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

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# RESPONDENT'S POST-HEARING SUBMISSION IN RESPONSE TO THE TRIBUNAL'S PROCEDURAL ORDER NO. 4

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11 November 2022

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# I. INTRODUCTION

1. The Federal Democratic Republic of Ethiopia ("Ethiopia" or the "Respondent") respectfully offers its response to the Tribunal's questions presented in its Procedural Order No. 4 rendered on 19 October 2022.

2. It is sometimes feared that theory could obscure fact. The fact is that the Tribunal has watched the Claimant's unsuccessful search for the proverbial black cat in the darkroom because it was simply not there.

3. The question presented to this Tribunal is whether Ethiopia violated international law when its Ministry of Industry asked Akgun to submit an acceptable environmental study required by existing law or relocate to a less environmentally sensitive site. No level of exorbitance in international legal doctrine could innocently convert these types of routine administrative decisions of a sovereign State into violations of international law. If such be the case, no sovereign State could function without being held responsible for violating international law by its routine and regular administrative decisions every single day. That certainly was not the purpose of the Ethiopia-Turkish Bilateral Investment Treaty. It exists to protect the legitimate interests of investors and provide remedy where they are treated unfairly and inequitably or when their property is unduly taken.

4. The simple question is thus: Did Ethiopia treat Akgun unfairly and inequitably or otherwise take its property in this case? The facts show that it did not. No amount of doctrinal stretch could cure the factual deficiency. By signing the Treaty, Ethiopia and Turkey did not intend to be hauled before tribunals for routine microlevel environmental decisions under their existing laws. Ethiopia submits that no sovereign State would accept liability for these types of routine administrative decisions. Ethiopia's participation in this process is evidence of its respect for the commitments that it gave in the Treaty. It has honored its promise, submitted extensive written pleadings, and participated in the hearings during which it presented its documentary and testimonial evidence completely disproving the outlandish claims of

conspiracy and discrimination that formed the basis of the Claimant's initial factual theories that prompted the initiation of the case in the first place. Ethiopia submits that with those grave factual allegations disproven in front of its probing eyes, the Tribunal is not left with the most basic factual predicates required to prove a violation of international law under even a most expansive theory of liability.

5. Over the course of more than three years of proceedings and during two weeks of hearings in May 2022, Ethiopia has established beyond doubt that the suspension and relocation decisions of the Ethiopian government were made exclusively because of Akgun's failure to meet the *bona fide* environmental obligations assumed under existing Ethiopian laws and expressly included in the contract that it knowingly and willingly assumed. Ethiopia's suspension and relocation decisions were mere enforcement of the contractual obligations and demands of the applicable law.

6. The conception of expropriation under customary international law requires profuse distortion to convert a decidedly *bona fide* environmental decision into a compensable taking. As a matter of fact, Ethiopia genuinely and profoundly believes that a *bona fide* application of the expropriation provision of the Treaty requires no greater exposition of arbitral jurisprudence or sorting of clashing doctrines beyond simple application of the Treaty's text to the facts of this case.

7. The second question pertains to the so-called umbrella clause "importation." Ethiopia left the May 2022 hearings with the impression that the Claimant had abandoned its creative umbrella clause argument because it realized that it pushed the boundaries of frivolity a little bit too far. What is left of it is unsalvageable.

8. The Tribunal has also queried the parties regarding the nature of a leasehold interest under Ethiopian law, the duty of mitigation under international law, and the award of costs in this arbitration. Although these concepts are analytically redundant where liability could not be found, pleading exhaustion necessitates a response.

9. Ethiopia now addresses each of the Tribunal's questions *seriatim* as follows.

## II. RESPONSES TO THE TRIBUNAL'S QUESTIONS

### 2.1 Police powers doctrine and expropriation. Word count limit: 3000.

#### 2.1.1 What is the content and scope of the police powers doctrine under customary international law? How should this doctrine be applied to the facts of this case?

10. The police powers doctrine was neither briefed nor otherwise presented to the Tribunal in any meaningful way because Ethiopia's principal argument was that there was no wrongful action attributable to Ethiopia and injurious to the investor that could conceivably qualify as an act of expropriation to begin with. Ethiopia submits that the police powers doctrine intersects with expropriation when and only when the Tribunal identifies a direct or indirect act that is otherwise expropriatory in the first place. At a minimum, the Tribunal should first identify a "regulatory taking" to apply the principle to. It is only when the exercise of a confiscatory regulatory power is established that the doctrine becomes even relevant. Where, on the facts of any given case, there is no established regulatory action that has deprived an investor of a property interest, the doctrine presents no dilemma to resolve.

11. Ethiopia submits again that the order for suspension of project works until submission of environmental impact studies was a simple contract performance demand that was unduly elevated to a treaty claim. As the Tribunal would recall, this was accompanied by a relocation option, which the investor admitted to having refused. Unless the Tribunal totally disbelieves all the evidence that Ethiopia has submitted including Akgun's own admissions as to exactly what happened in this case, it need not struggle with the application of competing doctrines.

12. In any case, the application of competing doctrines no less requires the Tribunal to decide, genuinely and in good conscience, whether on balance the Respondent State took an investor's property and denied it compensation. At the end of the day, all the principles of international and national law briefed and argued in this case as well as the police powers doctrine, along with the attendant doctrines of amelioration, ask the same stubborn question of this Tribunal:

On the facts of this case, did Ethiopia take an investor's property and refuse to pay for it? The answer is a resounding no.

13. It is extremely important to remember the established facts of this case: Akgun was asked to suspend works because it was not able to provide satisfactory environmental studies that it expressly undertook to perform by contractual agreement. It was offered a reasonable relocation option. It refused, exited Ethiopia, and initiated this action some four years later. No level of perversion of legal theory can yield a finding of liability on the facts of this case in modern times.

14. Quoting from the award in the case of *Saluka Investments BV v. Czech Republic*, Catharine Titi summarizes the perennial question best: "It thus inevitably falls to the adjudicator to determine ***whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation***."[1] Whichever doctrine it applies, this Tribunal's unavoidable task is to determine, on the facts of this case and in good conscience, whether the red line was crossed. Ethiopia resolutely submits that such conclusion is quite simply impossible.

15. In its classic and respected formulation (which naturally extends beyond the expropriation standard alone), the police powers doctrine states:

> "A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."[2]

16. In the words of the Organization for Economic Co-operation and Development, "[i]t is an accepted principle of customary international law that where economic injury results from a

[1] Catharine Titi, *Police Powers Doctrine and International Investment Law*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (Andrea Gattini, Attila Tanzi & Filippo Fontanelli eds., 2018), **RLA-76**, p. 13 (quoting *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, **CLA-048**, paras. 263-264) (emphasis added).
[2] RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES (quoted in Titi, note 1 *supra*, **RLA-76**, p. 1).

bona fide non-discriminatory regulation within the police power of the State, compensation is not required."[3]

17. Catharine Titi fleshes out the bounds of the permissible police powers in her recent essay as follows:

> "In principle, the state's police powers include the ensemble of its sovereign powers relating to public policy, including the maintenance of public order, the protection of public health and the environment, and taxation. According to Black's Law Dictionary, the state's police power is the 'power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity'. It is 'the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits and is an essential attribute of government'. Since Black's Law Dictionary is a dictionary of 'the Terms and Phrases of American and English Jurisprudence', it follows the common law jurisprudence on the police powers doctrine, with special regard to the US case law and practice. It may be recalled that a number of international investment agreements (IIAs) concluded by the United States expressly specify that exceptions for the maintenance of public order encompass measures taken in the pursuit of the host state's police powers in order to ensure public health and safety."[4]

18. She further suggests that these new treaties are not inventing new rules inasmuch as they are merely codifying an existing rule in clear terms.[5] Other sources articulate the contents of the rule. Titi offers a good summary of these authorities ranging from the United States Supreme Court to the Iran-US Claims Tribunal as follows:

> "Recognition of the state's police powers has a long pedigree. As early as 1915, the United States Supreme Court found that '[t]he police power of the state cannot be abdicated nor bargained away, is inalienable even by express grant, and all contract and property rights are held subject to its fair exercise'. At the international level, the police powers doctrine started to gain currency in the second half of the 20th century. Federico Garcia Amador's Fourth Report on the law of State responsibility to the International Law Commission (ILC) in 1959 expressly acknowledged the concept at hand. So did

[3] OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004/4 (2004), **RLA-77**, p. 5, n. 10. Thus, as seen in each of these two prominent formulations, a valid exercise of the police powers equally immunizes the State as against a claim for breach of the lesser treaty standards.
[4] Titi, note 1 *supra*, **RLA-76**, p. 2.
[5] Titi, note 1 *supra*, **RLA-76**, p. 13.

> the 1961 Harvard Draft Convention on the International Responsibility of States, the American Law Institute's *Restatement of the Law (Second)* in 1965 and then its *Restatement of the Law (Third)*, cited at the opening of this chapter.
>
> Soon the state's police powers found recognition in investment case law, including by the Iran-US Claims Tribunal, in which some indications emerged that the doctrine applies as part of general international law. The authority usually invoked to that end is the Partial Award in *Saluka v. Czech Republic*. There, the tribunal found that:
>
> > '***the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today.'***
> >
> > ***In order to determine whether a measure has a regulatory character and falls within the police powers,* vel non*, the tribunal must consider the state's intention in adopting it. Like the* Saluka *tribunal, legal scholarship for the most part concedes the customary international law status of the state's police powers***."[6]

19. As the *Tecmed v. Mexico* tribunal concluded even prior to the *Saluka* award, "[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[7]

20. In the more recent case of *Philip Morris v. Uruguay*, that claimant unsuccessfully urged a narrow doctrinal scope "limited to State powers related to protection and security such as enforcement of the law, maintenance of the public order, and defense of the State."[8] This suggestion was roundly rejected by an eminent tribunal which found that the State's measures enacting legislation to include a plain-packaging requirement for tobacco products "were a valid exercise by Uruguay of its police powers for the protection of public health."[9] The *Philip Morris* tribunal further found as follows:

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[6] Titi, note 1 *supra*, **RLA-76**, pp. 3-4 (quoting *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, **CLA-048**, para. 262) (emphasis added) (other citations omitted).
[7] *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, **CLA-006**, para. 119.
[8] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-78**, para. 197.
[9] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-78**, para. 307. Mr. Gary Born issued a partially dissenting

> "It should be stressed that the [relevant State measures] have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health. Article 44 of the Uruguayan Constitution states: 'The State shall legislate in all matters appertaining to public health and hygiene, to secure the physical, moral and well-being of all the inhabitants of the country.' As held by Professor Barrios, one of the Respondent's experts, 'it is in this framework of the essential duty to protect public health that the State has the authority to prevent, limit or condition the commercialization of a product or service, and this will consequently prevent, limit or condition the use of the trademark that identifies it.' Article 7 states the principle of protection pursuant to which '[t]he inhabitants of the Republic have the right to be protected in the enjoyment of their life' and Article 46 directs the State to 'combat social vices by means of the law and International Convention.'"[10]

21. These findings resonate distinctively with expert evidence adduced by Ethiopia in response to the Claimant's erroneous contentions on the contents of Ethiopian law in this arbitration.[11] Article 44 of Ethiopia's Constitution expressly establishes that "[a]ll persons have the right to a clean and healthy environment"[12] while its Article 92, entitled "*Environmental Objectives*," provides that "[g]overnment shall endeavour to ensure that all Ethiopians live in a clean and healthy environment" and further that "[g]overnment and citizens shall have the duty to protect the environment."[13] As Ethiopia noted in oral argument, it has expressly codified the customary obligations of the precautionary principle within its EIA Proclamation:

> "The [Environmental Protection] Authority or the relevant regional environmental agency shall err on the side of caution while determining the negative impact of a project having both beneficial and detrimental effects, but which, on balance, is only slightly or arguably beneficial, and thus determine that it is likely to entail a negative significant impact."[14]

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opinion on unrelated issues; in his opinion he expressly affirmed Uruguay's police powers, writing in closing that his conclusions "do not question the broad authority of Uruguay, or other states, to regulate in the interest of public health and safety." *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Mr. Gary Born of 28 June 2016, **RLA-79**, para. 197.

[10] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-78**, para. 302.

[11] *See* Expert Report of Dr. Ayele H. Anabo, dated 12 March 2021, Secs. II, III, and V.

[12] Constitution of the Federal Democratic Republic of Ethiopia, **RLA-32**, Art. 44(1).

[13] Constitution of the Federal Democratic Republic of Ethiopia, **RLA-32**, Art. 92.

[14] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, **RLA-1**, Art. 4(2) ("*Considerations to Determine Impact*"). *See also* Hr. Tr. (29 May 2022) [Prof. Kidane] 254:1-14.

22. Thus, further to its obligation at customary international law, Ethiopia bears the burden of the precautionary principle *qua* embedded in its own laws in manifestation thereof, all being well within the bounds of the permissible police powers.[15]

23. In sum, the preponderance of the authority considers that **(i)** the State's police powers constitute a rule of customary international law; and **(ii)** the scope of such powers extends to *bona fide* measures to protect public health and the environment.

24. As Ethiopia additionally noted in oral argument, there is a powerful distinguishing factor as between the present case and much arbitral case law in the realm of regulatory takings.[16] This distinction is equally present by comparison to *Philip Morris v. Uruguay*, namely that unlike Uruguay's enactment of new measures for the protection of public health (which measures were wholly unknown at the time of "investment"), Ethiopia's act is only in the administration of a pre-existing régime of environmental law, which undoubtedly requires the proponent of an industrial megaproject to prepare an EIA. Furthermore, in addition to its express invocation of the Ethiopian laws (which are applicable of their own force),[17] the governing contractual instrument stipulates the following well-familiar provision:[18]

[15] Another instance of manifestation of police powers within Ethiopia's municipal laws may be found at Article 7 of Ethiopia's Water Resources Management Proclamation (entitled "*Preference Among Uses*") which document was annexed to the report of the Claimant's expert witness Professor Mekete Bekele Tekle. *See* Ethiopian Water Resources Management Proclamation No. 197/2000, **MBT-09**, Art. 7(1) (stating that "[d]omestic use shall have priority over and above any other water uses" and where, as is universally recognized, access to water is a necessity of basic health). In contracting for ETIZ, Akgun neither sought nor gained water rights attendant to its project; rather, the 2012 ETIZ Agreement affirms Akgun's adherence to Ethiopia's water laws of general applicability. *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 11(8) ("the Developer adheres to the relevant rules and regulations of Ethiopia regarding generation of power and supply of water").

[16] *See* Hr. Tr. (29 May 2022) [Prof. Kidane & The President] 135:1-137:17.

[17] 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").

[18] As Ethiopia has noted, if Article 8(10) of the 2012 ETIZ Agreement were not itself considered to affirm or incorporate exogenous provisions of law, it would then be an autonomous contract provision imposing requirements additional to those of the general laws. In such a case, Article 8(10) confers upon Akgun an obligation to produce "environmental studies" as may be "necessary" to ensure that the developer "shall" take "maximum care to safeguard the Legedadi and Dire Dams underground water basin from pollution," with entitlement residing in the Ministry of Industry and Oromia Regional State to determine the sufficiency of those studies to this end. Studies sufficient to ensure the environmental safety of the intended project in view of sensitive hydrological conditions at the contemplated site are, of course, precisely what the Ministry of Industry and Oromia Regional State sought to attain, but which Akgun failed to deliver. Akgun's failure to meet the obligation of Article 8(10) of the 2012 ETIZ Agreement—however interpreted—irredeemably dooms its case. *See further* Ethiopia's Rejoinder, dated 21 January 2022, notes 86 and 87.

> 10. 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.

2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10)

25. It was confirmed in witness testimony that Akgun sought legal advice regarding its project in Ethiopia.[19] The content of that advice is unknown. It is however known that ***both*** GOTA (whom Akgun engaged to perform environmental studies) ***and*** Ernst & Young (from whom Akgun sought a proposal but whom Akgun did not ultimately engage) advised that the ETIZ project was subject to "full EIA" by reference to Ethiopian law.[20]

26. This was openly confirmed by Mr. Ufuk Akgun under examination:

> "**Q:** […] So it's true, is it not, that both GOTA and Ernst & Young both confirmed your project was subject to full EIA?
>
> **A.** Yes, they did. Sorry, yes, they did."[21]

27. In other words, where viewed through the police powers lens, what one factually sees in this case is an instance of the exercise of police powers ***as established in existing laws*** of which the Claimant had ***actual knowledge***. The evidence thus establishes that **(i)** any diligent investor would have known of the requirement of a proponent's EIA for a megaproject such as ETIZ in Ethiopia; and that **(ii)** Akgun did actually know. In the face of this evidence the

[19] *See* Hr. Tr. (19 May 2022) [Mr. Kern & Mr. Yunus Akgun] 107:15-108:19 and Hr. Tr. (20 May 2022) [Prof. Kidane & Mr. Yusuf Akgun] 78:13-24.
[20] *See* Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**, p. i ("Executive Summary") ("[a]s per Schedule I of the [EIA] Guidelines, construction of industries, factories and activities carried out have significant environmental impacts, and, there, require a full EIA/ EM study") and Technical and Financial Proposal for ESIA for Ethio-Turkish Industry Zone, Ernst & Young, dated 11 February 2014, **Exhibit R-42**, p. 25 ("[a]ccording to Annex III of the FDR of Ethiopia's Environmental Protection Authority (EPA)'s 'Environmental Impact Assessment Procedural Guideline Series 1' it is clear that this project (as an Industrial Estate) will require a full EIA").
[21] Hr. Tr. (20 May 2022) [Mr. Kern & Mr. Ufuk Akgun] 26:25-27:3.

Claimant has presented only a desperate *post hoc* theory of technical defect in the enactment of an environmental directive ***without even bothering to assert that Akgun or any of its principals actually believed this feeble suggestion at any time***.[22]

28. Ethiopia submits that is because they did not.

29. The authoritative articulation of the police powers under international law is found in the *Restatement of the Law (Third)*, which reads once again as follows:

> "A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."[23]

30. The application of this rule to the facts of this case leads to only one possible conclusion and that is that Ethiopia's suspension and relocation decision, even if it were to otherwise qualify as a regulatory measure causing a loss of property (it does not), cannot amount to expropriation under international law because **(i)** it was an application of Ethiopia's existing environmental law which is a quintessential government function well within the police powers; and **(ii)** it is not demonstrated to be discriminatory nor even credibly claimed to be so.

31. If the rule to be applied is the police powers doctrine, the analysis is no more complicated than that. Akgun has not even set out a *prima facie* discrimination claim at all. A discrimination claim requires the showing of disparate treatment of similarly situated parties for impermissible reasons. Akgun has not demonstrated that it was subject to differential treatment vis-à-vis ***any*** other party whether similarly situated or otherwise; Akgun has never even claimed that it was mistreated because it was a Turkish company. Indeed, the record is replete with examples of how it was accorded favorable treatment at every step of the way including, after its environmental studies were repeatedly rejected, an offering of land that Mr.

[22] *See, in this respect*, Ethiopia's Rejoinder, dated 21 January 2022, Sec. II.C.
[23] RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES (quoted in Titi, note 1 *supra*, **RLA-76**, p. 1).

Yusuf Akgun himself endorsed and that the government, for its part, considered to be better suited.[24]

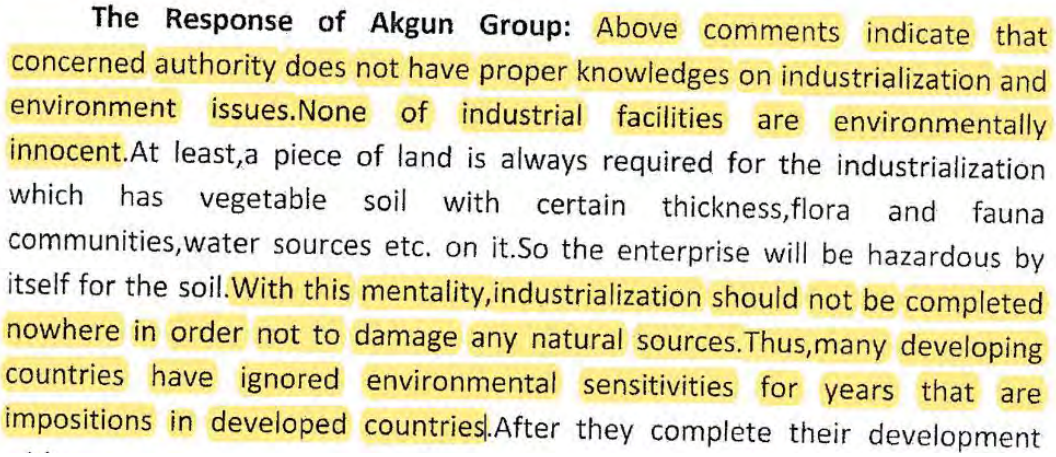
32. Due process also forms a part of the exercise of police powers. Here again, Akgun does not even claim that it was denied due process and indeed the record shows that it cannot. It is useful to here have reference once again to the established facts. In Ethiopia's memorials it has set out in painstaking detail the full life cycle of its meticulous review of Akgun's proffered environmental studies.[25] Throughout the summer of 2014, toward the end of this episode, Akgun's employee Mr. Hagos Sequar repeatedly implored Akgun to produce a full and comprehensive EIA following Ethiopia's earlier rejection of the revised GOTA report; he did so by reference, once again, to Ethiopian law.[26] It was confirmed in examination that Akgun did receive his pleas.[27]

33. Instead, Akgun produced in October 2014 only a thirty-page addendum to its twice-rejected environmental study.[28] Nonetheless, Ethiopia's Ministry of Environment and Forest dutifully reviewed this addendum and concluded in November 2014 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 [our] above comments***."[29] This message is equally seen in the letter whereby the Ministry of Industry conveyed these comments to Akgun, wherein it wrote that

[24] *See* para. 65 *infra* and citations therein.
[25] *See* Ethiopia's Statement of Defense, dated 12 March 2021, Sec. III.C and Ethiopia's Rejoinder, dated 21 January 2022, Sec. II.D.
[26] *See* Email from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 31 July 2014, **Exhibit R-46**; Email from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 5 September 2014, **Exhibit R-50**; and Letter from Mr. Hagos Sequar to Messrs. Yusuf Akgun, Ufuk Akgun, and Yunus Akgun, dated 5 September 2014, **Exhibit R-51**.
[27] *See* Hr. Tr. (20 May 2022) [Mr. Kern & Mr. Ufuk Akgun] 28:2-29:13.
[28] The addendum is the Ethio-Turkish Industry City Environmental Study, prepared by Istanbul Technical University, dated 10 October 2014, **Exhibit C-078**.
[29] "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," dated November 2014, **Exhibit C-082**, p. 15 (emphasis added). As may be seen from this decisional document, risk of water source contamination is the motivating factor in the Ministry's rejection of the ITU addendum. The Ministry of Environment and Forest (formerly the Environmental Protection Authority) delivered these review comments to the Ministry of Industry by a letter dated 13 November 2014. *See* Letter from Ministry of Environment and Forest to Ministry of Industry, dated 13 November 2014, **Exhibit C-029**.

"we advise you to work in close collaboration with the relevant stakeholders, and revise and develop the EIA report as per the given comments."[30]

34. Thus, the offer to revise and re-submit the studies stood, and this after more than one year of continuous review of Akgun's inadequate reports (the first of which was submitted in September 2013).[31] Months passed without reply from Akgun, whose singular substantive reaction to Ethiopia's review comments came in February 2015 featuring the following memorable passage:



**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

35. Following Akgun's failure to address the merits of Ethiopia's concerns, Ethiopia elected to offer less sensitive alternative sites for the ETIZ project:

[30] Letter from Ministry of Industry to Akgun Construction, dated 20 November 2014, **Exhibit C-027**.
[31] The first report was the Environmental Impact Assessment Plan of ETIZ by GOTA, dated September 2013, **Exhibit R-4**.

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**

36. In sum, Akgun was offered endless opportunities to present and defend proper environmental studies as was required under Ethiopian law in keeping with Ethiopia's police powers privileges. After Akgun failed, it was offered alternate land for relocation with incentives.[32] Akgun was never terminated.[33] It exited Ethiopia of its own accord and as these generous offers stood throughout. All these facts were confirmed beyond boredom during the evidentiary hearing irredeemably dooming all of the Claimant's claims.

**2.1.2. As a matter of law, what is the relationship between the police powers doctrine and the 'sole effects' doctrine? If there is a conflict between how the two doctrines are applied, how should the conflict be resolved and why?**

37. The "sole effects" doctrine is an exorbitant and discredited ideological arbitral invention without State consent.[34] It is one of the principles that invited a serious backlash against investor-state dispute settlement or ISDS in recent decades. Indeed, states ranging from the United States, Canada, China, India, and Mauritius have rushed to either renounce such rules or clarify through new treaty models.

38. At its core and without attenuation, the "sole effects" doctrine seeks to convert the host State into an issuer of an all-purpose insurance policy. It oversimplifies the equation by considering effect as evidence of wrongdoing; if it caused loss or injury, it must have been a violation of international law. Catharine Titi explains the contours of the "sole effects" doctrine as follows:

> "[T]he sole effect doctrine relates to the determination of an indirect expropriation, and it is the direct antithesis of the police powers doctrine. According to the sole effect doctrine, the effect of the state measure is the litmus test that allows the tribunal to determine whether an indirect expropriation has taken place. The intent of the state in adopting the measure is irrelevant."[35]

[32] This is despite the fact that no proposal (as Ethiopia requested in order to facilitate selection of an alternative site) has ever been seen, as the Claimant itself has confirmed. *See* Hr. Tr. (25 May 2022) [The President & Mr. Swanson] 98:17-99:7 and 128:5-21.
[33] The Claimant confirms this. *See* Hr. Tr. (20 May 2022) [Mr. Kern & Mr. Ufuk Akgun] 45:14-18.
[34] In the words of the prominent treatise, "the 'sole effect doctrine' (ie that the effect on the investor is the only relevant criterion) remains a highly controversial approach to indirect expropriation." CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), **RLA-54**, para. 8.88.
[35] Titi, note 1 *supra*, **RLA-76**, p. 6.

39. Even tribunals that have used this doctrine to justify a preferred outcome have done so without totally disregarding intent although they downgrade it to second level in importance.[36] A passage from the *Azurix Corp. v. Argentina* award illustrates the doctrinal confusion:

> "[T]he issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. In the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate. The tribunal in S.D. Myers found the purpose of a regulatory measure a helpful criterion to distinguish measures for which a State would not be liable: 'Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State.' This Tribunal finds the criterion insufficient and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation based on public purpose was intellectually viable […]"[37]

40. Ethiopia does not believe that the facts of the Akgun case should drag the Tribunal into this now outdated debate. The community of nations across the development spectrum has spoken, and spoken loudly and clearly. The following is a collection of contemporary instruments that have unequivocally renounced the "sole effects" doctrine in clear terms as it has never been a part of their understanding under international law in the first place:

> **US Model BIT (2012), Annex B(4)(b)**: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[38]
>
> **China-Mauritius FTA (2019), Chapter 8, Annex B(5)**: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public moral, public health, safety, and the environment, do not constitute indirect expropriation."[39]
>
> **Canada Model BIT (2021), Article 9(3)**: "An indirect expropriation under paragraph 1 may occur when a measure or a series of measures of a Party has an effect equivalent to

[36] *See, e.g.*, Titi, note 1 *supra*, **RLA-76**, p. 7 (citing *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, **CLA-005**, para. 7.5.20).
[37] *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, **CLA-039**, para. 310.
[38] 2012 US Model Bilateral Investment Treaty, **RLA-21**, Annex B(4)(b).
[39] China-Mauritius FTA, Chapter 8 ("*Investment*") (2019), **RLA-80**, Annex B(5).

> direct expropriation without formal transfer of title or outright seizure. A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation."[40]

41. The authority that rejects the "sole effects" doctrine is quite simply overwhelming. In any case, this Tribunal's task is limited to determining the intent of the signatory parties of the Treaty, i.e., in this case Turkey and Ethiopia. There is no indication whatsoever that by including a non-expropriation provision in the Treaty, they intended to be bound by arbitral decisions that do not represent their understanding of international law when the treaty was signed. There is no evidence that Ethiopia or Turkey considered or even knew of the "sole effects" doctrine when they signed the Treaty.

42. Even under the most unmitigated form of the exorbitant "sole effects" theory, Akgun's facts fail to prove expropriation because neither the suspension order nor the relocation decision have caused any effects. The effects, if any, were a function of Akgun's reaction to *bona fide* measures under the 2012 ETIZ Agreement and the applicable law. Any genuine effects analysis must first reconstruct the *sin qua non* – the dictionary definition of which is "an essential condition; a thing that is absolutely necessary."

43. ***But for*** its own abandonment of the project, Akgun would not have sustained any claimed damages. Any causation analysis cannot ignore the Claimant's own self injurious behavior as the *sin qua non* of the final result whatever it might have been. Indeed, the mitigation question is properly asked as a part of the finding of liability under the "sole effects" doctrine because the causes of the effect are salient in the equation.

44. And again, no matter how theory is redefined and reconstructed, Akgun's facts are just too mundane, too dull to tempt any genuine legal analysis.

[40] 2021 Model Foreign Investment Protection Agreement, Government of Canada, **RLA-52**, Art. 9(3).

45. In summary, Ethiopia submits that **(i)** the "sole effects" doctrine is exorbitant and discredited; **(ii)** there is no evidence that Ethiopia and Turkey intended it to be a part of their Treaty; **(iii)** the community of nations have overwhelmingly rejected it; and **(iv)** even where it applies, on the facts of Akgun's case, the "effects" did not follow government action but rather followed Akgun's own action. Hence, there is no non-frivolous legal theory that can potentially convert the environmental relocation decision in the Akgun case into an international delict.

## 2.2. 'Importation' of umbrella clauses. Word count limit: 3000.

### 2.2.1. Please submit on whether and to what extent this Tribunal should adopt the reasoning in paragraphs 326-329 of the case of *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 regarding the 'importation' of umbrella clauses via a most favoured-nation clause.

46. The referenced reasoning within the *Ickale v. Turkmenistan* award reads as follows in full:

> "326. The Claimant seeks to import the FET, FPS, non-discrimination and umbrella clause protections from other investment treaties concluded by Turkmenistan with third States on the basis of Article II(2) and Article VI of the [Turkey-Turkmenistan] BIT. Article II(2) of the BIT, which forms part of a broader provision headed "Promotion and Protection of Investments," provides as follows:
>
> > 'Each Party shall accord to these investments [i.e., investments permitted into its territory pursuant to Article II(1)], once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.'
>
> 327. The provision thus establishes a requirement of both national treatment ('investments of its investors') and MFN treatment ('investments of investors of any third country'). In support of its argument that it may rely on substantive protection standards not specifically included in the BIT, the Claimant relies on the MFN treatment clause. The Respondent argues that the MFN clause does not allow such 'importation,' and that in any event the scope of application of the clause is limited to 'similar situations.' According to the Respondent, this limitation makes it clear that the determination of whether the investor is entitled to rely on the MFN clause requires a comparative, fact-based analysis of investments of investors that are in 'like circumstances.'
>
> 328. The Tribunal has carefully considered the meaning and effect of the MFN clause in Article II(2) of the BIT, in light of the general rule of treaty interpretation in Article 31 of the Vienna Convention. The ordinary meaning of the terms of the MFN clause,

> when read in their context and in light of the object and purpose of the Treaty, suggests that each State party to the Treaty agreed to treat investments made in its territory by investors of the other State party in a manner that is no less favorable than the treatment they accord in similar situations to investments by investors of any third State. Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State. However, this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in 'a similar situation.' Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a 'similar situation' to that of the investments of investors of third States; in such a situation, there is *de facto* no discrimination.
>
> 329. The terms 'treatment accorded in similar situations' therefore suggest that the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State. It follows that, given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.' Investors cannot be said to be in a 'similar situation' merely because they have invested in a particular State; indeed, if the terms 'in similar situations' were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause 'treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country' and 'treatment no less favourable than that accorded […] to investments of investors of any third country.' Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect."[41]

47. The MFN clause within the controlling Ethio-Turkish treaty in this case contains the critical "in similar situations" phrase that the *Ickale v. Turkmenistan* tribunal has thoroughly and

[41] *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, **RLA-49**, paras. 326-329.

credibly analyzed. As Ethiopia has briefed and argued, the blanket importation of all provisions of a third-State treaty in any given case is not the intended purpose of an MFN clause that contains the "similar situations" qualification.[42] As such, Ethiopia agrees with the above-quoted analysis.

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

49. Moreover, even if this Tribunal were to tolerate the attempted umbrella clause importation as a matter of treaty interpretation, and as has been extensively pled, there is a mountain of authority correctly to the effect that the underlying claims sought to be so imported are properly heard only in the contractually agreed arbitration forum.[43] In the words of the late Judge Crawford, contractual arbitration agreements represent a clear intention to "renounce" the right to arbitrate contractual claims in the treaty forum:

> "Whatever answer may be given to the question whether an investor can by contract in advance renounce the right to arbitrate treaty claims, there cannot be any doubt that it can renounce the right to arbitrate contract claims in a treaty forum. An exclusive jurisdiction clause in a contract is surely intended to do just that."[44]

[42] *See* Ethiopia's Rejoinder, dated 21 January 2022, Sec. III.D.
[43] For a summation of relevant authorities, *see* Ethiopia's Rejoinder, dated 21 January 2022, paras. 223-229.
[44] J. Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) Arb. Intl. 351, **CLA-104**, p. 14. In this case the Claimant has additionally agreed that any claims for breach of the treaty standards of investment protection be equally subject to the same exclusive jurisdiction clause featuring within the contractual instrument; such is the inescapable conclusion of a collective reading of its Articles 13 and 21. *See* 2012 ETIZ Agreement, **Exhibit C-009**, Arts. 13 and 21; *see also* Ethiopia's Rejoinder, dated 21 January 2022, Sec. III.A.

50. As for the Claimant's single extra-contractual umbrella clause claim that Ethiopia breached "a specific commitment to relocate ETIZ"[45] (which claim was tacked onto its Reply memorial in an act of pleading exhaustion), the claim is so sparse and undeveloped as to be meaningless; it may comfortably be dismissed as a case of *de minimis non curat lex*, separately and apart from the fact that it fails spectacularly on its merits.[46]

### 2.3. Leaseholds under Ethiopian law. Word count limit: 1000.

#### 2.3.1. Under Ethiopian law, are leaseholds considered to be a property right?

51. Ethiopia responds that under Ethiopian law a leasehold is a right *in personam* vis-à-vis the lessor and a right *in rem* vis-à-vis all others. Collectively, they make up the person's patrimony. By application, therefore, any recourse that the lessee may have against the lessor relating to the lease is necessarily of a contractual nature.

52. In the present case, the Claimant has confirmed that it attained contractual leasehold rights from its lessor for "***free***":

> "Now, it is my understanding the way the contract is structured that there is not any separate financial obligation of Akgun either upfront premium or going forward premium for the lease of the land. That -- that payment is made in order to compensate the farmers who are on the land, and then the leasehold itself is -- is -- you might say it's free; the leasehold itself is free."[47]

53. A treatise on the Ethiopian law of property calls the leasehold a "***precarious possession***" of land and describes the distinction between its nature vis-à-vis the lessor as contrasted to all others as follows:

[45] Claimant's Reply, dated 22 October 2021, para. 5.217.
[46] *See* Ethiopia's Rejoinder, dated 21 January 2022, paras. 370-372 and paras. 64-70 *infra*.
[47] Hr. Tr. (29 May 2022) [Mr. Reichard] 112:16-23.

> "***2.3.1 PRECARIOUS POSSESSION***
>
> Possession of a person is affected by the defect of precariousness if the person does not have a right of ownership in relation to the object he holds. According to French terminology, precarious possessions refer to the possession of those who hold a thing for another on basis of an agreement or in such quality that, at the expiration of the agreement, or where they lose their quality, they must return the thing. Hence, the possession of a usufructuary, a limited user /usage/, a tenant farmer, leaseholder or a pledgee, a creditor secured by antichresis, a tutor with regard to a minor's property is affected by the defect of precariousness.
>
> Simple occupants lack the animus element (intent to hold for them selves). This presumption is tied to the origin of their possession and continues through out its duration. Simple change of intention, that is the intention to hold henceforth for their own account, is not capable to change their occupancy in to a genuine possession.
>
> However, those simple occupants who hold a real interest in the thing, such as a usufructuary, a holder of a use right, and a pledgee are considered as possessors in relation to all persons other than the person to whom they have the obligation to return the thing.
>
> The defect of precariousness can be healed only by change in the nature of the possession resulting from a legal ground originating in a third person or from the owner, or from a formal contest by the simple possessor against the person for whose account he has been holding."[48]

54. The structure of the Ethiopian Civil Code confirms the contractual nature of the leasehold right. Title VI of the Civil Code pertains to property.[49] Title XVIII pertains to "*Contracts Relating to Immovables*."[50] Leasehold is included in the latter; where it is classified as a contract "[r]elating to" immovables, the leasehold is logically excluded from itself constituting an immovable. There is no doubt that a leasehold is patrimonial, but its nature is contractual vis-à-vis the lessor. Legal recourse for any grievance under a lease agreement is decidedly contractual in nature.

[48] *Law of Property: Teaching Material*, Prepared by Fassil Alemayehu under the Sponsorship of the Justice and Legal System Research Institute (2009), **RLA-81**, pp. 41-42.
[49] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, **RLA-82**, Title VI.
[50] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, **RLA-82**, Title XVIII.

55. Ethiopia considers that any further discussion of doctrine may be academically interesting, but the above note is sufficient to demonstrate that Akgun's conditional leasehold rights under the 2012 ETIZ Agreement do not qualify as a property interest under Ethiopian law.

### 2.4. Mitigation of damages. Word count limit: 3000.

#### 2.4.1. Under international law, what are the principles regarding mitigation of losses in the context of calculating the quantum of damages?

56. The question of mitigation of damages could only arise if a wrongful State act otherwise requiring reparation is duly established, although in many cases a lack of mitigation could break the chain of causation and hence go to the issue of liability. In any case, Ethiopia submits that because any finding of an internationally wrongful act on the facts of this case is impossible, it will only address this issue as a matter of curiosity and decorum.

57. Mitigation of damages is a general principle of international law. As recognized in the commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, the question of mitigation of damages is an "element affecting the scope of reparation," and thus

> "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a 'duty to mitigate', this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent."[51]

58. It thus follows that the duty to mitigate may operate to totally exclude recovery in a situation where damages claimed were totally avoidable.

[51] ILC ARTICLES ON STATE RESPONSIBILITY, **CLA-042**, Art. 31, cmt. 11. A panel of the United Nations Compensation Commission elaborated that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused." *Id.*, note 467.

**2.4.2. In particular, what is the implication for the calculation of quantum of damages if the aggrieved party does not take up a reasonable opportunity to mitigate its losses?**

59. This question combines several important matters. It presupposes the existence of an aggrieved party. A party that has failed to perform its own obligations under law and contract does not qualify as an aggrieved party. The facts on this point are established beyond any doubt so much so that the Claimant itself showed during the hearing how it does not believe its own stories anymore. All of its factual theories crumbled in front of this Tribunal.

60. Akgun began with mesmerizing conspiracy theory. In the earlier course of these proceedings it submitted to this Tribunal that Ethiopia "belatedly invoked the EIA requirement as part of its discriminatory machinations to halt the ETIZ project in favor of the Condominium Project it preferred"[52] and that Ethiopia's "insistence" on an EIA for ETIZ "***was intended and did in fact target ETIZ and cause its demise***."[53] Not to be outdone by these earlier memorials, in its final pre-hearing submission, the Claimant denoted Ethiopia's EIA process as being nothing less than "diabolical."[54]

61. And yet, as the Tribunal would recall from the hearing, upon being confronted, not one of Akgun's witnesses dared to voice this narrative of conspiracy and deceit as was set out in the written pleadings in its own case. Akgun's theory morphed into discrimination and ended with the argument that the replacement land was too far from a city center without even checking the presence of cities nearby.[55]

62. In the present case, this failure to "take up a reasonable opportunity" goes to the heart of the question of liability, whether the theory of recovery is denial of FET (which seemed like the Claimant's main theory) or expropriation; Ethiopia's offering of suitable alternative lands

[52] Claimant's Reply, dated 22 October 2021, para. 5.180.
[53] Claimant's Reply, dated 22 October 2021, para. 5.184 (emphasis added).
[54] Claimant's Rejoinder dated 25 March 2022, para. 2.2.
[55] *See, e.g.*, Hr. Tr. (20 May 2022) [Prof. Kidane & Mr. Yusuf Akgun] 93:9-94:6.

destroys all theories of recovery by causing the substantive absence of any treaty breach. It destroys the legal basis of FET recovery because it shows that by offering alternative lands, the Respondent acted reasonably and not arbitrarily, for a reasonable accommodation is all that the FET standard requires.[56] It equally destroys the basis of the expropriation theory because the value of a leasehold is not deprived if the land would have been suitably replaced, as the Claimant itself has conceded and confirmed.[57]

63. ***Akgun held no unconditional entitlement to any* (i) *parcel of land*; *or* (ii) *mix of industries***.[58] Development and operation of the industrial zone project was at all times contingent upon compliance with numerous obligations, including the obligations of environmental study existing under both law and contract. Indeed, Akgun itself has acknowledged and confirmed (as it must) that an offering of suitable alternative lands would serve to defeat its claims but chooses instead to factually dispute the suitability of the lands as were, in the event, offered to it. The standard that Akgun appears to endorse is one of adequate suitability.[59] As is by now well known, the alternatives that Ethiopia offered were lands of eminent suitability.[60]

64. To demonstrate this truth, Ethiopia has offered evidence in the form of videos of alternative lands taken by Akgun itself during site visits conducted in August 2015:

[56] In fact, following the failures of Akgun's proffered studies, Ethiopia was entitled to give notice and terminate the 2012 ETIZ Agreement for the developer's default of its obligations under the instrument's own terms. *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(10)-(12) and Art. 18(3). Instead, Ethiopia offered suitable and numerous alternative sites, in proximity to Addis Ababa and otherwise, all of which Akgun declined.
[57] *See* Claimant's Reply, dated 22 October 2021, para. 5.128 (describing Ethiopia's "expropriatory measures" as "culminating in its July 2014 suspension letter ***and*** its failure to offer suitable alternative land") (emphasis added). Akgun has here conceded that it never held any entitlement to the originally contemplated Sendafa site. An offering of suitable alternative lands forestalls a destruction of any "investment" and bars a finding of expropriation.
[58] As to industrial composition, the governing contractual instrument offers only sparse aspirational language, and this for the benefit of Ethiopia. *See* 2012 ETIZ Agreement, **Exhibit C-009**, Art. 8(13) (stating that Akgun shall "take in to account" the industrial development strategy of Ethiopia) and Art. 8(14) (stating that Akgun shall provide "priorities" for certain industries enumerated).
[59] *See, e.g.*, Claimant's Reply, dated 22 October 2021, para. 2.1.7.
[60] *See* Ethiopia's Rejoinder, dated 21 January 2022, paras. 190-194.

Still Images from the Video AKGUN-146
taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit R-57**

65. While viewing this site, Mr. Yusuf Akgun himself concluded that with a certain addition "***this [land] could do***."[61] Upon being queried regarding such addition Mr. Deribu Jamal, then bureau head for Oromia Land and Environmental Protection,[62] responds affirmatively.[63] At the hearing, Mr. Yusuf Akgun declined to shed any light on the discrepancy as between his favorable contemporaneous commentary and his adverse testimony in this arbitration, saying only that the land "wasn't acceptable" and "***I don't even want to discuss this issue***," without more.[64]

66. Ethiopia for its part submits that the suitability of the alternative lands is proven by evidence as a matter of fact.

[61] Transcription of the Video AKGUN-146 taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit R-58** (emphasis added).
[62] Hr. Tr. (24 May 2022) [Dr. Haile & Mr. Sisay Gemechu Edo] 19:21-20:13.
[63] Video AKGUN-146 taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit R-56** (02:40).
[64] Hr. Tr. (20 May 2022) [Mr. Yusuf Akgun] 94:5-6 (emphasis added).

67. Where weighing Akgun's refusal to take up the offered lands under the principle of mitigation of loss rather than viewing Ethiopia's offers under the lens of treaty breach *ab initio*, the result is no different. In such a case the compensation leg of the claim simply fails, for the "reasonable opportunity" to mitigate dispenses with any actual loss and thus the Claimant's own conduct reduces quantum to zero where, as here, the replacements offered are of a quality equal to (or perhaps better than) the originally contemplated land.

68. As may be visibly seen from the videographic evidence, the specific site that Mr. Yusuf Akgun himself viewed favorably is an open expanse of flat land situated along a highway. The land is confirmed to be situated in the vicinity of Modjo,[65] the site of a massive dry port that featured in the Claimant's own feasibility studies,[66] near to the world-class Addis Ababa-Adama Expressway,[67] and located within thirty kilometers of Adama itself, also known as Nazareth, one of Ethiopia's largest cities, already numbering at the relevant time several hundred thousand people.

69. In the following diagram, Ethiopia has indicated the position of Adama by the arrow that is superimposed onto the lower-right corner of the image:

[65] Hr. Tr. (24 May 2022) [Dr. Haile & Mr. Sisay Gemechu Edo] 15:24-18:25.
[66] *See* Ethio-Turkish Industrial Zone Feasibility Study by Casta, dated December 2009, **Exhibit C-045**, p. 333.
[67] *See* Video AKGUN-149 taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit R-64** and Still Images from the Video AKGUN-149 taken on 21 August 2015 during a site visit in Ethiopia, **Exhibit R-65**.


Claimant's Rejoinder on Jurisdiction and Counterclaims, dated 25 March 2022
**Figure 3**: Distance from Addis Ababa to Mojo (77.3 km) (Source: Google Maps)

70. Furthermore, in discussions amongst the parties regarding alternative lands, Ethiopia sweetened the deal by offering a fifteen-year tax holiday that did not form any part of the original contractual bargain.[68] It is in viewing all these facts that Ethiopia has observed Akgun's "unmitigated failure" to perform its contractual and legal obligations and its "unmitigated abandonment" of the ETIZ project.[69]

71. Lastly, in its earlier phase submissions, Ethiopia identified other defects in the Claimant's effort to set out the elements of a quantum claim.[70] Those defects remain uncured. The Claimant bears the burden of identifying which treaty standard is alleged to be breached by

[68] *See, e.g.*, 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").
[69] Ethiopia's Rejoinder, dated 21 January 2022, paras. 431, 481.
[70] Ethiopia's Rejoinder, dated 21 January 2022, Sec. VI.C.

which conduct of Ethiopia, and further to establish the causation of injury therefrom.[71] The Claimant has declined to do so.[72] Instead, the Claimant asserts only a blanket entitlement to recover the value of the "investment" it has destroyed by its own decision to depart.

72. But the Claimant cannot isolate quantum of damages from the individual treaty standards that it has chosen to invoke. Where one sets out a claim for the full value of an investment it protests to have lost, this claim coincides with the expropriation standard. As has been shown, Ethiopia's conduct in this case does not remotely approach the threshold of an expropriation event, thereby destroying the Claimant's damages claims.

### 2.5. Costs. Word count limit: 3000.

#### 2.5.1. Please submit on how costs should be apportioned and why.

73. The relevant Article 42 of the UNCITRAL Arbitration Rules states:

> "1. 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.
>
> 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs."[73]

[71] As Ethiopia has earlier noted, the position in international law is admirably articulated in the final award 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." *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)). And, indeed, in *Biwater*, the relief the Tribunal granted was declaratory even when it found expropriation had taken place because the Claimant had caused its own loss.

[72] Furthermore, the Claimant has declined to demonstrate that it did itself actually pay *any* of its claimed out-of-pocket expenditures. *See* Hr. Tr. (29 May 2022) [Mr. Kern] 192:10-193:5.

[73] 2010 UNCITRAL Arbitration Rules, Art. 42.

74. Although Ethiopia is willing to defer to the Tribunal's exercise of its discretion under this rule, should the Tribunal decide to exercise jurisdiction over any of Akgun's substantive claims, Ethiopia submits that in its award of costs, the Tribunal take account of Akgun's unnecessary and disingenuous jurisdictional maneuver of disregarding the contract-based dispute settlement mechanism to which it freely, directly, and expressly assented,[74] and the possibility that it may yet embark on another arbitral adventure under the contract.

75. Ethiopia underscores a few further factors to be taken into account in the Tribunal's award of costs, namely **(i)** the Claimant's disregard of all other less costly alternatives such as domestic administrative processes (in addition to its total disregard of the contractually agreed international arbitral forum); **(ii)** its casual dismissal of the alternative lands that it was offered; **(iii)** its extensive and unnecessary discovery requests including irrelevant environmental reports of other projects to seek a lowering of environmental standards; **(iv)** its advancement of frivolous Ethiopian environmental law arguments that required expert witnesses; and **(v)** its presentation of volumes of irrelevant and unhelpful arbitral cases that required the dedication of immense resources.

[74] *See* Ethiopia's Rejoinder, dated 21 January 2022, Secs. III.A and III.B.

## III. CONCLUSION

76. Ethiopia submits that a developing country's non-discriminatory *bona fide* enforcement of its existing environmental laws expressly referred in contract does not offer a suitable experimental opportunity for the pursuit of liability under experimental legal doctrines such as the "sole effects" doctrine. Indeed, not a single investor-State arbitral tribunal has ever found liability for a State's enforcement of an existing environmental law incorporated in the investment agreement under any theory whatsoever.

77. The Claimant not only bypassed all available domestic administrative and judicial remedies but also bypassed international contract remedies and initiated a treaty claim under substantive principles enshrined in the Ethiopia-Turkey bilateral investment treaty. The two nations have accepted certain fundamental international law principles for the protection of each other's investments and investors. There is no reason to believe that in agreeing to these principles in the year 2000, they wanted to assign to any terms any meaning other than what at the time was recognized as constituting principles of international law. They by no means agreed to the creative permutations of principles designed to turn states into issuers of a blanket insurance policy for all types of losses.

78. They promised to treat each other's investors fairly and equitably and not to expropriate their property. At the end of the day, the question for this Tribunal is rather simple: Did Ethiopia expropriate Akgun's property or otherwise deny it fair and equitable treatment when it suspended project works and then asked Akgun to relocate because it failed to satisfy environmental obligations established in Ethiopian law and expressly undertaken by the agreement that it signed? Ethiopia submits that the answer to that question is emphatically negative.

79. Akgun went to treaty arbitration without having the facts to prove an internationally wrongful act. Ethiopia kept its promise to arbitrate, honored the Tribunal as it did honor the Claimant, and expects that, at the end, it will receive a total exoneration and a just award of costs.

Respectfully submitted,

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