

ICSID tribunal finds investment claims inadmissible because revoked mining rights were obtained by corruption

by *Practical Law Arbitration*, with *NL Investmentconsulting*

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In *BSG Resources Ltd (in Administration) and others v Republic of Guinea (ICSID Case No ARB/14/22)*, an ICSID tribunal has provided an in-depth analysis and useful guidance on how to deal with investments alleged to be tainted by corruption. The tribunal found overwhelming evidence of corruption and concluded that the claimants had paid more than USD30 million to obtain mining permits. It concluded that the corruption not only violated domestic Guinean law but also international public policy.

Speedread

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In a recently published award, an ICSID tribunal has dismissed claims to compensation of USD5 billion for alleged unlawful revocation of mining permits, finding the claims to be inadmissible because the permits were obtained by corruption.

The underlying dispute concerned claims by investors against Guinea brought under domestic Guinea Investment Law and a contract for exploitation of iron ore deposits made between the investors and Guinea.

The tribunal found overwhelming evidence of corruption and concluded that the claimants had paid more than USD30 million to various persons to obtain the mining permits.

More specifically, the tribunal made it very clear that corruption and other activities intended to influence public officials so as to obtain permits, violated international public policy. Any claims related to investments tainted by corruption must be considered inadmissible and the majority of the associated costs should be borne by the claimants.

Importantly, and to support the fight against corruption, the tribunal applied a relatively low standard of proof: "reasonable certainty" that corruption had taken place.

However, and at the same time, the tribunal also blamed Guinea for failing to take any action against its own civil servants who were involved in the corruption scheme, thereby suggesting that there is a duty to fight corruption on both sides. Investors must abstain from such acts, while states must actively fight against corruption once it becomes known.

More generally, this award continues the line of jurisprudence of previous awards in *World Duty Free v Kenya* and *Methanex v United States*. The award unequivocally makes clear that corruption has no place in international

investment law and arbitration. (*BSG Resources Ltd (in Administration) and others v Republic of Guinea (ICSID Case No ARB/14/22) (18 May 2022).*)

Background

The Republic of Guinea has enacted various investment legislation. These include:

- The Investment Code of the Republic of Guinea (Investment Code).
- Act L/95/036/CTRN of 30 June 1995 (Mining Code).
- Law L/97/012/AN of 1 June 1998 Authorizing the Financing, Construction, Operation, Maintenance and Transfer of Development Infrastructures by the Private Sector of the Republic of Guinea (BOT Act).

Article 42(1) of the ICSID Convention provides as follows:

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

Facts

The claimants, BSG Resources (BSGR) and its subsidiaries, are incorporated in Guernsey and the British Virgin Islands. The claimants' ultimate beneficial owner is a Liechtenstein trust, whose beneficiary is Mr Steinmetz, an Israeli businessman.

BSGR started operating in Guinea in 2006 and obtained prospection permits for exploring iron ore mines in the Simandou region located in south-eastern Guinea (Permits), in particular in an area known as Zogota.

The previous concession holder, Rio Tinto, had failed to develop these mines and Guinea forced Rio Tinto to relinquish two mining blocks in 2008. These were subsequently reallocated to BSGR. This reallocation decision coincided with the last weeks in office of Guinea's then ailing President, Lansana Conté, who died in December 2008. A Basic Agreement between the Republic of Guinea and BSGR for the Exploitation of the Zogota/N'Zerekore Iron Ore Deposits was entered into on 16 December 2009 (Base Convention).

However, following the election of a new president (President Condé) in 2010, whose main aim was to eradicate corruption, an overall review of Guinea's mining ventures took place. In 2014, this resulted in revocation of the Permits and termination of the Base Convention. The review process and the subsequent revocation of the Permits was largely based on a corruption probe, led by the FBI, regarding Ms Mamadie Touré, the widow of former President Mr Conté.

Unusually, BSGR initiated ICSID arbitration in reliance on the dispute resolution provisions contained in the Investment Code, Mining Code, the BOT and the Base Convention, rather than on the basis of a bilateral investment treaty (BIT). It claimed that Guinea had acted unlawfully and sought (among other relief) USD5 billion in compensation for the revocation of the mining rights. It argued that those rights had been revoked unlawfully as a result of a corrupt scheme by which President Condé had come to power in exchange for providing third parties with access to valuable mining rights, including those of BSGR.

Guinea disputed jurisdiction and, on the merits, argued that BSRG's mining rights were null and void because they had been obtained by corruption. It alleged that President Conté had been seriously ill and unduly influenced by people close to him, in particular by Ms Mamadie Touré, when granting the mining rights to BSGR. Relying on Article 46 of the ICSID Convention and Article 40 of the ICSID Arbitration Rules 2006, Guinea asked the tribunal to declare the claimants liable for the economic and moral damages Guinea had suffered as a consequence of the claimants' corrupt dealings.

Both parties placed weight on the role of Ms Touré. Guinea alleged that she was the central character in the corruption scheme. By contrast, BSRG submitted that Ms Mamadie Touré had blackmailed them and, for that purpose, used forged documents. Therefore, the corruption allegations were at the core of this dispute and a key issue for the tribunal was to identify and apply the appropriate legal framework governing corruption in this case.

Decision

The tribunal found that it had jurisdiction to deal with the claims but found them to be inadmissible because they were tainted by corruption. It also rejected the counterclaims, finding that those claims would not have arisen had it not been for the corrupt dealings that had taken place.

Jurisdiction

The parties agreed that Article 25 of the ICSID Convention governed the ICSID Centre's jurisdiction and the tribunal's competence. In other words, the jurisdiction of the tribunal in this case was governed by international law, although national law might be relevant to the interpretation and application of certain jurisdictional requirements, depending on the issue in question.

The tribunal concluded that it had jurisdiction over all claimants in respect of claims asserted under the Investment Code. The tribunal also accepted jurisdiction over the claims asserted by BSGR's subsidiaries under the Base Convention, but not over the claims asserted by BSGR under the Base Convention or over the claims brought under the Mining Code or under the BOT Act.

Merits

The tribunal held that, in accordance with Article 42(1) of the ICSID Convention, Guinean and international law were applicable to the merits of the claims.

Legal framework applicable to corruption

Since the parties had not agreed on a governing law, the tribunal took the second sentence of Article 42(1) of the ICSID Convention as the starting point. Accordingly, the tribunal decided to primarily apply Guinean law and to determine if any rules of international law might apply, in addition or in lieu of Guinean law.

The tribunal concluded that the notion of corruption under Guinean law includes bribery and active and passive trading of influence. Furthermore, even if Guinean law were not to prohibit active trading of influence (which was not the case), the Constitution of Guinea provides that international treaties prevail over national law and Guinea is bound by treaties containing that prohibition. Moreover, the tribunal emphasised that it is undisputed that international law contains a rule prohibiting corruption and bribery, and that the international community has adopted a number of instruments to fight corruption.

Referring more particularly to the African context, the tribunal noted that corruption is seen as a "scourge" which has "devastating effects on the economic and social development of the African peoples" and "undermines accountability and

transparency in the management of public affairs as well as socio-economic development on the continent". Therefore, the fight against corruption has also been a primary focus on the agenda of many national legislatures.

The tribunal concluded that, because it is universally shared, the prohibition of corruption is deemed a matter of truly international or transnational public policy. It referred to *World Duty Free v Kenya*, in which the tribunal stated that:

"[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy."

On that basis, the tribunal concluded that international public policy against corruption prohibits both bribery, and the passive and active forms of trading of influence, to the extent that the latter is exercised to directly or indirectly obtain an undue advantage from a public official.

The tribunal also concluded that conduct irreconcilable with international public policy leads to a finding of inadmissibility of the claims.

Burden and standard of proof

In the light of the fact that the claims brought in this case sought to establish the responsibility of a state for breach of its international obligations, the tribunal deemed it appropriate to apply international law to the burden of proof.

The parties had agreed on application of the maxim *actori incumbit probatio* (each party carries the burden of proving the facts on which it relies). In addition, the tribunal noted that the International Court of Justice (ICJ), and arbitral tribunals acting under the ICSID Convention, have regarded this rule as a general principle of law.

Accordingly, since Guinea was the party alleging acts of corruption, it was also the one carrying the burden of proving such acts. However, a different question is the standard by which proof adduced in accordance with this principle must be measured.

Because corruption is a matter of international public policy and because activity involving corruption is, by its nature, difficult to prove, the tribunal deemed it reasonable not to resort to a heightened standard. Therefore, the tribunal would make a finding of corruption if, on the basis of the evidentiary record, it was reasonably certain that acts of corruption had been committed.

Furthermore, irrespective of the standard of proof, given the difficulties inherent in establishing corruption, the tribunal shared the view expressed by a number of tribunals that corruption may be established through circumstantial evidence. The tribunal in *Methanex v United States*, for instance, spoke of "sufficient circumstantial evidence to justify inferring" the existence of corruption.

When assessing circumstantial evidence, tribunals are increasingly relying on so-called red flags, namely, facts which do not prove corruption in and of themselves but signal conduct of potential concern. Professional and industry associations seeking to fight corruption have drawn up a list of red flags. For instance, the International Chamber of Commerce (ICC) issued in 2010 the ICC Guidelines on Agents, Intermediaries and Other Third Parties, identifying red flags in connection with intermediaries. A combination of facts of the same nature or, in other terms, a cumulation of red flags, may constitute evidence of corruption.

Corruption allegations

Despite the central role of Ms Mamadie Touré in the corruption allegation claims, the tribunal pointedly noted that neither party had presented her as a witness and neither party had requested the tribunal to order her to appear before the tribunal.

The tribunal nonetheless engaged in a detailed analysis of the role of Ms Mamadie Touré and several other civil servants and intermediaries, and found conclusive evidence that BSGR made payments totalling USD30,835,000 to intermediaries, including payments of USD9,419,200 to Ms Mamadie Touré. The tribunal also established that BSGR paid government officials USD35,424.68. Moreover, the tribunal concluded that the claimants did not perform any meaningful due diligence in respect of the intermediaries, and failed to comply with their own accounting standards.

Consequently, the tribunal established that the record contained overwhelming evidence that the claimants employed corrupt practices to obtain the Permits, the Base Convention and the Zogota mining concession. In consequence, all claims related to the mining rights were inadmissible.

Counterclaims

The tribunal agreed that the counterclaims were within the jurisdiction of the ICSID Centre in accordance with Article 25 of the ICSID Convention and that the connexity requirement ("arising directly out of the subject matter of the dispute") had been fulfilled.

Furthermore, the tribunal noted that the inadmissibility of claims does not automatically lead to a finding of inadmissibility of counterclaims.

However, in this case, the counterclaims were found to be inadmissible because (among other things):

- The harm caused by the claimants' actions would not have occurred if the Guinean state officials in charge of making the controversial decisions (or persons close to them) had not been on the receiving end of the corruption scheme. Had they resisted the corruption attempts, BSGR's mining applications would have been processed legally without undue influence, and the damage for which the counterclaims sought reparation would never have been inflicted.
- An aggravating circumstance was that Guinea had not initiated criminal proceedings against individuals implicated in BSGR's corrupt dealings, in particular not against government officials. The tribunal found this lack of action troubling given that, as Guinea had conceded, corruption had been pervasive at the highest levels of the Guinean government for decades.

Costs

The tribunal determined that the claimants should bear 80% of the ICSID costs and 80% of the costs incurred by Guinea in connection with the proceedings.

Comment

The tribunal made it very clear that corruption and other activities intended to influence public officials so as to obtain permits violates international public policy, that any claims related to investments tainted by corruption must be considered inadmissible and that the majority of the associated costs should be borne by claimants.

Importantly, to support the fight against corruption, the tribunal applied a relatively low standard of proof: "reasonable certainty" that corruption has taken place, including reliance on circumstantial evidence.

However, and at the same time, the tribunal also criticised Guinea for failing to take any action against its own civil servants who had been involved in the corruption scheme, and dismissed the counterclaims. Consequently, the tribunal suggested a duty to fight corruption on both sides. Investors must abstain from such acts, while states must actively fight against corruption once it becomes known.

More generally, this award continues the line of jurisprudence of previous awards in *World Duty Free v Kenya* and *Methanex v United States*. The award unequivocally makes clear that corruption has no place in international investment law and arbitration, and that corruption must be actively fought against.

Case

BSG Resources Ltd (in Administration), BSG Resources (Guinea) Ltd, BSG Resources (Guinea) Sàrl v Republic of Guinea (ICSID Case No ARB/14/22) (Award) (18 May 2022) (Tribunal: Professor Gabrielle Kaufmann-Kohler (President); Professor Albert Jan van den Berg (claimant); Professor Pierre Mayer (respondent).)

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