

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. 4

Members of the Tribunal

The Honourable Ian Binnie CC, QC, President

Mr. Kanaga Dharmananda SC, Arbitrator

Professor Brigitte Stern, Arbitrator

Acting Secretary of the Tribunal

Ms. Kendra Magraw

9 September 2016

WHEREAS

1. On 5 May 2016, in accordance with Procedural Order No. 1, the Claimants filed their Memorial on the Merits, accompanied by the First Witness Statement of Mr. David Anderson, the First Witness Statement of Mr. Francis Donald O’Sullivan and the First Witness Statement of Mr. Darren Townsend.
2. By letter of 18 August 2016, the Respondent submitted an application requesting that the Tribunal order the Claimants to produce certain documents that the Respondent stated the Claimants had relied upon in their Memorial and its accompanying witness statements, but had not introduced as exhibits. The Respondent also submitted as Exhibit 1 to its 18 August 2016 application a 20 June 2016 letter addressed from it to the Claimants requesting the production of seventeen sets of documents identified in an accompanying appendix (Appendix 1) as Items 1 to 17.
3. According to the Respondent’s application, the parties exchanged correspondence concerning the requested documents between 20 June 2016 and 12 August 2016. The following correspondence was accordingly also included in Exhibit 1:
 - an e-mail of 5 July 2016 from counsel for the Claimants to counsel for the Respondent;
 - a letter of 13 July 2016 from counsel for the Respondent to counsel for the Claimants;
 - an e-mail of 25 July 2016 from counsel for the Respondent to counsel for the Claimants;
 - an e-mail of 29 July 2016 from counsel for the Claimants to counsel for the Respondent;
 - an e-mail of 5 August 2016 from counsel for the Respondent to counsel for the Claimants;
 - an e-mail of 12 August 2016 from counsel for the Claimants to counsel for the Respondent.
4. In the course of the above correspondence, the Claimants agreed to produce Items 9, 15 and 16 listed in Appendix 1 of Exhibit 1, but the parties were unable to come to an agreement on the remaining requested documents.
5. As a result, in its 18 August 2016 application, the Respondent requests that the Claimants be ordered to produce Items 1-7 and 17 of Appendix 1 of Exhibit 1, and reserves the right to request Items 8, 10, 11-14 of Appendix 1 of Exhibit 1.
6. Upon invitation, the Claimants submitted a response to the application by letter of 26 August 2016, in which they confirm that they had agreed to produce Items 9, 15 and 16, but that they did not agree to produce Items 1-7 and 17 listed in Appendix 1 of Exhibit 1.

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

7. The Tribunal has now had an opportunity to review the documents in question, and the submissions of counsel, and agrees with the Respondent that, for the most part, in making reference to particular documents in their Memorial, the Claimants put forward such documents as “evidence on which it wishes to rely” within the meaning of paragraph 14.2 and “documentary evidence relied upon by the parties” within the meaning of paragraph 16.1 of Procedural Order No. 1 dated 29 March 2016. The Claimants were thus required to produce such documents along with their Memorial. Those paragraphs provide more specific direction than the general Redfern regime for production of documents under paragraph 15 of Procedural Order No. 1, an exercise in documentary discovery that is not yet due to commence under the current procedural timetable as set out in Procedural Order No. 3 dated 6 June 2016. The more specific rule prevails over the more general. Furthermore, in the Tribunal’s view, it makes practical sense that a party is entitled to call for the production of documents identified specifically in a pleading prior to being called upon to respond to that pleading based on the documents and evidence at a time prior to initiation of the Redfern procedure.
8. At present, the Tribunal is required to rule on the production of documents 1, 2, 3, 4, 5, 6, 7 and 17 of Appendix 1 of Exhibit 1 of the Respondent’s document request application dated 18 August 2016.
9. Attached as Annex A to this Order is a chart listing the document requests, the references to the documents in the Claimants’ Memorial material, and the respective positions of the parties.
10. **Items 1 to 7** relate to development information possessed from time to time by the Claimants with respect to the Mrima Hill mineral deposits, the subject matter of the investment claim. The parties agree that the documents are relevant.
11. Firstly, the Respondent says that, as these documents ought to have been delivered together with the Claimants’ Memorial, the Respondent is not required as a condition precedent to production to make a search of records available to it to determine if it already has the documents in its “possession, custody or control” within the meaning of the IBA Guidelines. However, in light of the Respondent’s second point – that the Respondent has already conducted such searches and continues to do so, but to date without success – the Tribunal considers it preferable to base its ruling on the second point, as follows.
12. Counsel for the Respondent stated in an e-mail to counsel for the Claimants on 5 August 2016 that “our client has conducted searches, and is continuing to search, for Items 1 to 8 and has not yet been able to locate these documents.”¹ In the 18 August 2016 application

¹ Exhibit 1 to the Respondent’s 18 August 2016 application, p. 21.

to the Tribunal, counsel for the Respondent stated that “the Claimants have refused to accept the Respondent’s good faith assurance[s]”² in this respect and that “the Claimants have made it clear that they will accept nothing less than a categorical confirmation ‘that the requested documents are not within the State’s custody, possession or control.’”³

13. It is evident that the parties are somewhat at cross purposes on this point. While it may not be practical at a time of ongoing searches for the Respondent to state “categorically” that it does not have the requested documents in its “possession, custody or control,” it is equally unsatisfactory for the Respondent to talk of its inability “to locate these documents” when what is requested is an assurance that, despite its good faith search efforts to date, it does not have the requested documents in its “possession, custody or control.”
14. The Respondent should therefore, as a condition of production at this time, provide a statement as requested by the Claimants, except that instead of the “categorical confirmation” referred to above, it will be sufficient for the Respondent to provide assurance that it has made and continues to make its best efforts to determine whether any of the requested Items 1 to 7 are already in its possession, custody or control, but that, to date, such searches have been unsuccessful; and that therefore, the Respondent, to the best of its knowledge, does not have Items 1 to 7 in its possession, custody or control, but will forthwith advise the Claimants if any such documents so described are found to be in its possession, custody or control.
15. The Claimants, for their part, draw a distinction between documents “upon which a party relies,”⁴ which they acknowledge must be produced unless already in the Respondent’s possession, custody or control, and documents simply referred to as a part of the background to the narrative set out in the Memorial. In the Tribunal’s view, documents referred to in the Memorial are *prima facie* to be taken as “documents upon which a party relies.”
16. Having regard to the description and considerations set out in Annex A attached hereto, the Tribunal makes the following rulings with respect to the requested documents:
 - Item 1 – The Claimants are to produce copies of ***all reports and drilling sampling and assay results prepared by Said S. Hussein***. This material is said to be a key starting point for the Claimants’ investment.
 - Item 2 – ***A geological survey that includes the relevant area done in 1952 as part of the Geological Survey of Kenya***. This is not a document particular to the claim but an early official survey that provided the Claimants with some insight into “the overall picture.” In the Tribunal’s view, this is a background document which need not be produced at this time.

² Respondent’s 18 August 2016 application, p. 3.

³ *Id.* (internal citations omitted)

⁴ Claimant’s 26 August 2016 response, p. 1.

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- **Item 3 – Report by Anglo-American (whole document)**. The Claimants have produced a selection of pages from this document as Exhibit C-105. The Respondent should not have to rely on the Claimants’ selection of extracts. The whole document should be produced.
- **Item 4 – Data from “extensive exploration work” done by Messers Coetzee and Edwards for the Geological Society of South Africa**. This data is identified by the witnesses Mr. David Anderson (Managing Director of Claimants Cortec Mining Kenya Limited and Cortec (Pty) Ltd.) and Mr. Darren Townsend (formerly President and Chief Executive Officer of the parent company of Claimants Stirling Capital Limited and Cortec (Pty) Ltd.) as part of their “due diligence” for the Mrima Hill project. The Claimants are to produce the data referred to in Item 4.
- **Item 5 – Report by Pichiney Saint Gobain**. This report was also included in the “due diligence” referred to under Item 4 and is to be produced by the Claimants.
- **Item 6 – Geological Mapping by Messers Dodhia and Pandit for the Geological Survey of Kenya**. This is a 1976 document, hence potentially of more significance than the 1952 document referred to in Item 2, but this work is not included in the list of “due diligence” documents listed by Mr. Anderson in his witness statement. It need not be produced at this time.
- **Item 7 – Mineral Exploration and drilling results from the Japanese International Cooperation Agency and the Metal Mining Agency of Japan** during 1990 to 1992. This work is included by Messers Anderson and Thompson as part of the Claimants’ “due diligence” in evaluating the potential investment. The Claimants are to produce Item 7.
- **Item 17 – Cover e-mail from the Speaker to Mr. Juma** (Exhibit C-93). The Claimants state that the reference to this e-mail was “erroneous”⁵ and will be corrected in due course. Nevertheless, if it exists, the e-mail is potentially a significant document which the Respondent may want to take into consideration in drafting its Counter-Memorial. The document is to be produced or the Claimants are to state that the document is not within their possession or control.

17. In instances where a document has not been ordered to be produced at this stage, such is without prejudice to the Respondent’s right to seek production at a later date under the process outlined at paragraph 15 of Procedural Order No. 1.

⁵ Exhibit 1 to the Respondent’s 18 August 2016 application, p. 7.

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18. Costs are reserved for subsequent determination.
19. For the reasons set out above, the Tribunal orders the Respondent to provide the statement specified in paragraph 14 above by **September 15, 2016** and orders the Claimants to produce the Items identified in paragraph 16 above (namely, Items 1, 3, 4, 5, 7 and 17) by **September 23, 2016**.

On behalf of the Tribunal:

[signed]

The Honourable Ian Binnie CC, QC
President of the Tribunal
Date: 9 September 2016

ANNEX A

ITEM	TITLE	LOCATION IN MEMORIAL / WITNESS STATEMENTS	TEXT	RESPONDENT'S POSITION (Application of August 18, 2016)	CLAIMANT'S POSITION (Response of August 26, 2016)
1	Copies of all reports and drilling, sampling and assay results prepared by Said S. Hussein	Memorial, paras. 37 and 38	<p>37. Once SPL 256 was granted, CMK put its work programme into action by conducting further field work. For this purpose, CMK hired Said Hussein, a Kenyan geologist who had previously held a senior position at the DMG.⁷⁹ In August 2008, Mr Hussein's activities included taking soil samples from selected areas within CMK's Prospecting Right at Mrima Hill.⁸⁰ Again, because permission had not yet been granted to prospect in the forest,⁸¹ Mr Hussein's prospecting activities were limited to the areas alongside roads and forestry tracks.</p> <p>38. The results of Mr Hussein's work suggested that CMK was getting closer to discovering a commercially viable resource. Under Clause 17(i) of SPL 256, CMK was obliged to immediately report any discovery of minerals "<i>likely to be of major and immediate economic interest</i>" to the Commissioner of Mines and Geology.⁸² In accordance with this</p>	<p>"Item 1: the Claimants in their Memorial rely on a 'work programme' allegedly carried out by the Kenyan geologist Said Hussein and the 'results of Mr Hussein's work' which allegedly 'suggested that CMK was getting closer to discovering a commercially viable resource.'¹⁵ Mr Anderson in his witness statement also relies upon 'drilling, sampling and assay results and a report prepared by Said S Hussein' as assessing the 'viability of Mrima Hill for exploration and development'.¹⁶" (p. 4)</p>	<p>The Claimants did not produce this document because they understand the relevant documents are in the State's possession, custody or control. (p. 4)</p>

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			<p>obligation, CMK reported the progress it was making at Mrima Hill.⁸³ Indeed, CMK went beyond the reporting requirements of its licence: for example, Mr Anderson sent Commissioner Biwott a copy of the Anglo American report, which had been sourced by Mr O'Sullivan in Australia in May 2008.⁸⁴</p>		
		<p>First WS David Anderson, para. 23(f)</p>	<p>23. After my visit to Kenya, I continued my investigations, using both my personal network and information I had obtained as a result of my visit. From these investigations I discovered: [...] (f) drilling, sampling and assay results and a report prepared by Said S Hussein for the Mines and Geological Department comparing Mrima Hill with other carbonatites and assessing the viability of Mrima Hill for exploration and development.</p>		
		<p>First WS David Anderson, para. 41</p>	<p>41. Once SPL 256 was granted, CMK commenced exploration work at Mrima Hill using Said Hussein, a</p>		

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			<p>former senior exploration geologist with the Department of Mines and Geology and the author of one of the reports I had found during our earlier research (discussed at paragraph 23 above), and Mr Mwadime. At the time we engaged Mr Hussein, he was working for the Department of Water Affairs. I accompanied Mr Hussein and Mr Mwadime to the Mrima Hill site and we surveyed (through auger drilling) some of the locations identified in Mr Hussein's report. At this stage, we were only permitted to drill along the roads and at the old drilling and pitting sites used by Pechiney. As I explain below, it was not until later that we were given authorisation to drill in the bush. The report Mr Hussein and I prepared following this field work is attached as Exhibit C-37. Essentially, the sampling we did supported the results previously obtained by Mr Hussein. But, given we were only able to sample at a depth of about two metres, our understanding of the ore body remained preliminary and further drilling and sampling was required. Mr Hussein informed us that his drill cores were stored in a shed at the Department of Mines and</p>		
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		<p>Geology in Mombasa and we were able to find and identify these core samples.</p> <hr/> <p>First WS David Anderson, para. 45</p> <hr/> <p>First WS Darren Townsend, para. 13</p>	<p>45. Through ASMIN, Mr O'Sullivan engaged Terra Search, a Perth based geological company, to undertake modelling of the ore body. CMK engaged Terra Search to produce a three-dimensional model of the Mrima Hill ore body based on all the available data (i.e. the data I collected with Mr Hussein, and all the other data sets we had acquired from other parties, including Anglo American, Pechiney and JICA). CMK's ultimate objective in engaging Terra Search was to procure a graphical representation of the Mrima Hill resource so that potential investors could see the scale of the resource and the investment opportunity it presented.</p> <hr/> <p>13. When I returned to Perth, I carried out further due diligence on the opportunity and after discussions with David Bale, a specialist consultant in strategic metals, decided the Mrima Hill asset was worth pursuing. I then asked Mr Anderson to provide</p>		
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			further materials, including any historical information that he had, including the reports prepared by Anglo American. The materials that I recall reviewing included a report produced by David Jenkins at Terra Search, a study conducted by a Kenyan geologist named Said Hussein, a report by Coetzee and Edwards, a report by Pechiney Saint Gobain, drilling data from Anglo American and a report by the Japanese International Cooperation Agency.		
2	Geological Survey	First WS David Anderson, para. 23(a)	23. After my visit to Kenya, I continued my investigations, using both my personal network and information I had obtained as a result of my visit. From these investigations I discovered: [...] (a) a geological survey done in 1952;	“ Items 2, 4, 5, 6 and 7: the Claimants in their Memorial and witness testimony rely upon a number of reports, surveys, geological data and mineral exploration and drilling results in order to demonstrate that while ‘ <i>the true scope of the [Mrima Hill] resource had not yet been identified...[t]he overall picture painted by these materials was very positive</i> ’.” ¹⁷ ” (pp. 4-5)	“Similarly, Item 2 is the Geological Survey of Kenya ...[i]t would be very surprising if the State does not have copies of these documents. If the State does have copies of these documents, then, as determined by the Tribunal in <i>ADF v. United States</i> , there is no necessity for documents available to both parties to be produced.” (p. 5) Thus, the Claimants consider this item to be in the State’s possession, custody or control. (pp. 4-5)

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3	Report by Anglo-American (Whole Document)	Memorial, paras. 33, 38, 40, 50 and 80	<p>33. [A]lthough Anglo American had earlier identified the niobium potential of the area [...].</p> <p>[...]</p> <p>38. The results of Mr Hussein's work suggested that CMK was getting closer to discovering a commercially viable resource. Under Clause 17(i) of SPL 256, CMK was obliged to immediately report any discovery of minerals “likely to be of major and immediate economic interest” to the Commissioner of Mines and Geology.⁸² In accordance with this obligation, CMK reported the progress it was making at Mrima Hill.⁸³ Indeed, CMK went beyond the reporting requirements of its licence: for example, Mr Anderson sent Commissioner Biwott a copy of the Anglo American report, which had been sourced by Mr O'Sullivan in Australia in May 2008.⁸⁴</p> <p>[...]</p> <p>40. Terra Search studied the set of exploration data provided by CMK, including the data in the Anglo</p>	<p>“Item 3: the Claimants in their Memorial and witness testimony rely repeatedly on the Anglo-American Report dated August 1957 (the ‘Anglo-American Report’).¹⁸ Instead of providing the full Anglo-American Report, the Claimants have submitted, at Exhibit C-105, a selection of pages that appear to omit, <i>inter alia</i>, the key section dealing with prospecting. As explained in the Respondent's letter dated 13 July 2016, given the reliance placed by the Claimants upon the Anglo-American Report, it is incumbent upon them to submit the full and unaltered version of this document, including annexures, as a matter of priority so that its contents can be addressed in the Respondent's Counter-Memorial and expert reports.¹⁹” (p. 5)</p>	<p>“During the course of the Claimants’ exploration work at Mrima Hill, the Claimants provided the State with copies of Items 3, 5 and 7, which are the earlier reports on Mrima Hill prepared by Anglo-American, Pechiney Saint Gobain and the Metal Mining Agency Japan respectively (see witness statement of David Anderson, paras. 43, 23(c) and 23(e)).”</p> <p>Thus, the Claimants consider this item to be in the State’s possession, custody or control. (pp. 4-5)</p>
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			<p>American report, and produced a report in December 2009.⁸⁶ Terra Search also produced a three-dimensional graphic of the niobium ore body at Mrima Hill. A copy of one of the graphics that Terra Search produced is below. The red/pink colouring represents higher grade niobium pentoxide concentration; the blue/green colour represents lower grade niobium pentoxide concentration.⁸⁷</p> <p>[...]</p> <p>50. In late 2009, as a result of a contact made at a mining conference in Harare, Mr Anderson was introduced by email to Darren Townsend, CEO and President of PAW.¹¹⁷ At this time, PAW had an active tantalum project in Mozambique and was looking for new opportunities in rare earths and metals.¹¹⁸ Mr Townsend and Mr Anderson met in Johannesburg in October 2009.¹¹⁹ As Mr Townsend recalls in his witness statement, this first meeting went well and it was agreed that Mr Anderson would provide further materials in relation to Mrima Hill so as to allow Mr</p>		
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		<p>First WS David Anderson, para. 43</p>	<p>Townsend to commence his due diligence investigations.¹²⁰ The materials exchanged included the reports prepared by Anglo American and other data. Mr Townsend was assisted in this due diligence process by David Bale, a specialist consultant in strategic metals. After discussions with Mr Bale, Mr Townsend decided that the Mrima Hill asset was worth pursuing.¹²¹</p> <p>[...]</p> <p>80. Significantly, SML 351 gave CMK freedom to explore off the roads and track and in the forest, meaning CMK would be able to conduct drilling on a more regular pattern (much like the grid pattern Anglo American had used to explore for niobium in the 1950s).¹⁹⁴</p> <hr/> <p>43. Around the same time (mid 2008), Mr O'Sullivan began to conduct his own research on Mrima Hill. Mr O'Sullivan informed me that in the course of his research he had come across a report by Anglo American in respect of Mrima Hill</p>		
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		<p>First WS Darren Townsend, paras. 13-14</p>	<p>(the Anglo American Report). Mr O'Sullivan said that he had purchased a copy of the Anglo American Report, and that it could be used to supplement the data CMK already had. Upon being informed that Mr O'Sullivan had secured a copy of the Anglo American Report, I informed Commissioner Biwott and offered a copy for deposit into the records of the Department of Mines and Geology. Commissioner Biwott was pleased to accept my offer as the Department of Mines and Geology did not have any copies of the Anglo American exploration work or a copy of the report on file. While I did not ask Commissioner Biwott what had happened to the Department's copy, I assumed that it had either been lost or perhaps stolen.</p> <p>13. When I returned to Perth, I carried out further due diligence on the opportunity and after discussions with David Bale, a specialist consultant in strategic metals, decided the Mrima Hill asset was worth pursuing. I then asked Mr Anderson to provide further materials, including any</p>		
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		<p>First WS Francis Donald O’Sullivan, paras. 13-15</p>	<p>historical information that he had, including the reports prepared by Anglo American. The materials that I recall reviewing included a report produced by David Jenkins at Terra Search, a study conducted by a Kenyan geologist named Said Hussein, a report by Coetzee and Edwards, a report by Pechiney Saint Gobain, drilling data from Anglo American and a report by the Japanese International Cooperation Agency.</p> <p>14. The Anglo American data was sufficient to illustrate a large exploration target in respect of niobium. But it did not display the existence of other minerals at economic levels. The Pechiney data included other minerals, such as europium (a high value rare earth which has industrial applications in lighting and colouring).</p> <p>13. I also continued to do my own research on Mrima Hill which included a review of books David had been able to obtain from one of his visits. One of these books mentioned a report done by Anglo American Corporation. As this phase of my research was ongoing, I searched for information about</p>		
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			<p>Mrima Hill on the internet. Most of the information available on the web about Mrima Hill at the time related to rare birds and not rare metals but, one Sunday, after many hours of searching, I found a website which offered a copy of the Anglo American report for sale. The seller turned out to be a company based in Queensland, Australia. I purchased a copy of the report for AU\$ 30, not knowing what it would contain.</p> <p>14. The Anglo American report was then delivered to my home. I remember being surprised when I read it. The report had been put together a long time ago – in the 1950s – but the data was very interesting. It was clear to me from the Anglo American report that a significant amount of work had been done by them in assessing Mrima Hill. Anglo had dug around 80 or 90 three-metre deep pits that revealed the existence of high-grade niobium resources and also some rare earths. Anglo had also drilled four holes to a depth of 100 metres (the height of Mrima Hill) and the Department of Mines and Geology had also drilled one hole. The grades increased at depth beyond</p>		
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			<p>the 100 metre level, which indicated that the ore body was open at depth (by which I mean that the ore body did not end with the hill but rather continued into the earth beneath). I remember thinking at that time that this drilling work would have cost around US\$ 10 million if it was carried out today. Regarding the weathered ore body the Anglo American report found as follows: [...]</p> <p>15. The report also noted that other than niobium, there were also abundant quantities of "lime, barium, phosphorous, rare earths including thorium, and manganese" (a copy of the executive summary of the Anglo American report is attached as Exhibit C-105). I am not a geologist but I am good with numbers and I understood these results to mean that the whole of the hill (Mrima Hill is a hill) could be an economically viable resource. I also understood that the high grades of the metals indicated in the Anglo American assays suggested that Mrima Hill could be a world class resource. As I already knew that Mrima Hill was close to a well built road and a major port (Mombasa), and that there was already power</p>		
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		<p>First WS Darren Townsend, paras. 37-38</p>	<p>and other infrastructure in place, I thought it was an ideal project location.</p> <hr/> <p>37. Accordingly it was necessary for CMK to conduct extensive exploration work at Mrima Hill to define the resource and bring it into compliance with the NI 43-101 standards. The first step was to verify the existing data that we had for Mrima Hill. The most important part of this exercise was verifying the grade information from the historic pits dug by Anglo American [...].</p> <p>38. Whilst on average the results were similar, there was significant variation locally between CMK drilled holes and Anglo American pits. On the one hand, these results were positive because they proved the exploration targets indicated by the Anglo American data; on the other hand, the variation raised the question of whether the Anglo American results were reliable – at least for modern compliance purposes.</p>		
4	Data from extensive exploration work done by Messrs.	First WS David Anderson, para. 23(b)	23. After my visit to Kenya, I continued my investigations, using both my personal network and	“ Items 2, 4, 5, 6 and 7: the Claimants in their Memorial and witness testimony rely	The Claimants did not produce this document because they understand the

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	Coetzee and Edwards for the Geological Society of South Africa	First WS Darren Townsend, para. 13	<p>information I had obtained as a result of my visit. From these investigations I discovered: [...] (b) data from extensive exploration work done by Messrs Coetzee and Edwards for the Geological Society of South Africa in 1959.</p> <p>13. When I returned to Perth, I carried out further due diligence on the opportunity and after discussions with David Bale, a specialist consultant in strategic metals, decided the Mrima Hill asset was worth pursuing. I then asked Mr Anderson to provide further materials, including any historical information that he had, including the reports prepared by Anglo American. The materials that I recall reviewing included a report produced by David Jenkins at Terra Search, a study conducted by a Kenyan geologist named Said Hussein, a report by Coetzee and Edwards, a report by Pechiney Saint Gobain, drilling data from Anglo American and a report by the Japanese International Cooperation Agency.</p>	<p>upon a number of reports, surveys, geological data and mineral exploration and drilling results in order to demonstrate that while ‘<i>the true scope of the [Mrima Hill] resource had not yet been identified...[t]he overall picture painted by these materials was very positive</i>’.¹⁷” (pp. 4-5)</p>	<p>relevant documents are in the State’s possession, custody or control. (p. 4)</p>
5	Report by Pechiney Saint Gobain	Memorial, para. 24	24. When Mr O’Sullivan and Mr Anderson first invested in Kenya,	“ Items 2, 4, 5, 6 and 7: the Claimants in their Memorial	“During the course of the Claimants’ exploration

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			<p>there was limited research data available for Mrima Hill, even though the area had been partially explored – first by Anglo American in the 1950s and then by Pechiney Saint Gobain in the late 1960s.³⁸ As Mr Anderson explains in his witness statement, the DMG had little data from either of these companies, his supposition being that the relevant data had been lost or perhaps stolen.³⁹ Thus, for CMK, the first step was to perform preliminary geological investigations. To do this, a prospecting right was required.</p>	<p>and witness testimony rely upon a number of reports, surveys, geological data and mineral exploration and drilling results in order to demonstrate that while ‘<i>the true scope of the [Mrima Hill] resource had not yet been identified...[t]he overall picture painted by these materials was very positive</i>’.¹⁷” (pp. 4-5)</p>	<p>work at Mrima Hill, the Claimants provided the State with copies of Items 3, 5 and 7, which are the earlier reports on Mrima Hill prepared by Anglo-American, Pechiney Saint Gobain and the Metal Mining Agency Japan respectively (see witness statement of David Anderson, paras. 43, 23(c) and 23(e)).”</p> <p>Thus, the Claimants consider this item to be in the State’s possession, custody or control. (pp. 4-5)</p>
		<p>First WS David Anderson, para. 23(c)</p>	<p>23. After my visit to Kenya, I continued my investigations, using both my personal network and information I had obtained as a result of my visit. From these investigations I discovered: [...] (c) references to exploration work done by the French company, Pechiney Saint Gobain (Pechiney) during 1967 to 1971;</p>		
		<p>First WS Darren Townsend, para. 13</p>	<p>13. When I returned to Perth, I carried out further due diligence on</p>		

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		<p>First WS David Anderson, paras. 42 and 45</p>	<p>the opportunity and after discussions with David Bale, a specialist consultant in strategic metals, decided the Mrima Hill asset was worth pursuing. I then asked Mr Anderson to provide further materials, including any historical information that he had, including the reports prepared by Anglo American. The materials that I recall reviewing included a report produced by David Jenkins at Terra Search, a study conducted by a Kenyan geologist named Said Hussein, a report by Coetzee and Edwards, a report by Pechiney Saint Gobain, drilling data from Anglo American and a report by the Japanese International Cooperation Agency.</p> <hr/> <p>42. After returning to Nairobi from the exploration trip with Mr Hussein and Mr Mwadime, I spent time at the library of the Department of Mines and Geology searching for materials concerning Mrima Hill. With the assistance of the librarian at the Department of Mines and Geology, I was able to locate a series of reports done by Pechiney during 1967 to 1971.</p>		
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			<p>[...]</p> <p>45. Through ASMIN, Mr O'Sullivan engaged Terra Search, a Perth based geological company, to undertake modelling of the ore body. CMK engaged Terra Search to produce a three-dimensional model of the Mrima Hill ore body based on all the available data (i.e. the data I collected with Mr Hussein, and all the other data sets we had acquired from other parties, including Anglo American, Pechiney and JICA). CMK's ultimate objective in engaging Terra Search was to procure a graphical representation of the Mrima Hill resource so that potential investors could see the scale of the resource and the investment opportunity it presented.</p>		
		<p>First WS Darren Townsend, para. 14</p>	<p>14. The Anglo American data was sufficient to illustrate a large exploration target in respect of niobium. But it did not display the existence of other minerals at economic levels. The Pechiney data included other minerals, such as europium (a high value rare earth which has industrial applications in lighting and colouring).</p>		

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6	Geological mapping by Messrs Dodhia and Pandit for the Geological Survey Kenya	First WS David Anderson, para. 23(d)	23. After my visit to Kenya, I continued my investigations, using both my personal network and information I had obtained as a result of my visit. From these investigations I discovered: [...] (d) geological mapping done by Messrs Dodhia and Pandit for the Geological Survey Kenya during 1976;	“ Items 2, 4, 5, 6 and 7: the Claimants in their Memorial and witness testimony rely upon a number of reports, surveys, geological data and mineral exploration and drilling results in order to demonstrate that while <i>‘the true scope of the [Mrima Hill] resource had not yet been identified...[t]he overall picture painted by these materials was very positive’</i> . ¹⁷ ” (pp. 4-5)	“[I]tem 6 is a set of geological maps prepared for the Geological Survey of Kenya. It would be very surprising if the State does not have copies of these documents. If the State does have copies of these documents, then, as determined by the Tribunal in <i>ADF v. United States</i> , there is no necessity for documents available to both parties to be produced.” (p. 5) The Claimants did not produce this document because they understand the relevant documents are in the State’s possession, custody or control. (pp. 4-5)
7	Mineral exploration and drilling results from Japanese International Cooperation Agency and the Metal Mining Agency Japan	First WS David Anderson, para. 23(e)	23. After my visit to Kenya, I continued my investigations, using both my personal network and information I had obtained as a result of my visit. From these investigations I discovered: [...] (e) mineral exploration and drilling results from Japanese International Cooperation Agency (JICA) and the	“ Items 2, 4, 5, 6 and 7: the Claimants in their Memorial and witness testimony rely upon a number of reports, surveys, geological data and mineral exploration and drilling results in order to demonstrate that while <i>‘the true scope of the [Mrima Hill] resource had not yet been identified...[t]he</i>	“During the course of the Claimants’ exploration work at Mrima Hill, the Claimants provided the State with copies of Items 3, 5 and 7, which are the earlier reports on Mrima Hill prepared by Anglo-American, Pechiney Saint Gobain and the Metal

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		<p>First WS Darren Townsend, para. 13</p>	<p>Metal Mining Agency Japan (MMAJ) during 1990 to 1992;</p> <hr/> <p>13. When I returned to Perth, I carried out further due diligence on the opportunity and after discussions with David Bale, a specialist consultant in strategic metals, decided the Mrima Hill asset was worth pursuing. I then asked Mr Anderson to provide further materials, including any historical information that he had, including the reports prepared by Anglo American. The materials that I recall reviewing included a report produced by David Jenkins at Terra Search, a study conducted by a Kenyan geologist named Said Hussein, a report by Coetzee and Edwards, a report by Pechiney Saint Gobain, drilling data from Anglo American and a report by the Japanese International Cooperation Agency.</p>	<p><i>overall picture painted by these materials was very positive’.</i>¹⁷” (pp. 4-5)</p>	<p>Mining Agency Japan respectively (see witness statement of David Anderson, paras. 43, 23(c) and 23(e)).”</p> <p>Thus, the Claimants consider that this item is in the State’s possession, custody or control. (pp. 4-5)</p>
17	Cover email from the Speaker to Mr Juma (Exhibit C-93)	First WS David Anderson, para. 144	144. The meeting with the Speaker took place at 6 pm on 16 July 2013 at the Thai restaurant at the Sarova Stanley Hotel. It was attended by the Speaker, Mr Juma and I. At the meeting, we informed the Speaker of what CS Balala had said to Mr Juma (and indirectly to me) in	“ Item 17: Mr Anderson in his witness statement relies on a ‘ <i>statement and the enclosing email from the Speaker [of the National Assembly] to Mr Juma</i> ’ (Exhibit C-93) ²⁰ in support of their serious	“Item 17 refers to an email attaching the document provided at Exhibit C-93. By emails dated 5 and 29 July, 2016, the Claimants explained to the State that there was a typographical error in the description of

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		<p>relation to the payment of Kshs 80 million and the fact he had refused to attend the press conference held the previous day, unless CMK agreed to renegotiate the terms of SML 351. Having listened to what we had to say, the Speaker advised us to report CS Balala to a body within the Departmental Committee of Natural Resources. The Speaker made a written statement summarising what was discussed at the meeting and provided a copy of the statement to Mr Juma at a later date. A copy of the statement and the enclosing email from the Speaker to Mr Juma is attached as Exhibit C-93.</p>	<p>allegation of improper conduct on the part of the Respondent's former Cabinet Secretary for the Ministry of Mining, Mr Najib Balala. However, the Claimants did not submit the 'enclosing email' relied upon by Mr Anderson in his witness statement with their Memorial. The Claimants' response to the Respondent's request for production of this email has been evasive:</p> <p>- first, on 5 July 2016, the Claimants stated that the reference was 'erroneous' and would be corrected in due course²¹ ;</p> <p>- then on 29 July 2016, the Claimants argued that 'there was a typographical error in Mr Anderson's witness statement' and proposed deleting the reference to the 'enclosing email' in Mr Anderson's witness statement but did not deny the email's existence²² ; and</p> <p>- when pressed by the Respondent to confirm whether</p>	<p>the document in Mr Anderson's witness statement and that they intended to update Mr. Anderson's witness statement in due course. The State does not accept the Claimants' explanation.</p> <p>Despite the fact that the Claimants disagreed with the State's position, the Claimants by email on 12 August 2016 advised the State that '<i>Mr Anderson has conducted a reasonable and proportionate search of his records and does not have a copy of the requested email</i>', and further, that '[g]iven Mr Juma died on the same day the Claimants filed their Memorial of Claim, the Claimants are unable to request Mr Juma to search his records.' The Claimants also refer to Mr Anderson's witness statement, paras 152 and 153, where he states that Deon Alberts (the general manager of CMK) '<i>was forced to abandon (amongst other things) CMK's</i></p>		
	<p>List of Exhibits</p>	<table border="1"> <tr> <td data-bbox="489 927 787 1031"> <p>C-93</p> </td> <td data-bbox="787 927 1241 1031"> <p>Statement from the Speaker to Mr Juma and enclosing email</p> </td> </tr> </table>	<p>C-93</p>	<p>Statement from the Speaker to Mr Juma and enclosing email</p>		
<p>C-93</p>	<p>Statement from the Speaker to Mr Juma and enclosing email</p>					

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				<p>the email existed or not²³, the Claimants subsequently claimed that ‘<i>Mr Anderson has conducted a reasonable and proportionate search of his records and does not have a copy of the requested email</i>’.²⁴</p> <p>Given that the email is referred to twice - in the exhibit list to the Memorial and in Mr Anderson's witness statement (both being documents which Claimants' counsel will have helped to prepare) - it is simply not plausible that this email cannot be located. Further, we note that the Claimants have not confirmed that neither they (as opposed to Mr Anderson only) nor their counsel can now locate this email.</p> <p>The Respondent therefore seeks an order that Claimants conduct searches for this document (including electronic searches) and that the document be produced.” (pp. 5-6)</p>	<p><i>records ... [because he fled] Kenya to avoid arrest and incarceration on fictitious charges.’” (pp. 5-6)</i></p>
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