

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. 8
Following the Second Pre-Hearing Telephone Conference

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

1. The Tribunal convened a pre-hearing organizational conference on Thursday 14 December 2017 to consider and dispose of a number of matters raised by the parties including:
 - (1) an application by the Claimants dated 20 November 2017 requesting the Tribunal to require the Respondent to call as witnesses (or in the alternative to invite the Tribunal to directly summon as witnesses) the former Cabinet Secretary Najib Balala, the former Mines Commissioner Masibo and the former NEMA Director of Compliance and Enforcement Benjamin Langwen, to testify at the hearing of this dispute on jurisdiction and the merits;
 - (2) an application by the Claimants dated 27 November 2017 requesting the Tribunal to take into account in deciding the above application the witness statement of former Mines Commissioner Masibo dated on or about 27 November 2017; and
 - (3) an application by the Claimants dated 8 December 2017 to admit the said witness statement of former Commissioner Masibo into evidence.
2. UPON READING THE MATERIAL FILED AND HEARING THE SUBMISSIONS OF COUNSEL the Tribunal rules as follows.
 - (1) There is no compelling evidence in support of the applications in respect of former Cabinet Secretary Najib Balala and former NEMA Director Benjamin Langwen and the said applications are dismissed.
 - (2) In the view of the Tribunal, compelling circumstances exist to justify the reception of the witness statement of former Mines Commissioner Masiibo dated on or about 27 November 2017, despite the delayed application. The Tribunal notes the statement by the Respondent in its Reply at paragraph 24 that "Given conditions of procedural fairness, including adequate time and notice, the State would of course have no difficulty in dealing with whatever allegation may be contained in the Claimants' new witness evidence, and defend itself vigorously." Accordingly, the following terms are imposed:
 - (a) the Claimants produce former Commissioner Masibo at the hearing in Dubai in person as their own witness and at their own expense. (In the event Mr Masibo does not have a passport the Respondent has agreed to assist in the issuance of a valid passport to Mr Masibo in time for the hearing). In the event Mr Masibo does not appear the said witness' statement is to be struck from the record;
 - (b) the Respondent shall have the right to cross examine Mr Masibo as the Claimants' witness and for that purpose one half day (3 hours) shall be added to the Respondent's allocated time for the hearing; and
 - (c) the Claimants and the Respondent are to cooperate in producing documents relevant to the examination and cross examination of Mr Masibo as requested by the opposing party/ parties, and for that purpose each side is to prepare a list of document demands in the form of a Redfern Schedule and serve on the opposing party/parties on or before 20 December, to be responded to no later

than 5 January 2018. In the event disputes arise with respect to the production of documents the Tribunal will decide.

(3) Each party will have the opportunity to have its expert witness(es) provide a 30-minute presentation which may or may not include questions by the counsel for the party calling the expert evidence.

(4) The parties are to confer to complete to the extent possible the draft hearing schedule. The Tribunal expects that witnesses will be available to provide a continuous flow of testimony during the hours of the hearing without gaps, including arrangements for the giving of evidence by Mr O'Sullivan as previously arranged.

3. The continued cooperation of counsel would be appreciated.

On behalf of the Tribunal:

Signed

The Honourable Ian Binnie CC, QC
President of the Tribunal
Date: 15 December 2017