

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Winshear Gold Corp.

v.

United Republic of Tanzania

(ICSID Case No. ARB/20/25)

PROCEDURAL ORDER NO. 4

Requests for Document Production

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Judge O. Thomas Johnson, Arbitrator
Mr. Edward William Fashole Luke II, Arbitrator

Acting Secretary of the Tribunal

Ms. Aurélia Antonietti

Assistant to the Tribunal

Dr. Magnus Jesko Langer

14 March 2022

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I. PROCEDURAL BACKGROUND

1. Pursuant to Section 16 of Procedural Order No. 1 (“PO1”) and the revised procedural calendar effective 7 December 2021, the Parties submitted on 14 January 2022 simultaneous requests to produce documents in the form of a Redfern Schedule. The Claimant’s Redfern Schedule is divided into 16 categories of documents and the Respondent’s Redfern Schedule into 6 categories of documents.
2. On 31 January 2022, the Parties submitted their respective objections to the document production requests.
3. On 21 February 2022, each Party produced non-objected documents and provided the Tribunal with its Redfern Schedule containing the objections raised by the opposing Party and its replies regarding the remaining document requests.
4. This Order addresses the Parties’ respective document production requests. The Tribunal will first determine the applicable standards and then issue its decision on the requests. The reasons for the Tribunal’s decisions are incorporated into the Redfern Schedules, which are annexed to and made an integral part of this Order (Annex A for the Claimant’s requests and Annex B for the Respondent’s requests).

II. APPLICABLE STANDARDS

5. This arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (the “Arbitration Rules”), and (iii) the procedural rules set out in PO1.
6. Under the ICSID Convention and the Arbitration Rules, the Parties have ample freedom to determine the applicable procedure, including with respect to the taking of evidence. For instance, pursuant to paragraph 16.1 of PO1, the Parties agreed that the Tribunal shall be guided by Articles 3 and 9 of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”).
7. In addition, PO1, which was discussed with the Parties at the first session, contains certain

rules on document production, of which the following are relevant to the present Order:

16.2. Within the time limit set in the Procedural Timetable, each party may request from the other party the production of documents or categories of documents within the other party's possession, custody or control. Such a request for production shall identify each document or narrow category of documents sought with precision, in the form of a Redfern Schedule as attached in Annex B hereto, in both Word and .pdf format, specifying why the document sought is relevant to the dispute and material to the outcome of the case. Such a request shall not be copied to the Tribunal, the Secretary of the Tribunal or the Assistant.

16.7. On or around the date set forth in the Procedural Timetable, the Arbitral Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the legitimate interests of the parties and all the relevant circumstances, including applicable privileges and if appropriate the burden of proof.

8. Where the Parties have not agreed on the applicable procedure, the Tribunal enjoys an equally ample freedom to establish the applicable procedure. Article 43 of the ICSID Convention and Rule 34(2) of the Arbitration Rules grant the Tribunal the power to order the Parties to produce documents in the following terms:

“Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence [...].”

And:

“The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts [...].”

9. Moreover, for the purposes of this Order, the following provisions of the IBA Rules are relevant:

- (i) Article 3.3:

“A Request to Produce shall contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
 - (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
 - (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party".

(ii) Article 3.4:

"Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection".

(iii) Article 3.5:

"If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3".

(iv) Article 3.7:

“Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it”.

(v) Article 9.2:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling”.

10. Accordingly, the Tribunal will apply the following standards to rule on the requests for

production of documents:

- Specificity: The request must identify each document or category of documents with precision.
- Relevance: The request must establish the relevance of each document or category of documents to prove allegations made in the submissions. For purposes of this Order, the term “relevance” encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal is only in a position to assess the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration with the benefit of a more developed record.
- Possession, custody or control: The request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, power or control of the other Party.
- Balance of interests: Where appropriate, the Tribunal will balance the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant circumstances, including any legal privileges applicable to certain types of communications, the need to safeguard confidentiality, and the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested Party.

III. ORDER

11. For the reasons set forth in the Redfern Schedule regarding the Claimant’s document production Requests attached as Annex A and made an integral part of this Order, the

Tribunal:

- (i) Takes note that no decision is required in respect of Request No. 14.
 - (ii) Partially grants the Claimant's Requests Nos. 8-10, and 13, as specified in the Redfern Schedule.
 - (iii) Grants the Claimant's Requests Nos. 1-7, 11-12, and 15-16, as specified in the Redfern Schedule.
 - (iv) Denies the other requests.
 - (v) Orders the Respondent to produce the documents responsive to the Requests granted above by **4 May 2022**.
12. For the reasons set forth in the Redfern Schedule regarding the Respondent's document production Requests attached as Annex B and made an integral part of this Order, the Tribunal:
- (i) Takes note that no decision is required in respect of Requests Nos. 3-4.
 - (ii) Partially grants the Respondent's Request No. 1, as specified in the Redfern Schedule.
 - (iii) Denies the other requests.
 - (iv) Orders the Claimant to produce the documents responsive to the Requests granted above by **4 May 2022**.

[signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 14 March 2022