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The Federal Democratic Republic of Ethiopia
Attorney General

ቁጥር FDREAG 087/19
Ref.No
ቀን 19/07/2019
Date

To: Akgun Insaat Makina Sanayi Dis Ticaret Ltd. Sti

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Re: Submission of Response for the Notice of Arbitration dated 19 June 2019

Dear Sirs and Mesdames,

On behalf of the Ethiopian Government (Respondent), we submit the enclosed Response for the Notice of Arbitration dated 19 July 2019 through International Currier in addition to the attachment having the same effect sent via Email.

Sincerely,

Mesker Tariku Yirefu
Director, Civil Justice Administration Directorate
Office of the Federal Attorney General
Ethiopia

Henok Tesfaye Tefera
D/Director, Civil Justice Administration Directorate
Office of the Federal Attorney General
Ethiopia

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IN ARBITRATION PURSUANT TO THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

AKGUN INSAAT MAKINA SANAYI DIS TICARET LTD. STI.

Claimant

Vs

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Respondent

Preliminary Statement in Response to Notice of Arbitration dated 19 June 2019 submitted by and on behalf of the Government of the Federal Democratic Republic of Ethiopia

19 July 2019

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Background

1. The Claimant has served a Notice of Arbitration (NOA) dated 19th June 2019 on 21st June 2019 to the Federal Democratic Republic of Ethiopia (FDRE). Having regard to the NOA, the Respondent via H. E. Attorney General of the FDRE has communicated with a letter dated 16th July 2019 through e-mail, and while regretting the lack of response from your side, Respondent submits this Response to the notice of arbitration (hereinafter the "Response").
2. This preliminary statement is submitted in the expectation that Respondent will have a full opportunity to respond to each of the claims made by the Claimant and to submit any counterclaims it may have against the Claimant at the appropriate time. Respondent therefore submits this Preliminary Statement without prejudice to its right to set out its defence in full at the appropriate time during this arbitration. Nothing contained in this preliminary statement shall preclude Respondent from making any claims, arguments or defences on any matter covered by this arbitration. Respondent further expressly reserves its rights, substantive as well as procedural, under international law, Ethiopian law or any system of law the tribunal might find applicable in the future.
3. The Claimant brought the present purported dispute "pursuant to the Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments dated 16 November 2002 and in force from 3 October 2005 (the "Treaty" or "Turkey-Ethiopia BIT")." (NOA, para. 2)
4. The Claimant alleges that Respondent has failed "to comply with its obligations under international law and Ethiopian law with respect to Claimant's investments in Ethiopia. Those investments include Claimant's interest in the development, construction and operation of the Ethio-Turkish Industrial Zone Project ("ETIZ" or the "Project")." (NOA, para. 3)The Claimant then refers to Article VII of the Bilateral Investment Treaty (BIT) and filed the NOA "pursuant to Article 3 of the UNCITRAL Arbitration Rules (with new Article 1, paragraph 4 as adopted in 2013)." (NOA, para. 4)
5. In its NOA, the Claimant refers to its allegedly "substantial experience in the development and operation of private organized industrial zones" and its Chairman's "recognized expert[ise] in the development and operation of industrial zones", which led "representatives of the Federal Democratic Republic of Ethiopia and Ethiopia's Ministry of Industry [to] approach Mr. Akgun [the Chairman] with the idea of developing an

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industrial zone in Ethiopia." (NOA, para. 8) The Claimant further alleges that, during their visits to Turkey the Ethiopian delegation "specifically asked Mr. Akgun if he and his company, Akgun Construction, would be willing to develop such an industrial zone in Ethiopia". (NOA, para. 9) The outcome of those visits and discussions was the conclusion of a Memorandum of Understanding (MoU) on 13 October 2008, an Agreement on the Lease of Land and Development of an Organized Industrial Zone on 11 June 2010, and a replacement Agreement on the Lease of Land and the Development of an Industrial Zone on 8 June 2012 ("the 2012 ETIZ Agreement").

6. The Claimant alleges that Respondent, despite its obligation under Article 1 of the 2012 ETIZ Agreement to deliver 1,460-hectares of land to Claimant, handed over to Claimant only the first 100 ha of land and, even then, failed "to ensure … provision of sufficient power and water to the site for development of the Project". (NOA, para. 23)

7. The Claimant then recounted a series of correspondence it had with different authorities of the Government of Ethiopia starting from the latter's demand that Claimant prepare a detailed Environmental Impact Assessment ("EIA"), the two EIAs it submitted and their subsequent rejection by the relevant Government agencies, and meetings it allegedly held with Government officials, from which the Claimant draws a number of, sometimes absurd, conclusions, including:

    a. A suggestion that, despite the rejection of its EIA by the competent Government agency and Claimant's inaction for more than seven months to rectify the problems identified therein and resubmit a revised EIA, "by letter dated 24 July 2014, the Ministry of Industry ***unexpectedly and without warning*** informed Claimant that it should suspend its work on the ETIZ Project" (NOA, para. 25, emphasis added);

    b. A groundless, irrelevant and highly malicious claim that "although Claimant had much earlier provided the payment of funds to satisfy claims by farmers and settlers on the land, ***Ethiopia never passed those funds onto all of the farmers***" (NOA, para. 23, emphasis added);

    c. A series of unfounded allegations that "the minister-advisor to Ethiopia's Prime Minister advised Claimant that the ***Ministry of Industry had made a mistake*** in the selection of the land for the Project, and that ***all fault on this subject belonged to the Ethiopian government***", that "Akgun Construction ***would not be allowed*** to

establish an industrial zone on the land", and that "***no environmental assessment would be approved*** for the Project and that the Project needed to stop" (NOA, para. 27, emphasis added);

d. The ludicrous suggestion, despite the Claimant's knowledge of the existence of a number of industrial zones in Ethiopia prior to its arrival in the country, that "the design and plan of these industrial zones bears a similarity to the designs prepared by Claimant and submitted to Ethiopia", which Ethiopia, somehow, "appears to have then used in the development of other industrial zones" in violation of some "intellectual property" owned by the Claimant; and

e. The unfounded allegation that, in spite of the meticulous and well-documented observance of due process in the Government's dealings with the Claimant, the decision of 17 June 2015 to suggest relocation of the Project to a less-environmentally-sensitive area, which was done in full appreciation of the Claimant's, by then obvious, lack of experience or expertise to meet the minimum regulatory requirements established in Federal Law that had been in place since 2002, somehow amounted to unlawful expropriation and a breach of the fair and equitable treatment (FET) standard.

8. Even more ludicrous is the allegation that, as a result of actions supposedly taken by Respondent, Claimant "suffered, and continues to suffer, losses that are no less than USD 150 million". Unsurprisingly, the Claimant did not provide any explanation as to how it arrived at its quantum of damages; it is unclear what this amount represents or on what valuation methodology it is based; it is just there.

9. As Respondent will demonstrate fully in its Statement of Defence at the appropriate time, it is already clear that none of the claims in the NOA has any foundation in law or in fact. No serious investor that has undertaken to complete "the infrastructure construction works of the first 100 hectares of Land handed over … within 18 months" would claim, in good faith, expropriation of an investment or breach of the FET standard before it has put anything meaningful on the ground, instead keeping the 100 hectares of land in its hands virtually idle for over six years, unable to produce an EIA that meets the most basic requirements under the law. (see Article 9(2) of the 2012 Lease Agreement)

10. In the rest of this preliminary statement, Ethiopia will provide a general statement of its objections to the jurisdiction of the proposed Tribunal, briefly touch on its defences on the merits and the Claimant's damages claim and propose a way forward.

Parties to the "Dispute"

A. The Claimant

11. The Claimant is AKGUN INSAAT MAKINA SANAYI DIS TICARET LTD. STI. being represented by;

Mr Gladstone N. Jones, III (gjones@jonesswanson.com)
Ms Jennifer Morrison Ersin (jersin@jonesswanson.com)
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James R. Swanson (jswanson@fishmanhaygood.com)
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Federal Democratic Republic ... Federal Attorney General

B. The Respondent

12. The Respondent is the Federal Democratic Republic of Ethiopia represented by the Office of the Federal Attorney General of the Federal Democratic Republic of Ethiopia which was established in 2016 under its establishment Proclamation No. 943/2016 having its head office at Kirkos sub-city, Bambis Street, Addis Ababa, Ethiopia.

13. Under Article 6(4) of the Federal Attorney General's establishment Proclamation No. 943/2016, the Office is conferred with the power to represent the Federal Government on civil matters brought before national as well as international judicial or quasi judicial bodies.

Objection to Jurisdiction

14. To the extent the Claimant may have a claim, which is categorically denied, it can only be based on the contract, which has an exclusive jurisdiction clause of its own under Article 21 therein:

> *"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 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 (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 to 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 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 BIT 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 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 the parties."

15. The Claimant has no investment that can be protected under the Ethiopia-Turkey BIT; because the Claimant failed to produce an Environmental Impact Assessment that met the most basic requirements, no approval was ever given for the Claimant to proceed to the stage of actual construction. In a situation where the Claimant failed to pass the preliminary stage and never implemented the project envisaged in the underlying contract, all that remains is the contract itself.

16. As such, to the extent Claimant may have any claim, which is categorically denied, it can only be contractual which can be settled only on the basis of the dispute settlement clause of that contract. In reality, as the Respondent will develop further in its counterclaim as part of the Statement of Defence, the Claimant's failure to perform its contractual obligations constitutes breach of contract that has caused Respondent to suffer significant damages.

17. In the current situation where the Claimant has been keeping idle 100 hectares of land for over six years in breach of its clear contractual obligations and with virtually no

investment on it, the dispute settlement provisions of a Bilateral Investment Treaty cannot be triggered and override the terms of the contract. In this connection, Ethiopia strongly rejects the Claimant's creative attempt to use the Most-Favoured Nation provision of the Ethiopia-Turkey BIT as the umbrella clause with which to import provisions from other BITs to which Ethiopia is a party that purportedly "afford more favorable investment protection".

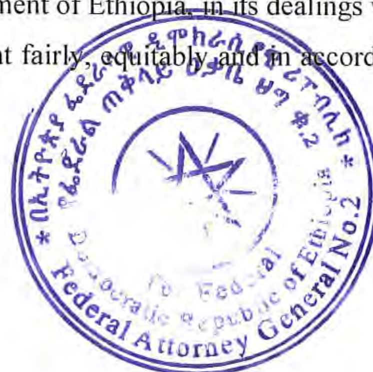
18. Finally, without prejudice to Respondent's objection against the Jurisdiction of the Tribunal and the applicability of the UNCITRAL Rules to the arbitration, the tribunal cannot have jurisdiction under UNCITRAL Arbitration Rules 2010/2013. As will be developed further in Respondent's statement of defence in due course, the presumption contained in Article 1(2), first sentence of UNCITRAL Arbitration Rules 2010/2013 has been rendered inapplicable under the second paragraph of the same provision for cases *"where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date"*, precisely the type of "arbitration agreement" asserted by Claimant to bring this matter within the scope of the Ethiopia-Turkey BIT.

Ethiopia Rejects the Claimant's Claims on Their Merits

19. The Claimant alleges that Respondent, "as a consequence of all the measures taken by Ethiopia, Akgun Construction has been completely deprived of its rights under the 2012 ETIZ Agreement and of its intellectual property in violation of Ethiopia's obligations under the Treaty." (NOA, para. 66).

20. Ethiopia rejects this claim as unfounded in fact or in law. The Government of Ethiopia, in its desire to attract and retain foreign investment, has a policy of nurturing and supporting all investment operations in every way it can, a policy that was applied to the present Claimant as well. At no time did Ethiopia take any action that deprived Claimant of its rights or otherwise interfered in its operations. Respondent's insistence that the Claimant had to produce an EIA to protect the ecosystem of the surrounding area in accordance with existing laws and, in this particular case, the specific contractual stipulations, is an exercise of legitimate governmental authority in discharge of its primary responsibility that cannot, and does not, amount to expropriation in any way.

21. Likewise, Respondent denies breach of the Fair and Equitable Treatment (FET) standard as alleged by the Claimant. The Government of Ethiopia, in its dealings with the Claimant and at all times, has treated the Claimant fairly, equitably and in accordance with a clear



law applied consistently, transparently, even-handedly and in full observance of the principles of due process of law.

22. Respondent also denies the outrageous and unfounded allegation that it has somehow infringed on the Claimant's intellectual property rights, an absurd allegation unbecoming of a genuine investor to make.

Ethiopia Rejects the Claimant's Baseless Claim for Damages

23. Claimant alleges that, "as a result of Respondent's breaches of international law and Ethiopian law, Claimant has suffered, and continues to suffer, losses that are no less than USD 150 million." (NOA, para. 76). Respondent rejects this claim as baseless, supported neither by logic nor any evidence of exactly how the damage was suffered or incurred. The Claimant did not identify the harm it suffered or provide any explanation as to how it arrived at the USD150 million figure. In the absence of any explanation of what this amount represents or what valuation methodology was used to reach it, Respondent can only reject it as wishful fiction.

Proposed Way Forward

24. Over the past two decades, the Government of Ethiopia has been successful in attracting and retaining foreign investment in a number of sectors. Ethiopia's regulatory and institutional environment for foreign investment has won the confidence of foreign investors from around the world, making it one of the top investment destinations in the developing world. Our principled approach to the promotion and nurturing of foreign investment has paid dividends in the form of double-digit economic growth spanning almost two decades.

25. The manner in which we interacted with, and treated, the Claimant from day one has been no exception. In hind sight, and considering the environmental sensitivity of the Project area, Respondent demonstrated its readiness to take the Claimant at its word, placing complete trust in its claimed competence, expertise and experience to work in such delicate ecosystem. All Respondent did at that stage was ensure that the contract had a specific stipulation that the Developer "shall protect the environment from pollution by using appropriate methods and technologies", adding: "In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard." (Article 8(10) of the 2012 Agreement).

26. It took the Respondent two substandard EIAs produced and submitted by the Claimant before it concluded that the Developer and supposed leader in the field of development of industrial zones in fact lacked the capacity to work in such a delicate environment. Yet, even then, the only decision Respondent took was to propose relocating the site to a less-environmentally-sensitive location rather than to close it down completely. That decision was motivated by our commitment to bring the initial project to fruition.

27. However, the Claimant, clearly with an eye for easy money and opportunities to enrich itself unduly, through an unfounded and outlandish claim before an investment tribunal, refused to cooperate, kept the land idle for over six years and now initiated this arbitration. We have nothing to fear from this process; indeed, we are confident that we will prevail in our counterclaims for the damage we suffered by Claimant's keeping so much resource idle for so long – and potentially other issues.

28. However, we are also happily aware that Ethiopia has been home to a large number of well-meaning and genuine Turkish investors. As such, we have every reason to want to avoid such an expensive and time-consuming exercise for both sides. With this in mind, we extend our hands of friendship for an amicable solution to this baseless dispute.

29. The Government of Ethiopia remains hopeful that this proposal will be received positively.

For the avoidance of any doubt, Respondent reserves its right to:

30. Further develop this response as well as produce other subsequent submissions including but not limited to detailed Statement of Defense, Exhibits, Legal Authorities;

31. Produce such factual or legal arguments or evidence (including witness testimony, expert testimony and other documents) as may be necessary to present its case or rebut any case which was presented on the NOA or may be put forward by the Claimant; and

This response to the notice of arbitration has been made bona fide and in the interest of Justice.

Through,

Mesker Tariku Yirefu
Director, Civil Justice Administration Directorate
Office of the Federal Attorney General
Ethiopia

Henok Tesfaye Tefera
D/Director, Civil Justice Administration Directorate
Office of the Federal Attorney General
Ethiopia