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

between

AKGUN INSAAT MAKINA SANAYII VE DIS TICARET LTD. STI.

Claimant

and

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Respondent

STATEMENT OF DEFENSE, OBJECTIONS TO JURISDICTION, AND COUNTERCLAIMS

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12 March 2021

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I. INTRODUCTION

1. The Federal Democratic Republic of Ethiopia ("Ethiopia" or the "Respondent") hereby presents its full Statement of Defense, Objections to Jurisdiction, and Counterclaims against the claims submitted by Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. ("Akgun" or the "Claimant") under the Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments (the "Treaty").[1]

2. Perilously creative, Akgun's claim encroaches the boundaries of frivolity in at least two respects: (i) it disregards an irrevocable contractual condition subsequent in the form of environmental legal responsibility; and (ii) it attempts to elevate a municipal contract dispute to an international treaty violation through an unprecedented, unintended and convoluted use of the Treaty's most-favored-nation treatment clause.

3. In essence, Akgun avers that (i) the requirements of the Ethiopian environmental laws, applicable on their own accord and through incorporation in the governing agreement for the lease and development of land, are themselves violations of the substantive protection provisions of the Treaty; and (ii) the dispute settlement provision within that same agreement is optional. In this Statement of Defense, Ethiopia will show that these major propositions are incorrect both as a matter of treaty interpretation and Ethiopian law.

4. The 2012 Agreement for the Lease of Land and Development of an Industrial Zone, signed between Akgun, the Ministry of Industry of the Federal Democratic Republic of Ethiopia, and the Oromia Regional State, expressly provides that "[Akgun] shall respect this Agreement ***and all other conditions stated in the relevant laws of Ethiopia***."[2]

[1] Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, signed 16 November 2001, **CLA-001** (hereinafter the "Treaty").
[2] Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Oromiya Regional State and Akgun Insaat Makine Sanayi Dis Ticaret Sirketi For The Lease of Land and The Development of an

5. The Agreement also expressly requires that "[Akgun] shall protect the environment from pollution by using appropriate methods and technologies," and that "[i]n this regard [Akgun] has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution ***and carryout the necessary environmental studies required in this regard***."[3] It further provides for continued monitoring of compliance of land use conditions under the law by both federal and state authorities, stating in particular that "[Akgun] shall allow experts of the Ministry and the Oromiya Regional State, who shall be sent for continuous assessment and follow up the proper use of the land leased and its conformity with this agreement, to have access to the [industrial zone]."[4]

6. The centerpiece of Ethiopian environmental law, the Environmental Impact Assessment Proclamation No. 299 of 2002, establishes the general rule in its Article 3(1):

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

7. The Environmental Protection Authority's Directive No. 1/2008, entitled "A Directive Issued to Determine Projects Subject to Environmental Impact Assessment," includes, at Item No. 21, "***Establishment of Industrial Zone***."[6]

8. Further, the Authority's earlier-issued Environmental Impact Assessment Procedural Guideline Series 1 of 2003 (the "Guidelines") sets forth the specific regulatory processes for the conduct of an environmental impact assessment ("EIA").[7] It defines "Environmental

Industrial Zone, dated 8 June 2012, **Exhibit C-009**, Art. 8(12) (emphasis added) (hereinafter the "2012 ETIZ Agreement").
[3] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).
[4] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(11).
[5] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 3(1) (emphasis added).
[6] A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2** (emphasis added).
[7] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**.

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."[8] It also defines "Environmental Impact Assessment Report" to be "***[a] report containing sufficient information to enable the Environmental Agency to determine whether and under what conditions a proposed action should proceed***."[9]

9. The Guidelines further provide that "all feasible options to a project, policies, programs or its components like site, processes, products, raw materials etc. including the 'no go' option should be considered."[10] The same Guidelines define "Alternatives" as "[a] possible course of action that might be adopted in lieu of the proposal or activity or in terms of site, design, input, process, including the 'no action' alternative."[11]

10. Most importantly, under the regulatory framework, the Authority has the discretion ***to*** "***refuse implementation*** of the project ***if it is convinced*** that the negative impact cannot be satisfactori[l]y avoided."[12]

[8] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Environmental Assessment") (emphasis added).
[9] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Environmental Impact Assessment Report") (emphasis added).
[10] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, Sec. 4.2.2 ("Guiding Principles of [Environmental Assessment]").
[11] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Alternatives").
[12] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 9(2)(c) (emphasis added). Article 9 reads in its entirety as follows:

> "Review of Environmental Impact Study Report 1) An environmental impact study report that is submitted to the Authority or the relevant regional environmental agency for review shall include a brief statement summarizing the study in non-technical terms as well as indicating the completeness and accuracy of the information given in the study report. 2) The Authority or the relevant regional environmental agency shall, after evaluating an environmental impact study report by taking into account any public comments and expert opinions, within 15 working days: (a) approve the project without conditions and issue authorization if it is convinced that the project will not cause negative impacts; (b) approve the project and issue authorization with conditions that must be fulfilled in order to eliminate or reduce adverse impacts or reduce adverse impacts to insignificance if it is convinced that the negative impacts can be effectively countered, or (c) refuse implementation of the project if it is convinced that the negative impact cannot be satisfactorily avoided."

11. Under the principal Ethiopian environmental legislation, the impact assessment must meet certain fundamental requirements. Proclamation No. 299/2002 provides in relevant part as follows:

> "1) An environmental impact study report shall contain sufficient information to enable the Authority or the relevant regional environmental agency to determine whether and under what conditions the project shall proceed. 2) An environmental impact study report shall contain, as a minimum, a description of: (a) the nature of the project, including the technology and processes to be used; (b) the content and amount of pollutant that will be released during implementation as well as during operation; (c) source and amount of energy required for operation; (d) information on likely trans-regional impacts; (e) characteristics and duration of all the estimated direct or indirect, positive or negative impacts[;] (f) measures proposed to eliminate, minimize, or mitigate negative impacts; (h) contingency plan in case of accident; and (i) procedures of self-auditing and monitoring during implementation and operation."[13]

12. Thus, Ethiopian environmental law leaves no room to be misunderstood: an industrial zone developer, as well as intended occupants of the industrial zone, must conduct their respective impact assessments. The law also provides that the Authority has an ongoing obligation to monitor compliance with governing environmental standards.[14]

13. Akgun's principal claim is that Ethiopia's "imposition of regulatory or other administrative hurdles" in the form of impact assessment requirements deprived it of its investment.[15]

[13] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 8.

[14] *See* Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 12. This article provides in full as follows:

> "Implementation Monitoring 1) The Authority or the relevant regional environmental agency shall monitor the implementation of an authorized project in order to evaluate compliance with all commitments made by, and obligations imposed on the proponent during authorization. 2) When the proponent fails to implement the authorized project in compliance with the commitments he entered into or obligations imposed upon him, the Authority or the relevant regional environmental agency may order him to undertake specified rectification measure. 3) Any other authorizing or licensing agency shall, in tandem with the Authority's or the relevant regional environmental agency's decision to suspend or cancel any authorization to implement a project, suspend or cancel the license it may have issued in favor of the project."

[15] Statement of Claim, para. 5.14. ("Even where an agreement has not been formally terminated, an investor has been deprived of its rights in that investment for purpose of expropriation analysis where it has been deprived of the right of use of the subject of that Agreement. This is all the more true where the instrument of deprivation is the State's

Ethiopia submits that all its regulatory or administrative "hurdles" are founded in existing laws that the Claimant should have known ***and did actually know***, as they are not only referenced in the Agreement but are also entirely consistent with Turkish law, international law, and existing and emergent global environmental best practices of which the Claimant had prior experience in Ethiopia.

14. 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."[16] 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."[17]

15. 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. The answer to that question specifically requires the determination of the following fundamental issues: (i) whether or not the Agreement requires the conduct and submission of an EIA, and if so, when; (ii) whether Ethiopian law sets forth substantive EIA requirements; if so, (iii) whether the EIAs submitted by Akgun met those legal requirements; (iv) whether Ethiopia followed its own laws in rejecting the proffered EIAs; (v) whether Ethiopia's actions in rejecting the EIAs and suspending the industrial zone project until a proper EIA was submitted violated Ethiopian law or the Agreement; and, most importantly,

imposition of regulatory or other administrative hurdles that it knows the investor cannot overcome") (citations omitted).
[16] Statement of Claim, para. 5.15 (emphasis added).
[17] Statement of Claim. para. 5.79 (emphasis added).

(vi) whether any domestic law violation or breach of contract could rise to the level of an internationally wrongful act requiring an international remedy.

16. In this Statement of Defense, Ethiopia will demonstrate that its environmental laws are modern, clear, and publicly available while also being consistent with Turkish laws, pertinent international laws, and globally accepted standards of environmental protection and sustainable development. Ethiopia will show that those laws, referenced in the Agreement, mandated the preparation and presentment of a valid EIA but that Akgun declined to perform.

17. Ethiopia will further demonstrate that in the course of the decision-making process it accorded to the Claimant more than adequate notice and afforded abundant opportunity to rectify all defects, but that the Claimant chose instead to entirely disregard its own contractual and legal obligations. Ethiopia will also demonstrate that Akgun's factual assertions are replete with inaccuracies, speculations, and outright misrepresentations.

18. Finally, Ethiopia will demonstrate that even if all of Akgun's factual representations were cumulatively proven to be true, they do not support a finding of treaty violation even under the most exorbitant reading of the fair and equitable treatment principle or the imported umbrella clause, let alone the traditional expropriation standard. Overall, this Statement of Defense will show that Akgun's entire claim, brought fully five years after the project's unfortunate demise, is an exercise in futility.

19. The Statement of Defense first identifies the parties to the dispute and presents a detailed statement of facts followed by a presentation of dispositive jurisdictional objections. It then offers details of the applicable law and the standard of review that this Tribunal must apply if it decides to exercise jurisdiction over the substantive claims. It further presents a step-by-step refutation of those substantive claims, demonstrates the lack of any compensable harm, asserts Ethiopia's counterclaims, and states Ethiopia's entitlement to all costs of this arbitral proceeding. The submission concludes with a request for relief.

20. In support of its defense, Ethiopia introduces forty-one fact exhibits and forty-three legal authorities.

21. Ethiopia further presents statements by the following three witnesses of fact:

- Mr. Ahmed Abtew, former Minister of Industry;
- Mr. Sisay Gemechu Edo, Chief Executive Officer of the Oromia Industrial Parks Development Corporation, former State Minister of Industry; and
- Mr. Fekadu Zeleke, Deputy General Manager of the Addis Ababa Water and Sewerage Authority.

22. Finally, Ethiopia presents reports by the following two expert witnesses:

- Dr. Ayele H. Anabo of Ethiopia's Environment, Forest and Climate Change Commission ("EFCCC") (on Ethiopian environmental law); and
- Professor Susan Murcott of the Massachusetts Institute of Technology ("MIT") (on the consistency of Ethiopian environmental laws and practices in this case with global environmental impact assessment standards and practices).

II. PARTIES TO THE DISPUTE

23. As set out in the Tribunal's Procedural Order No. 1 of 4 December 2020, the parties to this arbitration are the Claimant, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., an entity understood to be established and existing under the laws of the Republic of Turkey, and the Respondent, the Federal Democratic Republic of Ethiopia (collectively the "Parties").[18]

24. Ethiopia appears as a sovereign State and as per its solemn international obligation as a contracting party to the Treaty.

[18] *See* Procedural Order No. 1, dated 4 December 2020, Sec. 1.

III. STATEMENT OF FACTS

25. Aside from Akgun's implausible speculation that Ethiopia's requests for an environmental impact assessment of the Ethio-Turkish Industrial Zone project were pretextual, the facts of the matter are in the end uncomplicated.

26. Akgun's submission is notable for its purposeful ambiguity in respect of the principal issues in dispute. It is not clear to Ethiopia whether Akgun's case is that (i) the demonstrably defective studies it presented were actually sufficient to satisfy the requirements of the law and the Agreement, or rather that (ii) Akgun was somehow exempt from any such requirements.

27. Either suggestion would be wrong in any event.

28. Ethiopia was, at all times, ready and willing to see the developer demonstrate its ability and intention to achieve environmental safety at the Sendafa site, in accordance with its laws. This truth is evident in Ethiopia's commentary upon each of the three successive studies that Akgun proffered and in each and every one of Ethiopia's letters to Akgun in the matter. Unfortunately, the Claimant proved itself unwilling or unable, over a period extending to two years, to furnish even a minimally respectable impact assessment in respect of the designated land. Rather than terminate the agreement and bid the investor farewell, Ethiopia came to believe that a way forward for the desirable project might lie in allocation of an alternative site.

29. Ethiopia thus offered the prospect of free land and generous tax exemptions in Adama, Hawassa, or Dire Dawa. Adama is located some ninety kilometers from Addis Ababa, and Dire Dawa is equidistant between Addis Ababa and the port of Djibouti, through which the overwhelming part of Ethiopia's imports and exports must pass.

30. Akgun was not genuinely interested in this conversation and ultimately elected to unceremoniously exit. This departure was caused not by any unlawful act on the part of Ethiopia but rather by the frustration of Akgun's condescending belief that it could casually disregard the regulatory apparatus of an emerging State that is eager for economic development.

a. The Akguns Approach the Ethio-Turkish Industrial Zone Project with Specific Knowledge and Experience of Ethiopia's Environmental Regulatory Practices

31. As the members of the Akgun family take great care to point out, they were not strangers to the Ethiopian business or regulatory environment at the time of conception of the Ethio-Turkish Industrial Zone project.

32. Yunus Akgun testifies, under the heading "**OUR ENTRY TO ETHIOPIA**," that "[i]n 2005, [his] father and [his] brother, Ufuk Akgun, established OYAP Ethio Industry Trading PLC ('Oyap') in Ethiopia," that "Oyap was engaged in the manufacturing of PVC windows, profiles for doors, and wall panels," and that "[t]he business was immediately successful."[19]

33. Yunus Akgun neglects to mention that, directly upon issuance of an investment permit for its "**MANUFACTU[R]ING OF PVC FRAME**" project, Oyap received the following letter from Ethiopia's Environmental Protection Authority (the "Authority") in April 2005:

[19] Witness Statement of Yunus Akgun, dated 19 November 2020, paras. 2.1-2.2.

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Federal Democratic Republic of Ethiopia
Environmental Protection Authority

ሥዲ 3ዝ6/6ጠ16/1/2005
11 APR 2005

TO: OYAP ETHIO INDUSTRY AND TRADING PLC
(KIRKOS KEBELE 06)
(Tel 16 95 57)
Addis Ababa

This has a reference to a letter, Ref. No. LRD/FI/1384/1178 dated February 14,2005 in which the Ethiopian Investment Commission informed us the issuance of an investment license having a registration number of EIC-IP6394/05 for the establishment of your **MANUFACTUING OF PVC FRAME** project in Addis Ababa region with a capital out-lay of Eth. Birr 4,000,000.

Pursuant to Article 3 of the Environmental Impact Assessment Proclamation No. 299/2002, without obtaining an environmental clearance from the Environmental Protection Authority, no person is allowed to commence operation of any activity that requires environmental impact assessment.

We hereby inform you to contact our organization and collect the necessary information that help determine whether or not your project requires an environmental impact assessment.

For further information please call 46 48 78 or visit our web page at: www.epa.gov.org

With regards,

For Solomon Kebede
Head, Impact Assessment Service

Cc:

Ethiopian Investment Commission
Ministry of Trade and Industry
Addis Ababa

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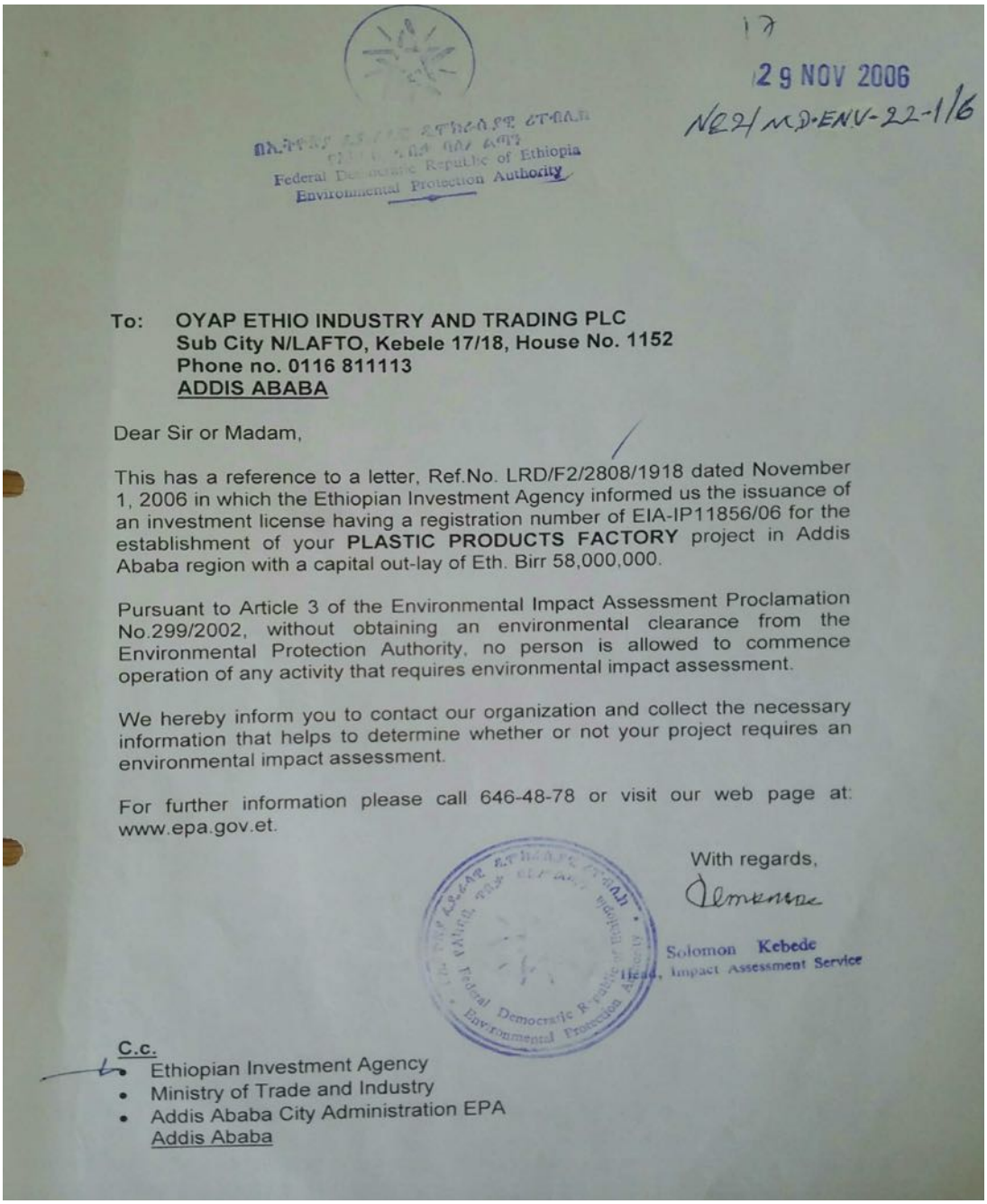
የደረሰበት ቀን 12/8/97 ሰዓት
የማኅደር ቁጥር ፍኦ/1384
የተመራበት ቀን 17/8/97 ሰዓት
የተመራበት ክፍል ኮሌ. ሠነ

Letter from the Environmental Protection Authority to Oyap, dated 11 April 2005, **Exhibit R-1**

34. Yunus Akgun further neglects to relate that, directly upon issuance of an investment permit for its "**PLASTIC PRODUCTS FACTORY**," Oyap received the following letter from the Authority in November 2006:



Federal Democratic Republic of Ethiopia
Environmental Protection Authority

29 NOV 2006
NEA/MD-ENV-22-1/6

To: **OYAP ETHIO INDUSTRY AND TRADING PLC**
Sub City N/LAFTO, Kebele 17/18, House No. 1152
Phone no. 0116 811113
ADDIS ABABA

Dear Sir or Madam,

This has a reference to a letter, Ref.No. LRD/F2/2808/1918 dated November 1, 2006 in which the Ethiopian Investment Agency informed us the issuance of an investment license having a registration number of EIA-IP11856/06 for the establishment of your **PLASTIC PRODUCTS FACTORY** project in Addis Ababa region with a capital out-lay of Eth. Birr 58,000,000.

Pursuant to Article 3 of the Environmental Impact Assessment Proclamation No.299/2002, without obtaining an environmental clearance from the Environmental Protection Authority, no person is allowed to commence operation of any activity that requires environmental impact assessment.

We hereby inform you to contact our organization and collect the necessary information that helps to determine whether or not your project requires an environmental impact assessment.

For further information please call 646-48-78 or visit our web page at: www.epa.gov.et.

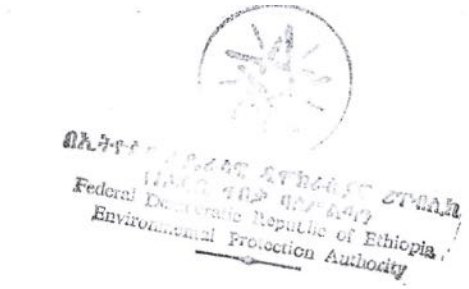
With regards,

Solomon Kebede
Head, Impact Assessment Service

C.c.
- Ethiopian Investment Agency
- Ministry of Trade and Industry
- Addis Ababa City Administration EPA
  Addis Ababa

Letter from the Environmental Protection Authority to Oyap, dated 29 November 2006, **Exhibit R-2**

35. Yunus Akgun equally neglects to relate that, directly upon issuance of an investment permit for its "**PVC PROFILES AND PIPES PRODUCTION FACTORY**," a locally established Akgun entity received the following letter from the Authority in October 2007:



4 OCT 2007,

N02/MD-ENV-22-1/100

To: AKGUN INDUSTRY AND TRADING PLC
Sub City BOLE, Kebele 02, House No., 003
Phone No. 0911 170482
Addis Ababa

Dear Sir or Madam,

This has a reference to a letter, Ref. No. LRD/FI/3631/653 dated June 27,2007 in which the Ethiopian Investment Agency informed us the issuance of an investment license having a registration number of EIA-IP 13625/653 for the establishment of your **PVC PROFILES AND PIPES PRODUCTION FACTORY** project in Addis Ababa region with a capital out-lay of Eth. Birr 20,000,000.

Pursuant to Article 3 of the Environmental Impact Assessment Proclamation No.299/2002, without obtaining an environmental clearance from the Environmental Protection Authority, no person is allowed to commence operation of any activity that requires environmental impact assessment.

We hereby inform you to contact our organization and collect the necessary information that helps to determine whether or not your project requires an environmental impact assessment.

For further information please call 646-48-78 or visit our web page at: www.epa.gov.et.

With regards,

Solomon Kebede
Head, Impact Assessment Service

C.c.
- **Ethiopian Investment Agency**
- **Ministry of Trade and Industry**
- **City Government of Addis Ababa EPA**
  Addis Ababa

Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, **Exhibit R-3**

36. One year later, in October 2008, an Ethiopian delegation including officials of Ethiopia's largest and most populous Oromia Regional State visited the Ikitelli Organized Industrial Zone in Turkey. Seeing the potential of such a project to accelerate Ethiopia's economic and industrial transformation, Oromia officials expressed a desire to bring a similar initiative to Ethiopia. Prior to his departure the then-President of Oromia executed a memorandum of understanding for this purpose with Mr. Yusuf Akgun.[20] The agreement provides that "[t]he location of the [contemplated industrial zone] will be shown by the **Oromia State**."[21]

37. Following a period of negotiation, an agreement was concluded in June 2010 as between Ethiopia's Ministry of Trade and Industry (as it was then known) and Akgun (the "2010 ETIZ Agreement").[22] Within this agreement, "Land" is defined to be "the land with an area of 1460 (one thousand four hundred sixty) hectares in Lagatafo Town, Oromiya Special Zone Surrounding Addis Ababa on which the [organized industrial zone] will be built and ***to be allocated*** and delivered to the Developer by the Oromia Regional State."[23] Under Article 8 of the 2010 ETIZ Agreement, it was stipulated that the developer "shall protect the environment from pollution by using appropriate methods and technologies"[24] and "shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."[25]

38. The investor unfortunately encountered difficulty attracting finance to the investment.[26] Concurrently, Ethiopia expressed a desire to exit from its commitment to fund a part of the

[20] Memorandum of Understanding between the President of Oromia State H.E. Abadula Gemeda and Mr. Yusuf Akgun, dated 13 October 2008, **Exhibit C-007**.
[21] Memorandum of Understanding between the President of Oromia State H.E. Abadula Gemeda and Mr. Yusuf Akgun, dated 13 October 2008, **Exhibit C-007** (emphasis in original).
[22] Agreement between the Ministry of Trade and Industry of the Federal Democratic Republic of Ethiopia and Akgun Insaat Makine Sanayi Dis Ticaret Sirketi on the Lease of Land and The Development of an Organized Industrial Zone, dated 11 June 2010, **Exhibit C-008** (hereinafter the "2010 ETIZ Agreement").
[23] 2010 ETIZ Agreement, **Exhibit C-008**, p. 3 (emphasis added).
[24] 2010 ETIZ Agreement, **Exhibit C-008**, Art. 8(9).
[25] 2010 ETIZ Agreement, **Exhibit C-008**, Art. 8(11).
[26] *See, e.g.*, Letter from Akgun to the Ministry of Industry, dated 19 December 2011, **Exhibit C-046**, stating as follows:

> "On May 17, 2011, H.E. Prime Minister had been visited in his office and a brief presentation had been given to H.E. with respect to financial works and negotiations executed with international funds and financial institutions pursuant to Land Lease and Organized Industrial Development Agreement. The difficulties in

infrastructure costs and from its position as a holder of equity in the venture.[27] For these reasons, it was mutually agreed to alter the terms of the deal, with Ethiopia relinquishing its participation rights while Akgun undertook to self-fund the entirety of the project in a phased model of expansion by reinvestment of any proceeds.

b. Akgun, the Ministry of Industry, and the Oromia Regional State Attempt for a Second Time to Pursue an Ethio-Turkish Industrial Zone Project

39. A new tripartite agreement, this time including the Oromia Regional State as an integral party, was executed to achieve the desired effect on 8 June 2012.[28] Within this 2012 Agreement for the Lease of Land and Development of an Industrial Zone (the "2012 ETIZ Agreement" or the "Agreement"), "Land" is defined to be "the land with an area of 1.460 (One Thousand Four Hundred Sixty) hectares in Sendafa Town, Oromiya Special Zone Surrounding Addis Ababa on which the [industrial zone] will be built and ***to be allocated*** and delivered to the Developer by the Oromia Regional State."[29]

40. By contrast to the 2010 ETIZ Agreement, Article 8 of the 2012 ETIZ Agreement establishes and elaborates the following more expansive investor's obligation:

> "The Developer shall protect the environment from pollution by using appropriate methods and technologies. ***In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard***."[30]

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

Under the 2010 ETIZ Agreement, Akgun bore the obligation to "seek, on its own, opportunities to get financing from natural persons, legal entities, private equity or venture capital funds, international banks, financial institutions or any other sources with interest to invest in and/or finance the Project in accordance to the rules and regulations of Ethiopia." 2010 ETIZ Agreement, **Exhibit C-008**, Art. 13(1).

[27] Under the 2010 ETIZ Agreement, the Ministry of Industry had accepted "to cover 30% (thirty percent) of the Infrastructure Costs." 2010 ETIZ Agreement, **Exhibit C-008**, Art. 11(7).

[28] 2012 ETIZ Agreement, **Exhibit C-009**.

[29] 2012 ETIZ Agreement, **Exhibit C-009**, p. 4 (emphasis added).

[30] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).

41. As did the 2010 ETIZ Agreement, the 2012 ETIZ Agreement equally provides that "[t]he Developer shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."[31] As seen in the Authority's earlier letters to the other Akgun entities, the most pertinent item within the *corpus* of Ethiopian environmental law is Proclamation No. 299/2002, the Environmental Impact Assessment Proclamation (the "EIA Proclamation").

42. The EIA Proclamation states the general rule in its Article 3(1):

> "Without authorization from the 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."[32]

43. In 2008 the Authority issued its Directive No. 1/2008, entitled "A Directive Issued to Determine Projects Subject to Environmental Impact Assessment."[33] The annexed list features, at Item No. 21, "Establishment of Industrial Zone."[34]

44. The Authority had earlier issued guidelines to determine the necessary elements of an EIA as well as the rules and principles of regulatory evaluation in its Environmental Impact Assessment Procedural Guideline Series No. 1 of 2003.[35] The Guidelines define "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."[36] They also provide, as a guiding principle of environmental assessment, that "all feasible options to a project, policies, programs or its components like site,

[31] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12).
[32] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 3(1).
[33] A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2**.
[34] A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2**.
[35] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**.
[36] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, p. 1.

processes, products, raw materials etc. including the 'no go' option should be considered,"[37] while defining "Alternative" as "[a] possible course of action that might be adopted in lieu of the proposal or activity or in terms of site, design, input, process, including the 'no action' alternative."[38]

45. Under the Guidelines an "Environmental Impact Assessment Report" is to be, definitionally, "[a] report containing sufficient information to enable the Environmental Agency to determine whether and under what conditions a proposed action should proceed,"[39] which is in turn derived from the EIA Proclamation itself, whereunder fundamental requirements must be met:

> "1) An environmental impact study report shall contain sufficient information to enable the Authority or the relevant regional environmental agency to determine whether and under what conditions the project shall proceed. 2) An environmental impact study report shall contain, as a minimum, a description of: (a) the nature of the project, including the technology and processes to be used; (b) the content and amount of pollutant that will be released during implementation as well as during operation; (c) source and amount of energy required for operation; (d) information on likely trans-regional impacts; (e) characteristics and duration of all the estimated direct or indirect, positive or negative impacts[;] (f) measures proposed to eliminate, minimize, or mitigate negative impacts; (h) contingency plan in case of accident; and (i) procedures of self-auditing and monitoring during implementation and operation."[40]

46. Under the EIA Proclamation it is Akgun who bears the burden of the study:

> "1) ***A proponent shall undertake*** an environmental impact assessment, identify the likely adverse impacts of his project, incorporate[] the means of their prevention or containment, and submit to the Authority or the relevant regional environmental agency the environmental impact study report together with the documents

[37] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, p. 6.
[38] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, p. 1.
[39] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, p. 1.
[40] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 8 ("Environmental Impact Study Report").

> determined as necessary by the Authority or the relevant regional environmental agency."[41]
>
> Furthermore,
>
> "***[a] proponent shall ensure*** that the environmental impact of his project is conducted and the environmental impact study report prepared by experts that meet the requirements specified under any directive issued by the Authority."[42]
>
> Finally,
>
> "[t]he cost of undertaking an environmental impact assessment and preparing an environmental impact study report ***shall be borne by the proponent***."[43]

47. Upon the proponent's presentation of an EIA, the Authority possesses the discretion ***to*** "***refuse implementation*** of the project ***if it is convinced*** that the negative impact cannot be satisfactori[l]y avoided."[44]

48. The EIA Proclamation provides for administrative review, allowing that "[a]ny person dissatisfied with the authorization or monitoring or any decision of the Authority… regarding the project may submit a grievance notice to the head of the Authority," and that "[t]he

[41] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 7(1) ("Duties of a Proponent") (emphasis added).
[42] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 7(2) (emphasis added).
[43] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 7(3) (emphasis added).
[44] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 9(2)(c) (emphasis added). Article 9 of the Proclamation ("Review of Environmental Impact Study Report") reads in its entirety as follows:

> "1) An environmental impact study report that is submitted to the Authority or the relevant regional environmental agency for review shall include a brief statement summarizing the study in non-technical terms as well as indicating the completeness and accuracy of the information given in the study report. 2) The Authority or the relevant regional environmental agency shall, after evaluating an environmental impact study report by taking into account any public comments and expert opinions, within 15 working days: (a) approve the project without conditions and issue authorization if it is convinced that the project will not cause negative impacts; (b) approve the project and issue authorization with conditions that must be fulfilled in order to eliminate or reduce adverse impacts or reduce adverse impacts to insignificance if it is convinced that the negative impacts can be effectively countered, or (c) refuse implementation of the project if it is convinced that the negative impact cannot be satisfactorily avoided."

The Authority delegated this power of review of EIAs to various governmental institutions including the then-Ministry of Trade and Industry by 2010. *See, e.g.*, D.G. Janka, *Environmental Impact Assessment in Ethiopia: Law and Practices, A Dissertation* (Tuscaloosa, Alabama, 2012), **Exhibit C-083**, note 438.

decision of the head of the Authority… shall… be issued within 30 days following the receipt of the grievance."[45]

49. Oromia State identified suitable land as per its obligation as a party to the 2012 ETIZ Agreement.[46] A valuation exercise was undertaken to determine appropriate compensation to evicted residents and farmers, and payment was effected.[47] On 20 August 2012 the Ministry of Industry wrote to Akgun offering two options under Article 7 of the Agreement, namely (i) pay additional compensation for vacancy of the land by remaining farmers who had already sown seeds; or (ii) wait until January to take possession of the land.[48] Thereafter, a Land Lease Certificate was issued by the Oromia Bureau of Rural Land and Environmental Protection on 2 January 2013,[49] and the first one hundred hectares were handed over to Akgun on 6 March 2013,[50] with Akgun taking receipt of its investment permit in April 2013.[51]

50. Mr. Ahmed Abtew, former Minister of Industry, relates as follows:

> "The [2012 ETIZ] Agreement was an agreement for the lease of land and development of an industrial zone. The signing of the Agreement was the culmination of contacts with Akgun by various federal and Oromian officials who seemed highly intrigued by what they saw in Istanbul and wanted to replicate it in Ethiopia. Akgun successfully represented itself as a company willing and able to bring such illusion to reality in Ethiopia. As it would be discovered later, Akgun not only lacked a genuine appraisal of the replicability of the Istanbul industrial park but also never in reality had the scientific sophistication or financial

[45] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 17 ("Grievance Procedures").
[46] See para. 39 *supra*.
[47] *See, e.g.*, Receipt Issued by Cooperative Bank of Oromia, dated 31 July 2012, **Exhibit C-010**.
[48] Letter from Ministry of Industry to Akgun Construction dated 20 August 2012, **Exhibit C-049**. The referenced provision allows that "[w]here there are crops on the Land, farmers shall be allowed to harvest and collect their produces within 7 months maximum before the handover is effected." 2012 ETIZ Agreement, **Exhibit C-009**, Art. 7(3).
[49] Land Lease Certificate issued by Oromia Bureau of Rural Land and Environmental Protection, dated 2 January 2013, **Exhibit C-012**.
[50] *See* Protocol Executed between Akgun Construction and Bureau of Rural Land and Environmental Protection of Oromia Regional State for the Handover of the Land, dated 6 March 2013, **Exhibit C-013**.
[51] Investment Permit issued by Ethiopian Investment Agency for Akgun Construction, dated 9 April 2013, **Exhibit C-056**.

> wherewithal to succeed in a developing market such as Ethiopia. It was, however, successful in portraying such an image at first."[52]

c. Ethiopia Requests Akgun to Prepare and Present the Requisite Environmental Impact Assessment, Which Akgun Fails Three Times to Deliver

51. Precisely as had occurred in the case of the Akguns' earlier investment pursuits in Ethiopia, the matter of environmental impact assessment arose following issuance of an investment permit.[53] Thus, in May 2013, the Ministry of Industry requested Akgun to prepare the requisite EIA in respect of its new industrial zone project.[54] Mr. Ahmed Abtew recalls the following:

> "Around May 2013, I remember that in consultation with the various concerned government agencies, we asked Akgun to produce an environmental impact assessment ('EIA') as required under the Agreement and the laws of the country. I later discovered that Akgun did two contradictory things at the same time. It commissioned a local company to conduct an EIA but also went forward with a sublease of land to Afro-Oil, which in turn commenced construction work. They did this without my permission. At that point in time, I was the only lawfully mandated official who could have permitted the sublease and commencement of construction. I never did. Akgun went forward without lawful authorization anyway."[55]

52. In response to the Ministry's request, Akgun engaged the local firm Gota Management and Development Consultancy PLC ("GOTA") and thereafter proffered its assessment in October 2013. In this arbitration, Akgun now seeks to characterize this document as a "first draft of its EIA report."[56] The "first draft" was not presented as such at the time. Rather, on 4 October 2013, Akgun wrote to the Ministry of Industry as follows: "Please find attached herewith ***Detailed Environmental Impact Assessment (EIA) Study*** for Ethio Turkish

[52] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 8.
[53] *See, e.g.*, Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, **Exhibit R-3** and paras. 31-35 *supra*.
[54] *See, e.g.*, Letter from Ministry of Industry to Akgun Construction dated 24 July 2014, **Exhibit C-016** ("our ministry requested you in May 2013 to prepare the [EIA] by a professional consultant").
[55] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 12.
[56] Statement of Claim, para. 2.17. This characterization would, if true, naturally entail an expectation of further iterations.

Industry Zone located in Sendafa."[57] The Claimant has not produced the so-called "Detailed Environmental Impact Assessment" (or "first draft") in this arbitration.[58] Ethiopia now does so.[59] For the Ministry of Industry, this document marked an unpromising beginning to the undertaking of environmental review.

53. In the very opening sentences of this report, to be found in its executive summary, Akgun's chosen consultant confirms the stipulations of the applicable law:

> "The FDRE Proclamation (No 299/2002) determines the modalities of protection, conservation and promotion of environment in Ethiopia [and] stipulates that every development project ***shall be required*** to undergo an Environmental Impact Assessment ***prior to its commencement***.
>
> Furthermore The Environment Protection Authority (EPA) has established an Environmental Impact Assessment system for Ethiopia including the preparation of Procedural and Sectoral Guidelines as a prerequisite for the approval of new development activities and projects. The EIA Process as applicable to development projects is detailed in the 'Environmental Impact Assessment Procedural Guidelines Series 1' of November 2003. ***As per Schedule I of the Guidelines, construction of industries, factories and activities carried out have significant environmental impacts, and, therefore, require a full EIA/EM study***."[60]

54. Within its introduction, Akgun's chosen consultant states the "aim and objective" of its study as follows:

> "The aim and objective of EIA can be divided into two categories. The immediate aim of EIA is ***to inform the process of decision making*** by identifying the potentially significant environmental effects and risks of development projects. The ultimate (long term) aim of EIA is ***to promote sustainable development*** by ensuring that development projects ***do not undermine critical resource and ecological***

[57] Letter from Akgun Construction to Ministry of Industry, dated 4 October 2013, **Exhibit C-059** (emphasis added). The Ministry of Industry shared the enclosure with interested governmental stakeholders. *See, e.g.*, Witness Statement of Mr. Fekadu Zeleke, dated 12 March 2021, para. 7.
[58] *See* Witness Statement of Yunus Akgun, dated 19 November 2020, note 31.
[59] *See* Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**.
[60] Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**, p. i (emphasis added).

> ***functions*** or the well being, lifestyle and livelihood of the communities and people who depend on them."[61]

55. Inauspiciously, the section falling under heading "**BASELINE ENVIRONMENTAL CONDITIONS**" comprises seven sparse pages in its entirety.[62]

56. On 13 November 2013, the Ministry of Industry thus responded to Akgun by letter bearing subject line "Feedback on the environmental impact assessment report regarding the Ethio-Turkish Industry Zone."[63] The Ministry noted, amongst other things, the following:

- Amongst the "[p]oints which are not included within the baseline environmental conditions" is "***[p]roject description/water bodies in the area: river, dam, wetland and others as regards to their linkage with the project***";
- "Regarding the positive and negative impacts analysis of the project," "***[its] positive and negative impacts… are not analyzed adequately***," and "***[g]iven the vastness of the project***, its impact on the locality, the community, humans and other living things should be analyzed thoroughly"; and
- "Regarding the impact mitigation measures of the project," ***"[i]t needs to be revised in conformity with the negative and positive impact analysis***," and "[i]mportant feedback collected during public consultation of the project should [also] be included within the negative and positive impact analysis of the project."[64]

57. On 28 November 2013, the Addis Ababa Water and Sewerage Authority ("AAWASA") wrote to the Ministry of Industry requesting a high-level workshop to be convened including the Ministry of Water, Irrigation and Energy, the Ministry of Health, the Environmental Protection Authority, the Addis Ababa City Government, and the Addis Ababa City Environmental Protection Authority, amongst "other stakeholders," so that "the issue can be

[61] Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**, p. 3 (emphasis added).
[62] Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**, pp. 85-91. For a full critique of Akgun's later-submitted revisions to first report, *see* Expert Report of Professor Susan Murcott, dated 7 March 2021, Sec. 5.4 and Secs. III.c and III.d *infra*.
[63] Letter from Ministry of Industry to Akgun Construction and the attached "Comments on Ethio-Turkish International Industry Zone," dated 13 November 2013, **Exhibit C-060**.
[64] Letter from Ministry of Industry to Akgun Construction and the attached "Comments on Ethio-Turkish International Industry Zone," dated 13 November 2013, **Exhibit C-060** (emphasis added).

reviewed extensively and a recommendation can be forwarded to the government."[65] Mr. Fekadu Zeleke, Deputy General Manager of AAWASA, relates as follows in respect of this letter:

> "As may be seen, our concerns were twofold. First, we were concerned about discharges of industrial waste. The water treatment plant at Legedadi, being conventional in nature, is equipped to treat turbid water by neutralizing the effects of organic wastes only. Second, because of the very high projection for daily water usage at the industrial facility that was given in the EIA report, we were concerned about potential impacts upon volume of water supply for our ever-growing capital city."[66]

58. On 18 December 2013, the Ministry of Industry forwarded AAWASA's letter to Akgun, writing as follows under subject line "Environmental impact regarding the Ethio-Turkish Industry Zone":

> "The overall opinion of our Ministry and [AAWASA] regarding the possible impacts of the project are summarized herein below:
>
> 1. With regard to the daily water consumption
>
> According to the study, the industry zone will have a daily water demand of 42,000 m 3 when it becomes fully operational and it is expected that this demand will be covered from the drinking water supply of Sendafa Town Water & Sewerage Office as well as from the water wells that the company plans to drill. However, the existence of such a huge water requirement will have an impact on the water supply of the Legedadi dam and therefore, another option shall be forwarded to accommodate the situation;
>
> 2. Sewerage to be released from the industry zone
>
> 2.1. The chemical content of the sewerage that the factories in the industry zone release during production shall be treated according to the national requirements and the capacity of the Legedadi dam to purify water;

[65] Letter from Addis Ababa Water and Sewerage Authority to Ministry of Industry, dated 28 November 2013, **Exhibit C-062**.
[66] Witness Statement of Mr. Fekadu Zeleke, dated 12 March 2021, para. 9.

> 2.2. There should be a mechanism designed to prevent the infiltration of the sewerage into the groundwater during storage, transportation and treatment in order that the water wells for the supply of drinking water will be protected from pollution.
>
> Therefore, we strongly suggest that the company shall put a special focus on [these] major points … and carry out or revise the study report."[67]

59. On 20 December 2013, acting upon AAWASA's request, the Ministry of Industry dispatched a letter to twelve governmental bodies across the federal, regional, and local levels requesting their attendance at an environmental consultation forum in respect of the ETIZ project and enclosing Akgun's "first draft" report.[68] The recipients of the letter are as follows:

> "− Ministry of Environment and Forestry
> − Ministry of Water, Irrigation & Energy
> − Ministry of Health
> − Ethiopian Investment Agency
> − Addis Ababa City Government Mayor's Office
> − Addis Ababa City Government Manager's Office
> − Addis Ababa City Water & Sewerage Authority
> − Oromia National Regional Government Office of the President
> − Oromia National Regional Government Bureau of Rural Land & Environmental Protection
> − Oromia National Regional Government Investment Commission Addis Ababa
> − North Shoa Zone Rural Land & Environmental Protection Office Fiche
> − Bereh Woreda Rural Land & Environmental Protection Sendafa"[69]

60. The stakeholders' forum was convened in Addis Ababa on 2 January 2014 and attended by nearly thirty participants.[70] As recounted by the convener of the consultation, then-deputy Minister of Industry (known in Ethiopia as State Minister) Mr. Sisay Gemechu Edo, the various officials assembled expressed their "unanimous disappointment" in the EIA that

[67] Letter from Ministry of Industry to Akgun Construction, dated 18 December 2013, **Exhibit C-026**.
[68] Letter from Ministry of Industry to Ministry of Environment and Forest et al., dated 20 December 2013, **Exhibit YUS-018**.
[69] Letter from Ministry of Industry to Ministry of Environment and Forest et al., dated 20 December 2013, **Exhibit YUS-018**.
[70] *See* List of Attendees to Ethio Turkish Industry Zone Environmental Assessment Meeting, dated 2 January 2014, **Exhibit C-066**.

Akgun had delivered.[71] Mr. Fekadu Zeleke of AAWASA recalls learning that the report was "respectfully but roundly rejected."[72] Mr. Ahmed Abtew relates the following:

> "When the EIA was finally presented some five months after our request, in October 2013, the concerned state and federal environmental officials reviewed the EIA and convened a workshop to give Akgun the opportunity to explain it. The EIA was unanimously rejected. I was later informed that Akgun had hired an inexperienced local company, headed by an economist, which did an abysmal job. At that point, the truth is that everybody doubted Akgun's seriousness. I was no exception but kept an open mind and was pleased to see that Akgun agreed to submit a new EIA from an international consultant. I knew that the level of expertise in these types of complex environmental studies was extremely limited or even non-existent in Ethiopia."[73]

61. Akgun thereafter submitted a revised document, also prepared by GOTA, to the Ministry of Industry on 5 March 2014, requesting the Ministry's "positive feedback to us in the shortest possible time."[74] Unfortunately, it would fare no better than the first.

62. On 18 March 2014, the Oromia Bureau of Rural Land and Environmental Protection rendered its comments to the GOTA EIA, telling of both "general and specific but major comments that need to be considered before [a] final decision is to be given on the project."[75] At the general level, the Bureau opined that though the report "generally followed" the format of the national EIA guidelines, the consultant had not considered the relevant proclamations of the Oromia Regional State.[76] The Bureau further found that "[t]he EIA report did not present substantial project alternatives and detailed analysis of different options in terms of technology or design or site change, and finally 'no go-option.'"[77]

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[71] Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 15.
[72] Witness Statement of Mr. Fekadu Zeleke, dated 12 March 2021, para. 11.
[73] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 13.
[74] *See* Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, **Exhibit C-068**; Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**; and Environmental Impact Assessment Plan of ETIZ by GOTA (Summary Document), dated 3 March 2014, **Exhibit C-070**.
[75] Comments on the EIA Report of Ethio-Turkish Industrial Zone Project, Oromia Bureau of Rural Land and Environmental Protection, dated 18 March 2014, **Exhibit R-5**, p. 1 (hereinafter the "March 2014 Oromia Bureau Comments").
[76] March 2014 Oromia Bureau Comments, **Exhibit R-5**, p. 1.
[77] March 2014 Oromia Bureau Comments, **Exhibit R-5**, p. 1.

63. The Bureau enumerated and elaborated seven specific comments which are here reproduced in largest part:

> "1. The EIA report lacks sufficient biophysical and hydro-geological data and information that are exclusively useful to provide realistic and precise decisions about the adverse environmental impacts of the proposed project on the ground and surface water resources of the area. The assessment made did not address ground water potential of the project study area, predicted ground and surface water resources potentials over the next 15 years or more, climatic data analysis and trends of precipitations, ground water recharge capacity over many years to come, and its impacts on water supply to Finfinne [Addis Ababa] city, and finally, adverse impacts of the proposed investment on the city water supply in near future and over long times must be clearly documented in the EIA report. In the report, it has been indicated that the project consumes 42,000m3/day of water from wells to be drilled when [it] starts operation at full capacity. This means, it consumes 42,000,000 liters of water per day at its full capacity. If, this project operates at least 300 days per annum, it will consume 12,600,000m3 (12,600,000,000 liters) of water every year when starting operation at its full capacity. Such a huge amount of water extraction from ground water resource will obviously deplete its water reserves. Coupled with current climate change and erratic nature of rainfall over the entire country the adverse impact is serious. To arrive at [a] conclusive decision, the water balance of the proposed project area needs to be known.
>
> 2. The consultant, as mitigation measures to groundwater consumption, has proposed rainwater harvesting and collecting runoff water during rainy seasons. But, the report failed to show the amount of water harvested in a unit time period, its technology with full design specification and explanation. The same is true to runoff water collected. Further, the proposed mitigation measures should show the amount of water to be reduced from the drilling wells by the project.
>
> 3. At [the] industrial zone, food processing and pharmaceutical manufacturing plants are mixed up with textile manufacturing, metallurgical production and car assembling plants. Distances between these different industrial establishments were not defined and clearly shown in the EIA document. The bureau strongly urges the consultant or proponent to clearly indicate possible air pollutions or air emissions impacts on food processing and pharmaceutical manufacturing plants.
>
> 4. In its adverse impact mitigation measures for wastes, [a] macro-management plan was proposed. In EIA principle, specific project impact requires specific mitigation measure[s] or management plan. [The] [m]acro-plan for waste management needs further elaboration and justification how it is operating and reducing negative impacts. It has to be effective in reducing impacts. For each

> effluent discharge and emission, clear and precise design[s] for [the] treatment plant need to be incorporated in the EIA report.
>
> 5. There are different industrial subzones and establishments to be constructed within each zone […] The major constraints observed in the EIA report with regards to [the proposed] clusters of industries are that, production capacity for each industrial establishment or plant within [each] industrial subzone was not mentioned. In another words, the production capacity and amount of water utilized during production processes were not discussed. As a result, liquid waste discharges, gas emissions and sound emission loads and limits from concerned production plants and how these effluents emissions needed to meet international or national emissions standards and the company should comply with environmental regulations were not elaborated and presented in clear and convincing manners. See pages; 16-18, 22-102, and 103-170.
>
> 6. Each manufacturing/production plant has its own specific waste type and constituent that requires specific management or treatment measures. In the assessment study report, blanket effluents were provided for each plant as depicted on pages 103-106, which were not based on realistic analysis and synthesis of discharges and emissions from different sources.
>
> 7. Without sufficient data and knowledge of ground water potential and synthesis of its adverse impacts, it is unfair to provide [an] unrealistic mitigation measure on water consumption from the proposed investment site. Refer to page 158, 5.2 Groundwater and its mitigation measure."[78]

64. Thereafter, on 3 April 2014, the federal Ministry of Environment and Forest (the "MOEF") rendered its own comments on the GOTA EIA, opening its introductory remarks as follows:

> "The introduction and implementation of various industries in the proposed delineated industrial zone would have importance for creation of job opportunities, generation of foreign exchange, poverty alleviation and economic growth of the country, among others."[79]

Amongst the general comments given were the following:

[78] March 2014 Oromia Bureau Comments, **Exhibit R-5**, pp. 1-5. The Respondent notes that the page references given in this extract may not match precisely to the Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069** for, as the Claimant notes, this exhibit is a non-final internal draft of the report. *See* Witness Statement of Yunus Akgun, dated 19 November 2020, note 44.

[79] Review Comments on "Environmental Impact Assessment and Management Plan of Ethio-Turkish Industrial Zone, Oromia Regional State, Bereh Woreda, Lega Beri-Lega Bolo and Girar Berak Kebele," Ministry of Environment and Forest, dated 3 April 2014, **Exhibit R-6**, p. 1 (hereinafter the "April 2014 MOEF Review Comments").

- "It is really very vague how [the] Environmental Impact assessment has been made in absence of detailed industry project proposals. This needs further clarification. Otherwise as per the recommendations of the first part of the review comments further assessment is required to be carried out on the development planning of the industrial zone by employing [Strategic Environmental Assessment]."[80]

- "Terms of Reference showing the scope of activities has not been attached to the document. Thus, our review comments made on the document is [sic] based on the environmental requirements of the country, literature review as well as the experiences which we have on the subject matter."[81]

- "Cumulative impacts resulting from the project in combination of other past, present, and future development activities on environment have not been addressed."[82]

- "Public consultation is mentioned as one of the methodologies that have been employed in undertaking the study. However, the minutes that reflect those public consultations meetings are not attached to the report. Apart from indicating consultation with [project affected persons], it doesn't indicate whether consultation has been carried out with federal and regional government stakeholders, including Addis Ababa Water and Sewerage Authority, as well as other interested parties."[83]

- "The report indicates that compensation has been paid to project affected persons. However, as a principle, compensation should not be paid before getting [an] environmental clearance letter."[84]

- "Only 3 experts have been engaged to undertake the assessment and prepare the report as indicated in the annex part of the document. As EIA requires [a] multi-disciplinary team, proper emphasis has not been given to include pertinent experts which address the issues of the envisaged project as per the system of the country. Thus, ***proper experts with the required capacity should be engaged to prepare an acceptable report***."[85]

[80] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 2.
[81] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[82] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[83] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[84] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[85] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3 (emphasis added).

65. The MOEF also noted that "[p]ertinent Regional legal systems are not addressed," and thus "there is a need to address this gap."[86]

66. At the level of specific commentary upon identified provisions of the revised GOTA EIA, the MOEF wrote as follows:[87]

- "**Page 3, Sub-section 1.2. Objective, second Paragraph from last**

  - As stated here 'The main objective is to carry out a comprehensive Environmental Impact Assessment study for the proposed industrial zone during construction and operation phase.' As explained earlier in the introductory remark, EIA is working at a project level, but not at a strategic level.

  - EIA, as one of the environmental management tools, would only apply to those industry projects that fit in to the absorptive capacity of the environmental resources. As explained earlier, this determination of absorptive capacity of the resources will be the result of [Strategic Environmental Assessment]."[88]

- "**Page 9, Sub-section 2.2.3. Limitation/ Gap of the study**

  - As stated in the section, some of the limitations of the study are absence of base line data, no detail feasibility study with regard to volume of the input raw materials and products, among others. It has to be underlined that without having quantitative and qualitative baseline information on the project as well as its environs, it is difficult to prepare [an] acceptable report that enables to review and take decisions."[89]

- "**Page 133, sub-section 2.2**

  - At the detail level of EIA, the recommendations that were proposed for managing the wastes (e.g. site selection for disposing wastes, diversion of natural streams by constructing diversion canals) are in a very general manner, which could not give any insight on how to address pertinent issues along with specific mitigation and enhancement measures that should be

[86] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[87] The Respondent notes once again that the page references given in these extracts may not match precisely to the Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, as the Claimant has not submitted the final version of that document. *See* note 78 *supra*.
[88] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[89] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.

translated on the ground. Such kinds of tasks are the responsibility of the consulting firm and it is not proper to push them to the promoter and Regional/local government."[90]

- "**Page 133-134, sub-sections 3.1 Landfill, 3.2 Incineration and 3.2 Composting**

  - The above mentioned intervention measures are most predominant and widely practiced methods for wastes disposal (i.e. for both hazardous and non-hazardous materials). Nonetheless, as seen in the section, their descriptions are outlined in the form of recommendations. Thus, the comment given on page 133, sub-section 2.2 is also applied to this. Moreover, no elaboration has been made on composting.

  - Regarding disposal of wastes, there is also a need of realizing [a] cleaner production system by taking certain imitative [sic] such as substitutions for toxic and hazardous materials and process and product modifications and internal use of waste product."[91]

- "**Page 131, sub-section 2.3.1 (Landfill), first bullet**

  - The report indicates that land fill means a disposal facility or a part of a facility where hazardous waste is placed in or on land. This is not complying with the Pollution Control Proclamation (No. 300/2002). This needs further clarification."[92]

67. In concluding, the MOEF wrote that "we are ***strongly recommending the owner of the project to revisit the submitted document based on the aforementioned review comments*** so as to enable decision makers to decide on the implementation of the projects in the delineated zone."[93] The MOEF would later and further summarize its April 2014 conclusions as follows:

- "the [revised GOTA] EIA report ***did not employ the EIA research methodology*** which could have indicated whether it is compatible with the planned industry zone in Sendafa area";

- "it has not thoroughly identified ***the potential impact of the industry zone on Legedadi basin***, especially on the Legedadi groundwater and dams"; and

[90] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 3.
[91] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 4.
[92] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 4.
[93] April 2014 MOEF Review Comments, **Exhibit R-6**, p. 4 (emphasis added).

- "the corrective measures for halting or minimizing the negative impacts on the environment ***lack transparency***."[94]

Thus, the MOEF "concluded that these factors made the establishment of the industry zone in Sendafa area very difficult" and "recommended" that Akgun "get a replacement site" in view of "the importance and significance of the industry zone."[95] The MOEF did not reach a conclusion as to the achievability of environmental safety at the Sendafa site. The MOEF rather concluded that the proponent developer had thus far failed to show it.

68. As one may see from the body of the Claimant's own evidence, Ethiopia did not then act upon the MOEF's recommendation. Instead, Ethiopia granted Akgun ***a third opportunity*** to demonstrate its commitment to environmental responsibility despite Akgun having now failed, for a second time, to deliver an even modestly respectable report. Mr. Ahmed Abtew relates the following:

> "In general, the Ministry's core mandate was to facilitate the smooth functioning of industries and to provide necessary support by liaising with other government agencies. It also assists foreign investors to discharge their legal responsibilities in a timely manner. In this regard, from the date the Ministry was informed by other government regulatory bodies that Akgun had not submitted an EIA, we provided unhindered support to Akgun, explaining how this matter was so crucial for Ethiopia and there was no way to escape it. We also guided Akgun as to what sort of quality of report it should produce, for as I have explained there were not well qualified experts in our country that could produce a credible EIA for such a large project in an environmentally sensitive area at that time."[96]

69. On 17 July 2014, at which point more than four months had passed since delivery of the second failed GOTA EIA, Akgun finally reported to the Ministry of Industry and the Ethiopian Investment Agency (as it was then known) that "[a] consultant firm which can undertake the environmental impact assessment of the project is identified" and that its

[94] Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029** (describing its April conclusions) (emphasis added).
[95] Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029** (describing its April conclusions).
[96] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 23.

experts would "come to Ethiopia at the beginning of August to start their study."[97] On 22 July 2014, the Prime Minister elected to order a pause of any works at the project site, which decision was immediately conveyed to Akgun by letter of 24 July 2014.[98]

Photograph of the Sendafa Site, dated February 2021, **Exhibit R-7**

70. Ethiopia did not determine to relocate the ETIZ project. Ethiopia did not determine to terminate the ETIZ Agreement. Rather, the Ministry conveyed the Prime Minister's instructions "to ensure that no construction shall take place ***before the EIA is presented and approved***."[99] In the words of Mr. Ahmed Abtew, "[i]t would be true to say that by the middle

[97] Letter from Akgun Construction to Ministry of Industry and Ethiopian Investment Agency, dated 17 July 2014, **Exhibit C-021**.
[98] *See* Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, **Exhibit C-016**.
[99] Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, **Exhibit C-016** (emphasis added).

part of 2014, Akgun's continuing disinterest in presenting a genuine environmental plan was a source of considerable concern for various stakeholders within the Ethiopian government."[100]

71. Nearly one month later, on 19 August 2014, Akgun wrote to the Ministry of Industry to offer, in a mere five pages, an overview of intended mitigation practices at the ETIZ project site, as apparently prepared by the "Ari Waste Treatment company."[101] Akgun fully confessed the failure of the GOTA EIA where it wrote that "the time spent for having the Environmental Report made in Ethiopia ***was spent for nothing***."[102]

72. Akgun further wrote that while it was "sorry about that," in its telling, "we have now come to the end of the Environmental Report prepared in Turkey," as "[t]he University Committee that has been preparing the report will come to Ethiopia and complete the report after they make an examination on the land, which is expected to take at most 30 days."[103] Akgun apparently presumed to pre-ordain a result without its "consultant" even setting foot in Ethiopia for, in Akgun's telling, "[t]he Environmental Report ***is only a procedure***" that "***doesn't prevent the work***, because the place is allocated as an Organized Industrial Zone."[104]

73. Akgun wrote to the MOEF with copy to the Ministry of Industry two days later, on 21 August 2014, this time promising to complete and submit a new EIA with the assistance of two US-based consultants.[105] Meanwhile, in a different letter of the same date, Akgun wrote to the

[100] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 25.
[101] Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, **Exhibit C-025**.
[102] Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, **Exhibit C-025** (emphasis added).
[103] Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, **Exhibit C-025**.
[104] Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, **Exhibit C-025** (emphasis added). It is recalled that under the Authority's 2008 Directive Issued to Determine Projects Subject to Environmental Impact Assessment, the annexed list features, at Item No. 21, "Establishment of Industrial Zone." A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2**.
[105] *See* Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029** ("Meanwhile, the company sent us a letter with a copy to your ministry on August 21/2014 with Ref. No. NVGUN/06/14 in which it promised to complete and submit the EIA report for the industry zone in Sendafa area with the help of two US based consultants within 30 days").

Prime Minister that "we have employed a consultant called 'Yeditepe University' … from Turkey and the consultant is … ready to come to Ethiopia to carry out the detail [sic] environmental impact study of the project … it will maximum take us 30 days."[106]

74. On 15 October 2014, Akgun finally delivered its third attempt at an ETIZ project EIA. This document, spanning a mere thirty pages in its entirety, came in the form of an addendum prepared not by US-based consultants, and not by Yeditepe University, but rather Istanbul Technical University ("ITU").[107] By letter of 20 October 2014, the Ministry of Industry forwarded this addendum to the MOEF, writing as follows:

> "[C]onsidering the risks shared by the Addis Ababa City Government and the international experiences, conducting a scientific environmental impact assessment study is one of the critical issues ***to ensure the safety of a society and the sustainability of national development*** … [t]his requires [a] reliable and highly reasonable decision which is beyond the capacity of our ministry… [a]s a result, we request your ministry to thoroughly review the study document and make a final decision regarding the issue."[108]

75. The MOEF obliged and responded on 13 November 2014 by letter bearing subject line "Feedback and review on the Environmental Impact Assessment of the Ethio-Turkish Industry Zone."[109] Therein, the MOEF wrote as follows:

> "[Akgun] sent us a letter … on August 21/2014 … in which it promised to complete and submit the EIA report for the industry zone in Sendafa area with the help of two US based consultants within 30 days … However, the document we received from your ministry [i.e. the ITU addendum] along with the letter does not indicate that a detailed EIA was conducted … ***[w]e, therefore, believe that the company has not submitted a comprehensive EIA report*** ... [w]e herewith attached the

[106] Letter from Akgun Construction to the Prime Minister, dated 21 August 2014, **Exhibit C-028**. Akgun wrote that it had also "signed [a] contract agreement with a company called **ARI ARITMA water and wastewater treatment technology**." *Id* (emphasis in original). The correct name of the company appears to be not "ARITMA" but rather "ARTIM." *See* Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, pp. 26-27.
[107] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-78**; *see also* Letter from Akgun Construction to Ministry of Industry, dated 15 October 2014, **Exhibit R-8** and Letter from Akgun Construction to Ministry of Industry, dated 17 October 2014, **Exhibit C-080**.
[108] Letter from Ministry of Industry to Ministry of Environment and Forest, dated 20 October 2014, **Exhibit C-081** (emphasis added).
[109] Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029**.

> conclusion and recommendation of our ministry which includes the required points that should be included in the report and our opinion on the project implementation."[110]

76. At fifteen pages long, the MOEF's review spans fully half the length of the proffered "EIA" itself, ultimately concluding that "***[w]e would support the implementation of the project under the condition that the company will confirm us to give due considerations of all the above comments***."[111]

77. Despite having received (and dedicated resources to review) ***no fewer than three defective studies in succession***, Ethiopia did not determine to relocate or terminate the ETIZ project even at this stage. Instead, the Ministry of Industry dutifully forwarded the MOEF's commentary to Akgun one week later, on 20 November 2014, concluding its letter as follows:

> "[W]e advise you to work in close collaboration with the relevant stakeholders, and ***revise and develop the EIA report*** as per the given comments."[112]

78. On the same day that the Ministry of Industry delivered this plea, the Ministry dispatched a separate letter to express its displeasure at having learned of ongoing construction activities at the ETIZ site in defiance of its July instructions:

> "It is to be recalled that with the letter dated [24 July 2014] Your Company has been ordered to suspend the construction of the Ethio-Turkish Industry Zone that has been planned to be constructed at Sendafa, Oromia Regional State, ***until [a] reliable EIA study which put[s] appropriate mitigation actions is presented to and approved by the Authorized Government organ***.
>
> However, we have received a report that Afro Oil Manufacturing PLC, which has been sub-leased a plot of land in the Industry zone has continued construction

[110] Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029** (emphasis added). The enclosed document is the one entitled "Review comments made on additional explanation about the main environmental effects report and specific guidance/directions for enhancing and improving Environmental Impact Assessment and Management Plan of Ethio-Turkish Industrial Zone Report," **Exhibit C-082** (hereinafter the "November 2014 MOEF Review Comments").
[111] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 15 (emphasis added). For a further overview of these comments, *see* Sec. III.e *infra*.
[112] Letter from Ministry of Industry to Akgun Construction, dated 20 November 2014, **Exhibit C-027** (emphasis added).

> activities in the area. It is obvious that such an act is intolerable provided that it violates the decision made in the letter mentioned above.
>
> Therefore, the ministry urges your company to give clarification as to why the decision has been violated."[113]

79. Unfortunately, Akgun would decline ever to remedy the defects in its successive studies and thus fail ever to demonstrate its capability to ensure environmental safety at the Sendafa site. In the words of the then-Minister of Industry Mr. Ahmed Abtew:

> "After Akgun submitted the addendum document from Istanbul Technical University, everybody within the Ethiopian Government, at both the federal level as well as Oromia State, and myself included, became convinced that Akgun lacked the seriousness to be trusted with Addis Ababa's water supply system. To put it mildly, the lack of any genuine semblance of effort to convince us that it would ensure reliable mitigation of environmental harm was startling."[114]

80. By the end of 2014, the Ethiopian government thus reached a view that a pathway forward for the ETIZ project might lie in allocation of an alternative site. On 19 December 2014, Akgun wrote to the Ministry of Industry to relate its telling of a meeting with the Special Advisor to the Prime Minister in which Ethiopia had conveyed its inclination to seek alternate land.[115] In Akgun's own telling,

> "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***."[116]

81. Akgun wrote in conclusion as follows:

> "[I]t was obviously expressed that it is not possible to implement a[n] Organized Industrial Zone under these conditions in Sendafa. As Akgün GROUP, we would

[113] Letter from Ministry of Industry to Akgun Construction, dated 20 November 2014, **Exhibit C-030** (emphasis added). The referenced letter is the Letter from Ministry of Industry to Akgun Construction, dated 24 July 2014, **Exhibit C-016**.
[114] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 35.
[115] Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, **Exhibit C-017**.
[116] Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, **Exhibit C-017** (emphasis added).

> like to specify that we disagree with the ideas for implementation [of] an Organized Industrial Zone in one of Hawasa or Dire Dawa cities."[117]

82. The "conditions" that had rendered it "not possible to implement a[n] Organized Industrial Zone" in Sendafa were Akgun's serial unwillingness (or its inherent inability) to prepare and present a report demonstrating its capability and intention to institute and maintain sound environmental practices at the site.

d. Ethiopia's Rejection of the Proffered Environmental Impact Assessments is Equally Sound under Turkish Law and International Best Practices

i. Turkish Law

83. The GOTA EIA and ITU addendum are equally defective where viewed under the lens of Turkish law as they are under Ethiopian law.

84. The ITU addendum to the GOTA EIA prepared in respect of the ETIZ project seeks to list Organized Industrial Zone ("OIZ") regulations in Turkey in its Section 7.[118] These regulations are only a segment of the rules governing industrial zones in Turkey and do not themselves accurately reflect the steps for the establishment of an OIZ.

85. Industrial zones in Turkey may have two different legal statuses – OIZ or simple Industrial Zone ("IZ"). Different laws and regulations apply to each. The relevant rules invariably include provisions on the protection of the environment and the conduct of EIA. Depending on the type of industry or project in the respective OIZ or IZ, the rules may require an EIA. When the rules require an EIA, this is done after the primary location for the project is selected. In terms of the requirement of EIA and the procedures thereof, having the status of OIZ or IZ does not make any difference. The EIA procedure, including application, report production, assessment, and evaluation criteria are subject to another set of rules.

[117] Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, **Exhibit C-017**.
[118] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, pp. 20-22.

86. Both the EIA report prepared by GOTA and the ITU addendum are patently deficient to meet the criteria of Turkish law.

(1) The Environmental Laws and Regulations in Turkey Are More Extensive Than Suggested by the ITU Addendum

87. As noted, OIZ and IZ are subject to different regulations. Section 7 of the ITU addendum does not acknowledge this distinction. Rather, the ITU addendum lists only the Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327) and Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759).[119] These regulations are repealed and no longer in force. The repealed regulations have similar procedures for finalization of location and EIA, though they place an even stronger emphasis on consideration of alternative locations than those presently in force.

88. OIZs are presently regulated by the following rules:

- Law on Organized Industrial Zones No. 4562;[120]
- Organized Industrial Zones Implementation Regulation (Official Gazette 02.02.2019/30674);[121] and
- Organized Industrial Zones Location Selection Regulation (Official Gazette 02.02.2019/30674).[122]

89. Meanwhile, IZs are subject to the following rules:

[119] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, pp. 20-22. The report includes the unofficial translation of the articles and the titles of the regulations. *See* Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327), **Exhibit R-9** and Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**.
[120] Turkish Law on Organized Industrial Zones No. 4562, dated 12 April 2000, **Exhibit R-11**.
[121] Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-12**.
[122] Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-13**.

- Law on Industrial Zones No. 4737;[123] and
- Industrial Zones Regulation (Official Gazette 06.08.2019/30854).[124]

90. These rules refer to the following legislation and regulation in terms of environmental protection and EIA:

- Environment Law No. 2872;[125] and
- Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186).[126]

91. Although the ITU addendum does not mention the applicable rules on EIA, at the time when the GOTA report and the ITU addendum were prepared, an earlier version of the Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784) was in force.[127] In terms of procedures and requirements, the rules that were in force at that time are essentially the same as under the current rules, while the general format with which the report must comply and the assessment criteria upon which the deciding commission renders its decision are identical.

92. According to the Law on OIZ, OIZs are

> "[g]ood and service production zones that are established by the allocation of parcels with defined territories per rates in zoning plans for the industry after being furnished with common areas, service and support areas, technology development areas in a planned manner and per certain systems in order to provide industrialization in appropriate areas, to prevent distorted industrialization and environmental problems, to manage urbanization, to use resources rationally, to benefit from information technologies, to settle and develop industry types within a certain plan, and zones, which are established, planned, operated in accordance with the provisions of this Law, that aim efficiency for the use of resources."[128]

[123] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**.
[124] Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**.
[125] Turkish Environment Law No. 2872, dated 9 August 1983, **Exhibit R-16**.
[126] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**.
[127] Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**.
[128] Turkish Law on Organized Industrial Zones No. 4562, dated 12 April 2000, **Exhibit R-11**, Art. 3(h).

93. By definition, OIZ thus aims at the efficient use of resources and protection of the environment.

94. Meanwhile, the Law on IZ defines IZ as

> "[p]roduction areas to be developed per this Law aiming to make the country's economy internationally competitive, to provide technology transfer, to increase production and employment, to expedite foreign investment inflow, to provide convenient industrial zones for large investments particularly in terms of production costs."[129]

95. The definition of IZ does not mention protection of the environment, but the relevant legislation has specific provisions referring to environment and EIA.[130] The Law on IZ aims to provide incentives, especially for foreign investors, by simpler procedures and requirements.

96. The industrial zone lauded by Akgun (Ikitelli Organize Sanayi Bolgesi or "Ikitelli OIZ") is subject to the Law on OIZ, as may be seen in the list approved by Turkey's Ministry of Industry and Technology.[131] The Law on OIZ has a stronger emphasis on environmental concerns in its definition. Likewise, the definition given in the 2012 ETIZ Agreement states "prevent[ing] environmental problems" as one of its objectives.[132]

97. Under Turkish law, there are different types of OIZ and IZ, depending on the subject of the activities, such as Mixed Zones, Specialized Zones, Individual Investment Zones and Private Industrial Zones. ETIZ was planned to accommodate various industries such as "leather products, goods and articles, textile and garment, chemicals and plastic, pharmaceutical,

[129] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 1(b).
[130] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Arts. 3/A, 3/B, 4/C, 4/Ç; Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**, Arts. 17(3), 23(2), 23(3).
[131] List of OIZs in Turkey Approved by Ministry of Industry and Technology, updated 31 January 2021, **Exhibit R-19**.
[132] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 1.

electric and electronics, printing, packing, automotive, metal and agro-processing Industries."[133] Similarly, Ikitelli OIZ is a Mixed Zone where various industries are active.

(2) The Turkish Rules Require EIA After Primary Location Selection

98. The Law on OIZ states one of its aims as prevention of environmental problems and unplanned industrialization.[134] The OIZ Location Selection Regulation requires submission of "the Environmental Impact Assessment positive certificate, if the OIZ is specialized" for finalization of the location.[135] The repealed regulation mentioned in the ITU addendum has the same wording.[136] The OIZ Location Selection Regulation defines specialized OIZ as "[t]he OIZ, in which the facilities operating in the same industrial sector and sub-industry groups included in this line of business, are located."[137] Article 4(ç) of the repealed regulation has the same wording.[138] Different from the current version, the repealed regulation mentioned in the ITU addendum requires determination of alternative locations and lists necessary features of alternatives,[139] and emphasizes that the commission shall not convene to finalize the location if there are no alternatives.[140]

99. The OIZ Implementation Regulation states that the Board of Directors shall cancel the allocation of a parcel to participants who "do not obtain a 'EIA Positive' or 'EIA is not Required' decision pursuant to the Environmental Impact Assessment Regulation."[141]

[133] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(14).
[134] Turkish Law on Organized Industrial Zones No. 4562, dated 12 April 2000, **Exhibit R-11**, Art. 3(h).
[135] Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-13**, Art. 9(1)(b).
[136] Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**, Art. 22(b).
[137] Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-13**, Art. 3(c).
[138] Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**, Art. 4(ç).
[139] Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**, Arts. 11, 12.
[140] Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**, Art. 16.
[141] Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-12**, Art. 60(c).

Similar wording is given in the repealed OIZ Implementation Regulation.[142] The OIZ Implementation Regulation further defines participants as "[n]atural persons or legal entities and financial leaseholders to whom parcels are allocated or sold for the establishment of an enterprise and those who make or undertake to make production on the parcels owned by them and operate in line with the purpose of the Law numbered 4562."[143] Similar wording is given in the repealed OIZ Implementation Regulation.[144]

100. Therefore, each participant must apply for and obtain an EIA decision after they are allocated a parcel at the OIZ. The provisions refer to the Environmental Impact Assessment Regulation ("EIA Regulation"). Annex 1 of the EIA Regulation lists the type of projects that require EIA, and Annex 2 lists the projects that might require EIA after an initial assessment. Specialized OIZs are listed under both annexes.[145]

101. As for IZ, the main provisions mentioning EIA in the IZ Rules are as follows. The Law on IZ states that

> "[b]efore the necessary permits, approvals and licenses are issued for the activities subject to the EIA legislation, which are accepted after the 'EIA Positive' or the 'EIA Not Required' decisions, the amount calculated within the ratio determined by the President, not exceeding five per thousand of the fixed investment amount to be used by the investor, shall be deposited to the account of the Ministry's Central Accounting Directorate."[146]

102. IZ Regulation Article 23(3) also provides that the amount should be deposited after the EIA decision.[147] The Law and IZ Regulation elaborate that "[a]ll other necessary licenses,

[142] Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327), **Exhibit R-9**, Arts. 173(1)(d), 108(b).
[143] Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-12**, Art. 3(1).
[144] Turkish Organized Industrial Zones Implementation Regulation (Official Gazette 22.08.2009/27327), **Exhibit R-9**, Art. 4(n).
[145] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 1, Annex 2. In the earlier version, Specialized OIZ is listed only under Annex 1. Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 1.
[146] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 3/A, para. 2.
[147] Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**, Art. 23(3).

permits and approvals shall be given by the relevant institutions within fifteen days without any further action for the activities for which the 'EIA Positive' or the 'EIA Not Required' decision is made.'"[148] The Law on IZ states that "[n]ational and foreign natural and legal persons, who want to invest in places declared as industrial zones, are obliged to perform their obligations in accordance with Article 10 of the Environment Law numbered 2872."[149]

103. Upon the submission of the EIA report, the Ministry of Environment and Forestry establishes a review and evaluation commission consisting of representatives of the organizations specified in the EIA rules, depending on the nature of the activity.[150] The examination, evaluation and final decision process lasts up to two months from the date the report is submitted. This period does not include time allowed for the project owner to correct the report. The project owner must correct the report returned to him for correction within fifteen days.[151] The IZ Regulation provides that the EIA report should be submitted after the investor is allocated a preliminary area.[152]

104. The Law on IZ states that

> "[f]ollowing the application of national or foreign natural or legal persons to the Ministry, the Ministry conducts a site examination and submits the assessment report on the area to the Board. Upon the submission of the assessment report, if the Board finds the said area suitable for investment, and after the EIA positive or EIA is not required decisions are obtained in accordance with the EIA legislation, the area can be allocated as an investment site with the condition that urgent expropriation can be made in accordance with Article 27 of the Expropriation Law numbered 2942 with the decree of the President."[153]

[148] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 3/A, para. 3; Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**, Art. 17(3).
[149] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 3/B.
[150] The Ministry of Environment and Forestry has since been renamed as the Ministry of Environment and Urbanization.
[151] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 3/B.
[152] Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**, Art. 23(2).
[153] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 4/C, para. 3.

105. The Law on IZ states that "[t]he following conditions are sought for areas to be declared as private industrial zones: (…) c) The 'EIA Positive' or the 'EIA Not Required' decision regarding the new investment has been obtained."[154] It further refers to Article 10 of the Environment Law,[155] which states that

> "[i]nstitutions, agencies and establishments, which may cause environmental problems as a result of their planned activities, are obliged to prepare Environmental Impact Assessment Report or project introduction file. Unless Environmental Impact Assessment Positive or Environmental Impact Assessment Not Required decisions are obtained, approval, permission, incentive, construction, and utilization licenses concerning the project cannot be issued; investment for the projects cannot start and be contracted. Projects that are subject to Environmental Impact Assessment, plans, and programs that are subject to Strategical Environmental Assessment, as well as procedures and principles regarding the issue, shall be determined by the regulation to be issued by the Ministry."[156]

106. EIA is carried out according to the EIA Regulation that is prepared under Article 10 of the Environment Law.[157] The procedure for EIA depends on the activity. The activities listed under Annex 1 of the EIA Regulation must go through the EIA procedure.[158] However, if the activity is listed under Annex 2 of EIA Regulation, the project may not need a complete EIA.[159] Such projects are submitted to get a decision stating that "EIA is Not Required." This procedure, which is called the Selection, Election Criteria procedure, can be considered as a preliminary investigation of the project file that may save the project owner from going through the EIA procedure. As stated in the ITU addendum, "OIZ area selection is a work to be done to begin with."[160] Consequently, if EIA is found to be necessary, the assessment is conducted on a defined location as per the Organized Industrial Zones Location Selection

[154] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 4/Ç, para. 2.
[155] Turkish Law on Industrial Zones No. 4737, dated 9 January 2002, **Exhibit R-14**, Art. 3/B.
[156] Turkish Environment Law No. 2872, dated 9 August 1983, **Exhibit R-16**, Art. 10.
[157] Turkish Environment Law No. 2872, dated 9 August 1983, **Exhibit R-16**, Art. 10.
[158] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 1.
[159] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 2.
[160] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 6.

Regulation and the Industrial Zones Regulation.[161] For a specialized OIZ, EIA is required for finalization of the location selection while for other types of OIZ, assessment is required before the parcels are leased for an industrial activity that falls under Annex 1 or 2 of the EIA Regulation.

(3) The GOTA Report and ITU Addendum Do Not Meet the Requirements of an EIA under Turkish Law

107. Under Turkish law, an EIA report is prepared following the general format given in Annex 3 of the EIA Regulation.[162] These requirements were the same under the earlier version of the EIA Regulation when the GOTA Report was written.[163] A commission evaluating the EIA report considers the below criteria:

- Whether the EIA Report and its annexes are sufficient and convenient;
- Whether the analysis, calculations, and evaluations are based on sufficient information, data and documents;
- Whether the possible impacts of the project on the environment are analyzed extensively;
- Whether the necessary measures are taken to eliminate the negative impacts on the environment; and
- Whether solutions are provided for the comments and suggestions from the public participation meeting during the process.[164]

108. First, the commission looks to whether the EIA Report and its annexes are sufficient and convenient. The GOTA Report misses important points required by Annex 3.[165] It does not

[161] Turkish Organized Industrial Zone Location Selection Regulation (Official Gazette 02.02.2019/30674), **Exhibit R-13**; Turkish Industrial Zones Regulation (Official Gazette 06.08.2019/30854), **Exhibit R-15**.
[162] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3.
[163] Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3.
[164] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Art. 12(9); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Art. 12(9).
[165] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3.

contain maps, ordinances, construction works at the site, the exact location and coordinates of the site or its approximation to concerned areas. There are only photographs of stakeholders and the Lage Bolo River. The GOTA Report does not suggest alternatives for location or technology, which is required under Annex 3.[166] The report merely states that no site alternatives were investigated.[167] The report does not provide alternative technologies or location for the project but only compares the present land use and infrastructure with the situation after the project is completed on the same site. Had the GOTA Report been subject to Turkish law, particularly to the then-in-force repealed regulations as implicitly acknowledged by the ITU addendum, the location would not be granted to a developer without consideration of alternatives.[168]

109. Although the GOTA Report touches upon some factors required by Annex 3 such as population, fauna, flora, geological features, soil, water, air, climate factors, ownership status of the land, and cultural assets, sources of information and calculations and observations are missing or in some instances no data were shared.[169] The report also does not consider other factors such as natural disasters and sensitivity degree of the area.[170]

110. Annex 3 requires defining possible problems that may impact the environment, amount of contaminants, interaction with the receiving environment, and identification of cumulative

[166] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section I(b); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section I(b).
[167] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 172.
[168] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section I(a); Turkish Regulation on Organized Industrial Zones Place Selection (Official Gazette 17.01.2008/26759), **Exhibit R-10**, Arts. 11, 12, 16; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section I(a).
[169] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section II; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section II.
[170] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section II; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section II.

impacts.[171] The GOTA Report states that no detailed feasibility study clearly indicating the volume of raw materials and products was conducted, and detailed baseline data are absent.[172] The GOTA Report similarly does not mention cumulative effects of the project.[173]

111. The GOTA Report lists greenhouse gases that would be emitted from the zone as stated in Annex 3.[174] However, the amount of gases or their impact on climate change are not stated. Measures to minimize the emission are vaguely mentioned as "installation of state of the art emission control technology" without further explanation.[175]

112. The report states negative environmental impacts and tries to provide mitigation measures per Annex 3.[176] The GOTA report mainly focuses on the industries (background, product type, materials and inputs, technology, equipment and production phase) and how much they would contribute to development. Negative impacts are categorized but no data collection, calculation or numeric values are provided.

113. The measures are not clear and generally in the form of suggestions and best practices rather than actions that Akgun is ready to take. The GOTA Report occasionally states that the developer "should" implement a measure rather than indicating how a particular negative impact can be overcome. Even at times when the report suggests a concrete precaution, no details are provided. For instance, to mitigate the negative effects of generation and disposal

[171] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(a); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(a).
[172] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 9.
[173] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(a); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(a).
[174] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(b); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(b); Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 104.
[175] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 178.
[176] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(c); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(c).

of sewage waste of temporary construction toilets, a fully automated Cyclic Biological Activated Sludge Treatment Plant is suggested, but how the mechanism would work, whether the suggested measures are best alternatives and how Akgun would actually implement the plan are not explained.[177] This general neglect is maintained throughout the report.

114. Per Annex 3, the monitoring plan must also be explained.[178] The GOTA Report struggles to describe an environmental plan. The environmental components that are envisaged to be monitored are limited.[179] One of the most important elements, liquid wastes that would negatively impact the water resources, is not even indicated.

115. Finally, Annex 3 requires public participation and observations from other parties.[180] The report indicates that the public raised its concerns that "environmental degradation including water bodies such as Laga-Dadi Dam might be exacerbated."[181] These concerns regarding the Laga-Dadi Dam are not addressed.[182]

116. After examination of the EIA report, the commission would have considered whether the analysis, calculations, and evaluations were based on sufficient information, data and documents. The GOTA report does not provide extensive analysis, calculation or evaluation of data, and references to data and information are not provided. The commission next would have looked at whether the possible impacts of the project on the environment are analyzed

[177] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 162.
[178] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(ç); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(ç).
[179] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 183.
[180] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section IV; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section IV.
[181] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 120.
[182] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 121.

extensively and whether the necessary measures are taken to eliminate the negative impacts on the environment. As stated, this analysis was not extensive and the measures to be taken by Akgun were not detailed. Finally, the commission would have investigated whether solutions are provided for the comments and suggestions from the public participation and consultation process. It is stated that a public participation meeting was held; however, solutions for the concerns raised are not given.[183] Therefore, the GOTA report would not have met the criteria provided in the current or earlier versions of the Turkish EIA Regulation and hence would not be approved.

117. As for the supplemental EIA addendum, it was finally prepared by a professor at Istanbul Technical University. Under Turkish law, this report could only be considered as an expert opinion rather than an official EIA report since it was not prepared by an appointed consultancy company.[184] In the report, the *curriculums vitae* and the professional capacities of the reporters are not indicated. The standards, laws or guidelines followed during the preparation of the report are not stated. The report is not comprehensive and generally does not conform to the format provided by Annex 3.[185]

118. The method for preparation of the report is not stated, nor whether any site visit was conducted. The ITU addendum does not properly introduce the project. The investment, its features, duration, service objectives, importance and necessity are not described in detail.[186] Rather, they are briefly mentioned only in the abstract.[187] The location and technology

[183] Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 118.
[184] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Art. 6(1); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Art. 6(1).
[185] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3.
[186] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section I(a); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section I(a).
[187] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 3.

alternatives of the project are not stated.[188] Coordinates, landscaping, ordinance, zoning, layout plan, or plan amendment proposals for the project's location or alternatives are all absent.[189]

119. The report focuses only on waste materials and quantities of wastes without considering any circumstances specific to the area. Environmental aspects at the area such as population, fauna, flora, geological and hydrogeological features, natural disaster status, soil, water, air, atmospheric conditions, climate factors, cultural assets, protection status, and sensitivity degree are not addressed.[190] Only environmental impacts of waste materials that may contaminate the water resources during construction and operation phases are mentioned.

120. Cumulative impacts, greenhouse gas emissions and measures to minimize emissions are not stated.[191] The ITU addendum states that the reason for not addressing air pollution was because "the facilities to be constructed throughout OIZ have to conform to the prevailing air emission limits in Ethiopia," yet moves on to state emission, its impacts on the settlement area, and use of natural gas as a "leading issue among the matters to be taken into consideration during area selection for the OIZ."[192]

[188] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section I(b); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section I(b).
[189] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section I(b) and "Annexes"; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section I(b) and "Annexes".
[190] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section II; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section II.
[191] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(a)-(b); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(a)-(b).
[192] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 6.

121. Although waste materials were the focus of the report, specific waste materials that would be produced by industries in the future were not listed. No resources were cited for the basis of the calculations, methods, or rationale.[193]

122. The management plan for waste materials is also unsatisfactory.[194] The ITU addendum makes generic suggestions such as compliance with official rules and procedures.[195] No calculations, modelling, sample applications, nor industry standards for specific management methods are discussed. The report does not discuss whether Akgun has these means nor to what extent the management plan can and will actually be implemented.

123. In some instances, the ITU addendum simply defers calculations for a later stage. For process effluent, the addendum suggests a treatment plant with a modular structure that may sustain increasing capacity.[196] Instead of detailing the mechanism, that addendum simply states without more that "[a]s the OIZ project will be completed in parts, the treatment plant will be designed in a manner that its capacity could be increased as a result of the facilities to be commissioned; and if necessary the additional capacities will be commissioned afterwards."[197]

124. Finally, the ITU addendum does not provide a monitoring plan for the project.[198] During the preparation of the report, public participation meetings were not organized and no other

[193] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, "Notes and Resources"; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, "Notes and Resources".
[194] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(c); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(c).
[195] *See, e.g.*, Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 15.
[196] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 12.
[197] Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 12.
[198] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section III(ç); Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section III(ç).

parties were consulted.[199] As there was no such consultation, there were no documents obtained from concerned organizations to supplement the report.[200]

125. Finally, the ITU addendum does not conform with the general format per Annex 3 or the criteria of the evaluating commission per current or earlier versions of the EIA Regulation. If this report were under scrutiny in Turkey, the commission would have rejected the report outright for not satisfying the requisite criteria. The report and its annexure are not sufficient and convenient; analysis, calculations, and evaluations are not based on sufficient information, data and documents; possible impacts of the project on the environment are not analyzed sufficiently and leading issues are absent entirely. Necessary measures are not given to eliminate negative impacts on the environment; in some instances, the measures proposed are intentionally postponed to a later stage; and there was no public participation and hence no public comments or suggestions are reflected.

(4) Conclusion

126. In conclusion, the GOTA EIA and ITU addendum are equally defective where viewed under Turkish law as they are under Ethiopian law.

127. Moreover, Ikitelli OIZ itself lacks the prospect of being a sustainable development project. The 2018 Activity Report of Basaksehir Municipality, wherein Ikitelli OIZ is located, states that during that year 660 businesses in Ikitelli OIZ were notified and 138 businesses were closed down by the Environment Protection Unit,[201] whereas in 2019, 809 businesses were notified and 108 businesses were shuttered.[202] These figures show that environmental

[199] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, Section IV; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, Section IV.
[200] Turkish Environmental Impact Assessment Regulation (Official Gazette 25.11.2014/29186), **Exhibit R-17**, Annex 3, "Annexes"; Turkish Environmental Impact Assessment Regulation (Official Gazette 03.10.2013/28784), **Exhibit R-18**, Annex 3, "Annexes".
[201] 2018 Activity Report of Basaksehir Municipality, **Exhibit R-20**, p. 85.
[202] 2019 Activity Report of Basaksehir Municipality, **Exhibit R-21**, p. 78.

management and monitoring plans in Ikitelli OIZ are not performing adequately to prevent enterprises from infringing the environmental regulations.

128. Ikitelli OIZ is no longer welcome by the citizens of Istanbul. The citizenry has urged its relocation as the city grew engulfing the industrial area, and has long complained of the pollution and industrial traffic caused by Ikitelli OIZ.[203] As early as 2009, Turkey's then-Minister of Trade and Industry Mr. Nihat Ergün pronounced "[t]here are loads that Istanbul can no longer carry," for Istanbul was "struggling to carry such a burden of the industry."[204]

129. These facts suggest that in the case of Ikitelli OIZ, its future impacts were not properly considered. This reality hinders the objective of developing industrial zones with the purpose of protecting the urban environment. In the absence of a proper EIA, the same fate may have befallen ETIZ, as the Sendafa site is similarly located a mere thirty-five kilometers from a burgeoning Addis Ababa.

ii. International Best Practices

130. The soundness of Ethiopia's rejection of the GOTA EIA and ITU addendum is further confirmed by Professor Susan Murcott of MIT. Professor Murcott was asked to opine upon the (i) adequacy; and (ii) limitations of the two studies. She finds as follows:

> "**5.4.1 Question 1: Adequacy of the EIAs**
>
> I was asked: 'did the two EIAs, dated 3 March 2014 (C-069, "EIA #1") and 10 October 2014 (C-078, "EIA #2") adequately assess environmental impacts of the proposed development?'
>
> After reviewing the first EIA, conducted by GOTA and submitted March 3, 2014, I believe that the first EIA did not adequately evaluate the environmental impacts of the proposed development project. I will detail what I see as the limitations of the first study in my answer to question 2, below.

[203] "Great Migration Plan from Istanbul," *Hurriyet*, dated 20 February 2013, **Exhibit R-22**.
[204] "Great Migration Plan from Istanbul," *Hurriyet*, dated 20 February 2013, **Exhibit R-22**.

After reviewing the second study, conducted by Istanbul Technical University and submitted October 10, 2014, I believe that the second study, which effectively served as an addendum to the first, also did not adequately evaluate the environmental impacts of the proposed development project. To the extent this second environmental study is held out as a second EIA, it definitely doesn't cover all of the components required for an EIA, as prescribed in the EIA Proclamation (see **Table 4**, right hand column).

In its comment letter dated April 3, 2014, the MOEF wrote that the EIA performed by GOTA was 'very vague,' and lacked 'detailed industry project proposals.' ITU's environmental study does not offer detailed information about specific industrial projects within the proposed industrial zone. MOEF also requested that Akgun perform a SEA; ITU's study *definitely* is not an SEA. I will detail its limitations in my answer to question 2, below.

5.4.2 Question 2: Limitation of the EIAs

I was asked: 'If the EIAs were not adequate, what were their limitations?'

In discussing the limitations of EIA #1 and EIA #2, I want to begin by specifying that I believe the EIA structure is a foundation upon which higher-level evaluations should be based. The EIA structure can be further developed by conducting multiple EIAs, one per industry. EIA is adequate to assess multiple projects at the project level. While other assessment methodologies should also have been applied … the EIA methodology as specified in the Environmental Impact Assessment Proclamation No. 299/2002, as well as in the Federal Democratic Republic of Ethiopia Environmental Protection Authority's Environmental Impact Assessment Procedural Guidelines, was sufficiently clear in its:

- General Provisions;
- Considerations to Determine Impact;
- Projects Requiring EIA;
- Trans-Regional Impact Assessment;
- Duties of a Proponent;
- EIA Report and Review;
- Implementation Monitoring;
- Public Participation;
- Grievance Procedures;
- Etc.

What is commendable is that the Ethiopian Environmental Policy, as early as 1997 and possibly earlier, shows its framers – the Environmental Protection Authority and the Ministry of Economic Development and Cooperation – to be grounded in U.N. human rights-based approaches to water, to sanitation, to a livable environment and to state-of-the-art practice in terms EIA. For example, section 2.2(e) announces the goal of 'improv[ing] the environment of human settlements to satisfy the physical, social,

economic, cultural and other needs of their inhabitants on a sustainable basis.' Both Proclamation No. 299/2002 and the EIA Procedural Guidelines also champion a broad vision of environmental assessment. The EIA Procedural Guidelines define 'environment' this way:

> 'The physical, biological, social, economic, cultural, historical and political factors that surround human beings. It includes both the natural and built environments. It also includes human health and welfare.'

There are also indications that the framers were aware of the key themes of SEA, if not specifically using that designation. The policy calls to 'integrate population planning, resource management and the rehabilitation and care for the environment to achieve a sustainability of life styles' and insists that authorities will 'subject all policies, programmes and projects to impact assessments in order to maximize equity for *economic, ethnic, social, cultural, gender and age group, especially the socially disadvantaged*.' (Emphasis added).

GOTA EIA Limitations

The EIA prepared by GOTA evinces an awareness of the major environmental, legal and policy requirements of an EIA, not to mention clear reference to the governing proclamation, Proclamation 299/2002. GOTA's report shows some understanding of a generic structure of the EIA. In fact, GOTA's EIA refers to itself as an 'Environmental and Social Impact Assessment' (EIA/SIA). This suggests that GOTA understood that an EIA does not necessarily limit itself strictly to the physical aspects of the environment.

GOTA's EIA sets out the specific objectives of its study, as shown in **Table 4**, left-hand column. It is instructive, given GOTA's awareness of the key policies and proclamations guiding EIAs, that their statement of specific objectives is a mismatch with the Ethiopian Environmental Impact Assessment Proclamation minimum requirements (right hand column). In **Table 4** we intentionally attempt to correlate, to a small degree, what is specified by GOTA and where it matches or doesn't match the EIA Proclamation (No. 299/2002). Also, sometimes it only partially matches. Where that is the case, the EIA Proclamation is more specific, and the EIA #1/GOTA is more general.

Table 4 - Mismatch between EIA #1 'Specific Objectives of the Environmental and Social Impact Assessment' and the delineation of the requirements of an EIA under Proc. 299/2002

EIA #1 (GOTA) Specific Objectives of the 'Environmental and Social Impact Assessment' (p. 3-4)	**Ethiopia Environmental Impact Assessment Proclamation (No.299/2002), requiring consideration of…**

To detect the effects of the project on the neighboring environment such as the water bodies, the soil, the people, the infrastructure, the fauna, the flora and the atmosphere	(b) the content and amount of pollutant that will be released during implementation as well as during operation. (e) characteristics and duration of all the estimated direct or indirect, positive or negative impacts.
To propose alternative measures where it is noticed that adverse effect may occur	
To enable the proposed mitigation measures where adverse effects may have occurred	(f) measures proposed to eliminate, minimize, or mitigate negative impacts;
To carry out a diagnosis of the existing environment and activities in the area of the Project	(c) source and amount of energy required for Operation
To propose enforcement measures where beneficial effects from the project are detected	
To set up an environmental management plan that will govern all activities of the project for the better protection of the environment	(g) contingency plan in case of accident; and
To establish monitoring plan that enable to follow up and guide to take immediate corrective measures (h) procedures of self-auditing and monitoring during implementation and operation.	(a) the nature of the project, including the technology and processes to be used;
	(d) information on likely trans-regional impacts

The requirements listed above under the right-hand column are the *minimum* requirements for an EIA; thus, it is surprising that GOTA's report did not adopt that structure. The impression is that GOTA may have recycled some earlier EIA structure from some prior project or textbook, rather than tailoring their EIA/SIA to the requirements of Ethiopia's EIA.

GOTA's report professes to conduct both an EIA and a Social Impact Assessment, but when it actually comes down to performing that EIA/SIA that GOTA specifies it is doing,

the text of their report offers generalities, not any dedicated commitment to integrating the environment with 'economy' and 'society,' or to deeply investigating the negative environmental impacts and proposing mitigating technologies and approaches *in detail.*

It's helpful to compare GOTA's EIA to other examples of EIAs. For example, Exhibit R-37 presents an EIA that was conducted for the construction of *two* gas turbines in Uzbekistan on 7 hectares of land. The EIA spans some 264 pages, considers multiple alternative locations for the project; different possible configurations and energy sources; and details impacts on physical resources; ecological resources, including flora, fauna, forests, birds; economic development; and social impacts. This is for *two* power plants. Meanwhile, GOTA's EIA spends a single 5-row table on the topic of ETIZ's energy requirements, and used only 210 pages to describe the impacts of a project with 790 separate facilities, and at least 315,000 employees, on nearly 1,500 hectares of land.

I summarize the limitations of EIAs #1 and #2 according to the grading system described below.

- 'Excellent' means comparable to worldwide best practice, i.e. high quality.
- 'Good' means work accomplished to the minimum standard of the EIA.
- 'Fair' means below the minimum standard and additional work is needed to be acceptable.
- 'Poor' means serious omissions in technical detail and/or not addressed at all.
- N/A means 'not addressed.'

The limitations of the two EIA studies are best comprehended by referring to the EIA Proclamation No. 299/2002 and allowing its minimum requirements to set the framework of the analysis.

Table 5 - Limitations and Evaluation of EIA #1 and EIA #2

	Ethiopia Environmental Impact Assessment Proclamation (No. 299/2002)	EIA #1	EIA #2
a)	the technology and processes used [We interpret this to refer to the Industrial Zone processes themselves.]	Fair	Poor
b)	the content and amount of pollutant that will be released during implementation as well as during operation;	Poor	Fair-to-Poor
c)	the source and amount of energy required for operation;	Poor	N/A
d)	information on likely trans-regional impacts	Poor	N/A
e)	characteristics and duration of all estimated direct and indirect, positive or negative impacts;	Poor	Fair-to-Poor

f) measures proposed to eliminate, minimize or mitigate negative impacts; [We interpret this to refer to the approaches, technologies or processes proposed]	Poor	Fair-to-Poor
g) contingency plan in case of accident	Poor	Poor
h) procedures of self-auditing and monitoring during implementation and operation	Poor	Poor
i) taking into account public comments and expert opinion	Fair	N/A
j) biophysical and socio-economic baseline conditions are adequately and truly described	Fair-to-Poor pp.107-113	Poor
k) thoroughly identify the potential impact of the industry zone on the Legedadi basin, especially on the Legedadi groundwater and dams	Poor-EIA #1 p. 111, 131-134, 138	Poor EIA #2 p.7-20
l) compensation of farmers who occupied the ETIZ land site	Good (EIA #1, p. 108 & p.120)	N/A
SUMMATION	1 Good, 2 Fair, 1 Fair-to-Poor, 8 Poor	0 Good, 0 Fair, 3 Fair-to-Poor, 4 Poor

Examples of 'Good'

Compensation of farmers/people was given as a total number of people and they were paid a specific amount: '40 farmers/people have been paid 14 million ETB.' But even this compensation raises some questions. EIA #1 indicates that some farmers felt the payments they received were inadequate.

Examples of 'Fair-to-Poor'

'Baseline Information Biophysical:' EIA #1 devotes roughly ten pages to biophysical descriptions, which aligns with the requirement to provide a baseline assessment of physical characteristics; however, the descriptions are general in nature.

Example of 'Poor'

Laga Bari River: Discussing the Laga Bari River, EIA #1 states that '[g]enerally, the results of chemical analysis of water supplies show the surface waters in the area were

not polluted at the time of this study.' This statement, which is supported by no data included in the report, is completely inadequate. Without providing data to substantiate the claim, it would be impossible for someone reviewing the study to know whether or not the statement was true.

Similarly, no data were provided to substantiate the statement that '[i]n situ measurements and laboratory analysis showed that groundwater was generally of good quality.'

I agree with an excellent summary statement of the limitations of GOTA's environmental study, expressed in the MOEF's 13 November, 2014 letter to MOI.

The MOEF summarized the limitations of GOTA's study, writing that the study:

1. 'Did not employ the EIA research methodology which could have indicated whether it is compatible with the planned industry zone in Sendafa area;
2. [H]as not thoroughly identified the potential impact of the industry zone on the Legedadi basin, especially on the Legedadi groundwater and dams;
3. The corrective measures for halting or minimizing the negative impacts on the environment lack transparency'

In addition to these, I would add three more limitations:

(1) The EIA did not establish a baseline against which to compare future impacts.
(2) Lack of public engagement.
(3) Lack of transparency regarding corrective measures and negative impacts.

I will take up each of these limitations by providing examples drawn for the key documents with which I have been provided.

Did Not Follow EIA Research Methodology (i.e. EIA Proclamation No.299/2002)

Tables 4 and 5 above, and the accompanying paragraphs explicating **Table 5**, show that EIA #1 did not follow the EIA Proclamation No. 299/2002, starting right at the beginning, the structure of the report.

Did Not Thoroughly Identify Impact of IZ on Legedadi Basin, Groundwater, Dams

It should not be forgotten that the proposed ETIZ project site was within 3 km of the Legedadi water reservoir. And yet the GOTA study's findings related to the impacts on water sources amount to the following statements:

1. 'The generation of substandard water may result from construction activities contaminate surface and groundwater'

2. 'disposal of solid and liquid waste may results (sic.) in a depletion of resources, is a nuisance to human and may result in visual impacts'
3. 'Waste water from the industrial zone is expected to be significant.'

These descriptions of the impacts on a water supply as consequential as the Legedadi dam – servicing 60% of the capital's demand – are exceptionally vague.

Lack of Transparency Regarding Corrective Measures and Negative Impacts in Terms of Chemicals in the Environment

The way I will answer this question is first by restating this question in the affirmative: 'What are the possible negative impacts on the environment and affected populations and what corrective measures protective of the environment and affected people should have been included in the EIA?'

This is a huge question and to answer it properly, would require a lengthy addendum to this statement. Here, I am only providing a brief summary.

Environmental assessment and social impact assessment both begin with a baseline study. Here's a good definition of a baseline study:

> 'A baseline study is an analysis of the current situation to identify the starting points for a programme or project. It looks at what information must be considered and analyzed to establish a baseline or starting point, the benchmark against which future progress can be assessed or comparisons made.
>
> An example is the REACH baseline study, a tool to monitor the new European Union policy on chemicals 'Registration, evaluation, authorisation and restriction of chemicals'. A first 'snapshot' has been taken of the situation before REACH came into force ('Pre-REACH-Baseline'); further snapshots later on will make it possible to monitor and assess the success of the Reach legislation.'

I chose this definition partly because it gives an example related to chemicals. The ETIZ megaproject will require and produce hundreds if not thousands of chemicals in the construction and implementation phases of the project, as well as the activities of its population of up to 700,000 workers on site. A large number of chemicals would be hazardous. Given the risk of exposure by workers and neighboring communities to these chemicals, it would be absolutely essential that the EIA document precisely identify which chemicals are involved. The way this is typically done is that an EIA would be performed for *each separate industry involved*. The list of industries involved at ETIZ is: paper and packing, pharma, food, leather, textile, light machinery, furniture, heavy industry, founders, and junk storage. By surveying all chemicals that would be produced, mitigation measures could then be proposed. This is the foundation on which monitoring is performed (see **Section 5.4.5**), comparisons between the before and after condition

made, and protective measures improved over time. Without this, disasters will occur, with little possibility of successful intervention and mitigation.

Serious Problem of Potential Drinking Water Contamination

Next, there is the serious problem of potential drinking water contamination. Here, it would not only be impacts on workers and neighboring communities. The fact that ETIZ is within kilometers of the main drinking water supply of the Addis Ababa population raises all kinds of red flags and ethical concerns. Should the health and well-being of the population of Addis Ababa be sacrificed on the altar of jobs, income and industrial development? Isn't the purpose of an EIA or SEA to avert disaster, whether from chemical exposure or water contamination? Shouldn't a properly conducted EIA/SEA enable all stakeholders to find win-win outcomes that will protect Ethiopia's precious water resources and at the same time contribute to good jobs and overall economic development?

Lack of public engagement and social impact assessment

Then, there is also the issue of social impact. The two EIA studies barely mention people. Yet it is well known that projects that engage stakeholders at the earliest stages and throughout the project have better outcomes than those that ignore stake-holders, and most especially the people most impacted by the project.

ITU Study Limitations

The primary limitation of the ITU study is that it is only an addendum to the first EIA performed by GOTA. It alone is not sufficient to be an EIA, considering that it has no consideration of social or economic impacts, and focuses almost exclusively on the treatment of waste. I agree with the MOEF's 13 November, 2014 letter to MOI, asserting that the ITU study functioned as an addendum to the original, deficient EIA:

> '[T]he document we received from your ministry along with the letter does not indicate that a detailed EIA was conducted. It rather shows the answers for questions raised about the EIA report by the appropriate stakeholder. We, therefore, believe that the company has not submitted a comprehensive EIA report.'"[205]

131. Professor Murcott reaches the following overall conclusion in her executive summary:

> "After reviewing the environmental studies produced by GOTA and ITU for the ETIZ project, I believe that the two studies are inadequate from the perspective of the standards of an Environmental Impact Assessment. They are limited in numerous ways, including being too vague, failing to consider broader

[205] Expert Report of Professor Susan Murcott, dated 7 March 2021, Secs. 5.4.1-5.4.2 (citations omitted).

consequences of the proposed project, failing to consider in detail the impacts of the project on surrounding water resources, and failing to address a number of serious alternatives."[206]

e. Rather Than Respond to the Merits of Ethiopia's Concerns, Akgun Dispatches a Dismissive and Disparaging Letter

132. In February 2015, Akgun belatedly sought to respond to the MOEF's fifteen pages of commentary on the thirty-page addendum to its defective EIA.[207] Akgun's letter would not inspire great confidence at the Ministry of Industry of the Federal Democratic Republic of Ethiopia.

133. In opening its commentary, the MOEF had written in respect of the ITU addendum that "**its preparation was not to the standard and in accordance to the EIA guideline documents**" before referring to its earlier-given comments upon the GOTA EIA, which "could witness/verify this statement."[208] The MOEF further wrote that "we have also quickly gone through the second report which deals with additional explanations about the main environmental effects of the EIA report," but that "the general and specific issues that are contained in the above mentioned review comment however are not given due considerations."[209]

134. Akgun's response was as follows:

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[206] Expert Report of Professor Susan Murcott, dated 7 March 2021, para. 17.
[207] *See* Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, **Exhibit C-087** (hereinafter "Akgun's February 2015 Letter"). Ethiopia notes that the version of this letter Akgun has submitted is not on letterhead and is unsigned. The version that Ethiopia received is dated 6 February 2015 (the following day) and is addressed to H.E. Ahmed Abtew by name, then Minister of Industry. *See* Letter from Akgun Construction to the Minister of Industry, dated 6 February 2015, **Exhibit R-23**. The two documents appear to be nearly identical, but *see, for example*, the first sentence of the third to last paragraph; *compare* Akgun's February 2015 Letter, **Exhibit C-087**, p. 22 ("Authorities of Ministry of Forest and Environment of Federal Democratic Republic of Ethiopia allocated this current land to Akgun Group") *to* Letter from Akgun Construction to the Minister of Industry, dated 6 February 2015, **Exhibit R-23**, p. 18 ("The ministry of Industry and Oromia regional state of Ethiopia allocated this current land to Akgün Group").
[208] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 1 (emphasis in original). The earlier-given comments are the April 2014 MOEF Review Comments, **Exhibit R-6**.
[209] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 1.

> "**The Response of Akgun Group:** Taking into account of Part 2, Article 7, Clause 2 of [the 2012 ETIZ Agreement], which states 'The Ministry shall deliver the Land to the Developer free of any encumbrance.' [I]t can be clearly expressed that preparation of Environmental Impact Assessment report is the responsibility of the authority. Nevertheless, Akgün Group has prepared essential reports."[210]

135. Thus, bereft of any leg to stand on, Akgun sought to discard its burden of EIA presentment by reference to a property law ***title assurance*** against encumbrances.[211] This flailing attempt would be repeated no fewer than five times in the course of the letter. Following its second invocation of the favored assurance against "encumbrances," rather than evince the slightest regard for governing Ethiopian law (which is absent from the letter), Akgun reached alternatively for assistance to Turkish law.[212]

136. The MOEF further commented that "[a]s per the given requirement which [Akgun] has set in place… the company has not sent us the detail[ed] EIA report of the subject matter."[213] In a deeply disingenuous response, Akgun wrote only that it "has to submit each essential letter or information to the Ministry of Industry" under the 2012 ETIZ Agreement.[214] As may be seen by any reader of the MOEF's comments, this point is plainly not a grievance for having been excluded from communications; it was rather a statement that there was, as yet, no "detail[ed] EIA report" at all.

137. The MOEF further commented that "[i]n view of making use of natural resources of the project area, especially water resources in a sustainable manner, it is [] equally important to analyze **recharge and discharge rates** of the area parallel to the investigation of water resource potentials."[215]

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[210] Akgun's February 2015 Letter, **Exhibit C-087**, p. 3.
[211] *See also*, in this respect, 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(8) ("[t]he Developer shall notify the Ministry immediately where any claim or interference arises by third parties on its use right, including the title deed certificate on the Land").
[212] Akgun's February 2015 Letter, **Exhibit C-087**, p. 4. The deficiency of Akgun's studies under Turkish law has been set out at Sec. III.d.i *supra*.
[213] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 3.
[214] Akgun's February 2015 Letter, **Exhibit C-087**, p. 5.
[215] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 4 (emphasis in original).

138. In response, Akgun first repeated its mantra of assurance against "encumbrances" before adding the following:

> "Certainly, it can be requested by developer to pay the maximum attention and take essential precautions in order to protect natural sources during implementation process. However, it should be considered, that ***all these demands have limits in terms of financial and technical implementation***. ***There are not any existing country [sic] which has developed without any air pollution.*** Surely, most desired matter is developing without any pollution by ***holding up this situation as a lesson***, but this matter is ***limited by technical and financial justifications***."[216]

139. In revelation of its only true concern, the Claimant then wrote that "[i]t should be considered, ***how Akgun Group can face with [] investors if the review result of EIA report is negative***."[217] The Claimant further wrote, in respect of waste treatment, that "[c]lose precentages [sic] to %100 in terms of efficiency can be also provided by ***very advanced but expensive techniques***," but that "[o]n the other hand, ***sustainability of such issues is not possible***," for "[i]f the cost cannot be compensated, it is possible that enterprise will burst up."[218]

140. The Claimant also wrote as follows:

> "Akgun Group could take part at committee as a stakeholder before the implementation of OIZ and [the] committee ***could decide to move the OIZ land to another place*** if the committee would consider as a result of a study that [the] current land has risks in terms [of] water pollution."[219]

141. The MOEF further commented in respect of water that "we are also strongly recommending the company to come up with the **establishment of acceptable limits of environmental resources, especially water** (e.g. through the considerations of threshold values of the

[216] Akgun's February 2015 Letter, **Exhibit C-087**, p. 7 (emphasis added).
[217] Akgun's February 2015 Letter, **Exhibit C-087**, p. 8 (emphasis added).
[218] Akgun's February 2015 Letter, **Exhibit C-087**, p. 9 (emphasis added).
[219] Akgun's February 2015 Letter, **Exhibit C-087**, p. 10 (emphasis added).

quantity and quality of water resources)" and that "[t]his requires to be done based on by taking into considerations [sic] of public views and scientific information."[220]

142. The "**Response of Akgun Group**" reads as follows:

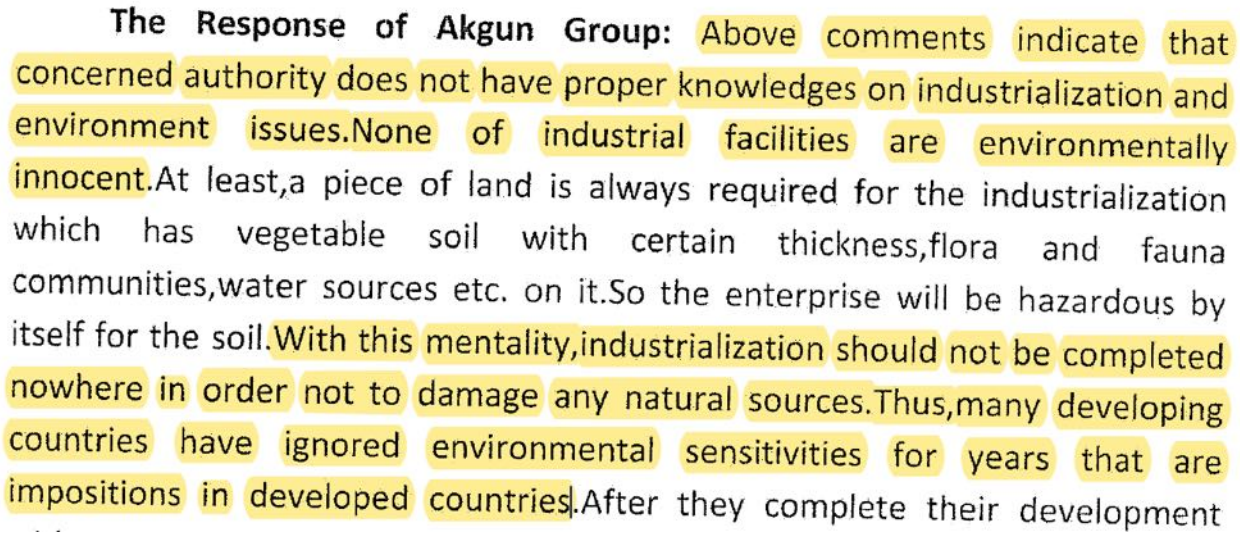
> "Taking into account of Part 2, Article 7, Clause 2 of [the 2012 ETIZ Agreement], which states 'The Ministry shall deliver the Land to the Developer free of any encumbrances.', we can specify that [the] authority, that has allocated land to Akgun Group, is the only responsible part for this situation."[221]

143. The MOEF further commented as follows:

> "One of the objectives of EIA is to integrate environmental considerations at the earliest phase of the project cycle so as to select the best project alternative that is socially acceptable and environmentally sound and sustainable.
>
> In order to achieve the above objective therefore, the required assessments in this section should be carried out for each of the alternatives. This will have importance in facilitating comparison between them.
>
> The statements for the baseline and impact assessments need to be in terms of specificities, not generalities. It is to be noted that they are required to be prepared at a level of accuracy and specificity consistent with a feasibility study of the project."[222]

144. Akgun's response speaks entirely for itself:

[220] November 2014 MOEF Review Comments, **Exhibit C-082**, pp. 5-6 (emphasis in original).
[221] Akgun's February 2015 Letter, **Exhibit C-087**, p. 14.
[222] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 9.



The Response of Akgun Group: Above comments indicate that concerned authority does not have proper knowledges on industrialization and environment issues.None of industrial facilities are environmentally innocent.At least,a piece of land is always required for the industrialization which has vegetable soil with certain thickness,flora and fauna communities,water sources etc. on it.So the enterprise will be hazardous by itself for the soil.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 impositions in developed countries.After they complete their development

Letter from Akgun Construction to the Minister of Industry, dated 5 February 2015, **Exhibit C-087**, p. 18

145. The MOEF further noted, amongst those aspects to be addressed in a more specific manner, "[d]escriptions of the toxicity of chemicals based on various factors including their **natures, types, synergistic and antagonistic behavior of the toxicity behavior [sic] of the chemicals**, etc."[223]

146. Akgun's response here requires, once again, no comment:

> "It is obviously meaningless to request explanations for this issue. ***Akgun Group is not a research company which employes [sic] toxicity or public health professors.*** It is not expected that any enterprises will operate without a recognition of chemicals. Therefore, it is expected that each enterprises [sic] will have knowledge about the qualifications of chemicals which will be used. They will be also wise and have responsibility to know what to do in case of any accidents. It can be only examined the types of chemicals and emergency case precautions against hazardous chemicals. Even, international instutions [sic] can examine if these precautions are enough appropriate. ***By considering Bhopal disaster in India, it can be clearly understood that chemicals issue is very crucial. However, by analyzing this issue detailed, it can be seen that mistake, hereby, does not belong to the chemical but to the local authorities with shallow mentality***."[224]

[223] November 2014 MOEF Review Comments, **Exhibit C-082**, p. 14 (emphasis in original).
[224] Akgun's February 2015 Letter, **Exhibit C-087**, p. 19 (emphasis added).

147. In concluding its letter, Akgun wrote that "[f]irst of all, the information about [the] current[ly] allocated land's location which is next to [a] drinking water basin, did not take place clearly in [the MOEF's review comments], although [the] authority have had this information," and that "[t]his is a very engrossing situation."[225] This is quite a curious comment in view of the fact that Akgun declined, within this same letter, to respond to those subsections of the MOEF's commentary entitled (i) "**Water quantity and quality issues**"; and (ii) "**Waste Water Treatment**."[226]

148. Mr. Sisay Gemechu Edo, then-State Minister of Industry, now reaches the following conclusion:

> "As a past and present CEO of industrial parks enterprises in Ethiopia, with a vast experience both at the federal and Oromia state levels, I now conclude that Akgun didn't want to engage an experienced international consulting company to produce an acceptable EIA because it knew very well that construction of a water treatment plant for this mega-project covering an area of up to one thousand hectares or more would have a heavy cost. I came to know about this from the zero-liquid-discharge water treatment plant that we built a few years ago in Hawassa Industrial Park."[227]

149. Akgun finally wrote as follows:

> "We consider that Ethio-Turkish OIZ, that planned to be implemented on the current land, may expose future problems because of the location of the land. Additionally, we also consider that this situation can be a very crucial future trouble for the investors who want to establish their enterprises on this land.
>
> Additionally, authorities of [the] Ministry of Industry of [the] Federal Democratic Republic of Ethiopia should guarantee that there will not be any problems for the expected investors in the future in case that OIZ construction will be continued on the current land."[228]

150. Entirely aloof and acting oblivious, Akgun sought this "guarantee" at a time after it had thrice failed to deliver a minimally respectable impact assessment in respect of this "current land."

[225] Akgun's February 2015 Letter, **Exhibit C-087**, p. 22.
[226] November 2014 MOEF Review Comments, **Exhibit C-082**, pp. 13-15 (emphasis in original).
[227] Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 19.
[228] Akgun's February 2015 Letter, **Exhibit C-087**, p. 22.

f. Akgun Rejects Proffered Alternate Lands and Elects to Depart

151. On 24 March 2015, Akgun wrote to the Prime Minister to complain of having received no "official response" to its insulting February letter, adding a request that he "***dispose***" of the EIA "***obstacle***."[229] Three days later, on 27 March 2015, Akgun dispatched a letter intended to trigger the dispute settlement mechanism under the Treaty.[230]

152. On 17 June 2015, the Ministry of Industry wrote to Akgun as follows:

> "In response to your requests related to the delay of the implementation of the project, the Oromia Regional Government and the Ministry of Industry have carried various discussions on how to solve the difficulty of the project to insure sustainable development of the Ethio-Turkin [sic] Industrial part [sic].
>
> Thus, on behalf of the Oromia Regional Government and the Ministry of Industry, I would like to inform you that we have reached to an understanding to relocate the site of this project to [an]other better location in order to safe guard the … water dams from any kind of pollution that might arise[] from the project site and thus ensure the sustainability of this important investment project.
>
> I would thus like to advise you to start discussion with the Oromia Regional Government to reach an agreement on the alternative site and proceed with implementation of the project. In this connection, I would like to inform the Oromia Regional Government to facilitate the provision of the alternative site as it is already decided by the Regional Government."[231]

153. Then-State Minister of Industry Tadesse Haile thereafter hosted Yusuf Akgun for a meeting on 20 August 2015 in which, in Yusuf Akgun's telling, he "reported that the government would propose new land alternatives."[232] Indeed, Yusuf Akgun acknowledges "***visiting***

[229] Letter from Akgun Construction to the Prime Minister, dated 24 March 2015, **Exhibit YUN-013** (emphasis added).
[230] *See* Notice from Akgun Construction to Ministry of Industry, dated 27 March 2015, **Exhibit C-036**. As in its February letter, Akgun again incorrectly suggested that the duty to conduct an EIA falls upon the State. *Id.*, para. 11.1.2.
[231] Letter from Ministry of Industry to Akgun Construction, dated 17 June 2015, **Exhibit C-031**.
[232] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.25.

three different properties in one day," although he now complains of their distance and suitability.[233]

154. On 27 November 2015, Yusuf Akgun met again with Tadesse Haile, and testifies that "[d]uring that meeting Minister Tadesse stated that Ethiopia would not compensate us for the damages we suffered" which, in his telling, "contradicted what Dr. Arkebe had told us before."[234] As may be seen in Akgun's own letter, Dr. Arkebe's earlier offer was in the form of incentives at a site to be newly allocated.[235]

155. Of Akgun's departure, Mr. Ahmed Abtew, former Minister of Industry, opines as follows:

> "It is very clear from Mr. Yusuf's statement (and it was also clear to me even at the time) that he was most interested in the value of the land as a piece of real estate rather than its prospects for industrial development. If industrial development was the true intention, an alternative location would have been preferable. As Akgun's subsequent sublease of the land to a local oil company for domestic consumption would suggest, the land's proximity to Addis Ababa was the alpha-omega of the Akgun project. It was clear to me then as it is now that Akgun's interest was one of a real estate deal rather than the industrial development that it had promised under the 2012 ETIZ Agreement."[236]

156. Yunus Akgun testifies that in the end, after first downsizing, Akgun "decided to close our office in Ethiopia," that "[s]ince August 2017, no member of the Akgun family has set foot in Ethiopia," and that in August or September of 2017 "[we] learned that the Oyap factory in Ethiopia was seized by Ethiopia's Commercial Bank."[237] Yusuf Akgun, for his part, tells that in 2018 the Akguns divested from OYAP Ethio Industry Trading PLC.[238]

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[233] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.25 (emphasis added).
[234] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.26.
[235] *See* Letter from Akgun Construction to Ministry of Industry, dated 19 December 2014, **Exhibit C-017** ("H.E. Dr. Arekebe Oqubay also expressed that [Ethiopia] can allocate a land for free in Hawasa or Dire Dawa cities to Akgün GROUP and provide tax exemption for 15 years").
[236] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 34.
[237] Witness Statement of Yunus Akgun, dated 19 November 2020, paras. 8.5-8.7. Yunus Akgun seems to suggest that Akgun Construction was heavily intertwined and commingled with the Oyap entity in Ethiopia. *See id.*, paras. 9.2-9.3
[238] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 3.4.

157. On 19 June 2019, more than four years after the date of its letter notifying a dispute under the Treaty,[239] Akgun lodged a Notice of Arbitration to commence this proceeding.[240]

IV. JURISDICTION

158. Ethiopia submits that this Tribunal lacks the jurisdiction to settle this dispute because of two independently dispositive reasons: (i) the dispute does not arise "in connection with [] investment" within the meaning of Article VII(1) of the Treaty; and (ii) the Tribunal is constituted under the wrong dispute settlement instrument.

a. The Dispute Does Not Arise "[I]n [C]onnection with [] [I]nvestment"

159. The dispute settlement provision of the Treaty provides:

> "**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 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,

[239] *See* Notice from Akgun Construction to Ministry of Industry, dated 27 March 2015, **Exhibit C-036**.
[240] *See* Notice of Arbitration, dated 19 June 2019.

> (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."[241]

160. The Claimant describes its "investment" in Ethiopia in the following terms:

> "3.7 ***Claimant's investments in Ethiopia are in the form of its interest in the ETIZ Project as embodied in the 2012 ETIZ Agreement***. Contrary to what Respondent states, the rights contained in the 2012 ETIZ Agreement are clearly an asset and may also be characterized as rights having financial value (point (b) of Art. I(2)), and therefore they clearly fall within the BIT's expansive definition of 'investments.' Moreover, the know-how needed to develop the ETIZ and the materials and equipment needed to perform the 2012 ETIZ Agreement also fall within the Treaty's definition of 'investment' as indicated in (c) and (d) of Art. I(2) of the Treaty.
>
> 3.8. In short, this case involves a substantial municipal construction and development project of the sort that investment tribunals routinely accept as an investment in the host State."[242]

161. The Treaty defines the term "investment" as follows:

> "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.

[241] Treaty, **CLA-001**, Art. VII.
[242] Statement of Claim, paras. 3.7-3.8 (emphasis added) (citations omitted).

> 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."[243]

162. The contractual right to build an industrial zone on a plot of land only accrues if the builder meets all of its obligations under the contract to earn all the necessary permissions to commence building. Even then, the right to build in and of itself cannot qualify as an "investment" within the meaning of the term as defined in the Treaty, which is ***an asset-based definition***.

163. The Claimant has undertaken the obligation to conduct an EIA. Such EIA would have to be acceptable under Ethiopian laws as expressly referenced in the Agreement. The Claimant cannot in sincerity claim that its contract would have economic value even if it had not met the legally prescribed prerequisites to proceed with the development. The right to build is clearly conditioned upon the submission of an acceptable EIA. The lack of presentment of an acceptable EIA means the repudiation of the builder's contractual obligations. A repudiating party would have no legal basis to seek redress under the same contract that it had repudiated much less have it considered as an investment with an economic value.

164. Akgun notably does not claim that the rejection of the EIA had no legal basis or was arbitrary and capricious or that it was otherwise denied adequate domestic legal remedy.

165. Even if Akgun had met the EIA and other regulatory requirements to proceed to the stage of development, its right to build could only begin to accrue economic value to the extent it actually commits assets through building or related economic activities. To the extent Akgun commenced construction works on the plot without obtaining all necessary environmental

[243] Treaty, **CLA-001**, Art. I(2)-(3).

and other regulatory permits, it is further evidence of Akgun's repudiation of its obligations under the contract rather than proper performance. Duly scrutinized, it may even amount to trespass, inviting extra-contractual liability under Ethiopian law.

166. The Claimant clearly struggles to fit its "contractual rights" to develop the allotted land into any section of the Treaty's definition of the term "investment." On the one hand it says the investment is "in the form of its interest in the ETIZ Project as embodied in the 2012 ETIZ Agreement."[244] On the other had it admits that it submitted an EIA to proceed to develop but that such was never accepted. It never claims that its right to develop was unconditional or that it did not have EIA obligations under the Agreement as well as the laws that the Agreement itself incorporates.

167. The Claimant also suggests that perhaps its investment is "the know-how needed to develop the ETIZ and the materials and equipment needed to perform the 2012 ETIZ Agreement."[245] This is also an unaccrued potential that never materialized by the Claimant's own lack of satisfaction of environmental conditions under the Agreement and the relevant laws. A prospective or potential investment is not an investment within the meaning of the Treaty.

168. The Claimant finally suggests that its investment is "a substantial municipal construction and development project of the sort that investment tribunals routinely accept as an investment in the host state."[246] None of the cases that the Claimant cites considers a municipal construction project that has not even commenced because of the developer's own fault as an investment made in the host state.

[244] Statement of Claim, para. 3.7.
[245] Statement of Claim, para. 3.7.
[246] Statement of Claim, para. 3.8 (citing *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, dated 31 May 2017, **CLA-009**, paras. 135-136; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, **CLA-010**, para. 92; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, dated 31 July 2001, **CLA-011**, para. 45; and *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, dated 19 December 2016, **CLA-012**, para. 234). The Claimant notes each of these as "finding that varied construction projects amounted to investments under the 'objective' ICSID definition of that term." Statement of Claim, note 164.

169. Indeed, all of the authorities that the Claimant invokes support a conclusion contrary to the Claimant's position.

170. Akgun's first authority is *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen.*[247] In that case, the investor had actually performed the first phase of a major airport terminal project worth US$ 114 million, and the dispute pertained only to the project's second phase.[248] The Tribunal's analysis that Akgun relies upon reads in relevant part as follows:

> "135. The BIT contains a detailed definition of what constitutes an investment, under which the commitment of resources under a contract to be performed in the other Contracting State explicitly qualifies as an investment.
>
> Article 1 Definitions
>
> In this Agreement,
>
> 1. The term 'investment' means, every kind of asset and capital invested directly or indirectly by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, including in particular but not limited to:
>
> (a) movable and immovable property as well as any other property rights such as mortgages, pledges, real securities, usufructs and similar rights;
> […]
> (c) creditor's rights and claims to any performance having an economic value; […]
>
> 136. In the opinion of the Tribunal, the definition of 'investment' in the Treaty does not exceed what is permissible under the ICSID Convention. BUCG's contribution to the Sana'a International Terminal project resulted in it now asserting 'claims to any performance having an economic value' within the meaning of Article 1 of the Treaty. In the view of the Tribunal, that is sufficient to bring the Claimant's claim within the jurisdiction of the Tribunal under both the Treaty and the ICSID Convention. Moreover, to the extent to which it may be necessary or useful to apply

[247] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, dated 31 May 2017, **CLA-009**.
[248] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, dated 31 May 2017, **CLA-009**, paras. 22-27 ("Factual Background").

the Salini test, that contribution clearly exposed BUCG, a foreign investor, to risks posed by the sovereign power and otherwise as described in Salini itself:

> With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of coordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price. It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor."[249]

171. The section following this that Akgun does not cite reads as follows:

> "137. In a similar vein, turning to other elements of the Salini test:
>
> It was pointed out in *Toto v. Lebanon* (Jurisdiction) that a construction contract in which the execution of the works extends over ***a substantial*** period of time involves by definition an element of risk. It is obvious that construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State's economic development."[250]

172. The focus in this case is also on the claimant's taking of an investment risk and substantial contribution to the host State's economy. In the *Beijing Urban Construction Group* case, as that tribunal here emphasized, it was a major ongoing construction project worth hundreds of millions of dollars.

[249] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, dated 31 May 2017, **CLA-009**, paras. 135-136.
[250] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, dated 31 May 2017, **CLA-009**, para. 137 (emphasis added).

173. Akgun's land lease contract never took off the ground for failure to meet basic environmental requirements. It had no meaningful performance of any duration, risk-taking or contribution to the Ethiopian economy. To the contrary, Akgun took a valuable piece of land off market for an extended period of time because of its own failure to meet environmental legal requirements.

174. The second of the three cases that Akgun relies on is *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*.[251] In this case, the tribunal adopted what is commonly referred to as the *Salini* test:

> "The ICSID Convention contains no definition of the term 'investment'. The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called 'Salini test'. Such test identifies the following elements as indicative of an 'investment' for purposes of the ICSID Convention: (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."[252]

175. The *Salini* test is known for requiring a certain duration, a contribution of resources to the host State's development and a sharing of operational risk at a minimum. Applying this test, the tribunal in the *Jan de Nul* case found the following:

> "The Tribunal agrees with the Claimants that their activities in connection with the dredging operation in the Suez Canal clearly meet these criteria. In particular, the amount of work involved (including the mobilization of two heavy ships for a period of approximately 19 months) and the related compensation show that the Claimants' contribution was ***substantial***. Moreover, there can be no question that an operation of such magnitude and complexity involves a risk and one cannot

[251] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, **CLA-010**.
[252] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, **CLA-010**, para. 91.

> seriously deny that the operation of the Suez Canal is of paramount significance for Egypt's economy and development."[253]

176. The tribunal examined duration and contribution on the merits of the particular case and decided that all of the *Salini* factors including duration and contribution were satisfied.

177. Akgun does not even attempt to show what the duration of its investment is let alone its contribution to the Ethiopian economy. Moreover, the case that Akgun relies on suggests that the tribunal in that case considered the ***substantiality*** of the contribution as a major and complex project in the operation of the Suez Canal. Except for saying that it did some *de minimis* construction works without necessary permissions on the allotted land, Akgun does not show what its contributions are. Indeed, Akgun's claim is that its investment is the Agreement itself. For that proposition, its citation to the *Jan de Nul* case is to no avail.

178. Akgun's third authority is *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* itself.[254] The original *Salini* formulation is set out as follows:

> "The doctrine generally considers that investment infers: contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction... In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
>
> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here."[255]

179. Akgun cites *Salini* for its quotation of the relevant treaty's definition of "investment" in that case, which definition is more elaborate than the one found under the present Treaty. It reads:

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[253] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, **CLA-010**, para. 92 (emphasis added).
[254] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, dated 31 July 2001, **CLA-011**.
[255] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, dated 31 July 2001, **CLA-011**, para. 52.

"45. Article 1 of the Bilateral Treaty provides that:

'Pursuant to the present Agreement,

> 1. the term 'investment' designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term 'investment' includes:
>
> > a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;
> > b) shares, securities and bonds or other rights or interests and securities of the State or public entities;
> > c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;
> > d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;
> > e) ***any right of an economic nature conferred by law or by contract***, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;
> > f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;
> > g) the elements mentioned in (c), (d) and (e) above must be the object of contracts approved by the competent authority.

The Parties, therefore, agreed upon a number of non-exhaustive hypotheses that they considered to be investments."[256]

180. The famous *Salini* test gives these types of broad and ambiguous definitions of investment proper grounding in fact. It requires a reasonable duration, risk-taking and contribution to the economic development of the host State.

[256] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, dated 31 July 2001, **CLA-011**, para. 44 (emphasis added).

181. Applying Akgun's own authority, Ethiopia submits that Akgun did not make an investment in Ethiopia covered under the investment protection provisions of the Treaty. The Treaty's definition of "investment" is plainly narrower than that in *Salini.* The relevant provision reads: "returns reinvested, claims to money or any other rights having financial value ***related to an investment***."[257] This is narrower because "claims to… rights having financial value" must relate to an already-existing investment; such rights do not, definitionally, establish an investment in and of themselves. Once again, the baseline of the Treaty's definition reads that "[t]he term 'investment', in conformity with the hosting Party's laws and regulations, shall include every kind of ***asset***."[258]

182. To summarize, any "rights having financial value" must be "related to an investment" which investment may only be an "asset."[259] A leasehold right obtained for the purpose of future development is not an "asset" within the definition of the Treaty.[260] Thus, as a threshold matter, there is no "asset" to which "rights having financial value" may "relate[]."

183. Now, therefore, if there is no "investment," any dispute that may arise is not one "in connection with [] investment" within the meaning of Articles I(2) and VII(1) of the Treaty, and thus this Tribunal lacks jurisdiction *ratione materiae*.

b. The Tribunal Is Constituted Under the Wrong Dispute Settlement Provision

184. The Agreement contains a fairly elaborate dispute settlement provision which reads in its entirety as follows:

[257] Treaty, **CLA-001**, Art. I(2)(b) (emphasis added).
[258] Treaty, **CLA-001**, Art. I(2) (emphasis added).
[259] Treaty, **CLA-001**, Art. I(2)(b).
[260] Notably, the Treaty includes within its definition of "investment" the following: "movable and immovable ***property***, as well as any other rights as ***mortgages, liens, pledges*** and any other similar rights as defined in conformity with the laws and regulations of the Party in whose territory the property is situated." Treaty, **CLA-001**, Art. I(2)(c) (emphasis added). Leasehold rights do not qualify as a property interest.

"**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 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 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."[261]

185. Akgun's dispute with the relevant Ethiopian government agencies is about the adequacy of an EIA that it has submitted. The questions (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. Article 21 of the Agreement captures precisely these kinds of claims. Article 21 is not optional. It is ***the*** dispute settlement provision for "***[a]ny disputes or differences*** between the Ministry and [Akgun] ***in connection with*** [the] Agreement," and this under all of the "Ethiopian laws, the [Treaty] and accepted principles of the international law."[262]

186. The Treaty's dispute settlement provision applies, by contrast, to "[d]isputes between one of the Parties and an investor of the other Party, ***in connection with his investment***."[263] When any dispute is clearly between Akgun, as developer, and the Ministry of Industry, its contractual counterparty, regarding the adequacy of an EIA required to continue contractual development, a treaty claim for investment protection is an exorbitant and unjustified legal maneuver that simultaneously undermines the object and purpose of both the Agreement and the Treaty itself.

187. This is patently a contract claim that belongs under the exclusive dispute settlement provision to which the Parties expressly agreed. The Claimant's choice to repudiate that agreement is an admission that it cannot sustain a claim for breach of contract under the laws applicable to the Agreement and prefers to seek refuge in amorphous and indeterminate treaty standards. More than this, it is a cynical and abusive attempt to jurisdictionally bar Ethiopia's valid contractual counterclaims. Evidently without irony, the same fact ultimately portends the

[261] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 21 ("Settlement of Disputes").
[262] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 21(1), (5) (emphasis added).
[263] Treaty, **CLA-001**, Art. VII(1) (emphasis added).

utter lack of a colorable treaty claim to begin with, for in the end the central claim in this case is inescapably founded upon the Agreement alone.[264]

c. Conclusion on Jurisdiction

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

189. If, however, the Tribunal should decide to exercise jurisdiction over any of Akgun's substantive claims, Ethiopia submits that in its overall assessment of the merits of this case, the admission of counterclaims, and award of costs, the Tribunal take note of Akgun's unnecessary and disingenuous jurisdictional maneuver of disregarding the most obvious and appropriate contract-based dispute settlement mechanism to which it has freely, directly, and expressly assented.

V. APPLICABLE LAW

190. The current claim is principally governed by the Treaty. The Treaty itself makes no reference to any other source of law, but the Respondent agrees that the Treaty may be interpreted in accordance with the Vienna Convention on the Law of Treaties ("VCLT"). The Respondent submits, however**,** that the Claimant's suggestion that the applicable law includes "international law generally" overstates the body of law that this Tribunal may apply.[265] The Respondent submits in particular that the Treaty may be interpreted in light of relevant rules of customary international law.

191. The Claimant suggests that relevant domestic laws do not make up the applicable body of law but may instead be pled as matters of fact to the extent they are relevant. However, the

[264] *See*, in this respect, Sec. VIII.c *infra*.
[265] Statement of Claim, para. 4.1 (citation omitted).

authority that it relies on for this proposition states that "when a State party enters into a commercial contract with a foreign party, even in the case of a contract that names a domestic legal regime as the governing law, international law will apply to some aspects of the contract."[266] This particular passage does not on its face suggest that the domestic law does not constitute the body of law that applies for the resolution of the dispute but rather only states that some aspects of the domestic contract may be governed by international law.

192. In any case, given the umbrella clause claims, it is impossible to avoid the application of Ethiopian law as a matter of law, not as a matter of fact. The application of matters of domestic law as fact is complicated even in purely international treaty-based claims let alone when the very basis of the claim is breach of contract.

193. Moreover, the Agreement, out of which the dispute solely arises, is not only governed by Ethiopian law but also incorporates relevant Ethiopian environmental laws as applicable. As a matter of fact, the Claimant's initial submission had expressly recognized the applicability of Ethiopian law in the following terms, within Section VI of its Notice of Arbitration, entitled "Applicable Law": "The rules of international law, including the [Treaty], and ***the relevant rules of Ethiopian law*** form the ***law applicable*** to this dispute."[267]

194. For all of these reasons, Ethiopia submits that this dispute cannot be resolved without application of the relevant Ethiopian laws alongside the external legal standards that the Treaty imposes. As such, the *corpus* of the applicable law in this case necessarily includes Ethiopian law. Reference to Turkish law may also be useful to discern mutuality of understanding for the purpose of interpreting and applying the Treaty's provisions and to evaluate the Claimant's knowledge of certain standards and expectations.

[266] Statement of Claim, para. 4.3 (quoting *Bankswitch Ghana Ltd. v. Republic of Ghana acting as the Government of Ghana*, PCA Case No. 2011-10, Award Save as to Costs, dated 11 April 2014, **CLA-028**, para. 11.64).
[267] Notice of Arbitration, dated 19 June 2019, para. 60 (emphasis added); *see also id.*, para. 79 ("Claimant expressly reserves all of its rights under international law and Ethiopian law").

195. The external legal standards that apply by virtue of the Treaty accord narrow and limited investment protection. The Claimant invokes four such substantive protection standards, namely, the rule against expropriation, the principle of fair and equitable treatment, the protection against impairment of an investment, and the protection of contractual rights that stems from what is commonly called an umbrella clause. The Treaty does not contain an umbrella clause, but the Claimant seeks to import one from the Denmark-Ethiopia bilateral investment treaty via the Treaty's most-favored-nation provision. The Claimant strains to assign meaning to these standards. It uses selected authority without acknowledging the serious difficulties of inconsistency and incoherence of the "jurisprudence." Before expressing its position on the permissible scope of these standards, the Respondent offers the following on its understanding of its Treaty obligations and the state of the various protection standards as well as their present interpretation and application.

196. Investment treaties are essentially devised to provide redress to real investor injuries caused by the host State's conduct or omission that clearly violates enumerated guarantees through new regulatory actions or a series of sustained and capricious micro-level steps that cumulatively and irremediably deny justice.[268]

197. The principles contained in these treaties such as the rule against expropriation and the principle of fair and equitable treatment, interpreted in good faith, redress real and cognizable injuries caused by government abuse and serve a legitimate objective. Interpreted beyond their scope to shift the risk of pure business loss from the investor to the State, the principles lose their character and reward illegitimate and harmful corporate behavior that States party to such treaties cannot be considered to have agreed to reward. It is precisely because of certain expansive and unrecognizable readings of some of these old principles of international law that the community of nations, acting through UNCITRAL, has set up

[268] *See e.g., Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, **RLA-4**, paras. 616, 626) (finding that a breach of fair and equitable treatment 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").

Working Group III for the purpose of reforming the whole system of investor-State dispute settlement (or "ISDS"). Incoherence of the jurisprudence is top of the agenda.[269]

198. Expressing this concern, August Reinisch writes: "What is far more serious for the acceptance of investment arbitration in general is a potential loss of confidence stemming from incomprehensible, unpredictable, and/or contradictory decisions and awards."[270] The incoherence of the jurisprudence is the most serious issue that is driving the current reform movement across the development spectrum.

[269] *See, e.g.,* "UNCITRAL Working Group III decides that multilateral reform of ISDS desirable; governments to submit proposals to develop work plan for reform," *Investment Treaty News*, dated 21 December 2018, **RLA-5**; *see also* "UNCITRAL Working Group III continues debate on ISDS concerns and multilateral reform," *Investment Treaty News*, dated 30 July 2018, **RLA-6**:

> "Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) continued discussions on possible reform of investor–state dispute settlement (ISDS) at its 35th session, held April 23–27, 2018 in New York. The meeting was attended by representatives of 50 of the 60 member states of UNCITRAL and 36 non-member states with observer status, as well as international and non-governmental organizations.
>
> General statements at the beginning of the session highlighted the importance of the working group's work for developing countries, in view of the impact of foreign investment and ISDS on sustainable development. Several statements stressed the need for any ISDS reform to strike a balance between rights and obligations of states and investors and underlined the importance of considering possible reform of ISDS at the multilateral level, with participation by both developing and developed country states. Contributions were made to the UNCITRAL trust fund to allow participation of developing countries in working group deliberations.
>
> During the week, the working group discussed the question of coherence and consistency of ISDS outcomes. It also considered concerns regarding the appointment of arbitrators as well as ethical requirements, including with respect to the limited number of individuals repeatedly appointed as arbitrators, the absence of transparency in the appointment process, individuals acting as counsel and as arbitrators in different proceedings (double-hatting) and the perception that arbitrators are less cognizant of public interest concerns than judges holding a public office. Other issues raised included third-party funding, lack of disclosure and security for costs.
>
> The working group presented its progress report at UNCITRAL's 51st session, held in New York from June 25 to July 13, 2018. The 36th session of the working group is tentatively scheduled for October 29–November 2, 2018 in Vienna. At the next working group session, UNCITRAL member states will begin to identify and discuss areas where, in their view, multilateral reform of ISDS may be desirable. More information and official documents are available on the working group website."

[270] August Reinisch, *The Future of Investment Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009), **RLA-7**, pp. 894, 904.

199. This is very well summarized by Colin Brown, Deputy Head of the European Commission, Unit on Dispute Settlement and Legal Aspects of Trade Policy Directorate General, in a speech that he gave at the 3rd Vienna Investment Arbitration Debate in 2018 under the title "The European Union's Approach to Investment Dispute Settlement":

> "Let me first address some of the conceptual issues, which arise around ISDS. Much of the criticism of the investment protection and ISDS system comes from the concern that it is a system which impacts and limits genuine regulatory activities. One could consider this surprising. After all, the key substantive investment protection obligations are commonplace in other legal systems and are not considered inimical to the ability of states to regulate. In particular, most favoured nation and national treatment obligations can historically be found in many treaties, most notably in the GATT/WTO system. There is surely in principle nothing objectionable in an obligation not to discriminate. In particular, an obligation not to discriminate says nothing about the ability of a state to regulate, simply that it must not do so in a discriminatory manner. Similarly, protection against uncompensated expropriation is commonplace in many legal systems. It forms part of the European Convention on Human Rights and is found in many national constitutions, particularly in Europe. But Europe has also legislated to achieve a very high standard of regulation for the protection of the environment or labour rights. So it cannot be the case, per se, that protection against uncompensated expropriation is by definition contrary to the right to regulate. A similar case can be made concerning the fair and equitable treatment standard. If this is considered as comparable, in general terms, to protections offered under administrative law or systems of judicial review, there is nothing that stands in the way of the development of sophisticated regulatory practices. There is no reason, and indeed it would be a matter of concern, for regulatory activities to be carried out in a manifestly arbitrary way, to take but one example.
>
> So if there is no substantive problem as such, where does the problem lie? Is it that foreigners are granted rights to defend their interests? Clearly, in certain quarters, that is an issue. But it behooves us, particularly now, to uphold international law. And international law is ultimately all about the reciprocal protection of the foreign interest. It's about imposing and accepting certain limits on a reciprocal basis so that actions of sovereign states do not have negative effects on foreign interests. That is, for example, the very foundational concept of the European Union. Accepting that this is the problem with investment protection and ISDS means negating the very core of international law. That clearly is a path we should not go down, in particular when we know that so much of our economic growth depends on our ability to export and to invest in third country markets. So where, then, does the issue arise? I want to suggest that it arises in the context of the dispute settlement mechanism for investment protection. It arises there because the ad hoc nature of a system, coupled with the public law nature of the disputes under treaties concluded

> between sovereigns is such that it fundamentally cannot provide the certainty and predictability about the core aspects of these investment protection standards that is required by all stakeholders, whether they be investors or governments or other interested parties. It is very difficult to point to a key decision taken by a tribunal and be able to honestly say that one knows that that particular decision will, with a high degree of certainty, be followed.
>
> That stability and predictability which comes via permanency is absent from the ISDS regime. ***Whether we like it or not, it is indisputable that any tribunal may develop its own interpretation of a particular treaty norm.*** I am not arguing that there is not de facto a significant degree of following of precedent. However, there is nothing in the system, no permanency, which creates expectations in stakeholders that a particular approach will prevail. And that, I would suggest, is the core question facing us today. That question is whether a system of dispute resolution with the key attributes of commercial arbitration remains the optimal system of dispute resolution for resolving investment disputes.
>
> These questions are not purely European questions. The legitimacy crisis of ISDS has become a global issue. As discussions in UNCITRAL have shown, practically all states are wrestling with these questions. Policy makers and the investment community at large must take account of this and engage in the necessary reform of the ISDS system if they want the ISDS system to continue to apply in the future."[271]

200. Any suggestion that consistent and coherent international investment tribunal jurisprudence that modifies customary international law has emerged is further contradicted by the active reform effort of UNCITRAL. The following passages taken from the first two sessions of UNCITRAL Working Group III illustrate this point:

> "**Inconsistency and lack of predictability**:
>
> **CANADA – on consistency and predictability in outcomes**: 'The issue of coherence and consistency and predictability goes to the very heart of the reasons why we are here gathered to discuss reform of the system. This is certainly one of the key concern[s] that we have heard from civil society, that we as a government also feel are issues that need to be addressed. It is critical that governments know where they stand when it comes to how those treaties will be interpreted. Obviously, ideally, consistently with the intention of the parties to the treaty and maybe that's

[271] "The European Union's approach to investment dispute settlement," a speech by Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, Directorate General for Trade, European Commission, at the 3rd Vienna Investment Arbitration Debate, dated 22 June 2018, **RLA-8**, pp. 1-3 (emphasis added).

another issue which would which [sic] we can address. We should have a better idea as government advisers of how investment tribunals will interpret the obligation in one treaty. Obviously if the treaty language is different as you've noted that's another issue. But there are instances where it has not been the case, where the same treaty language has been interpreted differently and that is something that needs to be addressed.'

SPAIN – on abuse of proceedings and misuse of structures and the need for a multilateral solution: Spain referred to 'the issue of abuse of proceedings and misuse of structures or the use of fund shopping or shell companies for abusive claims. We think that this issue is profoundly linked to the overall benefits of the system. We've seen such groups of companies being formed in third countries by domestic investors, the only goal being from that to be able to bring claims against the state by abusing an instrument conceived initially and exclusively for foreign investors. It is essential that these procedural issues be addressed in a multilateral context because they are intimately linked to the legitimacy of the whole system. And we should think and analyze multilateral instruments to prevent such abuses so that such issues are not even being registered by institutions or are addressed early on so that proceedings don't drag out and prove expensive, so that they can be thrown out as early as possible in the course of proceedings.'

EUROPEAN UNION – on the link between lack of consistency and cost: 'This lack of consistency brings significant cost. This is problematic because there is a lack of predictability when analyzing the potential legislative or regulatory activities. This also engenders disputes because it is very often the case that one or the other party in a potential dispute can point to at least one instance in which an interpretation that suits them has been adopted and therefore they are tempted to seek to bring a case when it might not be necessary. In our view, there are differences [among the treaties], but these differences should not be exaggerated. Many countries in the world have negotiated investment treaties on the basis of models and there is a high degree of similarity. Virtually all of these treaties have key core obligations – obligations that we're all familiar with: the non-discrimination obligations, the expropriation obligations, fair and equal treatment and [sic] types of obligations.'

EUROPEAN UNION – on the lack of consistency being a systemic problem: 'And in our view this problem is again a systemic problem because it's a problem which flows from the ad hoc nature of the existing regime that there are always three individuals asked to hear a particular case and they may take a slightly different view or they may take a different view from their predecessors on any particular issue. And we also think that this is related to the fact that there is no broad appeal review that allows to establish some notions of hierarchy and authority within the system.'

USA – on whether consistency is necessarily desirable: Noted that 'the notion of similar treaty provisions always appropriately being interpreted in the same way is not in our view necessarily a desirable outcome. States have taken a great deal of care in crafting these obligations with great specific intent, and that minute differences in the way they have drafted correspond to very important differences in both legal and policy objectives. While the language may appear to be identical in the provision itself, the rules of treaty interpretation require looking at the broader context including the instrument within which the provision occurs, and the way that that provision may interact with other provisions in those treaties including exceptions, preambles, and other interpretive material. We've also noted that in certain cases you may have the same treaty, same provision, and you may have different treatment of it.' But noted that these are 'matters of litigation and don't necessarily point to a broader systemic problem but rather one that is inherent to all forms of litigation.'

EUROPEAN UNION – on lack of consistency where the same words are interpreted differently: 'It is obvious that there may indeed be times that it is not intended that the same terms have the same meaning. But that issue as such is not a concern. The concern arises when it is intended that the same words have the same meaning and we have situations where tribunals arrive at different interpretations of those same words. It should be clear that there is an identified concern as regards this question of consistency.'

AUSTRALIA – on consistency, correctness and the importance of striking the right balance: 'But consistency is not an end, an objective in itself and one could say it has costs. Consistency does not equal correctness and perfect consistency may have costs in terms of length of proceedings and actual monetary costs. So we are talking about, in all of this, striking the right balance. I think from our perspective, digging down a little into the impact of inconsistency helps us to ensure when we go to the next step that we are focusing on getting the balance right, where we seek to address the inconsistency that there is [sic] no doubt exists.'

USA – on the importance of correctness and consistency not being the ultimate goal in and of itself: 'correctness seems to be the more important criterion. ***In other words the treaties are interpreted in accordance with the general rules of public international law***. If that occurs, then the results will be more predictable and will be more consistent when appropriate. So consistency for its own sake shouldn't be seen as a primary goal because interpretations that are consistent but wrong need to be avoided. But it's not in our view necessarily linked to the lack of a review mechanism. Consistency and predictability are affected by many factors that a number of other delegates have mentioned not only differences in treaty drafting and in the facts of disputes but also in the evidence that has presented the tactical

> choices made by parties to the dispute which can explain differences in outcome even in those cases where there seemed to be facial similarities in the dispute."[272]

201. The Respondent submits its position on the specific investment protection standards as follows.

a. Expropriation

202. The relevant provision of the Treaty states as follows:

> "**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."[273]

203. In its classical formulation expropriation requires "a compulsory transfer of property rights"[274] or simply a "taking" of property by a governmental authority.[275] Ordinarily, to prevail in a takings claim, therefore, the Claimant must at a minimum prove that (i) it owned property; and (ii) the ownership of that property was forcibly transferred to another owner by the State.

204. The standard for a regulatory taking is more exacting when the relevant government action is within the police power of the State.[276] In the case of *Burlington Resources v. Republic of*

[272] "UNCITRAL and ISDS Reforms," *EJIL: Talk! – Blog of the European Journal of International Law*, dated 5 June 2018, **RLA-9** (emphasis added).
[273] Treaty, **CLA-001**, Art. IV(1).
[274] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, 15 Iran-U.S. C.T.R. 189, Partial Award of 14 July 1987, **RLA-10**, para. 191.
[275] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, **RLA-11**, para. 280.
[276] *See, e.g.*, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, **CLA-048**, para. 262.

Ecuador, for example, the tribunal has recognized a well-established test whereby, in order to be found expropriatory, a measure must be so extreme as to effect a substantial deprivation of the investment's value.[277] As that tribunal has found, "what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment," and "***[i]t must be shown that the investment's continuing capacity to generate a return has been virtually extinguished***."[278]

205. Where expropriation is, in its classical definition and as a generally recognized principle of international law, a taking of property, Ethiopia submits there is only an expropriation where the measure is so extreme and punitive as to destroy all value of an existing investment.

206. The standard is equally well-articulated in the case of *Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, where the tribunal found that

> "under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a ***total loss of the investment's value*** or a ***total loss of control*** by the investor of its investment, both of a ***permanent nature***."[279]

207. Akgun does not dispute most of these propositions. As will be elaborated in detail in Section VI below, much of the dispute pertains only to the application of these principles to the present facts.

[277] *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, **RLA-12**, para. 396.
[278] *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, **RLA-12**, paras. 393, 397, 399 (emphasis added) (citation omitted).
[279] *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of 9 October 2014, **RLA-13**, para. 286 (emphasis added).

b. Fair and Equitable Treatment

208. The best articulation of the most recognized principle of international law on the minimum standard of treatment of aliens is contained in the *Neer Claim* and reads in relevant part:

> "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an ***outrage***, to ***bad faith***, to ***wilful neglect of duty***, or to an insufficiency of governmental action so far short of international standards that ***every reasonable and impartial man would readily recognize its insufficiency***."[280]

209. Leading scholarly writings offer summaries on the recognition of fair and equitable treatment as an expression of the classical minimum standard of treatment in international law. For example, Martins Paparinskis writes as follows:

> "[T]he 1967 OECD Draft Convention on the Protection of Foreign Property (that drew upon [earlier] treaties and provided the basis for subsequent bilateral practice) seemed to equate the content of fair and equitable treatment with that of the international minimum standard. State practice supports this view. Pleadings in the [International Court of Justice] (where one might expect to find the most considered statements on legal issues) show that such States as Belgium, Spain, the UK, and the US used the language of fair and equitable treatment to refer to the customary [] law administration of justice (in particular for claims regarding the content of the judgment), as well as to customary rules of the treatment of aliens in general. In the [International Law Commission] work on the protection of diplomatic agents in early 1970s, 'fair treatment' was used to incorporate all the procedural guarantees generally recognized to a detained or accused person throughout the criminal proceedings. Legal writers also used the language of fairness in describing the customary standards.
>
> If one takes the pre- and post-Second World War materials pre-dating investment arbitrations, it seems permissible to conclude that ***the ordinary meaning of fair and equitable treatment was a reference to customary minimum standard, in particular regarding administration of justice***. More recent practice confirms this view by necessary implication. The considerable number of arbitral decisions that read in the elements of customary law of denial of justice (particularly regarding the exhaustion

[280] *Neer Claim*, Mexico-US General Claims Commission, RIAA, IV 60, **RLA-14**, pp. 61-62 (emphasis added).

> of remedies) in the treaty rules on fair and equitable treatment necessarily engage in a reference to custom."[281]

210. As further evidence of the general acceptance of this interpretation of the FET standard by States, the NAFTA Free Trade Commission's 2001 binding interpretation may be cited. It reads in relevant part:

> "Minimum Standard of Treatment in Accordance with International Law:
>
> (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party.
>
> (2) The concepts of 'fair and equitable treatment' and 'full and protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[282]

211. This rule is now binding on NAFTA tribunals.[283] Indeed, a NAFTA tribunal in the case of *Glamis Gold Ltd. v. The United States of America* has given the standard more texture in holding that Article 1105(1) sets "a floor, an absolute bottom, below which conduct is not accepted by the international community," and that in terms of procedure a breach of FET would mean "***blatant unfairness, [or] a complete lack of due process***," or "***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***."[284]

212. Similar language is used to describe the essential elements of FET over and over again. Examples include the cases of *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, where the tribunal found that "any procedural irregularity that may

[281] MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013), **RLA-15**, pp. 162-163 (emphasis added) (citations omitted).
[282] North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, dated 31 July 2001, **RLA-16**, Sec. B.
[283] *See, e.g.*, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, **RLA-17**, para. 120.
[284] *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, **RLA-4**, paras. 616, 626 (emphasis added).

have been present would have to amount to ***bad faith, a willful disregard of due process of law or an extreme insufficiency of action***,"[285] and *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of* Hungary, where the tribunal found as follows:

> "***[N]ot every process failing or imperfection… will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection.*** It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of judicial propriety)… that the standard can be said to have been infringed."[286]

213. Reputable contemporary investment treaties and models have endorsed this interpretation. Examples include the 2004 and 2012 US Model Bilateral Investment Treaties[287] and the

[285] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, **RLA-18**, para. 371 (emphasis added).
[286] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, **RLA-19**, para. 9.3.40 (emphasis added).
[287] *See* 2004 US Model Bilateral Investment Treaty, **RLA-20**, Art. 5 ("Minimum Standard of Treatment"):

> "1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law."

The annex on interpretation states that "[t]he Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens." *Id.*, Annex A. The 2012 US Model Bilateral Investment Treaty sets forth identical language. *See* 2012 US Model Bilateral Investment Treaty, **RLA-21**, Art. 5 and Annex A.

Comprehensive Economic and Trade Agreement between Canada and the European Union.[288]

214. Evident in these sources is that a violation of the standard requires at a minimum bad faith, abusive and arbitrary conduct, and fundamental denial of due process.

215. Some recent arbitral tribunals have given FET an expansive reading, considering the standard to be an additional and autonomous obligation that sanctions "legitimate expectations" of the investor.[289]

[288] *See* Comprehensive Economic and Trade Agreement Between Canada, of the one part, and the European Union and its Member States, of the other part, provisionally entered into force on 21 September 2017, **RLA-22** (hereinafter the "Canada-EU CETA"), Art. 8.10 ("Treatment of investors and of covered investments"):

> "1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
> 3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.
> 4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
> 5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to the physical security of investors and covered investments.
> 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
> 7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1."

[289] The term has only emerged in recent times. *See, e.g.*, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award of 26 January 2006, **RLA-23**, para. 196.

216. The Claimant has identified no reference to "legitimate expectations" in any source that may give rise to a general principle of international law. However, even the most exorbitant interpretations to be found require a showing of the State's unfair or unreasonable behavior to frustrate the investor's legitimate expectations, and require that such unfairness must be serious and material to the outcome.[290] Any decision that lowers the standard further is so lacking in credibility that it does not deserve mention in a respectable legal proceeding applying generally recognized principles of international law.

217. All arbitral decisions regarding the FET standard are treaty-specific and are thus predicated upon the language of the relevant treaty. The standard ranges from the classic customary formulation of ***an outrage***, to ***bad faith***, to ***willful neglect of duty***, or ***an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*** – to – legitimate or reasonable expectations in some most recent decisions.

218. Ethiopia submits that incoherent, inconsistent and exorbitant formulations of a wide range of sporadic and experimental legal theories cannot make a rule of decision in this case.[291]

[290] *See, e.g.*, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award of 2 August 2010, **RLA-24**, para. 148 (requiring "procedurally improper behavior… which [is] both serious in itself and material to the outcome").
[291] Professor David D. Caron has offered an instructive commentary in this regard:

> "Any discussion of coherency in the ICSID system must begin by noting that the root of the problem is embedded very deeply in the structure of arbitration itself. Arbitration generally, and international commercial arbitration in particular, is not in fact a system, but rather is a framework within which discrete and possibly unknown private actions are taken. It is a framework in the same sense that municipal contract law provides a frame within which discrete and possibly unknown private arrangements are concluded. The quandary for ICSID is that it basically, *but not entirely*, adopts arbitration as the method it utilizes for dispute resolution, and thus the present effort to build a system on top of ICSID's use of a framework inherently poses great challenges.
>
> An illustrative example of this quandary is found in the role of the arbitrators in international commercial arbitration. In such arbitration, the focus of the arbitrators is on the dispute before them. For such arbitrators, there is no system with which they should endeavor to be consistent and—to the degree there is such a known body of relevant jurisprudence—it is not clear why the arbitral panel constituted by the parties has the duty to devote their time to ensure that a consistent body of a jurisprudence, arguably a public good, is developed. The duty of arbitrators, sometimes expressed in an oath or in an institutional rule, focuses on the mandate received from the parties which ordinarily focuses on the particular dispute. In short, much of the debate on consistency is tied to uncertainty as to whether the panel's focus should be on particular disputes or instead, on the 'system' that emerges from these disputes. ICSID can be schizophrenic in this way— on the one hand, imagining ICSID as a framework calls for a concentrated focus on the particular dispute, while at the same time, imagining ICSID as a

Ethiopia maintains in any event, and as the Tribunal will see, that the facts of this case do not sustain a finding of breach under even the most expansive interpretation of the FET or other treaty standards. Ultimately, this Tribunal's decision must rest on its own assessment of whether Ethiopia's conduct toward Akgun in this particular case was overall so recognizably unfair and inequitable as to rise to the level of an international delinquency.

219. The evaluation of whether or not Ethiopia breached its FET obligation requires the review not only of compliance with substantive prescriptions but also procedural regularity or due process. Applying generally recognized principles of international law, the Tribunal must determine whether the State's administrative apparatus or judicial institutions denied justice to the Claimant within the meaning of the term as recognized under international law.

220. A leading authority on denial of justice, Professor Jan Paulsson, helpfully summarizes its core elements as follows: (i) the denial of justice is essentially procedural in nature; (ii) it does not require the State to create a perfect system of justice but rather a system of justice that could correct serious errors; and, more importantly, (iii) the denial of justice requires the exhaustion of local remedies and the showing of a system failure.[292]

221. Relatedly, under the principle of denial of justice, it is also generally recognized that the standard of due process in administrative processes and adjudicative proceedings is lower than expected in judicial proceedings.[293] Ethiopia submits that a proper application would

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system represents an attempt to rearrange all of the free standing arbitrations as though they were part of a court system. This situation can lead to great surprise and frustration when the realization hits home that patterns [] sometimes present are more coincidental than planned. The question of whether there is a system present depends on whether the questions shared by the various tribunals are identical, or perhaps nearly so. Certainly ICSID tribunals share the procedural and jurisdictional limitations of the ICSID convention, but they do not necessarily address the same identical substantive questions since usually different concessions or [bilateral investment treaties] are involved. However, in the case of NAFTA Chapter 11 arbitration, for example, the tribunals are all part of a de facto system in that they all share the substantive text."

David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513 (2008), **RLA-25**, pp. 516-517 (emphasis in original).

[292] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), **RLA-26**, pp. 7-8. A claimant may overcome the exhaustion requirement by establishing the futility of pursuing remedies in the host State. *Id.*, pp. 115-116.

[293] *See, e.g.*, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award of 26 January 2006, **RLA-23**, para. 200.

allow the Tribunal to assess whether Ethiopia's conduct in this case has violated the FET standard under the Treaty. The Tribunal's task is limited to determining whether or not, on the whole, Ethiopia's conduct in this case fell below the minimum standard required.

222. The Tribunal need not thus decide whether it agrees with the decisions of the Ethiopian authorities on the interpretation of Ethiopian environmental laws, as its inquiry is limited to determining whether or not there is a system failure. To the extent that it might find any review of the merits of the environmental questions relevant to the determination of whether or not Ethiopia's conduct on the whole violated the FET standard of due process, Ethiopia submits that the FET rule does not require a standard of review more exacting than rational relations. In this regard, Ethiopia submits that the Ethiopian administrative authorities' decisions deserve a degree of deference akin to that commonly referred to in U.S. administrative law as *Chevron* deference, wherein administrative decisions are reviewed only for findings that are "arbitrary, capricious, or manifestly contrary" to law.[294]

223. Finally, and in any case, Akgun's suggestion that the relevant international law has evolved to include the principle of legitimate expectations is also rejected by the International Court of Justice in its 2018 decision in the case of *Obligation to Negotiate Access to the Pacific*

[294] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), **RLA-27**, p. 844. Although reference to *Chevron* might at first appear to be reliance on unrelated American administrative jurisprudence, Ethiopia submits that the standard has become commonly recognized in major legal systems of the world in different forms and offers useful guidance on the various types of standards of review in any proceeding that purports to review the legality of administrative authorities. Relatedly, a notable publicist has suggested the following useful standard of review:

> "Our review of fair and equitable treatment and arbitrary or discriminatory measures claims is narrow. The former requires us to ensure that the host state acted in a consistent and transparent manner and that its actions were free from material ambiguity. The latter requires us to confirm that the host state based its decision on relevant factors and not on preference or prejudice. Perfection is not demanded by either standard. We afford the greatest deference to host-state legislative judgments, and substantial deference to host state regulatory and administrative judgments, particularly when those judgments implicate specialized expertise or the allocation of limited resources. Deference is also owed to a host state's resolution of ambiguities in its own laws, regulations, and policies. We are not empowered to substitute our judgment for that of the host state. The state is required only to articulate a rational connection between the facts found and the choice made."

Anna T. Katselas, United States Trade and Development Agency, *Do Investment Treaties Prescribe a Deferential Standard of Review*, 34 MICH. J. INT'L L. 87 (2012), **RLA-28**, pp. 149-150. Ethiopia submits that this is a fair summary of the required standard of review under the applicable Treaty and generally recognized principles of international law.

Ocean (Bolivia v. Chile).[295] Albeit in the inter-State context, the Court categorically rejected this suggestion in the following terms:

> "5. Legitimate expectations
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> 160. Bolivia claims that Chile's representations through its multiple declarations and statements over the years gave rise to 'the expectation of restoring' Bolivia's sovereign access to the sea. Chile's denial of its obligation to negotiate and its refusal to engage in further negotiations with Bolivia 'frustrates Bolivia's legitimate expectations'. Bolivia argues that, '[w]hile estoppel focuses on the position of the State taking up a stance, and holds it to its commitments, the doctrine of legitimate expectations focuses on the position of States that have relied upon the views taken up by another State, and treats them as entitled to rely upon commitments made by the other State'. Bolivia also recalls that this principle has been widely applied in investment arbitration.
>
> 161. Chile is of the view that Bolivia has not demonstrated that there exists in international law a doctrine of legitimate expectations. Chile maintains that '[t]here is no rule of international law that holds a State legally responsible because the expectations of another State are not met'. It argues that Bolivia attempts 'to circumvent the requirement of detrimental reliance necessary to establish estoppel' because it is unable to prove that it has relied on Chile's alleged representation to its own detriment.
>
> 162. The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained."[296]

224. The Court's ruling on the status of "legitimate expectations" is clear. Although some investment treaty tribunals have experimented with the notion of legitimate expectations as a rule of decision urged by investors, this does not and cannot elevate such notion to a general principle of international law.

[295] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, ICJ, General List No. 153, **RLA-29**.
[296] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, ICJ, General List No. 153, **RLA-29**, paras. 160-162.

225. In any case, as will be demonstrated in Section VI below, the facts of this case do not support a finding of liability even under the most expansive reading of the principle of FET including legitimate expectations.

c. Umbrella Clause

226. The Treaty in this case does not contain an umbrella clause. Akgun thus attempts to import the one contained in the Ethiopia-Denmark bilateral investment treaty, which reads: "Each Contracting Party shall observe any commitment ***it*** may have entered in to with regard to ***investments of investors*** of the other Contracting Party."[297]

227. Meanwhile, the most-favored-nation ("MFN") provision in the present Treaty provides that "[o]nce 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."[298]

228. 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; and fourth, inconsistency with the intent of the Parties and the object and purpose of the Treaty. Each is discussed in turn.

229. Privity of contract is an indispensable prerequisite for a breach of contract claim. The borrowed umbrella clause expressly states that "[e]ach Contracting Party shall observe any commitment ***it*** may have entered into."[299] "[I]t" in this provision refers to Ethiopia or Denmark. Replacing Turkey for Denmark via the MFN clause overburdens the provision

[297] 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, **CLA-003**, Art. 2(3) (emphasis added).
[298] Treaty, **CLA-001**, Art. III(2) (emphasis added).
[299] 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, **CLA-003**, Art. 2(3) (emphasis added).

and stretches it too far. Further, even if one were to do so, "***it***" patently refers to the Contracting Parties but no one else. For the umbrella clause to apply, the contractual commitment must therefore have been undertaken ***by the Respondent State itself***. A treaty claim calls on the Contracting State itself to answer charges of treaty violation. It must answer charges of treaty violation because it is a party to the Treaty. ***It cannot respond to a claim for breach of commitments contained in a contract that it has not itself concluded***.

230. This was the specific question faced by the tribunal in the case of *Impregilo SpA v. Islamic Republic of Pakistan*.[300] That tribunal, composed of Bernardo Cremades, Toby Landau, and Judge Gilbert Guillaume arrived at the following most logical conclusion:

> "Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity."[301]

231. Even more problematic is the presence of an indispensable third party to the contract. The Agreement out of which this dispute arises is an agreement as between and amongst the Ministry of Industry of the Federal Democratic Republic of Ethiopia; the Regional State of Oromia; and the Claimant, Akgun.[302] It is a tripartite Agreement. The Oromia Regional State is an indispensable party to the Agreement as administrator of the land, and hence an

[300] *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, **RLA-30**.
[301] *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, **RLA-30**, para. 223 (citation omitted). *See also, in this respect*, CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), **RLA-31**, para. 4.168 ("[t]he *host State* will only be bound by commitments that *it* has entered into") (emphasis in original). The authors further observe that while "[s]ome Tribunals have applied the international law rules of attribution in the law of state responsibility to this question," that approach, while "undoubtedly correct for the purpose of determining the application of other treaty standards," "does not address the specific character of the umbrella clause as a confirmation of undertakings given by contract or other commitment existing in and governed by its own applicable law." *Id.*, note 210.
[302] 2012 ETIZ Agreement, **Exhibit C-009**.

indispensable party to any dispute that might arise out of it.[303] At the most formal level, the Agreement was signed and stamped by representatives of all three parties: H.E. Tadesse Haile for the Ministry of Industry; Mr. Yusuf Akgun for Akgun Insaat Makine Sanayi Dis Ticaret Sirketi; and H.E. Abdulaziz Mohamed for the Oromia Regional State.[304] Indeed, many of the contractual rights and obligations were directly undertaken by the Oromia Regional State.[305]

232. A contract claim that seeks 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. The lack of identification of the precise parties in a contract claim is of particularly grave concern where the mechanism of countenancing that claim is an MFN clause. The attempted procedural maneuver is too convoluted to be supported by any reading of the Treaty.

233. Compounding the insurmountable privity obstacle, the two treaties' definitions of "investment" do not match. Indeed, this truth offers a plausible explanation as to precisely why one contains an umbrella clause but not the other to begin with. An umbrella clause protects commitments made in respect of an "investment" under the relevant treaty. The Denmark-Ethiopia treaty contains a broad definition of "investment" which regards a larger class of contractual rights as protected; its inclusion of an umbrella clause may extend protection of contractual rights further still. The definition of "investment" in the present Treaty is, however, significantly narrower, and does not include the kinds of contractual rights that the Denmark-Ethiopia treaty does. This is easily observed in the differences of

[303] It may be noted for contrast that the initial agreement of June 2010 was a bilateral agreement as between the Ministry of Industry and Akgun. *See* 2010 ETIZ Agreement, **Exhibit C-008**. The addition of the Oromia Regional State as a party to the 2012 Agreement was an intentional act as the State is the administrator of the land under Ethiopia's Constitution, which provides that the States "shall have the [] power[] and function[] [t]o [a]dminister land and other natural resources in accordance with Federal laws." Constitution of the Federal Democratic Republic of Ethiopia, **RLA-32**, Art. 52(2)(d). Indeed, the original Memorandum of Understanding concluded on 13 October 2008 was signed by the President of Oromia Regional State, and expressly provided that the land would be identified by that State. *See* Memorandum of Understanding between the President of Oromia State H.E. Abadula Gemeda and Mr. Yusuf Akgun, dated 13 October 2008, **Exhibit C-007**, Art. 3.
[304] 2012 ETIZ Agreement, **Exhibit C-009**, p. 28.
[305] *See, e.g.*, 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(1) ("[t]he Developer shall pay to Oromiya Regional State compensation for the relocation of the farmers and their properties of the land before the handover").

formulation of the respective definitions of "investment." Comparing the texts of the two definitions readily illustrates this point.

234. The earlier-seen definition of "investment" in the present Treaty reads in full as follows:

> "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."[306]

235. Meanwhile, the definition of "investment" in the Denmark-Ethiopia treaty reads differently:

> "l. The term 'investment' means every kind of asset and shall include in particular, but not exclusively:
>
> a) tangible and intangible, movable and immovable property, as well as any other rights such as leases, mortgages, liens, pledges, privileges, guarantees and any other similar rights,
> b) a company or business enterprise, or shares, stock or other forms of participation in a company or business enterprise and bonds and debt of a company or business enterprise,
> c) returns reinvested, claims to money and ***claims to performance pursuant to contracts having an economic value***,
> d) industrial and intellectual property rights, including copyrights, patents, trade names, technology, trademarks, goodwill, know-how and any other similar rights,
> e) concessions or other rights conferred by law or under contract, including concessions to search for, extract or exploit natural resources."[307]

[306] Treaty, **CLA-001**, Art. I(2) (emphasis added).
[307] 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, **CLA-003**, Art. 1(1) (emphasis added).

236. Thus, the Denmark-Ethiopia treaty expressly defines and includes "claims to performance pursuant to contracts having an economic value" to be "investment[s]"[308] and further provides that each party "shall observe any commitment it may have entered into ***with regard to*** investments."[309] Meanwhile, Turkey and Ethiopia have expressly chosen to limit their mutual extra-investment protections to "rights having financial value ***related to*** an investment"[310] while excluding any umbrella clause.

237. In any event, an umbrella clause cannot turn something that is not an investment into an investment; it merely protects rights in relation to something that already falls under the definition of an investment in the first place. As such, unless Akgun is claiming that the definition itself should be transplanted (an impossible proposition), the umbrella clause is a lid on a jar of a different size; it simply doesn't fit.

238. The third obstacle is the availability of contract remedies and the lack of exhaustion of those remedies. An investor-State claim ordinarily seeks to identify and remediate an internationally wrongful act. That necessarily arises when domestic remedies are not available or are exhausted wherever they are available. Elevating 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 – not to mention the door that it opens for splitting of claims and duplication of proceedings.

239. The fourth obstacle is the intent of the Parties as it relates to their obligations and the object and purpose of a treaty claim. It cannot in honesty be argued that these unlikely but most creative maneuvers of borrowing bits and pieces of other treaties is what Turkey and Ethiopia

[308] 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, **CLA-003**, Art. 1(1)(c).
[309] 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, **CLA-003**, Art. 2(3) (emphasis added).
[310] Treaty, **CLA-001**, Art. I(2)(b) (emphasis added). *See*, in this respect, paras. 181-183 *supra*.

intended when they agreed that "[o]nce 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."[311] The Tribunal would have to accept that, in concluding this provision, Turkey and Ethiopia intended that an umbrella clause would become a part of their Treaty after they have plainly chosen to exclude it. That is a most troubling and illogical conclusion.

240. Moreover, the object and purpose of the Treaty is to afford a neutral forum for the resolution of disputes where investors of either State have genuine claims of violations of the protections promised under the Treaty. Contemporary *post hoc* reconceptualization of old rules cannot be attributed to the Parties when it is very clear that the Parties did not engage in this kind of unlikely and purposeless legal craftsmanship. Such kind of interpretation would be a most unwelcome imposition.

VI. SUBSTANTIVE CLAIMS

241. This section provides the Respondent's specific responses to each substantive claim in light of the applicable law described in Section V above. The Claimant quotes the rather unobjectionable formulation by the *Gold Reserve Inc v. Bolivarian Republic of Venezuela* tribunal 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."[312]

242. In this case, having recognized that the State has the responsibility to preserve the environment and protect the local population, the Claimant alleges that Ethiopia's attempt to

[311] Treaty, **CLA-001**, Art. III(2) (emphasis added).
[312] Statement of Claim, para. 5.2 (quoting *Gold Reserve Inc v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, dated 22 September 2014, **CLA-030**, para. 595).

carry out its environmental responsibility, although "commendable,"[313] had the effect of violating its obligations under the Treaty because it: (i) breached its duty not to expropriate; (ii) breached its duty to treat Akgun fairly and equitably; (iii) breached its duty not to impair Akgun's use of its investment; and (iv) breached the specific obligations it owed to Akgun under the Agreement, as deemed to violate an imported umbrella clause.

243. Ethiopia offers its responses to each in this section.

a. Expropriation

244. Ethiopia submits that Akgun did not own any investment that could be expropriated. In any case, Ethiopia always acted in accordance with the terms of the Agreement and applicable laws. Moreover, Akgun's claim of expropriation, legally unsupported and factually premature as it were, is essentially a function of its own abandonment of the ETIZ project without any governmental decision ever to terminate the Agreement.

i. Akgun Did Not Own Any Investment That Could Be Expropriated or Deprived

245. Ethiopia submits 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 the Claimant is a more exacting one than the Tribunal's inquiry into whether the Agreement constituted an investment for purposes of jurisdiction.

246. Ethiopia maintains that the Agreement as it stood when Akgun abandoned the project had no or even negative economic value. As such, expropriation is both theoretically and practically impossible. This is elaborated as follows.

[313] Statement of Claim, para. 5.2

247. The tripartite Agreement is entitled: "*The Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia and Oromiya Regional State And Akgun Insaat Makine Sanayi Dis Ticaret Sirketi For the Lease of Land and The Development of an Industrial Zone*."[314] On its face, it assigns the task of leasing land to the Ministry of Industry and the Oromia Regional State (the "Ethiopian parties") and the task of industrial development to Akgun.

248. Article 3(1) of the Agreement expressly provides: "It is hereby concluded, between the Ministry, Oromiya Regional State and [Akgun], a Land Lease Agreement for the development, construction, and operation of the [industrial zone] ***with the terms and conditions stipulated here under***."[315]

249. First and foremost, it is a "***Land Lease Agreement***," and it is for "***the development, construction, and operation of the [industrial zone]***."[316] The apportionment of responsibilities is clear: it is for the Ethiopian parties to give the use of land on lease to Akgun and for Akgun to develop, construct, and operate. Such development, construction, and operation, evidently, could only take place "with the terms and conditions" of the Agreement, of which there are many. The granting of a leasehold right for development, without more, cannot unilaterally bestow economic value upon the grantee without the reciprocal obligation to add value to the land once the terms and conditions of the Agreement are met.

250. Whether the terms and conditions of the Agreement were met or could have been met is a matter of dispute in this case; preliminarily, however, the question of whether the Agreement would have had an economic value on its own accord when the developer was unwilling or unable to meet the conditions of development must be answered.

251. The Agreement, as it must, sets forth numerous terms and conditions in the form of legal and environmental requirements for the implementation of the intended development project.

[314] 2012 ETIZ Agreement, **Exhibit C-009**.
[315] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 3(1) (emphasis added).
[316] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 3(1) (emphasis added).

Most importantly, the Agreement expressly states that "[Akgun] shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."[317]

252. More specifically, the Agreement expressly states that

> "[t]he Developer shall protect the environment from pollution by using appropriate methods and technologies. In this regard the Developer has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution ***and carryout the necessary environmental studies required in this regard***."[318]

253. By the express terms of the Agreement alone, carrying out the necessary environmental studies is not an advisory note, it is a ***required condition***. It cannot come as a surprise for a project of this scale and complexity let alone for one to be located near an elaborate supply basin upon which millions of people depend for access to clean, safe drinking water.

254. It should also not come as a surprise to any reasonable assessor of the economic value of a contractual right that the feasibility of the project, and hence its value, would depend on its environmental viability no matter at what stage such inevitable condition is considered. Any argument that the Agreement would have had an economic value without addressing the serious environmental concerns by conducting the required EIAs would neither be legally valid nor factually genuine. Each is described in turn as follows.

255. The Agreement does not refer to "all other conditions stated in the relevant laws of Ethiopia" without a reason. The Ethiopian environmental laws unambiguously state that "[w]ithout 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."[319]

[317] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12).
[318] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).
[319] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 3(1) (emphasis added).

256. As Dr. Ayele H. Anabo affirms in his Expert Report, "[a]ll investors, domestic or foreign, are subject to Ethiopia's mandatory environmental laws," which laws are "publicly available, readily intelligible and consistent with global standards."[320] The laws are "not advisory or waivable through conduct" but rather "mandatory and must be observed by all."[321] The laws are a standard step in legal due diligence for a proponent of any development project, let alone one of this magnitude and sensitivity.

257. The assertion of economic value without meeting environmental preconditions is also not factually genuine for two reasons. First, it categorically and implausibly denies the terms of the Agreement that refer to the "conditions stated in the relevant laws of Ethiopia" in a provision immediately following two others that establish express environmental obligations of Akgun.[322]

258. Second, and relatedly, it equally elides, ignores, and denies the inadequacy of the EIAs that Akgun submitted. This is significant not only because these events signify Akgun's own recognition of the environmental assessment responsibilities but simultaneously shows its inclination to go forward with a seriously polluting project without proper reckoning of its impact and proposal of mitigation measures, which could have invited a real—and much more serious—dispute down the road.

259. The lack of factual genuineness is also evident from Akgun's own express rejection of alternative and less environmentally sensitive land for development. Akgun does not deny that its plans to develop were apparently limited to a specific site near Addis Ababa, evidently to the exclusion of all else. As Ethiopia has set out in great detail, there are at least three sources of evidence showing that Akgun did not ever seriously consider alternative sites for development.[323]

[320] Expert Report of Dr. Ayele H. Anabo, dated 12 March 2021, para. 33.
[321] Expert Report of Dr. Ayele H. Anabo, dated 12 March 2021, para. 33.
[322] *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10)-(12).
[323] *See*, in this respect, Sec. III.f *supra*.

260. The first express reference to Akgun's inability or unwillingness to pursue development at a different site is contained in Akgun's letter of 19 December 2014 to the Ministry of Industry of the Federal Democratic Republic of Ethiopia, in which Akgun wrote as follows:

> "[I]t was obviously expressed that it is not possible to implement a[n] Organized Industrial Zone under these conditions in Sendafa. As Akgun GROUP, ***we would like to specify that we disagree*** with the idea for implementation an Organized Industrial Zone in one of Hawasa or Dire Dawa cities."[324]

261. For whatever reason, Akgun's interest was entirely confined to a single parcel of land which parcel is, Ethiopia would submit, remarkable only for its real estate price and fungibility but not industrial development.[325] When it was not able to meet the attendant environmental requirements, Akgun was offered alternative sites which it rejected, not only depriving the Agreement of any economic value but also turning it into an overall liability to all concerned.

262. Mr. Yusuf Akgun's very frank statement about Ethiopia's good faith relocation offer shows Akgun's mistaken conception of its contractual rights and obligations under the Agreement. He testifies:

> "5.25 In August 2015, Akgun met with the State Minister of Industry Tadesse Haile. Mr. Tadesse reported that the government would propose new land alternatives. I went to see the new alternatives with Ethiopian officials, but none of the alternative sites was suitable for industrial zone development. I remember visiting three different properties in one day. All of them were far away from Addis Ababa and other major population centers. This factor makes it harder to find both blue-collar and white-collar workers, increases transportation costs, and discourages investors because they would like to live close to a developed city, otherwise they have security concerns. I also remember that one of the alternatives was located on a hill, but the development of an industrial zone requires flat land, and it would not be financially or technically feasible to flatten a steep hill. In any case, none of those lands were proposed to us officially.
>
> 5.26 We met with State Minister of Industry Tadesse Haile again in November 2015. During that meeting Minister Tadesse stated that Ethiopia would not compensate us for the damages we suffered. That contradicted what Dr. Arkebe had

[324] Letter from Akgun to the Ministry of Industry, dated 19 December 2014, **Exhibit C-017** (emphasis added).
[325] *See* Photographs of the Sendafa Site, dated February 2021, **Exhibit R-7**.

> told us before. He also told us that, this time he would make sure that the Oromia State official would take us to more suitable land alternatives. But, no Oromian official ever contacted us on that point."[326]

263. Mr. Yusuf Akgun's own statement and the contemporaneous records in Akgun's own evidence clearly show that the Ministry of Industry and the State of Oromia were 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. The written records are otherwise unmistakable regarding Ethiopia's ability and willingness to offer appropriate and acceptable replacement land that could have avoided the environmental sensitivities of the allotted land, which sensitivities Akgun was not willing or not able to protect.

264. In this regard, the Ministry of Industry's letter to Akgun of 17 June 2015 states in full as follows:

[326] Witness Statement of Yusuf Akgun, dated 19 November 2020, paras. 5.25-5.26.

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ
የኢንዱስትሪ ሚኒስቴር

The Federal Democratic Republic of Ethiopia
Ministry of Industry

ቀን
Date 17 JUN. 2015
ቁጥር 02/1/27/119
Ref.No
AKGUN.GE.30

Akgün construction machinery Industry & Foreign Trade Limited Company
Addis Ababa

This is in response to your letter Ref. No Akgün/034/2015 dated 02/06/2015 which request an official response to all your letters in relation to the difficulties you have encountered in the implementation process of the Ethio-Turkish International Industry City located in Oromia Region around Sendafa town.

We feel sad to see Ethio - Turkish International Industry City project confronted with difficulties in its implementation, with particular issues related to the environmental impact of the" projects on Legedadi and Dire dams" which are the major water supply sources to the city of Addis Ababa.

In response to your requests related to the delay of the implementation of the project, the Oromia Regional Government and the Ministry of Industry have carried various discussions on how to solve the difficultly of the project to insure sustainable development of the Ethio- Turkin Industrial part.

Thus, on behalf of the Oromia Regional Government and the Ministry of Industry, I would like to inform you that we have reached to an understanding to relocate the site of this project to other better location in order to safe guard the above mentioned water dams from any kind of pollution that might arises from the project site and thus ensure the sustainability of this important investment project.

I would thus like to advise you to start discussion with the Oromia Regional Government to reach an agreement on the alternative site and proceed with implementation of the project. In this connection, I would like to inform the Oromia Regional Government to facilitate the provision of the alternative site as it is already decided by the Regional Government.

You are therefore, advised to submit a project proposal to the Oromia Regional Government as soon as possible. It is important to note that the project proposal should reflect the objectives and targets indicated in the Growth and Transformation plan of the country.

Best regards

Tadesse Haile
State Minister

The Federal Democratic Republic of Ethiopia
Ministry of Industry

C.C
H.E Ato. Abdulaziz Mohammed
Vice President and Head of Civil Service and Good Governance Bureau of Oromia Regional Government
Finfine

Letter from Ministry of Industry to Akgun, dated 17 June 2015, **Exhibit C-031**

265. It was in August of 2015, two months after this letter, that Mr. Yusuf Akgun was shown multiple alternative sites. In his own words, he was shown three locations within a single day, but he did not like any one of them for various reasons.[327] His son, Mr. Yunus Akgun, has also confirmed the contents of Akgun's earlier 19 December 2014 letter as conveying Akgun's rejection of the relocation option. He says in particular: "In [that] letter, ***Akgun also declined the proposed land options***, as they were located too far from Addis Ababa."[328]

266. For all of these reasons, in Akgun's own telling, the economic value of the Agreement lives or dies by the developer's ability to proceed on the initially allotted land. If the development could not have proceeded under the Agreement and applicable laws without meeting the environmental conditions on the same land, the Agreement could not have had any economic value as its viability depended on Akgun's ability to clear the environmental hurdle with a proper EIA or perhaps a different mix of industries. Because Akgun was unable to address the environmental constraints of the allotted land and was otherwise unwilling to develop on an alternate land, Akgun deprived the Agreement of any economic value.

267. The Claimant's quantum expert, Laura Hardin, states the standard that must apply in the assessment of fair market value in the following terms:

> "*The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts*."[329]

268. As in any contract, Akgun's rights under the Agreement are only as good as Akgun's ability to carry out its obligations. The Agreement itself does not on its face contain any provisions on assignment or transfer; assuming, however, that the applicable laws do allow

[327] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.25.
[328] Witness Statement of Yunus Akgun, dated 19 November 2020, para. 7.15 (emphasis added).
[329] First Expert Report of Laura Hardin, dated 19 November 2020, para. 60 (quoting American Society of Appraisers, "ASA Business Valuation Standards," dated November 2009, **Exhibit AM-315**, p. 27).

assignment or transfer, the transferable thing of "value" is the right to develop with the identical environmental preconditions it has itself assumed and faced under the Agreement.

269. In considering whether the Agreement itself had any economic value that could be expropriated at the time Akgun abandoned the project, the mentioned fair market value standard could be a useful tool. It asks whether any informed and reasonable buyer of the rights under the Agreement would have assigned any value to the Agreement as it stood at that time. Needless to say, a qualified buyer who is able and willing to meet all preconditions would have no reason to buy contractual rights of development at any price higher than mere lease of the land, just as Akgun itself did.

270. In conclusion, Akgun does not show that its Agreement had any economic value as it was unable to meet the express environmental conditions of the Agreement and the applicable laws and was unwilling to develop the industrial zone on any alternate land that Ethiopia offered to grant.

271. While there was thus no economic value to be expropriated, Ethiopia will next address the more traditional basis of the expropriation claim, for the acts alleged did not amount to a taking in any event.

ii. Ethiopia's Requests for a Proper Environmental Impact Assessment Were Mandated Under the Agreement and the Applicable Laws

272. Akgun asserts that the "instrument of deprivation" in this case is in the form of "regulatory or other administrative hurdles."[330] Akgun characterizes the actual measures in the following passage:

> "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. Under the express terms of the 2012 ETIZ Agreement, Akgun cannot use the allocated land for any purpose other than

[330] Statement of Claim, para. 5.14.

> 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."[331]

273. This claim contains at least five propositions that require response: (i) the Claimant has been deprived of its investment; (ii) this is as a result of the 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) the Claimant cannot develop ETIZ on any other land. Consequently, "[the] Claimant has had no ability to use the allocated land for the agreed purpose since July 2014."[332]

274. These five propositions put forth a mix of inaccurate factual and legal representations. Each is discussed as follows:

i. The claim of deprivation is factually inaccurate. As the uncontested facts would show, neither the Ministry of Industry nor the Oromia Regional State ever terminated the Agreement. They only asked the Claimant to undertake a proper EIA so that it could continue the development project consistent with its contractual and legal obligations.

ii. The claim of refusal to allow development is also factually inaccurate. The Ministry of Industry and the Oromia Regional State never refused Akgun's development of the ETIZ project. Indeed, they welcomed and did everything in their power to encourage the development. What they could not and would not do is waive Ethiopian law. The record is abundantly clear that they even offered numerous alternate lands. Akgun's interest was, however, limited to development of a specific parcel of land without meeting the attendant EIA requirements.

[331] Statement of Claim, para. 5.15.
[332] Statement of Claim, para. 5.15.

iii. The claim of the Agreement's limitation of development to the allocated land is also factually inaccurate. The Agreement does not limit ETIZ development to the allocated land although it does anticipate as much. It is, however, necessarily a conditional agreement; attendant environmental conditions are expressly stated in the Agreement and the applicable laws that it expressly incorporates.

iv. The claim of the Agreement's prohibition of use of the allocated land for anything other than development of the ETIZ project is also not accurate. The Agreement clearly anticipates that the allocated land may indeed be used for purposes other than the development of an industrial zone with the written consent of the Ministry of Industry. The Agreement anticipates such possibility or even probability and makes an independent provision for it under Article 3, entitled "Purpose of Land Lease Agreement."[333] This provision states in full:

- "It is hereby concluded, between the Ministry, Oromiya Regional State and the Developer, a Land Lease Agreement for the development, construction, and operation of the [industrial zone] with the terms and conditions stipulated here under."[334]

- "***The Developer shall obtain the prior written consent of the Ministry to use the Land for investment other than the development of the [industrial zone]***."[335]

Under the express terms of this provision, written consent is all that the developer would need to use the land for activity other than development of the industrial zone. Contrary to Akgun's contentions, not only could it have presented a proper EIA or altered the mix of industries, it could have potentially sought to use the land for other purposes with written permission under the Agreement.

[333] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 3.
[334] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 3(1).
[335] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 3(2) (emphasis added).

v. The claim of Akgun's inability to develop the ETIZ project on other land is also not true. Mr. Yusuf Akgun himself has testified that he was offered alternative land and even visited three locations within a single day. There is, of course, nothing in the Agreement that prohibits Akgun's development of the ETIZ on another site. Many other industrial zones and industrial parks have been developed since that time all across Ethiopia, and Akgun was a preferred developer as the record clearly shows.

iii. Akgun Rejected the Option to Relocate and Voluntarily Abandoned Its Project

275. 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.

276. By the Claimant's own reckoning, "[a]n expropriation occurs if the interference is substantial and ***deprives the investor of all or most of the benefits of the investment***," and "[t]here is a broad consensus in the academic writings that ***the intensity and duration of the economic deprivation is the crucial factor*** in identifying an indirect expropriation or equivalent measure."[336]

277. It would seem to be common ground between the Parties that the present dispute pertains entirely to the requirement and/or adequacy of the EIA and the possibility of relocation in view of environmental concerns. The singular measure that Ethiopia has taken is to issue what Akgun calls the suspension letter. Here is what it says in full:

> "It is recalled that the company has signed a tripartite agreement with the Oromia National Regional State (ONRS) and the Ministry of Industry on June 22/2012 and it has signed a lease agreement on December 31/2013 and received the title deed for the 100 ha land that it planned to develop in the first phase from the total 1364

[336] Statement of Claim, para. 5.8 (quoting *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, dated 21 November 2007, **CLA-038**, para. 240) (emphasis added).

ha. land. However, the regional state has not received Environmental Impact Assessment (EIA) at the time and our ministry requested you in May 2013 to prepare the report by a professional consultant. The EIA report was then presented in the presence of the consultant and the company's representatives as well as the concerned federal and regional offices. The report was evaluated by the participants and found to be inefficient and defective. We have sent to you [a] series of letters on 13/11/2013 with Ref. No. 02-1-30/1316 and on 18/12/2013 with Ref. No. 02-1-30/1412 requesting you to revise and present the report.

You replied to our letter after 6 months on July 17/2014 stating that you have selected a qualified consultant and you will need time to conduct the assessment. On the other hand, we found out from your report and from our field visit that you have already started construction works, you have subleased some part of the land and the sub-lessee has completed 70% of the construction work. In the first place, our law requires that EIA shall be completed and approved before the commencement of construction at any place let alone near the Legedadi basin and Dire Dawa groundwater.

Meanwhile, the Addis Ababa City Government has already expressed its concern over the viability of the proposed project. The City Government wrote a letter on July 03/2014, with Ref.No. AA/MO/01/79 in which it has stated that the Legedadi dam is the main source of surface water for the city and the Legedadi deep well groundwater which was developed to supply water for more than 35,000 condominium units being constructed in Yeka Abado and Bole Arabsa sites. The letter further stated that 1364 ha of land is partially transferred to the developers of the Ethio-Turkish Industry Zone which is composed of 790 plants. The recent EIA report presented by the developer showed that the waste released from the industry zone is composed of Heavy Metal and Cyanide, Medical Wastes, Oil and Grease as well as Domestic Wastes with a potential to pollute the raw water being flooded to the dam and the groundwater. During the consultative forum organized by the Ministry of Industry, the government was appreciated for its efforts to attract foreign investors and the impact of the industrial development was also considered. However, it was warned that if the industry zone is to be established at the selected site, the drinking water supply to the residents of the city will be exposed to pollution. The City Government also informed the Office of the Prime Minister that the Dire and Legedadi dams will have their capacity upgraded in September 2014 to supply 195,000m3 water per day. Also, the Legedadi deep well groundwater will supply 40,000m3 water per day starting in April 2015 to the condominium houses under construction by the City Government. The City Government requested the Prime Minister to consider the matter very seriously and find an alternative site to the industrial zone to protect the basin from pollution. Subsequently, the Office of the Prime Minister sent a letter to our ministry on July 22/2014 with Ref. No. M/10-230/12 in which we were instructed to ensure that no construction shall take place before the EIA is presented and approved.

> Accordingly, you are hereby informed that any type of construction activity is prohibited until the EIA is conducted and approved by the appropriate governmental body.
>
> The Oromia National Regional State is also advised to act accordingly."[337]

278. This letter simply highlights the environmental concerns that multiple agencies 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.

279. The Claimant does not dispute any of the key factual representations contained in the letter. These representations include:

i. Akgun signed a tripartite agreement with the Oromia Regional State and the Ministry of Industry in June 2012.

ii. Akgun signed a lease agreement and received a land lease certificate for one hundred hectares of land that it planned to develop in a first phase of the project.

iii. The Oromia Regional State did not receive an EIA.

iv. In May 2013, the Ministry of Industry requested Akgun to prepare and present a report by a professional consultant.

v. Akgun's consultant presented an EIA report in the presence of the company's representatives as well as the concerned federal and regional authorities.

vi. The report was evaluated by the participants and found to be defective.

[337] Letter from Ministry of Industry to Akgun, dated 24 July 2014, **Exhibit C-016**.

vii. Several letters were thereafter sent to Akgun requesting it to revise and present the report again.

viii. Akgun assured the Ministry of Industry in July 2014 that a qualified consultant would be commissioned but that it would need time to conduct the assessment.

ix. In the meantime, the Ministry discovered that Akgun had started construction works and subleased some parts of the land, and that the sublessee had completed seventy percent of its own construction works.

x. The law requires that an EIA shall be completed and approved before the commencement of construction at any place let alone near the Legedadi basin and Dire groundwater.

xi. The Addis Ababa City Government had expressed concern over the project.

xii. The EIA report presented by the developer showed that waste released from the industry zone would be composed of heavy metal and cyanide, medical wastes, oil and grease as well as domestic wastes with a potential to pollute both the raw water being flooded to the dam and the groundwater.

xiii. During the consultative forum organized by the Ministry of Industry, it was warned that if the industrial zone is to be established at the selected site, the drinking water supply to the residents of the city will be exposed to pollution.

xiv. The City Government also informed the Office of the Prime Minister that the Dire and Legedadi dams will have their capacity upgraded in September 2014 to supply 195,000 cubic meters of water per day and that starting in April 2015

the Legedadi deep well groundwater will supply 40,000 cubic meters of water per day to condominium houses under construction by the City Government.

xv. The City Government requested the Prime Minister to consider the matter very seriously and find an alternative site for the industrial zone to protect the basin from pollution.

xvi. Subsequently, the Office of the Prime Minister sent a letter to the Ministry of Industry in which it instructed that no construction shall take place before the EIA is presented and approved.

280. Based on all of the above, the Ministry of Industry informed Akgun that any type of construction activity is prohibited until the EIA is conducted and approved by the appropriate governmental body. On the facts of this case, these are the steps that Akgun would have this Tribunal believe amount to a creeping expropriation. The Claimant's own preferred definition of the standard states:

> "Creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment."[338]

281. Akgun does not set out any "incremental encroachments" on its contractual rights let alone the eventual total destruction of whatever value the Agreement might have had at that time. The steps that the Ministry of Industry has taken, as documented in what the Claimant calls the suspension letter, show legitimate steps to ensure regulatory compliance consistent with the contractual and legal obligations that the Claimant had assumed under the Agreement it concluded with the Ministry of Industry and the Oromia Regional State.

[338] Statement of Claim, para. 5.10 (quoting UNCTAD Series on Issues in International Investment Agreements, II, Expropriation, United Nations Publication, 2012, **CLA-031**, p. 11).

282. The suspension letter does not suspend the Agreement, which the Claimant considers its investment; it suspends 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.

283. In was only two months after Akgun's takeover of less than ten percent of the contemplated land in March 2013 (and one month after the issuance of Akgun's investment permit in April 2013) that the Ministry of Industry, as one of the parties to the tripartite Agreement, expressly reminded Akgun of its EIA responsibilities in May 2013.[339] Whatever construction works the Ministry of Industry suspended were carried out with full knowledge and disregard of the legal and contractual EIA responsibilities.

284. Further than this, and as the former Minister of Industry Mr. Ahmed Abtew testifies, any such act was "not only contrary to the letter and spirit of the Agreement and applicable laws but was indeed intended to create new facts on the ground in an effort to make a possible relocation decision difficult."[340] As Mr. Ahmed aptly notes, the record amply demonstrates that "Akgun showed a cavalier attitude towards the environmental rules even after it became aware of the grave consequences."[341]

285. Akgun expressly admits that by this time, "Ethiopian authorities at all levels of government had assisted with the commencement of ETIZ, issued and renewed multiple licenses to Akgun in furtherance of ETIZ, accepted payment for and handed over state-owned land to Akgun and changed Ethiopian domestic laws and regulations to establish a legal framework for subleasing within ETIZ."[342] The disagreement self-evidently emerged once Akgun was requested to present the required EIA.

[339] *See* paras. 49-51 *supra*.
[340] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 15.
[341] Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 16.
[342] Statement of Claim. para. 2.64.

286. Akgun appears to hesitatingly suggest that it undertook the EIA studies "[i]n an act of good will" rather than as a matter of legal or contractual obligation.[343] That premise irredeemably vitiates the foundations of its expropriation and all other claims *ipso jure* and *ipso facto*.

287. If it is found that such EIA obligation existed as a matter of law and contract, it necessarily follows that such must meet minimum regulatory requirements. The failure to submit or the submission of an incomplete or defective EIA that raises more questions than answers would not only be a breach of contract but would also independently be a violation of regulatory requirements.

288. 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.

b. Fair and Equitable Treatment

289. Akgun's denial of fair and equitable treatment claim is based on Article II(2) of the Treaty, which reads in full:

> "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."[344]

290. Akgun claims that Ethiopia denied it fair and equitable treatment under an exceedingly generous interpretation that stretches the principle beyond what the parties to the Treaty would have intended. Under Akgun's interpretation of the FET standard, the violation of

[343] Statement of Claim, para. 2.66.
[344] Treaty, **CLA-001**, Art. II(2).

some, not all, of the following would rise to the level of FET violation:[345] (i) respect the investor's legitimate expectations; (ii) act consistently; (iii) provide a stable and predictable legal and business environment for investment; (iv) act transparently; (v) refrain from arbitrary and discriminatory behavior and comply with the principles of due process in administrative decision-making; (vi) act in good faith; and (vii) ensure that there is a reasonable relationship of proportionality between the impact of a measure on an investment and the aim sought by the measure.[346]

291. These could be classified under six legal theories of liability: (i) the breach of legitimate expectations; (ii) the provision of a stable and predictable legal and business environment; (iii) the duty to act transparently and refrain from arbitrary and discriminatory behavior; (iv) the obligation to act in good faith; (v) non-impairment; and (vi) the duty of proportionality.

292. Ethiopia has set out its understanding of the limits of the FET standard in Section V.b above. With that understanding of the FET standard, Ethiopia submits that Akgun's claims cannot be sustained even under the most expansive interpretation that Akgun suggests and responds to each one of Akgun's claims under Akgun's own preferred standard as follows.

i. Any Expectation of Waiver of Environmental Requirements is Not Legitimate

293. The core of Akgun's legitimate expectations claim is contained in paragraphs 5.36 to 5.38 of its Statement of Claim. It reads in full:

> "5.36 In this case there can be no doubt that Ethiopia, through specific representations made by the [Ministry of Industry] and the Oromia Regional State, ***created a legitimate expectation that Akgun would be able to use the land allocated to Akgun for the express purpose of developing ETIZ*** and that Ethiopia would provide governmental support to Akgun. Indeed, there is no doubt that explicit representations by a State, such as Ethiopia's commitments to support ETIZ as provided in the 2012 ETIZ Agreement, create specific expectations.

[345] *See* Statement of Claim, para. 5.31 ("[a] claimant need not show a breach of each of these elements to prevail on its FET claim").
[346] Statement of Claim, para. 5.30 (citations omitted).

> 5.37. Similarly, there is no doubt that, in the context of this case, where Respondent recruited Claimant, negotiated with Claimant, entered into a series of agreements with Claimant and repeatedly encouraged Claimant through acts and statements at the highest levels of government, that ***Claimant's expectations were legitimate***. This is all the more true where ***the State not only approved a specific piece of land for the project, but itself identified the land, proposed the land to Claimant, accepted payment for the land and allocated the land to Claimant***.
>
> 5.38. Finally, there is equally no doubt that Respondent ***violated the expectations it had created when it withdrew both its support for ETIZ and prohibited Claimant from using the land for its agreed purpose*** — i.e., the development of ETIZ."[347]

294. This claim fails equally because it rests on a fatally flawed contractual and legal premise, i.e., the act of allocation of the land trumps all other endogenous, exogenous, express, and implied conditions. It is important to begin with the uncontested facts relevant to this particular claim: Akgun has expressly undertaken the obligation to "respect [the] Agreement and ***all other conditions stated in the relevant laws of Ethiopia***."[348] The Agreement further expressly requires that "[Akgun] shall protect the environment from pollution by using appropriate methods and technologies" and that "[i]n this regard [Akgun] has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution ***and carryout the necessary environmental studies required in this regard***."[349]

295. When the Ministry of Industry asked Akgun to conduct an EIA, it was doing nothing more than to remind Akgun of its EIA obligations under the Agreement that it signed. ***For Akgun's legitimate expectations claim to make any sense, Akgun must be able to say that either (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.***

[347] Statement of Claim, paras. 5.36-5.38 (emphasis added) (citation omitted).
[348] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12) (emphasis added).
[349] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).

296. Akgun does not make either claim without ambiguity, much less sustain them.

297. Akgun does hesitatingly suggest that a "full-scale" EIA may not have been required under the Agreement. Although the Claimant does not pursue this claim in any meaningful way, this suggestion is expressed in Mr. Yusuf Akgun's statement in the following terms:

> "In or around mid-2013, the Ministry of Industry verbally asked Akgun to prepare an Environmental Impact Assessment ('EIA'). As the full-scale EIA proposed by the Ministry of Industry exceeded the scope of the studies we had undertaken on how to protect the nearby watershed from pollution that were required by Art. 8(10) of the 2012 ETIZ Agreement, I expressed concern about undertaking such an EIA and the delay it might cause."[350]

Akgun then suggests that it is only "[i]n an act of good will" that it "set out to hire a local firm to prepare an EIA."[351]

298. If Akgun is claiming that the tripartite Agreement it signed with the Ministry of Industry and the Oromia Regional State did not require it to conduct a proper EIA before building an industrial zone that it supposedly estimated at US$ 8 billion in value on Addis Ababa's water supply basin, such claim should fail not only because it is inconsistent with the express terms of the Agreement but also on grounds of utter incredibility alone.

299. Akgun's second underdeveloped claim is one of arbitrary rejection of the EIA. This claim must also fail both on grounds of the terms of the Agreement and on the merits of the proffered EIAs themselves.

300. The Agreement expressly states that Akgun shall observe all conditions under Ethiopian law, which naturally includes Ethiopian environmental law. Ethiopian law sets forth the necessity of EIAs in these kinds of projects and the requirements thereof. Akgun did not even attempt

[350] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.5 (quoted in Statement of Claim, para. 2.65).
[351] Statement of Claim, para. 2.66 (citing Witness Statement of Yunus Akgun, dated 19 November 2020, para. 5.15).

to meet these requirements and indeed Mr. Yusuf Akgun openly admits that "[he] expressed concern about undertaking [a full-scale] EIA and the delay it might cause."[352]

301. Consistent with this statement, the EIAs that Akgun submitted were objectively defective as indeed they failed to meet many of the most basic EIA requirements, as Ethiopia's environmental expert Professor Susan Murcott of MIT has shown.[353]

302. Recognizing the weakness of its EIA related claims and defenses, Akgun turns focus to what could rightfully be called an ***implied waiver argument***. The core of this argument is contained in paragraph 2.84 of the Statement of Claim where, having narrated the progression of events that led up to the rejection of the EIAs and contemplation of a proportionate solution, Akgun says:

> "[T]he government's representatives proposed two alternatives: 1) relocate the site; or 2) limit the industries operating in ETIZ. Recall that Respondent had chosen the site and defined the industries to be located in ETIZ. Thus, either of these proposals would amount to an effective repudiation of the terms of the 2012 ETIZ Agreement."[354]

303. Thus, what Akgun ultimately considers a breach of its legitimate expectations is the proposal to either (i) relocate the site; or (ii) vary the mix of industries to be located within the ETIZ. This amounts to repudiation of the Agreement and hence a violation of legitimate expectations because, in Akgun's telling, the "Respondent had chosen the site and defined the industries."[355] So, the argument goes, the selection of the site not only overrides all other express terms of the Agreement but also implicitly supersedes the requirements of the applicable environmental laws.

304. This argument's incongruity with the express terms of the Agreement and the applicable laws that it incorporates is only surpassed by its illogicity. If such analysis ever invited the

[352] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.5 (quoted in Statement of Claim, para. 2.65).
[353] See Sec. III.d.ii *supra*.
[354] Statement of Claim, para. 2.84.
[355] Statement of Claim, para. 2.84.

expectation that an eight-billion-dollar industrial development project could occur between the years 2013 and 2023 without a full-scale proper EIA, it can by no stretch of the most permissive standards be considered legitimate.

305. Commenting on the relationship between contractual commitments and the doctrine of legitimate expectations, Professor James Crawford writes:

> "At the level of the merits it must be borne in mind that the investment contract is itself an allocation of risks and opportunities, and that that allocation is relevant in determining, in particular, whether there has been fair and equitable treatment under the BIT. ***In particular 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***."[356]

306. Finally, Akgun relies on the statement by the tribunal in the case of *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* that the "[a]pproval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view."[357] The Claimant further states that "[i]n an analogy to the present case, the *MTD* tribunal further determined that it was unreasonable, and thus contrary to FET, for the 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."[358]

307. In language from this passage that the Claimant does not reproduce, the *MTD* tribunal goes on to state as follows:

> "Approval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view… ***This is not to say that approval of a project in a particular location entitles***

[356] James Crawford, "Treaty and Contract in Investment Arbitration," 22nd Freshfields Lecture on International Arbitration, London, 29 November 2007, **RLA-33** (emphasis added).
[357] Statement of Claim, para. 5.35 (citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated 25 May 2004, **CLA-046**, para. 163).
[358] Statement of Claim, para. 5.35 (citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated 25 May 2004, **CLA-046**, paras. 163-166, 189).

> ***the investor to develop that site without further governmental approval***. The Foreign Investment Contracts are clear in that respect and this matter is dealt with separately in this award."[359]

308. Even assuming the *prima facie* rule applies, it only means that there is a presumption of approvability, not that it is conclusive evidence of environmental feasibility, as Akgun would suggest. Even then, there are more fundamental differences between Akgun's case and the *MTD* case. As the Tribunal would note, location was the very essence of MTD's attempted investment in Chile.[360] The essence of the Akgun plan was industrial development; the

[359] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated 25 May 2004, **CLA-046**, para. 163 (emphasis added).

[360] This may easily be discerned from the uncontested facts as described by the *MTD* tribunal in its Award:

> 40. In 1994 Dato' Nik of MTD visited Chile as a member of a trade delegation organized by the Malaysian Ministry of Public Works. During this visit, he met with government officials and business leaders who emphasized Chile's encouragement of foreign investment. Dato' Nik so reported to the Management Committee of MTD. He also met with Mr. Musa Muhamad, the Malaysian External Trade Commissioner in the Malaysian embassy in Santiago, who encouraged MTD to invest in Chile.
>
> 41. In April 1996, Dato' Nik heard from Mr. Muhamad about 'an opportunity to build a large planned community near Santiago.' Dato' Nik informed Dato' Azmil Khalid who at the time was traveling in the United States. Dato' Azmil Khalid traveled directly from the United States to Chile to investigate this opportunity. There he met with Messrs. Muhamad and Antonio Arenas, a local businessman. They informed Dato' Khalid that they had found 'the perfect location for a planned community.'
>
> 42. Dato' Khalid visited the site in the small town of Pirque and met with the owner of the land, Mr. Jorge Fontaine Aldunate. Mr. Fontaine is reported to have said that 'he would like to work with MTD to build a mixed-use planned community on the Malaysian model.' Although the site was zoned for agricultural use, Mr. Fontaine is alleged to have said that the land was unproductive and 'could readily be rezoned, particularly if it would attract foreign investment.'
>
> 43. Dato' Khalid returned to Malaysia and reported to MTD's Management Committee about this opportunity in Chile. The Management Committee decided to investigate it further. For this purpose, Messrs. Lee Leong Yow (Vincent Lee), MTD's Group General Manager and Head of Operations, and Nazri Shafiee, expert in land valuation, traveled to Chile from May 14 to May 18, 1996. Dato' Nik was also in Chile on May 16-17, 1996. He visited the project site and met with Mr. Fontaine and his family.
>
> 44. Messrs. Lee and Shafiee visited the Foreign Investment Commission (FIC) on May 16, 1996. There they met with Mr. Joaquín Morales Godoy, Senior Legal Counsel. The next day, Mr. Shafiee met with Mr. Fernando Guerra Francovich, the head of Servicio de Vivienda y Urbanización ('SERVIU'). After these meetings, Messrs. Lee and Shafiee concluded that MTD should pursue the investment opportunity and so reported to MTD's Management Committee. Based on their report, the Management Committee decided 'to pursue negotiations with Mr. Fontaine while continuing to study the feasibility of a joint venture to develop the Project.'
>
> 45. MTD engaged Banco Sud Americano in Santiago to appraise the land. In September 1996, the appraisers submitted their report valuing the land of Mr. Fontaine, 3000 hectares, at $34,385,487. The appraisal assumed

location was incidental, although Akgun rather implausibly argues that location was the essence. MTD's contemplated real estate development was inseparably linked to a particular location. That location ***was*** the project. Akgun was invited because of its supposed industrial development expertise, not for its ability to grow Addis Ababa.

309. More importantly, MTD was granted an investment permit in contravention of an existing regulation that ***affirmatively prohibited*** precisely the intended kind of development in the chosen location.[361] By contrast, the Agreement in this case sets forth the rights and obligations of the parties in clear terms, outlining all the various conditions with specific reference to the applicable laws.

310. Akgun's case is also distinguishable from the *MTD* case in a more fundamental and conclusively dispositive way. Unlike MTD, Akgun was never denied permission to develop or otherwise utilize the relevant location; as repeatedly stated and as the uncontested evidence in the record would show, it was only asked to suspend construction works until it was able to provide a proper and approvable EIA.

311. For these reasons, the Claimant fails to carry its burden to prove that it had legitimate expectations that were unjustifiably frustrated by Ethiopia.

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that the land could be developed as an upscale community after changing the existing zoning for agricultural use."

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, dated 25 May 2004, **CLA-046**, paras. 40-45 (citations omitted).

[361] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated 25 May 2004, **CLA-046**, para. 166. The Tribunal wrote as follows:

> "166. The Tribunal is satisfied, based on the evidence presented to it, that approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably. In this respect, whether the meeting of November 6, 1996 took place or not does not affect the outcome of these considerations. In fact, if it did take place, it is even more inexplicable that the FIC would approve the investment and the first two Foreign Investment Contracts would be signed. Minister Hermosilla and the FIC were different channels of communication of the Respondent with outside parties, but, for purposes of the obligations of Chile under the BIT, they represented Chile as a unit, as a monolith, to use the Respondent's term."

ii. Ethiopia Has Provided a Stable and Predictable Legal and Business Environment

312. Akgun's claim of what it calls violations of the obligation to act consistently and provide a stable and predictable legal and business environment makes no reference to unstable or unpredictable laws or regulations but instead rests entirely on factual innuendos that its evidence cannot sustain. It states in particular:

> "[T]he MoI at various times:
>
> - Assured Akgun it would be allowed to develop ETIZ on the land that had been allocated;
> - Suspended ETIZ allegedly because the EIA process had not been completed;
> - Allowed ETIZ to resume even though the alleged reason for the suspension (EIA) was not resolved;
> - Again suspended ETIZ and informed Akgun that it would be moved due to the local municipality's resource concerns;
> -Assured Akgun that ETIZ could and would be moved; and
> - Never amended the 2012 ETIZ Agreement or allocated suitable alternate land for ETIZ."[362]

313. Akgun's dispute with all Ethiopian federal and state agencies was singular: environmental impact. The response that Akgun got from all federal and state agencies was singular: environmental impact assessment. Akgun never got a mixed message about the need to get an EIA approved by the environmental authorities. As a matter of fact, 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. To the extent that Akgun might suggest that in these proceedings, it would not be true.[363]

[362] Statement of Claim, para. 5.47 (citations omitted).
[363] *See, e.g.*, Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 21 ("[Yusuf Akgun's] suggestion that the project would continue while the EIA was done is […] not accurate. Although our discussions were very cordial and we tried to be supportive, at no point did I suggest that the Ministry could permit the continuation of industrial development in the zone without the legally required impact assessment. I had no authority to waive any EIA requirements and never attempted or suggested to do so").

314. Akgun consistently heard a unified and singular message: do a proper EIA and show how you can address the environmental concerns of which you were aware at the time of signing, alter the mix of industries to reduce the cost of mitigation, or move to a different location with less concerns. Ethiopia's consistent messages were methodically documented in the Ministry of Industry's letter of 24 July 2014, the so-called suspension letter.[364] This document is a contemporaneous record. It shows the universality of the environmental concerns and the consistency and seriousness of the message delivered to Akgun.

315. For these reasons, the Claimant fails to carry its burden of proof that Ethiopia failed to act consistently or otherwise failed to provide a stable and predictable legal and business environment.

iii. Ethiopia Acted with Transparency and According to the Applicable Laws

316. The heading of Akgun's claim in this regard reads: "Respondent Violated Its Obligation to Act Transparently, to Refrain from Arbitrary and Discriminatory Behavior in Its Administrative Decision-Making."[365] Although a proper FET claim would have properly elaborated the actual claims under this promising title, the Claimant instead dedicated three skeletal paragraphs that do not offer any notice of the actual contents of the claim. This is by no means a function of inartful pleading inasmuch as it is an indication of the admitted weakness of the claim itself. Those three paragraphs read as follows in full:

> "5.56. Ethiopia's treatment of Akgun lacked transparency. The [Ministry of Industry] and executive members of government, in the form of the President and Prime Minister's office, gave Akgun conflicting instructions as to the importance and relevance of the EIA and whether and in what form ETIZ could proceed.
>
> 5.57. Additionally, the events of this case occurred in the context [of] Ethiopia's sweeping policy change regarding investment zones. Respondent undoubtedly

[364] *See* Letter from Ministry of Industry to Akgun, dated 24 July 2014, **Exhibit C-016**.
[365] Statement of Claim, Sec. 5(C)(ii)(c).

> recognized that the terms of the 2012 ETIZ Agreement did not conform to this new policy and would have put Akgun in a more advantageous position than other developers, but it did not disclose the existence of this policy change to Akgun until after it had decided to permanently suspend the development of ETIZ.
>
> 5.58. In sum, Respondent made a self-ascribed 'mistake' in the land that it allocated for ETIZ due to a competing political interest and it regretted its error. However, that mistake and regret are not imputable to Akgun."[366]

317. Apart from lacking the essential elements of a claim of arbitrariness or discrimination, these three paragraphs make grave factual misrepresentations. Akgun was never given "conflicting instructions as to the importance and relevance of the EIA." There is no single authority within the Ethiopian Government structure who promised to waive or could have waived the legally mandated EIA requirements. There was also no disagreement at the time that the EIA presented by Akgun was inadequate. As to that, the opinion was universal, and Akgun does not claim otherwise; indeed, this opinion was shared by Akgun itself.[367] The EIA was made important and relevant by the law and the Agreement, not by whims of officials.

318. Akgun's suggestion that EIA requirements were somehow shifted because of a "sweeping policy change regarding investment zones" is also simply not true.[368] The principal EIA law was a decade old by the time Akgun signed the 2012 ETIZ Agreement.[369] The Agreement itself refers to the applicable laws, naturally including such environmental laws. Akgun was never asked to do anything more than what a decade-old law required. Further, Akgun possessed actual knowledge of the law and its workings, as its owners were not strangers to Ethiopia.[370]

[366] Statement of Claim, paras. 5.56-5.58 (citation omitted).
[367] *See* Letter from Akgun Construction to Ministry of Industry, dated 19 August 2014, **Exhibit C-025** (acknowledging that "the time spent for having the Environmental Report made in Ethiopia was spent for nothing" and that "[w]e are sorry about that").
[368] Statement of Claim, para. 5.57.
[369] *See* Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**.
[370] *See, e.g.*, Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, **Exhibit R-3** and paras. 31-35 *supra*.

319. Akgun's fixation on "mistake" and "competing political interest" are sensationalized and unsubstantiated accounts of social interactions devoid of any factual accuracy or legal significance.

320. 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.

321. Akgun does not even attempt to do so.

iv. Ethiopia Acted in Good Faith

322. Akgun's claim of bad faith rests on the proposition that "[b]ad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created."[371]

323. Applying this standard, the Claimant states: "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."[372]

324. The paucity of this claim is not a function of pleading neglect as much as it is an acknowledgement of the absence of facts indicating any signs of bad faith. Ethiopia did not act in bad faith. Akgun knows this very well and submits no evidence to show otherwise.

v. Ethiopia's Acts Were Legally Required and Purposefully Proportionate

325. Akgun attempts to rely on the award in the case of *SoIEs Badajoz GmbH v. Kingdom of Spain* in which that tribunal found the sudden and unexpected removal of "the essential features of

[371] Statement of Clam, para. 5.60 (quoting *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, dated 12 November 2010, **CLA-057**, para. 300).
[372] Statement of Claim, para. 5.61 (citation omitted).

the regime in place when Claimant invested" to be disproportionate with the legitimate objectives of the State.[373] Akgun claims that "[i]t is undeniable that the allocation of suitable land for ETIZ was indeed an 'essential feature' of the legal and business framework of Akgun's investment," that "[c]onsequently, Respondent's actions permanently prevented the use by Akgun of its investment," and that "[t]his is not a balanced and proportional treatment."[374] It further states that "[t]his is underscored by Respondent's refusal to engage in any constructive discussions with Akgun, failure to propose any adequate alternative land and resultant failure to relocate ETIZ."[375]

326. This claim fails both as a matter of Akgun's preferred legal standard and as a matter of fact. The location was never the essential element of the regime in place. It was a lease agreement to develop an industrial park subject to all applicable regulatory requirements. The location itself was not and can never be an essential feature of the regulatory regime.

327. The EIA was legally and contractually required. Akgun cannot (and, to Ethiopia's understanding, does not) dispute that. It claims instead that the measures were disproportionate because they "permanently prevented" the use of land and it was not offered an adequate alternative. These assertions are simply factually wrong. Akgun was never "permanently prevented" and was admittedly offered numerous alternative options after it failed to discharge its EIA obligation.

328. As the so-called suspension letter of 24 July 2014 clearly states, Akgun was requested to temporarily suspend work until it could produce a legally mandated and contractually required EIA.[376] Akgun itself has admitted that it was offered alternate lands, but it was only interested in the previously allocated parcel.

[373] Statement of Claim, para. 5.64 (quoting *SoIEs Badajoz GmbH v. Kingdom of Spain,* ICSID Case No. ARB/15/38, Award, dated 31 July 2019, **CLA-054**, para. 462).
[374] Statement of Claim, para. 5.65.
[375] Statement of Claim, para. 5.66.
[376] *See* Letter from Ministry of Industry to Akgun, dated 24 July 2014, **Exhibit C-016** ("you are hereby informed that any type of construction activity is prohibited until the EIA is conducted and approved by the appropriate governmental body").

329. In Mr. Yusuf's own words, he was shown three locations in one day, but he did not like any one of them.[377] His son, Mr. Yunus Akgun, has also confirmed the contents of Akgun's earlier 19 December 2014 letter as conveying Akgun's rejection of the relocation option. He has said in particular that "[i]n [this] letter, Akgun also declined the proposed land options, as they were located too far from Addis Ababa."[378]

330. Ethiopia's response to the environmental concerns was lawful and proportionate. It was lawful because the EIA was a legally mandated and contractually required step. The deliberate and gradual steps that were taken to ensure that the measures were proportionate include (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.

331. At the very end, not only was Akgun offered perfectly viable alternatives including incentives for relocation but it was also allowed to revise the EIA and was given even a third chance, after it became apparent that perhaps Akgun had neither the interest nor the capability to meet the environmental requirements. Even then, the Ministry of Industry did not terminate the Agreement; instead, it merely suspended unauthorized construction works on the particular environmentally sensitive site. All of these efforts cumulatively prove in earnest the very opposite of lack of proportionality.

[377] Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 5.25.
[378] Witness Statement of Yunus Akgun, dated 19 November 2020, para. 7.15 (confirming the contents of the Letter from Akgun to the Ministry of Industry, dated 19 December 2014, **Exhibit C-017**) ("[a]s Akgun GROUP, we would like to specify that we disagree with the ideas for implementation [of] an Organized Industrial Zone in one of Hawasa or Dire Dawa cities").

vi. Conclusion

332. For all of the above reasons, Akgun has failed to carry its burden of proof that Ethiopia violated the FET provision of the Treaty.

333. Lastly, Akgun's non-impairment claim is a mere restatement of its expropriation and FET claims. The claim is not genuinely advanced but is rather put forth solely for purposes of pleading exhaustion over a total of three paragraphs.[379] This claim must equally be rejected in its entirety for all those reasons stated hereinabove.

c. Umbrella Clause

334. Akgun claims that Ethiopia breached umbrella clause obligations. This claim must be rejected on jurisdictional grounds as stated in Section IV.b above. This section responds to the merits of the claim in the interest of completeness.

335. Under the umbrella clause claim, Akgun lists various contractual commitments and simply says that all of them were breached. This claim fails on the facts alone. The list includes six provisions which Akgun says were breached by the Ministry of Industry and the Prime Minister.[380] Each is responded to as follows.

i. "The Ministry undertakes to facilitate possible supports of all governmental organs of various levels, during the construction, development and operation of the [industrial zone]."[381]

[379] *See* Statement of Claim, paras. 5.67-5.69.
[380] *See* Statement of Claim, para. 5.80.
[381] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(1).

This is true and the record would show that the Ministry has provided extensive assistance and facilitation to the proponents of the ETIZ project. This is elaborated in Section III above.

ii. "The GOE undertakes that there shall not be any expropriation except in conformity with the relevant laws; in connection with the Land use right, Parcels, plants, enterprises and/or factories to be established over the Land."[382]

Ethiopia never expropriated. This is elaborated in Section VI.a above.

iii. "For the purpose of ensuring the realization of the Project in full, the GoE hereby undertakes to provide adequate energy power including energy lines up to red line of the Project at its own expenses and that the [industrial zone] will not suffer undue power interruption."[383]

The ETIZ project unfortunately never reached this point due to Akgun's failure to meet threshold contractual conditions; this promise would otherwise have been honored without difficulty.

iv. "The GOE undertakes to bring telecommunication up to the red line of the project at its own expenses."[384]

The ETIZ project unfortunately never reached this point due to Akgun's failure to meet threshold contractual conditions; this promise would otherwise have been honored without difficulty.

[382] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(2).
[383] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(8).
[384] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(9).

v. "In the case where the Project is suspended or stopped or the Land is returned to the Ministry due to third persons, legal entities or civil society organizations and similar external factors without any default which is attributable to the Developer, any and all direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the [Treaty]."[385]

This is an important provision because it not only anticipates that the project could be suspended due to third parties including civil society organizations (presumably because of environmental concerns) but it also sets forth the proper legal recourse to remediate any suspensions that may cause harm to the investor. The Parties to this Agreement were, however, very careful to prescribe that such remedy is available only if the land is returned to the Ministry through no fault of Akgun. If such return is due to the developer's fault, as it is here, there is no obligation arising out of this particular provision (although this is understandably not a waiver of all remedies by the developer). In any case, since the suspension occurred due to Akgun's own fault as elaborated in Section III.c above, this provision is of no help to the Claimant.

vi. "If the investment made within the scope of the Project is stopped or suspended by a court order or administrative decision without any default which is attributable to the Developer, any and all direct and indirect losses of the Developer shall be handled by the relevant laws of the Federal Democratic Republic of Ethiopia and the [Treaty]."[386]

Similar to the fifth point immediately above, this provision also foresees legal remedy for harm that might befall the investor through no fault of its own. Since the evidence shows that the project was suspended because of Akgun's failure to present an acceptable EIA, this provision similarly cannot be a source of liability for Ethiopia. On the contrary, the formulation of this provision, just like the one

[385] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(10).
[386] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(11).

immediately preceding it, shows that the contracting parties anticipated remedy under the provisions of Ethiopian law and the Treaty, in their autonomously chosen arbitration forum.[387] These provisions also make clear that the parties anticipated the use of courts and administrative tribunals in the course of implementation of the project and added remedies for the event that such institutions might fail to offer adequate remedy. This is not in any way extraordinary. The Claimant does not claim and cannot show that it even attempted to use any domestic administrative or judicial processes that these provisions openly anticipate.

336. For all of the above reasons, Akgun's umbrella clause claims must equally be rejected in their entirety.

VII. DAMAGES

337. Predicated on fundamentally flawed legal instructions on the finding of liability and assessment of damages, the Expert Report of Laura Hardin of Alvarez & Marsal ("the A&M Report") assigns the value of $381,477,179 to the 2012 ETIZ Agreement for the Lease of Land and Development of an Industrial Zone.[388] It must be summarily dismissed on grounds of frivolity and lack of common sense alone.

338. The Claimant has alleged four treaty breaches: (i) indirect expropriation; (ii) the denial of fair and equitable treatment; (iii) impairment through unreasonable or discriminatory measures; and (iv) breach of imported umbrella clause obligations. Compensation is due when conduct constituting a violation of one or more standards invoked causes a quantifiable loss.

339. In an extraordinary submission on quantum of compensation claimed, the Claimant has asserted without basis a blanket entitlement to receive full investment value without

[387] *See*, in this respect, Sec. IV.b *supra*.
[388] *See* First Expert Report of Laura Hardin of Alvarez & Marsal, dated 19 November 2020, p. 46, Table 5 (hereinafter the "A&M Report").

bothering to set out any causal link between the injury alleged and any breach of the particular treaty standards it has chosen to invoke. The Claimant has thus failed to plead a case for damages.

340. Furthermore, 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.

341. That is because there is none.

a. Akgun Sustained No Damages Caused by Any Conduct of Ethiopia

342. A case for damages would at a minimum require the 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 the Respondent. The Claimant simply seeks three alternative measures of damages each of which corresponds to full investment value without regard to the legal requirements.[389]

343. ***It is Akgun that chose to quit the project and exit Ethiopia***. At the most preliminary level, that in itself makes it impossible for Akgun to present a credible claim of damages for violation. To claim damages for any investment value, Akgun must prove that Ethiopia's unlawful conduct extinguished the value of its investment. This, on the facts of the case, as set out in Section III hereinabove, it simply cannot do.

344. 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.[390] The rule merits

[389] *See* Statement of Claim, Sec. 6.C ("Lost Profits"); Sec. 6.D ("Claimant Must be Compensated for Loss of Opportunity"); and Sec. 6.E ("Out of Pocket Damages").

[390] The self-evident causation requirement is recognized in the ILC Articles on State Responsibility and their accompanying commentary. *See* ILC ARTICLES ON STATE RESPONSIBILITY, **CLA-042**, Art. 31(2) ("[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State") and pp. 203-204 ("[t]his phrase is used to make clear that the subject matter of reparation is, globally, ***the injury resulting from and ascribable***

repetition: Akgun bears the burden to prove injury as caused by each treaty breach that it pleads.[391] Akgun simply does not do so in its Statement of Claim. But again, this is not a function of inartful pleading. Akgun simply does not have the facts in this case.

b. Akgun's Quantum Assessment is *Void Ab Initio* for Resting on Faulty Legal Instructions

345. Turning to the expert report that the Claimant has proffered: If it survives the most cursory review for frivolity as matter of elementary common sense, it must be rejected for resting on faulty legal instructions and misapplication of the standards of valuation that it has itself put forward.

346. The A&M Report 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;[392] 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";[393] and that (iii) such "Measures" "as such are compensable to Claimant under the standard of full reparation."[394] If either of the first two legal assumptions is wrong, the inquiry must end there.

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to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act") (emphasis added).

[391] The position is well reflected in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*:

> "It is therefore insufficient to assert that simply because there has been a 'taking', or unfair or inequitable conduct, there must necessarily have been an '*injury*' caused such as to ground a claim for compensation. Whether or not ***each wrongful act*** by the Republic 'caused injury' such as to ground a claim for compensation must be analysed in terms of ***each specific 'injury'*** for which [the claimant] has in fact claimed damages.
>
> As set out earlier, the conclusions on causation reached by the majority of the Tribunal are based on the lack of linkage between ***each of the wrongful acts of the Republic***, and ***each of the actual, specific heads of loss and damage*** for which [the claimant] has articulated a claim for compensation."

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award of 24 July 2008, **RLA-34**, paras. 804-805 (citing ILC ARTICLES ON STATE RESPONSIBILITY, **CLA-042**, Art. 31(2)) (emphasis added).

[392] A&M Report, para. 53.

[393] A&M Report, para. 58.

[394] A&M Report, para. 58.

347. The flaw in each is shown as follows.

i. Faulty Instructions on Liability

348. The assumption that "rights to develop and operate a large-scale industrial zone" are an investment within the meaning of the Treaty is more fundamentally deficient as a basis for damages than for purposes of countenancing jurisdiction.[395] The legal basis is stated in particular as:

> "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."[396]

349. The valuation analysis utterly misunderstands the nature of the Agreement and the allocation of rights and obligations of the Parties. It ignores the fact that it is a land lease agreement. Land is leased in exchange for payment and for the purpose of industrial development. It ignores the mutuality of the potential risks and benefits. More importantly, it gratuitously ignores the unavoidable preconditions for the development to occur. That is not a question of liability alone; it goes directly to valuation because valuation ought necessarily to assume probability of success.

350. To achieve success, the project must meet regulatory requirements. The A&M Report assumes that the development of an industrial zone of the contemplated size occurs in a legal vacuum. 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*. Where the Agreement itself is valued, the full scope of rights and obligations of the Parties must be taken into account.

[395] Ethiopia's position with respect to the basis for purposes of jurisdiction is set out in Sec. IV.a *supra*.
[396] A&M Report, para. 53.

351. Such a holistic evaluation would have revealed that there are contractual conditions that the Claimant was either unwilling or unable to meet. These are environmental conditions. If the valuator assumes that the Claimant was willing and able to meet its environmental responsibilities, it must still show how its valuation makes sense without accounting for such obstacles to implementation of the project. The A&M Report makes no mention of the environmental preconditions for project implementation. It pretends that they do not exist when the Agreement itself makes them a precondition to its own execution.

352. To review, the environmental provisions of the Agreement state as follows:

(1) "[Akgun] shall protect the environment from pollution by using appropriate methods and technologies. In this regard [Akgun] has to take maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution and carryout the necessary environmental studies required in this regard."[397]

(2) "[Akgun] shall allow experts of the Ministry and the Oromyia Regional State, who shall be sent for continuous assessment and follow up the proper use of the land leased and its conformity with this agreement, to have access to this [industrial zone]." [398]

(3) "[Akgun] shall respect this Agreement and all other conditions stated in the relevant laws of Ethiopia."[399]

353. The "relevant laws" state that "[w]ithout 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

[397] 2012 ETIZ Agreement, **Exhibit C-009**, Art 8(10).
[398] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(11).
[399] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12)

in a directive issues pursuant to Article 5 of this [law]."[400] The Environmental Protection Authority's Directive No. 1/2008, entitled "A Directive Issued to Determine Projects Subject to Environmental Impact Assessment," includes, at Item No. 21, "Establishment of Industrial Zone."[401]

354. Under the law's implementing guidelines:

(1) "Environmental Assessment" is defined as "[t]he Methodology of identifying and evaluating in advance, any impact positive or negative, which results from the implementation of a proposed action."[402]

(2) "Environmental Impact Assessment Report" is defined as "[a] report containing sufficient information to enable the Environmental Agency to determine whether and under what conditions a proposed action should proceed."[403]

(3) "[A]ll feasible options to a project, policies, programs or its components like site, processes, products, raw materials etc. ***including the 'no go' option*** should be considered."[404]

(4) "Alternative[]" is defined as "[a] possible course of action that might be adopted in lieu of the proposal or activity or in terms of site, design, input, process, ***including the 'no action' alternative***."[405]

[400] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 3(1).
[401] A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Directive No. 1/2008, Environmental Protection Authority, **RLA-2**.
[402] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Environmental Assessment").
[403] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Environmental Impact Assessment Report").
[404] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3**, Sec. 4.2.2 ("Guiding Principles of [Environmental Assessment]") (emphasis added).
[405] Environmental Impact Assessment Procedural Guideline Series 1, Environmental Protection Authority, dated November 2003, **RLA-3** (defining "Alternatives") (emphasis added).

355. Finally, under the law, the Environmental Protection Authority has the discretion to "***refuse*** implementation of the project ***if it is convinced*** that the negative impact cannot be satisfactorily avoided."[406]

356. Ethiopian environmental law thus makes it clear that the industrial zone developer, Akgun, as well as all occupants of the industrial zone, must conduct their respective EIAs. In point of fact, ***the Agreement holds precisely zero value*** unless and until this regulatory requirement is cleared. The law also provides that the Environmental Protection Authority has an ongoing obligation to monitor compliance with all applicable environmental standards.[407]

357. A valuation of the Agreement as an investment that ignores all of 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. The Report must be rejected in its entirety for what it ignores. Ironically, the present environmental arbitration itself is an example of evidence of what could have gone wrong with the project in light of the certainty standard that the Report applies.

358. The expert cannot contend that these are mere matters of legal instruction because all of these considerations emerge from the text of the Agreement itself, which Agreement the Report purports to valuate. The Claimant cannot valuate selected provisions of the Agreement while dismissing and ignoring others. ***The Report ignores what completes it because what completes it is what destroys it.***

ii. Faulty Instructions on Breach of Treaty and Measure of Damages

359. The A&M Report is also to be rejected for it is predication on faulty instructions on treaty breach and measure of damages. The report's author states the legal instructions as follows:

[406] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 9(2)(c) (emphasis added).
[407] *See* Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 12.

> "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."[408]

360. Although these assumptions would give the outward appearance of the kinds of assumptions that may be made in the assessment of damages, a closer scrutiny shows that beyond their untruth as a matter of establishing liability, they also vitiate the merits of the damages assessment for at least two reasons.

361. First, the assumption of fault in this way bypasses the valuator's assessment of inherent risks of the execution of the Agreement.

362. Second, 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).[409]

363. Moreover, 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. Overall, the instructions omit all the necessary nuances and ask the expert to value a hypothetical enterprise in a utopian world where all goes well for the Claimant while all goes very poorly indeed for Ethiopia.

[408] A&M Report, para. 58.
[409] Remarkably, the expert simply recounts, in a footnote, the following without more: "Counsel in this matter has informed me that Respondent's actions in this matter represent breaches of the following provisions of the Treaty: Unlawful Expropriation, Fair and Equitable Treatment, Umbrella Clause and Non-Impairment Obligation." A&M Report, note 48. The expert then confirms, a mere three paragraphs later, her participation in the Claimant's conflation of all treaty standards into the expropriation mold where she states her selection of "a [valuation] date just preceding the date I have been instructed that Claimant's Investment was ***effectively destroyed***." A&M Report, para. 61 (emphasis added).

c. The Standards of Valuation

i. Lost Profits

364. The Claimant first states its injury to be US$ 381,477,179 in lost profits calculated on the basis of a discounted cash flow methodology.[410] The A&M Report 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" is "effectively destroyed."[411]

365. The A&M Report states a definition of fair market value ("FMV") as follows:

> "*The price, expressed in terms of cash equivalent, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts*."[412]

366. In applying this standard, nowhere does the A&M Report analyze its most important prong, i.e., "***when both [seller and buyer] have reasonable knowledge of the relevant facts***."[413] Although the expert's own standard requires analysis of the facts of the Agreement's implementation, nowhere are the relevant facts even mentioned. In reality, at a minimum, this step would have required an analysis of the effect of environmental preconditions on the value of the Agreement.

[410] Statement of Claim, p. 93, Table 5.
[411] A&M Report, para. 61.
[412] A&M Report, para. 60 (quoting American Society of Appraisers, "ASA Business Valuation Standards," dated November 2009, **Exhibit AM-315**, p. 27).
[413] American Society of Appraisers, "ASA Business Valuation Standards," dated November 2009, **Exhibit AM-315**, p. 27 (emphasis added).

367. An informed buyer who is willing to pay FMV would want to know, as a matter of due diligence, what are the conditions of contract implementation, what are the attendant permitting procedures, and what are the attendant regulatory requirements, et cetera. These factors are paramount in any transaction let alone where such conditions are expressly stated in the instrument that is being valued for sale.

368. The A&M Report states that "[i]n order for such a calculation to be accepted by the Tribunal, Claimant must typically prove that it is '***sufficiently probable'*** or '***reasonably certain'*** that such value could have been achieved."[414]

369. Further, relying on Ripinsky and Williams, the A&M Report states that "future losses must be proved" with ***"sufficient (degree of) certainty," "sufficient degree of probability," "some level of certainty," or "comparative likelihood,***" and that losses must be ***"probable and not merely possible."***[415]

370. While stating the standard fairly well, the A&M Report goes on to misapply it to a hypothetical utopian project and not the project actually at hand where it relies only upon (i) the developer's purported past successes in other localities on other continents; and (ii) Ethiopia's aggregate growth trajectories.[416] What the A&M Report does not do is precisely what it is asked to do: evaluate the 2012 ETIZ Agreement with all its attendant terms and conditions.

371. The A&M Report makes numerous unwarranted or patently faulty assumptions, leans heavily upon the feasibility studies of the Claimant itself, and does not otherwise make a holistic, informed, or independent assessment of all the conditions of project implementation, including attendant regulatory requirements. It does not even mention the principal point of

[414] A&M Report, para. 79 (quoting Marboe, Irmgard: Calculation of Compensation and Damages in International Investment Law (Second Edition), **Exhibit AM-318**, p. 116 and M. Kantor, Valuation for Arbitration (2008), **Exhibit AM-322**, p. 71) (emphasis added).
[415] A&M Report, para. 80 (quoting S. Ripinsky & K. Williams, Damages In International Investment Law (2008), **Exhibit AM-339**, p. 164) (emphasis added) (further citations omitted).
[416] *See* A&M Report, Sec. 5.1.

contention, i.e., environmental impact assessment, including the distinct and legitimate possibility that the entire project may have been rejected on its own terms.

372. It is not sufficient to simply say, under instruction, one is assuming breach; it still must be shown that, ***but for*** the breach assumed, all value that is sought would be realized. A reasonable certainty analysis that deliberately omits the elephant of uncertainty (environmental uncertainty) is deliberately empty.

373. Overall, the threshold of attainability of lost profits is so far out of reach for this Claimant on these facts that the mere attempt evokes a classical caricature of arbitral abuse and adventurism, as seen by the Claimant's contortions in seeking to suggest otherwise.

374. The overwhelming weight of the authority in international law leaves no room for doubt: lost profits may only ever be awarded in the case of an enterprise or going concern with a proven record of profitability.[417] 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."[418] The Report to the Development Committee that accompanies these guidelines further offers the following perspective:

> "[P]articular caution should be observed in applying this method as experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits. Compensation under this method is not appropriate for speculative or indeterminate damage, or for alleged profits which cannot legitimately accrue under the laws and regulations of the host country."[419]

[417] Ethiopia here notes Article 31(2) of the ILC Articles on State Responsibility, which states that "compensation shall cover any financially assessable damage including loss of profits insofar as it is ***established***." ILC ARTICLES ON STATE RESPONSIBILITY, **CLA-042**, Art. 36(2) (emphasis added).
[418] *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, World Bank Group (1992), 31 ILM 1366, **RLA-35**, Art. IV(6)(i).
[419] *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, World Bank Group (1992), 31 ILM 1366, **RLA-35**, para. 42 (citation omitted).

375. Thus, under the Claimant's own legal authority, in the case of *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, the tribunal found as follows:

> "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 the Claimant."[420]

376. That tribunal reached this result even in a case where the relevant enterprise had been in operation for a period exceeding two years.

377. In the present case, the extent of Akgun's "operation" is seen in a single concrete shell.

[420] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, dated 29 May 2003, **CLA-006**, para. 186. The tribunal also noted the "considerable difference" in the amount paid by the claimant under a tender offer for relevant assets – US$ 4,028,788 – and the relief sought by the Claimant, amounting to US$ 52,000,000, which the tribunal considered "likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant's investment at the time of making the investment." *Id.*

Photographs of the Sendafa Site, dated February 2021, **Exhibit R-7**

ii. Loss of Opportunity

378. Acknowledging the impossibility of its claim for lost profits on the basis of discounted cash flow, the Claimant next seeks damages for "[l]oss of [o]pportunity" to develop the industrial zone project.[421] But again, on the facts of this case, Akgun cannot prove that it has lost any opportunities for reasons that are not attributable to its own default.

379. Quite 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.[422]

380. Compensation for loss of opportunity is, as such, not available to the Claimant under the Treaty or otherwise.[423]

iii. Out of Pocket Damages

381. Finally, the Claimant seeks in four sparse paragraphs "compensation for the amounts it expended in its effort to pursue its investment."[424]

382. 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

[421] *See* Statement of Claim, Sec. 6.D.
[422] *See, e.g.*, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits of 30 March 2010, **RLA-36**, para. 382 ("the 'loss of 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'"). The tribunal considered the state of the law to be so evident that it did not invoke any authority.
[423] *See* Statement of Claim, para. 4.1, wherein the Claimant submits "[i]t is well settled that 'the applicable law in any claim for a breach of [a] treaty can be [] said to be the treaty itself specifically and international law generally" (quoting *Azurix Corp. v. Argentine Republic* (I), ICSID Case No. ARB/01/12, Decision on Annulment, dated 1 September 2009, **CLA-026**, para. 146).
[424] Statement of Claim, para. 6.81.

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.[425]

383. In addition to the governing laws and the Agreement that invokes them, the Claimant was expressly requested to prepare and present the requisite EIA report immediately upon issuance of its investment permit, for 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.[426]

384. Whatever the Claimant may or may not have subjectively believed prior to that point in time, as of May 2013 the Claimant was thus on ***actual notice*** of the EIA requirement upon which project development depended. The Claimant, however, was so cavalier as to continue pursuit of development works ***even after*** receiving the Prime Minister's express order of suspension, conveyed via the Ministry of Industry, in July 2014.[427]

385. The 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.

d. Where There Is No Entitlement to Damages, There Is No Entitlement to Interest

386. Where there is no compensable harm, there are no damages, and thus no interest.

[425] *See,* in this respect, Witness Statement of Mr. Ahmed Abtew, dated 12 March 2021, para. 15 ("[t]his act was not only contrary to the letter and spirit of the Agreement and applicable laws but was indeed intended to create new facts on the ground in an effort to make a possible relocation decision difficult").
[426] *See* paras. 49-51 *supra*.
[427] *See, e.g.*, Letter from Akgun Construction to Ethiopian Electric Utility, dated 27 August 2014, **Exhibit C-022** (stating that "the construction and installation of the 1st factory called Afro-oil manufacturing plc which is located in our industry zone has reached above 80% and it need[s] supply of electric power because it is near to be operational"); *see also* Letter from Ministry of Industry to Akgun Construction, dated 20 November 2014, **Exhibit C-030** (stating that "we have received a report that Afro Oil Manufacturing PLC, which has been sub-leased a plot of land in the Industry zone has continued construction activities in the area" and thus "the ministry urges your company to give clarification as to why the decision has been violated").

e. Conclusion

387. The A&M Report relies on faulty legal instructions, conveniently omits fundamental regulatory preconditions of contract implementation and arrives at a conclusion that lacks the slightest measure of rationality. It is wrong as a matter of law. It is wrong as a matter of fact. It is wrong as a matter of common sense.

388. The sunk costs assessment is not only unsupported by the evidence but is additionally a function of the Claimant's own unlawful conduct, which conduct has caused injury to the Respondent, as now elaborated in Ethiopia's counterclaims.

VIII. COUNTERCLAIMS

a. Introduction

389. Under the 2012 ETIZ Agreement, Akgun assumed numerous contractual obligations. It did, however, fail to carry out any one of them.

390. Akgun's singular explanation for this failure to date is that it was asked to conduct proper environmental assessments. As has been set out at great length, Akgun cannot credibly contest that it was bound to perform such assessments under the Agreement and the Ethiopian laws.[428] Those Ethiopian laws, whose existence and operation were specifically and actually known to Akgun,[429] would naturally govern the ETIZ project of their own force where the relevant lands fall within Ethiopia's territorial jurisdiction. The Ethiopian laws are further and expressly referenced within the Agreement itself,[430] accompanied by an explicit

[428] *See* Sec. III.c *supra*.
[429] *See, e.g.*, Letter from the Environmental Protection Authority to Akgun Industry and Trading PLC, dated 4 October 2007, **Exhibit R-3** and paras. 31-35 *supra*.
[430] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(12) ("[Akgun] shall respect this Agreement ***and all other conditions stated in the relevant laws of Ethiopia***") (emphasis added).

contractual undertaking to "***carryout the necessary environmental studies***," to which Akgun freely assented.[431]

391. The 2012 ETIZ Agreement was not Ethiopia's unilateral gift of land to Akgun. It was 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. Its abandonment not only breached the Agreement but has caused Ethiopia significant loss.

392. Ethiopia hereby presents its counterclaims seeking damages for losses caused by Akgun's breach of contract and gratuitous and unmitigated abandonment of the project.

b. Parties to the Dispute

393. The Parties to the present claim are the Federal Democratic Republic of Ethiopia as counterclaimant and Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. as counter respondent.[432]

c. Jurisdiction

394. Ethiopia has earlier noted the Claimant's unsuccessful attempt to jurisdictionally bar Ethiopia's valid and legitimate claims by seeking to recast what are rather clear municipal contract law questions into violations of international law.[433] The Claimant not only repudiates its contractual agreement to arbitrate disputes in another forum but also argues preemptively for the exclusion of Ethiopia's counterclaims before they were even brought.

[431] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10) (emphasis added).
[432] *See* Procedural Order No. 1, dated 4 December 2020, Sec. 1.
[433] *See* Sec. IV.b *supra*.

395. Under the heading "This Tribunal's Jurisdiction Does Not Extend to Counterclaims,"[434] the Claimant submits as follows:

> "For present purpose, Claimant reiterates that the only source of this Tribunal's jurisdiction is the Treaty. 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.'"[435]

396. The Claimant's pleading here suffers the same superficiality that pervades its entire submission. The quoted sentence reads in full as follows: "***Disputes*** between one of the Parties and an investor of the other Party, ***in connection with his investment***, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment."[436]

397. Thus, this Tribunal is vested of jurisdiction over "[d]isputes… in connection with" investment. The 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.

398. This Tribunal has two interrelated bases for jurisdiction over Ethiopia's counterclaims. The first and most obvious one is the Claimant's consent expressed in its presentation of breach of contract claims under the umbrella clause. If the umbrella clause contract claims are admitted, there could be no doubt that the Claimant has consented to the jurisdiction of the Tribunal to adjudicate all disputes arising out of the same contract. It is impossible that there would be jurisdiction over the claims but not over counterclaims when the counterclaims arise out of one and the same contractual instrument containing reciprocal obligations.[437]

[434] Statement of Claim, Sec. 3.F.
[435] Statement of Claim, para. 3.27 (quoting the Treaty, **CLA-001**, Art. VII) (emphasis in the Claimant's quotation).
[436] Treaty, **CLA-001**, Art. VII(1) (emphasis added).
[437] Ethiopia recalls, in this respect, Article 19(3) of the 1976 UNCITRAL Arbitration Rules ("the 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 ("the respondent may make a counterclaim

399. The Claimant's pleading suffers a further and serious analytical oversight, which is the second basis of jurisdiction. Aside from the umbrella clause contract-based claims, all of the Claimant's treaty-based claims arise out of the contract as well.

400. The core of the expropriation claim states, for example, as follows:

> "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. 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."[438]

401. This is a claim for breach of contract, pure and simple.

402. The core of the claim for breach of FET states:

> "5.36 In this case there can be no doubt that Ethiopia, through specific representations made by the [Ministry of Industry] and the Oromia Regional State, created a legitimate expectation that Akgun would be able to use the land allocated to Akgun for the express purpose of developing ETIZ and that Ethiopia would provide governmental support to Akgun. Indeed, there is no doubt that explicit representations by a State, such as Ethiopia's commitments to support ETIZ as provided in the 2012 ETIZ Agreement, create specific expectations.
>
> 5.37. Similarly, there is no doubt that, in the context of this case, where Respondent recruited Claimant, negotiated with Claimant, entered into a series of agreements with Claimant and repeatedly encouraged Claimant through acts and statements at the highest levels of government, that Claimant's expectations were legitimate. This is all the more true where the State not only approved a specific piece of land for the project, but itself identified the land, proposed the land to Claimant, accepted payment for the land and allocated the land to Claimant.

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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* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 21. By initiating a treaty claim but seeking to bring claims arising out of the contract before this Tribunal, the Claimant cannot avoid counterclaims.

[438] Statement of Claim, para. 5.15.

> 5.38. Finally, there is equally no doubt that Respondent violated the expectations it had created when it withdrew both its support for ETIZ and prohibited Claimant from using the land for its agreed purpose — i.e., the development of ETIZ."[439]

403. This too is a claim for breach of contract by another name. The 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.

404. Claims under a contract invite the counterparty's counterclaims. Therefore, in addition to consent-based jurisdiction, 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. It would be inequitable, unjust, and indeed profoundly so, if the Tribunal were to endorse the Claimant's grotesque maneuver, countenance contract claims masquerading as treaty claims, and deny any consideration of counterclaims.

405. 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).[440] That tribunal would have had the clear contractual jurisdiction over any counterclaims arising out of the

[439] Statement of Claim, paras. 5.36-5.38 (citation omitted).
[440] *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 21(5) ("[t]he applicable law for the arbitration shall be Ethiopian laws, the [Treaty] and accepted principles of the international law").

Agreement. Fundamental justice requires that this Tribunal fill that gap if it decides to exercise jurisdiction over any of the Claimant's claims.[441]

406. 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 the Claimant.

d. Applicable Law

407. The Parties to the 2012 ETIZ Agreement have selected Ethiopian law, the Treaty, and accepted principles of international law to govern the Agreement.[442] For these contract claims, therefore, the principal applicable law is the Ethiopian Law of Obligations. Ethiopia's Law of Obligations is contained in Book IV of its Civil Code of 1960.[443] Book IV offers detailed and modern rules on contractual obligations. The most relevant provisions are set out as follows.

408. Ethiopian law recognizes the fundamental rule of *pacta sunt servanda* in the following terms: "The provisions of a contract lawfully formed shall be binding on the parties as though they were law."[444]

409. Article 1771 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

[441] The Respondent notes, in this respect, a recent resolution of the *Institut de Droit International* stating that "[b]oth the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent, interpreted in accordance with the principle of the equality of the parties," this latter being "a fundamental element of the rule of law that ensures a fair system of adjudication" and, as such, "a general principle of law applicable to the procedure of international courts and tribunals." Resolution on Equality of Parties before International Investment Tribunals, *Institut de Droit International*, dated 31 August 2019, **RLA-37**, Preamble and Art. 2(1).
[442] *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 21(5).
[443] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Book IV (Obligations), **RLA-38** (hereinafter the "Civil Code").
[444] Civil Code, **RLA-38**, Art. 1731.

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."[445]

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

"Art. 1790. – *Damages arising out of non-performance*

(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. – *Damage when to be made good*

(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."[446]

411. Article 1790(2) thus invokes the chapter regarding extra-contractual liability to determine the damage to be made good. Its fundamental rules read as follows:

"A. *Material damage*

Art. 2090 – *Modes of compensation.*

(1) Unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages.

[445] Civil Code, **RLA-38**, Art. 1771. Article 1775 establishes that "[n]otice need not be given where … the debtor has declared in writing that he would not perform his obligations." *Id.*, Art. 1775(c).
[446] Civil Code, **RLA-38**, Arts. 1790-1791.

> (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.
>
> Art. 2091. – *Extent of damages*
>
> 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."[447]

412. These provisions collectively constitute the governing law as to the determination of liability and assessment of damages.

e. Statement of Facts

413. The Statement of Facts contained in Section III above of this Statement of Defense, Objections to Jurisdiction, and Counterclaims is incorporated by reference in its entirety.

f. Substantive Claims

414. Barring the mutual termination of a contract, the absence of its execution requires legitimate justification. Akgun has not offered and cannot offer a legitimate explanation for its failure to perform its contractual obligations of development under the Agreement. Akgun's only explanation for its non-performance is that it declined to carry out environmental obligations that are both established in law and affirmed in the Agreement itself.[448]

415. As indicated, 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."[449]

[447] Civil Code, **RLA-38**, Arts. 2090-2091.
[448] *See* Secs. III.c and III.e *supra*.
[449] Civil Code, **RLA-38**, Art. 1791(2).

416. The precise terms of the obligations that Akgun undertook but failed to perform without justification are stated in the following section.

i. Non-Performance of Akgun's Obligations

417. Akgun undertook numerous obligations under the 2012 ETIZ Agreement that it has failed without justification to perform.

418. As a threshold matter, the Agreement was premised on certain fundamental assumptions regarding Akgun's abilities and intentions to develop. These assumptions arose from Akgun's own representations as to its financial ability, technical competence, and professional skill.

419. The preamble of the Agreement memorializes these representations in the following terms:

> **WHEREAS**; the Developer has know-how and experience at the highest level regarding the establishment of an industrial zone, construction of infrastructure and superstructure, operation of industrial zones and finding Investors to invest in industrial zones;
>
> **WHEREAS**; the Ministry recognizing 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;
>
> **WHEREAS**; the Developer intends to bring its highest level of know-how, experience, financial, technical and technological resources to the Federal Democratic Republic of Ethiopia for the purpose of establishing an industrial zone within the scope of the project.
>
> **NOW THEREFORE**; with this purpose in view, the contracting Parties have agreed to be bound by the provisions of this Agreement.
>
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2012 ETIZ Agreement **Exhibit C-009**, Preamble

420. Thus, 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."[450]

421. Akgun failed to perform upon that promise.

(1) Breach of Obligation to Develop an Industrial Zone

422. Article 10 of the Agreement contains the most specific contractual obligations that Akgun, as Developer, undertook. This article provides as follows in full:

[450] 2012 ETIZ Agreement, **Exhibit C-009**, Preamble.

ARTICLE 10. RIGHTS AND OBLIGATIONS OF THE DEVELOPER- RELATED TO THE DEVELOPMENT OF THE IZ

1. The Developer shall bring its highest-level of know-how, experience, technical, financial resource and technological equipment to the Federal Democratic Republic of Ethiopia for the purpose of establishing an organized industrial zone.

2. The Developer shall submit the detailed Business plan to the Ministry within 1 (one) month as of the signing date of this Agreement.

3. Acting with the capacity of duly authorized contractor, the Developer is responsible solely for the whole planning, project designing, infrastructure and superstructure constructions related to the Project, including the preparatory studies such as the ***"Feasibility Report"*** and ***"Business plan"*** related to the Project. Construction works can be realized directly by the Developer itself or by sub-contractors determined by the Developer. The Developer has the full right and power to solely assign sub-contractors for the construction works and to execute sub-contractor agreements with them.

4. The Developer shall realize the Architectural, Static, Mechanical, Electrical, Installation, Landscaping and Furnishing works and all other related works within the scope of the Project for the

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infrastructure and superstructure facilities to be constructed over the Land received in accordance with the procedure and progress as to be specified in detail in the "**Business plan**" to be prepared in compliance with the objective of this Agreement and the provisions specified in the relevant federal and regional laws and regulations of the Federal Democratic Republic of Ethiopia.

5. The Developer shall be entitled and authorized to carry out the transactions regarding the parcels on the Land within the context of this Agreement.

6. The Developer may at any time enter into any kind of collaboration or partnership with any Business Person or company or institution with respect to the construction, management and operation of the IZ and its social and commercial facilities including without limitation education facilities, exhibition and trade fair facilities, accommodation facilities, trade centers, filling stations and logistic parks.

7. The Developer has the right to invest in businesses to be set up within the IZ.

8. The Developer shall be exclusive authority regarding the construction of the buildings to be built over the Parcels to be allocated for the Industrialists, and such Industrialist cannot deal with any other contractor other than the Developer without obtaining the prior written consent of the Developer.

9. The Developer shall also be exclusively and fully authorized to execute Sub-Lease Contract to be signed one by one with each potential Industrialist willing to establish a facility or factory within the scope of the Project and the investment law. The

Developer shall determine the provisions and conditions of the said Sub-Lease Contract.

10. Following the allocation and delivery of the Land, the Developer shall be entitled to use the land to construct buildings and the necessary facilities including water, electricity and sanitary installations in order to properly start and conduct the works. The buildings and facilities shall be appropriate for accommodation and operation of personnel and for protection of property in accordance with the health, safety and technical conditions and these buildings shall be secured as much as possible against any and all internal factors.

11. The Developer is entitled to employ local and/or foreign professional workers in such qualification and number it may deem appropriate for the execution of the Project. The Developer shall not hire unskilled foreign employees. Relevant Ethiopian laws shall govern such employments. The relationship between local employees and the Developer shall be governed as per the relevant laws of Ethiopia and agreements between the concerned parties.

12. The Developer shall submit monthly written reports regarding the progress of the Project to the Ministry on the works executed, explanations regarding the occurrences leading to delay, if any, measures taken or to be taken for the prevention or elimination of such delays and the requests and demands, if any, made by the Ministry. Such monthly reports shall be submitted within the first 5 (five) business days of the following month.

13. In addition to the report stated under sub-article 12 of this Article, authorized representatives of the Developer shall submit an activity report prepared on annual basis including the

activities realized in the previous year to the Ministry within July during the term of this Agreement.

14. The Developer may freely use all legal instruments for the purpose of attracting potential Investors and Industrialists for the Project, and may carry out international advertising activities for the publicity of the Project, organize international tours and attempt to introduce the Project to the potential investors through presentations, conferences and similar methods.

15. Should the potential Investors investing in the IZ in accordance with the Ethiopian investment laws or the lenders providing funds or loans for the Project request diminution in the total area of the cultural and social facilities of the Project, the Developer shall have the right to amend or change the zoning and the architectural plan of the Project. The Ministry shall be informed before the changes made on the Project.

16. All the rights of the management of the Project shall exclusively and entirely reside in the Developer.

17. All decisions relating to the management of the IZ including the service quotations and pricing, internal biddings, incorporations, parcel renting and the like shall be taken by the Developer.

18. The Developer has the right to register its intellectual and industrial rights arising during the realization of the Project as per the relevant laws of Ethiopia.

19. The Developer shall avail all of its team and equipment which are directly related with the project in sufficient amount and

performance capacity on time and in accordance with the Business plan and in accordance to the Ethiopian Laws.

20. The Developer and its shareholders shall be able to repatriate their revenues obtained within the Federal Democratic Republic of Ethiopia in foreign currency in accordance with the investment law, tax laws and the foreign exchange regulations of the country. On condition that any possible changes may occur on the related laws, the Developer shall enjoy the rights in favor. Acquired rights shall be protected in accordance with the law.

21. The provisions of sub article (20) above shall apply regarding the right of repatriation of income by the Investors and the Industrialists making investment and in the IZ.

22. The Developer shall prepare and submit to the Ministry a Master Plan regarding the development and utilization of the Land (1.460 hectares) of land to be handed over within 3 months after the signing of this Agreement.

2012 ETIZ Agreement, **Exhibit C-009**, Art. 10

423. Akgun has failed to perform any one of its development obligations under Article 10 of the 2012 ETIZ Agreement.

(2) Breach of Obligation to Finance the Project

424. Akgun also undertook the obligation to finance the entirety of the ETIZ project. Its obligation in this respect is further stated in Article 12 of the Agreement as follows:

ARTICLE 12. FINANCING OF THE PROJECT

1. The Developer shall seek, on its own, opportunities to get financing from natural persons, legal entities, private equity or venture capital funds, international banks, financial institutions or any other sources with interest to invest in and/or finance the Project in accordance to the rules and regulations of Ethiopia.

2. The Ministry accepts and undertakes that the Developer shall act independently in finding Investors and executing partnership agreements.

2012 ETIZ Agreement, **Exhibit C-009**, Art. 12

425. Akgun has, once again, failed to perform this obligation.

(3) No Justification for Failure to Perform

426. Akgun 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.

427. As clearly set out in Ethiopia's Statement of Facts hereinabove, Akgun does not claim that it has performed ***any one*** of these obligations.[451] There is thus no dispute between the Parties on this point, as a matter of fact. The dispute pertains solely to whether or not there was any justification for non-performance as a matter of law.

428. Under the applicable Ethiopian law, "[t]he party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault"; further, "[h]e shall not be released unless he can show that performance was prevented by force majeure."[452] The Civil Code specifies where *force majeure* is deemed to have occurred in Article 1792:

[451] *See* Sec. III *supra*.
[452] Civil Code, **RLA-38**, Art. 1791.

> "(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."[453]

429. Under Article 1793 "[t]he following occurrences may, according to the circumstances, constitute cases of force majeure:

> (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."[454]

430. There were no circumstances of *force majeure* as defined in Article 1792 of the Civil Code in this case. As clearly explained in Ethiopia's Statement of Facts hereinabove, Akgun was never asked to perform what the Agreement and applicable laws did not require.[455] The July 2014 suspension of construction works was ordered ***because of*** the 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.

431. Finally, under Article 14 of the Agreement, entitled "Events of Force Majeure," an event of *force majeure* must be contemporaneously notified in order to excuse a party's non-performance.[456] No such notification was ever given as no such event ever occurred.

[453] Civil Code, **RLA-38**, Art. 1792.
[454] Civil Code, **RLA-38**, Art. 1793.
[455] *See* Sec. III *supra*.
[456] 2012 ETIZ Agreement, **Exhibit C-009**, Art. 14(3).

ii. Conclusion

432. Akgun has failed to perform nothing less than all of its obligations under the Agreement. Because it has breached these obligations without justification, it is liable to pay damages for loss that is caused under the applicable law.

g. Damages

433. Under Article 2091 of the Civil Code, the extent of damages is stated as follows:

> "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."[457]

434. The victim of breach may also seek future damages. In this regard, the immediately following article states that "[a] future damage which is certain to occur shall be made good without waiting for it to materialize."[458]

435. In performance of their obligations under the 2012 ETIZ Agreement, the Ministry of Industry and the Oromia Regional State took numerous steps. Exercising the government's constitutional power of eminent domain, numerous residential and agricultural lands were expropriated to make way for the development project. This was 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. As Mr. Sisay Gemechu Edo testifies, Akgun had initially promised that its project would create one million

[457] Civil Code, **RLA-38**, Art. 2091.
[458] Civil Code, **RLA-38**, Art. 2092.

jobs over ten years.[459] Akgun did indeed propose to create more than 300,000 direct employment openings, as may be seen in its own EIA.[460]

436. Akgun had also proposed that diverse industries would be located in the industrial zone. The promised level of investment, 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. In concluding the 2012 ETIZ Agreement, Ethiopia expected to gain all the economic benefits of an industrial zone of the contemplated size. All of these benefits would have been gained had Akgun performed upon its many promises.

437. Ethiopia recognizes, however, that for these economic benefits to accrue, myriad obstacles would have had to be overcome. Ethiopian law provides for compensation of losses that are ***certain*** to occur.[461] As such, in recognition of the difficulty of proving the certainty of the occurrence of future damages so as to meet the legal requirement, the amount that Ethiopia seeks is limited to material damages for loss and injury that have ***actually and already occurred***, including interests under the applicable law.

438. Akgun paid, in its own telling, approximately US$ 880,000 for full expropriation of all resident families,[462] and took possession of one hundred hectares of land with unencumbered leasehold rights thereto extending for a period of eighty years.[463] Because it thereafter failed

[459] *See* Witness Statement of Mr. Sisay Gemechu Edo, dated 12 March 2021, para. 4; *see also* Letter from Akgun Construction to Ministry of Industry et al., dated 5 March 2014, **Exhibit C-068** ("[w]hen working at full capacity the area will provide employment opportunities to 1 million people and this fact makes us understand the importance of the project more clearly").
[460] *See, e.g.*, Environmental Impact Assessment Plan of ETIZ by GOTA (Main Document), dated 3 March 2014, **Exhibit C-069**, p. 16 ("[w]ater distribution system will be laid out with an estimated 790 number establishment and an estimated 42,000m3 of daily consumption and an estimated 315,000 workers will be employed"); *see also* Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**, p. 3 ("[i]n the case of realization of the planned investment and activities reaching full capacity, 700.000 people are expected to be employed").
[461] *See* Civil Code, **RLA-38**, Art. 2092 (stating that future damage "shall be made good without waiting for it to materialize" where it is "certain to occur").
[462] *See* Witness Statement of Yusuf Akgun, dated 19 November 2020, para. 4.22.
[463] *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 6(1).

to develop the land in breach of the Agreement, Akgun's conduct in 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.[464]

439. In 2013 Akgun subleased a portion of this land at a price of US$ 1 per square meter per annum:

Article 5 – Price and Payment

5.1. Both parties have mutually agreed that the sub-lease price of the sub-leased land per square meter is **US Dollar 1.00 per square meter per annum (US Dollar One per square meter Per annum)** and its birr exchange rate shall be corresponding to the exchange rate of the Ethiopian National Bank at the date of payment and the total price of sub-lease to be paid by the Sub-Lessee to the Sub-Lessor is **US Dollars 46,973.00 (US Dollars Forty Six Thousand Nine Hundred Seventy Three per annum)** and its birr exchange rate shall be corresponding to the

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Sublease Agreement between Akgun and Afro-Oil Manufacturing PLC, dated 23 October 2013, **Exhibit C-015**

440. This rent was obtained by Akgun without development and as-is; this number is thus a relevant and reliable indicator of the fair market value of the land as from the date of detainment. As such, Ethiopia's value deprivation over the full allotment of one hundred hectares is reliably calculated in the amount of US$1 per square meter per annum, or US$1 million per year:

[464] *See* Protocol Executed between Akgun Construction and Bureau of Rural Land and Environmental Protection of Oromia Regional State for the Handover of the Land, dated 6 March 2013, **Exhibit C-013**. For simplicity, Ethiopia has here calculated its damages incurred to date on the basis of an eight-year detention period, i.e. to 6 March 2021. The figure will be revised to current as at the date of final award and payment.

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

441. It is further warranted 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. Akgun's own sublease agreement stipulates a rental increase of five percent every three years.[465] Ethiopia here adopts this modest measure. Lastly, under Ethiopian law, statutory interest of nine percent is applied to the date of payment.[466]

442. Ethiopia's damages are thus calculated as follows:

	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**

443. Ethiopia now claims from Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. actual damages provisionally calculated in the amount of **US$ 12,466,803.41** to date, which amount will be revised to current as of the date of final award and execution.[467]

[465] Sublease Agreement between Akgun and Afro-Oil Manufacturing PLC, dated 23 October 2013, **Exhibit C-015**, Art. 5.2.
[466] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Art. 2479, **RLA-39**.
[467] *See* note 464 *supra*.

IX. COSTS

444. Article 42(1) of the UNCITRAL Rules supplies the controlling rule on costs. It provides as follows in full:

> "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."[468]

445. As demonstrated in this Statement of Defense, Objections to Jurisdiction, and Counterclaims, and as will be further seen in the course of later submissions, Akgun's claims are to be dismissed in their entirety. Ethiopia submits that there is no basis to depart from the presumption of this rule and requests the full award of costs in its favor.

X. REQUEST FOR RELIEF

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

[468] 2010 UNCITRAL Arbitration Rules, Art. 42(1).

- 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.

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

Respectfully submitted,

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Professor Won L. Kidane
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Addis Law Group LLP

12 March 2021