

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**KANSANSHI MINING PLC**

Claimant

and

**REPUBLIC OF ZAMBIA**

Respondent

**ICSID Case No. ARB/20/17**

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

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***Members of the Tribunal***

Ms. Wendy Miles KC, President of the Tribunal

Mr. John Beechey CBE, Arbitrator

Mr. Christopher Adebayo Ojo SAN, Arbitrator

***Secretary of the Tribunal***

Ms. Aïssatou Diop

*Date of dispatch to the Parties: 7 September 2023*

## REPRESENTATION OF THE PARTIES

*Representing Kansanshi Mining Plc:*

Ms. Juliya S. Arbisman  
Mr. Robert W. Mockler  
Ms. Niyati Ahuja  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
United States of America

and

Mr. Paul Key KC  
Mr. Lucas Bastin KC  
Essex Court Chambers  
24 Lincoln's Inn Fields  
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United Kingdom

*Representing the Republic of Zambia:*

Mr. Mulilo Kabesha  
Attorney General  
Lusaka  
Republic of Zambia

and

Mr. Marshal Muchende, Solicitor General  
Mr. Chibale Mulonda, State Advocate  
Ms. Diana Mwewa, State Advocate  
Lusaka  
Republic of Zambia

1. On 19 May 2020, Kansanshi Mining Plc (“**Kansanshi**” or the “**Claimant**”) filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) a request for arbitration against the Republic of Zambia (“**Zambia**” or the “**Respondent**”). The Claimant and the Respondent are together referred to as the “**Parties.**” The request for arbitration (the “**Request**”) was made on the basis of the Kansanshi Development Agreement between Kansanshi and Zambia dated 14 March 1997, as amended and restated on 20 December 2001 (the “**Development Agreement**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. On 4 June 2020, the ICSID Secretary-General registered the Request in accordance with Article 36(3) of the ICSID Convention 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 ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
3. By letter dated 23 June 2020, the Claimant confirmed the Parties’ agreement on the method of constituting the Tribunal found in Clause 18.4 of the Development Agreement, as follows: the Tribunal would “consist of a total number of three arbitrators, one appointed by each Party, and an arbitrator, who shall be President of the Tribunal, appointed by agreement of the parties or, failing such agreement by neutral official.”
4. The Tribunal is composed of Ms. Wendy Miles KC, a national of New Zealand, as President of the Tribunal, appointed by agreement of the Parties; Mr. John Beechey CBE, a national of the United Kingdom, appointed by the Claimant; and Mr. Christopher Adebayo Ojo SAN, a national of the Federal Republic of Nigeria, appointed by the Respondent.
5. On 18 August 2020, the ICSID Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**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. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

6. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 23 September 2020 by video conference.
7. Following the first session, on 30 September 2020, the Tribunal issued Procedural Order No. 1 (“**PO1**”) recording the agreement of the Parties on procedural matters. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, United Kingdom. Annex A to PO1 set forth the procedural timetable.
8. Further to a request made by the Claimant, which was unopposed by the Respondent, on 19 January 2021, the Tribunal extended the deadline for the filing of the Claimant’s first written submission. Accordingly, on 26 January 2021, the Claimant filed a Memorial on the Merits dated 25 January 2021 (“**Claimant’s Memorial**”), together with supporting documentation.
9. Further to a request made by the Respondent and following a brief exchange of views between the Parties, on 14 June 2021, the Tribunal extended the deadline for the filing of the Respondent’s first written submission. Accordingly, on 9 July 2021, the Respondent filed a Memorial on Jurisdiction and a Counter-Memorial on the Merits (“**Respondent’s Counter-Memorial**”), together with supporting documentation.
10. On 13 July 2021, the Claimant filed a Request for Provisional Measures (the “**PM Request**”), together with supporting documentation. The PM Request related to the Claimant’s recently renewed mining license and recent tax assessments.
11. By email of 15 July 2021, the Respondent requested an opportunity to be heard on the PM Request and reminded the Tribunal of its challenge to jurisdiction as set forth in the Respondent’s Counter-Memorial. On 16 July 2021, the Tribunal invited the Respondent to respond to the PM Request within 30 days.
12. By letter of 17 July 2021, the Claimant reminded the Tribunal of the ‘extreme urgency’ of the circumstances that gave rise to its application and reiterated its request made in the PM Request for the Tribunal to issue “*an interim direction to preserve the status quo, pending further observations of the Parties and the Tribunal’s final decision on [the PM Request].*”

Also, the Claimant pointed out that the Respondent did not object to “*this direction being made.*”

13. The Respondent responded by email of 18 July 2021, *inter alia*, indicating that it would not consent to an order being made in view of its jurisdictional challenge and offering to provide an undertaking not to take any steps to change the *status quo* in respect of the mining license or the tax assessments without giving 30-days’ prior written notice of its intentions to the Claimant or following release from the undertaking by the Tribunal.
14. Between 20 and 28 July 2021, the Parties exchanged further communications clarifying the terms of the Respondent’s proposed undertaking. By email of 30 July 2021, the Respondent informed the Tribunal that the Parties had reached agreement on the substance and form of the Respondent’s undertaking and requested that the Tribunal give directions accordingly.
15. On 12 August 2021, the Tribunal issued Procedural Order No. 2 (“**PO2**”) memorialising the Parties’ agreement on the Respondent’s undertaking and thereby resolving the PM Request.
16. On 17 September 2021, the Respondent submitted a corrected Counter-Memorial with non-substantive amendments relating to typographical/grammatical errors.
17. The document production phase unfolded in accordance with the steps indicated in PO1. Thus, following exchanges between the Parties, on 27 September 2021, the Tribunal issued a decision on production of documents, granting the parties three weeks to produce documents pursuant to its ruling.
18. On 17 October 2021, the Respondent sought a two-week extension of time to comply with the Tribunal’s decision of 27 September. The Claimant responded on 18 October 2021, stating that it did not oppose the Respondent’s request and indicating its understanding that any such extension would equally apply to it. The Claimant added that it was likely that it would request an extension of time to file its Reply on the Merits, due to the repercussions of the delay in document production on the preparation of the submission. Thus, the Claimant suggested that the Parties confer and submit a modified procedural calendar to

the Tribunal for approval. The same day, the Tribunal granted the Parties a two-week extension of time for document production.

19. On 22 November 2021, four days before the original deadline for the filing of its Reply on the Merits, the Claimant requested an extension of time until 18 January 2021 to file the submission, indicating that the Respondent agreed in principle to an extension for the Claimant, pending the Parties' submission of a joint procedural calendar proposal, as previously agreed. On 30 November 2021, the Tribunal confirmed the Parties' agreement on the Claimant's requested extension and took note of the Parties' agreement to submit a revised procedural calendar.
20. On 6 January 2022, the Tribunal informed the Parties that it intended to proceed with the March 2022 hearing, as scheduled, in-person but directed the Parties to put in place parallel video conference arrangements for anyone not attending in person, due to the COVID-19 pandemic or other justifiable reasons.
21. By letter of 6 January 2022 from the Claimant and a letter of 7 January 2022 from the Respondent, the Parties agreed that the upcoming hearing scheduled for March 2022 should be postponed.
22. Following exchanges between the Parties and the Tribunal regarding the deadlines for parties' written submission as well as the length and alternative dates for the hearing, on 21 January 2022, the Tribunal (i) requested that the Parties confirm their availability for a hearing in January 2023, and (ii) granted the Parties' respective requests to extend the deadlines for the filing of the Claimant's Reply on the Merits and the Respondent's Rejoinder on the Merits.
23. By letter of 25 January 2022, the Claimant confirmed its availability for the rescheduled hearing. In its letter, the Claimant also requested leave to submit a Rejoinder on Jurisdiction, which had not been previously contemplated in PO1, since there would now be a period of six months between the last scheduled filing, *i.e.*, the Respondent's Rejoinder on the Merits, and the hearing. By email of 26 January 2022, the Respondent also

confirmed its availability for the rescheduled hearing and objected to the Claimant's request to submit a Rejoinder on Jurisdiction.

24. Also on 26 January 2022, the Tribunal confirmed that the hearing was rescheduled for January 2023 and reminded the Parties that, pursuant to Section 10 of PO1, London is the place of proceeding; however, “[t]he Tribunal may hold in-person hearings at any other place that it considers appropriate if the parties so agree.”
25. By email of the same date, the Claimant responded to the Respondent's message objecting to the Claimant's submission of a Rejoinder on Jurisdiction.
26. On 31 January 2022, the Tribunal denied the Claimant's request to submit a Rejoinder on Jurisdiction, indicating that it was

*not persuaded that subsequent delay of the hearing due to the Claimant's request for extension of time to submit its Reply on Merits and Counter-Memorial on Preliminary Objections alone warrants any change to [the Tribunal's] direction at this time.*

*However if appropriate, including if the Respondent's Rejoinder on Counterclaims and Jurisdiction, now due June 2022, were to raise new matters not previously raised, the Tribunal will consider any further application by the Claimant at that time.*

27. On 12 February 2022, in accordance with the procedural calendar as modified on 21 January 2022, the Claimant filed a Counter-Memorial on Jurisdiction and a Reply on the Merits (“**Claimant's Reply**”), both dated 11 February 2022, together with supporting documentation.
28. By joint letter dated 14 June 2022, the Parties informed the Tribunal that they were in the process of entering into a settlement agreement and, therefore, requested an extension of ninety days for the Respondent to file its Rejoinder on the Merits. On 16 June 2022, the Tribunal granted the Parties' request, with the Respondent's Rejoinder due on 14 September 2022. The Tribunal confirmed that the extension did not affect the agreed hearing dates.
29. No rejoinder submission was received from the Respondent by the amended deadline.

30. By email of 19 September 2022, the Claimant informed the Tribunal that it had not received the Respondent's Rejoinder as of that date. On 22 September 2022, the Tribunal acknowledged the Claimant's email and invited the Respondent to "*provide an update as a matter of urgency.*"
31. By email of 4 October 2022, the Claimant confirmed that it had not received any update from the Respondent and raised concerns that the procedural timetable in advance of the hearing "*may be jeopardized.*"
32. On 25 October 2022, the Tribunal (i) confirmed that the Respondent's Rejoinder had not been filed, and (ii) invited the Parties to discuss whether an extension of time should be permitted for the filing of the Rejoinder. The Tribunal also stated that, unless the Parties advised otherwise, it would "*take all reasonable steps*" to preserve the January 2023 hearing dates.
33. On 28 October 2022, the Respondent submitted to the Tribunal an application for an extension of time together with its Reply on Jurisdiction and a Rejoinder on the Merits ("**Respondent's Rejoinder**") and supporting documentation. In the application for an extension of time, the Respondent stated that "*the parties embarked on a series of negotiations which were intended to settle the arbitration.*"
34. By email of the same date, the Claimant informed the Tribunal that it would respond to its 25 October request for an update by 31 October 2022. The Respondent commented on this message by email of later the same date.
35. By email of 1 November 2022, the Claimant informed the Tribunal that the Parties continued to work towards a settlement agreement and proposed an eight-day "*standstill,*" until 9 November 2022, "*regarding any further positions in this arbitration.*"
36. By email of 10 November 2022, the Claimant, *inter alia*, informed the Tribunal that it did not object to the admission of the Respondent's "*submission dated 28 October 2022*" as a means to "*ensur[e] that the hearing as currently scheduled can remain in place.*"



37. Also on 10 November 2022, ICSID requested that each Party make an advance payment in the amount of USD 150,000. Pursuant to ICSID Administrative and Financial Regulation 16, payment was due within thirty days after the date of that request, *i.e.*, by 1 December 2022.
38. On 14 November 2022, the Tribunal wrote to the Parties proposing an amended timetable for the remainder of the proceeding and invited their comments by 21 November 2022.
39. On 16 November 2022, ICSID's financial department confirmed its receipt of a wire transfer from the Claimant corresponding to the Claimant's portion of the advance payment requested on 10 November.
40. By email of 20 November 2022, the Respondent informed the Tribunal that its expert witnesses on damages was unwell and would not be able to attend the hearing; as such, the Respondent requested a "*short adjournment*" to "*enable the Respondent's new expert to be able to ... provide a short supplemental report saying whether and if so he agrees with the expert evidence*" already on the record.
41. By email of 21 November 2022, the Claimant confirmed that it was in discussions with the Respondent following its email of the previous date, but that the Claimant agreed with the Tribunal's amended timetable of 14 November "*subject to an effective resolution of the Respondent's request for adjournment.*"
42. On 22 November 2022, the Tribunal took note of the Parties' communications of 20 and 21 November and invited the Respondent to provide further clarifications with respect to a replacement expert. The Tribunal also noted that it would be unable to schedule a new hearing before July 2023. The Respondent provided further clarifications by email of 28 November 2022.
43. Upon invitation from the Tribunal, on 1 December 2022, the Claimant commented on the Respondent's 28 November email. The Claimant, *inter alia*, urged the Tribunal to request a statement directly from the Respondent's expert before determining the way forward in respect of the dates of the hearing.

44. On 2 December 2022, the Tribunal invited the Respondent to provide, by 6 December 2022, a medical confirmation that its expert is undergoing treatment and would be unable to attend the January 2023 hearing; the Respondent subsequently provided the confirmation.
45. On 7 December 2022, the Tribunal invited the Parties to set forth their views on proceeding with the full hearing in January 2023, save as to damages experts, to be heard at a later date.
46. On 8 December 2022, one of the counsel for the Respondent informed the Tribunal that he was withdrawing from the proceeding. Later that date, the Tribunal invited the Parties to submit their respective positions given this new development, including any impact on the scheduled hearing dates. Following the Tribunal's message, a second member of the Respondent's counsel team informed the Tribunal that he was withdrawing from the proceeding.
47. By letter of 8 December 2022, the Claimant informed the Tribunal that it consented to "*the Respondent's application to adjourn the entire hearing, on the basis that the entire hearing can be rescheduled for a date no later than July 2023.*" No further comment on the matter was received from the Respondent.
48. As ICSID had not received payment from the Respondent following its request for advance payment of 10 November, on 13 December 2022, in accordance with Administrative and Financial Regulation 16(a), ICSID informed the Parties of the default and gave either Party the opportunity to make the required payment within 15 days, *i.e.*, by 28 December 2022.
49. On 14 December 2022, the Tribunal informed the Parties that it was minded to postpone the hearing and invited the Respondent to provide any comments by 16 December 2022, after which the Tribunal would make a final decision. No further comment on the matter was received from the Respondent.
50. On 9 January 2023, the Tribunal confirmed that the hearing would be rescheduled for 31 July 2023 for a duration of two weeks or part thereof.

51. On 24 January 2023, ICSID informed the Parties that, as neither Party had made the default payment requested on 13 December 2022, the ICSID Secretary-General may suspend the proceeding for non-payment pursuant to ICSID Administrative and Financial Regulation 16(2)(b).
52. By letter of 27 January 2023, the ICSID Acting Secretary-General informed the Parties that the proceeding was suspended for non-payment as of that date, pursuant to ICSID Administrative and Financial Regulation 16(2)(b). The Acting Secretary-General reminded the Parties that, pursuant to ICSID Administrative and Financial Regulation 16(2)(c), if the proceeding remains suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding.
53. By email of 30 January 2023, the Claimant stated that it was “*fully compliant with its payments as ordered*” and “*defer[ed] to the Respondent to provide its position on the given outstanding amount.*”
54. By letter of 25 April 2023 the Claimant requested that the ICSID Secretariat not discontinue the proceeding until the parties have had an opportunity to update the Tribunal on the culmination of the consensual settlement discussions. The Respondent did not object.
55. On 26 April 2023 the Tribunal informed the Parties in its email that it would be content to go along with the Claimant’s proposal on the condition that the hearing dates be released with immediate effect, pending the conclusion of the settlement negotiations.
56. In its email of 27 April 2023, the Claimant stated that it did not have any objection to the release of the hearing dates. The Respondent did not object to the release of the hearing dates either.
57. On 28 April 2023, ICSID informed the Parties that the Secretary-General would not issue the notice referred to in ICSID Administrative and Financial Regulation 16(2)(c) within the next 30 days.

58. Also on 28 April 2023, the Tribunal decided to vacate the hearing dates (fixed for 31 July to 11 August 2023) and ordered the Parties to update the Tribunal on the culmination of their settlement discussions within 30 days.
59. In accordance with the Tribunal's order, on 30 May 2023, the Claimant informed the Tribunal that the Parties had made progress in their settlement negotiations and would be able to provide a more comprehensive joint update to the Tribunal by 30 June 2023.
60. On 28 June 2023 the Claimant informed the Tribunal that the Parties continued to make meaningful progress in their settlement negotiations and were on the verge having a final position on which to update the Tribunal. In the same letter the Claimant noted that a joint final update should be achievable by Parties by 15 August 2023.
61. On 21 August 2023 the Claimant informed the Tribunal that the Parties appeared to be making progress in the resolution of the dispute and proposed to provide a joint update by 31 August 2023. On 28 August 2023, the Tribunal approved the Parties' agreement to provide a joint update by 31 August 2023.
62. By the letter dated 21 August 2023, which was communicated to ICSID and the Tribunal on 30 August 2023, the Parties informed that they have reached a settlement agreement and formally requested that the Tribunal take note, in an order, of the discontinuance of the proceeding pursuant to Rule 43(1) of the ICSID Arbitration Rules.
63. 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**

64. 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.

[signed]

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Mr. John Beechey CBE  
Arbitrator

Date: 7 September 2023

[signed]

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Mr. Christopher Adebayo Ojo SAN  
Arbitrator

Date: 7 September 2023

[signed]

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Ms. Wendy Miles KC  
President of the Tribunal

Date: 7 September 2023