

**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)**

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**DECISION ON THE PROPOSAL TO DISQUALIFY  
ALL MEMBERS OF THE ARBITRAL TRIBUNAL**

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*Chairman of the Administrative Council*

Dr. Jim Yong Kim

*Secretary of the Tribunal*

Mr. Benjamin Garel

Date: 28 December 2016

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## I. PROCEDURAL HISTORY

1. On 1 August 2014, BSG Resources Limited submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Republic of Guinea (“**Guinea**” or “**Respondent**”).
2. On 8 September 2014, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”), under ICSID Case No. ARB/14/22.
3. On 5 February 2015, the Secretary-General 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, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”). Mr. Benjamin Garel, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
4. The Tribunal is composed of Ms. Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by her co-arbitrators in accordance with the Parties’ agreement regarding the method of constitution of the Tribunal under Article 37(2)(a) of the ICSID Convention; Mr. Albert Jan van den Berg, a national of the Netherlands, appointed by the Claimants; and Mr. Pierre Mayer, a national of France, appointed by the Respondent.
5. On 23 April 2015, the Tribunal held its first session with the Parties. During the first session, the Parties confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of any member of the Tribunal.
6. On 13 October 2015, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL submitted another Request for Arbitration to ICSID against Guinea. On 25 November 2015, the Secretary-General registered this Request for Arbitration pursuant to Article 36(3) of the ICSID Convention, under ICSID Case No. ARB/15/46.
7. On 7 December 2015, the Tribunal in ICSID Case No. ARB/15/46 was constituted pursuant to Article 37(2)(a) of the ICSID Convention. It was composed of the same members as the Tribunal in ICSID Case No. ARB/14/22.

8. On 14 February 2016, the Tribunals issued Procedural Order No. 1 in ICSID Case No. ARB/15/46 and Procedural Order No. 5 in ICSID Case No. ARB/14/22 implementing, at the Parties' request, the consolidation of the two cases into ICSID Case No. ARB/14/22. On the same day, the Tribunal in ICSID Case No. ARB/15/46 issued Procedural Order No. 2 taking note of the discontinuance of ARB/15/46 in accordance with ICSID Arbitration Rule 43(1).
9. On 9 August 2016, the Parties submitted their requests for document production to the Tribunal, in the form of Redfern Schedules.
10. On 5 September 2016, the Tribunal issued Procedural Order No. 7 ("PO7") containing its decisions on the Parties' requests for document production.
11. On 3 October 2016, the Parties produced documents pursuant to PO7.
12. By letter dated 15 October 2016, BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL ("**Claimants**") alleged that the Respondent was withholding certain relevant and material documents that the Tribunal had ordered it to produce in PO7. The Claimants asked the Tribunal to order the Respondent to produce these documents and to indicate the steps it had taken to identify and collect the documents ordered to be produced by PO7.
13. By letter dated 22 October 2016, the Respondent denied having withheld responsive documents and explained the steps taken to comply with the Tribunal's decision in PO7.
14. By emails dated 22 and 24 October 2016, the Claimants sought leave to respond to the Respondent's letter dated 22 October 2016. By email dated 24 October 2016, the Tribunal informed the Parties that it did not wish to receive further communications from the Parties in relation to document production, and that it would revert shortly with further directions.
15. By letter dated 27 October 2016, the Tribunal conveyed the following message to the Parties:

*Having reviewed the positions of the Parties, including the Respondent's responses to Annex 1, the Tribunal is of the view that pursuing these issues of document production at this stage of the proceedings will make no meaningful contribution to the resolution of this dispute. This said, it notes that, to the extent the Claimants wish to claim that non-compliance with*

*Procedural Order No. 7 entails legal consequences, such as for instance adverse inferences, they may do so in the further course of the arbitration, specifically in their further scheduled written submissions and at the hearing. In addition, the Tribunal reminds the Parties that they are under a continuing duty to produce responsive documents as and when they become available. All other requests are denied.*

16. On 4 November 2016, the Claimants proposed the disqualification of all three members of the Tribunal in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (“**Proposal**”). On that date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the Parties’ submissions on the Proposal.
17. On 11 November 2016, the Respondent submitted its response to the Proposal.
18. By letter dated 15 November 2016, the three members of the Tribunal jointly furnished explanations as envisaged by ICSID Arbitration Rule 9(3).
19. By email dated 22 November 2016 and by letter dated 23 November 2016, the Respondent and the Claimants, respectively, submitted further observations.

## **II. PARTIES’ ARGUMENTS**

### **A. The Claimants’ Proposal**

20. The Claimants’ arguments in support of their proposal to disqualify the members of the Tribunal were set forth in their submissions of 4 November 2016 and 23 November 2016. These arguments are summarized below.

#### **1) The Basis for Disqualification of the Tribunal Members**

##### **a. The Tribunal’s Alleged Prejudgment of a Central Issue in the Arbitration**

21. The Claimants contend that the Tribunal prejudged a central issue in the arbitration, “*which raises reasonable doubts as to the impartiality of the members of the Tribunal and reveals an underlying bias against Claimants.*”<sup>1</sup>

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<sup>1</sup> Proposal, ¶ 38.

22. The Claimants' contention relates to the Tribunal's decision on 27 October 2016 regarding the Claimants' requests for document production (the "**Decision**"). During the document production phase, the Claimants had sought from the Respondent "*the production of Emails and Deliberations in relation to the process and the reasoning for the award of the Mining Rights to Claimants.*"<sup>2</sup> According to the Claimants, these key documents related to the core issues in this case as they would assist in establishing whether the mining rights were procured by the Claimants in accordance with due process and based on arms-length negotiations.<sup>3</sup>
23. The Claimants argue that in PO7 the Tribunal acknowledged that the Emails and Deliberations were relevant and material to the outcome of the case, yet it came to the opposite conclusion on 27 October 2016 when it found "*that pursuing these issues of document production at this stage of the proceedings will make no meaningful contribution to the resolution of this dispute*" and rejected the Claimants' request.<sup>4</sup>
24. The Claimants consider that:

*By concluding that the production of the Emails and Deliberations (that until a few weeks ago were considered relevant and material) will no longer meaningfully contribute to the resolution of the dispute, the Tribunal has undoubtedly prejudged the fiercely contested issues in this arbitration.*<sup>5</sup>

25. The Claimants maintain that the Tribunal's Decision on document production is flawed because it is based on Guinea's belated and incorrect argument that it lacked control over the requested documents and was unable to search for them.<sup>6</sup> The Claimants further submit that there is reasonable doubt as to the Tribunal's impartiality because the Tribunal ignored Guinea's withholding of relevant and material documents without proper justification and because the Tribunal failed to review such documents.<sup>7</sup> According to the Claimants, these

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<sup>2</sup> Proposal, ¶ 35.

<sup>3</sup> Proposal, ¶ 35; see also Cl. Fur. Obs., ¶¶ 20-36.

<sup>4</sup> Proposal, ¶ 36.

<sup>5</sup> Proposal, ¶ 37.

<sup>6</sup> Proposal, ¶¶ 38-39; see also Cl. Fur. Obs., ¶¶ 37-51.

<sup>7</sup> Proposal, ¶¶ 40-41.

concerns are amplified by the Tribunal's refusal to allow them to respond to Guinea's letter of 22 October 2016.<sup>8</sup>

26. On the basis of the foregoing, the Claimants conclude that:

*A third person undertaking a reasonable evaluation of the Tribunal's extraordinary decision to allow Guinea to withhold possibly hundreds of Emails that are potentially relevant and material to the outcome of the case and the Tribunal's refusal to Claimants' request to reply to Guinea's defence, would conclude that the members of the Tribunal manifestly lack the impartiality required under the ICSID Convention.*<sup>9</sup>

**b. The Tribunal's Alleged Denial of Due Process and Violation of the Claimants' Rights**

27. In the Claimants' view, the production of documents is an essential part of international arbitration, and it plays a key role in ascertaining the truth.<sup>10</sup> The Claimants argue that the documents requested will be crucial to meet their burden of proof and to demonstrate that the mining rights at issue were obtained in a lawful manner.<sup>11</sup> According to the Claimants, the Tribunal's refusal to order the production of such documents is a denial of due process, which violates the Claimants' rights to present their case and be treated fairly.<sup>12</sup> The Claimants add that "[t]his denial of due process and violation of Claimants' most fundamental rights raises reasonable doubts as to the impartiality of the arbitrators and their underlying bias against Claimants."<sup>13</sup>

28. The Claimants submit that the Tribunal's decision was not warranted by the procedural timetable of the case.<sup>14</sup>

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<sup>8</sup> Proposal, ¶ 42; see also Cl. Fur. Obs., ¶¶ 78-80.

<sup>9</sup> Proposal, ¶ 43.

<sup>10</sup> Proposal, ¶¶ 44-47.

<sup>11</sup> Proposal, ¶ 47.

<sup>12</sup> Proposal, ¶¶ 48-49.

<sup>13</sup> Proposal, ¶ 50.

<sup>14</sup> Proposal, ¶ 51.

29. The Claimants also argue that, contrary to the Tribunal's suggestion, the potential to request inferences adverse to the Respondent would not alleviate their concerns.<sup>15</sup> The Claimants note that arbitral tribunals rarely draw adverse inferences and that adverse inferences are not an adequate substitute for the undisclosed evidence.<sup>16</sup>
30. For the Claimants,

*a third person undertaking a reasonable evaluation of the Tribunal's extraordinary decisions to deprive Claimants of hundreds [sic] Emails, Deliberations and other documents that will assist them to establish their innocence, undermine Guinea's case and evidence and impeach Guinea's witnesses in cross-examination, would conclude that the members of the Tribunal manifestly lack the impartiality required under the ICSID Convention.*<sup>17</sup>

**c. The Claimants' Further Observations on the Proposal**

31. The Claimants contend that factual developments occurring subsequent to the Tribunal's Decision reinforced the relevance of the documents not produced by the Respondent.<sup>18</sup>
32. The Claimants also allege that the Tribunal had shown prior preferential treatment of Guinea in its decisions on prior applications made to the Tribunal in August and September 2016.<sup>19</sup>
33. The Claimants finally submit that their Proposal is made in good faith and was not intended to delay the proceedings.<sup>20</sup>

**d. The Claimants' Observations on the Respondent's Response**

34. *First*, the Claimants reject the Respondent's argument that the Tribunal has simply exercised its discretion to order additional document production. The Claimants state that they had not

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<sup>15</sup> Proposal, ¶ 52; see also Cl. Fur. Obs., ¶¶ 111-114.

<sup>16</sup> Proposal, ¶ 52; Cl. Fur. Obs., ¶ 112-113.

<sup>17</sup> Proposal, ¶ 53; see also Cl. Fur. Obs., ¶¶ 94-105.

<sup>18</sup> Cl. Fur. Obs., ¶¶ 85-88.

<sup>19</sup> Cl. Fur. Obs., ¶¶ 89-93.

<sup>20</sup> Cl. Fur. Obs., ¶¶ 137-152.

sought new or additional documents, but they had merely requested clarification of the Respondent's document production obligations.<sup>21</sup>

35. *Second*, the Claimants maintain that the Tribunal's reminder of the Parties' continuing production obligation, on which the Respondent relies, is meaningless because it is unclear how these contested documents will become available to the Respondent at a later stage.<sup>22</sup>
36. *Third*, the Claimants reject the Respondent's argument that the Tribunal has not prejudged the merits of the dispute by denying production of the contested documents because the scope of the Tribunal's ruling is limited in time by the words "*at this stage*."<sup>23</sup> For the Claimants,

*[i]t is at this stage of the proceedings, during which Claimants could in normal circumstances incorporate the evidence obtained in the document production in its Reply Memorial and in its additional witness statement, that the requested documents could have contributed to the resolution of the dispute, not at a later stage when the Claimants have already filed their last memorial on the merits and last round of witness evidence.*<sup>24</sup>

37. *Fourth*, the Claimants consider that, contrary to the Respondent's assertions, the Tribunal's document production decisions dated 5 September 2016 and 27 October 2016 are inconsistent.<sup>25</sup> For the Claimants, the decision in PO7 imposed an obligation on the Respondent to produce the requested documents, and the Decision of 27 October 2016 effectively revoked that obligation by refusing to reconfirm the order made in PO7.<sup>26</sup>
38. *Lastly*, the Claimants reject the Respondent's submission "*that a tribunal's refusal to order production cannot constitute a violation of a party's right to due process and to the right to set out its case because otherwise a party would have an absolute right to document*

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<sup>21</sup> Cl. Fur. Obs., ¶¶ 107-108.

<sup>22</sup> Cl. Fur. Obs., ¶¶ 115-116.

<sup>23</sup> Cl. Fur. Obs., ¶¶ 117-125.

<sup>24</sup> Cl. Fur. Obs., ¶ 120.

<sup>25</sup> Cl. Fur. Obs., ¶¶ 126-129.

<sup>26</sup> Cl. Fur. Obs., ¶ 127.

*production.*”<sup>27</sup> For the Claimants, a party is treated unfairly and there is no due process if that party is denied the production of important documents or other evidence.<sup>28</sup>

## 2) The Applicable Legal Standard

39. The Claimants submit that: (a) the requirement in Article 14 of the ICSID Convention that an arbitrator must be “*a person who may be relied upon to exercise independent judgment*” requires arbitrators to be both impartial and independent; (b) impartiality refers to the absence of bias or predisposition toward a party, and independence is marked by the absence of external control;<sup>29</sup> (c) actual proof of bias or dependence is not required, and appearance is sufficient;<sup>30</sup> (d) the applicable legal standard is an objective standard based on a reasonable evaluation of the evidence by a third party;<sup>31</sup> and (e) the term “manifest” in Article 57 of the ICSID Convention means “obvious” or “evident” and relates to the ease with which the lack of the required quality can be perceived.<sup>32</sup>
40. The Claimants further submit that “*the legal standard that applies to the disqualification of arbitrators in ICSID proceedings [...] is whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that the arbitrator possessed the required qualities of impartiality and or independence.*”<sup>33</sup>
41. The Claimants conclude that a third party observer would find that the Tribunal treated them unfairly and that:

*[...] due process was violated, that Claimants have been deprived of the right to fully set out their case and defend Guinea's case and that they have been treated unfairly by the Tribunal. He would conclude that the facts manifestly evidence an appearance of a lack of impartiality and prejudgment with*

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<sup>27</sup> Cl. Fur. Obs., ¶ 130.

<sup>28</sup> Cl. Fur. Obs., ¶ 136.

<sup>29</sup> Proposal, ¶ 29.

<sup>30</sup> Proposal, ¶ 30.

<sup>31</sup> Proposal, ¶ 31.

<sup>32</sup> Proposal, ¶ 32.

<sup>33</sup> Cl. Fur. Obs., ¶ 5.

*respect to Claimants. The disqualification proposal must therefore be upheld.*<sup>34</sup>

## **B. The Respondent's Reply**

42. The Respondent's arguments opposing the Claimants' Proposal to disqualify the members of the Tribunal were set forth in its submission of 11 November 2016.<sup>35</sup> These arguments are summarized below.

### **1) The Lack of Merits of the Proposal to Disqualify**

43. *First*, the Respondent contends that the Tribunal respected the rules applicable to document production and fulfilled its duties in that respect.<sup>36</sup> The Respondent adds that arbitral tribunals have discretion to order document production, which includes the power to draw adverse inferences.<sup>37</sup> The Respondent also emphasizes that the Tribunal has reminded the parties of their continuing duty to produce responsive documents as and when they become available.<sup>38</sup>
44. *Second*, the Respondent submits that the Tribunal has not prejudged the merits of the dispute.<sup>39</sup> According to the Respondent, the Tribunal did not conclude that the production of the requested documents would not contribute to the resolution of the dispute.<sup>40</sup> Rather, the Tribunal found supplementary production was unnecessary at this stage of the proceedings.<sup>41</sup>

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<sup>34</sup> Cl. Fur. Obs., ¶¶ 104-105.

<sup>35</sup> As mentioned in ¶ 18 above, the Respondent submitted further observations by email dated 22 November 2016, which read (translated from the French):

*“The Republic of Guinea took note of the letter dated 15 November 2016 from Professor Gabrielle Kaufmann-Kohler, Professor Albert Jan van den Berg and Professor Pierre Mayer, who confirm having acted in accordance with the fundamental principles of procedure, impartially and independently.*

*The statement from the Tribunal members confirms that the decision challenged by the BSGR companies occurred in the course of the normal conduct of an arbitration proceeding. This decision is therefore not susceptible of justifying their disqualification.*

*Subject to this further observation, the Republic of Guinea continues to rely on its submission dated 11 November 2016.”*

<sup>36</sup> Respondent's Observations dated 11 November 2016, ¶¶ 37-45.

<sup>37</sup> Respondent's Observations dated 11 November 2016, ¶¶ 38-43.

<sup>38</sup> Respondent's Observations dated 11 November 2016, ¶ 44.

<sup>39</sup> Respondent's Observations dated 11 November 2016, ¶¶ 46-59.

<sup>40</sup> Respondent's Observations dated 11 November 2016, ¶ 48.

<sup>41</sup> Respondent's Observations dated 11 November 2016, ¶ 48.

The Respondent also argues that the documents requested by the Claimants would not support the Claimants' case, hence the Tribunal's decision could not prejudice the Claimants.<sup>42</sup>

45. *Third*, the Respondent submits that the Tribunal's decisions of 5 September 2016 and 27 October 2016 are not inconsistent, since the first decision concerned the production of documents and the second decision related to additional measures sought by the Claimants in relation to document production.<sup>43</sup>
46. *Fourth*, the Respondent argues that the Proposal is based on a misleading description of the Tribunal's decision of 27 October 2016. For the Respondent, the Tribunal did not decide, as the Claimants contend, that the requested documents "*will no longer meaningfully contribute to the resolution of the dispute.*"<sup>44</sup> Rather, the Respondent submits, the Tribunal ruled that "*pursuing these issues of document production at this stage of the proceedings will make no meaningful contribution to the resolution of this dispute.*"<sup>45</sup> The Respondent therefore contends that the Tribunal reserved the possibility of amending its decision later in the proceeding if the requested measures become relevant.<sup>46</sup>
47. *Fifth*, the Respondent considers that the Tribunal respected the Claimants' due process rights.<sup>47</sup> According to the Respondent, the Tribunal has discretion to decide on document production requests and therefore has not impaired the Claimants' ability to present their case by exercising such power.<sup>48</sup> To the contrary, the Respondent submits that the potential to request the Tribunal to draw adverse inferences based on an allegedly defective document production protects the Claimants' due process rights.<sup>49</sup>

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<sup>42</sup> Respondent's Observations dated 11 November 2016, ¶¶ 52-59.

<sup>43</sup> Respondent's Observations dated 11 November 2016, ¶ 62-64.

<sup>44</sup> Respondent's Observations dated 11 November 2016, ¶ 65.

<sup>45</sup> Respondent's Observations dated 11 November 2016, ¶ 66, citing the Tribunal's decision of 27 October 2016.

<sup>46</sup> Respondent's Observations dated 11 November 2016, ¶ 67.

<sup>47</sup> Respondent's Observations dated 11 November 2016, ¶¶ 69-76.

<sup>48</sup> Respondent's Observations dated 11 November 2016, ¶¶ 70-73.

<sup>49</sup> Respondent's Observations dated 11 November 2016, ¶¶ 75-76.

48. *Sixth*, the Respondent submits that the Tribunal has not breached the Claimants’ right to equitable treatment by rejecting their requests for document production.<sup>50</sup>

## 2) The Applicable Legal Standard

49. The Respondent submits that Article 57 of the ICSID Convention requires the challenging party to bear the burden of proving that the lack of impartiality is “manifest.”<sup>51</sup> For the Respondent, this burden of proof is high as it is insufficient to establish an apparent lack of impartiality; the lack of impartiality must be established by objective evidence which would convince a reasonable observer and would not require an extensive analysis of the facts. The Respondent further submits that the decisions relied on by the Claimants affirm the high burden of proof on a disqualification.<sup>52</sup>

50. The Respondent contends that the facts relied on by the Claimants do not raise any objective doubts as to the impartiality of the arbitrators, and only reflect a party’s disagreement with a procedural decision.<sup>53</sup>

## C. Arbitrators’ Explanations

51. By letter dated 15 November 2016, arbitrators Kaufmann-Kohler, van den Berg and Mayer provided a joint statement, which reads:

*Dear Secretary of the Tribunal,*

*We refer to the Claimants’ proposal of 4 November 2016 for the disqualification of all members of this Arbitral Tribunal and to the Respondent’s response of 11 November 2016.*

*We will not comment on the Parties’ submissions. We confirm that we consider that we have conducted, and we further intend to conduct, these proceedings in compliance with fundamental principles of procedure, in particular with the principles of due process and impartiality and independence.*

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<sup>50</sup> Respondent’s Observations dated 11 November 2016, ¶¶ 77-80.

<sup>51</sup> Respondent’s Observations dated 11 November 2016, ¶ 26.

<sup>52</sup> Respondent’s Observations dated 11 November 2016, ¶¶ 27-34.

<sup>53</sup> Respondent’s Observations dated 11 November 2016, ¶ 35.

*Sincerely yours,*

*Albert Jan van den Berg*

*Pierre Mayer*

*Gabrielle Kaufmann-Kohler*<sup>54</sup>

### III. DECISION BY THE CHAIRMAN

#### A. The Applicable Legal Standard

52. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*

53. The disqualification proposed in this case alleges that all members of the Tribunal manifestly lack the qualities required by Article 14(1) of the ICSID Convention. Accordingly, it is unnecessary to address disqualification “*on the ground that [an arbitrator] was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*”

54. A number of decisions have concluded that the word “manifest” in Article 57 of the ICSID Convention means “evident” or “obvious,”<sup>55</sup> and that it relates to the ease with which the

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<sup>54</sup> Tribunal’s letter dated 15 November 2016.

<sup>55</sup> See *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic* (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007) (“*Suez*”), ¶ 34; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) (“*Alpha*”), ¶ 37; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (May 20, 2011), (“*Universal*”), ¶ 71; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013) (“*Saint-Gobain*”), ¶ 59; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (November 12, 2013) (“*Blue Bank*”), ¶ 47; *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) (“*Burlington*”), ¶ 68; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 04, 2014) (“*Abaclat*”), ¶ 71; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego

alleged lack of the required qualities can be perceived.<sup>56</sup>

55. Article 14(1) of the ICSID Convention provides:

*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*

56. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*,” the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.<sup>57</sup>

57. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.<sup>58</sup> Independence and impartiality both “*protect parties against arbitrators being influenced by factors other than those related to the merits of the case.*”<sup>59</sup> Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.<sup>60</sup>

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Vicuña and Claus von Wobeser (December 13, 2013) (“*Repsol*”), ¶ 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (May 05, 2014) (“*Conoco*”), ¶ 47; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (July 1, 2015) (“*Conoco et al.*”), ¶ 82.

<sup>56</sup> C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.

<sup>57</sup> *Suez*, ¶ 28; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011), ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012) (“*Getma*”), ¶ 59; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012) (“*ConocoPhillips*”), ¶ 54; *Alpha*, ¶ 36; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010) (“*Tidewater*”), ¶ 37; *Saint-Gobain*, ¶ 55; *Burlington*, ¶ 65; *Abaclat*, ¶ 74; *Repsol*, ¶ 70; *Conoco*, ¶ 50; *Conoco et al.*, ¶ 80.

<sup>58</sup> *Suez*, ¶ 29; *ConocoPhillips*, ¶ 54; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81.

<sup>59</sup> *ConocoPhillips*, ¶ 55; *Universal*, ¶ 70; *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ARB/07/26, August 12, 2010 (“*Urbaser*”), ¶ 43; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81.

<sup>60</sup> *Urbaser*, ¶ 43; *Blue Bank*, ¶ 59; *Burlington*, ¶ 66; *Abaclat*, ¶ 76; *Conoco*, ¶ 52; *Conoco et al.*, ¶ 83.

58. The legal standard applied to a proposal to disqualify an arbitrator is an “*objective standard based on a reasonable evaluation of the evidence by a third party.*”<sup>61</sup> As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>62</sup>

### **B. Timeliness**

59. Arbitration Rule 9(1) reads as follows:

*A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

60. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.<sup>63</sup> Previous tribunals have found that a proposal was timely when filed within 10 days of learning the underlying facts,<sup>64</sup> but untimely when filed after 53 days.<sup>65</sup>

61. The Respondent has not contended that the Proposal was untimely.

62. The Proposal in this case was filed 7 days after the Tribunal’s ruling which gave rise to the Proposal. Accordingly, the Proposal was filed promptly for the purposes of Arbitration Rule 9(1).

### **C. Merits**

63. As recalled above, each Party had an opportunity to submit comments on the relevant document production issues, first in their Redfern Schedules submitted on 9 August 2016 and

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<sup>61</sup> *Suez*, ¶¶ 39-40; *Abaclat*, ¶ 77; *Burlington*, ¶ 67; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

<sup>62</sup> *Burlington*, ¶ 67; *Abaclat*, ¶ 77; *Blue Bank*, ¶ 60; *Repsol*, ¶ 72; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

<sup>63</sup> *Burlington*, ¶ 73; *Conoco*, ¶ 39; *Abaclat*, ¶ 68; *Conoco et al.*, ¶ 63.

<sup>64</sup> *Urbaser*, ¶ 19.

<sup>65</sup> *Suez*, ¶¶ 22-26.

subsequently in their additional observations, i.e. the Claimants' letter of 15 October 2016 and the Respondent's response thereto of 22 October 2016.<sup>66</sup>

64. The Tribunal then ruled on the Claimants' 15 October 2016 request, indicating that "pursuing these issues of document production at this stage of the proceedings [would] make no meaningful contribution to the resolution of the dispute."<sup>67</sup>
65. The Tribunal also expressly indicated that the Claimants were free to discuss the Respondent's alleged non-compliance with PO7 and its legal consequences, such as adverse inferences, "in their further scheduled written submissions and at the hearing,"<sup>68</sup> thus offering further opportunities to the Claimants to address these evidentiary matters.
66. The Tribunal finally reminded the Parties of their "continuing duty to produce responsive documents as and when they become available."<sup>69</sup>
67. Therefore, and upon careful review of the Parties' submissions, the Chairman sees no evidence of either prejudgment of the disputed issues or any violation of due process in the Tribunal's Decision.
68. While the Claimants may not be satisfied with the Tribunal's Decision, the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by a dissatisfied party, which would unduly disrupt and prolong the arbitral process.
69. In the Chairman's view, a third party undertaking a reasonable evaluation of the Tribunal's Decision and surrounding facts relied upon in the Claimants' Proposal, would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

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<sup>66</sup> See ¶¶ 9-14.

<sup>67</sup> Tribunal's Letter of 27 October 2016. Emphasis added.

<sup>68</sup> Tribunal's Letter of 27 October 2016. Emphasis added.

<sup>69</sup> Tribunal's Letter of 27 October 2016.

**IV. DECISION**

70. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chairman rejects the Claimants' Proposal to disqualify all members of the Tribunal.

[SIGNATURE]

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*Chairman of the ICSID Administrative Council*

Dr. Jim Yong Kim