

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BSG Resources Limited

v.

Republic of Guinea

(ICSID Case No. ARB/14/22)

PROCEDURAL ORDER No. 4

Respondent's Objection to Publication

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

25 November 2015

1. The Tribunal refers to the Respondent's letter of 30 September 2015 and the Claimant's letter of 19 October 2015 in relation to the Respondent's request to protect confidential information contained in five categories of documents under Article 7 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") as adapted by Procedural Order No. 2 ("PO2").
2. This order sets out the applicable legal framework (A), the Tribunal's determination for each category of documents sought to be protected (B), and directions for the next procedural steps (C).

A. Legal framework

3. The Parties have agreed to the application of the Transparency Rules as set out and adapted in PO2. Accordingly, the Parties have agreed to make available to the public the documents listed in paragraph 12(iii) of PO2, subject to the exceptions to transparency provided in Article 7 of the Transparency Rules.
4. Where there is a dispute on whether a certain document or category of documents is confidential or otherwise protected, the Tribunal will make its determination in application of the standards set out in Article 7 of the Transparency Rules. In this context, Article 1(4) of the Transparency Rules specifies that, in the exercise of its discretion, the Tribunal must take into account the public interest in transparency as well as the Parties' interest in a fair and efficient resolution of their dispute. Further, according to Article 1(6) of the Transparency Rules, the Tribunal must ensure that the transparency objectives prevail in the face of any conduct having the effect of undermining such objectives.
5. Finally, the Tribunal observes that the IBA Rules on the Taking of Evidence (the "IBA Rules") are unhelpful in the present context. Indeed, they address a distinct issue, i.e. whether certain documents may become part of the record, while the

Transparency Rules and PO2 address whether documents already in the record can be made public. Admittedly, some of the relevant considerations for the purposes of exceptions to transparency under the Transparency Rules may overlap with aspects pertinent to exemptions from production under the IBA Rules (e.g. in respect of Art. 7(2)(a) and (c)). One should, however, not lose sight of the fact that the goal of the exercise carried out here is a different one.

B. Determinations

6. Applying the legal framework set out above, the Tribunal makes the following determinations. For the sake of procedural economy and efficiency, it provides its decision and its main reason(s) for it in bullet point format. It does so after having reviewed the Parties' arguments and the relevant tests arising from the applicable legal framework.

(a) Witness statements in Guinean proceedings

- **Documents:** 14 exhibits containing copies of witness statements made in Guinean criminal proceedings.¹ References to these exhibits in the Claimant's written submissions.
- **Decision:** Protected under Article 7(2)(c).
- **Main Reasons:** Whether viewed as "information of" Guinea or "other information", the documents originate from Guinean criminal proceedings. Their status is thus most closely linked with that country and with Article 10 of the Guinean Code of Criminal Procedure providing for secrecy of ongoing investigations, including testimony. Subject to further indications pointing to the contrary, the ruling also applies to the report of questioning of Ms. Touré. Finally, a waiver of secrecy is not sufficiently established.
- **Redactions:**
 - BSGR's Response to Guinea's requests under ICSID Arbitration Rules 28(1) and 39(1): paras. 50, 60(i), (ii), (iii), (iv) and (vi);

¹ Exh. C-68 to C-74 and Exh. C-0007, C-0011, C-0018, C-0022, C-0077, C-0078, C-0080, C-0157.

- BSGR's Memorial: paras. 47, 65, 85, 329, 330(ii), 332(ii), 333(i), 334, 336, note 188, 339(i), (iii), (iv), (vi), (vii), 341, 345.²

(b) Witness statements in Swiss proceedings

- **Documents:** nine exhibits containing copies of witness interrogations in the course of Swiss criminal proceedings³ and references to these exhibits in the Claimant's written submissions.
- **Decision:** Protected under Article 7(2)(c).
- **Main Reasons:** Whether they are governed by Swiss law (because they were conducted as part of a Swiss criminal investigation) or by Guinean law (because the interrogations were conducted there) or by both, these interrogations are protected by the secrecy of criminal investigation. The Geneva Prosecutor authorized the Parties to use the documents "exclusively in the arbitral proceedings". However, he does not appear to have lifted the secrecy for purposes of making the documents available to the public at large.
- **Redactions:** BSGR's Memorial paras. 47, 52, 63, 64, 66, 67, 82, 83, 84, 85, 329, 330(i), 331, 332(i), 333(i), 335, note 188, 339(v), 340, 345(i), 347, 348, 349.⁴

(c) Report of Heenan Blaikie

- **Documents:** Report from the law firm of Mr. Blaikie dated 20 December 2011 prepared for the President of the Republic of Guinea (Exh. C-105) and references thereto in the Claimant's written submissions.
- **Decision:** Protected under Article 7(2)(c).
- **Main Reasons:** Under French law, which is the legal system having the closest connection to the issue at hand, legal advice is protected by attorney-client privilege.
- **Redactions:** para. 73 of the witness statement of Mr. Asher Avidan.

² Redaction of paragraphs includes corresponding footnotes.

³ Exh. C-0006, C-0008, C-0019, C-0020, C-0021, C-0076, C-0079, C-0081, C-0082.

⁴ Exh. C-0006, C-0008, C-0019, C-0020, C-0021, C-0076, C-0079, C-0081, C-0082.

(d) Note of Minister Thiam

- **Document:** Confidential note prepared by Mr. Mahmoud Thiam in December 2011 (Exh. C-140).
- **Decision:** Protected.
- **Main Reason:** The Claimant does not object.

(e) Witness statement of Mr. Saifee Durbar

- **Document:** Witness statement of Mr. Durbar and references thereto in the Claimant's written submissions. Alternatively, the Respondent requests to reserve the decision on publication until the end of the arbitral proceedings.
- **Decision:** Reserved for later decision. No publication at this stage.
- **Redactions:** Reserved for later decision. Provisional redactions at this stage of proceedings: BSGR's Memorial fn. 55, end of fn. 57, fn. 58, end of fn. 61, fn. 79, end of fn. 90, fn. 94, fn. 111, fn. 118, end of fn. 161, fn. 165, fn. 168.

C. Order

(a) Exhibits and witness statement not for publication

- (i) Exhibits C-68 to C-74 C-105, C-140, C-0006, C-0007, C-0008, C-0011, C-0018, C-0019, C-0020, C-0021, C-0022, C-0076, C-0077, C-0078, C-0079, C-0080, C-0081, C-0082, C-0157, and for the time being also the witness statement of Mr. Durbar shall be exempted from publication. The Tribunal will communicate documents for publication to the Repository accordingly pursuant to Article 3(3) of the Transparency Rules as adapted.

(b) Redaction of submissions

- (i) The Claimant shall identify the redacted passages with square brackets containing the words "Protected" and shall indicate on the cover page of the submission

“Redacted Version”.

- (ii) Within two weeks from this order, the Claimant shall file the redacted versions of its Response to Guinea’s Application under ICSID Arbitration Rules 28(1) and 39(1), and of its Memorial, and of Mr. Avidan’s witness statement following the rules set in PO1 for the filing of written submissions;
- (iii) The Tribunal will then transmit these submissions to the Repository for publication.

(c) Format of future objections to publication

- (i) The Parties shall file future objections to publication within 21 days from receipt of the submission containing or attaching the information for which protection is sought.
- (ii) The other Party shall then reply within two weeks;
- (iii) The Tribunal will rule thereafter;
- (iv) Objections and replies shall be submitted in the form of a “Transparency Table”, a standard form of which is attached as Annex A.

On behalf of the Tribunal

[Signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal

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[insert Party]'s	Objection 1 [use one sheet per category of documents]
Documents sought to be protected	
Legal basis for protection	
Comments	
Reply by opposing party	
Decision	