

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BSG Resources Limited

v.

Republic of Guinea

(ICSID Case No. ARB/14/22)

PROCEDURAL ORDER NO. 2

Transparency

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

Mr. Magnus Jesko Langer

September 17, 2015

I. PROCEDURAL BACKGROUND

1. On 27 May 2015, pursuant to paragraph 26.1 of Procedural Order No. 1, the Parties filed their comments on the rules of transparency applicable to the present proceedings, in particular on (i) the applicability of the UNCITRAL Rules on Transparency (the “Transparency Rules”) and (ii) whether and through which means the hearings would be open to the public.
2. On 8 September 2015, the Centre circulated a draft of this procedural order. The Parties provided their comments on the draft on 15 September 2015, after which the Tribunal issues this order in final form.
3. After setting out the positions of the Parties (II), the present order addresses the transparency regime applicable to the present arbitration (III).

II. POSITIONS OF THE PARTIES

4. The Claimant agrees to apply the Transparency Rules, subject to two amendments, namely that (i) the Secretary-General of ICSID or an institution named by ICSID act as repository of published information and that (ii) all exhibits, expert reports, and witness statements be published in addition to the documents referred to in Articles 3(1)-(2) of the Transparency Rules, without prejudice to Article 7.
5. The Claimant further proposes that (iii) the Tribunal be exclusively responsible for submitting documents to the repository; (iv) the Tribunal designate a person of contact between the Tribunal and the repository, absent which the Presiding Arbitrator would assume that role; (v) the Tribunal submit documents to the repository in a format agreed upon with the repository; (vi) the Tribunal communicate with the repository in English or French; (vii) the repository publish information in the form and language in which it receives it; and (viii) the repository refrain from publishing any additional document

from, or relating to, the arbitration once the Tribunal has discharged its function and its mandate is terminated.

6. The Respondent also agrees to apply the Transparency Rules and concurs with the Claimant's proposals (i) to (viii) referred to above. The Respondent further proposes that each Party be granted 45 days to ask the Tribunal to determine prior to publication whether information contained in a document is confidential or protected.
7. The Claimant agrees that the hearings be open to the public, always subject to the exceptions contained in Articles 6(2) and 7 of the Transparency Rules.
8. The Respondent consents to open hearings by way of video transmission, with a time lag of at least 30 minutes so as to allow the suspension of the transmission in the event that confidential or particularly sensitive information for purposes of State interests requires protection.

III. TRANSPARENCY REGIME

9. Although elaborated in the framework of UNCITRAL, the Transparency Rules are available for use in non-UNCITRAL arbitrations such as this ICSID arbitration (Art. 1(9)). Where the Contracting States to an investment treaty have not provided for the application of the Transparency Rules, the disputing parties (in the present case: the "Parties") may agree to apply the Transparency Rules (Art. 1(2)(a) by analogy and combined with Art. 1(9)). The ICSID legal framework allows the Parties to agree on a degree of transparency that is greater than the one required by the ICSID Convention and Arbitration Rules.
10. In the present case, the Parties have agreed on the application of the Transparency Rules, expanded their scope in some respects, and provided for specific rules for their implementation. ICSID has confirmed its willingness to administer this arbitration in

accordance with the rules set forth in this Order and to act as repository as defined in the Transparency Rules and in this Order (the “Repository”).

IV. ORDER

11. On the basis of the foregoing, the Tribunal gives the following directions in respect of the transparency of this arbitration. Unless otherwise specified, references to “Article(s)” designate article(s) of the Transparency Rules.

12. The Transparency Rules shall apply to the present proceedings, subject to the following specifications or amendments:

(i) Articles 1(1)-(2), 1(3)(a), and 2 are not applicable;

(ii) Article 1(5) is modified to the extent that the Tribunal may exercise its authority to promote transparency in this case;

(iii) The following provision replaces Article 3 of the Transparency Rules:

1. Subject to Article 7, the following documents shall be made available to the public: the Claimant’s request for arbitration, the Claimant’s memorial, the Respondent’s counter-memorial and any further written statements or written submissions by any Party, the exhibits, legal authorities, witness statements, expert reports (including any appended exhibits), transcripts of hearings, orders, decisions, and award of the arbitral tribunal.

Legal authorities shall be made available to the public in the form of lists hyperlinked to the relevant documents; if the documents are publicly available online, the hyperlink shall be to the relevant source online and the documents shall not be submitted to the Repository in PDF format.

2. Subject to Article 7, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether and how to make available to the public any documents provided to, or issued by, the Tribunal not falling within paragraph 1 above.

3. The documents to be made available to the public pursuant to paragraph 1 shall be communicated by the Tribunal to the Repository, subject to Section 15 below. The documents to be made available pursuant to paragraph 2 may be communicated by the Tribunal to the Repository as they become available and, if applicable, in a redacted form in accordance with Article 7. The Repository shall make all documents available to the public in a timely manner, in the form and in the language in which it receives them.

4. Any administrative costs of making those documents available to a person, such as the costs of photocopying or shipping documents to that 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.

13. As a result of the foregoing, Article 48(5) of the ICSID Convention and ICSID Arbitration Rules 32(2), 37(2), and 48(4) do not apply to proceedings before this Tribunal.
14. Pursuant to Article 6(3) of the Transparency Rules, the following logistical arrangements will be made to facilitate public access to the hearings:
- (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance by third persons at hearings shall be subject to the Tribunal's approval.
 - (ii) In order to protect potential confidential or protected information, the broadcast will be delayed by 30 minutes (Articles 6(2) and 7(3)(c)).
 - (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential, that the broadcast of the hearing be temporarily suspended or that protected information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential or protected 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”. The transcript made public by the Repository shall redact those portions of the hearing marked “confidential”.

- (iv) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link.
15. Pursuant to Article 7(3)(a), each Party or third person shall give notice within 21 days from the filing of a document that it seeks protection for confidential or protected information in that document. In the absence of such notice, the Tribunal will authorize the publication of any document mentioned in Section 12(iii) above.
 16. Pursuant to Article 7(3)(b), any request to protect confidential or protected information made in accordance with the preceding paragraph shall specifically identify the part (or parts) of the document sought to be designated as confidential or protected. After consulting the Parties, the Tribunal will decide whether the identified information is confidential or protected. If the information is found to be confidential or protected, the Party or third person will provide the Tribunal with a redacted version of the document in question. The Tribunal will thereafter transmit that document to the Repository for publication.
 17. With reference to Section 10 above, Article 8 is modified to the extent that the Repository of published information shall be ICSID. In addition, the following rules shall apply in connection with the Repository:
 - (i) The Tribunal will be responsible for submitting the documents for publication (in redacted form if applicable) to the Repository.

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- (ii) The Secretary of the Tribunal will receive the documents from the Tribunal and ensure publication in searchable electronic format (.pdf format).
 - (iii) The Repository will publish information and documents in the form and language in which it receives it.
 - (iv) The Tribunal will communicate with the Repository in English or French.
 - (v) The Tribunal will be released of its responsibility under the Transparency Rules and this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, being specified such mandate extends to any interpretation or revision proceedings.
 - (vi) Upon completion of the case, video recordings of hearings, and all documents referred to in Section 12(iii) above shall continue to be made available to the public on the ICSID website.
18. Pursuant to Section 12(iii) above, this Order which is hereby communicated to the Repository shall be published upon issuance.

On behalf of the Tribunal,

[Signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal