

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Winshear Gold Corp.

v.

United Republic of Tanzania

(ICSID Case No. ARB/20/25)

PROCEDURAL ORDER NO. 3

Decision on Claimants' request that Respondent be ordered to pay its share of the advances

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

19 November 2021

1. PROCEDURAL BACKGROUND

1. On 3 February 2021, in accordance with ICSID Administrative and Financial Regulation 14(3) (the “Regulation”), the ICSID Secretariat requested that each Party make an initial advance payment of US\$ 150,000 within 30 days.
2. The ICSID Secretariat received the Claimant’s payment on 24 February 2021 but has not received the Respondent’s payment to date.
3. On 16 March 2021, during the first procedural session, the Respondent informed the Tribunal that it would first have to budget the payment of the initial advance in the next financial year and that it would revert later on that issue.
4. On 25 May 2021, the ICSID 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.
5. On 20 July 2021, the Respondent informed the ICSID Secretariat that “*the advance payment should be communicated later after consultation with respective Government’ [sic] Institutions*”.
6. On 6 October 2021, pursuant to Regulation 14(3)(d), the ICSID Secretariat informed the Parties of the Respondent’s default and invited either Party to pay the outstanding amount of US\$ 150,000 within 15 days, i.e., by 21 October 2021.
7. 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.
8. The Respondent did not respond to the Claimant’s invitation and neither Party paid the Respondent’s share of the advance by 21 October 2021.
9. 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”).
10. On the same day, the ICSID Secretariat invited the Respondent to comment by 5 November 2021 on the Request, which the Respondent did not do, and which failure the Claimant noted on 10 November 2021 by stating that the Respondent had therefore acquiesced to the content of the Request and requesting that the Tribunal decide on the Request accordingly.

II. PARTIES' POSITIONS

11. The Claimant argues that it is the Respondent's obligation under international law to pay its share of the advance on costs. For the Claimant, the terms of Regulation 14(3)(d) according to which "*each party shall pay one half of each advance*" are mandatory (emphasis added by the Claimant).¹ The Claimant further asserts that it would suffer harm if it were forced to substitute for the Respondent's share of the advance on costs, since this would affect its budget and constitute a "*serious limitation on its access to justice*".²
12. In reliance on Rule 28(1)(a) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), the Claimant submits that the Tribunal should decide which portion of the Tribunal's and ICSID's fees and expenses each Party should bear and order the Respondent to pay its share of the initial advances in the amount of US\$ 150,000.
13. As noted above, the Respondent did not comment on the Request.

III. ANALYSIS

A. APPLICABLE STANDARD

14. These proceedings are governed by (i) Section C 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 "Agreement" or the "BIT"), which section relates to the settlement of disputes between an investor and the host State; (ii) to the extent they are in conformity with the BIT, the ICSID Convention, the Arbitration Rules and the Regulation, and (iii) the rules set out in Procedural Order No. 1 ("PO1").
15. In contrast to Section D of the BIT, which deals with State-to-State dispute settlement procedures, Section C does not set out specific rules on costs of an investor-State arbitration. Article 33(2) merely states that "[t]he Tribunal may also award costs in accordance with the applicable arbitration rules", which, as seen above, are composed of the ICSID Convention, the Arbitration Rules and the Regulation.
16. Rule 28 of the Arbitration Rules reads in relevant part as follows:

¹ Request, p. 1.

² Request, p. 1.

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

- (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
- (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

17. Regulation 14(3) provides in relevant part as follows:

(3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):

[...]

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General

may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding [...].

18. The Tribunal already determined in paragraph 10.1 of PO1 that “[t]he parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs”.

B. DISCUSSION

19. Under the arbitration rules set out above, the general rule is that, subject to a different division decided by the Parties or the Tribunal and without prejudice to the final decision on the allocation of costs, each party shall pay the advances on costs in equal parts. As noted in *Transglobal v. Panama*, the terms of Regulation 14(3)(d) that “each party shall pay one half of each advance” are mandatory.³
20. The procedural history shows that the Claimant paid its share of the initial advance and the Respondent failed to do so until now, which failure led the ICSID Secretariat, on behalf of the Secretary-General and pursuant to Regulation 14(3)(d), to notify the Parties of the Respondent’s default as of 6 October 2021 and to invite either Party to pay the outstanding amount of US\$ 150,000 within 15 days.
21. In view of the Respondent’s failure to pay its share of the advance following the notification of its default, the Claimant now requests that the Tribunal order the Respondent to pay the outstanding amount pursuant to Rule 28(1)(a) of the Arbitration Rules.
22. For the following reasons, the Tribunal has come to the conclusion that it will not grant the Request. First, the Tribunal already determined in PO1 that the advances on costs should be borne by the Parties in equal parts. Combined with the mandatory terms employed in Regulation 14(3)(d), this determination constitutes a direction given to the Respondent to pay its share of the advance, and there is no doubt that the Respondent has understood it in such fashion. It would therefore be redundant to order the Respondent again to honor its obligation to settle its share of the advance.

³ *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28, Decision on Respondent’s Request for Shifting the Costs of the Arbitration, 4 March 2015, para. 38. The Tribunal notes that this decision dealt with a somewhat different situation in which the Respondent requested that the Claimant pay the entirety of the costs in reliance on *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Provisional Measures, 12 December 2013 and *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs with Assenting and Dissenting Reasons, 13 August 2014. It also notes that decisions on varying the share of the advances in accordance with Arbitration Rule 28 and the default rule in Regulation 14(3)(d) depend on the factual circumstances.

23. Second, Regulation 14(3)(d) provides that, once one Party is in default, the Secretary-General shall provide either Party an opportunity to make the required payment within 15 days, absent which the Secretary-General may move the Tribunal to stay the proceedings. In other words, after the notification of the Respondent's default, on 6 October 2021, either Party had 15 days to make the required payment and the failure to do so carried with it the risk that the Secretary-General would eventually move the Tribunal to stay the proceedings. In the Tribunal's view, that position is not altered through the submission of the Request. The Request does not exonerate the Claimant from making the substitute payment of the Respondent's share of the initial advance to avoid the risk of a suspension of the proceedings.
24. This being so, the Tribunal is mindful that the Respondent's default will burden the Claimant's budget and could limit its access to justice. The Tribunal is also mindful that the Respondent initially stated its intention to pay its share of the advance. There is therefore still the possibility that the Respondent will eventually honor its obligation to pay its share of the initial advances. At this stage, however, considering the Respondent's recent silence on the issue, the Tribunal can only take cognizance of the Respondent's default. In this context, it notes that the Respondent's unwillingness to pay its share of the advances may be a factor to be taken into account when determining the final allocation of costs. In the circumstances, however, the Tribunal sees no cogent reason to depart from the general rule contained in Regulation 14(3)(d), namely that the Respondent's default triggers the obligation of the Claimant to substitute for the Respondent in making the required payment if it wishes to avoid the proceedings being stayed. To avoid a stay, the Tribunal will grant the Claimant a further 15 days to make the substitute payment.
25. This decision is without prejudice to the Tribunal's final decision as to the allocation of costs or to any other determination in the course of the arbitration if circumstances so justify.

IV. DECISION

26. For the reasons above, the Tribunal:
 - a. Denies the Request;
 - b. Takes note of the Respondent's default since 6 October 2021, to pay its share of the initial advance payment in the amount of US\$ 150,000;
 - c. Invites the Claimant to pay the outstanding amount of US\$ 150,000 within 15 days, i.e. by 4 December 2021;

- d. Reserves its decision on the costs associated with the Request for a later stage.

[signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
19 November 2021