

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. 7
Following the First 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

Further to the pre-hearing organizational teleconference on Tuesday 14 November 2017, the Tribunal wishes to advise that a formal procedural order will issue in due course dealing with the agenda items as follows:

1. *Agenda item 1:* As to the length of the hearing, the hearing will terminate no later than Friday 26 January 2018. The subsequent days of Saturday 27 January to Monday 29 January 2018 are released. In accordance with Article 2.4 of Procedural Order No. 1 (“P.O.#1”), the Tribunal expects that the last day (Friday 26 January 2018) will be kept available for Tribunal deliberations.
 - a. The Tribunal will not sit on Saturday 20 January 2018. To save time on the opening day of the hearing, the parties are encouraged to bring forward contested applications to the extent convenient and appropriate, to the next pre-hearing teleconference, on 15 December 2017.
 - b. The Tribunal will be flexible regarding when a day's proceedings terminates when it is desirable to sit later than the usual closing time to finish a witness.
 - c. As to opening statements each side is to have 2.5 hours plus 30 minutes for Tribunal questions, i.e. the Claimants will go 9:30 to 12:30 and the Respondent 2 pm to 5 pm.
 - d. The members of the Tribunal will pose questions during the opening and closing presentations of each party as may be appropriate rather than waiting until the end. The timekeeper will be astute to identify when counsel's answer concludes and counsel's presentation resumes for purposes of the agreed time allocation.

- e. The parties are invited to submit a brief outline of oral opening statements not exceeding 10 pages by 10 January 2018. The outline should simply identify the issues or questions to be addressed by the Tribunal but not supporting arguments. Such statements are for the convenience of the Tribunal members and will not restrict the opening submissions of counsel.
 - f. As to the order of witnesses, the Tribunal affirms Article 18.8 of P.O. # 1 and will hear the fact witnesses of both parties followed by experts for both parties. As to the suggestion that the Tribunal would be better able to appreciate the fact witnesses having heard the Kenya law expertise, the Tribunal notes that it will already have reviewed the written opinions. The Tribunal prefers to have the facts established in testimony before an expert witness assumes those facts to be true in giving his or her opinion.
 - g. As to time available for the examination of witnesses, the Tribunal affirms Article 20.5 of P.O.#1 which grants the parties equal time to examine/cross-examine witnesses to be allocated as they see fit. Article 20.5 reserves to the Tribunal some flexibility in this regard if circumstances require.
 - h. Regarding the sequence of closing addresses, the Tribunal awaits the comments of the Respondent on the Claimants' proposal that the Respondent first address the Tribunal followed by the Claimants.
2. *Agenda item 2.3:* Regarding direct examination, the Tribunal affirms Article 18.8.2 of P.O.#1, up to 10 minutes for fact witnesses and 30 minutes for experts.
3. *Agenda item 2.4:* Regarding witness sequestration:

- a. A party representative is entitled to be present throughout the hearing to give instructions as may be necessary. (The Claimants have advised that in their case the representative will be David Anderson). The condition is that if the party representative is also a witness he or she be the first to testify for that party;
- b. Once a fact witness has testified he or she may remain in the hearing;
- c. Experts can be in the hearing room throughout.

Note: The Tribunal notes that having the opposing experts of each party testify together (“the Australian hot box”) has proven to be very effective in some cases to get an understanding of the real issues. The Tribunal invites the views of the parties on this possibility and, if such a measure is adopted, the preferred procedure, e.g. who may ask questions and in what order. The topic will be on the agenda for the 15 December 2017 teleconference.

4. *Agenda item 3.4:* The Tribunal understands that the parties have sorted out the USB issue.
5. *Agenda item 4:* The need for post hearing briefs will be determined at the hearing. It is anticipated that towards the middle of the second week of the hearing, the Tribunal will give some guidance to the parties as to the issues on which they might put particular emphasis in the closing oral arguments. The Tribunal may wait until after hearing closing arguments to indicate whether post-hearing briefs will be requested, and if so on what topics. Additional topics or questions may subsequently be added after the Tribunal has had an opportunity to deliberate.
6. *Agenda item 6:*

- a. The Tribunal is in receipt of the application concerning Mr. O'Sullivan. The usual term would be that if at the time of the hearing Mr O'Sullivan is unable to travel his evidence may be taken by video. However, the Tribunal awaits the comments of the Respondent in respect of Dr. Kimaru's letter;
 - b. The parties agreed to arrange a joint meeting of legal experts in Nairobi. It would be helpful to the Tribunal to have a joint expert report of no more than 10 pages simply outlining what they agree on and where they disagree, but preparation of such a joint report is a suggestion not a Tribunal direction;
 - c. The Tribunal acknowledges receipt of the Claimants' application to the Tribunal to require the testimony of a number of Kenyan officials. The Tribunal requests the Respondent to reply to the application no later than Friday 1 December 2017.
7. *Agenda item 6.1:* the hearing will be closed to the public in accordance with Article 20.6 of P.O. #1 unless both parties agree to open it to the public and make a joint application to the Tribunal to that effect.
8. The Tribunal will hold a further pre-hearing teleconference on Friday 15 December 2017. The Secretary, Ms. Aïssatou Diop, will circulate the dial-in information.

Signed

On behalf of the Tribunal:
The Honourable Ian Binnie CC, QC
President of the Tribunal
Date: 22 November 2017