

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. 15

Request for Reconsideration of Procedural Order No. 3

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

7 November 2017

I. Procedural background

1. On 25 November 2015, the Tribunal issued Procedural Order No. 3 (“PO3”) providing that, as from the second advance of costs, BSGR would bear 75% and the Respondent 25% of the requested advances, without prejudice to the final cost allocation. On 14 February 2016, the Tribunal issued Procedural Order No. 5 (“PO5”), whereby ICSID Cases Nos. ARB/14/22 and ARB/15/46 were consolidated into ICSID Case No. ARB/14/22. PO5 notes the Parties’ agreement that PO3 continues to apply and be binding on all the Parties to the consolidated arbitration.¹
2. On 10 October 2017, the Centre requested the payment of a cost advance in the amount of USD 450,000 by 9 November 2017. More specifically, the Centre requested that the Claimants advance USD 337,500 and the Respondent of USD 112,500.²
3. On 20 October 2017, the Claimants submitted an “Application to Vary Procedural Order No. 3 re Allocation of Cost Advances” (the “Application”).
4. On 27 October 2017, the Respondent submitted its comments and observations on the Application (the “Response”).
5. The present order rules on the Application.

II. Parties’ positions

6. The Claimants request that the Tribunal reconsider its decision in PO3 regarding the allocation of cost advances and thus restore the allocation to 50% each.³ According to the Claimants, the exceptional circumstances that justified a 75/25 allocation no longer exist for the following reasons:

- (i) The Ebola virus crisis “appears to have significantly abated”, which is shown by the fact that, on 1 June 2016, the World Health Organization

¹ Procedural Order No. 5, para. 1.2.5.

² Letter of 10 October 2017 from ICSID to the Parties, p. 2.

³ Application, p. 1.

(“WHO”) declared the end of the Ebola crisis in Guinea followed by a 90-day surveillance period where no new outbreaks have been reported;⁴

- (ii) Guinea’s economic status has improved due to the conclusion of an agreement with the People’s Republic of China (“China” or the “PRC”) in early September 2017 providing for a US\$ 20 billion loan over a period of 20 years in exchange for bauxite mining concessions;⁵
- (iii) In respect of the conduct of this arbitration, the Claimants reiterate that the African Legal Support Facility funds Guinea’s defense. They also observe that Guinea spends “excessive amounts” on its counsel team, which is shown by Guinea’s “expensive and unnecessary” instructions of two internationally renowned law firms (in addition to two media consulting firms).⁶

7. On that basis, the Claimants request the Tribunal to:

- “(i) order the allocation of cost advances be restored to a 50/50 basis between the Parties;
- (ii) apply the 50/50 basis retroactively to BSGR’s previous payment in May 2017 and order that it be given credit for its over-payment in the amount of US\$ 142,500;
- (iii) apply the 50/50 basis immediately to BSGR’s next payment due on 9 November 2017, such that, accounting for its previous over-payment, it must pay the outstanding amount of US\$ 82,500;
- (iv) apply the 50/50 basis retroactively to Guinea’s previous payment in April 2017 and order that it pay the amount of US\$ 142,500;

⁴ Application, p. 2.

⁵ Application, p. 2.

⁶ Application, pp. 2-3.

- (v) apply the 50% basis immediately to Guinea’s next payment due on 9 November 2017, such that it must pay the amount of US\$ 225,000;
 - (vi) in the unlikely scenario that the Tribunal were only minded to revert to the 50/50 basis going forward, order each party to pay the amount of US\$ 225,000 due on 9 November 2017”.⁷
8. The Respondent opposes the Application and requests that the Tribunal uphold its decision in PO3.⁸ For the Respondent, none of the exceptional circumstances that justified the allocation of cost advances have “fundamentally changed”, since the economic situation in Guinea remains “precarious” and the economic repercussions of the Ebola crisis are still “heavily” felt.⁹
9. With respect to the economic situation in Guinea, the Respondent argues that the Claimants have failed to demonstrate that there has been any real improvement since 2015. Contrary to the Claimants’ position, the Respondent submits that the framework agreement of 5 September 2017 concluded with the PRC does not provide a “loan” to Guinea; no monies will be transferred directly to the State and it cannot be presumed that Guinea’s budgetary situation will improve in the short term. The Chinese agreement aims at the realization of infrastructure projects by Chinese companies over a period of 20 years and the royalty fees paid by Chinese mining concessions will serve to repay the financing provided by the PRC. In addition, the Respondent argues that the United Nations figures for 2016 and 2017 show that Guinea is still among the poorest nations, that the GDP per capita has decreased from USD 522.89 in 2012 to USD 499.92 in 2016, and that the World Bank estimated Guinea’s poverty rate to have increased in the past years due to the Ebola crisis.
10. With respect to the Ebola crisis, the Respondent rejects the Claimants’ argument that Guinea no longer suffers negative impacts from that crisis. In reality, the crisis “profoundly and lastingly” affected Guinea’s economic situation, as was confirmed by

⁷ Application, p. 3.

⁸ Response, p. 1.

⁹ Response, p. 2.

the World Bank as late as 5 October 2017 when speaking of “persistent stagnation” of Guinea’s economy.¹⁰

11. Finally, the Respondent argues that the Claimants’ observations on Guinea’s legal team in this arbitration are irrelevant in assessing Guinea’s “precarious” economic situation.¹¹ The funding provided by the African Legal Support Facility – in the amount of USD 1,5 million – only covers one part of the fees of Guinea’s lawyers. It is the first and only source of financing of Guinea’s legal fees, and in fact Guinea is unable to date to pay its other legal fees in this case. At any rate, those funds are not meant to cover the advances for this arbitration and Guinea was only able to pay the advances requested by the Centre because of the 75/25 allocation set in PO3.
12. Furthermore, for the Respondent, the fact that it retains two law firms is equally irrelevant. This situation was known to the Claimants since the arbitration’s inception and thus cannot serve to appreciate any change in exceptional circumstances. In addition, the involvement of the two law firms is justified, since they were involved in different aspects of the dispute and their joint efforts serve to optimize the sharing of information. In any event, the Claimants are also represented by two law firms and a barrister in these proceedings.
13. On that basis, the Respondent requests that the Tribunal deny the Application in its totality.

III. Analysis

1. Legal framework

14. In PO3, to which it refers, the Tribunal set out the legal framework applicable to cost advances. In particular, Regulation 14(3) allows the Tribunal to depart from the 50/50 apportionment of the cost advances in the event of an agreement of the Parties or of a decision of the Tribunal:

¹⁰ Response, p. 5, referring to: Banque Mondiale, *Guinée – Vue d’ensemble*, mise à jour au 5 octobre 2017 (Exhibit 4).

¹¹ Response, p. 6.

**Regulation 14
Direct Costs of Individual Proceedings**

[(d)] in connection with every conciliation proceeding, and in connection with every arbitration proceeding *unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge*, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. [...] (emphasis added)

15. Rule 28 of the ICSID Arbitration Rules further provides for the Tribunal’s power to decide on the allocation of cost advances “at any stage of the proceeding”.
16. Finally, the Tribunal made it clear in PO3 that its decision was made on the basis of the record as it stood then and that “any conclusion reached here could be revised if relevant circumstances were to change”.¹²

2. Discussion

17. It is common ground that, on the basis of ICSID Arbitration Rule 28(1), the Tribunal has the power to reassess its earlier cost advance allocation and that the relevant test for purposes of the reallocation is the presence of changed circumstances.
18. In support of the existence of changed circumstances, the Claimants essentially raise two arguments. First, the Ebola crisis ended in June 2016. Second, Guinea obtained a USD 20 billion loan from the PRC in September 2017. As a third argument, the Claimants submit that Guinea’s spending “excessive amounts” on legal counsel should be considered when assessing Guinea’s overall economic situation. On that basis, the Claimants request that the allocation of cost advances be restored to a 50/50 basis prospectively and retroactively to the previous payments made in April and May 2017.
19. The Tribunal agrees that the question before it now is whether the circumstances have changed since PO3 with the result that the reasons that led to the 75/25 apportionment

¹² PO3, para. 58.

are no longer valid. As it arises from PO3, these reasons centered on Guinea's weak economy and public finances which were under particular strain due to the Ebola crisis.

20. It is undisputed that the Ebola crisis ended last year in Guinea. Indeed, on 1 June 2016, the WHO declared the end of the Ebola virus transmission and no new flare-ups have occurred since then in Guinea last year.¹³
21. That does not mean that the economic impact of the crisis has not outlasted the epidemic. It is true that the population below the poverty line is estimated to have increased and unemployment has risen.¹⁴ Moreover, per capita GDP has decreased from USD 522.89 in 2012 to USD 499.92 in 2016.¹⁵ In addition, Guinea remains ranked among the least developed countries by the UN.¹⁶ In other words, the Tribunal is aware that the fate of large parts of the population appears to have deteriorated rather than improved in recent years.
22. At the same time, the World Bank's latest figures show that Guinea's GDP has increased by 6.6% in 2016 and is expected to rise by 6.7% in 2017.¹⁷ More importantly for our purposes, public finances have improved with the budgetary deficit brought down from 8.1 % in 2015 to 1.4% in 2016 and expected at 2.8% in 2017.¹⁸
23. The Tribunal also notes that on 5 September 2017 Guinea has entered into an agreement with the PRC pursuant to which the PRC will inject USD 20 billion into the Guinean economy over 20 years against mining concessions. USD 3 billion will be

¹³ WHO Media Centre, *End of Ebola transmission in Guinea* (Claimants' Attachment 1).

¹⁴ Banque Mondiale, *Guinée – Vue d'ensemble*, mise à jour au 5 octobre 2017 (Respondent's Exhibit 4)

¹⁵ Banque Mondiale, *Guinée – Vue d'ensemble*, mise à jour au 5 octobre 2017 (Respondent's Exhibit 4). This drop appears related to the country's demographics showing an increase in population from 11.75 million in 2012 to 12.6 million in 2016.

¹⁶ United Nations Committee for Development Policy, *List of Least Developed Countries (as of June 2017)* (Respondent's Exhibit 2).

¹⁷ Banque Mondiale, *Guinée – Vue d'ensemble*, mise à jour au 5 octobre 2017 (Respondent's Exhibit 4).

¹⁸ Banque Mondiale, *Guinée – Vue d'ensemble*, mise à jour au 5 octobre 2017 (Respondent's Exhibit 4).

disbursed immediately mainly for infrastructure projects.¹⁹ This financing appears earmarked for specific purposes and will thus not be available to fund Guinea's defense in cases such as the present one. While one can expect that this agreement with the PRC will contribute to improving the development level of the country over time, it is also true that the monies lent will have to be reimbursed. Hence, this development does not in and of itself appear to show a change of circumstances.

24. By contrast, the end of the Ebola crisis, the GDP growth and especially the improvement of the State's finances and the reduction of the deficit lead the Tribunal to conclude that the exceptional strain that the Ebola crisis placed on the country's financial capacity justifying a departure from the 50/50 rule no longer exists to an extent sufficient for the continuation of such departure.
25. Since it was not seized of this request earlier in the proceedings and since it bases its assessment in part on the latest country update by the World Bank in October 2017, the Tribunal is of the view that the restoration of the 50/50 rule shall apply prospectively and not retroactively to the advance payments in April and May 2017. It also recalled that this decision is without prejudice to the final cost decision.
26. In sum, the Tribunal grants the Application for future advances and especially for the one due on 9 November 2017.

IV. Order

27. For the reasons set out above, the Tribunal:
 - (i) Partially grants the Application and orders that the allocation of cost advances be restored to a 50/50 basis as of now;
 - (ii) Declares that the 50/50 apportionment shall apply to the advance payment called for 9 November 2017, the Claimants and the Respondent owing USD 225,000;
 - (iii) Denies all other requests;

¹⁹ *LumièreGuinée, Détails de l'accord stratégique de 20 milliards signés entre la Guinée et la Chine, 8 septembre 2017 (Respondent's Exhibit 1).*

- (iv) Reserves its decision on costs of this Application for a later stage of these proceedings.

On behalf of the Tribunal

[SIGNED]

Gabrielle Kaufmann-Kohler
President of the Tribunal