

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. 16

Claimants' Request in respect of additional evidence

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

15 February 2018

I. Procedural background

1. On 21 December 2017, the Claimants submitted a request to add new documents to the record as well as a request that the Respondent produce three categories of documents (the “Request”).
2. On 4 January 2018, the Respondent provided its comments objecting to the Request (the “Response”).
3. On 11 January 2018, the Claimants requested leave to comment on the Response, which they did on 15 January 2018 (the “Reply”).
4. On 18 January 2018, the Respondent responded to the Reply (the “Rejoinder”).
5. The present order rules on the Request.

II. Parties’ positions

1. The Claimants’ position

6. The Claimants’ first request is that the Tribunal allow the Claimants to adduce to the record excerpts of the transcripts of three interviews of Mamadie Touré conducted by the Swiss prosecutor on 6 and 7 July 2017 and 18 October 2017.
7. The Claimants argue that the interviews postdate the merits hearing in these proceedings (the “Merits Hearing”), that the Claimants only “recently” became aware of their existence and that they “respond to key issues in the claim”, thus fulfilling the requirement of exceptional circumstances under Article 17.2 of Procedural Order No. 1 (“PO1”).¹ In any event, the Tribunal can order the production of documents at any stage of the proceedings pursuant to Article 34(2) of the ICSID Arbitration Rules.
8. The Claimants reject Guinea’s assertion that their request is untimely, since they became aware of the October 2017 transcripts on 6 December 2017 and “it was when

¹ Letter of 21 December 2017 from the Claimants to the Tribunal, p. 1; letter of 15 January 2018 from the Claimants to the Tribunal, p. 2.

viewing these transcripts that it became apparent that Mamadie Touré’s evidence in July 2017 was contradictory”.²

9. While “the entire transcripts are relevant”, the Claimants request that only certain excerpts be adduced to the record to disprove the Respondent’s assertions on the availability of Mamadie Touré to testify as a witness, its alleged lack of control over Mamadie Touré, as well as its submissions on the chain of control of the documents subject to the document authenticity phase (the “Disputed Documents”).³ However, in response to Guinea’s criticism to provide only selected excerpts, the Claimants are also “content to submit the entirety of the transcripts”.⁴
10. As to Mamadie Touré’s availability to testify in these proceedings, and more specifically the Respondent’s unwillingness to present her as a witness, the Claimants recall that they raised this issue since the start of this arbitration and that it was discussed “at length” during the Merits Hearing. According to the Claimants, the excerpts which they seek to add to the record disprove the Respondent’s allegations that the US authorities prevented Mamadie Touré from testifying in these proceedings, that Mamadie Touré refused to testify other than before the US proceedings, including the present arbitration, and that the Respondent does not have direct access to Mamadie Touré nor control over her.⁵ The distinction the Respondent now seeks to make between criminal proceedings and non-criminal proceedings is ill-conceived since the Respondent never asked the US authorities whether Mamadie Touré could participate in the present proceedings.⁶ In addition, the Respondent disregards the burden of proof when it argues that the Claimants could have sought the assistance of the US authorities to get access to Mamadie Touré.⁷
11. The excerpts sought to be introduced into the record show that Mamadie Touré is able and willing to testify in proceedings other than those pending in the US, and has in fact

² Letter of 15 January 2018 from the Claimants to the Tribunal, p. 5.

³ Letter of 21 December 2017 from the Claimants to the Tribunal, p. 2; letter of 15 January 2018 from the Claimants to the Tribunal, p. 2.

⁴ Letter of 15 January 2018 from the Claimants to the Tribunal, p. 2.

⁵ Letter of 21 December 2017 from the Claimants to the Tribunal, p. 5.

⁶ Letter of 15 January 2018 from the Claimants to the Tribunal, p. 3.

⁷ Letter of 15 January 2018 from the Claimants to the Tribunal, p. 3.

testified in criminal proceedings conducted in Guinea, Israel and Switzerland. They further show that the Respondent has access to and control over Mamadie Touré, and in particular that the Respondent is paying for her legal fees. Finally, they reveal the “fundamentally unfair position” in which the Claimants find themselves, since Mamadie Touré was presented with the transcripts of the Merits Hearing “in order for her to provide partial evidence” in the criminal proceedings in circumstances where the Respondent refuses to call her as witness, thus preventing the Claimants to cross-examine her.

12. As to the Respondent’s access to and control over Mamadie Touré, the Claimants argue that the Respondent not only paid US\$ 50,000 to Mamadie Touré in 2013 for legal expenses, including travel costs, but also “well after 2013, and in particular in relation to her provision of evidence to various criminal authorities”.⁸ In addition, the excerpts show that the 2013 payment “was not in fact for legal expenses”, further highlighting the existence of exceptional circumstances justifying the present request.⁹
13. As to the chain of custody of the Disputed Documents, the Claimants argue that the excerpts disprove the Respondent’s assertions that Mamadie Touré provided these documents directly to Guinea’s President Alpha Condé and that the Respondent is unaware of Mr. Mebiame’s role in this context.
14. The Claimants’ second request seeks an order that the Respondent produce the following documents:
 - (i) A record of all communications the Respondent has had with all US authorities in relation to the production of the declaration of Mr. Martinez on 26 June 2017 including all emails and/or letters exchanged with the authority, and notes of telephone conversations;
 - (ii) All communications relating to BSGR, Mr. Steinmetz and/or Simandou between the US authorities and Guinea and/or DLA Piper; and

⁸ Emphasis in the original. Letter of 15 January 2018 from the Claimants to the Tribunal, p. 3.

⁹ Letter of 15 January 2018 from the Claimants to the Tribunal, p. 3.

(iii) All information in Guinea's possession relating to how the Swiss Public Prosecutor came into possession of the ICSID hearing transcripts in advance of his interviews with Mamadie Touré on 6 and 7 July 2017.

15. To the Respondent's objection that its communications with US authorities are protected by confidentiality, the Claimants oppose that in Procedural Order No. 12 the Tribunal ordered the production of all communications with US authorities on the modalities of accessing the Disputed Documents.¹⁰ Accordingly, no confidentiality or attorney-client privilege applies here.

2. The Respondent's position

16. In its Response, the Respondent provided the information requested in item (iii) of paragraph 14 above. Otherwise, it opposed the other limbs of the Request.

17. With respect to the first part of the request seeking to introduce excerpts of the transcripts of Mamadie Touré's interviews before the Swiss prosecutor, the Respondent argues first that the Claimants have not put forward any "exceptional circumstance" required under Article 17.2 of Procedural Order No. 1 ("PO1").¹¹ For the Respondent, the existence of transcripts originating from ongoing criminal procedures is nothing exceptional, and allowing the Parties to continuously submit new evidence would excessively increase the complexity of these proceedings. In addition, while Mamadie Touré's availability as a witness, the payment of her "legal expenses" by Guinea, and the chain of custody of the Disputed Documents are challenged, albeit minor issues, the Claimants did not allege that the excerpts of the transcripts are relevant to resolving the key issue in this arbitration of whether the Claimants obtained their mining rights through corruption.¹²

18. Moreover, this request is untimely considering that the Claimants were aware since 2 June 2017 at the latest that the Swiss prosecutor would interrogate Mamadie Touré in

¹⁰ Letter of 15 January 2018 from the Claimants to the Tribunal, p. 5.

¹¹ Letter of 4 January 2018 from the Respondent to the Tribunal, p. 2; letter of 18 January 2018 from the Respondent to the Tribunal, p. 3.

¹² Letter of 18 January 2018 from the Respondent to the Tribunal, p. 3.

July 2017.¹³ In addition, while the Claimants argue that they received the October 2017 transcripts on 6 December 2017, their explanation reveals that they were in possession of the July 2017 transcripts well before.¹⁴

19. The Respondent further stands by its statements in this arbitration. The Claimants' attempts to justify their request on the ground of Guinea's bad faith are misconceived. In particular, the Claimants fail to distinguish between the abilities to testify in criminal proceedings and in arbitration proceedings. According to the Respondent, the US authorities allowed Mamadie Touré to provide testimony in other criminal proceedings, but did not authorize her to do so in this arbitration. The Respondent further reiterates that it made oral requests which the US authorities denied.¹⁵ In addition, Mamadie Touré's lawyer, Ms. Mary Mulligan, clearly stated that her client refuses to give evidence in this arbitration.¹⁶ Moreover, the Claimants could have contacted Ms. Mulligan directly or requested the assistance of the US authorities pursuant to Section 28 U.S.C, § 1782, but they chose not to.
20. The Respondent also disputes that it has access to or control over Mamadie Touré. The criminal proceedings in the US are ongoing and thus covered by the secrecy of the investigations. The Respondent was not provided with the information obtained by the Guinean prosecutor through mutual assistance. In addition, while Guinea is a complainant in the Swiss criminal proceedings, it has no access to the file so far. Neither does it have control over Mamadie Touré. While it is true that the Respondent paid her "legal expenses" in 2013 for a total amount of USD 50,000 to cover her travel costs, there is nothing exceptional to cover travel expenses of a witness who is called to testify in criminal proceedings pending in several countries.
21. Further, the Respondent explains that the Claimants were aware that, on 19 May and 2 June 2017, the Swiss prosecutor had ordered the production of the full transcripts of the Merits Hearing, which it did. However, the Respondent stresses that it is not privy to

¹³ Letter of 4 January 2018 from the Respondent to the Tribunal, p. 9.

¹⁴ Letter of 18 January 2018 from the Respondent to the Tribunal, pp. 3, 9.

¹⁵ Letter of 18 January 2018 from the Respondent to the Tribunal, p. 5.

¹⁶ Letter of 4 January 2018 from the Respondent to the Tribunal, p. 5; letter of 18 January 2018 from the Respondent to the Tribunal, p. 6.

the decision of the Swiss prosecutor to confront Mamadie Touré with these transcripts. In any event, while the Claimants will not have been in a position to cross-examine Mamadie Touré in the present proceedings, they were afforded an opportunity to ask her written questions through the intermediary of the Swiss prosecutor.

22. Finally, the Respondent objects to two document production requests set out in items (i) and (ii) in paragraph 14 above on the ground of confidentiality and privilege. With respect to the request to produce the communications between the US authorities and Guinea regarding the declaration of Mr. Martinez, the Respondent explains that these communications took place in the context of the international mutual assistance proceedings and are thus confidential. With respect to the request to produce communications between the US authorities and Guinea and/or DLA Piper regarding BSGR, Mr. Steinmetz and/or Simandou, the Respondent argues that secrecy covers Guinea's communications insofar as they relate to ongoing criminal investigations and that DLA Piper's communications are covered by attorney-client privilege.
23. On that basis, the Respondent requests that the Tribunal deny the Request in its totality, but for the information provided in response to the request set forth in item (iii) of paragraph 14 above.¹⁷

III. Analysis

24. The Request concerns two separate issues. First, the Claimants request permission to adduce certain documents to the record. Second, they seek an order that the Respondent produce certain categories of documents.

1. The Claimants' request to adduce new documents to the record

25. Article 17 of PO1 regulates the submission of documents. In particular, Article 17.1 provides that documentary evidence must be filed during the written phase and Article 17.2 requires "exceptional circumstances" for the filing of additional documents after the written phase. Article 17.2 of PO1 reads as follows:

¹⁷ Letter of 4 January 2018 from the Respondent to the Tribunal, p. 2.

- 17.2. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, save under exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other Party.
- 17.2.1. Should a Party request leave to file additional or responsive documents, that Party may not annex to its request the documents that it seeks to file.
- 17.2.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.
26. The Claimants request leave to file excerpts of transcripts of examinations of Mamadie Touré by the Swiss prosecutor on 6 and 7 July and 18 October 2017. The Respondent first objects that no exceptional circumstances justify the request. Without assessing at this stage the detailed discussions between the Parties, the Tribunal notes that the role of Mamadie Touré is a controversial issue in this arbitration. It also notes that, it is undisputed that the Swiss criminal proceedings could be relevant for the determination whether the Claimants obtained their mining rights in Guinea through corruption. Accordingly, on a *prima facie* basis, the transcripts of Mamadie Touré's examinations by the Swiss prosecutor appear to be relevant. This consideration, in addition to the fact that the transcripts postdate the Merits Hearing, are sufficient to satisfy the standard of exceptional circumstances under Article 17.2 of PO1.
27. The Respondent further objects that the request is untimely. Considering the Claimants' explanation that they obtained the 18 October 2017 transcript on 6 December 2017, there is no timeliness issue with respect to that transcript. With respect to the 6 and 7 July 2017 transcripts, the Tribunal accepts that a contradiction between the 6-7 July 2017 and 18 October 2017 transcripts could well have prompted the Claimants to make the present request. Accordingly, the Tribunal concludes that this request is admissible.
28. Finally, the Tribunal agrees with the Respondent that the filing of excerpts of the transcripts selected by the Claimants could give an incomplete picture. This could

potentially disadvantage the Respondent and render the Tribunal's fact finding task more difficult. Since the Claimants have no objection to producing the full transcripts of Mamadie Touré's examinations, the Tribunal is of the view that the entirety of the transcripts of Mamadie Touré's examinations shall be adduced to the record.

29. In sum, the Tribunal grants the request to adduce to the record the transcripts of the examinations of Mamadie Touré by the Swiss prosecutor on 6 and 7 July 2017 and 18 October 2017. The Claimants shall produce the full versions of these transcripts as factual exhibits C-0364 to C-0366 by 20 February 2018. If a Party wishes to comment on these transcripts, it must advise the Tribunal accordingly as part of its submission on the need for an authenticity hearing (due by 12 March 2018).

2. The Claimants' request for a document production order

30. Section 16 of PO1 governs document production requests. Pursuant to Article 16.1, the Parties must raise document production requests within the time limits set in Annex A of PO1, i.e. between the first and the second rounds of the written phase.
31. That said, Article 16.6 of PO1 confirms the Tribunal's power to order the production of documents "at any time". This provision reads as follows:

In addition, the Tribunal may at any time order a Party to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2). In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with §17 below and shall be deemed on record.

32. The power of the Tribunal to order the production of documents at any stage of the proceeding is confirmed by ICSID Arbitration Rule 34, which reads in relevant part as follows:

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents [...]

33. The Tribunal further recalls that Article 25.1 of PO1 provides that the IBA Rules on the Taking of Evidence in International Arbitration may provide guidance regarding document production. The Tribunal spelled out the standards for document production requests in paragraph 16 of Procedural Order No. 7, to which it refers here.
34. In addition, considering that the document production phase pursuant to Article 16.1 and Annex A of PO1 has lapsed and that “responsive documents” can only be added to the record in exceptional circumstances pursuant to Article 17.2.1 (quoted above at paragraph 25), the Tribunal deems that, at this late stage, a Party requesting the production of new documents must at least show that it could not make its requests earlier.
35. The Claimants request that the Tribunal order the Respondent to produce the following:
- i. A record of all communications the Respondent has had with all US authorities in relation to the production of the declaration of Mr. Martinez on 26 June 2017 including all emails and/or letters exchanged with the authority, and notes of telephone conversations;
 - ii. All communications relating to BSGR, Mr. Steinmetz and/or Simandou between the US authorities and Guinea and/or DLA Piper; and
 - iii. All information in Guinea’s possession relating to how the Swiss Public Prosecutor came into possession of the ICSID hearing transcripts in advance of his interviews with Mamadie Touré on 6 and 7 July 2017.
36. At the outset, the Tribunal notes that, in its Response, the Respondent provided the information referred to in item (iii) above and that the Claimants have not commented further in their Reply. On that basis, and considering the content of the information provided by the Respondent, the Tribunal considers that no further action is required.

37. With respect to item (i) set out in paragraph 35 above, the Claimants do not explain the relevance of the communications between Guinea and the US authorities in respect of the declaration of Mr. Martinez dated 26 June 2017. They actually already submitted a similar request to the Respondent in their email of 29 May 2017,¹⁸ but never formally submitted it to the Tribunal until now.¹⁹ Accordingly, the Tribunal finds that this request could have been raised earlier and sees no reason to order production now.
38. With respect to item (ii) set out in paragraph 35 above, the request is unspecific and too burdensome, in addition to the fact that the Claimants do not explain the relevance of the documents sought. The request is also untimely since the existence of the cooperation between Guinea and the US authorities was known at the time of the regular document production procedure under Annex A of PO1.²⁰ Moreover, insofar as the request relates to communications exchanged as part of the mutual assistance proceedings, such documents are protected by the secrecy of criminal investigations. In sum, the request is denied.

IV. Order

39. For the reasons set out above, the Tribunal:
- (i) Grants the request to adduce to the record the transcripts of the examinations of Mamadie Touré before the Swiss prosecutor conducted on 6 and 7 July 2017 and 18 October 2017 and orders the Claimants to produce such transcripts as exhibits C-0364 to C-0366 by 20 February 2018, it being understood that if a Party wishes to comment on these transcripts, it must

¹⁸ Email of 29 May 2017 from the Claimants to the Respondent.

¹⁹ See, e.g.: Tr. (Day 8) (ENG), 4:9-18 and 7:12-23 (Opening, Libson).

²⁰ See, e.g.: CM, ¶ 692.

- (ii) advise the Tribunal accordingly as part of its submission on the need for an authenticity hearing (due by 12 March 2018);
- (iii) Denies all other requests;
- (iv) Reserves its decision on costs of this Request for a later stage of these proceedings.

On behalf of the Tribunal

[SIGNED]

Gabrielle Kaufmann-Kohler
President of the Tribunal