

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Republic of Kenya

(ICSID Case No. ARB/15/29)

Annulment Proceeding

**PROCEDURAL ORDER NO. 3
On the Organization of the Hearing**

Members of the Committee

Mr. D. Brian King, President of the *ad hoc* Committee
Mr. Cavinder Bull, SC, Member of the *ad hoc* Committee
Ms. Dorothy Udeme Ufot, SAN, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Mr. Paul Jean Le Cannu

12 August 2020

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I. PROCEDURAL BACKGROUND

1. In Procedural Order No. 2, the Committee invited the parties (i) to reach consensus by 24 July 2020 on whether the hearing should take place in person or by virtual means, with a status report to be provided to the Committee on that date, and (ii) to confer with the ICSID Secretariat to schedule and conduct test runs of the Webex system in the interim.¹ The Committee also adjourned the pre-hearing telephone conference scheduled for 18 May 2020 until 31 July 2020, commencing at 8:00 a.m. New York time.²
2. Webex tests took place on 16 July (with the Applicants) and 22 and 23 July 2020 (with the Respondent).
3. On 23 July 2020, the Applicants informed the Committee that the parties had conferred and agreed that the circumstances necessitated that the hearing proceed as a virtual hearing, with the dates being 10-11 and 14-15 September 2020. On 24 July 2020, the Respondent indicated *inter alia* that

the impression should not be conveyed to the Committee that the Respondent has given its unqualified consent to a virtual hearing. Rather, that the Respondent does not dispute that, in the context of the Committee's previous directions and the prevailing covid-19 conditions, the hearing will be a virtual one, but one which will have to build into the modalities of the hearing conditions which satisfy the Respondent that the standards of the hearing equate to an in-person hearing.

4. On 29 July 2020, the Committee through its Secretary circulated the Draft Agenda for the pre-hearing telephone conference between the parties and the Committee (the “**Pre-Hearing Conference**”).

¹ Procedural Order No. 2 (“**PO2**”), ¶ 16.

² PO2, ¶ 18.

5. On 30 July 2020, the Applicants informed the Committee of the parties' request that the Pre-Hearing Conference be postponed to either 7 August or the week of 10 August 2020. On the same date, the Committee through its Secretary confirmed that the Pre-Hearing Conference would take place on Friday, 7 August 2020, starting at 8:00 a.m. New York time.
6. By email dated 6 August 2020, the Applicants informed the Committee that the parties had reached agreement on most, but not all, of the procedural issues identified in the Draft Agenda. The main points of disagreement related to potential pre-hearing and post-hearing written submissions, and to the daily schedule for the Hearing.
7. By email dated 7 August 2020 and transmitted just prior to the commencement of the Pre-Hearing Conference, the Applicants provided the Committee with alternative proposals from themselves and the Respondent with respect to the Hearing schedule.
8. Pursuant to paragraph 17.1 of Procedural Order No. 1, the Pre-Hearing Conference was held by telephone conference on 7 August 2020. Participating were:

Committee:

Mr. D. Brian King, President of the Committee
Mr. Cavinder Bull, SC, Member of the Committee
Ms. Dorothy Udeme Ufot, SAN, Member of the Committee

ICSID Secretariat:

Mr. Paul Jean Le Cannu, Secretary of the Committee

On behalf of the Applicants:

Mr. Audley Sheppard, Clifford Chance LLP
Dr. Romesh Weeramantry, Clifford Chance LLP
Ms. Clementine Packer, Clifford Chance LLP

On behalf of the Respondent:

Ms. Njeri Wachira, Deputy Solicitor General
Mr. Emmanuel Bitta, Deputy Chief State Counsel
Ms. Christine Kusa, Principal State Counsel
Mr. Charles Wamwayi, Senior State Counsel
Ms. Sheila Mammet, Senior State Counsel

Mr. Michael Sullivan QC, One Essex Court
Mr. Henry Forbes Smith, One Essex Court

9. During the Pre-Hearing Conference, the parties and the Committee discussed the Draft Agenda circulated to the parties on 29 July 2020 and the agreements reached by the parties on certain items, as well as their respective positions where no agreement was reached.
10. An audio recording of the Pre-Hearing Conference was made and deposited in the archives of ICSID. It was made available to the Members of the Committee and the parties on 11 August 2020.
11. The Committee has considered the parties' positions and, in the present Order, sets out the procedural rules that the parties have agreed upon and/or the Committee has determined will govern the conduct of the Hearing. The Committee considers that the directions in this Order satisfy the concerns expressed by the Respondent as referred to in paragraph 3 above.

II. ORGANIZATION OF THE HEARING

A. DATE AND FORMAT

12. The Hearing will take place virtually through ICSID's Webex video conference platform. As explained more fully below, the Hearing dates will be 10, 11, 14 and 15 September 2020, with 16 September 2020 in reserve. The details to join the Webex session will be shared by the ICSID Secretariat in advance of the Hearing. The Secretariat will conduct further tests of the Webex system with the parties and the Committee prior to the Hearing, and it will also endeavor to arrange and test a back-up system.

B. ORDER OF PROCEEDINGS AND SCHEDULE

13. To accommodate the multiple time zones of all Hearing participants, the Hearing will start at 7:00 a.m. New York time on each Hearing day. It is expected to conclude by

11:30 a.m. New York time each day. There will be two breaks during each Hearing day of 15 minutes each.³

14. The order of proceedings and structure of the Hearing have not been agreed by the parties. As set out in their respective proposals circulated on 7 August 2020, and described in more detail by counsel during the Pre-Hearing Conference, the disagreement principally relates to the time to be allotted to the argument of three issues: alleged annulment ground 2E; whether some alleged annulment grounds are untimely; and the discretion not to annul/scope of any annulment.
15. In summary, the Applicants submit that those three issues should be argued on Day 4 of the Hearing, along with two other issues (alleged annulment grounds 2A and 2D), with the fifth Hearing day being held in reserve. The Respondent disagrees, stressing that these three issues are important from the State's perspective and deserve more time. It submits that argument of them should commence on Day 4 but continue through Day 5.
16. Having considered the parties' submissions and deliberated, the Committee decides that the Hearing will take place over four days, with the fifth day remaining in reserve to be used for submissions or Committee questions if needed, and otherwise to be used for Committee deliberations. However, to address the Respondent's concern, the Committee considers that the two other issues slated for Day 4 in the Applicants' proposal can be moved to earlier days, leaving the entirety of Day 4 for the three issues noted above. Accordingly, and subject to any contrary agreement of the parties, the arguments on alleged annulment ground 2D will be heard on Day 2, and the arguments on alleged annulment ground 2A will be heard on Day 3.
17. Bearing these instructions in mind, the parties are invited to seek to agree the daily agenda for the Hearing using the form attached as **Annex A**. They are to provide to the

³ PO2, ¶ 15.

Committee an agreed agenda, or failing that their separate proposals, by Friday, 21 August 2020.

18. The Committee may in its discretion adjust the Hearing schedule as needed to facilitate the parties' submissions and to accommodate any technical disruptions.

C. TIME ALLOCATION

19. As agreed by the parties, they will in principle have equal time overall, with a measure of flexibility to ensure fairness in the virtual hearing setting. A chess clock system will be used. The Secretary of the Committee will keep time and will inform the parties how much time each has used at the end of each Hearing day.
20. A total of 4 hours and 30 minutes are reserved for each Hearing day. After deducting time reserved for breaks, and excluding the reserve day (16 September 2020), there will be a total of 16 hours for the Hearing. Applying the equal time principle, the Applicants are allocated 7 hours and 15 minutes, the Respondent is allocated 7 hours and 15 minutes, and 1 hour and 30 minutes are provisionally reserved for the Committee.
21. Each party may use the time available to it at each stage of the Hearing in the manner it desires, subject to the following:
 - (a) *Opening submissions.* Each party shall be allowed a maximum of 2 hours for its overview submissions on the first Hearing day.
 - (b) *Committee Questions.* Time attributable to Committee questions to counsel shall not interrupt the clock for the party otherwise making a presentation, but in the event of any extended Committee questioning (in excess of 5 minutes), the time in excess of 5 minutes will be allocated to reserved Committee time.
 - (c) *Daily Agenda.* The parties shall endeavor to follow the daily agenda referenced in paragraph 17 above.

22. The Committee emphasizes that the parties are expected to use the Hearing days efficiently and avoid unnecessary slippage (*e.g.*, delays in returning from breaks). In the event of excess slippage, the Committee may revisit the length of any sitting day or, in unusual circumstances, the time allocated to the parties, bearing in mind the principles of predictability, equal treatment and a fair opportunity for the parties to be heard.

D. PRE-HEARING SKELETONS

23. The Applicants consider that pre-Hearing skeletons are not necessary in this case. The Respondent agrees, on the assumption that there will be written post-hearing memorials (“PHMs”). The Committee intends to allow PHMs, and therefore, by agreement of the parties, there will be no pre-Hearing skeletons.
24. The Committee envisages transmitting a list of questions to the parties by approximately Friday, 21 August 2020. The parties are encouraged to address these questions during their oral submissions.

E. DOCUMENTS FOR USE AT THE HEARING

1. Electronic Hearing Bundle

25. There shall be a single Electronic Hearing Bundle (PC and Mac compatible), which shall contain all pleadings, exhibits, legal authorities and Committee orders or decisions on file to date, with a consolidated hyperlinked index. It shall not contain any document not previously filed, and shall be organized as follows:

Electronic Hearing Bundle

01. Pleadings

- A. Applicants
- B. Respondent

02. Exhibits

- A. Applicants
- B. Respondent

03. Legal Authorities

- A. Applicants
- B. Respondent

04. Committee Orders and Decisions

26. By agreement of the parties, the Applicants will prepare the Electronic Hearing Bundle in consultation with the Respondent. It shall be uploaded to a designated sub-folder in the BOX file sharing platform by Monday, 17 August 2020. On the same date, the Applicants shall courier USB sticks containing the Electronic Hearing Bundle to each Member of the Committee, the Secretary of the Committee (two USBs), and the Respondent (three USBs).
27. To ensure proper operation of the hyperlinked index, the entire Electronic Hearing Bundle shall be housed within one folder and then uploaded to BOX as a single zip file. Should the size of the zip file make the upload to BOX impossible, the Applicants shall upload the organized Electronic Hearing Bundle to a designated sub-folder on the BOX file sharing platform, in sub-folders using the structure indicated at paragraph 25 above, and including a consolidated (non-hyperlinked) index.
28. No new documentary evidence shall be admitted prior to or at the Hearing, save with the Committee's permission following a reasoned application. The parties are invited to agree on a cut-off date for the submission of any new legal authorities. They shall report to the Committee their agreement, or failing that their separate positions, by Friday, 21 August 2020. No new legal authorities will be admitted after the cut-off date, except with the Committee's permission.

2. Demonstrative Exhibits

29. Demonstrative exhibits (including a Power Point or other slide presentations) shall be used in accordance with paragraph 15.6 of Procedural Order No. 1 (reproduced below), with certain adjustments indicated in paragraphs 30 and 31 below:

15.6. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from

which it is derived. The party submitting such exhibits shall provide them in electronic and hard copy to the other party, the Committee Members, the Secretary, the court reporter(s) and any interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

30. To account for the remote nature of the Hearing, paragraph 15.6 of Procedural Order No. 1 is amended such that: (i) hard copy submission of demonstratives is not required, and (ii) an electronic copy of each demonstrative shall be distributed by the party intending to use it via email to the entire case email distribution list for each party, to the Secretary of the Committee, to the Members of the Committee and to the court reporter, no later than 24 hours *prior* to its use.
31. In addition, promptly after the conclusion of the Hearing day during which a demonstrative exhibit is used, the party that used it shall upload such demonstrative exhibit to the case folder in the BOX file sharing platform, designating each by the party filing it and a unique document number.

3. Electronic Presentation of Evidence

32. Hearing participants are advised to have the Electronic Hearing Bundle, and any demonstrative exhibit previously distributed in accordance with paragraph 30 above, downloaded onto their own devices and available for access offline.
33. Demonstrative exhibits and clean, unannotated electronic copies of documents on the record may be displayed to all Hearing participants via the Webex videoconference platform. Any Hearing participant has the technical ability to display a document to all Hearing participants via Webex, and such person need not be an active speaker. The Hearing participant displaying the document will be the only one with the ability to scroll through the document being displayed. The parties should be aware that over-use of this function will increase pressure on the Internet bandwidth and stability of the connection.
34. Documents that do not form part of the record may not be displayed at the Hearing, absent a contrary order of the Committee.

F. AUDIO RECORDING

35. The provisions of Procedural Order No. 1, paragraph 19.1, concerning audio recording (reproduced below) apply.

19.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Committee Members.

36. The audio recording shall be made by the ICSID Secretariat, and it will be shared with the parties and the Members of the Committee at the conclusion of the Hearing. Hearing participants shall not otherwise record the Hearing or any part of it via audio, video or screenshot.

G. TRANSCRIPTION

37. The provisions of Procedural Order No. 1 concerning transcription (reproduced below) apply, with the adjustments indicated in paragraph 38 below.

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

19.3. The parties shall agree on any corrections to the transcripts within 14 days of the later of the dates of receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts ("revised transcripts"). The Committee shall decide upon any disagreement between the parties and any correction adopted by the Committee shall be entered by the court reporter in the revised transcripts.

38. Real-time court reporting in English shall be made available to the Hearing participants via an online link connection to be provided by the court reporter. Hearing participants shall connect to the transcript by opening this link in a browser window separate from

the Webex browser window. The details (link, password) and instructions to connect to the streamed transcript shall be provided by the ICSID Secretariat to the Hearing participants before the start of each Hearing day.

H. POST-HEARING MEMORIALS

39. The parties will submit simultaneous PHMs following the Hearing. The due date will presumptively be four weeks after the conclusion of the Hearing. The content and length of these submissions will be addressed at the Hearing.
40. Should the Committee have remaining questions to pose to the parties after the conclusion of the Hearing, it shall submit them to the parties in writing within seven calendar days following conclusion of the Hearing. In that event, the parties shall respond to those questions in their PHMs.

I. STATEMENTS OF COSTS

41. The parties shall submit statements of costs following the Hearing. The timing and form of these statements will be discussed at the Hearing.

J. CLOSED HEARING

42. In accordance with paragraph 18.6 of Procedural Order No. 1, the Hearing shall be closed to the public.

K. VIRTUAL HEARING ARRANGEMENTS

43. The following procedures shall be followed in order to ensure the good conduct of the virtual Hearing.

1. Testing

44. The Secretariat will conduct additional technical tests with the Committee and each party in advance of the Hearing, to test connectivity to the video conference platform (Webex)

and to the court reporter's real-time transcription service. The date of each test and the access details will be communicated in due course.

2. Participants

45. Each party shall provide its list of participants for the Hearing ("**Hearing List of Participants**") no later than Thursday, 3 September 2020, using the format provided in **Annex B**. Each party shall designate the participants who will have an active speaking role ("**Active Participants**") and those who will be passive attendees ("**Passive Participants**"). Contact telephone numbers shall be provided for Active Participants.
46. All Hearing participants shall clearly denote their names when connecting to the Webex platform on each Hearing day. Any name appearing on the Webex List of Participants should also appear on the Hearing List of Participants. Should there be any discrepancy at any point during the Hearing, the Secretary of the Committee will alert the Committee, and the Committee will address the matter.

3. Connectivity

47. To improve operation of the Webex platform, the parties are advised to keep the number of video connections to a minimum and to Active Participants only. Passive Participants should preferably join the Hearing through their computers but connecting only their audio (*i.e.*, turning off their video).
48. All Hearing participants shall use the "mute microphone" function when not speaking to reduce background noise and to avoid interference with the audio recording. The Webex video host at the ICSID Secretariat may also mute and unmute all or some Hearing participants if needed to avoid background noise.

4. Equipment and Set-Up

49. For optimum sound quality, especially for the audio recording and the transcription, ICSID highly recommends that the main speakers use a headset equipped with a microphone and connected through the USB or "mic" jack of the computer or laptop

being used for the Webex videoconference. Internal microphones do not provide the same sound quality as external microphones. If not available, Active Participants are asked to speak close to the microphone of the computer or laptop from which they are connected to the Webex session.

50. While not indispensable, Hearing participants are advised to have at least two screens, and preferably three (it can be one device with multiple screens or a combination of devices including tablets), to facilitate simultaneous viewing of: (i) the Webex video connection; (ii) the online real time transcript; and (iii) offline documents.
51. Hearing participants joining via video shall avoid sitting with a window or source of light behind so that they may clearly be seen on screen.

5. Break-Out Rooms

52. The Applicants and the Respondent shall each be provided with a “virtual break-out room” to handle internal team communications during breaks, which shall be separate from the Webex virtual Hearing Room. The Secretary of the Committee will coordinate with the parties in this regard.

For and on behalf of the Committee,

[*Signed*]

D. Brian King
President of the Committee
Date: 12 August 2020

ANNEX A

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

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ESTIMATED HEARING SCHEDULE

DAY 1 [10 SEPTEMBER 2020]

7:00	
	<i>15-minute break</i>
	<i>15-minute break</i>
11:30	

DAY 2 [11 SEPTEMBER 2020]

7:00	
	<i>15-minute break</i>

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	<i>15-minute break</i>
11:30	

DAY 3 [14 SEPTEMBER 2020]

7:00	
	<i>15-minute break</i>
	<i>15-minute break</i>
11:30	

DAY 4 [15 SEPTEMBER 2020]

7:00	
	<i>15-minute break</i>
	<i>15-minute break</i>
11:30	

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ANNEX B

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HEARING ON 10-11 AND 14-15 SEPTEMBER 2020

Video Conference

LIST OF PARTICIPANTS

<u>Name</u>	<u>Role/Affiliation</u>	<u>Time zone</u>	<u>Active or Passive Participant</u>	<u>Email address/ Phone number</u>
COMMITTEE				
<u>Mr. D. Brian King</u>	<u>President of the Committee</u>	<u>7:00 am EDT (UTC-4)</u>		
<u>Mr. Cavinder Bull SC</u>	<u>Committee Member</u>			
<u>Ms. Dorothy Udeme Ufot, SAN</u>	<u>Committee Member</u>			
ICSID SECRETARIAT				
<u>Mr. Paul-Jean Le Cannu</u>	<u>Secretary of the Committee</u>	<u>7:00 am EDT (UTC-4)</u>		
APPLICANTS				
<u>Counsel</u>				
<u>[Name]</u>	<u>[Firm]</u>	<u>[time] [time zone]</u>		

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RESPONDENT

Counsel

<u>[Name]</u>	<u>[Firm]</u>	<u>[time] [time zone]</u>		