

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Winshear Gold Corp.

v.

United Republic of Tanzania

(ICSID Case No. ARB/20/25)

PROCEDURAL ORDER NO. 2

Transparency/Confidentiality

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 of the Tribunal

Dr. Magnus Jesko Langer

14 April 2021

I. Introduction

1. Pursuant to the procedural discussion held with the Parties on 16 March 2021 and paragraph 24 of Procedural Order No. 1, and in accordance with Articles 28, 30 and 31 of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (the “BIT”), this Procedural Order No. 2 will govern the transparency regime applicable to the present arbitration, as well as the designation and use of confidential information.

II. Procedural background

2. On 16 March 2021, the Tribunal and the Parties held the first session to discuss the procedural rules that apply in these proceedings. During that session, the Tribunal called the Parties’ attention to the transparency regime set out in Articles 28, 30 and 31 of the BIT and advised them that it would shortly circulate draft transparency rules.
3. On 19 March 2021, the ICSID Secretariat, acting on behalf of the Tribunal, sent to the Parties a draft of this procedural order.
4. The Parties provided their comments on the draft on 6 April 2021, after which the Tribunal issued this order in final form.

III. Definitions

5. For the purposes of this procedural order:
 - a. “disputing party” means either Winshear Gold Corp. or the Government of the United Republic of Tanzania.
 - b. “non-disputing State party” means the Government of Canada (Article 28 of the BIT).
 - c. “non-disputing party” means any person or entity that is not a disputing party and that has a significant interest in the arbitration (Article 31 of the BIT).
 - d. “third party” means any other person or entity that is not a disputing party, a non-disputing State party or a non-disputing party.

- e. “confidential information” means information that is:
 - i. confidential business information;
 - ii. information protected from disclosure under the applicable domestic law of the disputing State party; and
 - iii. financial, commercial, scientific or technical information supplied by or relating to a third party that has been treated as confidential information by that third party.

- f. “Repository” shall mean the ICSID Secretariat.

IV. Transparency regime

- 6. These proceedings shall be governed by (i) Articles 28, 30 and 31 of the BIT; (ii) to the extent they are in conformity with the BIT, the ICSID Convention and Arbitration Rules, and (iii) the rules set herein which seek to implement the BIT provisions.

- 7. Articles 28, 30 and 31 of the BIT read as follows:

Article 28 – Documents to, and Participation of, the Other Party

- 1. A respondent Party shall deliver to the other Party to this Agreement a copy of the notice of intent to submit a claim to arbitration and other documents no later than 30 days after the date that such documents have been delivered to the respondent Party. The other Party shall be entitled, at its cost, to receive from the respondent Party a copy of the evidence that has been tendered to the Tribunal, copies of all pleadings filed in the arbitration, and the written argument of the disputing parties. The Party receiving such information shall treat the information as if it were a respondent Party.
- 2. The other Party to this Agreement shall have the right to attend any hearings held under Section C. Upon written notice to the disputing parties, the other Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

Article 30 – Public Access to Hearings and Documents

- 1. Any Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.

2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information, including business confidential information.
3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
4. The Parties [to the BIT] may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
5. To the extent that a Tribunal's confidentiality order designates information as confidential and a [State] Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavor to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Article 31 – Submissions by a non-disputing party

A Tribunal shall have the authority to consider and accept written submissions from a person or entity that is not a disputing party and that has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and does not unduly burden or unfairly prejudice either disputing party.

8. As a result of the foregoing, Article 48(5) of the ICSID Convention and Rule 32(2) and 48(4) of the ICSID Arbitration Rules shall not apply to this proceeding.

V. Documents

9. Subject to Section VII, the award shall be publicly available. Decisions and procedural orders shall be publicly available, unless the disputing parties agree otherwise.
10. Subject to Section VII, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available to the public any

documents provided to, or issued by, the Tribunal. This may include, for example, making such documents available for consultations at a specified location.

11. The documents to be made available pursuant to paragraph 10 may be communicated by the Tribunal to the Repository as they become available. The Repository shall make all documents available to the public by uploading them on the ICSID website in a timely manner, in the form and in the language in which it receives them.
12. Any administrative costs of making documents under paragraph 10 available to a person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.

VI. Publicity of Hearings (Article 30(2) of the BIT)

13. The following logistical arrangements will be made to facilitate public access to hearings:
 - a. If technical constraints allow it, the hearings will be broadcast on closed-circuit television in a separate room. An audio-video recording will also be made of hearings.
 - b. In order to protect confidential information, and if technical constraints allow it, the broadcast will be delayed by 30 minutes.
 - c. At any time during the hearings, a disputing party may request that a part of the hearing be held in private, that the broadcast of the hearing be temporarily suspended or that confidential information be excluded from the video transmission. To the extent possible, a disputing party shall inform the Tribunal before raising topics where confidential information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held *in camera* and the transcript shall be marked “confidential”. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and the relevant portion of the transcript shall be marked “confidential”.
 - d. The non-disputing State party may attend the hearings in person. The physical attendance at the hearings of non-disputing parties shall be subject to the Tribunal’s approval. For logistical reasons, physical attendance at the hearings by third parties will not be permitted.

VII. Non-disclosure of confidential information

14. Confidential information, as defined in paragraph 5(e) above and identified pursuant to this Section, shall not be made available to the public.
15. The disputing parties shall give notice within 15 days from the filing or issuance of a document, including the award that they seek protection of confidential information in that document and object to its publication. In the absence of such notice, the Tribunal will authorize the publication of any document mentioned in paragraph 10 above. Such notice shall specifically identify the part(s) of the document sought to be designated as confidential and explain the reasons for confidentiality.
16. The other disputing party may raise reasoned objections to the requested protection within 15 days. In the absence of an objection, the Tribunal will authorize the publication by the Repository.
17. The notice and the objections from disputing parties shall be submitted in the form of a “Transparency Table”, in the form attached as Annex A.
18. In the event of an objection, the Tribunal will decide whether the identified information is to be treated as confidential. In the affirmative, the disputing party that filed the protected document shall provide a redacted version of the document within 15 days of the Tribunal’s decision. The Tribunal will thereafter transmit that document to the Repository for publication.
19. If the Tribunal decides that information for which protection is sought is not confidential and should be made available to the public, the disputing party that filed the document shall be permitted to withdraw all or part of the document from the record within 15 days of the Tribunal’s decision.

VIII. Repository of Published Information

20. ICSID shall act as Repository of published information.
21. The following rules shall apply in connection with the Repository:
 - a. The Tribunal will submit the documents for publication (in redacted form if applicable) to the Repository.
 - b. The Secretary of the Tribunal will ensure publication in searchable electronic format (.pdf format).

- c. The Repository will publish information and documents in the form and language in which it receives it.
- d. Upon completion of this arbitration, documents referred to in Section V above shall continue to be made available to the public on the ICSID website for a duration of 120 days.

[signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 14 April 2021

Annex A

Transparency Table

Claimant/Respondent [Party filing objections against publication]	Objection 1 [use one sheet per document/category of documents]
Identification of document and parts sought to be protected	
Legal basis for protection	
Comments	
Reply by opposing party	
Decision	