

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WINSHEAR GOLD CORP.

Claimant

and

UNITED REPUBLIC OF TANZANIA

Respondent

ICSID CASE NO. ARB/20/25

**ORDER OF THE TRIBUNAL TAKING NOTE OF THE
DISCONTINUANCE OF THE PROCEEDING**

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Judge O. Thomas Johnson, Arbitrator

Mr. Edward William Fashole Luke II, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

Assistant to the Tribunal

Dr. Magnus Jesko Langer

Date of dispatch to the Parties: 1 November 2023

REPRESENTATION OF THE PARTIES

Representing Winshear Gold Corp.:

Dr. Marc Veit
Mr. Robert Denison
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and

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Switzerland

and

Mr. Timothy L. Foden
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Representing the United Republic of Tanzania:

Dr. Boniphace Luhende
Ms. Salome Magesa
Ms. Consesa Kahendaguza
Ms. Lydia Thomas
Mr. Andrew A. Rugarabamu
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1. On 8 July 2020, the International Centre for Settlement of Investment Disputes (“ICSID”) received a request for arbitration from Winshear Gold Corp. (“Winshear” or “the Claimant”) for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the ICSID Convention”) and the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, which entered into force on 9 December 2013 (the “Treaty” or the “BIT”), in respect of a dispute with the United Republic of Tanzania (“Tanzania” or the “Respondent”) (“the Request”). The dispute relates to a gold project in the Saza and Makongolosi areas in the Chunya district, Sonye region in Tanzania (the “SMP” or the “Saza-Makongolosi Project”).
2. On July 27, 2020, the Secretary-General registered the Request, pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Institution Rules 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 the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
3. The Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and that the Tribunal would consist of three arbitrators, one to be appointed by each Party, the third arbitrator and President of the Tribunal to be appointed by agreement of the two co-arbitrators.
4. The Tribunal is composed of Judge O. Thomas Johnson, a national of the United States of America, appointed by the Claimant; Mr. Edward William Fashole Luke II, a national of Botswana, appointed by the Respondent; and Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by agreement of the co-arbitrators.
5. On 2 February 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“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. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
6. On 3 February 2021, in accordance with the 2006 version of the ICSID Administrative and Financial Regulation 14(3) (the “AFR”), the ICSID Secretariat requested that each Party make an initial advance payment of USD 150,000 within 30 days.
7. On 24 February 2021, the ICSID Secretariat received the Claimant’s payment.
8. On 8 March 2021, the ICSID Secretariat, acting on behalf of the Tribunal, circulated a draft procedural order and proposed the appointment of Dr. Magnus Jesko Langer as Assistant of the Tribunal. The Claimant provided its comments on the draft on 12 March

2021 and the Respondent on 15 March 2021.

9. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 16 March 2021 by videoconference. In addition to discussing the content of the draft procedural order, it was agreed that the Tribunal would issue a separate order about the transparency regime governing the arbitration.
10. On 17 March 2021, the Tribunal issued Procedural Order No. 1 (“PO1”), setting out the procedural rules governing this arbitration.
11. On the same date, and pursuant to the Tribunal’s directions during the first session, the Claimant confirmed that the private equity firm Delta Capital Partners Management LLC was funding the Claimant in this arbitration through its subsidiary 24LF Capital LLC.
12. On 19 March 2021, the ICSID Secretariat, acting on behalf of the Tribunal, sent a draft procedural order setting out the transparency rules governing this arbitration to the Parties. The Parties provided their comments on the draft on 6 April 2021.
13. On 14 April 2021, the Tribunal issued Procedural Order No. 2 (“PO2”), setting out the transparency regime of this arbitration in accordance with Articles 28, 30 and 31 of the BIT.
14. On 25 May 2021, the ICISD Secretariat wrote to the Parties noting that the Respondent had not yet paid its share of the first advance and inviting the Respondent to provide an update on the status of its payment, which the Respondent did on 20 July 2021 by stating that the advance payment would be made at a later point in time after consultation with Government institutions.
15. On 2 July 2021, the Claimant filed its memorial (the “Memorial”), accompanied by 286 factual exhibits (Exh. C-18 to C-303), 95 legal authorities (Exh. CL-1 to CL-95), the witness statements of Messrs. Richard Williams and Christopher MacKenzie, and an expert report of Ms. Vikki Wall of Kroll Expert Services (accompanied by Exh. VW-2.1 to VW-6.9).
16. On 6 October 2021, pursuant to Regulation 14(3)(d) of the 2006 AFR and on behalf of the Secretary-General, the ICSID Secretariat notified the Parties of the Respondent’s default and invited either Party to pay the outstanding amount of USD 150,000 within 15 days, i.e., by 21 October 2021.
17. On 8 October 2021, the Claimant stated that it expected the Respondent to pay its share of the advance in accordance with its previously stated intention of 20 July 2021 and invited the Respondent to confirm by 12 October 2021 its intention to do so, which the Respondent did not do.
18. On 25 October 2021, the Claimant requested that the Tribunal order the Respondent to

pay its share of the advance within ten days from the Tribunal's decision (the "Request for Payment").

19. On the same day, the ICSID Secretariat invited the Respondent to comment on the Request for Payment by 5 November 2021.
20. On 10 November 2021, the Claimant stated that the Respondent, by failing to respond to the Request for Payment, acquiesced to the content of the Request for Payment. The Claimant requested that the Tribunal decide on the Request for Payment accordingly.
21. On 19 November 2021, the Tribunal issued Procedural Order No. 3 ("PO3"), denying the Request for Payment, taking note of the Respondent's default since 6 October 2021 to pay its share of the initial advance, and inviting the Claimant to pay the outstanding amount of USD 150,000 within 15 days, i.e., by 4 December 2021.
22. On 20 December 2021, the Respondent filed its counter-memorial (the "Counter-Memorial" or "CM"), accompanied by 69 factual exhibits (Exh. R-1 to R-69), 46 legal authorities (Exh. RL-1 to RL-46), the witness statements of Prof. Abdulkarim Hamisi Mruma (RWS-1), Mr. Edwin Simon Igenga (RWS-2), and Mr. Andrew Abraham Mwangakala (RWS-3).
23. The ICSID Secretariat received the payment of USD 150,000 from the Respondent on 4 January 2022, and a further payment of USD 150,000 from the Claimant on 12 January 2022.
24. On 14 January 2022, the Parties simultaneously exchanged their requests to produce documents in the form of a Redfern Schedule. The Claimant's Redfern Schedule was divided into 16 categories of documents and the Respondent's Redfern Schedule into 6 categories of documents.
25. On 21 January 2022, the Claimant confirmed that it wished its most recent payment to be held by ICSID for its account and credited to the next call for funds.
26. On 31 January 2022, the Parties submitted their respective objections to the document production requests.
27. On 21 February 2022, the Parties produced non-objected documents and provided the Tribunal with their Redfern Schedules containing the outstanding document production requests.
28. On 14 March 2022, the Tribunal issued Procedural Order No. 4 ("PO4") resolving the outstanding document production requests.
29. On 4 August 2022, the Claimant filed its reply memorial (the "Reply"), accompanied by 154 factual exhibits (Exh. C-304 to C-457), 37 legal authorities (Exh. CL-96 to CL-132), the second witness statements of Messrs. Richard Williams and Christopher

MacKenzie, and the second expert report of Ms. Vikki Wall of Kroll Advisory Limited (“Kroll”) (accompanied by Exh. VW2-3.1 to VW2-6.2).

30. On 16 November 2022, in accordance with Regulation 15(1)(c) of the 2022 version of the AFR, the ICSID Secretariat requested that the Claimant make an advance payment of USD 50,000 and the Respondent a payment of USD 200,000 by 16 December 2022.
31. On 12 December 2022, the Respondent filed its rejoinder memorial (the “Rejoinder”), accompanied by one legal authority (Exh. RL-47), and the second witness statement of Prof. Mruma.
32. On 13 December 2022, the ICSID Secretariat received the Claimant’s payment of USD 50,000.
33. On 19 December 2022, the Claimant notified the Respondent and informed the Tribunal of its intention to cross-examine all of the Respondent’s witnesses at the hearing, i.e., Mr. Edwin Igenge, Prof. Abdulkarim Mruma and Mr. Andrew Mwangakala.
34. On 21 December 2022, the ICSID Secretariat, on behalf of the Tribunal, sent a draft Procedural Order No. 5 on pre-hearing matters (the “draft PO5”) to the Parties and invited them to provide their comments by 9 January 2023 as well as their proposals for the hearing agenda.
35. On the same day, in accordance with Regulation 16 of the 2022 AFR, the ICSID Secretariat notified the Parties of the Respondent’s default and invited either Party to pay the outstanding amount of USD 200,000 by 10 January 2023.
36. Still on the same day, the Respondent wrote to the ICSID Secretariat requesting an extension until 23 April 2023 to pay the outstanding amount of USD 200,000 “due to the fact that the requested fund was not allocated in the budget for this financial year”.
37. On 22 December 2022, the Respondent notified the Claimant and informed the Tribunal of its intention to cross-examine all of the Claimant’s witnesses and its expert.
38. The following day, the Claimant indicated that its witness, Mr. MacKenzie, was not fully vaccinated against COVID-19 and thus requested that he be allowed to attend the hearing virtually.
39. On 27 December 2022, the Tribunal informed the Parties that, subject to any compelling objection by the Respondent by 30 December 2022, the Tribunal was inclined to allow Mr. MacKenzie to attend the hearing remotely.
40. In the absence of an objection by the Respondent, the Tribunal confirmed on 4 January 2023 that Mr. MacKenzie was authorized to appear at the hearing remotely.
41. On the same day, the Respondent requested to postpone the hearing due to financial hardship to handle consecutive hearings in two arbitral proceedings and the Tribunal

invited the Claimant to respond to that request by 9 January 2023.

42. On 6 January 2023, the Parties submitted their comments on the draft PO5.
43. On 9 January 2023, the Claimant objected to the Respondent's request to postpone the hearing.
44. On 11 January 2023, the Centre invited Canada to inform the Centre by 31 January 2023 whether it wished to attend the hearing.
45. On 12 January 2023, in accordance with PO1, the Tribunal and the Parties held a pre-hearing organizational meeting by video link to discuss the organization of the hearing (the "Hearing"). During that conference, and after hearing the Parties, the Tribunal decided to deny the Respondent's request to postpone the Hearing.
46. On the same day, the Tribunal issued Procedural Order No. 5 ("PO5") on pre-hearing matters and the Centre made the recordings of the pre-hearing conference available to the Parties and the Tribunal.
47. On 13 January 2023, the Centre informed the Parties that it invited Canada to attend the Hearing in person.
48. On 17 January 2023, Canada wrote to the Centre asking whether it could obtain a copy of the pleadings prior to deciding whether or not to attend the Hearing, and whether it could attend the Hearing remotely. On the same day, the Centre answered that it would give Canada access to the pleadings on the basis of Article 28(1) of the BIT and confirmed that Canada could attend the Hearing remotely.
49. On 23 January 2023, the Centre informed the Parties that it had not received the outstanding payment of USD 200,000 from either Party and notified them that if the payment was not received by 3 February 2023, the Secretary-General intended to suspend the proceeding for non-payment. The Centre received the Claimant's payment on behalf of the Respondent on January 31, 2023, and then received the Respondent's payment on April 11, 2023.
50. On 24 January 2023, the Centre informed the Parties that Canada would attend the Hearing remotely.
51. On 25 January 2023, the Claimant requested leave to produce a one-page document to prove that the Ministry of Minerals received the correspondence submitted under Exhibit C-144.
52. On 26 January 2023, the Centre invited the Parties to upload the Electronic Hearing Bundle to the Box folder by 6 February 2023, unless they agreed otherwise and informed the Tribunal accordingly.
53. On 29 January 2023, the Respondent objected to the Claimant's request to introduce

new evidence.

54. On 31 January 2023, the Tribunal granted the Claimant's request to introduce the one-page document as Exhibit C-458 by 1 February 2023, which the Claimant did, and allowed the Respondent to provide any comments on this new exhibit in writing by 7 February 2023 and/or during the opening statements at the Hearing.
55. The Hearing was held at the World Bank offices in Washington, D.C., between 13 and 16 February 2023. The following persons attended the Hearing in whole or in part:

The Tribunal

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Ella Rosenberg

Assistant to the Tribunal

Dr. Magnus Jesko Langer

Claimant's counsel and representatives

Dr. Marc Veit	Lalive
Mr. Timothy Foden	Lalive
Mr. Augustin Barrier	Lalive
Mr. Robert Denison	Lalive
Ms. Eden Jardine	Lalive
Mr. Richard Williams	CEO of Winshear Gold Corp.
Mr. Mark Sander	President of Winshear Gold Corp.
Mr. Andrew Thomson	Party representative

Claimant's witnesses and expert

Witnesses

Mr. Richard Williams
Mr. Christopher MacKenzie

Expert

Ms. Vikki Wall
Mr. Jonny Davies

Respondent's counsel and representatives

Dr. Boniphace Luhende Solicitor General

Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments;

- b) orders the United Republic of Tanzania to pay compensation for the loss and damage sustained by the Claimant as a result of the breaches by the United Republic of Tanzania of its obligations under the Treaty, in an amount of **CAD 116,083,376** if the Tribunal adopts 18 December 2019 as the valuation date, or alternatively **CAD 95,118,680** if it adopts 10 January 2018 as the valuation date;
- c) orders the United Republic of Tanzania to pay pre-Award and post-Award interest at Canadian Prime rate + 2% compounded quarterly on all sums awarded;
- d) rejects any counterclaim by the United Republic of Tanzania as inadmissible and unfounded; and
- e) orders the United Republic of Tanzania to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to the present arbitration, including the fees and expenses of its counsel, witnesses and experts and reasonable funding costs”.

63. At paragraph 194 of its PHB, the Respondent requested the following orders from the Tribunal:

- “a. **ORDER** that the Tribunal has no jurisdiction to determine this matter.
- b. **DECLARATION** that the United Republic of Tanzania has not breached any obligations under Articles 10 and 6 of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments;
- c. **DECLARATION** that there is no any Damage Caused to and suffered by the Claimant;
- d. **DECLARATION** that the Claimant has breached the provisions of the Tanzania Laws governing mining sector, the Canadian BIT and Customary International Law;
- e. **ORDER** that the Claimant has failed to discharge the burden of proof that any measures taken by Tanzania is in violation of various provisions of Tanzanian Laws, Customary International Law and any provision of BIT of which Tanzania is a party to;
- f. **ORDER** that the Claimant pay damages for loss suffered as a result of the breaches of Tanzanian laws, and general principles of law in an amount to be determined during the course of these submissions and proceedings respectively;
- g. **ORDER** the Claimant to pay the Respondent interest (both pre- and post-Award) on the sums ordered to be paid above, at a rate to be determined during the course of these proceedings;

- h. **ORDER** the Claimant to pay all of the costs and expenses of this Arbitration, including the fees and expenses of the Tribunal, and the costs that the Government has and will incur in pursuing the breaches and this Arbitration, including, without limitation, all legal and other professional fees associated with any and all proceedings undertaken in connection with this Arbitration;
 - i. **ORDER** such other relief as it deems just and appropriate”.
- 64. In addition, in relation to costs, the Respondent requested the following relief at paragraph 255 of its PHB:
 - “a. An **ORDER** that the Claimant shall bear the full costs and expenses incurred in relation to these proceedings, including the fees and expenses of the Members of the Tribunal;
 - b. An **ORDER** that the Claimant shall reimburse the Respondent for the legal costs and expenses the Respondent has incurred in bringing these proceedings within 60 days of the date of dispatch of the Tribunal’s award;
 - c. IN **ALTERNATIVE**, an **ORDER** that each party should to bare its own costs on legal representation and the parties should equally share the Tribunal fees and expenses, administrative fees and other charges related with the use of the hearing facility”.
- 65. The Parties simultaneously filed their statements of costs on 17 May 2023.
- 66. On 1 June 2023, having reviewed the PHBs, the Tribunal invited the Parties to answer the following questions:
 - a. If the Tribunal were to determine that the claims are within the jurisdiction of ICSID and the competence of the Tribunal, what evidence is there in the record that a certificate of urgency signed by the President of Tanzania was issued pursuant to Order 80(4) of the National Assembly’s Standing Orders (Exhibits RL-17 and C-433) in order to adopt the Amending Legislation pursuant to the emergency procedure? In addition, what evidence is there in the record that the Steering Committee determined under Order 80(6) that the draft Amending Legislation could be submitted to the National Assembly as a matter of urgency?
 - b. With reference to Table 5.2 and Appendix VW-C of Ms. Wall’s first report, what is the significance of the fact that BTL continued to incur exploration costs after the cancellation of the four retention licenses in January 2018?
 - c. If the Tribunal were to determine that the Respondent is liable in whole or in part, and with reference to Exhibit VW2-4.2, what is the increase in terms of percentage of the Arca Gold Miners Index between 19 June 2017 and the two alternative valuation dates of 10 January 2018 and 18 December 2019? The Arca Gold Miners Index, as presented in Exhibit VW2-4.2, begins on 5 January 2015, as does the graph of changes in Shanta’s share price. What was the numerical value of the Arca Index on 5 January 2015, 2 March 2017, 19 June 2017 and the two alternative valuation dates?

- d. With reference to Exhibit C-354, what was Shanta's share price on 5 January 2015, 2 March 2017 and the two alternative valuation dates of 10 January 2018 and 18 December 2019? What was Shanta's total market capitalization on 19 June 2017 and the two alternative valuation dates? Was there a change in the number of Shanta shares between 19 June 2017 and the two alternative valuation dates and, if so, in what amount?
 - e. With reference to Exhibit C-354, what was Helio's share price on the two alternative valuation dates of 10 January 2018 and 18 December 2019? What was Helio's total market capitalization on 19 June 2017 and the two valuation dates?
67. On 12 June 2023, the Parties simultaneously provided their answers to the Tribunal's questions and, on 22 June 2023, each Party filed its response to the other Party's answers.
68. On 8 September 2023, the Center wrote to the Parties on behalf of the Tribunal, noting that the Award in the matter *Nachingwea et al. v. Tanzania* (ARB/20/38) had been rendered on 14 July 2023 and giving the Parties the opportunity to submit any comments by 22 September 2023.
69. On 15 September 2023, the Respondent informed the Tribunal that the Parties had agreed to stay the proceeding until 16 October 2023 to discuss settlement. The Claimant confirmed the Respondent's message on 17 September 2023.
70. On 16 October 2023, the Parties jointly notified the Centre that they have reached an amicable settlement and requested the Tribunal to issue an order taking note of the discontinuance of the proceedings in accordance with Rule 43(1) of the ICSID Arbitration Rules.
71. According to their joint notice just referred to, the Parties agreed to amicably settle their dispute on the following terms:
- "i. The Claimant shall irrevocably and permanently withdraw all of its claims in the arbitration, with prejudice;
 - ii. The Parties shall bear their own costs and expenses for their participation in the arbitration; and
 - iii. The costs of the arbitration, including the Tribunal's fees, administration fees, and Tribunal Secretary's fees shall be borne equally".
72. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to:

Arbitrators' fees and expenses	
Gabrielle Kaufmann-Kohler	USD 150,772.05
O. Thomas Johnson	USD 74,768.75
Edward William Fashole Luke II	USD 224,544.33
Magnus Jesko Langer (Assistant)	USD 80,596.07
ICSID's administrative fees	USD 178,000.00
Direct expenses (estimated)	USD 55,072.90
Total	<u>USD 763,754.10</u>

73. Rule 43(1) of the ICSID Arbitration Rules provides:

If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

ORDER

74. THEREFORE, in accordance with the Parties' request, and pursuant to Rule 43(1) of the ICSID Arbitration Rules, the Tribunal hereby takes note of the discontinuance of the proceeding.

Dated as of 1 November 2023:

[signed]

Judge O. Thomas Johnson
Arbitrator

[signed]

Mr. Edward William Fashole Luke II
Arbitrator

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal