ICSID Case No. ARB/15/29

BETWEEN

Cortec Mining Kenya Limited

Cortec (Pty) Ltd

Stirling Capital Limited

CLAIMANTS/APPLICANTS

AND

The Republic of Kenya

RESPONDENT

Application for Annulment

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15 February 2019

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Pursuant to Article 52 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**) and Rule 50 of the Rules of Procedure for Arbitration Proceedings (**ICSID Arbitration Rules**), Cortec Mining Kenya Limited (**CMK**), Cortec (Pty) Ltd and Stirling Capital Limited (together, the **Claimants** or the **Applicants**) hereby submit this Application for Annulment (**Application**) of the Award rendered on 22 October 2018 (the **Award**) in the matter of *Cortec Mining Kenya Limited, Cortec (Pty) Ltd and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29.[1]

2. The Applicants seek partial annulment of the Award on two grounds: (i) that the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52(1)(b))' and (ii) that the Tribunal failed to state the reasons on which the Award was based (ICSID Convention, Article 52(1)(e)).

II. BACKGROUND

3. The background to this dispute is summarised (albeit inaccurately) in the Award.[2] In 2006, the Claimants invested in a niobium and rare earths exploration project located at Mrima Hill (the **Mrima Hill Project** or the **Project**) in the Republic of Kenya (**Kenya** or the **State**).

4. The Claimants' principal investments in Kenya comprised (i) Special Prospecting Licence No. 256 (**SPL 256**), granted on 4 April 2008 and pursuant to which the Claimants invested millions of dollars on exploration work and successfully prospected and de-risked the site, and (ii) Special Mining Licence No. 351 (**SML 351**), granted on

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[1] The references in this Application to Exhibits A- and ALA- respectively refer to documents and legal authorities submitted for the first time by the Claimants (now the Applicants) in these annulment proceedings.

[2] In material parts, the Award disregards the facts and the evidence entirely. The Award rarely cites the underlying evidence and submissions. Despite posing more than 80 questions and sub-questions to the parties for closing submissions and post-Hearing briefs, the Award does not refer to or cite the parties' closing submissions or the parties' post-Hearing hearing submissions (the only exception is the "*Outline of Claimants' Position*" in paragraph 231, which is a copy and paste of the Executive Summary of the Claimants' post-Hearing brief). Further, despite there being four full days of cross-examination at the Hearing, there are a mere five references to the oral testimony of the parties' factual witnesses in the entire Award (fns. 58, 145, 146, 164 and 185). The Award is further embarrassed by a swathe of typographical errors and unresolved internal notes.

7 March 2013 after an extensive application process, which gave the Claimants the right to exploit the resources discovered at Mrima Hill for a period of 21 years. The Claimants' dispute with Kenya arose out of the 5 August 2013 revocation of SML 351, which had the effect of destroying the Claimants' investments in Kenya.

5. In 2015, after unsuccessfully pursuing local remedies, the Claimants exercised their right to refer their investment dispute with Kenya to ICSID arbitration under 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 **UK-Kenya BIT** or the **BIT**).

6. In accordance with the ICSID Convention, a tribunal was constituted, comprising Hon. Ian Binnie, C.C., Q.C. (President), Mr. Kanaga Dharmananda, S.C. (appointed by the Claimants) and Professor Brigitte Stern (appointed by the State). At the Claimants' suggestion, the Tribunal ordered bifurcation, such that the issues of jurisdiction, admissibility and liability were all addressed in the first phase, with a quantum phase to follow. After multiple rounds of written submissions, the issues of jurisdiction, admissibility and liability were heard over two weeks in January 2018, in Dubai.

7. This application is for the annulment of the Award that the Tribunal rendered in October 2018, in which the Tribunal dismissed the Claimants' claims in full, on the basis that it lacked jurisdiction *ratione materiae* under the BIT – fundamentally, because SML 351 was not an investment "*in accordance with Kenyan law*".

8. Before setting out the grounds on which they request annulment of the Award, the Applicants wish to make one thing clear: this is not a case where the investor was found to have breached substantive environmental obligations or to have caused harm to the natural environment. Rather, this is a case where the alleged breach was purely technical in nature, arising out of a *resequencing* of one particular aspect of the licencing process by the Commissioner of Mines. The Tribunal found that this resequencing by the Commissioner of Mines – a senior State official – was contrary to Kenyan environmental regulations and threw out the Claimants' case in its entirety. This result is not only tainted by annullable errors, but is remarkable for its lack of accuracy, proportionality and fairness.

III. OVERVIEW OF ANNULMENT GROUNDS

9. In the Award, the Tribunal ruled that SML 351 was void and declined jurisdiction on the basis that the Claimants "*failed to establish any compensable investment that was lawfully issued in accordance with the laws of Kenya*".[3] However, in dismissing all of the Claimants' claims on this basis, the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award was based.

A. Manifest excess of powers: Failure to decide the Claimants' claims concerning SPL 256

10. The Claimants were in the mining exploration business. The licence under which they conducted exploration work at Mrima Hill between 2006 and 2012 was SPL 256 (SML 351 was not granted until 2013). Although in the arbitration Kenya initially challenged the validity of SPL 256, by the time of the hearing, Kenya accepted that SPL 256 was a valid licence.[4] Kenya also did not dispute that the Claimants spent millions of dollars doing exploration and pre-development work under SPL 256 during the five-year period in which it was the only licence they had over Mrima Hill.

11. From the outset, the Claimants made specific claims in relation to SPL 256, namely that the legitimate expectations generated by SPL 256 had been frustrated (thereby violating the Fair and Equitable Treatment (**FET**) standard of the BIT) and that, at the very least, they were entitled to restitution of these sunk costs as *damnum emergens*.[5] In particular, in their Memorial of Claim, the Claimants emphasised the expectation that, "*as stated in Clause 22* [of SPL 256], *CMK would '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* [...]'".[6]

12. In Part 27 of the Award ("*Jurisdictional issues on which the Claimants fail*"), the first sentence reads "[t]*he issue is whether SPL 256 or SML 351 or associated 'intellectual property' qualify as protected investments, as having been made in accordance with the*

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[3] Award, para. 9.

[4] Award, para. 75.

[5] Additionally, the Claimants submitted that they were entitled to damages for loss of chance (see Claimants' Memorial of Claim, paras. 211, 213-217, 242-243, **Exhibit A-2**).

[6] Claimants' Memorial of Claim, para. 182(d) (**Exhibit A-2**).

Kenyan laws". However, while the Award contains the Tribunal's finding that SML 351 was void *ab initio* and therefore not an instrument that qualified for protection under the BIT, it does not contain any finding that the Tribunal lacked jurisdiction over SPL 256. There are only three places in the Award where the Tribunal makes findings *vis-à-vis* SPL 256:

(a) paragraph 10: "*SPL 256, expired (after two renewals) according to its own terms on 1 December 2014, without Government intervention*";

(b) paragraph 16: "*At that time* [the Claimants' Request for Arbitration was received], *as stated, SPL 256 had already expired in accordance with its own terms when the second renewal lapsed on 1 December 2014*"; and

(c) paragraph 328: "[SPL 256] *was not itself a licence to make money* [it] *was a licence to spend money*".

13. None of these paragraphs purports to be, nor can be read as being, a ruling that the Tribunal lacked jurisdiction over SPL 256. SPL 256 was valid when the dispute arose in August 2013 and, as a matter of international law, that is enough for subject matter jurisdiction in the circumstances of this case (and there is nothing in the Award to say otherwise). Regarding paragraphs 10 and 16 of the Award, the fact that the Claimants did not seek to renew SPL 256 after their dispute with the State arose in August 2013 – when they were facing hostile government intervention and, in the Tribunal's words, their "*mining activities and aspirations were effectively terminated*"[7] – cannot form a basis for declining jurisdiction *ratione materiae*. Equally, neither paragraph 10 nor paragraph 16 can be taken as a ruling that the Tribunal lacked jurisdiction *ratione temporis* over SPL 256 – elsewhere in the Award, the Tribunal states that it "*agrees with the Claimants that if there existed qualified investments, ratione temporis would not be a problem*".[8] As to the Tribunal's remark in paragraph 328, this statement cannot amount to a finding that jurisdiction *ratione materiae* was lacking either, because whether a particular type of licence "*make*[s] *money*" is irrelevant to its status as an investment protected by the BIT, which expressly protects "*business concessions* [...] *to search for* [...] *natural resources*". SPL 256 was exactly that: a business concession

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7 Award, para. 244.

8 Award, para. 286.

to search for natural resources. It was therefore an investment over which the Tribunal clearly had jurisdiction under the BIT (and the ICSID Convention).

14. The Award therefore does not contain any finding that the Tribunal lacked jurisdiction over SPL 256. Yet, as the Award clearly shows, the Tribunal still proceeded to dismiss the Claimants' claims in full, including their claims concerning SPL 256.[9] In its seminal decision in *Vivendi v Argentina*,[10] the *ad hoc* Committee recognised that an ICSID tribunal commits a manifest excess of powers under Article 52(1)(b) of the ICSID Convention where it fails to exercise jurisdiction it possesses. That is what happened in the case at hand: in failing to decide the Claimants' claims concerning SPL 256, the Tribunal failed to exercise a jurisdiction that it *did not lack*. This is clear and obvious in the Award. The Applicants have a right under the BIT and the ICSID Convention to have their claims in relation to SPL 256 decided and, by issuing an Award that is *infra petita* with respect to these claims, the Tribunal denied the Applicants this right.

B. Manifest excess of powers: Failure to apply the definition of "investment" in the BIT (SPL 256)

15. If (*arguendo*) the Tribunal could be said to have somehow implicitly declined jurisdiction *ratione materiae* over SPL 256 by its statement in the Award that the "*special prospecting licence was not itself a licence to make money* [it] *was a licence to spend money*",[11] then the Tribunal committed a manifest excess of powers by failing to apply the definition of "*investment*" in the BIT. As noted above, Article 1(a)(v) of the BIT provides that "*investment*" includes "*business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources*". SPL 256 was a business concession to search for natural resources and was therefore an "*investment*" protected by the BIT, regardless of whether it would "*make money*".[12] In circumstances where the State did not contest that SPL 256 was lawfully

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9 Award, para. 405.

10 *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux/Vivendi Universal S.A v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002, para. 111, (**Exhibit ALA-1**).

11 Award, para. 328.

12 With respect to the value of SPL 256 as an investment, the Applicants note that they submitted strong evidence of the market value of SPL 256. As set out in paragraph 109 of the Award, in September 2012, PAW spent approximately CAN$35 million for a 70% stake in CMK, which put the value of CMK at approximately US$38 million at that time. This was before CMK had any right to mine (i.e. CMK's only "investment" was

granted, and SPL 256 predated (and was, on the Tribunal's own reasoning, not linked to) the licence that was held to be unlawful (SML 351), the Tribunal had no basis under the BIT to decline jurisdiction over SPL 256 – if, in fact, that is what it did in the Award.

16. The Applicants refer to the decision of the *ad hoc* Committee in *Malaysian Historical Salvors v Malaysia*, where it was held that:

> "*In the light of this history of the preparation of the ICSID Convention and of the foregoing analysis of the Report of the Executive Directors in adopting it, the Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the* [UK-Malaysia BIT] *to be a gross error that gave rise to a manifest failure to exercise jurisdiction*".[13]

17. The same gross error is on the face of the Award in the case at hand. The Tribunal clearly and obviously failed to apply the "*business concessions*" limb of the BIT's definition of "*investment*". In a case concerning natural resources exploration, this failure is inexplicable. While the Tribunal clearly did not think that a "*piece of paper*"[14] deserves protection, the BIT says that this type of piece of paper does. Had it acted in accordance with its powers, the Tribunal should have held that the actions of Commissioner Masibo were a *novus actus* by the State and that SPL 256 did not simply lapse with government intervention.

C. Manifest excess of powers: Failure to apply the definition of "investment" in the BIT (SML 351)

18. The Tribunal found that SML 351 was issued by the Commissioner of Mines before CMK was granted an Environmental Impact Assessment (**EIA**) licence under the relevant regulations and that, as a result:

SPL 256 and IP). This evidence was submitted in paragraph 246 of the Claimants' Memorial of Claim (prior to the bifurcation of quantum) and was uncontested. Indeed, the Tribunal found that the project could have generated value: "*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*" (Award, para. 300(c)).

[13] *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, para. 74 (**Exhibit ALA-2**).

[14] Award, paras. 333(b) and 343.

> "*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 of an investment that qualified for treaty protection. Accordingly, ICSID and the Tribunal lack jurisdiction and the claim is dismissed.*"[15]

19. It was common ground in the arbitration that the BIT does not contain any "*in accordance with law*" clause (in its definition of "*investment*" or elsewhere). Without such a clause, there was nothing in the BIT that would make non-conformity with Kenyan law a jurisdictional issue. Yet the Tribunal declined jurisdiction on the basis that the Claimants "*failed to establish any compensable investment that was lawfully issued in accordance with the laws of Kenya*".[16] The Tribunal therefore did not apply the definition of "*investment*" in the BIT. Nor did the Tribunal apply the Vienna Convention on the Law of Treaties,[17] which governs the interpretation of the BIT.[18] Indeed, its reasons for finding that the BIT contains an "*Implicit Limitation to Lawful Investments*" are largely incoherent.[19] The Tribunal simply asserts that "[i]*t 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*"[20] and that "[t]*he formulation of this requirement can be found in the summary given in Phoenix*".[21] This radical (and ultimately dispositive) conclusion appears to be based entirely on the *obiter dicta* of the tribunal in *Phoenix Action v Czech Republic* (which was chaired by the State's party-

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15 Award, para. 11.

16 Award, para. 9.

17 Article 31(1) of the Vienna Convention provides that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*" **(Exhibit ALA-11)**.

18 The Vienna Convention is referred to just once in the entire Award, where the Claimants' arguments in response to the State's "*origin of capital*" objection are summarised (see Award, para. 294).

19 The section of the Award where the Tribunal sets out its reasons for adopting a "*Purposive Interpretation*" of the BIT addresses the purposive interpretation of the Kenyan *Mining Act* (see Award, paras. 310-311). This makes no sense: whether the BIT can be interpreted to contain an "*Implicit Limitation to Lawful Investments*"' plainly has *nothing* to do with whether the Kenyan *Mining Act* can be given a purposive interpretation. Indeed, reading this part of the Award, it very much looks like whoever wrote it had only a superficial understanding of the case, and simply mistook the issue of whether the Kenyan *Mining Act* could be read "*purposively*" for the issue of whether the BIT could be subjected to a "*Purposive Interpretation*", with the result that paragraphs 310-311 of the Award are a complete *non sequitur*.

20 Award, para. 260.

21 Award, para. 261.

appointed arbitrator in the case at hand and which identified a so-called "*implicit*" condition of "*conformity of the establishment of the investment with the national laws*"). As the Claimants submitted in the proceedings, eminent scholars have questioned the adequacy of the *Phoenix Action* tribunal's own interpretive analysis.[22]

20. Arbitrators can have views on what the law should be, but they are bound to apply the law *as it is* (including the BIT as written), and the arbitrators in this case manifestly failed to do so. As held in *Malaysian Historical Salvors v Malaysia*,[23] where an ICSID tribunal fails to apply the applicable BIT, the tribunal commits a manifest excess of powers and its award is subject to annulment under Article 52(1)(b) of the ICSID Convention.[24] That is obviously what occurred in this case and the same result should follow.

21. The Award represents the first time in the history of international investment law that a tribunal has implied a legality requirement into a BIT (without *travaux préparatoires* to show that such a requirement was intended by the signatory States[25]) and then applied

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[22] See Claimants' Rejoinder on Preliminary Objections, para. 38 (**Exhibit A-8**), citing Professor Douglas QC: "[i]*f* [a party argues that] *international law, independent of any policies underlying national laws, nonetheless compels an international tribunal to decline its jurisdiction in the face of a successful plea of illegality, then the burden of persuasion lies upon those advocating this position to demonstrate why that is the case and how it is consistent with the principles of interpretation in Article 31 and 32 of the Vienna Convention. The justification provided in* Phoenix v Czech Republic, *for instance, does not appear to be adequate* [...]". See Professor Z. Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) ICSID Review 29.1, p.171 (**Exhibit ALA-3**).

[23] *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, para. 74 (**Exhibit ALA-2**).

[24] As observed by Professor Schreuer, "[t]*here is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal*". See Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2013), p. 955 (**Exhibit ALA-4**).

[25] As was the case in *Inceysa Vallisoletana S.L. v Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006 (**Exhibit ALA-5**). Kenya sought to rely on *Inceysa* in the case at hand. As the Claimants explained in their Counter-Memorial on Preliminary Objections, "*the State's reliance on this case is flawed. While the El Salvador–Spain BIT did not contain a legality requirement in the definition of 'investment', other provisions of the treaty contained requirements that only investments made in accordance with host State law were protected under the BIT. For example, Article 3 of the El Salvador–Spain BIT provides that '[e]ach Contracting Party shall protect in its territory the investments made, in accordance with its legislation'. Article 2 also provides that the El Salvador–Spain BIT applies to pre-existing investments made 'in accordance with the laws of the other Contracting Party'. Further, the travaux préparatoires of the El Salvador–Spain BIT revealed that the contracting parties had intended for the BIT to apply only to investments which were made in accordance with the laws of the host State. Specifically, the travaux préparatoires revealed that the contracting parties understood that the legality requirements in other provisions of the BIT were sufficient to ensure that only lawful investments would be protected and that a legality requirement in the definition of 'investment' would be superfluous. Accordingly, the existence of the abovementioned legality requirements in the El Salvador–Spain BIT combined with the travaux préparatoires gave the Inceysa tribunal a basis for holding that the claimant's violation of the principle of good faith*

that "*Implicit Limitation*"[26] to decline jurisdiction. In this regard, the Award is truly a "black swan" – with potentially severe consequences for many investors.

D. Failure to state reasons: Ignorance of evidence that the Ministry of Forestry and Wildlife consented to the issuance of SML 351

22. As the Award shows, one of the key issues in the case was whether the Ministry of Forestry and Wildlife consented to the Claimants' project before the issuance of SML 351. In its Award, the Tribunal states that it is "*incorrect*" that the Ministry of Forestry and Wildlife consented to the project.[27] The Award also records the Tribunal's conclusion that there is not "*any persuasive evidence that KFS* [...] *ever consented to the issuance of a mining licence in respect of the Mrima Hill forestry and nature reserve*".[28] However, in reaching each of these conclusions, the Tribunal entirely ignored a key piece of evidence, the letter from the Permanent Secretary of the Ministry of Forestry and Wildlife to CMK stating "*it is not a condition to degazette any protected area for resource exploitation*"[29] (the **Wa-Mwachai Letter**). Significantly, this letter was copied to the Kenya Forest Service (**KFS**) (which did not object[30]).

23. The Wa-Mwachai Letter went right to the heart of the environmental law questions in the case (which were dispositive[31]). It was discussed at length during the hearing and was the subject of specific lines of questioning during cross-examination. The significance of the Wa-Mwachai Letter is proven by the fact that the Tribunal specifically directed the parties to make post-hearing submissions on its legal effect.[32]

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deprived the tribunal of jurisdiction [...]" (citations omitted). See Claimants' Counter-Memorial on Preliminary Objections, para. 38 (**Exhibit A-4**).

26 Award, p. 114.

27 The Tribunal deems as "*incorrect*" a statement in a letter from the the Permanent Secretary of the Ministry of Environment and Mineral Resources to Professor Wahungu that "*the Lead Agencies including the Ministry of Forestry and Wildlife* [...] *have all consented to the project*" (Award, para. 171-172).

28 Award, para. 178.

29 Letter from Wa-Mwachai, Permanent Secretary of the Ministry of Forestry and Wildlife, to CMK dated 30 August 2012 (**Exhibit A-15**).

30 See Claimants' Post-Hearing Brief, para. 18 (**Exhibit A-11**).

31 The Tribunal's decision that the Claimants be denied BIT protection is based on its conclusion that "*the Claimants' fail*[ed] *to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve*" (Award, para. 365).

32 The Tribunal's 9 February 2018 letter to the parties (**Exhibit A-10**) on post-Hearing submissions asked: "[c]*an it be said that the Permanent Secretary for Forestry was directing his comments to the forestry reserve, the nature reserve and the national monument designation, or just the* ***forestry*** *reserve?*" (Question 14, emphasis

Despite its obvious significance (and the emphasis placed on it by the parties and the Tribunal), the Award does not mention this critical piece of evidence at all – not even in its footnotes.

24. Additionally, while the Tribunal's ignorance of evidence is most striking in relation to the Wa-Mwachai Letter, the Tribunal also ignored other evidence of the Ministry of Forestry and Wildlife's consent. At the Hearing, the Tribunal specifically requested that the parties provide "*pinpoint references to the evidence of 'approvals' or 'consents' by word, letter or deed*" from the Ministry of Forestry and Wildlife[33]. In response, the Claimants provided citations to 25 exhibits and 11 items of witness evidence, including the Wa-Mwachai Letter.[34] The Award does not mention or cite a single piece of this evidence in reaching the conclusions referred to above.[35]

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original). The Claimants responded that "*there can be no doubt that* [the Wa-Mwachai Letter] *was referring at the very least to the designations for which the Ministry of Forestry and Wildlife is responsible: the forest reserve and the nature reserve*" (Claimants Post-Hearing Brief, para. 21, **Exhibit A-11**).

[33] See the Tribunal's letter to the parties dated 20 January 2018, Question 3(2)(d) (**Exhibit A-9**).

[34] See Claimants' Post-Hearing Brief, paragraph 18 (and the relevant footnotes) (**Exhibit A-11**), which provides:

> "**The forest reserve and the nature reserve:** on 14 November 2007, Commissioner Biwott re-opened the area covered by SPL 256 to prospecting and mining; on 24 November 2008, NEMA sent the Claimants a letter regarding the EIA process for mining in the "*Mrima Hill Nature Reserve*" (this NEMA letter summarises the steps for an EIA and makes no mention of degazettement); on 25 January 2010, PS Wa-Mwachai issued CMK a consent to prospect within Mrima Hill forest; between 2010 and 2012 the KFS accepted annual rent from CMK; on 20 May 2010, the KFS approved CMK's application to open-up old tracks within Mrima forest; in November 2010, PS Wa-Mwachai attended a CMK information seminar and addressed stakeholders at Mrima Hill; on 5 April 2011, the KFS approved CMK opening up further existing roads; on 16 November 2011, NEMA approved the EIA Terms of Reference, which do not contemplate degazettement; on 19 December 2011, the KFS approved CMK opening up new roads; on 16 January 2012, PS Wa-Mwachai approved CMK's proposal to set up a Community Forest Association; on 16 June 2012, a KFS representative attended a public hearing on Claimants' EIA and acknowledged that "*much of the gazetted forest has been lost to farming over the years and that this is still ongoing with new encroachment and illegal felling of hardwood trees in the forest*"; on 30 August 2012, PS Wa-Mwachai sent a letter to CMK (copied to the KFS) stating that "*it is not a condition to degazette any protected area for resource exploitation*" (**Wa-Mwachai Letter**); on 24 October 2012, NEMA representatives attended a CMK technical presentation at which the Wa-Mwachai Letter was discussed, as was CMK's forest rehabilitation programme; in December 2012, the Chief Compliance Officer of the KFS informed the Claimants that the KFS had no objection to them mining on Mrima Hill and that, when the DMG issued CMK a mining licence, that licence will be referred to KFS for KFS to grant permission to mine; on 11 January 2013, NEMA representatives attended a meeting with the Claimants during which Professor Wahungu accepted the Wa-Mwachai Letter and agreed that Mrima Hill did not need to be degazetted; on 22 March 2013, SML 351 was notified in the Kenya Gazette without objection; on 8 July 2013, Professor Langwen sent CMK two letters (copied to the Director of the KFS) approving the Claimants' EIAs for the mine and processing plant (**Langwen Approvals**) and there was no objection from the KFS."

[35] Of the 25 pieces of documentary evidence cited by the Claimants as support for the Ministry of Forestry and Wildlife having consented to the Project, only five are referred to in the Award, and none in the context of the Ministry of Forestry and Wildlife's and the KFS's consent.

25. As stated by the *ad hoc* committee in *TECO v Guatemala*:

> "*While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion*".[36]

26. The *TECO* committee concluded that the tribunal "*ignored the existence in the record of evidence which at least appeared to be relevant to its analysis*" which resulted in the tribunal's reasoning "*being difficult to understand*"[37] and therefore annulled the part of Award dealing with the claim in question.

27. As was the case in *TECO*, the Award in the matter at hand does not satisfy the reasoning requirements of Article 52(1)(e) of the ICSID Convention and should be annulled.

E. Manifest excess of powers: Failure to apply the law of State responsibility

28. In ruling that SML 351 was void *ab initio*, and therefore that jurisdiction *ratione materiae* was lacking entirely, the Tribunal failed to apply the law of State responsibility. In their submissions, the Claimants argued that any illegality associated with the grant of SML 351 was attributable to the State, even if the grant of SML 351 by Commissioner Masibo was *ultra vires*.[38] This flows from Article 7 (excess of authority or contravention of instructions) of the International Law Commission Draft

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[36] *TECO v Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016, para. 131 (**Exhibit ALA-6**).

[37] *TECO v Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016, para. 138, see also paras. 135-136 (**Exhibit ALA-6**).

[38] See Claimants' Rejoinder on Preliminary Objections, para. 136(e) (**Exhibit A-8**) and *Kim* Annex, nos. 3 and 4, columns "*Compliance / noncompliance by the Claimants*" and "*Conclusion*". The Award outlines the Claimants' position that "*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*" (para. 231(a)) and that "*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*" (Award, fn. 328).

Articles on Responsibility of States for Internationally Wrongful Acts,[39] which provides:

> "*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*"

29. The Claimants expressly relied upon ILC Article 7 in written submissions[40].

30. In its Award, the Tribunal makes the positive finding that the violation of Kenyan law that resulted in a lack of jurisdiction (i.e. the issuance of SML 351 before all conditions precedent had been satisfied) was a violation by a senior officer of the Kenyan Government, Commissioner Masibo.[41] However, the Tribunal then neglects to apply the customary international law of State responsibility to the facts, and instead casts all responsibility for the Commissioner's violation of Kenyan law to the Claimants. The failure to apply international law to the issuance of SML 351 is manifest in paragraph 333(b) of the Award, which states that "*SML 351 is a piece of paper whose value, if*

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[39] International Law Commission, *'Draft Articles on Responsibility of States for Internationally Wrongful Acts'*, 2008 (**Exhibit ALA-7**).

[40] See Footnote 220 to the Claimants' Post-Hearing Brief (**Exhibit A-11**):

> "Pursuant to Article 7 of the ILC Articles on International Responsibility (**Exhibit CL-21**), representations made by a person empowered to exercise governmental authority will be attributable to the State, even if that person exceeds his or her authority or contravenes instructions. As set out in the commentary to Article 7 (pp. 45-47): 'The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question. Any other rule would contradict the basic principle stated in article 3 [i.e. that the characterisation of an act of a State as internationally wrongful is governed by international law], since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.'"

[41] See Award, para. 385: "*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." The Award also finds that Commissioner Masibo "*did what he was told by his bureaucratic and political masters*" (para. 375(a)) and "*issued SML 351 under pressure from the politicians and cabinet officials and out of fear of ICSID litigation*" (para. 386). Indeed, it was undisputed that Commissioner Masibo issued SML 351 with the support of a number of senior Government officials, including Ali Mohammed (Permanent Secretary of the Ministry of Environment and Mineral Resources), Ali Mwakwere (Minister of Environment and Natural Resources) and CS Kimemia (Head of the Public Service and Secretary to the Cabinet). See Award, paras. 161-166; see also Claimants' Post-Hearing Brief, para. 13 (**Exhibit A-11**).

any, lies exclusively in the consequences attached to it by Kenyan law".[42] The Tribunal's failure to apply international law constitutes a further manifest excess of powers for the purposes of Article 52(1)(b) of the ICSID Convention.

31. In this regard, the Applicants note the annulment decision in *Tulip v Turkey*, where the applicants requested an annulment on the basis that the tribunal failed to apply the ILC Articles (i.e. manifest excess of power) or failed to state reasons for why certain conduct was not attributable to the State (i.e. failure to state reasons). The *ad hoc* committee dismissed the application in *Tulip* as it found that the tribunal had expressly discussed whether the relevant conduct was attributable to the State and had considered the commentary to the ILC Articles in its award.[43] In the Award at hand, we have neither.

F. Failure to state reasons: Absent or incoherent reasons for dismissing the Claimants' estoppel claim

32. The Tribunal failed to state the reasons for its decision that the Claimants' could not invoke estoppel against the State's myriad allegations of illegality. The record shows that estoppel was a major part of the Claimants' case – hardly surprising, given that the Claimants operated at Mrima Hill in full sight of the Kenyan authorities, often with their active cooperation, for six years (and the State's "*illegality*" objections were only raised after the Claimants challenged the revocation of SML 351). The Claimants' estoppel arguments addressed not just the validity of SML 351, but a wide range of other matters, including the status of Mrima Hill and the consent of the various Government agencies which had jurisdiction over the area. Indeed, the Tribunal's post-

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[42] The Award suggests that the Tribunal substituted its own political views for international law. The Award states, "[t]*n 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*" (Award, para. 11, emphasis added). The Tribunal offers no legal authority for this manifesto. Indeed, this is an argument that the Tribunal came up with *sua sponte* – the State never argued that a change in Government allowed a State to avoid its obligations under international law. Indeed, such a proposition has the potential to undermine the clarity and security of international relations (which is why the rule set out in ILC Article 7 was developed in the first place – see ILC Article 7 Commentary, para. 3 (**Exhibit ALA-7**).

[43] *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015, paras. 211-221 (**Exhibit ALA-8**).

hearing brief questions included three questions related to estoppel: Questions 2,[44] 29[45] and 30[46]. Yet, with a disdain that is characteristic of the Award, the Tribunal dismissed the Claimants' estoppel arguments in just two lines: "*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*".[47]

33. Even if (*arguendo*) these could be said to constitute reasons with respect to the estoppel arguments on SML 351, they cannot constitute reasons with respect to the estoppel arguments that the Claimants made concerning many other aspects of the Government's conduct.

G. Failure to state reasons: Incoherent and contradictory reasons for the alternative ruling on the merits

34. Finally, the Tribunal failed to state reasons for its decision that "[e]*ven if not void* ab initio, *the Tribunal would nevertheless deny protection to SML 351 on the merits*".

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[44] Letter from the Tribunal to the parties dated 9 February 2018 (**Exhibit A-10**), Question 2: "*As to the availability of estoppel at the jurisdictional stage, the Tribunal understands the Claimants to be taking the position at pp. 53 and following, that once they have a license "referable to a written law", [as SML 351 is said to be "referable" to s. 17 of the Mining Act], the onus switches to the Respondent to show cause why the license was invalid (or not a protected investment). At pp. 89-90, the Respondent disputes that the phrase "conferred by law" should be interpreted as "referable to law". So to hold would deny Article 1(a)(v), its effect utile. As a consequence of this shifting of onus to the Respondent (according to the Claimant's argument), the Respondent then becomes the moving party and the Claimants are entitled to rely on principles of estoppel as a "shield" based on the conduct and representations of government officials. The parties are invited to make submissions as to the applicability (or not) of onus-shifting and estoppel at the jurisdictional stage.*"

[45] Letter from the Tribunal to the parties dated 9 February 2018 (**Exhibit A-10**), Question 29: "*To defeat the Claimants' estoppel argument, the Respondent relies on the "mandatory" requirements of Kenyan law, and its administrative procedures set out in the roadmap and the existence of a regulator who wrote back and said "sorry, your application will expire in 6 months" (p. 115, l. 24). The Respondent says in these circumstances, there could be no reasonable reliance on a few statements and documents of officials. Discuss*". The State did not specifically respond to Question 29 (State's Post-Hearing Brief, para. 105, **Exhibit A-13**).

[46] Letter from the Tribunal to the parties dated 9 February 2018 (**Exhibit A-10**), Question 30: "*Most of the Claimants' 'reliance' evidence goes to SPL 256 rather than SML 351. At p. 87, and p. 115, the Respondent argues that between March 2013 and August 2013 the factual basis is insufficient to ground an estoppel. The Claimants are invited to pinpoint any evidence of reliance between 6 March and 5 August 2013.*" The State did not respond to Question 30 and instead reserved the right to answer any new argument (State's Post-Hearing Brief, para. 106, **Exhibit A-13**).

[47] Award, para. 222. This paragraph is contained within a disjointed section of the Award in a subsection captioned "*(i) The Tribunal's Ruling*" which deals with the legality of SML 351, even though the main title of this section is "*Part 22 – The Kenyan Court Proceedings*".

35. As noted above, the Tribunal dismissed the Claimants' claims on the basis that it lacked jurisdiction *ratione materiae*. However, after setting out its conclusions on jurisdiction, the Tribunal (in Part 28) includes what it presents as an alternative ("*even if*") ruling on the merits of the case. This part of the Award is exclusively concerned with the Commissioner's discretion and whether his grant of SML 351 was a valid exercise of regulatory power.[48] The conclusion of that section of the Award (paragraph 387) reads as follows:

> "*the Tribunal concludes on the merits that the Government has demonstrated that SML 351 is not in any event a protected investment*".[49]

36. This is incoherent and contradictory: whether an asset, right or interest (in this case SML 351) qualifies as a "*protected investment*" is plainly a question of jurisdiction (*ratione materiae*), not a question "*on the merits*". The premise and the conclusion in paragraph 387 are, in the words of the *ad hoc* committee in *Continental Casualty v Argentina*, "*incapable of standing together on any reasonable reading of the decision*".[50] Paragraph 287 is also "*frivolous*"[51] because it articulates an unintelligible conclusion.

H. Conclusion

37. On these grounds, the Applicants seek partial annulment of the Award, such that they can have their claims heard by a new tribunal comprised of persons who will respect the limits of their powers, apply the BIT and the governing law, and state reasons for their decision. Accordingly, the Applicants seek annulment of the following parts and paragraphs of the Award:

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48 Award, paras. 367-386.

49 Award, para. 387.

50 *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103 (**Exhibit ALA-9**).

51 *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), Decision of the Ad hoc Annulment Committee, 22 December 1989, para. 5.09 (**Exhibit ALA-10**).

(a) paragraphs 172 and 178 (in whole or in part), wherein the Tribunal ignored evidence that the Ministry of Forestry and Wildlife and the KFS consented to the project;

(b) paragraphs 260-262 (inclusive), wherein the Tribunal manifestly exceeds its powers by applying an '*in accordance with* [Kenyan] *law*' requirement that is not contained in the BIT or the wider governing law;

(c) Part 27 ("*Jurisdictional issues on which the Claimants fail*") in its entirety;

(d) Part 28 ("*Even if not void* ab initio*, the Tribunal would nevertheless deny protection to SML 351 on the merits*") in its entirety;

(e) Part 29 ("*Costs*") in its entirety; and

(f) Part 30 ("*Award*") in its entirety.

IV. REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

38. In accordance with Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules, the Applicants request a provisional stay of enforcement of the Award. The Applicants respectfully request that, in accordance with Rule 54(2) of the ICSID Arbitration Rules, the Secretary-General inform Kenya that the Award has been provisionally stayed.

39. In addition, as will be explained by the Applicants at the appropriate stage of the proceedings, there are reasons justifying an order to continue the provisional stay until the Committee has decided this Application for annulment.

V. REQUEST FOR RELIEF

40. The Applicants respectfully request that the Committee:

(a) STAY the enforcement of the Award pending the Committee's decision on this Application;

(b) ANNUL those parts of the Award listed at paragraph 37 above; and

(c) ORDER Kenya to pay all costs of these annulment proceedings, including the costs of the Applicants' legal representation, with interest.

In the meantime, the Applicants reserve their rights to add to, reformulate and expand upon the grounds above and file further authorities in due course.

Respectfully submitted on behalf of the Applicants on 15 February 2019.

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Dr Romesh Weeramantry
Peter Harris
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Index of Applicants' Factual Exhibits

Document	Description	Date
A-1	Claimants' Request for Arbitration	18 June 2015
A-2	Claimants' Memorial of Claim	5 May 2016
A-3	State's Counter Memorial on the Merits and Memorial on Objections to Jurisdiction	5 October 2016
A-4	Claimants' Counter-Memorial on Preliminary Objections	25 January 2017
A-5	Claimants' Reply on the Merits	31 July 2017
A-6	State's Rejoinder on the Merits	20 October 2017
A-7	State's Reply on Preliminary Objections to Jurisdiction	20 October 2017
A-8	Claimants' Rejoinder on Preliminary Objections	10 November 2017
A-9	Letter from the Tribunal to the parties	20 January 2018
A-10	Letter from the Tribunal to the parties	9 February 2019
A-11	Claimants' Post-Hearing Brief	11 April 2018
A-12	Claimants' Cost Submissions	11 April 2018
A-13	State's Post-Hearing Brief	11 April 2018
A-14	State's Cost Submissions	11 April 2018
A-15	Letter from Wa-Mwachai, Permanent Secretary of the Ministry of Forestry and Wildlife, to CMK dated 30 August 2012 (formerly **Exhibit C-218**)	30 August 2012

Index of Applicants' Legal Authorities

Exhibit	Description
ALA-1	*Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux/Vivendi Universal S.A v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2004
ALA-2	*Malaysian Historical Salvors v Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment of 16 April 2009 (formerly **Exhibit CL-4**)
ALA-3	Professor Z. Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) ICSID Review 29.1 (formerly **Exhibit CL-45**)
ALA-4	Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2013)
ALA-5	*Inceysa Vallisoletana S.L. v Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006
ALA-6	*TECO v Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016
ALA-7	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNGA 56th Sess, Supp 10 (A/56/10) (formerly **Exhibit CL-21**)
ALA-8	*Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015
ALA-9	*Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011
ALA-10	*Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), Decision of the Ad hoc Annulment Committee, 22 December 1989
ALA-11	*Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) (formerly **Exhibit RL-108**)