

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited

v.

Republic of Kenya

(ICSID Case No. ARB/15/29)

PROCEDURAL ORDER NO. 3

Members of the Tribunal

The Honourable Ian Binnie CC, QC, President
Mr. Kanaga Dharmananda SC, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Assistant Secretary of the Tribunal

Ms. Kendra Magraw

6 June 2016

WHEREAS

1. On 5 May 2016, in accordance with Procedural Order No. 1, the Claimants filed their Memorial on the Merits.
2. By letter of 23 May 2016, the Respondent raised with the Tribunal an objection that the Claimants had not submitted any expert evidence with respect to quantum with their Memorial, which the Respondent argued was contrary to the requirements contained in sections 14.2 and 14.3 of Procedural Order No. 1. As a result, the Respondent requested, *inter alia*, that a separate phase be held after the hearing on the merits with regard to quantum in the event such a determination becomes necessary.
3. On 26 May 2016, the Claimants responded that, while they were open to discussing trifurcation of the proceeding, they would prefer to defer the discussion until 18 November 2016 (i.e. the scheduled date for consideration of bifurcation under Annex A to Procedural Order No. 2).

Having considered the above-referenced submissions, the Tribunal hereby orders as follows:

4. The Tribunal has conferred in respect of the above issues and agrees with the Respondent that under the terms of Procedural Order No. 1, and in particular section 14.2, the Claimants were required to provide with their Memorial the evidence, including expert evidence, on which they wish to rely. The Claimants did not file any expert evidence with respect to the quantification of their alleged loss. Nor did they seek an amendment to the terms of Procedural Order No. 1 to permit them to follow the “wait and see” procedure they now propose. It was not open to the Claimants unilaterally to “reserve their rights to make further submissions and file further evidence (expert and lay) on quantum, and seek the Tribunal’s indulgence in this regard.”
5. In its letter of 23 May 2016, the Respondent proposes that, at the conclusion of the merits phase, depending on the outcome, there be (if it proves to be necessary and permitted by the Tribunal) “a separate loss of profits phase to commence after the hearing on the merits has concluded.”
6. In the Tribunal’s opinion, the Respondent’s proposal is an appropriate resolution of this issue.

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7. As a result, the Tribunal has amended the procedural calendar, as contained in the attached Annex A.

On behalf of the Tribunal:

[signed]

The Honourable Ian Binnie CC, QC
President of the Tribunal
Date: 6 June 2016

Annex A – Procedural Timetables

No.	Description	Party / Tribunal	Time Period / Date	Comments
1.	Memorial on the Merits	CLAIMANTS	5 May 2016	
2.	Notice of Preliminary Grounds for Objection to Jurisdiction and, if desired, Request for Bifurcation	RESPONDENT	5 July 2016	
3.	Counter-Memorial on the Merits (except quantum) and Memorial on Objections to Jurisdiction (if any) including fact witness statements, legal expert reports, and any supporting documentary evidence	RESPONDENT	5 October 2016	Respondent has 5 months from Claimants' Memorial on the Merits to respond
4.	Claimant's Response on Request for Bifurcation	CLAIMANTS	10 November 2016	Claimants have 5 weeks to respond
5.	Consideration by Tribunal of Application for Bifurcation in writing unless teleconference is requested by either of the parties	TRIBUNAL AND PARTIES	18 November 2016	
6.	Tribunal Decision on the Request for Bifurcation	TRIBUNAL	8 December 2016	

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SCENARIO ONE: PROCEEDING IS BIFURCATED

The following calendar shall apply if the Respondent raises objections under Arbitration Rule 41(1) and the proceedings are bifurcated.

No.	Description	Party / Tribunal	Time Period / Date	Comments
7.	Claimants' Counter-Memorial limited to jurisdiction, including fact witnesses, statements, legal expert reports, and any supporting documentary evidence	CLAIMANTS	25 January 2017	Agreed by the parties
8.	Parties to file any requests for document production in form of Redfern Schedule	PARTIES	8 February 2017	
9.	Producing/Objecting parties to produce non-contentious documents and file objections concerning contentious document requests	PARTIES	1 March 2017	
10.	Requesting parties to reply to objections concerning contentious document requests	PARTIES	8 March 2017	

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No.	Description	Party / Tribunal	Time Period / Date	Comments
11.	Teleconference on document production requests and Decision shortly thereafter	TRIBUNAL	10 March 2017	
12.	Parties to produce documents according to Tribunal's Decision	PARTIES	22 March 2017	
13.	State's Reply Memorial on Jurisdiction, including fact witness statements, legal expert reports, and any supporting documentary evidence	RESPONDENT	12 April 2017	Respondent has 11 weeks from 25 January 2017 for Reply
14.	Claimants' Rejoinder Memorial on Jurisdiction, including fact witness statements, legal expert reports, and any supporting documentary evidence	CLAIMANTS	12 May 2017	Claimants have 4 weeks, 2 days for Rejoinder
15.	Pre-hearing organizational meeting by telephone conference call or, at the request of either party, in person	TRIBUNAL AND PARTIES	24 May 2017	
16.	Oral hearing on Jurisdiction	ALL	14 June 2017	
17.	Decision on Jurisdiction	TRIBUNAL	on or before 14 July 2017	

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No.	Description	Party / Tribunal	Time Period / Date	Comments
IF JURISDICTION UPHELD:				
18.	Parties to file any Requests for Document Production in form of Redfern Schedule	PARTIES	29 July 2017	
19.	Producing/Objecting parties to produce non-contentious documents and file objections concerning contentious document requests	PARTIES	26 August 2017	
20.	Requesting parties to reply to objections concerning contentious document requests	PARTIES	8 September 2017	
21.	Hearing (if so ordered) and Decision on Document Production Requests	TRIBUNAL	15 September 2017	
22.	Parties to produce documents according to Tribunal's decision	PARTIES	22 September 2017	

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No.	Description	Party / Tribunal	Time Period / Date	Comments
23.	Claimants' Reply Memorial on the Merits (except quantum), including fact witness statements, legal expert reports, and any supporting documentary evidence ¹	CLAIMANTS	20 October 2017	Claimants have 4 weeks from document production to prepare Reply
24.	State's Rejoinder Memorial on the Merits (except quantum), including fact witness statements, legal expert reports, and any supporting documentary evidence ²	RESPONDENT	1 December 2017	Respondent has 6 weeks from Claimants' Reply to prepare Rejoinder

¹ Note: If the Respondent seeks additional documents related to new issues raised in the Reply, the request is to be made promptly, responded to by the Claimants and disposed of promptly in writing by the Tribunal.

² Note: If the Claimants seek additional documents related to new issues raised in the Rejoinder, the request is to be made promptly, responded to by the Respondent and disposed of promptly in writing by the Tribunal.

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No.	Description	Party / Tribunal	Time Period / Date	Comments
25.	<p>Pre-hearing organizational meeting in person or (if Tribunal so directs) by teleconference including:</p> <ul style="list-style-type: none"> -Tribunal to deal with new document requests or related issues; -Parties to identify the witnesses and experts of the opposing party (having filed witness statements and expert reports) who it intends to cross-examine; - Tribunal to indicate any witnesses or experts not called by the parties who it wishes to question, if any; - Settle List of Issues. 	TRIBUNAL AND PARTIES	15 December 2017	
26.	Delivery of Hearing Bundles	PARTIES	5 January 2018	
27.	Oral Hearing on the Merits (except quantum)	TRIBUNAL AND PARTIES	15 January to 26 January 2018 (if necessary)	

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No.	Description	Party / Tribunal	Time Period / Date	Comments
28.	Post-hearing submissions on law and evidence if requested by Tribunal	PARTIES	TBD	
29.	Decision on the Merits (except quantum). If no liability is found to exist, the Tribunal will issue its Award.	TRIBUNAL	TBD	
30.	If the Tribunal finds that the Respondent is liable, the parties will seek to agree on a timetable for a Phase on Quantum. In default of agreement, the Tribunal will hear submissions and issue procedural directions for a Quantum Phase.	TRIBUNAL AND PARTIES	TBD	

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SCENARIO TWO: THERE IS NO REQUEST FOR BIFURCATION; OR BIFURCATION IS REQUESTED, BUT NOT GRANTED³

No.	Description	Party / Tribunal	Time Period / Date	Comments
31.	Claimants' Counter-Memorial on Preliminary Objections	CLAIMANTS	25 January 2017	
32.	Request for production of documents	PARTIES	9 February 2017	
33.	Objections to production of contentious documents and any production of non-contentious documents	PARTIES	9 March 2017	
34.	Reply to Objections	PARTIES	6 April 2017	
35.	Hearing by teleconference of Objections to production of documents	TRIBUNAL	20 April 2017	
36.	Decision shortly thereafter	TRIBUNAL	5 May 2017	
37.	Production of documents as ordered by the Tribunal	PARTIES	26 May 2017	

³ Tribunal's Decision to be rendered on or before 15 December 2016.

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No.	Description	Party / Tribunal	Time Period / Date	Comments
38.	Reply on the Merits (except quantum) and Counter-Memorial on Preliminary Objections (if any) ⁴	CLAIMANTS	21 July 2017	Claimants have 2 months from end of document production to prepare Reply
39.	Rejoinder on the Merits (except quantum) and Reply on Preliminary Objections (if any) ⁵	RESPONDENT	20 October 2017	Respondent will have 3 months following Claimants' Reply
40.	Rejoinder on Preliminary Objections (if any) ⁶	CLAIMANTS	10 November 2017	
41.	Identification of witnesses/experts for cross-examination	PARTIES	24 November 2017	

⁴ Note: If the Respondent seeks additional documents related to new issues raised in the Reply, the request is to be made promptly, responded to by the Claimants and disposed of promptly in writing by the Tribunal.

⁵ Note: If the Claimants seek additional documents related to new issues raised in the Respondent's pleading, the request is to be made promptly, responded to by the Respondent and disposed of promptly in writing by the Tribunal.

⁶ Note: If the Respondent seeks additional documents related to new issues raised in the Claimants' pleading, the request is to be made promptly, responded to by the Respondent and disposed of promptly in writing by the Tribunal.

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No.	Description	Party / Tribunal	Time Period / Date	Comments
42.	<p>Pre-hearing organizational meeting in person or (if Tribunal so directs) by teleconference including:</p> <ul style="list-style-type: none"> -Tribunal to deal with new document requests or related issues; -Parties to confirm the witnesses and experts of the opposing party (having filed witness statements and expert reports) who it intends to cross-examine; - Tribunal to indicate any witnesses or experts not called by the parties who it wishes to question, if any; - Settle List of Issues. 	ALL	15 December 2017	As in PO No. 1
43.	Delivery of Hearing Bundles	PARTIES	5 January 2018	
44.	Hearing on the Merits (except quantum)	TRIBUNAL AND PARTIES	15 to 29 (if required) January 2018	

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No.	Description	Party / Tribunal	Time Period / Date	Comments
45.	Post-hearing briefs, if ordered by Tribunal	CLAIMANTS AND RESPONDENT	TBD	
46.	Decision on the Merits (except quantum). If no liability is found to exist, the Tribunal will issue its Award.	TRIBUNAL	TBD	
47.	If the Tribunal finds that the Respondent is liable, the parties will seek to agree on a timetable for a Phase on Quantum. In default of agreement, the Tribunal will hear submissions and issue procedural directions for a Quantum Phase.	TRIBUNAL AND PARTIES	TBD	