

**THE PERMANENT COURT OF ARBITRATION AT THE HAGUE**

**Case No. 2020-08**

**IN THE MATTER OF AN ARBITRATION UNDER THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW ARBITRATION RULES 2010 AS REVISED IN 2013**

Between

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

... Claimant

and

**FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

... Respondent

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**PROCEDURAL ORDER NO. 3**

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**03 May 2022**

**Tribunal**

Dr Michael Hwang S.C., Presiding Arbitrator  
Professor Philip J. McConnaughay, Arbitrator  
Sir David A R Williams KNZM, QC, Arbitrator

**Secretary to the Tribunal**

Mr Kevin Tan

**OMNIBUS PROCEDURAL ORDER NO. 3**

1. The Tribunal refers to its email of 26 April 2022 and thanks the Parties for its patience thus far.
2. This omnibus Procedural Order deals with the following outstanding issues:
  - 2.1. Whether a Case Management Conference (“**CMC**”) is required;
  - 2.2. The Claimant’s application to strike out one of the Respondent’s legal expert reports;
  - 2.3. Ms Laura Hardin’s attendance at the hearing;
  - 2.4. Witness conferencing (colloquially referred to as “hot-tubbing”) of expert witnesses at the hearing; and
  - 2.5. Production of two summaries comparing the views of each set of experts.

**Whether a CMC is required**

3. After further deliberations, and notwithstanding the Tribunal’s request for the Parties’ availability in Tribunal Communication No. 36, the Tribunal is now of the view that a CMC will not be necessary.
4. The Tribunal considers that any contentious issue that arises between now and the hearing can be dealt with through email correspondence, especially taking into account the significant difficulties of organising a CMC in which seven different timezones around the globe must be accommodated.
5. Instead, the Tribunal will issue a separate Tribunal Communication outlining a list of typical pre-hearing issues, which will be issued in due course. The Parties will be invited to confer and provide their answers to the questions the Tribunal will ask, and the Tribunal is confident that any disagreements can be managed without the need for a CMC.
6. The Tribunal notes that the PCA has informed the Parties in its letter dated 29 April 2022 that the Tribunal would like to meet both Parties’ representatives at 4pm, 17 May 2022, at the Peace Palace to discuss any outstanding issues and review housekeeping matters.

**The Claimant’s application to strike out one of the Respondent’s legal expert reports**

7. The Tribunal refers to the Claimant’s email of 7 April 2022, and the Respondent’s reply dated 13 April 2022.
8. To summarise, the Tribunal has considered the Claimant’s submissions carefully, but has decided to allow the Respondent to rely on both Dr Damtie and Dr Anabo’s reports.
9. The Claimant relies on paragraph 13.1 of Procedural Order No. 1 (“**PO1**”), which is reproduced below:

*The provisions of [12] above are applicable, mutatis mutandis, to expert witnesses. The expert must identify his or her area of expertise. Each Party will be confined to one expert per discipline unless permission is granted by the Tribunal for additional experts. The expert’s report will contain the expert’s opinion, including a description of the method, evidence and information used in arriving at the expert conclusions.*
10. The purpose of this provision is to ensure “equality of arms” and prevent a party with greater financial muscle from tipping the scales by bringing more experts to support its position on the same point.
11. The Tribunal considers that there is no meaningful duplication between Dr Damtie and Dr Anabo’s reports. While the two reports are broadly of the same discipline, they are in their essential character not overlapping. The Tribunal does not think that the Claimant is correct to characterise this as the Respondent getting a “second bite at the cherry” on issues of Ethiopian environmental law.
12. Finally, paragraph 13.1 of PO1 also gives the Tribunal the discretion to allow additional experts.

13. For the above reasons, the Tribunal disallows the Claimant's application to strike out either of the Respondent's legal expert reports.
14. Instead, the Tribunal grants the alternative relief of directing that witness conferencing be between Dr Damtie and Professor Tekle, and that the Claimant be allowed to cross-examine Dr Anabo separately from and prior to any examinations of Professor Tekle and Dr Damtie.
15. However, the Tribunal does not think that Dr Damtie should be prohibited from listening to Dr Anabo's testimony before the latter occurs, or that Respondent's counsel should be prohibited from discussing Dr Anabo's testimony with Dr Damtie.
16. It is not typical to segregate expert witnesses. This is because expert witnesses are independent parties who owe their duties to the Tribunal, not the Parties appointing them. Dr Anabo and Dr Damtie have confirmed in their reports that they understand this and there is no reason to assume otherwise. There is therefore no need to direct that Dr Damtie be segregated from Dr Anabo.
17. The Claimant will be permitted to cross-examine either Dr Damtie or Dr Anabo on the extent and nature of any discussions between themselves if it feels that that would be helpful to its case.

#### **Ms Laura Hardin's attendance at the hearing**

18. The Tribunal refers to the Claimant's email of 26 April 2022 and the Respondent's reply of 27 April 2022.
19. The Tribunal notes that the Respondent does not object to Ms Laura Hardin attending the hearing, as long as it is given the opportunity to cross-examine Ms Hardin. The Tribunal assumes that the expressed position of the Respondent overrides its earlier statement on 2 April 2022 where it indicated that it did not wish to cross-examine Ms Hardin.
20. The Tribunal now directs that Ms Hardin may attend the hearing physically, and that time should be allocated in the agreed hearing schedule for (a) Ms Hardin to make an oral presentation to the Tribunal on her expert opinion, and (b) the Respondent to cross-examine her on her written and oral evidence.

#### **Witness conferencing of expert witnesses**

21. The Tribunal is of the view that witness conferencing between the expert witnesses at the hearing would be helpful.
22. The expert witnesses should be paired up according to their topics of expertise (each a "**Topic**") as follows:

<b>Topic</b>	<b>Claimant</b>	<b>Respondent</b>
<b>Scientific merits of an EIA / SEA (jointly, the "Scientific Experts")</b>	Professor Dale Whittington	Professor Susan Murcott
<b>Ethiopian environmental law (jointly, the "Legal Experts")</b>	Professor Mekete Bekele Tekle	Dr Mellese Damtie Dandi

23. The Tribunal notes that Dr Damtie's report is directly responsive to Professor Tekle's report, for which the Tribunal is grateful to the Parties. Witness conferencing will therefore take place between Dr Damtie and Professor Tekle based on their answers to the identical questions they deal with in their reports.
24. There is less direct coincidence between Professor Whittington's and Professor Murcott's reports. Notwithstanding this, the Tribunal notes that a section of Professor Whittington's report is dedicated to addressing Professor Murcott's report.
25. The Tribunal therefore directs that witness conferencing should occur between Professors Whittington and Murcott to the extent that their reports overlap or deal with sufficiently similar issues. However, they should be cross-examined separately on their independently expressed views (that is, those views which are addressed or

responded to in the opposing expert's report), with the possibility of the Tribunal asking the opposing expert for a spontaneous comment in reply on any point.

### **Production of two summaries comparing the views of each set of experts**

26. The Tribunal refers to the Claimant's email on behalf of the Parties dated 14 April 2022, in which the Claimant conveyed the Parties' joint affirmation that the submission of Experts' Joint List(s) of Issues upon which they have reached agreement, and the reasons for any remaining disagreement or differences, would not be useful.
27. The Tribunal has considered this issue further, and sets out its views below.
28. The Tribunal would point out that Tribunal Communications Nos. 32 and 33 were issued when the Tribunal had only had sight of the Statement of Claim and Statement of Defence and Counterclaim. At that point, the Claimant had submitted an expert report on quantum of damages, and the Respondent had submitted expert reports on Ethiopian environmental law and the scientific merits of an EIA/SEA. It was correct at that point to say that there was insufficient overlap between the Claimant's and Respondent's reports to make any Joint List of Issues useful or even possible.
29. However, this is no longer the case. As identified in paragraph 22, there are now at least two sets of experts (namely, the Scientific Experts and the Legal Experts) who have expressed views on broadly the same discipline. The Tribunal understands that there are significant disagreements between both sets of Experts, which may have posed some difficulty given the assumption underlying the Experts' Joint List of Issues that the areas of disagreement would be relatively minor. However, it would still be helpful to the Tribunal for the Parties to assist in highlighting clearly the issues on which both opposing experts have expressed a view (and what those views are).
30. The Tribunal notes that the Legal Experts, while disagreeing on their interpretations of Ethiopian environmental law, at least answer the same questions, which lends itself easily to useful comparison. However, as noted above, the Scientific Experts' reports are not responsive to each other in the way the Legal Experts' reports are.
31. The Tribunal therefore requests the Parties to produce a comparison table setting out clearly the issues on which either Scientific Expert's report is responsive to the opposing expert's report, and summarising succinctly – with paragraph references to the Scientific Expert reports as appropriate – each relevant Scientific Expert's view on each disputed issue on which they both express a view (henceforth the "**Comparison Table**").
32. The Tribunal provides in Annex A to this Procedural Order a sample template of the Comparison Table.
33. The Tribunal requests the Parties to confer and jointly work on this Comparison Table for the Scientific Experts, to be submitted to the Tribunal by **13 May 2022**.
34. If the Parties are unable to agree on how an Expert's evidence on any point should be summarised (which should be a relatively uncontentious issue), they may each provide their own version of what they think is an accurate summary, with paragraph references to the relevant Expert reports.



**Michael Hwang S.C.**

Presiding Arbitrator  
For and on behalf of the Tribunal

# **ANNEX A**

## **Sample Comparison Table**

**SAMPLE COMPARISON TABLE**

<b>Scientific Experts Comparison Table: Point of Conflict No. 1</b>	
<b>Brief summary of the issue at hand</b>	
<b>Professor Susan Murcott's view (with references as appropriate)</b>	
<b>Professor Dale Whittington's view (with references as appropriate)</b>	