26 September 2016

Dear Madame President,

Dear Members of the Arbitral Tribunal,

BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) Sarl v. The Republic of Guinea (ICSID Case No. ARB/14/22)

We refer to Guinea’s letter dated 19 September 2016 in which Guinea objects to BSGR’s request to the Tribunal to admit nine new exhibits (C-0161 – C0169) and order Guinea to produce additional documents.

1. The exhibits can and must be added to the record in this arbitration

Guinea’s objections are twofold. First of all, the Tribunal’s directions would not allow for the filing of new exhibits in between the filing of the first and the second round of submissions. Secondly, BSGR would not suffer any damages if it could only file the new exhibits together with its second memorial. Both points are wrong.

In paragraph 18 of Procedural Order No. 7 dated 5 September 2016 ("PO7"), the Tribunal stated as follows:

"[p]ursuant to Article 15.3 and 17 of PO1, no new exhibits may be filed between the two rounds of submissions, subject to leave of the Tribunal, which has neither been sought nor granted in the instant case." (emphasis added)

Paragraph 18 of PO7 thus allows for the filing of new exhibits between two memorials, be it that such filing is subject to the Tribunal’s prior consent.
In terms of the prejudice to BSGR, it is clear that the new exhibits justify BSGR's request to the Tribunal to order Guinea to produce additional documents (see further below). These documents need to be produced prior to the filing of BSGR's second memorial so that BSGR can incorporate and address them in its second memorial. On the basis of the present procedural timetable, this second memorial will be BSGR's last opportunity to set out its case in relation to these documents.

If the new exhibits are filed together with BSGR's second memorial and the Tribunal, on the basis of these exhibits, orders Guinea to produce additional documents, BSGR will only be able to set out its position in relation to these new documents if the procedural timetable is substantially amended. However, the current timetable is tight and does not accommodate in any straightforward way the filing of a third memorial on BSGR's claims while maintaining the hearing dates fixed in May 2017.

In other words, the prejudice to BSGR is obvious if the new exhibits are not allowed now. Either (i) the Tribunal will reject BSGR's request to order Guinea to produce additional documents prior to the filing BSGR's second memorial and these documents will not be before the Tribunal at all or (ii) the Tribunal will grant BSGR's request only after the filing of the second memorial in which case the procedural timetable will have to materially adjusted so as to give BSGR the opportunity to address the documents in a third memorial. This, in turn, may put the hearing dates at risk.

Furthermore, there will be no prejudice to Guinea if the new exhibits are allowed. The number of exhibits is limited to nine and Guinea will have the opportunity to set out its position in relation to these exhibits (and whatever documents it will be ordered to produce by the Tribunal) in its second memorial due on 24 February 2017. It is also in Guinea's interest to maintain the present procedural timetable and not to postpone the merits hearing.

2 The production of additional documents is necessary

BSGR first of all notes that Guinea does not contest that the Tribunal has the discretionary power to order the production of additional documents.

Guinea objects, however, that BSGR should not be allowed to disrupt the proceedings by requesting for documents at any given time. BSGR agrees. However, BSGR's timing has been dictated by the filing and the disclosure of the US criminal investigations, not by a willingness to disrupt the smooth conduct of the document production exercise.

Guinea further purports that the requested documents are not necessary. It quotes in this respect paragraph 145 of BSGR's first memorial:

"The Claimants do not need to provide any explanation for the true motives behind Guinea's conduct in order to succeed in their claims in this arbitration. For example, it is enough that they establish that Guinea has expropriated their rights without providing compensation. They do not need to go on to identify (let alone prove) the reasons as to why Guinea wanted to expropriate those rights."

It is clear that Guinea reads too much in this paragraph. The only point that BSGR makes therein is that it is not a legal requirement in investor-state arbitration to establish the true motives of a sovereign in order for the investor to prevail. An investor can prevail without
establishing the motives as long as he can establish that the state's conduct is unlawful. However, this does not mean that the motives of a state are not relevant and material. As BSGR explained in paragraph 146 of its first memorial:

"However, the facts enumerated above demonstrate that there was a determined campaign of harassment waged by Guinea against the BSGR group; and that, contrary to the impression which Guinea sought to give, this campaign had nothing to do with the merits of the investments made by the Claimants or their conduct. What has now emerged is a substantial body of evidence which indicates that there was, in fact, an ulterior motive behind this campaign and the imposition of the Measures. This motive illuminates Guinea's conduct and clearly demonstrates that its complaints about the BSGR group were a mere fig leaf to distract from the true purpose behind the campaign which resulted in the Measures."

As the decision in Aguas del Tunari v Bolivia (on which also Guinea relies) illustrates, the concept of necessity in ICSID Rules 34(2) comes very close to the concept of materiality and relevance that is customary in international arbitration proceedings. BSGR will elaborate on the requirement of materiality and relevance in a separate section below.

3 The requested documents are relevant and material

Guinea purports that there is no link between the criminal complaint filed against Samuel Mebiame in the United States and this present arbitration. BSGR fully disagrees with this contention.

In addition to the points that BSGR has already made in its application dated 13 September 2016, the relevance and the materiality of the requested documents is established by the following:

i) Guinea starts its memorial with a chapter in which it elaborates on how it progressed from the dark ages of a dictatorial and corrupt regime (under President Lansana Conté) into a period of enlightenment under the current leadership of President Alpha Condé with a zero tolerance towards corruption (paras. 26 to 54, in particular 51 and 53 of its first memorial).

These statements sit very uncomfortable with the evidence in the Criminal Complaint according to which inter alia "African politicians and government officials sought personal financial success by acquiring power within their respective governments and, in turn, control over the natural resources of their countries, which they leveraged for their own personal gain through bribery" (at para. 9) and "Mebiame […] had special access to mining opportunities in Guinea because of payments he provided to senior government officials in Guinea in exchange for such access" (para. 43).

ii) Guinea devotes an entire chapter to its reform of the mining sector and its Mining Code and qualifiers these reforms as "a priority" (paras. 523 to 539 of its first memorial);

Guinea’s statements in relation to its Mining Code do not accord with the evidence in the Criminal Complaint according to which "e-mail records show that in or about and between February and March 2011, Co-conspirator #1 and Mebiame, among others, were involved in re-writing the Guinea Mining Code" (para. 41 Criminal Complaint);
iii) Guinea admits that the investigation into BSGR and its mining rights were "triggered" by the reform of the Mining Code (para. 540 and following of its first memorial) and by investigations into BSGR by a Mr Williams in July 2011 (para. 559), the Guinean Minister of Mines in November 2011 (para. 560), law firm Heenan Blaikie in December 2011 (para 561), by law firm DLA in the same period (para 562) and by the Technical Committee since October 2012 (paras 622 to 673);

The US Criminal Complaints refers to evidence according to which "Co-conspirator #1 and Mebiame prepared and transmitted draft correspondence, to be printed on Republic of Guinea Conakry letterhead and signed by a Guinean Minister, which would be used to notify existing permit holders of legal issues with their mining permits" (para. 41 Criminal Complaint).

BSGR received at least two of letters, one from the Minister of Mines dated 17 November 2011 (Exhibit C-43) and one from the Technical Committee dated 30 October 2012, that triggered Guinean investigations against BSGR. Possibly these letters were prepared by Mebiame and part of Mebiame’s efforts to secure valuable mining rights for himself or related entities.

Guinea further purports that the requests would not be relevant as the US Criminal Complaint would not specifically refer to Simandou or BSGR. This is not serious. The Complaint does not identify any mining company or mining asset. This is simply the way in which the US authorities draft these complaints. However, the complaint contains plenty of references to Guinea, mineral rights and opportunities and Guinean officials, including "a candidate for high political office in Guinea who was later elected and became Guinea Official #1".

Taking into account that BSGR's mining rights related to one of the best and most valuable mining deposit in the world, that the Government of Guinea was already investigating these rights in 2011 and that Mebiame had access to the highest officials in the country, it is very likely that at least some of his activities and declarations to the US authorities related to BSGR and Simandou. Purporting the opposite is simply not credible.

Guinea further purports that the requests would be "too general" ("le caractère général des quatre nouvelles demandes"). This is not correct. The requests are limited in time (see below), number of individuals concerned and subject matter.

4. The requests are reasonable in time

Guinea complains that the period covered by BSGR’s requests would be too long. BSGR requests the Tribunal to order documents that were issued or created between June 2010 and 2014. This is a reasonable period taking into account that:

i) the US Criminal Complaint against Mr Mebiame refers to offences committed "between January 2007 and June 2015" (see para 2 of Criminal Complaint);

ii) the Criminal Complaint states that "in or about and between June 2010 and June 2012, Mebiame engaged in negotiations for mineral rights and opportunities […] Mebiame sent e-mail messages to Co-conspirator #1 which stated that he (Mebiame) had 'exclusivity' over such opportunities" (para. 40);
iii) The Criminal Complaint lists a number of facts in the 2010-2012 period, including the delivery of a Mercedes car ("in 2010", see para 43), the payment of USD 440,000 ("on 15 March 2011", para 43); a loan of USD 25 million ("on or about April 29, 2011"; para. 42) and a payment of USD 150,000 to Guinea Official #2 ("on or about June 29, 2011", para 45);

iv) The Criminal Complaint states that "bank records, e-mails and Mebiame's statements show that between 2011 and 2012 Mebiame provided additional in-kind payments to Guinea Government officials" (para. 47)

The cut-off period of June 2014 is reasonable as the Technical Committee recommended the withdrawal of BSGR’s mining rights in March 2014 and the rights were effectively withdrawn in April 2014. It is reasonable to add two more months to the research period to cover documents that may have been sent or created immediately following the withdrawal.

5. **The requests are not too burdensome**

Guinea complains that the production would be too burdensome.

However, the period to be covered is relatively short (4 years) and in any event relatively recent.

The individuals involved were no doubt using e-mails to communicate and therefore Guinea should be in a position to at least run e-searches on the basis of an appropriate set of search terms without any difficulty or disproportionate costs.

Furthermore, Guinea is assisted by two international law firms that have plenty of experience with document disclosure in general and e-disclosure in particular.

Most importantly, however, the US Criminal Complaint is based on statements made by Mr Mebiame himself and documents that the US authorities have collected, including bank records establishing individual payments and individual e-mails. As the Guinean authorities have publicly announced that they are co-operating with the US authorities, Guinea will no doubt have received a copy of the evidence that the US authorities have collected. This material will provide an excellent and cost efficient starting point for Guinea’s further searches.

In the unlikely hypothesis that the Tribunal were to reject BSGR’s requests on the basis of proportionality or the burden that these requests would impose, the Tribunal should at a very minimum order Guinea to disclose the documents that were received from the US authorities as part of the Mebiame investigation. This material should be readily available.

6. **The requests should not disrupt the procedural timetable**

Finally, Guinea purports that it would require several weeks to produce additional documents and that an order to produce additional documents would disrupt the procedural timetable and the merits hearing. With all due respect, this is cannot be taken serious.
First, the procedural timetable allowed both parties 4 weeks to produce documents responsive to over 30 requests. If a period of 4 weeks is sufficient to deal with 30 requests, a period of 2 weeks should be sufficient to deal with 4 requests.

Second, Guinea can make a reasoned application to produce the responsive documents on a rolling basis.

Third, Guinea's second memorial is only due on 24 February 2017. Guinea will therefore have close to five months to integrate these documents into its Second Memorial.

Fourth, the hearing is scheduled to start on 10 May 2017 and is thus still 7 months away. It is hard to imagine that the Tribunal together with the parties would not be able to integrate this production in the next couple of weeks and months.

7. Conclusion

BSGR’s request to the Tribunal is reasonable and justified. The requests are necessary or otherwise relevant and material. The documents to be produced will establish that BSGR was the victim of a corrupt regime and the political and financial agenda of a new elite.

The Government of Guinea opposes these requests so vehemently - and in sheer contrast to its alleged agenda of transparency and co-operation with judicial authorities - because it is perfectly aware that the documents to be produced will make BSGR’s case and destroy the fairy tale that President Condé and his ministers would like the outside world to believe.

International arbitration proceedings should however not rely on fairy tales. They should rely on pure and hard facts and establish the truth. The orders that BSGR seeks from the Tribunal will assist in establishing those facts and ultimately the truth.

Yours faithfully,

Mishcon de Reya

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