

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. 1

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

29 March 2016

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Introduction

The first session of the Tribunal was held on 5 February 2016, at 10:30 a.m. (Washington, D.C. time), by telephone conference, the Parties having agreed to extend the time period by which to hold the first session referred to in ICSID Arbitration Rule 13. The session was adjourned at 11:14 am.

An audio recording and a transcript of the session were made and deposited in the archives of ICSID. The audio recording and the transcript was distributed to the Members of the Tribunal and the Parties.

Participating in the conference were:

Members of the Tribunal:

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

ICSID Secretariat:

Ms. Aïssatou Diop, Secretary of the Tribunal
Ms. Kendra Magraw, Assistant Secretary of the Tribunal

Participating on behalf of the Claimant:

Dr. Sam Luttrell, Counsel, Clifford Chance (Perth)
Mr. Peter Harris, Senior Associate, Clifford Chance (Perth)
Mr. Isuru Devendra, Associate, Clifford Chance (Perth)

Participating on behalf of the Respondent:

Mr. Karori Kamau, Partner, Iseme Kamau and Maema Advocates
Ms. Milly Jalega Odari, Partner, Iseme Kamau and Maema Advocates
Mr. Ben Sanderson, Of Counsel, DLA Piper UK LLP
Ms. Harriet Foster, Associate, DLA Piper UK LLP
Ms. Muthoni Kimani, Senior Deputy Solicitor General, Republic of Kenya
Ms. Njeri Wachira, Head of the International Law Division, Republic of Kenya
Ms. Pauline Mcharo, Senior Principal State Counsel, Republic of Kenya

The Tribunal and the Parties considered the following:

- The Draft Agenda circulated by the Tribunal Secretary on 16 December 2016, as amended by the Parties on 14 January 2016 and the Tribunal on 1 February 2016;
- The Draft Procedural Order circulated by the Tribunal Secretary on 16 December 2015;

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- The Parties' comments on the Draft Procedural Order received on 14 January 2016, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree; and
- The Respondent's Proposed Procedural Timetable received on 19 January 2016.

Following the session, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The timetable is attached as Annex A.

1. Applicable Arbitration Rules
Convention Article 44

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.

2. Constitution of the Tribunal and Tribunal Members' Declarations
Arbitration Rule 6

- 2.1. The Tribunal was constituted on 12 November 2015 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Parties confirmed that the Tribunal was properly constituted and that no Party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the Parties by the ICSID Secretariat on 12 November 2015 and 9 December 2015. By letter to the Parties of 21 January 2016, the Tribunal confirmed that none of their signed declarations required updating as a result of the Claimants' disclosure of their third-party funder, Alliance 1 Pty Ltd.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

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3. Fees and Expenses of Tribunal Members
Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees
 - 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
 - 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
 - 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
 - 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Decisions and Procedural Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
 - 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
 - 5.3. The Tribunal will draft all rulings, including the award, within a reasonable time period. If a ruling has not been issued within three months after the final submission

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on a particular matter, the Tribunal will provide the Parties with status updates every two months.

5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.

5.5. The Tribunal's rulings on procedural matters may be communicated to the Parties by the Tribunal Secretary in the form of a letter or email.

6. Delegation of Power to Fix Time Limits
Arbitration Rule 26(1)

6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.

6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Secretary of the Tribunal
Administrative and Financial Regulation 25

7.1. The Tribunal Secretary is Ms. Aïssatou Diop, Legal Counsel, ICSID, assisted by Ms. Kendra Magraw, Legal Associate, ICSID, or such other person as ICSID may notify the Tribunal and the Parties from time to time.

7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Aïssatou Diop
ICSID
MSN J2-200
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-9833
Fax: + 1 (202) 522-2615
Email: adiop3@worldbank.org
Paralegal email: Phoebe Ngan, sngan@worldbank.org

Ms. Kendra Magraw
ICSID
MSN J2-200

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1818 H Street, N.W.
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Tel.: +1 (202) 458-8979
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Paralegal email: Phoebe Ngan, sngan@worldbank.org

7.3. For local messenger deliveries, the contact details are:

Ms. Aïssatou Diop
Ms. Kendra Magraw
701 18th Street, N.W. (“J Building”)
2nd Floor
Washington, D.C. 20006
Tel.: + 1 (202) 458-4567

8. Representation of the Parties
Arbitration Rule 18

8.1. Each Party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For Claimants

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Clifford Chance LLP
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For Respondent

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9. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. The Parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 9.2. By letter of 18 November 2015, ICSID requested that each Party pay US\$150,000 to cover the initial costs of the proceeding. ICSID received the Claimants' payment on 18 December 2015 and the Respondent's payment on 20 January 2016.
- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

10. Place of Proceeding
Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)

- 10.1. Dubai, United Arab Emirates, shall be the place of the proceeding.

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- 10.2. The Tribunal may hold hearings at any other place that it considers appropriate if the Parties so agree.
- 10.3. The Tribunal may deliberate at any place it considers convenient.
11. Procedural Language, Translation and Interpretation
Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22
- 11.1. English is the procedural language of the arbitration.
- 11.2. Documents filed in any other language must be accompanied by a translation into English.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only the relevant parts, provided that the Tribunal may require a more full or a complete translation at the request of any Party or on its own initiative.
- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the Party disputing the translation specifically requests a certified version.
- 11.5. Documents exchanged between the Parties in a language other than English under §15 below need not be translated.
- 11.6. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted simultaneously.
- 11.7. The Parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.8. The costs of the interpreters will be paid from the advance payments made by the Parties, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs.
12. Routing of Communications
Administrative and Financial Regulation 24
- 12.1. Written communications in the case shall be transmitted by email or other electronic means to the Parties, the Tribunal Secretary, and the Tribunal.
- 12.2. Electronic versions of communications ordered by the Tribunal to be filed

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simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing Party and the Tribunal.

12.3. The Tribunal Secretary shall not be copied on direct communications between the Parties when such communications are not intended to be transmitted to the Tribunal.

12.4. The email addresses of the Members of the Tribunal are:

The Honourable Ian Binnie CC, QC
Email: ibinnie@litigate.com

Mr. Kanaga Dharmananda SC
Email: skd@17francisburt.com

Prof. Brigitte Stern
Email: brigitte.stern@jstern.org

13. Number of Copies and Method of Filing of Parties' Pleadings
Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23

13.1. By the relevant filing date, the Parties shall submit by email to the Tribunal Secretary and the opposing Party an electronic version of the pleading with witness statements, expert reports and a list of documents,¹ and upload the pleading with the supporting documentation to the file sharing platform that will be created by ICSID for purposes of this case.

13.2. On the business day following the electronic filing, the Parties shall courier to the Tribunal Secretary:

13.2.1. one unbound hard copy in A4/Letter format² of the entire submission, including signed originals of the pleading, witness statements, and expert reports, together with documents (but not including legal authorities);

13.2.2. one hard copy in A5 format of the entire submission including the pleading, the witness statements, expert reports, and documents (but not including legal authorities); and

13.2.3. two USB drives, or CD-ROMs or DVDs, with full copies of the entire submission, including the pleading, the witness statements, expert reports, documents, and legal authorities.

¹ Please note that the World Bank server does not accept emails larger than 25 MB.

² The A4/Letter format is required for ICSID's archiving.

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13.3. Also on the day following the electronic filing, the Parties shall courier to the opposing Party at the addresses indicated at §8.1 above and to each Member of the Tribunal at the addresses indicated at §13.4 below:

13.3.1. one hard copy in A4 format of the entire submission including the pleading, witness statements, expert reports, and exhibits (but not including legal authorities);

13.3.2. for the Honourable Ian Binnie: one hard copy in A4 format of the entire submission in size 14 font including the pleading, witness statements, expert reports and exhibits (but not including legal authorities);

13.3.3. for Mr. Dharmananda: one hard copy in A5 format of the entire submission including the pleading, witness statements and exhibits (but not including legal authorities);

13.3.4. for Prof. Stern: one hard copy in A4 format of the entire submission including the pleadings, witness statements and expert reports (but not including exhibits and legal authorities); and

13.3.5. one minimum USB drive, or CD-ROMs or DVDs each for §13.3.1 to §13.3.4, with a full copy of the entire submission, including the pleading, witness statements, expert reports, documents, and legal authorities.

13.4. The addresses of the Tribunal Members are as follows:

The Honourable Ian Binnie CC, QC Arbitration Place Bay Adelaide Centre 900-333 Bay Street Toronto, Ontario M5H 2T4 Canada	Mr. Kanaga Dharmananda SC Francis Burt Chambers Level 19, 77 St. Georges Terrace Perth, WA 6000 Commonwealth of Australia	Prof. Brigitte Stern 7, rue Pierre Nicole 75005, Paris French Republic
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13.5. Legal authorities shall be submitted in electronic format only, unless a hard copy is specifically requested by the Tribunal.

13.6. Electronic versions of a pleading or other written submission, witness statement or expert report shall be text searchable (i.e., "non-scanned" and text searchable PDF format or Word) and, if possible, in "e-brief" version, containing hyperlinks to the evidence cited).

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- 13.7. Pleadings or other written submissions, witness statements and expert reports shall be accompanied by an index hyperlinked to the supporting documentation.
- 13.8. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to the Tribunal Secretary.
- 13.9. A filing shall be deemed timely if sent by a Party by 5pm, Washington, D.C. time, on the relevant date.

14. Number and Sequence of Pleadings
Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

- 14.1 The Parties shall submit their written submissions in accordance with the Procedural Calendar set out in Annex A for the reasons provided in Annex B and in accordance with the rules set out below.
- 14.2. In the first exchange of submissions (within each phase), the Parties shall set forth all the facts and legal arguments on which they intend to rely. Allegations of fact and legal arguments shall be presented in a detailed and comprehensive manner, and shall respond specifically to all allegations of fact and legal arguments made by the other Party. Together with such submissions, each Party shall produce all evidence upon which it wishes to rely, including factual exhibits and legal authorities, written witness statements and expert reports, if any, with the exception of documents to be obtained during the document production phase.
- 14.3. In the second exchange of submissions (within each phase), the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange of submissions, or discussing matters arising from evidence obtained in the document production phase, unless new facts have arisen after the first exchange of submissions. Together with this second exchange of submissions, the Parties may file additional factual exhibits and legal authorities, witness statements and expert reports only insofar as relevant to the adverse Party's preceding submission (including the documents, witness statements and expert reports produced therewith) or the documents produced by the Parties during the document production phase.
- 14.4. Following each factual allegation, the Parties shall, whenever possible, identify the evidence adduced or to be adduced in support of that allegation.
- 14.5. All written submissions, witness statements, and expert reports shall be divided into consecutively numbered paragraphs.

15. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

15.1. Within the time limit set out in Annex A, a Party may request another Party to produce documents or categories of documents within the other Party's possession, custody or control. Every request for production of documents shall identify with precision each document or category of documents sought and establish its relevance to the case and materiality to the outcome. The requests shall be recorded in a joint schedule (populating columns 1 through 4) in the form below. Such requests shall not be sent to the Tribunal or the ICSID Secretariat.

1	2	3	4		5	6	7
No.	Requesting Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decisions
			Ref. to Submissions	Comments			

15.2. Within the time limit set out in Annex A, using column 5 of the schedule provided by the first Party, the other Party shall either produce the requested documents that are in its possession, custody or control or set forth its objections to the production sought.

15.3. Within the time limit set out in Annex A, the requesting Party shall reply to the other Party's objections in the column 6 of the same schedule. The reply shall be limited to answering specific objections made in column 5. The Parties shall jointly provide the Tribunal and the ICSID Secretariat with the completed schedule (in both Word and PDF formats).

15.4. On or around the date set out in Annex A, the Tribunal will, in its discretion, rule upon the production of the documents or categories of documents sought having regard to the legitimate interests of the other Party and all of the surrounding circumstances.

15.5. Within the time limit set out in Annex A, documents for which no objection is sustained by the Tribunal shall be produced to the requesting Party without copying the Tribunal. Documents so produced shall not be deemed on record unless and until the requesting Party subsequently files them as exhibits in accordance with §16 below.

15.6. The failure to produce as ordered may result in adverse inferences drawn by the Tribunal as regards the merits of the defaulting Party's case.

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- 15.7. Further requests for the production of documents sought by either Party, if any, shall be permitted only at the discretion of the Tribunal. The request must be substantiated with reasons.
- 15.8. Introduction by a Party of evidentiary materials following the filing of the last written submission will be permitted only in exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other Party. Any such request shall not attach the new evidentiary materials. If the Tribunal admits the new evidentiary materials, the opposing Party shall be allowed to submit evidence in rebuttal.
- 15.9. For the avoidance of doubt, Power Point slides, demonstrative exhibits and charts or other similar materials in aid of argument may be used by either Party during any oral hearing, subject to the direction of the Tribunal and, provided always that such slides or materials reflect evidence on the record (with citations to such evidence) and do not constitute or introduce any new evidence, whether directly or indirectly.
- 15.10. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2). In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with §16 below and shall be deemed on record.
16. Submission of Documents
Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24
- 16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the Parties, including exhibits and legal authorities. Further documentary evidence relied upon by the Parties in rebuttal shall be submitted with the Reply and Rejoinder.
- 16.2. The documents shall be submitted in the manner and form set forth in §13 above.
- 16.3. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party.
- 16.3.1. Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.
- 16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is

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afforded sufficient opportunity to make its observations concerning such a document.

- 16.4. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. The documents shall be submitted in the following form:
 - 16.5.1. Exhibits shall be numbered consecutively throughout these proceedings.
 - 16.5.2. The number of each Exhibit containing a document produced by Claimant shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.
 - 16.5.3. Each Exhibit shall have a divider with the Exhibit identification number on the tab.
 - 16.5.4. A Party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.
 - 16.5.5. Exhibits shall also be submitted in PDF format and start with the number “C-0001” and “R-0001,” respectively.
 - 16.5.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party, in which case the Tribunal will determine whether authentication is necessary.
- 16.6. The Parties shall file all documents only once by attaching them to their pleadings. Documents so filed need not be resubmitted with witness statements even if referred to in such statements.
- 16.7. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each Party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The Party submitting such exhibits shall provide them in hard copy to the other Party, the Tribunal Members, the Tribunal Secretary, the court reporter and interpreters at the hearing at a time to be decided at the pre-hearing organizational meeting. The use of separate witness bundles is to be considered at the pre-hearing organizational meeting.

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17. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 24

- 17.1. Witness statements and expert reports shall be filed together with the Parties' pleadings.
- 17.2. Neither Party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party (following the procedure outlined in §16.3).
- 17.3. Each witness statement and expert report shall be signed and dated by the witness.
- 17.4. Witness statements and expert reports shall be submitted in English or with a translation into English and shall be accompanied by any documents or information upon which they rely unless such documents or information have already been submitted as exhibits with the Parties' submissions, in which case reference to such exhibits shall be sufficient.
- 17.5. The Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference and conclusions of any such expert. The Tribunal may, on its own initiative or at the request of any Party, take oral evidence of such expert(s).
- 17.6. The first statement of a witness shall be identified as "First Witness Statement," the second as the "Second Witness Statement," and so on. In addition, the witness statements submitted by each Party shall be numbered consecutively using the prefixes "CWS-" and "RWS-" (for Claimants and Respondent witness statements, respectively).
- 17.7. The first report of an expert shall be identified as "First Expert Report," the second as the "Second Expert Report," and so on. In addition, the expert reports submitted by each Party shall be numbered consecutively using the prefixes "CER-" and "RER-" (for Claimants and Respondent expert reports, respectively).
- 17.8. Within the parameters of the IBA Guidelines on Party Representation in International Arbitration, it shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts or to help prepare the witness statements and examinations.

18. Examination of Witnesses and Experts
Arbitration Rules 35 and 36

For witnesses of fact

- 18.1. By the date set out in Annex A, the Parties will identify the witnesses and experts of the opposing Party (having filed witness statements and expert reports) whom it intends to cross-examine. By the date set out in Annex A, the Tribunal will indicate the witnesses or experts not called by the Parties whom it wishes to question, if any.
- 18.2. Each Party shall be responsible for securing the appearance of its own witnesses at the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 18.3. The facts contained in the written statement of a witness whose cross-examination has been waived by the other Party shall not be deemed established by virtue of the fact that no cross-examination has been requested. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances.
- 18.4. Each Party shall be responsible for the practical arrangements, costs, and availability of the witnesses it offers. The Tribunal will decide upon the appropriate allocation of any related costs in the final award.
- 18.5. The Tribunal may call upon a Party to produce as a witness or invite to appear as a witness any person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.
- 18.6. If appropriate, the Tribunal may in its discretion allow a witness to be examined by videoconference and will issue directions to that effect.
- 18.7. The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear when summoned to a hearing or requested for cross-examination by either Party, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider (and shall exclude, if so requested by either Party) the witness statement of a witness who fails to appear and does not provide a valid reason. For these purposes, it shall be understood that a witness who was not called to testify and/or be cross-examined in person has a valid reason not to appear and that a witness whom the Tribunal has allowed to testify by videoconference has appeared at the hearing.
- 18.8. As a rule and subject to other arrangements during the pre-hearing telephone conference, fact witnesses shall be examined prior to expert witnesses, and the Claimants' fact (expert) witnesses shall be examined prior to the Respondent's fact

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(expert) witnesses.

18.9. At the hearing, the examination of each witness shall proceed as follows:

18.8.1. The witness shall make the declaration specified at Arbitration Rule 35(2).

18.8.2. The Party who presents the witness may briefly examine the witness (in principle no more than 10 minutes) for purposes of asking introductory questions, including to confirm and/or correct that witness's written statement, and to address facts which have arisen after such statement was drafted ("direct examination").

18.8.3. The adverse Party may then cross-examine the witness on facts which are relevant and of which the witness has direct knowledge but not limited to facts addressed in that witness's written statement ("cross-examination").

18.8.4. The Party who has presented the witness may then re-examine the witness with respect to any matters arising out of the cross-examination ("redirect examination").

18.8.5. The Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.

18.8.6. The Tribunal may order two or more witnesses to be examined concurrently ("witness conferencing").

18.10. Subject to a different agreement by the Parties or a different ruling by the Tribunal, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read transcripts of oral testimony or argument, prior to his or her examination. The question of the presence of persons who are witnesses and instructors of a Party in the proceedings shall be considered at the pre-hearing organizational meeting.

18.11. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness and expert. The Tribunal may in its discretion refuse to hear a witness or expert when it appears that the facts on which he or she is to testify are already proven by other evidence or are irrelevant. It may also order that a witness or expert be recalled for further examination at any time. Any witness or expert may only be recalled by the Tribunal (of its own motion or on request) if such intention is announced in time to assure the availability of the witness and expert during the hearing.

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For experts

18.12. The rules set forth in §§18.9 - 18.11 above shall apply by analogy to the evidence of Party- and Tribunal-appointed experts, with the following specifications:

18.11.1. Before giving oral evidence, the expert shall make the declaration specified at Arbitration Rule 35(3).

11.11.2. After consultation with the Parties, the Tribunal may request non-legal experts to give a presentation lasting no longer than thirty minutes summarizing their methodology and conclusions in lieu of or in addition to brief direct examination.

18.11.3. Subject to a different agreement by the Parties or a different ruling by the Tribunal, the limitation at §18.10 shall not apply to expert witnesses.

19. Pre-Hearing Organizational Meetings

Arbitration Rule 13

19.1. A pre-hearing organizational meeting shall be held 8 weeks before the hearing by telephone between the Tribunal, or its President, and the Parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.

20. Hearings

Arbitration Rules 20(1)(e) and 32

20.1. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.

20.2. The hearing shall be held at a place to be determined in accordance with §10 above.

20.3. The hearing shall take place on the dates determined in Annex A for the reasons provided in Annex B.

20.4. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.

20.5. In principle, each Party will have an equal time allocation to examine witnesses and/or experts at the hearing, subject to adjustments if due process so requires, in particular if there is a significant imbalance in the number of cross-examinations. It is left to each Party to determine how much of its total allotted time it wishes to spend on direct,

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cross, or redirect examinations, as long as it does not exceed the total time allocated. The Parties may request short extensions of time if necessary and the Tribunal will exercise a limited degree of flexibility in this regard.

20.6. Hearings shall not be open to the public.

21. Records of Hearings and Sessions

Arbitration Rules 13 and 20(1)(g)

21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.

21.2. A verbatim transcript in the procedural language shall be made of any hearing and session. Unless otherwise agreed by the Parties or ordered by the Tribunal, the verbatim transcript of hearings other than sessions on procedural issues shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.

21.3. The Parties shall agree on any corrections to the transcript within 15 days of the later of the dates of the receipt of the sound recordings and transcript. The agreed corrections may be entered by the court reporter in the transcript (“revised transcript”). The Tribunal shall decide upon any disagreement between the Parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcript.

22. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

22.1. The Tribunal is to make orders regarding Post-Hearing Memorials, if required, as soon as possible following conclusion of the hearing.

22.2. In accordance with Arbitration Rule 28(2), promptly after the closure of the hearings, the Parties are to submit their statements of costs reasonably incurred in accordance with any timelines or further directions ordered by the Tribunal.

23. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

23.1. The Parties consent to ICSID publication of the award and any order or decision issued in the present proceeding.

24. Additional Guidance on Evidence

24.1. The Tribunal may seek guidance from, but shall not be bound by, the IBA Rules on the Taking of Evidence in International Arbitration (2010 edition).

24.2. The Parties agree to adhere to the IBA Guidelines on Party Representation in International Arbitration.

On behalf of the Tribunal:

[signed]

The Honourable Ian Binnie CC, QC

President of the Tribunal

Date: 29 March 2016

ANNEX A

Annex A – Procedural Timetables

No.	Description	Party / Tribunal	Time Period / Date
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 and Memorial on Objections (if any) to Jurisdiction including fact witness statements, legal expert reports, and any supporting documentary evidence	RESPONDENT	5 October 2016
4.	Claimant's Response on Request for Bifurcation	CLAIMANTS	10 November 2016
5.	Disposition of Application for Bifurcation in writing unless teleconference is requested by the parties	TRIBUNAL AND PARTIES	18 November 2016
6.	Tribunal Decision on the Request for Bifurcation	TRIBUNAL	15 December 2016

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
7.	Claimants' Counter-Memorial limited to jurisdiction, including fact witnesses, statements, legal expert reports, and any supporting documentary evidence	CLAIMANTS	25 January 2017
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
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

*Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited
v. Republic of Kenya
(ICSID Case No. ARB/15/29)*

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No.	Description	Party / Tribunal	Time Period / Date
14.	Claimants' Rejoinder Memorial on Jurisdiction, including fact witness statements, legal expert reports, and any supporting documentary evidence	CLAIMANTS	12 May 2017
15.	Pre-hearing organizational meeting in person or by telephone conference call (to be determined)	TRIBUNAL AND PARTIES	24 May 2017
16.	Oral hearing on Jurisdiction	ALL	14 June 2017
17.	Decision on Jurisdiction	TRIBUNAL	on or before 20 July 2017
IF JURISDICTION UPHELD:			
18.	Parties to file any Requests for Document Production in form of Redfern Schedule	PARTIES	9 August 2017
19.	Producing/Objecting Parties to produce non-contentious documents and file objections concerning contentious document requests	PARTIES	15 September 2017
20.	Requesting Parties to reply to objections concerning contentious document requests	PARTIES	29 September 2017
21.	Hearing (if so ordered) and Decision on Document Production Requests	TRIBUNAL	6 October 2017
22.	Parties to produce documents according to Tribunal's decision	PARTIES	13 October 2017

*Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited
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No.	Description	Party / Tribunal	Time Period / Date
23.	Claimants' Reply Memorial on the Merits, including fact witness statements, legal expert reports, and any supporting documentary evidence	CLAIMANTS	23 October 2017
24.	State's Rejoinder Memorial on the Merits, including fact witness statements, legal expert reports, and any supporting documentary evidence	RESPONDENT	15 November 2017
25.	Any applications for additional document production to be filed, limited to in scope to any new issues raised in the Reply	PARTIES	21 November 2017
26.	Pre-hearing organizational meeting in person or (if Tribunal so directs) by teleconference including: -Tribunal to deal with new document requests; -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	24 November 2017
27.	Delivery of Hearing Bundles	PARTIES	25 November 2017
28.	Oral Hearing on the Merits	TRIBUNAL AND PARTIES	28 November to 1 December 2017

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No.	Description	Party / Tribunal	Time Period / Date
29.	Post-hearing submissions on law and evidence if requested by Tribunal	PARTIES	TBD
30.	Award on the Merits	TRIBUNAL	TBD

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

No.	Description	Party / Tribunal	Time Period / Date
31.	Request for production of documents	PARTIES	25 January 2017
32.	Objections to production of contentious documents and any production of non-contentious documents	PARTIES	23 February 2017
33.	Reply to Objections	PARTIES	23 March 2017
34.	Hearing by teleconference of Objections to production of documents, and Decision shortly thereafter	TRIBUNAL	13 April 2017
35.	Production of documents as ordered by the Tribunal	PARTIES	10 May 2017
36.	Reply on the Merits and Counter-Memorial on Preliminary Objections (if any)	CLAIMANTS	23 June 2017
37.	Rejoinder on the Merits and Reply on Preliminary Objections (if any)	RESPONDENT	18 August 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
38.	Rejoinder on Preliminary Objections (if any)	CLAIMANTS	15 September 2017
39.	Identification of witnesses/experts for cross-examination	PARTIES	18 October 2017
40.	Pre-hearing conference	ALL	8 November 2017
41.	Hearing on the merits	ALL	28 November to 1 December 2017
42.	Post-hearing briefs, if ordered by Tribunal	CLAIMANTS AND RESPONDENT	TBD
43.	Award	TRIBUNAL	TBD

ANNEX B

Annex B – Reasons for Decisions reflected in Annex A

Following the First Session, on 12 February 2016, the Tribunal circulated draft Annex A to Procedural Order No. 1 and invited both Parties to submit comments thereto by 19 February 2016. The Parties did so in an exchange that took place from 18 February 2016 to 8 March 2016. Having considered the Parties' comments, the Tribunal set the procedural calendar in Annex A for the reasons provided below.

As noted by DLA Piper, counsel for the Respondent, in its letter of 29 February 2016, the Kenyan election will be held on 8 August 2017. Public servants will be told "around June 2017" not to make any "significant decisions" or "incur any substantial expenditure until the new government takes office." Such a directive is, of course, normal, but firstly, Kenya is already committed to the litigation. This arbitration is not a new commitment that is to be entered into by public servants. Secondly, the "oral hearing on jurisdiction" is scheduled for 14 June 2017, and according to the existing schedule, a decision is to be delivered by 20 July 2017. Accordingly, there will not be much for Kenya's public servants to deal with until towards the end of July when it will be known whether or not the claim survives the expected jurisdictional challenge. During this period, it seems doubtful that Kenyan public servants will need to be taking decisions about "engaging with factual and expert witnesses" and "travel expenses" because it will not be known whether the case will continue at all.

Moreover, while the Presidential election is on 8 August 2017, DLA Piper indicates that the new President will take "at least 21 days to assume office." This would take "at least" until 29 August. DLA Piper notes that the election could be contested, and possibly a new election ordered which will take "at least 85 days," i.e. another two and a half to three months, with the possibility of more political controversies to follow. The Tribunal does not think it appropriate to create a schedule around a *possible* need to accommodate a contested Presidential election. If there is a challenge to the election, and DLA Piper in fact encounters the potential concerns outlined in its letter, the Tribunal will of course have to re-assess the situation and, if necessary, re-schedule as may be required.

In any event, under the proposed Annex A, the only scheduled event before 29 August 2017 is item 18 – request for document production in the form of a Redfern Schedule on or before 9 August 2017. In the view of the Tribunal, this is lawyers' work. The Respondent will have had the Claimants' Memorial on the Merits since 5 May 2016. Counsel for the Respondent will have been briefed in depth by the Kenyan public servants in the fall of 2016, and relevant documents assembled, in order to put DLA Piper in a position to produce a Counter-Memorial on the Merits by 5 October 2016. This is *ten months* before the Presidential election. By the autumn of 2016, accordingly, both sides will know the general categories of documents they will want produced should the case survive the jurisdictional challenge. In the view of the Tribunal, in the event jurisdiction is upheld, counsel will be in a position to deliver the document requests by the originally scheduled date of 9 August 2017.

The next critical date is 30 August 2017, by which it was anticipated that the Parties would produce documents to which no objection is taken, and to file objections. The Tribunal

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acknowledges that at this point it may be necessary for counsel for the Respondent to have greater input from the Respondent and perhaps seek further instructions. Although many of the documents will already have been assembled to produce the Counter-Memorial, there may be additional material to assemble and review before passing the “uncontested” documents to the Claimants. However, according to DLA Piper, the new Government will be up and running by September. Accordingly, the Tribunal is in agreement that a delay is warranted in the deadline for delivery of the “uncontested” documents and the filing of any objections from 30 August until 15 September. This delay gives the Respondent *six weeks* between service of the notice to produce to the deadline for the delivery of the uncontested documents. That should be adequate time. If instructions are required from senior Kenyan public servants, such a need would arise towards the end of the period (perhaps for a “sign off”) when, in the ordinary course of post-election events, the Attorney General will be in place (i.e. more than a month after the Presidential election).

As to the formulation of objections to the production of documents, it would be usual for counsel for the Respondent to discuss such issues with the client at the time of preparation of the Counter-Memorial months earlier. In any event, it is lawyers’ work to determine what objections can legitimately be made.

If the Notices of Objection are filed 15 September, and keeping in mind it was earlier accepted that two weeks would be sufficient to respond, the Tribunal has concluded that it can reasonably schedule a deadline for the response to objections for 29 September.

In accordance with the original schedule, the Tribunal’s hearing on contested documents would be one week after the Replies. Accordingly, that event would now be scheduled for 6 October. The Tribunal expects to deliver its decision on the contested documents soon thereafter.

The Parties would then have a week – until 13 October – to produce any additional documents ordered by the Tribunal.

The Claimants’ Reply would then be required by 23 October. At that stage the Claimants would have had in hand the Tribunal’s decision on jurisdiction since 20 July, and would have been working on their Reply since then. It would not take long for the Claimants to plug into the draft Reply references to any new documents ordered produced by the Tribunal.

At that stage the Tribunal would then be back on its originally proposed Schedule that requires the Respondent’s Rejoinder by 15 November. If, as expected, the Respondent properly limits its Rejoinder to new arguments or evidence arising out of the Reply, the Tribunal believes that three weeks would be sufficient.

On this basis, the originally proposed schedule for items 25 through 27 would remain the same with the hearing on the merits scheduled for 28 November to 1 December.

As to Scenario Two – “There is no Request for Bifurcation or Bifurcation is requested but refused” – the original schedule, modified in the August/September 2017 period as indicated above, would accommodate the interest of all Parties. After all, the problem that needed to be addressed in

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Scenario One – “if the proceeding is bifurcated” – is that additional time constraints are imposed by the bifurcated hearing which are (obviously) avoided if there is no bifurcation.

With respect to the remaining issues, the Tribunal is of the view that, in the event of a request for bifurcation, the application would be determined on the written application material unless the Parties agree to proceed by videoconference or telephone conference.