

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Republic of Kenya

(ICSID Case No. ARB/15/29)

**PROCEDURAL ORDER NO. 6
On the Production of Documents**

Members of the Tribunal

The Honourable Ian Binnie CC, QC, President

Mr. Kanaga Dharmananda SC, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

21 July 2017

1. The Claimants have brought an application for relief in respect of what it considers deficiencies in the Respondent's compliance with the Tribunal's order for production of documents dated 5 May 2017.
2. In particular, the Claimants seek additional productions in response to
 - (1) DPR 5, relating to the establishment, mandate/terms of reference, objectives, operating procedures and protocol of the PMLC during the Relevant period. The Claimants challenge whether the PMLC had jurisdiction to re-open existing licences [SPL 256 and/or SML 351] much less suspend or revoke them.
 - (2) DPR 9, relating to an alleged letter sent from Mr Ali Mohammed to the Head of the Public Service and Secretary to the Cabinet dated on or about 31 January 2013
 - (3) DPR 29, relating to documentation of the input of the Technical Advisory Committee ("TAC") to the management of NEMA in respect of CMK's EIA application in 2002. The Claimants question whether (and if so how) the TAC input was made available in May 2013 when the terms of reference were not established until October or November 2013.
 - (4) DPR 43, relating to a letter dated 17 July 2013 seeking the opinion of the Attorney General's office. This letter has now been produced, but nice days after the scheduled deadline for the production of documents.
 - (5) DPR 49, relating to the production of documents in the possession, custody or control of the TAC or other government agencies referencing the Claimants or the Mrima Hill project or related topics. While there is some question whether TAC in fact opened a file, the Claimants point to Exhibit R-19 as indicating that such a file exists.
3. The Claimants request an order that the Respondent make further and better searches and if the alleged deficiencies in document production are not addressed in a satisfactory manner that an order be made that aspects of the evidence and submissions adopted by the Respondent in its pleadings be disregarded.
4. The Respondent states that it has made all reasonable and proper searches (as outlined in paragraphs 42 to 46 of its written Response to this application) and has simply been unable to locate any documents other than those already produced, referred to in the pleadings, or on the public record.

The Tribunal's Analysis

5. The Tribunal appreciates that if documents cannot be found *after all reasonable searches have been made* the case must continue on the basis of whatever material is available. In at least one instance the Respondent doubts whether the document requested in DPR 9 *ever* existed. The Respondent has agreed to provide affidavits

from those state officials supervising the document searches setting forth what was done, when it was done, and by whom it was done.

6. The Tribunal cannot accept the notion in response to DPR 5, DPR 29 and DPR 49 that important state agencies such as the PMLC and the TAC exercised economically significant state powers in relation to mining licences without statutory or regulatory authority following procedures contained in regulations or bylaws or other formal instruments. These agencies must have filing systems in place to track and retain documents relevant to the fulfillment of their mandate(s) and decisions made. The Claimants have challenged some of the decisions of Kenya state authorities in the Kenyan courts. At that point, some lawful source of jurisdiction must have been put forward by the Respondent by way of defense to the challenge.
7. While the production ordered under DPR 29 was targeted at the TAC advice to NEMA, the relative lack of production of responsive documents indicates that a wider explanation of the establishment and authority of the TAC is necessary for the Tribunal to understand the Respondent's position in defense of the sparse production. The Tribunal understands from the Respondent's explanation, for example, that the TAC did not even open a file on the Claimants licence, despite its broad review function of mining and prospecting licences.
8. The Tribunal does not consider that the Claimants have been significantly prejudiced by the nine-day delay in the production of DPR 43. However, while the Tribunal does not read anything sinister into the nine-day delay, the delay is nevertheless non-compliant with the schedule established in the Tribunal's Procedural Order No 3.

The Tribunal's Ruling

9. The Respondent is ordered to make further searches in response to DPR 5, DPR 29 and DPR 49 and produce documents of general application, if documents specific to the current dispute cannot be located, on the establishment, mandate/terms of reference, objectives, operating procedures and protocols of the PMLC and the TAC including procedures governing filing and retention of documents.
10. The Claimants are to make, and the Respondent is to cooperate in making, an application to the Kenyan court for release of the document bundle put before the court in the judicial review proceedings initiated by the Claimants in relation to the suspension or cancellation of their licence(s). Documents obtained from the court can be added to the documentary record in this proceeding.
11. The Respondent is to file within 14 days of the date of this order affidavits from the officials supervising the documentary search described at paragraphs 42 to 46 of its written submission, or otherwise, and in particular (but without limiting the generality of the foregoing) in relation to DPRs 5, 9, 29, and 49, indicating what was done, when it was done, and by whom it was done.
12. The Respondent is to file its Reply on the Merits (except quantum) on or before 31 July 2017.

13. Except as aforesaid, the application is dismissed.

14. Costs of the application are reserved until the end of the procedure.

On behalf of the Tribunal:

Signed

The Honourable Ian Binnie CC, QC

President of the Tribunal

Date: 21 July 2017