INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CORTEC MINING KENYA LIMITED, CORTEC (PTY) LIMITED AND STIRLING CAPITAL LIMITED

Claimants

and

REPUBLIC OF KENYA

Respondent

ICSID Case No. ARB/15/29

AWARD

Members of the Tribunal
Hon. Ian Binnie, C.C., Q.C., President
Mr. Kanaga Dharmananda, S.C., Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Date of dispatch to the Parties:22 October 2018

REPRESENTATION OF THE PARTIES

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

Mr. Audley Sheppard QC
Clifford Chance
London, United Kingdom

and

Mr. Ben Luscombe
Dr. Sam Luttrell
Mr. Peter Harris
Mr. Nathan Eastwood
Ms. Clementine Packer
Clifford Chance
Perth, Commonwealth of Australia

and

Dr. Romesh Weeramantry
Clifford Chance
Hong Kong, SAR

Representing the Republic of Kenya:

Ms. Njeri Wachira, Deputy Solicitor General
Ms. Pauline Mcharo, Deputy Chief State Counsel
Mr. Emmanuel Bitta, Deputy Chief State Counsel
Ms. Christine K. Omwakwe, Prinicipal State Counsel
Mr. Charles Wamwayi, State Counsel

and

Mr. Guglielmo Verdirame
20 Essex Street Chambers
London, United Kingdom

and

Mr. Alexander Brabant
DLP Piper France LLP
Paris, French Republic

and

Mr. Ben Sanderson
Ms. Elinor Thomas
Ms. Maria Scott
Ms. Kate Cervantes-Knox
DLP Piper UK LLP
London, United Kingdom

and

Mr. Kamau Karori
Ms. Milly Jalega
Mr. Ken Melly
Iseme Kamau & Maema Advocates
Nairobi, Republic of Kenya

TABLE OF CONTENTS

DRAMATIS PERSONAE

NAME	TITLE
David Anderson	Managing Director of CMK and Cortec UK
Najib Balala	Mining Minister and Cabinet Secretary of the Ministry of Mining (May 2013 – November 2015)
Lojomon Biwott	Commissioner of Mines and Geology (2001 – 2009)
Jacob Juma	Kenyan businessman who invested in PAW and became an indirect shareholder in CMK
Isaiya Kabira	Kenya's Ambassador to Australia (March / April 2013 – current)
Uhuru Kenyatta	President of Kenya (9 April 2013 – present)
Mwai Kibaki	President of Kenya (20 December 2002 – 9 April 2013)
Francis Kimemia	Secretary of Cabinet (March 2013 – April 2015)
Marrian Kioko	Head of the EIA Section at NEMA
Moses Masibo	Acting Commissioner of Mines and Geology (September 2010 – August 2013)
Robert Mathu	Kenyan stockbroker, business partner of Mwara Njiri and co-owner of Kingdom
Mwenda Mbaka	Lawyer of Kenyan law firm Robson Harris, engaged by Messrs. Anderson, O'Sullivan and Townsend
John Michuki	Minister of Environmental and Mineral Resources (January 2008 – February 2012)
Ali Mohammed	Permanent Secretary of the Ministry of Environment and Mineral Resources (June 2010 – current)
Justin Muturi	Speaker of the National Assembly of Kenya (March 2013 – current)
Salim Mvuyra	Governor of Kwale County
Paul Mwadime	Kenyan geologist based in the Mombasa office of DMG, engaged by CMK to conduct the initial prospecting and exploration work at Mrima Hill

NAME	TITLE
Ali Mwakwere	Minister of Environment and Natural Resources (March 2012 – April 2013)
Harie Kinosthe Ndung'u	Geologist, former employee of the Department of Mines and Geology of the Republic of Kenya, engaged by CMK to conduct the initial prospecting and exploration work at Mrima Hill in addition to other tasks
Mwara Njiri	Kenyan business associate of David Anderson and co-owner of Kindgom
Mohammed Nyaoga	Chairman of the Task Force
Raila Odinga	Prime Minister of Kenya (April 2008 – April 2013)
Donald O'Sullivan	Chairman of CMK, Chairman of PAW and Director of Stirling
Jacqueline O'Sullivan	Francis O'Sullivan's daughter
Bernard Rop	Commissioner of Mines and Geology (February 2009 – August 2010)
William Ruto	Deputy President of the Republic of Kenya
Hussein Said	Kenyan geologist, former employee of the Department of Mining and Geology of Kenya, performed field work for CMK
Mike Saner	South African geologist, engaged by CMK to conduct the initial prospecting and exploration work at Mrima Hill
Darren Townsend	Former CEO and President of PAW
Jeremiah Wahome	Technical EIA expert at NEMA
Geoffrey Wahungu	Director-General of NEMA (May 2012 – current)
M. A. M. Wa-Mwachai	Permanent Secretary of the Ministry of Forestry and Wildlife

TABLE OF SELECTED DEFINED TERMS

TERM	DEFINITION
ASMIN	African Strategic Minerals Limited, an unlisted Australian public mining company in which Mr. O'Sullivan had an interest
Arbitration Rules	ICSID *Rules of Procedure for Arbitration Proceedings* [2006]
BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the promotion and protection of investments, 13 September 1999
Exhibit C-[#]	Claimants' Exhibit - #
CL-[#]	Claimants' Legal Authority - #
Claimants	Cortec Mining Kenya Limited, Cortec (Pty) Ltd and Stirling Capital Limited
Cls. C-M Jur.	Claimants' Counter-Memorial on Jurisdiction dated 25 January 2017
Cls. Mem. Merits	Claimants' Memorial on the Merits dated 5 May 2016
Cl. PHB	Claimants' Post Hearing Brief dated 11 April 2018
Cls. Rej. Jur.	Claimants' Rejoinder on Jurisdiction dated 10 January 2018
Cls. Rep. Merits	Claimants' Reply on the Merits dated 31 August 2017
CMK	Cortec Mining Kenya Limited
Commissioner	Commissioner of Mines and Geology
Cortec UK	Cortec (Pty) Ltd
EIA	Environmental Impact Assessment
EPL	Exclusive Prospecting Licence
Equity Participation Regulations	The Mining (Local Equity Participation) Regulations 2012, which entered into force on 27 September 2012
First Western	First Western Limited, a shareholder in CMK
Hearing	Hearing on Jurisdiction and Merits held from 15 January to 23 January 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

TERM	DEFINITION
JORC Code	Australian Code for Reporting of Exploration Results, Minerals Resources and Ore Reserves
Kenya or Respondent	The Republic of Kenya
KFS	Kenya Forest Service
Kingdom	Kingdom Minerals Limited owned by Mwara Njiri and Robert Mathu, which planned to acquire 30% of CMK
KMSHG	Kaya Mrima Self-Help Group
Mining Act	The *Mining Act, Cap 360*, entered into force on 1 October 1940, as revised in 2012
NEMA	National Environment Management Authority
NI 43-101	National Instrument 43-101 standards and the definitions and guidelines of the Canadian Institute of Mining, Metallurgy and Petroleum's Standards on Mineral Resources and Reserves
NMK	National Museums of Kenya
PAW	Pacific Wildcat Resources Corp, which acquired 100% of the shares in each of Cortec UK and Stirling
PEA	Preliminary Economic Assessment
PMLC	Prospecting and Mining Licensing Committee
Prospecting Right	A preliminary right that precedes other mining rights under the *Mining Act*
Prospecting Right No 8258	Prospecting Right granted in the name of Harie Kinosthe Ndung'u on 15 May 2007
Exhibit R-[#]	Respondent's Exhibit - #
Resp. C-M Merits and Mem. Jur.	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 5 October 2016
Resp. PHB	Respondent's Post Hearing Brief dated 11 April 2018
Resp. Rep. Jur. and Rej. Merits	Respondent's Reply on Jurisdiction and Rejoinder on the Merits dated 20 October 2017
RL-[#]	Respondent's Legal Authority - #
SML	Special Mining Licence
SML 351	Special Mining Licence 351 dated 7 March 2013

TERM	DEFINITION
SPL	Special Prospecting Licence
SPL 256	Special Prospecting Licence 256 dated 4 April 2008
Stirling	Stirling Capital Limited
Task Force	Task Force constituted by Cabinet Secretary Najib Balala and headed by Nairobi lawyer Mohammed Nyaoga to review mining licences issued between 14 January and 15 May 2013
Transition Period	Period between 14 January and 15 May 2013 associated with the general and presidential elections in Kenya
Tr. Day [#] p. [#], l [#]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 12 November 2015

PART 1 - OVERVIEW

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") arising out of a mining project at Mrima Hill in Kenya, said by the Claimants to be home to one of the world's largest undeveloped niobium and rare earth deposits.

2. The Claimants contend that their investment in this project was "nationalized" in August 2013, after they had expended six years and millions of dollars in exploration and development. Their key asset, **Special *Mining* Licence 351** ("**SML 351**"), was granted (they say) upon completion of the conditions of their **Special *Prospecting* Licence** ("**SPL 256**") but was "revoked" after the 2013 Kenyan election by way of a Government announcement on Kenyan national television, followed up with a *Twitter* post by a Cabinet Secretary of the newly elected Government. There was no prior (or subsequent) formal notification.[1] The Claimants characterize the "revocation" of SML 351 as a direct expropriation contrary to *The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments*, dated 13 September 1999 (the "**BIT**"[2] or "**Treaty**") and bring the present dispute under the BIT and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, which entered into force on October 14, 1966 (the "**ICSID Convention**").

3. The Claimants obtained SPL 256 on 4 April 2008. It was renewed twice. Subsequent events were closely bound up with Kenyan politics. A Kenyan general election was held on 4

[1] Claimants' Memorial on the Merits dated 5 May 2016, para. 4.
[2] BIT, 13 September 1999, Exhibit C-17.

March 2013. **SML 351** was signed three days later, on 7 March 2013, before the new President was sworn in on 9 April 2013. SML 351 was notified in the *Kenya Gazette* on 22 March 2013. However, on 5 August 2013**,** as part of a general review of mining licences issued between 15 January 2013 and 15 May 2013, a period referred to as the "Transition Period", SML 351 was "revoked" (according to the Claimants) or "suspended" (according to the Government). The need for such a review was attributed by the Government to irregularities in the conduct of his office by the Mining Commissioner, Moses Masibo.

4. The Kenyan Government's position is that "there was no expropriation of the "purported licence [SML 351]" by the Government because the licence was *void ab initio* for illegality and did not exist as a matter of law, as held by the Courts in Kenya. As a result, the Government argues, "where there is no protected investment, there can be no expropriation."[3] In the alternative, the Government says SML 351 was never revoked but merely suspended.

5. The Claimants are alleged by the Government to have known that, as a matter of statute law, a number of key approvals and consents were required and conditions were to be satisfied *before* they could be allowed to obtain a valid mining licence, including requirements arising out of the special protected status of Mrima Hill as a **forest reserve**, **nature reserve** and **national monument**. The Claimants were also required to produce a mining feasibility and an approved Environmental Impact Assessment licence, which, according to the Government, they never did. The Claimants' project proposed removal of 100 million tonnes of the metal niobium and 30 million

[3] Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016, para. 5.

tonnes of rare earths from the reserve area. Section 4(2) of the *Environmental (Impact Assessment and Audit) Regulations, 2003*, provided:

> **No licensing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required** under the Act unless the applicant produces to the licensing authority **a licence** of environmental impact assessment issued by the Authority [NEMA] under these Regulations.[4] (emphasis added)

6. Instead, apparently losing patience with Kenya's "bureaucratic process",[5] the Claimants sought political intervention from the administration of President Mwai Kibaki and engaged the services of an intermediary (said by the Government to be unsavoury), Mr. Jacob Juma. The Claimants' intent, according to the Government, was to circumvent the legal obstacles and procure a mining licence illegally.[6]

7. The Claimants challenged the "revocation" before the Kenyan High Court, which, on 20 March 2015, ruled that SML 351 was *void ab initio* on the basis, *inter alia*, that the mining of Mrima Hill was by statute prohibited, and that in any event the Claimants had not satisfied the prerequisites to comply with Kenyan law.[7] The Claimants then commenced this arbitration. Subsequently, the decision of the Kenyan High Court was upheld (on narrower grounds) by the Kenyan Court of Appeal, which at the time was the highest court in the country.

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[4] Geoffrey Wahungu First Witness Statement, paras. 8-9. (internal citations omitted; emphasis in original.)
[5] David Anderson First Witness Statement, para. 102.
[6] Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016, para. 14.
[7] *Cortec Kenya Mining Limited v. The Cabinet Secretary Ministry of Mining & 9 others*, ELC No.195 of 2014, [2015] eKLR, Judgment, 20 March 2015, RL-089.

8. The Tribunal recognizes that resource allocation was to a significant extent intertwined with politics in Kenya in 2013, but nevertheless the regulatory system, including statutory conditions precedent to the issuance of the mining licence, required compliance.

9. For the reasons that follow, the Tribunal concludes that the BIT protects only lawful investments, and that the Claimants have failed to establish any compensable investment that was lawfully issued in accordance with the laws of Kenya.

10. The prospecting licence, SPL 256, expired (after two renewals) according to its own terms on 1 December 2014, without Government intervention.

11. SML 351 purported to confer on the Claimants an *exclusive* right to mine valuable minerals for 21 years in an area that included Mrima Hill and to exclude all others from exploitation of these public resources. The Claimants' own evidence establishes that SML 351 was procured by their successful political lobbying of officials of the outgoing Kibaki Government. In the Tribunal's view, the freshly elected Government was not bound either under domestic law or international law by a "purported" mining licence issued under political direction in disregard of the explicit requirements of the Kenya *Mining Act* and other relevant Kenyan legislation.[8] The Tribunal is not bound by the decision of the Kenyan courts but has reached the independent conclusion that SML 351 was *void*. It was a scrap of paper issued by an irresponsible bureaucrat contrary to specific legislative requirements. In the circumstances, the Claimants have failed to establish the existence

[8] Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016, para. 5.

of an investment that qualified for treaty protection. Accordingly, ICSID and the Tribunal lack jurisdiction and the claim is dismissed.

12. In the alternative, if SML 351 could be said to have been issued at all, it was voidable if not void. On that basis, accepting that the onus would then shift to the Respondent to establish illegality, the Tribunal finds that the Government has established that SML 351 was issued contrary to the laws of Kenya and international law and does not qualify as an investment protected by the Treaty or the ICSID Convention.

13. In either event, the Claims are dismissed with costs.

PART 2 - THE PARTIES

14. The three Claimants in this dispute are:

(a) Cortec Mining Kenya Limited ("**CMK**"), a company incorporated in Kenya with registration number C141313;

(b) Cortec (Pty) Ltd ("**Cortec UK**"), a company incorporated in England and Wales with company number 6156667; and

(c) Stirling Capital Limited ("**Stirling**"), a company incorporated in England and Wales with company number 6224835.

CMK is majority (70%) owned by Cortec UK and Stirling. Cortec UK and Stirling were eventually wholly owned by Pacific Wildcat ("**PAW**"), a Canadian company listed on the Venture Exchange Market of the Toronto Stock Exchange.

15. The Respondent is the Republic of Kenya (the "**Respondent**" or the "**State**").

PART 3 - THE PROCEDURAL HISTORY

16. On 18 June 2018, ICSID received a request for arbitration of the same date from CMK, Cortec and Stirling against Kenya (the "**Request**"). At that time, as stated, SPL 256 had already expired in accordance with its own terms when the second renewal lapsed on 1 December 2014.

17. On 7 July 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's *Rules of Procedure* for the Institution of Conciliation and Arbitration Proceedings.[9] The Tribunal is composed of former Judge Ian Binnie, C.C. Q.C., a national of Canada, President, appointed by agreement of his co-arbitrators; Mr. Kanaga Dharmananda S.C., a national of Australia, appointed by the Claimants; and Professor Brigitte Stern, a national of France, appointed by the Respondent.

18. On 12 November 2015, the Secretary-General, in accordance with Rule 6(1) of the ICSID *Rules of Procedure for Arbitration Proceedings* (the "***Arbitration Rules***"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

[9] The parties agreed to constitute a Tribunal in accordance with Article 37(2)(a) of the *ICSID Convention* consisting of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the parties, failing which, by agreement of the two co-arbitrators.

19. In accordance with ICSID *Arbitration Rule* 13(1), the Tribunal held a first session with the Parties by teleconference on 5 February 2016, following the Parties' agreement to extend the period of time provided under Rule 13 of the ICSID *Arbitration Rules*.

20. Following the first session, on 29 March 2016, the Tribunal issued **Procedural Order No. 1** ("**PO No. 1**") recording the agreement of the Parties on procedural matters and the decisions of the Tribunal on disputed issues. PO No. 1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural language is English, and that the place of proceeding is Dubai, the United Arab Emirates.[10]

21. On 5 May 2016, the Claimants filed their **Memorial on the Merits** along with supporting Witness Statements[11] Exhibits C-1 to C-185, and Legal Authorities CLA-1 to CLA-44, in accordance with PO No. 1.

22. On 5 April 2016, the Respondent filed an application requesting the Tribunal to reconsider the procedural calendar which, the Respondent argued, would be unfairly prejudicial to it by reason of complications arising out of the 2017 Kenyan general election. The Claimants opposed the Respondent's request. On 6 May 2016, the Tribunal issued **Procedural Order No. 2** ("**PO No. 2**") deciding, on balance, to adjust the procedural calendar of PO No. 1 to accommodate the Kenyan elections as well as the Claimants' interest in moving forward the arbitration process expeditiously.

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[10] PO No. 1 also sets out the agreed schedule which consisted of two scenarios. Scenario One contemplated a bifurcated process whereby jurisdiction would be dealt with as a preliminary step and merits as the next step if jurisdiction was upheld. Scenario Two contemplated a procedure combining jurisdiction and merits in case the Respondent did not request bifurcation or its request for bifurcation was not granted.

[11] The Claimants filed the First Witness Statement of David Anderson dated 5 May 2016, the First Witness Statement of Donald O'Sullivan dated 5 May 2016, and the First Witness Statement of Darren Townsend dated 5 May 2016.

23. On 23 May 2016, the Respondent submitted to the Tribunal that the Claimants had not filed any expert evidence with respect to the quantum along with the Memorial pleading. As a result, the Respondent requested the Tribunal to consider quantum in a separate phase of the proceeding, after a merits phase. On 26 May 2016, the Claimants indicated that while they were open to quantum being considered in a separate phase of the proceeding, they requested the Tribunal to defer its decision on the issue of quantum until a decision was made on possible bifurcation of jurisdiction from merits. The Tribunal agreed, and, on 6 June 2016, issued **Procedural Order No. 3** ("**PO No. 3**") modifying the procedural calendar accordingly.

24. On 18 August 2016, the Respondent filed an application requesting the Tribunal to order the Claimants to produce certain documents that, according to the Respondent, the Claimants had relied on in their Memorial and accompanying witness statements but had not produced as exhibits. The Claimants indicated that they had produced some documents to the Respondent, but declined to produce the documents at issue in the Respondent's application. On 9 September 2016, the Tribunal issued **Procedural Order No. 4** ("**PO No. 4**"), agreeing 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 [sic] 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 PO No 1."[12] Thus, the Tribunal ordered that such documents be produced by the Claimants, but that the rest of the documents did not need to be produced at that time.

25. In accordance with PO No. 3, the document production phase started on 9 February 2017, when the Parties exchanged their respective requests for documents. On 5 May 2017, the Tribunal

[12] PO No. 4, para. 7.

issued **Procedural Order No. 5** ("**PO No. 5**"), ruling on each Party's objections to the production of contentious document requests.

26. On 5 July 2016, the Respondent filed its notice of grounds for preliminary objections to jurisdiction in accordance with PO No. 3. In the notice, the Respondent confirmed that it would **not be seeking a bifurcation** of the procedure with respect to jurisdiction.

27. On 5 October 2016, the Respondent filed its **Counter-Memorial on the Merits and Memorial on Jurisdiction** along with supporting Witness Statements,[13] Exhibits R-1 to R-157, and Legal Authorities RLA-1 to RLA-122, in accordance with PO No. 3.

28. On 25 January 2017, the Claimants filed their **Counter-Memorial on Jurisdiction** along with supporting Witness Statements,[14] Exhibits C-186 to C-288, and Legal Authorities CLA-45 to CLA-77, in accordance with PO No. 3.

29. The Claimants filed an application requesting the Tribunal to order the Respondent to produce certain categories of documents in compliance with the Tribunal's PO No. 5 on document production, otherwise the Tribunal should disregard aspects of the Respondent's case. The Respondent indicated that, having made all reasonable and proper searches, it was unable to locate the additional requested documents. On 21 July 2017, the Tribunal issued **Procedural Order No.**

[13] The Respondent filed the Witness Statement of Harie Kinosthe Ndung'u dated 27 September 2016, the Witness Statement of Moses Njiri Njeru dated 27 September 2016, the Witness Statement of Esau O. Omollo dated 27 September 2016, the Witness Statement of Raymond Mutiso dated 30 September 2016, the Witness Statement of Dr. Idle Omar Farah dated 3 October 2016, the Witness Statement of Dr. Helen Roberts dated 3 October 2016, the Witness Statement of Ambassador Isaiya Kabira dated 4 October 2016, the Witness Statement of Mohammed Nyaoga dated 4 October 2016, the Witness Statement of Professor Geoffrey Wahungu dated 4 October 2016 and the First Expert Report of Dr Neal Rigby dated 28 September 2016.

[14] The Witness Statements included the Second Witness Statement of David Anderson dated 25 January 2017, the Second Witness Statement of Donald O'Sullivan dated 24 January 2017, the Second Witness Statement of Darren Townsend dated 24 January 2017 and the First Expert Report of Justice Edward Torgbor dated 21 January 2017.

6 ("**PO No. 6**"). With respect to some of the categories of documents, the Tribunal ordered the Respondent to produce documents of general application if documents specific to this arbitration could not be located. The Tribunal also ordered the Parties to cooperate to make an application to the Kenyan Court for release of the document bundle filed in the judicial review proceeding initiated by the Claimants. The Tribunal further ordered the Respondent to file affidavits of the officials supervising the document search process with respect to certain of the categories of documents requested. Additionally, the Tribunal extended the time for the Claimants to file their Reply on the Merits to 31 July 2017.

30. On 31 July 2017, the Claimants filed their **Reply on the Merits** along with the Third Witness Statement of David Anderson dated 25 July 2017, Exhibits C-287 to C-304, and Legal Authorities CLA-78 to CLA-90, in accordance with PO No. 2.

31. On 20 October 2017, the Respondent filed its **Reply on Jurisdiction and Rejoinder on the Merits** along with multiple supporting Witness Statements,[15] Exhibits R-158 to R-241, and Legal Authorities RLA-133 to RLA-211, in accordance with PO No. 3.

32. On 10 November 2017, the Claimants filed their **Rejoinder on Jurisdiction** along with supporting Witness Statements,[16] Exhibits C-305 to C-369, and Legal Authorities CLA-91 to CLA-100, in accordance with PO No. 3.

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[15] The Witness Statements consisted of the First Witness Statement of Hon. Speaker Muturi dated 18 October 2017, the First Witness Statement of Cabinet Secretary D. Kazungu dated 20 October 2017, the Second Witness Statement of Harie Kinosthe Ndung'u dated 17 October 2017, the Second Witness Statement of Raymond Mutiso dated 19 October 2017, the Second Witness Statement of Idle Farah dated 12 October 2017, the Second Witness Statement of Professor Geoffrey Wahungu dated 19 October 2017 and the First Expert Report of Professor Albert Mumma dated 19 October 2017.

[16] The Respondent filed the First Witness Statement of Kenneth Wade dated 11 September 2017, the Third Witness Statement of Donald O'Sullivan dated 9 November 2017, the Fourth Witness Statement of David Anderson dated 10 November 2017, the Second Expert Report of Justice Edward Torgbor (undated).

33. On 14 November 2017, the Tribunal held a pre-hearing telephone conference with the Parties to discuss procedural and logistical matters relating to the organization of the Hearing. In the result, on 22 November 2017, the Tribunal issued **Procedural Order No. 7** ("**PO No. 7**").

34. On 20 November 2017, the Claimants filed an application requesting the Tribunal to require that the Respondent call certain witnesses to testify at the Hearing and, as an alternative, requesting the Tribunal to summon the witnesses directly. The witnesses in question were former Cabinet Secretary **Najib Balala**, former Mines Commissioner **Moses Masibo**, and former NEMA Director of Compliance and Enforcement **Benjamin Langwen**.

35. The Claimants filed a second application dated 27 November 2017 requesting the Tribunal to receive the Witness Statement of former Commissioner **Moses Masibo** dated on or around 27 November 2017.

36. On 8 December 2017, the Claimants filed a third application requesting the Tribunal to admit the witness statement of former Commissioner Moses Masibo into evidence.

37. On 14 December 2017, the Tribunal held a second pre-hearing telephone conference with the Parties, and on 15 December 2017, the Tribunal issued **Procedural Order No. 8** ("**PO No. 8**"). In PO No. 6, the Tribunal dismissed the Claimants' application with respect to former Cabinet Secretary Najib Balala and former NEMA Director Benjamin Langwen but admitted into evidence the Witness Statement of former Commissioner Moses Masibo, imposing the conditions that the Claimants produce the former Commissioner as their witness and at their expense, and that the Respondent have the right to cross examine him, and the Parties cooperate to produce the documents relevant to the examination and cross examination of the former Commissioner. The Tribunal also decided other procedural matters relating to the Hearing.

38. A hearing on jurisdiction and merits was held in Dubai, the United Arab Emirates, from 15 January to 23 January 2018 (the "Hearing"). The following persons attended the Hearing:

Tribunal:	
Hon Ian Binnie, C.C., Q.C.	President
Mr. Kanaga Dharmananda, S.C.	Arbitrator
Professor Brigitte Stern	Arbitrator
ICSID Secretariat:	
Ms. Aïssatou Diop	Secretary of the Tribunal
For the Claimants:	
Mr. Audley Sheppard	Clifford Chance
Mr. Ben Luscombe	Clifford Chance
Dr. Sam Luttrell	Clifford Chance
Dr. Romesh Weeramantry	Clifford Chance
Mr. Peter Harris	Clifford Chance
Mr. Nathan Eastwood	Clifford Chance
Ms. Clementine Packer	Clifford Chance
Ms. Djamela Magid	Clifford Chance
Mr. Mwenda Mbaka (*by telephone*)	Mr. Masibo's counsel
For the Respondent:	
Ms. Njeri Wachira	Office of the AG,[17] Republic of Kenya
Ms. Christine Kusa	Office of the AG, Republic of Kenya
Mr. Emmanuel Bitta	Office of the AG, Republic of Kenya
Mr. Derrick Nzioka	Office of the AG, Republic of Kenya
Ms. Pauline Mcharo	Office of the AG, Republic of Kenya
Dr. Ibrahim Mohammed	Office of the AG, Republic of Kenya
Ms. Faith Pesa	Ministry of Mining, Republic of Kenya
Mr. Albert Otieno Omoni	Ministry of Mining, Republic of Kenya
Ms. Catherine Maloba Shiroko	Ministry of Mining, Republic of Kenya
Mr. Guglielmo Verdirame	20 Essex Street Chambers
Mr. Alexander Braban	DLA Piper France LLP
Mr. Ben Sanderson	DLA Piper UK LLP
Ms. Elinor Thomas	DLA Piper UK LLP
Ms. Maria Scott	DLA Piper UK LLP
Mr. Kamau Karori	Iseme Kamau & Maema Advocates
Ms. Milly Jalega Odari	Iseme Kamau & Maema Advocates
Mr. Ken Melly	Iseme Kamau & Maema Advocates
Court Reporter:	

[17] Attorney General.

Ms. Claire Hill	The Court Reporter Limited

39. During the Hearing, the following persons were examined:

On behalf of the Claimants:	
Mr. David Anderson	Witness
Mr. Francis O'Sullivan (*by video link*)	Witness
Mr. Kenneth Wade	Witness
Mr. Darren Townsend	Witness
Mr. Moses Masibo	Witness
Professor Justice Edward Torgbor	Expert
On behalf of the Respondent:	
Mr. Moses Njeru	Witness
Mr. Harie Kinosthe Ndung'u	Witness
Cabinet Secretary Daniel Kazungu Muzee	Witness
Ambassador Isaiya Kabira	Witness
Mr. Raymond Mutiso	Witness
Professor Geoffrey Wahungu	Witness
Dr. Idle Omar Farah	Witness
Mr. Esau Omollo	Witness
Professor Albert Mumma	Expert
Dr. Neal Rigby	Expert

40. On 9 February 2018, the Tribunal invited the parties to make Post-Hearing submissions and submissions on costs up to and including this stage of the proceeding.

41. On 11 April 2018, each party filed a Post-Hearing brief and submission on costs, and on 25 April 2018, the Respondent submitted additional observations.

PART 4 - THE MRIMA HILL PROJECT

42. Mrima Hill is located approximately 70 kilometres to the south of Mombasa in the south-east corner of Kenya, in Kwale County. Mrima Hill covers an area of approximately 376.8 hectares and is home to a natural forest, part of a chain of coastal dry forests found in the region which are said to be rich in biodiversity and rare species. Mrima Hill also contains sacred

areas (called "**kaya**") for the Digo, an indigenous community found in the coastal region of Kenya.[18]

43. The Government has, over the years, taken legal steps to preserve and protect Mrima Hill:

(a) on 26 May 1961, Mrima Hill was gazetted as a **forest reserve**.[19] The effect of this gazettement was to restrict any activities that would adversely affect the flora and fauna, without the express permission of the Kenya Forest Service ("**KFS**");

(b) on 9 May 1989, Mrima Hill was designated as a **nature reserve** by the Minister of Environment and Natural Resources.[20] Under the *Forests Act*, nature reserves provide an additional level of protection. All proposals for disruptive activities within a nature reserve are subject to the consent of a forest conservation committee;[21]

(c) on 17 January 1992, in recognition of its cultural importance, the **Mrima Hill Sacred Grove** was designated as a **national monument** under the *Antiquities*

[18] On 8 July 2008, the United Nations Educational, Scientific and Cultural Organisation added kayas in Kwale County to its World Heritage List as "an outstanding example of traditional human settlement…which is representative of a unique interaction with the environment." See UNESCO *Decisions Adopted at the 32nd Session of the World Heritage Committee* (Quebec City, 2008) (Extract), Exhibit R-003. See also Miriam Gathigah, "On Kenya's Coast, a Struggle for the Sacred", *Inter Press Service News Agency*, 23 June 2015, Exhibit R-064.
[19] Legal Notice No. 304 of 1961, *The Forest Ordinance (Cap. 176)*, 26 May 1961, Exhibit R-004; and Esau O. Omollo Witness Statement, para. 13.
[20] Legal Notice No. 212 of 1989, *The Forests Act (Cap. 385)*, 9 May 1989, Exhibit R-005; and Esau O. Omollo Witness Statement, para. 13.
[21] Section 33 of the *Forests Act (Cap. 385)* (entered into force 1 February 2007), Exhibit RL-115.

and Monuments Act[22] by the Minister of Home Affairs and National Heritage.[23] This classification as a national monument was confirmed by further notice in 1994;[24]

(d) on 21 February 1997, the Mining Commissioner issued a Gazette notice under the *Mining Act* prohibiting all prospecting and mining in the Kwale District which includes Mrima Hill.[25]

(a) The Claimants Initiate Their Project

44. One of the Claimants' principal promoters of the Mrima Hill project, Mr. David Anderson, the eventual Managing Director of CMK, testified that he first became aware of Mrima Hill from the CEO of a South African mining company, Robbie Louw,[26] who described it as a potentially rich niobium and rare earths deposit. Acting on this tip, Mr. Anderson and a colleague, Mr. Don O'Sullivan, also an eventual Director of CMK, decided to incorporate a company in Kenya (now CMK) and apply for prospecting permission to carry out the exploration activities needed to gain a better understanding of the mineralisation at Mrima Hill.[27] "Rare Earths Elements" ("**REEs**") is a phrase used to describe the group of 15 chemical elements in the "lanthanide

[22] *Antiquities and Monuments Act (Cap. 215)* (entered into force 21 January 1983), Exhibit RL-109.
[23] Gazette Notice No. 200 of 1992, *The Antiquities and Monuments Act (Cap. 215)*, 6 January 1992, Exhibit R-006.
[24] Gazette Notice No. 1132 of 1994, *The Antiquities and Monuments Act (Cap. 215)*, 3 March 1994, Exhibit R-007.
[25] Gazette Notice No. 986 of 1997, *The Mining Act (Cap.306)*, 13 February 1997, Exhibit R-154.
[26] David Anderson First Witness Statement, paras. 16-17.
[27] Donald O'Sullivan First Witness Statement, para. 12; David Anderson First Witness Statement, para. 25.

group"[28] for which demand has grown dramatically in the past two decades, in large part due to their expanding use in advanced technologies.

45. Many of the devices that contain REEs are manufactured in China – a country that at that time (2007) was supplying the vast majority of the global REE market and whose REE export quotas and duties were causing prices of rare earth products to spike.[29]

46. Niobium is a rare *metal*, rather than a rare *earth*. Although niobium has many uses, most of it (as much as 90% of global niobium production) is used in the manufacture of specialized steel products.

(b) The Kenyan Mining Legislation

47. At all relevant times, mining activity in Kenya was regulated under the *Mining Act*, Chapter 306 (the "***Mining Act***")[30] and subsidiary regulations. Mining was also subject to compliance with other Kenyan statutes. The *Mining Act* allowed for a hierarchy of mining rights and licences which were summarized by the Claimants as follows:

Right/Licence type	**Description**
Prospecting right	The holder is entitled to search or "prospect"[31] for mineralised areas. The right is usually granted in relation to a particular area specified in the application subject to various exclusions and limitations included within the *Mining Act* (e.g. no prospecting on burial grounds).

[28] The 15 lanthanides are lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium and lutetium. The elements yttrium and scandium are usually added to the "rare earth" group, to bring it to a total of 17 elements.
[29] BMGS Report, 1 September 2013, Exhibit C-124, p. 41.
[30] *Mining Act*, Exhibit CL-002.
[31] The expression "to prospect" is defined in Section 2 of the *Mining Act* as "to search for minerals and includes such working as is reasonably necessary to enable the prospector to test the mineral-bearing qualities of the land." (*Mining Act*, Exhibit CL-002).

Prospecting licence	The holder of a prospecting *licence* (as distinguished from a prospecting *right*) is entitled to conduct detailed geological investigations over all or part of the area for which the applicant has a prospecting right.
Mining licence	The holder is entitled to carry out mining activities in areas covered by the licence.

(Source: Claimants' Memorial, para. 20)

48. The Claimants were able to obtain enough research data for Mrima Hill from earlier explorations to warrant further preliminary geological investigations, principally from Anglo American in the 1950s and then by Pechiney Saint-Gobain in the late 1960s[32]. The Claimants' consultant, Sound Mining Solutions (Pty.) Ltd. ("**SMS**") in its report of September 2011[33] ("**SMS First Report**") summarized the earlier data as follows:

Table 3 – Summary of Tonnages and Grade Estimates of Mineralisation at Mrima Hill (Jenkins, 2009)

Period	**Organisation**	**Tonnage/Grade Estimate (Not NI 43-101 Compliant)**
1934	Kenya Mines and Geological Department	544,300 short tons at 20% - 30% Mn_2O_3
1955	Binge	32 M short tons at 3.10% Rare Earth Oxides
1955 to 1957	Anglo American Prospecting (Africa) Ltd	50.5 M short tons at 0.67% Nb_2O_5 including 5.3 M short tons at 1.21% Nb_2O_5 to 9.14 metres depth
1959	Coetzee and Edwards	100 Mt at 0.7% Nb_2O_5 to 30meters
1959 to 1962	Kenya Mines and Geological Department	38 M short t at 0.67% Nb_2O_5 including 4.5 M short tons at 1.15% Nb_2O_5 to 9.14 metres depth
1968 to 1971	Pechiney Saint Gobain	12,000 t at 800 ppm Eu_2O_3 and 1,800 t at 850 ppm Eu_2O_3

[32] Donald O'Sullivan First Witness Statement, para. 13; David Anderson First Witness Statement, para. 22.
[33] SMS Stage 1 Feasibility Study, Exhibit C-57.

49. Accordingly, there was substantial data on Mrima Hill mineral deposits before the Claimants arrived on the scene.

(c) The Special Prospecting Right

50. Prospecting *rights* (preliminary to a prospecting *licence*) are granted under Section 13 of the *Mining Act*[34] and confer the privileges set out at Section 14 thereof.[35]

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[34] *Mining Act*, Exhibit RL-104. Section 13 of the *Mining Act* provides as follows:

(1) The Commissioner or an officer duly authorized by him in that behalf may issue to any person a prospecting right in the prescribed form upon the payment of the prescribed fee:
Provided that a prospecting right shall not be granted –
(i) to any person who is under eighteen years of age;
(ii) to any person who, in the opinion of the Commissioner, is unable to understand the provisions of this Act and the regulations;
(iii) to any person to whom there has previously been issued either in his own name or as agent for any individual, company, body of persons or partnership a prospecting right which has not been surrendered or cancelled and which is in all other respects still valid.
(2) **A prospecting right may be granted to an individual as agent for another individual** if such agent is the lawfully constituted attorney of such individual.
(a) A prospecting right shall not be granted to a company, body of persons or partnership as such, but may be **granted to an individual as agent of the company**, body of persons or partnership. (emphasis added)
(b) In such case, the application for the prospecting right must be made by the individual in person, who must either be the lawfully constituted attorney of the company, body of persons or partnership or produce an application in writing for the grant of the prospecting right to the individual as agent for the company, body of persons or partnership, signed by a director or responsible manager of the company, or by all the members of the body of persons or by every member of the partnership.
(c) Such application shall contain an undertaking by the company or by every member comprising the body of persons or by every member of the partnership with the Government to be responsible for the acts and omissions of the individual, who shall also be responsible for his own acts and omissions.
(4) **A prospecting right shall not be transferable**, and shall be in force for a period of one year from the date of issue, but may be renewed for a period of one year from the date of expiration thereof or from the expiration of any renewal thereof upon application being made in the prescribed form and upon payment of the prescribed fee.
(5) A prospecting right shall be produced whenever demanded by the owner or occupier of private land on which the holder thereof is prospecting, or by any administrative officer, officer of the Mines and Geological Department or police officer.
(6) Deleted by Act No. 18 of 1986, Sch.
(7) The Commissioner may at any time require the holder of a prospecting right to give security in such sum as he may consider necessary, and to deposit such sum with the Provincial Commissioner of such province as the Commissioner may specify. (emphasis added).

[35] *Mining Act*, RL-104. Section 14 of the *Mining Act* ("*Prospecting right privileges*") provides as follows:

Subject to the exceptions contained in section 7 and to the regulations and to the provisions of any law as to forests or as to the regulation of natural water supplies, **the holder of a prospecting right may** –
(a) by himself, his agents and his servants –

51. On 10 April 2007, the Claimants reserved the name "*Cortec Mining Kenya Ltd*." with the Kenyan Registrar of Companies.[36]

(i) The Claimants' Position on the Holder of the Prospecting Right

52. On 5 May 2007, the Claimants formally engaged **Harie Ndung'u**, an individual recommended by the then Mining Commissioner **Lojomon K. Biwott**, as CMK's agent to apply

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(i) prospect on any land in Kenya for any minerals, except diamonds, unless the Commissioner endorses on the prospecting right authority to prospect for diamonds; any such authority may be refused by the Commissioner without assigning any reason and, in any case in which such authority is granted, the Commissioner may –

(a) limit such authority to any specified area of land or to the time during which it shall remain in force, or both;

(b) **make such authority subject to any terms and conditions which he, in his absolute discretion, deems fit**:

Provided that **the holder of a prospecting right shall not prospect in a forest area or game reserve unless he has first given notice to the officer in charge of such area** or reserve and complies with the conditions lawfully imposed by such officer;

(ii) whilst engaged in bona fide prospecting, erect on any unoccupied land his camp and such buildings or machinery as may be necessary for the purpose of prospecting, on payment or tender of a reasonable sum in payment therefor;

(iii) make excavations, sink shafts or wells, drive adits or levels or dig trenches;

(iv) **on any land not excluded from prospecting** take for the purposes of bona fide prospecting or for his domestic use water from any lake, river or stream, and, with the consent of the owner or occupier of private land or on tendering to the owner or occupier a reasonable sum in payment therefor, any fuel other than standing timber:

Provided that he shall not divert water from any river, stream or watercourse without the consent of the authority having control thereof;

(v) graze upon lands not excluded from prospecting such horses or other animals as may be necessary for his subsistence or for the carrying on of prospecting or mining, on payment or tender of a reasonable sum in payment therefor;

(vi) build installations and other devices for protecting and, where the prospecting is done within the exclusive economic zone, create safety areas around such installations or devices;

(b) by himself –

(i) create a protection area;

(ii) apply for an exclusive prospecting licence; and

(iii) peg locations. (emphasis added).

[36] Email from Mr. Kigen Kandie to Mr. David Anderson, CMK, 10 April 2007, Exhibit C-22.

for CMK's prospecting *right* and, in due course, a prospecting *licence*, as well as to use his geological expertise to assist in prospecting activities on Mrima Hill.[37]

53. The Claimants contend that on 15 May 2007, Mr. Ndung'u applied for the prospecting right as agent for CMK, a company to be incorporated and the required fees were paid.[38] The Prospecting Right (No. 8258) was granted on the same day by Commissioner Biwott.[39]

54. CMK was not formally incorporated as a Kenyan company until almost two months later, on 4 July 2007.[40] Nevertheless, the Claimants contend that the beneficial interest in No. 8258 was always held by Mr. Ndung'u for a company "to be incorporated" and, after 4 July 2007, for CMK.

(ii) The Government's Position

55. The Government argues that Mr. Ndung'u acquired the prospecting right in his own right and conferred no entitlement on the Claimants or their future corporate vehicle. While s. 13(2) of the *Mining Act* contemplates application by individuals as agents of "a company, body of persons or partnership", this expression does not include a non-existent company "to be incorporated" in the future such as CMK.

56. Moreover, according to the Government, the Claimant' reliance on Prospecting Right No. 8258 in this arbitration contradicts the position advanced by CMK to the Nairobi High Court in

[37] David Anderson First Witness Statement, paras. 33-36; email from Mr. David Anderson, CMK, to M. Njiri, et al, 4 May 2007, Exhibit C-29.
[38] Prospecting Right No. 8258, Exhibit C-31.
[39] Prospecting Right No. 8258, Exhibit C-31.
[40] Certificate of Incorporation for CMK, Exhibit C-2.

the Mrima Hill judicial review proceedings in which Mr. Juma stated in his affidavit (provided in his capacity as a director of CMK):

> a. The prospecting right number 8258…was applied for and issued to Mr. Ndung'u. It was not applied for or issued to [CMK];
>
> b. [CMK] needed not have applied for the statutory consents in respect of the prospecting right issued to Mr. Ndung'u as it was not the applicant of that right and had not been incorporated…; and
>
> c. The prospecting right issued to Mr. Ndung'u has never been transferred or assigned to [CMK] nor does [CMK] claim any right thereunder.[41]

57. In short, the Government notes that pursuant to section 13(4) of the *Mining Act*, the prospecting right was not transferable by Mr. Ndung'u to CMK.

(iii) The Tribunal's Ruling on Ownership of the Prospecting Right

58. It is clear that whatever was done by Mr. Ndung'u was done pursuant to his agreement with, and on the instructions of, the promoters Mr. Anderson and Mr. O'Sullivan, on behalf of a company to be incorporated. Mr. Ndung'u was never intended to be the beneficial owner.

59. The point is in any event largely irrelevant as the subsequent disputes focused on the special prospecting *licence* SPL 256 and the special *mining* licence SML 351 which were not dependant on the prospecting right No. 8258. The licences at issue were clearly in the name of CMK.

(d) The Claimants Solicit Political Support

60. CMK sought political assistance. As the Claimants state in their Memorial:

> …the Ministry of Environment and Natural Resources issued a letter to the Provincial Commissioner for Coast Province asking him to

[41] *Cortec Kenya Mining v. The Cabinet Secretary Ministry of Mining*, Supplementary Affidavit of Jacob Juma, 30 August 2013, Exhibit R-065, para. 7.

> assist the holder of the prospecting right in obtaining "*mining consent*" from Kwale County Council (Letter from Ministry of Environment and Natural Resources to the Provincial Commissioner for Coast Province, Exhibit C-131). Concurrently, the Office of the President of Kenya wrote to the Clerk of the County Council of Kwale, directing that the County Council grant CMK's agent Mr Ndung'u "*consent to prospect right away*."[42]

61. The Claimants were clearly effective at the political level. However, this case ultimately turns on their success (or lack of it) in respect of compliance with the law.

PART 5 - THE CLAIMANTS' ACQUISITION OF SPECIAL PROSPECTING LICENCE 256

62. Prospecting licences are granted under Section 17 of the *Mining Act*[43] which provides that:

> (4) Any special licence granted under this section shall be subject to all the terms and conditions contained therein and to all the provisions of this *Act*

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[42] Letter from Office of the President of Kenya to the Clerk of the County Council of Kwale, 15 May 2007, Exhibit C-132.

[43] Section 17 of the *Mining Act* ("*Authority to prospect or mine on land reopened after exclusion under section 7(1)(j)*"), RL-104, provides as follows:

> (1) **When any land has been excluded by the Commissioner** from prospecting and mining under paragraph (j) of subsection (1) of section 7, the Commissioner may, by notice in the Gazette, declare the whole or any part of **such land to be reopened** to prospecting or mining or both.
> (2) Upon such reopening, the Commissioner may, by notice in the Gazette, declare that the whole or such part of the land as is reopened may be prospected or mined, or both, in accordance with—
> (a) the provisions of this Act and the regulations; or
> (b) **a special licence which, notwithstanding the provisions of this Act and the regulations, may contain such terms and conditions as the Commissioner in his discretion may determine**.
> (3) Without in any way restricting or fettering the discretion of the Commissioner granted by paragraph (b) of subsection (2), a special licence may contain terms and conditions in respect of the following matters—
> (a) area;
> (b) the minerals which may be prospected for, or mined, and the methods of prospecting, or mining, to be adopted;
> (c) rents, royalties and fees;
> (d) labour;
> (e) form and period of such licence.
> (4) Any special licence granted under this section shall be subject to all the terms and conditions contained therein and to all the provisions of this Act and the regulations, except in so far as the terms and conditions contained in such licence expressly provide for non-compliance with any provisions of this Act and the regulations.
> (emphasis added.)

> and the regulations, **except in so far as the terms and conditions contained in such licence expressly provide for non-compliance** with any provisions of this *Act* and the regulations. (emphasis added)

63. Mrima Hill had been closed in 1997 to mining by a previous Mining Commissioner, but it was within the power of Mining Commissioner Biwott to reverse a *Mining Act* closure.

64. The position of the Government, denied by the Claimants, is that as Mrima Hill had been excluded from prospecting or mining activities not only by the Mining Commissioner but as well as by legislation protective of nature reserves, forestry and national monuments, *all* of these exclusions had to be addressed by authorities *other* than the Mining Commissioner *before* a prospecting licence could be issued.

65. On 22 May 2007, Mr. Ndung'u applied for an exclusive prospecting *licence* over the same area as covered by the prospecting right.[44] In the application form, Mr. Ndung'u is identified as agent of CMK, and CMK is identified as the company ("*miner*") on whose behalf the application was made (although it was not formally incorporated until 4 July 2007).[45] A work programme was submitted with the application, setting out the prospecting activities that CMK intended to conduct. Oddly enough, despite the Claimants' focus on Mrima Hill, Commissioner Biwott notified CMK on 2 November 2007 that "you are going to be considered for a free area of approximately 1180km^2, **excluding the Mrima Hill Nature Reserve**."[46] The Claimants were therefore aware at least by November 2007 that the status of Mrima Hill as a

[44] Application for Exclusive Prospecting License, 22 May 2007, Exhibit C-35; David Anderson First Witness Statement, para. 38.
[45] Application for an Exclusive Prospecting Licence, Exhibit C-35; David Anderson First Witness Statement, para. 38.
[46] Letter from Mr. Biwott, Commissioner of Mines and Geology to CMK, 2 November 2007, Exhibit R-066.

nature reserve presented a statutory obstacle. The evidence is that the nature reserve included the full extent of the area of Mrima Hill of interest to the Claimants.

66. In addition, the Claimants were required, as a condition of obtaining a prospecting licence, to obtain the support of the local Kwale people through the Kwale County Council.

67. The Claimants argue, that on 16 May 2007, Mr. Ndung'u obtained from the Kwale County Council consent to prospect in the area covered by Prospecting Right No. 8258.[47] However, the form of consent indicates that it was issued to "HARIE KINOSTHE NDUNG'U HEREINAFTER called the Miner";[48] and Mr. Ndung'u testified that the "consent by Kwale County Council was again issued in my name."[49] As stated above, however, the Tribunal proceeds on the basis that what was being done by Mr. Ndung'u was done for the benefit of the Claimants.

(a) The Authority of the Mining Commissioner Over "Excluded Lands"

68. The Government argues that "excluded lands" can only be reopened by a formal gazetting procedure by the Ministry responsible for the original exclusion. A "nature reserve" and forestry reserve can only be re-opened by the Ministry of Forestry. A "national monument" can only be opened to prospecting or mining by the National Museums of Kenya ("**NMK**"). The Mining Commissioner has no such authority in respect of the closures effected by these other ministries.

69. The Claimants argue that any such "excluded lands" could be dealt with by the Commissioner of Mines and Geology. The Commissioner may declare that formerly

[47] Consent to Prospect dated 16 May 2007, Exhibit C-32.
[48] Consent to Prospect dated 16 May 2007, Exhibit C-32.
[49] Harie Kinosthe Ndung'u First Witness Statement, para. 13.

excluded land may be prospected and/or mined in accordance with a "*special licence*" under Section 17(2)(b) of the *Mining Act*. The re-opening procedure set out in Section 17(2)(b)[50] was sufficient in their view to clear any bar to the issuance of a prospecting licence *or* a mining licence posed by "exclusions" against prospecting on Mrima Hill.

70. The Claimants' legal expert, (former) Justice Edward Torgbor, indicated that in such circumstances, the Mining Commissioner should take a "prudent approach" and "**act consistently with the consent requirements of other relevant laws and regulations** in the exercise of this unfettered discretion."[51] As will be seen, the Tribunal's view is that the Commissioner would only act "consistently with the consent requirements of other relevant laws and regulations" (to repeat the language of Justice Torgbor) by insisting on the required approvals *prior* to issuing licences.

(b) The Claimants Proceeded (with the Permission of the Mining Commissioner) with Prospecting Work while its Application for a Prospecting Licence was still Pending

71. While CMK's application for a prospecting licence was pending, CMK with the agreement of Commissioner Biwott, conducted "preliminary prospecting/reconnaissance surveys."[52] This reconnaissance was limited to areas alongside the existing roads and forestry tracks on Mrima Hill which had largely been opened up during the earlier prospecting efforts of Anglo American in the 1950s.

[50] Claimants' Memorial on the Merits dated 5 May 2016, para. 30.
[51] Tr. Day 6, p. 102, ll. 14-24.
[52] Letter from Commissioner Biwott to CMK, 29 June 2007, Exhibit C-036; David Anderson First Witness Statement, para. 39.

72. The Claimants' geologist, Mr. Mike Saner, noted that, although Anglo American had earlier identified the niobium potential of the area, "Anglo did not examine or report on the rare earth potential there."[53] (As mentioned earlier, however, Mr. Anderson knew from his South African contact, Mr. Robbie Louw, of the rare earth potential which had been identified by a firm called Binge as early as 1955.)[54] Mr. Saner provided his Report on 7 July 2008.[55]

73. On 30 November 2007 (in Gazette Notice 11829), notice was given of CMK's application for a special prospecting licence. On the same day, Commissioner Biwott issued a notice of the re-opening of Mrima Hill for prospecting and mining under Section 17(2)(b) of the *Mining Act* (Gazette Notice 11830).[56] As previously noted, the Government's position is that Commissioner Biwott's authority to "reopen" lands was limited to lands previously "excluded" under the *Mining Act*. He could not remove the protection granted to Mrima Hill as a forest and nature reserve nor circumvent the Mrima Hill kaya status as a national monument.

[53] Letter from Mr. Michael Saner, Minerals Industry Consultant, to Mr. David Anderson, Cortec Mining (Pty) Ltd. 22 August 2007, Exhibit C-33, p. 1.
[54] SMS First Report, Exhibit C-57, p 25.
[55] Independent Geologist's Report (M. Saner), 7 July 2008, Exhibit C-38.
[56] Gazettal Notice 11830, 30 November 2007, Exhibit C-133.

*(c) The Special Prospecting Licence 256 (**SPL 256**) was Issued to CMK on 4 April 2008*

74. On 4 April 2008, Commissioner Biwott issued a Special Prospecting Licence ("**SPL 256**")[57] to CMK. (The licence was classified as "special" because it covered an area that included land which had been re-opened in accordance with Section 17 of the *Mining Act*.)

75. The Government does not now allege any irregularities in the issuance of SPL 256[58] which required CMK to "prepare a mine feasibility report" and an Environmental Impact Assessment Study *before* applying for a mining licence.[59]

76. Although, as noted, section 17(4) of the *Mining Act* allows the Mining Commissioner in the prospecting licence itself "to provide for non-compliance with any provision of this Act and the regulations", SPL 256 did not provide for any such non-compliance.

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[57] SPL 256, Exhibit C-6.

[58] Mr. Sanderson, Tr. Day 1, p. 131, ll. 14-15, ("We have no evidence of irregular conduct [affecting SPL 256], we are not making that submission.") See also Claimants' Rejoinder, paras. 68-75. The issue of the Prospecting Right has now fallen away (see Claimants' Rejoinder, paras. 63-69) – the Kenyan law experts agree that the grant of a Special Prospecting Licence did not require a valid prospecting right and, in any event, Mr. Ndung'u confirmed that descriptions of him as CMK's "agent" were accurate (Tr. Day 4, p. 136, l. 20).

[59] SPL 256 required CMK to comply with the mandatory conditions of the Mining Investment Road Map including:

> Special Licence No. 256
> Messrs Cortec Mining Kenya Limited
> Phase I
> Carry out systemic trenching and pitting in the licence area to establish target areas.
> Phase II
> Based on the results from phase I, undertake detailed geological investigations on the target areas to establish mineable deposits.
> Phase III
> **Prepare a mine feasibility report and undertake an Environmental Impact Assessment Study before apply for a mining lease.** (emphasis added)

(Claimants' Memorial on the Merits dated 5 May 2016, para. 35).

77. The Claimants assert, and the Government denies, that fulfilment of the conditions to SPL 256 would give CMK a future **entitlement** to a *mining* licence over the same area. Clause 22 of SPL 256 provided that:

> The Licensee having observed all its obligations hereunder **shall be entitled** to such further or other rights over the Area or any part or parts of the Area or to the grant of a **Special Mining Lease or Leases** for a period not exceeding twenty-one (21) years as provided by the [Mining] *Act*.[60] (emphasis added)

78. The Government contends that CMK did not observe "all its obligations" under SPL 256 and therefore never became entitled to "a special mining lease or leases." As will be seen, the Tribunal agrees with the Government that CMK was never entitled to a Special Mining Licence.

79. In the months that followed the issuance of SPL 256, CMK did make some progress in its assessment of potential mineralization. Mr. Anderson sent Commissioner Biwott a copy of the earlier Anglo American report. CMK hired Mr. Said Hussein, a Kenyan geologist who had previously held a senior position at the Department of Mines and Geology ("**DMG**")[61] to conduct further prospecting activities.

80. The Claimants planned to raise finance through a company called African Strategic Minerals Limited ("**ASMINB**"), in which Mr. O'Sullivan had an interest.[62] Terra Search, an Australian firm based in Perth, was then instructed to carry out initial modelling of the ore body.

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[60] SPL 256, Exhibit C-006, Clause 22. The Government notes that Clause 22 refers to "Special Mining Lease or Leases" and does not refer to licences.
[61] David Anderson First Witness Statement, para. 41. See also SMS First Report, Exhibit C-57, p. 25.
[62] David Anderson First Witness Statement, para. 44; Donald O'Sullivan First Witness Statement, para. 21.

81. Terra Search studied the set of exploration data provided by CMK, including the data in the Anglo American report, and produced its own report in December 2009[63] which estimated that "the in ground value of the resource would be between US $2.8 and US $6 billion."[64] Terra Search also produced a three-dimensional graphic of the niobium ore body at Mrima Hill and recommended that CMK conduct further drilling at a depth of at least 30 meters (and up to 100 meters), including some diamond drilling. Terra Search also noted that drilling 50 holes in the areas of the best pit results would allow a comparison to be made with the previous pit results and potentially confirm the earlier results.[65]

82. The significance of the **2009 Terra Search Report** is much disputed. The Claimants portray it as the turning point for the project which "turned Mrima Hill from a 'maybe' into a certainty."[66] The Respondent's expert, Dr. Neal Rigby, however states "the work that Terra Search undertook did nothing of the sort."[67] The Terra Search Report itself concludes that "[t]he preliminary modelling is **rudimentary** and needs further work on the ground and with the model to be conclusive or **accurate**."[68] In Dr. Rigby's view, the report "did little more than indicate the potential of substantial niobium resources with rare earth upside, which would need to be subject to substantially more exploration."[69]

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[63] Terra Search Report, December 2009, Exhibit C-39.
[64] Terra Search Report, December 2009, Exhibit C-39, p. 8.
[65] Terra Search Report, December 2009 Exhibit C-39, p. 8.
[66] Donald O'Sullivan First Witness Statement, para. 19.
[67] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 18, para. 34.
[68] Terra Search Report, December 2009, Exhibit C-39, p. 8.
[69] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 19, para. 35.

83. The Claimants did not call any equivalent expert evidence to respond to Dr. Rigby's dismissive assessment of the 2009 Terra Search Report.

PART 6 - THE CLAIMANTS ALLEGE BUREAUCRATIC OBSTRUCTION

84. The Claimants say that they were delayed in the progress of CMK's exploration work at Mrima Hill by an emerging pattern of bureaucratic obstruction (or simply foot-dragging) which necessitated an application for a one year-extension of SPL 256.[70]

(a) The Claimants Alleged Problems

85. Mr. Anderson testified that by 2009 CMK's relationship with certain Government agencies began to deteriorate.[71] In one instance, armed Kenya Forest Service (**KFS**) officers denied Mr. Anderson and a potential investor access to part of the area covered by SPL 256.[72] (The Government points out that Mrima Hill was a forest reserve which as of that date had not been "reopened" by the Ministry of Forestry, and was therefore off limits to prospecting.)[73] Mr. Anderson was later to write to KFS to acknowledge that CMK was not "aware

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[70] On 6 November 2009, Mr. Anderson wrote to Commissioner Rop to request a one-year extension of SPL 256, explaining:

> As detailed in our report and stated in our Chairman, Don O'Sullivan's, letter to you, we have encountered considerable **delays and obstructions** in our exploration of our Mrima Hill SPL 256 and from discussions we have had together you will understand that these delays have cost us not only financially, but also in time and effort. For this reason we would like to request of your office that our licence is **extended for 1 year** in order for us to make up for the time lost with the delays imposed upon us. **This will give us the opportunity to prove up the niobium and rare earth resources.** As Don O'Sullivan pointed out we could be creating a major mining resource for Kenya and enormous benefits for the community. (emphasis added)

(See letter from Mr. David Anderson, CMK, to Dr. Bernard Rop, Commissioner of Mining and Geology, 6 November 2009, Exhibit C-41; David Anderson First Witness Statement, para. 58.)

[71] David Anderson First Witness Statement, para. 54.

[72] David Anderson First Witness Statement, paras. 54-56.

[73] The Government says the reason why CMK was denied access to Mrima Hill by KFS officials was that CMK had no right to conduct any prospecting activities in the area. As Mr. Esau Omollo (Senior Deputy Director of KFS) testified, "[t]he reason CMK was not allowed into Mrima Hill at this time is that it was excluded from

of the procedures of the *Forests Act* that we overlooked…being in the exploration phases of our project and not having extensive personnel on the coastal project we were placed in positions where we were pressured into hasty and possibly injudicious decisions."[74]

86. Progress was slower than expected. Mr. Anderson and Mr. O'Sullivan were concerned that SPL 256,[75] might not be renewed. They addressed their concerns to the new Mining Commissioner, Dr. Bernard Rop but Dr. Rop did not reply. However, on 18 November 2009, Mr. Anderson received an email from A.K. Chumba, on behalf of Commissioner Rop, stating that "after the expiry of [SPL 256] you will be required to relinquish half of the licence area including Mrima Hills [sic]."[76] Mr. Anderson testified that on 30 November 2009, he learned that Andrew Kimani, a "well-connected Kenyan businessman", had been making visits to Mrima Hill since June/July 2009[77] and one of his associates, Sammy Mwanyas, reportedly took five tonnes of samples from the site.[78] This was contrary to the exclusive rights purportedly granted to CMK under SPL 256.

87. The Claimants contend that there was a clear connection between the interest an influential local businessman was showing in the Mrima Hill project and the increasingly unhelpful treatment that CMK was receiving from the Government (including the disputed actions of the KFS).

SPL 256. The KFS officers were correct to deny access to this protected area." It seems that no consent from KFS was sought by CMK until 2010 in the context of CMK's application to renew SPL 256. (Esau O. Omollo Witness Statement, para. 18)

[74] Letter from Mr. David Anderson to Mr. David Mbugua, Director of Kenya Forest Service, 15 January 2012, Exhibit R-045.

[75] Donald O'Sullivan First Witness Statement, para. 26; David Anderson First Witness Statement, paras. 58-62.

[76] Email from Mr. A.K. Chumba, for Commissioner of Mines and Geology to Mr. David Anderson, CMK, 18 November 2009, Exhibit C-42; David Anderson First Witness Statement, para 59.

[77] David Anderson First Witness Statement, para 57.

[78] Letter from Mrima Hill Forest Protectors to CMK, 30 November 2009, Exhibit C-40; David Anderson First Witness Statement, paras. 57 and 60.

88. KFS subsequently agreed to some prospecting on stated conditions, but (as will be seen) never agreed to *mining* activities within the forest reserve or nature reserve.

(b) The Creation of the Mrima Technical Committee

89. In December 2010, the Mrima Technical Committee ("**MTC**") was established including members of KFS, NMK and National Environment Management Authority ("**NEMA**").

90. In March 2011, the MTC produced a situation report on CMK's prospecting activities.[79] The report summarized "[c]oncerns over uncontrolled prospecting for mineral and forest destruction at Mrima Hill."[80]

91. The report stated that CMK had been conducting prospecting works without seeking the prior authority of KFS and NMK, as required under the terms of SPL 256. The report states that "[i]t was clear that work had been going on without reference to NMK. It was also observed that some pits were in a sensitive ritual area."[81] In other words, CMK was being warned that its activities were encroaching on lands protected as a national [cultural] monument.

92. Moreover, the report concluded that:

> Cortec…chose to ignore the legal requirements that the proponent is required to submit an **Environmental Impact Assessment (EIA) report** to the National Environment Management Authority (NEMA) and obtain the authority's approval of the report **prior to commencing exploration** works…The license that was issued to [CMK]…was

[79] Mrima Technical Committee Report, *Situation Report on Prospecting for Minerals at the Mrima Hill Forest Reserve and Gazetted National Monument, Coast Province*, March 2011, Exhibit R-071, p. 4.
[80] Mrima Technical Committee Report, *Situation Report on Prospecting for Minerals at the Mrima Hill Forest Reserve and Gazetted National Monument, Coast Province*, March 2011,, Exhibit R-071, p. 4.
[81] Mrima Technical Committee Report, *Situation Report on Prospecting for Minerals at the Mrima Hill Forest Reserve and Gazetted National Monument, Coast Province*, March 2011, , Exhibit R-071, p. 10.

> explicit on this requirement. However, this was not done.[82] (emphasis added)

93. On 7 October 2010, the Kenyan newspaper, the *Daily Nation*, reported comments from a local Kwale group, the Kaya Mrima Self Help Group ("**KMSHG**") that:

> "Huge trees have been felled, and according to *kaya* elder and chairman of Kaya Mrima Self-Help group Omari Alale, **the exploration for minerals is worrying because the company is not doing what it promised to do**.
>
> As we see the situation now, the work is going against the conditions set. They have brought in big earth movers in the forest to open up the roads and the machines have caused untold damage.
>
> If the trend continues, we will have no forest to talk of, **let alone the sacred forest where the secrets of the Digo community have been safeguarded**," Mr. Alawe said in a letter dated August 28, and addressed to Dr. Bernard Rop, the commissioner of Mines and Geology.[83] (emphasis added)

94. On 10 August 2011, KMSHG commenced legal proceedings seeking a halt to CMK's prospecting activities and obtained a temporary injunction restraining the Commissioner from any further renewal of CMK's prospecting licence.[84]

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[82] Mrima Technical Committee Report, *Situation Report on Prospecting for Minerals at the Mrima Hill Forest Reserve and Gazetted National Monument, Coast Province*, March 2011,, Exhibit R-071 pp. 13-14.

[83] The Government also quotes an October 2010, the *Daily Nation* article alleging that "[h]uman activity and the quest for precious metals are once again piling pressure on heritage sites." (Mazera Ndurya, "Experts raise the red flag over forest loss", *Daily Nation*, 7 October 2010, Exhibit R-072.)

[84] *Juma Dari Omari & others v. The Commissioner of Mines and Geology & others*, Petition No. 42 of 2011, Petition of Juma Dari Odari and Affidavit in Support of Petition 10 August 2011, Exhibit R-073. In the affidavit filed in support of the application, a local elder stated that:

> …severe acts of destruction have been occasioned on the Kaya Mrima, such as the felling of sacred trees and the digging of deep shafts…the sacred shrine of the Digo community that is protected by several gazette notices has been and continues to be destroyed.

(*Juma v. The Commissioner of Mines and Geology*, Certificate of Urgency and Affidavit in Support or Urgency, 10 August 2011, Exhibit R-120.)

95. On 12 August 2011, the Mombasa High Court issued a further injunction ordering a stay of CMK's activities under prospecting licence SPL 256.[85]

96. In or around August 2011, Mr. Michuki, the Minister of Environment and Mineral Resources, directed CMK to stop prospecting for minerals until the dispute with the local community was resolved. Mr. Michuki stated that "[n]o prospecting will continue until the community's concerns over the project have been addressed."[86] On 17 August 2011, **Pacific Wildcat** (the parent company of the Claimants) entered into a memorandum of understanding[87] with the Chairman of the KMSHG, Mr. Juma Dari Omari, intended to resolve outstanding issues.

(i) The Claimants' Position on Bureaucratic Obstruction

97. The Claimants sought political relief from what they regarded as lack of cooperation in the bureaucracy. As early as 2009, Mr. Anderson had sought intervention from Minister Michuki to resolve the problems encountered by CMK.[88] In the same period, the

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[85] *Juma Dari Odari & others v. The Commissioner of Mines and Geology & others*, Petition No. 42 of 2011, Order, 12 August 2011, Exhibit R-074.
[86] Eunice Machuhi, "Court suspends firm's mineral mining project", *Daily Nation*, 7 September 2011, Exhibit R-075.
[87] Memorandum of Understanding between Pacific Wildcat and Kaya Mrima Self Help Group, 17 August 2011, Exhibit R-076.
[88] In this letter, Mr. Anderson stated that:

> It would now appear obvious as to why Mines and Geological Department do not wish us to have Mrima Hill as part of our licence. It is a fact that certain Kenyan parties are sampling Mrima Hill, have been doing some form of exploration work and have access to Cortec Mining Kenya's confidential documents. A Mr. Andrew Mwangi Kimani and Mr. Sammy Mwanyas have visited Mrima Hill on 3 occasions, the latest where they took about 5 tons of samples from Mrima Hill and our SPL area for testing and, according to these persons, to be forwarded to clients or partners in Germany.

(Letter from Mr. David Anderson to Hon. John Michuki, Minister of Environment and Mineral Resources, 14 December 2009, Exhibit C-43).

Claimants also sought political assistance from the Honourable Omar Zonga, Member of Parliament for the Lunga Lunga Constituency (in which Mrima Hill is located).[89]

98. A meeting was arranged with the then Prime Minister of Kenya, Mr. Raila Odinga[90] on 7 January 2010.[91] According to Mr. Anderson's testimony, Prime Minister Odinga summoned the Mining Commissioner Rop who agreed in principle to grant the extension of SPL 256 that CMK had sought the previous November.[92]

99. Having obtained high-level political support, CMK then submitted its application for the renewal of SPL 256 on 25 February 2010.[93]

100. The geographic limits of the renewed licence were enlarged to *include* Mrima Hill. It is not clear what prompted Commissioner Rop's abandonment of his predecessor's opposition dated 2 November 2007 to the grant of a prospecting licence in the Mrima Hill "nature reserve".

(ii) The Government's Response to Allegations of Bureaucratic Obstruction

101. The Government denies that CMK's lack of progress at Mrima Hill was a consequence of the bureaucracy.[94] In its view, the lack of progress was due to CMK's lack of compliance with the regulatory rules. Thus:

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[89] Donald O'Sullivan First Witness Statement, para 28; David Anderson First Witness Statement, para 62; letter from Mr. Donald O'Sullivan, CMK, to Hon. Omar Zonga, Member of Parliament, 15 November 2009, Exhibit C-107.
[90] David Anderson First Witness Statement, para 62.
[91] David Anderson First Witness Statement, para 62.
[92] David Anderson First Witness Statement, para 62.
[93] Application for renewal of SPL 256, 25 February 2010, Exhibit C-47.
[94] Claimants' Memorial on the Merits dated 5 May 2016, paras. 43 *et seq.*

(a) opposition from the Kenya Forestry Service as a result of CMK conducting illegal activities in the Mrima Hill area where CMK had no KFS authorisation to prospect;[95]

(b) opposition from local Kwale community leaders who had not been properly consulted on CMK's activities and who were "mistreated" by CMK;

(c) CMK was attempting to move ahead without complying with the terms of SPL 256 which required consents from both KFS (as Mrima Hill was a forest reserve and a nature reserve) and from the National Museums of Kenya (as Mrima Hill was a gazetted national monument); and

(d) CMK was not taking seriously its obligation to obtain an Environmental Impact Assessment licence.

102. Eventually, on 25 January 2010, the Ministry of Forestry and Wildlife (the Ministry with oversight of KFS) issued CMK with a consent to *prospect* within Mrima Hill.[96] The consent was valid for one year and was subject to a number of conditions, notably that CMK was "to restrict its sampling to the existing pits."[97] Mr. Esau Omollo, Senior Deputy Director of KFS, testified that "[n]o consent was ever issued by KFS allowing CMK to create new track or to excavate new pits." As mentioned, CMK admitted in correspondence dated 15 January 2012 that

[95] Esau O. Omollo Witness Statement, para. 18.
[96] Letter from Mr. Wa-Mwachai, Permanent Secretary of Ministry of Forestry and Wildlife, to Mr. David Anderson, CMK, 25 January 2010, Exhibit R-012.
[97] Letter from Mr. Wa-Mwachai, Permanent Secretary of Ministry of Forestry and Wildlife, to Mr. David Anderson, CMK, 25 January 2010, Exhibit R-012.

it had "overlooked" procedures of the *Forests Act* and that CMK had made "hasty and possibly injudicious decisions." [98]

103. On 9 February 2010, NMK issued a letter of no objection in response to CMK's application for an extension of SPL 256 to continue some *prospecting* activities in Mrima Hill.[99] However, NMK insisted on a number of conditions in order to minimize the risk of interference with the national monument site. According to the Government, these conditions, too, were "overlooked" by CMK.

(iii) The Tribunal's View on Bureaucratic Obstruction Versus Political Intervention

104. The fact that CMK sought political intervention to try to speed things up is understandable. However, the Tribunal's focus is on the legal requirements not the politics of the situation. By its express terms, SPL 256 required CMK to conduct a "mine feasibility report" and an "Environmental Impact Assessment Study" *before* applying for a mining licence. These conditions were imposed on SPL 256 by authority of s. 17 of the *Mining Act* and s. 4(2) of the *Environmental Impact (Assessment and Audit) Regulations*.

105. No amount of frustration with the bureaucracy excused CMK from non-performance of these legal conditions, nor could non-performance be waived by the politicians.

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[98] See letter from Mr. David Anderson, CMK to Mr. David Mbugua of KFS dated 15 January 2012, Exhibit R-045; Esau O. Omollo Witness Statement, para. 21. The Government says that the suggestion at para. 47 of the Memorial on the Merits that the renewal of SPL 256 gave CMK "*the ability to open new pits for prospecting*" is misleading. This could only be done if, as both the text of SPL 256 and the evidence of Mr. Omollo make clear, an Environmental Impact Assessment was conducted and approved by the relevant authorities. See also Esau O. Omollo Witness Statement, paras. 26-27.

[99] Letter from Dr. Atiti, Director-General of NMK, to the Permanent Secretary for National Heritage and Culture, 9 February 2010, Exhibit R-008. See also Dr. Idle Omar Farah First Witness Statement, paras. 21-23.

PART 7 - CMK OBTAINS A FIRST RENEWAL OF SPL 256

106. On 16 April 2010, Commissioner Rop issued CMK with [the first] renewal of SPL 256 valid for a further term of two years.[100] The renewal now purported to permit CMK for the first time to conduct exploration and sampling within what was (accurately) described as the Mrima Hill **nature reserve** subject to the seven conditions set out therein which were designed to minimize the environmental impact of prospecting on Mrima Hill as follows:[101]

> (i) Observe the **cultural and biodiversity** values of the reserve
>
> (ii) Restrict sampling to the existing pits. Opening of new pits will be subject to undertaking an **Environmental Impact Assessment**
>
> (iii) Cover any open prospecting pits when not in use and have them sealed at the at the end of the exploration programme
>
> (iv) Ensure no waste is dumped within the forest reserve
>
> (v) **Not to fell trees or construct any structures** within the forest without seeking and obtaining the necessary approvals.
>
> (vi) Undertake tree planting in the open areas within the prospecting sites after completion of the exercise
>
> (vii) Together with meeting licence condition number 10, undertake regular updates of the prospecting activities to the **Kenya Forest Service, the National Museums of Kenya, and the Kenya wildlife Service**. (emphasis added)

107. This [first] renewal of SPL 256 would expire in accordance with its terms on 16 April 2012 unless further renewed.

PART 8 - CORPORATE REORGANIZATION

108. As mentioned, in October 2009, Mr. Anderson had met Mr. Darren Townsend, CEO and President of Pacific Western ("**PAW**")[102] who was potentially interested in making an

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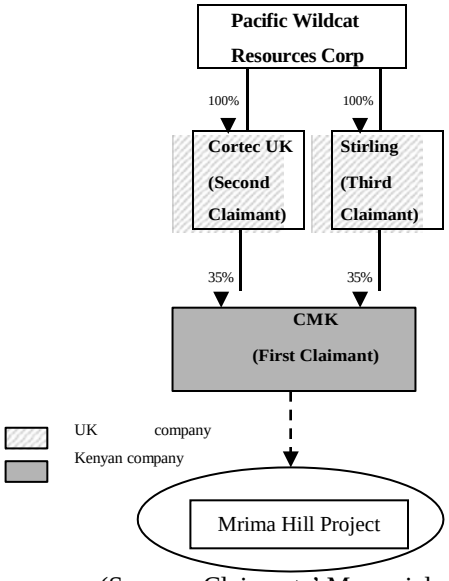
[100] Renewal of SPL 256 for 2 years, 16 April 2010, Exhibit C-7.
[101] Renewal of the SPL 256 for 2 years, 16 April 2010, Exhibit C-7, pp. 1-2.
[102] David Anderson First Witness Statement, paras. 50-51.

investment in the Mrima Hill project. Mr. Townsend reviewed the reports prepared by Anglo American and data generated by CMK and others.

109. On 23 July 2010, PAW and CMK entered into an agreement under which PAW acquired an indirect 70% stake in CMK through the acquisition of Cortec UK and Stirling.[103] The transaction was completed on 13 September 2012.[104] As consideration, Mr Anderson and Mr O'Sullivan each received CAN $25 million in cash and CAN $10 million worth of PAW shares.[105] PAW became the sole shareholder of Cortec UK and Stirling. The Claimants have provided a chart of the corporate structure that resulted from the PAW acquisition:



(Source: Claimants' Memorial, para. 51)

[103] Donald O'Sullivan First Witness Statement, para. 24.
[104] Darren Townsend First Witness Statement, para. 21.
[105] Donald O'Sullivan First Witness Statement, para. 24.

110. The Claimants state that the affiliation with PAW enhanced their ability to raise public funds[106] and provided the technical depth CMK lacked, but needed to take the project forward.

PART 9 - CMK OBTAINS A SECOND EXTENSION OF SPL 256

111. In November 2011, CMK applied for a further renewal of SPL 256.[107] On 25 November 2011, this second renewal was approved by the then Acting Commissioner of Mines and Geology, Mr. Moses Masibo, with the result that SPL 256 was extended for a further three years (effective from 1 December 2011 to 1 December 2014).[108]

112. At this point, CMK was still not in a position to satisfy the conditions of its "obligations hereunder"[109] of SPL 256 which included:

(a) compliance with all relevant environmental regulations (Clauses 14, 15 and 16 of SPL 256);

(b) preparation of a compliant "mine feasibility report" (Phase III of SPL 256);

(c) "fulfilment of all the Conditions of this Licence and the provisions of the Act **and** [not "or"] to the satisfaction of the Commissioner" (Clause 21 of SPL 256); and

(d) payment of compensation to affected landowners (Clause 23 of SPL 256).

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[106] Donald O'Sullivan First Witness Statement, para. 23; David Anderson First Witness Statement, para. 52.
[107] David Anderson First Witness Statement, para. 70.
[108] Second Renewal of SPL 256, 25 November 2011, Exhibit C-8.
[109] SPL 256, 4 April 2008, Exhibit C-6, Clause 22.

113. By 2011, the Claimants were working out a more comprehensive plan to exploit the resources of Mrima Hill. For niobium, they proposed to construct a recovery and processing plant on land adjacent to Mrima Hill, the first phase of which was to be a pilot plant.[110] The plan was then to construct a ferroniobium ("**FeNb**") plant near the port in Mombasa.[111]

114. CMK engaged various technical and financial experts and consultants. As mentioned, the South African firm, Sound Mining Solutions ("**SMS**"), was engaged as lead consultant for this process.[112] SMS prepared a three-dimensional model of the ore body at Mrima Hill.[113] The model showed a larger niobium resource than that presented in the earlier three-dimensional model prepared by Terra Search.

115. For REEs, the plan was ultimately to construct three facilities: a concentrate plant, a carbonate plant and a final products plant.[114] These facilities were not peripheral "add-ons" to the mining project. The SMS Report devoted several sections to the economics of the proposed mine. Cost-efficient processing formed an important aspect of feasibility.[115]

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[110] Darren Townsend First Witness Statement, para. 59; Donald O'Sullivan First Witness Statement, para. 33; David Anderson First Witness Statement, para. 78.
[111] David Anderson First Witness Statement, paras. 79-80.
[112] David Anderson First Witness Statement, para. 77.
[113] SMS Feasibility Study, September 2011, Exhibit C-57; David Anderson First Witness Statement, para. 77.
[114] David Anderson First Witness Statement, para. 78.
[115] See SMS Feasibility Study, September 2011, Exhibit C-07, ss. 9 and 13.

PART 10 - MR. MASIBO SETS OUT IN A "ROADMAP" HIS UNDERSTANDING OF THE PREREQUISITES FOR A SPECIAL MINING LICENCE

116. CMK required a mining licence to exploit the resources of Mrima Hill.[116] The new Mining Commissioner, Mr. Masibo,[117] gave Mr. Anderson a copy of a document titled the "Mining Investment Roadmap."[118] The Roadmap had no statutory basis independent of the provisions therein referred to, but it set out Mr. Masibo's statement of the steps which in his view had to be satisfied before obtaining a mining licence. As will be seen, Mr. Masibo issued SML 351 contrary to his own stated policy, as set out in the Roadmap, of what was required.

117. The Roadmap set out Mr. Masibo's instructions as follows:

> 1. Undertake **mining feasibility study** on the established mineral deposit.
>
> 2. Undertake **cadastral survey** of the deposit area by a registered surveyor and have it approved by the Director of Surveys.
>
> 3. Undertake an **Environmental Impact Assessment Study ("EIA")** for the Mining Project, Environmental Action Plans, etc a**pproved by NEMA**. EIA reports are published in the media for public comments before approval at the applicants' cost.
>
> 4. Undertake **compensation** survey Estimates, negotiating rates with the land owners in case of private land. Come up with compensation Agreements.
>
> 5. Apply for the mining lease/special mining lease ***enclosing mining feasibility study*** **report, approved cadastral survey by the Director of Surveys, EIA and *Environmental Action Plans (EMPs) approved by NEMA*, compensation agreements with land owners, company's registration documents, financial capability, etc**.

[116] Claimants' Memorial on the Merits dated 5 May 2016, para. 62.
[117] In August 2010, Mr. Moses Masibo became the Acting Commissioner (replacing Commissioner Rop). Mr. Masibo formally became Commissioner in late 2012. Mr. Masibo is at the centre of the Government's allegations of misconduct in the grant SML 351 and at the time of the Merits Hearing (January 2018) was under investigation by the Government for abuse of office.
[118] Mining Investment Roadmap, Exhibit C-61; David Anderson First Witness Statement, para. 84.

> 6. The application is checked before being recommended to the Interministerial **Prospecting and Mining Licensing Committee** which sits every three months.
>
> 7. Application is **published once in the Kenya Gazette** and three (3) times in a local newspaper at intervals of not less than a week to invite any objections within 90 days from the date of last publication, at the cost of the applicant.
>
> 8. **Carry out compensation exercise** to the land owners for private land parcels.
>
> 9. **Issuance of the mining/special mining lease** followed by stamp duty at Land's office.[119] (emphasis added)

It is to be emphasized that issuance of a mining licence is the last step in Mr. Masibo's "road map" process.

118. Item 6 refers to the **Prospecting and Mining Licensing Committee** ("**PMLC**"). The PMLC, according to the Government, provided "appropriate checks and balances to ensure that the delegated powers of the Commissioner are being carried out correctly, impartially and without undue influence from third parties."[120] The Claimants were aware of the role of the PMLC as early as 2007. On 3 February 2007, Mr. Anderson had sent an email to Mr. O'Sullivan summarising a meeting with the then Mining Commissioner, Mr. Biwott. During this meeting, Mr. Biwott had informed Mr. Anderson that:

> [a]ll applications, mining, exploration, etc are submitted to an approval committee that sits every quarter.[121]

119. On 19 February 2007, Mr. Anderson responded to Commissioner Biwott seeking clarification on "when the next sitting of the Mining Committee that approves licences will be

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[119] Mining Investment Roadmap, Exhibit C-61, p. 5.
[120] Raymond Mutie Mutiso Second Witness Statement, para. 7; Morse Nijiri Njeru Witness Statement, para. 8.
[121] Email from Mr. David Anderson to Mr. Donald O'Sullivan, 5 February 2007, Exhibit C-20.

held."[122] The Government says the Claimants were well aware that as a matter of government policy, endorsed by Mining Commissioner Masibo, PMLC approval was required before any licence could be issued.[123] As will be seen, the CMK application for a mining licence was never approved by the PMLC. On the contrary, as will be discussed, the PMLC eventually recommended that SPL 256 be revoked.

PART 11 - CMK MAKES A PREMATURE APPLICATION FOR A MINING LICENCE IN RESPECT OF MRIMA HILL

120. On 11 January 2012, CMK made an application for a Special Mining Lease over an area of approximately 614.3 km^2 in the Kwale District for 21 years.[124]

121. On 27 January 2012, Mr. Kimeto from the Ministry of Mines advised CMK by letter that the application was incomplete as it did not have documents that the Mining Commissioner required to process the application namely:

(a) an **Environmental Impact Assessment** report;

(b) a **feasibility study** of the project;

(c) a project financing plan and action plan;

(d) a tax compliance certificate; and

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[122] Letter from Mr. David Anderson, CMK, to Mr. Lojomon Biwott, Commissioner of Mines and Geology, 19 February 2007, Exhibit C-24.
[123] This was later confirmed to Mr. Anderson in the document entitled "Mining Investment Road Map" provided to him by Commissioner Masibo, Exhibit C-61. See para. 116 above. Claimants' Memorial on the Merits dated 5 May 2016, para. 63.
[124] Stamped application for mining licence, Exhibit C-67. **[NTD: And this included processing plants?]**

(e) **details of compensation and resettlement** of the affected landowners.[125]

122. The communication further notified CMK that if the application for a mining licence remained incomplete for 6 months it "will be considered abandoned."[126]

(a) The Lack of a "Mining Feasibility Study"

123. In Item 1 of the *Mining Investment Roadmap*, Mr. Masibo called for a "mining feasibility study".

124. In the opinion of Justice Torgbor, the Claimants' legal expert, the requirement for a feasibility study arises "only because the Commissioner has included it" in Schedule B to the original SPL 256.[127] Justice Torgbor says "there is no further detail given as to the content or standard of such report" and "if the study was completed in good faith and Commissioner Masibo accepted it in good faith, he would have done so within his general discretion as Commissioner of Mines and Geology." In other words, Commissioner Masibo created the requirement and he can interpret it as he sees fit.[128]

125. The Respondent's mining expert, Dr. Neal Rigby, on the other hand, testified that a feasibility study is a well understood term in the mining industry. When asked if there was a "particular template for the preparation of a mine feasibility report", Dr. Rigby responded:

> There isn't a template per se, there are many sort of learned papers which cover, going from conceptual through scoping studies through pre-

[125] Letter from Mr. Kimeto, Acting Commissioner of Mines and Geology, to CMK, 27 January 2012, Exhibit R-013.
[126] Letter from Mr. Kimeto, Acting Commissioner of Mines and Geology, to CMK, 27 January 2012, Exhibit R-013.
[127] SPL 256, Exhibit C-6.
[128] Tr. Day 6, p. 10, ll. 13-25.

> feasibility studies and feasibility studies and there is industry accepted content that one covers, and to a certain extent the detail that one goes into those contents, as you progress through the levels of accuracy, from conceptual through scoping through pre-feasibility and feasibility. **It is industry accepted standard.**[129] (emphasis added)

126. The Claimants' own consultant, Sound Mining Solutions (Pty) Ltd. ("SMS") appeared to agree with Dr. Rigby. SMS stated at p. 6 of its September 20111 Feasibility Study that its mandate was to write a report "in accordance with **standard industry practices**" and that it purported to do so.

127. With respect to "industry accepted standards", Dr. Rigby states:

> All of the work was based upon **inferred** resources which are too speculative geologically to include in models for feasibility work.[130] (emphasis added)

128. Reference has already been made to the SMS First Report dated September 2011 entitled "**Stage 1 Feasibility Study** f**or the Mrima Hill Niobium and Associated Rare Earths Project Kenya**".[131] Dr. Rigby was dismissive of this report, commenting:

> …the title given to this report appears to be designed to appear to comply with the requirements of the Kenyan mining law. I suggest that all involved in the commissioning and preparation of the SMS report were fully aware that the SMS report was **not** a Feasibility Study and should **not** have been titled as such. The report seems to have been created as a 'tick box exercise', with the insertion of the work 'feasibility' in its title to give the impression to the relevant authorities that this was a Feasibility Study.[132]
>
> …perhaps the most worrying aspect of the SMS report is found in the Conclusions and Recommendations section of the report. Put simply, **there are no conclusions or recommendations**, simply the word 'CORTEC' highlighted in yellow:

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[129] Tr. Day 6, p. 277, ll. 6-14.
[130] Tr. Day 6, p. 280, ll. 18-23.
[131] SMS Feasibility Study, September 2011, Exhibit C-57.
[132] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 23, para. 43.

> This strongly suggests that **Cortec would be supplying the conclusions and recommendations**, which seriously undermines the entire credibility and independence of the SMS report.[133] (emphasis added)

The Tribunal shares Dr. Rigby's concerns about the apparent willingness of SMS to defer to CMK to formulate what were supposed to be independent conclusions of an independent consultant. In any event, Dr. Rigby testified that the report fell:

> …far short of industry standards for a Feasibility Study. The status of the SMS report appears to be a work in progress draft with many typographical errors, grammatical issues, errors and omissions, it is unsigned and the conclusions were to be supplied by Cortec.[134]

129. The evening before the commencement of the Hearing on the merits in Dubai in January 2018, the Claimants produced an updated and purportedly final **SMS Mining Feasability Study**[135] dated 20 September 2012 which remedied some of the deficiencies of the SMS September 2011 document. However, **no expert witness was produced by the Claimants in support of the argument that the new document** could be considered, rationally, to constitute a mining feasibility study "in accordance with standard industry practices".

130. Dr. Rigby, the Government's expert, was no less scathing in his analysis of the "updated report". He testified that:

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[133] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 24, para. 45. (internal citations omitted).
[134] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 24, para. 46.
[135] SMS Final Feasibility Study, 20 September 2012, Exhibit C-252A.

> …the updates, the changes are largely editorial in nature, a number of the sections are let's call it reorganized, some of the previous typos and grammatical issues have been addressed and likewise a "conclusion" section has been completed, which wasn't the case in C-57… [there is] no material data and information that would give me and others much more confidence in the certainty of the project.[136]

131. According to Dr. Rigby:

> As at August 2013, the Mrima Hill project remained at the early exploration stage of evaluation and a development decision had not been made. I have placed the Mrima Hill project at the **Preliminary Economic Assessment (PEA)** stage, a view which is shared by Mr. Townsend (per his statement of 29 July 2013).[137] (emphasis added)
>
> * * * * *
>
> …my point is it is not a feasibility study, and I think in my first report, I said at the time that really the project was somewhere between conceptual and scoping, a scoping study is also referred to as a **preliminary economic assessmen**t, and **Mr. Townsend** in a press announcement suggested that they were looking forward to advancing the project to a PEA in, I believe, 2013. So if it is not at PEA, how it can be at feasibility?[138] (emphasis added)

132. In the above passage, Dr. Rigby was referring to the statement made by Mr. Townsend (CEO of PAW) on 29 July 2013: "We look forward to rapidly advancing the metallurgical work and completing the **Preliminary** Economic Assessment for the Project **by the end of 2013**."[139] Mr. Townsend's statement was made four months **after** issuance of CMK's Special Mining Licence on 7 March 2013. As Dr. Rigby explains, a preliminary economic assessment "is normally conducted well before a Feasibility Study and of course before any application for a mining licence."[140]

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[136] Tr. Day 6, p. 282, ll. 3-8, 15-17.
[137] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 5, para. 12(a).
[138] Tr. Day 6, p. 284, ll. 13-21.
[139] Pacific Wildcat News Release 2013-15, *High Grade and Large Tonnage Niobium and Rare Earth Resource for Mrima Hill*, 29 July 2013, Exhibit C-118. (emphasis added).
[140] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 17, para. 30.

133. Mr. Townsend's statement of 29 July 2013 demonstrates, in the Tribunal's view, that not only had CMK failed to satisfy the conditions precedent to the issuance of SML 351 as of 7 March 2013, but that Mr. Townsend of PAW as the most knowledgeable of the promoters, *knew* the Mrima Hill project would require "rapid advance" even to enable a "preliminary" assessment of its economic viability by the end of 2013, *i.e.* 10 months after Mr. Masibo rushed out SML 351.

134. Dr. Rigby (whose conclusions were not contradicted by any expert called by the Claimants) testified that he has "worked probably in 60 countries around the world" and "I have been undertaking all of these studies, including feasibility studies for about 40 years" and "in any jurisdiction in the world that I have worked, does not allow feasibility level work…based upon *inferred* mineral resources because they are geologically *too speculative* and they don't meet the minimum requirements of certainty."[141]

135. The reason, according to Dr. Rigby, is that "the design assumptions may change substantially and with further exploration which may be successful and upgrades the inferred, may be unsuccessful and downgrades the inferred and excludes them. **But because that work hasn't been done, the project scope possibilities are far too wide to tie down – you know, to support even moving the project forward**"[142] (emphasis added). In the result, according to Dr. Rigby:

> …Consequently EIAs are typically undertaken only after the project scope, scale and design have been sufficiently developed for them all to be "frozen". This is entirely logical since it would be pointless to undertake an EIA project different to that which will ultimately be implemented.
>
> This presented significant challenges for the Mrima Hill project since the SMS study was Conceptual only, was based purely on Inferred resources and did not address REE resources. **Even with the later BMGS report (see below) which upgraded part of the Niobium resource to Indicated status and declared a maiden REE resource, no reserves were ever**

[141] Tr. Day 6, p.286, ll. 8-22 (emphasis added).
[142] Tr. Day 6, p. 287, ll. 1-12.

> **declared which could have formed the basis for a proper mine and processing plan.** Only bench scale metallurgical testwork had been undertaken so the process flowsheet and plant design, reagent use and tailings characterization could not be defined. No mine or processing plan was developed for the REE resource and only a relatively small proportion of the Niobium resource was scheduled to be mined in the SMS report. **Consequently, the final footprint of the project, the scale and size of the waste rock dump and likewise the tailings dam could not be defined nor could tailings characterization be undertaken. With all these uncertainties and scope for change, it would be impossible, in my view, to produce a meaningful EIA.**[143]

136. The fact is that Mr. Masibo himself laid it down as a condition of SPL 256 that he required a "mining feasibility study" before moving ahead to consider issuance of a mining licence. The Tribunal accepts Dr. Rigby's expert evidence (while noting, again, that the Claimants did not produce any expert to contradict Dr. Rigby's view) that the Claimants failed to do so.

137. In the absence of any independent expert to contradict Dr. Rigby, the Claimants are left with the argument that Mr. Masibo is the sole judge of what is required in a mining feasibility study, and his discretion to accept the SMS work cannot be impeached. Be that as it may, the fatal blow to SML 351 is not the lack of a mining feasibility study but the **presence** of the forest and nature reserve lands exclusion, and the **absence** of prior EIA approval. Accordingly, the lack of a proper feasibility study illustrates the cavalier attitude of the Claimants towards Kenya's requirements and Commissioner Masibo's willingness to cut corners, but the lack of a proper feasibility study does not itself form a ground for the Tribunal's decision to dismiss the claims.

[143] Dr. Neal Rigby First Expert Report, 28 September 2016, p. 25, paras. 50-51.

(b) The Lack of an Approved Environmental Impact Assessment Study ("EIA")

138. CMK initiated the process of compiling input to an EIA study which appears as item three in the *Mining Investment Road Map*. The EIA study report would be evaluated by NEMA which, if the study were considered satisfactory, would then issue an EIA licence. Mr. Geoffrey Wahungu, the Director-General of NEMA, testified that:

> …In order for any company to be granted a mining licence, it is a **pre-requisite** that the company obtains an EIA licence **before** any mining licence is issued.
>
> 9. This requirement is set out in the Environmental (Impact Assessment and Audit) Regulations, 2003 ("**the Regulations**") which read:
>
> > **No licensing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required** under the Act unless the applicant produces to the licensing authority a licence of environmental impact assessment issued by the Authority [NEMA] under these Regulations.[144] (emphasis added)

139. Mr. Kenneth Wade of the environmental consultants, 5 Capitals, testified as to the extensive work undertaken and strenuous efforts made to satisfy the environmental concerns expressed by NEMA including an expert Government Technical Advisory Committee. However, Mr. Wade left the project before any NEMA approval was obtained.[145]

140. Mr. Wade testified:

> Q. So there was still in your mind a process of assessment and review that NEMA was undertaking?
>
> A. Well, yes, certainly, in terms of providing this final information, these were clarifications that had been requested. We respond to each of those

[144] Geoffrey Wahungu First Witness Statement, paras. 8-9. (internal citations omitted; emphasis in original).
[145] His parting submission to Nema ended, "We trust that the detailed technical response to your clarifications and the supporting information/ no objection letters will provide sufficient information to enable you to complete your technical review with the aim of issuing a conditional mining licence for Mrima Hill." (Tr. Day 3, p. 110, ll. 19-24).

> points, put them in writing, so it's a formal response to NEMA, and at that point, I believe certainly at that point that we have completed everything, that there isn't anything outstanding.[146]

141. The Tribunal was favourably impressed with Mr. Wade's testimony. But, as he acknowledged, NEMA still had points of controversy under consideration and while he considered CMK's submission to be satisfactory, he agrees CMK had no EIA approval when his engagement ended and NEMA took a very different view.

(i) The Claimants' Argument

142. The Claimants dismiss as unfounded the controversy over their lack of an EIA licence. They point out that they engaged three environmental assessment companies – 5 Capitals of Dubai, CRO of South Africa and Sigtuna of Kenya. When NEMA raised a number of issues including water and radiation,[147] CMK engaged a further three environmental consultancy firms to assist CMK to respond to NEMA's queries: SMS (which prepared the mining feasibility study), an Australian firm called Caltrix Consulting ("**Caltrix**") and a Kenyan firm called **Canon**.[148]

143. NEMA advised CMK that EIA approval would be required not only in relation to Mrima Hill but in relation to the area adjacent to Mrima Hill where CMK was planning to locate additional processing facilities.[149]

144. In or around October 2011, CMK submitted to NEMA for approval the proposed terms of reference which provided an outline of the scope of the proposed EIA report. The terms of

[146] Tr. Day 3, p. 111, ll. 1-12.
[147] David Anderson First Witness Statement, paras. 92-94.
[148] David Anderson First Witness Statement, paras. 93-94.
[149] David Anderson First Witness Statement, para. 95.

reference approval stage precedes the submission for approval of the full EIA report.[150] The terms of reference were approved by NEMA on 16 November 2011.[151]

145. The Claimants note that on July 2013 (four months after issuance of SML 351) two letters were issued to CMK by Mr. Benjamin Langwen, the Director of Compliance and Enforcement at NEMA at that time.[152] The Claimants rely on these letters as evidence of NEMA's approval of what Mr. Anderson calls the "Second EIA".[153]

146. In summary, the Claimants contend:

(a) the necessary EIA approval was given by Mr. Langwen, an authorized NEMA Official;[154]

(b) Commissioner Masibo had the discretion to convert the EIA condition precedent (set out in the conditions to SPL 256) into a condition subsequent that could be fulfilled after SML 351 had issued; and

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[150] Geoffrey Wahungu First Witness Statement, para. 23.
[151] Receipt of lodgement of EIA study report at NEMA, 17 November 2011, Exhibit C-065; and Approval from NEMA, Exhibit C-66. Mr. Anderson alleges that this 16 November 2011 approval evidences NEMA's approval of "CMK's EIA" (see David Anderson First Witness Statement, para. 89). NEMA's Mr. Wahungu testified that Mr. Anderson's assertion "is incorrect and rather misleading considering that Cortec continued in correspondence with NEMA to try to seek approval well into 2013" (Geoffrey Wahungu First Witness Statement, para. 23).
[152] Letter from Mr. Benjamin Langwen, Director General NEMA to CMK in respect of the processing plant, 8 July 2013, Exhibit C-91; and Letter from Mr. Benjamin Langwen, Director General NEMA, to CMK in respect of mining project, 8 July 2013, Exhibit R-056.
[153] David Anderson First Witness Statement, para. 137. However, Mr. Langwen's letters purport to be the belated approval of NEMA of *both* the Mrima Hill project (see Exhibit R-056) and the processing plant (see Exhibit C-91).
[154] Justice Torgbor ventured into the facts and opined that EIA approval was given, and points to the letter from Benjamin Langwen dated 8 July 2013, Exhibit C-91, and an EIA review report signed by Mr. Jeremiah Wahomel According to Justice Torgbor, "having reviewed this document, it seems clear that NEMA had reviewed Cortec's EIA and communicated approval." (Tr. Day 6, p. 12, ll. 7-18). At that point, Justice Torgbor was no longer providing evidence of Kenyan law and had become an advocate of the facts.

(c) in any event, the Claimants' EIA submission satisfied Mining Commissioner Moses Masbio, and it was within his discretion to find the CMK had met the EIA condition.

(ii) The Government's Position

147. When CMK provided NEMA with environmental information, NEMA wrote to CMK on 19 July 2012 setting out eight fundamental deficiencies.[155] Mr. Wahungu, the Director General of NEMA, testified that the Claimants were dismissive of NEMA's concerns:

> It became the norm that whenever NEMA wrote a letter to Cortec, Cortec would show up at NEMA's offices a day or two later, accompanied by lawyers and environmental consultants. This was most unusual and unnerving. I recall being very uncomfortable with this trend where **Cortec hardly replied to our letters in writing** and instead made in person visits to assert their views and positions. What was most disconcerting with Cortec was that, whenever we requested that Cortec address particular issues, Cortec would show up at our offices with **huge bundles of documents which did not address the specific issues we had raised**. I felt that Cortec was bombarding us with information to try to intimidate my officers and me.[156] (emphasis added)

148. In 2013, EIA planning was difficult if not impossible because, as Dr. Rigby noted, "the project parameters had not been fixed".[157]

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[155] Letter from Ms. Marrian Kioko, for Director General of NEMA, to CMK, 19 July 2012, Exhibit R-053. Mr. Wahungu testified that:

> …the report was not a good submission and that large sections of the documents appeared to be still in draft and there were significant gaps and glaring omissions…My officials were very concerned that Cortec was simply going through the motions and not addressing the significant legal and environmental obstacles to establish a mine at Mrima Hill.

(Geoffrey Wahungu First Witness Statement, para. 25).

[156] Geoffrey Wahungu First Witness Statement, para. 20.

[157] Insufficient progress had been made to create and produce a meaningful Environmental Impact Assessment (EIA) **as the project parameters had not been fixed** [by an appropriate mining feasibility study]. (emphasis added)

149. Not only had no EIA licence been issued by 7 March 2013 when Mr. Masibo purported to issue SML 351, but two weeks later, on 22 March 2013, NEMA confirmed that it would not be issuing an EIA licence for the Mrima Hill project. The NEMA letter stated in part:

> 1. The proposed project will be implemented within Mrima Forest which is Gazetted as a Nature Reserve, Forest Reserve and a Natural Monument.
>
> The Forest Act, 2005 section 31(3) prohibits extractive uses of natural reserves other than for research…**Mrima Hill has so far not been degazetted by the respective minister** to pave way for the proposed project. The Forest Act, 2005 condemns mining in such areas in section 41(1).
>
> 2. The proponent has failed to identify an appropriate site for the Processing Plant and **undertake a consequent Environmental Impact Assessment** for the same…
>
> 4. The project will lead to **massive destruction of Forest followed by Loss of Biodiversity**.
>
> 5. The Project will **interfere with sites of cultural significance** within the proposed project site.
>
> * * * * *
>
> In view of the above grounds and in light of the provisions of the Environmental Management and Coordination Act, 1999, the Authority is of the view that **the proposed project will not enhance sustainable and sound environmental management**. Consequently, **the Authority is unable to issue an Environmental Impact Assessment Licence** under the Act. You are hereby advised to explore alternative sites.[158] (emphasis added)

150. Mr. Wahungu, the Director General of NEMA, testified that:

> [t]he [NEMA] letter dated 22 March 2016 constitutes what is known as a "**Record of Decision**" issued by the office of Director General. The letter was clear that NEMA had declined to issue an EIA licence, **principally because of the protected status of Mrima Hill**. The decision set out in the Record of Decision issued by the Director General is final and can only be reviewed by the National Environment Tribunal. **Even as Director General, I do not have power to review any Record of Decision I have issued.** It follows that any NEMA

[158] Letter from Professor Wahungu, Director-General of NEMA, to CMK, 22 March 2013, Exhibit R-011.

> officer subordinate to me also has no authority to revisit the Record of Decision.[159] (emphasis added)

151. Notwithstanding the Director General's statement that no "NEMA subordinates" had authority to revisit the "Record of Decision" rejecting the Claimants' EIA application, Mr. Langwen purported to do so by letters of 8 July 2013. Mr. Langwen's letters of approval were unauthorized, the Government says, and without effect.

152. According to Mr. Wahungu, no EIA licence has ever been issued to CMK.[160] Further, Mr. Wahungu testified that Mr. Langwen's two letters were issued "in unusual and irregular circumstances"[161] and that in December 2013 Mr. Langwen was summarily dismissed for gross misconduct in a different matter.[162] (It seems that subsequently Mr. Langwen's claim of wrongful dismissal was ultimately successful.)

(iii) The Tribunal's Ruling in Respect of EIA Approval

153. Mr. Langwen wrote two letters on 8 July 2013. In the first letter (Exhibit R-056), he purported to approve the EIA Study Report for "the proposed Mrima Hill Niobium and Associated Rare Earths Mining Project" ("the mining project approval"). The second letter of the same date (Exhibit C-091) purports to approve the related "processing plant in Mrima Hill, Kwale County" ("the processing plant approval"). The two letters confirm that CMK had no EIA approval at the time SML 351 was issued. If Mr. Langwen believed the "mining project" had received EIA approval prior to 7 March 2013, he would not have purported to give "the mining project" NEMA

[159] Geoffrey Wahungu First Witness Statement, para. 33.
[160] Geoffrey Wahungu First Witness Statement, paras. 36-43.
[161] Geoffrey Wahungu First Witness Statement, para. 41.
[162] Geoffrey Wahungu First Witness Statement, para. 42.

approval on 8 July 2013. He would only have written Exhibit C-091 in respect of processing plant approval.

154. For reasons to be elaborated below, the Tribunal:

(a) concludes that it is clear that *Environmental (Impact Assessment and Audit) Regulation 2003* s. 4(2) requires an EIA **licence** as a condition precedent to the issuance of a special mining licence as stated by Professor Albert Mumma at p. 123 of his expert report.[163] There is ample evidence that an EIA licence was not issued;

(b) accepts the evidence of the Director General of NEMA, Mr. Wahungu, that only he had authority to issue the requisite EIA licence to CMK;

(c) Mr. Langwen's letters of 8 July 2013 do not address the prior NEMA "Record of Decision" dated 22 March 2013 rejecting CMK's submission, nor address the deficiencies of CMK's environmental submissions therein indicated;

(d) the EIA requirement was attached to SPL 256 as a condition *precedent* to CMK's application for a special mining licence. Mr. Masibo had no authority to waive compliance or, after issuance of SML 351 to (belatedly) try to convert the condition precedent into a condition subsequent;

(e) even if Mr. Langwen's unauthorized letters of 8 July 2013 could be given the effect contended for by the Claimants, they were four months too late; and

[163] Tr. Day 6, p. 132, ll. 13-25.

(f) in any event, the Tribunal does not accept Mr. Langwen's letters of 8 July 2013 as authorized NEMA approvals.[164]

155. The Claimants argue that CMK would have held off removing what it claimed was estimated to be about 130 million tonnes of mineral resources until after it had prepared satisfactory EIA studies, but this "wait and see" approach contradicts regulation 4(2). The purported gift by Mr. Masibo to the Claimants of exclusive rights would keep out other potentially better prepared and more compliance minded mining operations off Mrima Hill for 21 years. Mr. Masibo was not legally entitled to make such a gift. The gift of SML 351 was invalid from the outset.

PART 12 - THE COMMUNITY PARTICIPATION

156. Some of the meetings arranged by CMK's solicitors, Mr. Robson Harris, concerned participation of the local Kwale community in the Mrima Hill project.[165] The Claimants point out that in March 2013, the corporate structure and financing of the project were not yet at the stage when the community's equity participation was ripe for determination. CMK nevertheless proposed a 5% free-carried interest for the State and an additional 1% additional royalty to be held on trust for the benefit of the local community.[166] Mr. O'Sullivan testified that the Kwale people appeared uninterested in this proposal and it never came to fruition.[167] The Government agrees that the issue of local Kwale participation was never resolved.

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[164] See Mr. Wahungu's testimony, Tr. Day 5, p. 83, l. 23 to p. 86, l. 3.
[165] David Anderson First Witness Statement, para. 100; Donald O'Sullivan First Witness Statement, para. 39.
[166] David Anderson First Witness Statement, para. 100; Donald O'Sullivan First Witness Statement, para. 39.
[167] Donald O'Sullivan First Witness Statement, para. 39.

PART 13 - THE UNFULFILLED REQUESTS FOR INFORMATION FROM NATIONAL MUSEUMS OF KENYA

157. On 5 February 2013, the Director General of NMK wrote to Mr. Anderson as follows:

> …NMK is ready to grant a letter of no objection to the project **once these recommendations have been fully addressed**:
>
> 1. **Mapping the cultural sites within the area (e.g. early settlements, burials and community ritual sites).**
>
> 2. Identify areas void of **archaeological and cultural sites** for exploratory drilling and commercial mining.
>
> 3. Hold a **consultative discussion** between stakeholders (the community, developer, archaeologists, Coastal Forests Conservation Unit of the National Museums of Kenya and Kenya Forestry Service) on the way forward should the mining impact on some of these cultural sites.
>
> 4. Finally an archaeologist should be on site during the mining operations.
>
> I propose a meeting in order to discuss further.[168] (emphasis added)

158. The Claimants had not provided the information requested by 7 March 2013 when Mr. Masibo issued SML 351 without NMK's approval.

PART 14 - THE CLAIMANTS' POLITICAL EFFORTS CULMINATE IN HIRING MR. JACOB JUMA

159. CMK filed its application for a mining licence on 11 January 2012.[169] By September 2012, no approval had been given and the Claimants engaged their law firm, Robson Harris, to advance their cause. Ms. Jane Mwangi, Managing Partner of Robson Harris, was familiar with many

[168] Letter from Mr. Idle Omar Farah, Director General NEMA, to Mr. David Anderson, CMK, 5 February 2013, Exhibit R-009.
[169] Application for Mining Licence, 11 January 2012, Exhibit C-67.

Kenyan political figures and coordinated the meetings[170] amongst others with PS Mohammed and Minister Mwakwere.[171]

(a) *The Hiring of Jacob Juma*

160. Mr. Anderson testified that in February 2013, he received a telephone call from Jacob Juma, a Kenyan businessman. Mr. Juma informed him that CMK's licence application was being "blocked somewhere in the State's bureaucratic system."[172] The Claimants reached an agreement[173] with Mr. Juma under which he would assist CMK in discussions with the Government. Mr. Juma would also buy shares in PAW and another CMK affiliate, First Western Limited.[174] The Claimants emphasize that Mr. Juma was not just an outside consultant. He was to be a significant investor.

161. On 6 March 2013 (two days after the general election), Mr. Juma was able to arrange meetings with representatives from the outgoing Kenyan Government at the offices of the

[170] David Anderson First Witness Statement, para. 99; Donald O'Sullivan First Witness Statement, para. 39.
[171] David Anderson First Witness Statement, paras. 99-100; Donald O'Sullivan Witness Statement, para. 39.
[172] David Anderson First Witness Statement, para. 102; Claimants' Memorial on the Merits dated 5 May 2016, para. 71.
[173] Pursuant to the agreement:

(a) Mr. Anderson and Mr. O'Sullivan engaged Mr. Juma to "caus[e] the Mrima Mining Licence to be granted to CMK" (Memorandum of Understanding between Mr. O'Sullivan, Mr. Anderson and Mr. Juma, 7 March 2013, Exhibit C-179, para. 4);
(b) Mr. Juma would receive 14.85% of the issued share capital of CMK, a stake which, according to the Claimants' own valuation of CMK's interest in Mrima Hill, is worth in excess of US $300 million. Memorandum of Understanding between Mr. O'Sullivan, Mr. Anderson and Mr. Juma, 7 March 2013, Exhibit C-179, para. 4.
(c) "JJ [Mr. Juma] will personally hold then [sic] licence granted to CMK till the perfection of clauses 1 to 4 herein above." (Memorandum of Understanding between Mr. O'Sullivan, Mr. Anderson and Mr. Juma, 7 March 2013, Exhibit C-179, para. 5)

[174] David Anderson First Witness Statement, para. 106.

President of Kenya and the Cabinet Secretary.[175] According to Mr. Anderson, this meeting was attended by:

(a) Mr. Francis Kimemia, the Cabinet Secretary;

(b) Mr. Ali Mohammed, the Permanent Secretary of the Ministry of Environment and Mineral Resources;

(c) Mining Commissioner Mr. Moses Masibo;

(d) Mr. Isiah Kabinia, the newly-appointed Kenyan Ambassador to Australia;

(e) Mr. David Anderson;

(f) Mr. Donald O'Sullivan; and

(g) Mr. Jacob Juma.

162. Neither NMK nor the Ministry of Home Affairs and National Heritage was represented.

163. Mr. O'Sullivan and Mr. Anderson testified[176] that at this meeting:

> Mr Kimemia [the Secretary of Cabinet] asked Mr Masibo what the legal position was regarding his office issuing a Special Mining Licence, and whether there was any impediment to him issuing the licence. Commissioner Masibo responded by reading out sections of the Kenyan *Mining Act* and confirmed that he was within power and had full authority to issue CMK a Special Mining Licence, including for a period of 21 years…Mr Kimemia then informed Commissioner Masibo that if he was satisfied, **he could issue CMK a Special Mining Licence**. Commissioner Masibo indicated that he

[175] David Anderson First Witness Statement, para. 107.
[176] David Anderson First Witness Statement, paras. 107-113; Donald O'Sullivan First Witness Statement, para. 43.

> was satisfied and that he would proceed accordingly.[177] (emphasis added)

164. Note that Mr. Masibo spoke of a special mining licence. He did not mention "amended" conditions to a "re-grant" of SPL 256 as he later alleged.

165. The following day, on 7 March 2013, a formal "launch" took place at the Fairview Hotel in Nairobi. At this meeting, Commissioner Masibo quoted from Section 17 of the Mining Act as the provision giving him authority to grant CMK its special mining licence,[178] which he then issued.

166. SML 351 was subsequently notified in the Kenya Gazette on 22 March 2013.[179]

(b) *The Tribunal's Finding in Respect of SML 351*

167. The meeting of 6 March 2013 was based on demonstrable misconceptions reflected in a subsequent letter dated 26 March 2013 from PS Mohammed to NEMA purporting to countermand NEMA's "Record of Decision" dated 22 March 2013 rejecting CMK's application and ordering NEMA to issue an EIA licence (thereby again confirming incidentally, that the requisite EIA approval was not in place prior to issuance of SML 351):

> The mineral resource riches of Mrima Hill have been **confirmed** through extensive historical work and prospecting spanning several years. The initial results from the drilling works by Cortec Mining company has inferred niobium resource estimate of over 100 million tonnes and additional 30 million tonnes of rare earth minerals that could sustain the project for 20-30 years. In fact the rare earth

[177] David Anderson First Witness Statement, paras. 112-113.
[178] David Anderson First Witness Statement, para. 114.
[179] Gazette Notice 3899, 22 March 2013, Exhibit C-10.

> mineral deposits of Mrima are estimated to be the third largest in the world… [180]

168. According to Dr. Rigby, whose expert evidence the Tribunal accepts, such resources had not been confirmed. Indeed, in a press release on 2 August 2013, PAW was obliged to acknowledge:

> There is no certainty that all or any part of the estimated mineral resource of the Mrima Hill Project will be converted into mineral reserves.[181]

169. PS Mohammed continued in his letter of 26 March 2013:

> The company has submitted feasibility study report and management plan which include social and environmental considerations… [182]

170. Dr. Rigby's criticism of the "feasibility study" submitted by the Claimants (whether the report initially marked Exhibit C-252 and Exhibit C-57 or the later version Exhibit C-252A) has earlier been referred to, and his criticisms are accepted as both relevant and correct by the Tribunal. The reference to a management plan which includes social and environmental considerations" is no substitute for an approved EIA licence.

171. PS Mohammed continues:

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[180] Letter from PS Ali Mohammed, Ministry of Environment and Mineral Resources, to Prof. Geoffrey Wahungu, Director General NEMA, 26 March 2013, Exhibit C-135.
[181] Pacific Wildcat News Release 2013-16, *Pacific Wildcat Clarifies Technical Disclosure*, 2 August 2013, Exhibit R-062.
[182] Letter from PS Ali Mohammed, Ministry of Environment and Mineral Resources, to Prof. Geoffrey Wahungu, Director General NEMA, 26 March 2013, Exhibit C-135.

> …the Lead Agencies including the Ministry of Forestry and Wildlife, the Radiation Protection Board, the Kwale County Council, as well as the local community have all consented to the project.[183]

172. This statement is incorrect. As discussed, the KFS agreed to a prospecting licence on existing paths and pits, not a mining licence. PS Mohammed does not even refer explicitly to the "national monument" issue. Moreover, the alleged support of the Kwale County Council was contested by Kwale representatives.

173. Finally, PS Mohammed in effect gives NEMA a political direction:

> The position of the Authority therefore, needs to be immediately reviewed and the company facilitated to contribute to national growth and poverty eradication.[184]

174. Mr. Wahungu, the Director General of NEMA, was offended by PS Mohammed's letter:

> Q. …You received a letter on 26th March 2013 from PS Ali Mohammed, copied to the Honourable Ali Mwakwere and other officials and ministers including Mr Kimemia; you confirmed you received that letter?
>
> A. Yes, but I found it very offensive, because the Permanent Secretary knows the procedures and the law, and there is no provision for the Permanent Secretary in the Environmental Management and Co-ordination Act to advise or even instruct the Director General. It was wrong for him to do this. He is not allowed in law. The Environmental Management and Co-ordination Act states it very clearly.[185]

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[183] Letter from PS Ali Mohammed, Ministry of Environment and Mineral Resources, to Prof. Geoffrey Wahungu, Director General NEMA, 26 March 2013, Exhibit C-135**.**

[184] Letter from PS Ali Mohammed, Ministry of Environment and Mineral Resources, to Prof. Geoffrey Wahungu, Director General NEMA, 26 March 2013, Exhibit C-135**.** Reference has already been made to the two letters to CMK subsequent to the issuance of SML 351 by Mr. Benjamin Langwen, the Director of Compliance and Enforcement at NEMA dated 8 July 2013. The Claimants rely on one of these letters as evidence of NEMA's approval of what Mr. Anderson calls the "Second EIA" (David Anderson First Witness Statement, para. 137). According to Mr. Wahungu's evidence this is not correct and no EIA licence has ever been issued to CMK (either with respect to mining on Mrima Hill or the adjacent proposed processing plants) (Geoffrey Wahungu First Witness Statement, paras. 36-43).

[185] Tr. Day 5, p. 86, ll. 10-22.

175. As will be seen, PS Mohammed's political directive was eventually overridden by the political directive of the subsequent Kenyatta Government. The political actors came and went but the Kenyan regulatory laws remained throughout and unfulfilled.

176. PS Mohammed's posture is all the more curious in light of the fact that a few weeks before the events of March 2013, to be precise, on 31 January 2013, the PMLC (of which PS Mohammed was chair) held one of its quarterly meetings to discuss various mining applications. Commissioner Masibo himself tabled an agenda item recommending revocation of CMK's prospecting licence SPL 256 for "fraud". The minutes of that meeting note:

> The Special licence was also supposed to **exclude Mrima Hill Nature Reserve.** [186] (emphasis added)

177. The Claimants contend that the Tribunal should accept Mr. Masibo's explanation that after further examination he concluded:

> …that the "decision [by the PMLC] to revoke SPL 256 was made hastily based on inaccurate information", and "then consulted with PS Mr. Ali [Mohammed] and Hon. Minister Charua Ali Mwakwere and both decided that the revocation be discontinued."[187]

In other words, the PMLC recommendation was not reversed by the PMLC itself, which never approved CMK's mining licence.

178. In summary, the Tribunal has not been provided with any document that could be said to constitute the EIA "licence" required by s. 4(2) of the regulations in respect of Mrima Hill. Nor

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[186] Minutes of PMLC meeting, 31 January 2013, Exhibit R-014, s. E(vi). See also Njiru Njeru Witness Statement, para. 15; and Raymond Mutie Mutiso First Witness Statement, paras. 15-17.
[187] Claimants' Cost Submission dated 11 April 2018, p. 13, para. 17(d) citing Commissioner Massibo signed statement to DCI, 22 November 2013, Exhibit R-254, p. 3.

is there any persuasive evidence that KFS or NMK ever consented to the issuance of a mining licence in respect of the Mrima Hill forestry and nature reserve and national monument areas.

PART 15 - THE CLAIMANTS' WORK PLAN

179. In operational terms, SML 351 purported to authorize CMK to implement the work programme annexed as Schedule B, the text of which is copied below:

SCHEDULE "B"
WORK PROGRAMME

SPECIAL (MINING) LICENCE NO.....

MESSRS CORTEC MINING KENYA LIMITED

PHASE I

- Construction of the project infrastructure
- Commissioning of the project infrastructure
- Continuously explore the property area to re-assess and update the total ore reserves in view of changing economic and technological conditions and access possibilities for expansion of production capacities

PHASE III

- Undertaking of mining and processing operations
- Commissioning of the project infrastructure
- Implementation of social programmes
- Rehabilitation of mined out areas

180. It seems Schedule B to SPL 351 was prepared in such haste that it skips from Phase I to Phase III without there being a Phase II. In the absence of an approved EIA, the Claimants would not know where it would be appropriate to construct "infrastructure" or begin to "undertake mining processing operations" to remove what PS Mohammed referred to as 100 million tonnes of niobium and 30 million tonnes of rare earth minerals?

181. From the Claimants' perspective, CMK believed SML 351 gave it freedom to explore away from the existing roads and tracks in the forest. This meant CMK would be able to conduct more

extensive drilling.[188] On the other hand, such off-track exploration violated the terms imposed by the KFS in "opening" up for prospecting purposes the forest reserve beyond areas previously disrupted, as well as creating potential confrontation with the local Kwale people.

182. The Claimants point out that KFS officials were aware of CMK's activities on Mrima Hill but, as Justice Torgbor testified "to the extent that the Ministry official is acting officially in attending site, et cetera., that is an act of cooperation by the Ministry [as opposed to approval] and I don't wish to take it any further."[189]

PART 16 - THE GOVERNMENT'S ALLEGATIONS OF CORRUPTION AGAINST JACOB JUMA AND MOSES MASIBO

183. The Government alleges that Jacob Juma and Moses Masibo worked together corruptly to issue SML 351. For example, at paragraph 16 of the Counter-Memorial, the Government alleges that "there is evidence to show that Mr. Juma had a history of paying bribes to Commissioner Masibo."[190] Moreover, Mr. Ndung'u's evidence is that he attended four or five meetings with Mr. Juma and Mr. Masibo at which (according to Mr. Ndung'u) Mr. Juma gave "pocket money" to both him and Mr. Masibo, "on each occasion…usually around KSH 150,000 (about US $1,500)."[191]

184. Mr. Juma is dead and cannot defend himself. Mr. Masibo provided a detailed witness statement which denied any wrongdoing. The Government did not put to Mr. Masibo while in the witness box the so-called "incriminating" evidence. Fairness required, if the Government wished

[188] David Anderson First Witness Statement, para. 115.
[189] Tr. Day 6, p. 15, ll. 3-6.
[190] Hari Kinosthe Ndung'u First Witness Statement, para. 27. See also Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016, para 16.
[191] Harie Kinosthe Ndung'u First Witness Statement, para. 27.

to pursue its allegations of corruption, that Mr. Masibo be given the opportunity to explain his conduct. This opportunity was not given. The Tribunal does not accept the Government's explanation that it did not wish by cross-examination to further complicate Mr. Masibo's existing legal jeopardy in Kenya.[192] Mr. Masibo's lawyer, not the Government, was present to protect Mr. Masibo. Nevertheless, the Government seeks to persuade the Tribunal to draw the conclusion that "this arrangement involved corruption. On that basis alone, the Government says, the claim should be dismissed, as investment treaty protection does not extend to investments procured by corruption and/or made in bad faith."[193]

185. The Tribunal rejects the allegations of corruption against Mr. Masibo as unproven.

PART 17 - SUMMARY OF THE GOVERNMENT'S ARGUMENT ON THE CLAIMANTS' NON-COMPLIANCE

186. The Government argues that putting to one side the corruption allegations, the Claimants knew, or ought to have known, that SML 351 had not been issued in accordance with Kenyan law. In particular:

(a) CMK had not complied with the *Mining Investment Road Map*, a document which does not have the force of a statute but which references requirements that

[192] The Public Service Commission is currently investigating the Ministry of Mining's findings that "Mr. Masibo had abused the powers conferred to him" and had "contravened Mining Act Cap. 360 by issuing Cortec Mining Kenya Limited with a special licence which was not in compliance with the law." (Letter from Dr. Ibrahim M. Mohamed, CBS, Permanent Secretary of the Ministry of Mining, to Mrs. Alice A. Otwala, CBS, Public Service Commission of Kenya, 11 April 2013, attaching minutes of the Ministerial Human Resource Management Advisory Committee meetings held on 26 and 27 March 2015, Exhibit R-155, p. 11.) In parallel, the Directorate of Criminal Investigations has recommended to the Director of Public Prosecution that Mr. Masibo be charged with "[a]buse of office contrary to section 101 of the penal code." (Letter from Mr. Richard Koywer, for the Director of Criminal Investigations, to the Director of Public Prosecutions, 18 January 2016, Exhibit R-115.)

[193] Respondent's Counter-Memorial on the Merits and Memorial on Objection to Jurisdiction dated 5 October 2016, para. 18.

do have a statutory basis, and in which Mr. Masibo himself set out to indicate the steps *he* believed the Claimants were required to be followed:

(i) the mining feasibility study prepared by SMS and other consultants was not fit for purpose;

(ii) the Claimants knew that no EIA licence had been issued (and that neither NMK[194] nor KFS[195] had provided the requisite consents to a *mining* licence);

(iii) SML 351 had been issued without PMLC approval (which Mr. Masibo had earlier advised the Claimants he regarded to be a prerequisite for any mining licence to be issued);[196]

(iv) there had been no Gazette Notice inviting objections on the proposed mining licence;

(v) Mrima Hill remained a protected area in terms of a nature reserve, forestry reserve and national monument;[197]

(vi) CMK did not comply with the Equity Participation Regulations; and

(vii) on 27 January 2012, the Claimants had been advised that CMK's application would be "considered abandoned" if the defects in the

[194] Dr. Idle Omar Farah First Witness Statement, paras. 25-28.
[195] Esau O. Omollo Witness Statement, paras. 28-29.
[196] See para. 119 above.
[197] Esau O. Omollo Witness Statement, para. 25; Dr. Idle Omar Farah First Witness Statement, paras. 27-28.

application were not remedied within 6 months and CMK had not taken appropriate steps to bring itself into compliance within the regulatory deadline.

PART 18 - THE KENYAN ELECTIONS OF 4 MARCH 2013

187. On 4 March 2013, general and presidential elections were held in Kenya.

188. On 9 April 2013, Mr. Uhuru Kenyatta was inaugurated as the new President of Kenya and a new Government was formed.

189. By letter dated 12 April 2013,[198] Mr. Anderson requested an audience with the new President and shortly afterwards, he was able to meet at State House in Mombasa with President Kenyatta, a number of Government officials, including Commissioner Masibo, Mutea Iringo (Permanent Secretary for Internal Security), Jomo Gecaga (President Kenyatta's nephew and personal assistant) and Isaiah Kabira (Ambassador-Designate to Australia).[199] Present for the Claimants were Mr. Anderson, Mr. O'Sullivan, Jacqueline O'Sullivan and Mr. Townsend. According to Mr. Anderson, the newly installed President Kenyatta expressed his support for CMK's Mrima Hill project.[200] Following this meeting, PAW announced that President Kenyatta had commented:

> We will support the development of the Mrima Hill Niobium and Rare Earth Project and the efforts of Cortec Mining Kenya but are keen to ensure that exploitation of the minerals benefits the Country. Commercial development of this project will have a significant

[198] Letter from Mr. David Anderson, CMK, to His Excellency Uhuru Kenyatta, CGH, 12 April 2013, Exhibit C-80.
[199] David Anderson First Witness Statement, para. 119; Donald O'Sullivan First Witness Statement, para. 47.
[200] David Anderson First Witness Statement, para. 121; Donald O'Sullivan First Witness Statement, para 48.

> positive effect on all the stakeholders including the local community, the Kwale County and the Country as a whole.[201]

190. On the other hand, the Ambassador-designate to Australia, Mr. Kabira, who was also present at the meeting, describes it as a "sales pitch" by CMK, at which "[t]he Cortec team repeatedly mentioned the purported scale of the project and the claim that that the project will earn Kenya a lot of money."[202] The Government denies that the President gave any specific assurances to CMK. According to Mr. Kabira, "His comments were of a general nature and expressed his Government's policy towards the mining sector."[203]

PART 19 - AFTER ISSUANCE OF SML 351, CMK CONTINUED TO GATHER DATA RELEVANT TO A "FEASIBILITY STUDY"

191. In the Spring of 2013, PAW raised an additional US $1.5 million in capital to fund further resource definition and exploratory work.[204] In parallel, CMK commenced assaying work on the first holes of 3,482 metres of reverse circulation drilling (which had been undertaken in 2012).[205]

192. On 26 June 2013, PAW announced results regarding the extent of rare earths resources within the area covered by SML 351.[206] On 15 July 2013, PAW's announcement included its niobium discoveries, stating that these results "continue to demonstrate the presence of wide and high-grade zones of mineralization and remain open laterally and at depth. In addition elevated

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[201] Pacific Wildcat Resource TSX Announcement, 23 May 2013, Exhibit C-108.
[202] Isaiya Kabira Witness Statement, para. 22.
[203] Isaiya Kabira Witness Statement, para. 19.
[204] Pacific Wildcat TSX Announcement, 25 April 2013, Exhibit C-136.
[205] Pacific Wildcat TSX Announcement, 21 May 2013, Exhibit C-137.
[206] Pacific Wildcat Announcement, 26 June 2013, Exhibit C-138. As a Canadian-listed public mining company, any announcement by PAW was required to comply with *National Instrument 43-101 Standards of Disclosure for Mineral Projects* (NI 43-101, CL-042).

niobium…results have also been intersected in a number of holes further confirming the potential of this large mineralized system."[207]

193. Around this time, PAW hired BMGS Perth ("**BMGS**") as an independent consultant to prepare a Technical Report on the Mrima Hill project.[208] The purpose of the report was to review the current status of the Mrima Hill project, focusing on the niobium and REE resources. In its Technical Report of 1 September 2013 (the "BMGS Report"), BMGS concluded that "the exploration activities completed and on which this Mineral Resource have been generated were successful in achieving their objective."[209]

194. As explained earlier, the Tribunal accepts the evidence of Dr. Rigby, the Government's expert, that the then existing data including the data analyzed by BMGS did not support these conclusions.

195. The Claimants did not call a witness from BMGS.

PART 20 - THE TURNING OF THE TIDE: THE NEW KENYATTA GOVERNMENT ORDERS A REVIEW AND SUSPENDS SEVERAL HUNDRED "TRANSITION PERIOD" MINING LICENCES DUE TO "COMPLAINTS REGARDING THE PROCESS"

196. A few weeks after President Kenyatta was elected, a new Cabinet Secretary for the Ministry of Mining was appointed: Najib Balala ("**CS Balala**").

[207] Pacific Wildcat Announcement, 15 July 2013, Exhibit C-178.
[208] Darren Townsend First Witness Statement, para. 69.
[209] BMGS Report, 1 September 2013, Exhibit C-124, pp. 103-104.

197. Mr. Anderson testified that on 8 July 2013, he heard from Mr. Juma that CS Balala had threatened that, unless CMK paid CS Balala KSH 80 million (US $921,130),[210] he would revoke SML 351.[211] Mr. Anderson and Mr. O'Sullivan testified that no such money was paid.[212]

198. On 15 July 2013, CMK anticipated being able to announce NEMA's approval processing plant at a public press conference.[213] CS Balala and Commissioner Masibo were scheduled to attend. However, just as the press conference was about to begin, Mr. Anderson says he was intercepted by Commissioner Masibo who told him (privately) that unless CMK agreed to "renegotiate" the terms of SML 351, he and CS Balala would not attend the press conference.[214] Having conferred with Mr. O'Sullivan by telephone,[215] Mr. Anderson says he informed Commissioner Masibo that the Claimants would not entertain any "renegotiation" of SML 351.[216] Commissioner Masibo and CS Balala did not attend the press conference.[217] Mr. Anderson went ahead in their absence and announced CMK's drilling results and the [alleged] approval of the EIA by NEMA.[218] As mentioned, NEMA denies that any such valid approval was given.

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[210] Based on an exchange rate of 0.0115141199 Kshs/US$ at 8 July 2013.
[211] In the local court proceedings that CMK later initiated in respect of the revocation of SML 351, Mr Juma made this allegation on affidavit: "The 1st Respondent [CS Balala] took the action [revoking SML 351] and made the impugned decision [to revoke SML 351] after [CMK's] refusal to accede to his demand for a bribe, a matter that [CMK] had reported to the Ethics and Anti-Corruption Commission." (Jacob Uma Affidavit, 6 May 2015, Exhibit C-139, para. 24).
[212] David Anderson First Witness Statement, para. 134; Donald O'Sullivan First Witness Statement, para. 50.
[213] David Anderson First Witness Statement, para. 137.
[214] David Anderson First Witness Statement, para. 139.
[215] David Anderson First Witness Statement, para. 140.
[216] David Anderson First Witness Statement, paras. 140-141.
[217] David Anderson First Witness Statement, para. 142.
[218] "Firm receives Nema nod to mine rare metals in Kwale",15 July 2013, Exhibit C-92; David Anderson First Witness Statement, para. 142.

199. Mr. Anderson says he reported CS Balala to the Anti-Corruption Commission[219] over the request for a bribe. In 2015, the Anti-Corruption Commission sought a personal interview with Mr. Anderson in Nairobi. Mr. Anderson declined to attend in Nairobi and proposed South Africa as an alternate venue, to which the Anti-Corruption Commission agreed. To date, Mr. Anderson has not been interviewed by the Anti-Corruption Commission.[220]

200. On 5 August 2013, CS Balala went on national television and stated:

> You are aware that Kenya has about 500 licences issued. Only 20 are serious licences. The others are either briefcase - you can call them, or people who want to speculate.[221]

201. CS Balala stated: "We are **revoking** all licences from the 15th of January to date"[222] despite receipt of written advice from the Attorney General that, under the Mining Act, a "show cause" notice had to be issued before a mining licence could be revoked.[223] (The Government's position as eventually confirmed by the Kenyan Courts, is that no revocation was necessary because SML 351 was void ab initio as having been issued contrary to Kenyan law.) CS Balala's purported basis for these revocations was that the licences were issued during a "transition[al]

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[219] David Anderson First Witness Statement, para. 145; letter from Mr. David Anderson, CMK to Ethics and Anti-Corruption Commission of Kenya, undated, Exhibit C-94.
[220] David Anderson First Witness Statement, para 145, footnote 2.
[221] Media Report of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-140. Full transcript of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-141.
[222] Media Report of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-140. Full transcript of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-141.
[223] Letter from Mr. Githu Muigai, EGH, SC, Attorney-General to Hon. Najib M. Balala, EGH, Cabinet Secretary, 5 August 2013, Exhibit C-149.

period" of Government.[224] Around the time of the revocation, Commissioner Masibo was suspended[225] for alleged misconduct in office.

202. On 5 August 2013, on the Ministry of Mining's *Twitter* account, the following message was posted:[226]

203. On 5 August 2013, CS Balala announced the **establishment of a Task Force** to investigate the Government's stated concerns surrounding the legitimacy of the mining licences.[227] In total 253 licences and applications would be reviewed by the Task Force. The Government says this broad inquiry of numerous licence holders[228] refutes the Claimants' assertion that the alleged

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[224] Footage of a further report of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-142; Full transcript of CS Najib Balala's announcement on national television, 5 August 2013, Exhibit C-143.

[225] David Anderson First Witness Statement, para. 149; "Kenya minister scraps mining licenses and ups royalties", *BBC News*, 5 August 2013, Exhibit C-144.

[226] "Tweet" by Ministry of Mining, 5 August 2013, Exhibit C-145.

[227] Media Report of CS Najid Balala's announcement on national television, 5 August 2013, Exhibit C-140. Full transcript of CS Najid Balala's announcement on national television, 5 August 2013, Exhibit C-141 The Task Force consisted of:

(a) Mohammed Nyaoga (lawyer) (Chair);
(b) Caroline Armstrong – Director of Strategy, Housing Finance Company of Kenya (Vice Chairperson);
(c) Eliabeth Rotich – Lawyer in Private Practice based in Eldoret town;
(d) Ferhan Chaudri – Lawyer in Corporate/Commercial Law practice;
(e) Nawal Salim – Head of Central Bank, Mombasa Branch;
(f) Erastus Lokaale – Human Rights Lawyer working with UNDP;
(g) Hassan Hussein – Banker, Chase Bank;
(h) Mahat Somane – Lawyer in Private Practice (Secretary to the Task Force).

(Gazette Notice No. 11573 of 2013, Task Force on Review of Prospecting, Exploration and Mining Licenses and Agreements (published in the Kenya Gazette on 16 August 2013), Exhibit R-017).

[228] Gazette Notice No. 11573 of 2013, Task Force on Review of Prospecting, Exploration and Mining Licenses and Agreements (published in the Kenya Gazette on 16 August 2013), Exhibit R-017. The specific mandate for which the Task Force had been created and its terms of reference included:

revocation of SML 351 targeted CMK for CMK's refusal to pay an alleged bribe (CS Balala was not called to testify by the Government and the Tribunal declined to make an order that he be brought to Dubai to be examined). The Tribunal makes no comment on the Claimants' bribery allegations against CS Balala.

PART 21 - THE TASK FORCE INQUIRY

204. On 23 August 2013, the Task Force issued a press statement restating its mandate and invited all affected parties to make representations to it, and to produce documents in their possession that would prove that the licences issued to them were in compliance with Kenyan law. Affected parties were also invited to make submissions in person if they so desired.[229]

205. The licences under review were treated as suspended during the review period.

206. Instead of making representations to the Task Force, CMK's response was two-fold:

(a) Review all the agreement and licences relating to prospecting, exploration and mining issued between January, 2013 and May, 2013 with a view to ascertaining their legality and establishing whether due procedure was followed in their issuance and prepare a short report on the same;
(b) Review all the agreement and licences relating to prospecting, exploration and mining issued between January, 2003 and December, 2012 with a view to ascertaining their legality and establishing whether due procedure was followed in their issuance;
(c) Review the status of all licences issued between January, 2013 and May, 2013 with a view of determining whether they are dormant, operational or expired;
(d) Make recommendations on the basis or the findings on (a) and (b) above to the Cabinet Secretary for Mining on the way forward with regard to any licence(s) that is found to be dormant, operational or expired;
(e)Recommend measures for developing processes and institutional capacity to effectively comply with licensing procedures;
(f) Recommend clear modalities and processes of licensing which will ensuree [sic] transparency and spell out clear timelines.

[229] Ministry of Mining, *Press Statement*, 23 August 2013, Exhibit R-018. In all, the Task Force reviewed 43 potentially irregular applications made and licences issued between 15 January 2013 and 15 May 2013, and the majority of licence holders made representations to the Task Force to confirm the legitimacy of their licences. (See Appendix 45 of the Interim Report of the Task Force on Review of Prospecting, Exploration and Mining Licences and Agreements, 4 October 2013, Exhibit R-019, pp. 109-111. CMK's name is not included in this list.)

(a) on 22 August 2013, it initiated discussions with Deputy President Ruto aimed at a political resolution of the dispute over SML 351;[230] and

(b) CMK commenced judicial review proceedings in the Nairobi High Court, seeking to quash Cabinet Secretary Balala's purported revocation of its licence and appointment of the Task Force.[231]

207. In addition, CMK, through its lawyers Havi & Co Advocates, wrote to the Task Force on 27 August 2013,[232] informing the Chairman that CMK was not going to participate in the Task Force process, and indicated that it considered the issues regarding the legitimacy of SML 351 to be *sub judice*. The Claimants requested that the Task Force not consider or make any findings regarding SML 351 pending the determination of the court proceedings. The Task Force obliged.

208. With respect to those licensees who did participate in the Task Force and whose licences were found deficient, the evidence is that:

(a) where the defects were minor and the licensees remedied the irregularities thus identified, their licences were reinstated;[233]

(b) where the defects were more serious, the Ministry of Mining notified the relevant licensees in writing that their licences had been revoked, and the requisite Gazette

[230] Letter from Mr. David Anderson, CMK, to His Excellency William Ruto, Deputy President, Republic of Kenya, 22 August 2013, Exhibit C-99.
[231] *Cortec Kenya Mining v. The Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, Exhibit RL-089.
[232] Letter from Mr. Nelson Havi, Havi & Company Advocates, to Mr. Mohamed Nyaoga, The Chairperson, Task Force on Review of Prospecting, Exploration and Mining Licences and Agreements, 27 August 2013, Exhibit R-039.
[233] Raymond Mutie Mutiso First Witness Statement, paras. 38-41.

Notice published.[234] It was open to those licensees to re-apply for a licence, in a manner compliant with the applicable requirements.

209. The Tribunal notes that the Claimants requested the presence at the Hearing of Mr. Mohammed Nyaoga, the Chairman of the Task Force. Mr. Nyaoga duly presented himself in Dubai as requested. Justice Torgbor, the Claimants' legal expert, praised Mr. Nyaoga as "a good friend of mine, and I believe he is here, and he knows what he is saying – he is a reputable lawyer."[235] Justice Torgbor later referred to Mr. Nyaoga as "a distinguished lawyer."[236]

210. Despite his requested appearance in Dubai, Mr. Nyaoga was not cross-examined by the Claimants. His evidence that the Task Force was independent and respected due process is uncontradicted and is therefore accepted as reliable by the Tribunal.

211. There is no evidence that the Task Force was a sham, and the outcome of its deliberations do not suggest on their face a lack of independence. The decision by the Claimants not to submit SML 351 for review bypassed what would have been, if the Task Force had accepted the Claimants' evidence of their compliance, an effective remedy to restore SML 351 to operational status.

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[234] Raymond Mutie Mutiso First Witness Statement, para. 42, Gazette Notice No. 3264 dated 8 May 2015, Exhibit C-15. See also, for example, a letter from Mr. Moses N. Njeru, Acting Commissioner of Mines and Geology, to Mr. Robert Lee-Steel E.A. Ltd, 26 May 2014, Exhibit R-027, notifying the licensee that "the suspension of your approved application was upheld. As a result your application's approval stands revoked. You are however, at liberty to make a fresh application over the area that was subjected of the revoked application within 21 days from the date of this letter."
[235] Tr. Day 6, p. 76, ll. 16-18.
[236] Tr. Day 6, p. 77, l. 16.

PART 22 - THE KENYAN COURT PROCEEDINGS

212. On 15 August 2013, CMK filed its application before the High Court of Kenya seeking leave to commence judicial review proceedings against Cabinet Secretary Balala and the Attorney General to quash CS Balala's purported revocation of its licence and quash the appointment of the Task Force to review its legality.[237]

(a) The Court Decision and its Interpretation by the Parties' Experts

213. The decision of the Environmental and Land Court Division of the High Court was handed down on 20 March 2015 (Exhibit RL-089). The Court declared that:[238]

> The acquisition by [CMK] of the Mining Licence was not in compliance with the law and the **licence was *void ab initio*** and liable to be revoked.[239]

214. In particular, the court found that:

(a) a mining licence could not be validly issued before an EIA approval had been issued by NEMA;

(b) a mining licence could not be validly issued absent consents from KFS and NMK; and

[237] CMK's application for judicial review of the revocation of SML 351 (proceedings instituted 15 August 2013); Exhibit C-147, Pacific Wildcat Announcement, 27 August 2013.
[238] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, Exhibit RL-089.
[239] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, RL-089., p. 28. (emphasis added).

(c) Commissioner Masibo had acted in breach of the *Mining Act* and the Kenyan Constitution.

215. CMK's appeal against this judgment was dismissed on narrower grounds by the Court of Appeal on 9 June 2017.[240]

216. Justice Torgbor says the Kenyan Courts only decided that there was no basis on which to issue judicial review orders because Cortec had come to the wrong forum. It should have initiated an appeal (not judicial review) under s. 93 of the *Mining Act*. Justice Torgbor states:

> The most fundamental decision made by the trial court in this matter was that judicial review orders were not available owing to the availability of an alternative remedy. The Court was ready to rest its decision on that finding. [241] In short, the High Court found that Cortec had come to, and I am quoting, "the wrong forum to ventilate its grievance" [242] …the orders for judicial review sought cannot therefore issue in these proceedings.[243]

217. Everything else, according to Justice Torgbor, was obiter and in his view, wrong:

> I am saying, and I emphasise it, both courts were entirely wrong, wrong in every way, and I have given my reasons in my opinion why I say so respectfully.[244]
>
> * * * * *
>
> So if you put all of it together, the Court of Appeal is saying the High Court has not misdirected itself, and the judgment is not wrong, and I am saying it is wrong, wrong, wrong, for the reasons I have been giving. Both courts.[245]

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[240] *Cortec Mining Kenya Limited v. Cabinet Secretary Ministry of Mining, & 9 others* [2017] eKLR, Civil Appeal No. 105 of 2015, Court of Appeal Judgment, 9 June 2017, Exhibit CL-91.
[241] Tr. Day 6, p. 22, ll. 9-23.
[242] Tr. Day 6, p. 22, ll. 11-13.
[243] Tr. Day 6, p. 23, ll. 19-20.
[244] Tr. Day 6, p. 80, l. 17-20.
[245] Tr. Day 6, p. 82, ll. 7-11

218. As may be expected, the Government's legal expert, Professor Mumma, took a different view. He notes that the High Court judge states "although the determination of this single issue [wrong forum] *would have been* sufficient to dispose of this application, I will in case I am wrong in determination of the issue deal with the other issues for completeness of my determination on all of the issues."[246]

219. The Court of Appeal endorsed the decision of the High Court judge not only on the "wrong forum" issue[247] but on his broader invocation of validity issues because in the view of the Court of Appeal, those issues were relevant to the exercise of the High Court "discretion" in disposing of the judicial review application (a discretionary remedy) and to that extent were not *obiter*. The Court of Appeal stated:

> 36. But the trial court was vilified for delving into the validity of the license issued in a manner that was irrelevant and totally outside the purview of the application before it. In the end, it is said, it determined the merits of the license rather than the process of its revocation. **With respect, we think that criticism is rather harsh.** The application before the trial court was initially between Cortec and the two public offices of the CS and the AG. But **Cortec had pleaded that it had a valid license** on account of consents and approvals obtained from the institutions that must be involved before the issuance of the license. Those institutions then became necessary parties and were enjoined in the proceedings and **provided information which the trial court was bound to consider in abundant caution. The information was relevant and it assisted in the judicious exercise** of the discretion the court was called upon to exercise. In our view, it was not a determination of the merits of the decision of the CS.

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[246] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, RL-089, p. 23.

[247] In affirming the High Court judge's finding of an alternative remedy, the Court of Appeal stated:

That was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstances, the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal. (*Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Court of Appeal Judgment, 9 June 2017, CL-91, para. 35).

> 37. We have come to the conclusion that **in exercising its discretion, the trial court did not misdirect itself** in the matter and as a result arrive at a wrong decision, or that the decision as a whole was clearly wrong. In the result we find no merit in the appeal and order that it be and is hereby dismissed. As the matter raised more of public interest rather than private issues for consideration, we order that each party bears its own costs of the appeal.[248] (emphasis added)

220. Justice Torgbor, confronted with these passages, testified "well in a sense, yes, it is endorsing it."[249] Seven issues were raised by the Applicant and the Kenyan Courts decided to dispose of the case, "on the basis of validity not of the others."[250]

221. The Court of Appeal unequivocally affirmed the trial judge's view that SML 351 was issued in violation of the relevant statutes:

> …the facts brought out in this case were that the license was clandestinely issued by the Commissioner at a time when the country was transitioning to a new government, **in a manner that flouted the provisions of the *Act***. The Commissioner was complicit in the matter, was under suspension, and could not therefore issue any notice to show cause. Was the CS then powerless to take action under ***section 27***. The trial court did not think so and we have no reason to fault him. It was not an isolated case involving the appellant and in the scheme of the *Act* the CS was the overall custodian of the provisions of the *Act*.[251] (first emphasis added)

(This last paragraph suggests some substance to Professor Mumma's view that in fact CS Balala and the Courts were exercising constitutional remedies not *Mining Act* remedies but the Tribunal makes no comment on this suggestion.)

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[248] *Cortec Mining Kenya Limited v. Cabinet Secretary Ministry of Mining*, Court of Appeal Judgment, CL-91, paras. 36-37.
[249] Tr. Day 6, p. 240, ll.20-21.
[250] See also Professor Mumma's testimony, Tr. Day 6, p. 247, ll. 13-17.
[251] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Court of Appeal Judgment, 9 June 2017, CL-91, para. 33.

(i) The Tribunal's Ruling

222. The Tribunal is mandated to apply international law not Kenyan domestic law, yet in the Tribunal's view, the application of international law reaches the same conclusion. The alleged "investment" is a mining licence. A mining licens is not bricks and mortar. It is wholly the creature of Kenyan domestic law. Its creation is governed by Kenyan law. The *Forests Act* and the *Antiquities and Monuments Act* excluded from Mr. Masibo any discretion to issue a licence to mine Mrima Hill. Mr. Masibo was precluded by s. 4(2) of the *Environmental (Impact Assessment and Audit) Regulations 2003* from issuing a mining licence in the absence of EIA approval expressed in the form of a licence. In the Tribunal's view, neither the BIT nor the ICSID *Convention* can be construed to protect an investment (SML 351) prohibited by Kenyan law especially in circumstances where, in the Tribunal's view, the Claimants knew that they had no such entitlement but attempted a political end-run around the statutory requirements with Mr. Juma's assistance. The Claimants were aware of the requirements set out in the roadmap and their non-compliance with s. 4(2) of the *EIA regulations*. There is no plausible argument that the Government is estopped by the Claimants "reliance" on SML 351 as a valid investment under Kenyan law. If estoppel was available to the Claimants, they have failed to establish the prerequisites for its application.

223. The Claimants were successful in bending Mr. Masibo to their will but they knew enough about the Kenyan regulatory system to know they had not yet met its requirements. The Claimants had no legitimate expectation that SML 351 was valid.

PART 23 - THE CLAIMANTS PURSUE A POLITICAL SETTLEMENT

224. In parallel with the Claimants' judicial review application, Mr. Anderson wrote to the Deputy President of Kenya, William Ruto,[252] on 22 August 2013, to request a meeting. He received no response. Mr. Anderson tried again on 9 December 2013.[253] In February 2014, Mr. Juma intervened and arranged a meeting of Mr. Anderson and Mr. O'Sullivan with Deputy President Ruto.[254]

225. Mr. Anderson's evidence is that on 11 February 2014, he attended a meeting with Mr. Juma and Deputy President Ruto and Major (Retired) John Waluke Koyi,[255] a friend of Mr. Juma. According to Mr. Anderson, Deputy President Ruto admonished CMK for going to the courts and the press. Mr. Anderson testified that Deputy President Ruto proposed that the Commissioner of Mines would be willing to "restore" CMK's licence if (i) CMK withdrew its legal challenge to the revocation of SML 351; and (ii) the level of royalties was increased so that the project was more beneficial to the State. Deputy President Ruto also noted that the Governor of Kwale County was hostile to CMK's cause.[256]

226. Mr. Anderson testified that he was summoned to another meeting with Deputy President Ruto on 13 February 2014, held in the Deputy President's private office.[257] At this meeting,

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[252] Letter from Mr. David Anderson, CMK, to His Excellency William Ruto, Deputy President, Republic of Kenya, 22 August 2013, Exhibit C-99; David Anderson First Witness Statement, para. 155.
[253] Letter from Mr. David Anderson, CMK to His Excellency William Ruto, Deputy President, Republic of Kenya, 9 December 2013, Exhibit C-100; David Anderson First Witness Statement, para. 156.
[254] David Anderson First Witness Statement, para. 157.
[255] David Anderson First Witness Statement, para. 158.
[256] David Anderson First Witness Statement, paras. 162, 164.
[257] David Anderson First Witness Statement, paras. 167-168.

Deputy President Ruto adopted what Mr. Anderson describes as an aggressive tone and repeated that CMK had lost the goodwill of the people of Kwale.[258]

227. The following week, on 19 February 2014, Mr. Anderson, Mr. O'Sullivan and Mr. Townsend attended a further meeting with Deputy President Ruto.[259] CS Balala also attended the meeting and said that to restore CMK's licence the Government would require a free-carried interest of between 10 and 50%.[260] This proposal was not acceptable to the Claimants.[261]

228. The Claimants contend that they are the victims of "resource nationalism" that operated in disregard for licence holders' rights. Days after he was appointed, CS Balala announced details of a new Kenyan *Mining Bill* which included Government royalties and other benefits to the mining sector.[262]

229. Around this time, Kenyan officials held mining-related discussions with various Chinese Government officials and Chinese State-owned organizations.[263]

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[258] David Anderson First Witness Statement, para. 168.

[259] David Anderson First Witness Statement, para. 173; Darren Townsend First Witness Statement, para. 90; Donald O'Sullivan First Witness Statement, para. 55.

[260] David Anderson First Witness Statement, para. 174; Donald O'Sullivan First Witness Statement, para. 56.

[261] Donald O'Sullivan First Witness Statement, para. 57.

[262] "Kenya to embark on massive exploration campaign to spur mining investment, economic development", *Mining Weekly*, 6 March 2015, Exhibit C-152. The *Mining Bill* included (*inter alia*):

(a) the establishment of a State-owned national mining company;
(b) a rule that the State would be given a 10% free-carried interest in large mining concessions;
(c) increased royalties – in the case of rare earths and niobium, the royalty would more than triple (from 3% to 10%); and
(d) a requirement that holders of mining licences list at least 20% of their equity on the local Kenyan stock exchange within four years.

("Balala says new mining royalties non-negotiable", *Business Daily Africa.com*, Exhibit C-153).

[263] The evidence is of a very general nature and includes reports that:

(a) on 7 August 2013, the Mining Minister met with a Chinese delegation in relation to "issues crucial to mining";

230. In the Claimants' submission, they have been discriminated against in favour of Chinese investors. The Government responds that the Claimants' fuss over "resource nationalization" is simply an attempted diversion from "the reality…that the government in Kenya was getting tough on corruption and had identified the mining sector as one area where compliance with the law could be improved."[264] The Tribunal regards the issue of "resource nationalization" as irrelevant to the present dispute.

PART 24 - OUTLINE OF CLAIMANTS' POSITION

231. In summary, the Claimants contend that:[265]

(a) the State cannot invoke its own law to avoid its international obligations, especially considering that most of the State's complaints relate to the alleged acts and omissions of its own officials;

(b) on 14 August 2013, the *Business Daily* reported that CS Najib Balala had signed a memorandum of understanding with the President of the Geological Exploration Technology Institute of Jiangsu province in China "to map out areas in Kenya that have signs of mineral deposits in a government-to-government pact that gives the Asian giant [China] an upper hand in future bidding for exploration and mining contracts" (See "Minerals survey deal gives Chinese firms upper hand", *Business Daily*, 14 August 2013, Exhibit C-161);
(c) on 29 January 2014, the *Shanghai Daily* reported that "Mining Cabinet Secretary Najib Balala said late last year that both Kenyan and Chinese governments have entered into a partnership that will see the latter do a geo-mapping or airborne survey for minerals in all counties beginning 2014" (See "Kenya approves mining bill to regulate mineral operations", *Shanghai Daily*, 29 January 2014, Exhibit C-163);
(d) in March 2015, CS Najib Balala announced that the Chinese Geological Institute, a non-commercial, Government-owned entity, had been awarded the contract to conduct a country-wide aeromagnetic survey to acquire geological data (See "Kenya to embark on massive exploration campaign to spur mining investment, economic development", *Mining Weekly*, 6 March 2015, Exhibit C-164).

[264] Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016, para. 147.
[265] Claimants' Post-Hearing Brief dated 11 April 2018, para. 2.

(b) the State's corruption case was baseless from the outset and collapsed at the Hearing (the State not even putting its allegations to Commissioner Masibo);

(c) the State has no defence to the Claimants' claims as they relate to SPL 256, which the State accepts was not affected by "irregular conduct".[266] The Claimants invested millions under this licence and generated valuable IP;

(d) the key decision-maker (Commissioner Masibo) "bravely" came forward and his explanation of his statutory discretion to re-grant SPL256 as SML 351 (a conditional mining licence) was not effectively challenged by the State at the Hearing;

(e) the Claimants' reasonably relied on SML 351 to their detriment;

(f) the State withheld (until Day 4 of the Hearing) two statements given by Commissioner Masibo to the State in November 2013 that directly contradict allegations of fact underpinning its Illegality Objections;[267]

(g) CS Balala's revocation of SML 351 on 5 August 2013 was arbitrary, malicious and a clear excess of power under the licence, the *Mining Act* and the Constitution. He has been conspicuously absent from these proceedings. Even if the Tribunal were to find SML 351 void ab initio, the arbitration provision in SML 351 is separable and valid; and

[266] See also Mr. Sanderson testimony, Tr. Day 1, p. 131.
[267] See also Claimants' Costs Submissions, 11 April 2018; signed statements of Moses Nabiswa Masibo, Commissioner of Mines, to Directorate of Criminal Investigations, 22 November 2013, Exhibits R-254 and R-255.

(h) the Claimants are entitled to relief for the State's violations of the BIT, plus costs.

PART 25 - JURISDICTION

1. Preliminary Remarks

232. The Claimants contend that ICSID Arbitration Rule 41(1) requires that any objection to the jurisdiction of ICSID or the competence of the tribunal be made "as early as possible...and in any event no later than the time fixed for the filing of the Counter-Memorial."

233. The Claimants state that the Respondent's objections to jurisdiction are out of time. However, Rule 41(5) expressly permits the Respondent to raise its objections when it did. In any event, Rule 41(2) provides that the Tribunal "on its own initiative…at any stage of the proceeding" may consider whether the dispute is "within the jurisdiction of the Center and within its own competence."[268] Either way, the jurisdictional issues have been fully argued and will be addressed by the Tribunal. The Claimants' "preliminary" objection is rejected.

234. Equally, the Tribunal acknowledges that the arbitration clause survives the Government's allegations of illegality, but the continued validity of the arbitration clause simply affirms the Tribunal's jurisdiction to determine whether the Claimants made investments that qualified for treaty protection.

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[268] ICSID Convention, Regulations and Rules, Rule 41, Preliminary Objections:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.
(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.
(3) …

235. On the other hand, the Government raises the preliminary point that the Claimants have no claim because SML 351 was never revoked. It was just "suspended" pending review of the Task Force. No treaty relief is available in respect of a mere "suspension", decided in the proper conduct of Government business.

(i) The Claimants' Position on "Revocation"

236. CS Balala purported *explicitly* to revoke SML 351 under s. 27 of the *Mining Act*. In Justice Torgbor's opinion, "the State in my view cannot now say such licence was not revoked, or that it was merely suspended. The State never argued during the court proceedings that SML 351 was suspended and not revoked."[269] Moreover, according to Justice Torgbor,

(a) there is no express provision in the *Mining Act* in respect of revocation of a special *mining* licence;

(b) the heading to s. 27 is "Revocation of *Prospecting* Right or Exclusive *Prospecting* Licence." It has no application to a mining licence;[270]

(c) an appeal under s. 93 presupposes that the original revocation was accomplished under s. 27, which is not the case.

237. Regardless of the source of power, Justice Torgbor says revocation is clear from (i) CS Balala's public announcement that the licence was revoked; (ii) the letter from the Attorney

[269] Tr. Day 6, p. 17, ll. 14-17.
[270] Tr. Day 6, p. 63, ll. 6-15.

General dated 5 August 2013[271] which provides advice on revocation of licences; (iii) the letter from the Ministry of Mining dated 19 June 2014[272] which confirmed that SML 351 has been revoked; and (iv) the High Court decision which referred to the revocation of SML 351.[273]

238. To date, no formal notice has been given for the revocation of SML 351 but the Government took the position before the Kenyan Court that the licence had been revoked.

(ii) The Government's Position on "Revocation"

239. The Government's position in this arbitration is that SML 351 has **not** been revoked.

240. Pending the outcome of the audit by the Task Force, the licences under review were treated as suspended. Of those licences reviewed by the Task Force, only seven licences were revoked, by Gazette Notice No. 3264 dated 8 May 2015.[274] The Claimants' purported mining licence, SML 351, was not one of the licences revoked.

241. The Kenyan Courts did not need to invalidate SML 351 because it was *void ab initio*. However, should the Tribunal view the judicial decisions as the source of "revocation", the Claimants are not entitled to pursue the claim because there is no plea of "denial of justice" and there is no Treaty basis on which the Tribunal can otherwise grant relief in a case of "judicial expropriation".

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[271] Letter from Mr. Githu Muigai, EGH, SC, Attorney General, to Hon. Najib M. Balala, EGH, Cabinet Secretary, Ministry of Mining, 5 August 2013, Exhibit C-149.
[272] Letter from Mr. Moses N. Njeru, Ag, Commissioner of Mines and Geology, Ministry of Mining, to Cortec Mining Kenya Ltd, 19 June 2014, Exhibit C-289.
[273] Tr. Day 6, p. 19, l. 25 to p. 20, l. 11.
[274] Gazette Notice No. 3264, *The Mining Act (Cap. 306),* 8 May 2015, Exhibit C-15, pp. 1129-1131.

242. Professor Mumma argued that CS Balala "could lawfully resort to his oversight powers that are to be found in the Constitution as well as in statutes that implement the Constitution".[275] CS Balala's press release of 5 August 2013, according to Professor Mumma, "was not revocation of the licence, it was an intervention which was designed to enable the Cabinet Secretary to gather the information that would enable the Cabinet Secretary to decide whether in fact any action was required beyond[276] 'the establishment of the Task Force.'"[277]

243. Justice Torgbor responded that high level constitutional remedies are irrelevant where there is specific applicable legislation like the *Mining Act*.[278]

(iii) The Tribunal's Ruling

244. Regardless of how the Government chooses to describe the status of SML 351, the Claimants' mining activities and aspirations were effectively terminated on 5 August 2013. The Claimants' attempts to make payments otherwise due under SML 351 were rejected. The Respondent's argument that the Claimants have no valid claim because SML 351 was (and is) simply "suspended" is rejected. The real issue is whether SML 351 is a protected investment.

[275] Tr. Day 6, p. 112, ll. 1-21. On Day 6, at p. 58, Justice Torgbor expressed the view that high level constitutional remedies are irrelevant where there is specific applicable legislation like the *Mining Act*. Professor Mumma points out that Article 132(3) of the Constitution assigns responsibilities to the Cabinet Secretary and the *National Government Coordination Act* of 2013 in s. 9(3) and 10(1) gives the Cabinet Secretary oversight of the executive Government. Executive Order No. 2/2013 gave CS Balala specific responsibility for the Ministry of Mines.
[276] Tr. Day 6, p. 113, ll. 7-12.
[277] Tr. Day 6, p. 107, ll. 11-16; p. 111, l. 23 to p. 113, l. 2.
[278] Tr. Day 6, p. 58, ll. 21-24.

2. The Standard of Proof for Jurisdictional Questions

245. The Claimants accept the burden of proof of establishing that they qualify as an "investors" for the purposes of the BIT and the ICSID Convention[279] as well as proving that they held a qualifying "investment" within the meaning of the BIT and the ICSID Convention.

(i) The Claimants' Position

246. While the Claimants accept the onus of establishing jurisdiction, they do not accept that they bear the onus of proof on matters that go beyond the express jurisdictional requirements of the BIT and the ICSID Convention – neither of which, they say, includes a requirement of compliance with host State law – and maintain that the State bears the burden of proving the facts on which its preliminary objections are based. [280]

(ii) The Government's Position

247. The Government cites *Paushok v. Mongolia* where the tribunal found that the "[c]laimants bear the burden of the proof to demonstrate that their investment is protected [by the dispute resolution provision of the Russia-Mongolia BIT]."[281]

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[279] *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008, Exhibit RL-051, para. 64. See also *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, RL-032, para. 58 ("Claimant accordingly bears the burden of proving to the satisfaction of the Tribunal that he…belongs to the class of investors in respect of whom the Respondent has consented to ICSID jurisdiction.")

[280] Where the State objects on the basis that an act or event alleged by the Claimants never occurred, the State can adopt a position of bare denial (but it does so at its own peril). But where the State makes an objection premised on the existence of a fact the Claimants did not allege in their positive case on jurisdiction, the burden must be on the State alone (and from the outset) to prove that fact to the applicable standard of proof (which will be higher for more serious allegations, such as corruption and fraud).

[281] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, RL-068, para. 200. See also the *Perenco v. Ecuador* tribunal's finding that "[t]he burden of proof to establish the facts supporting its claim to standing

248. In the same manner, in *ICS v. Argentina*, the tribunal concluded that:

> The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.[282]

249. The Claimants cannot invoke Kenya's consent to ICSID arbitration until they have fulfilled all of the procedural prerequisites under the BIT and the Convention. If they are unable to do so, the Tribunal lacks jurisdiction to hear their case.

(iii) The Tribunal's Ruling on the Onus of Proof

250. The Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends. One of the "jurisdictional facts" is the existence of a qualified investment. The Claimants seek to reverse the onus onto the Government in respect of "the facts on which [the Government's] preliminary objections [e.g. illegality] are based." However, for the most part, the Government's arguments are simply denials that the Claimants have proven the jurisdictional facts to the requisite standard, *i.e.* on a balance of probabilities. According to the Tribunal, the facts on which the Claimants rest the jurisdiction of the Tribunal have to be proven by them at the outset, as explained in *Hamester*:

> In order to clarify the distinction between a jurisdictional question and a merits' question, it is useful to consider the different burden of proof required for each. If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. However, if facts are alleged in order to establish a violation of the relevant BIT, they have to be

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lies with the Claimant" (*Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011, RL-069, para. 98).

[282] *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, RL-072, para. 280. (internal citation omitted).

> accepted as such at the jurisdictional stage, until their existence is ascertained (or not) at the merits stage.[283]

251. In any event, even if proof of the facts on which the illegality rests were considered a Government's issue in respect of which it bears the onus of proof, the Tribunal finds, as will be seen, that the Government has met the burden.

252. While the Claimants assert that there is no doubt that the Tribunal has jurisdiction over their claims, the Respondent denies that the Claimant has established the prerequisites to jurisdiction.

253. The Government contends that:

(a) the Claimants have failed to demonstrate that they held any investments capable of protection under the BIT and the ICSID Convention. In particular, according to the Government:

(i) the licence at the heart of this dispute (SML 351) was unlawful and *void ab initio*. The Claimants disregarded the legal requirements of applying for and securing valid rights and licences to prospect and mine in Kenya and procured SML 351 through illegal means and/or bad faith;

(ii) the Claimants had no intellectual property that was capable of treaty protection. Information provided by the Claimants to the Government in pursuit of prospecting and mining rights was provided as a matter of self-

[283] *Gustav F W Hamester GmbH & Co KG* v. *Republic of* Ghana, ICSID Case No. ARB/07/24, Award, 10 June 2010, para. 143.

interest and was no more protected "intellectual property" than the extensive data utilized by the Claimants from earlier exploration from Anglo American in the 1950s and onwards;

(iii) no claim arises out of SPL 256 which expired according to its own terms when the second renewal lapsed on 1 December 2014 without any Government intervention.

3. The Jurisdictional Requirements

254. It is common ground that the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant text providing for consent to arbitration.

255. Article 41 of the ICSID Convention makes plain that the Tribunal is the judge of the Centre's jurisdiction and its own competence. In order to determine the existence of its jurisdiction in any given case, an ICSID tribunal has to analyze the fulfillment of the requirements of the Washington Convention, and the requirements of the contract, the national law, the BIT or the multilateral treaty providing for the submission of investment disputes to ICSID arbitration.

(i) The Definition of "Investment"

256. The relevant jurisdictional requirements of the ICSID Convention are contained in its Article 25, which reads, in pertinent part, as follows:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When

> the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

257. In other words, in order for the Centre to have jurisdiction over a dispute, three conditions must be met, according to Article 25 (to which one must add a condition resulting from a general principle of law, which is the principle of non-retroactivity):

> − first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
>
> − second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
>
> − third, a condition *ratione voluntatis*, *i.e.* the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
>
> − fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

258. The jurisdictional requirements of the BIT are contained in its Article 1:

> ARTICLE 1
>
> **Definitions**
>
> For the purposes of this Agreement:
>
> (a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) moveable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.

…

(c) "nationals' means:

(i) in respect of the United Kingdom : physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(ii) in respect of the Republic of Kenya : physical persons deriving their status as Kenyan nationals from the law in force in Kenya;

(d) "companies" means:

(i) in respect of the United Kingdom : corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12 ;

(ii) in respect of the Republic of Kenya : any juridical person as well as any company or association with or without legal personality and having its residence within the Republic of Kenya , irrespective of whether or not its activities are directed at profit;

ARTICLE 8

Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

> (2) A company which is incorporated or constituted under the law in force in the territory f one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

259. In other words, the essential jurisdictional requirements under the BIT, to which one must add a condition resulting from the general principle of law of non-retroactivity, overlap with the requirements of the ICSID Convention – the condition *ratione voluntatis* being fulfilled by Article 8:

> − first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national or company of another Contracting State;
>
> − second, a condition *ratione materiae*: there must exist a dispute concerning a qualifying investment;
>
> − third, a condition *ratione temporis*: the BIT must have been applicable at the relevant time.

(ii) The Definition of Protected Investment

260. It is accepted jurisprudence that in order to be protected an investment has to be in accordance with the laws of the host State and made in good faith. This requirement can be analyzed at the jurisdictional or the merits level.

261. The formulation of this requirement can be found in the summary given in *Phoenix*:

> To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:
>
> 1 – a contribution in money or other assets;
>
> 2 – a certain duration;
>
> 3 – an element of risk;
>
> 4 – an operation made in order to develop an economic activity in the host State;

5 – assets invested in accordance with the laws of the host State;

6 – assets invested *bona fide*.[284]

262. The Tribunal will proceed to analyze the conditions *ratione personae, ratione voluntatis, ratione temporis and ratione materiae,* including in the last element the question of its legality and its *bona fide*.

PART 26 - JURISDICTIONAL ISSUES ON WHICH THE CLAIMANTS ARE SUCCESSFUL

(a) Ratione Personae

263. The protections granted pursuant to Articles 2, 3, 4, 5 and 6 of the UK-Kenya BIT are expressed to be in favour of "nationals or companies of either Contracting Party."

264. The Republic of Kenya is a Contracting State to the ICSID Convention. As Cortec UK and Stirling are nationals of the UK – also a Contracting State to the ICSID Convention. CMK is a Kenyan company.

(i) The Claimants' Position

265. Article 1(d) of the BIT defines "companies" as (in the case of the UK) "corporations, firms and associations incorporated or constituted under the law in force of any part of the United Kingdom." Cortec UK was incorporated as a private limited company under the law of England and Wales on 13 March 2007;[285] Stirling was incorporated as a private limited company under the

[284] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 19 April 2009, CL-27, para. 114.
[285] Certificate of Incorporation of a Private Limited Company, Company No. 6156667, Cortec (Pty) Ltd, 13 March 2007, Exhibit C-3.

law of England and Wales on 24 April 2007.[286] Cortec UK and Stirling are therefore "companies" of the UK for the purposes of the BIT. The Government raises the alleged sale of shares to Uppal (a company wholly owned by Cortec UK and Stirling) but the evidence is that no such sale took place.[287]

266. The Government's argues that for a time, Cortec UK and Stirling were temporarily struck off the English Companies Register, and that this discontinuity is fatal to their status as qualified investors. The Claimants have demonstrated that under the UK Companies Act restoration to the Registry cures the default.[288] There was therefore, as a matter of UK law, no discontinuity. Cortec UK and Stirling meet the criteria for qualified investors.

267. In the case of CMK, a Kenyan company, jurisdiction *ratione personae* arises from the specific regime of Article 8(2) of the BIT, which provides as follows:

> A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the [ICSID] Convention be treated for the purposes of the [ICSID] Convention as a company of the other Contracting Party.[289]

268. CMK was incorporated on 4 July 2007. On 31 July 2007, Cortec UK and Stirling each acquired 35% of the shares of CMK. Together, Cortec and Stirling therefore hold the majority

[286] Certificate of Incorporation of a Private Limited Company, Company No. 6224835, Stirling Capital Limited, 24 April 2007, Exhibit C- 4.
[287] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, para. 266.
[288] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 273-277.
[289] BIT, 13 September 1999, Exhibit C-17Article 8(2).

(70%) of the shares of CMK, with the result that the deemed nationality mechanism in Article 8(2) is engaged in this case (and has been since 31 July 2007 at the latest).

(ii) The Government's Position

269. The two UK incorporated Claimants, Cortec UK and Stirling, are not protected investors. Quite apart from being struck off the UK Companies' Register, neither company made any meaningful financial contribution, or undertook any risk in relation to the Mrima Hill project. There is no evidence that any investment was made flowing from the United Kingdom to Kenya. The true investors in the Claimants' Mrima Hill project are Mr. O'Sullivan, an Australian national, Mr. Anderson, a South African national, and Pacific Wildcat, a Canadian Company. Yet none of these investors are UK nationals and they are not entitled to bring a claim under the BIT.

(iii) The Tribunal's Ruling

270. The Tribunal concludes on the evidence that for the purposes of the BIT, the Tribunal has jurisdiction *ratione personae* in respect of CMK as well as Cortec UK and Stirling. Restoration of the UK companies to the UK Companies' Register nullified the legal effect of being, for a time, struck off for administrative reasons.

271. It is well established in arbitral law that the "origin of funds" issue is not a valid objection. The UK companies hold the shares. Through their corporate network money was invested in Kenya.

272. Kenya and the UK reached an agreement in Article 8(2) of the BIT, which specifically refers to Article 25(2)(b) of the ICSID Convention[290] which allows the parties to agree that a locally-incorporated company will be treated as a "national of another Contracting State."[291] Thus, when read together, Article 8(2) of the BIT and Article 25(2)(b) of the ICSID Convention deem CMK to be a "national" of the UK for the purposes of being a "qualified investor" in this dispute.

273. Accordingly, the Tribunal is satisfied it has jurisdiction *ratione personae* over all Parties to this dispute.

(b) Ratione Voluntaris

274. Article 8 of the BIT embodies the State's advance written consent ("[e]ach Contracting Party hereby consents") to submit to ICSID arbitration legal disputes arising between the State and UK nationals or companies concerning a protected investment.[292]

(i) The Claimants' Position

275. The Claimants argue that these words constitute an offer to arbitrate which a qualified investor (in this case, a UK company) may accept by filing a Request for Arbitration at ICSID. Article 8(3) of the BIT reflects this, providing that the claimant "may institute proceedings by

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[290] BIT, 13 September 1999, Exhibit C-17. Article 8(2) of the BIT provides that "[a] company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party."

[291] Article 25(2)(b) of the ICSID *Convention* defines "National of another Contracting State" to mean "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

[292] BIT, 13 September 1999, Exhibit C-17, Article 8.

addressing a request to that effect to the Secretary-General of the Centre…" The Claimants did so on 18 June 2015.

276. Article 8(1) of the BIT provides as follows:

> Each Contracting Party **hereby consents** to submit to the **International Centre for the Settlement of Investment Disputes** (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.[293] (emphasis added)

277. Article 8(3) of the BIT provides that, in circumstances of an investment dispute, if "agreement cannot be reached within three months between the parties to [the] dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention."

278. In the Request For Arbitration, the Claimants consented in writing to the submission of the dispute to ICSID, choosing arbitration (in the exercise of the right expressly given to them under Article 8(3) of the BIT).[294] Both the State and the Claimants have, therefore, provided their written consent to the submission of their dispute to ICSID. Jurisdiction *ratione voluntatis* is present for the purposes of the ICSID Convention.

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[293] BIT, 13 September 1999, Exhibit C-017, Article 8(1).
[294] Claimant's Request for Arbitration dated 18 June 2015, para 6.6(d).

279. An issue has arisen, however, with respect to proper notice of the claim. The Claimants note that the BIT does not include any notice requirement and argue that it would do considerable violence to the text of the BIT to imply a requirement of formal notice.[295] In any event, the facts show that written notice of CMK's complaint was given in August 2013.[296] The Claimants consider that the State is maintaining this objection in bad faith.[297]

280. The dispute was clearly notified to the Government as soon as SPL 351 was revoked on 5 August 2013.

(ii) The Government's Position

281. The Claimants failed to give proper notice of their claim to the Respondent pursuant to the BIT prior to commencing these proceedings, and accordingly failed to provide the "cooling off" requirement in Article 8(3) of the BIT[298] thereby vitiating the Respondent's consent.

(iii) The Tribunal's Ruling

282. There was no issue of lack of notice or lack of an opportunity to arrive at a settlement. The extensive negotiations between the Claimants and the Deputy President Rutu have already been described. The Claimants had been pursuing judicial local remedies since well before the initiation

[295] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 303-305. As set out by the tribunal in *Bear Creek v. Peru* (at para. 320), "under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties" (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, CL-105).
[296] David Anderson Affidavit, 15 August 2013, Exhibit R-219; letter from Mr. Nelson Havi, Havi & Company Advocates, to Chairperson of the Task Force on Review of Prospecting Exploration and Mining Licences and Agreements, received 27 August 2013, Exhibit R-039.
[297] Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 301-307.
[298] BIT, 13 September 1999, Exhibit C-17, Article 5(1).

of this arbitration.[299] The three-month curative period contemplated by Article 8(3) of the BIT was therefore satisfied well before the Claimants referred the dispute to arbitration.

283. The Tribunal agrees that the all Parties gave advance consent to the arbitration of disputes concerning *qualified* investments.

(c) Ratione Temporis

(i) The Claimants' Position

284. The Claimants contend that the protections of the BIT are not time limited. Article 1(a) of the BIT provides that "the term 'investments' includes all investments, whether made before or after the date of entry into force of this Agreement."[300] The BIT entered into force on 13 September 1999 and remains in force today.[301] Thus, the BIT protects any investments made before and after 13 September 1999. Nevertheless, all of the Claimants' investments were made, and the dispute arose, well *after* the BIT came into force.

(ii) The Government's Position

285. The Government contends that the Claimants cannot establish that the jurisdictional requirements were satisfied at that relevant time.

[299] Donald O'Sullivan First Witness Statement, para. 53.
[300] BIT, 13 September 1999, Exhibit C-17, Article 1(a).
[301] BIT, 13 September 1999, Exhibit C-17, Article 13.

(iii) The Tribunal's Ruling

286. The Tribunal agrees with the Claimants that if there existed qualified investments, *ratione temporis* would not be a problem.

(d) Ratione Materiae: the existence of an investment

287. The Parties concentrated on Article 25(1) of the ICSID Convention ("Jurisdiction of the Centre") which provides:

> The jurisdiction of the Centre shall extend to any **legal dispute** arising **directly** out of an **investment**, between a **Contracting State** (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a **national of another Contracting State**, which the parties to the dispute **consent in writing** to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[302] (emphasis added)

(i) The Claimants' Position

288. Each of the jurisdictional requirements prescribed in Article 25(1) of the ICSID Convention is satisfied in this case as follows.

"Legal Dispute"

289. The dispute at hand arises out of Kenya's alleged violation of the Claimants' rights under the BIT. The BIT is a treaty and, therefore, an instrument of international law. Accordingly, the present dispute is inherently legal in nature.

[302] ICSID *Convention*, Article 25(1).

"Arising Directly"

290. The Claimants' investments referenced above, include (without limitation) SPL 256 and SML 351 and the rights granted under these instruments. The present dispute arises directly out of Kenya's allegedly unlawful revocation of SML 351, the measures the Kenyan Government took against the Claimants' other assets and interests (namely their shares, intellectual property rights and know-how) and the resulting alleged injuries suffered by the Claimants. The dispute therefore arises directly out of the Claimants' investments.

"Out of an investment**"**

291. The Claimants' investments are specifically covered by Article 1(a)(i), (ii), (iv) and (v) of the BIT. The Claimants note that the ICSID Convention does not define "investment" and so it is for the Tribunal to ascertain the meaning of this term and apply it to the facts. In determining whether there is an "investment" for ICSID Convention purposes, it is usual to take into account some or all of the four Salini[303] indicators:

(a) contribution by the investor;

(b) duration of performance;

(c) participation in the risks of the transaction; and

(d) contribution by the investor to the economic development of the host State.[304]

[303] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, CL-3.
[304] *Salini Costruttori SpA v. Kingdom of Morocco*, CL-3.

292. In the Claimants' submission, the *Salini* criteria to determine the existence of an "investment" are satisfied in this case.

293. The Claimants have contributed both money and assets in relation to their interests in the project. They say that between 31 July 2007 and 5 August 2013 when CS Balala intervened, CMK alone spent not less than Kshs 773,525,404 (US $9.32 million)[305] on the Mrima Hill project. Cortec UK spent not less than Kshs 68,140,942 (US $775,651)[306] and Stirling spent not less than Kshs 61,818,188 (US $703,679)[307] on the Mrima Hill project. Between 1 July 2009 and 31 December 2015, PAW spent over CAN $37 million (US $33.7 million)[308] in connection with the Mrima Hill project.[309] Throughout this period, the Claimants also contributed geological and useful information regarding mine development.[310]

294. The concept of "investment" must recognize the realities of funding and management within a corporate group. The Vienna Convention requires the interpretation of the term "investment" to have due regard to the object and purposes of the Convention.[311] This means the term should be read in a way that recognizes the realities of funding and the essential role that

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[305] Based on an estimate of the average exchange rate of 0.01204818928 Kshs/US$ over the period from 1 January 2010 to 31 December 2013.
[306] Based on an estimate of the average exchange rate of 0.0113830393 Kshs/US$ over the period from 1 January 2011 to 31 December 2011.
[307] Based on an estimate of the average exchange rate of 0.0113830393 Kshs/US$ over the period from 1 January 2011 to 31 December 2011.
[308] Based on an estimate of the average exchange rate of 0.91 CAN$/US$ over the period from 1 July 2009 to 31 December 2015.
[309] Darren Townsend First Witness Statement, para. 88.
[310] See for example, Cortec Mining Kenya (PTY) LTD, Quarterly Report, 1 July 2008 – 30 September 2008, Exhibit C-171; Cortec Mining Kenya LTD. 6-Monthly Report, July – December, 2010, Exhibit C-172; Letter from Cortec Mining Kenya LTD. To Dr. B. Rop, Commissioner of Ministry of Environment and Mineral Resources, attaching work programmes for Kwale and Samburu Districts and confirmatory drilling programme for Mrima Hill, 20 July 2010, Exhibit C-56.
[311] There is nothing in the text of the Convention to require that a claimant investor itself make a monetary contribution in order for there to be an "*investment*" for the purposes of Article 25.

corporate structures like that used by the Claimants play in financing private foreign investment and driving economic development. The overwhelming weight of authority is against treating "**origin of capital**" as a condition for ICSID jurisdiction.[312] In the case at hand, there is no dispute that Stirling and Cortec UK contributed capital directly to CMK, the dispute is over how much they contributed.

295. The BIT does not allow for the origins of CMK's capital to be treated any differently to the origins of Cortec UK's and Stirling's capital. This is because, under Article 8(2) of the BIT, Kenya agreed that CMK is to be "treated for the purposes of the [ICSID] Convention as a company of the [UK]."[313] To permit the State to draw a distinction between the origin of capital expended by Cortec UK and Stirling and the origin of capital expended by CMK would be to allow the State to breach Article 8(2) of the BIT and to benefit from that breach by using it as a basis for objection.

296. Details of the proof and timing of Stirling's, Cortec UK's and PAW's investments can be found in the Claimants' Memorial of Claim (paragraphs 213-217 under the heading "*Damnum emergens*"). CMK's audited Annual Reports note that "[t]he Company has received cash or had its liabilities settled by persons or companies related to directors" and treat payments by Stirling UK, Cortec UK, Messrs. O'Sullivan and Anderson and PAW as "Long Term Loans" and/or "Other Liabilities"[314]

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[312] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, para. 292.
[313] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 293-294. The only condition that must be met in order for CMK to be deemed British for ICSID purposes under Article 8(2) of the BIT is that the majority of its shares were owned by nationals or companies of the UK before the dispute arose, which they were. Once this condition is met, CMK has all the rights of a UK national under the ICSID Convention (including the right to an award under Article 48).
[314] Audited annual reports for CMK (2011-2013), Exhibit C-98, pp. 7, 11, 20, 24, 35 and 41 ; *Case Concerning the Factory At Chorzów* (1928) PCIJ Ser. A No. 17, CL-22, p. 55.

(ii) The Government's Position

297. Quite apart from the objection *ratione personae,* the Government alleges that Cortec UK and Stirling are two shell companies that made no financial contribution and that no investment was made from the United Kingdom into Kenya.

(iii) The Tribunal's Ruling

298. In the Tribunal's view, the Government has adopted an excessively narrow view of financial contribution. In *Wena Hotels v. Egypt,*[315] the tribunal addressed not only the intertwined "interests of subsidiaries and affiliates" but also the situation were at least some of the "subsidiaries and affiliates" are nationals of other States:

> ICSID practice has also been quite flexible on claims that include the interests of subsidiaries and affiliates, including on occasion entities that are nationals of States that are not contracting parties to the Convention.[316]

299. The Tribunal agrees with the Claimants that the Respondent's objection denies a realistic appreciation of customary corporate structures and investment financing. The Tribunal concludes that there was a contribution by the Claimants to the project in Kenya.

300. The other elements of the *Salini* test are similarly satisfied:

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[315] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Annulment Application, 28 January 2002, CL-100.
[316] *Wena Hotels v. Egypt*, Decision on the Annulment Application, 28 January 2002, CL-100, para. 54, citing *SOABI v. Senegal*, 2 ICSID Reports 164, at 182-183, Decision on Jurisdiction, 1 August 1984, paras. 33-38

(a) the Claimants' investments (though not protected) had existed for more than five years before the dispute arose;[317]

(b) the Claimants' investments involved acceptance of the commercial risks that are inherent in a long-term mining project, both in respect of discovery and exploitation;

(c) as to "contribution to economic development", it is evident that prospecting and developing a mineral deposit of the potential value of Mrima Hill could make an important contribution to Kenya's Gross Domestic Product.[318] Of course, risk capital cannot guarantee a successful result. Otherwise it would not be characterized as risk capital.

301. The Claimants also note some collateral benefits associated with the Mrima Hill project. CMK hired local staff (from labourers through to geologists), built (or offered to build) classrooms for local schools, a medical clinic (although contradicted on this point by the evidence of Dr. Rogers), provided pumps at community water points, established a nursery for forest rehabilitation, developed infrastructure and provided technology.

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[317] Donald O'Sullivan First Witness Statement, para 10; David Anderson First Witness Statement, paras. 26 and 147. As the PS Mohammed put it in his 26 March 2013 letter to NEMA:

> The mineral resource riches of Mrima Hill have been confirmed through extensive historical work and prospecting spanning several years. The initial results from the drilling works by Cortec Mining company has inferred niobium resource estimate of over 100 million tonnes and additional 30 million tonnes of rare earth minerals that could sustain the project for 20-30 years. In fact the rare earth mineral deposits of Mrima are estimated to be the third largest in the world. These minerals are some of the most valuable in the world and are therefore considered a significant economic resource for the country with tremendous potential to contribute to the attainment of the country's Vision 2030 towards a globally competitive and prosperous nation with a high quality of life.

(Letter from PS Ali Mohammed, Ministry of Environment and Mineral Resources, to Prof. Geoffrey Wahungu, Director General NEMA, 26 March 2013, Exhibit C-135.)

[318] Memo of Meeting at Office of the President of Kenya, 6 March 2013, Exhibit C-166.

302. If the Claimants had fulfilled the requisites of a lawful investment, *other* requirements of the ICSID Convention, whether or not viewed through the lens of *Salini*, would have been satisfied.

(e) Ratione Materiae: the existence of a protected investment; no lack of good faith

303. The Tribunal will now discuss the issue of the existence of a *protected* investment, *i.e.* it will verify whether the investment has been made in good faith. This issue is discussed here, as the Tribunal concludes that there was no lack of good faith and thus this is an issue on which the Claimants succeed. The question of the existence of an investment made in accordance with the Kenyan laws will be dealt with later.

(i) The Claimants' Position

304. The Claimants proceeded at all times in good faith in its dealings with the Government which did not reciprocate the good faith, but acted abusively and in bad faith.

(ii) The Government's Position

305. The Government argues that the Claimants' conduct *vis-à-vis* the Government violated the principle of good faith and the Tribunal should decline jurisdiction to hear the Claimants' case.

306. It relies on the maxim *nemo auditur propriam turpitudinem allegans*, the *Inceysa* tribunal confirmed that:

> …the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its

> act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud."[319]

307. Similarly, the *Khan v. Mongolia* tribunal echoed the *Inceysa* tribunal's finding on this point, stating that:

> An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the [investment treaty] only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*.[320]

(iii) The Tribunal's Ruling

308. The Tribunal has rejected the allegations of bribery and corruption. Other forms of bad faith on the part of the Claimants have not been proven on a balance of probabilities. While some aspects of the Claimants' conduct have been criticized in these reasons, such acts as are criticized do not amount, either individually or collectively, to proof of bad faith.

PART 27 - JURISDICTION ISSUES ON WHICH THE CLAIMANTS FAIL

309. The issue is whether SPL 256 or SML 351 or associated "intellectual property" qualify as protected investments, as having been made in accordance with the Kenyan laws.

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[319] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, RL-41, para. 242.
[320] *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, RL-76, para. 383.

(a) Purposive Interpretation: Does the BIT Contain an Implicit Limitation to Lawful Investments?

310. The Tribunal agrees with Justice Torgbor that it is appropriate to interpret the *Mining Act* "purposively, meaning to allow the objects of the Act or the licence to be fulfilled rather than to prevent such fulfillment."[321] However, Justice Torgbor views the purpose to be "to enable the licence to be issued."[322] The Tribunal prefers the broader approach of Professor Mumma which interprets the *Mining Act* in the context of the entire regulatory system and requires the eligibility of a mining project to be evaluated in that broader statutory context.

311. The Tribunal does not agree simply to interpret the *Mining Act* so as to facilitate the issue of mining licences. There may be cases where (as here) issuance of a mining licence conflicts with the broader purposes of the *Mining Act* and the broader Kenyan legislative framework.

312. As mentioned earlier, this aspect of the case does not turn on the Government's allegations of bribery and corruption, which the Tribunal has put aside in light of the Government's decision not to put those allegations to Mr. Masibo for his explanation. Equally, the allegations of corruption against Mr. Juma are speculative and entirely insufficient to support such a serious allegation.

313. The issue here is whether the BIT extends protection to a mining licence [SML 351] not issued "in accord with the laws of Kenya" because the Claimants failed to satisfy statutory prerequisites such as EIA approval.

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[321] Tr. Day 6, p. 9, ll. 3-6.
[322] Tr. Day 6, p. 73, ll. 14-20.

(i) The Claimants' Position

314. Regulatory compliance is not a jurisdictional issue. There is no express legality requirement in the UK-Kenya BIT. As held by the tribunal in the recent case of *Bear Creek v. Peru*: "under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the [contracting] parties."[323] In the case at hand, without any express legality requirement, questions of regulatory compliance could only go to the merits (in which context the onus of proving non-compliance would be on the State).[324]

315. The decision of the tribunal in *Kim v. Uzbekistan*[325] should apply to the "illegalities" alleged by the State. The burden is on the State to apply and satisfy the *Kim* test[326] which holds that:

> …the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State.[327]

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[323] *Bear Creek v. Perú*, Award, 30 November 2017, CL-105, para. 320.
[324] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 14-54.
[325] See Claimants' Rejoinder on Preliminary Objections dated 10 November 2017, paras. 131-137.
[326] In *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, RL-185, the tribunal held that the State would need to prove that "the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined." For example, the State alleges that Commissioner Masibo did not have authority to issue a conditional mining licence without degazetting the area as a national monument. To establish that this "illegality" vitiates jurisdiction, the State would need to lead evidence as to the considerations relevant to the first and second steps of the *Kim* test. A summary of the three step *Kim* test and the relevant factors is provided in the Claimants' Rejoinder on Preliminary Objections, para. 133.
[327] *Kim v. Uzbekistan*, Decision on Jurisdiction, 8 March 2017, RL-185, para. 413

316. Even if (*arguendo*), regulatory compliance was treated as a matter of jurisdiction, the Claimants submit that a proper application of the *Kim* test should result in a rejection of each of the alleged "illegalities" as a basis for the "harsh consequence" of denying treaty protection.

317. The Claimants submit that none of the alleged violations that underpin the Government's Illegality Objections would justify the Tribunal declining jurisdiction, even if the alleged illegal conduct had occurred (which is denied) and blame for it could be assigned to the Claimants (which is also denied).[328]

(ii) The Respondent's Position

318. The Respondent contends that the Claimants' purported investment was procured in violation of both Kenyan law and international law. The *Phoenix* tribunal found that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws,"[329] and this is so whether or not the treaty at issue contains an explicit clause requiring investments to be made *"in accordance with"* domestic law.[330] It stated that "this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT."[331]

[328] The Claimants note that most of the "illegalities" alleged by the State (see Claimants' Rejoinder on Preliminary Objections, *Kim* Annex, items 3-6) do not arise out of the Claimants' conduct, but rather the acts and omissions of Commissioner Masibo in granting SML 351 (*i.e.* this is not a case of a foreign investor allegedly flouting local regulations, but a case of State officials supposedly failing to adhere to internal rules and processes). This undoubtedly impacts the assessment of the "seriousness of the Claimants' conduct" for the second step of the *Kim* test.
[329] *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award, 19 April 2009, CL-27, para. 101.
[330] *Phoenix Action v. The Czech Republic,* CL-27.
[331] *Phoenix Action v. The Czech Republic,* CL-27, para.101.

(iii) The Tribunal's Ruling

319. The Tribunal concludes that for an investment such as a licence, which is the creature of the laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State. The claims do not relate to bricks and mortar, as earlier observed. The claimed rights flow from a document which has no legal existence or effect, and cannot therefore give rise to compensable rights.

320. The Tribunal endorses the application of the *Kim* principle of proportionality to an assessment of the impact of alleged illegalities. Omission of a minor regulatory requirement, such as the act of Mr. Langwen on 8 July 2013 to issue an ordinary letter rather than use Form 3 of Schedule 1 of the *Environmental (Impact Assessment and Audit) Regulations*, or inadvertent misstatements, will not have the same impact as an investment "created" in defiance of an important statutory prohibition imposed in the public interest.

321. The Tribunal concludes that for an investment to be protected on the international level, it has to be in substantial compliance with the significant legal requirement of the host state.

***(b)* Were the Claimants' Investments Made in Accordance with Kenyan Law: What Was the Content of the Kenyan Law Concerning Mining Licences?**

322. The next question is therefore to examine whether the Claimants' Investments were made in accordance with the Laws of Kenya

(i) The Claimants' Position

323. As stated, the definition of "investment" was clearly intended to be very broad ("every kind of asset"), and, according to the Claimants, include:

(a) the shares in CMK;

(b) **Special Prospecting Licence 256** issued to CMK as renewed from time to time and the rights granted thereunder, including:

(i) CMK's "full and exclusive liberty and license to prospect and explore for ALL MINERALS"[332] in the licenced area; and

(ii) CMK's entitlement ("shall be entitled") to "such further or other rights over the Area or any part of parts of the Area or to the grant of a Special Mining Lease or Leases for a period not exceeding twenty-one (21) years [...]";[333]

(c) **Special Mining Licence 351** and the rights thereunder, including;[334]

(i) CMK's right, under Clause 2, which provides that "[CMK] shall have the full and exclusive right to explore, develop and mine Niobium and Rare Earths Elements (REEs) resources in the area"[335] for the term fixed in the preamble to SML 351, being 21 years; and

(ii) CMK's right, under Clause 16, to "occupy such portions of the surface of the land of the Area for the purposes of the operations permitted by [SML 351]";[336]

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[332] SPL 256, Exhibit C-6, Preamble (emphasis added).
[333] SPL 256 Exhibit C-6, Clause 22.
[334] SML 351, Exhibit C-9.
[335] SML 351, Exhibit C-9, Clause 2 (emphasis added).
[336] SML 351, Exhibit C-9, Clause 16.

(d) Intellectual Property (IP) rights, including the know-how that CMK generated and applied in furtherance of the Mrima Hill project, such as geological and drilling data, resource analyses, feasibility studies, technical processes and project development plans authored by or on behalf of CMK and provided to the State (via the DMG and other agencies).

324. The investments of Cortec UK and Stirling include the shares they each directly hold in CMK, including the value of those shares, dividends and the returns due to Cortec UK and Stirling as their owners. Shares and other "forms of participation in a company" are covered investments under Article 1(a)(ii) of the BIT; dividends and returns are "claims to money" for the purposes of Article 1(a)(iii) of the BIT.

325. The BIT does not require that "investments" be direct. It is well settled that, where a BIT does not expressly require that investments be direct, indirect investments by Cortec UK and Stirling are covered.

326. The Claimants argue that all their investments were made in accordance with Kenyan laws.

(ii) The Respondent's Position

327. The Claimants case stands or falls on the validity of SML 351. The prospecting licence, SPL 256, expired as a result of the terms of the second renewal ending 1 December 2014. No Government action was taken against it. The Kenyan Courts have held that SML 351 was *void ab initio*. It had no legal existence. The Tribunal should accept the rulings of the Kenyan Courts on a point of Kenyan law and dismiss the claims.

(iii) The Tribunal's Ruling on SPL 256

328. The special prospecting licence was not itself a licence to make money. It was a licence to spend money. Prospecting, as such, involves cost not revenue.

329. Prospecting *may* be a stepping stone to a profitable mine but not necessarily so, and in Dr. Rigby's opinion (which the Tribunal accepts), the Claimants never established the economic viability of the Mrima Hill mine (a conclusion echoed, according to Dr. Rigby, by Mr. Townsend of PAW in his statement of 29 July 2013).

330. If the Claimants had proceeded to fulfill the conditions precedent to a mining licence (assuming they were ever in a position to do so), the prospecting work might have led eventually to the wealth the Claimants describe, but the wealth would in that case flow from work under the mining licence not the prospecting licence.

331. There is no doubt CMK generated and submitted considerable data about the minerals of Mrima Hill, but the data was freely given by the Claimants to the Government in the **hopes** of – but with **no entitlement** to – a mining licence. The data was not disclosed on the basis it was to remain the property of CMK. There was no protected investment in intellectual property. It will be recalled that the Claimants made extensive use of the data generated by the exploratory work of earlier prospectors as well as the Kenyan Mines and Geological Department.

(iv) The Tribunal's Ruling on the Legality of SML 351

332. The Tribunal concludes that the sole surviving subject matter of the arbitration is the alleged special mining licence, SML 351. The Tribunal rejects, for reasons to be discussed, Mr.

Masibo's theory, apparently developed in the course of his criminal case, that SML 351 was really a "re-grant" of SPL 256 with fresh conditions.

333. In the Tribunal's view, SML 351 was *void ab initio* under international law and the Tribunal is without jurisdiction:

(a) for the reasons already outlined, ICSID and the BIT protects only "lawful investments." The text and purpose of the BIT and the ICSID *Convention* are not consistent with holding host governments financially responsible for investments created in defiance of their laws fundamental protecting public interests such as the environment. The *explicit* language to the effect that protected investments must be made "in accordance with the laws of Kenya" is therefore unnecessary to secure the objects and purpose of the BIT;

(b) in any event, SML 351 is a piece of paper whose value, if any, lies exclusively in the consequences attached to it by Kenyan law. In this case, as the Kenyan Courts have said, Kenyan law attached no consequences to the piece of paper;

(c) Mining Commissioner Moses Masibo lacked jurisdiction even to consider issuance of a special mining licence in light of the status of Mrima Hill as a nature reserve, a forestry reserve and a national monument encircled by layers of statutory protection under the *Forests Act*, *The Environmental (Impact Assessment and Audit) Regulations 2003*, the *Antiquities and Monuments Act* and the *Mining Act* and reinforced by the conditions attached to SPL 256;

(d) although this Tribunal is applying international law rather than Kenyan law, the Tribunal agrees with the Kenyan Courts that SML 351 as issued was *void ab initio*.

(c) Were the Claimants' Investments Made in Accordance with Kenyan Law: Did Commissioner Masibo Have Jurisdiction to Issue a Mining Licence?

334. Mr. Masibo asserted a very broad jurisdiction and discretion. In his witness statement, dated 27 November 2017, he testifies that as Commissioner, he possessed "sole, express/unequivocal and primary legal authority, power and responsibility under the Mining Act Chapter 306 to grant, deny or cancel Licenses of the first instance." The short answer to Mr. Masibo's position was provided by the Claimants' own legal expert, Justice Torgbor:

> Q. …but you accept that if there is a mandatory statutory requirement, that the statute will prevail.
>
> A. (by Justice Torgbor) Yes, indeed. Professor Mumma agrees.[337]

(i) The Claimants' Position

335. The Claimants contend that the issuance of SML 351 was fully in accordance with Kenyan law.

336. In the alternative, the Claimants contend that the Government's arguments are not jurisdictional. The Claimants refer the Tribunal to three authorities in this regard:

(a) *Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan*: in this case, the tribunal found (at paragraph 187) that "[s]ince the transfer of the Licence was not invalid, but only voidable, Claimants' investment does not fall outside the

[337] Tr. Day 6, p. 254, ll. 17-25.

scope of Respondent's consent to jurisdiction [under the *Energy Charter Treaty*]."[338] Significantly, the *Liman Caspian* tribunal considered that it would arguably have had jurisdiction even if the investment (a licence) was *void ab initio* under host State law;[339]

(b) *World Duty Free v. Kenya*: although this case concerned a contract governed by Kenyan and English law (and was therefore not a case decided by application of international law), the award includes a discussion of the void/voidable distinction;[340]

(c) *Parry & Grant Encyclopaedic Dictionary of International Law*: "void/voidable – The distinction common in municipal legal systems, applicable mainly to contracts, that particular circumstances may render them void or voidable, whereby some are null ab initio and require no formal recognition of their nullity, and other subsist until such time as they are nullified by a judicial body, has no direct counterpart in international law."[341]

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[338] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, CL-106, para. 187.

[339] *Liman Caspian v. Kazakhstan*, CL-106, para. 187:

> even in the case of an investment finally found to be in breach of Kazakh law from the very beginning it could be argued that an investment had still been made and consequently that a dispute over such an investment regarding an alleged breach of the [Energy Charter Treaty] would fall within the jurisdiction of this Tribunal. In such a case, the question of legality might well be relevant to the merits, but it would not have preclusive effect at the level of jurisdiction.

[340] *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, RL-43, para. 143; see also para. 164 (extracting the opinion of Lord Mustill on the subject).

[341] J. P. Grant & J. C. Barker, *Parry & Grant Encyclopaedic Dictionary of International Law*, Oxford University Press, 3rd edition, 2009), CL-107, p. 664.

(ii) The State's Position

337. The State refers to the decision dated 20 March 2015 of the Nairobi High Court that because Commissioner Masibo had not been furnished with the requisite consents under Kenyan law, "he could not issue a valid Mining Licence and the Licence…was null and void and of no legal effect."[342] The Government endorses the view of the Trial Justice that:

> A party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. [343]

338. A number of tribunals have relied upon and applied host State courts' determinations on questions of domestic law.[344] For example, the *GAMI v. Mexico* tribunal found that the Mexican courts' decision on the legality of an expropriation was "an authoritative expression of national law" to which the tribunal had to defer as far as Mexican law was concerned.[345] In the *Chevron v. Ecuador* decision, the tribunal similarly emphasized the importance of a tribunal deferring questions of municipal law to the local courts of a host State.[346]

339. Further, a tribunal should not act as an appellate body in respect of the decision of a national court.[347] Instead, a tribunal should "accept the findings of local courts" as long as there

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[342] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, RL-089, p. 24.
[343] *Cortec Mining Kenya v. Cabinet Secretary Ministry of Mining*, Judgment, 20 March 2015, RL-089, p. 28.
[344] See for example *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, RL-26, para. 10.1.4; and *William Nagel v. Czech Republic*, SCC Case No. 49/2002, Final Award, 9 September 2003, RL-024, para. 316.
[345] *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, RL-034, para. 41.
[346] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [II]*, PCA Case No. 2009-23, Decision on Track 1B, 12 March 2015, RL-088, para. 140.
[347] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, RL-018, para. 47. See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, RL-073, paras. 291 and 299; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2,

are no gross deficiencies, including those amounting to a denial of justice under international law.[348]

340. In *Fraport v. Philippines*, one of the arbitrators observed that:

> It [the Tribunal] is not bound by a decision of a Philippine court…but its own judgment on Philippine law must be premised on Philippine law itself.[349]

341. In the *Azinian* case, a Mexican court had ruled that the decision of the Mexican authorities to annul a concession *contract* for waste collection and disposal was lawful, *inter alia*, due to procedural irregularities in the award of the concession.[350] On this basis, the tribunal found itself precluded from scrutinizing the decision of the Mexican local authorities which had already been confirmed by the Mexican court.

342. According to the *Azinian* tribunal, "a governmental authority surely cannot be faulted for acting in a manner validated by the courts unless the courts themselves are disavowed at the international level."[351] The *Azinian* tribunal also emphasized that it did not have an appellate function and that the claimant would have to show that the court decision constituted "either a denial of justice, or a pretence of form to achieve an internationally unlawful end."[352]

Final Award, 11 October 2002, RL-019, para. 126; *Liman Caspian v. Kazakhstan*, RL-064, para. 289; and *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, RL-52, paras. 105 -106.

[348] *Helnan v. Egypt*, Award, 3 July 2008, RL-052, para. 106

[349] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades, 19 July 2007, RL-50, para. 26.

[350] *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, RL-12, paras. 96-97.

[351] *Robert Azinian v. The United Mexican States*, RL-012, para. 97 (emphasis in original).

[352] *Robert Azinian v. The United Mexican States*, RL-012., para. 99. This rationale was also approvingly referred to in the *Mondev v. United States*, Decision, Exhibit RL-19, para. 126).

(iii) The Tribunal's Ruling

343. Whether or not the concepts of "*void ab initio*" and "voidable" are commonly discussed in investment treaty awards, as a matter of treaty interpretation it is impossible to conclude that the parties intended to protect non-existent assets. Production of a piece of paper with the signature of a rogue official, signed in defiance of the applicable statute law does not constitute a "qualified investment" for purposes of jurisdiction. In this respect, the Tribunal will apply (as suggested by the Claimants) the analysis of illegality set out in *Kim v. Uzbekistan*[353] in which proportionality was identified as the governing principle. For ease of reference, *Kim*'s basic proposition, cited by the Claimants[354], is as follows:

> In the Tribunal's view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State.[355]

344. The *Kim* tribunal suggested, and the Claimants agree, that this aspect of the analysis should proceed in three stages:

> ***First the Tribunal must assess the significance of the obligation with which the investor is alleged not to comply.***[356]

[353] *Kim v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017.
[354] See para. 314 of the Award.
[355] *Kim v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 413.
[356] *Kim v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 406.

345. It is difficult to overstate the importance of environmental protection in areas, such as Mrima Hill, of special vulnerability. The vulnerability was evidenced by the layers of protection applied by statute and regulation:

(a) Mrima Hill was gazetted as a **forest reserve**.[357] The effect of this gazettement was to restrict any activities that would adversely affect the flora and fauna, without the express permission of the Kenya Forest Service ("**KFS**");

(b) Mrima Hill was designated as a **nature reserve** by the Minister of Environment and Natural Resources.[358] Under the *Forests Act*, nature reserves provide an additional level of protection and all proposals for disruptive activities within a nature reserve are subject to the consent of a forest conservation committee;[359]

(c) the Mrima Hill kaya was designated as a **national monument** under the *Antiquities and Monuments Act*[360] by the Minister of Home Affairs and National Heritage.[361] This classification as a national monument was confirmed by further notice in 1994. A month before the issuance of SML 351, (namely on 5 February 2013) NMK had advised CMK that the Mrima Hill site would need to be fully mapped in order to identify "the cultural sites within the area (e.g. **early**

[357] Legal Notice No. 304 of 1961, *The Forest Ordinance (Cap. 176)*, 26 May 1961, Exhibit R-4; and Esau O. Omollo First Witness Statement, para. 13. The Government produced a map of the gazette "forestry reserve", which was co-extensive with the "nature reserve", and covered the entire area of Mrima Hill of interest to the Claimants. The Claimants raise an argument about the map coordinates but the intention is clear and the Tribunal does not accept their objection. The Claimants always acknowledged that Mrima Hill was protected as a nature reserve and forestry reserve
[358] Legal Notice No. 212 of 1989, *The Forests Act (Cap. 385)*, 9 May 1989, Exhibit R-005; and Esau O. Omollo First Witness Statement, para. 13.
[359] Section 33 of the *Forests Act (Cap. 385)* (entered into force 1 February 2007), RL-115.
[360] *Antiquities and Monuments Act (Cap. 215)* (entered into force 21 January 1983), RL-109.
[361] Gazette Notice No. 200 of 1992, *The Antiquities and Monuments Act (Cap. 215)*, 6 January 1992, Exhibit R-006.

settlements, burials and community ritual sites)."[362] Dr. Farah, the Director General of NMK at the time, testified that "[u]ntil a proper mapping of the area had been conducted it would be impossible for NMK to consider whether it would be appropriate for part of Mrima Hill to be degazetted."[363] There is no evidence that such mapping ever took place. There was no "de-gazettement";[364]

(d) The vulnerability was buttressed by strong environmental legislation and in particular, the *Environmental (Impact Assessment and Audit) Regulations*, 2003 which read:

> **No licencing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required** under the Act unless the applicant produces to the licencing authority a licence of environmental impact assessment issued by the Authority [NEMA] under these Regulations. (emphasis added)

346. In the Tribunal's opinion, the regulatory obligations on which the Claimants defaulted were of fundamental importance in an environmentally vulnerable area faced with a project to remove and at least partially process 130 million tonnes of Mrima Hill.

347. Having said that, the Tribunal wishes to make it clear that its decision in this case rests on (1) the protected status of the Mrima Hill forest and nature reserve; and (2) the lack of EIA approval. While the Claimants failed to respond to the requests of NMK, there is enough doubt

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[362] Letter from Dr. Idle Omar Farah, Director-General of NMK, to Mr. Anderson, CMK, 5 February 2013, Exhibit R-009.
[363] Dr. Idle Omar Farah First Witness Statement, para. 25.
[364] Gazette Notice No. 1132 of 1994, *The Antiquities and Monuments Act (Cap. 215)*, 3 March 1994, Exhibit R-007.

about the precise boundaries of the "national monument"[365], so that the Tribunal does **not** rely on the absence of NMK approval in its decision to dismiss the claim.

> ***Second, the Tribunal must assess the seriousness of the investor's conduct.***[366]

348. Non-compliance with the protective regulatory framework was a serious matter. The Tribunal has already discussed at length the disregard exhibited by the Claimants for compliance issues.

349. The attempt by the Claimants to use Mr. Juma's assistance to by-pass statutory requirements and obtain a purported mining licence within weeks of Mr. Juma being enlisted, despite such non-compliance, showed serious disrespect for the fundamental public policies of the host country in relation to the environment and resource development.

350. It will be recalled that Mr. Wahungu, the Director General of NEMA testified as follows:

> …the [CMK] report was not a good submission and that large sections of the documents appeared to be still in draft and there were significant gaps and glaring omissions. My officials were very concerned that Cortec was simply going through the motions and not addressing the significant legal and environmental obstacles to establish a mine at Mrima Hill.
>
> It became the norm that whenever NEMA wrote a letter to Cortec, Cortec would show up a NEMA's offices a day or two later, accompanied by lawyers and environmental consultants. This was most unusual and unnerving. I recall being very uncomfortable with this trend where **Cortec hardly replied to our letters in writing** and instead made in person visits

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[365] Gazette Notice No. 5187 dated 10 November 1989, Exhibit R-006, "gazette" the national monument as follows: Mrima Hill Sacred Grove.

> All that are of forest and land known as Mrima Hill Sacred Grove within Mrima Forest Reserve in Grid Square 2840 of Map Sheet 200/4, Series Y731, Edition 3-SK at a Scale of 1:50,000 in Kwale District, Coast Province.

There was much argument at the Hearing regarding the boundary limits of the "Sacred Grove" which was inconclusive.

[366] *Kim v. Uzbekistan*, Decision on Jurisdiction, 8 March 2017, RL-185, para. 407. (emphasis added).

> to assert their views and positions. What was most disconcerting with Cortec was that, whenever we requested that Cortec address particular issues, Cortec would show up at our offices with **huge bundles of documents which did not address the specific issues we had raised**. I felt that Cortec was bombarding us with information to try to intimidate my officers and me.[367] (emphasis added)

351. The Tribunal regards the Claimants' failure to comply with basic statutory requirements as a serious breach of the "investors" obligations

> ***Third, the Tribunal must evaluate whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined.*** [368]

352. The *Kim* tribunal added the following: "The primary indication of such a compromised significant interest is whether the legal consequence of the violation under the Host State's law manifests a gravity to the act of non-compliance that is proportional to the harshness of denying access to the protections of the BIT**."**"[369]

353. The legal significance of non-compliance on Commissioner Masibo's powers was the subject of some debate between the Kenyan law experts.

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[367] Geoffrey Wahungu First Witness Statement, para. 20. (emphasis added). Recall also the report in the Kenyan newspaper, the *Daily Nation*, that:

> Huge trees have been felled, and according to kaya elder and chairman of Kaya Mrima Self-Help group Omari Alale, **the exploration for minerals is worrying because the company is not doing what it promised to do**.
>
> "As we see the situation now, the work is going against the conditions set. They have brought in big earth movers in the forest to open up the roads and the machines have caused untold damage." (emphasis added).
>
> (Mazera Ndurya, "Experts raise the red flag over forest loss," *Daily Nation*, 7 October 2010, Exhibit R-072).

[368] *Kim v. Uzbekistan*, Decision on Jurisdiction, 8 March 2017, RL-185, para. 408.

[369] *Kim v. Uzbekistan*, Decision on Jurisdiction, 8 March 2017, RL-185, para. 408.

354. Justice Torgbor proposes what could be called a "Wait and See" theory and refers to EIA Regulation 4(1)[370] which says that "no proponent shall *implement* a project…unless an environmental impact assessment has been concluded and approved," and argues from the word "implement" that an EIA licence is required only when mining activity is eventually initiated. However, as Professor Mumma points out, s. 4(1) is an instruction to the *proponent*. So far as the *regulator* [Commissioner Masibo] is concerned, the limitation is found in subregulation 4(2) which says:

> no licencing authority under any law in force in Kenya shall issue a *licence* for any project for which an environmental impact assessment is required under the *Act* unless the applicant produces to the licencing authority *a licence of environmental impact assessment issued by the authority* [*i.e.* NEMA].[371]

355. Nevertheless, Justice Torgbor insisted that SML 351 could live side by side with the [forest and nature] reserves until mining commenced:

> Because s. 17 does not expressly mandate the Commissioner to override nature designation that had not been degazetted, I would prefer the view that SML 351 can live side by side with the designation until mining commenced.[372]

356. Further, Justice Torgbor argued that Mr. Masibo could transform conditions precedent into conditions subsequent even in the case of *statutory* conditions precedent.

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[370] *Environmental (Impact Assessment and Audit) Regulations*, 2003, RL-139, pp. E12-82.
[371] Tr. Day 6, p. 123, ll. 1-22.
[372] Tr. Day 6, p. 14, ll. 5-9.

357. A member of the Tribunal, referred Justice Torgbor[373] to the letter from the Mining Commissioner to CMK dated 27 January 2012[374] stating that:

> Consequently, to enable us further consider your application, you are required to furnish us with the following lacking documents.

358. The Tribunal member suggested that this language indicated Commissioner Masibo realized that the "lacking documents" are required *before* not after issuance of the licence.[375] Justice Torgbor said "I think you are right to take that view, yes that is what the letter says"[376] and the Tribunal member then asked, "so it seems that there are conditions *precedent*." Justice Torgbor said "well, *I would say yes*, if it is required before the issuance, yes, I would say it is a condition precedent."[377]

359. According to Professor Mumma,[378] no mining licence could lawfully be issued until:

(a) the land in respect to which the licence is to be issued is open to mining. He points out that s. 7.1 of the *Mining Act* gives 10 categories of exclusions under which land could be excluded from mining, only one of which is within the purview of Commissioner Masibo, *i.e.* s. 7(1)(j). Other ministries have power pursuant to s. 7(1)(j) to exclude land from mining for other reasons;

(b) where the Commissioner has closed lands, there must be a gazetted reopening;

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[373] Tr. Day 6, p. 69.
[374] Letter from Mr. Kimeto, Acting Commissioner of Mines and Geology, to CMK, 27 January 2012, Exhibit R-013.
[375] Tr. Day 6, p. 69, ll. 14-25.
[376] Tr. Day 6, p. 70, ll. 14-15.
[377] Tr. Day 6, p. 70, ll. 16-19. (emphasis added).
[378] Tr. Day 6, p. 108-110.

(c) other statutory consents must be in place including the removal of excluded status from forest and nature reserves and national monuments which are not within the purview of Commissioner Masibo to vacate;[379] and

(d) an EIA licence.[380]

360. Both Justice Torgbor and Professor Mumma agree that not all licence conditions are conditions precedent. Professor Mumma gave an example[381] of local equity participation:

> …conditions are of different kinds. There are some conditions that would invalidate a licence, if they are not compliant with, if they are missing. There are other conditions that would not invalidate a licence, so it would depend on the nature of the condition in issue.[382]

361. Justice Torgbor added[383] that "what should render anything **void** must be something of **considerable weight** as to remove the ground from under the licence" (but not necessarily fraud). Justice Torgbor is essentially expressing the need for proportionality or, in the words of *Kim*, the "compromise of a significant interest."

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[379] Tr. Day 6, p. 108, l. 20 to p. 110, l. 5.

[380] In Professor Mumma's view, respecting SPL 351 is that "it was void, it is invalid, it is null and *void ab initio*" for three reasons:

(a) it was clear to the Commissioner and to the Applicants that SML 351 was issued in breach of express provisions of the law and "even at the time they received [SML 351], it was void" (Tr. Day 6, p. 126, ll. 5-17). Specifically, "the Commissioner was aware that these (EIA) provisions had not been complied with because nobody produced to him a licence." (Tr. Day 6, p. 125, ll. 14-19).

(b) it is *void ab initio* because the High Court has stated that it is void and the Court of Appeal has said that the appeal against the High Court findings has failed; (Tr. Day 6, p. 126, ll. 19-24).

(c) Professor Mumma says the conditions now described as conditions subsequent are not conditions the Applicant has any capacity to implement. Compliance is out of its hands. They are therefore not appropriate conditions. (Tr. Day 6, p. 127, ll. 7-11).

[381] Tr. Day 6, p. 154.

[382] Tr. Day 6, p. 154, ll. 16-21.

[383] Tr. Day 6, p. 252.

362. As the Tribunal has already made clear, it regards the issue of excluded lands and an EIA licence to be "of considerable weight" and "significant" prejudice to the host country.

363. The Tribunal rejects the "wait and see" theory presented by Justice Torgbor. The Claimants failed to comply with the statutory conditions *precedent* to the issuance of SML 351. These conditions were specifically notified to the Claimants by Mr. Masibo himself in the *Mining Investment Road Map*.[384]

364. There is no doubt on the evidence that protection of the environment and forest and nature reserves was required by the legislature to be resolved by the appropriate authorities (not just the Mining Commissioner) *prior* to the issuance of a mining license. This was not done. The Claimants' "wait and see" and "live together" arguments are inconsistent both with the terms of SPL 256 and the *Environmental (Impact Assessment and Audit) Regulations of 2003*, s. 4(2).

365. The Tribunal therefore concludes that the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form) from NEMA concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.

[384] Claimant's Memorial on the Merits dated 5 May 2016, para. 63; Mining Investment Road Map, Exhibit C-61; David Anderson First Witness Statement, para. 84.

PART 28 - EVEN IF NOT *VOID AB INITIO*, THE TRIBUNAL WOULD NEVERTHELESS DENY PROTECTION TO SML 351 ON THE MERITS

366. The Tribunal's analysis of the illegalities attending the birth of SML 351 is equally applicable to a situation if the onus were to switch to the Government to establish that SML 351 is not a protected investment.

(i) The Claimants' Position

367. This is an argument in the "merits" phase. The issuance of SML 351 was within the discretion of Commissioner Masibo, and nothing in the evidence justifies the Tribunal in interfering with the exercise of that discretion.

(ii) The Government's Position

368. The Government responds that Commissioner Masibo's discretion was confined by the purpose and subject matter of the *Mining Act*, and that his issuance of SML 351 was entirely *ultra vires*.

(iii) The Tribunal's Ruling

369. The Tribunal concludes that Mr. Masibo purported to exercise a discretion he did not possess. As such, his grant of SML 351 was of no legal effect.

370. In any event, the Tribunal does not accept that Mr. Masibo performed his statutory functions in good faith and for their intended purpose.

371. Firstly, Mr. Masibo's re-writing of history in his witness statement of 27 November 2017 that (contrary to all the documentary evidence) SML 351 is not a Special *Mining* Licence at all but a "re-grant" of SPL 256 with amended conditions is not credible. The argument seems to be that,

as SPL 256 was issued by Mr. Masibo's predecessor Commissioner Biwott, whatever errors were made in that respect must have been made by Commissioner Biwott and not Mr. Masibo, who just "re-granted" SPL 256 and for some reason called it SML 351.

372. Mr. Masibo's evidence of a re-grant came as news to the Claimants who say the first time they heard about the re-grant theory is when they received Mr. Masibo''s witness statement dated 27 November 2017, more than 4 years after the issuance of SML 351 on 7 March 2013.[385] Until then, the Claimants understood SML 351 to be a mining licence as distinct from a prospecting licence. Indeed, nothing on the face of SML 351 suggests it is a re-grant. SPL 256 is not mentioned in the document.

373. Second, at the meeting of Messers Anderson, Sullivan and Juma with C.S. Kimemia on 6 March 2013, Mr. Masibo was asked if he had authority to issue a *mining licence*. Mr. Masibo did not suggest that there was no need to issue a mining licence at all, merely to amend the conditions of SPL 256. Mr. Anderson's written recollections in his first witness statement[386] of the meeting and other meetings with Mr. Masibo, do not refer to a *re-grant* of SPL 256.

374. Third, the written pleadings of the Claimants in these proceedings (prior to 27 November 2017) do not advance or indeed betray any awareness of a re-grant theory. The idea of a "re-grant" first surfaced (according to the Claimants) in the subsequent Kenyan criminal investigation into Mr. Masibo's conduct. Whatever purpose the "re-grant" theory has in Mr. Masibo's criminal inquiries, it lacks any corroboration in the record of this arbitration.

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[385] Claimants' Post-Hearing Brief dated 11 April 2018, p. 12, FN 69.
[386] David Anderson First Witness Statement, paras. 107-113; Donald O'Sullivan First Witness Statement, para. 43.

375. Fourth, in the 27 November 2018 statement submitted to this Tribunal, Mr. Masibo himself provides two alternate explanations of his premature issuance of SML 351, neither of which are related to the due performance of his duties as Mining Commissioner:

(a) he did what he was told by his bureaucratic and political masters;[387]

(b) he believed that unless the Claimants got what they wanted they would bring a claim against Kenya before ICSID. Mr. Masibo thought such a claim would be an embarrassment. The easiest course of action was to give the Claimants what they wanted.[388]

Neither of these reasons provide authority to issue a mining licence for which CMK had not satisfied the statutory prerequisites.

376. As to political orders, the Tribunal accepts the expert testimony of Professor Mumma[389] that "where a statute exists and such statute has established a regulator, then that basically means that the space is occupied, the Minister cannot then start purporting to be regulating in a situation where statute has appointed a regulator."

> Q. So a Minister cannot usurp a regulator where the powers of the regulator are prescribed in the Act?
>
> A. That is my view.[390]

377. Professor Mumma repeated:

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[387] Moses Nabiswa Masibo Statement, 27 November 2017, para. 57(ix), 61 and 62.
[388] Moses Nabiswa Masibo Statement, 27 November 2017, paras. 64, 67-73, 83.
[389] Tr. Day 6, p. 175.
[390] Tr. Day 6, p. 175, ll. 6-14.

> [W]e have a very strong principle against regulators getting directions from Ministers in regard to the manner of exercising their regulatory powers.[391]

378. The decision was given to Mr. Masibo. He did not discharge his statutory obligations.

379. Justice Torgbor's initial testimony about an "unfettered" discretion was moderated in the "hot tub" phase of the Hearing. He attributed the concept of "unfettered" to s. 17(3) of the *Mining Act* which reads:

> Without in any way restricting or *fettering* the discretion of the Commissioner granted by paragraph (b) of subsection (2), a special licence may contain terms and conditions in respect of the following matters.

380. When it was suggested to Justice Torgbor that "an alternate reading is to say that the provisions from (a) to (e) are not to be regarded as fettering his discretion to impose *other* conditions", Justice Torgbor said "yes, I agree with that."[392] Accordingly, s. 17(3) is of little assistance in determining the limits of the power to grant a mining convention.

381. Moreover, in dealing with the "wrongful exercise of discretionary powers", JusticeTorgbor was asked:

> Q. …is it, for example, the case that an exercise of discretionary power that is not respectful of reason and law is wrongful, or a discretionary power that is exercised arbitrarily, would that be an exercise of wrongful?
>
> A. Yes, it would be. [393]

[391] Tr. Day 6, p. 195, ll. 11-14.
[392] Tr. Day 6, p. 89, l. 12 to p. 90, l. 9.
[393] Tr. Day 6, p. 27, ll. 11-24.

382. Justice Torgbor goes on to say that the exercise of a discretion by a statutory decision maker is quite closely supervised under Kenyan law:

> Q. …it is within the reviewing powers of a Court to inquire into whether the decision maker has acted carefully, sensibly and judiciously.
>
> A. Yes.[394]

383. Also, the reviewing Court may take illegality into account:

> Q. Just to be clear on the scope of this review, so illegality comes under the review quite clearly?
>
> A. Yes.[395]

384. And then:

> Q. So there is the law but there is also a different category which isn't illegality but its unreasonableness and rationality on which in some cases Courts will review how administrative bodies –
>
> A. I wouldn't argue with that, no.[396]

Professor Mumma distanced himself even further from Mr. Masibo's assertion of a "sole, express/unequivocal and primary legal authority and power."[397] He testified "that discretion is always fettered" and he points out that "the discretionary power must be exercised strictly within the four corners of the statute that donates the power" and "typically [as in this case] there is more than one law of which the administrator has to be cognizant in exercising discretion."[398] Moreover, the decision maker cannot expand the scope of his or her powers through its own loose

[394] Tr. Day 6, p. 28, ll. 18-22.
[395] Tr. Day 6, p. 29, ll. 14-16.
[396] Tr. Day 6, p. 30, ll. 17-21.
[397] Moses Nabiswa Masibo Statement, 27 November 2017, para 13.
[398] Tr. Day 6, p. 120, ll. 1-8.

interpretation of the law or by inference[399] and discretionary power must be exercised in good faith and **for the purpose for which it was given**.[400]

385. The Tribunal owes no deference to Commissioner Masibo's exercise of discretion because the discretion was abused and the result was an invalid SML 351. Firstly, the discretion was not exercised in accordance with the law. In particular, Mr. Masibo violated the statutory protections accorded the forest and nature reserve and issued SML 351 without an EIA licence contrary to the explicit prohibition under s. 4(2) of the *EIA regulations*. He acted *ultra vires*.

386. Secondly, Mr. Masibo did not exercise his discretion for the purpose for which it was given. According to his own testimony, he issued SML 351 under pressure from the politicians and cabinet officials and out of fear of ICSID litigation. Neither concern relieves Mr. Masibo from ensuring statutory compliance.

387. Accordingly, because Mr. Masibo:

(a) purported to exercise a discretion he did not possess; and

(b) ignored statutory requirements he had no authority to ignore,

the Tribunal concludes on the merits that the Government has demonstrated that SML 351 is not in any event a protected investment.

[399] Tr. Day 6, p. 120, ll. 9-12.
[400] Tr. Day 6, p. 121, ll. 1-16.

PART 29 - COSTS

388. The Tribunal has the authority and discretion to make awards of costs pursuant to Article 61(2) of the ICSID Convention. While there is some variation in tribunals' practices, the prevailing approach of international investment tribunals is to order costs to follow the event.[401]

389. A party is free to spend as much money as it wishes on legal fees and expenses, but it does not follow that all such costs and expenses should be imposed on the opposing (unsuccessful) party. In this case, the Respondent claims a "grand total" of US $6,452,858.42. By way of comparison, the Claimants claim costs of US $3,600,000.00. In the Tribunal's view, having regard to the nature and difficulty of the case, the Respondent's claim for costs is manifestly excessive.

390. Secondly, the conduct of the party seeking costs is a highly relevant factor. In the present case, the Government essentially relied on two arguments. The first is the "illegality objection". This is extensively discussed in the preceding reasoning. The second main argument is the "corruption objection", to the effect that the Claimants procured SML 351 by bribery or other corrupt means. The main suspect was Commissioner Masibo. The other objections raised by the Government were somewhat peripheral to the main event.

391. While the Tribunal agrees with the Government in respect of its "illegality objection", it is nevertheless deeply concerned about the vague terms in which the allegation of corruption was made, and the lack of evidence given in support. The Government relied largely on surmise and speculation. However, shortly before the Hearing on the merits in Dubai, the Claimants produced a witness statement from Mr. Masibo dated 17 November 2017. The appearance of Mr. Masibo

[401] *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, CL-52, paras. 152-155.

as the Claimants' witness ought to have given the Respondent an opportunity to prove its corruption case if there was such a case to prove.

392. Mr. Masibo's statement gave rise to numerous issues, but despite the Claimants' request for additional documents in relation to what Mr. Masibo had said (or not said) in his witness statement, it was not until Day 4 of the Hearing that the Government belatedly produced three documents to the Claimants[402] which included two statements that Mr. Masibo had previously given to the Kenyan authorities shortly after the events in question, namely on 22 November 2013 (Exhibit R-254) and a further statement of the same date (Exhibit R-255), both of which were highly relevant.

393. In addition, the Government belatedly produced a transcript of proceedings against Mr. Masibo in the Chief Magistrate's Court at Milimani Law Courts, Criminal Case No. 1087 of 2017 (Exhibit R-253).

394. In the course of the Hearing, the Tribunal learned from a Government witness, Mr. Raymond Mutiso, that he had testified in the prosecution of Mr. Masibo on 20 December 2017. The Government did not produce a transcript of this testimony.

395. In addition, and regrettably, when Mr. Masibo was cross-examined, the Government chose not to put to him questions regarding the allegations of corruption even though such allegations lay at the heart of the Government's case against the Claimants. This omission was manifestly unfair both to Mr. Masibo and the Claimants.

[402] See Tr. Day 4, p. 43.

396. Even more egregiously, despite having failed to give Mr. Masibo an opportunity to defend himself in the witness box, the Government persisted in its Closing Submissions to seek a finding that Mr. Masibo had acted corruptly on the basis of "red flags" of circumstantial evidence. Mr. Masibo ought to have been given the opportunity in cross-examination to explain away, if he could, the allegations made against him.

397. Allegations of corruption were also made against Mr. Jacob Juma, but these too were essentially unsubstantiated apart from some evidence that in the past Mr. Juma had provided relatively modest amounts of money (in the neighbourhood of US $1,500.00) from time to time to Government officials in pursuit of his various projects. None of this evidence in respect of Mr. Juma related to the events at issue in this arbitration.

398. Essentially, the Government's case came down to the proposition that Mr. Masibo had conducted himself in office with such gross inconsistency and inexplicable haste as well as disregard for his statutory duties starting from the time Mr. Jacob Juma became involved with Mrima Hill, that the only rational explanation for his misconduct must be corruption.

399. In the Tribunal's view, it is not appropriate for a Party to make such serious allegations of corruption and then not only fail to support it with credible evidence but to withhold from the opposing party documents which shed significant light on the conduct of the individual (Mr. Masibo) at the center of the bribery allegations.

400. Accordingly, in considering the disposition of costs, notwithstanding that the Government succeeded in its "illegality objection", the Tribunal wishes nevertheless to express its concern at the excessive level of the Government's claimed costs and, more importantly, its disapproval of the Government's conduct of the corruption allegations.

401. In the circumstances, the Tribunal declines to grant the Respondent's claim for costs of US $6,452,858.42 but reduces the award by 50%. In the result, the Government will be entitled to recover costs in the sum of US $3,226,429.21.

402. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US $):

Arbitrators' fees and expenses	
Ian Binnie	136,113.50
Kanaga Dharmananda	106,432.42
Brigitte Stern	161,682.79
ICSID's administrative fees	106,000.00
Direct expenses	134,893.57
Total	**645,122.28**

403. The above costs have been paid out of the advances made by the Parties in equal parts.[403] As a result, each Party's share of the costs of arbitration amounts to US $322,561.14.

404. The Tribunal orders the Claimants to pay the Respondent US $322,561.14 for the expended portion of the Respondent's advances to ICSID.

PART 30 - AWARD

405. The Claimants' claims are dismissed with costs to the Respondent in the sum of US $3,226,429.21 plus US $322,561.14 in ICSID costs.

[403] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[signed]

Kanaga Dharmananda, S.C.
Arbitrator

Date: 20 September 2018

Brigitte Stern
Arbitrator

Date:

Ian Binnie, C.C., Q.C.
President of the Tribunal

Date:

[signed]

Kanaga Dharmananda, S.C.
Arbitrator

Date:

Brigitte Stern
Arbitrator

Date: 21 September 2018

[signed]

Ian Binnie, C.C., Q.C.
President of the Tribunal

Date: 24 Sept 2018