

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**BSG Resources Limited, BSG Resources (Guinea) Limited and
BSG Resources (Guinea) SARL**

v.

Republic of Guinea

(ICSID Case No. ARB/14/22)

PROCEDURAL ORDER No. 12

Post-Hearing Matters 2

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Albert Jan van den Berg, Arbitrator
Professor Pierre Mayer, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

Assistant to the Tribunal
Dr. Magnus Jesko Langer

14 July 2017

I. Procedural background

1. By letter of 12 June 2017 pursuant to paragraph 13(ii) of Procedural Order No. 11 (“PO11”), the Respondent provided information on the procedure to access for inspection the allegedly original versions of the Disputed Documents (as defined in paragraph 2 of PO11).
2. By letter of 14 June 2017, the Claimants provided their comments on the Respondent’s letter of 12 June 2017 and requested that the Tribunal order the Respondent to provide “a record of all communications it has had with the US authority” in relation to the Disputed Documents.
3. By letter of 16 June 2017 pursuant to paragraph 13(i) of PO11, the Respondent provided information on the chain of custody of the originals of the Disputed Documents. Pursuant to paragraph 15 of PO11, the Respondent also commented on the production of the witness statement of Mr. Noy in the LCIA arbitration (the “WS Noy”).
4. In a first letter of 26 June 2017 pursuant to paragraph 14 of PO11, the Claimants filed their observations regarding the chain of custody of the Disputed Documents. In a second letter of the same day, the Claimants responded to the comments made by the Respondent on the production of the WS Noy.
5. The present order addresses the production in this arbitration of the WS Noy (1. below), additional information sought about the Disputed Documents (2. below), the chain of custody of the Disputed Documents (3. below), and the communications with US authorities regarding the inspection of the Disputed Documents (4. below).

II. Analysis and decisions

1. Witness statement of Mr. Noy in the LCIA arbitration

6. The Respondent requests that the Tribunal order the production of the WS Noy. The Claimants oppose this request on the grounds that (i) Guinea agreed on 3 June 2015 to

maintain the confidentiality of any materials received from the LCIA arbitration, (ii) the LCIA tribunal agreed on 28 June 2015 to share the record in that case with ICSID, subject to maintaining confidential documents designated by BSGR, (iii) BSGR designated the WS Noy as confidential when it filed its Statement of Defense on 1 July 2015, (iv) Vale accepted on 7 August 2015 that the WS Noy be kept confidential, and (v) Mr. Noy expressly refused that his statement be shared with the ICSID tribunal.

7. Having considered the Parties' positions, the Tribunal is of the view that the Respondent's request must be denied. The production of the WS Noy in this arbitration would be contrary to the confidentiality of the LCIA arbitration and to the record sharing regime put in place in those proceedings, and thus contrary to the legitimate expectations of the parties in the LCIA arbitration. In addition, production would be unfair towards Mr. Noy who provided his witness statement on the understanding that it would be protected by the confidentiality of the LCIA arbitration.

2. Additional information on the Disputed Documents

8. The table in paragraph 2 of PO11 (the "Table") lists 11 documents, the authenticity of which was challenged by the Claimants during the course of the hearing. Paragraph 3 of PO11 states that it had "emerged" that the originals of these documents are within the custody of the FBI, but for Exhibits R-269 and R-346.
9. As part of the information on the chain of custody provided by letter of 16 June 2016, the Respondent informed the Tribunal that Guinea's Minister of Justice forwarded the original version of 8 Disputed Documents (Exh. R-24, R-25, R-26, R-27, R-28, R-29, R-31 and R-32) to a special agent of the FBI on 30 August 2013.
10. With respect to the remaining 3 Disputed Documents, the Respondent indicated that, contrary to paragraph 3 of PO11, the status was as follows:
 - a. Exhibit R-269 is in the custody of the FBI;
 - b. Exhibit R-30 is not in the custody of the FBI; and
 - c. Exhibit R-346 is equally not in the custody of the FBI.

11. In their letter of 26 June 2016, the Claimants specified that they did not allege that all the Disputed Documents were forged. They only make this allegation about the contracts listed at (iv), (v), (vi), (vii) and (viii) of the Table. They cannot confirm whether the other documents are forged. However, the Claimants confirmed that the hearing cast doubt on the authenticity of these other documents as well, and that a forensic inspection is therefore “likely to be of immense evidentiary value”.
12. The Claimants further took note of the Respondent’s indication that it has no information on the chain of custody regarding Exhibits R-269, R-30 and R-346 and stated that they would “make submissions on these matters at the appropriate time”.
13. The Tribunal understands from the Parties’ communications that, while formal allegations of forgery have to date only been made with regard to the Disputed Documents listed at (iv), (v), (vi), (vii) and (viii) of the Table, the authenticity of all 11 documents listed in the Table is put into doubt. Therefore, the Tribunal prefers that all 11 documents be subject to document inspection, if possible. The Tribunal further understands that the FBI is in possession of 9 of the 11 Disputed Documents, i.e. it lacks Exhibits R-30 and R-346.
14. On that basis, the Tribunal requests that the Parties submit information on the whereabouts of the original versions of Exhibits R-30 and R-346 by **31 July 2017**. If such original versions can be located, the Tribunal will make further directions as to the modalities of making them available to document inspection. If no original versions can be located, the Parties are invited to state within the same deadline whether copies of better quality than those in the record do exist and can be made available.

3. Chain of custody

15. The Claimants request that the Tribunal order the Respondent to provide further information on the chain of custody of the allegedly original versions of the Disputed Documents. The Claimants raise the following questions on the chain of custody:
 - a. To whom in the Government of Guinea did Mamadie Touré hand over the Disputed Documents on 7 February 2013?

- b. How were these Disputed Documents handed over?
 - c. Who accessed the Disputed Documents in the six month period they were in the Government of Guinea's possession between 7 February 2013 and 30 August 2013?
 - d. Who was the Minister of Justice who handed over the Disputed Documents to the FBI on 30 August 2013?
 - e. Who was the "Special Agent" who received the Disputed Documents on 30 August 2013?
 - f. How were these Disputed Documents handed over to the Special Agent?
 - g. Who provided the Disputed Documents to Michael Ostrove during his trip to Guinea on 3 to 5 April 2013?
16. In addition, the Claimants request that the Respondent indicate "whether any scans and/or images of the Disputed Documents were taken at each stage in the chain of custody, i.e. before Mamadie Touré provided the Disputed Documents to the Government of Guinea; when the Government of Guinea received the Disputed Documents (before Mr Ostrove took his scans); and when the FBI received the Disputed Documents".
17. The Claimants further raise a series of questions regarding the way the Disputed Documents were handled to date, and in particular: (i) how and where Mamadie Touré stored the documents prior to handing them to Guinea on 7 February 2013, (ii) where the documents were stored in Guinea before transmitting them to the FBI on 30 August 2013, (iii) how and where the documents were stored by the FBI, and (iv) whether any forensic examinations has been conducted on the documents to date.
18. Moreover, the Claimants note certain contradictions between the chain of custody information provided by the Respondent on 16 June 2017 and other elements in the record, such as the Allegations Letter (Exh. C-53) and the DLA Report (Exh. C-240), as well as Mamadie Touré's testimony of 8 February 2013 (Exh. C-350). For the

Claimants these contradictions may suggest the existence of “a further set of supposed ‘original’ documents that the Tribunal is not aware, and which must also be included in the forensic examination”. In this context, the Claimants raised the following questions for the Respondent:

- a. What documents was the Technical Committee referring to in the Allegations Letter?
 - b. Who provided these documents to the Technical Committee?
 - c. What is the status of these documents now?
 - d. If the Technical Committee was not relying on any documents, what was the basis for allegations 15 and 16 [in the Allegations Letter]?
 - e. What was the role of Mr Mebiame in the chain of custody? And
 - f. What documents did Mamadie Touré still have in her possession on 8 February 2013?
19. At the outset, the Tribunal notes that Guinea transmitted only 8 of the allegedly original versions of the Disputed Documents to the FBI (Exh. R-24, R-25, R-26, R-27, R-28, R-29, R-31 and R-32) and states that it has no information regarding the chain of custody of Exhibits R-269, R-30 and R-346. In addition, the Tribunal notes that the FBI has custody over Exhibit R-269, but not Exhibits R-30 and R-346.
20. Considering the information provided so far by the Respondent and the additional questions raised by the Claimants, the Tribunal is of the view that it may assist for purposes of the document inspection that the Respondent answer by **31 July 2017** in respect of the chain of custody of the 8 documents which Guinea transmitted to the FBI and which are listed in paragraph 19 above, all the questions listed in paragraphs 15 and 16 and questions (i), (ii) and (iv) in paragraph 17 above, the answer to question (iv) in such paragraph being limited to whether Guinea has undertaken a forensic examination of the 8 documents.

21. The Tribunal expects Guinea to answer these questions without seeking information from the US authorities. To the extent that information is required from the FBI, the Tribunal reserves its determinations for a later date following the appointment of the forensic expert.
22. With respect to the contradictions raised by the Claimants, the Tribunal is of the view that the Respondent shall at this stage only provide answers to the extent that they are relevant for the present document authenticity phase, which includes questions related to the chain of custody. On that basis, the Tribunal orders the Respondent to provide answers to the following questions by no later than **31 July 2017**:
 - a. Did the Technical Committee refer to any of the Disputed Documents in the Allegations Letter, and specifically in allegations 15 and 16, and if so, which ones?
 - b. If the answer to (a) is affirmative, was the Technical Committee in possession of originals or copies?
 - c. If the Technical Committee was in possession of originals, who provided these documents to the Technical Committee?
 - d. Did Mr. Mebiame play a role in the chain of custody of the originals and, if so, what was it?
 - e. Did Mamadie Touré turn over the Disputed Documents on 7 or 8 February 2013? What documents did Mamadie Touré still have in her possession on 8 February 2013? Is the document to which she refers in her 8 February 2013 statement (i.e. the “memorandum of understanding” between Mamadie Touré, Asher Avidan and Frédéric Cilins mentioned at Exh. C-350, p. 9) included in the Disputed Documents?

4. Communications with the US authorities

23. The Claimants request that the Tribunal order the Respondent to produce “a record of all communications it has had with the US authority on [the issue of access to the

Disputed Documents], including all emails and/or letters exchanged with the authority, and notes of telephone conversations”.

24. While the Respondent provided the information on the access to the documents in compliance with paragraph 13(ii) of PO11, the Tribunal agrees that it is preferable that the related exchanges between Guinea and the US authorities be made available to the Claimants and the Tribunal. Therefore, it invites the Respondent to provide by **31 July 2017** a record of all communications, including by email, letter and telephone, which it had with US authorities (including the Department of Justice and the FBI) in connection with the modalities of access to the Disputed Documents for inspection purposes.
25. Further, the Tribunal takes note of the statement by the US Department of Justice, as relayed in the Respondent’s letter of 12 June 2017, that “[l]’accès par un expert aux originaux serait plus aisément accordé dans le cadre de la coopération inter-étatique, c’est-à-dire si la demande d’accès émanait de la République de Guinée”. The Tribunal further notes that the Claimants did not object to this course of action. The Tribunal notes this statement and will revert with directions in this respect at the time of appointment of the forensic expert and finalization of his terms of reference.
26. In the meantime, communications, if any, with the US authorities in respect of the inspection of the Disputed Documents shall be subject to prior leave of the Tribunal. If the circumstances make prior leave impossible or impractical, the Respondent shall promptly report on the content of oral communications and provide copies of written communications to the Claimants and the Tribunal.

On behalf of the Tribunal

[SIGNED]

Gabrielle Kaufmann-Kohler
President of the Tribunal