IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

between

AKGUN INSAAT MAKINA SANAYII VE DIS TICARET LTD. STI.

Claimant

and

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Respondent

FINAL AWARD
(SAVE AS TO COSTS)

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29 August 2025

Members of the Tribunal:

Dr Michael Hwang S.C. (Presiding Arbitrator)

Sir David AR Williams

Professor Philip McConnaughay

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I. Abbreviations and Acronyms[1]

2008 Directive	Ethiopia's Directive No. 1/2008 (RLA-2)
2003 Guideline	Ethiopia's Environmental Impact Assessment Procedural Guideline Series No. 1 of 2003 (RLA-3)
2010 ETIZ Agreement, or 2010 Agreement	Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Akgun Construction for the Lease of Land and Development of an Industrial Zone dated 11 June 2010 (C-008)
2012 ETIZ Agreement, or 2012 Agreement, or ETIZ Agreement, or ETIZ Project	Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia, Oromia Regional State and Akgun Construction for the Lease of Land and the Development of an Industrial Zone dated 8 June 2012 (C-009)
AAWASA	Addis Ababa Water and Sewerage Authority
Adama	A city in Ethiopia, also called Nazret
Afro Oil	Afro Oil Manufacturing PLC, the first factory located within ETIZ
Akgun Construction, Akgun, or Claimant	Akgun Insaat Makina Sanayii Dis Ticaret Ltd. Sti.
Arbitration Agreement	Arbitration agreement contained in Article VII of the TEBIT
BIT	Bilateral Investment Treaty
Casta Advisory Services DMCC or Casta	Akgun's feasibility study consultant, a company which developed ETIZ pre-feasibility study (C-043) and full feasibility study (C-045)
Claimant's Rejoinder	Claimant's Statement of Rejoinder on Jurisdictional Objections and Counterclaims filed 25 March 2022
Claimant's Reply	Claimant's Statement of Reply and Defence to Respondent's Jurisdictional Objections and Counterclaims

[1] As adopted by the Parties in their Joint List of Terms & Abbreviations dated 11 May 2022, with minor amendments and additions.

	filed 22 October 2021
Claimant's Reply to TLOQ	Claimant's Reply to TLOQ dated 3 July 2024
Condominium Project	Projects for the construction of over 35,000 condominium houses in Bole Arabsa and Yeka Abado areas
DEBIT	Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark concerning the promotion and reciprocal protection of investments, signed 24 April 2001
Dire Dawa	A city in Ethiopia
DCF	Discounted Cash Flow
Draft Articles on State Responsibility	Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session, 2001 (CLA-042)
EIA	Environmental Impact Assessment
EIA Proclamation	Environmental Impact Assessment Proclamation, Proclamation No. 299/2002 (RLA-1)
EPA	Environmental Protection Authority
Eskoop	Eskoop industrial site within Ikitelli industrial zone
Ethiopia, GoE, or Respondent	Federal Democratic Republic of Ethiopia
ETIZ Project or ETIZ	Ethio-Turkish Industrial Zone
FET	Fair and Equitable Treatment
FMV	Fair market value
GOTA	GOTA Management and Development Consultancy, a company which developed the GOTA EIA
GOTA EIA	EIA for ETIZ submitted by Akgun in October 2013 and revised in March 2014 (R-4, C-069 and C-070)
Hardin Report or Valuation Report	Expert Report of Laura Hardin of Alvarez & Marsal dated 19 November 2020

Hawasa	A city in Ethiopia
Ickale	*Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016
Ikitelli	Ikitelli organized industrial zone in Istanbul
ITU	Istanbul Technical University
ITU Supplement	A supplemental study to GOTA EIA prepared by Istanbul Technical University dated 10 October 2014 (C-078)
Legatafo	A region in Oromia State in Ethiopia
Legedadi	A dam and reservoir in Ethiopia
MFN	Most Favoured Nation
MoI	Ethiopian Ministry of Trade and Industry
Mojo	A city in Ethiopia
MoU	Memorandum of Understanding between the Oromia State and Akgun dated 13 October 2008 (C-007)
MoEF	Ethiopian Ministry of Environment and Forestry
MoWIE	Ethiopian Ministry of Water, Irrigation and Energy
NOA	Notice of Arbitration
OIZ	Organized Industrial Zone
Oromia	A regional state in Ethiopia
Oromia BRLEP	Oromia Bureau of Rural Land and Environmental Protection
Oyap or OYAP	Oyap Ethio Industry Trading PLC incorporated by the Akgun family in Ethiopia to manufacture PVC windows, profiles for doors, and wall panels
PO	Procedural Order
Respondent's Rejoinder	Respondent's Statement of Rejoinder filed 22 January 2022
Respondent's Response to TLOQ	Ethiopia's Letter to the Tribunal dated 3 July 2024

Response or Answer	Respondent's Response to the Notice of Arbitration filed 19 July 2019
SEA	Strategic Environmental Assessment
Sendafa	A region in Oromia State in Ethiopia
Sendafa site, or Sendafa plot, or ETIZ site, or site, or plot	Plot of land in Sendafa initially selected for construction of the Ethio-Turkish Industrial Zone
SGS v Pakistan	*SGS Société Générale de Surveillance S.A. v Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003
SGS v Philippines	*SGS Société Générale de Surveillance S.A. v the Philippines*, ICSID Case No. ARB/02/6, Decision of The Tribunal on Objections to Jurisdiction, 29 January 2004
SOC	Claimant's Statement of Claim filed 20 November 2020
SOD	Respondent's Statement of Defence, Objections to Jurisdiction and Counterclaims filed 12 March 2021
Suspension Date	24 June 2014, the date on which Respondent permanently suspended the ETIZ
Tekle Report	Expert Report of Prof. Mekete Bekele Tekle dated 18 October 2021
TLOQ	Three further questions posed by the Tribunal on 12 June 2024 to be answered by the Parties in post-hearing submissions.
Turkey-Ethiopia BIT, or Treaty, or TEBIT	Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, signed 16 November 2000 (CLA-001)
VCLT	Vienna Convention on the Law of Treaties (CLA-047)
Whittington Report	Expert Report of Prof. Dale Whittington dated 18 October 2021

II. Parties

A. Claimant

1. Claimant, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. ("**Akgun**" or "**Claimant**"), is a family-owned company incorporated under Turkish law and registered with the Istanbul Trade Registry on 26 September 1991 under the registration number 279250.[2] It is owned by three Turkish nationals, Yusuf Akgun, Serkan Ufuk Akgun and Yunus Akgun, who are each members of the Akgun family.[3]

2. Claimant has been represented in this arbitration by:

a. **Jones, Swanson, Huddell & Daschbach LLC**
Gladstone N. Jones, III Lynn E. Swanson
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b. **Fishman Haygood, L.L.P.**
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[2] Exhibit C-1.
[3] Exhibit C-2.

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d. **Verrill Advocacy, LLC**
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Email: charlesverrill@gmail.com

B. Respondent

3. Respondent is the Federal Democratic Republic of Ethiopia ("**Ethiopia**" or "**Respondent**", and together with Claimant, the "**Parties**").

4. Respondent has been represented in this arbitration by:

a. **Addis Law Group LLP**
Zewdineh Beyene Haile
Won L. Kidane
Jackson Shaw Kern
Aseel Barghuthi
Cemre Kadioglu
Giday Belay Assefa
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b. **Ministry of Justice of Ethiopia**
Mesker Tariku Yirefu
Henok Tesfaye Tefera
Infront of Bambis
Addis Ababa, Ethiopia

III. List of Dramatis Personae[4]

Mr. Abadula Gemeda	President of the Oromia Regional State in Ethiopia during 2008-2010
Mr. Ahmed Abtew	Ethiopian Minister of Industry during 2013-2015, Respondent's witness
Mr. Anwar K. Yahia	Industrial Park Regulators and Developers Team Leader at Ethiopian Investment Commission
Mr. Arkebe Oqubay or Dr. Arkebe or Dr. Oqubay or the Special Advisor	Senior Minister and Special Advisor to the Prime Minister of Ethiopia between 2010 and the present
Mr. Atilla Yurtcu	Honorary Consul of Ethiopia in Istanbul during 2008-2009
Mr. Ayale H. Anabo or Dr. Anabo	Dr. Ayale H. Anabo, Respondent's environmental expert
Mr. Dale Whittington or Prof. Whittington	Professor Dale Whittington, Claimant's environmental expert
Mr. Fekadu Zeleke	Deputy General Manager of the Addis Ababa Water and Sewerage Authority, Respondent's witness
Mr. Girma Birru	Ethiopian Minister of Trade and Industry during 2009-2010
Mr. Hailemariam Dessalegn	Prime Minister of Ethiopia from August 2012 to August 2019, Deputy Prime Minister of Ethiopia from August 2010 to August 2012
Mr. Hagos Sequar	Former MoI official, local employee of Akgun
Mr. Hakan Akgun	Son of Yusuf Akgun, brother of Ufuk and Yunus Akgun, who assisted in the implementation of ETIZ from Akgun's office in Turkey
Mr. Ismail Toroz or Prof. Toroz or Dr. Toroz	Professor Dr. Ismail Toroz, Istanbul Technical University. Expert in strategies to mitigate environmental harm, leading author of a supplemental study to GOTA EIA prepared by Istanbul Technical University dated 10 October 2014 (C-078)

[4] As adopted by the Parties in their Joint List of *Dramatis Personae* dated 11 May 2022, with minor amendments and additions.

Ms. Laura Hardin or Ms Hardin	Ms Laura Hardin, Claimant's valuation/quantum expert
Mr. Mekete Bekele Tekle or Prof. Tekle	Professor Mekete Bekele Tekle, Claimant's environmental expert
Mr. Meles Zenawi	Prime Minister of Ethiopia from August 1995 to August 2012, Chairperson of the Environmental Council of Ethiopia
Mr. Mellese Damtie Dandi or Dr. Dandi	Dr. Mellese Damtie Dandi, Respondent's environmental expert
Mr. Mesfin Seyoum	Ethiopian Minister of Foreign Affairs during 2009-2010
Mr. Mulatu Teshome Wirtu or Dr. Mulatu	President of Ethiopia from October 2013 to October 2018, former Ambassador of Ethiopia to Turkey
Mr. Necati Basaran	Assistant to Mr. Yusuf Akgun
Mr. Sadettin Ozdonmez	The ETIZ architect
Mr. Serdar Sen	Representative of Casta, a feasibility study consultant
Mr. Salahattin Akgun	Brother of Yusuf Akgun who assisted with the implementation of ETIZ
Mr. Sisay Gemenchu Edo	Former State Minister of Industry, Respondent's witness
Ms. Susan Murcott or Prof. Murcott	Professor Susan Murcott, Respondent's environmental expert
Mr. Sufian Ahmed	Ethiopian Minister of Finance and Economic Development during 2009-2015
Mr. Tadesse Haile	Ethiopian State Minister of Industry during 2012-2015
Mr. Ufuk Akgun	Shareholder of Akgun, son of Yusuf Akgun, Claimant's witness
Mr. Yunus Akgun	Shareholder of Akgun, son of Yusuf Akgun , Claimant's witness
Mr. Yusuf Akgun	Founder of Akgun, father of Ufuk and Yunus Akguns, Claimant's witness

IV. Procedural History

5. This section briefly sets out the arbitration's procedural history and is not meant to be exhaustive.

6. On 19 June 2019, Claimant filed the Notice of Arbitration.

7. On 19 July 2019, Respondent filed its Response to the Notice of Arbitration ("**Response**" or "**Answer**").

8. On 25 June 2019, Sir David A R Williams KNZM, Q.C. was appointed as Co-arbitrator by Claimant.

9. On 3 December 2019, Professor Philip J. McConnaughay was appointed as Co-arbitrator by Respondent.

10. On 2 March 2020, Dr. Michael Hwang S.C. was appointed by the two Co-Arbitrators as the Presiding Arbitrator ("**Chairman**") of the Tribunal.

11. On 11 March 2020, by way of Tribunal Communication No. 1, the Tribunal wrote to the Parties to (i) record its appointment, (ii) invite the Parties to discuss and inform the Tribunal if they were able to come to a mutual agreement on the seat of the arbitration, (iii) circulate a copy of the Draft Terms of Appointment for the Parties' review (and indicate any and all objections and proposed amendments) within 21 days of the letter, (iv) inform the Parties that the Tribunal had reached out to the PCA, which had confirmed that it was willing to act in an administrative capacity in this arbitration, and (v) seek the Parties' confirmation that they were agreeable for the Notice of Arbitration and the Response to be forwarded to the PCA.

12. On 13 March 2020, the Parties both replied to acknowledge receipt of Tribunal Communication No. 1.

13. On 17 March 2020, further to Tribunal Communication No. 1, the Parties both confirmed that they were agreeable for the Notice of Arbitration and the Response to be forwarded to the PCA.

14. On 24 March 2020, Claimant wrote to inform the Tribunal that, in view of the COVID 19 pandemic, the Parties were jointly requesting an extension of the

deadline to provide comments on the Draft Terms of Appointment and the seat of arbitration, till 30 April 2020.

15. On 24 March 2020, by way of Tribunal Communication No. 2, the Tribunal granted the extension of time requested by the Parties. The Tribunal also provided the Parties with a Draft Letter setting out the Terms of Appointment for the PCA as the administering institution for this arbitration and requested the Parties to indicate any objections and/or proposed amendments by 30 April 2020.

16. On 30 April 2020, further to Tribunal Communication No. 2, Claimant wrote to inform the Tribunal that the Parties had agreed that the seat of this arbitration would be The Hague, Netherlands. Claimant also (i) provided the Tribunal with a revised copy of the Draft Terms of Appointment, (ii) stated that the Parties had agreed that the currency of the deposits would be US dollars, and (iii) confirmed that the Parties had reviewed and agreed with the text of the Draft Letter of Appointment of the PCA as the administering institution for this arbitration.

17. On 14 May 2020, by way of Tribunal Communication No. 3, the Tribunal wrote to provide the Parties with a revised copy of the Draft Terms of Appointment and the Tribunal's comments on the same. The Tribunal requested the Parties to provide their response to these amendments and comments by 28 May 2020.

18. On 21 May 2020, by way of Tribunal Communication No. 4, the Tribunal wrote to the Parties to provide a finalized copy of the Letter setting out the Terms of Appointment for the PCA as the administering institution for this arbitration. The Tribunal also informed the Parties that it had consulted with the PCA and, amongst other things, the PCA had suggested that, since the Terms of Appointment for the Tribunal were expressed to be governed by the laws of the Netherlands, the Parties should produce a power of attorney authorizing their counsel to represent them in this arbitration.

19. On 28 May 2020, further to Tribunal Communication No. 4, Claimant wrote to inform the Tribunal that the Parties agreed with the Tribunal's proposed amendments to the Draft Terms of Appointment. The Parties also indicated that they were prepared to submit a Power of Attorney authorizing Counsel to represent their respective clients before signing the final text of the Terms

of Appointment, but that, due to ongoing shutdowns in Turkey, there might be some delay in obtaining such a Power of Attorney from Claimant.

20. On 3 June 2020, by way of Tribunal Communication No. 5, the Tribunal provided the Parties with a finalized version of the Draft Terms of Appointment and requested the Parties to confirm, by 10 June 2020, that they were agreeable to the Draft Terms of Appointment. Thereafter, on the assumption that the Parties would have no further comments, the Tribunal indicated that the Parties should proceed to sign the Terms of Appointment and provide signed copies of the Terms of Appointment by 22 June 2020.

21. On 10 June 2020, Claimant confirmed that it was agreeable to the final version of the Draft Terms of Appointment, and it would proceed with the signing of the Terms of Appointment as soon as it obtained the Power of Attorney.

22. On 11 June 2020, Respondent confirmed that it was agreeable to the Draft Terms of Appointment, and it would proceed with the signing of the Terms of Appointment.

23. On 11 June 2020, by way of Tribunal Communication No. 6, the Tribunal wrote to the Parties to propose the appointment of Mr. Ryan Chong (a lawyer in the Chairman's Chambers) as the Tribunal Secretary for this arbitration. The Tribunal also requested Respondent to clarify whether it intended to make a formal application objecting to the jurisdiction of the Tribunal. If so, the Tribunal indicated that it might deal with this issue first, as a preliminary point, before issuing any other directions for the filing of pleadings. The Tribunal indicated that Respondent should respond to this point by 25 June 2020.

24. On 22 June 2020, Claimant provided the Tribunal with a signed copy of the Terms of Appointment and Power of Attorney.

25. On 22 June 2020, Respondent provided the Tribunal with a signed copy of the Terms of Appointment and Power of Attorney.

26. On 25 June 2020, further to Tribunal Communication No. 6, Claimant and Respondent informed the Tribunal that they did not have any objections to the appointment of Mr. Ryan Chong as the Tribunal Secretary for this

arbitration. Respondent also indicated that it would be able to submit its jurisdictional objection by 15 October 2020.

27. On 29 June 2020, by way of Tribunal Communication No. 7, the Tribunal confirmed the appointment of Mr. Ryan Chong as the Tribunal Secretary for this arbitration. The Tribunal also invited Claimant to provide its comments on Respondent's proposed timeline to submit its jurisdictional objections by 15 October 2020.

28. On 2 July 2020, further to Tribunal Communication No. 7, Claimant wrote to the Tribunal, stating that it was unclear whether Respondent intended to submit a full brief on its objections to jurisdiction or whether it intended to submit a short statement setting out those objections that would be briefed in later pleadings. Claimant accordingly requested for a clarification on this issue before providing further comments. Claimant also stated that it objected to the bifurcation of jurisdictional matters from those of liability and quantum and requested for an opportunity to respond should Respondent request bifurcation.

29. On 3 July 2020, by way of Tribunal Communication No. 8, the Tribunal invited Respondent to respond to Claimant's email of 2 July 2020 and provide the clarification requested by Claimant by 10 July 2020.

30. On 3 July 2020, further to Tribunal Communication No. 8, Respondent clarified that its request to have the opportunity to submit a jurisdictional objection, by 15 October 2020, had assumed that Claimant would not object to the resolution of the jurisdictional issue as a preliminary matter. However, if Claimant opposed bifurcation and insisted on submitting a full Statement of Claim, Respondent took the position that it would not object as long as it was duly noted that Respondent's Statement of Defence would contain a jurisdictional objection. Respondent also indicated that it had submitted its Response on 19 July 2019 without the benefit of external Counsel, and that, following its retention of external Counsel, it desired to submit an amended Response which included its objection to jurisdiction.

31. On 3 July 2020, by way of Tribunal Communication No. 9, the Tribunal invited Claimant to respond to Respondent's email and to provide any further comments that it might have by 10 July 2020.

32. On 3 July 2020, further to Tribunal Communication No. 9, Claimant wrote to expressly confirm that it opposed the bifurcation of this proceedings. Claimant further stated that the Parties had agreed that the jurisdictional issues in this case would be pleaded as part of the Parties' respective cases, since Respondent had acknowledged that it was prepared to submit its jurisdictional objections as part of its Statement of Defence. Claimant also indicated that it would not object to Respondent's request to submit an amended version of its Response, but requested that such amendments be submitted by 1 September 2020.

33. On 3 July 2020, Respondent wrote to the Tribunal to request that it be given until 15 October 2020 to submit its amended Answer. Respondent indicated that it would require this extra six-week period because (i) its Counsel would be engaged in another major case until mid-August, (ii) the period leading up to and after 2 September 2020 would be Ethiopia's New Year holiday season during which offices were open only sporadically, and (iii) the addition of six more weeks was unlikely to result in any material prejudice to Claimant.

34. On 6 July 2020, by way of Tribunal Communication No. 10, the Tribunal invited Claimant to respond to Respondent's email and to provide any further comments that it might have by 13 July 2020.

35. On 9 July 2020, further to Tribunal Communication No. 10, Claimant wrote to indicate that it was seeking for the Amended Response to be filed by no later than 15 September 2020. Claimant stated that Respondent's counsel would have had many months to review and revise the original Response filed, and that the briefing period would be far longer than was typical for a filing of this sort. Claimant also indicated that it had been unable to obtain any independent verification that Ethiopian government offices would observe the holiday period stated by Respondent.

36. On 10 July 2020, Respondent wrote to the Tribunal and submitted that the addition of a few additional weeks to submit the amended Response would not be unfairly prejudicial to Claimant. Respondent took the position that the slow process of the constitution of the Tribunal, and the pace of the operations, was indicative of any lack of urgency on Claimant's part. Respondent also stated that Claimant's own initiation of settlement negotiations after it had filed the claim had the effect of essentially suspending the arbitral proceedings. Respondent contended that it would be

unreasonable to expect it to prepare an amended Response at great expense, given the uncertainties of whether the case would be pursued, and, even if it would, how quickly it would move forward in the absence of a clear timetable ordered by the Tribunal.

37. On 13 July 2020, Claimant wrote to the Tribunal, stating that the settlement negotiations had been initiated by Respondent, and Claimant participated in such negotiations in good faith. Claimant stated that it fully intended to pursue the case in an expeditious manner, and requested the Tribunal to require the same of Respondent.

38. On 13 July 2020, by way of Tribunal Communication No. 11, the Tribunal wrote to the Parties and requested that they consider whether it would be possible to proceed with the filing of the Statement of Claim and Defence without regard for the filing date of the amended Response.

39. On 21 July 2020, further to Tribunal Communication No. 11, Claimant wrote to inform the Tribunal that the Parties had met and were in the process of agreeing on the procedural calendar, which would be submitted to the Tribunal at the end of the week.

40. On 24 July 2020, Claimant provided the Tribunal with a copy of the Parties' agreed procedural calendar and requested the Tribunal Members to indicate their earliest availability for a hearing. Claimant also clarified that Respondent would be including any corrections, jurisdictional objections and counterclaims in its Statement of Defence, rather than supplying an amended Response.

41. On 28 July 2020, by way of Tribunal Communication No. 12, the Tribunal informed the Parties that it had good availability for a substantive hearing in June 2022 and/or July 2022. The Tribunal also (i) requested the Parties address a number of points regarding the agreed procedural calendar, and (ii) proposed that two Case Management Conferences ("**CMC**"s) be included in the procedural calendar to facilitate the Tribunal's management of the proceedings.

42. On 4 August 2020, further to Tribunal Communication No. 12, Claimant wrote on behalf of the Parties to clarify that Respondent would not be filing a separate amended Response. Instead, Respondent would be including any

corrections, jurisdictional objections and counterclaims, which it initially intended to address in its amended response, in its Statement of Defence. Claimant also indicated that the Parties' submissions in the procedural schedule would be accompanied by factual exhibits, legal authorities, witness statements and expert reports, and therefore no separate schedule for the filing of such supporting documents would be required.

43. On 11 August 2020, Claimant informed the Tribunal that it was agreeable to the Tribunal's proposal to hold the CMC(s), and for such conferences to be conducted online by virtual means. Claimant also requested the Tribunal to indicate the earliest possible date after 1 June 2022 on which the Tribunal had availability for the hearing, so that the hearing date could be fixed in the procedural timetable.

44. On 12 August 2020, Respondent informed the Tribunal that it was likewise agreeable to the proposal to hold the CMC by virtual means.

45. On 25 August 2020, by way of Tribunal Communication No. 13, the Tribunal informed the Parties that it would be available for a substantive hearing on any of the dates after 1 June 2022. The Tribunal also circulated a draft copy of Procedural Order ("**PO**") 1, which had been prepared on the basis of the draft procedural calendar circulated by the Parties. The Tribunal invited the Parties to review the draft PO and to provide any comments or proposed amendments by 8 September 2020.

46. On 8 September 2020, further to Tribunal Communication No. 13, the Parties provided the Tribunal with an amended draft copy of PO1, which contained their comments and proposed amendments.

47. On 18 September 2020, by way of Tribunal Communication No. 14, the Tribunal provided its comments on the Parties' amended draft copy of PO1, and invited the Parties to consider these comments and provide their response by 2 October 2020.

48. On 1 October 2020, responding to Tribunal Communication No. 14, Respondent indicated that it accepted the Tribunal's comments and proposed changes.

49. On 2 October 2020, Claimant similarly responded that it agreed with the Tribunal's revisions and comments but suggested a few further amendments to the clauses in the draft copy of PO1.

50. On 3 October 2020, Respondent responded that it had no objections to Claimant's suggestions set out in Claimant's email of 2 October 2020.

51. On 12 October 2020, by way of Tribunal Communication No. 15, the Tribunal provided the Parties with an amended draft copy of PO1 which incorporated the changes discussed. The Tribunal also informed the Parties that it had been informed by the PCA that there was a possibility that the Peace Palace in The Hague would be undergoing renovations during the summer of 2022, and this might affect the dates of the substantive hearing (in the draft PO1). The Tribunal accordingly invited the Parties to consider various alternatives, and to respond by 26 October 2020.

52. On 26 October 2020, the Parties wrote to inform the Tribunal that they would prefer for the evidentiary hearing to be fixed on an earlier date (before the renovations to the Peace Palace began in the summer of 2022), and inquired as to the Tribunal's availability in the period of April-May 2022.

53. On 29 October 2020, by way of Tribunal Communication No. 16, the Tribunal informed the Parties that it was available for a hearing in the period of April 2022 to May 2022 and requested the Parties to incorporate these hearing dates into the draft copy of PO1.

54. On 13 November 2020, responding to Tribunal Communication No. 16, Respondent provided the Tribunal with a further amended draft copy of PO1.

55. On 20 November 2020, by way of Tribunal Communication No. 17, the Tribunal informed the Parties that it had no further comments on the draft copy of PO1 and invited Claimant to confirm its consent to the same for good order.

56. On 20 November 2020, further to Tribunal Communication No. 17, Claimant confirmed its consent to the terms of the draft copy of PO1.

57. On 20 November 2020, Claimant filed its Statement of Claim ("**SOC**") and supporting documents. Claimant also requested the Tribunal members to provide their shipping addresses for purposes of USB submissions.

58. On 23 November 2020, Respondent provided its shipping address, and requested that this be reflected in PO1.

59. On 25 November 2020, by way of Tribunal Communication No. 18, the Tribunal provided the Parties with its members' respective shipping addresses and indicated that it would incorporate these details into the draft copy of PO1.

60. On the same day, Claimant confirmed that its USB submissions had been shipped to the provided addresses of Respondent, Dr. Michael Hwang S.C., and the PCA. USB sticks were not sent to Sir David A R Williams, QC and Prof. Philip McConnaughay as they had yet to confirm their shipping addresses.

61. On 26 November 2020, by way of Tribunal Communication No. 19, the Tribunal provided the Parties with a finalized draft copy of PO1 and indicated that, unless the Parties had any further comments, the Tribunal would proceed to issue PO1 by 4 December 2020.

62. On 4 December 2020, the Tribunal issued PO1 (which specified that the Evidentiary Hearing would take place on 18 May 2022 – 31 May 2022).

63. On 1 March 2021, by way of Tribunal Communication No. 20, the Tribunal asked the Parties to confirm that they had no objection to the appointment of Mr. Kevin Tan (a lawyer in the Chairman's Chambers) as Tribunal Secretary in replacement of Mr. Ryan Chong (who was leaving the Chairman's firm and was resigning as Tribunal Secretary).

64. On 8 March 2021, Claimant notified the Tribunal that it had no objection to the appointment of Mr. Kevin Tan as Tribunal Secretary.

65. On 9 March 2021, Respondent notified the Tribunal that it had no objection to the appointment of Mr. Kevin Tan as Tribunal Secretary.

66. On 11 March 2021, by way of Tribunal Communication No. 21, the Tribunal formally appointed Mr. Kevin Tan as Tribunal Secretary.

67. On 12 March 2021, over two separate emails, Respondent filed its Statement of Defence, Objections to Jurisdiction and Counterclaims ("**SOD**"), as well as its supporting witness statements and expert reports.

68. On 29 March 2021, by way of Tribunal Communication No. 22, the Tribunal informed the Parties that the CMC would have to be rescheduled from 7 April 2021 to 9 April 2021. The Tribunal requested the Parties to provide a full list of attendees as well as the city from which they would be attending to aid in scheduling a time.

69. On 31 March 2021, Claimant informed the Tribunal that the Parties were unable to agree on a Preliminary List of Issues and thus submitted its own draft Preliminary List of Issues.

70. On 31 March 2021, Respondent submitted its draft Preliminary List of Issues.

71. On 2 April 2021, further to Tribunal Communication No. 22, Claimant confirmed its attendees along with their availability on 9 April 2021.

72. On the same date, further to Tribunal Communication No. 22, Respondent confirmed its attendees along with their availability on 9 April 2021.

73. On 6 April 2021, by way of Tribunal Communication No. 23, the Tribunal cancelled the CMC (originally scheduled for 7 April and subsequently rescheduled for 9 April) for two reasons. First, the Parties had noted that they did not have specific issues to discuss at a CMC. Secondly, the CMC was intended to settle on the Preliminary List of Issues. However, in the short time available for the CMC (maximum one hour due to time zone considerations) it was felt that there would be insufficient time settle on an agreed Preliminary List of Issues, taking into consideration the differences between the Parties' own respective draft Preliminary List of Issues. Furthermore, it was noted that finalising a Preliminary List of Issues might unnecessarily restrict the Parties' freedom to plead their cases in the second round of Memorials.

74. On 8 April 2021, by way of Tribunal Communication No. 24, the Tribunal informed the Parties of the further directions regarding the Requests for Production of Documents. The Tribunal extended the original deadline of 9 April 2021 outlined in the PO1 for the Requests for Production of Documents to 16 April 2021.

75. On 20 April 2021, the Tribunal emailed the Parties to inquire into the status of the Requests for Production of Documents, as neither Party had submitted its requests by 16 April 2021.

76. On 20 April 2021, Claimant informed the Tribunal that the Parties had in fact exchanged Requests for Production of Documents between themselves without copying the Tribunal on such exchange. Claimant also attached its Request for Production of Documents.

77. On the same date, Respondent distributed its Request for Production of Documents.

78. On 23 April 2021, the Tribunal thanked the Parties for their Requests for Production of Documents and clarified that the Tribunal did not need to be informed of all correspondences between the Parties until after the first Stern Schedules were submitted on 28 May 2021.

79. On 28 May 2021, both parties provided their respective Document Production Requests in the form of a Stern Schedule.

80. On 9 June 2021, the Tribunal informed the Parties that its decision on the disputed aspects of the Parties' Stern Schedules would only be ready on 21 June 2021 which was 10 days later than the deadline of 11 June 2021 originally stated in PO1. Consequently, the deadline of 9 July 2021 for the production of documents responsive to disputed requests also had to be pushed back 10 days to 19 July 2021.

81. On 11 June 2021, by way of Tribunal Communication No. 25, the Tribunal reminded the Parties that Document Production Requests the Parties considered uncontested should be complied with by that day. The Tribunal gave the Parties until 14 June 2021 to confirm that such uncontested Requests had been complied with.

82. On the same date, Claimant confirmed that it had no objection to the extension of the deadlines for the rendering of the Tribunal's Decision on Parties' respective Stern Schedule.

83. On 12 June 2021, further to Tribunal Communication No. 25, Claimant reiterated which Requests for Production of Documents it would comply with (and to what extent), as well as which Requests it would not comply with and the reason for its refusal.

84. On 15 June 2021, further to Tribunal Communication No. 25, Respondent confirmed that it had produced all uncontested documents.

85. On 17 June 2021, Claimant requested that Ms Jennifer Ersin be removed from the email distribution list for Claimant.

86. On 21 June 2021, by way of Tribunal Communication No. 26, the Tribunal explained the shortcomings of the Requests for Document Production by both parties failing to meet the requirement in Article 3(3)(a)(ii) of the IBA Rules on the Taking of Evidence in International Arbitration. The Tribunal therefore suggested that, going forward, a preliminary exercise of administering Requests for Information would first be conducted before another round of Requests for Production. The Tribunal also attached Annexes A and B which contained the Tribunal's draft Decision on each Party's Stern Schedule. The Tribunal had reworked some of the Document Production Requests into Requests for Information and subsequent Requests for Production, and thus invited the Parties to comment on such documents by 5 July 2021.

87. On 5 July 2021, further to Tribunal Communication No. 26, Claimant circulated Claimant's Comments on the Tribunal's draft Decisions.

88. On the same date, further to Tribunal Communication No. 26, Respondent informed that it had no comments on the Tribunal's draft Decisions.

89. On 7 July 2021, the Tribunal invited Respondent to provide its comments on Claimant's proposed edits by 12 July 2021.

90. On 9 July 2021, Respondent clarified that it did not wish to comment on any specific point but rather asked the Tribunal to render its final decision in light of its instructions outlined in Tribunal Communication No. 26.

91. On 18 July 2021, by way of Tribunal Communication No. 27, the Tribunal sought clarification of some of Claimant's proposed edits to the Tribunal's draft Decision on its Stern Schedule and invited Claimant to provide an answer to the Tribunal by 26 July 2021.

92. On 24 July 2021, further to Tribunal Communication No. 27, Claimant clarified its original comments on the Tribunal's draft decision.

93. On 25 July 2021, the Tribunal invited Respondent to comment on Claimant's email by 2 August 2021.

94. On 27 July 2021, Respondent confirmed that it had no comments in respect of Claimant's comments of 24 July 2021.

95. On 2 August 2021, by way of Tribunal Communication No. 28, the Tribunal circulated the Tribunal's final decisions on Claimant's and Respondent's Stern Schedules respectively. The Tribunal further directed the Parties to confer and attempt to come to an agreement on a revised procedural timetable that accounted for the delay in finalising the Stern Schedules by 13 August 2021.

96. On 14 August 2021, further to Tribunal Communication No. 28, on behalf of both Parties, Claimant circulated the revised agreed procedural schedule subject to the Tribunal's comments and availabilities.

97. On 20 August 2021, by way of Tribunal Communication No. 29, the Tribunal informed the Parties that the Parties' proposed new hearing date from 27 July 2022 – 10 August 2022 was not workable for the Tribunal. Thus, the Tribunal proposed a hearing from 20 June 2022 – 1 July 2022 and requested the Parties to rework the Proposed New Procedural Timetable on the basis of these hearing dates and re-submit the revised timetable to the Tribunal by 29 August 2021. In the alternative, the Tribunal suggested a two-week hearing period between 15 November 2022 – 20 December 2022 should either Party be unavailable on 20 June 2022 – 1 July 2022.

98. On 26 August 2021, further to Tribunal Communication No. 29, Claimant informed the Tribunal that the Parties had conferred, revised and attached the New Procedural Timetable on the basis that the hearing would be held from 20 June – 1 July 2022.

99. On 31 August 2021, by way of Tribunal Communication No. 30, the Tribunal outlined the two main options for a hearing in 2022. If the Parties were set on having the hearing held in the Peace Palace, the hearing would have to be held on the original dates of 18 May 2022 – 31 May 2022. If the Parties were prepared to rent an alternative venue, the hearing could be held from 20 June – 1 July 2022. The Tribunal invited the Parties to confirm which of the two options they favoured by 3 September 2021.

100. On 3 September 2021, responding to Tribunal Communication No. 30, Claimant noted that the Parties had not yet agreed on the hearing dates. Claimant preferred to have the hearing from 20 June 2022 – 1 July 2022 at an

alternative hearing facility in The Hague (as the Peace Palace might be unavailable). However, Respondent was concerned with the costs and was only willing to agree to these dates if Claimant bore the entirety of the cost of an alternative venue. Otherwise, Respondent preferred to have the hearing at the Peace Palace from 18 May 2022 – 31 May 2022 as was originally scheduled.

101. On 5 September 2021, the Tribunal updated the Parties on inquiries made for alternative hearing venues and their pricing, and to better facilitate the pricing quotes, the Tribunal requested the Parties to provide the number of people who would be attending the hearing by 9 September 2021.

102. On 9 September 2021, Claimant informed the Tribunal that it expected to have 16 people attend the hearing on behalf of Claimant.

103. On the same date, Respondent informed the Tribunal that it expected to have 10 – 12 people attend the hearing on behalf of Respondent.

104. On 11 September 2021, by way of Tribunal Communication No. 31, the Tribunal circulated the PCA's Draft Note to the Tribunal on Quotations for Alternative Venues to the Parties and requested the Parties' final decision regarding the hearing dates by 17 September 2021.

105. On 14 September 2021, further to Tribunal Communication No. 31, the Tribunal circulated the PCA's finalised report comparing potential alternative venues for the hearing.

106. On 14 September 2021, further to Tribunal Communication No. 31, Claimant informed the Tribunal that both Parties had agreed to keep the original hearing dates of 18 – 31 May 2022 at the Peace Palace. Claimant circulated the revised Procedural Timetable.

107. On 20 September 2021, by way of Tribunal Communication No. 32, the Tribunal directed that, according to the agreed hearing dates of 18 – 31 May 2022, the Procedural Timetable outlined in paragraph 9.1 of PO1 should be replaced by the Revised Procedural Timetable as outlined in Tribunal Communication No. 32. Furthermore, the Tribunal noted that the deadline for document production had passed and requested confirmation of completion of this exercise by 22 September 2021. Additionally, the Tribunal noted that Claimant's and Respondent's expert witness reports did not deal

with the same subject matter. Thus, the Tribunal directed the Parties, by 27 September 2021, to either provide an indication of the issues any forthcoming reports will deal with, or in the alternative, if there were no further expert witness reports, to consider whether an Experts' Joint List of Issues would be helpful for the Tribunal and provide comments (particularly on whether the agreed Revised Provisional Timetable needed any modification).

108. On 22 September 2021, responding to Tribunal Communication No. 32, Claimant circulated a Letter which addressed production under the Stern Schedule, stating that it could not confirm that the document production exercise had been completed, as there was disagreement between the Parties as to the scope of production ordered by the Tribunal. In relation to the expert witness reports, Claimant confirmed that it would produce additional expert reports in conjunction with its Statement of Reply and Defence to Respondent's Jurisdictional Objection and Counterclaims. Secondly, Claimant agreed with the Tribunal that it would be difficult to produce any coherent Joint List of Issues.

109. Also, on 22 September 2021, in response to Claimant's Letter, Respondent confirmed that there was disagreement as to the scope of document production and offered to reply to Claimant's Letter of 22 September 2021 in full upon being granted leave to do so.

110. On 24 September 2021, further addressing Tribunal Communication No. 32, Respondent wrote to the Tribunal to say that it was unable to confirm at that point whether it would submit any further expert witness reports. Respondent also shared its view that the production of an Experts' Joint List of Issues might not be valuable.

111. On 30 September 2021, by way of Tribunal Communication No. 33, the Tribunal directed that Claimant's forthcoming expert reports must provide a reply to Respondent's expert reports additionally to Claimant's own comments. The Tribunal also invited Respondent to provide its response to Claimant's Letter of 22 September 2021 by 6 October 2021. For the avoidance of doubt, the Tribunal stated that the dispute about the production of documents did not affect the deadlines for filing pleadings in the agreed Revised Procedural Timetable.

112. On 7 October 2021, further to Tribunal Communication No. 33, Respondent explained its obligation of confidentiality in respect to certain passages that it intended to redact from documents that fell under the Tribunal's order for production.

113. On 18 October 2021, by way of PO2, the Tribunal directed Respondent to produce the document in question with "*very few and very brief*" redactions as necessary, by 21 October 2021. The Tribunal further directed that redactions must be accompanied by a brief description of what the redacted words related to without breaching confidentiality. After seeing the redacted document, Claimant could apply to the Tribunal for an inspection of the unredacted document by the Tribunal if it could present a reasonable argument that the redacted information was likely to be directly relevant to a viable pleaded claim.

114. On 22 October 2021, Claimant circulated its Statement of Reply and Defence to Respondent's Jurisdictional Objections and Counterclaims ("**Claimant's Reply**") along with three witness statements and two expert reports.

115. On 3 December 2021, Claimant submitted correspondence and exhibits in response to PO2 and Respondent's Document Production Requests dated 21 October 2021.

116. On 5 December 2021, in response to Claimant's Letter sent on 3 December 2021, Respondent provided confirmation regarding the nature of the document which was the subject of the Claimant's application in its Document Production Request regarding the Kilinto Industrial Park EIA, and indicated that the request was therefore moot.

117. On 8 December 2021, by way of Tribunal Communication No. 34, the Tribunal noted that Respondent had provided the confirmation requested by Claimant and that there was no further request requiring the Tribunal to make a decision regarding document production.

118. On 18 January 2022, by way of Tribunal Communication No. 35, the Tribunal raised its concern that the rapidly spreading Omicron variant of the Covid-19 coronavirus throughout Europe might make it unfeasible for the hearing to be held at the Peace Palace in the Netherlands from 18 – 31 May 2022. The Tribunal provided the PCA memorandum on the prevailing travel restrictions

in the Netherlands as well as alternative formats for the Evidentiary Hearing. This memorandum outlined four possible alternatives to a fully in-person Evidentiary Hearing which were summarised in the Tribunal Communication. The Tribunal requested that the Parties to confer and agree on which of the options for the Evidentiary Hearing they would prefer if an in-person hearing were not feasible, and inform the Tribunal of their preference and reasons for their preference by 1 February 2022. In the event that the Parties were unable to agree, the Parties should separately inform the Tribunal of their own preference and reasons for their preference, also by 1 February 2022.

119. On 22 January 2022, Respondent submitted its Statement of Rejoinder (**"Respondent's Rejoinder**") on the Merits and Reply on Jurisdictional Objections and Counterclaims.

120. On 27 January 2022, further to Tribunal Communication No. 35, Claimant informed the Tribunal that the Parties had conferred and wished to stress that both Parties favoured an in-person hearing if at all feasible. In the event that an in-person hearing became unfeasible due to any Covid-related restrictions in place in the Netherlands in May, the Parties agreed to choose 'Option 1' that the Tribunal members, witnesses and a specified number of essential Counsel attend the hearing in-person, with the other participants joining virtually. Among the four options the Tribunal had supplied, Option 1 would hew most closely to a full, in-person hearing.

121. On the same date, Respondent confirmed the email sent by Claimant.

122. On 9 March 2022, Claimant inquired whether the Tribunal had any observations on the Parties' joint response to Tribunal Communication No. 35 and the Tribunal's guidance whether Claimant should coordinate directly with the PCA to initiate the *note verbale* process and other travel-related requirements.

123. On 16 March 2022, Claimant added Ethel Kocoglu (ekocoglu@jonesswanson.com) to its distribution list.

124. On 25 March 2022, Claimant submitted its Statement of Rejoinder on Jurisdictional Objections and Counterclaims ("**Claimant's Rejoinder**").

125. On 1 April 2022, pursuant to PO1, Claimant notified that it intended to call all of Respondent's witnesses for cross-examination at the Evidentiary Hearing,

including Mr. Ahmed Abtew, Mr. Sisay Gemechu Edo, Mr. Fekadu Zeleke, Dr. Ayele H. Anabo, Prof. Susan Murcott, and Dr. Mellese Damtie Dandi.

126. On the same date, Respondent also notified that it would request the presence of Mr. Yusuf Akgun, Mr. Ufuk Akgun, Mr. Yunus Akgun, Prof. Dale Whittington, and Prof. Mekete Bekele Tekle for cross-examination at the Evidentiary Hearing.

127. On 3 April 2022, by way of Tribunal Communication No. 36, the Tribunal requested confirmation by the Parties of the Tribunal's understanding that the Evidentiary Hearing had been set for 18 – 31 May 2022 at the Peace Palace in The Hague. The Tribunal also noted that the second CMC would be scheduled for late April or early May pursuant to Tribunal Communication No. 32. The Tribunal stated that this meeting would be virtual, and requested the Parties to provide their availability and propose dates to the Tribunal for this meeting by 11 April 2022.

128. On 5 April 2022, Respondent confirmed the Tribunal's understanding that the Evidentiary Hearing would be held on 18 – 31 May 2022 at the Peace Palace in The Hague.

129. On the same date, Claimant confirmed its understanding that the Evidentiary Hearing was set to occur at the Peace Palace in The Hague from 18 – 31 May 2022.

130. On 7 April 2022, Claimant applied to the Tribunal for interlocutory relief. Claimant requested that the Tribunal strike Dr. Mellese Damtie Dandi's Report from the record and preclude Respondent from relying on it in this proceeding, as having been submitted in violation of PO1, paragraph 13.1.

131. On 9 April 2022, the Tribunal invited Respondent to provide its comments on Claimant's request of 7 April 2022 by 15 April 2022.

132. On 11 April 2022, further to Tribunal Communication No. 36, Claimant reported that both Parties were available to hold a virtual CMC on the dates of April 18, 20 – 22, 26, 29 (preferably between the hours of 8am CST to 1pm CST).

133. On the same date, Respondent confirmed the receipt of Claimant's email regarding the Parties' availability for the virtual CMC.

134. On 13 April 2022, Respondent submitted its comments in response to Claimant's application of 7 April 2022.

135. On 14 April 2022, Claimant wrote on behalf of both Parties to inform the Tribunal that they had conferred on the matter of the Parties' Experts Joint List of agreed and disagreed Issues and affirmed their earlier view that such lists were unlikely to be of value to the Tribunal.

136. On 15 April 2022, Claimant wrote to the Tribunal to inquire whether, notwithstanding Respondent's not calling Ms. Hardin to testify, the Tribunal wished for Ms. Laura Hardin to appear at the hearing, to address any questions that the Tribunal might have for her.

137. On 22 April 2022, in accordance with paragraph 8.2.2 of PO1 and the procedural timetable (as amended), Respondent submitted its draft of the Final List of Issues.

138. On the same date, in accordance with paragraphs 8.2.2 and 9.1(o) of PO1, as amended by Tribunal Communication No. 32, Claimant submitted its draft of the Final List of Issues.

139. On 25 April 2022, the Tribunal informed the Parties that the physical presence of Ms. Laura Hardin was not necessary. Nonetheless, Claimant should take steps to ensure Ms. Hardin was available to testify via video conference if the Tribunal thought that it was required (during the Evidentiary Hearing).

140. On 26 April 2022, Claimant sought the Tribunal's permission to present Ms. Hardin at the Evidentiary Hearing so that her testimony might be set as part of the hearing schedule. Claimant requested that the Tribunal permit Ms. Hardin to make a brief presentation of her opinion in this matter, after which, an examination of Ms. Hardin should be conducted in the sequence and fashion that the Tribunal saw fit. Claimant also noted that 29 April 2022 was the last of the joint set dates that the Parties supplied the Tribunal for a proposed pre-hearing conference. Claimant advised that it would be available on 3-6 May 2022 in the event that the Tribunal wished to hold a pre-hearing conference on one of those dates.

141. On 27 April 2022, Respondent noted that, in view of Claimant's insistence on presenting its own expert, Respondent would not object to her appearance

so long as it had sufficient opportunity to cross-examine her, whether in-person or virtually.

142. On 3 May 2022, by way of PO3, the Tribunal stated the following, (i) no further CMC was required, (ii) Claimant's application to strike out one of Respondent's legal expert reports was denied (iii) Ms Laura Hardin's physical attendance at the hearing was scheduled in with an opportunity for cross-examination (iv) witness conferencing (colloquially referred to as "*hot-tubbing*") of expert witnesses at the hearing would be helpful, and had therefore been scheduled, (v) production of two summaries comparing the views of each set of experts would be helpful and the Tribunal therefore requested that the Parties confer and jointly work on this Comparison Table for the Scientific Experts to be submitted by 13 May 2022.

143. On the same date, by way of Tribunal Communication No. 37, the Tribunal circulated a list of Pre-Hearing Issues for the Parties to answer jointly, if possible; otherwise the Parties should provide the Tribunal with separate answers by 9 May 2022. The list also contained some instructions that the Parties were directed to comply with.

144. On 10 May 2022, further to Tribunal Communication No. 37, Claimant submitted the joint answers of the Parties.

145. On 11 May 2022, further to Tribunal Communication No. 37, Claimant submitted joint replies of the Parties on the issues the Tribunal requested to be supplied by 11 May 2022.

146. On 12 May 2022, further to Tribunal Communication No. 37, Respondent circulated its Reading List for the Tribunal.

147. On the same date, further to Tribunal Communication No. 37, Claimant circulated its Reading List for the Tribunal.

148. On the same date, the Tribunal answered questions from the Parties relating to hearing logistics and procedural arrangements.

149. On 12 May 2022, further to Tribunal Communication No. 37 and PO3, Claimant circulated the Parties' joint fact chronology and the Comparison Table jointly prepared by the Parties' Scientific Experts. The Parties also

inquired whether the Tribunal would be agreeable to having the hearing video recorded.

150. On 13 May 2022, the Tribunal stated that it had no objections to having the hearing video recorded.

151. On 17 May 2022, Claimant submitted its opening slides for the Evidentiary Hearing.

152. On the same date, Respondent submitted its opening statement presentation.

153. On 18 May 2022, day 1 of the Evidentiary Hearing began.

154. On 19 May 2022, Claimant circulated the Parties' agreed Hearing Schedule indicating the order of witness presentations.

155. On 22 May 2022, the Tribunal reminded the Parties that it would appreciate an updated factual Chronology by 23 May 2022.

156. On 23 May 2022, Claimant circulated the Parties' revised Chronology.

157. On 27 May 2022, Claimant circulated the expert presentations of Prof. Mekete Bekele Tekle, Prof. Dale Whittington and Ms. Laura Hardin.

158. On 29 May 2022, Claimant submitted its closing presentation.

159. On 30 May 2022, the Evidentiary Hearing ended.

160. On 26 August 2022, Claimant wrote to the Tribunal to confirm that there were no outstanding questions that the Tribunal wished the Parties to address.

161. On 19 October 2022, by way of PO4, the Tribunal posed five further questions to be answered by the Parties in post-hearing submission by 11 November 2022.

162. On 11 November 2022, further to PO4, Claimant submitted its post-hearing submission.

163. On 12 November 2022, further to PO4, Respondent submitted its post-hearing submission accompanied by legal authorities.

164. On 8 February 2023, the Tribunal asked the Parties to confirm that they had no objection to the appointment of Mr. Lee Kwang Chian (a lawyer in the Chairman's Chambers) as Tribunal Secretary in replacement of Mr. Kevin Tan (who was leaving the Chairman's firm and was resigning as Tribunal Secretary).

165. On 13 February 2023, Claimant notified the Tribunal that it had no objection to the appointment of Mr. Lee Kwang Chian as Tribunal Secretary.

166. On the same date, Respondent notified the Tribunal that it had no objection to the appointment of Mr. Lee Kwang Chian as Tribunal Secretary.

167. On 14 February 2023, the Tribunal formally appointed Mr. Lee Kwang Chian as Tribunal Secretary.

168. On 12 June 2024, the Tribunal posed three further questions to be answered by the Parties in post-hearing submission by 26 June 2024 ("**TLOQ**")

169. On 18 June 2024, Parties made a joint application to extend the deadline to answer the Tribunal's further questions till 3 July 2024.

170. On 19 June 2024, the Parties' joint application for an extension of time was granted.

171. On 3 July 2024, the Parties submitted their responses to the Tribunal's further questions.

172. On 5 February 2025, the Tribunal indicated to the Parties that it was finishing the Award, and expected to invite the Parties to submit their cost submissions soon. The Parties were requested to provide further deposits for the case by 7 March 2025.

173. On 14 March 2025, the PCA noted that Respondent had not submitted their share of the deposits, and requested for an update no later than 19 March 2025. On the same day, the PCA noted that Respondent had paid its share of the deposits.

174. On 8 July 2025, the Tribunal notified the Parties that it had prepared the Final Award (Save as to Costs), and invited the Parties to inform the Tribunal if

Wet-Ink Signatures would be required (or if electronic signatures would suffice).

175. On the same day, the Parties informed the Tribunal that they consented to electronic signatures. However, Claimant requested for any electronic signatures to be signed using a Qualified Electronic Signature, and that, if Qualified Electronic Signatures could not be procured, Claimant would request for Wet-Ink Signatures.

176. On 22 July 2025, the Tribunal notified the Parties that it had elected to provide Wet-Ink Signatures for the Award, and was collating the signatures accordingly. It further requested for the Parties to provide a breakdown of their costs by 5 August 2025.

177. On 31 July 2025, the Tribunal requested for the Parties to provide the Tribunal with the full list of their legal representatives by 7 August 2025, for inclusion into the Award.

178. On the same day, Respondent provided the Tribunal with the list of their legal representatives.

179. On 5 August 2025, the Parties submitted a breakdown of their costs.

180. On the same day, Claimant provided the Tribunal with the list of their legal representatives.

181. On 11 August 2025, the Tribunal asked the Parties to confirm that they had no objection to the appointment of Mr. Hng Zong Xian (a lawyer in the Chairman's Chambers) as Tribunal Secretary in replacement of Mr. Lee Kwang Chian (who was leaving the Chairman's firm and was resigning as Tribunal Secretary).

182. On 25 August 2025, given that it had received no objections to Mr Hng Zong Xian's appointment by the deadline of 18 August 2025, the Tribunal formally appointed Mr. Hng Zong Xian as Tribunal Secretary.

V. Factual Background

183. This section briefly sets out this arbitration's factual background and is not meant to be exhaustive.

184. A review of the Parties' submissions, witness statements and oral testimony given at the oral hearing indicates that, with few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed. That being said, the appearance (or lack of appearance) of any fact in the factual background should not be taken to imply that the Tribunal agrees with (or disagrees with) a purported event, unless the fact is specifically relied upon by the Tribunal in its decision(s) below.

A. 1984

185. Mr. Yusuf Akgun and his company participated in the planning and development of a large industrial zone on the outskirts of Istanbul known as the "*Ikitelli Industrial Zone*". By all accounts, the Ikitelli Industrial Zone was a successful and profitable venture.

B. 2002

186. Ethiopia passed the Environmental Impact Assessment Proclamation, Proclamation No. 299/2002 ("**EIA Proclamation**"), which states, *inter alia*, that:

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

187. In November 2003, the Environmental Impact Assessment Procedural Guideline Series 1 was issued by Environmental Protection Authority.

C. 2005

188. Mr. Yusuf Akgun and his two sons established OYAP Ethio Industry Trading PLC ("**OYAP**") in Ethiopia, which was involved in the manufacturing of PVC windows, profiles for doors, and wall panels.

[5] Exhibit RLA-1, at Art. 3(1).

D. 2008

189. Directive No. 1/2008 was issued by Ethiopia's Environmental Protection Authority. This Directive was titled "*A Directive Issued to Determine Projects Subject to Environmental Impact Assessment*" and outlined 22 project types which were subject to an Environmental Impact Assessment ("**EIA**"), which included the "*Establishment of Industrial Zone[s]*".

190. On 13 October 2008, Ethiopia and Turkey officials headed by Mr. Abadula Gemeda visited Ikitelli Industrial Zone. Oromia Regional State and Claimant signed a Memorandum of Understanding ("**MoU**") to work together to build an industrial zone within Ethiopia.

E. 2009

191. In January 2009, Claimant visited three sites suggested by a delegation of Ethiopian officials assembled by Mr. Abadula Gemeda. This visit resulted in agreement between the Parties that a particular plot of land near Sendafa (the initial "**site**" or "**plot**" or "**Sendafa site**" or "**Sendafa plot**" or "**ETIZ site**") would be the site for the planned development of ETIZ.

192. On 19 February 2009, Claimant's Ethiopia branch was incorporated in Addis Ababa. On the same date, Ethiopian Investment Agency issued to Claimant an Investment Permit for Foreign Investor and a Principal Trade Registration Certificate.

193. On 18 May 2009, the Ethiopian Investment Agency informed Akgun that an investment license had been issued.

194. On 17 August 2009, Claimant presented its pre-feasibility study to Ethiopian officials.

195. In December 2009, Claimant submitted its detailed final feasibility study.

F. 2010

196. On 11 June 2010, Akgun and the Ethiopian Ministry of Trade and Industry ("**MoI**") entered into the 2010 ETIZ Agreement ("**2010 ETIZ Agreement**" or "**2010 Agreement**") for the development of an Industrial Zone in the Oromia

Regional State. The Ethiopian government agreed to fund 30% of the infrastructure cost under the 2010 ETIZ Agreement.[6]

G. 2011

197. On 17 May 2011, Akgun met with Prime Minister Meles Zenawi, to discuss revisions to the 2010 ETIZ Agreement.

198. In November 2011, Ethiopia issued a federal-level Climate Resilient Green Economy Strategy. This Strategy was summarised as:

> *The Government of the Federal Democratic Republic of Ethiopia has […] initiated the Climate-Resilient Green Economy (CRGE) initiative to protect the country from the adverse effects of climate change and to build a green economy that will help realise its ambition of reaching middle income status before 2025. […] The objective is to identify green economy opportunities that could help Ethiopia reach its ambitious growth targets while keeping greenhouse gas emissions low. The government intends to attract development partners to help implement this new and sustainable growth model.*[7]

199. On 19 December 2011, Claimant wrote to the MoI regarding the financing status of the ETIZ Project and amendments to the ETIZ Agreement.

H. 2012

200. In April 2012, Oromia Regional State issued the Compensation Payment Proposal Report. This Report stated its objective to be to:[8]

> *Prepare land available for the purpose of industrial development to realize the planned sustainable agricultural development led industrialization and work out appropriate amount of compensation payment due to residents to be evicted due to the project.*

Furthermore, the Report described the methodologies and valuation processes in detail, citing cooperation between the "*leadership of Berek Woreda of Finfine Environs Oromia Special Zone, Woreda Compensation*

[6] Exhibit C-8, at Art. 11(7).
[7] Exhibit R-43, at Foreword.
[8] Exhibit C-48, at Objective.

Committee, and professionals from Land and Environmental Protection of Oromia Regional State and Oromia Special Zone, which enabled to build consensus regards the overall benefits of the Project and how it will improve their livelihoods".[9]

201. On 8 June 2012, Akgun, the MoI and Oromia Regional State executed the 2012 ETIZ Agreement ("**ETIZ Agreement**" or "**ETIZ Project**"),[10] which replaced the 2010 ETIZ Agreement. This Agreement, *inter alia*, changed the finance provisions to reflect that Respondent was no longer responsible to cover 30% of the infrastructure costs and that Claimant was relieved of its obligation to secure outside financing.

202. On 31 July 2012, Akgun deposited ETB 14,717,476.15 in a bank account at the Oromia Cooperative Bank[11] (which it claims was owned by the Oromia Regional State), as compensation to the Oromia Regional State for the relocation of farmers and/or settlers occupying the ETIZ site for the first 100ha of the ETIZ site.

203. On 18 September 2012, notwithstanding that Akgun had seemingly already paid the compensation on 31 July 2012[12], and that the relevant plot of land had not been handed over to Akgun at the time, the Oromia Investment Office wrote to Bereh Woreda Administration Office (copying to Akgun) regarding their "*Request to implement the recommendation of investment board.*" These Recommendations outlined that Akgun:[13]

> *shall settle a compensation payment of Birr 14,717,476.15 for 59 farmers to be dislocated from the site and acquire 100 hectares of land by concluding rural lease land agreement and undertake the work of your project. Accordingly, we hereby strongly urge the company to undertake the work of its industrial zone for establishment of different industries project in accordance with the rules and regulations in force.*

[9] Exhibit C-48, at Activities accomplished.
[10] Exhibit C-9.
[11] Exhibit C-10.
[12] The Tribunal notes that there has been no allegation of overpayment by Claimant. Therefore, the discussion of the exact timing and receipt of the compensation is primarily academic in nature.
[13] Exhibit C-51.

I. 2013

204. On 2 January 2013, Claimant obtained a Land Lease Certificate, issued by Oromia Bureau of Rural Land and Environmental Protection ("**Oromia BRLEP**"), for the first 100ha of land on the ETIZ site.

205. On 6 March 2013, a protocol was executed between Akgun and the Oromia BRLEP of Oromia Regional State for the first 100ha of the land on the site to be physically handed over to Akgun.

206. On 12 March 2013, Akgun submitted its work plan to Respondent for the first year of works on ETIZ.

207. On 18 March 2013, the MoI wrote to the Ethiopian Investment Agency asking it to issue Akgun an investment permit.

208. On 9 April 2013, the Ethiopian Investment Agency issued Akgun an investment permit.

209. In April 2013, Akgun began mobilization and construction work at the site.

210. From about May 2013 to mid-2013, the MoI requested Claimant to prepare an EIA.

211. On 12 June 2013, Akgun wrote to the MoI regarding certain issues it was facing with the site and the signing of the sublease agreement.

212. In mid-2013, Akgun hired GOTA Management and Development Consultancy ("**GOTA**") to prepare an EIA.

213. On 6 August 2013, Akgun submitted its work report for July 2013 to MoI.

214. On 5 September 2013, Akgun submitted its work report for August 2013 to MoI.

215. On 4 October 2013, Akgun submitted the first draft of its GOTA EIA report.

216. On the same date, Akgun submitted its work report for September 2013 to MoI.

217. On 25 October 2013, Akgun and Afro Oil Manufacturing P.L.C ("**Afro Oil**"), an engine oil manufacturer, entered into a sublease agreement for a plot of land within the ETIZ. Afro Oil subsequently commenced construction of its factory.

218. On 7 November 2013, Akgun entered into an agreement with Kedamawi Advertising[14] for the manufacture of billboards.

219. On 13 November 2013, the MoI provided comments to Claimant, requested revisions to the GOTA EIA and sought to convene a workshop to discuss the EIA with stakeholders.

220. On 22 November 2013, Akgun sent MoI a progress report.

221. On 28 November 2013, the Addis Ababa Water and Sewerage Authority ("**AAWASA**") wrote to the MoI providing its comments on the first GOTA report.

222. On 29 November 2013, Ethiopia issued Claimant's Ethiopian branch with a Commercial Registration Certificate, which described the company's business as "*Industrial Zone development and leasing.*"[15]

223. On 18 December 2013, the MoI provided the comments from AAWASA to Akgun.[16]

224. On 20 December 2013, the MoI wrote to Akgun in order to organize a workshop on the GOTA EIA.

J. 2014

225. On 2 January 2014, Akgun, GOTA and numerous government officials including representatives from AAWASA and the Ministry of Environment and Forest ("**MoEF**"), held a formal workshop to discuss the first GOTA EIA.

226. On 31 January 2014, Akgun wrote to Ernst & Young to request a technical proposal for the EIA.

[14] Exhibit Yun-15 to Yunus Akgun 1st Witness Statement dated 19 November 2020.
[15] Exhibit C-63.
[16] Exhibit C-26.

227. On 6 February 2014, AAWASA wrote a letter to MoI regarding the ETIZ Project. This letter came to the following conclusion:[17]

> *Lastly, in order to preserve the surface and underground water production of Legedadi currently serving the residents of Addis Ababa, the City Government of Addis Ababa Water and Sewerage Authority hereby recommends construction of the industry zone at a different place from the currently intended location in a manner that does not affect water aquifers so as to maintain the services in the future as well.*

228. On 11 February 2014, Akgun received a technical proposal from Ernst & Young for an EIA to analyse the first phase development of 100ha.

229. On 5 March 2014, Akgun submitted a revised GOTA EIA to MoI.

230. On the same date, Akgun sent a letter to the President urging him to provide solutions to the problems Akgun was facing in relation to the EIA and the delay of the Project.

231. On 15 March 2014, Akgun sent a letter to the MoI informing them, "*we have stopped the construction of office buildings of the Project which were under construction for the reason that your good office advised us orally to stop the activities until the environmental impact assessment issue of the Project gets decision*" and urging them to provide Akgun with a method to move forward.[18]

232. On 25 March 2014, the MoI organized another EIA workshop. At the workshop, it was proposed that Akgun either relocate the site or limit the industries operating in the ETIZ.[19]

233. On 27 March 2014, Akgun and the Special Adviser to Prime Minister, Dr. Arkebe Oqubay ("**Dr. Oqubay**" or the "**Special Advisor**") held a meeting. Dr. Oqubay was (or was held out to be) qualified to speak for the Prime Minister. During this meeting, Akgun addressed the issue of the EIA and reconfirmed Akgun's commitment to implement mitigation measures to ensure purified water if they were allowed to continue. If that were not to be the case, and the Project had to be relocated, Akgun stated that Akgun would be owed

[17] Exhibit C-127, at pg. [5].
[18] Exhibit C-72.
[19] Exhibit C-73.

reimbursement for all the work and resources that had already flowed into the project site. Furthermore, Akgun reported that, during the first workshop organized by the MoI on the EIA reports of the Project, Akgun was orally instructed to stop any activity in the industry zone, and the Ethiopian Electric Power Corporation was also allegedly advised to stop the supply of 25MW Electric Power to the Project. The Special Advisor reassured Akgun that there would be no relocation measures made, and that the Government of Ethiopia still supported the Project. Dr. Oqubay assured that these problems would be sorted out and set another meeting for 3 April 2014.[20]

234. On 3 April 2014, Akgun representatives and Dr. Oqubay held another meeting. Dr. Oqubay also visited the ETIZ site. During this meeting, Dr. Oqubay informed Mr. Yusuf Akgun that the ETIZ site would not be relocated any more, advising him to continue the development of the industry zone at full capacity, and further promised Mr. Yusuf Akgun that the Government of Ethiopia would provide him necessary support during the implementation of the ETIZ Project. He also added that, if there were any decision that needed to be made on the ETIZ Project, it would only be decided by the Prime Minister of the Federal Democratic Republic of Ethiopia. Furthermore, Dr. Oqubay advised Akgun "*to re-carry out environmental impact assessment study by international consultant in order to get international acceptance on the study and he suggested the study to be done by consultants from the United Kingdom or the united states of American* [sic]".[21]

235. On the same date, the MoEF wrote a letter to the MoI and attached its review of the EIA and the Management Plan of ETIZ. This review included the conclusion that not only was an EIA necessary, but a Strategic Environmental Assessment ("**SEA**") was required to complement this project-level assessment.

236. On 10 April 2014, Akgun wrote to the MoI requesting written support to allow for the erection of advertisement billboards. The request was duly relayed to the Addis Ababa City Government Mayor's Office on 11 April 2014.

237. On 14 April 2014, MoEF wrote a letter to the MoI regarding the ETIZ Project, stating that:

[20] Exhibit C-73.
[21] Exhibit C-74.

instead of an environmental impact assessment, a strategic environmental assessment should have been conducted with regard to the intended industry zone, taking heed of the quantity, capacity and nature of the industries included therein. The environmental impact assessment conducted lacks the proper relevant professional diversity. Furthermore, it does not identify the impacts of the industry on the Legedadi Underground water, Legedadi dam, and the Legedadi watershed. Further, the measures recommended in the assessment to rectify the negative impacts lack clarity as sufficient detail was not provided for mitigating the damages to be generated in the process. […] Secondly, the environmental impact assessment does not clearly provide a strategy to satisfactorily mitigate potential industrial pollution to the dam and the underground water. The water purifiers at the Legedadi Dam do not have the capacity to filter heavy metals and various other industrial pollutions in conducting filtration for regular potable water from the dam as well as underground water. […] Taking heed of the extensive holistic significance of the intended construction of the industry zone for our country, we believe that an alternative replacement industry zone should be prepared.[22]

238. On 23 April 2014, the MoEF wrote a letter to MoI regarding the ETIZ Project, stating that the EIA conducted failed to show sufficient measures to mitigate against the potential negative impact of the ETIZ, especially with regard to the water usage (and possible contamination) by the ETIZ site.

239. On 16 May 2014, the AAWASA wrote to the MoI, the MoEF and the Ministry of Water, Irrigation and Energy ("**MoWIE**"), concerning the planned ETIZ Project at the Sendafa site. The letter listed a number of concerns, and recommended "*to construct the Industry Zone at a location that will not cause impacts on water aquifers, a location different from the currently intended one, so as to maintain and sustain the protection of the Legedadi surface and underground water from pollution as that water is currently providing water to the Addis Ababa residents*".[23]

240. On 3 July 2014, the Mayor of Addis Ababa City (at the time), Mr. Diriba Kuma, wrote a letter to the Prime Minister about the ETIZ, requesting the Project to

[22] Exhibit C-106.
[23] Exhibit C-128, at pg. [6].

be relocated, stating that the allocated ETIZ site: "*in addition to the Legedadi Dam (which, in turn, is the main source of potable surface water for the Addis Ababa City) is intended to supply potable water to more than 35,000 condominium houses being constructed in Yeka Abado and Bole Arabsa*" and that "*pursuant to the environmental impact assessment recently conducted by the developer, it is observed that effluents from the industry zone contain heavy metals, cyanide, medical wastes, oil, grease, and domestic wastes that could pollute the streams feeding the dam as well as the water percolating into the soil*".

241. The Mayor therefore requested for:

> *a resolution on behalf of the government providing an alternative site for the industry zone which is clear of any dispute and vulnerabilities so as to prevent pollution of the watershed until a common understanding is attained through alternative details that can assure absence of any impacts on the Legedadi deep well underground water (which is the source of about 40,000 cubic meters of water daily dedicated to supply the condominium houses to be inhabited as of April 2015) and the Legedadi and Dire surface water source (which is the important source of about 195,000 m3 of potable water daily), while increasing the capacities of the Legedadi and Dire dams as of the coming September 2014, which is the only alternative.*[24]

242. On 7 July 2014, Akgun submitted its 15-year plan to MoI.

243. On 22 July 2014, the Office of the Prime Minister, Mr. Ato Hailemariam Dessalegn, directed the MoI to suspend the ETIZ Project.

244. On 24 July 2014, the MoI suspended the ETIZ Project construction "*until the EIA is conducted and approved by the appropriate governmental body*".[25]

245. On 19 August 2014, Akgun replied to the MoI's Suspension Letter of 24 July 2014. The letter addressed their concerns regarding water pollution outlining their measures. The letter also informed the MoI that an Environmental Report by the Istanbul Technical University ("**ITU**") was forthcoming.

[24] Exhibit C-130.
[25] Exhibit C-16, at pg. [3].

246. On 21 August 2014, Akgun wrote to the Prime Minister stating that it had attracted interest in the ETIZ Project from 23 companies, and that it might lose these companies if construction continued to be suspended pending a satisfactory EIA. Claimant therefore requested for the Prime Minister to "*allow us to receive the Twenty three /23/ companies listed above to our Industry zone until we finalized the environmental impact assessment study of our project, submit and get decision by concerned authority of"* the Ethiopian Government.[26]

247. Between 21 August and 1 September 2014, Akgun corresponded with the Ethiopian Mapping Agency, Ministry of Agriculture, MoWIE and the City Government of Addis Ababa.

248. On 1 September 2014, the AAWASA replied to Akgun's request for guidance regarding the EIAs, and provided a list of important information for Akgun to consider for its EIA, such as (1) the amount of groundwater from the relevant area and (2) the distance of the ETIZ from the relevant dams. The reply also stated that Akgun could obtain the soil ground survey and yearly mean rainfall data for its calculations from the relevant government institutions in Ethiopia.

249. On 14 October 2014, Akgun submitted another study prepared by the ITU to the President. This study outlined measures to address concerns about the consumption of water or the pollution thereof. This 30-page report outlined the impact of the construction and operation stage of the initial stage(s) of the ETIZ Project.

250. On 17 October 2014, Akgun submitted the ITU study to the MoI.

251. On 13 November 2014, MoEF provided comments on the ITU study. These were review comments made on the additional explanation(s) about the main environmental effects report and specific guidance/directions for enhancing and improving Environmental Impact Assessment and Management Plan of Ethio-Turkish Industrial Zone Report.

[26] Exhibit C-28, at pg. [3].

252. On 20 November 2014, the MoI wrote to Akgun outlining their advice to Akgun to "*work in close collaboration with the relevant stakeholders, and revise and develop the [ITU] EIA report as per the given comments*."[27]

253. On 9 December 2014, Akgun representatives held a meeting with President Mulatu. The discussion in this meeting was centred around how to move forward with the ETIZ Project and what were the possible ways forward.

254. On 11 December 2014, Akgun held a meeting with Dr. Arkebe Oqubay.

255. On 19 December 2014, Akgun wrote a letter to the MoI, copied to Dr. Arkebe Oqubay, regarding the status of the ETIZ Project.

K. 2015

256. On 5 February 2015, Akgun responded to the review comments and requests made by MoEF on 13 November 2014, outlining its disagreements with certain comments made by the MoEF on the EIA's viability (and arguing that it did not have the necessary information to make full predictions about the ETIZ Project and its effect on the environment), and stating the further steps it would take to protect the environment while constructing the ETIZ Project.

257. On 24 March 2015, Akgun wrote to the Prime Minister, stating that it did not feel governmental support for the Project, especially from the MoI; that its attempts to respond to the governmental bodies' concerns about the EIA were being ignored; and that things were moving very slowly. Claimant stated that it was willing to move the "*current location of project's land to another land which is close to the main artery roads and railways, [so long as] all our expenses for the current land [are] repaid*".

258. On 27 March 2015, Akgun sent a written notice to the MoI, invoking its rights under the 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 ("**TEBIT**" or "**Treaty**") and seeking an amicable negotiation.

[27] Exhibit C-27.

259. On 16 April 2015, the MoI's representative (Mr. Ahmed Abtew) visited the Ikitelli Industrial Zone.

260. On 16 April 2015, Akgun wrote to the MoI noting that they still had not received any responses to their letters dated 19 December 2014 to 6 February 2015.

261. On 30 April 2015, Akgun wrote to the MoI again noting that they had not received any responses to their letters dated 19 December 2014 to 16 April 2015.

262. On 17 June 2015, the MoI wrote a letter to Akgun to notify it of the Government's decision to relocate the ETIZ.

263. On 13 August 2015, Akgun was invited by the President of the Oromia Regional State to discuss the ETIZ Project with Oromia Regional State representatives on 20 August 2015.

264. On 20 August 2015, this meeting was held between MoI, the Vice President of Oromia State, and Akgun regarding the ETIZ.

265. On 21 August 2015, Akgun visited several (or at least three) alternative sites for ETIZ located within the Oromia Regional State. However, Mr. Yusuf Akgun felt that the alternative sites were "*far away from Addis Ababa and other major population centers*"[28] and decided not to proceed with the possible relocation of the ETIZ site.

266. On 7 September 2015, Akgun wrote to MoI and the President of the Oromia Regional State regarding the meeting held at the MoI on 20 August 2015 between Akgun's representatives and the Oromia Regional State representatives, during which Claimant received assurances from the MoI and/or Oromia Regional State that solutions for the suspended ETIZ Project were being discussed, and would be provided to Claimant at a later date.

267. On 2 November 2015, Akgun wrote a letter to President Dr. Mulatu Teshome Wirtu, regarding, *inter alia*, an alternative site for the ETIZ Project. Akgun stated that it was expecting an offer from the Oromia Regional State for "*a new land, not further away than 30 km to Addis Ababa City and adjacent to*

[28] Yusuf Akgun's 1st Witness Statement dated 19 November 2020, at [5.25].

a railroad and a highway, and for the reimbursement of the expenses [that Akgun had] incurred on the current land".[29]

268. On 27 November 2015, Mr. Yusuf Akgun met State Minister Tadesse Haile of the MoI in Addis Ababa.

L. 2016-2017

269. Between 19 December 2016 and 7 June 2017, Akgun corresponded with the Ethiopian Investment Commission regarding a potential industrial zone project on the Sendafa site for textiles and garments.

270. In August 2017, Mr. Yusuf Akgun and his sons departed permanently from Ethiopia.

M. 2019

271. On 19 June 2019, Akgun filed a Notice of Arbitration to commence the present arbitration.

VI. Arbitration Agreement, Seat of the Arbitration, and Governing Law

A. Arbitration Agreement

272. The arbitration agreement ("**Arbitration Agreement**") is found in the TEBIT. Article VII, Settlement of Disputes Between One Party and Investor of the Other Party, states as follows:[30]

> *1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.*
>
> *2. If the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in*

[29] Exhibit C-88.
[30] Exhibit CLA-1, at Art. VII.

paragraph l, the dispute can be submitted, as the investor may choose, to:

(a) the Competent Court or Arbitral Tribunal of the Party in the territory of which the investment has been made; or

(b) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", in case both Parties become signatories of this Convention,

(c) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

(d) The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.

B. Seat of the Arbitration

273. The seat of the Arbitration is The Hague, Netherlands.[31]

C. Governing Law

274. The Parties agree that the laws applicable to the 2012 ETIZ agreement are (1) relevant Ethiopian law, (2) the TEBIT, and (3) relevant rules of international law, where Ethiopian law applies insofar as to ascertain whether contractual obligations and breaches occurred between the Parties to the 2012 ETIZ agreement, while the TEBIT and the relevant rules of international law govern whether contractual breaches could trigger an international responsibility of Respondent.

275. However, the Parties disagree on whether or not Ethiopian law applies to the determination of a treaty dispute as a matter of fact or law.[32] On this point, the Tribunal finds that the difference is semantical, and agrees with

[31] Hearing Bundle A, Tab 13, "20200430 Claimant emails to Tribunal re Final agreed draft ToA".
[32] Statement of Claim ("**SOC**"), at [4.3]; Statement of Rejoinder on the Merits and Reply on Jurisdictional Objection and Counterclaims ("**Respondent's Rejoinder**"), at [288].

Respondent that Claimant's characterization of Ethiopian law applicable as a matter of fact rather than as a matter law of law would not lead to a different result under the treaty standards.[33]

276. The Parties agree that the law applicable to Respondent's counterclaims is the Ethiopian Law of Obligations.[34]

277. However, the question of the Tribunal's jurisdiction to hear and rule on Respondent's Counterclaims is predicated on the wording of the Arbitration Agreement above at Paragraph [272].

VII. Relief Requested

278. Claimant's request for relief in its Notice of Arbitration states as follows:[35]

> *78. Claimant, accordingly, requests that the Arbitral Tribunal grant the following relief in favor of Claimant:*
>
> *i. Find and declare that Respondent has violated its obligations under international law and Ethiopian law as a result of its acts and omissions with respect to the ETIZ Project;*
>
> *ii. Find and declare that Respondent has violated its obligations with regard to Claimant's investment contained in the 2012 ETIZ Agreement, and thus the umbrella clause obligation under the Treaty by virtue of the MFN clause thereof;*
>
> *iii. Award compensation to Claimant for its damages, currently estimated to be no less than USD 150 million;*
>
> *iv. Award Claimant all costs and fees incurred in connection with this Arbitration;*
>
> *v. Award Claimant pre-award and post-award interest at a rate to be compounded and fixed by the Arbitral Tribunal; and*

[33] Respondent's Rejoinder, at [288].
[34] Statement of Defence, Objection to Jurisdiction, and Counterclaims (**"SOD**"), at [407]; Statement of Reply and Defence to Respondent's Jurisdictional Objections and Counterclaims ("**Claimant's Reply**"), at [7.70].
[35] Notice of Arbitration ("**NOA**"), at [78].

vi. Award Claimant any other relief to which it may be entitled in law or equity.

279. Claimant's request for relief in its SOC differs somewhat from its request in the Notice of Arbitration, and states as follows:[36]

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

280. Claimant's request for relief was then further changed and expanded upon in Claimant's Reply, which states as follows:

> *8.1. Claimant, accordingly, requests that the Arbitral Tribunal grant the following relief in favor of Claimant:*
>
> *i. FIND and DECLARE that this Tribunal has jurisdiction over Claimant's claims under the Turkey-Ethiopia BIT;*
>
> *ii. FIND and DECLARE that Respondent has violated Article 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant's investments and impairing by unreasonable and discriminatory measures the use and enjoyment of such investments;*

[36] SOC, at [7.2].

iii. FIND and DECLARE that Respondent has violated Article 4 of the Turkey-Ethiopia BIT by expropriating Claimant's investments;

iv. FIND and DECLARE that Respondent has violated the umbrella clause obligation, incorporated into the Turkey-Ethiopia BIT through Article 3 of the Treaty, by breaching its contractual obligations and other commitments;

v. ORDER Respondent to pay Claimant damages:

a. in an amount of USD 241,515,079 (excluding pre-award interest) as compensation for its aforementioned violations related to Claimant's investments in ETIZ, as set out in Section 6.C.iv of Claimant's Statement of Claim dated 20 November 2020; and

b. in an amount to be determined by the Tribunal for the loss of opportunity to expand ETIZ into the additional area of 2,000ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020.

vi. Or alternatively ORDER Respondent to pay Claimant damages in the amounts for loss of opportunity to establish ETIZ in the original area of 1460ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020 and the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;

vii. Or alternatively ORDER Respondent to pay Claimant damages in the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;

viii. ORDER Respondent to pay Claimant pre-award interest as set out in Section 6.F of Claimant's Statement of Claim;

ix. ORDER Respondent to pay Claimant all costs and fees incurred in connection with this Arbitration;

x. ORDER Respondent to pay Claimant post-award interest at a rate to be compounded;

xi. AWARD Claimant any other relief to which it may be entitled in law or equity; and

xii. DISMISS Respondent's counterclaims in their entirety.

281. The same request for relief was made in Claimant's Rejoinder at [5.1].

282. Respondent's request for relief was initially stated in its SOD[37], as follows:

446. For each and all of the above stated reasons:

i. Ethiopia respectfully requests the Tribunal to find that it lacks jurisdiction over all claims asserted by the Claimant and dismiss the Claimant's claims in their entirety.

ii. If the Tribunal finds that it has jurisdiction over and admits any of the Claimant's claims, including any portion or portions thereof, Ethiopia respectfully requests the Tribunal to dismiss all such claims on their merits.

iii. Ethiopia further requests the Tribunal, in respect of its counterclaims, to:

- *Find and declare that the Claimant has violated obligations owed to the Respondent; and*
- *Award to the Respondent compensation in the amount of US$ 12,466,803.41 for its resulting losses.*

iv. Ethiopia respectfully requests the Tribunal to order that the Claimant shall bear the full costs of these proceedings, including all costs of representation and including interests, and to order such further relief as the Tribunal may deem appropriate and just.

[37] SOD, at [446].

v. Ethiopia reserves its right to modify or amend this Statement of Defence, Objections to Jurisdiction, and Counterclaims in further submissions.

283. Respondent's request for relief was then amended somewhat in Respondent's Rejoinder[38], and states as follows:

501. For each and all of the above stated reasons:

i. Ethiopia respectfully requests the Tribunal to find that it lacks jurisdiction over all claims asserted by the Claimant and dismiss the Claimant's claims in their entirety.

ii. If the Tribunal finds that it has jurisdiction over and admits any of the Claimant's claims, including any portion or portions thereof, Ethiopia respectfully requests the Tribunal to dismiss all such claims on their merits.

iii. Ethiopia further requests the Tribunal, in respect of its counterclaims, to:

- *Find and declare that Claimant has violated obligations owed to Respondent; and*
- *Award to Respondent compensation in the amount of US$ 14,790,540.72 for its resulting losses.*

iv. Ethiopia respectfully requests the Tribunal to order that Claimant shall bear the full costs of these proceedings, including all costs of representation and including interests, and to order such further relief as the Tribunal may deem appropriate and just.

v. Ethiopia reserves its right to modify or amend this Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims in further submissions.

[38] Respondent's Rejoinder, at [501].

VIII. Preliminary Issues

A. Jurisdiction

284. As a preliminary matter, the Tribunal notes that Respondent has raised several objections to the Tribunal's jurisdiction, namely that:

284.1 The Tribunal does not have jurisdiction over Akgun's claims via the TEBIT;

284.2 The Tribunal is constituted under the wrong dispute resolution mechanism; and

284.3 The Tribunal does not have jurisdiction over any contractual claims asserted by Claimant as there is no valid Umbrella Clause that elevates contractual claims to the status of treaty claims.

285. The Tribunal also notes that Claimant has raised an objection to the Tribunal's jurisdiction over Respondent's counterclaims.

286. The Tribunal will address each of these objections in turn.

[1] Does the Tribunal have jurisdiction over Claimant's claims via the TEBIT?

(a) Introduction

287. On 16 November 2000, the Republic of Turkey and the Federal Republic of Ethiopia signed a bilateral investment agreement "*concerning the reciprocal promotion and protection of investments*" (the TEBIT), to promote greater economic co-operation between the two nations.

288. The TEBIT came into force on 10 March 2005.

289. Among other things, Article I of the TEBIT[39] states that:

ARTICLE I

Definitions

[39] Exhibit CLA-1, at Art. I.

1. *The term "investor" means:*

   (a) *natural persons deriving its status as national of either Party according to its applicable law,*

   (b) *corporations, firms or business associations incorporated or constituted under the law of either of the Parties and having their headquarters in the territory of that Party.*

2. *The term "investment", in conformity with the hosting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively:*

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

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

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

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

   (e) *business concessions conferred by law or by contract, including concessions related to natural resources.*

   (f) *The said term shall refer to all direct investments made in accordance with the laws and regulations in the territory of the Party where the investments are made. The term "investment" covers all investments made in the territory of the other Party before or after the entry into force of this Agreement. However, it is not applicable to claims arising out of disputes which occurred prior to its entry into force.*

3. *The term "returns" means the amount yielded by an investment and includes in particular, though not exclusively, profit, interest, capital gains, royalties, fees and dividends.*

4. *The term "territory" means;*

   (a) *in respect to the Federal Democratic Republic of Ethiopia; the territory in which the Federal Democratic Republic of Ethiopia exercises sovereign rights or jurisdiction in accordance with international law.*

   (b) *In respect to the Republic of Turkey; territory, territorial sea, as well as the maritime areas over which the Republic of Turkey has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law.*

290. Additionally, Article VII of the TEBIT[40] states that:

Article VII

Settlement of Disputes Between One Party and Investors of the Other Party

1. *Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.*

2. *If the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:*

   (a) *the Competent Court or Arbitral Tribunal of the Party in the territory of which the investment has been made; or*

[40] Exhibit CLA-1, at Art. VII.

(b) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", in case both Parties become signatories of this Convention,

(c) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.

(b) Parties' Positions

291. The Tribunal will briefly summarise the Parties' positions below (and will do the same for most of the Parties' arguments in later parts of the Award). However, the Tribunal stresses that its summaries of the Parties' positions (in this section and in other parts of the Award) are merely provided for ease of reference. The Tribunal has carefully considered all arguments made by the Parties, even those that may not be mentioned in the Award's summaries of the Parties' positions.

292. As a preliminary point, it is not disputed by either Party in their respective pleadings that, for the Tribunal to have jurisdiction over this dispute under the TEBIT, it must have jurisdiction *ratione personae, ratione temporis,* and *ratione materiae.* The Tribunal therefore accepts that these three elements must be found to exist before it can have jurisdiction over this dispute.

Claimant's Position in the SOC

293. Claimant argues that the Tribunal is validly constituted and has jurisdiction under the TEBIT, for the reasons set out below.

294. First, the Tribunal has Jurisdiction *ratione personae*[41] as Claimant, Akgun, is a company incorporated in the Republic of Turkey and is, therefore, an

[41] SOC, at [3.2].

"*investor*" as defined in Article I(1)(b) of the Treaty.[42] Respondent, the Federal Republic of Ethiopia, is one of the contracting States to the Treaty.

295. Second, the Tribunal has Jurisdiction *ratione materiae*,[43] as Respondent has consented (in the TEBIT) to arbitrate any disputes that arise between itself and an investor (as defined in Article I(1) of the Treaty) *"in connection with [the investor's] investments",*[44] and Claimant has a valid "*investment*" in Respondent (triggering Article VII of the TEBIT).

296. The TEBIT "*adopts a broad, asset-based definition*" of the term "*investment*" that includes *"every kind of asset in particular, but not exclusively"* the assets defined in Article I(2) of the TEBIT, which demonstrated a mutual intention by the contracting States (including Respondent) to *"define the term 'investment' as broadly as possible so that it covers any asset owned by the foreign investor".*[45]

297. Claimant's "*interest in the ETIZ Project as embodied in the 2012 ETIZ Agreement*"[46] and the right to build the relevant industrial zone arising under the ETIZ Agreement are clearly assets that can be characterised as an "*investment*" under Article I(2)(b) of the TEBIT (as these rights arising under the 2012 ETIZ agreement have financial value) and/or under Article I(2)(c) of the TEBIT (as Claimant has provided equipment needed to perform the 2012 ETIZ Agreement) and/or under Article I(2)(d) of the TEBIT (as Claimant has the know-how needed to develop the 2012 ETIZ Agreement).[47]

298. The present case "*involves a substantial municipal construction and development project of the sort that investment tribunals routinely accept as an investment in the host State*."[48]

299. Third, the Tribunal has Jurisdiction *ratione temporis*[49] as, according to Article I(2) of the TEBIT, the TEBIT covers disputes regarding investments made in

[42] Refer to Paragraph [289] above.
[43] SOC, at [3.3]-[3.8].
[44] Exhibit CLA-1, at Art. VII.
[45] SOC, at [3.5]-[3.6]; Exhibit CLA-8, at [166].
[46] SOC, at [3.7].
[47] SOC, at [3.7]; Claimant's Reply, at [3.2]-[3.18].
[48] SOC, at [3.8]; See also Exhibit CLA-9, Exhibit CLA-10, Exhibit CLA-11, and Exhibit CLA-12.
[49] SOC, at [3.9].

the Federal Republic of Ethiopia, so long as the dispute arises after the TEBIT came into force.

300. Given that the dispute between the Parties *"arose no earlier than 2014 when Ethiopia forced Claimant to stop work on ETIZ"*,[50] Claimant argues that the present dispute post-dates the effective date of the TEBIT, and the Tribunal therefore has jurisdiction *ratione temporis*.

Respondent's Position in the SOD

301. Respondent does not dispute that the Tribunal has Jurisdiction *ratione personae* and *ratione temporis*[51] but argues that the Tribunal does not have jurisdiction *ratione materiae* over Claimant's claims via the TEBIT as the dispute does not arise in connection with Claimant's investment.

302. First, Claimant has not obtained any contractual rights from the 2012 ETIZ Agreement to build an industrial zone as Claimant would only have attained such rights once it met all of its obligations under the ETIZ Agreement to obtain all the necessary permissions to commence building. Given that Claimant failed to submit an acceptable EIA, Claimant has failed to meet the necessary requirements to be granted the rights to build the industrial zone. Any possible treaty rights relating to the contract/lease therefore never materialised.

303. In any case, the mere "*right to build in and of itself*" cannot qualify as a *"right having financial value"* (based on Article I(1)(b) of the TEBIT) and therefore cannot be an "*investment*" as defined in the TEBIT, given that the definition of "*investment*" in the TEBIT is an asset-based definition.[52]

304. Moreover, Article I(1)(b) of the TEBIT is narrow, and only relates to *"returns reinvested, claims to money or any other rights having financial value* ***related to an investment****"* and not to any possible right that has a financial value. According to Respondent, any *"rights having financial value"* must be *"related to an investment*" that is already existing and qualifies as an asset.[53]

[50] SOC, at [3.10].
[51] SOD, at [158].
[52] SOD, at [162].
[53] SOD, at [182].

A leasehold or other right for future development therefore cannot count as an "*asset*" within the definition of the Treaty.

305. Even if Claimant had submitted an acceptable EIA, Claimant's right to build the industrial zone would only accrue economic value once Claimant committed assets towards construction or related economic activities after the EIA was accepted. Any construction works conducted prior to obtaining the relevant approvals would only be evidence of Claimant's "*repudiation of its obligations under the contract rather than proper performance*".[54]

306. For similar reasons, Claimant's investment cannot be "*the know how needed to develop the ETIZ*" or "*the materials and equipment needed to perform the 2012 ETIZ Agreement*",[55] as these are all examples of "*unaccrued potential*" investments that never materialised due to Claimant's inability to obtain the relevant approvals and/or permits for building the industrial zone.[56]

307. There is a distinction between the construction projects in the cases cited by Claimant[57] that were accepted as "*investments*" (i.e. CLA-009, CLA-010, CLA-011, and CLA-012) and the present case, because none of the cases cited by Claimant involved "*a municipal construction project that has not even commenced because of the developer's own fault*".[58]

308. Additionally, the cases cited by Claimant essentially used what is commonly referred to as the *Salini* Test[59] (or tests similar to the *Salini* Test) to determine whether an investment was made in the host country, and Claimant's purported investment in Respondent fails to meet the requirements of the *Salini* Test.[60]

309. For the reasons above, there has been no valid "*investment*" by Claimant, any dispute that arose could not possibly have arisen "*in connection with [Claimant's] investment*", and thus the Tribunal lacks jurisdiction *ratione materiae*.[61]

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[54] SOD, at [165].
[55] SOD, at [167].
[56] SOD, at [167].
[57] Refer to Paragraphs [297]-[298] above.
[58] SOD, at [168].
[59] Refer to Exhibit CLA-11; SOD, at [178].
[60] SOD, at [171] & [180]-[183].
[61] SOD, at [183].

Claimant's Position in Claimant's Reply

310. The Tribunal has jurisdiction over Akgun's claims because those claims arise in connection with investments protected by the Treaty. The TEBIT defines an "*investment*" broadly to include "*every kind of asset*", and the ETIZ Agreement, along with the many assets that Akgun devoted to development of the Project, fall within that expansive definition, particularly in light of the Treaty's objective and purpose.[62]

311. Specifically, Claimant's investments "*include (1) contractual rights having financial value under the 2012 ETIZ Agreement; (2) equipment, machinery and other movable property needed for completion of the Project and for operation of ETIZ; (3) the experience, expertise and other know-how required to develop an industrial city like ETIZ; and (4) the Project as a whole. Each of these investments is specifically enumerated for protection by the BIT*".[63]

312. With regard to the rights described in (1) above, the rights granted to it under the 2012 ETIZ Agreement include *inter alia* (i) the right to develop ETIZ; and (ii) the leasehold for the land on which ETIZ was to be developed. Each of these rights has "*financial value*" and is a stand-alone investment under the BIT.[64] Respondent's assertion that a "*leasehold right obtained for the purpose of future development is not an 'asset' to which 'rights having financial value' may relate*" is mistaken and Respondent has not provided any authority to support such an assertion.[65]

313. In any case, Claimant's "*experience and expertise in developing industrial cities constitutes 'know-how', an investment protected under BIT Art. I(2)(d)*", and Respondent specifically identified and solicited Claimant to enter the ETIZ Agreement because of this know-how.[66]

314. Moreover, the present case "*involves a substantial municipal construction and development project of the sort that investment tribunals routinely accept as an investment in the host State*."[67] Thus, there is a *jurisprudence*

[62] Claimant's Reply, at [3.1]-[3.3], [3.5].
[63] Claimant's Reply, at [1.8].
[64] Claimant's Reply, at [3.10].
[65] Claimant's Reply, at [3.11].
[66] Claimant's Reply, at [3.12].
[67] Claimant's Reply, at [3.15]; See also Exhibit CLA-9, Exhibit CLA-10, Exhibit CLA-11, and Exhibit CLA-12.

constante that large construction projects such as the one in the present case qualify as investments.[68]

315. Respondent's objections are premised on a mischaracterization of the facts underlying the present dispute. Respondent is wrong in saying that Akgun's assets "*never materialized*" [69] and that the Project faltered because of Akgun's purported failure to obtain a satisfactory EIA.

316. Respondent is wrong that Akgun's assets "*never materialized*", as work on the Project had been ongoing for nearly a decade when Respondent thwarted its completion, at which point substantial progress on ETIZ had been made.[70] Respondent is also wrong in stating that Akgun was required to perform an EIA. Neither the 2012 ETIZ Agreement nor Ethiopian law imposed such a requirement.[71]

317. Respondent is wrong to suggest that the *Salini* factors are binding on the Tribunal. The *Salini* factors do not need to be used if the BIT itself offers a clear definition and scope of the "*investments*" protected under the treaty.[72] Furthermore, the present case is not an ICSID matter, and the Tribunal does not need to adhere strictly to ICSID's definition of investments or the *Salini* factors (given that the *Salini* factors were developed within the system of the ICSID convention).[73]

318. Claimant cites the ICSID cases of *Beijing Urban Construction v Yemen*[74] and *Gavrilovic v Croatia*[75] to highlight that several tribunals have found it unnecessary to review whether the investment fulfilled the *Salini* factors if the "*BIT contain[ed] a detailed definition of what constitutes an investment*"[76] or where "*the State Parties articulat[ed] […] the meaning of 'investment' in their instrument of consent to arbitration, namely, the BIT*".[77] Indeed, in *Guaracachi America v Bolivia*, in the tribunal stated that the definition of protected investment, at least in non-ICSID arbitrations, is to be

[68] Claimant's Reply, at [3.14]-[3.16].
[69] Claimant's Reply, at [3.19].
[70] Claimant's Reply, at [3.20]; a list of the alleged work done can be found in Claimant's Reply, at [3.21].
[71] Claimant's Reply, at [3.20]-[3.35].
[72] Claimant's Reply, at [3.39]-[3.40]; Exhibit CLA-9, at [135]-[136]; Exhibit CLA-82, at [192]; Exhibit CLA-83, at [364].
[73] Claimant's Reply, at [3.43].
[74] Exhibit CLA-9.
[75] Exhibit CLA-82.
[76] Exhibit CLA-9, at [135]-[136].
[77] Exhibit CLA-82, at [192].

found only from the (very broad) definition contained in the BIT concluded by the parties.[78]

319. Moreover, Claimant also refers to several non-ICSID cases, wherein the relevant tribunals declined to refer to the *Salini* factors as the tribunal(s) were not constituted under ICSID rules.[79]

320. In any case, Claimant contends that its investment(s) in Ethiopia fulfil(s) the *Salini* test.[80]

Respondent's Position in the Respondent's Rejoinder

321. Akgun never held any qualifying "*investment*" under Article I(2)(b), Article I(2)(c), or Article I(2)(d) of the TEBIT. The plain language of Article I(2)(b) makes it clear that "*any other rights having financial value*" must relate to an already existing investment that has materialised, and the TEBIT does not allow for a qualifying "*investment*" under Article I(2)(b) to be based on "*rights or claims in connection with investments that have not materialised*."[81] Just because Claimant was entitled to engage in an investment, to be "***entitled to engage in investments*** *is not the same as* ***having made an investment***."[82]

322. At best, Claimant had a "*right to build*", which can only begin to accrue economic value to the extent that Akgun "***actually commits assets*** *through building or related economic activities*".[83] Any activities that were actually undertaken by Akgun were merely in anticipation of performing its obligations under the Agreement, and did not constitute actual performance (which was prevented by Akgun's inability to produce an EIA).[84]

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

(i) It established an Ethiopian branch;
(ii) It paid for the ETIZ leasehold;
(iii) It brought investors to Ethiopia;

[78] Exhibit CLA-83, at [364].
[79] Exhibit CLA-78, at [296]-[298]; Exhibit CLA-85, at [7.4.9]; Exhibit CLA-87, at [150].
[80] Claimant's Reply, at [3.45]-[3.60].
[81] Respondent's Rejoinder, at [234].
[82] Respondent's Rejoinder, at [234], referring to Exhibit CLA-4, at [337].
[83] SOD, at [165]; Respondent's Rejoinder, at [239].
[84] Respondent's Rejoinder, at [240].

(iv) It conducted numerous feasibility studies and EIAs; and
(v) It provided the know-how to develop a successful ETIZ,

these activities were pursued in performance of pre-development contractual obligations expressly undertaken by Akgun in the ETIZ Agreement. Any rights or benefits that may have theoretically resulted from Akgun's eventual performance simply had not materialised before Akgun left.[85]

324. Additionally, save from some ancillary works to prepare the site for implementation, Akgun had not begun development work. "*The agreement to develop ETIZ contained obligations and conditions that the parties agreed to fulfill before any benefit to either side could be realized*", and therefore anything done in preparation for the development of the ETIZ site cannot be considered as performance of Claimant's obligations.[86] Therefore, Claimant cannot capitalise on "*the right to operate the ETIZ for 80 years*" until the completion of the ETIZ Project, and consequently does not have any "*asset*" which could have "*rights having financial value*" attached to it. [87] Consequently, Respondent contends that Claimant does not have a valid investment within the meaning of Article I(2)(b) of the TEBIT.

325. With regard to Claimant's argument that it has "*property*" invested in Respondent (within the meaning of Article I(2)(c) of the TEBIT), (1) Claimant's agreement to source for the necessary tools and equipment does not count as "*property*" (since a promise to provide the requisite tools to execute one's contract is not an investment) and (2) Claimant has not made any claim for loss of such property or that it could not repatriate or sell any machinery or equipment already deployed to the construction site.[88] Claimant therefore does not have a valid investment within the meaning of Article I(2)(c) of the TEBIT.

326. Moreover, with regard to Claimant's argument that it has invested "*know-how*" (within the meaning of Article I(2)(d) of the TEBIT), Claimant has not shown that it actually contributed "*know-how*" to Ethiopia, and Claimant's possession of existing know-how (which it did not contribute to or share with

[85] Respondent's Rejoinder, at [241]-[242].
[86] Respondent's Rejoinder, at [242].
[87] Respondent's Rejoinder, at [243].
[88] Respondent's Rejoinder, at [247]-[248], [254.

Ethiopia) cannot possibly qualify as an "*investment*" under the Treaty. If Akgun had actually invested any intellectual property or know-how in the Project, it could have registered its intellectual property rights in Ethiopia. The fact that Akgun did not produce evidence that it actually held any intellectual property rights in Ethiopia shows that it did not actually contribute such rights to the ETIZ Project.[89] Claimant's case is therefore distinct from other cases in which significant know-how was contributed to the relevant state/country in the course of an investment.[90] In any case, Claimant must show that it could provide "*cutting edge*" know-how, before the know-how can qualify as an investment.[91] Consequently, Claimant does not have a valid "*investment*" within the meaning of Article I(2)(d) of the TEBIT.

327. In any case, Claimant is wrong in suggesting that the *Salini* test does not apply to the present case, given that the *Salini* factors provide a well-established basis for assessing whether an investment has been made.[92] When viewed through the *Salini* lens, it is clear that Claimant has not fulfilled the requirements to have a qualifying "*investment*" in Respondent.[93]

Claimant's Position in Claimant's Rejoinder

328. Claimant reiterates that it has a qualifying "*investment*" in Respondent, as it had committed significant resources, which materialised into a number of assets, by the time Respondent's conduct prevented Claimant from realising profitable returns on its investment (thereby fulfilling the definition of an "*investment*" under Article I(2)(b) of the TEBIT). Claimant had already spent over 7 years developing the Project before it finally departed from Ethiopia[94] and Respondent is wrong to say that the commitment or assets, contributions of resources and other investment activity by Akgun were nothing more than "*pre-development contractual obligations*".[95] Other

[89] Respondent's Rejoinder, at [252]-[254].
[90] Respondent's Rejoinder, at [253].
[91] Respondent's Rejoinder, at [253].
[92] Respondent's Rejoinder, at [255]-[256].
[93] Respondent's Rejoinder, at [257]-[264].
[94] Statement of Rejoinder on Jurisdictional Objections and Counterclaims ("**Claimant's Rejoinder**"), at [3.39]-[3.40].
[95] Claimant's Rejoinder, at [3.45].

Tribunals have routinely recognised that "*similar investments, at similar postures, are protected under investment treaties*".[96]

329. Respondent's claim that Claimant's equipment and machinery in Ethiopia does not count as a qualifying "*investment*" under Article I(2)(c) of the TEBIT (as they could be repatriated to Claimant) is mistaken, as Claimant's ability to retrieve the equipment and machinery had no bearing on whether there was an "*investment*" under Article I(2)(c) the TEBIT.[97]

330. Additionally, the "*know-how*" that Claimant invested into Respondent was an investment under the TEBIT, given the plain wording of the TEBIT. Additionally, Claimant has cited *Muhammet v Turkmenistan*,[98] wherein the Tribunal determined that the relevant investors' "*manpower, expertise and commitment*" constituted a stand-alone category of investments under the ICSID Convention and within the meaning of the treaty governing the dispute (which had a nearly identical definition of investment as the present TEBIT). Claimant also denied that any "*know-how*" must be "*cutting-edge*", as that is not a requirement under the TEBIT.[99]

331. Lastly, the *Salini* factors do not bind the Tribunal and non-ICSID tribunals have routinely rejected strict adherence to the *Salini* factors. In any event, Claimant has satisfied the *Salini* factors.[100]

Claimant's Position in Post-Hearing Submission

332. Specifically with regard to leaseholds, "*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*".[101]

333. Further, the Ethiopian constitution 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*

[96] Claimant's Rejoinder, at [3.45]. See also Claimant's Rejoinder, at [3.46] referring to Exhibits RLA-49.
[97] Claimant's Rejoinder, at [3.49].
[98] Exhibit RLA-47, at [674] & [682].
[99] Claimant's Rejoinder, at [3.53].
[100] Claimant's Rejoinder, at [3.55]-[3.63].
[101] Claimant's Post-Hearing Submission, at [4.1].

by law'" and "*real property [i.e. land] could be split up in to successive interests*" such as tenancy and leases.[102]

334. Moreover, Ethiopian land rights rely upon a system of leasehold rights. For example, the Rural Land Administration and Land Use Proclamation No. 456/2005 applies to any rural land in Ethiopia, and specifically grants compensation to the holder of a leasehold right over rural land subject to expropriation. The proclamation also "*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*'".[103]

335. Claimant notes 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*".[104]

336. Ethiopian law affords leasehold protection against third-party interference,[105] and the only exception to this general rule is the constitutionally granted right for the government to expropriate private property for public purposes, but only upon payment in advance of compensation commensurate to the value of the property.[106] However, Claimant claims that "*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,' 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*'".[107]

337. For the reasons above, Claimant's leasehold interest must be considered a property right under Ethiopian law.

<u>Respondent's Position in Post-Hearing Submission</u>

[102] Claimant's Post-Hearing Submission, at [4.2].
[103] Claimant's Post-Hearing Submission, at [4.6]; Exhibit C-157, at Arts. 4, 6(6), 7(3), and 8(4)-8(5).
[104] Claimant's Post-Hearing Submission, at [4.6].
[105] Claimant's Post-Hearing Submission, at [4.7].
[106] Claimant's Post-Hearing Submission, at [4.8].
[107] Claimant's Post-Hearing Submission, at [4.8]; Exhibit C-154, at pg. [227]-[229].

338. Specifically with regard to leaseholds, Respondent claims that "*under Ethiopian law a leasehold is a right <u>in personam</u> vis-à-vis the lessor and a right <u>in rem</u> vis-à-vis all others. Collectively, they make up the person's patrimony. By application, therefore, any recourse that the lessee may have against the lessor relating to the lease is necessarily of a contractual nature*".[108]

339. In the present case, Claimant has confirmed that it attained contractual leasehold rights from its lessor for "*free*".[109]

340. A treatise on the Ethiopian law of property explains that leaseholds should be deemed to be a "*precarious possession*" of land, which is defined as:[110]

> *2.3.1 PRECARIOUS POSSESSION*
>
> *Possession of a person is affected by the defect of precariousness if the person does not have a right of ownership in relation to the object he holds. According to French terminology, precarious possessions refer to the possession of those who hold a thing for another on basis of an agreement or in such quality that, at the expiration of the agreement, or where they lose their quality, they must return the thing. Hence, the possession of a usufructuary, a limited user /usage/, a tenant farmer, leaseholder or a pledgee, a creditor secured by antichresis, a tutor with regard to a minor's property is affected by the defect of precariousness.*
>
> *Simple occupants lack the animus element (intent to hold for themselves). This presumption is tied to the origin of their possession and continues through out its duration. Simple change of intention, that is the intention to hold henceforth for their own account, is not capable to change their occupancy into a genuine possession.*
>
> *However, those simple occupants who hold a real interest in the thing, such as a usufructuary, a holder of a use right, and a pledgee are considered as possessors in relation to all persons other than the person to whom they have the obligation to return the thing.*
>
> *The defect of precariousness can be healed only by change in the nature of the possession resulting from a legal ground originating in a*

[108] Respondent's Post-Hearing Submission, at [51].
[109] Respondent's Post-Hearing Submission, at [52]; Hearing Transcripts Day 9, at [112:16]-[112:23].
[110] Exhibit RLA-81, at pg. [41]-[42].

third person or from the owner, or from a formal contest by the simple possessor against the person for whose account he has been holding.

341. The structure of the Ethiopian Civil Code confirms the contractual nature of the leasehold right, as leaseholds are included in Title XVIII of the Civil Code (which pertains to contracts relating to immovables) and not Title VI of the Civil Code (which pertains to property).[111]

342. Respondent further asserts that "*a leasehold is patrimonial, but its nature is contractual vis-a-vis the lessor. Legal recourse for any grievance under a lease agreement is decidedly contractual in nature*".[112]

343. Respondent therefore claims that Akgun's conditional leasehold rights under the 2012 ETIZ Agreement do not qualify as a property interest under Ethiopian law.

Claimant's Position in Reply to the TLOQ

344. Specifically with regard to whether the *Salini* factors are mandatory legal requirements, Claimant reiterates that the Tribunal is constituted under the UNCITRAL Arbitration Rules, and not the ICSID Convention, and therefore should not follow ICSID criteria set out in ICSID cases for the definition of an "*investment*". [113]

345. However, if the Tribunal finds that the case law established by ICSID tribunals on the definition of "*investment*" should be followed, then the case of *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay* is indeed instructive in showing that the *Salini* factors merely define what is typical of an investment (and are not mandatory requirements).[114]

346. Claimant instead points towards the Vienna Convention on the Law of Treaties ("**VCLT**"), to state that the interpretation of the TEBIT must be in good faith and consider the ordinary meaning of its terms as well as the TEBIT's object and purpose. A good faith interpretation of the term

[111] Respondent's Post-Hearing Submission, at [54].
[112] Respondent's Post-Hearing Submission, at [55].
[113] Claimant's Response to TLOQ, at [2.2]-[2.3].
[114] Claimant's Response to TLOQ, at [2.4]; *Philip Morris Brands Sàrl, Philip Morris Products S.A*. and *Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, at [206].

"*investment*" must hinge on whether or not an asset has an economic value or aims to create a further economic value in principle.[115]

347. Claimant states that it is "*only where interpreting the term 'investment' under a BIT in accordance with Vienna Convention Art. 31 distorts the term that the tribunal may refrain from adopting that interpretation under Vienna Convention Art. 32(b)*",[116] and that determining that Akgun's assets are "*investments*" would not distort the term "*investment*". A contract to develop and operate an industrial zone is not an ordinary commercial transaction, and is in fact one of the conventional types of investments recognised as an "*investment*" by investment tribunals. In any event, Claimant states that Akgun's assets meet all the typical features of an investment, even when assessed under the Salini test.[117]

348. Accordingly, Claimant's assets in Ethiopia must be counted as an "*investment*" for the purposes of the TEBIT.

Respondent's Position in Response to the TLOQ

349. Specifically with regard to whether the *Salini* factors are mandatory legal requirements, Respondent reiterates that its position is that any ICSID cases would be persuasive but non-binding on the Tribunal.[118]

350. In any case, Respondent states that its principal jurisdictional challenge relates to its claim that Claimant bypassed the contractual tribunal envisaged and agreed upon by the Parties to instead initiate a treaty claim.[119]

(c) Tribunal's Decision

351. For the reasons below, the Tribunal has determined that it has jurisdiction over Claimant's claims via the TEBIT.

352. First, the Tribunal finds that the TEBIT provides a broad definition of the word "*investment*" to include "***every asset in particular**, but **not exclusively***" the types of assets listed in Article I of the Treaty. The Tribunal finds that the

[115] Claimant's Response to TLOQ, at [2.5].
[116] Claimant's Response to TLOQ, at [2.6]; Exhibit CLA-47, at Art. 32(b).
[117] Claimant's Response to TLOQ, at [2.6]-[2.7].
[118] Respondent's Response to TLOQ, at [14].
[119] Respondent's Response to TLOQ, at [15].

wording used in Article I of the Treaty means that the list of "*assets*" in Article I is not exhaustive, and that "*all kinds of assets*" are included as "*investments*" under the TEBIT.[120]

353. While the Tribunal accepts that the definition of the word "*investment*" in the TEBIT is an asset-based definition,[121] in the Tribunal's view, the Treaty must, by its nature, be expansive in its definition of the word "*asset*". The argument that "*assets*" are very narrowly defined under the TEBIT[122] is inconsistent with the fundamental purpose of the TEBIT, namely, to encourage and protect investments between the two countries.

354. In the present situation, the dispute is essentially over Claimant's rights to develop an industrial zone on a plot of land provided by Respondent, which clearly fulfils Article I(2)(b) of the Treaty, which states that investments can be over *"returns reinvested, claims to money or* ***any other rights having financial value*** *related to an investment"*. It cannot be gainsaid that the right to develop land for a specific purpose (or even the lease itself) is a right having financial value. Tellingly, Respondent accepted compensation from Claimant for the lease of the initially chosen plot of land, which implies that both Parties viewed the lease itself as having a financial value. Consequently, the requirement that the dispute relates to an investment is clearly fulfilled.

355. The Tribunal does not accept that the words *"related to an investment"* in Article I(2)(b) of the TEBIT mean that "*returns reinvested, claims to money or any other rights having financial value*" do not of themselves establish an investment unless they result from a pre-existing investment.[123] There is no evidence that the drafters of the TEBIT intended for Article I(2)(b) of the TEBIT to be construed so narrowly, and a more generous view is consistent with the plain wording of Article I(2)(b).

356. In any case, the Tribunal accepts that the 2012 ETIZ Agreement required a transfer of know-how and materials/equipment,[124] and that the dispute between the Parties therefore involves a dispute over "*movable and*

[120] Exhibit CLA-8, at [166].
[121] SOC, at [3.5]-[3.6]; SOD, at [162].
[122] SOD, at [162] & [182].
[123] SOD, at [181].
[124] SOC, at [3.7] and Claimant's Reply, at [3.12]-[3.18].

immovable property" (i.e. Article I(2)(c) of the Treaty) and/or "*industrial and intellectual property rights*" (i.e. Article I(2)(d) of the Treaty).

357. The Tribunal does not accept the argument that Claimant's construction work (or any know-how transfer) prior to obtaining a valid EIA approval[125] cannot be considered when determining if the dispute involves a dispute over "*movable and immovable property*" (i.e. Article I(c) of the Treaty) and/or "*industrial and intellectual property rights*" (i.e. Article I(d) of the Treaty). While the industrial zone was eventually left unbuilt and unfinished, the Tribunal finds that construction work that was performed pre-EIA was performed with the approval (tacit or otherwise) of Respondent. [126] It would be inconsistent of Respondent to now claim that the work performed should not be considered.[127]

358. Second, the Tribunal does not accept that, to be counted as an "*investment*" according to the TEBIT, Claimant must fulfil the so-called *Salini* test,[128] which provides several criteria for determining if an investment has been made, namely that there has been "(*i) a contribution, (ii) a certain duration over which the Project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.*"[129]

359. The Tribunal notes that both Parties agree that the *Salini* test is not binding on the Tribunal,[130] but finds it instructive to discuss why it will not follow the *Salini* factors in the present case.

360. As a preliminary point, the *Salini* test is meant to determine whether something can be deemed to be an investment under the ***ICSID Convention***, which does not define the term "*investment*". Given that this Tribunal is not constituted under the ICSID Rules, the Tribunal is not bound to apply the *Salini* test.

[125] SOD, at [165].
[126] Hearing Transcripts Day 5, at [63:4]-[64:20].
[127] SOD, at [165].
[128] Exhibit CLA-11; SOD, at [171], [175], [177] & [180].
[129] Exhibit CLA-10, at [91].
[130] Refer to the Parties' respective replies/responses to the TLOQ above at [344]-[350].

361. Moreover, the Tribunal agrees that, where the "*BIT contain[s] a detailed definition of what constitutes an investment*",[131] or where "*the State Parties articulat[e] … the meaning of 'investment' in their instrument of consent to arbitration, namely, the BIT*",[132] there is no need to refer to the Salini factors to determine if there was an investment.[133] The Tribunal believes that the definition of a protected investment, at least in non-ICSID arbitrations, can be determined purely from the definition contained in the BIT concluded by the relevant parties.[134]

362. In any case, the Tribunal considers that the *Salini* factors are not mandatory legal requirements but merely express the typical features of investments under the ICSID Convention. Therefore, even if the *Salini* test were to apply to the present case, and even if Claimant were unable to show that it fulfils all of the *Salini* factors, this would neither preclude Claimant's investment from being deemed to be an "*investment*" under the TEBIT nor preclude Claimant from initiating an action under the TEBIT.[135]

363. That said, the Tribunal views Claimant's actions of attempting to develop an industrial zone in a plot of land provided by Respondent to be sufficient to fulfil most, if not all, of the *Salini* factors. First, the Tribunal believes that there was a clear contribution of resources (whether of machinery, equipment, or know-how) sufficient to fulfil the requirements of "*contribution*" and "*a contribution to the host state's development*" under the *Salini* test.[136] This is evident in, *inter alia*, Claimant's email to the MoI on 15 March 2014, which Claimant claimed that it had imported several items of construction machinery for the ETIZ Project, but had been forced to cease construction on the Sendafa site until a satisfactory EIA was performed.[137] Additionally, the Tribunal finds that, since Claimant had paid the relevant compensation to the residents of the intended Sendafa site, this showed a clear *"sharing of the operational risk*".[138] Lastly, the Tribunal finds that it is undisputed that Claimant had already begun work on the site (with approval),

[131] Exhibit CLA-9, at [135]-[136].
[132] Exhibit CLA-82, at [192].
[133] Exhibit CLA-82, at [192].
[134] Exhibit CLA-83, at [364].
[135] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, at [206].
[136] Exhibit CLA-10, at [91].
[137] Exhibit C-72.
[138] SOD, at [175].

and had been operating for some time in Ethiopia (albeit not on a large scale), which fulfils the durational requirement of the *Salini test.*

364. Therefore, even if the *Salini* test were applicable to the present matter, the Tribunal finds that it has been clearly fulfilled, and that Claimant has made a qualifying "*investment*" under the *Salini* test.

365. In light of the above, the Tribunal finds that there is a dispute over an "*investment*" under either Article I(2)(b), Article I(2)(c), and/or Article I(2)(d) of the TEBIT, and that the Tribunal has jurisdiction over the dispute.

[2] Is the Tribunal wrongly constituted under the wrong dispute resolution mechanism?

(a) Introduction

366. The Tribunal next moves to Respondent's argument that the Tribunal is wrongly constituted under the wrong dispute resolution mechanism.

(b) Parties' Positions

Respondent's Position in the SOD

367. Akgun's dispute should be characterised as follows: "(*i) whether Akgun was required to submit an EIA under the contract and the applicable laws to which that contract expressly refers; if so, (ii) what constitutes an adequate EIA; and (iii) who determines said adequacy are all questions of contract and/or Ethiopian law.*" [139] In other words, Akgun's treaty claims are actually disguised contract claims.

368. Respondent argues that "*Article 21 of the Agreement captures precisely these kinds of claims*" and that "*Article 21 is not optional*".[140] Article 21 of the 2012 ETIZ Agreement[141] reads as follows:

> *ARTICLE 21. SETTLEMENT OF DISPUTES*
>
> *1. Any disputes or differences between the Ministry and the Developer in connection with this Agreement shall as far as*

[139] SOD, at [185].
[140] SOD, at [185].
[141] Exhibit C-9, at Art. 21.

possible be settled amicably through consultations and negotiations between the Parties. To this effect, the Parties shall notify each other in writing of the causes of the dispute including detailed information. Parties may also appoint one or more mediators with this respect within three months period.

2. *If the dispute cannot be settled in accordance with sub-article (1) of this Article in this way within six months following the date of the written notification, the dispute may be submitted to:*

    a. *The International Center for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Disputes Between States and Nationals of Other States, in case both parties become members of this Convention; or*

    b. *The Additional Facility Rules of ICSID if one of the Parties is not a member of the Convention.*

3. *The Agreement will be finally settled by an arbitration committee consisting of three arbitrators in accordance with the Arbitration Rules ('Rules') of the Washington Convention on the Settlement of Investment Disputes (ICSID) and International Agreement.*

4. *The said Rules will apply in any and all transactions related to arbitration. The Parties will each appoint an arbitrator who will act as Chairman [sic] of the arbitration committee. In the case where either Party fails to appoint an arbitrator within 14 (fourteen) Business Days as of the receipt of notification sent by the other Party or the two arbitrators who are already appointed fail to reach an agreement upon election of the third arbitrator, the said arbitrator will be appointed in accordance with the said Rules upon request of either Party.*

5. *The applicable law for the arbitration shall be Ethiopian laws, the [Treaty] and accepted principles of the international law.*

6. *The place of arbitration will be determined by the parties and or arbitrators and the Parties have agreed that the language of arbitration including verbal hearing, presentation of written documents and notifications shall be in the English language. The*

duly given arbitration award will be final and binding upon the Parties which are a party to the dispute.

7. *This arbitration clause may be executed independently by the parties.*

Respondent asserts that the dispute should be properly defined as a contractual dispute arising from the 2012 ETIZ Agreement, and the matter must therefore be presided over by a tribunal constituted under ICSID rules, and the arbitration is therefore wrongly constituted under the wrong dispute resolution mechanism.[142]

369. It follows that the Tribunal cannot be constituted under Article VII of the TEBIT, given that there is no valid dispute over an "*investment*" under the TEBIT. Accordingly, if Claimant wishes to bring a claim against Respondent, it can only do so via Article 21 of the 2012 ETIZ agreement.

Claimant's Position in the Claimant's Reply

370. Claimant argues that its claims arise wholly under the TEBIT, not the 2012 ETIZ Agreement, and that "*forum selection clauses apply only to claims based on contractual rights, and may not affect treaty claims*" [143] (including umbrella clause claims).[144]

371. In any case, even if the ETIZ Agreement were to apply, it would not preclude the jurisdiction of the Tribunal as (1) the TEBIT expressly provides that Akgun's claims may be heard in this forum,[145] (2) the 2012 ETIZ Agreement's forum selection clause does not affect the Tribunal's jurisdiction, as the 2012 ETIZ Agreement incorporates the BIT's arbitration provision by reference; and (3) the 2012 ETIZ Agreement's dispute resolution provision is not mandatory or exclusive.[146]

372. Given that the "*2012 ETIZ Agreement provides that '[t]he relevant Ethiopian laws, and the BIT shall govern this Agreement' and, as such, incorporates the*

[142] SOD, at [185].
[143] Claimant's Reply, at [3.72].
[144] Claimant's Reply, at [3.73]; Exhibit CLA-12, at [245].
[145] Exhibit CLA-1, at Art. VII(2)(c).
[146] Claimant's Reply, at [3.74].

BIT's arbitration clause by reference",[147] this allows the Tribunal to resolve Akgun's claims regarding the ETIZ Agreement, since "*other Tribunals have found that, where treaty provisions are incorporated by reference into a contract related to or at issue in the dispute, the arbitration provisions of the treaty apply*".[148]

373. In any case, Article 21 of the 2012 ETIZ Agreement is neither mandatory nor exclusive, given that Article 21 merely states that disputes arising under the 2012 ETIZ Agreement "***may** be submitted"* in accordance with the procedures set forth under Article 21 of the ETIZ Agreement, and does not use the customary words "***shall** be submitted*",[149] which is generally used to denote a mandatory provision. Additionally, Article 21 does not have "*any language providing that its dispute resolution procedure would be the exclusive means by which disputes involving the 2012 ETIZ Agreement*"[150] would be resolved. Since Article 21 is neither mandatory nor exclusive, even if Article 21 were to apply, Claimant submits that its claims may still be heard by the Tribunal.

Respondent's Position in the Respondent's Rejoinder

374. Respondent's position is that "*the 2012 ETIZ Agreement's elaborate dispute settlement mechanism is not invitational but is rather **the** dispute settlement provision for **'[a]ny disputes or differences'** as may occur **'in connection with'** the Agreement, and this under all of the '**Ethiopian laws, the [Treaty] and accepted principles of the international law'**"*, [151] which was freely negotiated and accepted by Claimant.[152]

375. If Claimant wishes to bring any claim on the basis of any "'***disputes or differences'** arising **'in connection with'** the Agreement under any of the '**Ethiopian laws, the [Treaty] [or] accepted principles of the international law'**"*, given the broad scope of Article 21, it is clear that the Parties intended precisely to avoid questions of jurisdiction by making the process under Article 21 mandatory (where there is a dispute or difference arising in connection with the ETIZ Agreement). Article 21 also extends to treaty-

[147] Claimant's Reply, at [3.78].
[148] Claimant's Reply, at [3.78]; Exhibit CLA-95, at [55].
[149] Claimant's Reply, at [3.81]; Exhibit CLA-22, at [52] & [54].
[150] Claimant's Reply, at [3.81].
[151] Respondent's Rejoinder, at [210], citing Exhibit C-9, at Arts. 21(1) & 21(5).
[152] Respondent's Rejoinder, at [214].

related claims.[153] This intention is readily seen when one examines the plain text of Article 21.[154]

376. Furthermore, the use of the permissive "*may*" in Article 21 does not mean that Claimant can circumvent the contractually agreed-upon dispute resolution mechanism in the event of a dispute.[155]

377. Even if the Tribunal were to agree that Article 21 does not bar the Tribunal's exercise of jurisdiction over treaty claims by Claimant, the Tribunal should rule that Akgun's claims are inadmissible (as "*some tribunals have found that the failure to abide by a dispute settlement provision in an underlying contract is a matter of admissibility*")[156] and/or refuse to exercise jurisdiction over Claimant's claims as they "*are ultimately and essentially contractual in nature*".[157]

378. Claimant has not invoked any true instance of *puissance publique*. The Tribunal has essentially been asked to adjudicate a series of contract claims under the cover of treaty principles while in reality they are merely municipal rights and obligations in dispute.

379. Respondent further argues that "*Claimant does not establish a prima facie cause of action under the Treaty*" and the "*facts alleged by Claimant are not 'susceptible of constituting a treaty breach'*".[158] Given that "*the essential basis of [Claimant's] claim brought before [the Tribunal] is a breach of contract*",[159] the Tribunal should give effect to any valid choice of forum clause in the Contract (i.e. Article 21).

380. In any case, under Claimant's own test (which Claimant calls the "*fundamental basis of the claim*" test),[160] Claimant's fundamental claim is regarding municipal rights and obligations to be decided under the Contract, and applicable Ethiopian law, and Claimant has not presented any claims "*that are capable of being characterized as independent breaches by Ethiopia*

[153] Respondent's Rejoinder, at [215].
[154] Respondent's Rejoinder, at [216].
[155] Respondent's Rejoinder, at [217].
[156] Respondent's Rejoinder, at [218]; Exhibit CLA-96, at [155]; Exhibit CLA-105, at [252]; Exhibit CLA-62, at [148].
[157] Respondent's Rejoinder, at [219].
[158] Respondent's Rejoinder, at [220].
[159] Exhibit CLA-88, at [149].
[160] Respondent's Rejoinder, at [225]; Claimant's Reply, at [3.64]-[3.66].

of any of its treaty obligations".[161] Therefore, the express selection of forum by the Parties via Article 21 must be respected.[162]

Claimant's Position in the Claimant's Rejoinder

381. Claimant disagrees that the 2012 ETIZ Agreement applies to Akgun's treaty claims, as, by its plain language, Article 21 of the ETIZ Agreement is limited to only "*contractual disputes arising under the Agreement*".[163]

382. Respondent initially conceded that Article 21 only applied to contractual claims in its SOD, where it stated that Claimant's claims were "*contract claim[s] that [belong] under the exclusive dispute settlement provision to which the Parties expressly agreed*".[164] However, once Claimant demonstrated that its claims were treaty claims arising under the TEBIT, Respondent then tried to "*broaden the scope of the 2012 ETIZ Agreement's dispute resolution provision, suggesting that it applies not only to contractual claims, but also to claims arising 'in connection with' the BIT*".[165]

383. Claimant states that "*nothing in the 2012 ETIZ Agreement specifies that the dispute settlement provisions govern all claims arising under the BIT, and Respondent cannot unilaterally rewrite the terms of that provision to include treaty claims*."[166] Additionally, Respondent "*can point to no tribunal finding that a contractual dispute settlement clause extends to govern the forum for claims arising under an investment treaty*".[167] Absent "*any express language to adjudicate treaty claims in accordance with the terms of the contract*", Claimant submits that "*it cannot be presumed that the parties intended to waive the right to adjudicate [their] treaty claims in accordance with the terms of the treaty*".[168]

384. Moreover, where "*treaty provisions are incorporated by reference into a contract related to or at issue in a dispute, the arbitration provisions of the treaty apply*".[169] Claimant therefore argues that *"[r]ather than making the*

[161] Respondent's Rejoinder, at [225].
[162] Respondent's Rejoinder, at [229].
[163] Claimant's Rejoinder, at [3.6].
[164] SOD, at [187].
[165] Claimant's Rejoinder, at [3.8]; Respondent's Rejoinder, at [214].
[166] Claimant's Rejoinder, at [3.10].
[167] Claimant's Rejoinder, at [3.17].
[168] Claimant's Rejoinder, at [3.18], citing Exhibit CLA-134, at [271].
[169] Claimant's Rejoinder, at [3.11]; Exhibit CLA-95, at [55].

contract's dispute settlement provisions the master of any BIT claims that may touch on the 2012 ETIZ Agreement, as Respondent argues, Art. 21's reference to the BIT in fact recognizes that the terms of the BIT are the master of any such dispute."[170] Essentially, even if Respondent were correct that Article 21 of the ETIZ Agreement extended beyond mere contract claims to include treaty claims, the ETIZ Agreement would still permit such claims to be brought before the Tribunal.[171]

385. In any case, "*Respondent continues to ignore that the 2012 ETIZ Agreement's dispute resolution provision is neither exclusive (i.e., it does not explicitly preclude all other means of dispute settlement) nor mandatory (i.e., it does not require that dispute settlement occur in accordance with the 2012 ETIZ Agreement's terms), such that even if it were in any way applicable to Akgun's claims (it is not), Akgun would still have the option to bring its claims before this Tribunal*."[172]

386. The dispute settlement provision of the ETIZ Agreement is not mandatory (as it does not state that the Parties "***shall***" submit their dispute to the process stated in Article 21).[173] Therefore, the 2012 ETIZ Agreement merely provides the Parties with an "*option*"[174] to pursue arbitration before a tribunal constituted under Article 21, and does not exclude the possibility of using other means of dispute resolution.[175]

387. Moreover, Claimant disagrees with Respondent that its claims should be ruled inadmissible (owing to its alleged failure to abide by a dispute settlement provision in the underlying ETIZ Agreement), as (1) it did abide by the 2012 ETIZ Agreement and (2) in any case, the dispute settlement provision in the ETIZ Agreement is not mandatory or exclusive, and therefore does not need to be followed.[176]

388. It is incorrect to say (as Respondent does), that Claimant's claims are not treaty claims, and are "*essentially contractual in nature*" because "*they all*

[170] Claimant's Rejoinder, at [3.12].
[171] Claimant's Rejoinder, at [3.13].
[172] Claimant's Rejoinder, at [3.20].
[173] Claimant's Rejoinder, at [3.21]; Claimant's Reply, at [3.81]; Exhibit CLA-48, at [51].
[174] Claimant's Rejoinder, at [3.23].
[175] Claimant's Rejoinder, at [3.23].
[176] Claimant's Rejoinder, at [3.27]-[3.29].

arise out of the 2012 ETIZ Agreement".[177] Claimant has established, *prima facie*, that the fundamental basis for each of Akgun's claims is the TEBIT (as explained below): [178]

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

388.2. Claimant's position is as follows:

388.2.1. By failing to state or imply that an EIA would be required as a condition precedent to the development of ETIZ, and taking numerous steps to indicate the contrary;

388.2.2. Only to then impose such a requirement (grounded neither in the terms of the MoU, the 2010 ETIZ Agreement, the 2012 ETIZ Agreement, or Ethiopian law) five years after development of the Project commenced; and then

388.2.3. Demanding that construction of ETIZ be halted without ever recompensing Akgun (despite its repeated promises to do so)

Respondent violated Art. VI of the BIT, which protects against "*direct or indirect" "expropriat[ion]*" of investments.

388.3. Respondent breached certain commitments under the 2012 ETIZ Agreement as well as other specific commitments, in violation of the umbrella clause imported into the BIT through its MFN clause.

[177] Respondent's Rejoinder, at [219] & [222].
[178] Claimant's Rejoinder, at [3.33].

389. These allegations demonstrate that Claimant had in fact invoked *puissance publique* and that the "*Respondent['s] [insistence] that, because the factual matrix underlying Akgun's claims includes the 2012 ETIZ Agreement, they are exclusively contractual claims*" is incorrect (and Respondent's cited authorities are inapposite to the argument it asserts).[179]

(c) Tribunal's Decision

390. The Tribunal agrees that forum selection clauses in contracts generally do not operate upon treaty claims.[180] Without a clear indication to the contrary in the ETIZ Agreement, a forum selection clause in the ETIZ Agreement must necessarily apply only to claims based on contractual rights, and will not affect treaty claims.[181] The Tribunal does not see why this general rule should be abrogated in this particular instance, given that there is nothing in the ETIZ Agreement or pre-contract discussions that shows that the Parties intended for treaty claims to be adjudicated in accordance with the terms of the ETIZ Agreement instead of the TEBIT. The Tribunal does not accept that the plain wording of Article 21 *clearly* showed an intention for treaty claims to be covered.

391. Having carefully reviewed Claimant's claims, the Tribunal also agrees with Claimant that its claims are not disguised contractual claims, but genuine treaty claims. Therefore, Article 21 of the ETIZ Agreement is inapplicable to the present case. Given that Claimant's claims are *bona fide* treaty claims, they do not fall under Article 21. The reasoning for the Tribunal's decision that Claimant's claims are not disguised contractual claims is discussed below.[182]

392. Given the above ruling, the Tribunal finds that it is not necessary to determine whether Article 21 is a mandatory and/or exclusive forum selection clause,[183] given that it will not apply to treaty claims in any case.

393. Having established above that there is indeed a valid dispute over an "*investment*" under the TEBIT, the Tribunal affirms that it can be validly

[179] Claimant's Rejoinder, at [3.34]-[3.37].
[180] Exhibit CLA-93, at [498].
[181] Claimant's Reply, at [3.72]-[3.73]; Exhibit CLA-12, at [245].
[182] See below at Section VIII(A)[3] of the Award.
[183] This point is discussed below in Section VIII(A)[3] of the Award, at Paragraphs [480]-[483].

constituted under Article VII of the TEBIT, which allows the relevant tribunal to be constituted under the UNCITRAL Rules.

394. Consequently, the Tribunal rejects Respondent's argument that any tribunal should properly be constituted under the ICSID Convention rules. Given that Claimant's claims have been deemed to be treaty claims, the Tribunal has jurisdiction over the matter under Article VII(2)(c) of the TEBIT and the arbitration may properly proceed under the UNCITRAL Rules.

[3] Does the Tribunal have jurisdiction over Claimant's alleged contractual claims via the importation of the Umbrella Clause in the Denmark-Ethiopia BIT ("DEBIT") through the most favoured nation clause in the TEBIT?

(a) Introduction

395. In the Parties' pleadings, there has been a debate on whether or not the Tribunal has jurisdiction over Claimant's alleged contractual claims based on the Most Favoured Nation ("**MFN**") clause in the TEBIT read with the Umbrella Clause of the DEBIT.

396. In Article III(2) of the TEBIT,[184] it is provided that:

Article II

Promotion and Protection of Investments

1. […]

2. 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.

(b) Parties' Positions

Claimant's Position in the SOC

397. Since the subject matter of the TEBIT is the promotion and protection of investment, the "*MFN clause creates an obligation upon the host State vis-à-*

[184] Exhibit CLA-1, at Art. III(2).

vis *the treatment it provides under other investment treaties, including substantive standards of protection such as umbrella clauses*"[185] and "*the very character and intention of [MFN clauses] is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty*"[186] (including umbrella clause protections).[187]

398. Since the DEBIT includes an umbrella clause,[188] it should be imported into the TEBIT. Article 2(3) of the DEBIT[189] states that:

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

399. Umbrella clauses "*[elevate] all of the obligations of a contract between an investor and a State into the ambit of the BIT such that a breach of a protected obligation becomes a breach of the substantive obligations of the treaty*",[190] and Ethiopia's breach of commitments owed to Akgun in the 2012 ETIZ Agreement are breaches of the TEBIT.

400. Respondent failed to allow Akgun to obtain an 80-years right of use of the ETIZ site for the express purpose of developing the ETIZ, and breached multiple other obligations it owed under the ETIZ Agreement, including[191] the following obligations:

400.1. The MoI's undertaking to facilitate possible support from all governmental organs of various levels, during the construction, development, and operation of the ETIZ.

400.2. The Government's undertaking that there would not be any expropriation except in conformity with the relevant laws, in connection with the Land Use right, Parcels, plants, enterprises and/or factories to be established over the Land.

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[185] SOC, at [3.15].
[186] SOC, at [3.16]; Exhibit CLA-15, at [131].
[187] SOC, at [3.19]-[3.22]; Exhibit CLA-19, at [396]; Exhibit CLA-20, at [931]-[934].
[188] Citing Exhibit CLA-12, at [328], Claimant defines umbrella clauses as clauses which "*bring contractual and other commitments under the protective umbrella of a bi-lateral investment treaty*", at [5.71].
[189] Exhibit CLA-3, at Art. 2(3).
[190] SOC, at [5.75], citing Exhibit CLA-62, at [142].
[191] SOC, at [5.80].

400.3. Providing adequate energy power, including energy lines, up to the red line of the Project at the Government's expense, and ensuring that the ETIZ would not suffer undue power interruption.

400.4. The GOE's undertaking to bring telecommunications up to the "*red line*" of the Project at its expense.

400.5. If the Project were suspended or stopped or the allocated land is returned to the Ministry due to the acts of third persons, legal entities or civil society organizations and similar external factors without any default which was attributable to Akgun, any and all direct and indirect losses of Akgun would be dealt with by the relevant laws of the Federal Democratic Republic of Ethiopia and the TEBIT.

400.6. If the investment made within the scope of the Project were suspended or stopped by a court order or administrative decision without any default which was attributable to the Developer, any and all direct and indirect losses of the Developer would be dealt with by the relevant laws of Respondent and the TEBIT.

All of these commitments were breached by State actors.[192]

401. In any case, Claimant has the prerogative to formulate its claims as it sees fit and the "*Respondent cannot arbitrarily re-cast the nature [of] Claimant's claims to its favour*".[193] Claimant's claims, as pleaded, arise exclusively under the TEBIT, and it has not brought any contractual claims arising under the 2012 ETIZ Agreement before the Tribunal.[194]

Respondent's Position in the SOD

402. Claimant's attempt to import the umbrella clause from the DEBIT must fail, given that "*Akgun faces four independent impossibilities: first and foremost, lack of privity of contract; second, definitional mismatch; third, the availability of contractual remedies and lack of exhaustion of such remedies;*

[192] SOC, at [5.81].
[193] SOC, at [3.24]; Exhibit CLA-22, at [35].
[194] SOC, at [3.25].

and fourth, inconsistency with the intent of the Parties and the object and purpose of the Treaty".[195]

403. First, there is a lack of privity, given that the borrowed umbrella clause expressly states that each "*Contracting Party shall observe any commitment it may have entered into*",[196] and to replace "*Turkey for Denmark via the MFN clauses overburdens the provision and stretches it too far*".[197] A treaty claim "*calls on the Contracting State itself to answer charges of treaty violation*" and a State "***cannot respond to a claim for breach of commitments contained in a contract that it has not itself concluded***".[198]

404. Additionally, there is an indispensable third party to the ETIZ Agreement out of which the dispute arises, as the agreement is between Akgun, the Ministry of Industry of the Federal Democratic Republic of Ethiopia, and the Regional State of Oromia, and that a contract claim (via an umbrella clause) seeking to "*omit one indispensable party and to replace the other indispensable party with a Respondent that is not a party at all fails for lack of privity*".[199] When a contract is entered into with a separate and distinct entity and not with the State itself, the MFN clause cannot guarantee the observance of contractual commitments.[200]

405. Second, the definition of "*investment*" in the TEBIT does not match the DEBIT as "*the Denmark-Ethiopia treaty expressly defines and includes 'claims to performance pursuant to contracts having an economic value' to be 'investment[s]' and further provides that each party 'shall observe any commitment it may have entered into* ***with regard to*** *investments'*".[201] Conversely, "*Turkey and Ethiopia have expressly chosen to limit their mutual extra-investment protections to 'rights having financial value* ***related to*** *an investment' while excluding any umbrella clause*".[202]

406. In any event, an umbrella clause cannot turn a non-investment into an investment, and only protects one's rights in relation to something that

[195] SOD, at [228].
[196] Exhibit CLA-3, at Art. 2(3).
[197] SOD, at [229].
[198] SOD, at [229]-[230]; Exhibit RLA-30, at [223].
[199] SOD, at [231]-[232].
[200] SOD, at [230]; Exhibit RLA-30, at [223].
[201] SOD, at [236].
[202] SOD, at [236].

already falls under the definition of an investment in the first place. Since Akgun does not have an investment falling under the definition in the TEBIT, it cannot use the umbrella clause protection from the DEBIT (even if it can be imported to the TEBIT).[203]

407. Third, "*[e]levating a simple breach of contract case to a treaty violation without exhaustion of the contract remedies set forth in the contract itself and without any claim of futility renders the remedies that the contractual parties contemplated under their contract purposeless*".[204]

408. Fourth, it cannot have been the intent of the parties to the TEBIT to borrow "*bits and pieces of other treaties*" [205] and that, to accept Claimant's arguments, the Tribunal "*would have to accept that… Turkey and Ethiopia intended that an umbrella clause would become a part of their Treaty after they have plainly chosen to exclude it.*"[206]

409. In any case, Claimant's allegation that Respondent breached several contractual commitments at Paragraph [400] above must fail, given the following factors:[207]

    409.1. The MoI had provided extensive assistance and facilitation to the proponents of the ETIZ Project.

    409.2. Ethiopia never expropriated the site from Claimant.

    409.3. Respondent could not provide adequate energy power to Claimant since the ETIZ Project never reached that point due to Akgun's failure to meet threshold contractual conditions (but would have been able to do so without difficulty).

    409.4. Respondent could not provide telecommunication services to Claimant since the ETIZ Project never reached that point due to Akgun's failure to meet threshold contractual conditions (but would have been able to do so without difficulty).

[203] SOD, at [237].
[204] SOD, at [238].
[205] SOD, at [239].
[206] SOD, at [239].
[207] SOD, at [335].

409.5. Ethiopia is not in breach of its obligation to provide compensation to Akgun as these obligations are only triggered if the investment is suspended, or stopped, or the Land is returned to Ethiopia without any fault attributable to Akgun.

Claimant's Position in the Claimant's Reply

410. Respondent's four grounds set out above in Paragraphs [403]-[409] as to why the Umbrella Clause cannot be imported from the DEBIT to the TEBIT are invalid.

411. First, the definition of an investment in both the TEBIT and DEBIT are similar, and the TEBIT's definition of "*investment*" is actually "*broader in relevant parts than the [DEBIT's] definition.*"[208] In any case, Claimant argues that "*the definition of an investment in the source treaty from which an investor seeks to import an umbrella clause has no bearing on the analysis of whether an MFN clause in the applicable jurisdiction-granting treaty may incorporate standards found in other treaties to which the host state is party*"[209] and Claimant merely needs to show that it has an investment as defined in the TEBIT.[210]

412. Second, the importation of the umbrella clause protection through the TEBIT's MFN clause is consistent with the object and purpose of the TEBIT, given that the entire purpose of an MFN clause is "*to ensure the host state's equality of treatment to foreign investors of different nationalities*"[211] and "*the very fact that Turkey and Ethiopia decided to include an MFN clause in the Treaty indicates that they intended to place Turkish investors on [an] equal footing with investors from other countries and extend the protection provided to those investors to Turkish investors as well*".[212] If the parties to the TEBIT wanted to exclude the umbrella clause protection from being imported, such an exclusion would have to be express.[213]

413. Third, "*there is no requirement to show the exercise of state action for the purpose of assessing Claimant's umbrella clause claims*" and in any case "*the*

[208] Claimant's Reply, at [3.86].
[209] Claimant's Reply, at [3.91];
[210] Claimant's Reply, at [3.91]; Exhibit CLA-98, at [145].
[211] Claimant's Reply, at [3.96]; Exhibit CLA-14, at [162]-[163].
[212] Claimant's Reply, at [3.97].
[213] Claimant's Reply, at [3.99].

negotiation of the investment agreement with Akgun and Ethiopia's subsequent conduct with respect to ETIZ was through an exercise of sovereign means".[214]

414. Numerous tribunals and commentators have discussed and rejected the argument that umbrella clauses only protect against breaches that were applied in an exercise of sovereign authority.[215] The clearest example of that proposition comes from the tribunal in *SGS v Paraguay*,[216] which stated that:

> *Article 11 [containing an umbrella clause] requires the "observance" of commitments. Also as a matter of the ordinary meaning of the term, a failure to meet one's obligations under a contract is clearly a failure to "observe" one's commitments. There is nothing in Article 11 that states or implies that a government will only fail to observe its commitments if it abuses its sovereign authority. Hence, again applying standard principles of treaty interpretation, a breach of contract by Paraguay with respect to an investment of a Swiss investor is a breach of Article 11.*
>
> *[…]*
>
> *[T]he parties' discussion of whether Paraguay took actions of a sovereign nature, and, if so, whether such actions were an abuse of government authority, is irrelevant. In short, if Paraguay failed to observe its contractual commitments, then it breached Article 11. No further examination of whether Paraguay's actions are properly characterized as "sovereign" or "commercial" in nature is necessary.*

415. Consequently, Claimant does not need to prove that there was an exercise of sovereign authority to make an umbrella clause claim. In any event, Claimant states that the MoI and the Oromia Regional State's act of entering into the 2012 ETIZ Agreement should be attributable to the State of Ethiopia ("*and the conduct of said entities vis-à-vis ETIZ shall trigger Ethiopia's international responsibility irrespective of whether Akgun must show the exercise of state action*").[217]

[214] Claimant's Reply, at [3.102].
[215] Claimant's Reply, at [3.107]-[3.113].
[216] Exhibit CLA-103, at [91] & [95].
[217] Claimant's Reply, at [3.114].

416. Claimant also points to Article 4 of the Draft Articles on State Responsibility,[218] which states:

> *1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*

417. Furthermore, the relevance of the distinction between commercial and sovereign acts is expressly denied with respect to the conduct of a State organ under Article 4.[219] Claimant argues that, clearly, the MoI is "*an organ of the central Government*" and Oromia Regional State is "*a territorial unit of the State*", and therefore the conduct of such entities should be attributable to Respondent State (i.e. Ethiopia).[220]

418. In any case, if the Tribunal requires a showing of sovereign authority (before agreeing that there has been a treaty violation), it would be easy to prove in this scenario for the following reasons: (1) Respondent actively recruited Akgun to develop and operate the ETIZ with a high-level delegation of Ethiopian officials led by the Oromia Regional State's President,[221] (2) the ETIZ Agreement specifically recognized the public purpose and "*the importance of the development of the Industrial Zones to attract foreign direct investments and support the industrialization of the Federal Democratic Republic of Ethiopia*",[222] (3) under the 2010 Agreement, the

[218] Exhibit CLA-42, at Art. 4.

[219] Exhibit CLA-42, at Commentary to Charter II, pg. [39], at [7], which states that "*The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law*."

[220] Claimant's reply at [3.120]; Exhibit CLA-4, at [127]-[134]; Exhibit CLA-62, at [141].

[221] Claimant's reply at [3.123].

[222] Claimant's reply at [3.125], quoting Exhibit C-9, at Preamble; Exhibit C-8, at Preamble. See also Ahmed Abtew's Witness Statement dated 12 March 2021, at [3] (recognizing that the MoI signed the 2012 ETIZ Agreement "*for purposes of federal oversight and facilitation of the country's overall industrial development and investment promotion policies*").

Government was Akgun's express partner in the Project,[223] (4) the text of the ETIZ Agreements is replete with references to the Government of Ethiopia,[224] (5) various authorities took part in bringing the Project to life,[225] (6) the Oromia Bureau of Rural Land and Environmental Protection issued a valuation report with respect to the Sendafa site, accepted Akgun's payment for the land and delivered it to Akgun,[226] (7) Government officials at various levels pressured Akgun not to wait and to start implementing the Project immediately,[227] (8) Ethiopian officials at the Government's highest levels closely followed Akgun's progress on ETIZ,[228] and (9) when the Project was suspended, it was suspended by the Government of Ethiopia via its administrative action.[229]

419. Additionally, Respondent's suggestion that Akgun's umbrella clause claim is a contract claim is fundamentally incorrect, as an umbrella clause protection is protection that only the relevant bilateral investment treaty provides: "*by virtue of an umbrella clause, breaches of contractual obligations and other specific commitments of States are elevated into an investor's treaty claim. This 'elevation,' however, does not change the fact that the BIT forms the sole legal basis of the claim*."[230]

420. Moreover, Respondent's argument that the availability of contractual remedies precludes Claimant's umbrella clause is incorrect, as a contract's forum selection clause does not preclude Claimant's treaty-related claims (including any umbrella clause claims), and, in fact, case law and commentaries[231] demonstrate that treaty-based arbitration takes primacy over a forum selection clause in cases where the violation of an umbrella clause was alleged.[232] Furthermore, no express language to the contrary was inserted by the parties to the TEBIT (even though they were free to do so).[233]

[223] Claimant's reply, at [3.125].
[224] Claimant's reply at [3.126].
[225] Claimant's reply at [3.127].
[226] Claimant's reply at [3.128].
[227] Claimant's reply at [3.129].
[228] Claimant's reply at [3.130].
[229] Claimant's reply at [3.131].
[230] Claimant's reply at [3.135]; Exhibit CLA-106, at pg. [172].
[231] Claimant's reply at [3.139]-[3.144].
[232] Claimant's reply at [3.139]; Exhibit CLA-4, at [92]-[114], [250].
[233] Claimant's reply at [3.145]-[3.146].

421. Consequently, the "*availability of the contractually agreed remedies does not preclude the jurisdiction of the Tribunal over Claimant's umbrella clause claim*".[234]

422. Respondent has made little effort to contest the specific violations of its contractual commitments alleged by Claimant, who reiterates that Ethiopia did in fact commit the breaches alleged in Paragraph [400] above.[235]

Respondent's Position in the Respondent's Rejoinder

423. The parties elected not to include an umbrella clause even though "*Ethiopia agreed to umbrella clauses in investment treaties with other States before the Treaty with Turkey*" [236] and could have done so for the TEBIT.[237] Respondent further argues that "*[r]eading further substantive obligations into the Treaty would cut against its object and purpose and would serve to override the intention of the parties in negotiating and agreeing its terms. Claimant may not invoke a protection and impose an obligation that was excluded by the parties to the Treaty*".[238]

424. In any case, Claimant may not avail itself of the MFN clause to import substantive protections into the DEBIT unless Claimant has shown actual discrimination in favour of others (given that the MFN clause is expressly limited to treatment accorded to investors "*in similar situations"*).[239] In other words, "*Claimant must prove that: (i) more favorable treatment was accorded to investments of nationals or investors from countries other than Turkey; and (ii) such investments were in a "similar situation" to Claimant's alleged investment in Ethiopia*".[240] Otherwise, Respondent claims that tribunals have generally "*have refused to extend jurisdiction under an MFN clause to offer protections not included in the primary treaty where Claimant failed to demonstrate de facto discrimination*".[241]

[234] Claimant's reply at [3.147].
[235] Claimant's reply at [5.189]-[5.218].
[236] See Exhibit RLA-48, at Art. 10(2).
[237] Respondent's Rejoinder, at [268]-[269].
[238] Respondent's Rejoinder, at [269].
[239] Respondent's Rejoinder, at [271].
[240] Respondent's Rejoinder, at [271].
[241] Respondent's Rejoinder, at [272]-[277]; Exhibit RLA-49, at [329] & [332]; Exhibit RLA-47, at [780]-[781].

425. In order to benefit from the MFN clause, "*Akgun must demonstrate that Ethiopia granted treatment more favorable to a local or third-State investor in a situation 'similar' to that of its contemplated industrial zone megaproject*",[242] which it cannot do.

426. In any case, "*an umbrella clause does not 'elevate' any municipal obligation into a treaty obligation*".[243] Therefore, the Tribunal cannot assert jurisdiction over Akgun's claims, whether under the Treaty's own terms or by virtue of any umbrella clause imported into the TEBIT.

427. Lastly, Respondent claims that, even if the umbrella clause claims are allowed, they should still be denied, as Claimant cannot prove any breaches in the issues alleged at Paragraph [400] above.[244]

Claimant's Position in the Claimant's Rejoinder

428. Respondent's claim that the umbrella clause was consciously not included (and therefore should not be imported via the MFN clause) into the Treaty is flawed,[245] as MFN clauses, by their nature, "*allow for incorporation of more favorable substantive protections*" (including umbrella clauses)[246] and do not subvert the negotiated balance of the BIT.[247]

429. Furthermore, Claimant states that Respondent has no proof that the parties to the TEBIT intended not to provide umbrella clause protections.[248]

430. Additionally, Claimant does not need to establish *de facto* discriminatory treatment by Ethiopia to benefit from the Treaty's MFN clause (merely because the MFN clause includes the wording that it must be provided similar treatment "*in similar situations*") and in any case has established discriminatory treatment.

[242] Respondent's Rejoinder, at [280].
[243] Respondent's Rejoinder, at [282]. See Exhibit RLA-50, at [85] and Exhibit RLA-51, at [113].
[244] Respondent's Rejoinder, at [364]-[373].
[245] Claimant's Rejoinder, at [3.69].
[246] Claimant's Rejoinder, at [3.71]-[3.74].
[247] Claimant's Rejoinder, at [3.71]-[3.72]; Exhibit CLA-85, at [11.2.4].
[248] Claimant's Rejoinder, at [3.75]-[3.76].

431. As a preliminary note, Respondent has raised the argument that *de facto* discriminatory treatment is required only in its Rejoinder, and that argument should therefore be excluded for being belated.[249]

432. In any case, the very existence of the phrase "*in similar situations*" in the MFN clause does not introduce any additional criteria, and "*it is widely accepted that slight differences in the wording of [MFN clauses] do not alter their function*"[250] and that a "*review of the case law of investment tribunals suggests that in cases where claimants have invoked the MFN clause to attract substantive protection provisions, such as the umbrella clause protection, from third treaties, 'tribunals have been satisfied with the mere fact that Claimant qualifies as an 'investor' under the basic treaty and have not gone into actually comparing the investor with another foreign investor from a third country*'". [251] When an investor invokes the MFN treatment clause to rely on a substantive protection provision from a BIT between the Host State and the third State (as Akgun does in this case) it is sufficient to establish that such protection is available to investors from the third State investing in the host State under a BIT between the host State and the third State.[252]

433. Alternatively, Claimant argues that, at best, the phrase "*in similar situations*" in the MFN clause should be understood to merely require that "*substantive protection provisions can be imported into the base treaty at issue from another treaty, with a third State, provided that the comparator treaty has a common subject-matter with the base treaty containing the MFN treatment clause*".[253]

434. The case of *Ickale Insaat Limited Sirketi v. Turkmenistan*, ("**Ickale**")[254] relied upon by Respondent has been heavily criticised, and therefore its conclusion (that the phrase "*in similar situations*" poses additional limitations on the scope of any MFN clause) should not be followed.[255]

[249] Claimant's Rejoinder, at [3.78].
[250] Claimant's Rejoinder, at [3.81]; Exhibit CLA-137, at pg. [503].
[251] Claimant's Rejoinder, at [3.84]; Exhibit CLA-13, at pg. [63]-[64].
[252] Claimant's Rejoinder, at [3.84].
[253] Claimant's Rejoinder, at [3.87]; Exhibit CLA-13, at pg. [24]-[25]; Exhibit CLA-14, at [179]-[180].
[254] Exhibit RLA-49.
[255] Claimant's Rejoinder, at [3.88]-[3.97].

435. In any case, since "*the purpose of the BIT is the promotion and reciprocal protection of investments*", it is legitimate to "*resolve uncertainties in the interpretation of the clause to favour rather than exclude the protection of covered investments*".[256]

436. Furthermore, even if a showing of *de facto* discrimination is required for the MFN clause in the TEBIT to apply, Claimant has already shown that it was discriminated against when (1) the Condominium Projects (i.e., the houses being constructed in Yeka Abado and Bole Arabsa) that were developed around the same time received preferential treatment, and no EIA was required for those projects, and (2) Respondent relaxed its allegedly EIA-related concerns vis-à-vis industrial zone projects implemented by Chinese and other foreign investors in Ethiopia.[257]

437. Accordingly, Claimant submits that the Tribunal should dismiss Respondent's interpretation of the TEBIT's MFN clause and incorporate the umbrella clause protection from the DEBIT into the TEBIT by virtue of its MFN clause.[258]

Claimant's Position in Post-Hearing Submission

438. In addressing the Tribunal's question on whether the reasoning in paragraphs [326]-[329] of the case of *Ickale*, should be adopted, Claimant states that (a) it had already explained that the *Ickale* tribunal's reading of the MFN clause is erroneous and should not be adopted by the Tribunal, and (b) Respondent had a chance to address Claimant's criticism during the Evidentiary Hearing but failed to do so.[259]

439. Claimant agrees with the *Ickale* Award that prohibition of discrimination is at the heart of the MFN standard (which is a relative standard that always requires an element of comparison regardless of whether a particular MFN clause contains the phrase "*in similar situations*").[260] Further, the "*comparison and hence discrimination may be either actual and concrete (de*

[256] Claimant's Rejoinder, at [3.100]; Exhibit CLA-96, at [116]; Exhibit CLA-4, at [255]; Exhibit RLA-55, at [1200]. See also Exhibit CLA-47, at Art. 31(1).
[257] Claimant's Rejoinder, at [3.102].
[258] Claimant's Rejoinder, at [3.103].
[259] Claimant's Post Hearing Submission, at [3.3]; Claimant's Rejoinder, at [3.88]-[3.103].
[260] Claimant's Post Hearing Submission, at [3.7]; Claimant's Rejoinder, at [3.79]-[3.81].

facto) or may be in the abstract at the level of comparing standards of protection granted to investors (de jure)".[261]

440. However, 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 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 situations' excludes de jure discrimination, and (ii) the principle of effective interpretation (effet utile) mandates such a reading*", and such conclusions were incorrect.[262]

441. First, Claimant relies on a Report by the International Law Commission on the Work of its Thirtieth Session[263] to submit that (a) *"[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]*",[264] and (b) no "*concrete 'comparator' act in which a state accords more favourable treatment [is required] for a party to invoke the benefits of the MFN clause*".[265]

442. The phrase "*in similar situations*" calls for an assessment of similarity between investors or investments, reflecting the well-known *ejusdem generis* principle, and "*the Ickale tribunal's narrow reading of "in similar situations"* (limiting it to situations where a claimant can point to an actual investment by an actual investor), "*constricts the ordinary meaning of the phrase and cannot be correct*".[266] The VCLT states that such a special reading cannot be read into a treaty provision unless it is established that the parties intended the specific consequences of such a reading (which the *Ickale*

[261] Claimant's Post Hearing Submission, at [3.7]; Claimant's Rejoinder, at [3.79]-[3.81].
[262] Claimant's Post Hearing Submission, at [3.8]; Exhibit RLA-49, at [329].
[263] Exhibit CLA-167, at pg. [23], commentary to Art. 5 [6].
[264] Claimant's Post Hearing Submission, at [3.9]; Exhibit CLA-166, at [252]. See also Exhibit CLA-46, at [103]-[104]; Exhibit CLA-13, at pg. [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)*".
[265] Claimant's Post Hearing Submission, at [3.10].
[266] Claimant's Post Hearing Submission, at [3.11]-[3.13].

tribunal failed to do before it constricted the meaning of "*in similar situations*" to situations of an "*actual investment by an actual investor*").[267]

443. The VCLT also allows for "*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*".[268] In the present situation, Turkey's treaty practices would be instructional, as it would be nonsensical to conclude that Turkey intended to limit the protection to be offered to its own investors operating in countries which Turkey has a BIT with 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*".[269]

444. Instead, the more reasonable explanation is that Turkey did not attribute any special meaning to the words "*in similar situations*" in the MFN clauses that it used, let alone contemplate some form of limitation by using the specific wording of "*in similar situations*".[270] Claimant relies on Turkey's BIT with Pakistan, in which the two countries specifically revised the wording of their BIT to limit the scope of the MFN clause in the Turkey-Pakistan BIT, to state, essentially, that Turkey and Ethiopia would have specifically clarified in the wording of their BIT if they intended for the words "*in similar situations*" to have such a narrow meaning (as defined by the *Ickale* tribunal).[271]

445. Moreover, the *Ickale* tribunal's reasoning is also at odds with the principle of *effet utile*, which calls for effective interpretation of treaty language without exceeding acceptable boundaries by giving a term a special or exceptional meaning. Claimant states that scholars have pointed out that 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, or ii) further supports Claimant's interpretation*".[272]

446. 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*

[267] Claimant's Post Hearing Submission, at [3.13]; Exhibit CLA-47, at Art. 31(4).
[268] Exhibit CLA-47, at Art. 32.
[269] Claimant's Post Hearing Submission, at [3.14].
[270] Claimant's Post Hearing Submission, at [3.14].
[271] Claimant's Post Hearing Submission, at [3.15].
[272] Claimant's Post Hearing Submission, at [3.16].

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" and that "*the MFN clause would lose meaning and become less effective (contrary to effet utile) if it were limited to cases of de facto discrimination*".[273]

447. Lastly, the *Ickale* tribunal's finding is contrary to the principle of good faith, as well as the object and purpose of the BIT. There is a "*well-established jurisprudence on MFN clauses' scope of application*" and 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"* without explaining its rationale for doing so.[274]

448. Not only did the *Ickale* tribunal not analyse the MFN clause jurisprudence, but its reasoning was also contrary to the object and purpose of the BIT (which is to promote and protect investments and create conditions favourable for investments).[275]

449. In light of the foregoing, the 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*".[276]

Respondent's Position in Post-Hearing Submission

450. In addressing the Tribunal's question on whether the reasoning in paragraphs [326]-[329] of the case of *Ickale*, should be adopted, the Respondent noted that the MFN clause in the TEBIT contains the same wording of "*in similar situations*" that the *Ickale* tribunal already thoroughly and credibly analysed. Consequently, "*the blanket importation of all*

[273] Claimant's Post Hearing Submission, at [3.18]; Exhibit CLA-166, at [255].
[274] Claimant's Post Hearing Submission, at [3.21].
[275] Claimant's Post Hearing Submission, at [3.22]-[3.23].
[276] Claimant's Post Hearing Submission, at [3.24].

provisions of a third-State treaty in any given case is not the intended purpose of an MFN clause that contains the 'similar situations' qualification".[277]

451. The "*key issue is whether the Claimant has proven that in including the MFN clause in the treaty, Turkey and Ethiopia intended that the umbrella clause that they left out (both having signed treaties with other States containing an umbrella clause) would come back under the MFN clause that actually contains the 'similar situations' qualification. The only reasonable interpretation is that the umbrella clause was left out on purpose and that the parties to the Treaty never intended that it would be brought back through the back door in this manner. It is a discredited manipulation of legal principle that has no room in modern arbitral proceedings such as this one*".[278]

452. Moreover, even if the Tribunal "*were to tolerate the attempted importation of the umbrella clause as a matter of treaty interpretation, […] there is a mountain of authority […] to the effect that the underlying claims sought to be so imported are properly heard only in the contractually agreed arbitration forum*" (and contractual arbitration agreements represent a clear intention to renounce the right to arbitrate contractual claims in the treaty forum).[279]

453. The only extra-contractual claim Claimant has is that "*Ethiopia breached 'a specific commitment to relocate ETIZ'*" but such a claim is so sparse and undeveloped as to be meaningless, and may comfortably be dismissed as a case of *de minimis no curat lex*, notwithstanding that it fails on the merits anyway.[280]

(c) Tribunal's Decision

454. As an initial matter, the Tribunal finds that there appears to be no appreciable difference between allowing or disallowing Claimant's umbrella claims, whether in the scope of Respondent's alleged liability for violations of Claimant's Treaty claims, or in the measure of damages for proven violations. Perhaps this explains why Claimant devoted so much discussion in its pleadings to the question of whether it is appropriate to import the DEBIT

[277] Respondent's Post Hearing Submission, at [47]; Respondent's Rejoinder, at [273]-274] & [280].
[278] Respondent's Post Hearing Submission, at [48].
[279] Respondent's Post Hearing Submission, at [49]; Exhibit CLA-104, at pg. [363]. See also Respondent's Rejoinder, at [223]-[229]
[280] Respondent's Post Hearing Submission, at [50]; Respondent's Rejoinder, at [370]-[372].

umbrella clause via the TEBIT MFN clause, with so little discussion of the alleged contractual breaches that would be elevated, and damages awarded if the umbrella clause were imported.

455. Indeed, all of the alleged contractual breaches mentioned by Claimant (and listed in Paragraph [400] above) are either (i) simply evidence in support of Claimant's Treaty claims for unfair treatment or expropriation (i.e., Respondent's alleged failures to allow 80 years of use of the ETIZ site, to facilitate government support at all levels for the ETIZ Project, and to provide energy, power and telecommunications for the Project)[281] or (ii) contractual entitlements to the same measure of damages available independently for Claimant's Treaty claims (i.e., "*any and all direct and indirect losses*"). [282]

456. However, this is not to say that Claimant's Treaty claims are merely contract claims "*dressed up*" as Treaty claims. Although Claimant's Treaty claims clearly arise out of an investment occasioned by a contractual relationship, the investment and relationship are governed by Treaty obligations as well as contractual obligations. Moreover, the success of Claimant's Treaty claims depends on proof of Treaty obligations violated, not on proof of contract obligations violated.

457. In fact, proof of any contractual breaches alone would ***not*** be sufficient to establish Claimant's Treaty claims. For example, proof of the alleged contract breaches alone would not establish the "*legitimate expectations*" essential to Claimant's FET claim (as discussed later in the Award), nor would their proof necessarily establish expropriation, even though proof of Claimant's Treaty claims would seem to subsume Claimant's contract claims in their entirety.

458. Additionally, the Tribunal finds that, while Claimant has discussed Respondent's alleged contractual breaches, it has not made any standalone claims for damages on the basis of those breaches (instead choosing to mostly subsume such alleged breaches into allegations of expropriation and/or a breach of FET obligations).

459. The mere fact that some matters complained of by Claimant relate to Respondent's contractual obligations does not, in itself, render the matter a

[281] SOC, at [5.80].
[282] Refer to Paragraph [400.5] – [400.6].

contractual dispute. The Tribunal agrees that it has jurisdiction over Akgun's claims so long as the conduct alleged by Claimant, if established, breached the TEBIT.[283]

460. The Tribunal agrees that the fact that a contractual right may be breached does not itself exclude the possibility of a Treaty breach:[284] "*it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law*".[285]

461. Whether or not a tribunal is exercising its jurisdiction under a Treaty rather than a contract depends entirely on whether the fundamental basis of the claim is based on "*the treaty laying down an independent standard by which the conduct of the Parties is to be judged*".[286]

462. Insofar as the issues relate to Akgun's allegations that Respondent (1) expropriated Akgun's investments in violation of the BIT, or (2) violated its obligation to provide Akgun with fair and equitable treatment under the BIT, or (3) impaired Akgun's investment in violation of the BIT, the Tribunal finds that these issues are Treaty claims (notwithstanding that contractual breaches may be constituent components of the alleged Treaty claims).

463. The Tribunal agrees that, for the purposes of determining whether there is jurisdiction, it must look at the claims which are brought before it as they are pleaded and formulated by the relevant party.[287] The fact that these claims may possibly be recharacterized as contractual claims does not preclude Claimant from characterising its claims as Treaty breaches (so long as the Treaty claims fulfil the relevant conditions that the TEBIT requires).

464. It is clear that each allegation by Claimant of a contractual breach is also, at the same time, being claimed as expropriation or a breach of an FET obligation on the part of Respondent, with damages that presumably would be duplicative, rather than cumulative, of those claimed for the treaty violations and therefore not recoverable. Even accepting that the Tribunal does not have jurisdiction over contractual claims, the Tribunal must still take

[283] Exhibit CLA-23, at [112].
[284] Refer to Claimant's Reply, at [3.64].
[285] Exhibit CLA-24, at [665].
[286] Exhibit CLA-23, at [101].
[287] SOC, at [3.24]; Exhibit CLA-22, at [35].

Respondent's alleged contractual breaches into account when determining if there was expropriation or unfair treatment on the part of Respondent. Therefore, as stated above, there is no appreciable difference between allowing Claimant's alleged contractual claims or disallowing them, as the alleged contractual breaches are being used to support Claimant's arguments that there was a Treaty breach. The Tribunal therefore does not need to determine if the MFN clause in the TEBIT can import the umbrella clause from the DEBIT or whether privity of contract prevents the Tribunal from importing said clause.

465. As Respondent itself acknowledges,

> *Akgun's second and third categories of claims pertain to the principle of fair and equitable treatment and to the so-called umbrella clause.* ***The factual predicates are identical****: that Akgun was denied the opportunity to develop its proposed industrial zone on a specific plot of land. Akgun's expropriation claim reads in most relevant part as: 'Claimant has undeniably been deprived of its investments in ETIZ as a result of Respondent's refusal to allow Claimant to develop ETIZ on the allocated land and as required by the 2012 ETIZ Agreement.'* ***The umbrella clause claim rests on the same factual basis and reads as****: 'Ethiopia breached its fundamental obligation under the 2012 Agreement – to allow Akgun to use the site allocated for the development of ETIZ.'*
>
> *In this case, there could only be a genuine issue of dispute if Ethiopia did indeed deny Akgun its use of the allotted land in disregard of its own laws and the Agreement. More specifically, the question for the Tribunal is whether or not Ethiopia followed its own laws or acted arbitrarily.*[288]

466. In other words, even Respondent notes that its alleged contractual breaches are being used to bolster Claimant's argument that expropriation or unfair treatment (which are Treaty issues) has occurred.

467. In any case, the Tribunal notes that, although much time and effort was spent on discussing whether the Tribunal has jurisdiction over the Umbrella Clause

[288] SOD, at [14]-[15].

claims, and what the legal effect of an Umbrella Clause is, very little has been said about the merits of the claims supposedly elevated by the Umbrella Clause. At the Evidentiary Hearing, almost no time was spent discussing which of Respondent's actions were allegedly breaches of which specific provision of the ETIZ Agreement.

468. Given this background, the Tribunal considers that Claimant's allegations of contractual breaches are merely being used as evidence of a Treaty breach, with the contractual claims completely subsumed by the Treaty claims.

469. Indeed, the Tribunal considers that Claimant's discussion of Respondent's alleged contractual breaches is completely focused on the larger context of possible expropriation or unfair treatment by Respondent (which are entirely Treaty issues).

470. Insofar as the alleged contractual breaches by Respondent are merely being used as evidence of expropriation or unfair treatment, the Tribunal does not need to determine whether contractual claims can be elevated to treaty claims via the Umbrella Clause.

471. That said, the Tribunal accepts that, if Claimant has made a purely contractual claim, the Tribunal should not accept jurisdiction over the matter, either because (1) it would not have jurisdiction over such claims (unless the claims are also related to a breach of the TEBIT) or because (2) the Umbrella Clause claims raised by Claimant should not be heard by the Tribunal for the reasons discussed below.[289]

472. Given the Tribunal's analysis above that Respondent's alleged contractual breaches are being used to bolster Claimant's argument that there is expropriation or unfair treatment, the discussion below is purely academic, as the Tribunal clearly has jurisdiction to hear arguments that there has been expropriation or unfair treatment (as those are Treaty breaches notwithstanding that the Tribunal might need to consider Respondent's alleged contractual breaches in order to make a finding that expropriation or unfair treatment has occurred). The Tribunal therefore does not need to determine if the MFN clause in the TEBIT can allow the Umbrella Clause from the DEBIT to be imported to the TEBIT.

[289] Refer to Paragraphs [474]-[484].

473. However, as a purely academic discussion, the Tribunal will consider what would have happened if Claimant's claims were deemed to be standalone contractual claims.

474. If the Tribunal were to find that there were purely contractual claims made by Claimant, could the DEBIT's Umbrella Clause be imported to the TEBIT?As a preliminary matter, with regard to the argument that there is a lack of privity between Claimant and Respondent[290] given that other BITs were not signed by Turkey and Ethiopia, the Tribunal finds that it is unreasonable to argue that a state cannot be expected to follow obligations and commitments present in other treaties (and imported via MFN clauses) that it did not itself negotiate and agree to in its own Treaty, given that the addition of an MFN clause in a Treaty is *precisely* meant to import these *external* obligations and commitments into the Treaty.

475. Moreover, the Tribunal does not accept that there is no privity between Claimant and Respondent because the ETIZ Agreement and/or other relevant contracts were signed by State organs (such as the MoI) and regional governments (such as the Oromia Regional State) instead of Respondent itself.[291] Article 4 of the Draft Articles on State Responsibility[292] clearly states that "*conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*".

476. It is therefore not open to Respondent to claim that the actions complained about were actions by its State organs and/or regional governments, and cannot be imputed to Respondent, especially given that Claimant was courted to set up an industrial zone in Ethiopia by some of Respondent's highest-ranking government officials. Therefore, at least from the viewpoint of privity, there is nothing preventing the importation of the DEBIT's Umbrella Clause via the MFN Clause found in the TEBIT.

477. Next, the Tribunal also rejects the argument that, for the Umbrella Clause in the DEBIT to be imported into the TEBIT (via the MFN Clause), the definition

[290] Refer to Paragraphs [403]-[404].
[291] SOD, at [230]-[232], citing Exhibit RLA-30, at [223].
[292] Exhibit CLA-42.

of "*investment*" in both treaties must essentially be the same.[293] If that were the case, most (if not all) MFN clauses would be rendered otiose, given that it is unlikely for separate BITs to define "*investment*" in the exact same manner (although, an MFN clause is supposed to allow Turkey to obtain at least the same, if not better, terms and benefits as any other country contracting with Ethiopia under a BIT). Therefore, *prima facie*, the Tribunal sees no reason why the Umbrella Clause from the DEBIT could not be imported into the TEBIT (via the MFN clause).

478. Assuming the Tribunal were to accept that the Umbrella Clause from the DEBIT should be imported into the present matter through the MFN clause in the TEBIT, the Tribunal understands that investment treaty jurisprudence has typically treated Umbrella Clause claims in two ways:

478.1. The *SGS Société Générale de Surveillance S.A. v Pakistan* ("***SGS v Pakistan***") approach[294] – which states that Umbrella Clauses do not have the effect of elevating all contractual claims to treaty claims unless there is clear and convincing evidence of the BIT contracting States' intention for such Umbrella Clauses to have such an expansive effect. In other words, for a party to rely on the Umbrella Clause to elevate its contractual claims to treaty claims, it must show that the contracting States had clearly intended to allow contractual claims to be heard as treaty claims. If this cannot be demonstrated to the tribunal's satisfaction, then the tribunal has no jurisdiction over alleged contractual breaches unless the alleged breaches are also breaches of the BIT's substantive standards. Additionally, if parties have a forum selection clause in their contract for contractual disputes, the tribunal must accept the forum selection clause.

478.2. The *SGS Société Générale de Surveillance S.A. v the Philippines* ("***SGS v Philippines***") approach[295] – which states that Umbrella Clauses do have the effect of elevating contractual claims to Treaty claims. However, if there is an exclusive forum selection clause, the tribunal would have to decline to hear the contractual claims, as the parties

[293] SOD, at [236].
[294] Exhibit CLA-61, at [47]; Exhibit CLA-96, at [133]-[134].
[295] Exhibit CLA-96, at [130]-[135], [138] & [155]; Exhibit CLA-61, at [48].

would have decided, through their forum selection clause, to resolve their disputes in another forum.

479. If the Tribunal were to adopt the *SGS v Pakistan* approach, the first step would be to determine whether there is clear and convincing evidence that the contracting States intended for the Umbrella Clause to elevate contractual claims to treaty claims. The Tribunal finds that the Umbrella Clause imported from the DEBIT does not elevate contractual claims to treaty claims, as there is no clear and convincing evidence that Turkey and Ethiopia intended for the Umbrella Clause to have such an expansive effect. Indeed, the Tribunal agrees with the argument that the fact the Umbrella Clause had to be imported from the DEBIT suggests that the contracting States did not contemplate the elevation of contractual claims to Treaty claims.

480. If the Tribunal were to adopt the *SGS v Philippines* approach, the Tribunal would hold that (a) the Umbrella Clause would have the effect of elevating (purely) contractual claims to Treaty claims, but (b) the Tribunal would have to decline to hear such contractual claims because of the contract's exclusive forum selection clause.

481. The Tribunal finds that Article 21 of the Parties' ETIZ Agreement is effectively an exclusive forum selection clause, notwithstanding the argument that the clause states that disputes "**may**" [296] (rather than "*shall*") be submitted to ICSID or the Additional Facility Rules of ICSID (if one of the parties is not a member of the ICSID convention).

482. Read as a whole, it is clear that the Parties intended for a mandatory requirement to submit their contractual disputes to ICSID. The word "*may*" was only used because, if one of the Parties were not a member of the ICSID Convention, the Parties would have to submit their dispute to the Additional Facility Rules of ICSID instead. In essence, Article 21 creates a mandatory requirement for Parties to submit their dispute to ICSID, or, if one of the Parties were not a member of the Convention, then there would be a mandatory requirement for Parties to submit their disputes to the Additional Facility Rules of ICSID.

[296] Claimant's Reply, at [3.81].

483. Adopting the *SGS v Philippines* approach, the Tribunal therefore would have to respect the Parties' choice to resolve their contractual claims in another forum. Insofar as Claimant's claims were purely contractual in nature, the Tribunal would decline to decide the claims.

484. However, since the Tribunal has determined that Claimant's claims are not contractual, the Tribunal would still have jurisdiction over these claims (even if it adopted one of the approaches discussed above).

[4] Does the Tribunal have jurisdiction over Respondent's Counterclaims?

(a) Introduction

485. In Respondent's SOD, Respondent presents counterclaims against Claimant for "*losses caused by Akgun's breach of contract and gratuitous and unmitigated abandonment of the Project*".[297]

486. The Tribunal now turns to determine whether such counterclaims can be heard by the Tribunal.

(b) Parties' Positions

Claimant's Position in the SOC

487. Claimant notes that Respondent indicated an intention (in its Response) to bring counterclaims against Claimant, and therefore pre-emptively asserts that the Tribunal has no jurisdiction over Claimant's counterclaims as "*the only source of [the] Tribunal's jurisdiction is the [TEBIT]*" and "*Article VII of the Treaty affords Claimant, and only Claimant, a right to bring claims under it: 'Disputes… shall be notified in writing, including a detailed information, by the investor, to the recipient Party of the investment'*".[298]

Respondent's Position in the SOD

488. Under the 2012 ETIZ Agreement, Claimant assumed numerous contractual obligations but failed to carry out any of them.[299]

[297] SOD, at [392].
[298] SOC, at [3.27].
[299] SOD, at [389].

489. Respondent argues that Claimant's "*singular explanation for this failure [to carry out its contractual obligations] to date is that it was asked to conduct proper environmental assessments*" and that the 2012 ETIZ Agreement was not "*a unilateral gift of land*" to Claimant but "*a reciprocal exchange of promises for the Ministry of Industry and the Oromia Regional State to grant a leasehold right over a plot of land and for Akgun to construct a modern industrial zone on it. The rights and obligations of each party are expressly set forth in the Agreement. It was a reciprocal exchange of binding promises for mutual benefit. Akgun escaped its contractual obligations only by exiting the country without warning*".[300]

490. Respondent therefore presents counterclaims against Claimant for "*losses caused by Akgun's breach of contract and gratuitous and unmitigated abandonment of the Project*".[301]

491. As a preliminary point, the Tribunal is vested of jurisdiction over its counterclaims because the Tribunal is vested of jurisdiction over "*[d]isputes… in connection with*" [302] any investment under the TEBIT. [303] "*Claimant fundamentally misappreciates the plain language of the Treaty where it simply does not follow from the investor-claimant's privilege of initiation by first notifying a **dispute** that it thereafter holds a monopoly on **claims**. Where, as here, Akgun elects to exercise that privilege, Akgun opens the gate to all that may follow*".[304]

492. Moreover, the Tribunal has several bases for jurisdiction over Respondent's Counterclaims.

    492.1. First, Claimant has consented to the Tribunal's jurisdiction, as expressed in its presentation of breach of contract claims under the umbrella clause. Respondent claims that "*[i]f the umbrella clause contract claims are admitted, there could be no doubt that Claimant has consented to the jurisdiction of the Tribunal to adjudicate all disputes arising out of the same contract*" and that it would be "*impossible that there would be jurisdiction over the claims but not*

[300] SOD, at [390]-[391].
[301] SOD, at [392].
[302] Exhibit CLA-1, at Art. VII(1).
[303] SOD, at [397].
[304] SOD, at [397].

over counterclaims when the counterclaims arise out of one and the same contractual instrument containing reciprocal obligations".[305]

492.2. Second, "*Claimant's pleading suffer from a further and serious analytical oversight*" and all of Claimant's treaty-based claims "*arise out of the contract as well*".[306] Respondent claims that the core of Claimant's claim for expropriation and breach of FET obligations are actually disguised claims for breach of contract[307] and that "*Claimant has not invoked any true instance of puissance publique nor even seriously sought to do so. That is because the Claimant could not succeed in crafting a credible characterization of the acts of Ethiopia as such. While a claimant is the master of its claim, no amount of artful pleading may alter the claim's very essence. This Tribunal is asked to adjudicate a series of contract claims under the cover of treaty principles while in reality there are merely municipal rights and obligations in dispute*".[308] Respondent argues that contractual claims "*invite the counterparty's counterclaims*" and that "*if the Tribunal were to accept jurisdiction over the Claimant's claims, it would have jurisdiction over Ethiopia's counterclaims on the basis of what may be termed as an equitable estoppel principle*".[309]

492.3. Third, *"the equitable estoppel doctrine is particularly important in light of the Claimant's attempted evasion of the dispute settlement provision in the Agreement itself. If this Tribunal exercises jurisdiction over the claims, it is essentially undertaking the function of a tribunal that was agreed to be differently constituted under the Agreement's mandatory and exclusive dispute settlement provision to which Akgun freely assented (and which provision, furthermore, expressly incorporates the Treaty into the chosen corpus of governing law).*

[305] SOD, at [398]; Respondent also states that "*Article 19(3) of the 1976 UNCITRAL Arbitration Rules ("Respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off") and Article 21(3) of the 2010 UNCITRAL Arbitration Rules ("Respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it"). The Agreement contains its own reciprocal dispute settlement provision. See […]. Exhibit C-9, at Art. 21. By initiating a treaty claim but seeking to bring claims arising out of the contract before this Tribunal, Claimant cannot avoid counterclaims*".

[306] SOD, at [399].

[307] SOD, at [400]-[403].

[308] SOD, at [403].

[309] SOD, at [404].

That tribunal would have had the clear contractual jurisdiction over any counterclaims arising out of the Agreement. Fundamental justice requires that this Tribunal fill that gap if it decides to exercise jurisdiction over any of the Claimant's claims".[310]

492.4. Finally, "*the Tribunal would have an inherent power to review the contract-based counterclaims in any event because, at a minimum, it would serve the necessary purpose of completeness of its analysis of the affirmative claims presented by Claimant*".[311]

493. Further, since the parties to the ETIZ Agreement have selected "*Ethiopian law, the Treaty, and accepted principles of international law to govern the Agreement*", then "*the principal applicable law [for the counterclaims] is the Ethiopian Law of Obligations*".[312]

494. The most relevant provisions relating to Respondent's counterclaims are as follows:

494.1. "*Ethiopian law recognizes the fundamental rule of <u>pacta sunt servanda</u> in the following terms: 'The provisions of a contract lawfully formed shall be binding on the parties as though they were law'*".[313]

494.2. "*Article 1771 [of the Ethiopian Civil Code] states the effects of non-performance as follows:*

> *'(1) Where a party does not carry out his obligations under the contract, the other party may, according to the circumstances of the case, require the enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract.*

(2) He may in addition require that the damage caused to him by non-performance be made good."*[314]*

[310] SOD, at [405].
[311] SOD, at [406].
[312] SOD, at [407].
[313] SOD, at [408]; Exhibit RLA-38, at Art. 1731.
[314] SOD, at [409]; Exhibit RLA-38, at Art. 1771. Additionally, Art. 1775 establishes that "[*n*]*otice need not be given where … the debtor has declared in writing that he would not perform his obligations.*"

494.3. "*The following provisions give further instruction on non-performance and the consequences thereof:*

> *'Art. 1790. – <u>Damages arising out of non-performance</u>*
>
> *(1) Apart from or in addition to the enforcement or cancellation of the contract, a party may require that the damage caused to him by the other party failing to perform his obligations be made good.*
>
> *(2) Without prejudice to the provisions of the following articles, the provisions of the Chapter of this Code relating to 'Extra-contractual Liability' shall apply where the damage is made good under sub-art. (1) (Art. 2090-2123).*
>
> *Art. 1791. – <u>Damage when to be made good</u>*
>
> *(1) The party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault.*
>
> *(2) He shall not be released unless he can show that performance was prevented by force majeure'"*.[315]

494.4. "*Article 1790(2) thus invokes the chapter regarding extra-contractual liability to determine the damage to be made good [and that] its fundamental rule reads as follows:*

> *'A. <u>Material damage</u>*
>
> *Art. 2090 – <u>Modes of compensation</u>.*
>
> *(1) Unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages.*
>
> *(2) The court may, subject to the liberty of persons and to the rights of third parties, order in lieu of or in addition to damages any appropriate measures to make good or limit the damage.*

[315] SOD, at [410]; Exhibit RLA-38, at Arts. 1790-1791.

Art. 2091. – <u>Extent of damages</u>

The damages due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability."[316]

495. "*Barring the mutual termination of a contract, the absence of its execution requires legitimate justification [and that] Akgun has not offered and cannot offer a legitimate explanation for its failure to perform its contractual obligations of development under the Agreement*" and "*under the applicable Ethiopian law, non-performance of a contract obliges the non-performing party to pay damages to be calculated under provisions of the same law, from which obligation the non-performing party 'shall not be released unless he can show that performance was prevented by force majeure'*".[317]

496. Claimant "*undertook numerous obligations under the 2012 ETIZ Agreement that it has failed without justification to perform*"[318] and "*the entire Agreement was predicated upon the promise that Akgun would 'bring its highest level of know-how, experience, financial, technical and technological resources to the Federal Democratic Republic of Ethiopia for the purpose of establishing an industrial zone'*",[319] which it failed to do:

496.1. First, Article 10 of the ETIZ Agreement[320] contains most of the specific contractual obligations undertaken by Claimant under the ETIZ Agreement, and that Claimant "*failed to perform any one of its development obligations under Article 10 of the 2012 ETIZ Agreement*".[321]

496.2. Second, Akgun undertook to "*finance the entirety of the ETIZ Project*"[322] under Article 12 of the ETIZ Agreement,[323] but failed to do so.

[316] SOD, at [411]; Exhibit RLA-38, at Arts. 2090-2091.
[317] SOD, at [414]-[415]; Exhibit RLA-38, at Art. 1791(2).
[318] SOD, at [417].
[319] SOD, at [420].
[320] Exhibit C-9, at Art. 10.
[321] SOD, at [422]-[423].
[322] SOD, at [424].
[323] Exhibit C-9, at Art. 12.

497. Claimant "*repudiated all of these obligations without exception by simply exiting because it was unwilling to conduct required environmental studies and comply with the applicable environmental laws that it committed to uphold in the Agreement*"[324] and it is clear in Claimant's SOC (that Claimant does not claim to have performed any one of these obligations stated above at Paragraph [496].[325] In other words, Respondent asserts that "*[t]here is thus no dispute between the Parties on this point*" (that Claimant did not perform its contractual obligations), and that the present "*dispute pertains solely to whether or not there was any justification for non-performance as a matter of law*".[326]

498. Under the applicable Ethiopian laws, the "*party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault*"[327] and the breaching party "*shall not be released unless he can show that performance was prevented by force majeure*".[328]

499. Article 1792 and Article 1793 of the Ethiopian Civil Code[329] state that:

> *Article 1792 of the Ethiopian Civil Code:*
>
> *(1) Force majeure results from an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing his obligations.*
>
> *(2) Force majeure shall not exist where the occurrence could normally have been foreseen by the debtor or where it renders more onerous the performance by the debtor of his obligations.*
>
> *Article 1793 of the Ethiopian Civil Code:*
>
> *The following occurrences may, according to the circumstances, constitute cases of force majeure:*

[324] SOD, at [426].
[325] SOD, at [427].
[326] SOD, at [427].
[327] SOD, at [428]; Exhibit RLA-38, at Art. 1791.
[328] SOD, at [428]; Exhibit RLA-38, at Art. 1791.
[329] Exhibit RLA-38, at Arts. 1792-1793.

(a) the unforeseeable act of a third party for whom the debtor is not responsible; or

(b) an official prohibition preventing the performance of the contract; or

(c) a natural catastrophe such as an earthquake, lightning or floods; or

(d) international or civil war; or

(e) the death or a serious accident or unexpected serious illness of the debtor.

500. There were no *force majeure* related circumstances leading up to Claimant's alleged breach of the contract, and "*Akgun was never asked to perform what the Agreement and applicable laws did not require*".[330] Respondent claims that "*[t]he July 2014 suspension of construction works was ordered* ***because of*** *Claimant's serial default in preparing and presenting the required EIA report; it was thus a demand for performance of the un-waivable environmental obligations rather than a prohibition of performance. A party may not invoke its own non-performance as an excuse*".[331] In any case, under Article 14 of the ETIZ Agreement, any *force majeure* event must be contemporaneously notified to the other party in order to excuse a party's non-performance,[332] and no such notification was ever given by Claimant.[333]

501. Respondent therefore claims that Claimant is liable to pay damages for the losses it has caused, which it states should be calculated based on the principles stated in Article 2091 of the Ethiopian Civil Code, which states that the "*damages due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability*".[334] Respondent also states that it is entitled to seek future damages, as, according to Article 2092 of the Ethiopian Civil Code, a "*future damage which*

[330] SOD, at [430].
[331] SOD, at [430].
[332] SOD, at [431]; Exhibit C-9, at Art. 14(3).
[333] SOD, at [431].
[334] SOD, at [433]; Exhibit RLA-38, at Art. 2091.

is certain to occur shall be made good without waiting for it to materialize".[335]

502. In assessing the damages that it claims it is entitled to, Respondent claims that (1) the relevant government entities had taken numerous steps to facilitate the ETIZ Project, including "*[e]xercising the government's constitutional power of eminent domain [to expropriate] numerous residential and agricultural lands… to make way for the development project"* in the expectation that "*the ETIZ Project would offer numerous economic opportunities for the entire country, including direct and indirect employment to members of the displaced communities*" and that Claimant had "*proposed that diverse industries would be located in the industrial zone*".[336] The promised level of investment by Claimant, if successfully achieved, "*would have contributed enormously to Ethiopia's GDP (including in essential foreign currency export earnings) and directly to the State's coffers in the form of tax revenues and other duties levied*" and that "*these benefits would have been gained had Akgun performed upon its many promises*".[337]

503. However, Respondent recognises "*that for these economic benefits to accrue, myriad obstacles would have had to be overcome*"[338] and that Ethiopian law only "*provides for compensation of losses that are* ***certain*** *to occur*".[339] Therefore, Respondent only seeks damages "*for loss and injury that have* ***actually and already occurred****, including interests under the applicable law*".[340]

504. In determining the quantum of its counterclaim, Respondent claims that (a) Claimant failed to develop the land that Respondent had provided to Claimant (in breach of the ETIZ Agreement), and (b) Claimant's breach of contract has "*caused the detention and idling of this valuable land from the time of handover on 6 March 2013 to the present day*".[341]

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[335] SOD, at [434]; Exhibit RLA-38, at Art. 2092.
[336] SOD, at [435]-[436].
[337] SOD, at [436].
[338] SOD, at [437].
[339] Exhibit RLA-38, at Art. 2092 (stating that future damage "*shall be made good without waiting for it to materialize*" where it is "*certain to occur*").
[340] SOD, at [437].
[341] SOD, at [438]; Exhibit C-13.

505. Given that Claimant subleased a portion of the initially allocated land to Afro-Oil Manufacturing PLC in 2013 for USD 1 per square meter per annum,[342] Respondent claims that this "*rent was obtained by Akgun without development and as-is*" and is "*thus a relevant and reliable indicator of the fair market value of the land as from the date of detainment*".[343] Respondent therefore submits that its *"value deprivation over the full allotment of one hundred hectares is reliably calculated in the amount of US$1 per square meter per annum*", based on its calculations in the table below:[344]

1 HECTARE	**100 HECTARES**
1 hectare = 100 m X 100 m = 10,000 m^2	100 X 10,000 m^2 = 1,000,000 m^2

506. Respondent is entitled to "*assume a reasonable rate of appreciation in the rental value of the detained land, and thus a reasonable rate of increase in Ethiopia's value deprivation by reason of the land's detention over time*" given that "*Akgun's own sublease agreement stipulates a rental increase of five percent every three years*" (and that it would also similarly assume that rental for the land would increase 5% every three years).[345] Furthermore, Respondent is entitled to statutory interest of 9% (which is "*applied to the date of payment*").[346] Respondent's damages until 2021 should be calculated as follows:[347]

	Year	**Base Amount**	**Interest**	**Total**
1	2013-2014	US$ 1,000,000	X 1.09^8	US$ 1,992,562.64
2	2014-2015	US$ 1,000,000	X 1.09^7	US$ 1,828,039.12
3	2015-2016	US$ 1,000,000	X 1.09^6	US$ 1,677,100.11
4	2016-2017	US$ 1,050,000	X 1.09^5	US$ 1,615,555.15
5	2017-2018	US$ 1,050,000	X 1.09^4	US$ 1,482,160.69
6	2018-2019	US$ 1,050,000	X 1.09^3	US$ 1,359,780.45
7	2019-2020	US$ 1,102,500	X 1.09^2	US$ 1,309,880.25
8	2020-2021	US$ 1,102,500	X 1.09	US$ 1,201,725
	Total			**US$ 12,466,803.41**

[342] SOD, at [439]; Exhibit C-15.
[343] SOD, at [440].
[344] SOD, at [440].
[345] SOD, at [441]; Exhibit C-15, at Art. 5.1.
[346] SOD, at [441]; Exhibit RLA-39, at Art. 2479.
[347] SOD, at [442].

507. Respondent states that the calculated amount of **USD 12,466,803.41** will be revised to the current amount due as of the date of the final award and execution (assuming that the Tribunal rules it is entitled to this sum).[348]

Claimant's Position in Claimant's Reply

508. Respondent "*has invented unfounded and ill-reasoned concepts to establish jurisdiction in disregard of the most basic principles of arbitration and public international law for the protection of foreign investments*" and "*those jurisdictional defects mandate dismissal of Ethiopia's counterclaims in their entirety*". Respondent's counterclaims also fail on their merits as "*Ethiopia has failed to (i) establish a clear case with an adequately identifiable dispute, (ii) substantiate its counterclaims, and (iii) show that Akgun has committed any breach of the 2012 ETIZ Agreement*".[349]

509. In presenting its counterclaims, "*Ethiopia falsely contends that Akgun has brought contractual claims under the cloak of treaty claims and then uses this contention as a basis to argue that these purported contract-based claims invited Ethiopia's counterclaims*"[350] when Claimant's claims are clearly treaty claims. Furthermore, the fact that Claimant's claims partially involve Respondent's violations of the 2012 ETIZ Agreement does not transform its treaty-based claims into contractual claims.[351] Respondent's characterisation of its claims as contractual claims to "*establish the foundation for advancing its counterclaims*" must necessarily fail (and "*every subsequent argument that flows from it [is] equally futile and irrelevant*").[352]

510. Furthermore, Claimant implicitly argues that the plain language of the TEBIT does not allow Respondent to raise counterclaims (as Respondent claims), given that "*it states that* ***only the investor can initiate arbitration by dispatching a dispute notice***"**.** Additionally, Claimant states that the TEBIT "*makes clear that* ***only the investor has the right to choose the venue***".[353]

511. Respondent's argument that "*once Akgun initiated the dispute resolution mechanism as per Art. VII of the BIT, it opened the gate for all counterclaims*"

[348] SOD, at [443].
[349] Claimant's Reply, at [7.3]-[7.4].
[350] Claimant's Reply, at [7.8].
[351] Claimant's Reply, at [7.9], citing Exhibit RLA-30, at [258].
[352] Claimant's Reply, at [7.10].
[353] Claimant's Reply, at [7.12]; Exhibit CLA-1, at Arts. VII(1), VII(2).

is incorrect, as numerous "*investment tribunals have concluded that host states are not allowed to bring counterclaims if the dispute resolution clause in a bilateral investment treaty does not allow the host state to initiate arbitration against a foreign investor*".[354]

512. Citing *Saluka v Czech Republic*,[355] Claimant states that, in determining if counterclaims should be allowed, the Tribunal must analyse the scope of the dispute resolution clause and, "*if under the dispute resolution clause of the applicable Treaty the host state is allowed to initiate arbitration, it can also raise counterclaims*".[356]

513. Similarly, in *Roussalis v Romania*,[357] the tribunal considered that the existence of the parties' consent was a condition precedent for it to have jurisdiction over the host State's counterclaims.[358] The tribunal reviewed the relevant treaty, which read:

> *Disputes between an investor of a Contracting Party and the other Contracting Party concerning* ***an obligation of the latter under this Agreement, in relation to an investment of the former,*** *shall, if possible, be settled by the disputing parties in an amicable way […] [**bold** emphasis added]*
>
> *If such disputes cannot be settled within six months from the date either party requested amicable settlement,* ***the investor concerned may submit*** *the dispute either to the competent courts of the Contracting Party in the territory of which the investment have been made or to international arbitration.*[359]

514. The tribunal's conclusion may be summarised as follows: (1) the "*definition of 'disputes' is limited to those arising from the host state's breach of its BIT obligations towards the investor's investment*",[360] and (2) "*only the investor [was] given the right to submit the dispute to arbitration*" (based on the

[354] Claimant's Reply, at [7.13]-[7.14].
[355] Exhibit CLA-22.
[356] Claimant's Reply, at [7.17]; Exhibit CLA-22, at [39].
[357] Claimant's Reply, at [7.18]; Exhibit CLA-127.
[358] Exhibit CLA-127, at [865].
[359] Exhibit CLA-127, at [868].
[360] Claimant's Reply, at [7.20], citing Exhibit CLA-127, at [869].

relevant treaty). Accordingly, the tribunal had no right to hear the host State's counterclaims as it lacked the jurisdiction to do so.[361]

515. Claimant also cites *Gavazzi v Romania*,[362] which was decided in a similar vein (i.e. that since only the "*investor in question will be able to submit the dispute at his discretion*", the tribunal had no jurisdiction over the counterclaims).[363] The tribunal in that case stated that when "*there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the BIT*".[364]

516. Finally, Claimant cites *Rusoro v Venezuela,* which also was decided in a similar manner,[365] and asserts that the tribunal in that case concluded that only the claimant had *locus standi* to initiate international arbitration for the following reasons:

    516.1. The first paragraph of the relevant BIT limited the scope of disputes to investors' claims against the host States.

    516.2. Under the second paragraph of the relevant BIT, only investors had the right to define the dispute by sending a dispute notice.

    516.3. If amicable settlement negotiations failed at the end of six months, the third paragraph granted the right to file an arbitration only to investors.[366]

    Accordingly, "*the tribunal held that, according to the BIT and the applicable rules of international law, only the investors had the right to initiate arbitration; consequently, the tribunal had jurisdiction to hear only the investors' claims*".[367]

517. Claimant contends that (a) all the above-mentioned cases "*echo the same settled rule: the source of an arbitral tribunal's jurisdiction is the dispute resolution clause in the applicable BIT, which embodies the parties' consent*

[361] Claimant's Reply, at [7.20], citing Exhibit CLA-127, at [869].
[362] Exhibit CLA-128.
[363] Claimant's Reply, at [7.22]-[7.23], citing Exhibit CLA-128, at [145] & [159].
[364] Claimant's Reply, at [7.24]; Exhibit CLA-128, at [154].
[365] Exhibit CLA-129, at [627].
[366] Claimant's Reply, at [7.28]; Exhibit CLA-129, at [623]-[625].
[367] Claimant's Reply, at [7.29].

to arbitration"[368] and (b) in the present case "*it is obvious that the host state is not granted the ability to advance claims under the Treaty because: i) the first paragraph of Art. VII clearly states that only the investor can initiate an amicable negotiation period by notifying the host state of the disputes; and ii) the second paragraph of Art. VII provides that the investor, and only the investor, is given the right to choose the venue*".[369] Claimant therefore submits that only it has *locus standi* to submit disputes to arbitration, and consequently Respondent cannot raise any counterclaims.[370]

518. Claimant contends that its reading of the TEBIT accords with "*the Gavazzi, Rousalis, and Rusoro tribunals' interpretations of similarly narrow dispute resolution clauses which limited the right to resort to arbitration to investors. All three tribunals refused to hear the host state's counterclaims because the dispute resolution clauses in question were not drafted in a way that allowed the host states to submit disputes to arbitration*".[371] Moreover, the wording of Article VII in the TEBIT is not merely a standard term added into all of Respondent's investment treaties, as it differs from the Egypt-Ethiopia BIT (which was broader in nature in terms of which party could submit a request for arbitration), and the TEBIT is therefore instructive of the bargain struck by the contracting States to the TEBIT.[372]

519. Additionally, Claimant argues that its invocation of the umbrella clause under the DEBIT does not allow Respondent to raise its contractual claims against Claimant, because "*Ethiopia misapprehends the function of an umbrella clause, which is to elevate contractual claims to a treaty level. Once an investor invokes the umbrella clause, the contractual claims become treaty claims*".[373] Moreover, the wording of Article 2(3) of the TEBIT clearly states that "*Each Contracting Party shall observe any commitment it may have entered in to with regard to investors of the other Contracting Party*". Accordingly, only "*the host states' commitments 'with regard to investors,' such as contractual commitments, are taken under the umbrella of the BIT*" (and not the other way around).[374] Claimant states that Respondent agrees

[368] Claimant's Reply, at [7.30].
[369] Claimant's Reply, at [7.31].
[370] Claimant's Reply, at [7.31].
[371] Claimant's Reply, at [7.32].
[372] Claimant's Reply, at [7.34]-[7.35].
[373] Claimant's Reply, at [7.36].
[374] Claimant's Reply at [7.38].

with this assertion, since Respondent has submitted that the word "*it*" in "*[Article 2(3) of the TEBIT] refers to 'Ethiopia or Denmark', not the investor*".[375]

520. Accordingly, given that "*the umbrella clause relates only to the host states' obligations and not to the obligation of the investors*", Claimant argues that "*Ethiopia cannot successfully rely on Akgun's umbrella clause claim as a basis for its right to raise contract-based counterclaims*".[376] Claimant further argues that this is the same approach that the *Roussalis v Romania*[377] tribunal adopted towards Romania's similar arguments in that case, and that the tribunal determined that "*the umbrella clause contained in the BIT would not help Romania overcome this jurisdictional hurdle since the umbrella clause only confirmed that the host states would comply with their contractual obligations towards the investors but did not impose a reciprocal duty on the investors*".[378]

521. Claimant quotes the umbrella clause at issue in the *Roussalis v Romania* matter, which reads: *"[e]ach Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party*",[379] and points out its similarity to the umbrella clause at issue in the present case, which reads: *"[e]ach Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party*".[380]

522. Claimant also cites *Oxus Gold plc v Uzbekistan*,[381] which it argues demonstrates that "*Claimant's recourse to the umbrella clause would not be helpful to Respondent in raising contractual counterclaims because the umbrella clause only referred to obligations the host states owed*".[382]

523. In summary, "*umbrella clauses, like the one in the Denmark–Ethiopia BIT, solely incorporate host states obligations into treaties, and they do not do the same for investors' obligations*" and Respondent's argument that if "*'the*

[375] Claimant's Reply at [7.38].
[376] Claimant's Reply at [7.39].
[377] Exhibit CLA-127.
[378] Claimant's Reply at [7.40]; Exhibit CLA-127, at [875].
[379] Exhibit CLA-127, at [874].
[380] Exhibit CLA-3, at Art. 2(3).
[381] Exhibit CLA-132.
[382] Claimant's Reply, at [7.41]; Exhibit CLA-132, at [958(i)].

umbrella clause contract claims are admitted, there could be no doubt that Claimant has consented to the jurisdiction of the Tribunal to adjudicate all disputes arising out of the same contract' is totally alien to the fundamental principles of investment arbitration".[383]

524. In any case "*even if Ethiopia's argument were valid, which is denied, it would still need to overcome one more hurdle: [u]nder the governing law, it is not a party to the 2012 ETIZ Agreement, and Akgun assumed no obligations towards Ethiopia in the agreement*".[384]

525. Equity concerns cannot form the basis for the Tribunal's jurisdiction over Respondent's Counterclaims, as (1) "*Akgun's claims are not contract claims, they are Treaty claims*" and "*the very premise on which Respondent bases its argument is wrong*"[385] and (2) "*what empowers an arbitral tribunal is the parties' consent to arbitration contained within the dispute resolution clause, not fundamental justice or equity concerns*".[386] Even the authority cited by Respondent in its SOD "*indicates that a state can raise counterclaims as long as the instrument of consent allows it*".[387]

526. Claimant contends that the cases it cites above at Paragraphs [511]-[516] support the consent-based approach (i.e. there must have been consent to arbitrate the host State's counterclaims in the respective investment treaties), and that "*equity-based concerns cannot supersede the parties' explicit consent found in the dispute resolution clause of the relevant treaty*. *Where the wording of the BIT is explicit enough to exclude jurisdiction over the host state's counterclaim, like in the case at hand, no jurisdiction can be inferred merely from the principles of equity*" and that "*the parties had the opportunity to explicitly empower this Tribunal to decide this case ex aequo et bono as per Art. 35 of the UNCITRAL Rules and elected not to do so; therefore, the Tribunal cannot base its decision on the principles of equity and/or fairness*".[388] Moreover, Respondent "*lacks party standing here to raise contractual counterclaims in response to Akgun's treaty claims against it*" as "*the appropriate parties to the counterclaim must be the same as the*

[383] Claimant's Reply, at [7.42].
[384] Claimant's Reply, at [7.42].
[385] Claimant's Reply, at [7.44].
[386] Claimant's Reply, at [7.45], referencing SOD, at [405].
[387] Claimant's Reply, at [7.45], referencing SOD, at [405].
[388] Claimant's Reply, at [7.47]-[7.51].

parties to the main, or 'primary,' claim" (based on what Claimant calls the "*cardinal principle*" of counterclaims derived from the *Saluka v Czech Republic* decision, in which the tribunal declined jurisdiction because, *inter alia*, the party to the relevant share purchase agreement which formed part of the host State's counterclaims was a state agency controlled by the State, and not the state itself).[389]

527. According to *Tethyan v Pakistan*,[390] the "*Draft Articles on State Responsibility do not apply to non-treaty claims, including counterclaims under domestic instruments*"[391] and therefore "*the rules on international attribution of the acts of state organs, such as the MoI, and the acts of regional units, such as the Oromia Regional State, to that of the State do not apply to Ethiopia's counterclaims*".[392] Respondent's erroneous attempt to claim that it cannot respond to a claim for breach of contract that it has not itself concluded (when defending against Claimant's umbrella clause claims), "*without a doubt, shows that Ethiopia has acknowledged that the parties to this arbitration and the parties to the contract upon which Ethiopia bases its counterclaim are different, thereby destroying the party identity necessary to establish contractual counterclaim standing*".[393]

528. Claimant argues that "*it is the Oromia Regional State which would suffer directly from the alleged breach; therefore, the State of Oromia—not Ethiopia—would be entitled to enforce its contractual rights against Akgun and claim damages. The Ethiopian Constitution does not grant that power to the federal government [to claim damages on the State of Oromia's behalf]*".[394] Claimant also highlights that, according to Article 52(2)(d) of the Ethiopian Constitution, "*the power 'to administer land and other natural resources in accordance with Federal Laws' belongs to the federal states*",[395] and therefore, Respondent has no standing to bring the counterclaims.

529. Moreover, the Tribunal does not have any inherent power to review the counterclaims, and that, while it is true "*that some tribunals have analyzed whether the counterclaims alleged fell within their 'inherent power' because*

[389] Claimant's Reply, at [7.52]; Exhibit CLA-22, at [49].
[390] Exhibit CLA-24.
[391] Claimant's Reply, at [7.54], citing Exhibit CLA-24, at [1421].
[392] Claimant's Reply, at [7.55].
[393] Claimant's Reply, at [7.56].
[394] Claimant's Reply, at [7.59].
[395] Exhibit RLA-32, at Art. 52(2)(d).

they bore a close connection to Claimant's treaty claims. Such tribunals undertook this analysis, however, in parallel to their review of the literal wording of the relevant arbitration clauses".[396] A review of the investor-state jurisprudence will show that a counterclaim having a close connection to Claimant's claim is insufficient for the Tribunal to assume jurisdiction, as it will still hinge on whether or not the Parties consented to arbitrate their counterclaims under the relevant investment treaty.[397]

530. Claimant therefore argues that "*the notions of 'fundamental justice,' 'equitable estoppel,' and 'fairness' that Ethiopia resorts to cannot constitute a standalone basis for this Tribunal's jurisdiction over Ethiopia's counterclaims. This is because the 'instrument of consent' to arbitration in the Treaty does not grant Ethiopia the right to initiate arbitration or raise counterclaims*".[398]

531. Additionally, even if the Tribunal accepts jurisdiction over Respondent's counterclaims, the counterclaims will still fail as they do not fulfil the standards for Parties' submissions under the UNCITRAL Rules.

532. Article 21(4) of the UNCITRAL Rules states that counterclaims are subject to the same requirements as statements of claim, which *inter alia*, must include "*(a) The names and contact details of the parties; (b) A statement of the facts supporting the claim; (c) The points at issue; (d) The relief or remedy sought; and (e) The legal grounds or arguments supporting the claim*".[399] Moreover, Article 20(4) of the UNCITRAL Rules, while not mandatory, imposes a procedural duty for Respondent to *"substantiate its claims with evidence and other supporting documents 'as far as possible'"*.[400]

533. For various reasons, Claimant argues that Respondent's counterclaims are far from meeting the abovementioned requirements.[401] In any case,

[396] Claimant's Reply, at [7.64].
[397] Claimant's Reply at [7.64]-[7.68]; Exhibit CLA-22, at [37]-[39] & [61]. Exhibit CLA-24, at [1410]-[1417].
[398] Claimant's Reply, at [7.69].
[399] Claimant's Reply, at [7.72]; Art. 20(2) of the UNCITRAL Rules.
[400] Claimant's Reply, at [7.72]; Art. 20(4) of the UNCITRAL Rules.
[401] Claimant's Reply, at [7.73].

Claimant did not breach Article 10 of the ETIZ Agreement[402] or Article 12 of the ETIZ Agreement.[403]

534. Furthermore, "*the fact that Akgun does not claim that it had complied with its obligations in the Statement of Claim does not constitute an admission of non-performance*" (as Respondent had claimed)[404] and "*Akgun did not undertake any obligations towards Ethiopia as per the 2012 ETIZ Agreement*".[405] In any case, Claimant submits that any obligation would be towards the MoI and/or the Oromia Regional State and not Respondent (who has no standing).[406]

535. Moreover, Claimant had no obligation to submit an EIA, and therefore the suspension of the ETIZ Project was indeed a *force majeure* event under Ethiopian law.[407] Further, "*under Art. 1772 of the Ethiopian Civil Code, the party aggrieved by the other party's contract breach must dispatch a default notice to rely on the breaching party's non-performance*" and "*the MoI and Oromia Regional State had to notify Akgun if they genuinely believed that Akgun breached its obligations under Art. 10 and Art.12 of the 2012 ETIZ Agreement, but they did not*" (and are therefore unable to claim for default of the contract).[408]

536. Lastly, Respondent's claim for damages is incorrect because, *inter alia*, (1) before "*Ethiopia allocated the land to Akgun, it was already idle and occupied by random farmers*" and "*[n]othing in Ethiopia's pleading establishes that if the land had not been given to Akgun, Oromia Regional State would rent it to others and earn USD 1 per sqm*", (2) Afro-Oil Manufacturing PLC only agreed to rent 46.973 sqm for USD 1/sqm, and there is "*no basis for [Respondent's] assumption that an investor would pay the rate of USD 1 per sqm for a 1.000.000 sqm plot*" and (3) Respondent's "*alleged reasons for suspending ETIZ in July 2014 were to protect the environmentally sensitive Legedadi watershed and the need for groundwater to supply water to 35.000 condominiums*" (meaning that it could not lease the land to industrialists

[402] Claimant's Reply, at [7.74]-[7.83].
[403] Claimant's Reply, at [7.84]-[7.91].
[404] Claimant's Reply, at [7.93].
[405] Claimant's Reply, at [7.94].
[406] Claimant's Reply, at [7.95].
[407] Claimant's Reply, at [7.96]-[7.97].
[408] Claimant's Reply, at [7.98]-[7.99]; Exhibit RLA-38, at Art. 1772.

anyway).[409] For several other reasons, Claimant argues that Respondent's method of valuation (of the fair market value of the land) is incorrect.[410]

537. For all the reasons above, Respondent's counterclaims must either fail for lack of jurisdiction or on the merits.

Respondent's Position in Respondent's Rejoinder

538. Respondent argues that (1) "*the 2012 ETIZ Agreement plainly permits and does not bar counterclaims by a respondent party, while Article VII of the Treaty is also sufficiently capacious to encompass the present counterclaims*" and that (2) "*well-established principles of fairness, equity, and procedural economy support accepting jurisdiction over Respondent's directly related counterclaims, which are central to any determination of Claimant's claims*".[411]

539. Respondent states that it "*regards it as beyond reproach that any respondent holds the right to bring counterclaims under the mandatory and exclusive selection of forum within Article 21 of the 2012 ETIZ Agreement, and this under all of the 'Ethiopian laws, the [Treaty] and accepted principles of the international law.' If this hono[u]rable Tribunal were to usurp the role of the adjudicatory body that all parties have earlier envisaged and agreed, Ethiopia submits that it must exercise a jurisdiction that is coextensive with that which was conferred upon said body, lest a denial of justice occur*".[412]

540. If the Tribunal considers that a basis of its jurisdiction lies in the TEBIT, then the ordinary meaning of Article VII(1) of the TEBIT must be "*that 'disputes […] in connection with […] investment' may include claims that Respondent host State may have in connection with the same 'investment'*"[413] (and that "*Article VII(1) makes no distinction as between 'one of the Parties and an investor of the other Party' with respect to any '[d]isputes'*").[414]

541. Respondent further claims that while "*the investor is entitled under the Treaty to choose the forum for the resolution of disputes that may arise, the*

[409] Claimant's Reply, at [7.102]-[7.104].
[410] Claimant's Reply, at [7.105]-[7.108].
[411] Respondent's Rejoinder, at [432].
[412] Respondent's Rejoinder, at [433].
[413] Respondent's Rejoinder, at [434], citing Exhibit CLA-1, at Art. VII(1).
[414] Respondent's Rejoinder, at [434]; Exhibit CLA-1, at Art. VII(1). See also Exhibit RLA-55, at [1183]-[1187].

Treaty does not foreclose the host State from raising counterclaims that are directly related to the principal claims" and that by *"abusively seeking to supplant the contractually agreed forum, Claimant has invited the present counterclaims*".[415]

542. "*Tribunals confronted with provisions akin to the one in question, i.e. where '[**n]o distinction is made in respect of the party entitled with the rights that are at the basis of the dispute**,' have found that these rights 'can be rights of the investor **as they can be rights of the host State"***".[416] Respondent cites *Urbaser v Argentina*[417] to state that the tribunal in that case "*asserted prima facie jurisdiction over Argentina's counterclaim on the basis that the dispute settlement provision in question could not reasonably be read as excluding counterclaims by the host State from its scope*" because "*there was nothing in the treaty's language 'stating that the host State would not have any right under the BIT'*"".[418]

543. Furthermore, the language in the present TEBIT is broader than that of the BITs in the cases relied upon by Claimant and therefore the cases cited by Claimant should not be followed.[419] Respondent asserts that:

    543.1. First, the BIT in question in *Roussalis v Romania*[420] specifically noted that disputes must concern "*an obligation of the [host State] under [the treaty], in relation to an investment of the [investor]*"[421] and the majority decision in that case rested on the tribunal's finding on the language "*concerning an obligation of the [host State] under this Agreement*".[422]

    543.2. Second, the tribunal in *Rusoro v Venezuela*[423] (which involved a BIT that was similarly worded to the BIT in question in *Roussalis v Romania*) [424] interpreted the BIT "*as <u>expressis verbis</u> barring Respondent's counterclaims because it [was] narrowly concerned*

[415] Respondent's Rejoinder, at [435].
[416] Respondent's Rejoinder, at [436]; Exhibit RLA-55, at [1187].
[417] Exhibit RLA-55.
[418] Respondent's Rejoinder, at [436], citing Exhibit RLA-55, at [1183].
[419] Respondent's Rejoinder, at [437].
[420] Exhibit CLA-127.
[421] Exhibit CLA-127, at [874]-[875].
[422] Exhibit CLA-127, at [874]-[875].
[423] Exhibit CLA-129.
[424] Exhibit CLA-127.

with disputes relating to measures taken by the host State in alleged breach of the Treaty, rather than in relation to an 'investment' more generally".[425]

The language in the above cases is distinct from Article VII(1) of the TEBIT, which broadly applies to "*[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment*".[426]

544. Furthermore, Claimant's reliance on *Saluka v Czech Republic*[427] and *Gavazzi v Romania* [428] is incorrect, given that the reason for disallowing the counterclaims in those cases was that the counterclaims did not have a sufficient connection with the principal claim (and that, unlike those cases, Respondent's counterclaims are directly connected to Claimant's principal claims).[429]

545. Moreover, Respondent's "*counterclaims arise out of the exact same subject matter as the principal claims and implicate the same factual context and legal issues; they are directly relevant to the question of whether the Claimant may be entitled to the damages it seeks, or indeed any damages at all. Accordingly, it is in keeping with well-established principles of fairness, equity, and procedural economy in international arbitration to decide the Respondent's counterclaims alongside the Claimant's principal claims*" and that "*if the Tribunal were to (i) allow the Claimant to evade the applicability of the forum selection clause to which it expressly assented; and (ii) simultaneously decline to hear the Respondent's counterclaims, Ethiopia would be unjustly deprived of adequate recourse for its own inextricably interconnected claims*".[430]

546. It is clear that (a) the "*essential basis of the Claimant's claims is in the 2012 ETIZ Agreement and the alleged breach by Respondent of obligations relating to it*" and (b) "*Respondent's counterclaims on the basis of the Claimant's own*

[425] Respondent's Rejoinder, at [440], citing Exhibit CLA-129, at [598].
[426] Exhibit CLA-1, at Art. VII(1).
[427] Exhibit CLA-22.
[428] Exhibit CLA-74.
[429] Respondent's Rejoinder, at [442]-[443].
[430] Respondent's Rejoinder, at [446]-[447].

failures to perform that same Agreement are therefore directly relevant and related to the Tribunal's determination" of Claimant's claims.[431]

547. Respondent states that "*jurisprudence surrounding counterclaims by host States clearly shows that tribunals are inclined to assert jurisdiction over a counterclaim where it is directly related to the principal claims, or where they both arise out of the same contractual instrument*".[432] Respondent cites *Saluka v Czech Republic*,[433] wherein the tribunal stated that:

> *[t]he interdependence and essential unity of the instruments on which the original claim and counterclaim were based in those cases, resulting in the tribunals holding that they had jurisdiction over the counterclaims, may be contrasted with other cases in which tribunals have found that there was no sufficient connexion between the claims and the counterclaims to justify it having jurisdiction over the latter.*
>
> *[…]*
>
> *Article 19.3 of the UNCITRAL Rules, Articles 25(1) and 46 of the ICSID Convention and Article II(1) of the Iran-US Claims Settlement Declaration, all reflect essentially the same requirement: the counterclaim must arise out of the 'same contract' (UNCITRAL Rules, Article 19.3), or must arise 'directly out of an investment' and 'directly out of the subject- matter of the dispute' (ICSID, Articles 25(1) and 46), or must arise 'out of the same contract, transaction or occurrence that constitutes the subject matter of [the primary] claims' (Article II(1) of the Claims Settlement Declaration). The Tribunal is satisfied that those provisions, as interpreted and applied by the decisions which have been referred to,* ***reflect a general legal principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim****.*[434]

548. The same reasoning guided the tribunal in *Klöckner v Cameroon*, which asserted jurisdiction over Cameroon's counterclaim, "*highlighting that*

[431] Respondent's Rejoinder, at [448].
[432] Respondent's Rejoinder, at [450]. See also Exhibit CLA-22; Exhibit RLA-55; Exhibit RLA-56; Exhibit RLA-57; and Exhibit RLA-58.
[433] Exhibit CLA-22.
[434] Exhibit CLA-22, at [70] & [96].

where the subject-matter of the counterclaim is intimately connected with the subject-matter of the original claim, they are 'indivisible' and 'interdependent'". [435] Respondent notes that the *Klöckner v Cameroon* tribunal also reasoned that *"the reciprocal obligations had a* ***common origin, identical sources, and an operational unity***," and "*were assumed for the accomplishment of a single goal, and are thus interdependent*".[436]

549. Similarly, the same reasoning guided the Tribunal in *Urbaser v Argentina*,[437] which stated that the "*Tribunal observes that* ***the factual link between the two claims is manifest****. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession.* ***This would be sufficient to adopt jurisdiction over the Counterclaim as well*** *[…]*".[438] Respondent cites *David Aven & Others v Costa Rica*[439] and *Goetz v Burundi*,[440] which it states were decided in a similar vein.

550. Respondent cites J. Crawford, *Treaty and Contract in Investment Arbitration*,[441] for the proposition that:

> *Despite the inherently asymmetrical character of a BIT, BIT tribunals should be able to hear closely connected investment counterclaims arising under the investment contract. Otherwise the maxim pacta sunt servanda operates in only one direction.*

551. Furthermore, as "*emphasized by the SGS Société Générale de Surveillance S.A v Islamic Republic of Pakistan tribunal, '[i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the foreign investor could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the [host State] from pursuing its own claim for damages'*".[442]

[435] Respondent's Rejoinder; at [453]; See Exhibit CLA-22, at [65] (quoting Exhibit RLA-57).
[436] Exhibit CLA-22, at [67] (quoting Exhibit RLA-57).
[437] Exhibit RLA-55.
[438] Exhibit RLA-55, at [1151].
[439] Respondent's Rejoinder, at [455]; Exhibit RLA-56, at [692]-[694] & [696].
[440] Exhibit RLA-58, at [285].
[441] Exhibit CLA-104, at pg. [366].
[442] Exhibit RLA-59, at pg. [302].

552. Respondent's counterclaims should be decided in the same forum as Claimant's claims for procedural efficiency, citing *Urbaser v Argentina,*[443] which stated that:

> *It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.*[444]

553. The tribunal in *Aven v Costa Rica* similarly accepted the host State's "*submission that deciding both the principal claims and the counterclaims in the same forum would serve efficiency purposes, reasoning that 'the admission of counterclaims has several practical advantages on procedural economy and efficiency, for the benefit of both the host State and the foreign investor'*".[445]

554. Respondent cites the case of *Spyridon Roussalis v Romania* to argue that "*BITs [should] not be interpreted to foreclose counterclaims by the host State, even in the face of the restrictive treaty language*,"[446] noting that Professor Michael Reisman stated in his declaration in the case that:

> *It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 [of the ICSID Convention] works to the benefit of both respondent state and investor. In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by Claimant – perforce directs Respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counterclaim and set-off procedures work to*

[443] Exhibit RLA-55.
[444] Exhibit RLA-55, at [1151].
[445] Respondent's Rejoinder, at [461]; Exhibit RLA-56, at [741].
[446] Respondent's Rejoinder, at [462].

avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.[447]

555. Respondent therefore argues that if "*the Tribunal assert[s] jurisdiction over the Claimant's claims but refuse[s] to hear the Respondent's counterclaims, the only recourse left to Ethiopia would be in the form of duplicate proceedings inevitably turning on the same facts, issues, and overall subject matter presently before this Tribunal*" which would be "*dangerously at odds with the goals of economy and efficiency in international arbitration*".[448]

556. Respondent then moves on to state that the Parties agree that the "*law applicable to Ethiopia's counterclaims is the Ethiopian Law of Obligations*"[449] and states that the "*universal principle of good faith and fair dealing in contractual relations is enshrined at Article 1733 of the Civil Code, which provides that '[c]ontracts shall be interpreted in accordance with good faith and with regard to the loyalty and confidence which should exist between the parties according to business practice'*".[450]

557. "*Article 1733 of the Civil Code further provides that '[w]here the provisions of a contract are clear, the court may not depart from them and determine by way of interpretation the intention of the parties'*".[451]

558. Respondent then argues why it believes (1) Claimant breached its obligation to develop an industrial zone[452] and (2) it believes Claimant breached its obligation to finance the ETIZ Project,[453] stating that Claimant failed to perform without any justification.[454]

559. Respondent therefore claims for damages arising out of Claimant's alleged failure to "*to perform its contractual obligations in good time and in good faith*"[455] and states that "*it is Akgun that failed to perform its obligations*

[447] Exhibit RLA-60.
[448] Respondent's Rejoinder, at [463].
[449] Respondent's Rejoinder, at [464].
[450] Exhibit RLA-38, at Art. 1733.
[451] Respondent's Rejoinder, at [465], citing Exhibit RLA-38, at Art. 1733(ii).
[452] Respondent's Rejoinder, at [469]-[475].
[453] Respondent's Rejoinder, at [476]-[480].
[454] Respondent's Rejoinder, at [481]-[490].
[455] Respondent's Rejoinder, at [491].

under the Agreement, and it is the Claimant that is therefore to be barred from claiming its own self-inflicted damages" (and not Respondent).[456]

560. Additionally, Respondent is only claiming for "*those damages as have actually occurred*" and that the basis for Respondent's calculations (based on the rental paid by Afro Oil for a partial sublease of the land) is accurate in reflecting the rental value of the land[457] given that "*as Claimant itself acknowledges, Afro Oil agreed to pay this price for a right to rent and build on the land only. Ethiopia thus relies on a valuation freely and actually reached as between Akgun and Afro Oil, which accurately and reliably reflects the rental value of the land in the market at the relevant time*"[458] (plus interest at the statutory rate of nine percent per annum).[459]

561. Respondent therefore quantifies its damages as follows:

	Year	Base Amount	Interest	Total
1	2013-2014	US$ 1,000,000	X 1.09^9	US$ 2,171,893.28
2	2014-2015	US$ 1,000,000	X 1.09^8	US$ 1,992,562.64
3	2015-2016	US$ 1,000,000	X 1.09^7	US$ 1,828,039.12
4	2016-2017	US$ 1,050,000	X 1.09^6	US$ 1,760,955.12
5	2017-2018	US$ 1,050,000	X 1.09^5	US$ 1,615,555.15
6	2018-2019	US$ 1,050,000	X 1.09^4	US$ 1,482,160.69
7	2019-2020	US$ 1,102,500	X 1.09^3	US$ 1,427,769.47
8	2020-2021	US$ 1,102,500	X 1.09^2	US$ 1,309,880.25
9	2021-2022	US$ 1,102,500	X 1.09	US$ 1,201,725.00
	Total			US$ 14,790,540.72

562. Respondent thus claims "*actual damages in the provisional amount of **US$ 14,790,540.72**, subject to upward revision as of the date of the final award and execution*".[460]

Claimant's Position in Claimant's Rejoinder

563. Claimant states that the TEBIT "*clearly limits locus standi – and hence the Tribunal's jurisdiction ratione personae – to investors in two respects. First, it is the investor alone who possesses the right to initiate a dispute under the Treaty; the host state possesses no such correlative right. Second, the investor alone may elect the forum for the dispute. The clear wording of these*

[456] Respondent's Rejoinder, at [492].
[457] Respondent's Rejoinder, at [493]-[494].
[458] Respondent's Rejoinder, at [495].
[459] Respondent's Rejoinder, at [496]; Exhibit RLA-39.
[460] Respondent's Rejoinder, at [498].

provisions shows that it is beyond the purview of the Treaty for the host state to advance a claim against the investor".[461]

564. The plain language of the TEBIT must compel the Tribunal to reject jurisdiction over Respondent's counterclaims given that it "*does not make sense to think that two sovereigns, Turkey and Ethiopia*" drafted Article VII of the TEBIT with particular wording for no reason in particular.[462]

565. Claimant also reproduced Article 31 of the VCLT (which it asserts should be deemed to be a part of international customary law),[463] which states that:

> ***Article 31 General rule of interpretation***
>
> 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> 2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> 3. *There shall be taken into account, together with the context:*
>
> (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

[461] Claimant's Rejoinder, at [4.4]; Exhibit CLA-1, at Arts. VII(1) and VII(2).
[462] Claimant's Rejoinder, at [4.5].
[463] Exhibit CLA-97, at [88].

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

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

4. A special meaning shall be given to a term if it is established that the parties so intended.[464]

566. The application of Article 31 of the VCLT leads to the following results:

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

566.2. The Treaty's Preamble section reflects the contracting States' intention to create a legal framework designed to impose obligations solely upon the host state to encourage and protect investments. The Treaty did not intend to create a "*two-way system*" that equally imposes obligations on investors and host States or protects host States' rights toward the investors;

566.3. The Treaty's object and purpose is plainly stated in its Preamble as "*[d]esiring to promote greater economic cooperation between [Turkey and Ethiopia], particularly with respect to investment by investors of one Party in the territory of the other Party*" and *"[h]aving resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments*" shows that it is squarely focused on investor protection. Providing investors with special dispute resolution recourse is consistent with that object and purpose;

566.4. The Preamble section therefore shows that the parties wanted to attract foreign investment by providing rights to the investors to gain economic benefit. The same understanding dominates the rest of the

[464] Exhibit CLA-47, at Art. 31.

> Treaty. There is not a single word in the Treaty that imposes obligations on investors or raises the investors' contractual obligations to the international law level.[465]

567. Claimant states that what "*Ethiopia is trying to do in this dispute is to change the rules of the game long after it has started*"[466] and that if "*Ethiopia believes that the dispute resolution system in Art. VII of the Treaty is biased and unfair, its recourse is to renegotiate the Treaty with Turkey (and its other treaty partners) to reflect what it believes is more 'equitable' and 'unbiased'. It cannot, however, ask this Tribunal to essentially re-write the Treaty by ignoring its terms for the expediency of Ethiopia's arguments in this case*".[467]

568. Respondent attempts to erroneously remove the TEBIT's "*constraints on the Tribunal's ratione personae jurisdiction, claiming that Art. VII(1)'s definition of disputes is broad enough to cover counterclaims and relying on a fragment of the first sentence of Art. VII(1), which reads: [d]isputes between one of the Parties and an investor of the other Party, in connection with his investment*" but does not quote in full Article VII(1) of the TEBIT, which defeats its argument, as the full sentence of Article VII(1) of the TEBIT says that "*[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment,* ***shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment***".[468]

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

[465] Claimant's Rejoinder, at [4.9].
[466] Claimant's Rejoinder, at [4.11].
[467] Claimant's Rejoinder, at [4.12].
[468] Claimant's Rejoinder, at [4.13]-[4.14]. Exhibit CLA-1, at Art. VII(1).

Ethiopia omits from its submission and as further reflected in Art. VII(2), which limits forum selection to the investor".[469]

570. "*Ethiopia offers no affirmative argument in support of the Tribunal's ratione personae jurisdiction over its counterclaims. Instead, it conflates such jurisdiction with ratione materiae jurisdiction by arguing that Akgun's right to select the forum does not foreclose Respondent's counterclaims*"[470] and that any "*jurisdictional analysis solely based on ratione materiae jurisdiction, to the exclusion of ratione personae jurisdiction, like Ethiopia's analysis here, is incomplete*".[471]

571. Claimant denies that it failed to comply with its environmental obligations or an obligation to develop an industrial zone or to finance the industrial zone.[472] Claimant also argues that its "*alleged failure to consider alternative lands cannot be a basis for a counterclaim in the present arbitration because, under the 2012 ETIZ Agreement, there is no obligation for Akgun to consider alternative lands proposed by the MoI or the Oromia Regional State when the land turns out to be improper for ETIZ*".[473] Moreover, since there was no failure to perform its various obligations under the ETIZ Agreement, Claimant does not need to show any justification for its alleged breaches.[474]

572. Respondent's cited case of *Urbaser v Argentina*[475] also "*first determined ratione personae jurisdiction before analyzing ratione materiae jurisdiction"*[476] *and that, it was only because "the BIT dispute resolution clause at issue in Urbaser did not limit dispute notification to one party or the other and specifically permitted either one of the parties to initiate legal proceedings [that] claimants there had to admit that the broad wording of the dispute resolution clause before the tribunal allowed the states to raise counterclaims*".[477] Conversely, Claimant "*reiterates that that the BIT in this*

[469] Claimant's Rejoinder, at [4.15].
[470] Claimant's Rejoinder, at [4.16].
[471] Claimant's Rejoinder, at [4.17].
[472] Claimant's Rejoinder, at [4.75]-[4.92].
[473] Claimant's Rejoinder, at [4.93].
[474] Claimant's Rejoinder, at [4.101]-[4.110].
[475] Exhibit RLA-55.
[476] Claimant's Rejoinder, at [4.17], citing Exhibit RLA-55, at [1143].
[477] Claimant's Rejoinder, at [4.19]; Exhibit RLA-55, at [1145].

proceeding does lay down a ratione personae restriction which is decisive and disposes of the arguments based on Urbaser".[478]

573. Moreover, *Urbaser v Argentina*[479] also recognised that "the drafters of dispute resolution clauses in bilateral investment treaties are the states, and if those clauses are restrictive as to who may initiate a claim under the BIT, it is because States draft them so:

> *Claimants admit that the Spain-Argentina BIT does not lay down ratione personae restrictions on who may bring a claim or expressly limit such claims to a violation of the BIT's own provisions. This only means that the State parties did not restrict their offer to arbitrate.*[480]

574. Respondent improperly relies on *Saluka v Czech Republic*, [481] and Respondent's analysis of the case is misplaced for two reasons:

574.1. "*First, Akgun analyzed Saluka in its Statement of Reply and clearly recognized the broad wording of the dispute resolution clause before the Saluka tribunal, which allowed it to establish both ratione personae and ratione materiae jurisdiction over the host state's counterclaims, distinguishing it from the more restrictive clause at issue here*".[482]

574.2. "*Second, despite Akgun's precise analysis in its Statement of Reply, Ethiopia deliberately ignores the fact that the Saluka tribunal initially analyzed the text of the dispute resolution clause to determine if its scope of ratione personae jurisdiction was broad enough to allow the host states to initiate arbitration*".[483]

Claimant adds that "*Saluka undoubtedly supports Akgun's position that tribunals first look to the specific text of the dispute resolution clause to evaluate their ratione personae jurisdiction over purported counterclaims*

[478] Claimant's Rejoinder, at [4.20].
[479] Exhibit RLA-55.
[480] Exhibit RLA-55, at [1145].
[481] Exhibit CLA-22.
[482] Claimant's Rejoinder, at [4.23.1].
[483] Claimant's Rejoinder, at [4.23.2].

before deciding on whether they have subject matter jurisdiction to hear counterclaims".[484]

575. Claimant then states that "*Ethiopia further refers to Rusoro and Roussalis, but it limits its discussion to those tribunals' analysis on ratione materiae jurisdiction and ignores their findings on ratione personae jurisdiction*"[485] and similarly that Ethiopia "*also cites Gavazzi but mistakenly claims that the issue in Gavazzi as to the counterclaims was the lack of a close link between the investor's primary claims and the counterclaims*".[486]

576. Claimant asserts that, in any case, the close connection between the primary claims and the counterclaims is irrelevant when the Tribunal lacks *ratione personae* jurisdiction over the counterclaims, and that the close connection (if any) between the primary claims and the counterclaims only matters if the Tribunal already finds that the Parties consented to arbitrate the counterclaims via the relevant BIT.[487] Claimant asserts that this two-step test is usually attributed to *Saluka v Czech Republic*,[488] where the "*Saluka tribunal first analyzed the relevant dispute resolution clause in the applicable BIT to see if it had ratione materiae and ratione personae jurisdiction over the counterclaims* [and only when] *it found that nothing in the applicable BIT and UNCITRAL Rules limited its jurisdiction over the counterclaims [did the tribunal] procee[d] to the second step of its analysis, which was to analyze the connection between the primary claims and the counterclaims*".[489]

577. Furthermore, "*Ethiopia intentionally miscasts Akgun's claims so that Akgun's claims and Ethiopia's counterclaims arise out of the same transaction*" even though "*Akgun's legal claims arise out of the BIT itself, not from the 2012 ETIZ Agreement, and the fact that Akgun's claims involve the 2012 ETIZ Agreement does not transform its treaty-based claims into contractual claims*".[490] Moreover, Claimant states that the 2012 Agreement was not signed by Respondent, and the "*cardinal principle*"[491] is that the parties to

[484] Claimant's Rejoinder, at [4.24], citing Exhibit CLA-22, at [39].
[485] Claimant's Rejoinder, at [4.26]; Exhibit CLA-129; Exhibit CLA-127.
[486] Claimant's Rejoinder, at [4.27]; Exhibit CLA-128, at [151].
[487] Claimant's Rejoinder, at [4.29].
[488] Exhibit CLA-22.
[489] Claimant's Rejoinder, at [4.30], citing Exhibit CLA-22, at [61].
[490] Claimant's Rejoinder, at [4.31].
[491] Exhibit CLA-22, at [49].

the counterclaim must be the same as the parties to the primary claim[492] (and that Respondent therefore has no standing to bring the counterclaim).[493]

578. Respondent's other cited cases fail for one reason or another[494] and Respondent's cited article, J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, clearly states that "c*ontractual claims and counterclaims may be brought under appropriately worded BITs*"[495] and the present case does not have an appropriately worded BIT to allow Respondent to initiate arbitration or raise counterclaims against Claimant.[496]

579. Respondent's reliance on the tribunal's Procedural Order in *SGS v Pakistan*[497] is misplaced, because "*it would be inequitable if, by reason of the invocation of ICSID jurisdiction, Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of the international proceedings, if such international proceedings could not encompass Respondent's claim*"[498] must be read in context. In that case, "*Pakistan submitted its contractual disputes with the investor to local arbitration as per the investment agreement between the investor and Pakistan. Later, the investor initiated an ICSID arbitration pursuant to the Pakistan–Switzerland BIT. [The PO was issued], inter alia, to address the claimant's interim measure application, under which the claimant requested the stay of the local arbitration initiated by Pakistan, [and in support of that request,] the claimant argued, inter alia, that Pakistan could raise the claims it brought in the local arbitration as counterclaims in the ICSID proceedings*".[499]

580. The Procedural Order in *SGS v Pakistan* "*has to do with whether it is appropriate to compel a state to stay counterclaims it has already asserted in a contractually agreed fashion, not whether it is appropriate to compel an investor to face counterclaims that fall outside a BIT's jurisdictional ambit.*

[492] Claimant's Rejoinder, at [4.32].
[493] Claimant's Rejoinder, at [4.33].
[494] Claimant's Rejoinder, at [4.34]-[4.37], citing, *inter alia*, Exhibit RLA-57; Exhibit RLA-56, at [735].
[495] Exhibit CLA-104, at pg. [366].
[496] Claimant's Rejoinder, at [4.39].
[497] Exhibit RLA-59.
[498] Exhibit RLA-59, at pg. [302].
[499] Claimant's Rejoinder, at [4.40].

Thus, the SGS Procedural Order does not stand for what Ethiopia implies in its submissions".[500]

581. Therefore, "*none of the authorities Ethiopia presented to support its close connection analysis are sufficient to eliminate the clear wording of Art. VII of the [TEBIT] that limits locus standi to investors only*".[501]

582. Moreover, "*even if the Tribunal were to follow Ethiopia's argument and employ the close connection analysis without analyzing the parties' consent to arbitration as embodied in the text of Art. VII of the [TEBIT], this would be insufficient to establish this Tribunal's jurisdiction over the counterclaims*", as there is no close connection between the primary claims and the counterclaims.[502]

583. The TEBIT is the source of the claims Akgun is asserting in the present arbitration.[503] "*Ethiopia['s] counterclaims [instead rest on the assertion] that Akgun breached the 2012 ETIZ Agreement by failing to develop an industrial zone and finance the Project*".[504] Accordingly, "*Akgun's primary claims and the counterclaims do not share the same factual context and legal issues*".[505]

584. Claimant further asserts that:

    584.1. First, Respondent has been very vague about the facts that substantiate its counterclaim and Respondent does not explain which specific facts it says overlap with the specific facts Akgun presents. Consequently, Claimant argues that *"[n]either the Tribunal nor Akgun is in the position to guess Ethiopia's factual basis for its counterclaims, and consequently assess its close connection with the facts presented by Akgun*".[506]

    584.2. Second, the legal issues surrounding the primary claims and the counterclaims are not the same. As an example, Claimant states that "*an issue presented by Akgun is whether Ethiopia 'treated Akgun in*

[500] Claimant's Rejoinder, at [4.41].
[501] Claimant's Rejoinder, at [4.42].
[502] Claimant's Rejoinder, at [4.44].
[503] Claimant's Rejoinder, at [4.46].
[504] Claimant's Rejoinder, at [4.47].
[505] Claimant's Rejoinder, at [4.47].
[506] Claimant's Rejoinder, at [4.49].

[an] unfair and arbitrary manner by designating the site for ETIZ and encouraging Akgun to develop ETIZ on that site before reversing course and deciding instead to develop residential condominiums.' How this issue overlaps with whether Akgun failed to prepare the necessary studies to protect the environment is not clear".[507]

584.3. Third, Claimant reiterates that Respondent does not have standing and does not explain how "*Ethiopian law allows it to rely on the contractual rights that belong to the Ministry of Industry and the Oromia Regional State. Ethiopia also does not explain how claims based on a contract to which it is not a party could be closely connected to treaty-based claims that are appropriately directed towards it under the Treaty and principles of international investment law*".[508]

585. Additionally, whether "*Ethiopia is allowed to raise a counterclaim is a matter of the Tribunal's jurisdiction, and the limits of the Tribunal's ratione materiae and ratione personae jurisdiction are set forth in Art. VII of the Treaty*" and the Tribunal cannot depart from clear rules regarding its jurisdiction on counterclaims for "*the sake of procedural economy and efficiency*".[509]

586. While "*Ethiopia refers to Urbaser to support its argument, it fails to recognize that the Urbaser tribunal first considered the issue of whether the applicable BIT allowed the host state to be "a claimant" in arbitration proceedings, in other words whether it had ratione personae jurisdiction over the host state's counterclaims*".[510] Accordingly, *Urbaser v Argentina*[511] does not assist Respondent's case.

587. Similarly, Claimant argues that Respondent has failed to "*identify the key points that drove the tribunal [in Aven v Costa Rica[512]] to find jurisdiction over the counterclaims in that case*". Namely, the *Aven v Costa Rica* "*tribunal agreed to hear the host state's environmental counterclaims mainly because, unlike the Treaty at issue here, the relevant provisions of DRCAFTA imposed*

[507] Claimant's Rejoinder, at [4.50].
[508] Claimant's Rejoinder, at [4.51].
[509] Claimant's Rejoinder, at [4.54].
[510] Claimant's Rejoinder, at [4.55].
[511] Exhibit RLA-55.
[512] Exhibit RLA-56.

environmental obligations on investors and the dispute resolution clause was neutral as to Claimant's identity".[513]

588. The tribunal in *Saluka v Czech Republic*[514] also recognised that "a *need for procedural economy and efficiency could not override the parties' consent to arbitration*":

> *Policy considerations concerning the alleged advantages of economy and efficiency being best served by allowing Respondent's counterclaim are insufficient to override the principle that the scope of the Tribunal's jurisdiction is determined by the scope of the parties' consent*.[515]

589. Claimant then addresses Prof. Michael Reisman's dissent in *Roussalis v Romania*[516] (that is cited by Respondent). Claimant states that Respondent again misses the critical point that Prof. Reisman's dissent was "*based on the fact that the ICSID rules applied in that matter, which is not the case here*" and the dissent is therefore not applicable to the present arbitration.[517] While the *Goetz v Burundi*[518] tribunal followed the approach used by Prof. Michael Reisman, the tribunal first looked for the parties' consent to arbitrating the counterclaims before moving to discuss other factors such as procedural economy and efficiency, arguing that it was only "*after establishing the parties' consent to counterclaims did the Goetz tribunal and Prof. Reisman support their respective positions with policy-related arguments"*[519] regarding procedural efficiency and economy.

590. Claimant argues that "*Art. VII of the Treaty allows the investors to choose among three options for the settlement of their disputes with the host states: (i) ICSID arbitration, (ii) UNCITRAL Arbitration, and (iii) litigation before the Ethiopian Courts. If Akgun had chosen to submit its disputes to ICSID, the parties and the Tribunal might discuss the applicability of Art. 46 to the counterclaims. On the other hand, if Akgun had chosen to litigate its disputes before the Ethiopian Courts, whether Ethiopia could raise counterclaims*

[513] Exhibit RLA-56, at [740].
[514] Exhibit CLA-22.
[515] Exhibit CLA-22, at [27].
[516] Exhibit RLA-60.
[517] Claimant's Rejoinder, at [4.58]-[4.63].
[518] Exhibit RLA-58.
[519] Claimant's Rejoinder, at [4.65].

would be subject to the Ethiopian procedural law. However, Akgun chose to refer its disputes to UNCITRAL arbitration, and under UNCITRAL Rules, the Tribunal's jurisdiction over the counterclaims is subject to Art. VII of the Treaty. Nothing less, nothing more".[520]

591. Claimant also submits that the Tribunal has already confirmed "*in [PO1] dated 4 December 2020, that this Tribunal's sole source of jurisdiction is the arbitration agreement, which is Art. VII of the Treaty"* and that, according *"to Section 10.3 of [PO1], 'a claim or counterclaim may not be amended in such a manner that the amended claim or counterclaim falls outside the scope of the arbitration agreement.'"* [521] Claimant submits that PO1 "*clearly presupposes that any counterclaims must fall within the scope of Art. VII of the Treaty. And Art. VII limits locus standi to Akgun only*".[522]

592. Further, Claimant argues that "*if the Tribunal denies jurisdiction over the counterclaims, the parties to the 2012 ETIZ Agreement – i.e., the Ministry of Industry, or the Oromia Regional State – have other options to pursue their claims*" but that, conversely, if the "*Tribunal's decision [is] to hear the counterclaims despite the explicit restriction on its ratione personae jurisdiction over the counterclaims in Art. VII of the Treaty[, this] will amount to an excess of power, which would endanger the validity, recognition, and enforcement of the resulting award*" (which Claimant submits is the real threat to the arbitration's procedural economy and efficiency).[523]

593. In any case, "*nothing in the 2012 ETIZ Agreement indicates an obligation on Akgun's part to pay the Oromia Regional State USD 1 per square meter annually*"[524] and "*Ethiopia's primary basis for its damages claim is Akgun's alleged failure to develop an industrial zone. Under this theory, the correct formulation would be how much the Oromia Regional State would earn but for Akgun's alleged failure to develop an industrial zone. But the Oromia Regional State already earned the money it was due; under the 2012 ETIZ Agreement, Akgun paid the lease amount to the Oromia Regional State on 31 July 2012 in the amount of ETB 14.717.476,15 (USD 825.058,51), and this lease amount covered the lease of the first 100 ha for 80 years. Because no*

[520] Claimant's Rejoinder, at [4.66].
[521] Claimant's Rejoinder, at [4.67].
[522] Claimant's Rejoinder, at [4.67].
[523] Claimant's Rejoinder, at [4.68]-[4.69].
[524] Claimant's Rejoinder, at [4.113].

further land was allocated, there would be no basis for Ethiopia to argue that Akgun would owe for anything beyond that leased plot. And as to that leased plot, the payment has already been made. So, to the extent Respondent has a claim (which it does not), it has already received the compensation it was due".[525]

594. Claimant argues that Respondent "*pays no regard to the actual valuation figures it set for this very land*"[526] when it first leased the land to Claimant and in a futile "*effort to justify its absurd claim for USD 1 per sqm, Ethiopia argued in its Statement of Defense that this amount constituted '**the fair market value of the land**'*".[527]

595. Claimant asserts that Ethiopia's calculation of damages based "*on USD 1 per sqm means that Ethiopia is trying to employ the income-based approach to calculate damages*"[528] and that this "*valuation method assumes that a willing lessee would lease the land from a willing lessor: 'Market Rent is the estimated amount for which an interest in real property should be leased on the valuation date between a willing lessor and a willing lessee on appropriate lease terms in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion'*".[529]

596. Claimant contends that Respondent's reliance on the Afro-Oil Manufacturing sublease is incorrect, and that the sublease for a small portion of the land for a very specific purpose ("*i.e., construction and operation of an oil and grease manufacturing factory that was going to be part of a large industrial zone*")[530] does not represent a fair rental value of the land.[531]

597. For the above-mentioned reasons, Claimant states that the "*Tribunal is bound to reject Ethiopia's claim for damages*".[532]

[525] Claimant's Rejoinder, at [4.112]; Exhibit C-10; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [4.8].
[526] Claimant's Rejoinder, at [4.113]; Exhibit C-10.
[527] Claimant's Rejoinder, at [4.114].
[528] Claimant's Rejoinder, at [4.115].
[529] Claimant's Rejoinder, at [4.115], quoting Exhibit C-151, at pg. [21], [40.1].
[530] Claimant's Rejoinder, at [4.118].
[531] Claimant's Rejoinder, at [4.116]-[4.119].
[532] Claimant's Rejoinder, at [4.121].

(c) Tribunal's Decision

598. As a preliminary matter, the Tribunal agrees with the cases cited above at Paragraphs [512]-[516] that its jurisdiction to hear counterclaims must stem from the consent of the Parties to arbitrate counterclaims under the treaty instrument (in this case the TEBIT) and that the wording of the TEBIT will determine if such consent is found.[533]

599. The Tribunal's jurisdiction essentially stems from Article VII of the TEBIT,[534] which reads:

> ***Article VII***
>
> ***Settlement of Disputes Between One Party and Investors of the Other Party***
>
> *1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.*
>
> *2. If the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:*
>
> *(a) the Competent Court or Arbitral Tribunal of the Party in the territory of which the investment has been made; or*
>
> *(b) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", in case both Parties become signatories of this Convention,*

[533] See for example, Exhibit CLA-128, at [154]; Exhibit CLA-129, at [627].
[534] Exhibit CLA-1, at Art. VII.

(c) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.

600. From Article VII(1) and Article VII(2) of the TEBIT, it is clear that the Tribunal has jurisdiction only over the claims of the investor, and not the claims of the host State. The Tribunal makes this determination because:

600.1. The words of Article VII(1) that, *"[d]isputes between one of the Parties and an investor of the other Party**, in connection with his investment**, shall be notified in writing, including a detailed information, **by the investor to the recipient Party of the investment***", clearly indicate that Article VII of the TEBIT can only be exercised by the investor and not the host State; and

600.2. The words of Article VII(2) that, *"[i]f the disputes, cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted**, as the investor may choose**, to…*" also clearly indicate that the dispute can be submitted to arbitration only by the investor.

601. While the Tribunal accepts the premise in Paragraphs [545]-[555] above, that it might accept jurisdiction over Respondent's counterclaims despite restrictive wording in the relevant treaty seemingly preventing jurisdiction over such counterclaims if (1) the counterclaims are directly related to the principal claims and/or they arise out of the same instrument, and (2) it is in the interest of procedural efficiency to do so, the Tribunal finds that (1) and (2) are not made out in the present case.

602. First, the Tribunal finds it instructive to highlight that the mere fact that Respondent's counterclaims share the same factual background as Claimant's treaty claims is insufficient for the Tribunal to assert jurisdiction over the counterclaims. The Tribunal has already determined that Claimant's claims arise out of claimed treaty breaches, while Respondent's

counterclaims are contractual-related claims.[535] Respondent's counterclaims are therefore not closely connected enough to the primary claims that the Tribunal should assert jurisdiction for procedural efficiency alone without explicit Treaty authorization.[536] Moreover, Respondent's claims do not arise from the same instrument as Claimant's claims given that Respondent's claims arise from the ETIZ agreement while Claimant's claims arise from the TEBIT.

603. Second, concerns over procedural efficiency are not at issue here, given that Claimant has not made any standalone contractual claims in the present arbitration. Even assuming that the Tribunal were to take jurisdiction over Respondent's counterclaims, Claimant would still need to argue its contractual claims/defences afresh. There are few time-saving or procedural efficiency considerations at play given that one Party is arguing treaty violations, while the other Party is arguing contractual breaches.

604. Given that the TEBIT does not show, or imply, that the Parties have consented to arbitrate the host State's counterclaims under the TEBIT, and there are no other compelling reasons why the Tribunal should assert jurisdiction over Respondent's counterclaims, the Tribunal finds that it does not have the discretion to accept jurisdiction over Respondent's counterclaims. Where no jurisdiction is provided by the explicit wording of the BIT in relation to a counterclaim and without another compelling reason, the Tribunal is unable to infer jurisdiction from the "'*spirit' of the BIT*".[537]

605. Moreover, because the Tribunal has determined that Claimant's claims, properly understood, are treaty claims and not contractual claims, Respondent's argument that the Tribunal must accept jurisdiction over Respondent's counterclaims if it accepts jurisdiction over Claimant's contractual claims[538] is moot (as the Tribunal has already concluded, at Paragraphs [478] – [484], above, that it would not have jurisdiction over claims that are merely contractual claims).

[535] Refer to Section VIII(A)[3] of the Award.
[536] Refer to Paragraph [578] above.
[537] Exhibit CLA-128, at [154].
[538] Respondent's Rejoinder, at [447].

606. Correspondingly, since the Tribunal must decline to hear Claimant's contractual claims, it must also decline to hear Respondent's counterclaims.

607. For all the above reasons, the Tribunal does not have jurisdiction over Respondent's counterclaims, which are purely contractual in nature. If Respondent wishes to pursue such claims further, it must do so according to a forum chosen by the Parties pursuant to Article 21 of the ETIZ agreement.

608. For the avoidance of doubt, since the Tribunal has decided that it does not have jurisdiction over Respondent's counterclaims, it need not determine the merits of the counterclaims and/or the reasonableness of the quantum sought by Respondent. Nothing in this Award is to be taken as an acceptance or rejection of the validity of Respondent's counterclaims (or of the quantum claimed). Anything purporting to give such an opinion should be deemed to be *obiter dicta* by the Tribunal. Similarly, the Tribunal expresses no opinion on whether Respondent (as opposed to the MoI or the Oromia State) is the valid party to bring the counterclaims against Claimant.

609. The Tribunal will therefore evaluate *only* Claimant's claims based on the substantive legal protection standards afforded by the Treaty, namely, (1) the principle of Fair and Equitable Treatment, (2) the rule against expropriation, and (3) the protection against the impairment of investments.

IX. Did Respondent breach their Fair and Equitable Treatment ("FET") obligations?

A. Introduction

610. It is common ground between the Parties that, if Claimant has made a qualifying investment under the TEBIT, then Respondent has an obligation to provide fair and equitable treatment under Article II(2) of the Treaty, which states that:

Article II

Promotion and Protection of Investment

1. […]

2. *Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.*

611. However, the Parties disagree on the nature (and scope) of Respondent's FET obligations under the TEBIT.

612. To determine whether Respondent has breached its FET obligations to Claimant, it is first necessary to determine the standard applicable to the present case.

B. Parties' Positions

Claimant's Position in the SOC

613. While the TEBIT is silent on what specifically constitutes fair and equitable treatment, (1) there is case law that suggests the words "*fair*" and "*equitable*" should be given their ordinary meaning (i.e. even-handed, unbiased and legitimate),[539] and (2) Article II(2) must be interpreted within the broader context of the Treaty (i.e., to aid in providing greater economic cooperation between Turkey and Ethiopia).[540]

614. Fair and equitable treatment in Article II(2) must be understood to be "*treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment*".[541]

615. Referencing several case precedents, Claimant states that fair and equitable treatment generally means that, *inter alia*:

615.1. The State must act in a transparent manner;

615.2. The State must act in good faith;

615.3. The State must ensure that its conduct is not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;

[539] Exhibit CLA-46, at [113].
[540] SOC, at [5.23].
[541] SOC, at [5.24].

615.4. The State must respect procedural propriety and due process; and

615.5. The State must comply with the investor's reasonable and legitimate expectations.[542]

616. While Respondent has the right to regulate its own territories, it may not rely on its right to regulate to excuse its FET obligations. Claimant cites the case of *Global Telecom Holding S.A.E. v Canada*,[543] which states that "*this Tribunal does not consider that the FET obligation, as interpreted in accordance with the terms of the BIT, improperly or unreasonably restricts the state from legislating and adapting its legal system to changing circumstances. In doing so, however, the State may not ignore the interests of an investor that relied on the State's earlier course of action*".[544] Claimant argues that this requirement to follow FET obligations remains even if the regulatory conduct at issue was well-intentioned (i.e. even if the State was not acting in bad faith or with malicious intent).[545]

617. Respondent's FET obligations are therefore formulated as follows:

617.1. Respondent must respect the investor's legitimate expectations;

617.2. Respondent must act consistently;

617.3. Respondent must provide a stable and predictable legal and business environment for the investment;

617.4. Respondent must act transparently;

617.5. Respondent must refrain from arbitrary and discriminatory behaviour and, in particular, must comply with the principles of due process in its administrative decision-making;

617.6. Respondent must act in good faith; and

[542] SOC, at [5.24]-[5.27].
[543] Exhibit CLA-50.
[544] Exhibit CLA-50, at [490].
[545] SOC, at [5.29]; Exhibit CLA-39, at [372].

617.7. Respondent must ensure that there is a reasonable proportionality between the impact of a measure on the investment and the aim sought by the measure.[546]

618. Claimant argues that it need not show a breach of each of these elements to prevail in its FET claim (although it claims that Respondent has breached each element in the present case).[547]

Respondent's Position in the SOD

619. Conversely, Respondent argues that a State's FET obligations are simply an expression of the "*classical minimum standard of treatment under international law*",[548] and that the treatment of an investor must "*amount to an outrage, to bad faith, to wilful neglect of duty… [such] that every reasonable and impartial man would readily recognize [the State's] insufficiency*".[549]

620. Respondent refers to (1) The International Minimum Standard and Fair and Equitable Treatment *by Martins Paparinskis*,[550] and (2) the North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission, dated 31 July 2001*,[551] for the proposition that it is accepted practice that a State's FET Obligations are fulfilled so long as the State performs to the customary minimum standard under international law (and that treatment in addition to or beyond the minimum standard is not required).

621. While some recent arbitral tribunals have given FET obligations an expansive reading, and have determined that the FET standard is "*an additional and autonomous standard that sanctions [the] 'legitimate expectations' of the investor*", Respondent argues that (1) Claimant has not identified any reference to "*legitimate expectations*" in any source that may give rise to a general principle of international law, and that (2) even "*the most exorbitant interpretations to be found require a showing of the State's unfair or unreasonable behaviour to frustrate the investor's legitimate expectations,*

[546] SOC, at [5.30].
[547] SOC, at [5.31].
[548] SOD, at [209].
[549] SOD, at [208], citing Exhibit RLA-14, at pg. [61]-[62]. See also SOD, at [212]-[214].
[550] SOD, at [209].
[551] SOD, at [210]-[211].

and require that such unfairness must be serious and material to the outcome" or else the tribunal cannot find that the State breached its FET obligations.[552] Moreover, Respondent also argues that a recent decision[553] shows that there is no generally accepted principle that an investor's "*legitimate expectations*" create any (additional) FET obligation.[554]

622. Respondent also argues that the current formulations of FET standards are incoherent and inconsistent, and that there is no set rule to be followed as the FET standards to be applied are predicated on the language of the relevant treaty.[555] Instead, Respondent states that the Tribunal's decision in this particular case (on whether Respondent's FET obligations are breached) must depend on whether the Tribunal finds that Respondent's conduct towards Claimant "*was overall so recognizably unfair and inequitable as to rise to the level of an international delinquency*".[556]

623. An evaluation of whether or not Respondent breached its FET obligations must require "*a review of not only its compliance with substantive prescriptions but also procedural regularity or due process*" (and whether or not there was a denial of justice for Claimant).[557]

624. Applying generally recognised principles of international law, the Tribunal must determine whether the State's administrative apparatus or judicial institutions denied justice to Claimant, bearing in mind that the standards of due process are lower for administrative processes and adjudicative proceedings.[558] Therefore, Respondent argues that the Tribunal need not decide whether it agrees with the Ethiopian authorities' interpretation of Ethiopian environmental laws, but only "*whether or not there was a system failure*" in the decision-making process of the Ethiopian authorities.[559]

625. Respondent also submits that, to the extent that the Tribunal finds that the decision-making by the Ethiopian authorities is relevant in determining whether there was a system failure, the administrative decisions of the

[552] SOD, at [215]-[216].
[553] Exhibit RLA-29.
[554] SOD, at [223]-[224], citing Exhibit RLA-29, at [160]-[162].
[555] SOD, at [217]-[218].
[556] SOD, at [218].
[557] SOD, at [219].
[558] SOD, at [219]-[221].
[559] SOD, at [222].

Ethiopian authorities should be given a degree of deference "*wherein [the Ethiopian authorities'] decisions are reviewed only for findings that are 'arbitrary, capricious, or manifestly contrary' to law*"[560] (i.e., the *Chevron* deference).

Claimant's Position in Claimant's Reply

626. Claimant argues again that the FET standard should be interpreted by considering the object and purpose of the TEBIT, and that Respondent "*unquestionably bound itself to treat the investments of Turkish investors such as Akgun in a fair and equitable manner and to likewise refrain from imposing unreasonable and discriminatory measures on Turkish investors*".[561]

627. Referencing several cases,[562] Claimant states that the elements of a host State's FET obligations are well-established and include protection of legitimate expectations, good faith conduct, and transparent and non-discriminatory treatment that is non-arbitrary and affords due process.

628. Additionally, (1) whether a host state violates its FET obligations is a fact-specific inquiry,[563] (2) a series of acts may amount to an FET violation as readily as a single act,[564] and (3) bad faith does not need to be demonstrated to establish that a host state violated its FET obligations.[565]

629. Respondent's view of the FET standard is unduly narrow and would "*severely [curtail] the autonomous FET standard that numerous tribunals have adopted*".[566]

630. Claimant also highlights that Respondent did not cite a single case supporting its narrow view of the FET standard, instead relying upon working group papers and academic speeches (which reach no conclusion of the proper

[560] SOD, at [222], citing, Exhibit RLA-27, at pg. [844].
[561] Claimant's Reply, at [5.4].
[562] Claimant's Reply, at [5.5]-[5.10] & [5.15]-[5.17]; Exhibit CLA-54, at [308]; Exhibit CLA-44, at [450]; Exhibit CLA-45, at [546]; Exhibit CLA-78, at [534]-[535]; Exhibit CLA-53, at [336]; Exhibit CLA-48, at [297] & [306].
[563] Claimant's Reply, at [5.11]; Exhibit CLA-109, at [118].
[564] Claimant's Reply, at [5.12]; Exhibit CLA-30, at [566].
[565] Claimant's Reply, at [5.13]-[5.14]; Exhibit CLA-36, at [543].
[566] Claimant's Reply, at [5.19].

scope of a State's FET obligations and do not articulate a rule that limits the scope of the FET standards as adopted by numerous tribunals).[567]

631. While NAFTA tribunals are bound to interpret the FET standard as synonymous with applying the customary international law minimum standard of treatment, Claimant highlights that this FET standard binds only NAFTA tribunals, and even NAFTA tribunals have questioned such a narrow view of FET standards.[568]

632. Conversely, there is no such interpretation or narrowing of the FET standards in the TEBIT (and no evidence that the drafters of the TEBIT intended for the FET obligations under the TEBIT to be so narrowly construed).[569] Claimant also refers to jurisprudence from several investor-state cases to show that tribunals tend to favour the broader autonomous FET standards over the narrow customary international law minimum standard,[570] and that, in the absence of language to the contrary, parties should be taken to have adopted the autonomous FET standard.[571]

633. In any case, even under a narrow interpretation of the FET standard, Respondent would still have failed to fulfil its FET obligations, as even a narrow interpretation of the FET standard would include fulfilment of Claimant's legitimate expectations.[572]

<u>Respondent's Position in Respondent's Rejoinder</u>

634. FET standards are "*a floor, an absolute bottom, below which conduct is not accepted by the international community, and that in terms of procedure a breach of FET would mean 'blatant unfairness, [or] a complete lack of due process' or 'some act far beyond the measure's mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective'*".[573]

[567] Claimant's Reply, at [5.20].
[568] Claimant's Reply, at [5.21]; Exhibit CLA-112, at [98].
[569] Claimant's Reply, at [5.22].
[570] Claimant's Reply, at [5.23]; Exhibit CLA-49, at [250]-[253].
[571] Claimant's Reply, at [5.22]; Exhibit CLA-25, at [418].
[572] Claimant's Reply, at [5.26], citing Exhibit CLA-114, at [284]; Exhibit CLA-36, at [546]-[547]. See also, Claimant's Reply, at [5.29]-[5.33].
[573] Respondent's Rejoinder, at [295]; Exhibit RLA-4, at [616] & [626].

635. The Tribunal's task is limited to determining what the parties have meant by the words "*fair and equitable treatment*", and it must decide this case on the basis of the TEBIT and the VCLT (and should be careful adopting the most recent, expansive, and inappropriate interpretations).[574]

C. Tribunal's Decision

636. As a preliminary point, the Tribunal agrees with the Parties that the applicable FET standard is a fact-specific enquiry and depends on the TEBIT's wording.

637. Having carefully reviewed the wording of the TEBIT, the Tribunal finds that the TEBIT's requirement that the *"investments of investors of each Party shall at all times be accorded fair and equitable treatment*"[575] reflects that the drafters of the TEBIT wanted to accord investors with the protection of the wider autonomous FET standards as defined by Claimant. In the Tribunal's view, Respondent's TEBIT's FET obligations are not limited to the customary law "*minimum standard of treatment*" as defined by Respondent. Indeed, if the drafters of the TEBIT intended for the FET standards in the TEBIT to mean that investors would be accorded a "*minimum standard of treatment*" (a long established phrase in customary international law with a defined meaning), the drafters of the TEBIT could easily have adopted the phrase "*minimum standard of treatment*" instead of choosing to state that there would be FET for investors.

638. The Tribunal agrees with Claimant that, in the absence of contrary language, the parties to the TEBIT should be taken to have adopted the autonomous FET standard, including fulfilment of an investor's legitimate expectations.[576]

639. The Tribunal finds it unlikely that the drafters of the TEBIT intended for there to be only minimal protections afforded to investors given that the purpose of the TEBIT is to promote investments in the respective States. The Tribunal believes that the parties to the TEBIT intended for there to be wider protections than merely "*customary minimum standards*" given that the TEBIT specifically states that "*[i]nvestments of investors of each Party shall at all times be accorded fair and equitable treatment and* ***shall enjoy full***

[574] Respondent's Rejoinder, at [300].
[575] Exhibit CLA-1, at Art. II(2).
[576] Exhibit CLA-25, at [418].

protection in the territory of the other Party" and that *"[n]either Party shall* ***in any way impair*** *by* ***unreasonable or discriminatory measures*** *the management, maintenance, use, enjoyment, extension, or disposal of such investments".*[577]

640. It is clear that the drafters of the TEBIT did not intend for the standards of FET to be no more than an "*absolute bottom*", but intended for there to be "*full protection*" for investors. The Tribunal understands "*full protection*" in the TEBIT to mean a minimum standard of care aligned to the wider autonomous standards espoused by Claimant.

641. Nothing in the TEBIT indicates that the drafters intended for investors to be protected only against "*blatant unfairness, [or] a complete lack of due process*" or "*some act far beyond the measure's mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective*".[578]

642. The Tribunal therefore favours Claimant's interpretation of the relevant standards to be used, especially the FET standards as adopted by the tribunal in *Rumeli v Kazakhstan*[579] (which the Tribunal adopts below). Consequently, the Tribunal will now discuss if any of the FET obligations were breached by Respondent according to the following standards:

642.1. The State must act in a transparent manner;

642.2. The State must act in good faith;

642.3. The State must ensure that its conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;

642.4. The State must respect procedural propriety and due process; and

642.5. The State must comply with the investor's reasonable and legitimate expectations.[580]

643. In any case, it seems to the Tribunal that the standards stated above are not seriously challenged by Respondent, as Respondent's primary argument in

[577] Exhibit CLA-1, at Art. II(2).
[578] Respondent's Rejoinder, at [295].
[579] Exhibit CLA-16.
[580] Exhibit CLA-16, at [609].

respect of FET standards is the *degree* to which its conduct must breach the aforementioned standards before it is deemed to have breached its FET obligations.

644. For ease of comparison, the Tribunal will review the aforementioned standards according to the broad categories used in the Parties' submissions.[581]

X. Did Respondent frustrate Claimant's legitimate expectations?

A. Introduction

645. This question has two parts:

645.1. First, exactly what were Claimant's legitimate expectations in the present situation?

645.2. Second, can Respondent's actions be deemed to have frustrated Claimant's legitimate expectations?

B. Parties' Positions

Claimant's Position

646. Claimant asserts that (1) an investor's legitimate expectation can arise from the behaviour and statements made by State officials for the purpose of inducing investment by an investor (and that the State's intention to create an expectation within the investor is not relevant to the determination);[582] and (2) the approval of a project in a particular location would give a *prima facie* expectation to the investor that the project would be feasible from a regulatory point of view (and that it would be unreasonable for one authority to approve an investment only for another separate authority to later declare the investment to be contrary to its urban development policy and thus frustrate the contract).[583]

[581] Refer to SOC, at Section [5(c)].
[582] SOC, at [5.34]; Exhibit CLA-54, at [313]; Exhibit CLA-58, at [652].
[583] SOC, at [5.35]; Exhibit CLA-46, at [163].

647. Both explicit and implicit representations by the State may give rise to legitimate expectations, citing *Parkerings-Compagniet AS v Lithuania*,[584] which states that:

> *The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host- State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate*.[585]

648. Taking into account various types of representations is consistent with the tribunal's observation in *Arif v Moldova*[586] that legitimate expectations strengthen over time as the investments increase and mature and more time and effort is expended.[587]

649. The following actions, *inter alia*, led to a legitimate expectation that it would be able to develop the ETIZ:

649.1. Respondent induced Akgun to invest in the ETIZ Project and insisted that the parties sign an MOU, wherein Respondent volunteered to designate for Akgun the location of the proposed industrial zone.[588]

649.2. Akgun had communicated its land requirements to Respondent, and Respondent then provided three different options within several kilometers of each other to select from.[589] The 2012 ETIZ Agreement also identified the ETIZ location and specified that it would be used only as an industrial zone.[590]

[584] Exhibit CLA-115.
[585] Exhibit CLA-115, at [331].
[586] Exhibit CLA-19, at [542]-[544].
[587] Claimant's Reply, at [5.37].
[588] Claimant's Reply, at [5.41]; Exhibit C-7; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [2.3].
[589] Claimant's Reply, at [5.42]; Yusuf Akgun 2nd Witness Statement dated 17 October 2021, at [3.1]-[3.6].
[590] Exhibit C-9, at Arts. 1, 3, 8(2) & 8(4).

649.3. At no point during the land selection exercise did Respondent indicate that an EIA would be required, much less that Claimant would be responsible for performing such an analysis.[591]

649.4. Akgun was promised Respondent's fullest cooperation and support.[592]

649.5. Respondent issued Akgun an investment permit, a trade registration certificate, and a development license.[593]

649.6. After Akgun supplied a detailed feasibility study[594] to Respondent, the Parties signed the 2010 ETIZ Agreement, which was eventually superseded by the 2012 ETIZ Agreement.

649.7. Following the 2012 ETIZ Agreement, Akgun paid Respondent to compensate for the expropriation of the local farmers' land to make way for ETIZ and signed a lease agreement for the land.[595]

649.8. Respondent also renewed Akgun's investment permit,[596] handed over the land to Akgun,[597] and urged Akgun to immediately begin the ETIZ Project (threatening to withdraw the Project if it did not commence).[598]

649.9. While Respondent asked Akgun to supply an EIA in 2013, it did not ask Akgun to cease work on the ETIZ Project,[599] and Respondent's Minister of Industry led Akgun to believe the request for an EIA did not pose an impediment to the Project's continued progress.[600]

[591] Yusuf Akgun 2nd Witness Statement dated 17 October 2021, at [2.3] & [3.7]-[3.8]; Ufuk Akgun's Witness Statement dated 17 October 2021, at [3.1].
[592] Claimant's Reply, at [5.42]; Exhibit C-44.
[593] Claimant's Reply, at [5.43]; Exhibit C-38, Exhibit C-39, Exhibit C-41.
[594] Claimant's Reply, at [5.44]; Exhibit C-45.
[595] Exhibit C-10 & Exhibit C-12.
[596] Exhibit C-55.
[597] Exhibit C-13.
[598] Exhibit C-51.
[599] Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.14].
[600] Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.17].

649.10. Even during the EIA process, Akgun received continued assurances from the Prime Minister's office that the EIA process would not cause the ETIZ Project to be discontinued.[601]

650. Based on the abovementioned actions, it was reasonable and legitimate to form the expectation that Respondent would provide land suitable for the Project, which would allow Claimant to implement the ETIZ Project.[602]

651. Because (a) Akgun was a foreign, private investor and (b) Respondent had solicited Claimant to enter into the ETIZ Project, Claimant could reasonably expect that Respondent had pre-determined the environmental suitability of the industrial zones it selected to situate the ETIZ site (before proposing possible locations to Claimant).[603] This was reflected in Claimant's feasibility report.[604] As Professor Whittington explained, "*it would have been highly inappropriate for a private, foreign firm to attempt to balance the GOE's economic development, environmental quality, and social objectives*".[605]

652. Claimant's legitimate expectation above was further reinforced after site selection, as it was provided with licenses and permits to start work and Respondent repeatedly urged it to commence work on the Project.[606]

653. Furthermore, citing Professor Tekle, Claimant states that, if an environmental analysis was required before the ETIZ Project could begin, it should have been an initial step, to be done at the earliest stage of the Project.[607]

654. Respondent therefore breached Claimant's legitimate expectations by *"[making] an about-face and [blocking] ETIZ from going forward on its designated site, without offering any suitable alternative site, on the purported basis that Akgun had not supplied an adequate EIA*", especially given that "*Respondent did not require an EIA prior to selecting the site, issuing licenses, or receiving Akgun's feasibility study. Nor did it require an*

[601] Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.20]-[5.21].
[602] Claimant's Reply, at [5.49].
[603] Claimant's Reply, at [5.50]; Expert Report of Prof. Dale Whittington dated 18 October 2021 ("**Whittington Report**"), at [6.4]-[6.6], [6.19]-[6.20] & [6.60]-[6.65].
[604] Exhibit C-45, at pg. [102].
[605] Whittington Report, at [6.61].
[606] Refer to Paragraph [649].
[607] Expert Report of Prof. Mekete Bekele Tekle dated 18 October 2021 ("**Tekle Report**"), at [2.30].

EIA before receiving Akgun's feasibility study, signing the 2010 ETIZ Agreement, signing the 2012 ETIZ Agreement, accepting compensation for the land, issuing a lease to Akgun, or handing over the land to Akgun. Respondent only asked for an EIA after all these events, and even when it did so it indicated that the EIA process was not a threat to ETIZ and it did not order site activity to stop pending the outcome of the EIA process".[608]

655. Respondent's numerous representations over the course of time and subsequent sudden reversal resulting in the end of the Project constitutes a violation of Claimant's legitimate expectations.[609] Respondent's subsequent failure to provide Claimant with an adequate alternative site only compounded its error.[610] Claimant notes that "*Ethiopia itself recognised its obligation to provide an alternative site*" but nonetheless "*continued to frustrate Akgun's expectations by showing it only lands that were unsuitable to the establishment of ETIZ*" and then later by proposing that "*ETIZ … take on a much narrower scope*".[611]

Respondent's Position

656. Respondent claims that Claimant's purported legitimate expectations regarding the initial ETIZ site must fail, as it is illogical that the allocation of the land to Claimant at the start "*trumps all other endogenous, exogenous, express, and implied conditions*", especially where "*Akgun [had] expressly undertaken the obligation to 'respect [the ETIZ] Agreement and all other conditions stated in the relevant laws of Ethiopia'*",[612] and specifically agreed to "*take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard."*[613]

657. These laws include, *inter alia*:

    657.1. Article 3(1) of the Ethiopian Environmental Impact Assessment Proclamation No. 299 of 2002,[614] which states that "*[w]ithout*

[608] Claimant's Reply, at [5.56].
[609] Exhibit CLA-33, at [88].
[610] Exhibit CLA-19, at [547(e)].
[611] Claimant's Reply, at [5.59].
[612] Exhibit C-9, at Art. 8(12).
[613] SOD, at [294]-[295]; Respondent's Rejoinder, at [310]-[318]; Exhibit C-9, at Art. 8(10).
[614] Exhibit RLA-1, at Art. 3(1).

authorization from the [Environmental Protection] Authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment as determined in a directive issued pursuant to Article 5 of this Proclamation";

657.2. Item No. 21 of the Environmental Protection Authority's Directive No. 1/2008;[615]

657.3. The Environmental Impact Assessment Procedural Guideline Series 1 of 2003 [616] which defines "Environmental Assessment" as "*[t]he methodology of identifying and evaluating in advance, any impact positive or negative, which results from the implementation of a proposed action*" and defines "*Environmental Impact Assessment Report*" as a "*report containing sufficient information to enable the Environmental Agency to determine whether and under what conditions a proposed action should proceed*"; and

657.4. The discretion for the relevant authority to refuse implementation of a project if it is convinced that the negative impact cannot be satisfactorily avoided.[617]

658. When the MoI asked Claimant to perform an EIA, it was merely reminding Claimant of a pre-existing obligation under the 2012 ETIZ Agreement. Claimant could not therefore have had any legitimate expectations that it could take over the land without an EIA unless "*(i) when it agreed to safeguard environmental conditions and 'carryout the necessary environmental studies required in this regard' it meant something other than what it was subsequently asked to do; or (ii) the studies that it submitted were arbitrarily rejected with no subsequent remedy*".[618]

659. It is inconsistent with the terms of the 2012 ETIZ Agreement (and utterly incredible) that Claimant could claim that its understanding (or legitimate expectation) were that "*the tripartite Agreement it signed with the Ministry of Industry and the Oromia Regional State did not require it to conduct a*

[615] Exhibit RLA-2.
[616] Exhibit RLA-3.
[617] Exhibit RLA-1, at Art. 9(2)(c).
[618] SOD, at [295].

proper EIA before building an industrial zone that it supposedly estimated at US$ 8 billion in value on Addis Ababa's water supply basin".[619] Claimant could not have subjectively believed that it "*had no environmental responsibilities not only because it signed the 2012 ETIZ Agreement containing many provisions referencing environmental matters but also merely because of the scale, composition and location of the Project*".[620]

660. The provisions of the 2012 ETIZ Agreement and Ethiopian environmental law leave no room for doubt that Akgun had the responsibility to conduct and present an acceptable EIA and follow all environmental laws and regulations. Akgun attempts to challenge the applicability of the EIA and/or environmental laws and regulations by "*using expert reports to claim that government allocation of land amounts to the issuance of an unqualified environmental immunity*",[621] but neither Professor Tekle nor Professor Whittington could say without a doubt that Respondent's request for Claimant to perform an EIA came too unreasonably late (given that the EIA was supposed to be conducted in accordance with environmental laws which were to be followed under the 2012 ETIZ Agreement, and given that a reminder was provided to Claimant after a partial handover of 100ha of land).[622]

661. Respondent also suggests that Claimant's argument that it believed an EIA (or environmental assessment) had (or should have) already been conducted by the Government prior to the allocation of the relevant plot of land to Akgun is both untrue and an unreasonable assumption (regardless of the opinions in the Expert Reports that it submitted). Respondent states that Professor Tekle's conclusion that if a "*government prepares [a] land for an investment purpose, makes it available to interested investors via a lease agreement with the government and grants a license to leasehold rights without EIA authorization, then it is [Professor Tekle's] opinion that it would be presumed that such land has undergone the necessary EIA or SEA study requirements for the type of investment planned by the investor*",[623] is unsupported by recognisable authority and absolutely illogical, and that Professor Whittington does not (and cannot) conclude that Akgun was right

[619] SOD, at [298].
[620] Respondent's Rejoinder, at [309].
[621] Respondent's Rejoinder, at [318].
[622] Respondent's Rejoinder, at [319]-[320].
[623] Tekle Report, at [2.32].

in thinking that it had no EIA obligations,[624] and therefore Akgun cannot rely on these quasi-legal premises to conclude that it had a legitimate expectation that it would not be required to conduct an EIA.

662. Moreover, Respondent argues that "*(i) on the facts of this case, Akgun did indeed know that it had the responsibility to conduct an EIA where it signed the 2012 ETIZ Agreement; (ii) Akgun knew that no EIA had been done because it was shown three different locations and chose one where it was evident from the circumstances that Akgun and the government entities involved were jointly exploring options; and (iii) at a minimum, as a developer, Akgun should have known from all the above that it could not be developing an industrial park of this scale without an EIA in a sensitive area*".[625]

663. On the other hand, if Claimant is claiming that their submitted EIA was arbitrarily rejected, then this argument must fail both on the grounds of the terms of the Agreement and on the merits of the EIA's themselves. First, the Agreement expressly stated that Akgun shall observe all conditions under Ethiopian law (which included its environmental laws and regulations), but Akgun did not attempt to meet these environmental laws and regulations. Consequently, the EIAs submitted were objectively defective (as Respondent's environmental expert, Professor Susan Murcott, had shown in her report).[626]

664. Additionally, if Claimant is asserting that Respondent's proposal for it to (1) relocate the site or (2) vary the mix of industries to be located with the ETIZ was a violation of its legitimate expectations, Respondent points out that "*the doctrine of legitimate expectations should not be used as a substitute for the actual arrangements agreed between the parties, or as a supervening and overriding source of the applicable law*",[627] and that its proposals were not in breach of the 2012 ETIZ Agreement (while Claimant's argument that the EIA should not have been required would go against the 2012 ETIZ Agreement).[628]

[624] Respondent's Rejoinder, at [324]-[325].
[625] Respondent's Rejoinder, at [326].
[626] SOD, at [299]-[301]; Expert Report of Professor Susan Murcott dated 7 March 2021, at Section [5.4] and Sections [III.c] and [III.d].
[627] SOD, at [305]; Exhibit RLA-33.
[628] SOD, at [303].

665. Separately, Claimant wrongly relies upon the *MTD v Chile* case for the proposition that "*it was unreasonable, and thus contrary to FET, for Respondent to have approved an investment via one authority, the [Foreign Investment Commission], when a separate authority later declared the investment to be contrary to its urban development policy and thus likely to be frustrated",*[629] given that the tribunal in *MTD v Chile* also stated that *"approval of a project in a particular location [does not entitle] the investor to develop that site without further governmental approval*".[630] In any case, Respondent claims that (a) location was the very essence of MTD's attempted investment and (b) the essence of Akgun's investment conversely was industrial development (and therefore the location was incidental to the Agreement).[631] Akgun's case differs from *MTD v Chile* in that Claimant was never denied permission to develop or utilise the location. It was merely asked to suspend construction works until it was able to provide a proper and approvable EIA.[632]

C. Tribunal's Decision

666. The Tribunal agrees as a general principle that a State, by its representations or conduct, or even by inactivity, might encourage certain expectations in an investor, before an investment is made, with regard to the investor's or investment's future treatment in terms of the presence or absence of regulatory or administrative action. On the assumption that the expectations so created are reasonable and not fanciful or the result of misplaced optimism, they may constitute an investor's "*legitimate expectations*".[633]

667. The issues here, as discussed by both Parties, are (i) which acts or omissions of Respondent actually created "*legitimate expectations*" for Claimant, and (ii) which acts or omissions of Respondent unreasonably frustrated Claimant's legitimate expectations?

668. The Tribunal believes that the analysis of whether any legitimate expectations were created and then frustrated must be conducted according to the following framework:

[629] SOC, at [5.35].
[630] Exhibit CLA-46, at [163].
[631] SOD, at [308].
[632] SOD, at [310].
[633] Exhibit CLA-19, at [531]-[532].

668.1. What were the actions or omissions by Ethiopia that Akgun alleges created legitimate expectations with respect to its ETIZ investment?

668.2. Did these actions or omissions actually give rise to any legitimate expectation(s) in Akgun?

668.3. Were any of Akgun's legitimate expectation(s) frustrated by subsequent actions by Ethiopia?

668.4. Were the actions of Ethiopia proportionate to legitimate state objectives?

669. The Tribunal now turns to apply this framework to the broad categories of actions (or inaction) of Respondent that Claimant asserts created a legitimate expectation in its mind.

Site Selection Exercise

670. Both Parties have made extensive submissions on (a) which party should bear responsibility for the selection of the initial Sendafa site, (b) whether the initial site was in fact fundamentally unsuitable for the ETIZ Project, and (c) if so, the implication of such a finding.

671. Claimant asserts that Respondent was responsible for the initial site allocation, but that Respondent did not analyse the Sendafa site with an EIA or SEA before allocating it to Akgun (which, according to Claimant's Expert, should have been done).[634] Respondent therefore allocated an unsuitable Sendafa site, for which no EIA would ever have been satisfactory because of certain fundamental problems with siting the ETIZ there.[635]

672. Claimant asserts that Respondent's identification and allocation of the Sendafa site created a legitimate expectation in Claimant that the site would be usable as the site of ETIZ, but that this expectation was frustrated because no EIA could ever have satisfied the Ethiopian authorities. This is due to the fact that there was just not enough water for both ETIZ and the Yeka Abado and Bole Arabsa condominium projects.[636] Claimant says that it cannot be

[634] Tekle Report, at [2.32].
[635] Hearing Transcripts Day 1, at [59:24]-[60:11].
[636] Hearing Transcripts Day 1, at [66:1]-[66:8].

the investor's responsibility to consider the kind of policy trade-offs required to make the decision on whether to site the ETIZ at the Sendafa site or not.[637]

673. In response, Respondent says that any professed belief that presumed that the necessary environmental studies had already been completed (or would not need to be completed) "*defies all rationality*".[638] Respondent says that it is illogical that Ethiopia could require Akgun to perform an EIA for the selected site but be excused from all consequences if the EIA proved to be unsatisfactory.[639]

674. The Tribunal considers it important to distinguish carefully between the various actions of Ethiopia that could have created a legitimate expectation in Akgun. At this juncture, the Tribunal will consider only the fact that the Sendafa site was designated as the site for the ETIZ Project (the "**Site Selection Issue**").

675. By way of preface, the Tribunal notes that there is a dispute over how the Sendafa site came to be so designated.

    675.1. Yusuf Akgun says that (a) Akgun had no choice in determining the site for ETIZ, and (b) that Respondent presented him with the sole option of the Sendafa site as *"the only one that we would have to work with"*.[640] The Parties' 13 October 2008 MOU also expressly provided that "*The location of the **NIZ** will be shown by the **Oromia State**.*"[641]

    675.2. However, Respondent's witness, Mr. Edo, paints a different picture. Mr. Edo says that Akgun gave Respondent certain criteria (including that the land site must be within a 30km radius of Addis Ababa), and the Oromia Regional State presented Akgun with three possible locations on that basis. Mr. Edo says Akgun selected the Sendafa site.There is a slight disparity in these accounts regarding how the Sendafa site came to be designated as the ETIZ site, and whether or not the Sendafa site was the only site offered to Claimant. However, this is not the key question for the Tribunal. The Tribunal's enquiry is focused on determining what legitimate expectations Akgun had

[637] Hearing Transcripts Day 1, at [65:3]-[65:10].
[638] Respondent's Rejoinder, at [70].
[639] Respondent's Rejoinder, at [70].
[640] Hearing Transcripts Day 3, at [73:9]-[73:19].
[641] Exhibit C-7.

based on the prevailing circumstances at the relevant time. Therefore, it is irrelevant exactly how the Sendafa site came to be chosen.

677. To this end, the Tribunal considers that it is not necessary to make a finding on whether Akgun chose the Sendafa site out of three options or whether the Sendafa site was offered to Akgun as the sole option (which Akgun accepted without any demur). It is undisputed, and the Tribunal considers it clear from the record, that both Parties agreed to designate the Sendafa site as the ETIZ location as of January 2009.

Did Akgun have any legitimate expectations that arose purely from the offer of the Sendafa site, and if so what were they?

678. Claimant and their expert(s) have made extensive submissions on the issue of the residual risk of pollution,[642] which goes to the questions, inter alia, of (a) whether the Sendafa site was in fact fundamentally unsuitable for the ETIZ Project; (b) whether an SEA or EIA could have spotted this residual risk; (c) whether either Claimant or Respondent was obligated to conduct an SEA or EIA (prior to the allocation of the Sendafa site), and if so, (d) who was responsible for doing so?

679. It is clear to the Tribunal that, after the Sendafa location of the ETIZ Project was brought to the attention of AAWASA and MoEF, these two bodies raised serious concerns. In particular, the MoEF took the view in various inter-agency communications that the Sendafa site should never have been offered to Akgun for the purposes of the ETIZ Project. The relevant portions of this correspondence are reproduced below:

679.1 "*Even if at least the potential chemical pollution to the dam is be reduced to 1%, the Addis Ababa people will be at risk*".[643]

679.2 "*However, upon observation of the document submitted by your Ministry Office, instead of an environmental impact assessment [EIA], a strategic environmental assessment [SEA] should have been conducted with regard to the intended industry zone, taking*

[642] Hearing Transcripts Day 1, at [41:12]-[42:6] & [45:3]-[45:9]; Hearing Transcripts Day 4, at [11:18]-[11:25], [14:3]-[14:7] & [97:14]-[97:19].
[643] Exhibit C-105.

heed of the quantity, capacity and nature of the industries included therein".[644]

680. This shows that, once Respondent's various environmental-related ministries were made aware of the ETIZ Project, they had misgivings about the suitability of the Sendafa site for the ETIZ Project.

681. Claimant asserts (based on Professor Tekle's report) that Respondent had a duty to consider the suitability of the site before it allocated the site to Akgun.[645] The thrust of the relevant sections of Professor Tekle's report is that the 2003 Guidelines provide that an SEA is the assessment used to identify the potential impacts of the proposed "*public instrument*", and that the ETIZ Agreement is an "*international agreement*" which falls within the statutory definition within the EIA Proclamation of a "*public instrument*".[646]

682. Claimant links this purported duty to perform an SEA (or an EIA) back to Respondent's TEBIT obligations in this manner: "*By deciding to site ETIZ near the Legedadi dam and providing the land for ETIZ to Akgun, Respondent created the clear and obvious expectation that it had determined, through an SEA or otherwise, that this site was suitable for development as an industrial zone*".[647]

683. The question for the Tribunal is thus whether, prior to requesting an EIA, Ethiopia represented to Akgun by words or conduct that the Sendafa site would be (or at least had a reasonably high probability of becoming) environmentally suitable for the ETIZ Project as originally envisioned, thereby creating a legitimate expectation in Akgun that it would, in all likelihood, eventually be able to pursue the ETIZ Project at the initial site allocated to it?

684. The Tribunal now considers Ethiopia's action(s) in offering the Sendafa site to Akgun, in the context of answering the above question.

[644] Exhibit C-106.
[645] Claimant's Reply, at [5.149].
[646] Tekle Report, at [2.38]-[2.39].
[647] Claimant's Reply, at [5.197].

685. Claimant asserts that the following actions of Ethiopia created the legitimate expectation that Ethiopia would provide Akgun with land suitable for implementing ETIZ:[648]

685.1. In the MoU, Respondent had the duty of locating the appropriate site for ETIZ.

685.2. Akgun could expect, in the context of the 2010 ETIZ Agreement, that Ethiopia would not choose an environmentally unsuitable site for a project in which the State itself was a partner (although the State later withdrew from becoming a partner owing to financial constraints).

685.3. Ethiopia's issuance and renewal of permits for Akgun reinforced the expectation that the Sendafa site was suitable.

685.4. Ethiopia repeatedly urged Akgun to commence work on the Project.

686. With regard to Respondent's initial allocation of the Sendafa site, the Tribunal considers that, at the point that the Sendafa site was offered to Akgun, when Akgun formed the intention to develop ETIZ, the investment was still at a relatively inchoate stage.

687. For projects at such an early stage of development, the decision of the tribunal in *MTD v Chile* is particularly illuminating: [649]

> *Approval of a Project would give prima facie to an investor the expectation that the project is feasible in that location from a regulatory point of view [i.e. its urban policy] … This is not to say that approval of a project in a particular location entitles the investor to develop that site without further governmental approval.*

688. The Tribunal agrees with the *MTD* tribunal's discussion regarding the "*regulatory*" feasibility (i.e. urban policy or planning) of an offered site in creating an investor's legitimate expectation. The Tribunal's view (utilising the *MTD* tribunal's reasoning) is that there should be no fundamental regulatory hurdles, of which the State is or should be aware, with respect to the investor's development of the offered site for the purpose for which the

[648] Claimant's Reply, at [5.40].
[649] Exhibit CLA-46, at [163].

site has been offered. This formulation is consistent with both propositions in the quoted passage from the *MTD* award.

689. For the foregoing reasons, the Tribunal considers that, at the point a site has been initially offered to an investor for the purposes of a project, that investor is entitled to expect that the State is aware of extant State policies that might materially affect the eventual approval of that project on the designated location.

690. In this regard, the Tribunal finds that the same provision of the 2012 ETIZ Agreement that Respondent invokes to illustrate Claimant's awareness of its environmental protection obligations, namely, Article 8(10), which provides that *"[t]he Developer shall protect the environment from pollution by using appropriate methods and technologies. In this respect the Developer has to take maximum care to safeguard the Legedadi and Dire dams and underground water basin from pollution and carryout the necessary environmental studies in this regard*",[650] also presupposes the use of the Sendafa site, with appropriate protective measures, for the development of the ETIZ. *In other words,* the ETIZ Agreement gave the impression that, assuming protective measures were adopted, the Sendafa site could have been used as the site of the ETIZ project.

691. Further, the expansion of this obligation in the 2012 ETIZ Agreement from the language used in the 2010 ETIZ Agreement (which, after designating the land to be used and lease terms of the Project, provided in Article 8(9) that, "*[t]he Developer shall protect the environment from pollution by using appropriate methods and technologies")*[651] to include *"safeguard[ing] the Legadadi and Dire dams and underground water basin from pollution and carry[ing] out the necessary environmental studies in this regard*",[652] suggests not only a presupposition that the allocated land would be useable for its intended purpose with appropriate protective measures, but that the MoI knew at the time of the special risks associated with the Legadi and Dire dams and water basin but did not coordinate with AAWSA and MoEF to determine whether the risks were manageable before suggesting to Claimant (and thereby creating a legitimate expectation in Claimant) that the

[650] Exhibit C-8, at Art. 8(10).
[651] Exhibit C-8, at Art. 8(9).
[652] Exhibit C-9, at Art. 8(9).

risks were manageable and would not prevent development of the ETIZ Project largely as originally conceived.

692. Nonetheless, the Tribunal finds that an investor is not necessarily entitled to expect, by virtue of a project site being initially designated, that future studies of the feasibility of the Project will never produce negative results that may require reconsideration of the site (as stated concisely by the *MTD* tribunal).

693. In the present case, however, subsequent actions by Respondent continued to confirm Claimant's expectation that, even though it might need to comply with generally applicable regulatory requirements in conjunction with the development of the ETIZ Project, none of the requirements would prevent the development of the ETIZ Project on the Sendafa site. The following events support such an expectation:

693.1. Ethiopia requested, and Akgun paid, on 31 July 2012, compensation (amounting to approximately USD 825.058,51[653]) to the Oromia State for the first 100ha of the Sendafa site and for the expenses of relocating the farmers that were settled on the land, which was accepted by Oromia.[654]

693.2. After the Oromia Bureau of Rural Land and Environment Protection found out that some farmers had already sown seeds on the Sendafa site, the MoI wrote to Akgun saying that it could pay additional compensation to effect physical handover of the land immediately, or wait till 30 January of the next year.[655]

693.3. The Oromia Regional State later issued Akgun a Land Lease for the Sendafa site (giving Akgun property rights), and demanded that Akgun start work or risk having the land taken back pursuant to the provisions of the ETIZ Agreement.[656] This Land Lease was the instrument that gave Akgun property rights over the Sendafa site.

[653] Exhibit C-10.
[654] Exhibit C-10.
[655] Exhibit C-49.
[656] Exhibit C-12.

693.4. On 17 September 2012, the Investment Board of Oromia also told Akgun to commence work within six months, or risk having the land taken back.[657]

693.5. Ethiopia physically handed over the first 100ha of the Sendafa site to Akgun on 6 March 2013,[658] presumably after all the farmers had vacated the land and taken their crops.

693.6. Ethiopia tacitly allowed preliminary construction works to begin on the Sendafa site before an EIA had been submitted and approved.[659]

693.7. All of these actions were taken after the signing of the ETIZ Agreement on 8 June 2012, and before the MoI requested Akgun to submit an EIA in mid-May 2013.

693.8. In addition, a full year elapsed before the Ethiopian government requested an EIA in respect of the Sendafa site, despite knowing full well what kind of project was intended to be developed at the site.

693.9. Even after the MoI was aware of AAWASA and MOEF's concerns, the MoI requested the Ministry of Finance on 23 April 2014 to restore power to the Sendafa site for Akgun to resume construction.[660] A copy of this letter was furnished to Akgun contemporaneously.

693.10. Even the Oromia Investment Commission, which:

(a) took Akgun's payment for the first 100ha of the Sendafa site;

(b) demanded from Akgun compensation for relocating the farmers; and

(c) subsequently gave Akgun the Land Lease

realised the problems with finding Akgun's EIA unsatisfactory after Akgun had paid compensation for the land: "*It is proposed to let the developer be granted the right to establish agro-processing industries that do not pollute the environment [at the Sendafa site], wherein the*

[657] Exhibit C-50.
[658] Exhibit C-13.
[659] Hearing Transcripts Day 5, at [63:4]-[64:20].
[660] Exhibit C-77.

due compensation that was paid to date goes to conducting the installation of infrastructures; and, let the residual 1,358 hectare [sic] of tenancy be relocated to another site".[661]

693.11. Furthermore, from the oral evidence of Mr. Edo, it is clear that Ethiopia fully intended that any requirement for an EIA to be submitted would arise after the land had been handed over to Akgun (i.e. after Akgun had received its Land Lease).[662]

694. Based on Respondent's actions above, it is undisputable that Claimant would be led to legitimately believe that its construction of the ETIZ Project on the Sendafa site was essentially guaranteed, and it would not be asked to move the ETIZ Project.

695. At this point, the Tribunal must affirm that it is central to the *raison d'etre* of an EIA that, if environmental problems of sufficient magnitude are discovered that cannot be satisfactorily mitigated, the Project may be cancelled or otherwise re-negotiated. The Tribunal also affirms that Respondent has the sovereign right to enact and enforce its own environmental laws, and to require investors to submit EIAs.

696. However, it is only fair that, if a State wishes to implement an EIA requirement, it must also bear in mind its obligation under the relevant BIT to treat the investor fairly. Requiring a foreign investor to submit an EIA is unimpeachable. But asking a foreign investor to begin an environmental study that could conceivably result in the relocation of the entire project after (a) taking serious action to clear out settlers on the land, (b) asking for compensation from the investor for those settlers, and (c) giving the investor property rights through a lease, would undoubtedly create in the investor a legitimate expectation that, no matter what regulatory hurdles arose, the location of the project site was essentially finalised.

697. The Tribunal agrees with Claimant that Ethiopia asked for an EIA in respect of the Sendafa site and rejected the EIA submitted by Claimant at far too advanced a stage of the proceedings, after Claimant had already developed

[661] Exhibit C-105, at pg. [6].
[662] Hearing Transcripts Day 5, at [58:4]-[58:9].

a legitimate expectation that it would be able to construct the ETIZ Project at the Sendafa site.[663]

698. For the avoidance of doubt, the Tribunal does not need to decide whether Ethiopia asked for an EIA consistent with its own domestic environmental law. The internal legality of Ethiopia's actions is not dispositive of or even relevant to their legality under international law.[664] As clearly stated in the ILC Draft Articles on State Responsibility (which is usually accepted as an authoritative statement of customary international law):[665]

> *The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*

699. Therefore, whether Respondent asked for the EIA in compliance with its own domestic laws, and whether Respondent asked for the EIA at the correct times, does not affect the Tribunal's decision on whether Respondent created a legitimate expectation in Claimant or whether Respondent breached its FET obligations not to frustrate the legitimate expectations of Claimant.

Did the Statements by Dr. Oqubay also give rise to legitimate expectations in Claimant that the ETIZ Project would be approved on the Sendafa site?

700. For completeness, the Tribunal now turns to the Statements made by Dr. Oqubay (in his capacity as special advisor to the Prime Minister) to determine if any legitimate expectations arose from Claimant's discussion(s) with Dr. Oqubay. At a meeting between Mr. Akgun (and his sons) and Dr. Oqubay on 27 March 2014, Dr. Oqubay:[666]

700.1. Instructed the Ethiopian Electric Power corporation to continue supplying power to ETIZ; and

700.2. Promised that enterprises which had already located themselves in ETIZ could stay there, and that Akgun could continue dealing with

[663] Claimant's Reply, at [2.89].
[664] Art. 32 of the ILC Articles on State Responsibility states: "*The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.*"
[665] CLA-42, at Art. 3.
[666] Exhibit C-73, at pg. [3].

those companies which had already entered into commitments with them.

701. Following which, at a meeting between Akgun and Dr. Oqubay on 3 April 2014, Dr. Oqubay:[667]

701.1. Said that the ETIZ would not be relocated; and

701.2. Promised necessary support from the Ethiopian government to implement ETIZ.

702. The Tribunal notes that (a) Dr. Oqubay was a Special Adviser to the Prime Minister of Ethiopia and former mayor of Addis Ababa who was responsible for beginning construction of the Condominium Projects, and (b) the Environmental Council was headed by the Prime Minister.[668] It was therefore reasonable to expect that Dr. Oqubay was a person who could influence decisions on environmental matters. Akgun therefore had an objective basis for forming expectations based on Dr. Oqubay's representations.

703. As a result of Dr. Oqubay's statements:

703.1. which came after Akgun had been requested to perform an EIA;

703.2. but before the decision to suspend ETIZ; and

703.3. long before the decision to relocate ETIZ,

Akgun did have an objective basis for its expectations that the environmental regulatory process would not hamper the continued development and use of the Sendafa site for the ETIZ Project.

Were Akgun's legitimate expectations frustrated by Ethiopia?

704. Having established that Akgun did indeed have a legitimate expectation that it would be able to build the ETIZ Project on the Sendafa site, the Tribunal now turns to whether or not Claimant's legitimate expectations were frustrated by Respondent.

[667] Exhibit C-74, at pg. [1].
[668] Hearing Transcripts Day 7, at [147:3]-[147:5].

705. Respondent says that the decision to suspend construction on the Sendafa site (in what it calls the environmentally-sensitive areas) did not suspend the ETIZ Agreement, it only suspended unauthorised construction.[669] The Tribunal agrees that the suspension decision *per se* did not frustrate Akgun's legitimate expectation that the ETIZ Project would be carried out at the Sendafa site, on the understanding that the suspension would eventually be lifted.

706. However, Akgun's legitimate expectation was clearly frustrated by the 17 June 2015 decision[670] to relocate ETIZ, as Akgun would henceforth no longer be allowed to carry out the ETIZ Project at the Sendafa site.

707. Therefore, there was indeed a frustration of Akgun's legitimate expectations with regard to its investment. This alone would be sufficient to find that Ethiopia had breached its FET obligations, as the FET standards are cumulative,[671] with a breach of any standard sufficient for the Tribunal to find that Respondent did not uphold its FET obligations. For completeness, the Tribunal has assessed below whether Respondent breached its FET obligations in other ways as well.

XI. Did Respondent act "consistently", "arbitrarily" and "transparently"?

A. Parties' Positions

Claimant's Position

708. Citing several authorities,[672] Claimant argues that "*a State's decision-making in relation to an investor [needs to] be orderly, timely and free of serious administrative negligence. In keeping with this, separate government agencies must also act coherently in their positions regarding an investor vis-à-vis one another*".[673] In essence, Claimant submits that the State's decision-making must be non-arbitrary and consistent.

[669] SOD, at [282].
[670] Exhibit C-31, at pg. [2].
[671] Exhibit CLA-67, at [609].
[672] Exhibit CLA-33, at [78] & [88]-[90]; Exhibit CLA-30, at [578].
[673] SOC, at [5.43], citing Exhibit CLA-12, at [381]-[383].

709. Claimant asserts that Respondent's actions "*belied a complete lack of [consistency] not only across different arms of the government, but also within the same branch*".[674]

710. Claimant argues that "*where the lack of transparency is such that the State leaves the investor without any clear indication of when, how or why its administrative decisions are made or, as in this case, fails to make any clear or consistent decisions whatsoever, it has breached its FET obligations*".[675] Arbitrariness can also be seen from "*negligence on the part of the administration in the handling of negotiations with the [Claimant] as well as inconsistencies in the administration's practice*".[676]

711. Claimant states that *"Ethiopian authorities at all levels of government represented to Akgun that ETIZ was to be the centerpiece of the country's development plan and they used such assurances to induce Akgun to invest in Ethiopia"*.[677] However, *"when ETIZ lost political favor, those same authorities in a classic instance of a government 'blow[ing] hot and cold' withdrew any support for ETIZ in blatant conflict with their prior representations to the contrary"*.[678]

712. As examples, Claimant argues that the MoI at various times:[679]

    712.1. Assured Akgun it would be allowed to develop the ETIZ Project on the land that had been allocated;

    712.2. Suspended the ETIZ Project allegedly because the EIA process had not been completed;

    712.3. Allowed the ETIZ Project to resume even though the alleged reason for the suspension (i.e. the EIA) was not resolved;

    712.4. Again suspended the ETIZ Project and informed Akgun that it would be moved due to the local municipality's resource concerns;

[674] SOC, at [5.44].
[675] SOC, at [5.54].
[676] SOC, at [5.55]; Exhibit CLA-37, at [246].
[677] SOC, at [5.45].
[678] SOC, at [5.46].
[679] SOC, at [5.47].

712.5. Assured Akgun that the ETIZ Project could and would be moved; and

712.6. Never amended the 2012 ETIZ Agreement or allocated suitable alternative land for ETIZ.

Similarly, Claimant complains that the "Respondent's executive branch treated Akgun with a similar lack of consistency, with the President and Office of the Prime Minister at times intervening to support Akgun's efforts to resume construction and at times intervening to halt construction and insist that it must be moved".[680]

713. The present situation is similar *to Bilcon v Canada*[681] (in which case, the tribunal found that there was a breach of FET obligations), in that the government repeatedly "*encouraged [operating in an environmentally sound manner] and [the] claimant had committed to operate in an environmentally sound manner in accordance with all local and federal environmental laws*" but despite "*its efforts to comply with the standard development requirements and environmental assessments, [the] claimant was subjected to additional, unwarranted bureaucratic standards and processes that resulted in cancellation of the Project*".[682]

714. Inconsistent government positions and messages "*are frequently held to violate the FET standard requiring transparency and consistency*" and cases show that "*one arm of the state cannot […] affirm what another arm denies to the detriment of a foreign investor*".[683] "*[A] state violates the FET standard when it conceals its true intentions from the investor about the fate of its project*"[684] (which Claimant argues was done in the present case as Respondent needed water for its residential developments but did not fully disclose this fact to Akgun).[685]

715. Respondent was wrong in saying that "*the requirements of its environmental laws, and in particular its EIA proclamation, would have been clear and straightforward to a foreign investor such as Akgun and that they were*

[680] SOC, at [5.48].
[681] Exhibit CLA-51, at [8]-[10].
[682] Claimant's Reply, at [5.79].
[683] Claimant's Reply, at [5.83]; Exhibit CLA-36, at [579] (quoting *EnCana Corporation v. Republic of Ecuador*, Award, 3 November 2006, at [158]).
[684] Claimant's Reply, at [5.84]; Exhibit CLA-53, at [387].
[685] Claimant's Reply, at [5.78].

universally applied"[686] because (1) the EIA Proclamation is not on its face applicable to any project at all until there is a "*directive*" issued pursuant to Art. 5 of the Proclamation (and that Directive No. 1/2008[687] produced by Respondent was neither signed nor published and therefore ineffective as a matter of law according to Claimant's expert).[688] "*As a result, a foreign investor such as Akgun would have been unable to determine whether its project fell within the ambit of the EIA Proclamation, or whether the EIA Proclamation was at all effective without any accompanying directive to specify its effect*".[689] Additionally, Claimant claims that there was no real framework in place to meet the requirement in the EIA Proclamation that "experts" should be hired to undertake the EIA.[690]

716. Moreover, Claimant claims that the environmental laws were inconsistently applied, as evidenced by Professor Tekle's report[691] on the confusing legal environment in Ethiopia regarding environmental protections and the fact that Respondent failed to perform EIAs for its Condominium Projects[692] (which it claims was also arbitrary and lacking adequate due process considering that Respondent's Directive No. 1/2008 required "*an EIA for both 'Industrial Zone[s]' and 'Condominium construction' alik*e").[693]

717. Claimant also cites several examples of investor-state jurisprudence to argue that "*where a state tells an investor that it can do a particular project at a particular location but then reverses that decision for political reasons unrelated to the investor, then this constitutes unfair and arbitrary conduct for which treaty compensation is appropriate*".[694] Similarly, Claimant argues that Respondent concealed the reason that it suspended the ETIZ Project and kept rejecting Akgun's EIA, and that there were no mitigating measures that Akgun could have employed in constructing the ETIZ that would have met Respondent's requirements. Claimant argues that "*[t]hese acts, in combination with Respondent's designating the site and encouraging Akgun*

[686] Claimant's Reply, at [5.87].
[687] Exhibit RLA-2.
[688] Claimant's Reply, at [5.88]; Tekle Report, at [2.10].
[689] Claimant's Reply, at [5.89].
[690] Tekle Report, at [2.35].
[691] Tekle Report, at [2.27].
[692] Exhibit C-100, Response to Request 9.
[693] Claimant's Reply, at [5.107].
[694] Claimant's Reply, at [5.101]-[5.104]; Exhibit CLA-51, at [452]-[453] & [590]-[591]; Exhibit CLA-46, at [40]-[42], [53]-[54], [74]-[75], [80]-[82], [166] & [189]; Exhibit CLA-6, at [164]-[166] & [172].

to develop ETIZ on that site before reversing course, subjected Akgun to an unfair and arbitrary decision-making process concerning the ETIZ site".[695]

718. Lastly, Claimant claims that, although the "*Respondent's EIA Proclamation required the EPA to make a decision with regard to ETIZ's EIA within fifteen working days*", Respondent "*suspended and then deferred development of the ETIZ until that suspension became permanent, without genuinely considering the water treatment plan that Akgun submitted*".[696]

719. Claimant therefore submits that (a) Respondent has been inconsistent, arbitrary and non-transparent towards them, and (b) Respondent's actions constituted a violation of the required FET standards.

Respondent's Position

720. Respondent claims that it provided a stable and predictable legal and business environment for Claimant. Respondent's official position was never inconsistent, and it all revolved around the environmental impact of the ETIZ. Respondent claims that "*Akgun never got a mixed message about the need to get an EIA approved by the environmental authorities*" and that "*no one within the Ethiopian Government structure has ever suggested to Akgun that it could develop the ETIZ Project without a proper and acceptable EIA*".[697]

721. Moreover, Akgun was (1) never given "*conflicting instructions as to the importance and relevance of the EIA*", (2) there "*is no single authority within the Ethiopian Government structure who promised to waive or could have waived the legally mandated EIA requirements*",[698] and (3) the EIA was legally required by law and the ETIZ Agreement, not "*by whim of officials*".[699]

722. Akgun "*possessed actual knowledge of the [environmental] law and its workings, as its owners were not strangers to Ethiopia*"[700] and the EIA law was a decade old by the time Akgun signed the 2012 ETIZ Agreement.[701]

[695] Claimant's Reply, at [5.105].
[696] Claimant's Reply, at [5.108]; Tekle Report, at [2.63]; Exhibit C-105, at pg. [1]-[3] & pg. [14]. See also Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.23]-[5.26]; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.14] & [8.2].
[697] SOD, at [313].
[698] SOD, at [317].
[699] SOD, at [317].
[700] SOD, at [318]; Exhibit R-3, at [31]-[35].
[701] Exhibit RLA-1.

Akgun is trying to sensationalise what had occurred by referring to unsubstantiated allegations of a possible "*mistake*" in allocating the land or "*competing political interests*".[702]

B. Tribunal's Decision

[1] Did Respondent act inconsistently or arbitrarily or in a discriminatory manner?

723. The Tribunal agrees that the laws (as written) regarding the EIA were inconsistently applied, especially given the evidence below by the various experts:

723.1. Dr. Damtie said in his written statement and in his oral evidence that a foreign investor must get its investment license and complete land acquisition before conducting any EIA.[703] But when questioned by the Tribunal, he did not clearly distinguish between designation of a site, and the actual giving of property rights over that site to the investor.

723.2. Prof. Tekle took the view that, despite Proclamation 375/2003, the original requirement in the EIA Proclamation was that issuance of investment permits was still subject to clearance by the environmental authority, and any real-life practice to the contrary was a misapplication of the law by the authorities,[704] in contradiction of the express wording of Proclamation 375/2003.

723.3. Dr. Ayele said that the sequence should be as follows: (1) investment permit is obtained; (2) site selection/designation; (3) EIA commissioning and submission; (4) handover of the land.[705]

724. Pertinently, the Tribunal notes that, while Dr. Damtie also said that any construction on a project site prior to getting EIA clearance would be illegal,[706] it is not disputed that Claimant built its central office and a police

[702] SOD, at [319].
[703] Expert Legal Opinion of Dr. Mellese Damtie Dandi dated 20 January 2022, at [2.25]-[2.26].
[704] Hearing Transcripts Day 7, at [184:4]-[186:5].
[705] Hearing Transcripts Day 7, at [119:11]-[120:12].
[706] Hearing Transcripts Day 8, at [133]-[134].

station on the site, with the knowledge and tacit acquiescence of the Ethiopian MoI (which is clear from Mr. Edo's oral evidence).[707]

725. The Tribunal therefore finds that the EIA laws were inconsistently applied, and that Claimant's right to consistency by Respondent was breached. On the facts, it is clear that Respondent either (1) did not generally follow its required procedures (or had a difficult-to-navigate procedure) to obtain an EIA or (2) applied its EIA requirements inconsistently with regard to Claimant. In the Tribunal's view, at the time of the ETIZ Agreement, it appeared to be unclear to the Parties whether an EIA should be undertaken and approved prior to obtaining an investment license.

726. Furthermore, the Tribunal finds that the various arms of the Ethiopian state, even though they were pursuing independently important national policies pertaining to industrial development, environmental protection, and housing, acted inconsistently with regard to the Sendafa site (and with their instructions to Claimant). The fact of the matter is that there was a lack of timely inter-Ministry consultations within the Ethiopian Government regarding the Sendafa site, and there were contradictory instructions and assurances given by different arms of the government towards Claimant.[708] While one state organ/actor (such as Dr. Oqubay) reassured Claimant that the Sendafa site could be used, others tried to push for the suspension of the construction. It is therefore clear that there was inconsistent and/or arbitrary decision-making by Respondent.

727. For example, steps were taken by the MoI to finance the lease arrangements with Akgun without adequate consultation with the MOEF. The facts indicate that it was only when Akgun's first EIA Report was issued that the MoEF was made sufficiently aware of the nature of Akgun's project, and issued serious warnings to the Government about the danger of Akgun's project to the reservoir and water supply to Addis Ababa, which ultimately led to the suspension of work at the Sendafa site.[709]

728. The Tribunal therefore finds that Respondent acted inconsistently and/or arbitrarily towards Claimant, in breach of its FET obligations.

[707] Hearing Transcripts Day 5, at [63:4]-[64:20].
[708] See for example, Paragraph [712] above.
[709] Refer to Paragraphs [225]-[240] above.

729. For completeness, the Tribunal rejects Claimant's argument that Ethiopia acted discriminatorily by waiving the EIA requirement for the Yeka Abado and Bole Arabsa projects and/or preferring the water needs of the other investments over the water needs of ETIZ. [710]

730. During the Evidentiary Hearing, Respondent confirmed to the Tribunal that the supposed condominium projects were actually public housing projects, not foreign investments. [711] The Tribunal believes that Claimant is not comparing like with like when making this argument, given that the housing was meant to be a "*pro-poor*" public housing development, not an investment or industrial zone.[712]

731. The Tribunal therefore finds that Claimant's argument that Ethiopia acted discriminatorily or arbitrarily in favour of the condominium projects by waiving any EIA requirement is without merit (although this makes no difference to the Tribunal's overall finding that Respondent acted inconsistently and/or arbitrarily).

[2] <u>Did Respondent act transparently?</u>

732. With regard to the question whether Respondent had acted transparently, Respondent states that it merely acted in accordance with its written laws (the EIA Proclamation and related laws).[713]

733. At the Evidentiary Hearing, Claimant focused on the fact that the EIA Proclamation says that an EIA must be performed before an investment permit is granted.[714] Since Akgun was granted an investment permit prior to being asked to perform an EIA, Claimant argues that it could not have known that it was required to perform an EIA.

734. Claimant also contends that the EIA Proclamation would not have been applicable to any project unless there was a Directive on record issued pursuant to Article 5 of the EIA Proclamation. [715] However, the only

[710] Hearing Transcripts Day 1, at [113:12]-[113:16].
[711] Hearing Transcripts Day 1, at [151:20]-[151:24].
[712] Hearing Transcripts Day 1, at [240:13]-[240:19]; Hearing Transcripts Day 6, at [14:22]-[15:19].
[713] Exhibit RLA-1.
[714] Art. 3(3) of the EIA Proclamation provides that any licensing agency shall, <u>before</u> issuing an investment permit, ensure that the EPA or other environmental agency has given its approval.
[715] Claimant's Reply, at [5.88].

Declaration available was not signed, and did not meet the formalities to have the force of law (as explained above at Paragraph [715]).[716]

735. Additionally, Claimant argues that the EIA laws were inconsistently applied by the Ethiopian government. At the Evidentiary Hearing, Claimant highlighted the fact that the sequence involving the EIA, investment permit, and land handover was extremely unclear.[717]

736. In the Tribunal's view, an investor is entitled to look at the written laws of Ethiopia to determine the applicable legal requirements and cannot say that there is no transparency if the written laws are clear as to the legal position. In this regard, the Tribunal notes that Dr. Anabo's Expert Report states that Ethiopia's environmental law are "*publicly available, readily intelligible and consistent with global standards*".[718]

737. With regard to the question of whether, based on the written laws of Ethiopia at the time, Akgun could have known that the EIA Proclamation applied to the ETIZ Project, the Tribunal finds that, regardless of whether the EIA Declaration was valid, the EIA Proclamation was readily available to Claimant and Claimant likely knew about the EIA Proclamation since it confirmed that it had taken legal advice and/or had legal advisors during its negotiations with Respondent on the ETIZ Project.[719] It is therefore not reasonable for Akgun to state that it did not know about the relevant requirements under the EIA Proclamation/Declaration even though the exact formalities may not have been followed by Respondent.

738. Additionally, although the EIA Proclamation says that an EIA must come before an investment permit, Respondent's legal expert testified that this provision was later contradicted by a separate Proclamation to Amend the Investment Re-enactment Proclamation No. 280/2002, Proclamation No. 375/2003, which meant that the requirement for EIA to precede an investment permit was impliedly repealed.[720]

739. The Tribunal finds that the most reasonable interpretation of Proclamation No. 375/2003 is that it impliedly repealed Article 3(3) of the EIA Proclamation.

[716] Claimant's Reply, at [5.88].
[717] Refer to the difference in sequences discussed by the Experts at Paragraph [723] above.
[718] Expert Report of Dr. Ayele H. Anabo dated 12 March 2021, at [33].
[719] Refer to Paragraph [741] below.
[720] Hearing Transcripts Day 8, at [117:13] & [119:10].

Given that backdrop, it was objectively ascertainable by an investor who read the relevant laws/declarations that EIA requests would (or could) come after the issuance of an investment permit. Put in other words, any party who had done its due diligence and had consulted with a legal advisor (which Akgun admitted to doing during the Evidentiary Hearing) should have known that an EIA request would (or could) come after the issuance of an investment permit.

740. Indeed, for an experienced investor like Claimant, after taking legal advice, if there were apparent legal anomalies or lack of clarity regarding any laws (which would have given Claimant cause for concern before pushing on with the Project), Claimant should have either taken specialist legal advice or asked Respondent for confirmation of the correct legal position.

741. In this regard, the testimony of Mr. Yunus Akgun provided on Day 2 of the Evidentiary Hearing[721] is particularly illuminating, and shows that Claimant did in fact hire a legal consultant to advise them on the relevant laws:

> *Q: So this point 12 that you have there in front of you -- well, I'll ask you this question. Does an investor have a duty to know the local laws, Mr. Yunus?*
>
> *Mr. Yunus Akgun: Could you please read 12 to me?*
>
> *Q: Certainly. Number 12 reads: "The Developer shall respect this Agreement and all other conditions state[d] in the relevant laws of Ethiopia." And my question is: does an investor have a duty to know the local laws?*
>
> *Mr. Yunus Akgun: Well, actually, a developer may not be a specialist in Ethiopian law, but developers always have legal consultants to follow up on all these issues, and we had legal consultants.*
>
> *Q. So you had legal consultants. You sought local counsel, local legal advice. How much did you pay those lawyers?*
>
> *A. Well, actually I don't remember how much I used to pay them anymore, but I think they were on retainer agreements; we used to pay*

[721] Hearing Transcripts Day 2, at [107:14]-[108:17].

them something every month. Although I don't remember how much I was paying, but -- well, I'm just trying hard to remember how much we were paying them to answer your question. I think it must be around 10,000 or 15,000 birrs in Ethiopian currency.

Q. And did you seek their advice on issues of Ethiopian environmental law?

A. Well, this lawyer was a lawyer who was part of our team for the 2012 Agreement; and he was a part of our team and he participated in all the negotiation rounds.

742. It is clear to the Tribunal that Claimant sought (or should have sought) legal advice on the environmental law-related issues, and should have been able to find out about the relevant EIA requirements.

743. Even if the Tribunal were to accept Professor Tekle's viewpoint[722] that technically, the EIA Proclamation was not valid, and EIAs were not mandatory, the reality is that any lawyer that Akgun consulted at the time would have said that, in practice, the EIA laws were enforced, notwithstanding the possible confusion regarding the EIA Proclamation/Declaration. Given that Akgun had taken legal advice from (ostensibly) local legal consultants, it seems unlikely that Akgun did not know the general requirements of the EIA-related laws (and that these laws would be enforced).

744. Indeed, even if the law were unclear, Akgun was not new to investing in Ethiopia, and must have known about the requirements for investing in Ethiopia, notwithstanding any lack of transparency by Respondent. In particular:

744.1 Yusuf Akgun testified that Akgun believed it had a duty to protect the environment,[723] and he intended to comply with all relevant environmental laws.[724]

[722] Hearing Transcripts Day 7, at [184:4]-[186:5].
[723] Hearing Transcripts Day 3, at [78:15].
[724] Hearing Transcripts Day 3, at [78:21].

744.2 Both Yunus Akgun and Yusuf Akgun confirmed that they had taken legal advice when signing the ETIZ Agreement.[725]

744.3 Akgun agreed to perform an EIA, essentially acknowledging that it understood that such an obligation existed. It also submitted two draft EIAs and one EIA supplement (and engaged in several rounds of EIA-related correspondence with government entities).

744.4 While Yusuf Akgun also testified that he believed that he had no obligation to perform an EIA,[726] especially because Akgun was not informed of this requirement initially,[727] his past experiences in the country with OYAP must be taken into account. There is evidence that the EPA sent OYAP and other Akgun-owned entities EIA requests in respect of its past investments, after investment permits were issued, showing that Akgun should have known that this was a possibility.[728]

745. The Tribunal therefore does not accept that Claimant only submitted the EIAs out of goodwill. The Tribunal finds that Claimant took steps to perform EIAs because it was acting on its belief that the EIA laws were valid and enforceable (even if Akgun saw them as simply administrative steps that would be dealt with by the Ethiopian government in due course) and because it knew, from past experience, that it needed to submit such EIAs.

746. Therefore, even if all aspects of Respondent's laws were not completely transparent, Akgun knew (or should have known) that it had to conduct an EIA from the beginning of the Project. The Tribunal therefore finds that, even if there was a lack of transparency by Respondent, this did not affect Claimant (or its investment) in any substantial manner.

747. With regard to Claimant's argument that Respondent knowingly led Claimant to believe that an EIA needed to be carried out even though Respondent allegedly knew that it was not going to approve Claimant's EIA given that it was impossible for the site to maintain both the ETIZ Project and competing government projects such as the Yeka Abado and Bole Arabsa projects, the Tribunal believes this is more correctly an argument that Claimant's

[725] Hearing Transcripts Day 3, at [78:12].
[726] Hearing Transcripts Day 3, at [77:4].
[727] Hearing Transcripts Day 3, at [79:6].
[728] SOD, at [33]-[35].

legitimate expectations had been infringed and/or that Respondent had not acted in good faith, rather than an issue of transparency. Given that the Tribunal already has found that Claimant's legitimate expectations were frustrated by Respondent, there is no need to delve further into this argument.

XII. Did Respondent violate due process or do anything amounting to denial of justice and/or act in bad faith?

A. Parties' Positions

Claimant's Position

748. Claimant submits[729] that a finding of bad faith is not a necessary element to show a violation of FET standards,[730] but that a finding of bad faith will certainly amount to a FET violation.[731]

749. Claimant broadly submits that the "*Respondent's numerous failures to treat Akgun with even a minimum level of honesty, transparency or consistency also amount to a breach of Respondent's obligation to act in good faith vis-à-vis Akgun*".[732]

750. Claimant states that Ethiopia failed to "*comply with the principles of due process in its administrative decision-making*"[733] (by, *inter alia*, requiring Claimant to submit an EIA for the ETIZ Project but not requiring the developers for the Condominium Projects to do the same),[734] and that it had acted to "*sabotage*" Claimant's ETIZ Project in favour of the Condominium Projects.[735]

751. As an ancillary point, Claimant also claims that the relevant agency was supposed to make a decision regarding Claimant's submitted EIA within 15 working days under the EIA Proclamation,[736] but Respondent instead

[729] SOC, at [5.59]; Claimant's Reply, at [5.13]-[5.14].
[730] Exhibit CLA-25, at [420]; Exhibit CLA-7, at [129]; Exhibit CLA-57, at [297].
[731] Exhibit CLA-7, at [129]; Exhibit CLA-57, at [301]; Exhibit CLA-39, at [372]; Exhibit CLA-44, at [450].
[732] SOC, at [5.61].
[733] SOC, at [5.50].
[734] Claimant's Reply, at [5.107].
[735] Claimant's Reply, at [5.107]; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.7] & [7.9]; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.20].
[736] Tekle Report, at [2.63].

suspended and then deferred development of the ETIZ Project until the prolonged state of limbo turned permanent.[737] However, since Claimant discusses this point in the context of arguing that there was expropriation on the part of Respondent, the Tribunal does not believe that it is required to make a finding under this part of Claimant's case.

Respondent's Position

752. Respondent claims that Claimant's allegation of bad faith on its part is sparse and shows that Respondent has not actually acted in bad faith (which is why Respondent submitted no evidence to show otherwise).[738]

753. Respondent also claims that "*a genuine claim of arbitrary and capricious government conduct and the denial of due process must set forth the basis of such claim and generally show the denial of justice*", which it says Akgun did not even attempt to do.[739]

754. Respondent therefore denies that there was bad faith and/or lack of due process.

B. Tribunal's Decision

755. The Tribunal finds that Claimant has not discharged its burden to show that Respondent acted in bad faith. This argument does not seem to have been vigorously pursued, and Claimant does not point to specific instances of bad faith by Respondent.

756. The Tribunal also does not find that there was a lack of due process or denial of justice from Respondent towards Claimant, for the reasons below:

756.1. Insofar as Claimant claims that it was denied justice because it was unable to build the ETIZ Project on the Sendafa site, this is a claim for expropriation, not a lack of due process.

756.2. Insofar as Claimant's claim for lack of due process is grounded on the inconsistent treatment between itself and the developers of the Condominium Projects, this is a claim for breach of the FET

[737] Claimant's Reply, at [5.172].
[738] SOD, at [322]-[324].
[739] SOD, at [320]-[321].

requirement for consistency in treatment/action by the State (and has already been dealt with earlier in the Award).

756.3. Claimant never attempted to seek redress in the local courts and does not point to any action taken by Respondent preventing it from doing so.

756.4. It is clear from the record that Claimant was allowed to make representations and have its case heard by the Ethiopian Government after it was notified of the potential problems with the Sendafa site.

757. The Tribunal therefore finds no support for Claimant's argument that Respondent has acted in bad faith and/or denied Claimant its due process.

XIII. Were Respondent's actions proportionate to the public policy it wished to achieve?

A. Parties' Positions

Claimant's Position

758. Claimant claims that there must be an appropriate correlation between the State's public policy objective and the measures adopted to achieve it, and that the State must adopt a proportionate approach to achieving its public policy objective. Claimant cites *Gold Reserve v Venezuela*,[740] which stated that:

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

759. In other words, Claimant states that a State's "*right to exercise regulatory powers does not provide it carte blanche to mistreat investors*"[741] and that

[740] Exhibit CLA-30, at [595].
[741] Claimant's Reply, at [5.61]-[5.62].

the question of whether a measure is proportionate "*must be assessed in light of all the factual circumstances surrounding such conduct*".[742]

760. Furthermore, Claimant argues that the exercise of such regulatory powers "*must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment*"[743] and that this was not shown in the present case. Indeed, Claimant asserts that, in or around 2013, Respondent determined that its Bole Arabsa and Yeka Abado condominium developments were going to draw on the same water resources as the ETIZ Project, and that there were not enough water resources in place to support the condominium projects and the ETIZ Projects. Respondent accordingly decided to choose the condominium developments over the ETIZ Project, a choice governed by its preference for other investments over the foreign-owned investment.[744] Claimant states that Respondent's call for an EIA was merely to conceal its decision that it had chosen the condominium projects over the ETIZ Project, and that there was no way to resolve the water scarcity problem Respondent had created with its competing condominium projects.[745]

761. Claimant also states that a measure taken is disproportionate if "*those measures suddenly and unexpectedly removed the essential features of the regime in place when Claimant invested*" (which it claims is undeniably what happened when Respondent failed to allocate suitable land for the ETIZ Project and, by doing so, permanently prevented the use by Akgun of its investment).[746]

762. Claimant asserts that this lack of proportionality is underscored by Respondent's refusal to engage in any constructive discussions with Akgun and/or provide any adequate alternative, instead choosing to retain the payments made by Akgun to Ethiopia, abandoning the ETIZ Project, and attempting to disclaim any responsibility for it.[747] Claimant claims that Respondent never complied with its obligation to search for ways and means

[742] Exhibit CLA-71, at [533].
[743] Exhibit CLA-48, at [307].
[744] Claimant's Reply, at [5.64]; Exhibit CLA-48, at [307].
[745] Claimant's Reply, at [5.64]; Whittington Report, at [6.31].
[746] SOC, at [5.64]-[5.65]; Exhibit CLA-54, at [462].
[747] SOC, at [5.66].

to satisfy its environmental obligations in a balanced way, and, although it admitted to its error in offering Claimant the initial plot of land, never followed through on offering a suitable alternative site for Claimant to implement the ETIZ.[748]

763. Claimant also asserts that its agreement to obtain an EIA for ETIZ does not constitute an acknowledgement of Respondent's ability to exercise regulatory authority and does not preclude Claimant's claim for breach of its legitimate expectations.[749]

764. Claimant also disagrees with Respondent that its administrative authorities' actions should be given a degree of deference akin to the "*Chevron deference*" in the United States, given that, *inter alia*, "*if international tribunals were to adopt such a rule and automatically defer to state regulatory decisions, this would undermine the purpose of the protections that inhere within and form the foundation of BITs*"[750] and that "*in any event, event, a certain type of deference is already afforded to the exercise of regulatory power by virtue of the principle of proportionality*".[751]

Claimant finally argues that Respondent's actions "*left Akgun without the use of the land and consequently without any ability to pursue its investment and/or any compensation whatsoever*"[752] and that Respondent's actions were in no way proportionate to the damage it wrought.

Respondent's Position

765. Conversely, Respondent claims that its actions were both legally required and proportionate to its legitimate objective.

766. First, Respondent denies that the location of the ETIZ Project was an "*essential element of the regime in place*",[753] as the ETIZ Agreement was merely a lease agreement to develop an industrial park subject to all applicable regulatory requirements.[754]

[748] Claimant's Reply, at [5.65].
[749] Exhibit CLA-33, at [87]-[90].
[750] Claimant's Reply, at [5.69].
[751] Claimant's Reply, at [5.70]; Exhibit RLA-11, at [263].
[752] SOC, at [5.66].
[753] SOD, at [326].
[754] SOD, at [326].

767. Second, Respondent claims that the EIA was legally and contractually required to be performed and that Akgun was not permanently deprived of the use of land in any case as (1) the development was merely paused until a suitable EIA was performed [755] and (2) Akgun was offered numerous alternative plots after it failed to discharge its EIA obligations (all of which it rejected).[756]

768. Third, Respondent claims that its response to the environmental concerns were both lawful and proportionate, because the EIA was a legally mandated and contractually required step, and there were deliberate and gradual steps taken to ensure that its measures were proportionate[757], including "*(i) an immediate request for an EIA; (ii) a methodical assessment of the validity of the first EIA including through open inter-agency consultations; (iii) the suggestion to produce another more informed EIA; (iv) the proper review of the second EIA; (v) an open door policy for discussion with all ranks of government and a collaborative environment to resolve the issue; (vi) numerous letters of demand and encouragement to comply with the EIA requirements; (vii) preliminary warnings; (viii) a temporary suspension of unauthorized construction works at the site until a proper EIA was submitted; and (ix) the offering of alternate land with incentives*".[758]

769. In any case, Respondent states that it was clear when the ETIZ Agreement was signed, the parties "*clearly understood that the area was environmentally sensitive, that the developer would undertake the necessary environmental studies, and that the relevant governmental agencies would thereupon issue the necessary permits*".[759]

770. Respondent submits that it was clear to all involved that studies might reveal environmental issues requiring attention, and Akgun would possibly need to conduct further studies or further EIAs to show how it would mitigate said environmental issues (if any).

771. Furthermore, even when Akgun failed to deliver an appropriate EIA, Respondent claims that not only was Claimant offered viable alternative

[755] SOD, at [328]; Exhibit C-16.
[756] SOD, at [327]-[329]; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.25]; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.15].
[757] Respondent's Rejoinder, at [331].
[758] SOD, at [330].
[759] Respondent's Rejoinder, at [329].

plots (and incentives to relocate)[760] or to modify the mix of industries in the industrial zone,[761] it was also allowed to revise the EIA and was even given a third chance to submit an appropriate EIA. Even then, the MoI did not terminate the Agreement, instead merely suspending unauthorised works on the environmentally sensitive Sendafa site.

772. Respondent claims that this shows a clearly proportionate response[762] and that its treatment of Claimant was "*eminently fair and equitable*".[763]

B. Tribunal's Decision

773. The Tribunal agrees that Respondent's actions were proportionate to its public policy objective.

774. In the first place, Claimant does not deny that an EIA was required (its main complaint is that this requirement was not made known to Claimant and/or that it expected that such requirements would already have been completed), or that the failure to produce a satisfactory EIA can lead to a suspension or cancellation of a project subject to an EIA requirement (instead arguing that Respondent's actions and assurances created a legitimate expectation that this would not be the outcome with respect to ETIZ).[764]

775. Given this, Respondent's reaction to a failure to submit a satisfactory EIA was proportionate to the public policy objective that Respondent was trying to achieve, namely, ensuring that development of possible sites did not lead to unmanageable pollution.

776. Respondent was, *prima facie*, following the requirements of requesting an EIA, reviewing whether the EIA had addressed or could address relevant environmental concerns, and then acting in accordance with its review in deciding to suspend (and ultimately terminate) construction on the Sendafa site.

[760] Respondent's Rejoinder, at [332].
[761] Respondent's Rejoinder, at [330].
[762] SOD, at [331].
[763] Respondent's Rejoinder, at [333].
[764] Refer to Paragraph [649] above.

777. The Tribunal therefore finds that Respondent's actions were proportionate and not a breach of its FET obligations. In the Tribunal's view, it is clear that Respondent's actions of suspending construction of a site that was likely to cause (in its view) irreparable harm to its environment and water supply was proportionate to Respondent's environmental protection objective.

XIV. Did Respondent breach its obligation not to impair Claimant's investment?

778. Claimant argues that Article II(2) of the TEBIT expressly provides that "*Ethiopia shall not in any way 'impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of [Claimant's] investments*'".[765]

779. However, as rightly pointed out by Respondent,[766] Claimant merely states that, because Respondent breached its FET obligations and/or expropriated Claimant's investment, it also "*violated its specific obligation not to impair Akgun's enjoyment of its investment*",[767] and does not provide any further (or substantive) submissions or evidence as to how its investments were impaired by Respondent beyond its alleged breach of FET obligations and/or expropriation.

780. The Tribunal therefore finds that Claimant has not proven that its investments were impaired by Respondent.

Conclusion: Did Respondent breach its FET obligations?

781. In totality, the Tribunal finds that Respondent did in fact breach its FET obligations under the Treaty by (1) creating and then frustrating Claimant's legitimate expectations with respect to the Sendafa site, and (2) behaving inconsistently with respect to Ethiopia's economic development, regulatory, and environmental protection objectives.

782. The Tribunal now moves to whether there was an expropriation by Respondent.

[765] Exhibit CLA-1, at Art. II(2).
[766] SOD, at [333].
[767] SOC, at [5.69]; Claimant's Reply, at [5.112].

XV. Expropriation

A. Introduction

783. The Tribunal next turns to whether there was expropriation by Respondent with regards to Claimant's investments.

784. Article IV of the TEBIT[768] provides that:

> ***Article IV***
>
> ***Expropriation and Compensation***
>
> *1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.*
>
> *2. Compensation shall be equivalent to the market value of the expropriated investment before the expropriatory action was taken or became publicly known. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article V.*

B. Parties' Positions

Claimant's Position in the SOC

785. From the wording of Article IV of the TEBIT, both direct and indirect expropriation are allowed, subject to the fulfilment of certain conditions. "*Indirect expropriation*" is "*widely understood as a State's interference with an investment that deprives the investor of the use or enjoyment of its investment without a physical taking*".[769] A finding of "*indirect expropriation*" depends on the effect the contested measure has on the investor.[770]

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[768] Exhibit CLA-1.

[769] SOC, at [5.5]-[5.6]; See also Exhibit CLA-31, at pg. [11]; Exhibit CLA-32, at [8]-[23]; Exhibit CLA-33, at [103]; Exhibit CLA-34, at [591] & [604]; Exhibit CLA-6, at [114] & [116]; Exhibit CLA-35, at [10.3.1]; Exhibit CLA-36, at [667]; Exhibit CLA-24, at [1326]-[1327].

[770] SOC, at [5.8]; Exhibit CLA-38, at [240]. See also Exhibit CLA-6, at [116]; Exhibit CLA-25, at [503]; Exhibit CLA-5, at [7.5.20]; Exhibit CLA-39, at [309]-[310].

786. Moreover, the *"decisive element in an indirect expropriation is the loss of control of a foreign investment, in the absence of any physical taking*".[771]The essential question is whether the enjoyment of the property has been effectively neutralised,[772] as where a party no longer is in control of the investment or where it cannot direct the day-to-day operations of the investment.[773]

787. Deprivation of control can be caused by either actions or inaction of the State.[774] A State can be "*liable for expropriation regardless of whether the deprivation results from a single act or failure to act or by the cumulative effect of a series of actions [or] inactions*".[775] A cumulative series of acts or a composite act is also known as a creeping expropriation.[776] Whether an act or series of acts can be deemed to be expropriation depends on "*whether the measures at issue had the actual effect of depriving the investor of its investment*".[777]

788. Claimant alleges that Respondent expropriated Claimant's investment "*through a series of measures culminating in the final suspension of ETIZ in mid-2014*" and that taken together, these actions "*constitute an indirect and/or creeping expropriation of Claimants' investment or 'measures of similar effects' within the meaning of Art. IV of the BIT*" (which resulted in Claimant being deprived of the control, economic use, and enjoyment of its investments). [778]

789. Furthermore, even where an agreement has not been formally terminated, an investor can still be deprived of its rights in that investment (for the purposes of finding expropriation) if it has been deprived of the use of the subject of that Agreement [779] and this *"is all the more true where the instrument of deprivation is the State's imposition of regulatory or other administrative hurdles that it knows the investor cannot overcome*".[780]

[771] Exhibit CLA-40, at [245]-[248] & [256]. See also Exhibit CLA-33, at [103]; Exhibit CLA-24, at [1326]-[1328].
[772] SOC, at [5.9]; Exhibit CLA-40, at [252]; Exhibit CLA-24, at [1328].
[773] See, e.g., Exhibit CLA-7, at [188]; Exhibit CLA-41, at [321]-[322].
[774] Exhibit CLA-34, at [605]; Exhibit CLA-4, at [186]. See also Exhibit CLA-42, at Art. 2.
[775] SOC, at [5.10]; Exhibit CLA-31, at pg. [11].
[776] Exhibit CLA-42, at Art. 15. See also Exhibit CLA-7, at [188]; Exhibit CLA-6, at [114]; Exhibit CLA-36, at [667].
[777] SOC, at [5.12]; Exhibit CLA-41, at [331].
[778] SOC, at [5.13].
[779] SOC, at [5.14]; Exhibit CLA-43, at [311].
[780] SOC, at [5.14]; Exhibit CLA-41, at [341].

790. Claimant argues that it "*has undeniably been deprived of its investments in ETIZ as a result of Respondent's refusal to allow Claimant to develop ETIZ on the allocated land and as required by the 2012 ETIZ Agreement. Under the express terms of the 2012 ETIZ Agreement, Akgun cannot use the allocated land for any purpose other than the development of ETIZ and cannot develop ETIZ on any other land. It is undisputed that Claimant has had no ability to use the allocated land for the agreed purpose since July 2014. As a result, its investment in ETIZ has been completely destroyed*".[781]

791. Claimant further argues that Respondent's expropriation was unlawful, given that Article IV(1) of the BIT establishes the following criteria for a lawful expropriation:[782]

791.1. The expropriation must be for a public purpose;

791.2. Done in a non-discriminatory manner;

791.3. Upon payment of prompt, adequate and effective compensation; and

791.4. in accordance with due process of law and the general principles of treatment provided for in Article III of the TEBIT.

792. Claimant argues that Respondent did not fulfil these requirements, given that, even assuming that the expropriation of Claimant's investments was justified and non-discriminatory, "*it is undisputed that Respondent has never paid any compensation to Akgun for the deprivation of Akgun's investment*" nor did it reimburse Akgun for its payment for the first 100ha of land.[783]

<u>Respondent's Position in the SOD</u>

793. The classical formulation of expropriation requires a compulsory transfer of property rights[784] or "*taking*" of property by a governmental authority[785] and that to prevail in a "*takings*" claim, Claimant must at minimum prove that (i)

[781] SOC, at [5.15].
[782] SOC, at [5.17].
[783] SOC, at [5.18]-[5.19].
[784] SOD, at [203]; Exhibit RLA-10, at [19].
[785] SOD, at [203]; Exhibit RLA-11, at [280].

it owned property and (ii) the ownership of the property was forcibly transferred to another owner by the State.[786]

794. Additionally, the standard for a regulatory taking is more exacting when the "*relevant government action is within the police power of the State*",[787] requiring essentially that "*the measure [be] so extreme and punitive as to destroy all value of an existing investment*"[788] such that "*the investment's continuing capacity to generate a return has been virtually extinguished*".[789]

795. In any case, Akgun did not own any investment that could be expropriated or deprived, given that the Agreement at the point when Akgun abandoned the Project had no economic value or negative economic value.[790]

796. The land lease of the Sendafa site (or any other site) could only be validly effected if Claimant followed all the terms and conditions of the ETIZ Agreement, including the need to carry out an EIA and/or environmental studies, and comply with all relevant laws of Ethiopia.[791]

797. Given that, under Ethiopian law, no party can commence implementation of any project that requires an environmental impact assessment without authorization from the Environmental Protection Authority or from the relevant regional environmental agency, Respondent argues that the ETIZ Agreement (which would lease land to Claimant subject to Respondent's environmental laws) had no economic value until such environmental laws and requirements were met.[792]

798. Claimant's assertion that the ETIZ Agreement had economic value is not factually "*genuine*" [793] because Claimant (1) denies the terms of the Agreement that require Akgun to follow the environmental laws and

[786] SOD, at [203].
[787] SOD, at [204].
[788] SOD, at [205].
[789] Exhibit RLA-12, at [393], [397] & [399].
[790] SOD, at [246].
[791] SOD, at [247]-[253].
[792] SOD, at [254]-[256].
[793] SOD, at [256].

obligations in Ethiopia[794] and (2) denies that the EIAs Akgun submitted were inadequate.[795]

799. This "*lack of factual genuineness is also evident from Akgun's own express rejection of alternative and less environmentally sensitive land for development*" due to its obsession with developing on the Sendafa site,[796] even though Respondent was "*not only ready, willing, and able to allocate an alternate land but also took the time to give Mr. Yusuf Akgun a tour of possibilities and offered multiple alternatives*".[797]

800. Additionally, Akgun's characterisation of the "*instruments of [Respondent's] deprivation*" as the "*regulatory or other administrative hurdles*" [798] (i.e. the request for an EIA) Akgun had to go through includes at least five separate propositions: "*(i) Claimant has been deprived of its investment; (ii) this is as a result of Respondent's refusal to allow it to develop the ETIZ Project on the allocated land; (iii) the Agreement limits any development to the allocated land; (iv) the Agreement prohibits the use of the land for any other purpose; and (v) Claimant cannot develop ETIZ on any other land*",[799] all of which Respondent claims are factually or legally inaccurate.[800]

801. Furthermore, any "*possible claim of indirect or creeping regulatory expropriation is decisively defeated by Akgun's own abandonment of the Project for its inability to comply with its own contractual commitments*"[801] and/or its inability to "*clear the environmental hurdle with a proper EIA or perhaps a different mix of industries*".[802]

802. It is common ground between the Parties that the issue at hand is "*the requirement and/or adequacy of the EIA and the possibility of relocation in view of environmental concerns"* and that the *"singular measure that Ethiopia has taken is to issue what Akgun calls the suspension letter*",[803] which merely highlights the "*environmental concerns that multiple agencies*

[794] SOD, at [256]; Exhibit C-9, at Arts. 8(10)-(12).
[795] SOD, at [257].
[796] SOD, at [259]-[262].
[797] SOD, at [263].
[798] SOD, at [272].
[799] SOD, at [273].
[800] SOD, at [274].
[801] SOD, at [275].
[802] SOD, at [266].
[803] SOD, at [277].

had raised, describes the nature of the environmental issues, indicates the illegality of the commencement of construction works prior to the approval of an EIA, requests the submission of an adequate EIA, and suspends construction until such a time as the EIA would have been presented".[804] Respondent claims that it did not cause any incremental encroachments on Akgun's contractual rights let alone lead to the "*eventual total destruction of whatever value the Agreement might have had at the time*."[805]

803. The "*suspension letter*" did not suspend the Agreement, but merely "*suspend[ed] unauthorized and premature construction works until such a time as the environmental impact of the Project was properly assessed under both existing laws and the Agreement itself*."[806] Respondent consequently concludes that it did not terminate or expropriate Akgun's investment (and that it was in fact Akgun that behaved cavalierly towards the EIA requirements and ended up abandoning the Project).[807]

804. Respondent therefore argues that "*Akgun's expropriation claim thus falls for failure to show and prove: (i) the total or near total destruction of an investment; (ii) a series of illegitimate or arbitrary regulatory or other state measures; (iii) that the EIA requirement was unlawfully imposed; (iv) that the rejection of the EIA was pretextually rendered; and, overall, for total failure to even identify much less prove (v) any plausible and illegitimate expropriatory intent, motive or purpose*".[808]

<u>Claimant's Position in Claimant's Reply</u>

805. Claimant argues that Respondent's argument neither "*replies to Claimant's legal grounds or arguments*"[809] nor does it "*set out in sufficient detail the factual and legal basis for*"[810] Respondent's position.[811]

806. Claimant argues that Respondent's "*general failure to rebut Claimant's authorities"* seems to show that it accepts the *"Claimant's statement of the*

[804] SOD, at [278].
[805] SOD, at [281].
[806] SOD, at [282].
[807] SOD, at [283]-[287].
[808] SOD, at [288].
[809] As required under Art. 21 of the UNCITRAL Rules.
[810] As required under Procedural Order No. 1, at [10.1].
[811] Claimant's Reply, at [5.115].

law applicable to indirect expropriation" [812] and that Respondent cannot "*vaguely and without providing explanation or support [assert] that Claimant's expropriation claims fail for its alleged 'failure to show and prove' 'a series of illegitimate or arbitrary regulatory or other state measures', 'that the EIA requirement was unlawfully imposed', 'that the rejection of the EIA was pretextually rendered,' and 'any plausible and illegitimate expropriatory intent, motive or purpose'"*.[813]

807. Claimant states that Respondent does not provide any authority for its suggestion that "*the inquiry into whether the balance of rights and obligations contained in the Agreement itself would have had a determinable and ascertainable positive economic value to Claimant is a more exacting one than the Tribunal's inquiry into whether the Agreement constituted an investment for purposes of jurisdiction*".[814]

808. Claimant states that, although Respondent has failed to explain a legal basis for its arguments, Claimant will try its best to respond to Respondent's arguments.[815]

809. First, so long as Claimant has an "*investment*" under the TEBIT, such an investment will be protected from expropriation, and there does not need to be an investigation into the investment's economic value.[816] Claimant notes that Article IV of the TEBIT "*references the 'value' of the expropriated asset only in conjunction with the prescribed 'compensation' due when an expropriation in fact occurs. As such, the issue of economic damage to Claimant arising from Respondent's expropriation is not a requirement for a finding of expropriation under the BIT.*[817] *Nor is a finding of economic benefit to Respondent a prerequisite.*"[818]

810. Second, Respondent's argument misrepresents the facts and misconstrues Ethiopian law, given that Respondent argues that expropriation is impossible because the ETIZ Agreement had no value or even negative value at the time when Akgun abandoned the Project, even though the reason why the ETIZ

[812] Claimant's Reply, at [5.117].
[813] Claimant's Reply, at [5.118], citing SOD, at [288].
[814] Claimant's Reply, at [5.120], citing SOD, at [245].
[815] Claimant's Reply, at [5.121].
[816] Claimant's Reply, at [5.125] & [5.127].
[817] Claimant's Reply, at [5.126]; Exhibit CLA-1, at Art. IV(2); Exhibit CLA-25, at [504]-[505].
[818] Claimant's Reply, at [5.126]; Exhibit CLA-116, at [18.76]; Exhibit CLA-33, at [103].

Agreement supposedly had no value was because of Respondent's expropriatory measures (namely, its arbitrary imposition of an EIA requirement for ETIZ culminating in the suspension of the Project).

811. Claimant argues that Respondent's assertion that Claimant's investment had no value at the time, in fact, is not a defence to Claimant's expropriation claim, but rather an admission that an indirect expropriation had in fact occurred under the sole effects test.[819]

812. Additionally, Respondent's assertion that the 2012 ETIZ Agreement required Claimant to undertake an EIA for ETIZ is incorrect given that (1) Article 8(10) of the ETIZ Agreement should properly be deemed to refer to "*Akgun's responsibility under the Environmental Pollution Control Proclamation No. 300/2002 and Prevention of Industrial Pollution Council of Ministers Regulation No. 159/2008*"[820] and not Akgun's responsibility to provide an EIA, and (2) Article 8(12) of the ETIZ Agreement only provides that Akgun shall respect the Agreement and all other conditions stated in the ***relevant*** laws of Ethiopia. Akgun further claims that the EIA is not such a ***relevant*** law, given that there was no corresponding directive issued to effect the EIA Proclamation and given that Respondent did not follow the EIA Proclamation in issuing permits and licenses to Claimant before the EIA was approved.[821]

813. Additionally, Claimant states that, even under Respondent's standards, Claimant's materials, equipment and know-how are assets (as defined in the TEBIT) which are protected from expropriation.[822]

814. Moreover, Respondent has not disputed that creeping and/or indirect expropriation may occur depending on the aggregate effect of the series of contested measures on the investment, and must therefore be taken to accept that claim.[823]

815. Claimant then goes on to discuss the series of events that it claims contributed to the creeping expropriation of its investments.[824]

[819] Claimant's Reply, at [5.128].
[820] Claimant's Reply, at [5.131]; Tekle Report, at [2.47].
[821] Claimant's Reply, at [5.132]-[5.136].
[822] Claimant's Reply, at [5.138]-[5.140].
[823] Claimant's Reply, at [5.144].
[824] Claimant's Reply, at [5.145]-[5.155].

816. Furthermore, "*even 'covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property' constitutes expropriation*",[825] which is essentially an iteration of the "*sole effects*" doctrine.

817. Claimant refers to the tribunal's analysis in *Biloune et al. v. Ghana Investment Centre*[826] to argue that, where there was a problem unrelated to the missing EIA that caused a cessation of Claimant's investment (i.e. the competing Condominium Projects that Respondent favoured and wished to proceed with in lieu of the ETIZ Project), the Tribunal must find that there was expropriation.[827]

818. Claimant also disagrees with Respondent's characterisation that the "true reason for any deprivation was Claimant's failure to accept alternative land or to alter the scope of the Project at the existing site."[828]

819. First, Claimant states that it negotiated and committed to undertake specifically the ETIZ Project, "*the scope and details of which Akgun had presented to Respondent in its pre-feasibility and final feasibility reports in 2009 and which were further reflected in that 2010 ETIZ Agreement and 2012 ETIZ Agreement*"[829] and that Respondent cannot transform "*its substantial deprivation of Claimant's right to develop ETIZ into a mere incidental limitation on a right to develop some nondescript project by claiming that Claimant could have entered a new agreement with Respondent to build that nameless, shapeless project*".[830] Claimant claims that the "*investment was the right to develop ETIZ in the manner the parties had envisioned and agreed*",[831] and that depriving Claimant of that right was an expropriation.

820. Second, Claimant cannot be faulted for not accepting the alternative land for the Project because "*each of the locations [Respondent] informally offered in August 2015 … were unsuitable for ETIZ due to their distance from a*

[825] Claimant's Reply, at [5.156]; Exhibit CLA-33, at [103].
[826] Claimant's Reply, at [5.160]-[5.161]; Exhibit CLA-121, at pg. [184], [187] & [191]-[192].
[827] Claimant's Reply, at [5.161].
[828] Claimant's Reply, at [5.162].
[829] Claimant's Reply, at [5.163].
[830] Claimant's Reply, at [5.163].
[831] Claimant's Reply, at [5.163].

population center" [832] and, while Claimant fully intended to work with Respondent to source for suitable lands, it "*soon became clear that Respondent did not take its obligation to provide a suitable alternative seriously*".[833]

821. Claimant claims that it did not voluntarily abandon the ETIZ Project and did not reject any suitable alternative land, but only departed from the Project in the wake of Respondent's expropriation, and that Respondent's measures effected a substantial deprivation on Claimant's investments.[834]

822. Furthermore, Respondent's expropriation of Claimant's investments was unlawful because, for an expropriation to be lawful, it had to be for "*a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law*" (as required under Article IV(1) of the TEBIT)[835], and Respondent satisfied none of these requirements (and definitely did not satisfy *all* of these requirements).[836]

823. Claimant asserts that it is "*undisputed that Respondent has not provided any compensation for Claimant's expropriated investments*", much less the prompt, adequate and effective compensation required by Article IV(1) of the TEBIT, and that the Tribunal does not need to even consider any other factor in light of this situation.[837]

824. Claimant also deals with the other requirements for a lawful expropriation:

    824.1. **The expropriation must be done for a public purpose**: Claimant claims that Respondent's stated reason for its ultimate suspension of ETIZ on the land that it allocated for the ETIZ Project was Claimant's alleged failure to procure a satisfactory EIA, but this cannot serve as a "*public purpose*" in the present case as "*Respondent's expropriation of Claimant's rights to develop ETIZ under the 2012 ETIZ Agreement occurred due to Respondent's initial allocation of unsuitable land for*

[832] Claimant's Reply, at [5.163]; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.25].
[833] Claimant's Reply, at [5.164].
[834] Claimant's Reply, at [5.166].
[835] Exhibit CLA-1, at Art. IV(1).
[836] Claimant's Reply, at [5.167]; Exhibit CLA-44, at [428] & [433]; Exhibit CLA-36, at [716]-[717]; Exhibit CLA-45, at [496]-[497].
[837] Claimant's Reply, at [5.168].

ETIZ, which Claimant could not fix with futile revisions to its EIA".[838] Although Respondent at one time admitted its mistake and offered to compensate Claimant,[839] it has now chosen to instead claim that Claimant was at fault for failing to present a satisfactory EIA.[840] Respondent cannot shield itself from liability for claiming that the decision to suspend the ETIZ on the unsuitable land was for a "*public purpose*" when Respondent was the one who created the initial problem (and then weaponised the EIA procedures to suspend the ETIZ without compensating Claimant).[841]

824.2. **The expropriation must be non-discriminatory**: Respondent's stated justification that Claimant produced an unsatisfactory EIA reveals that Respondent's actions were discriminatory, as the "*Respondent's Directive No. 1/2008 purportedly required EIA for both ETIZ and the Condominium Project [but Respondent only] suspended development of the [ETIZ] Project due to a lack of EIA*"[842] and "*Respondent's officials admitted to Akgun that ETIZ was subject to 'sabotage' in favour of the Condominium Project, which, unlike ETIZ, involved local developers*".[843]

824.3. **The expropriation must be in accordance with due process***:* Respondent's expropriation was not in accordance with due process, given that the EIA Proclamation required the relevant agency to make a decision regarding Claimant's submitted EIA within fifteen working days under the EIA Proclamation,[844] but Respondent instead suspended and then deferred development of the ETIZ Project until the prolonged state of limbo turned permanent.[845] Claimant also claims that the "*EIA Proclamation does not create a private right of action for investors to address any anomalies in the EPA's process or decisions*" and that the "*Respondent's refusal to meaningfully*

[838] Claimant's Reply, at [5.170].
[839] Exhibit C-9, at Art. 11(11); Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.7] & [7.14]; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.21].
[840] Exhibit C-16.
[841] Claimant's Reply, at [5.170].
[842] Claimant's Reply, at [5.171]; Exhibit C-100.
[843] Claimant's Reply, at [5.171]; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.7] & [7.9]; Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [5.20].
[844] Tekle Report, at [2.63].
[845] Claimant's Reply, at [5.172].

consider Claimant's water treatment plan in the EIA, permanent deferral on making any actual decision on Claimant's EIA, and refusal to provide any meaningful avenue for aggrieved investors to appeal an unfavorable EIA assessment, taken together, denied Claimant due process over the course of the expropriation".[846]

825. Consequently, as Respondent's expropriation was not in accordance with each condition of Article IV(1) of the TEBIT, the expropriation was unlawful.[847]

826. Furthermore, Claimant argues that the Police Powers doctrine[848] does not shield Respondent from liability for expropriation. As an initial matter, a measure's effect (and not its purpose) determines whether a measure is expropriatory[849] (i.e., the purpose is less important than the effect in assessing whether expropriation has occurred),[850] such that Respondent's actions constitute expropriation if they deprived Claimant of its investments (notwithstanding that they could have been a legitimate exercise of Respondent's Police Powers).

827. In any case, even if Respondent had an allegedly lawful purpose for its expropriation, it must still fulfil the requirements under Article IV of the TEBIT that its expropriation must be (1) for a public purpose, (2) non-discriminatory, (3) in accordance with due process of law and (4) coupled with payment of prompt, adequate and effective compensation.[851] Therefore, even if Respondent's expropriation had been for a public purpose, Article IV(1) of the TEBIT would still require Respondent to compensate Claimant for its expropriated investment.[852] Claimant argues that this is in line with other tribunals which generally agree that "*a state's public purpose – no matter how laudable – will not exonerate it for an expropriation without compensation*"[853] and that even if the taking is for environmental purposes,

[846] Claimant's Reply, at [5.172].
[847] Claimant's Reply, at [5.173].
[848] Refer to Paragraph [832] below.
[849] Claimant's Reply, at [5.175]; Exhibit CLA-33, at [103] & [111]; Exhibit CLA-122, at [22]; Exhibit CLA-66, at [71]; Exhibit CLA-118, at [270]; Exhibit CLA-121, at pg. [209].
[850] Claimant's Reply, at [5.175]; Exhibit CLA-121, at pg. [209]. See also Exhibit CLA-34, at [608]; Exhibit CLA-6, at [115] & [116].
[851] Exhibit CLA-1, at Art. IV(1).
[852] Claimant's Reply, at [5.176].
[853] Claimant's Reply, at [5.177]; Exhibit CLA-66, at [71].

"*whether domestic or international, the state's obligation to pay compensation remains*".[854]

828. This requirement to pay compensation is even more applicable in the present case, as it submits that Respondent's environmental concerns were a mere pretext to "*move forward with its policy decision to pursue additional housing instead of ETIZ*".[855]

829. While some tribunals have held that "*a state's bona fide regulations falling within its Police Powers will not amount to expropriatory measures even when they effect some level of deprivation*"[856] (i.e. the "**Police Powers doctrine**"), a state must show that its regulatory or administrative measures were non-discriminatory (in order to avail itself of the Police Powers doctrine).[857]

830. This requirement of being non-discriminatory is not met in the present situation, given that (1) Respondent claimed that Ethiopian environmental laws required an EIA (because Directive No. 1/2008 lists "*Industrial Zone[s]*" among the projects requiring an EIA under the EIA Proclamation)[858] but then admitted that Directive No. 1/2008 was never signed and therefore remains in draft form[859] (meaning that an EIA was not technically required by law at the time as the Directive remains without legal effect).[860]

831. Respondent's contemporaneous conduct and its admissions drive this point home, as Respondent had made a policy decision to favour the competing Condominium Projects and to forego the ETIZ Project, as evidenced by its "*failure to require an EIA for the Condominium Project while demanding that Akgun provide an EIA for ETIZ [proving] the arbitrary and discriminatory nature of that demand*"[861] (even though Directive No. 1/2008 purportedly required EIAs for both industrial zones and condominium constructions).[862]

[854] Exhibit CLA-66, at [71]-[72].
[855] Claimant's Reply, at [5.178].
[856] Claimant's Reply, at [5.179]; Exhibit CLA-48, at [254]-[255].
[857] Exhibit CLA-48, at [255].
[858] Claimant's Reply, at [5.181]; Exhibit RLA-2.
[859] Claimant's Reply, at [5.181]; Exhibit C-100.
[860] Tekle Report, at [2.6] & [2.9]-[2.10].
[861] Claimant's Reply, at [5.182].
[862] Exhibit RLA-2.

832. Claimant submits that "*international law does not sanction a State's use of its Police Powers to target an individual investor in this way*"[863] and that requirements or conditions specifically excluding or discriminating against Claimant should constitute expropriation.[864] Respondent's insistence on an EIA was far from the lawful exercise that Respondent paints it to be, and the EIA requirements (and procedures) were not consistently[865] and non-discriminatorily applied (and Respondent had targeted the ETIZ Project for failure in order to proceed with its internal Condominium Projects).[866] Claimant states that "*because Respondent's purported EIA requirement was not, in fact, a requirement under Ethiopian law or the 2012 ETIZ Agreement and only applied arbitrarily and discriminatorily as a bar to ETIZ*",[867] the Police Powers doctrine does not apply.

833. Last, Claimant discusses Respondent's cited authorities,[868] stating that they are distinguished as, "*unlike the export ban, forced administration, and fiscal measures that Claimants argued constituted expropriatory measures in SDMI, Saluka, Burlington, and Venezuela Holdings*",[869] Respondent's purported EIA requirements are not found in Ethiopian Law (since Directive No. 1/2008 was left unsigned) or the ETIZ Agreement.[870] Claimant states that Respondent's decision to require an EIA was "*made with nothing but discretion, because Ethiopia's laws do not require EIA*",[871] and, in contrast to "*SDMI, Saluka, Burlington, and Venezuela Holdings, Ethiopia's insertion of the EIA requirement, eventual suspension of works on ETIZ purportedly in the name of such requirement, and failure to propose suitable alternative lands effected a permanent and total deprivation of Claimant's rights to develop ETIZ*".[872]

834. Claimant argues that "*international law does not immunize a state's discriminatory conduct even where it is carried out via regulation*" and that

[863] Claimant's Reply, at [5.183]; Exhibit CLA-41, at [415], citing Exhibit CLA-6, at [429].
[864] Claimant's Reply, at [5.184].
[865] Claimant's Reply, at [5.184]; Tekle Report, at [2.11].
[866] Claimant's Reply, at [5.184].
[867] Claimant's Reply, at [5.185]; Exhibit CLA-6, at [122].
[868] Exhibit RLA-11, at [279]-[288]; Exhibit CLA-48, at [271]-[275]; Exhibit RLA-12, at [425]-[426], [445], [450] & [456]-[457]; Exhibit RLA-13, at [286]-[287].
[869] Claimant's Reply, at [5.187].
[870] Tekle Report, at [2.6]-[2.10] & [2.36].
[871] Claimant's Reply, at [5.187].
[872] Claimant's Reply, at [5.187].

the "*state is nevertheless liable for expropriation where its discriminatory regulation effects a substantial deprivation*".[873]

835. Consequently, Claimant argues that Respondent's Police Powers defence must fail.

Respondent's Position in Respondent's Rejoinder

836. Respondent reiterates its claim that Claimant has failed to prove that Ethiopia expropriated any investment.

837. In Claimant's SOC, Claimant has failed to plead a claim for expropriation, but merely (a) submitted that expropriation can occur from a single act or failure to act or by the cumulative effect of a series of actions or inactions, [874] and (b) stated in a conclusory manner, without more, that an expropriation of its purported investment had been effected "*through a series of measures culminating in the final suspension of ETIZ in mid-2014*" that "*taken together… constitute an indirect and/or creeping expropriation*".[875]

838. Accordingly, Claimant has not set out in the SOC what actions or measures Respondent took to expropriate its investment.[876]

839. The standard of expropriation that Claimant has chosen to invoke (i.e. indirect and/or creeping expropriation) requires "*Claimant, by its own reckoning, to set out 'incremental encroachment' [877] by a 'series of measures'[878] that 'eventually destroys or nearly destroys the value of his or her investment'[879]*" and that Claimant, "*having declined to set out such a 'series of measures' earlier in the Statement of Claim (as it was required to do), now seeks to cure this defect by setting out in its Reply memorial (for the first time), eight 'measures' that would supposedly effect such eventual destruction*" which Respondent claims is no better than Claimant's earlier silence.[880]

[873] Claimant's Reply, at [5.188].
[874] Respondent's Rejoinder, at [336]-[337].
[875] Respondent's Rejoinder, at [337], citing SOC, at [5.13].
[876] Respondent's Rejoinder, at [338].
[877] SOC, at [5.10], quoting Exhibit CLA-31, at pg. [11].
[878] SOC, at [5.13].
[879] SOC, at [5.10], quoting Exhibit CLA-31, at pg. [11].
[880] Respondent's Rejoinder, at [341]-[342].

840. As a preliminary matter, Respondent disagrees that an expropriation may be effected by inaction, given that expropriation is the "*gravest of the international delicts in the realm of investment protection*" and "*may not be accomplished by mere neglect*".[881] Respondent states that "*Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place*".[882] McLachlan, Shore, and Weiniger[883] state that *"while some tribunals 'do not find a distinction between actions or inactions to be relevant,' '[t]his lack of attention to State purpose is troubling,' and the 'teleologically driven' test is 'to be preferred'"*.

841. Moving to Akgun's eight "*measures*"[884] that it claims led to the eventual expropriation of its investments, Respondent argues that those alleged "*measures*" consist of false factual allegations which, "*even if true, are not by their nature capable of comprising an expropriation event.*"[885] Only one "*measure*", which if true, could possibly encroach upon any ownership right that Akgun had would be its claim for wrongful suspension of works in tandem with a failure to offer suitable alternative sites. However, Akgun, having failed to set out a series of measures earlier in their Statement of Claim, now seeks to "*embellish the only true 'measure' it invokes by leaning upon a contrived chain of empty allegations*".[886]

842. In choosing to plead indirect or creeping expropriation, Claimant has *"recognized and confirmed that the suspension of works alone is not sufficient to constitute a taking*" and therefore "*belatedly sought to concoct a series of 'measures' that it might hitch onto the so-called suspension letter in order to reach out for the threshold of expropriation but has, in so doing, failed to add anything of weight whatsoever to the original measure itself (the insufficiency of which is already admitted)*".[887]

843. Claimant's purported "*measure*" fails because (1) Respondent's EIA requirement was not arbitrary and was grounded in both law and contract and (2) Akgun acknowledges and confirms that an offering of suitable

[881] Respondent's Rejoinder, at [343].
[882] Exhibit RLA-53, at [84].
[883] Exhibit RLA-54, at [8.72].
[884] Respondent's Rejoinder, at [344].
[885] Respondent's Rejoinder, at [345].
[886] Respondent's Rejoinder, at [346].
[887] Respondent's Rejoinder, at [347].

alternative land would serve to independently defeat its claim.[888] Akgun only challenges the suitability of the alternatives offered to it without much evidence (other than a single video of one such site offered and the self-serving testimony of its own principals as evidence).[889]

844. The suitability of the alternative sites can be seen from "*four additional videos, taken by Akgun itself but earlier withheld from this Tribunal, the audio of which features favorable contemporaneous commentary by none other than Messrs. Yusuf and Yunus Akgun"*[890] and contends that the reality of the situation is that *"following Akgun's failure to discharge its obligations of environmental study, Ethiopia offered numerous suitable sites*" and "*enhanced these proposals of alternative lands with generous offers of compensation in the form of rent abatement and tax exemption*" [891] but Akgun refused these offers "*for reasons only known to itself*".[892]

845. Additionally, Claimant's quoted case of *Biloune et al. v. Ghana Investment Centre*[893] should be distinguished from the present case because, in that case, the "*stop work order*" by the State was only the first in a "*series of measures*", whereas Akgun relies on the stoppage of work as the culmination of its alleged expropriation.[894]

846. Claimant *"does not dispute that the State's intent, motive, or purpose may be relevant considerations in the expropriation inquiry, and openly acknowledges that '[s]ome tribunals have held that a state's <u>bona fide</u> regulations falling within its Police Powers will not amount to expropriatory measures even when they effect some level of deprivation,' but that '[t]o avail itself of the Police Powers doctrine' a State 'must show that its regulatory or administrative measures were non-discriminatory*'''.[895]

847. However, Claimant has made bold (i.e. false) allegations that Respondent only invoked the EIA requirements as a discriminatory machination to halt

[888] Respondent's Rejoinder, at [347], citing Claimant's Reply, at [5.128].
[889] Respondent's Rejoinder, at [349]; Exhibit C-140; Exhibit C-141; Yunus Akgun 1st Witness Statement dated 19 November 2020, at [7.15].
[890] Exhibit R-58.
[891] Respondent's Rejoinder, at [351]; Exhibit C-17 ("H.E. Dr. Arekebe Oqubay also expressed that [Ethiopia] can allocate a land for free in Hawasa or Dire Dawa cities to Akgün GROUP and provide tax exemption for 15 years").
[892] Respondent's Rejoinder, at [351].
[893] Exhibit CLA-121.
[894] Respondent's Rejoinder, at [353]-[356].
[895] Respondent's Rejoinder, at [353], quoting Claimant's Reply, at [5.179].

the ETIZ Project in favour of the Condominium Projects, and Respondent's continued insistence for an EIA for ETIZ was intended to target the ETIZ Project and cause its demise.[896]

848. The truth is that (a) the "*EIA process is established in law and was initiated and conducted for the sole purpose of safeguarding the public health and welfare in proximity to key sources of water for the burgeoning population of its capital city, precisely an instance of bona fide regulations falling within its police powers*"[897] and (b) its so-called suspension letter "*merely (i) highlights the environmental concerns that multiple agencies had raised; (ii) describes the nature of the relevant environmental issues; (iii) indicates the illegality of the commencement of construction works prior to the approval of an EIA; (iv) requests the submission of an adequate EIA; and (v) suspends construction until such a time as the EIA would have been presented*" and were *"legitimate steps to ensure regulatory compliance consistent with the contractual and legal obligations that Claimant assumed under the Agreement that it signed*".[898]

849. Expropriation, at its heart, requires that a "*measure*" is "*so extreme and punitive as to destroy all value of an investment*"[899] and that the "*measures*" relied upon by Claimant "*are not capable of comprising such an event*".[900] Respondent asserts that for Akgun's "*expropriation claim to succeed [it] requires that Ethiopia's conduct reduced the value of the "investment" to zero at the time of the so-called suspension letter in July 2014*".[901] This did not happen, and Akgun failed to dedicate a rigorous level of attention to the exercise of environmental review. In fact, Ethiopia offered *"two alternative options: first, the possibility to alter the mix of industries it had intended or, second, to acquire various alternative lands with generous rent abatement and tax forgiveness, all of which Akgun declined and elected instead to seek treaty recourse*".[902]

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[896] Respondent's Rejoinder, at [357], quoting Claimant's Reply, at [5.180] & [5.184].
[897] Respondent's Rejoinder, at [359]. See generally Witness Statement of Mr. Ahmed Abtew dated 12 March 2021; Witness Statement of Mr. Sisay Gemechu Edo dated 12 March 2021.
[898] Respondent's Rejoinder, at [359].
[899] As seen in the words of the Burlington Resources v. Republic of Ecuador tribunal, "*[i]t must be shown that the investment's continuing capacity to generate a return has been virtually extinguished.*" (Exhibit RLA-12, at [399]).
[900] Respondent's Rejoinder, at [360].
[901] Respondent's Rejoinder, at [361].
[902] Respondent's Rejoinder, at [361].

850. Respondent claims that "*for this Tribunal to find that there has been an expropriatory deprivation, it would necessarily have to find that Akgun held a singular discretion in its unreasonable refusals*" but even "*Akgun [does not] itself [put] forth such a suggestion*".[903]

851. For the reasons above, Respondent claims that "*Akgun's expropriation claim fails for its failure to show and prove: (i) the existence of an investment of economic value, (ii) the total or near total destruction of such investment; (iii) a series of illegitimate or arbitrary regulatory or other State measures; (iv) that the EIA requirement was unlawfully imposed; (v) that the rejection of the EIA was pretextually rendered; and, overall, for total failure to even identify much less prove (vi) any plausible and illegitimate expropriatory intent, motive or purpose*".[904]

Claimant's Position in Post-Hearing Submission

852. There is "*no absolute rule concerning the scope of the police powers doctrine*" but one must rely on the "*relevant treaty's expropriation provision to determine the doctrine's potential application to an expropriation event*".[905]

853. Most investment treaties define a State's power to expropriate foreign investments, and a State's expropriation of a foreign investment is "*lawful*" only if (1) the act was done for a public purpose, (2) in a non-discriminatory manner, (3) in accordance with due process of law, and (4) against payment of compensation.[906]

854. The proponents of the "*broad application of police powers, however, apply it as an absolute defence, regardless of treaty language*" and that these proponents "*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*".[907] Claimant further states that 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*", and therefore argue that

[903] Respondent's Rejoinder, at [362].
[904] Respondent's Rejoinder, at [363].
[905] Claimant's Post Hearing Submissions, at [2.1].
[906] Claimant's Post Hearing Submissions, at [2.4].
[907] Claimant's Post Hearing Submissions, at [2.5].

"*investment treaties cannot limit states' police powers under customary international law*".[908]

855. Claimant references the *Saluka v. Czech Republic* [909] and *Methanex Corporation v. United States of America*[910] cases, which advance the general proposition that States complying with the first three requirements in Paragraph [853] above will not be liable to pay compensation.[911]

856. However, Claimant argues that the "*Tribunal should not follow this broad approach to the Police Powers doctrine because its unduly expansive nature permits States to circumvent their treaty obligations*" and that "*the scope of police powers must be defined with reference to the terms of the treaty at issue*".[912]

857. Claimant refers to *ADC Affilliate Ltd. and ADC & ADMC Management Ltd v. Hungary*, [913] which stated that, "*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*".[914]

858. The TEBIT could have provided for specific Police Power exceptions, but did not do so, and, without "*such explicit wording, giving broad effect to the police powers doctrine may undermine the protection of foreign investment*".[915]

859. Article IV of the TEBIT operates as a limitation on Respondent's Police Powers, "*and mandates that the state pay compensation for an expropriatory act, even if done for a public purpose and in a non-discriminatory way*".[916] Accordingly, even a *bona fide* and non-discriminatory act aimed at a public purpose requires payment of compensation, so long as the act has an expropriatory effect, and to further expand Respondent's ability to use its

[908] Claimant's Post Hearing Submissions, at [2.5].
[909] Exhibit CLA-48, at [255].
[910] Exhibit CLA-157, at pg. [4] & [7].
[911] This is also in line with Exhibit CLA-31, at pg. [94], which Claimant also cited at [2.5] of its Post-Hearing Submissions.
[912] Claimant's Post Hearing Submissions, at [2.9].
[913] Exhibit CLA-29.
[914] Exhibit CLA-29, at [423].
[915] Claimant's Post Hearing Submissions, at [2.10]; Exhibit CLA-159, at [99].
[916] Claimant's Post Hearing Submissions, at [2.12].

Police Powers would undermine the protections that the parties to the Treaty negotiated and agreed upon.[917] Here, because Respondent has not paid compensation to Claimant, it is liable for expropriation (without further inquiry into whether Respondent had used its Police Powers).[918]

860. Claimant states that "*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*".[919]

861. In any event, even under a broader reading of the Police Powers doctrine, Claimant should still prevail as Respondent (1) violated Akgun's legitimate expectations, (2) treated Akgun in a discriminatory fashion, (3) failed to act in good faith towards Akgun, (4) failed to afford Akgun due process, and (5) used its Police Powers out of proportion to the harm Akgun suffered.[920]

862. The differences between the sole effects doctrine and the Police Powers doctrine are that the sole effects doctrine "*defines a state act as expropriatory based on its effect, regardless of state intent"* (as opposed to the Police Powers doctrine "*which defines certain state acts as non-compensable expropriation based on the state's intent*").[921]

863. The two doctrines could, in principle, conflict with one another "*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*",[922] but there would be no genuine conflict in the present case if the Tribunal adopts the view of the *ADC Affilliate Ltd. and ADC & ADMC*

[917] Claimant's Post Hearing Submissions, at [2.13].
[918] Claimant's Post Hearing Submissions, at [2.13]; Exhibit CLA-45, at [496]-[498]; Exhibit CLA-36, at [716]-[171]; Exhibit CLA-44, at [433]-[435].
[919] Claimant's Post Hearing Submissions, at [2.14].
[920] Claimant's Post Hearing Submissions, at [2.15]-[2.24], repeating similar arguments as its submissions on Respondent's breach of FET obligations.
[921] Claimant's Post-Hearing Submission, at [2.26]; Claimant's Reply, at [5.156].
[922] Claimant's Post-Hearing Submission, at [2.26].

Management Ltd v. Hungary[923] tribunal (as described in Paragraph [857] above).[924]

864. Whatever those differences may be, the sole effect doctrine should apply (1) based on the Treaty's plain text (as Article IV of the TEBIT *"focuses on the effect of the state's act, without any reference to the state's intent*"[925]) and (2) because the "*measures at issue were not generally applicable but rather were specific to Akgun and worked a substantial deprivation of Akgun's investment*".[926]

865. In *Siemens A.G. v Argentine Republic*,[927] the applicable provision of the Treaty was used to determine whether the State's intention or the effects of its conduct should be used to determine whether there was expropriation (and since the applicable Treaty referred to "*measures that had the effect of an expropriation*", the intention of the State did not matter in determining whether there was expropriation).[928]

866. Similar to the abovementioned case, Article IV of the TEBIT "*establishes that '[i]nvestment shall not be expropriated, nationalized or* ***subject, directly or indirectly, to measures of similar effects….****' 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*".[929]

867. Furthermore, the measures taken by Respondent in this case were specific to Claimant, a factor that has generally militated in favour of the tribunal's use of the sole effects test in other cases.[930]

[923] Exhibit CLA-29.
[924] Claimant's Post-Hearing Submission, at [2.26].
[925] Claimant's Post-Hearing Submission, at [2.29], citing Art. IV of the TEBIT which states that "*[i]nvestment shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects…."*
[926] Claimant's Post-Hearing Submission, at [2.26].
[927] Exhibit CLA-118.
[928] Claimant's Post-Hearing Submission, at [2.28]; Exhibit CLA-118, at [270].
[929] Claimant's Post-Hearing Submission, at [2.29].
[930] Claimant's Post-Hearing Submission, at [2.30], citing Exhibit CLA-66, at [71]-[72].

868. Regulation "*may also cross the line from acceptable to expropriatory depending on the severity of the effects of the measure*",[931] where "*the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner*"[932] and/or where "*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*".[933]

869. Accordingly, while "*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*".[934] Claimant argues that this test, which it calls the "*substantial deprivation test*", aims to balance the "*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 measure*".[935]

870. In any case, Claimant asserts that "*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*".[936]

Respondent's Position in Post-Hearing Submission

871. As a preliminary matter, the "*police powers doctrine was neither briefed nor otherwise presented to the Tribunal in any meaningful way because Ethiopia's principal argument was that there was no wrongful action attributable to Ethiopia and injurious to the investor that could conceivably qualify as an act of expropriation to begin with*",[937] and that, "*the order for suspension of project works until submission of environmental impact studies was a simple contract performance demand that was unduly elevated to a treaty claim*".[938]

[931] Claimant's Post-Hearing Submission, at [2.31].
[932] Exhibit CLA-159, at [102].
[933] Exhibit CLA-163, at [65].
[934] Claimant's Post-Hearing Submission, at [2.33].
[935] Claimant's Post-Hearing Submission, at [2.33].
[936] Claimant's Post-Hearing Submission, at [2.34].
[937] Respondent's Post-Hearing Submission, at [10].
[938] Respondent's Post-Hearing Submission, at [11].

872. Respondent submits that, (a) "*the police powers doctrine intersects with expropriation when and only when the Tribunal identifies a direct or indirect act that is otherwise expropriatory in the first place*" [939] and (b) the application of these competing doctrines "*requires the Tribunal to decide, genuinely and in good conscience, whether, on balance, Respondent State took an investor's property and denied it compensation*".[940]

873. It is important to note that Claimant "*was asked to suspend works because it was not able to provide satisfactory environmental studies that it expressly undertook to perform by contractual agreement. It was offered a reasonable relocation option. It refused, exited Ethiopia, and initiated this action some four years later. No level of perversion of legal theory can yield a finding of liability on the facts of this case in modern times*".[941]

874. Respondent asserts that the classic formulation of the Police Powers doctrine is that a "*state is not responsible for loss of property or for other economic disadvantage resulting from <u>bona fide</u> general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory*" [942] and that "*where economic injury results from a <u>bona fide</u> non-discriminatory regulation within the police power of the State, compensation is not required*".[943] Respondent also refers to an article by Prof. Catharine Titi to discuss the bounds of permissible Police Powers,[944] and to state that "*new treaties are not inventing new rules inasmuch as they are merely codifying an existing rule in clear terms*".[945]

875. The essential test is "*whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation*" [946] and, whichever doctrine is applied by the Tribunal, the Tribunal must "*determine,*

[939] Respondent's Post-Hearing Submission, at [10].
[940] Respondent's Post-Hearing Submission, at [12].
[941] Respondent's Post-Hearing Submission, at [13].
[942] Respondent's Post-Hearing Submission, at [15]; Exhibit RLA-76, at pg. [1].
[943] Respondent's Post-Hearing Submission, at [16]; Exhibit RLA-77, at pg. [5].
[944] Respondent's Post-Hearing Submission, at [17]; Exhibit RLA-76, at pg. [2].
[945] Respondent's Post-Hearing Submission, at [18]; Exhibit RLA-76, at pg. [13].
[946] Respondent's Post-Hearing Submission, at [14]; Exhibit RLA-76, at pg. [13], quoting Exhibit CLA-48, at [263]-[264].

on the facts of this case and in good conscience, whether the red line was crossed".[947]

876. Respondent also refers to the cases of (1) *Tecmed v Mexico*[948] which stated that the "*principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable*"[949] and (2) *Philip Morris v Uruguay*,[950] in which an argument (made by Claimant in that case) that the Police Powers doctrine had a "*narrow doctrinal scope 'limited to State powers related to protection and security such as enforcement of the law, maintenance of the public order, and defense of the State'*"[951] was "*roundly rejected by an eminent tribunal which found that the State's measures enacting legislation to include a plain-packaging requirement for tobacco products 'were a valid exercise by Uruguay of its Police Powers for the protection of public health*'",[952] and the tribunal in that case further found that the measures enacted were adopted in order to fulfil "*Uruguay's national and international legal obligations for the protection of public health*".[953]

877. The findings in the *Philip Morris v Uruguay*[954] case resonate with the present case, as (1) Article 44 of Respondent's Constitution establishes that "*all persons have the right to a clean and healthy environment*"[955] and (2) Article 92 of Respondent's Constitution states that the *"[Respondent] shall endeavour to ensure that all Ethiopians live in a clean and healthy environment*" and that "*[Respondent] and [its] citizens shall have the duty to protect the environment*".[956]

878. Respondent expressly codified this obligation (as well as its obligation under customary obligations to err on the side of caution, or what it calls the "*precautionary principle*") within its EIA Proclamation, which states that the

[947] Respondent's Post-Hearing Submission, at [14].
[948] Respondent's Post-Hearing Submission, at [19]; Exhibit CLA-6.
[949] Respondent's Post-Hearing Submission, at [19]; Exhibit CLA-6, at [119].
[950] Exhibit RLA-78.
[951] Respondent's Post-Hearing Submission, at [20]; Exhibit RLA-78, at [197].
[952] Respondent's Post-Hearing Submission, at [20]; Exhibit RLA-78, at [307].
[953] Exhibit RLA-78, at [302].
[954] Exhibit RLA-78.
[955] Exhibit RLA-32, at Art. 44(1).
[956] Exhibit RLA-32, at Art. 92.

"*[Environmental Protection] Authority or the relevant regional environmental agency shall err on the side of caution while determining the negative impact of a project having both beneficial and detrimental effects, but which, on balance, is only slightly or arguably beneficial, and thus determine that it is likely to entail a negative significant impact*",[957] and, further to its obligations under customary international law, Respondent "*bears the burden of the precautionary principle qua embedded in its own laws in manifestation thereof, all being well within the bounds of the permissible police powers*".[958]

879. Respondent states that "*the preponderance of the authority considers that (i) the State's police powers constitute a rule of customary international law; and (ii) the scope of such powers extends to bona fide measures to protect public health and the environment*".[959]

880. Moreover, there is a powerful distinguishing factor between the present case and other cases (as stated in its oral arguments).[960] Respondent's acts were in the administration of a pre-existing regime of environmental law, which required Claimant to prepare an EIA before undertaking the ETIZ Project (and were not unknown or new measures).[961] Furthermore, notwithstanding the applicable laws, the ETIZ Agreement itself stated, at Article 8(10), that "*[Claimant] shall protect the environment from pollution by using appropriate methods and technologies. In this regard [Claimant] has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout [sic] the necessary environmental studies required in this regard*".[962]

881. It was clear Claimant knew about its need to submit a full EIA, given that (1) it sought legal advice regarding the ETIZ Project in Ethiopia,[963] and (2) GOTA (which Claimant engaged to perform environmental studies) and Ernst & Young (whom Claimant approached for a proposal but ultimately did not

[957] Respondent's Post-Hearing Submission, at [21]; Exhibit RLA-1, at Art. 4(2). See also Hearing Transcripts Day 9, at [254:1]-[254:14].
[958] Respondent's Post-Hearing Submission, at [22].
[959] Respondent's Post-Hearing Submission, at [23].
[960] Hearing Transcripts Day 9, at [135:1]-[137:17].
[961] Respondent's Post-Hearing Submission, at [24].
[962] Exhibit C-9, at Art. 8(10).
[963] Respondent's Post-Hearing Submission, at [25]; Hearing Transcripts Day 2, at [107:15]-[108:19]; Hearing Transcripts Day 3, at [78:13]-[78:24].

engage) advised Claimant that an EIA was required.[964] Ufuk Akgun confirmed that he knew Claimant required an EIA before starting on the Project (under cross-examination).[965]

882. In other words, when *"viewed through the police powers lens, what one factually sees in this case is an instance of the exercise of Police Powers* ***as established in existing laws*** *of which Claimant had* ***actual knowledge****. The evidence thus establishes that (i) any diligent investor would have known of the requirement of a proponent's EIA for a megaproject such as ETIZ in Ethiopia; and that (ii) Akgun did actually know. In the face of this evidence Claimant has presented only a desperate post hoc theory of technical defect in the enactment of an environmental directive* ***without even bothering to assert that Akgun or any of its principals actually believed this feeble suggestion at any time***".[966]

883. If the Tribunal applies the authoritative articulation of Police Powers described above at Paragraph [874], the only possible conclusion is that Respondent's "*suspension and relocation decision, even if it were to otherwise qualify as a regulatory measure causing a loss of property (it does not), cannot amount to expropriation under international law because (i) it was an application of Ethiopia's existing environmental law which is a quintessential government function well within the Police Powers; and (ii) it is not demonstrated to be discriminatory nor even credibly claimed to be so*".[967]

884. Moreover, "*if the rule to be applied is the police powers doctrine, the analysis is no more complicated than that. Akgun has not even set out a prima facie discrimination claim at all. A discrimination claim requires the showing of disparate treatment of similarly situated parties for impermissible reasons. Akgun has not demonstrated that it was subject to differential treatment vis-à-vis any other party whether similarly situated or otherwise; Akgun has never even claimed that it was mistreated because it was a Turkish company. Indeed, the record is replete with examples of how it was accorded favorable treatment at every step of the way including, after its environmental studies were repeatedly rejected, an offering of land that Mr. Yusuf Akgun himself*

[964] Respondent's Post-Hearing Submission, at [25]; Exhibit R-4; Exhibit R-42, at pg. [25].
[965] Hearing Transcripts Day 3, at [26:25]-[27:3].
[966] Respondent's Post-Hearing Submission, at [27].
[967] Respondent's Post-Hearing Submission, at [30].

endorsed and that the government, for its part, considered to be better suited".[968]

885. Respondent claims that (1) due process "*also forms a part of the exercise of police powers*" but (2) Claimant "*does not even claim that it was denied due process and indeed the record shows that it cannot*".[969] Instead, Respondent states that it "*has set out in painstaking detail the full life cycle of its meticulous review of Akgun's proffered environmental studies*",[970] which it describes as follows:[971]

885.1. Throughout the summer of 2014, Claimant's employee, Mr. Hagos Sequar, repeatedly implored Akgun to produce a full and comprehensive EIA following Ethiopia's earlier rejection of the revised GOTA report. He did so by reference, once again, to Ethiopian law. It was confirmed in examination that Akgun did receive his pleas[972] but that Claimant instead "*produced in October 2014 only a thirty-page addendum to its twice-rejected environmental study*".[973]

885.2. Nevertheless, Respondent's MoEF dutifully reviewed this addendum and concluded in November 2014 that they would support the implementation of the Project under the condition that Claimant would give due consideration to all Respondent's comments on the addendum.[974]

885.3. The MoI also conveyed these comments to Claimant, stating in a letter that "*we advise you to work in close collaboration with the relevant stakeholders, and revise and develop the EIA report as per the given comments*".[975]

885.4. The offer for Claimant to revise and re-submit the studies stood, even after more than "*one year of continuous review of Akgun's inadequate*

[968] Respondent's Post-Hearing Submission, at [31].
[969] Respondent's Post-Hearing Submission, at [32].
[970] Respondent's Post-Hearing Submission, at [32].
[971] Respondent's Post-Hearing Submission, at [32]-[35].
[972] Respondent's Post-Hearing Submission, at [32]-[33]; Exhibit R-46; Exhibit R-50; Exhibit R-51; Hearing Transcripts Day 3, at [28:2]-[29:13].
[973] Respondent's Post-Hearing Submission, at [33]; Exhibit C-78.
[974] Respondent's Post-Hearing Submission, at [33]; Exhibit C-82, at pg. [15].
[975] Respondent's Post-Hearing Submission, at [33]; Exhibit C-27.

reports (the first of which was submitted in September 2013)".[976] However, months passed without reply from Claimant, whose only response to Respondent's review comments came in February 2015, and stated, *inter alia*, that Respondent's "*comments indicate that concerned authority does not have proper knowledge on industrialization and environment issues. None of industrial facilities are environmentally innocent […] With this mentality, industrialization should not be completed nowhere in order not to damage any natural sources. Thus, many developing countries have ignored environmental sensitivities for years that are [imposed] in developed countries*".[977]

885.5. Following Claimant's failure to address the merits of Respondent's concerns, Respondent "*elected to offer less sensitive alternative sites for the ETIZ Project*".[978]

886. In sum, Claimant "*was offered endless opportunities to present and defend proper environmental studies as was required under Ethiopian law in keeping with Ethiopia's police powers privileges. After Akgun failed, it was offered alternate land for relocation with incentives. Akgun's [project] was never terminated. It exited Ethiopia of its own accord and as these generous offers stood throughout. All these facts were confirmed beyond boredom during the evidentiary hearing irredeemably dooming all of Claimant's claims*".[979]

887. With regard to the sole effects doctrine, it "*is an exorbitant and discredited ideological arbitral invention without State consent*"[980] and "*seeks to convert the host State into an issuer of an all-purpose insurance policy*".[981]

888. The sole effects doctrine oversimplifies the equation by considering the effect of a measure as *de facto* evidence of wrongdoing. As explained by Prof. Catharine Titi, the "*sole effect doctrine relates to the determination of an indirect expropriation, and it is the direct antithesis of the police powers doctrine. According to the sole effect doctrine, the effect of the state measure is the litmus test that allows the tribunal to determine whether an indirect*

[976] Respondent's Post-Hearing Submission, at [34]; Exhibit R-4.
[977] Exhibit C-87, at pg. [18].
[978] Respondent's Post-Hearing Submission, at [35]; Exhibit C-31.
[979] Respondent's Post-Hearing Submission, at [36].
[980] Respondent's Post-Hearing Submission, at [37]; Exhibit RLA-54, at [8.88].
[981] Respondent's Post-Hearing Submission, at [38].

expropriation has taken place. The intent of the state in adopting the measure is irrelevant".[982]

889. Even tribunals that have used this doctrine to justify a preferred outcome have done so without totally disregarding the state's intent, although they downgrade it to a second level of importance.[983]

890. Contemporary BITs instruments have unequivocally renounced the sole effects doctrine, citing several recent BITs as proof (all of which have wording to the effect that non-discriminatory regulatory actions taken in good faith for legitimate public objectives are not deemed to be indirect expropriation).[984]

891. In any case, the Tribunal's task "*is limited to determining the intent of the signatory parties of the Treaty, i.e., in this case Turkey and Ethiopia. There is no indication whatsoever that by including a non-expropriation provision in the Treaty, they intended to be bound by arbitral decisions that do not represent their understanding of international law when the treaty was signed. There is no evidence that Ethiopia or Turkey considered or even knew of the 'sole effects' doctrine when they signed the Treaty*".[985] Even accepting "*the most unmitigated form of the exorbitant 'sole effects' theory, Akgun's facts fail to prove expropriation because neither the suspension order nor the relocation decision have caused any effects. The effects, if any, were a function of Akgun's reaction to bona fide measures under the 2012 ETIZ Agreement and the applicable law. Any genuine effects analysis must first reconstruct the sine qua non – the dictionary definition of which is 'an essential condition; a thing that is absolutely necessary'*".[986]

892. *But-for* Claimant's own abandonment of the ETIZ Project, it would not have sustained any damage (which it is claiming in the present arbitration), and any causation analysis "*cannot ignore Claimant's own self injurious behavior as the sine qua non of the final result whatever it might have been. Indeed, the mitigation question is properly asked as a part of the finding of liability*

[982] Exhibit RLA-76, at pg. [6].
[983] Respondent's Post-Hearing Submission, at [39]; Exhibit RLA-76, at pg. [7], citing Exhibit CLA-5, at [7.5.20].
[984] Respondent's Post-Hearing Submission, at [40].
[985] Respondent's Post-Hearing Submission, at [41].
[986] Respondent's Post-Hearing Submission, at [42].

under the 'sole effects' doctrine because the causes of the effect are salient in the equation".[987]

893. To summarise, *"(i) the 'sole effects' doctrine is exorbitant and discredited; (ii) there is no evidence that Ethiopia and Turkey intended it to be a part of their Treaty; (iii) the community of nations have overwhelmingly rejected it; and (iv) even where it applies, on the facts of Akgun's case, the 'effects' did not follow government action but rather followed Akgun's own action. Hence, there is no non-frivolous legal theory that can potentially convert the environmental relocation decision in the Akgun case into an international delict*".[988]

C. Tribunal's Decision

894. Both Parties generally agree that the wording of the relevant bilateral investment treaty (in this case the TEBIT) governs the question and consequences of expropriation.

895. Article IV(1) of the TEBIT states that *"[i]nvestment shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effect* […]*"*.[989] The Tribunal accepts that Article IV(1) contemplates that actions of the state having similar effect to expropriation may qualify as expropriation under the Treaty.

896. The Tribunal consequently also accepts that expropriation can be direct or indirect. [990] The Tribunal agrees that this is a fact-sensitive inquiry that requires an examination of the degree and duration of interference with the property right. An act that substantially denies or hinders a party's rights to the property may be deemed to be an expropriation even if there is no direct taking of the property.

[987] Respondent's Post-Hearing Submission, at [43].
[988] Respondent's Post-Hearing Submission, at [45].
[989] Exhibit CLA-1, at Art. IV.
[990] SOC, at [5.5]-[5.6]; See also Exhibit CLA-31, at pg. [11]; Exhibit CLA-32, at [8]-[23]; Exhibit CLA-33, at [103]; Exhibit CLA-34, at [591] & [604]; Exhibit CLA-6, at [114] & [116]; Exhibit CLA-35, at [10.3.1]; Exhibit CLA-36, at [667]; Exhibit CLA-24, at [1326]-[1327].

897. Regardless of whether an expropriation is direct or indirect, TEBIT Article IV(1) requires the "payment of prompt, adequate and effective compensation" for the expropriation.[991]

898. However, there can be a taking or other regulatory-imposed diminution in value or deprivation of use of an investment, *short of expropriation*, which does *not* require compensation, if the taking, diminution, or deprivation occurs pursuant to a *bona fide* regulation of general applicability made for a public purpose that is not applied in a discriminatory way (i.e. if the taking, diminution, or deprivation occurs pursuant to a valid exercise of the state's Police Powers).[992]

899. The Tribunal's analysis of whether Claimant has suffered a compensable expropriation, consequently, will turn on whether Respondent was validly exercising its Police Powers when causing the loss of value in Claimant's investment. This, in turn, depends on whether Respondent's actions were (1) pursuant to regulations of general applicability enacted for a public purpose, (2) applied in a non-discriminatory manner, and (3) in accordance with due process of law.[993] If the Tribunal finds that there was a valid exercise of Respondent's police powers, there will be no expropriation.

900. For the avoidance of doubt, the Tribunal does not accept that the sole effects doctrine applies in the present scenario. The Tribunal finds it untenable for Claimant to claim that the sentence "*investments shall not be expropriated, nationalized or subject, directly or indirectly,* ***to measures of similar effects*** *[…]*" (in Article IV(1) of the TEBIT) means that the sole effects doctrine should apply, given that, as Claimant itself notes, the immediate next part of the sentence reads "[…] *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*" (which Claimant admits contains elements of the police powers doctrine).[994]

[991] Exhibit CLA-1, at Art. IV(1).
[992] Exhibit CLA-1, at Art. IV.
[993] Exhibit CLA-1, at Art. IV(1).
[994] Refer to Paragraph [859] above.

Was there expropriation in the present case?

901. *Prima facie*, there was a taking in the present case, given that Respondent's action to suspend the construction of the ETIZ Project on the Sendafa site (and then cease it altogether) led to a significant diminution in value of the Sendafa site and/or deprivation of Claimant's use of the site. In the Tribunal's view, it is not necessary for Respondent to have seized the Sendafa plot before finding that there was a taking.

902. The Tribunal also rejects the argument that there was no diminution in value for Claimant because Claimant did not own an investment of value that could be expropriated or deprived,[995] for the reasons stated in its decision earlier at Section VIII(A)(1) of the Award.

903. However, in the Tribunal's view, because Ethiopia's decision to suspend work on the Sendafa site and relocate ETIZ was a valid exercise of its Police Powers, Claimant did not suffer a compensable expropriation.

904. As a preliminary point, it is not the Tribunal's task to assess whether Ethiopia's conclusion with regard to the sufficiency of the EIA was "*correct*" in terms of scientific merit. The Tribunal's inquiry is into whether Respondent's decision was made pursuant to regulations (1) enacted for a public purpose, (2) of general applicability, (3) applied in a non-discriminatory manner, and (4) enacted and applied in accordance with due process of law.

905. The evidence points to the conclusion that Ethiopia was genuinely motivated by the desire to protect the water supply of Addis Ababa (or at least, there is not enough evidence to sustain any allegation that Ethiopia's actions in requesting an EIA were motivated by some other purpose to deny and stop the ETIZ Project). Indeed, from the Tribunal's understanding, the housing projects that Claimant says were given favourable treatment were not alternative investment opportunities pursued by Respondent, but *public* housing projects. This supports the conclusion that Respondent was genuine in its attempt to protect the water supply for its citizens' benefit, especially since there was apparently no possible way for the ETIZ project to continue

[995] SOD, at [246].

without severely affecting the access to water for the citizens in the public housing projects.[996]

906. It is clear that Respondent's actions were (at least *prima facie*) for a public purpose, as Respondent's actions were committed in order to comply with, *inter alia*, (1) Article 44 of Respondent's constitution, which states that "*all persons have the right to a clean and healthy environment*",[997] (2) Article 92 of Respondent's constitution, which states that the *"[Respondent] shall endeavour to ensure that all Ethiopians live in a clean and healthy environment*" and that "*[Respondent] and [its] citizens shall have the duty to protect the environment*",[998] and (3) its EIA requirements under the EIA proclamation.[999] This is especially significant given that the possible environmental issues caused by ETIZ Project could have adversely affected the residents of Respondent's future public housing projects in a meaningful way.

907. Even without the public housing projects, Respondent would still have an obligation to protect the water supply near the proposed ETIZ Project given that the ETIZ Project would likely have caused issues with the water supply in a relatively urban area, as stated in Professor Whittington's report.[1000]

908. Moreover, the Tribunal also accepts that Respondent acted non-discriminatorily, given that an EIA is *required* to be conducted for such project sites. Although Claimant has stated that Respondent acted discriminatorily because it did not request an EIA from the Condominium Projects, and in fact tried to stop the ETIZ Project in favour of those Condominium Projects, the fact of the matter is that the ETIZ Project would have caused an unacceptable environmental issue in the surrounding area regardless of the presence and/or development of the *competing* housing projects. Indeed, the evidence points towards the conclusion that the site was unable to sustain the ETIZ Project without even factoring in the public housing projects.

[996] Mr. Fekadu Zeleke Witness Statement dated 12 March 2021, at [9].
[997] Respondent's Post-Hearing Submission, at [21]; Exhibit RLA-32, at Art. 44(1).
[998] Respondent's Post-Hearing Submission, at [21]; Exhibit RLA-32, at Art. 92.
[999] Respondent's Post-Hearing Submission, at [21]; Exhibit RLA-1, at Art. 4(2).
[1000] Expert Opinion of Professor Dale Whittington, at [6.32] & [6.38].

909. There is no evidence that the removal of the housing projects would have made it environmentally acceptable for Claimant to construct the industrial zone at the Sendafa site. In fact, there is a broad consensus among the relevant Party experts[1001] that there was essentially no way a satisfactory EIA could have been submitted for the Sendafa site (regardless of any other possible competing factors), meaning that the environmental concerns cited by Respondent were legitimate.

910. The Tribunal therefore rejects Claimant's discrimination argument, given that (1) the Condominium Projects were meant as "*pro-poor*" public housing development and not as an investment or industrial zone[1002] and (2) the Condominium Projects were not an investment project *per se*, but instead a public purpose project to provide housing for Ethiopia's poorer citizens.[1003] Accordingly, the considerations and requirements for the two projects were different.

911. Claimant therefore has not discharged its burden to show that it was in fact specifically targeted in a discriminatory way by Respondent.

912. Claimant might have had a stronger argument if it had shown that EIAs were not requested for similar industrial projects, but the record includes no such evidence.

913. Additionally, as briefly discussed in the FET section, there is no compelling evidence that Ethiopia took the decision to cease the construction of the ETIZ Project at the Sendafa site for non-legitimate reasons, or any other reasons aside from genuine environmental concerns. This finding is supported by the conclusions drawn by the relevant experts.

914. As was made clear in the Expert Report of Claimant's own expert, Professor Dale Whittington, it was reasonable for the Ethiopian authorities to conclude that building the ETIZ Project on the Sendafa site was an unacceptable public health risk. The following excerpts from Professor Whittington's report are significant:[1004]

[1001] Refer to Paragraphs [914]-[915] below.
[1002] Hearing Transcripts Day 6, at [14:25]-[15:18].
[1003] Hearing Transcripts Day 1, at [242:16]-[242:20].
[1004] Whittington Report, at [6.32] & [6.38].

Question 4: Was it reasonable in your opinion for Ethiopian authorities to decide against locating the GOE/Akgun industrial park in the watershed above the Lege Dadi Dam?

[6.32] ***Answer: Yes.*** *In my opinion it is reasonable for a policymaker to conclude that locating a major industrial park in an urban watershed is an unacceptable public health risk. But I would note that although watershed protection is an important policy to protect public health, the adoption and enforcement of such a policy should be made before deciding to locate a project such as the GOE/Akgun industrial park in such a watershed. Moreover, although it seems reasonable to me to keep the proposed GOE/Akgun industrial park out of the watershed supplying water to the population of Addis Ababa, other urban and agricultural development activities continued (and are continuing today) to take place in the watershed.*

[…]

Question 6: Would strict GOE (government of Ethiopia) enforcement of its own environmental regulations have eliminated all potential risks that the GOE/Akgun industrial park might pose to the safety of Addis Ababa's water supply?

[6.38] ***Answer: No.*** *Although strict enforcement of GOE environmental regulations would certainly have reduced the risks of contamination of the Lege Dadi Reservoir, residual risks of hazardous waste spills due to both human error and natural disasters would have remained. The establishment of any industrial park will necessarily entail some environmental risks. In my opinion, the GOE should have understood this fact about industrial parks and understood that nothing Akgun could do would eliminate all environmental and public health risks.*

915. This understanding that the Sendafa site was indeed unsuitable for the ETIZ Project was also echoed by Claimant's other expert, Professor Mekete Bekele Tekle during the Evidentiary Hearing:[1005]

Transcripts of Hearing Day 7

[1005] Hearing Transcripts Day 7, at [140:22]-[141:8] & [141:25]-[142:9].

> ***Page 140, Line 22 to Page 141, Line 8:*** *The federal government is responsible for the management of trans-boundary natural resources; that is the water resources between Addis Ababa City Administration and Oromia Regional State. Also, the Ministry of Water Resource is responsible for implementing the master plan of the Legedadi and Dire water basin areas, and such plans and policies constitute public instruments, in my understanding. SEA would have revealed unsuitable sites.* ***Ethiopia should have conducted SEA for ETIZ or for the applicable water basin plan, either one of which would have revealed that the site was not suitable for ETIZ.*** *[**bold** emphasis added]*
>
> ***Page 141, Line 25 to Page 142, Line 9:*** *Although the EPA issued such draft directives or guidelines, the Environmental Council never adopted them, as required by law. If it had and the EIA or SEA requirement was legally effective, then the government was responsible for an SEA for ETIZ or the applicable water plan.* ***Such an SEA would have revealed that the site the government selected for ETIZ was unsuitable.*** *Instead, the government failed to provide suitable land for ETIZ, which, as lessor, it was obligated to do under Ethiopian law. [**bold** emphasis added]*
>
> *Therefore, there is nothing to show that Ethiopia was not acting pursuant to a legitimate public policy consideration when deciding not to allow the ETIZ Project to continue. It is common ground between the Parties that the land was unsuitable for the ETIZ Project (and the Project could not have been built without removing or waiving the EIA requirements).*

916. There is also no suggestion that Respondent did not give Claimant due process of law. Indeed, the evidence suggests that Respondent gave Claimant several chances to review and correct the EIA it submitted.[1006] The fact that an EIA could not (as per expert testimony) resolve the legitimate environmental issues faced by Respondent points towards a failure of Respondent's FET obligations.

917. Taking into account all the factors above, the Police Powers doctrine applies,[1007] as Respondent's actions in diminishing the value of Claimant's

[1006] Refer to Paragraph [885] above.
[1007] See, for example, Exhibit CLA-48, at [254]-[255].

investment were pursuant to regulations (1) enacted for a public purpose, (2) of general applicability, (3) applied in a non-discriminatory fashion, and (4) enacted and applied in accordance with due process of law.[1008] Ethiopia therefore did not commit a compensable expropriation of Akgun's investment.

918. The Tribunal's finding that Respondent's actions were pursuant to and justified by its Police Powers obviates the need to consider whether the resulting diminution in the value of Claimant's investment was "direct" or "indirect/creeping".

919. Claimant has cited the case of *Compañia del Desarrollo de Santa Elena, S.A. v. Costa Rica*[1009] for the proposition that the reason for the State's taking (even if for an environmental reason or a legitimate exercise of its police powers) makes no difference to the requirement to compensate the investor. However, the Tribunal finds that the case differs from the present case because, in that case, Costa Rica specifically enacted a decree to expropriate land from the investor for environmental reasons.

920. Contrary to the present case, Costa Rica's actions were a direct expropriation that was directly targeted at the investor in question.

921. As stated above, the Police Powers doctrine operates in respect of *bona fide*, *non-targeted*, regulation of general applicability enacted for a public purpose. The Tribunal's finding on expropriation might have been different if it were shown that Respondent had targeted Claimant specifically not in accordance with a regulation of general applicability.

922. For the above reasons, the Tribunal takes the view that *Compañia del Desarrollo de Santa Elena, S.A. v Costa Rica* is not applicable to the present case. Claimant itself noted that there is prevailing jurisprudence to show that compensation may not be required when there is a *bona fide* exercise of a state's Police Powers.[1010]

923. To repeat the Tribunal's findings recited in Paragraph [911], the Tribunal accepts that Respondent was validly exercising its Police Powers and cannot

[1008] Exhibit CLA-1, at Art. IV(1).
[1009] Exhibit CLA-66.
[1010] Refer to Paragraph [855] above.

be found to have committed an expropriation (even if the Tribunal uses the stricter test for the legitimate use of Police Powers espoused by Claimant).

924. In any case, as will be discussed below in Section XVI of the Award, there would be no difference in the calculation of compensation provided to Claimant whether there is a breach of FET obligations ***and*** expropriation, or whether there is only a breach of FET obligations without expropriation.

925. Therefore, even if the Tribunal were to accept that expropriation had indeed occurred and that adequate compensation needed to be paid, the Tribunal wishes to emphasize that there would be no increase in the quantum of damages granted to Claimant.

XVI. Quantum

A. Introduction

926. Given that the Tribunal has found that Respondent breached its FET obligations to Claimant, the Tribunal now turns to decide the quantum that should be paid to Claimant for these breaches.

B. Parties' Positions

Claimant's Position in the SOC

927. Claimant submits that the TEBIT does not provide guidance with respect to the calculation of compensation to Claimant, given that it only determines compensation in the case of lawful expropriation. Claimant has asserted unlawful expropriation and FET violations, which have different compensation standards.[1011]

928. The customary international standard of compensation for illegal international acts was first set out in the PCIJ's decision in the *Factory at Chorzów* case:

> *The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act*

[1011] SOC, at [6.1]; Exhibit CLA-029, at [483]; Exhibit CLA-5, at [8.2.3]-[8.2.5].

and the situation which would, in all probability, have existed if that act had not been committed.[1012]

929. Based on the above case, Claimant states that the customary international law standard of compensation is the "*full reparation standard*" (which is also reflected in Article 31 of the ILC Articles on State Responsibility),[1013] and claims that the "*overwhelming majority of international tribunals have also recognized that the damages resulting from a host state's illegal conduct should be compensated based on the customary international law standard of full reparation as articulated in the Factory at Chorzów case and the ILC Articles on State Responsibility*".[1014]

930. The valuation date of the investment "*can be any point in time within that range when the owner has been irreversibly deprived of its property*"[1015] and that the date of expropriation in the present case should be 24 June 2014, being the date on which Respondent permanently suspended the ETIZ ("**Suspension Date**"), and Claimant has instructed its valuation expert to assess the value of the ETIZ as at 24 June 2014 accordingly in their Valuation Expert report ("**Hardin Report**" or "**A&M Report"** or "**Valuation Report**").[1016]

Lost Profits

931. In Claimant's submission, the full reparation standard requires that Claimant as an investor be allowed to recover lost profits, notwithstanding that there is a speculative element in the lost profits,[1017] so long as lost profits can be established with reasonable probability.[1018] Lost profits can be calculated on the basis of estimates so long as the underlying assumptions can be justified.[1019] Accordingly, lost profits should be awarded as long as they are "*probable or reasonably anticipated and not merely possible"*.[1020]

[1012] Exhibit CLA-63, at pg. [47].
[1013] Exhibit CLA-42, at Art. 31(1).
[1014] SOC, at [6.5]; See, e.g., Exhibit CLA-29, at [483]; Exhibit CLA-38, at [116]; Exhibit CLA-64, at [160] & [177]; Exhibit CLA-52, at [548]-[550]. See also Exhibit CLA-65, at [88].
[1015] SOC, at [6.6].
[1016] SOC, at [6.8].
[1017] Exhibit CLA-5, at [8.3.16]; Exhibit CLA-67, at [139], citing Exhibit CLA-79, at [1012]-[1013].
[1018] SOC, at [6.11].
[1019] Exhibit CLA-52, at [585]. See also Exhibit CLA-36, at [874]-[875].
[1020] Exhibit CLA-38, at [285]. See also Exhibit CLA-68, at [298].

932. Claimant's valuation expert opines that the Discounted Cash Flow ("**DCF**") method/model is the "*most appropriate method to evaluate the loss of Claimant's Investment in Ethiopia under the standard of full reparation*".[1021]

933. More important, Claimant contends that the DCF method can apply even when a project has not started operations, so long as the data used for projections of future income can be established with sufficient certainty. Claimant argues that *"disallowing the recovery of lost profits, including through the DCF method, by Claimants whose business was at an early stage at the time of the wrongful act would also 'result in a windfall to the wrongdoer and could even provide an incentive for a party to breach its contractual obligations'"* [1022] and argues that a number of tribunals have "*awarded loss of profits, including on the basis of the DCF method, even for the projects which were at their infancy*".[1023]

934. Claimant therefore asserts that compensation for lost profits is warranted in the present case *"since the 2012 ETIZ Agreement expressly provides that in case the Project is suspended or stopped for no fault of the developer, the latter must be entitled to compensation of 'any and all direct and indirect losses'"* (and the term "indirect losses" conventionally includes lost profits).[1024]

935. According to Claimant, the Tribunal must compare Akgun's loss of profits against a scenario in which "*Ethiopia did not suspend the Project and had complied with its own obligations in the 2012 ETIZ Agreement*".[1025] In that scenario, Claimant submits that the ETIZ would have become a major industrial zone in Africa, and would have been a profitable investment for Akgun, for the following reasons:

    935.1. Claimant is a highly successful developer with an established track record of developing and operating a similar industrial development in Turkey since 1984.[1026]

[1021] SOC, at [6.18];]; Expert Report of Laura Hardin of Alvarez & Marsal dated 19 November 2020 ("**Hardin Report**"), at [63]-[75].
[1022] SOC, at [6.20]; Exhibit CLA-70, at pg. [102].
[1023] SOC, at [6.21]-[6.35].
[1024] SOC, at [6.36].
[1025] SOC, at [6.37]; Hardin Report, at [76]-[78].
[1026] SOC, at [6.38].

935.2. There was a high demand from both Turkish and international industrialists for a development such as ETIZ, and the market for industrial zones were largely untapped at the time.[1027]

935.3. ETIZ had a high probability of financial feasibility, given the essentially self-funded nature of Claimant's business model[1028] (which was essentially a cost-plus model where the plan "*was to finance the remaining development of the Project with profits received from industrialists as they joined ETIZ*").[1029]

936. Claimant claims that "*any compensation other than full compensation by way of an award of lost profits would contradict Claimant's legitimate expectations, including when it signed the 2012 ETIZ Agreement and was allocated the land to develop ETIZ, and undertook all necessary studies and works in relation thereto*".[1030]

937. Based on the DCF method of calculation, with certain assumptions made by A&M, Claimant submits that it is entitled to **USD 241,515,079** as Claimant's lost profits for the first two Stages of the ETIZ development.[1031]

Loss of Opportunity

938. Further, alternatively, Claimant claims for the loss of opportunity to develop ETIZ on the original area of 1460ha.[1032]

939. Citing several cases,[1033] Claimant submits that there is no doubt "*that compensation for loss of opportunity may be granted within the application of the principle of full reparation*".[1034] Furthermore, "*where the quantification of loss is uncertain or difficult, Claimants should not be treated 'as having failed to prove an essential element of their claims in respect of*

[1027] SOC, at [6.39]-[6.45].
[1028] SOC, at [6.46]-[6.47].
[1029] Yunus Akgun 1st Witness Statement dated 19 November 2020, at [9.1]. See also Yusuf Akgun 1st Witness Statement dated 19 November 2020, at [2.6] & [4.19].
[1030] SOC, at [6.49].
[1031] SOC, at [6.50]-[6.52].
[1032] SOC, at [6.54].
[1033] Exhibit CLA-73, at [6.18]; Exhibit CLA-32, at [13-84]; Exhibit CLA-72, at [215].
[1034] SOC, at [6.55].

lost future profits'" leading to the dismissal of their claims for compensation as this would "*produce a harsh and unfair result*".[1035]

940. In accordance with the approach taken by previous tribunals, the burden of proof should be switched in situations where a claimant's difficulty in proving its lost profits claim is caused by respondent's breach. In *Gemplus v Mexico*,[1036] the tribunal stated that:

> *[…] as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), Respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound Respondent's wrongs and unfairly defeat Claimant's claim for compensation […] confronted by evidential difficulties created by Respondent's own wrongs, the tribunal considers that Claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to Respondent itself proving otherwise*.[1037]

941. Claimant then refers to examples of investor-State jurisprudence[1038] to show that it is "*well settled in international law that it is possible to grant compensation on the basis of a loss of opportunity, especially when the wronged party is not capable of establishing loss of profits with reasonable certainty. It is even more so in cases where claimant's failure to establish profits was a result of the acts and omissions of Respondent*".[1039]

942. In the present case, "*the burden of proof lies with Respondent, as the author of the damage, to show that there was no chance that Claimant could have developed the Project as anticipated*".[1040]

943. Claimant further submits that "*UNIDROIT Principles state that compensation for the loss of a chance should be calculated in proportion to the probability of its occurrence*"[1041] and that the tribunal in *Lemire v Ukraine*[1042] stated that

[1035] SOC, at [6.59]-[6.60]; Exhibit CLA-32, at [13-92].
[1036] Exhibit CLA-32.
[1037] SOC, at [6.60]; Exhibit CLA-32, at [13-91].
[1038] Exhibit CLA-74, at [224]; Exhibit CLA-64, at [129], [250] & [271]-[280]; Exhibit CLA-75, at [220] &[221]; Exhibit CLA-51, at [152]-[157] & [590]; Exhibit CLA-76, at [175]-[176].
[1039] SOC, at [6.65].
[1040] SOC, at [6.65].
[1041] SOC, at [6.66]; Exhibit CLA-77, at Art. 7.4.3. See also, Exhibit CLA-78, at [922]-[924].
[1042] Exhibit CLA-69.

loss of opportunity should be calculated "*as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition*".[1043] The *GAR Guide on Damages in International Arbitration* also echoes the same principle.[1044] However, while the quantification of the claim for loss of opportunity should be made by reference to the degree of probability of the chance turning out in the plaintiff's favour, in practice the quantification of the loss of opportunity by arbitral tribunals is decided based on the tribunal's discretion (especially where the probability is impossible to determine).[1045]

944. The additional 2000ha that would have been allocated to it in Stage 2 would have been at least as profitable as the first 1460ha and *"there is at least a 50% probability that the additional land would have been allocated and Akgun would have been able to expand ETIZ. Claimant's damages for loss of opportunity to negotiate the allocation of additional 2000ha of land and to expand ETIZ shall therefore be no less than half of Claimant's lost profits that the Tribunal would find quantifiable for Stage I and Stage II of ETIZ collectively*".[1046]

945. In addition, "*and only if the Tribunal dismisses Claimant's claim for lost profits with respect to the development of ETIZ on the original 1460ha of land*", Claimant argues that it "*must be compensated for the loss of opportunity to develop ETIZ on the original area of 1460ha. Claimant submits that these profits are more than probable and that there was a near certainty that ETIZ would have been developed through Stage I. Claimant further submits that it was also highly probable that ETIZ would have been developed through Stage II. The Tribunal is therefore requested, if it deems that Claimant is not entitled to compensation on the basis of lost profits, to apply a risk factor that the Tribunal deems appropriate to the quantified lost profits, corresponding to the probability the Tribunal deems Claimant had of developing and profiting from ETIZ pursuant to the DCF method*".[1047]

[1043] Exhibit CLA-69, at [251].
[1044] Exhibit CLA-65, at pg. [88]-[89].
[1045] Exhibit CLA-32, at [13-87], quoting Ripinsky & Williams on Damages, at [291], & [13-95]-[13-99].
[1046] SOC, at [6.79].
[1047] SOC, at [6.80].

Out of Pocket Damages (i.e. Sunk Costs)

946. Claimant alternatively submits that, if the Tribunal deems that it is not due compensation for lost profits and/or loss of opportunity, "*the Tribunal must award Claimant compensation for the amounts it expended in its effort to pursue its investment at a minimum*".[1048]

947. Claimant claims that it spent "*millions of dollars and years of effort pursuing this investment by, among other things, preparing plans and feasibility studies, acquiring equipment and machinery necessary for construction, hiring employees and consultants, preparing marketing materials and paying Respondent amounts due under the 2012 ETIZ Agreement*"[1049] and that these documented expenditures amounted to no less than **USD 4,955,131** before interest.[1050]

948. However, Claimant had additional expenses "*in connection with the implementation of ETIZ, including local accounting and ledger books, computer accounting records, as well as records tracing the cash payments to employees and consultants, etc. were left in Ethiopia and are no longer available to Claimant*".[1051] These claims raise the total figure to the range of **USD 7,000,000** before interest (and Claimant requests the Tribunal to award this amount instead).[1052]

Interest Rate

949. Claimant asserts a right to claim for interest as enshrined in *"[Article] 38 of the ILC Articles on State Responsibility and recognized in the consistent jurisprudence of arbitral tribunals in investment arbitration*".[1053]

950. Claimant submits that the "*applicable interest rate must reflect the full reparation standard and wipe out all the consequences of Respondent's illegal acts"* and the only way is *"through the award of the interest compounded at an appropriate interval so to take into account the element of risk associated with Claimant's investment and the unlawful character of*

[1048] SOC, at [6.81].
[1049] SOC, at [6.82].
[1050] SOC, at [6.83].
[1051] SOC, at [6.84].
[1052] SOC, at [6.84].
[1053] Exhibit CLA-42, at Art. 38. See also, e.g., Exhibit CLA-44, at [598]; Exhibit CLA-39, at [440].

Respondent's measures".[1054] The appropriate rate, based on its valuation expert's report, is **6.625%**.[1055]

951. Claimant also requests for post-award interest to be provided at a rate to be determined by the Tribunal.[1056]

Respondent's Position in the SOD

952. Respondent submits that "*Claimant has asserted without basis a blanket entitlement to receive full investment value without bothering to set out any causal link between the injury alleged and any breach of the particular treaty standards it has chosen to invoke. Claimant has thus failed to plead a case for damages"*[1057] and *"even if all of the treaty breaches claimed were to be cumulatively proven, Akgun has failed to show any harm it may have incurred that has been caused by any wrongful conduct attributable to Ethiopia*".[1058]

953. No damage has been caused by the conduct of Ethiopia, and a "*case for damages would at a minimum require Claimant to identify a loss that has occurred or that will certainly have occurred and draw a causal link between such loss and a breach of treaty violation attributable to Respondent. Claimant simply seeks three alternative measures of damages each of which corresponds to full investment value without regard to the legal requirements*".[1059]

954. At the most preliminary level, Akgun cannot prove that Ethiopia's unlawful conduct extinguished the value of its investment, given that "*it [was] Akgun that chose to quit the Project and exit Ethiopia*".[1060]

955. "*Akgun bears the burden to prove injury as caused by each treaty breach that it pleads*" and the "*Claimant must identify* ***which treaty standard*** *is alleged to have been breached by* ***which act of Ethiopia****, and further establish the* ***causation of injury*** *therefrom*".[1061]

[1054] SOC, at [6.87].
[1055] Hardin Report, at [150].
[1056] SOC, at [6.89].
[1057] SOD, at [339].
[1058] SOD, at [340].
[1059] SOD, at [342].
[1060] SOD, at [343].
[1061] SOD, at [344].

956. Moreover, Claimant's quantum assessment is void *ab initio* as it rests on "*three irredeemably flawed legal assumptions pertaining to liability and damages: that (i) 'rights to develop and operate a large-scale industrial zone' are an investment within the meaning of the Treaty; that (ii) 'the Measures undertaken by Respondent in this matter, including but not limited to the GOE's suspension of the ETIZ Project, represent a breach of the terms of the Treaty'; and that (iii) such 'Measures' 'as such are compensable to Claimant under the standard of full reparation'*" [1062] and, if either of the first two assumptions are wrong, the inquiry must then end.

957. Claimant's instructions to its valuation expert were faulty insofar as the expert was instructed that Claimant's "*investment in this matter consists of its rights to develop and operate a large-scale industrial zone on a 1,460 [hectare] plot of land in the Sendafa Town of Oromia, outside of Addis Ababa, Ethiopia, for a period of at least 80 years beginning with the date of the first land handover from the GOE, based on the terms of the 2012 ETIZ Agreement*" [1063] rather than being asked to value the potential land lease based on the "*preconditions [of having a satisfactory EIA] for the development to occur*" (which goes directly to the valuation of the Agreement as the valuation ought necessarily to assume the correct probability of success). [1064]

958. The "*valuation rests on the assumption that the Project would have been implementable had it not been for the breach of the other party, but to consider the Agreement itself as the item of value, the valuation cannot pick and choose provisions; it must take the Agreement as a whole and in toto*" [1065] (i.e. the valuation should have considered the regulatory requirements and the Project's chance of success as a result of said requirements), especially given the "*contractual conditions that Claimant was either unwilling or unable to meet*" (i.e. the environmental responsibilities it had to undertake). [1066]

[1062] SOD, at [346], citing the Hardin Report, at [53] & [58].
[1063] Hardin Report, at [53].
[1064] SOD, at [349].
[1065] SOD, at [350].
[1066] SOD, at [351].

959. Any valuation analysis must account for its environmental laws and regulations[1067] and "*the Agreement holds precisely zero value unless and until this regulatory requirement is cleared*".[1068] Therefore, a valuation of the Agreement as an investment that ignores these conditions, "*any of which could go wrong at any point in time in any project let alone one with acknowledged environmental challenges, assumes the impossible with absolute certainty*", and should be rejected.[1069]

960. Additionally, the Valuation Report should be rejected owing to "*faulty instructions on treaty breach and measure of damages*",[1070] which are reproduced below:

> *I understand from Claimant's Counsel in this matter that the Measures undertaken by Respondent in this matter, including but not limited to the GOE's suspension of the ETIZ Project, represent a breach of the terms of the Treaty, and as such are compensable to Claimant under the standard of full reparation*.[1071]

961. Respondent submits that (1) *"the assumption of fault in this way bypasses the valuator's assessment of inherent risks of the execution of the Agreement*"[1072] and (2) "*the legal instructions make no attempt to link the value of the Agreement with a breach of any treaty provision or provisions. The expert is not properly instructed as to the difference between a violation of the FET principle (which may not attract pecuniary compensation at all) and expropriation (which might attract different levels of compensation)*"[1073] and (3) "*the idea that a lease agreement for the development of a complex industrial park over a period of eighty years could be valued with reasonable certainty on the basis of bits and piece of incomplete information and without regard to all the necessary conditions is too speculative to be taken seriously*".[1074] For all the reasons above, the Valuation Report by Claimant should be rejected.

[1067] SOD, at [352]-[356].
[1068] SOD, at [356].
[1069] SOD, at [357].
[1070] SOD, at [359].
[1071] Hardin Report, at [58].
[1072] SOD, at [361].
[1073] SOD, at [362].
[1074] SOD, at [363].

Lost Profits

962. In the Hardin Report, the valuer "*purports to apply the standard of 'full compensation' without taking into consideration the nature or extent of any damages. The expert was simply informed that the 'Investment' [was] 'effectively destroyed'*".[1075]

963. According to the Hardin Report's own definition,[1076] fair market value ("**FMV**") is determined when, *inter alia*, "*both [seller and buyer] have reasonable knowledge of the relevant facts*" (such as the effect of environmental preconditions to the value of the Agreement), and an informed buyer who wants to determine the FMV of the Agreement would, as a matter of diligence, want to know "*what are the conditions of contract implementation, what are the attendant permitting procedures, and what are the attendant regulatory requirements*".[1077]

964. The consensus (even in the Hardin Report) is that, for a calculation of lost profits (usually via the DCF method) to be accepted by the Tribunal, it must be shown that it was sufficiently probable or reasonably certain that such profits would have been achieved.[1078]

965. The Hardin Report attempts to determine lost profits and FMV on the basis of a hypothetical utopian project and not the ETIZ Project, "*when it relies only upon (i) the developer's purported past successes in other localities on other continents; and (ii) Ethiopia's aggregate growth trajectories*".[1079]

966. It is insufficient for the Hardin Report to assume that there has been a breach; it must also be shown that, but for the assumed breach, all value that is sought by Claimant would be realised. A "*reasonable certainty analysis that deliberately omits the elephant of uncertainty (environmental uncertainty) is deliberately empty*" and cannot be trusted (especially where it makes "*numerous unwarranted or patently faulty assumptions*").[1080]

[1075] SOD, at [363]; Hardin Report, at [61].
[1076] Hardin Report, at [60];, quoting Exhibit AM-315, at pg. [27].
[1077] SOD, at [367].
[1078] Hardin Report, at [79]-[80]; Exhibit AM-318, at pg. [116]; Exhibit AM-322, at pg. [71]; Exhibit AM-339, at pg. [164].
[1079] SOD, at [370].
[1080] SOD, at [371]-[372].

967. Moreover, lost profits "*may only ever be awarded in the case of an enterprise or going concern with a proven record of profitability*"[1081] and even the "*World Bank Guidelines on the Treatment of Foreign Direct Investment adopt precisely this language and propose compensation on the basis of discounted cash flow value only 'for a going concern with a proven record of profitability'*". [1082] Furthermore, even Claimant's own authority, [1083] when dealing with an operation that had been ongoing for over two years, states that:

> *The non-relevance of the brief history of operation of the Landfill […] —a little more than two years— and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made —building of seven additional cells— in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to Claimant*.[1084]

968. While not clearly stated by Respondent, the Tribunal assumes that Respondent means to imply, based on the quoted reasoning, that Claimant's project, being one that had not started, could not be awarded lost profits under the discounted cash flow calculation method.

Loss of Opportunity

969. Respondent contends that Claimant cannot claim for loss of opportunity because "*aside from the fact that this basis of damages suffers the same incurable defects in its inherent projection of project success as a matter of simple logic, Ethiopia submits that 'loss of opportunity' or 'loss of a chance' does not enjoy the wide acceptance across legal systems such as could bring it to be considered a generally recognized principle of law and that it is, as such, not a rule of international law*".[1085]

[1081] SOD, at [374].
[1082] SOD, at [374]; Exhibit RLA-35, at Art. IV(6)(i).
[1083] Exhibit CLA-6.
[1084] Exhibit CLA-6, at [186].
[1085] SOD, at [379]; See, e.g., Exhibit RLA-36, at [382].

970. Accordingly, it is not open to Claimant to claim a definite sum for loss of opportunity under the Treaty or otherwise.[1086]

Out of Pocket Damages (i.e. Sunk Costs)

971. According to Respondent, "*Akgun's disturbance of the allocated land and commencement of construction works prior to taking receipt of the requisite environmental clearance were unauthorized acts in contravention of both Ethiopian law and the Agreement that Akgun signed. As such, by choosing to take these actions, Akgun did not create value but sought to preempt a legitimate environmental assessment*".[1087]

972. Consequently, "*Claimant's own disturbance of the land in defiance of the requisite EIAs being the essence of its assessment of damages, its claim for compensation for out-of-pocket expenditures must be rejected as a risk that it maliciously assumed*".[1088]

Interest

973. Respondent denies that damages should be provided to Claimant, and also states that interest cannot be awarded.[1089]

Claimant's Position in Claimant's Reply

974. In reply, Claimant states that Respondent's discussion on damages is pervaded by questions central to jurisdiction and liability (which have already been addressed by Claimant).[1090]

975. More importantly, Respondent's general arguments turn entirely on their characterisation of the EIA as a "*precondition*", and the ETIZ Agreement as holding "*precisely zero value*" until this "*precondition*" is met.[1091] According to Claimant, it has proven that the EIA was not a precondition, therefore Respondent's argument must fail.[1092]

[1086] SOD, at [380].
[1087] SOD, at [382]; Witness Statement of Mr. Ahmed Abtew dated 12 March 2021, at [15].
[1088] SOD, at [385].
[1089] SOD, at [386].
[1090] Claimant's Reply, at [6.2]-[6.5].
[1091] Claimant's Reply, at [6.6], quoting SOD, at [356].
[1092] Claimant's Reply, at [6.8]-[6.9].

Lost Profits

976. Claimant emphasises that the standard for awarding damages is full reparation, measured by its lost profits, that "*wipe[s] out all consequences of the illegal act*",[1093] stating that Respondent has not contradicted Claimant's standard.[1094] Furthermore, the "*reasonable expectations of Akgun and Ethiopia contemplate compensation"* and *"there can be little doubt that the consequences of Ethiopia's unfair treatment extend significantly beyond the sums of money Akgun expended and time that Akgun wasted".*[1095]

977. There were various noteworthy aspects of the Project which, taken together, show that there was "*an objective likelihood that it would have generated significant quantifiable profits*".[1096]

977.1. Akgun had already built from scratch a similar, highly successful industrial zone in Istanbul.

977.2. An industrial zone is a well-known business model and the viability of such zones is neither speculative nor technically unfeasible.

977.3. Ethiopia cannot credibly challenge market demand for ETIZ since Ethiopia itself made the creation of such zones a cornerstone of its economic policy.

977.4. Akgun had obtained the requisite investment licenses and permits.

977.5. Akgun's plan of finance did not require third-party investment or loans.

977.6. The fact that many industrialists had committed to build factories in ETIZ substantiated Akgun's projected revenues.

977.7. Akgun's pricing for the construction of the factories and the ongoing lease payments were in line with the experience at other similar projects.

[1093] Exhibit CLA-63, at pg. [47].
[1094] Claimant's Reply, at [6.10].
[1095] Claimant's Reply, at [6.15]-[6.16].
[1096] Claimant's Reply, at [6.18].

977.8. Akgun's costs were also reasonably concrete because they were based on indications of interest from various Ethiopian vendors and they had been cross-checked against costs experienced by other similar projects.

977.9. Akgun had commissioned and circulated feasibility studies for the Project that Ethiopian officials had enthusiastically endorsed.

978. In light of the foregoing, given "*the joint enthusiasm for the project plan, the MoI's contractual commitment to support the Project, Akgun's contractual entitlement to build the zone in a favorable logistical location close to Ethiopia's largest city, sited favorably on desirable property under an 80 year lease, and the commitments from numerous industrialists and the demonstrated interest of many others, this project was at a stage where it evidenced significant and highly probable future cash flows that meant that the Project itself had significant value at the time it was stopped*".[1097]

979. Claimant submits that Respondent's misconduct should cause the burden of proof to be relaxed or even reversed.[1098]

980. Moreover, Claimant disagrees with Respondent's claim that "*lost profits may only ever be awarded in the case of an enterprise or going concern with a proven record of profitability*" as "*Tribunals adopt a forward-looking damages model even when a claimant's investment does not qualify as a 'going concern' where other indicia show that model to be reliable*"[1099] and cites the case of *Crystallex v. Venezuela*[1100] for that proposition.

981. More importantly, the DCF method is the preferred method[1101] to determine compensation in expropriation cases and there is extensive case law to that effect.[1102] Additionally, the trend of having tribunals unwilling to award "*lost value under a DCF analysis without several years of normalized operating results*" is slowly eroding, and "*in recent years many panels have awarded*

[1097] Claimant's Reply, at [6.19].
[1098] Claimant's Reply, at [6.20]; See Exhibit CLA-32, at [13-92] & [13-84].
[1099] Claimant's Reply, at [6.21].
[1100] Exhibit CLA-36, at [875].
[1101] SOC, at [6.15], citing Exhibit CLA-52, at [575].
[1102] See Exhibit CLA-29, at [502]; Exhibit CLA-5, at [8.3.4].

damages under a DCF model even where the business was damaged or destroyed before it had demonstrated its full potential".[1103]

982. At most, "*the World Bank Guidelines on the Treatment of Foreign Direct Investment cited by Respondent advise 'caution' in applying the DCF method and advise against it where damages are 'speculative or indeterminate.' Those guidelines do not foreclose the method*".[1104] Similarly, the *Tecmed v. Mexico*[1105] case also did not foreclose this method (but merely did not apply the DCF method given the difficulties in obtaining objective data for that case).[1106]

983. Additionally, according to the cases Claimant relies upon, "*an award of lost profits, including those calculated based on the DCF method, is appropriate for newly established projects which have not yet become operational so long as a claimant can demonstrate that (1) it was engaged or would have engaged in a profit-making activity but for respondent's breach and (2) the activity would have been profitable"*.[1107] Furthermore, the tribunal explained in *Vivendi v. Argentina*,[1108] that a claimant might demonstrate as much simply "*by presenting sufficient evidence of its expertise and proven record of profitability … in similar circumstances*"[1109] and that lost profits were not theoretically foreclosed to a new business *("[a] claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first-hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of the Treaty violation"*).[1110]

[1103] Claimant's Reply, at [6.23]; See, e.g., Exhibit CLA-16; Exhibit CLA-124; Exhibit CLA-30.
[1104] Claimant's Reply, at [6.28].
[1105] Exhibit CLA-6.
[1106] Exhibit CLA-6, at [186] & [195].
[1107] Claimant's Reply, at [6.30].
[1108] Exhibit CLA-5.
[1109] Exhibit CLA-5, at [8.3.4].
[1110] Exhibit CLA-5, at [8.3.10].

984. The "*A&M [Report] has done exactly what Vivendi v. Argentina required: it has established based on the balance of probabilities that ETIZ would have produced profits if Ethiopia had not stopped it*".[1111]

985. Claimant further contends that "*Ethiopia has articulated a variety of risks that it suggests are not included in the A&M damage calculations. The cash flows do not reflect the risks inherent in the Project, but are undiscounted blue-sky estimates. It describes other project-specific risks and claims that A&M failed to factor in the risk that Ethiopia would not allow the Project to proceed*".[1112] However, these risks are already included in the risk premium which A&M has applied to the valuation (based on modelling the estimated future cash flows and discounting them for risk).[1113]

986. Claimant therefore submits that the specific arguments Respondent offers against allowing it to claim lost profits *"are not compelling in these circumstances in light of the probability of a successful business outcome in this circumstance"*.[1114]

Loss of Opportunity

987. Claimant then reiterates that, if "*for some reason the Tribunal does not believe that the evidence regarding the DCF value is sufficiently supported, the Tribunal could turn to the concept of lost opportunity damages to remedy the breaches*" [1115] and that Respondent is wrong to state "*that 'loss of opportunity' or 'loss of chance' does not enjoy the wide acceptance across legal systems such that it could be considered a generally recognized principle of law*".[1116]

988. There is a "*long line of cases demonstrating that loss of opportunity may indeed be awarded as part of ensuring a claimant's full reparation*"[1117] (and even Respondent's cited case of *Chevron v Ecuador*[1118] states that loss of

[1111] Claimant's Reply, at [6.33]; Hardin Report, at Section [5].
[1112] Claimant's Reply, at [6.38].
[1113] Claimant's Reply, at [6.34]-[6.37].
[1114] Claimant's Reply, at [6.41].
[1115] Claimant's Reply, at [6.42].
[1116] Claimant's Reply, at [6.43], quoting SOD, at [379].
[1117] SOC, at [6.15]. See also Exhibit CLA-73, at [6.18]; Exhibit CLA-72, at [215]; Exhibit CLA-32, at [13-91]; Exhibit CLA-36, at [870]-[871]; Exhibit CLA-74, at [121]-[124]; Exhibit CLA-64, at [278]-[279]; Exhibit CLA-75, at [220]- [221]; Exhibit CLA-76, at [175]-[176].
[1118] Exhibit RLA-36.

chance can be applied in exceptional situations where there exists a harm whose existence cannot be disputed but which is difficult to quantify)[1119] and that this "*theory is recognized under the UNIDROIT Principles on International contracts*".[1120]

989. Moreover, "*loss of opportunity has been recognized as an appropriate measure of damages when respondent's breach causes any difficulty on claimant's part in proving a lost profits claim; and, in that case, the burden of proving future profits should be reversed and the onus imposed on respondent to dispute claimant's proof*".[1121]

990. Therefore, "*not only is Respondent wrong as to the overall acceptance of loss of opportunity as a measure of damages, given the fact that any difficulty in Akgun's ability to prove a lost profits claim is attributable to Respondent's precipitous breach, the onus is on Respondent to show there was no chance Akgun could have developed ETIZ as anticipated"* but Respondent instead *"rests its argument against loss of opportunity on the single assertion that 'Akgun cannot prove that it has lost any opportunities for reasons that are not attributable to its own default'"*.[1122]

991. In any case, Respondent did not suspend ETIZ because of any failure on Akgun's part regarding the EIA or otherwise, but "*suspended ETIZ without any regard for its obligations toward Akgun simply because of Respondent's own error in siting ETIZ in a location that drew on the same limited water resources that served Addis Ababa and Respondent's ambitious residential development on Addis Ababa's outskirts. There was no default by Akgun, only breach by Respondent*".[1123]

992. Accordingly, Claimant once again submits that, "*in addition to lost profits due to Akgun's inability to develop ETIZ on the original land plot of 1460 ha as envisaged in the 2012 ETIZ Agreement, Akgun must be awarded damages for the loss of its opportunity to expand ETIZ into the additional area of 2000 ha*"

[1119] Exhibit RLA-36, at [382].
[1120] Claimant's Reply, at [6.45]; Exhibit CLA-77, at Art. 7.4.3.
[1121] Claimant's Reply, at [6.49]; Exhibit CLA-32, at [13-92].
[1122] Claimant's Reply, at [6.50]-[6.52], quoting SOD, at [378].
[1123] Claimant's Reply, at [6.53].

(or, at the very least, the damages for loss of opportunity on the initial 1460 ha).[1124]

Out of Pocket Damages (i.e. Sunk Costs)

993. Finally, Respondent's characterisation of Akgun's expenses incurred as resulting from "*unauthorised acts*" is untrue, and the "*facts demonstrate conclusively that Akgun commenced and continued construction on ETIZ with Respondent's full knowledge and encouragement before, during, and after the point at which Respondent requested an EIA*".[1125] In fact, "*multiple articles contained in the 2012 ETIZ Agreement required Akgun to begin development within specified time frames and to complete development on specified timelines. Under certain of those articles, failure to do so could even have resulted in penalties such as forfeiture of the land allocated for ETIZ*".[1126]

994. Therefore, Claimant submits that "*Akgun acted not only with authorization, but at the behest of Ethiopia, and the idea that Akgun's activities were in any way unauthorized thereby precluding [sunk cost or out of pocket] damages has no basis whatsoever*".[1127]

Respondent's Position in the Respondent's Rejoinder

995. According to Respondent, even if all the treaty breaches claimed were proven, Claimant has failed to show *"a causal relationship between any such violation and the claimed injury or damage, for Akgun has failed to show that any 'harm' it may have incurred has been caused by any wrongful conduct on the part of Ethiopia*."[1128]

996. Claimant also "*appears not to appreciate the burden that it bears in establishing the elements of a successful damages claim. It is precisely the identification of which wrongful act has caused which specific injury that is the very essence and function of the damages inquiry*".[1129]

[1124] Claimant's Reply, at [6.55]-[6.56].
[1125] Claimant's Reply, at [6.59]-[6.60].
[1126] Claimant's Reply, at [6.61].
[1127] Claimant's Reply, at [6.63].
[1128] Respondent's Rejoinder, at [377].
[1129] Respondent's Rejoinder, at [380].

997. Respondent points out that Claimant incorrectly submits that Respondent's argument on damages turns entirely on the characterisation of the EIA as a precondition, and that, although this presents a fatal defect to Claimant's damages claim, it is not the only defect.[1130]

998. Respondent further submits that Claimant has failed to establish the elements of a damages claim for a total investment loss, as it "*must prove that unlawful conduct by Ethiopia extinguished all value of the 'investment,' for where a claimant seeks (as Akgun has) full investment value, it bears the burden to prove that full investment value has been nullified. In order to attain such class of damages as it seeks, Akgun must establish unlawful conduct by Ethiopia that is extreme so as to effectively destroy the 'investment.'*".[1131]

999. Additionally, Claimant seems to have chosen to only confine itself to a claim for damages arising from expropriation (and not damages arising from breach of FET obligations) and has taken an all-or-nothing approach (i.e. either Ethiopia's actions were so extreme as to destroy the investment or they were not).[1132]

1000. Moreover, the rule of reparation articulated in the *Factory at Chorzow*[1133] case (i.e. that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*")[1134] has been improperly applied by Claimant.

1001. "*The lawfulness of any act by Ethiopia is determined by reference to the Treaty. Thus, the rule is full reparation for injury that is caused by any measure found to constitute breach of a treaty standard invoked. Claimant chooses to disavow these requirements of the reparation rule and seeks instead to leap unnoticed from full reparation directly to full investment value. In so doing, Akgun bypasses the burden that it bears. Full reparation under international law is emphatically measured not by default reference to full investment value but rather as those damages that are actually and*

[1130] Respondent's Rejoinder, at [381]-[382].
[1131] Respondent's Rejoinder, at [387]; Hardin Report, at [61].
[1132] Respondent's Rejoinder, at [389].
[1133] Exhibit CLA-63.
[1134] Exhibit CLA-63, at pg. [47].

proximately caused by (and thus required to fully remedy) those measures constituting a treaty breach that is found".[1135]

Lost Profits

1002. Respondent contends that while Claimant submits it has "*established that it is entitled to the full suite of lost profits damages calculated by its valuation expert*", [1136] Akgun's "*forward-looking damage model*" [1137] seems to go against the plain meaning of the *Factory at Chorzow* rule, which, when viewed against *"its purpose to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed,' [seems to be] decidedly backward-looking in its orientation*".[1138]

1003. In any case, Claimant's assertion "*that 'various noteworthy aspects' of the industrial zone project 'create an objective likelihood that it would have generated significant quantifiable profits'*" [1139] (which is summarised at Paragraph [977] above) is wrong.[1140]

1004. Also, Claimant's proposition that the burden of proof should be relaxed or shifted to Respondent should be rejected (as even the authorities invoked by Claimant do not support the proposition).[1141]

1005. Respondent next discusses the cases that Claimant relies on to conclude that lost profits may be awarded for businesses or projects in their infancy. Respondent rejects this proposition saying that, as a preliminary point, Claimant has only relied upon cases dealing with the standard for expropriation (and not breach of FET obligations).[1142] Moreover, Respondent claims that these cases are discussed so superficially and are devoid of analytical comparison to the present facts, such that they can only amount to an empty plea.[1143]

[1135] Respondent's Rejoinder, at [392]-[393]; See Exhibit CLA-42, at Art. 31, Comment 9.
[1136] Claimant's Reply, at [6.17].
[1137] Claimant's Reply, at [6.21].
[1138] Respondent's Rejoinder, at [395]; Exhibit CLA-63, at pg. [47].
[1139] Claimant's Reply, at [6.18].
[1140] Respondent's Rejoinder, at [396].
[1141] Respondent's Rejoinder, at [397]. See also Exhibit CLA-32, at [13-85].
[1142] Respondent claims that Claimant concedes this point in its Reply at [6.23] by stating that the method is employed "*in expropriation cases*".
[1143] Respondent's Rejoinder, at [400]-[409].

1006. Moreover, Claimant's submission that its Valuation Report had already accounted for a "*risk premium*" (based on various indicators offered in international marketplaces) is somehow adequate or sufficient to satisfy the requisite level of legal certainty for an award of damages fails, especially where there are "*innumerable project-specific risks*".[1144]

1007. Finally, Claimant's argument that the trend of "*tribunals [being] generally unwilling to award lost value under a DCF analysis without several years of normalized operating results*" is heading in the other direction is wrong.[1145] Respondent accordingly submits that Claimant cannot claim for lost profits.

Loss of Opportunity

1008. Respondent reiterates its argument that "*aside from the fact that this basis of damages suffers the same incurable defect for Akgun by virtue of its inherent assumption of the existence of a harm, Ethiopia maintains that the 'loss of opportunity' or 'loss of a chance' principle 'does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations'' and that it is, as such, not a rule that may be employed by a tribunal bound to international law*". [1146]

1009. The present situation is not the "*exceptional situation*" as envisioned in *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, where the "'*loss of chance' principle [can possibly be] applied in exceptional situations where there exists a 'harm whose existence cannot be disputed but which it is difficult to quantify*'".[1147]

1010. Respondent asserts that, "*put succinctly, the numerous commercial and other risks that Akgun faced, including in its own inability to finance even the modest start-up phase of the Project, foreclose any finding of certainty in respect of the existence of future revenues (much less future profits), and thus foreclose any finding of certainty of the relevant harm*", meaning that loss of opportunity should not be allowed as a basis of claim for damages by Claimant.

[1144] Respondent's Rejoinder, at [410].
[1145] Claimant's Reply, at [6.24].
[1146] Exhibit RLA-36, at [382].
[1147] Exhibit RLA-36, at [382].

Out of Pocket Damages (i.e. Sunk Costs)

1011. Respondent argues that "*Akgun's claim for out of pocket damages should be dismissed as a classic case of de minimis non curat lex, especially as a treaty claim that does not establish that such amounts to 'investment' within the meaning of the Treaty*".[1148]

1012. For completeness, Respondent also submits that "*to the extent that Akgun commenced any works prior to taking receipt of the requisite environmental clearances as set out in both Ethiopian law and the 2012 ETIZ Agreement that Akgun signed, Akgun did so at its own risk in seeking to preempt a legitimate environmental assessment*"[1149] and that the facts will show that "*Ethiopia expressly requested Claimant to prepare and present the requisite EIA report immediately upon issuance of its investment permit, for it is common ground between the parties that partial handover of the land occurred in March 2013; the investment permit was issued in April 2013; and the Ministry of Industry's request came in May 2013*".[1150]

1013. Claimant's submission that the ETIZ Agreement included timelines and time frames for it to begin work is a non-starter, "*as Ethiopia has shown [that] the referenced provisions were simply tolled in the event of Akgun's delay in attaining regulatory approvals*" [1151] (i.e. that the timelines were simply paused for the time being).

1014. Respondent therefore claims that the "*Claimant's own disturbance of the land in defiance of the requisite environmental requirements being the essence of its assessment of damages, its claim for compensation for out of pocket expenditures lack causal relationship with an illegal State conduct and is meaningless as such*"[1152] and should not be granted.

1015. Lastly, in any event, Respondent claims that no injury to Claimant was caused by any conduct of Respondent, and that:

[1148] Respondent's Rejoinder, at [418].
[1149] Respondent's Rejoinder, at [420].
[1150] Respondent's Rejoinder, at [421].
[1151] Respondent's Rejoinder, at [422].
[1152] Respondent's Rejoinder, at [423].

1007.1 It was "*Akgun that chose to quit the Project and exit Ethiopia*";[1153]

1007.2 "*Akgun's departure was a result of its failure to meet environmental conditions and a business decision*";[1154]

1007.3 Akgun's departure had "*multiple causes but none attributable to Ethiopia's wrongful conduct*";[1155] and

1007.4 Whatever "*expenditure Akgun might have made did not create value for*"[1156] Respondent.

Claimant's Position in Post-Hearing Submission

1016. On the question whether Claimant had a duty to mitigate its damages claimed, Claimant states that, as a preliminary matter, its attempts at mitigation were forestalled by Respondent's refusal to supply a firm offer of an alternative site for the ETIZ Project (even though Claimant appealed twice to Respondent by letter for such an offer), which effectively waived any mitigation-based defences of Respondent.[1157]

1017. Claimant admits that, (a) it has a duty to mitigate damages based on prevailing jurisprudence (even if such a duty is not specified in the relevant BIT) and (b) inadequate efforts to mitigate may reduce recoverable damages.[1158] The duty includes an obligation for an aggrieved party to take steps to minimize his losses and abstain from doing anything to increase his losses,[1159] meaning that "*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*".[1160]

[1153] Respondent's Rejoinder, at [425].
[1154] Respondent's Rejoinder, at [427].
[1155] Respondent's Rejoinder, at [428].
[1156] Respondent's Rejoinder, at [429].
[1157] Claimant's Post-Hearing Submission, at [5.1].
[1158] Claimant's Post-Hearing Submission, at [5.2]-[5.3]; Exhibit CLA-171, at [25.44], Exhibit CLA-172; Exhibit CLA-42, Commentary to Art. 31, at [11]; Exhibit CLA-176, at [167].
[1159] Claimant's Post-Hearing Submission, at [5.4]; Exhibit CLA-177.
[1160] Claimant's Post-Hearing Submission, at [5.4], citing Exhibit CLA-76, at [204]-[205].

1018. Even if the Tribunal does not consider the mitigation defence waived, Respondent's defence that Claimant failed to mitigate its damages cannot be upheld.[1161]

1019. Respondent has not argued that Claimant unreasonably incurred additional expenses, but focused on the "*alternative lands that it showed – but never offered – to Akgun*" (i.e. it focuses on Claimant's alleged failure to minimise its losses following Respondent's alleged breach).[1162]

1020. Claimant argues that there are four critical principles guiding the mitigation analysis:

1020.1. First, the mitigation rule is one of reasonableness.[1163]

1020.2. Second, the reasonableness of Claimant's conduct must be assessed by the information and data that was available to it when it allegedly failed to mitigate its loss and cannot involve second-guesses made years after the fact.[1164]

1020.3. Third, Tribunal should apply a "*business judgement rule*" to the mitigation defence, and should not second-guess Claimant's business judgement.[1165]

1020.4. Fourth, it is Respondent's burden to prove the facts that support its mitigation defence,[1166] and it must be shown that Claimant's actions following Respondent's breach was unreasonable, abusive, or against Claimant's own economic interest (and tribunals are therefore seldom persuaded by speculative options of mitigation that are proposed in hindsight).[1167]

1021. Applying the abovementioned principles, Claimant states that there is no basis for the Tribunal to second-guess Claimant's decision to depart Ethiopia

[1161] Claimant's Post-Hearing Submission, at [5.1].
[1162] Claimant's Post-Hearing Submission, at [5.5]; Respondent's Rejoinder, at [186]-[196]; Claimant's Rejoinder, at [2.48]-[2.49].
[1163] Claimant's Post-Hearing Submission, at [5.6]; Exhibit CLA-173, at [10.124]; Exhibit CLA-179, at [251].
[1164] Claimant's Post-Hearing Submission, at [5.7]; Exhibit CLA-180, at [1894]; Exhibit CLA-173, at [10.132].
[1165] Claimant's Post-Hearing Submission, at [5.8]; Exhibit CLA-76, at [217]; Exhibit CLA-175, at [216], Exhibit CLA-182, at [273]; Exhibit CLA-181, at [427].
[1166] Claimant's Post-Hearing Submission, at [5.9]; See for e.g. Exhibit CLA-178, at Section III.B & Exhibit CLA-176, at [170].
[1167] Claimant's Post-Hearing Submission, at [5.10]; Exhibit CLA-180, at [1888]; Exhibit CLA-171, at [25.44].

when "*when Akgun had spent many months pursuing opportunities to mitigate its damages, but Respondent failed to offer any firm commitment for an alternative site".*[1168]

1022. The Tribunal may also be guided by *Magyar Farming Company Ltd v Hungary*,[1169] which Claimant states was a case in which Respondent's mitigation defence failed as the tribunal "*relied on Claimants' communications with Respondent to secure replacement land, resulting in respondent offering only a smaller parcel located over 50km from the expropriated site*"[1170] to show that mitigation had been performed, even though claimant declined the alternative plot offered because, in its business judgement, the land was unsuitable. Claimant states that the tribunal in the case refused to reduce the amount of compensation provided as it felt that claimant in that case had attempted to mitigate its damages but did not accept (and was not required to accept) the alternative plot offered due to the unsuitability of the plot (which was not considered as a lack of mitigation to the tribunal).[1171]

1023. The situation in the abovementioned case is similar to the present case, as Claimant repeatedly sought to have Respondent offer it a suitable alternative site for the ETIZ Project, but Respondent did not provide such an offer or even a skeletal set of terms for an alternative plot of land. Moreover, the alternative sites which Respondent showed Claimant were at a far greater distance from Addis Ababa than the original site, which was merely 30km away from Addis Ababa, even though proximity to Addis Ababa was one of the factors that Claimant viewed would be key to the success of the ETIZ Project.[1172]

1024. Claimant notes that, against these factors, Respondent could only provide a video clip of Mr. Yusuf Akgun remarking that one of the sites visited potentially "*could do*" (with some additions), and Respondent failed to provide Claimant any direct evidence about the circumstances of the sites which were allegedly offered to Claimant (a fact which Claimant states was

[1168] Claimant's Post-Hearing Submission, at [5.11].
[1169] Exhibit CLA-181.
[1170] Claimant's Post-Hearing Submission, at [5.12].
[1171] Exhibit CLA-181, at [377] & [427]-[428].
[1172] Claimant's Post-Hearing Submission, at [5.13].

noted by the Tribunal).[1173] In fact, Respondent not only had scant evidence concerning the alternative sites it showed Akgun, it also never actually offered the alternative sites to Claimant.[1174]

1025. Therefore, Claimant submits that Respondent is unable to fulfil its duty to prove facts that support a mitigation defence. Claimant wrote twice to Respondent after the date of Mr. Yusuf Akgun's visits to the alternative sites to request for a formal offer, so that it could evaluate the terms attached to the proposed alternative site and make an informed business decision, but received no response.[1175] Therefore, Respondent's mitigation defence must fail.

1026. Unlike *Magyar Farming Company Ltd v Hungary*, [1176] where Claimants received an offer for alternative land, Claimant was not even given a chance to evaluate and choose among possible alternative sites (and did not therefore have a reasonable chance to mitigate its losses or consider how to mitigate its losses).

1027. Claimant argues that "*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*" [1177] and that to the extent "*Respondent points to subsequent industrial developments in the region of the alternative sites, 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'*".[1178]

1028. In any case, citing *AIG Capital Partners Inc v f Kazakhstan,*[1179] the Tribunal should not impose a duty to mitigate in the investor-state context, especially where the right expropriated was the right to develop the ETIZ Project on the Sendafa site as the Parties had agreed, given, *inter alia*, (1) there was no provision in the contract that compelled selection of an alternative site, (2)

[1173] Claimant's Post-Hearing Submission, at [5.13]; Hearing Transcripts Day 1, at [226:23]-[228:12]; Hearing Transcripts Day 3, at [97:9]-[97:11] & [101:18]-[102:5].
[1174] Claimant's Post-Hearing Submission, at [5.14]; Hearing Transcripts Day 3, at [95:16]-[96:24].
[1175] Claimant's Post-Hearing Submission, at [5.14]; Exhibit C-149; Exhibit C-88.
[1176] Exhibit CLA-181.
[1177] Claimant's Post-Hearing Submission, at [5.15].
[1178] Claimant's Post-Hearing Submission, at [5.16]; See also, e.g., Exhibit CLA-180, at [1894].
[1179] Exhibit CLA-35.

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*", and (3) Claimant nevertheless tried to "*engage 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 AIG, Respondent never gave Akgun a firm commitment on either the site or the reimbursement of costs*".[1180]

1029. It should not be considered unreasonable for Claimant to be wary of "*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*" and that it should not need to attempt to mitigate without a firm offer of an alternative plot by Respondent.[1181]

1030. 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*" and there is no principled basis for the Tribunal to reduce Akgun's damages on the basis of a failure to mitigate its damages.[1182]

1031. Further, the *Factory of Chorzow* full reparation principle is not varied by the failure to mitigate damages but merely reduces the amount of damages to reflect the "*actual loss*" suffered at Respondent's hands "*under the theory that Respondent should not be liable for amounts by which Claimant's unreasonable conduct increases its damages*",[1183] but very few tribunals have "*actually applied this principle to reduce a claimant's damages*".[1184] The few cases that have reduced a claimant's damages for failure to mitigate pointed to specific facts in support of the tribunal's decision that showed an unreasonable refusal to mitigate damages.[1185]

[1180] Claimant's Post-Hearing Submission, at [5.18], referring to Exhibit CLA-35; Exhibit C-9, at Arts. 3.1, 4, and 11.11; Yusuf Akgun's 1st Witness Statement dated 19 November 2020, at [4.6].
[1181] Claimant's Post-Hearing Submission, at [5.18].
[1182] Claimant's Post-Hearing Submission, at [5.19].
[1183] Claimant's Post-Hearing Submission, at [5.20]; Exhibit CLA-184.
[1184] Claimant's Post-Hearing Submission, at [5.20].
[1185] Claimant's Post-Hearing Submission, at [5.20], citing, *inter alia*, Exhibit CLA-187, at pg. [10].

1032. Claimant also questions whether "*there is any theoretical basis for further reducing lost profits by the amount of costs later incurred […] because the lost profits calculation does not include the sunk costs that Akgun incurred after the date of harm […] the largest sum that the Tribunal could deduct is USD 54,814 – i.e., the amount of costs Akgun incurred after July 2014. 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. Expenses incurred in pursuit of damage mitigation should not be considered in calculating a reduction in compensation due to a failure to mitigate. The [Claimant states that the] Tribunal should also note that Akgun actively mitigated its damages by over USD 760,000 by selling some of its equipment*".[1186]

1033. Moreover, most tribunals that do reduce damages due to lack of mitigation tend to take a highly-fact based approach, and "*there are no facts or data that would permit this Tribunal to make the sort of principled calculation that the EDF tribunal*[1187] *made nor a clear contractual mechanism for third-party recoupment such as in Bridgestone.*[1188] *Respondent here is solely answerable to Akgun for its damages*".[1189]

1034. "*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*".[1190]

Respondent's Position in Post-Hearing Submissions

1035. On Claimant's duty to mitigate its damages claimed, Respondent submits that the question of mitigation should only arise where "*a wrongful State act otherwise requiring reparation is duly established*", and "*because any finding of an internationally wrongful act on the facts of this case is impossible, it will only address this issue as a matter of curiosity and decorum*".[1191]

[1186] Claimant's Post-Hearing Submission, at [5.22].
[1187] Exhibit CLA-20, at [1307]-[1309].
[1188] Exhibit CLA-188, at [565].
[1189] Claimant's Post-Hearing Submission, at [5.23]-[5.24].
[1190] Claimant's Post-Hearing Submission, at [5.25].
[1191] Respondent's Post-Hearing Submissions, at [56].

1036. Like Claimant, Respondent notes that the jurisprudence on the matter generally notes that a failure to mitigate by an injured party may preclude recovery to the extent of the failure,[1192] and that "*the duty to mitigate may operate to totally exclude recovery in a situation where damages claimed were totally avoidable*".[1193]

1037. However, there is no need to consider whether Claimant failed to mitigate its losses because Claimant "*failed to perform its own obligations under law and contract [and] does not qualify as an aggrieved party"*.[1194] Although Claimant came up with several narratives and conspiracy theories to show that it deserves compensation, none of Claimant's witnesses actually dared to voice out these narratives and theories during the Evidentiary Hearing.[1195]

1038. In any case, Respondent's offering of suitable alternative lands to Claimant "*destroys all theories of recovery by causing the substantive absence of any treaty breach. It destroys the legal basis of FET recovery because it shows that by offering alternative lands, Respondent acted reasonably and not arbitrarily, for a reasonable accommodation is all that the FET standard requires. It equally destroys the basis of the expropriation theory because the value of a leasehold is not deprived if the land would have been suitably replaced, as Claimant itself has conceded and confirmed*".[1196]

1039. Furthermore, Claimant held no unconditional entitlement to any (i) parcel of land or (ii) mix of industries within Ethiopia under the ETIZ agreement, and that the development and operation "*of the industrial zone project was at all times contingent upon compliance with numerous obligations, including the obligations of environmental study existing under both law and contract*".[1197] Moreover, Claimant acknowledges that an offering of suitable alternative plots (to replace the Sendafa plot) would serve to defeat its claims, and Claimant therefore chose to factually dispute the suitability of the alternative plots offered, even though Respondent claims the alternative plots were "*lands of eminent suitability"* for the ETIZ Project.[1198]

[1192] Respondent's Post-Hearing Submissions, at [57]; Exhibit CLA-42, at Art. 31, Comment 11.
[1193] Respondent's Post-Hearing Submissions, at [58].
[1194] Respondent's Post-Hearing Submissions, at [59].
[1195] Respondent's Post-Hearing Submissions, at [60]-[61].
[1196] Respondent's Post-Hearing Submissions, at [62]; Claimant's Reply, at [5.128].
[1197] Respondent's Post-Hearing Submissions, at [63].
[1198] Respondent's Post-Hearing Submissions, at [63]; Respondent's Rejoinder, at [190]-[194].

1040. To demonstrate the suitability of the alternative plots, Respondent refers to the videos taken by Akgun itself during site visits conducted in August 2015[1199] and highlights that Mr. Yusuf Akgun himself concluded that one of the alternative plots "*could do*" [1200] if it had certain additions (additions that Respondent claims it was happy to make).[1201]

1041. Respondent asserts therefore that Mr. Yusuf Akgun had generally favourable impressions of the alternative plots offered, but then provided adverse testimony in the present arbitration (when discussing the suitability of the alternative plots), and then declined to answer during the Evidentiary Hearing why he had shifted from a favourable contemporaneous commentary of the alternative plot to his adverse testimony in the present arbitration.[1202]

1042. In any case, Respondent states "*that the suitability of the alternative lands is proven by evidence as a matter of fact"* (notwithstanding Mr. Yusuf Akgun's allegedly shifting opinion on the matter).[1203]

1043. Respondent further submits that even where viewing "*Akgun's refusal to take up the offered lands under the principle of mitigation of loss rather than viewing Ethiopia's offers under the lens of treaty breach ab initio, the result is no different*", as Claimant's refusal to take up the alternative plots meant that it did not take up a reasonable opportunity to mitigate, and therefore its own conduct reduced the quantum it can recover to zero (as the alternative plots offered were of a quality at least equal to the initial Sendafa plot, and would have allowed Claimant to make similar amounts of profits).[1204]

1044. Respondent points to (1) the fact that the specific site that Mr. Yusuf Akgun viewed favourably was the site of a massive dry port close to the world-class Addis Ababa-Adama Expressway, and was located within thirty kilometers of Adama itself, one of Ethiopia's largest cities (with several hundred of thousands of citizens living close by to the proposed alternative site),[1205] and

[1199] Respondent's Post-Hearing Submissions, at [64]; Exhibit R-57.
[1200] Respondent's Post-Hearing Submissions, at [64]; Exhibit R-58.
[1201] Respondent's Post-Hearing Submissions, at [64]; Exhibit R-56, at the 2min 40s mark.
[1202] Respondent's Post-Hearing Submissions, at [65]; Hearing Transcripts Day 3, at [94:5]-[94:6].
[1203] Respondent's Post-Hearing Submissions, at [66].
[1204] Respondent's Post-Hearing Submissions, at [67].
[1205] Respondent's Post-Hearing Submissions, at [68]-[69]; Exhibit C-45, at pg. [333]; Exhibit R-64; Exhibit R-65.

(2) Respondent's offer to Claimant of a fifteen-year tax holiday if it agreed to move the ETIZ Project from the Sendafa site, to show that the alternative sites (and deals) offered were of equal (if not better) quality as compared to the Sendafa site.[1206]

1045. Lastly, Respondent also argues that (as mentioned in its previous submissions)[1207] "*Claimant bears the burden of identifying which treaty standard is alleged to be breached by which conduct of Ethiopia, and further to establish the causation of injury therefrom*", but has declined to do so[1208] (meaning that Claimant's claim for compensation must fail) and that it is insufficient for Claimant to assert "*a blanket entitlement to recover the value of [its] 'investment'*" (as Claimant cannot isolate quantum of damages from the individual treaty standards it has chosen to invoke). If Claimant cannot show how Respondent's conduct violates the individual treaty standards, Claimant cannot claim for any damages.[1209]

Claimant's Position in Reply to the TLOQ

1046. In response to the Tribunal's question on whether the Tribunal had the discretion to award Claimant damages if the Tribunal finds that Respondent only breached its FET obligations (and did not commit expropriation), the "*standard of compensation is agreed upon by both Parties and is the one of full reparation as outlined in Factory at Chorzów and the ILC Articles on State Responsibility*".[1210]

1047. With "*the exception of compensation for lawful expropriation, this standard of compensation fully applies to any type of a Treaty breach, including an FET breach*".[1211] Because Respondent's action deprived it of the value of its investment, the standard of full reparation applies.[1212]

Loss of Profits

[1206] Respondent's Post-Hearing Submissions, at [70]; Exhibit C-017.
[1207] Respondent's Rejoinder, at Section VI.C.
[1208] Respondent's Post-Hearing Submissions, at [71].
[1209] Respondent's Post-Hearing Submissions, at [72].
[1210] Claimant's Reply to TLOQ dated 3 July 2024 ("**Claimant's Reply to TLOQ**"), at [3.3].
[1211] Claimant's Reply to TLOQ, at [3.3]; Exhibit CLA-32, at [12-52]; Exhibit CLA-178, at pg. [4]
[1212] Claimant's Reply to TLOQ, at [3.3].

1048. Claimant asserts that it has established in prior pleadings why the preferred measure of damages should be the DCF method,[1213] and states that it had "*calculated its lost profits on a project stage basis, providing the Tribunal with at least three alternatives for the award of lost profits. Consequently, if the Tribunal finds lost profits for the entire project (through Stages 1 and 2 – i.e., the entire 1460ha) speculative, it can still award lost profits for Stage 1 (660ha). If the Tribunal finds lost profits for Stage 1 speculative, it can still award lost profits for Phase 1 of Stage 1 (the first 100ha). Claimant submits that it has established with reasonable certainty lost profits for at least Phase 1 of Stage 1*".[1214]

1049. The Tribunal has the discretion to choose among Claimant's proposed lost profits scenarios should it believe that any one of the advanced stage scenarios is too speculative.[1215]

Loss of opportunity

1050. With regard to loss of an opportunity, damages for loss of an opportunity are particularly appropriate in cases where the tribunal concludes that the evidence of lost profits is too uncertain or speculative to form a basis for a precise calculation.[1216]

1051. Indeed, a claim for loss of opportunity only requires "*Claimant to prove the existence of a viable chance to make a profit*", as opposed to a claim for lost profits, where "*a claimant must demonstrate with reasonable certainty that profits would have been earned had the breach not occurred*".[1217]

1052. The principle of full reparations under international law "*mandates that the injured party be placed in the position it would have been in had the breach not occurred. This encompasses not only the direct financial outlays (sunk costs) but also the potential future benefits and opportunities that were foreseeable and reasonably certain to accrue*".[1218]

[1213] Claimant's Reply to TLOQ, at [3.5].
[1214] Claimant's Reply to TLOQ, at [3.6].
[1215] Claimant's Reply to TLOQ, at [3.7].
[1216] Claimant's Reply to TLOQ, at [3.9]-[3.10].
[1217] Claimant's Reply to TLOQ, at [3.10].
[1218] Claimant's Reply to TLOQ, at [3.11]; Exhibit CLA-36, at [882].

1053. Claimant claims that, (a) its loss of the opportunity to succeed in the EITZ Project and profit from developing and operating ETIZ "*as per the terms of the 2012 ETIZ Agreement is a tangible and substantial detriment that directly impacts the value of its investment*", and (b) several arbitral tribunals have decided, essentially, that "*the fact that damages cannot be assessed for a certainty is not a reason not to award damages when a loss has been incurred*".[1219]

1054. At the time the ETIZ Project was suspended, Claimant's investment represented a significant potential opportunity "*to become the successful developer and operator of a pioneering industrial zone in Ethiopia, situated at a prime location on the outskirts of Addis Ababa*" (with favourable contractual and political frameworks established by Ethiopia for Claimant).[1220] Claimant also states that (1) there were no major issues encountered during the Project's implementation to prevent the Project from moving forward, (2) Claimant is a highly successful developer in Turkey, (3) there was a high demand from Turkish and international parties for an industrial development like ETIZ, and (4) the Project was likely to be financially feasible due to the essentially self-funded nature of Claimant's business model.[1221]

1055. Claimant therefore should be compensated for loss of an opportunity based on the model below:[1222]

1055.1. If the Tribunal finds that there existed an opportunity to succeed in generating profits from Phase 1 of Stage 1 of the Project, there was at least 80% probability of achieving such an outcome, the Tribunal should award at least an 80% of lost profits for Phase 1 of Stage 1 as damages for the loss of its opportunity;

1055.2. Alternatively, if the Tribunal finds that there existed an opportunity to succeed in generating profits not only from Phase 1 of Stage 1 but also from Stage 1 as a whole, given that there was at least a 50% probability of achieving such success; hence, the Tribunal should

[1219] Claimant's Reply to TLOQ, at [3.12]-[3.13], citing, *inter alia*, Exhibit CLA-72, at [62]-[64], Exhibit CLA-74, at [200], Exhibit CLA-76, at [280]-[303] & Exhibit CLA-32, at [13-91] to [13-100].
[1220] Claimant's Reply to TLOQ, at [3.13].
[1221] Claimant's Reply to TLOQ, at [3.13]-[3.14].
[1222] Claimant's Reply to TLOQ, at [3.15].

award at least 50% of lost profits for Stage 1 as damages for the loss of its opportunity;

1055.3. Additionally, if the Tribunal finds that there was also an opportunity to succeed in generating profits from Stage 2, given that there was at least a 25% probability of achieving such success, the Tribunal should award at least 25% of lost profits for Stage 2 as damages for the loss of its opportunity.

1056. Claimant states that, "*although the quantification of a loss of opportunity should theoretically reflect the probability of the chance benefiting the plaintiff, in practice, arbitral tribunals largely rely on their own discretion when determining this quantification*" [1223] and that the Tribunal has full discretion to award any form of compensation that it deems to be reasonable.[1224]

1057. Even if the Tribunal were to find Claimant's claim for lost profits to be speculative, it "*should still recognize and award the value of Claimant's opportunity to profit from the ETIZ Project (in whole or in part) as part of the full reparation standard*", and could award damages for Claimant's loss of a chance independently or in combination with sunk costs.[1225]

Out of Pocket Damages (i.e. Sunk Costs)

1058. With regard to its sunk costs, awarding damages for sunk costs is an absolute floor[1226] (as discussed by Claimant's quantum expert[1227]), and should not be granted unless the Tribunal rejects both loss of profits and loss of a chance as speculative.[1228]

1059. In any case, Claimant's actual sunk costs were at least USD 7 Million, and not the approximately USD 5 Million calculated by their expert (as Claimant claimed that they had lost certain documentary evidence verifying the additional USD 2 Million spent).[1229]

[1223] Claimant's Reply to TLOQ, at [3.16].
[1224] Claimant's Reply to TLOQ, at [3.17].
[1225] Claimant's Reply to TLOQ, at [3.17].
[1226] Claimant's Reply to TLOQ, at [3.18].
[1227] Hardin Report, at [24].
[1228] Claimant's Reply to TLOQ, at [3.19].
[1229] Claimant's Reply to TLOQ, at [3.20].

Respondent's Position in Response to the TLOQ

1060. In response to the Tribunal's question whether the Tribunal has the discretion to award Claimant damages if the Tribunal finds that Respondent breached only its FET obligations (and did not commit expropriation), Respondent contends that the Tribunal has no discretion to do so, as Respondent did not commit any breaches of its FET obligations in the first place.[1230]

1061. Respondent states that "*the finding of a breach of fair and equitable treatment would require 'blatant unfairness, [or] a complete lack of due process', or '**some act far beyond the measure's mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective**'*", which it claims is not found in the present case.[1231]

1062. Finally, Respondent claims (without any legal arguments, and very briefly) that sunk costs cannot be awarded to Claimant, given that "*the expenditure was not even made by the present Claimant*"[1232] and Claimant has not shown that Respondent should be liable for the sunk costs incurred by a non-party.

C. Tribunal's Decision

1063. As a preliminary point, the Tribunal notes that Claimant has claimed for either (1) loss of profits or (2) loss of a chance. In the alternative, if the Tribunal does not accept that Claimant's expected profits or chance of making profits are sufficiently certain, Claimant claims for (3) the sunk costs it had incurred in developing the ETIZ Project.

1064. Put simply, Claimant has claimed for three possible heads of damages:

1064.1. Loss of profit;

1064.2. Loss of opportunity or loss of a chance; or

1064.3. Sunk costs.

[1230] Ethiopia's Letter to the Tribunal dated 3 July 2024 ("**Respondent's Response to TLOQ**"), at [18] & [26].
[1231] Respondent's Response to TLOQ, at [20], citing Exhibit RLA-4, at [616]-[626].
[1232] Respondent's Response to TLOQ, at [27].

1065. The Tribunal agrees with the Claimant that (1) loss of profits and (2) loss of opportunity cannot be claimed at the same time, given that a claim for lost profits assumes that the likelihood of profits was sufficiently certain to calculate the profits with reasonable certainty, whereas the loss of opportunity implies that Claimant had lost the chance to *possibly* make profits, but that the profits cannot be calculated with sufficient certainty to warrant their award. In other words, the heads are mutually exclusive.

1066. Thus, the Tribunal can only provide damages for either (1) loss of profits ***or*** (2) loss of a chance, but not both.

1067. Similarly, the Tribunal finds that it cannot order damages for either lost profits or loss of chance alongside sunk costs, given that expectation losses (i.e., lost profits or loss of a chance) cannot usually be granted in combination with reliance losses (i.e., the sunk costs). In any case, Claimant has not argued explicitly that expectation and reliance losses may be granted together, although it does note that the Tribunal has full discretion to award any compensation the Tribunal believes necessary to adequately compensate Claimant.[1233]

1068. Consequently, the three heads of claims by Claimant for damages are mutually exclusive. The Tribunal now turns to its determination of which head of claim, if any, can succeed.

Guiding Principles for Damages

1069. Before the Tribunal decides on Claimant's damages claims, it will first determine the guiding principles for (1) when damages can be granted for loss of profits, loss of chance, or sunk costs, and (2) the calculation of the quantum of damages in situations where only FET obligations have been breached.

1070. The Tribunal will first address the question of when damages can be granted for loss of profits, loss of chance, or sunk costs in cases where Respondent has breached only its FET obligations. The Tribunal has provided the Parties an opportunity to make their arguments, but Respondent has chosen not to respond to whether damages (for sunk costs or otherwise) can be provided in cases where breaches of only FET obligations are found, instead arguing

[1233] Claimant's Reply to TLOQ, at [3.17].

that, as no breaches of FET obligations had occurred (in its opinion), there was no need to determine if damages could be awarded.[1234]

1071. Given that Respondent did not provide any clear reasons why such damages should not be granted in the event of a breach only of FET obligations, and given that the Tribunal sees no logical reason why damages cannot be granted purely for breach of a State's FET obligations, the Tribunal therefore accepts Claimant's position that there is no impediment to granting damages for loss of profits, loss of chance, or sunk costs in cases where Respondent has breached its FET obligations, provided that a claimant supplies appropriate proof of damage. [1235]

1072. Respondent has made a brief submission that the expenditure in the present case was not made by Claimant, but by its related entities.[1236] However, Respondent did not develop the argument, and does not clearly state why that should matter in the present case. Therefore, the Tribunal rejects Respondent's unsupported argument that expenditures by entities related to Akgun may not be attributed to Akgun. This is especially since the Tribunal understands that, regardless of which entity specifically incurred the relevant costs, the controlling party of the entities was the Akgun family.

1073. With regard to the determination of the quantum of damages, as neither Party has made any suggestion that the determination of the quantum of damages to be awarded *changes* in situations where Respondent has breached only its FET obligations, the Tribunal finds that it is common ground between the Parties that the formulation in the *Factory at Chorzow*[1237] case should be used (i.e. that "...*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act has not been committed*", more commonly known as the standard of full reparation), even in situations where only breaches of FET obligations are found (and not expropriation).[1238]

1074. The Tribunal accepts that the full reparation standard (as espoused in the *Factory at Chorzów* case) applies to the present situation. The challenge for

[1234] See Respondent's Response to TLOQ, at [17]-[26].
[1235] Claimant's Reply to TLOQ, at [3.3]; Exhibit CLA-32, at [12-52]; Exhibit CLA-178, at pg. [4] and fn. [14].
[1236] Respondent's Response to TLOQ, at [27].
[1237] Exhibit CLA-63, at pg. [47].
[1238] Exhibit CLA-63, at pg. [47].

the Tribunal is determining what "*full reparation*" entails. Respondent claims that the *Factory at Chorzow* test is a backwards-looking test (i.e., that full reparations can only be granted for situations that are sufficiently probable and certain),[1239] given that the tribunal in that case stated that purpose of reparations should be to "*wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed*".[1240]

1075. Claimant also accepts that any forward-looking damages such as lost profits must be reasonably certain before they can be granted to Claimant.[1241]

1076. The Tribunal therefore sees no issues with adopting a requirement that any damages sought by Claimant must be sufficiently certain or probable before the Tribunal may award such damages.

1077. It is also clear to the Tribunal that, depending on the situation, the *Factory at Chorzow* test may support a claim for expectation damages, so long as the expectation damages are proved with reasonable certainty.[1242] This is a highly fact-specific enquiry, and the Tribunal accepts that it has wide discretion in this regard.

1078. With this in mind, the Tribunal now turns to the individual heads of claim made by Claimant.

Lost Profits

1079. As a preliminary matter, the Tribunal notes that Respondent claims that there was no causation between Respondent's suspension of the construction of the ETIZ Project on the Sendafa site and Claimant's inability to make a profit from the ETIZ project. Respondent further claims that Claimant must first prove that its injuries were caused by the treaty breaches that it pleaded and that "*Claimant must identify* ***which treaty standard*** *is alleged to have been breached by* ***which act of Ethiopia****, and further establish the* ***causation of injury*** *therefrom*",[1243] or Claimant's claim for lost profits must fail.

[1239] Respondent's Rejoinder, at [395]; Exhibit CLA-63, at pg. [47].
[1240] Exhibit CLA-63, at pg. [47].
[1241] Refer to Paragraphs [941] and [964] above.
[1242] Exhibit CLA-63, at pg. [47].
[1243] SOD, at [344].

1080. Given that the Tribunal has found that Respondent indeed breached its FET obligations, the Tribunal finds that these arguments are moot, as the Tribunal has found that there was indeed causation between Respondent's actions and the harm suffered by Claimant.

1081. That being said, while it is clear that causation is found, the main issue to the Tribunal is whether Claimant's claim for loss of profits is sufficiently certain and non-speculative, given that the ETIZ project was still in an early stage of development when it was suspended.

1082. While Claimant has cited many authorities in which the measure used was lost profits under the DCF method, Claimant has also admitted that damages for lost profit must be based on facts that show the profits are more than speculation.[1244] In other words, the Tribunal must make a factual assessment of the extent to which the aggrieved investor has proved the success and profitability of its venture.

1083. The Tribunal agrees that, to adequately determine Claimant's lost profits, the Tribunal must compare Claimant's loss of profits against a scenario in which "*Ethiopia did not suspend the Project and had complied with its own obligations in the 2012 ETIZ Agreement*".[1245] If the Tribunal is unable to reasonably determine what the profits would have been in that situation and/or if the profits claimed would be too speculative, the Tribunal will not be able to grant damages for loss of profits to Claimant.

1084. The Tribunal accepts in principle the thrust of the passage from the *Micula v Romania*[1246] award cited by Claimant, which is that it may **i***n rare instances* be possible for an investor without a going concern or record of profitability to meet the burden of proof required to claim lost profits.[1247] However, the *Micula* case also points out that, in most circumstances, such an investor will fail, as it is exceedingly difficult to prove the certainty (or even the probability) of lost profits without proof of prior profits.

1085. Indeed, while Claimant attempts to show that a business or project in its infancy could still be granted lost profits, this is almost always the exception

[1244] Claimant's Reply, at [6.18].
[1245] Hardin Report, at [76]-[78].
[1246] Exhibit CLA-71.
[1247] SOC, at [6.21]; Exhibit CLA-71, at [1009]-[1010].

rather than the rule. Generally, tribunals do not grant "*lost value under a DCF analysis without several years of normalized operating results*".[1248] Claimant itself admits that the trend has been for tribunals not to grant lost profits for businesses/projects in their infancy, although Claimant argues that the trend is gradually changing.

1086. While the Tribunal notes that Claimant believes it would have succeeded in developing the ETIZ Project due to being a highly successful developer with an established track record of developing and operating a similar industrial development in Turkey since 1984,[1249] the Tribunal finds that this does not, in itself, prove that a unique, first-of-its-kind industrial zone in Ethiopia would attain the same level of success.

1087. Furthermore, while Claimant argues that there was a high demand from both Turkish and international industrialists for a development such as ETIZ, and that the market for industrial zones was largely untapped at the time, the Tribunal is not convinced that (1) there was sufficient evidence showing said demand or (2) that these factors would have guaranteed the success of the Project.

Ms Hardin's Expert Report

1088. The Tribunal turns to Ms Hardin's expert report to determine if it could provide a stronger basis for Claimant's lost profits claim.

1089. As a preliminary matter, the Tribunal disagrees with Respondent that Claimant's instructions to Ms Hardin were faulty merely because the instructions failed to account for the precondition of having a satisfactory EIA (and therefore could not be a valid estimation of the possible profits given that it did not account for the possibility that Claimant's EIA would not be approved).

1090. Given that the Tribunal found that Claimant had a legitimate expectation that it could build on the initial Sendafa site, the Tribunal finds that the instructions provided to the valuation expert were accurate even though

[1248] Refer to Paragraph [981] above.
[1249] SOC, at [6.38].

they did not instruct Ms Hardin to account for the possibility that Claimant's EIA would be rejected.

1091. However, having carefully considered Ms Hardin's report, the Tribunal finds that it makes several other flawed assumptions in attempting to show that Akgun's lost profit is more than speculative.

1092. First, the factual basis of Ms Hardin's assumptions was largely the evidence of Claimant's own witnesses and instructions from Claimant's Counsel. For example:

1092.1. Ms Hardin relied on the opinions of Yusuf and Yunus Akgun to conclude that there was "*a backlog of investor demand*".[1250]

1092.2. Ms Hardin did not attempt to show how the planned ETIZ Project and the Ikitelli industrial zone are comparable, but instead relied on Counsel's instructions that Mr. Yusuf Akgun's reputation and expertise from his role in the Ikitelli industrial zone was what attracted Ethiopia to solicit Akgun's investment, and that Akgun's participation would bring in investors for the ETIZ Project.[1251]

1093. Second, Ms Hardin's arguments for why demand for ETIZ would be high are simply too speculative to amount to reasonable proof. For example, Ms Hardin cited Ethiopia's favourable national economic climate at the time as a reason why ETIZ might have succeeded if it had gone ahead. However, none of her reasons are sufficient to demonstrate that the ETIZ Project's profitability was reasonably likely; at most, they were indicators that the ETIZ Project could *possibly* become successful.

1094. Third, and relatedly, even though Ms Hardin provided data about Ethiopia's significant rate of economic growth at the relevant time, she did not explain why that growth necessarily meant that the ETIZ Project would succeed and become profitable.[1252] Without more evidence, the mere fact that a country's economy is growing does not mean that every industry (especially a new project like the ETIZ Project) or area in that country will experience the same level of growth.

[1250] Hardin Report, at [99]-[102].
[1251] Hardin Report, at [88].
[1252] Hardin Report, at [91]-[95].

1095. Finally, although Ms Hardin drew attention to the several other industrial zones which were planned in Ethiopia at the time when ETIZ was slated to be built, which she cited as evidence of strong and continuing demand from investors, she did not account for the possibility of those industrial zones competing with the ETIZ and reducing its overall profitability and/or viability.

1096. Accordingly, Ms Hardin's report is not persuasive as a prediction of the overall profitability of the ETIZ, assuming it had been built. The ETIZ Project was still at an extremely early stage with very few reliable indicators of how profitable it would be or even whether it would succeed.

1097. In fact, only 100ha out of 1460ha of the contemplated Sendafa site had actually been handed over to Akgun,[1253] which was a mere 7% of the intended total.[1254]

Other Considerations

1098. Additionally, the "*list of investors*" submitted by Akgun to the Ethiopian government was more accurately a list of *possible* investors.[1255] There was nothing to show that any of the 123 named "*investors*" had actually committed to investing in the Project (at the time) even though Akgun claims that there were verbal agreements with some of the investors to invest in the ETIZ Project.[1256] In the Tribunal's view, whether or not these investors ultimately would have come on board is purely a matter of speculation.

1099. Indeed, the emails Yusuf Akgun sent to 73 potential investors indicate nothing about those potential investors' reactions to those emails.[1257] Yusuf Akgun had not even included any business proposal in his emails. Indeed, in one of his emails, to provide a situational update about the ETIZ site, there was an acknowledgement that the situation was *still* uncertain: "*We will inform you about the outcome of this [EIA] issue in a written form as soon as possible...*".[1258]

[1253] Exhibit C-12.
[1254] Hearing Transcripts Day 1, at [147:22]-[147:24].
[1255] Exhibit C-95.
[1256] Exhibit C-93; Exhibit C-95.
[1257] Exhibit C-96.
[1258] Exhibit C-96.

1100. Although Akgun stated in a letter to the MoI dated 7 July 2014 that it *"[had] been able to attract over a hundred companies to Addis Ababa up until the present time*",[1259] the Tribunal places little weight on this evidence. This comment was not corroborated by other evidence and, alone, is not probative of whether these companies would become part of the ETIZ Project.

1101. Finally, Akgun rightly points out that the ETIZ Project was of a scale and magnitude that would have been the first of its kind in Ethiopia.[1260] To the Tribunal's mind, that fact makes it even more difficult for Akgun to prove the success and profitability of the ETIZ Project, had it gone ahead.

1102. While the Tribunal takes the point that it is *technically* possible for a Claimant to demonstrate that there were lost profits by "*by presenting sufficient evidence of its expertise and proven record of profitability … in similar circumstances*",[1261] it notes that the situation at hand was novel, as the industrial zone in Ethiopia was first of its kind.

1103. Although Claimant states that there were various noteworthy aspects of the Project which, taken together, show that there was "*an objective likelihood that it would have generated significant quantifiable profits*",[1262] the Tribunal finds that the novel nature of building an industrial zone in Ethiopia, coupled with uncertain commitments from possible investors, meant that there was significant uncertainty surrounding the profits that Claimant would have made had the ETIZ Project been successfully constructed.

1104. The Tribunal has no doubt that, if Akgun had managed to obtain firmer assurances or concrete contractual agreements from potential investors, it would have submitted those into evidence. The lack of such assurances and agreements suggests no firm commitments were made to Claimant, which, in turn, casts doubt on the probable profitability of the site.

1105. Moreover, although Claimant submits that Ms Hardin's report accounted for a "*risk premium*", the report does not give sufficient clarity as to whether all the project-specific risks were accounted for.[1263] The Tribunal is unable to

[1259] Exhibit C-93.
[1260] SOC, at [6.39].
[1261] Exhibit CLA-5, at [8.3.4].
[1262] Claimant's Reply, at [6.18].
[1263] Respondent's Rejoinder, at [410].

accept, without further evidence, that the risk premium would be sufficient to deal with all the Tribunal's doubts regarding Claimant's claim to lost profits of approximately USD 380 Million.

1106. The Tribunal agrees with the tribunal in *ADM v Mexico*: "*lost profits are allowable insofar as Claimants prove that the alleged damage is not speculative or uncertain – i.e., that the profits anticipated were probable or reasonably anticipated and not merely possible*".[1264] The Tribunal finds that Claimant has not shown that the profits it claims would have been probable or reasonably anticipated. Therefore, Akgun's claimed loss of profits cannot be awarded.

1107. For completeness, the Tribunal notes that there is some jurisprudence which implies that the burden of proof of proving lost profits can possibly be switched in situations where Claimant's difficulty in proving its lost profits claim is caused by Respondent's breach, such as in *Gemplus v Mexico*,[1265] where the tribunal stated that:

> *[…] as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), Respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound Respondent's wrongs and unfairly defeat Claimant's claim for compensation […] confronted by evidential difficulties created by Respondent's own wrongs, the tribunal considers that Claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to Respondent itself proving otherwise.*[1266]

1108. However, the Tribunal finds that, in the *Gemplus* case, Claimant was essentially claiming for the "*lost income stream to be received by the Concessionaire from the Concession Agreement*",[1267] which was far easier to estimate than a novel industrial zone in Ethiopia. In any case, the Tribunal only granted lost profits for the initial contract period of 10 years, as,

[1264] Exhibit CLA-38, at [285].
[1265] Exhibit CLA-32.
[1266] SOC, at [6.60]; Exhibit CLA-32, at [13-91].
[1267] Exhibit CLA-32, at [12-48].

although there was a possible extension of 10 more years, the *Gemplus* tribunal found those lost profits to be far too speculative.[1268]

1109. It would seem to the Tribunal that, for the burden of proof to shift to Respondent, the lost profits cannot be so speculative that Claimant cannot meet even a minimum evidentiary burden to show a reasonable likelihood that it would be able to achieve the profits claimed.[1269] This has not been shown in the present case.

Loss of Opportunity/Loss of a Chance

1110. The Tribunal broadly agrees with the tribunal in *SPP v Egypt*, [1270] which stated that, "*the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred*". [1271] The Tribunal accepts Claimant's assertion that loss of opportunity can theoretically be granted (for breaches of FET obligations) in certain circumstances.[1272]

1111. However, the Tribunal finds that a claim for loss of a chance still requires the *reasonable* possibility of the chance coming to fruition. In other words, a party cannot claim damages based on fanciful or unlikely scenarios.

1112. This is admitted by Claimant, who agrees that, for loss of a chance, "*Claimant [has] to prove the existence of a **viable** chance to make a profit*" (bold and underline emphasis added).[1273]

1113. In the present situation, the Tribunal finds that, at the time the ETIZ Project was suspended, (i) the Project was still in the early stages of its lifecycle, (ii) Claimant was merely beginning to gauge interest in the development, and (iii) the Parties had only committed to Phase 1 of Stage 1 of the Project.[1274]

1114. While there were options on the table to further develop the ETIZ Project, the Tribunal finds that this was contingent on Claimant achieving several

[1268] Exhibit CLA-32, at [12-49].
[1269] Respondent's Rejoinder, at [397].
[1270] Exhibit CLA-72.
[1271] Exhibit CLA-72, at [215].
[1272] Refer to Paragraph [988] above.
[1273] Claimant's Reply to TLOQ, at [3.10].
[1274] Refer to Paragraph [1055] above.

occupancy and financial targets for the initial phases of the Project, and that further development was subject to approval from both Parties.

1115. In other words, Claimant is claiming (i) that it lost the chance to develop Phase 1 of Stage 1 of the Project, and (ii) assuming it had succeeded with Phase 1, it then lost a chance to develop Phase 2 of Stage 1 and Stage 2 of the Project. The Tribunal finds this progression to be highly speculative.

1116. Indeed, the fact that the Parties did not commit to the full Stage 1 and Stage 2 of the Project immediately shows that the Parties were not fully confident of the financial success of the industrial zone and wanted to reserve exit options in case Phase 1 of Stage 1 of the Project was a failure.

1117. It therefore seems clear that the Parties themselves believed that Phase 2 of Stage 1 of the Project as well as Stage 2 of the Project were more speculative than certain.

1118. Put another way, Claimant cannot now claim that there was a viable chance to earn a profit from Phase 2 of Stage 1 (or from Stage 2) of the ETIZ Project, when Claimant agreed to contingencies that allowed it to avoid developing the Project further in the event that the initial phase was not successful. Given that the Project was in its infancy, Claimant has not discharged the burden of proof to show that Phase 2 of Stage 1 or Stage 2 would have a *reasonably likely* chance to be profitable. As stated earlier, at Paragraphs [1092]-[1097], even with Ms Hardin's Expert Report, the Tribunal remains unconvinced about the profitability of the Project.

1119. The Tribunal therefore finds that Claimant's request for damages arising from the loss of a chance to develop the ETIZ Project must necessarily exclude the loss of a chance to develop Phase 2 of Stage 1 of the Project (as well as Stage 2 of the Project).

1120. Cognizant of this very issue, Claimant has helpfully provided three possible scenarios for its claim for loss of a chance, namely, (1) for the loss of a chance to profit from the development of Phase 1 of Stage 1 of the Project, (2) for the loss of a chance to profit from the development of the entire Stage 1 of the Project, and (3) for the loss of a chance to profit from the development of both Stage 1 and Stage 2 of the Project.[1275] However, this does not solve

[1275] Claimant's Reply to TLOQ, at [3.15].

Claimant's central problem: that the entire Project was in its infancy and there was no indication that the Project at any phase or stage would be financially viable.

1121. While the Tribunal appreciates that Claimant had created a similar industrial project in Turkey (which was successful), that does little to assuage the Tribunal's concerns that Claimant was operating in a foreign land, with markedly different needs and requirements, and there was no indication that their successes in Turkey could be replicated in Ethiopia.

1122. While Claimant submits that loss of opportunity should be calculated "*as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition*",[1276] it admits that in practice the quantification of the loss of opportunity by arbitral tribunals is based on the tribunal's discretion (especially where the probability of success is impossible to determine).[1277] Consequently, Claimant itself implicitly acknowledges that there is no framework for determining whether damages for loss of opportunity should be granted and that this head of claim is subject to the Tribunal's discretion.

1123. In an attempt to circumvent the burden of proof issue, Claimant asserts that, as Respondent had breached its obligations towards Claimant, the burden of proof should be reversed, with Respondent bearing the burden to show that Claimant would **not** have made a profit or would not have had a reasonable chance to make a profit.

1124. Claimant's position is that "*loss of opportunity has been recognized as an appropriate measure of damages when Respondent's breach causes any difficulty on claimant's part in proving a lost profits claim; and, in that case, the burden of proving future profits should be reversed and the onus imposed on respondent to dispute claimant's proof*".[1278]

1125. The Tribunal is reluctant to adopt Claimant's position that the burden of proof should be reversed in situations where Respondent's breach causes difficulty in Claimant's ability to prove its losses, especially given that the Tribunal has found that Respondent acted in the interests of environmental

[1276] Exhibit CLA-69, at [251].
[1277] SOC, at [6.72]-[6.73]; Exhibit CLA-32, at [13-87], quoting Ripinsky & Williams on Damages, [291] & [13-95]-[13-99].
[1278] Exhibit CLA-32, at [13-92].

protection and not specifically to block Claimant from developing the ETIZ Project.

1126. In any case, the Tribunal finds that Claimant has only provided sparse case law for this proposition.[1279]

1127. Accordingly, for the same reasons as those given for rejecting Claimant's claim for loss of profits, the Tribunal finds that the valuation of Claimant's loss of opportunity is unreasonably speculative and improbable. The Tribunal therefore finds that it cannot grant damages for a loss of opportunity to Claimant.

Out of Pocket Expenses (i.e. Sunk Costs)

1128. Given the above analysis, the Tribunal finds that compensating Claimant for its actual sunk costs (or out of pocket damages) is the best measure of damages that would "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act has not been committed".*[1280]

1129. While Claimant states that awarding sunk costs is the absolute floor (in terms of compensation), it does not deny that sunk costs are the appropriate damages to be awarded in situations where a party is unable to prove expectation losses with sufficient certainty.[1281] Indeed, Claimant submitted that sunk costs should be granted where the Tribunal has rejected both loss of profits and loss of a chance as speculative.[1282]

1130. In the present case, because of the uncertain nature of Claimant's claim for loss of profits and/or loss of a chance, the Tribunal finds that it is constrained to only allow Claimant to recover the reasonable, documented sunk costs that it expended on the Project.

1131. As stated above, the Tribunal has found that Respondent did, *inter alia*, in fact (1) create a legitimate expectation for Claimant that it could develop the Sendafa site,[1283] and (2) implicitly or otherwise agreed to let Claimant begin

[1279] Exhibit CLA-32, at [13-92].
[1280] Exhibit CLA-63, at pg. [47].
[1281] Claimant's Reply to TLOQ, at [3.19].
[1282] Claimant's Reply to TLOQ, at [3.19].
[1283] Refer to the Tribunal's analysis above at Paragraphs [690]-[703] on Claimant's Legitimate Expectation.

working on the site (before the EIA was approved).[1284] The Tribunal finds that, but for Respondent's conduct, Claimant would not have incurred any of the sunk costs which it is claiming, namely:

1131.1. Compensation in the amount of ETB 14.717.476,15 to the Oromia Regional State for the relocation of farmers;

1131.2. Building costs for the central office and police station that Claimant built with Respondent's tacit approval; and

1131.3. Associated manpower and marketing costs before the Project was suspended.

1132. The Tribunal therefore finds that the sunk costs incurred by Claimant were caused by Respondent's breach of its FET obligations and are recoverable from Respondent.

1133. The Tribunal does not agree with the characterisation that Claimant's "*disturbance of the allocated land and commencement of constructions works did not create any value but sought to pre-empt a legitimate environmental assessment*",[1285] given Respondent's knowledge and tacit approval of Claimant beginning construction on the land.

1134. Indeed, there is evidence that Respondent repeatedly urged Claimant to commence work on the project prior to EIA approval.[1286] Moreover, the Tribunal finds that the 2012 ETIZ Agreement had specified timeframes for the completion of construction, without mentioning that these timeframes were subject to any delays for EIA approval.[1287] Respondent's claim that these timeframes were "*simply tolled in the event of Akgun's delay in attaining regulatory approvals*"[1288] are not borne out by the facts (or any contractual clause).

1135. Similarly, the Tribunal does not agree that Claimant's claim for out-of-pocket damages can be deemed to be *de minimis non curat lex*,[1289] given that they

[1284] The Tribunal agrees with Claimant's characterization that Respondent must have known and allowed them to begin work on the Sendafa site at Paragraph [993] above.
[1285] SOD, at [382]; Witness Statement of Mr. Ahmed Abtew dated 12 March 2021, at [15].
[1286] Claimant's Reply, at [5.51].
[1287] Claimant's Reply, at [6.61].
[1288] Respondent's Rejoinder, at [422].
[1289] Respondent's Rejoinder, at [418].

include compensation to displaced parties living on the Sendafa plot in exchange for a leasehold and construction costs, which the Tribunal has already noted fall under the meaning of "*investment*" under the TEBIT (refer to Section VIII(A)(1) above).

1136. The Tribunal notes that Ms Hardin's report calculates that Claimant incurred **USD 4,955,131** [1290] in sunk costs (up till the Project was discontinued). Claimant argues that this figure omits certain expenditures and that its actual sunk costs were at least USD 7 Million, not USD 4,955,131.[1291]

1137. Claimant acknowledges that there is no documentary evidence for the additional **USD 2,044,869** it has claimed, but explains that its inability resulted from its departure from Ethiopia without complete records.[1292]

1138. While the Tribunal accepts that additional expense may have been incurred by Claimant, the Tribunal is unable to allow Claimant to recover sunk costs that it *alleges* but is not able to prove.

1139. Claimant argues that Respondent has not challenged Claimant's estimate of USD 7 Million for its sunk costs, and must therefore be deemed to have accepted such an estimate. The Tribunal finds that although Respondent has issued a blanket denial that it should pay the amounts claimed entirely, this is not the equivalent of an admission (tacit or otherwise) by Respondent that the amounts claimed by Claimant are accurate. Accordingly, in the absence of additional documentation supporting Claimant's claim for an additional USD 2 Million in sunk costs, the Tribunal is unable to find that an award of the additional amount is warranted.

1140. Consequently, the Tribunal accepts Ms Hardin's calculation of Claimant's actual reliance loss suffered[1293] (which is based on documentary evidence of expenses incurred), and awards **USD 4,955,131,** before interest, as the sunk costs incurred by Akgun in relation to the ETIZ Project.

Did Claimant Mitigate its Losses?

[1290] Hardin's Report, at [25].
[1291] Claimant's Reply to TLOQ, at [3.20].
[1292] Claimant's Reply to TLOQ, at [3.20].
[1293] Hardin's Report, at [25].

1141. As a preliminary matter, the Tribunal notes that Parties did not submit on whether the duty to mitigate is an affirmative defence under the applicable law (meaning that it is unclear in the present case whether Claimant has the burden of proof to show that it attempted to mitigate or whether Respondent has the burden of proof to show that Claimant failed to mitigate). However, the Tribunal finds that the allocation of the burden of proof does not matter in the present case given that Claimant has provided adequate evidence that it did, in fact, sufficiently attempt to mitigate its losses. This will be discussed further below.

1142. The Tribunal notes that it is common ground between both Parties that Claimant had a duty to mitigate its damages and that inadequate efforts to mitigate would reduce otherwise recoverable damages.[1294]

1143. In the present case, the Tribunal must decide whether Claimant (1) received offers for alternative plots of land on which to build the industrial zone (or an offer for an alternative mix of industries which would be allowed to be built upon the Sendafa site),[1295] and (2) unreasonably chose not to proceed with the alternatives.

1144. While Respondent argues that the mere offering of suitable alternative lands precludes any recovery, as this act in itself shows that Respondent did not breach FET obligations and/or replaced any allegedly expropriated land,[1296] the Tribunal finds this argument untenable for the reasons explained above in Sections IX-XV.

1145. Conversely, Claimant states that its attempts at mitigation were forestalled by Respondent's refusal to supply a firm offer of a suitable alternative site for the ETIZ Project (even though Claimant appealed twice to Respondent by letter for such an offer),[1297] which effectively waived any mitigation-based defences of Respondent (as Claimant could not possibly mitigate without any alternatives to choose from).[1298]

[1294] Claimant's Post-Hearing Submission, at [5.2]-[5.3]; Exhibit CLA-171, at [25.44], Exhibit CLA-172; Exhibit CLA-42, Commentary to Art. 31, at [11]; Exhibit CLA-176, at [167]; Respondent's Post-Hearing Submissions, at [57].
[1295] Respondent's Rejoinder, at [330].
[1296] Respondent's Post-Hearing Submissions, at [62]; Claimant's Reply, at [5.128].
[1297] Claimant's Post-Hearing Submission, at [5.14]; Exhibit C-149; Exhibit C-88.
[1298] Claimant's Post-Hearing Submission, at [5.1].

1146. From the evidence provided, the Tribunal finds that Claimant did indeed press Respondent to offer a suitable alternative site for the ETIZ Project,[1299] but Respondent did not provide a firm offer or even a skeletal set of terms for an alternative plot.[1300]

1147. The Tribunal accepts that Claimant must reasonably have been provided sufficient data *"that would have permitted it to make a reasoned business decision"*[1301] and that it should not be faulted for rejecting alternative plots due to insufficient information provided by Respondent. Moreover, the Tribunal also accepts "*subsequent industrial developments in the region of the alternative* sites" [1302] is irrelevant to show that Claimant made a wrong decision in choosing to reject the sites, as the reasonableness of Claimant's decision must be evaluated based on the information Claimant had available at the time.

1148. Given that Respondent did not provide Claimant with a firm offer, or with more information to inform its decision, the Tribunal accepts that Claimant found the sites which Respondent showed Claimant unsuitable based on what limited information it had. Claimant's opinion was that these sites were located at a far greater distance from Addis Ababa than the original site, which was approximately 30km away from Addis Ababa, even though proximity to Addis Ababa was one of the factors that Claimant viewed would be key to the success of the ETIZ Project.[1303]

1149. While the Tribunal notes that the evidence provided by Respondent's witnesses indicated that the alternative sites offered by Respondent may have been suitable for large scale industrial developments, and that there would have been no issues producing an EIA, the Tribunal finds that there is no evidence that this information was passed down to Claimant, or that the sites were suitable for industrial developments of the envisioned scale and composition of ETIZ.

[1299] Exhibit C-84; Exhibit C-85; Exhibit C-17; Yusuf Akgun 1st Statement dated 19 November 2020, at [5.20]-[5.21]; Yunus Akgun 1st Statement dated 19 November 2020, at [7.6]-[7.15]; Ufuk Akgun's Witness Statement dated 17 October 2021, at [3.9].
[1300] Exhibit C-149; Exhibit C-88; Yusuf Akgun 1st Statement dated 19 November 2020, at [5.26].
[1301] Claimant's Post-Hearing Submission, at [5.15].
[1302] Claimant's Post-Hearing Submission, at [5.16]; See also, for example, Exhibit CLA-180, at [1894].
[1303] Claimant's Post-Hearing Submission, at [5.13].

1150. The Tribunal takes guidance from the case of *Magyar Farming Company Ltd v Hungary*, [1304] wherein Respondent's mitigation defence failed [1305] even though claimant declined the alternative plot offered because, in its business judgement, the land was unsuitable.

1151. The Tribunal agrees with the *Magyar* tribunal's analysis that, *prima facie*, given that a claimant would be looking to make a profit, it would not be likely for a claimant to reject a suitable alternative plot. Given that Claimant here did reject alternative plots, it is reasonable to assume that the rejection was due to some reasonable consideration (at least in Claimant's mind) that the plot was unsuitable. Without proof that the alternative sites, in fact, were suitable, and that Claimant was provided with adequate information at the time to make this determination, the Tribunal is inclined to defer to Claimant's business judgement that the sites were not suitable.[1306] A failure to select an unsuitable site cannot be considered as a lack of mitigation.[1307]

1152. Even if Respondent is correct that Claimant held no unconditional entitlement to any (i) parcel of land or (ii) mix of industries within Ethiopia under the ETIZ agreement, and that the development and operation "*of the industrial zone project was at all times contingent upon compliance with numerous obligations, including the obligations of environmental study existing under both law and contract*",[1308] Claimant's duty to mitigate must be viewed in light of the possibility of reasonable alternatives, and not any possible alternative.

1153. While it is true that, if Claimant refused to take up reasonable alternative plots of land, it arguably would have failed to mitigate, the entire premise is contingent on the alternative plots being of a quality and location similar to the initial Sendafa plot and on Claimant likely making similar amounts of profits (as readily stated by Respondent).[1309]

[1304] Exhibit CLA-181.
[1305] Claimant's Post-Hearing Submission, at [5.12]; Exhibit CLA-181, at [337] & [427]-[428].
[1306] Claimant's Post-Hearing Submission, at [5.8]; Exhibit CLA-76, at [217]; Exhibit CLA-175, at [216], Exhibit CLA-182, at [273]; Exhibit CLA-181, at [427].
[1307] Exhibit CLA-181, at [377] & [427]-[428].
[1308] Respondent's Post-Hearing Submissions, at [63].
[1309] Respondent's Post-Hearing Submissions, at [67].

1154. In that regard, Respondent argues that the alternative plots offered to Claimant were of a comparable quality to the Sendafa plot,[1310] and points to (1) the audio recording of a site visit where Mr Yusuf Akgun apparently agreed that one of the proposed alternative plots "*could do*"[1311] if it had certain additions (additions that Respondent claims it was happy to make)[1312] and to (2) the fact that the specific site that Mr. Yusuf Akgun viewed favourably was the site of a massive dry port close to the world-class Addis Ababa-Adama Expressway, and was located within thirty kilometers of Adama, one of Ethiopia's largest cities (with several hundred of thousands of citizens) ,[1313] thus making Claimant's claim[1314] that it would be harder to (1) transport the necessary construction materials to the alternative sites for construction and (2) transport finished goods out of Ethiopia from the alternative sites questionable at best.

1155. Respondent further states that it made an offer to Claimant of a fifteen-year tax holiday if Claimant agreed to move the ETIZ Project from the Sendafa site, and therefore that the alternative sites (and deals) offered were of equal (if not better) quality as compared to the Sendafa site.[1315]

1156. In the Tribunal's view, while Respondent may very well have promised Claimant a tax holiday and alternative sites for industrial development, these alleged promises were not reduced into writing (or a formal offer) that included information supporting Respondent's assertions of comparability to Sendafa. Consequently, the Tribunal finds that there were no reasonable alternative sites on offer to Claimant (or at least, Respondent did not provide Claimant with sufficient information about the sites for Claimant to make an informed decision). Claimant did not have a duty to mitigate its losses by selecting an alternative site unaccompanied by relevant supporting information.

1157. Therefore, the Tribunal finds that Claimant did not fail to mitigate its losses in the present circumstances. In any case, the Tribunal points out that, since it has not granted Claimant's claim for loss of profits and/or loss of

[1310] Respondent's Post-Hearing Submissions, at [70]; Exhibit C-17.
[1311] Respondent's Post-Hearing Submissions, at [64]; Exhibit R-58.
[1312] Respondent's Post-Hearing Submissions, at [64]; Exhibit R-56, at the 2min 40s mark.
[1313] Respondent's Post-Hearing Submissions, at [68]-[69]; Exhibit C-45, at pg. [333]; Exhibit R-64; Exhibit R-65.
[1314] Witness Statement of Yusuf Akgun dated 19 November 2020, at [5.25].
[1315] Respondent's Post-Hearing Submissions, at [70]; Exhibit C-17.

opportunity, the value of any mitigation drops drastically, as the sunk costs that Claimant already had expended on the Sendafa plot would not have been reduced or recovered by moving to a new site. This renders the question of mitigation merely academic in nature.

Pre-Award Interest Rate and Starting Date

1158. As a preliminary matter, having received no contrary submissions on the matter by Respondent, the Tribunal accepts the opinion of Claimant's expert that the Pre-Award interest rate should be **6.625%** (which is calculated based on the ten-year Ethiopian sovereign bond yields and would represent the cost-of-borrowing for the sum owed).[1316]

1159. While Parties have not submitted on this, the Tribunal finds that the 6.625% interest rate requested by Claimant is broadly in line with the standard "*cost-of-borrowing*" approach adopted by most international tribunals (i.e., the interest rate that would have applied had the Parties borrowed the sum in question), and finds it reasonable to peg the interest rate to 6.625%.

1160. The Tribunal also notes that the Parties have not submitted that international law or the domestic laws of Ethiopia (if applicable) would prescribe a lower interest rate (or cap the interest rate at a lower amount), and therefore finds that it is appropriate to award an interest rate of 6.625% in the present matter.

1161. With regard to the starting date from which Pre-Award Interest should be granted, the Tribunal notes that there are a few possible dates to choose from, namely:

1161.1. The date on which Claimant was first notified that it required an EIA (at or around May 2013);

1161.2. The date on which Claimant was first notified to indefinitely suspend construction work on the ETIZ Project (24 July 2014);

1161.3. The date on which Claimant sent a notice to Respondent that it was invoking its rights under the TEBIT to seek an amicable resolution (27 March 2015);

[1316] Hardin Report, at [150].

1161.4. The date on which Respondent notified Claimant that the ETIZ Project must be relocated (12 June 2015);

1161.5. The date on which Claimant rejected the suggested alternative plots of land to develop the ETIZ Project on the grounds that they were unsuitable (2 November 2015);

1161.6. The date of Claimant's final departure from Ethiopia (in or around August 2017); or

1161.7. The date on which Claimant sent out the Notice of Arbitration (19 June 2019).

1162. It is trite that Pre-Award Interest can only be granted, at earliest, from the date the damage occurred, or the date of failure to perform an obligation.

1163. The Tribunal believes that Pre-Award Interest should be granted from the date on which it became clear to Claimant that the ETIZ Project could not be built on the initial site. This is because, as stated earlier in the Award, the Tribunal has found that Respondent has breached its FET obligations by creating and then frustrating Claimant's legitimate expectation of building at the *initial* Sendafa plot (the fact that alternatives sites were offered is not relevant in determining when Respondent's FET breach occurred).

1164. In the Tribunal's view, Claimant is not correct in stating that Pre-Award interest should accrue from the date which Claimant was *initially* notified that its EIA was rejected or the date of the indefinite suspension of construction on the ETIZ Project. Instead, the Tribunal believes that Pre-Award Interest should accrue only from the date on which Claimant was **certain** that no satisfactory EIA could be provided to Respondent (i.e. the date on which there was a definite breach of Respondent's FET obligation). Put another way, Pre-Award Interest should only accrue from the date that Respondent notified Claimant that the ETIZ project must be relocated (i.e. 12 June 2015).

1165. This is because, even after the EIA was rejected, the Parties were still in discussion on how to improve the EIA or the steps to be taken in order to provide a satisfactory EIA. In other words, there was still a possibility that Respondent could have approved the continuation of the Project. Indeed,

the Tribunal finds that Respondent encouraged Claimant to re-submit the EIA after dealing with the issues that it had pointed out in the first EIA.

1166. Furthermore, given that Claimant was in contact with relatively high-ranking members of the Ethiopian government at the relevant time (who apparently gave Claimant assurances that the EIA issue could be fixed), it seems to the Tribunal that both sides truly believed that a satisfactory EIA still was possible, and that this belief seems to have lasted all the way until Respondent's notice on 12 June 2015 that the ETIZ Project had to be relocated.

1167. The Tribunal therefore orders that Pre-Award interest should be granted to Claimant beginning from **12 June 2015**, being the date on which Claimant sent the notice to Respondent that it was invoking its rights under the TEBIT, which the Tribunal finds to be the date on which Respondent breached its FET obligations to Claimant.

Post-Award Interest Rate and starting date

1168. Given that Respondent has declined to provide submissions on the Post-Award interest rate, the Tribunal accepts and agrees with the submission of Claimant[1317] that the Post-Award interest rate should also be **6.625%**.

1169. The Tribunal repeats and affirms its comments at Paragraphs [1159]-[1160], that the interest rate requested by Claimant seems to be in line with the "*cost-of-borrowing*" approach. The Tribunal has not received any submissions that international law or Ethiopian law prescribes a lower interest rate or caps the interest rate at a lower amount. The Tribunal therefore grants a Post-Award interest rate of 6.625% in the present matter.

1170. However, the Tribunal finds Claimant's request for the Post-Award interest rate to be compounded monthly (and immediately from the date of the Award) to be excessive, especially given that Respondent (as a country) will likely need to complete certain bureaucratic steps before it is able to disburse funds to Claimant. Claimant has given no reason why it is necessary for interest to be compounded monthly merely to "*encourage prompt settlement of the Award*".[1318]

[1317] Claimant's Reply to TLOQ, at [4].
[1318] Claimant's Reply to TLOQ, at [4.3].

1171. The Tribunal therefore orders that Post-Award Interest will begin to accrue **4 weeks** from the date of the Award (i.e. **26 September 2025**). The Tribunal also orders that Post-Award Interest be compounded **annually** (starting from the first anniversary of the Award).

XVII. Costs of the Arbitration

1172. The Tribunal will decide on the costs of the arbitration in a separate Award, after receiving submissions from the Parties on the matter.

XVIII. Findings

1173. For the ease of understanding the dispositive orders to be made by this Tribunal, the various claims for relief by both Parties are set out below, followed by the orders made by this Tribunal on those claims.

1174. As stated above at Paragraph [280], Claimant's latest request for relief is as follows:

i. FIND and DECLARE that this Tribunal has jurisdiction over Claimant's claims under the Turkey-Ethiopia BIT;

ii. FIND and DECLARE that Respondent has violated Article 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant's investments and impairing by unreasonable and discriminatory measures the use and enjoyment of such investments;

iii. FIND and DECLARE that Respondent has violated Article 4 of the Turkey-Ethiopia BIT by expropriating Claimant's investments;

iv. FIND and DECLARE that Respondent has violated the umbrella clause obligation, incorporated into the Turkey-Ethiopia BIT through Article 3 of the Treaty, by breaching its contractual obligations and other commitments;

v. ORDER Respondent to pay Claimant damages:

a. in an amount of USD 241,515,079 (excluding pre-award interest) as compensation for its aforementioned violations related to Claimant's investments in ETIZ, as set out in

Section 6.C.iv of Claimant's Statement of Claim dated 20 November 2020; and

b. in an amount to be determined by the Tribunal for the loss of opportunity to expand ETIZ into the additional area of 2,000ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020.

vi. Or alternatively ORDER Respondent to pay Claimant damages in the amounts for loss of opportunity to establish ETIZ in the original area of 1460ha as set out in Section 6.D.iii of Claimant's Statement of Claim dated 20 November 2020 and the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;

vii. Or alternatively ORDER Respondent to pay Claimant damages in the amounts of the expenses specified in Section 6.E of Claimant's Statement of Claim dated 20 November 2020;

viii. ORDER Respondent to pay Claimant pre-award interest as set out in Section 6.F of Claimant's Statement of Claim;

ix. ORDER Respondent to pay Claimant all costs and fees incurred in connection with this Arbitration;

x. ORDER Respondent to pay Claimant post-award interest at a rate to be compounded;

xi. AWARD Claimant any other relief to which it may be entitled in law or equity; and

xii. DISMISS Respondent's counterclaims in their entirety.

1175. With regard to Claimant's request for relief, the Tribunal decides as follows:

i. It has jurisdiction over Claimant's claims under the Turkey-Ethiopia BIT.

ii. Respondent has violated Article 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant's investments but has not impaired, through unreasonable or

discriminatory measures, the use and enjoyment of such investments.

iii. The indefinite suspension of the ETIZ Project by Respondent was a lawful exercise of its Police Powers and did not violate Article 4 of the TEBIT.

iv. The alleged umbrella clause claims of Claimant are actually based on claims of breach of the TEBIT, and accordingly the Tribunal does not need to make a decision on the validity and enforceability of the DEBIT umbrella clause.

v. Claimant has not proved its claim for lost profits.

vi. Claimant has not proved its claim for loss of opportunity.

vii. The Tribunal orders that Respondent pay Claimant its sunk costs totalling **USD 4,955,131.**

viii. The Tribunal orders that pre-award interest calculated at **6.625%** be awarded to Claimant on the sum above at (vii) from **12 June 2015**.

ix. The Tribunal orders that post-award interest of **6.625%** be awarded to Claimant on the sums described in (vii) and (viii) above from **26 September 2025** and that such post-award interest be compounded annually on each anniversary of the Award until full payment.

x. Costs will be decided in a separate Costs Award.

xi. All other claims by Claimant are dismissed.

xii. Respondent's Counterclaims are dismissed for lack of jurisdiction.

1176. As stated above at Paragraph [283], Respondent's latest request for relief is as follows:

i. Ethiopia respectfully requests the Tribunal to find that it lacks jurisdiction over all claims asserted by Claimant and dismiss Claimant's claims in their entirety.

ii. If the Tribunal finds that it has jurisdiction over and admits any of Claimant's claims, including any portion or portions thereof, Ethiopia respectfully requests the Tribunal to dismiss all such claims on their merits.

iii. Ethiopia further requests the Tribunal, in respect of its counterclaims, to: § Find and declare that Claimant has violated obligations owed to Respondent; and § Award to Respondent compensation in the amount of US$ 14,790,540.72 for its resulting losses.

iv. Ethiopia respectfully requests the Tribunal to order that Claimant shall bear the full costs of these proceedings, including all costs of representation and including interests, and to order such further relief as the Tribunal may deem appropriate and just.

v. Ethiopia reserves its right to modify or amend this Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims in further submissions.

1177. With regard to Respondent's request for relief, the Tribunal decides as follows:

i. As stated in Paragraph [1175(i)] above, the Tribunal finds that it has jurisdiction over Claimant's claims under the Turkey-Ethiopia BIT.

1178. As stated in Paragraph [1175(ii) and 1175(iii)] above, the Tribunal dismisses Claimant's claim for impairment of the use and enjoyment of its investments and Claimant's claim for expropriation. However, the Tribunal accepts that Respondent violated Article 2(2) of the Turkey-Ethiopia BIT by failing to provide fair and equitable treatment to Claimant's investments.

ii. As stated in Paragraph [1175(xii)] above, the Tribunal finds that it has no jurisdiction over Respondent's counterclaims.

iii. As stated in Paragraph [1175(x)] above, the Tribunal will decide on Costs in a separate Costs Award.

XIX. Dispositive Section

1179. In summary, the Tribunal **AWARDS**, **DECIDES**, and **ORDERS** as follows.

1179.1. The Tribunal has jurisdiction over all Claimant's claims under the TEBIT.

1179.2. The Tribunal does not have jurisdiction over Respondent's counterclaims under the TEBIT.

1179.3. Respondent has breached its FET obligations but has not expropriated Claimant's investments.

1179.4. Respondent is ordered to pay sunk costs to Claimant totalling **USD 4,955,131.**

1179.5. Pre-award interest calculated at **6.625%** is awarded to Claimant on the sum above from **12 June 2015**.

1179.6. Post-award interest calculated at **6.625%** is awarded to Claimant on the two sums above from **26 September 2025**. The Tribunal further orders that post-award interest be compounded annually on such parts of the two sums above (and interest thereon) as shall remain outstanding on each anniversary of the Award (starting from the first anniversary) until the date of full payment.

1179.7. All other claims and requests for relief by either party are denied.

Seat of Arbitration: The Hague, Netherlands

Date: 29 August 2025

Sir David Williams KNZM K.C.

Arbitrator

Prof Philip McConnaughay

Arbitrator

Dr Michael Hwang S.C.

Presiding Arbitrator