



Dr. Zewdineh Beyene Haile
Professor Won Lemma Kidane
Mr. Jackson Shaw Kern

ALG LLP
International Lawyers
1775 I Street, NW
Suite 1150
Washington, DC 20006
USA

T +1 202 587 2750
www.algllp.law

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Dr Michael Hwang S.C.
Michael Hwang Chambers LLC
160 Robinson Road
#19-01 SBF Center
Singapore 068914

michael@mhwang.com

Professor Philip J. McConnaughay
125 West 110th Street, Apt. 2A
New York, New York 10026
United States of America

pjmcconnaughay@gmail.com

Sir David A R Williams KNZM, QC
Bankside Chambers
Level 22, Lumley Centre
88 Shortland St, Auckland 1010
New Zealand

david.williams@darwilliams.co.nz

VIA EMAIL ONLY

PCA Case No. 2020-08

Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. v. The Federal Democratic Republic of Ethiopia

Dear Mr. Chairman and Members of the Tribunal:

I. Introduction

1. We are in receipt of the “Tribunal’s List of Questions” in the above-referenced matter.

2. The Respondent is duly puzzled by the universe of possibilities that would consider Questions 1 and 2 simultaneously relevant at this late stage. It is also exceedingly concerned about the possibility that the Tribunal's recollection of the Parties' vigorous and comprehensive submissions might have incongruously morphed through the passage of time.
3. This case is not about whether Ethiopia should pay a few hundred thousand dollars to compensate for Akgun's commercial losses or sunk costs: it is about a developing nation's compliance with its international obligations that will have extremely grave reputational and economic consequences. The decision will affect the lives of millions of underprivileged and invisible people who did not have the chance to appear before this Tribunal and compete for its sympathy.
4. The choice is not between an investor who lost a few hundred thousand dollars and a State who could potentially compensate. The Respondent here is not a wealthy commercial party. It is a developing nation whose reputation could irreparably be impugned by a finding of wrongful act no matter how irrational the decision and how small the compensation.
5. That is why Ethiopia honored its obligations, appeared before this Tribunal, and defended its record vigorously at great cost. It never genuinely considered that there was any non-frivolous treaty violation claim at all. It participated out of diplomatic courtesy to the Republic of Türkiye and a sense of international obligation.
6. The finding of any liability for a developing nation's decision to relocate an investor for serious environmental impact and abject failure to demonstrate adequate controls before the project was even underway is exactly the kind of abuse of authority that would ignite the kind of uproar, backlash and scrutiny that such cases as *Nigeria v. P&ID* provoked.
7. This Tribunal does not have the jurisdiction to decide this case *ex aequo et bono*. Its task is limited to deciding whether Ethiopia violated the international law rules contained in the Ethio-Turkish bilateral investment treaty. A finding of liability is a finding of an internationally wrongful act. It cannot be ameliorated by diminution in damages.
8. This is not a breach of contract case, for the Claimant quite regrettably chose the wrong arbitral avenue. This is an extremely important public international law matter with exceedingly grave consequences for the entire developing world, particularly in Africa. An internationally wrongful act cannot be casually found to reward an investor who got caught up in regulatory enforcement that it knew about at the time of making the investment.
9. A defensible finding of international liability against a sovereign nation requires not only sufficient, sustained, unremedied, arbitrary and discreditable State action but also an extremely careful appraisal of the actions and omissions through an impeccable and careful

legal process. It cannot be emphasized enough that ultimately the Claimant bears the burden of proof.

10. Any finding of liability will not end the controversy between the Parties; it will only ignite a more serious and public legal battle that would lead to a protracted judicial and political scrutiny not only of the law and the facts but also the entire process. This is particularly so because the publication of the award will likely attract the attention of the community of nations who are currently struggling to reform the ISDS system.
11. The Respondent wishes to refresh the Tribunal's recollection that this is not a simple breach of contract case between two commercial parties that might share losses equitably. It is an indictment of a developing nation's enforcement of its preexisting environmental laws that the investor agreed to honor but failed to do.
12. There is simply no principled pathway to a finding of liability under international law in this case.

II. Specific Responses

13. **Question No. 1** queries whether the *Salini Factors* are legal requirements.
14. The Respondent is unsure about the relevance of this question at this stage. As it repeatedly made clear in its extensive pleadings and oral submissions, any previous ISDS arbitral awards including ICSID cases are not binding on this Tribunal but may be used for their persuasive authority. The question is simply whether the Tribunal is persuaded by the *Salini Factors*.
15. In any case, the Respondent's principal jurisdictional challenge relates to the Claimant's bypassing of the contractual tribunal that the Parties envisaged and agreed upon to instead initiate a treaty claim.
16. That is the threshold jurisdictional question that requires a most careful review.
17. **Question No. 2** queries whether the Tribunal has the discretion to award sunk costs for a finding of FET violation.
18. ***No, the Tribunal does not have the discretion to award sunk costs.*** As indicated in the introduction above, this Tribunal does not have the jurisdiction to decide this case *ex aequo et bono*. The Parties have not agreed to give it that authority. As the Respondent has repeatedly pled, it is elementary that sunk costs are a method of measuring investment value. Investment value is not recoverable absent an expropriation event.
19. Although the temptation is understandable as the ultimate bearers of the burden of State responsibility are invisible, the "equity" in FET does not equate to sympathy. It is a legal principle with a specific and agreed meaning. There is no difference of opinion between the Parties regarding the outer limits of the FET principle: that at a minimum, the finding

- of a violation of FET requires a finding of arbitrary, unjustified and discreditable State action.
20. In the famous words of the *Glamis Gold Ltd. v. The United States of America* tribunal, the finding of a breach of fair and equitable treatment would require “blatant unfairness, [or] a complete lack of due process,” or “***some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.***”¹
 21. The enforcement of pre-existing environmental laws that the investor knew (or should have known) has never ever been found to violate FET – not even by the most irresponsible and exorbitant tribunals.²
 22. The assessment of damages is also subject to the applicable treaty. Ordinarily, tribunals inquire whether any internationally wrongful act ***proximately caused*** any damage to the investor.
 23. An offer of an alternate land following the investor’s failure to meet its legal and contractual environmental obligations destroys proximate causation as the “losses” are then attributable to the investor’s own business decision to exit. There is no way around this.
 24. An investment treaty is not an insurance policy against commercial losses. ISDS tribunals that have gone down in disrepute often confuse State responsibility under international law with breach of contract in commercial contexts.
 25. ISDS tribunals cannot substitute their own judgment on the wisdom of any regulatory action that the State might have taken. They may only look for manifestly arbitrary State behavior. In the words of the *Joseph Charles Lemire v. Ukraine* tribunal:

“The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal’s sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way.”³
 26. Without a finding of arbitrary and capricious conduct by the Ethiopian State relating to the protection of its natural environment, there is no avenue towards the award of damages. It simply does not exist.

¹ *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, **RLA-4**, paras. 616, 626 (emphasis added).

² For the Claimant’s admission of the applicable EIA requirement, see Respondent’s Post-Hearing Submission in Response to The Tribunal’s Procedural Order No. 4, dated 11 November 2022, paras. 25-28.

³ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010, **CLA-49**, para. 283 (emphasis added).

27. The sunk costs theory faces another impossible obstacle in this case: it must be recalled that the expenditure was not even made by the present Claimant, *for the costs were incurred by a non-party*. The allocation of the burden of proof assists the Tribunal to resolve any doubts in this regard. *It is the Claimant that bears the burden of proof and not the other way around, and this equally with regard to liability as to damages.*⁴
28. If the Tribunal still holds any doubts about the legality of the State's actions or causation, it should consider holding another round of hearings to refresh its recollection. As the Respondent vigorously presented during the hearing, there is no principled way of arriving at a finding of liability of any type in this case.
29. **Question No. 3** inquires about interests.
30. Again, the finding of liability based on FET requires, at a minimum, an arbitrary, unjustifiable and discreditable State action. The Tribunal must first identify exactly what action it would consider arbitrary: the request for acceptable environmental studies (on the basis of both law and contract);⁵ or the decision to relocate based on the failure of said studies.
31. Which action is arbitrary, without legal basis, and discreditable?
32. The Respondent cannot imagine a possibility that an informed Tribunal would find Ethiopia's conduct in this case arbitrary and discreditable leading to any compensation that would attract the assessment of interests.
33. Therefore, this question is answered on the assumption that it relates to counterclaims and the award of costs. The Treaty does not contain any provision on interests. As such, the Tribunal must be guided by accepted principles of law that consider interests for their compensatory rather than punitive purpose.

III. Conclusion

34. The Respondent is extremely concerned about the inordinate delay and the nature of these last-minute questions that suggest the use of *ex aequo et bono* as an alternative to a principled and reasoned treaty analysis. The Respondent is again gravely concerned that the understanding of some of the details might have morphed with the passage of time.

⁴ See, in this respect, Hr. Tr. (29 May 2022) [Mr. Kern] 192:24-193:5 (“[I]t’s not shown that *any one* of these expenses was *actually incurred* by Akgun Insaat Makina by this claimant. The claimant has declined to demonstrate that this claimant in this arbitration actually incurred any one of the expenditures that it claims. And in a treaty arbitration this matters.”) (emphasis added).

⁵ As Ethiopia has repeatedly shown, if the 2012 ETIZ Agreement were not found to incorporate exogenous provisions of law (which are applicable of their own force) it can then only be an *autonomous contract provision* imposing requirements *additional* to those of the general laws. See Respondent’s Post-Hearing Submission in Response to The Tribunal’s Procedural Order No. 4, dated 11 November 2022, note 18; see also Ethiopia’s Rejoinder, dated 21 January 2022, notes 86 and 87.

35. When the hearing ended in the Peace Palace on 29 May 2022, there was no lingering doubt that this was a treaty case that should not have been brought in the first place. It claims that a nation's lawful enforcement of its preexisting environmental laws without discrimination violates the relevant investment treaty.
36. It is a great surprise to the Respondent that the Tribunal struggled with these simple questions for more than two years. The Respondent remains curious about the delay's bearing on the overall due process.
37. The Respondent would like to emphasize one final time that this is a treaty claim that cannot be decided *ex aequo et bono*. A finding of FET violation is a finding of an internationally wrongful act. It requires the finding of an arbitrary and discreditable government conduct that left the investor with no administrative and judicial remedy.
38. A treaty remedy is a final remedy for a system failure. It cannot be found casually as it has far greater consequences for a developing nation than any member of the Tribunal could ever imagine.
39. The Respondent urges extreme caution. The facts in this case cannot justify the finding of any liability under any theory of international law.
40. There can only be one honorable and legitimate outcome in this case: the rejection of all treaty claims.
41. Finally, the Respondent would like to remind the Tribunal that a treaty claim is just one of many avenues of redress for the Claimant. The rejection of the treaty claims does not foreclose all other remedies that the Claimant might otherwise have, including international commercial arbitration under the relevant contractual instruments.

Respectfully submitted,



Dr. Zewdineh Beyene Haile
Professor Won Lemma Kidane
Mr. Jackson Shaw Kern

ALG LLP

CC:

Permanent Court of Arbitration

Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Attention: Ashwita Ambast

aambast@pca-cpa.org

VIA EMAIL ONLY