UNCITRAL ARBITRATION
PERMANENT COURT OF ARBITRATION

AKGUN INSAAT MAKINA SANAYII VE DIS TICARET LTD. STI.
Claimant

v.

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
Respondent

Claimant's Responses to Tribunal's List of Questions

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1. INTRODUCTION

1.1. Pursuant to the Tribunal's Communications dated 12 and 19 June 2024, Claimant, Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti., respectfully submits its Responses to the Tribunal's List of Questions.

2. QUESTION 1

> THE OPINION IN *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, DECISION ON JURISDICTION, SEEMS TO STATE MORE PRECISELY AND SUCCINCTLY THAN CASES CITED BY CLAIMANT THAT, ALTHOUGH THE *SALINI* FACTORS MAY BE CHARACTERISTIC OF INVESTMENTS UNDER THE ICSID CONVENTION, THEY ARE "*NOT MANDATORY LEGAL REQUIREMENTS*". IS THIS A CORRECT READING AND CHARACTERIZATION OF *PHILIP MORRIS*?

2.1. The Tribunal's reading and characterization of *Philip Morris* is correct. Yet, Claimant wishes to clarify its position as to the relevance of the *Salini* factors to this case.

2.2. *Philip Morris* is an ICSID case, which discussed the application of the *Salini* factors to the definition of investment *under the ICSID Convention*.[1] In ICSID proceedings, the tribunal's jurisdiction is typically determined by assessing whether an "investment" exists within the meaning of Article 25 of the ICSID Convention and whether it meets the criteria set out in the relevant BIT.[2] Conversely, the jurisdiction of a non-ICSID tribunal hinges solely on the presence of an investment under the applicable BIT. The predominant precedent among non-ICSID investment tribunals, including those operating under the UNCITRAL Arbitration Rules, is that the *Salini* factors are not applicable.[3]

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[1] **RLA-78**, *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, 8 July 2016, Annex A, Decision on Jurisdiction dated 2 July 2013 ("*Philip Morris*"), ¶¶ 193-210.

[2] *See* **CLA-011**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, ¶¶ 43-58; **CLA-009**, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 ("*Beijing Urban Construction v. Yemen*"), ¶¶ 124-138; **CLA-010**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶ 90-106.

[3] *See* **CLA-085**, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 ("*White Industries v. India*"), ¶¶ 7.4.8-7.4.9; **CLA-083**, *Guaracachi America, Inc. and Rurelec PLC v.*

2.3. This case is not an ICSID case. Consequently, this Tribunal should not look at how the term "investment" is defined under the ICSID Convention. This Tribunal is sitting under the UNCITRAL Arbitration Rules, and the jurisdiction of this Tribunal is determined solely by the terms of the Turkey-Ethiopia BIT. The Treaty's definition of investment is contained in Art. 2 and Akgun's investment falls within that definition.[4] Hence, this Tribunal's analysis should stop right there.

2.4. If the Tribunal finds – which Claimant submits it need not – that the case law of ICSID tribunals pertains to establishing jurisdiction in the case at hand (a non-ICSID case) then the *Salini* factors should be viewed as non-binding characteristics of investment rather than mandatory criteria. *Philip Morris* is indeed instructive here:

> [T]he four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not "a set of mandatory legal requirements". As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case.[5]

2.5. If the Tribunal seeks a common test for defining "investment" under BITs, it may look to the ordinary economic notion of investment as, for example, inferred from the BIT's Preamble. The Vienna Convention on the Law of Treaties

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Plurinational State of Bolivia, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 364; **CLA-084**, *Energoalians TOB v. Republic of Moldova*, UNCITRAL, Arbitral Award, 23 October 2013, ¶¶ 235-241; **CLA-078**, *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶¶ 296-298.

[4] Claimant's Statement of Claim dated 20 November 2020 ("Statement of Claim"), ¶¶ 3.3-3.8; Claimant's Statement of Reply and Defense to Respondent's Jurisdictional Objections and Counterclaims dated 22 October 2021 ("Statement of Reply"), ¶¶ 3.2-3.18; Claimant's Statement of Rejoinder on Jurisdictional Objections and Counterclaims dated 25 March 2022 ("Claimant's Rejoinder"), ¶¶ 3.39-3.54; Hearing Tr., Day 1, 69:9 – 73:11.

[5] **RLA-78,** *Philip Morris*, ¶ 206 (internal citation omitted). Other ICSID tribunals similarly found that the *Salini* factors do not universally apply to the definition of the term "investment" under the ICSID Convention and therefore do not represent mandatory requirements. *See, e.g.,* **CLA-082**, *Gavrilovic v. Croatia*, ¶¶ 191-193; **CLA-009**, *Beijing Urban Construction v. Yemen*, ¶¶ 135-136.

mandates the interpretation of Treaty terms in good faith, considering the ordinary meaning of the terms as well as the Treaty's object and purpose.[6] Claimant submits that a good faith interpretation of the ordinary term "investment" in its context and in the light of the object and purpose of the Turkey-Ethiopia BIT as envisaged in its Preamble hinges on whether or not an asset has an economic value or aims to create a further economic value in principle.[7]

2.6. It is only where interpreting the term "investment" under a BIT in accordance with Vienna Convention Art. 31 distorts the term that the tribunal may refrain from adopting that interpretation under Vienna Convention Art. 32(b).[8]

2.7. Claimant has demonstrated during these proceedings that qualification of Akgun's assets as investment does not distort the term "investment."[9] Indeed, a contract to develop and operate an industrial zone is not an ordinary commercial transaction which should be denied protection. Such enterprise is, in fact, one of the conventional types of investments as recognized by investment tribunals[10] and as acknowledged by the Respondent.[11] In any event, Akgun's investment meets all typical features of investment, including when assessed through *Salini* factors.[12]

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[6] **CLA-047**, Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force on 27 January 1980), United Nations Treaty Series, vol. 1155, p. 331 ("Vienna Convention"), Art. 31(1).

[7] **CLA-088**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 111-112; **CLA-004**, *Eureko B.V. v. Republic of Poland, Ad Hoc Arbitration*, Partial Award dated 19 August 2005, ¶ 145. *See also* Hearing Tr., Day 9, 63:19 – 64:1.

[8] **CLA-047**, Vienna Convention, Art. 32(b). Consistent with this approach, if a particular transaction falls on its face within the broad definition of "investment" under the BIT but is so simple and/or instantaneous that giving investment protection to it would be "manifestly absurd or unreasonable", the protection may be denied.

[9] Statement of Claim, Section 3.B; Statement of Reply, Section 3.A; Claimant's Rejoinder, Section 3.C.

[10] Statement of Claim, ¶¶ 3.7-3.8; Statement of Reply, ¶¶ 3.14-3-18, 3.45-3.60; Claimant's Rejoinder, ¶¶ 3.45-3.47, 3.55-3.63.

[11] *See, e.g.,* **C-009**, Agreement between the Ministry of Industry of the Federal Democratic Republic of Ethiopia, Oromia Regional State and Akgun Construction for the Lease of Land and the Development of an Industrial Zone dated 8 June 2012 ("2012 ETIZ Agreement"), Art. 11(11) (referring to Akgun's "investment made within the scope of the Project"); Hearing Tr., Day 1, 69:19-21.

[12] Statement of Reply, ¶¶ 3.45-3.60; Claimant's Rejoinder, ¶¶ 3.55-3.63.

2.8. In sum, the Tribunal's interpretation of *Philip Morris* is correct, but this Tribunal need not rely on *Philip Morris* or any other ICSID tribunal case law regarding the interpretation of "investment" under the ICSID Convention for the reasons stated above.

3. QUESTION 2

> IF THE TRIBUNAL WERE TO FIND THAT THERE WAS ONLY A BREACH OF FET OBLIGATIONS, AND NO EXPROPRIATION HAD OCCURRED, AND THE TRIBUNAL FINDS THAT CLAIMANT'S CLAIM FOR LOST PROFITS IS TOO SPECULATIVE, DOES THE TRIBUNAL HAVE THE DISCRETION TO AWARD CLAIMANT WITH DAMAGES FOR ITS SUNK COSTS?

3.1. The Tribunal has the discretion to award Claimant any measure of damages, including sunk costs, if it finds that a Treaty breach, such as a breach of FET obligations, has occurred.

3.2. According to Art. 27(4) of the UNCITRAL Arbitration Rules, "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." This provision grants the Tribunal complete discretion in these matters, including the discretion to determine the weight to be assigned to the evidence presented in support of the damages quantification.

3.3. The standard of compensation is agreed upon by both Parties and is the one of full reparation as outlined in *Factory at Chorzów* and the ILC Articles on State Responsibility.[13] With the exception of compensation for lawful expropriation, this standard of compensation fully applies to any type of a Treaty breach, including an FET breach.[14] Because the Respondent's actions deprived Claimant of the value of its investment, the standard of full reparation requires that Claimant be compensated for that lost value.[15]

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[13] Statement of Claim, ¶¶ 6.1-6.5; Statement of Rejoinder on the Merits and Reply on Jurisdictional Objections and Counterclaims dated 21 January 2022 ("Ethiopia's Rejoinder"), ¶ 392.

[14] Statement of Claim, ¶ 6.1 and *note* 300; **CLA-032**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 ("*Gemplus v. Mexico*"), ¶ 12-52; **CLA-178**, S. Ripinsky, *Assessing Damages in Investment Disputes: Practice in Search of Perfect*, Journal of World Investment and Trade, Vol. 10, No. 1 (2009) ("Ripinsky"), p. 4 and fn. 14.

[15] Expert Report of Laura Hardin dated 19 November 2020 ("A&M Report"), ¶¶ 60-65; Statement of Claim, ¶¶ 6.9-6.10 and Section 6.C.iii; Statement of Reply, ¶¶ 6.10-6.19, 6.33-6.34.

3.4. In this case, Claimant requests that this Tribunal quantify Claimant's loss based on one of the following measures of damages, in order of priority: a) lost profits; b) loss of opportunity either in addition to sunk costs or independently of sunk costs; or c) sunk costs. Although the Tribunal's Question 2 assumes for the sake of inquiry that a finding of lost profits would be too speculative, Claimant, for the sake of completeness, summarizes below the principles underlying each of its measures of damages.

A. Lost Profits

3.5. Claimant has established in its pleadings why the preferred measure of damages should be lost profits determined based on the DCF method.[16]

3.6. To recall, Claimant has calculated lost profits on a project stage basis, providing the Tribunal with at least three alternatives for the award of lost profits.[17] Consequently, if the Tribunal finds lost profits for the entire project (through Stages 1 and 2 – *i.e.*, the entire 1460ha) speculative, it can still award lost profits for Stage 1 (660ha). If the Tribunal finds lost profits for Stage 1 speculative, it can still award lost profits for Phase 1 of Stage 1 (the first 100ha). Claimant submits that it has established with reasonable certainty lost profits for at least Phase 1 of Stage 1.[18]

3.7. In conclusion, the appropriate measure for quantifying damages in this case is through lost profits determined based on the DCF method. This Tribunal has considerable discretion to choose among any of Claimant's proposed lost profits scenarios. Additionally, it retains the authority to adjust the inputs of the lost profits model to achieve alternative results for any scenario it finds reasonable under the circumstances.

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[16] Statement of Claim, Section 6(C); Statement of Reply, Section 6(A)(ii); A&M Report, Sections 4 and 5(i).

[17] Statement of Claim, ¶ 6.52; A&M Report, ¶ 152.

[18] *See* Statement of Claim, Section 6.C; Statement of Reply, Section 6.A.ii. Claimant reiterates that although reasonable or sufficient certainty is required for the award of lost profits, the concept of certainty "is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case." **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-82 to 13-83, 13-88.

B. Loss of Opportunity

3.8. Claimant reiterates that its lost profits for at least Phase 1 of Stage 1 of the ETIZ project have been established with reasonably certainty. If, however, the Tribunal finds that even lost profits for Phase 1 of Stage 1 are speculative, the Tribunal has discretion to award loss of opportunity on top of (as in *SPP* or *Gavazzi*)[19] or in the alternative to (as in *Gemplus* or *Bilcon*)[20] sunk costs.

3.9. As Claimant outlined in its pleadings, according to international arbitral practice and jurisprudence, damages for loss of opportunity are particularly appropriate in cases where the tribunal concludes that the evidence of lost profits is too uncertain or speculative to form a basis for a precise calculation, as the Tribunal's hypothetical in Question 2 assumes.[21]

3.10. In short, the difference between a claim for lost profits and a claim for loss of opportunity is that to succeed on a claim for lost profits, a claimant must demonstrate with reasonable certainty that profits would have been earned had the breach not occurred. A claim for loss of opportunity, on the other hand, only requires the claimant to prove the existence of a viable chance to make a profit. In the latter scenario, the tribunal focuses on whether there was an actual opportunity for profit-making, not on the certainty of the profits themselves. To award a claim for loss of opportunity, the tribunal must therefore conclude that: i) there was a realistic and tangible chance to profit; ii) the breach obstructed this opportunity from being explored or realized.

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[19] **CLA-072**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 ("*SPP v. Egypt*"), ¶¶ 212-218; **CLA-074**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award, 18 April 2017 ("*Gavazzi v. Romania*"), ¶¶ 222-232.

[20] **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-93 to 13-100; **CLA-076**, *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("*Bilcon v. Canada*"), ¶¶ 280-303.

[21] Statement of Claim, Section 6.D.i and ¶ 6.72; Statement of Reply, Section 6.A.iii; Hearing Tr., Day 1, 141:1-13. *See also* **CLA-074**, *Gavazzi v. Romania*, ¶ 124 (observing that tribunals are not constrained to choose between awarding lost profits or sunk costs exclusively) and ¶ 217 citing Ripinsky&Williams, p. 291; **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-75 (noting that "it is necessary for the Tribunal to steer an appropriate middle course, between Scylla and Charybdis" in quantifying the claimant's loss), ¶ 13-88 (noting that there are different levels of certainty required for establishing claims for lost profits and loss of opportunity). *See also id.,* ¶¶ 13-91, 13-94.

3.11. The principle of full reparation under international law mandates that the injured party be placed in the position it would have been in had the breach not occurred.[22] This encompasses not only the direct financial outlays (sunk costs) but also the potential future benefits and opportunities that were foreseeable and reasonably certain to accrue.[23] In this context, the Claimant's loss of the opportunity to succeed on and profit from developing and operating ETIZ as per the terms of the 2012 ETIZ Agreement is a tangible and substantial detriment that directly impacts the value of its investment. By considering the loss of opportunity as part of the value of the investment, the Tribunal can provide a more accurate and just compensation, addressing both immediate expenditures and the thwarted potential of the investment.

3.12. This is in accord with the result reached in *SPP v. Egypt*. The dispute in *SPP* arose from a failed project to build a tourist complex near the Egyptian pyramids. Despite initial governmental approval and commencement of construction, the project faced political opposition due to concerns about potential damage to undiscovered antiquities, leading to the withdrawal of approval.[24] In that case, although claimant's claim for lost profits was rejected, the tribunal concluded that claimant's investment value exceeded out of pocket expenses and under the facts of the case included a loss of opportunity to make a commercial success of the project.[25] The tribunal stated that "it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred" and awarded damages for the loss of such opportunity on top of claimant's sunk costs.[26] It calculated such damages based on the difference between the revenues generated by the sale of lots in the tourist complex during the investment's operation and the costs

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[22] Statement of Claim, ¶¶ 6.1-6.5; Statement of Reply, ¶ 6.11.

[23] *See, e.g.,* **CLA-036**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 882. *See also* Statement of Claim, Section 6.C.iii and ¶¶ 6.76-6.77; Statement of Reply, Section 6.A.ii and specifically ¶¶ 6.34-6.35; Hearing Tr., Day 1, 141:19-24.

[24] **CLA-072**, *SPP v Egypt*, ¶¶ 62-64.

[25] *Id*., ¶¶ 188, 214-215.

[26] *Id*., ¶¶ 215-218.

required to generate such revenues.[27] The tribunals in *Gavazzi*,[28] *Bilcon*,[29] and *Gemplus*[30] reached similar results.

3.13. The rationale applied in the *SPP*, *Gavazzi*, *Gemplus*, and *Bilcon* cases equally applies here. At the time of the ETIZ project suspension, the Claimant's investment value, in addition to out-of-pocket expenses, included a significant potential opportunity.[31] This opportunity was to become the successful developer and operator of a pioneering industrial zone in Ethiopia, situated at a prime location on the outskirts of Addis Ababa. This was underpinned by the favorable contractual and political framework established by Ethiopia. The existence of this opportunity is evidenced by the ETIZ Agreements and the ongoing efforts of the parties to implement the ETIZ project over several years. Importantly, there were no major issues encountered during the project's implementation, which could have caused the project from proceeding further except for Ethiopia's improper siting of the project; its arbitrary, inconsistent, and unfair conduct regarding the EIA process; and its subsequent failure to relocate the project's site to a suitable location. Additionally, the existence and value of the opportunity to profit from the project are supported by the terms of the 2012 ETIZ Agreement, which expressly acknowledged that if ETIZ was stopped because of some governmental action without fault on the part of Akgun, the government would pay Akgun's direct and indirect losses.[32]

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[27] *Id*., ¶¶ 216-218.

[28] **CLA-074**, *Gavazzi v. Romania,* ¶ 200 (noting that "it is a fact of commercial life and international trade that investors do not do something for nothing" and that "[i]t would thus make no sense to limit the Claimants' compensation in this case to capital invested."). The tribunal awarded damages for "loss of opportunity to benefit from its capital invested" on top of claimant's sunk costs, which the tribunal quantified at 50% of the amounts the claimant invested. *See id.,* ¶¶ 201, 222-223, 229-232, 251.

[29] **CLA-076**, *Bilcon v. Canada*, ¶¶ 280-303, 400(a) (noting that "[n]o reasonable business person would spend over [the amount of their out of pocket expenses] on an opportunity whose value does not exceed that amount by some reasonable margin" and awarding loss of opportunity damages, which it quantified based on the amounts invested and past transactions regarding the property at issue).

[30] **CLA-032**, *Gemplus v. Mexico*, ¶¶ 13-91 to 13-100 (finding that claimants' opportunity to make future profits on a concession agreement formed part of the value of their investment and awarding damages, primarily on the tribunal's own discretion, with reference to claimants' claimed lost profits, arriving at an amount slightly exceeding one third of the claimed lost profits under the discounted cash flow methodology.)

[31] *See* Statement of Claim, Section 6.C.iii and ¶¶ 6.76-6.77; Statement of Reply, ¶¶ 6.13-6.19.

[32] *See* **C-009**, 2012 ETIZ Agreement, Arts. 11.10-11.11.

3.14. Other factors that enhance the likelihood of Akgun's chance to succeed on the project and are indicative of its high economic value include the following:

3.14.1. Claimant is a highly successful developer with an established track record of developing and operating a similar industrial development in Turkey since 1984;

3.14.2. There was a high demand from both Turkish and international industrialists for a development such as the ETIZ; and

3.14.3. The Project had a high probability of financial feasibility given the essentially self-funded nature of Claimant's business model, which was for the industrialists to provide the capital for Claimant to develop and build both the infrastructure and superstructure (factories) for each industrialist after a contract was signed and funds were received, which was to cover both Akgun Construction's underlying costs and provide a constructor's profit.[33]

3.15. International law dictates that compensation for the loss of an opportunity should be calculated in proportion to the probability of its occurrence.[34] Claimant reiterates that the application of the standard to the fact of this case should be made with a reference to Claimant's calculated lost profits and result in the following quantification:

3.15.1. If the Tribunal finds that there existed an opportunity to succeed on and generate profits from Phase 1 of Stage 1 of the project, Claimant submits that there was at least 80% probability of achieving such success and profits; hence, the Tribunal should award at least 80% of lost profits for Phase 1 of Stage 1 as damages for the loss of its opportunity;

3.15.2. Alternatively, if the Tribunal finds that there existed an opportunity to succeed on and generate profits not only from Phase 1 of Stage 1 but also from Stage 1 as a whole, the Claimant asserts there was at least a 50% probability of achieving such success and profits; hence, the Tribunal should award at least 50% of lost profits for Stage 1 as damages for the loss of its opportunity;

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[33] A&M Report, Section 5.1. *See also* Statement of Claim, ¶¶ 6.36-6.49; Statement of Reply, ¶¶ 6.18-6.19.

[34] Statement of Claim, Section 6.D.ii.

3.15.3. Additionally, if the Tribunal finds that there was also an opportunity to succeed on and generate profits from Stage 2, Claimant submits that there was at least 25% probability of achieving such success and profits; hence, the Tribunal should award at least 25% of lost profits for Stage 2 as damages for the loss of its opportunity.

3.16. Although the quantification of a loss of opportunity should theoretically reflect the probability of the chance benefiting the plaintiff, in practice, arbitral tribunals largely rely on their own discretion when determining this quantification.[35] Hence, should the Tribunal find that any of the opportunities to succeed and profit from the project (through any of its planned stages and phases) existed, it has full discretion to determine based on the facts of this case what would be the probability of such opportunity coming to life, or use any other way of quantification of the loss of opportunity as it sees fit.[36] In exercising its discretion, the Tribunal may consider the Claimant's sunk costs as a baseline measure of damages, while also recognizing the additional harm caused by the lost opportunity for potential success on the ETIZ project. This dual approach aligns with the principle of full reparation under international law, which aims to restore the Claimant to the position it would have been in had the treaty breach not occurred.

3.17. Consequently, even if the Tribunal finds the Claimant's claim for lost profits to be speculative, as its hypothetical in Question 2 assumes, it should still recognize and award the value of the Claimant's opportunity to profit from the ETIZ project (in whole or in part) as part of the full reparation standard. It could

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[35] *Id.*, ¶¶ 6.66-6.75. *See also* **CLA-075**, *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Award, 27 September 2019 (*"Perenco v. Ecuador"*), ¶ 324 (acknowledging that "any estimation of the value of the loss of opportunity is an exercise of discretion" and stating with a reference to Murphy v Ecuador that "Tribunals enjoy a large margin of appreciation in order to determine how an amount of money may "as far as possible, wipe out all the consequences of the illegal act").

[36] *See* **CLA-072**, *SPP v. Egypt*, ¶¶ 214-218 (the appropriate measure of compensation was the difference between the revenues generated by the sale of lots during the investment's operation and the costs required to generate such revenues); **CLA-074**, *Gavazzi v. Romania*, ¶¶ 229-232 (the claimants' loss of chance was found to amount to 50% of the amounts invested by the claimants); **CLA-076**, *Bilcon v. Canada*, ¶¶ 280-303 (the tribunal based its quantification of claimants' loss of opportunity on amounts invested and past transactions regarding the quarry site); **CLA-32**, *Gemplus v. Mexico*, ¶¶ 13-75, 13-94, 13-100 (quantification of the lost opportunity to make profit was done at the tribunal's discretion based on the investor's reasonably anticipated loss of future profits); **CLA-075**, *Perenco v. Ecuador*, ¶¶ 324-326 (quantification of the lost opportunity to have the contract extended was done at the tribunal's discretion).

award damages for the lost opportunity either independently or in combination with sunk costs. Although Claimant has provided various alternative quantifications based on the probability of these opportunities materializing, the Tribunal has full discretion to award any compensation it deems reasonable given the facts of this case.

C. Sunk Costs

3.18. As Claimant's quantum expert observed, since the asset based approach "does not consider the profit-generating potential of the assets, it is not an appropriate measure of damages in this matter under the standard of full reparation."[37] The asset or "cost" approach to value is "an *absolute floor on damages*"[38] and while it can sometimes be used to calculate claimants' sunk costs in their investments, it "has little meaning in the context of damages calculated under the standard of full reparation."[39]

3.19. Claimant reiterates that the value of Claimant's investment exceeded Claimant's sunk costs. Hence, the correct measure of damages in this case would be to compensate Claimant's value of its investment either on the basis of lost profits or at the very least on the basis of lost opportunity to engage in and succeed on the ETIZ project, irrespective of whether the Tribunal would do so based on the income-based approach or any other approach to quantification of the loss. It is only if the Tribunal both rejects lost profits as too speculative, as the hypothetical in Question 2 assumes, and also rejects the principle of loss of opportunity, that it should turn to a damages analysis based solely upon Claimant's sunk costs.

3.20. Claimant has previously addressed its case concerning sunk costs in earlier submissions.[40] However, Claimant wishes to emphasize that while it has documented approximately USD 5 million in sunk costs, the actual costs incurred for the project were significantly higher, totaling no less than USD 7

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[37] A&M Report, ¶ 74. *See also* Hearing Tr., Day 1, 141:19-24.

[38] A&M Report, ¶ 24 (emphasis in original).

[39] *Id.*, ¶ 75.

[40] Statement of Claim ¶¶ 6.81-6.84; Statement of Reply ¶¶ 6.58-6.63; A&M Report ¶¶ 153-154, AM-Appendix 5.

million.[41] This figure includes expenses for which documentary evidence has been lost, as well as accounting for the time and efforts expended by members of the Akgun family in developing the project, which otherwise could have been directed towards other profit-generating activities.[42] Claimant notes that Respondent has not contested the sunk cost figures pled by Claimant.[43]

3.21. The Tribunal has the discretion to award a greater amount in sunk costs than what is documented to cover additional undocumented expenses. This practice is not uncommon for an international tribunal. For example, in *Vivendi v. Argentina*, to ascertain the claimants' sunk costs, the tribunal relied on witness testimony in the absence of other available evidence, resulting in an award that was a rough estimate.[44]

3.22. Based on the foregoing, should the Tribunal dismiss Claimant's claims for lost profits and lost opportunity, it should, at the very minimum, award compensation for all amounts Claimant invested into the project including non-documented expenses in the total amount of at least USD 7 million.

4. QUESTION 3

> IF THE TRIBUNAL WERE TO GRANT COMPENSATION TO EITHER PARTY, WHAT SHOULD THE POST-AWARD INTEREST BE PEGGED TO (E.G. SHORT-TERM COST OF BORROWING IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA)?

4.1. Claimant submits that if the Tribunal were to grant compensation, the post-award interest shall be the same as pre-award interest – *i.e.*, Ethiopia's one-year short-term borrowing rate (based on ten-year Ethiopian sovereign bond

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[41] Statement of Claim, ¶ 6.84.

[42] Witness Statement of Yunus Akgun dated 19 November 2020, ¶¶ 8.1-8.7, 9.4; Ufuk Akgun Witness Statement dated 17 October 2021, ¶ 2.2.

[43] Statement of Defense, Objections to Jurisdiction, and Counterclaims dated 12 March 2021, Section VII.C.iii; Ethiopia's Rejoinder, Section VI.D.iii.

[44] **CLA-005**, *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 August 2007, ¶¶ 8.3.16-8.3.19. *See also* **CLA-178**, Ripinsky, pp. 14-15.

yields) of 6.625 percent.[45] Investment tribunals routinely apply the same rate to pre-award and post-award interest.[46]

4.2. Claimant submits that although the rate of the pre-award and post-award interest shall be the same, the post-award interest shall be compounded monthly rather than annually to ensure that Respondent settles the award promptly. As the tribunal in *Pezold v. Zimbabwe* observed:

> It is well known that Pre- and Post-Award interest serve separate functions. Pre-Award interest is granted in order to ensure full reparation […]. It acts as a proxy to compensate the successful party for being kept out of his or her money from the time of breach up until the date of the Award. […] Post-Award interest serves a different purpose, namely "to serve as an effective incentive to comply with the terms of the judgment or award as expediently as possible."[47]

4.3. Similarly, in *Masdar,* the tribunal cited a number of cases where a higher (monthly, as opposed to annual) rate was applied in respect of post-award interest "in order to encourage prompt settlement of the award" and indeed followed this approach which it considered "the appropriate course to follow."[48]

4.4. For avoidance of doubt, Claimant also seeks post-award interest on the costs that the Tribunal may award in favor of Claimant as a result of its decision on allocation of costs.[49]

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[45] Statement of Claim, ¶ 6.88.

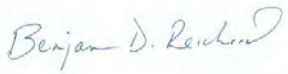
[46] *See, e.g.,* **CLA-071**, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1269.

[47] **CLA-045**, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 943. *See also* **CLA-030**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 856.

[48] **CLA-052**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 665. *See also* **CLA-055**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 849; **CLA-033**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 131; **CLA-029**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 522, 543(2) (all of which awarded post-award interest compounded monthly).

[49] *See* **CLA-016**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, p. 227, ¶ 6 of the operative part; **CLA-041**, *UP*

4.5. In conclusion, Claimant claims post-award interest at Ethiopia's one-year short-term borrowing rate compounded monthly. The post-award interest shall extend to all components of Claimant's compensation, including costs.

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(formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶ 622; **CLA-068**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1857; **CLA-069**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, Section V.3.