

**IN THE MATTER OF AN ARBITRATION**

**UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL  
CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID CASE No. ARB/14/22**

**BETWEEN:**

**(1) BSG RESOURCES LIMITED (IN ADMINISTRATION)**

**(2) BSG RESOURCES (GUINEA) LIMITED**

**(3) BSG RESOURCES (GUINEA) SÀRL**

**Claimants**

**- v -**

**THE REPUBLIC OF GUINEA**

**Respondent**

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**CLAIMANTS' POST-HEARING BRIEF**

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## **I. INTRODUCTION**

### **1.1 Preliminaries**

1. This Post-Hearing Brief is served on behalf of:

- (i) BSG Resources Limited (In Administration) ("**BSGR**");
- (ii) BSG Resources (Guinea) Limited ("**BSGR Guernsey**"); and
- (iii) BSG Resources (Guinea) Sàrl ("**BSGR Guinea**"),

together, the "**Claimants**".

2. In accordance with Procedural Order No 18 and as discussed during the hearing for the examination of the experts on 26 – 27 March 2018 ("**Expert Hearing**"), the Claimants herewith submit their Post Hearing Brief.

### **1.2 Opening remarks**

3. This is an extraordinary saga. It has been going on for well over 5 years. It has led to a bewildering amount of investigations and litigation on which millions of dollars have been spent, during which same period nothing has happened at Simandou and the disenfranchised Guinean people have, once again, been deprived of the opportunities their mineral rich land has the potential to offer them. And, what for? To discover at the end of all of this, as at the beginning, there is not a shred of evidence to support the allegations on which Guinea based its decision to strip BSGR of its rights and thereby punish its own citizens.

4. BSGR, in the midst of this noise, only needs to do one thing. It needs to show the rights it was awarded were done so legitimately. It has done that and has done so convincingly. In fact, despite Guinea's best attempts to frustrate that effort, including complete non-disclosure of any of its internal documents relating to critical events, not even Guinea's own witnesses were able to offer a scintilla of evidence that undermined the legitimacy of the process by which the rights were awarded. And Guinea's star witness, Mamadie Touré, the woman on whom this whole edifice is constructed – both

Guinea's defence and the original Comité Technique process – is a busted flush. She turns out to be, as BSGR has said all along, a liar, someone with no power, not married to the President and with no influence whatsoever over the processes under which the rights were awarded.

5. That should be that. Because, however, of the noise and the very serious allegations made against it, BSGR also set out to show, and has successfully shown, that all of the allegations of corruption made against it are untrue. In fact, the entirety of the corruption allegations has turned out to be indirect and inferential. In contrast to Guinea, BSGR, through its disclosure and testimony, allowed the very heart of its enterprise to be exposed to the highest degree of forensic scrutiny and there was, as BSGR has always maintained, nothing there. No evidence of payments by or on behalf of BSGR to Mamadie Touré, no evidence of illegitimate payments to, or influence wielding of, a single Guinean minister, not even any evidence of attempts to shortcut the procedures and processes required under Guinean law for the award of rights. In fact, there was not a single act, let alone a course of conduct, that comes close to the threshold of corruption.
6. In other words, BSGR has proven its case and defeated Guinea's. These submissions, therefore, deal with the case in this manner. That is to say, they bring together the evidence for the proper award of BSGR's rights and then go on to answer the case of corruption. Finally, and very shortly, they deal with motive. BSGR does not have to explain the motive for Guinea's tragic act of self-destruction to prevail in this arbitration. But it is difficult to understand this wanton act of recklessness without understanding the behaviour of two people, sitting President of Guinea Alpha Condé and George Soros whose scheme now needs to be brought to an end. BSGR presented the perfect storm: a company connected to Israel (important to Soros) from whom they could steal a trophy asset (important to President Condé) to hold out as an experiment in global, ungoverned governance (Soros) and in turn pay back the crooks who had financed a corrupt ascent to power (Condé).
7. When, as it must, the Tribunal finds for BSGR, BSGR, despite the manner in which it has been treated, remains prepared to deliver the project on the terms it committed to do so,

so that, at long last, the people of Guinea can begin to reap the benefits of this precious resource.

## **II. THE MINING RIGHTS WERE PROPERLY AND LAWFULLY AWARDED TO BSGR**

8. This arbitration relates to three vested rights of BSGR which were forcibly and unlawfully withdrawn and revoked by Guinea:
  - (i) A prospecting permit granted to BSGR Guinea over Simandou Blocks 1 and 2 on 9 December 2008, giving rise to (i) an exclusive right to prospect for iron ore and (ii) a right to develop and operate the area upon completion of a feasibility study (the "**Blocks 1 and 2 Permit**").
  - (ii) A mining infrastructure agreement dated 16 December 2009 entered into by BSGR Guernsey and BSGR Guinea with Guinea regarding the rights and obligations arising from the Zogota Mining Concession and granting a right of first refusal in relation to any Simandou Blocks which became available (the "**Base Convention**").
  - (iii) An iron ore mining concession granted to BSGR Guinea on 19 March 2010 over an area in Simandou South, near the village of Zogota (the "**Zogota Mining Concession**").
9. BSGR acquired its mining rights lawfully.
10. All three rights were expropriated and/or nationalised by Guinea in April 2014 without compensation. This stripped BSGR Guinea of all of its relevant assets.
11. As demonstrated below, the processes undertaken between 2008 and 2010 which led to the grant of those rights were looked at in exhaustive detail by ministers and senior Guinean officials at the time, and were conducted to the highest standard of international due process.



## 2.1 Exploration permits over Simandou North and Simandou South

12. By 2005, the BSGR group had a significant and diverse portfolio of mining and metal assets and, in Africa, had invested in South Africa, Sierra Leone, Zambia and the DRC.<sup>1</sup> BSGR learned that large iron ore resources were thought to exist in the Simandou region of Guinea and set about preparing its application for exploration permits over areas of Simandou North and Simandou South, pursuant to Guinea's 1995 Mining Code ("**the Mining Code**"). Marc Struik ("**Struik**"), on his first visit to Guinea, made a presentation to Soumah of the CPDM to demonstrate "*BSGR's financial and technical capabilities to carry out the exploration works and feasibility studies*".<sup>2</sup> BSGR had substantial financial and technical expertise.<sup>3</sup> As Minister of Mines Ahmed Souaré ("**Souaré**") said, it was those matters which made BSGR an attractive proposition:

*"BSGR tried to make itself very attractive, claiming to have the financial capability, the ability to mobilise the technical resources and the ability to conduct several mining projects at the same time. Of course this is attractive."*<sup>4</sup>

13. On that trip, Struik "*found out about the potential of Simandou*".<sup>5</sup> In his subsequent meetings with the CPDM, Struik also became aware both that there was frustration with the non-performance of Rio Tinto in the Simandou Blocks 1 to 4, and of what the Mining Code required in terms of retrocession of such areas. This spiked his interest in those areas.<sup>6</sup>
14. BSGR acquired its exploration permits for Simandou North and South on 6 February 2006.<sup>7</sup> They were granted upon the recommendation of the CPDM and with the approval

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<sup>1</sup> Exhibit C-0001, para. 19.

<sup>2</sup> Struik/4/59/3-20.

<sup>3</sup> Struik/4/62/6-9 ("*I can tell everybody in this room that we had substantial mining expertise, technical expertise.*"). Struik himself was recruited because of his expertise and had extensive mining experience and qualifications: Struik/4/70/3-10.

<sup>4</sup> Souaré/6/77/16-20.

<sup>5</sup> Struik/4/73/6-7.

<sup>6</sup> Struik/4/76/4-9 ("*Now, when I was at the CPDM, I became aware very quickly of what the Mining Code said, I became aware of certain frustration with certain people at the CPDM about the non-performance of the other mining company, and of course I became interested. We were there for business.*"). Struik/4/86/22 to 4/87/4 ("*I understand the use-it-or-lose-it rule, which particularly became very prominent during 2006 and further even more so in 2007 [...] I realized that even in that [1995 Mining] code, if you do not do certain things, the government has the right to take assets away from you.*").

<sup>7</sup> Exhibits C-0004 and C-0005.

of Guinea's own witness, Souaré. **PROTECTED**

In an interview in April 2014, he said:

*"This company applied for, and was granted in a perfectly regular manner and in conformity with the current law on mining, two permits..."*<sup>9</sup>

15. Souaré confirmed that in his oral evidence:

*"Yes, the North and the South, and the whole of Simandou, the procedure was respected. I saw to it that it was"*<sup>10</sup>

And:

*"Q. So you are corroborating here that the granting of those permits was perfectly regular?"*

*A. Yes"*<sup>11</sup>

16.

**PROTECTED**

17. Souaré further confirmed that the CPDM, which recommended granting the permits to BSGR, is an independent body, which performs checks on the competence and background of the mining applicants.<sup>13</sup> No other promoters were interested in Simandou

8

**PROTECTED**

See also paras. 344 and 345 of BSGR's Reply Memorial dated 10 January 2017 ("**Reply**").

9

Exhibit C-0248.

10

Souaré/6/68/14-17.

11

Souaré/6/72/7-9.

12

**PROTECTED**

13

See Souaré/6/66/25 to 6/67/22. E.g.: 6/67/2-5 ("*One of its missions is to draft sort of an ID card for the promoter, their background, technical competence, et cetera, so as not to enter into business with somebody who is not known at all.*"); 6/67/11-13 ("*It's a kind of filter also. When it is totally negative, they don't even bother to submit anything to the minister.*").

North and South at the time.<sup>14</sup> It was in keeping with governmental policy to grant these permits to BSGR.<sup>15</sup>

18. The exploration permits allowed BSGR the exclusive right to explore the area to assess whether there was a commercially viable iron ore deposit. Exploration permits are usually given out for free, as they require a huge capital investment with no guarantee of a return. It is only when a company discovers a commercially viable resource and submits a feasibility study to the Ministry of Mines that it can be considered for a mining concession. That was the case with BSGR.

## **2.2 The Memorandum of Understanding dated 20 February 2006**

19. On 20 February 2006 the BSGR group, through BSGR Guinea BVI,<sup>16</sup> entered into a Memorandum of Understanding (or *protocole d'accord*) with Guinea (the "**MoU**").<sup>17</sup> This was drafted with the help of Linklaters in Paris.<sup>18</sup> It was an agreement regarding the grant of rights to North and South Simandou and a "right of first refusal" over any part of Simandou Blocks 1, 2, 3 or 4 should they become available.<sup>19</sup>
20. It was negotiated with and signed by Souaré,<sup>20</sup> who confirmed that it was for North and South Simandou, and:

*"we promised in the memorandum of understanding that they would be the first ones to be consulted – in other words, they would have a right of first refusal – if Blocks 1 and 2 were to be retroceded."*<sup>21</sup>

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<sup>14</sup> Souaré/6/70/22-24 ("Q. Were other promoters interested in these areas? A. At the time, no. This is the reason why they had not been attributed.").

<sup>15</sup> Souaré/6/70/25 to 6/71/7 ("Q. So at the time during which the country is actually attracting its investors, and there are zones that are as of yet unexplored and no other promoter has expressed an interest in that area, would it be in keeping with the governmental policy to promote investment, and if there's a willing investor who says, "I want to come and invest in that zone", they would have received a permit? A. Yes, yes, that is in keeping with the policy.").

<sup>16</sup> As defined in para. 24 of BSGR's Amended Memorial dated 29 February 2016 ("**BSGR's Memorial**").  
<sup>17</sup> Exhibit C-0009.

<sup>18</sup> Struik/4/80/25-81/1 ("it was with the help of Linklaters in Paris").

<sup>19</sup> Struik/4/81/14-23 ("If we look at what this document refers to, is it fair to summarise that it's an agreement regarding the grant of rights to North and South Simandou that we looked at and a right of first refusal over Blocks 1 and 2 to -- A. That is correct. Q. I'm sorry, not just 1 and 2, but of any part of Blocks 1, 2, 3 or 4 that would become available? A. Yes, I was going to remind you of that. Yes, that is correct.").

<sup>20</sup> Souaré/6/75/23-24. For the avoidance of doubt, the Pentler individuals played no part in negotiating the MoU: Struik/4/114/9-22.

21. A first draft of the MoU had been sent to Guinea in November 2005<sup>22</sup> and a second draft on 6 January 2006.<sup>23</sup> The right of first refusal was included because Struik realised that Simandou Blocks 1 and 2 might become available:

*"Now, I saw this as an opportune moment because at the same time whilst I was investigating what was available to us to apply for as an exploration permit, I also heard, right from almost the beginning, that people were very unhappy, very unhappy with Rio Tinto sitting on all these blocks for all that time and doing nothing. Even today Guinea has not seen one tonne of iron ore exported from the country; not one.*

*So it was obvious to me, and this is what I recommended to Roy [Oron] – in the end, it was not my decision to add it to the MOU, the protocole d'accord, because it was Roy's decision – I just suggested to him that if these blocks become available – it would not be Blocks 3 and 4 because, in all fairness, Rio Tinto did work there... They focused mostly on those blocks, and they left 1 and 2 alone. So it was very fair, very probable, very plausible that if the Government of Guinea was going to remove 50%, as per the Mining Code, it would be Blocks 1 and 2, and not 3 and 4.*

*That's why I suggested to Mr Oron at the time, "Please, let us try and put this in. If they accept it, fine. If not, then we stick with Simandou North and South". But they accepted it. And the final draft – the version of the protocole d'accord actually includes that.*

*So forgive me for being opportunistic, but we are in business; this is what we try to do. So this is why I suggested we put it in."<sup>24</sup>*

22. The MoU included a 15% stake (or "free carry") for Guinea. BSGR was the first company actually to offer such a stake,<sup>25</sup> which was not an obligation in respect of iron ore under the 1995 Mining Code, in recognition of the large capital investment required to prospect

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<sup>21</sup> Souaré/6/76/5-9.

<sup>22</sup> Struik/4/82/13-16 ("Q. Roy Oron had first sent a draft of this to the government back in November 2005; were you aware of that? A. Yes, I was aware of that.").

<sup>23</sup> Exhibit C-0208. The second draft of the MoU did not include a right of first refusal (unlike the first and final drafts): Struik/4/85/15-19.

<sup>24</sup> Struik/4/87/6 to 4/88/10.

<sup>25</sup> Struik/4/95/20-24 and Struik/4/96/4-11 ("(...) And I don't think that any other company had done this. I don't think the Government of Guinea at that point in time had any stake in mining projects. We were the first, I think. And this is why I recall saying this, or this is why I wrote it. Because they made a very big issue out of this when the new Mining Code was promoted, but we had done something already six/seven years before.");

for iron ore.<sup>26</sup> BSGR was ahead of its time to offer this 15% which was later introduced as standard by Guinea.<sup>27</sup>

23. There was a ceremony for the signature of the MoU in the presence of "*all of the services of the Ministry* [of Mines]".<sup>28</sup> Souaré was proud of the MoU because it was in compliance with the Mining Code and a good deal for Guinea:

*"Q. It means that your services were proud of this contract?"*

*A. I was myself proud of it.*

*Q. Why? Because it was a good contract for the country?"*

*A. Because, first, it complied with the mining law. It was a contract the announcement of which was of interest to the country. We thought we'd done a good deal."<sup>29</sup>*

24. Following an analysis of preliminary drilling results for Simandou North, BSGR concluded that the area held little potential for direct shipping ore. However, initial fieldwork in 2007 in Simandou South resulted in the discovery of an iron ore deposit with potential for direct shipping ore near the village of Zogota. BSGR invested over USD 130 million in these activities, leading to the submission of a feasibility study (the "**Feasibility Study**") (see Subsection 2.4 below).

### **2.3 The Simandou Blocks 1 and 2 Permit**

25. This involves a discussion first of the withdrawal of Blocks 1 and 2 from the previous rights holder, Simfer S.A. (a subsidiary of Rio Tinto). As demonstrated below, that

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<sup>26</sup> Struik/4/96/2-4 ("*Q: Ok, but that was a stake that was essentially foreseen in the 1995 Mining Code; correct? A. As far as I know, no. (...)*") see also Souaré on whether the 15% stake was a provision the Mining code at Souaré/6/76/21-25 to 6/78/1-13.

<sup>27</sup> Struik/4/257/6 to Struik/4/258/17: Wolfson directed Struik to the provision in Article 150 of the 2011 Mining Code (Exhibit RL-0018): "*Q. Is this the 15% free carry you were referring to in the 2011 Mining Code? A. Yes, Correct*". Wolfson then directed Struik to Article 167 of the 1998 Mining Code (Exhibit CL-1), and in particular Articles 167.2, which provided an exception to the free-carry for "*Bauxite, Iron ore, Solid hydrocarbons, etc. Due to the degree of investment required, the State does not take free shares in the capital of a company operating substances of special interest*".

<sup>28</sup> Souaré/6/91/20-23.

<sup>29</sup> Souaré/6/91/24 to 6/92/4.

withdrawal was lawful. This section then moves to the subsequent lawful granting of these rights to BSGR.

*i. The Withdrawal of Simandou Blocks 1 and 2 mining rights from Rio Tinto*

26. On 25 February 1997 Rio Tinto (which term includes its subsidiary, Simfer S.A.) was awarded four prospecting permits covering the Simandou mountain.
27. The permits were valid for a period of three years. In accordance with the 1995 Mining Code on exploration permits, if no feasibility study had been completed in that period, half of the area covered by the permits must be returned to the government. This is known as "retrocession".
28. On 30 May 2000, and in accordance with the Mining Code, Rio Tinto retroceded 50% of its mining permits and renewed the remaining permits for two further years. This left Rio Tinto with prospecting permits in respect of four blocks, known as Simandou Blocks 1 to 4.
29. Rio Tinto sought to retain its permits from then on without regard to, and in breach of, the Mining Code,<sup>30</sup> in that:
  - (i) In 2002 Rio Tinto's prospecting permits for Blocks 1 to 4 were renewed without retrocession. As Souaré said:

*"They never retroceded.*

*Q. So this is a breach of the Mining Code?*

*A. It could be understood that way.*"<sup>31</sup>
  - (ii) Notwithstanding that Rio Tinto had not retroceded half of its area, and had not completed and submitted a feasibility study, on 26 November 2002 Rio Tinto and Guinea concluded a base convention in which the government committed to granting Rio Tinto a mining concession for Blocks 1 to 4.

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<sup>30</sup> See Reply, paras 10 to 84.

<sup>31</sup> Souaré/6/62/25 to 6/63/3.

- (iii) In both 2004 and 2005 Rio Tinto again refused to accept any retrocession to its Blocks 1 to 4.
- (iv) By May 2006, Rio Tinto was due to finalise and submit a feasibility study to the Ministry of Mines. Instead, Rio Tinto froze Guinea's mining reserves by delaying the exploration works and by concentrating the little exploration it did do on only a tiny area of the perimeter, with no exploration whatsoever in the rest of the blocks.

30. As Souaré said (understating the position), "*generally speaking we can say that Rio Tinto did not yield total satisfaction in the eyes of the government*".<sup>32</sup> By 2006, Rio Tinto had not even completed their research.<sup>33</sup> Rio Tinto had drilled only 6 holes over an area of 56km.<sup>34</sup> Rio Tinto was also forced to admit to the Government that it had misled them about the available iron ore at Simandou.<sup>35</sup>
31. By December 2007, the government started to examine all mining permits and concessions to determine whether the mining companies had complied with their obligations and commitments. By this stage, Rio Tinto had held its rights for almost ten years and still claimed to be six years away from production.
32. President Conté took legal advice from the Ministry of Mines in relation to Rio Tinto's rights. The Legal Adviser to the Ministry of Mines, Sakho, prepared a note in February 2008, stating that Rio Tinto's agreement with Guinea was in breach of the mining legislation and should be terminated.<sup>36</sup> The President was thus informed that Rio Tinto's 2002 base convention and 2006 mining concession had been awarded in breach of the law and should be revoked.

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<sup>32</sup> Souaré/6/58/22-24.

<sup>33</sup> Souaré/6/59/6 ("*They hadn't completed their research.*").

<sup>34</sup> Struik/4/101/9-18 ("*We found out subsequent to that, after we were given these blocks as exploration permits in December 2008 that Rio Tinto only had drilled -- it's disappeared now -- only had drilled six holes, over 56-kilometre length going north/south, in Blocks 1 and 2.*").

<sup>35</sup> Struik/4/105/10-13 ("*they were forced to tell also the Government of Guinea that they didn't have just 2 or 3 billion tonnes, but potentially 8 to 11 billion tonnes. The gaff came up.*").

<sup>36</sup> Exhibit C-0169.

33. By letter dated 22 May 2008, Rio Tinto was informed in a detailed and reasoned letter of the government's intention to revoke its mining concession on the ground of illegality.<sup>37</sup>
34. A presidential decree was issued on 28 July 2008, suspending the mining rights of Simandou Blocks 1 to 4 from Rio Tinto ("**Presidential Decree**"). That did not grant permits to BSGR nor concern BSGR at all.<sup>38</sup> Following that Presidential Decree, Rio Tinto apparently appealed to the President to overturn this decree.<sup>39</sup>
35. After the suspension of the mining concession, several technical and legal committees analysed Rio Tinto's rights and confirmed that those rights had been granted unlawfully and needed to be revised. For example:
- (i) On 20 August 2008, the President of the Control and Assessment Commission for Mining Titles, Alsény Bangoura, said that "[Rio Tinto] *is under the obligation of retroceding 50% of the 738 [square kilometres] that it still holds without reason; further to the payment of a lump-sum fine (at your discretion) for infringing the mining rules and regulations in force in the Republic of Guinea.*"<sup>40</sup>
  - (ii) On 27 August 2008, Minister of Mines Kanté ("**Kanté**") set up a committee in order to review the mining titles granted to Rio Tinto.<sup>41</sup> That was an "*in-house committee*" according to Souaré (by then Prime Minister).<sup>42</sup> It comprised nine members (a chair, Bangoura – who was the National Director for Geology – two rapporteurs and another six members), which were selected by Kanté and were people "*who were competent to have an opinion*

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<sup>37</sup> Exhibit R-0228.

<sup>38</sup> Kanté/7/136/2-4 ("*Q. The presidential decree of July 2008, did it grant permits to BSGR? A. No. No, the decree does not concern BSGR.*").

<sup>39</sup> Nabé/8/134/1-5 ("*Q. Is it possible that after the presidential decree had suspended Rio Tinto's rights, is it not that Rio Tinto would have appealed to the President to overturn this presidential decree? Does this remind you of anything? A. You are free to come to that conclusion yourself.*").

<sup>40</sup> Exhibit C-0174, page 2.

<sup>41</sup> Exhibit C-0176; Kanté/7/134/8-11 ("*Do you remember having set up that committee? A. Yes.*") (on his last day as Minister of Mines).

<sup>42</sup> Souaré/6/118/9-10.



on this".<sup>43</sup> They were to examine where Rio Tinto had done prospecting and the zones where they had done less work, as it was the areas where they had not done work which could be removed from Rio Tinto.<sup>44</sup> It was made up of officials belonging to the Ministry of Mines, who were senior officials.<sup>45</sup> It was "very normal" to set up a committee like this to review the mining titles granted to Rio Tinto and no pressure was exerted by President Conté (or Mamadie Touré) on that committee.<sup>46</sup> All the decisions that Kanté took (including setting up this committee) were in compliance with the Mining Code. He said:

*"for me my consistent line of behaviour was being in compliance with the Mining Code. So no decisions were taken that were not in accordance with the Mining Code."*<sup>47</sup>

- (iii) On 28 August 2008, Souaré set up an inter-ministerial committee to discuss the issue of retrocession of Rio Tinto's rights.<sup>48</sup> That committee had six members (four of whom were ministers) and was chaired by the Minister of Justice. Loucény Nabé (then Minister of Mines) ("**Nabé**") was a member of it.<sup>49</sup> Those were senior officials and this was a "very serious committee".<sup>50</sup> The purpose of that committee was to make a recommendation to the Council

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<sup>43</sup> Kanté/7/134/25 to 7/135/5 ("*Q. Do you know whether President Conté exerted any pressure on the members of the committee? A. No, no. That committee is a committee which I would call a very normal committee within the Ministry of Mines. It's normal to set up a committee like this in order to review the mining titles granted to Rio Tinto in connection with all of the delays accumulated in their operations, and particularly in the retrocession timetable. So that is a committee that would be considered to be perfectly ordinary, run of the mill, within that department.*").

<sup>44</sup> Kanté/7/135/7-15 ("*We needed to have people there who could, on the basis of the work that had already been done, tell us what the permit was within which Rio Tinto had effectively done prospecting, and the zones where less work had been done. Because the permits in the areas where they had actually performed, we couldn't remove those permits, leaving them the other ones.*").

<sup>45</sup> Souaré/6/118/15-19 ("*So this is a committee, you would agree with me, made up by officials, officials belonging to the Ministry of Mines. These are high officials, aren't they? A. Yes.*").

<sup>46</sup> Souaré/6/118/20 to 6/119/9.

<sup>47</sup> Kanté/7/136/25 to 7/137/3.

<sup>48</sup> Exhibit C-0177; Souaré/6/119/14; Nabé/8/128/12-15.

<sup>49</sup> Nabé/8/129/11-15 ("*Q. You see in the second paragraph that you have the names of the six people who made up this committee, amongst which you are the second one: "Dr Loucény NABÉ, Minister of Mines and Geology". So you took part in this meeting, at least according to this document.*").

<sup>50</sup> Souaré/6/120/5-16.

of Ministers regarding Rio Tinto.<sup>51</sup> The government was in a hurry to resolve the Rio Tinto position, due to "social upheaval and political upheaval".<sup>52</sup> President Conté was not part of that committee nor was he present during its meetings.<sup>53</sup> As Prime Minister Souaré said, this committee's position was that Rio Tinto was refusing to retrocede any part of Simandou Blocks 1 to 4 and that its actions were in breach of the Mining Code:

*"I think that at the time the inter-ministerial committee, after several working sessions, came to the conclusion that Rio Tinto was not willing to return the blocks, which was in violation of the Mining Code, and this is why the committee recommended to the government to take a decision ex officio.*

...

*This was a governmental committee responsible for looking into the relationship between the state and an operator, an operator who had failed in its obligations and had made an appeal. And the committee decided that this appeal could not be acceded to, and the operator Rio Tinto was found to not have been in compliance with its legal obligations to return 50% of its concession. This is why the committee recommended to the government that decision be taken.*

...

*Q... So Rio Tinto had appealed directly to the President, but the ministerial committee says unanimously that it is simply impossible to accede to this request?*

*A. That is correct, because the committee believed that it was not legal."<sup>54</sup>*

- (iv) A legal opinion, produced within the Ministry of Mines and dated 27 August 2008,<sup>55</sup> was provided to the inter-ministerial committee. It found that Rio Tinto had "not

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<sup>51</sup> Souaré/6/120/19-22.

<sup>52</sup> Souaré/6/130/14-23 ("My government was in a hurry. There was a great deal of social upheaval and political upheaval. Things had to be handled very quickly to move forward. There was this type of pressure that was being felt at all levels of government.").

<sup>53</sup> Souaré/6/120/23 to 6/121/7 ("At the time, President Conté was not present during the meetings of the Council of Ministers.").

<sup>54</sup> Souaré/6/122/6 to 6/123/10.

<sup>55</sup> Exhibit C-0178.

*honoured its obligations, neither in terms of the retrocession or the feasibility study", as Souaré agreed.*<sup>56</sup>

- (v) Minister of Mines Nabé said that he set up a yet further commission on 16 September 2008.<sup>57</sup> This was chaired by a Mr Nimaga. The purpose of this commission was to "*get Rio Tinto to accept a retrocession in accordance with the provisions of the Mining Code.*"<sup>58</sup> On the same day, Nabé sent a letter to Rio Tinto inviting them to a meeting the very next day with that commission, but he could not recall if the meeting happened.<sup>59</sup>
- (vi) The Ministry of Mines committee (chaired by Bangoura) produced a technical memorandum on 14 November 2008.<sup>60</sup> It reported that Rio Tinto had offered only to retrocede 17% of its areas, not 50% as required. Rio Tinto maintained that position throughout.<sup>61</sup>

36. Between August and December 2008, Guinea and Rio Tinto negotiated, but Rio Tinto refused to compromise.

37. The Government became increasingly frustrated with Rio Tinto. As Souaré said:

*"I can say the government was starting to feel harassed by Rio Tinto. Rio Tinto had the concession and it had these advantages, [it] had a deposit to develop, and we were still waiting. We needed to clarify the situation, we needed to know what the real situation was and what needed to be done in order to advance on*

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<sup>56</sup> Souaré/6/123/20 to 6/124/1.

<sup>57</sup> Nabé/8/145/1-15 ("*Q. On the first page there is the date of September 16<sup>th</sup> 2008, which would be one week after this alleged meeting. You set up a Technical Commission to follow up on the Simfer case, and there is a variety of officials: the members are Diaby, and the chair is Mr Nimaga, and then there are several members. Did you set up this commission? A. Yes.*"). He said he was not aware of the commission set up by his predecessor on 27 August 2008: Nabé/8/147/17-19.

<sup>58</sup> Nabé/8/146/1-2.

<sup>59</sup> Nabé/8/150/6-14 ("*Q. So the commission that you set up, did it meet with Rio Tinto the very next day; that is, on September 17th? Did that meeting take place? A. That was the purpose of this letter. Q. So did it take place? A. It's possible that it took place. But if you expect from me that I can recall this specifically, I think you would be asking me too much in terms of my ability to recall.*").

<sup>60</sup> Exhibit C-0187.

<sup>61</sup> Souaré/6/140/4-6 ("*Q. They were ready to retrocede only 17%; do you agree with me? A. Yes, that's why it was inadmissible.*").

*this. Companies cannot simply freeze mining resources; either it develops to operate or it has to return it.*"<sup>62</sup>

38. On 30 September 2008, Rio Tinto wrote to Nabé.<sup>63</sup> It summarised the Government's concerns, including that "*Rio Tinto intends to 'freeze' the Simandou resources*". Those were the Government's concerns, said Nabé.<sup>64</sup> Rio Tinto's letter amounted to a refusal to retrocede its areas.<sup>65</sup>
39. On 6 October 2008, Rio Tinto wrote again to Nabé.<sup>66</sup> That letter said "*the fact of the matter is if our title were not confirmed by the Government, our estimation of the Resource could also be lowered. This would have a disastrous effect on the "bankability" of the project*". That warning conveyed Rio Tinto's opposition to retrocession. Nabé said of this letter and the others from Rio Tinto around this time, "*the interpretation I made of all these letters was that Rio Tinto did not want a retrocession to take place.*"<sup>67</sup>
40. On 28 October 2008, Nabé wrote to Rio Tinto asking for a 50% retrocession (as their proposals amounted to only 17%).<sup>68</sup> As Nabé said in evidence, "*Rio Tinto didn't agree. They didn't agree with the principle of retrocession of 50%.*"<sup>69</sup>
41. On 3 December 2008, after refusing to retrocede 50%, Rio Tinto wrote to Nabé and said that it was going to cut down its investment in Simandou, including its number of subcontractors, because of a drop in iron ore prices. It included a yet further refusal to retrocede.<sup>70</sup> This was the final straw for the Government.

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<sup>62</sup> Souaré/6/126/1-9.

<sup>63</sup> Exhibit C-0181.

<sup>64</sup> Nabé/8/152/17-20 ("*Does this summary by Rio Tinto of the major concerns of the state correspond to reality? That was really the position of the government at the time? A. Well, these were indeed concerns for the government.*").

<sup>65</sup> Nabé/8/154/5-9 ("*Q. But that presentation of things was a refusal to retrocede the areas. A. Well, yes, you can read that in the background. This is what you [have to try and] understand, my dear sir. This is what I was trying to explain.*").

<sup>66</sup> Exhibit R-0151.

<sup>67</sup> Nabé/8/155/18-21.

<sup>68</sup> Exhibit R-0235 and Nabé/8/157/1-10 ("*So is paragraph 13 of your witness statement referring to this letter? A. That could very well be the case.*").

<sup>69</sup> Nabé/8/157/15-16.

<sup>70</sup> Exhibit C-0189; Nabé/8/174/19 to 8/175/1.

42. The next day, 4 December, the Council of Ministers met and gave Nabé the "green light" to withdraw Blocks 1 and 2 from Rio Tinto.<sup>71</sup> The Prime Minister ordered the Minister of Mines "to take all necessary measures, legal measures, in view of the situation".<sup>72</sup> Souaré said that the letter of 3 December was what convinced the Government to take Rio Tinto's permits over Blocks 1 and 2:

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43. Nabé explained what this amounted to: "*the Council of Ministers decided – or instructed the Minister of Mines to do what I call an "ex officio retrocession", of which Rio Tinto would be informed.*"<sup>74</sup>

44. As a result, the retrocession was forced upon Rio Tinto, with Blocks 1 and 2 removed, leaving Rio Tinto with Blocks 3 and 4. The inter-ministerial committee had asked a technical team to advise on exactly what would be the limits of the zone to be retroceded, which is how Blocks 1 and 2 came to be removed.<sup>75</sup>

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<sup>71</sup> Nabé/8/175/12-17 ("A. Well look, after receiving this letter, which is dated 3rd December, you might have seen that the decision of the council is dated 4th December. Q. Yes, this is precisely what I was heading at. Immediately after this letter, there was a meeting of the Council of Ministers, on the next day."). And Nabé/8/177/13-14 ("All I needed was for the council to give me the green light.").

<sup>72</sup> Souaré/6/141/20-23.

<sup>73</sup> PROTECTED

<sup>74</sup> Nabé/8/157/20-25.

<sup>75</sup> Souaré/6/123/10-13 ("And the committee asked the technical team to carry on discussions with the partners to get the data and to determine exactly what would be the limits of the zone to be retroceded.").

45. Over a dozen governmental committees, mining authorities and ministries, and over 30 Guinean public officials were involved in the decision to withdraw Blocks 1 and 2 from Rio Tinto.
46. The ultimate decision to withdraw Blocks 1 and 2 was taken by the Council of Ministers without the involvement of President Conté,<sup>76</sup> who was very sick at the time and had delegated most of his powers to the Prime Minister, and who died two weeks later<sup>77</sup> (BSGR has asked Guinea for the Council of Ministers' decision, but it has never been provided).<sup>78</sup> The Council of Ministers (chaired by Prime Minister Souaré) ordered the Minister of Mines to "use all legal means in order to restore the rights of the state on Mount Simandou in connection with Simfer."<sup>79</sup> There were 36 members of the Council of Ministers,<sup>80</sup> and according to Souaré, there should have been minutes of these meeting,<sup>81</sup> which Guinea failed to produce.<sup>82</sup>
47. Several of Guinea's own witnesses accept that Rio Tinto's concession and exploration permits were validly withdrawn. They confirmed this **PROTECTED** and in their testimony in these proceedings, for example:
- (i) Souaré:

<sup>76</sup> Nabé/8/185/14-17 ("The decision to withdraw Blocks 1 and 2 from Rio Tinto, was this decision taken by the Council of Ministers; yes or no? A. Yes. I said yes.").

<sup>77</sup> Nabé/8/117/1-4.

<sup>78</sup> See also Section 3.5 below.

<sup>79</sup> Souaré/6/146/15-19.

<sup>80</sup> Souaré/6/146/20-21 ("How many members in the council? A. Well, if no one is absent, 36.").

<sup>81</sup> Souaré/6/146/25 – 6/147/5 ("A. Well, I can't say, but the minutes can tell us. The minutes show the people present, those who sent in apologies. Q. Well, unfortunately we haven't got that document. We have asked for it, but we haven't received it, we haven't obtained it."); Sylla/7/40/1-15 ("I did not have a Prime Minister. There was an official responsible for coordinating governmental work and there was a Secretary General of the Presidency, and the strategy was approved by him and by the Council of Ministers. Q. By the Council of Ministers? When did they approve the strategy? Was there a meeting? A. Of course. Council meetings took place every Tuesday under the chairmanship of the Coordinator of Governmental Activity, and that's when I spoke and it was approved by all those present. Q. So if we had the minutes of these meetings, we would be able to see that this presentation was made and it was approved? A. Yes, it was approved."); B. Sylla 8/84/2-10 ("A. Each representative of the administration is under the obligation of referring to their line manager who decides to interpret. There are often to-and-fros between the administrations. Q. Are there notes, internal notes that are taken, or memos? A. Do you mean minutes of --Q. Yes? A. Minutes of meetings, yes.").

<sup>82</sup> See BSGR's Request No 5 of its Document Production Request.

<sup>83</sup> **PROTECTED**

*"I think that, unfortunately for Rio Tinto, when I came back to business in 2008 I could see that they had not fulfilled all of the commitments that they had made when they got their concession in 2006 when I was Minister of Mines."*<sup>84</sup>

(ii) Kanté:

*"Q. When I read this, this means that you actually do recognise that the government was entitled to withdraw those blocks from Rio Tinto.*

*A. But of course."*<sup>85</sup>

(iii) Nabé:

*"Q. The decision to withdraw the two blocks from Rio Tinto, was it legitimate?*

*A. Yes, I consider it to have been legitimate.*

*Q. Was it legal?*

*A. Yes, all the more so that it was legitimate."*<sup>86</sup>

(iv) Nabé also agreed that the opinion of the commission on 20 August 2008<sup>87</sup> was unequivocal about this:

*"Q. Do you agree with me that this was the opinion of this commission, that the concession held by Rio Tinto infringed mining laws?*

*A. That it was the opinion of the commission? Well, as expressed here, it is unequivocal."*<sup>88</sup>

And he said:

*"it is true that the government was ready to withdraw Blocks 3 and 4 from Rio Tinto, and that all of this adventure shows that the government was right to wish to do so."*<sup>89</sup>

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<sup>84</sup> Souaré, RWS-2, para. 44.

<sup>85</sup> Kanté/7/132/24 to 133/2.

<sup>86</sup> Nabé/8/187/12-16.

<sup>87</sup> Exhibit C-0174.

<sup>88</sup> Nabé/8/126/19-23.

<sup>89</sup> Nabé/8/177/25 to 8/178/3.

48. The removal of Rio Tinto's rights in Blocks 1 and 2 was undertaken in a lawful manner, and plainly without any pressure or influence from Mamadie Touré or President Conté.

ii. *The Lawful Award of a Prospecting Permit for Simandou Blocks 1 and 2 to BSGR*

49. As for the award of the prospecting permit for Blocks 1 and 2 to BSGR, it was widely known in the mining industry and in Guinea from as early as 2002 that Rio Tinto was acting in breach of the Mining Code and had failed to undertake any substantial development of Blocks 1 to 4. Struik said he had discovered this on his early visits to Guinea.<sup>90</sup>

50. It is no surprise that BSGR wanted to obtain permits to explore some or all of Blocks 1 to 4.<sup>91</sup> This does not signify anything illicit, or anything close to it. BSGR wanted to do what Rio Tinto had failed to do in over ten years: develop a mine at Simandou and start production, which would benefit the country and the people of Guinea.

51. When it became clear that the government was frustrated with Rio Tinto's lack of progress, BSGR expressed its ambitions using the normal formal channels:

- (i) On 12 July 2007 BSGR wrote to Minister of Mines Kanté to express its interest in acquiring an exploration permit for Blocks 1 and 2.<sup>92</sup>
- (ii) In April 2008, BSGR wrote again to Kanté to inform him that it had returned nine permits in respect of bauxite and uranium, and to clarify that it now had the capacity to extend its rights to Blocks 1 and 2 of Simandou.<sup>93</sup>
- (iii) Kanté responded on 10 July 2008, now formally rejecting BSGR's application to Blocks 1 and 2 on account of the concession being held by Rio Tinto.<sup>94</sup>

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<sup>90</sup> Struik/4/76/4-9 ("Now, when I was at the CPDM, I became aware very quickly of what the Mining Code said, I became aware of certain frustration with certain people at the CPDM about the non-performance of the other mining company, and of course I became interested.").

<sup>91</sup> Struik/4/87/9 to 4/88/10 ("So forgive me for being opportunistic, but we are in business; this is what we try to do. So this is why I suggested we put it in.").

<sup>92</sup> Exhibit R-0214.

<sup>93</sup> Exhibit C-0195.



- (iv) When Rio Tinto's rights were suspended in July 2008, BSGR reapplied for Blocks 1 and 2 (in early August 2008),<sup>95</sup> along with another mining company, AfriCanada.
- (v) On 3 November 2008, Minister of Mines Nabé wrote to BSGR asking for information in relation to 5 matters, including regarding its work in the Simandou zone and its technical and financial capability.<sup>96</sup> Those conditions had been set by the Council of Ministers.<sup>97</sup> Nabé said that the government was implementing the presidential decree of 28 July 2008 (which had suspended the Rio Tinto concession).<sup>98</sup> Nabé had similar discussions with AfriCanada; he said "*I remember I did have discussions with AfriCanada on the proposals that had been made.*"<sup>99</sup>
- (vi) BSGR responded on 6 November 2008, stating that it was ready to fulfill the terms and conditions as per Nabé's letter of 3 November.<sup>100</sup>
- (vii) Thereafter, on 10 November 2008, Nabé wrote to the Prime Minister and the Minister of Justice indicating that at that stage it was not ready to grant the permits to BSGR.<sup>101</sup>

52. One of Guinea's witnesses, Kanté, suggested that the *application* by BSGR was illegal.<sup>102</sup> That was obviously wrong (and even Kanté was unable to point to which provision of the Mining Code it would contravene). Another of Guinea's witnesses, Nabé, did not agree;

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<sup>94</sup> Exhibit C-0196.

<sup>95</sup> Exhibit C-0098.

<sup>96</sup> Exhibit C-0094.

<sup>97</sup> Nabé/8/160/8-10 ("*Were these conditions set by the inter-ministerial committee? A. Those conditions were set by the Council of Ministers.*").

<sup>98</sup> Nabé/8/158/13 to 159/14 ("*Q. So five days later you sent a letter to BSGR, and in the second paragraph of that letter you say: 'In that connection, we should like to inform you that the Government is now implementing the conditions contained in decree D/041 ... of 28 July 2008 ...' That was the presidential decree, by the way, which suspends the Rio Tinto concession.*").

<sup>99</sup> Nabé/8/160/18-19.

<sup>100</sup> Exhibit C-0095.

<sup>101</sup> Exhibit C-0179.

<sup>102</sup> Kanté/7/141/5-19 ("*A. May I finish? This is even less so for a mining concession that belongs to another company. That was completely illegal. Q. Why is applying for a permit illegal? I mean, the simple fact of applying for a permit, to what extent is that illegal?*")

he said it is not a question of whether the application was "*legal or illegal*" – "*the application may be considered to be exorbitant by the party receiving it, but it's normal for the applicant to put it forward*".<sup>103</sup>

53. As noted above, BSGR was not the only interested party. By early November 2008, it was clear that other applicants had also, like BSGR, expressed an interest in Simandou Blocks 1 and 2. Nabé said "*From memory, yes, I know that AfriCanada, for instance, was interested.*"<sup>104</sup> What is notable about that is how much Nabé's answer differed from that of Souaré who insisted that it was only BSGR that was able to take up this opportunity:

*"Q. And this opportunity [following the presidential decree in July 2008] was also open to other mining promoters?"*

*A. No, I've already told you that it wasn't the case. The proof of the pudding is that nobody else obtained it."*<sup>105</sup>

54. As Nabé's more straightforward answer made clear, not only was this opportunity open to other mining promoters, it was also acted on by others. Souaré's evidence to the contrary was an attempt to prove his theory that only BSGR stood in the wings because of some special deal with the President, when that was simply not the case and there is no evidence to suggest that BSGR did anything other than take a legitimate opportunity available to it (and to other mining promoters) when that opportunity arose.

55. The application process for Blocks 1 and 2 was robust, and the eventual award of the exploration permits to BSGR was in accordance with Guinean law.

- (i) BSGR's application was only entertained when the government's negotiations with Rio Tinto to find an amicable solution stalled and the government's frustrations grew.
- (ii) The government set out a number of substantial conditions that the applicants for the exploration rights had to meet. BSGR was the only company to apply which satisfied those preconditions, as confirmed in a memo dated 10

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<sup>103</sup> Nabé/8/123/12-25 and 8/124/18-23.

<sup>104</sup> Nabé/8/159/11-16.

<sup>105</sup> Souaré/6/145/7-14.

November 2008 from Minister of Mines Nabé to Prime Minister Souaré and the Minister of Justice.<sup>106</sup>

(iii) PROTECTED

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(iv) PROTECTED

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56. The decision to grant Blocks 1 and 2 to BSGR was a decision taken by the Council of Ministers,<sup>109</sup> which consisted of 36 members from across the whole of government. See Nabé's evidence:

*"Q. The decision to grants Blocks 1 and 2 to BSGR, was this decision taken by the Council of Ministers; yes or no?"*

*A. Yes."*<sup>110</sup>

There is no evidence that the Council of Ministers was somehow cowed into awarding the permits to BSGR and it is inconceivable that it would.

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<sup>106</sup> Exhibit C-0179.

<sup>107</sup> PROTECTED

<sup>108</sup> PROTECTED

<sup>109</sup> As set out above in paragraph 46 and as confirmed by Guinea's witnesses, there exist minutes of the meetings of the Council of Ministers. These have been requested from Guinea in BSGR's Request 6 of its Document Production Request. Guinea has failed to produce the requested documents.

<sup>110</sup> Nabé/8/185/18-20.

57. As the evidence shows, BSGR acted lawfully throughout that process and the award of the exploration permits over Blocks 1 and 2 was both perfectly legitimate and in accordance with the Mining Code.

#### **2.4 The Base Convention and the Zogota Mining Concession**

58. The Feasibility Study for the Zogota Project in South Simandou was completed and submitted to the CPDM on 16 November 2009.<sup>111</sup> Struik was "*fully responsible for that document*".<sup>112</sup> It was 454 pages plus thousands of pages of annexes.<sup>113</sup> Ten copies were delivered to the CPDM by Struik and Avidan,<sup>114</sup> plus a digital version.<sup>115</sup>

59. This was the first serious feasibility study ever submitted to the CPDM. By way of comparison, it took Rio Tinto 19 years to submit a feasibility study in respect of Simandou Blocks 3 and 4 (in March 2016), leaving the area undeveloped in the intervening period.<sup>116</sup> That BSGR achieved this in just 3 years was hailed, justifiably, as a huge step forward in the fight against the so-called "resource-curse" which had plagued Guinea.<sup>117</sup>

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<sup>111</sup> Exhibit C-0014.

<sup>112</sup> Struik/4/213/15-16.

<sup>113</sup> Struik/4/213/21 to 214/3 ("*The document itself, which we have on the record, is the main body; it's a 454-page document. But your witness statement also refers to annexes. A. Yes. Q. I think there were 19 annexes? A. There were a lot. I can't recall exactly how many, but there were a serious amount of annexes.*"). Even then, this was a smaller document than the feasibility study for Blocks 1 and 2 which followed in September 2011, because the Zogota area represented about 900 million tonnes of iron ore, of which 150 or 180 million tonnes were relatively high grade shipping order. In contrast, Blocks 1 and 2 represented 5 billion tonnes of very high grade iron ore: Avidan/9/167/11-20 ("*Zogota presented approximately 900 million tonnes of iron ore in general, of which 150 or 80 tonnes that was relatively high-graded of direct shipping ore, and all the rest was a relatively low grade that was meant to be mixed with the iron ore that we are going to bring from Blocks 1 and 2. And the Blocks 1 and 2 represented at least 5 billion tonnes of a very high-grade iron ore and represented, from what we knew at the time, at least 5 billion tonnes. So it was -- Zogota was much, much smaller than the blocks.*").

<sup>114</sup> Avidan/9/146/14-16 ("*Q. Did you personally assist in bringing the feasibility study over? A. Yes, to the ministry.*")

<sup>115</sup> Struik/4/214/12-16 ("*Q. So this feasibility study then, with essentially thousands of pages of annexes, did you personally deliver that to the CPDM? A. Yes. And not just one copy; I think we delivered ten copies, if I'm not mistaken, plus a digital version.*")

<sup>116</sup> Reply, para. 37.

<sup>117</sup> Sylla/7/16/23-25 ("*You know that Guinea has been described as a geological scandal, with so very many mining resources available and untapped...*"); Nabé/8/115/4-10 ("*The people of Guinea knew that the country was very rich in mineral ore, but that mineral ore wealth of the population had not really been used for the benefit of the population.*"); Souaré/6/19/6-9 ("*The final goal was tapping into the mining resources of the*

60. On 1 December 2009, Thiam (then Minister of Mines) established a Commission, in accordance with the 1995 Mining Code, to study the Feasibility Study and to negotiate the Base Convention with BSGR (the "**Base Convention Commission**" or "**Commission**").<sup>118</sup> In reality, however, from 16 November 2009, BSGR had been discussing the Feasibility Study with the CPDM and they had sent questions that BSGR had to answer with regard to it.<sup>119</sup> So the Commission formed on 1 December 2009 essentially focused on the Base Convention.<sup>120</sup>
61. The Commission consisted of 20 members from numerous government departments, the Central Bank and the National Company of Mining Infrastructure. The Commission included representatives of various Ministries, including the Ministry of Justice, the Ministry of Labour, the Ministry of Transport, the Ministry of Defence, the Ministry of Infrastructure and others.<sup>121</sup>
62. This was no rubber-stamping exercise. The Commission analysed the Feasibility Study and the Base Convention in great detail. Every one of the Commission members participated in that process and "*it was a very, very intense period of time*".<sup>122</sup> There were multiple reports and questions between departments on a wide range of issues relating to the terms of the draft agreement, including geological issues, exploitation, infrastructure, transport, tax, financial and environmental issues. Detailed questions were put to BSGR

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*country. We had that reputation for mining wealth and the Mining Minister, the mining sector, had to see to it that mining was developed in the country."); Souaré/6/127/24-6/128/1 ("And clearly the government's policy was to ensure that partners comply with their commitments, that projects advance, to avoid the freezing of resources."); Nabé/7/86/19-21 ("it was well known that Guinea was not sufficiently benefiting financially from the operations of these natural resources.").*

118

Exhibit C-0015.

119

Struik/4/216/1-20 ("So you're saying you deposited this study on 16th November? A. Yes. Q. And then you say there were lots of exchanges with the CPDM? A. There were exchanges between us and the CPDM. I had documents that I'm sure were taken also from my laptop, documents that had questions, some Word documents. They sent us questions which we had to answer with regard to the feasibility study.").

120

Struik/4/215/8 to 4/216/2. See 4/216/1-2 ("The committee in the end was basically purely focusing on the convention minière.").

121

PROTECTED and 227/18-23 PROTECTED

PROTECTED

PROTECTED ("They were representatives of the various ministries. Because the Ministry of Budget, the Ministry of Finance, the Ministry of Labour, the Ministry of Justice, the Ministry of Transport, they all have to have representation on a committee like this."); Exhibit C-0015.

122

Struik/4/218/2-6.

which BSGR responded to in a lengthy letter dated 7 December 2009.<sup>123</sup> **PROTECTED**

**PROTECTED**  
They were technically competent people who "were able to dive in and really spend time, they understood this".<sup>127</sup>

63. BSGR worked from 16 November 2009 until the Base Convention was signed on 16 December 2009.<sup>128</sup> The Commission's report said that it worked from 2 to 12 December 2009.<sup>129</sup>

64. Struik later gave a report to BSGR about this process.<sup>130</sup>

65. The Commission members were paid a sitting allowance, which was requested by the chairman of the Commission.<sup>131</sup> This was done transparently<sup>132</sup> in accordance with standard practice because the government did not have a budget for this (and is the practice in other similar countries).<sup>133</sup> Souaré suggested this was neither "legal within the Mining Code nor traditional" and that "[t]his is not a practice that would enable one to reach one's objective in terms of obtaining mining titles" by which he said he meant that it would mean the Commission was not impartial, would not apply the law and that the investor would not be telling the truth.<sup>134</sup> It is difficult to understand why the payment of

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<sup>123</sup> Exhibit R-0497.

<sup>124</sup> **PROTECTED**

<sup>125</sup> **PROTECTED**

<sup>126</sup> **PROTECTED**

<sup>127</sup> Struik/4/228/10-18.

<sup>128</sup> Struik/4/221/4-10 ("So if you and the CPDM and the committee worked from the moment that you handed it in on November 16th until the minute it was signed -- A. Yes. Q. -- by the minister, then that would be four weeks and two days. A. Correct."). Avidan/9/149/18-20 ("It was -- from my recollection, it was two weeks' negotiations, about 14 days.") and 9/157/1-7 ("It was two weeks, yes. Q. Is that the total period that you negotiated -- A. The total, yes. Q. And is that just negotiating the Base Convention or does that also include examining the feasibility study? A. It was -- examining the feasibility studies was in the first days of the negotiations."). 9/158/15-16 ("A. Yes, I think so, yes. So it represents more or less two weeks.").

<sup>129</sup> Exhibit R-0268.

<sup>130</sup> Exhibit R-0319, dated 29 March 2010.

<sup>131</sup> Struik/4/247/24 ("A. The request came from the chairman of the committee.").

<sup>132</sup> Struik/4/249/24-25 ("it was all out in the open. This was not some secret, underhand thing.").

<sup>133</sup> Struik/4/248/14-17 ("There was a norm somehow that the daily allowance would be paid. The government did not have budgets. The ministries themselves had very little, if no money at all, to do things.").

<sup>134</sup> Souaré/6/12/5-16.

a sitting allowance to all members of the Commission would have that effect, bearing in mind that the Commission was comprised of representations of a large number of Ministries. In any event, it was not disputed that (a) the sitting allowance was requested by the Chair of the Commission itself; (b) it was paid openly and transparently; (c) it accorded with practice in similar countries; and (d) none of the members of the Commission have been challenged, charged or still less convicted in relation to the receipt of such sitting allowance. See further paragraphs 122 to 124 below.

66. Dadis Camara, then President, was shot on 3 December 2009, shortly after the Commission was formed. The Commission continued to operate and they were very grateful that BSGR continued and did not flee like other foreign companies.<sup>135</sup>
67. The Base Convention was based on a draft proforma that came from the World Bank and which Guinea used.<sup>136</sup>
68. At the conclusion of this extensive process, the Commission issued its final report on 14 December 2009 to the Minister of Mines, Thiam.<sup>137</sup> It said that BSGR's project accorded with the Government's objectives, and recommended (to the Council of Ministers) that the draft Base Convention be signed with BSGR and a mining concession awarded.
69. That, however, was not the end of the scrutiny. On receiving the recommendation from the Commission, Thiam reported to the Council of Ministers, summarising the conclusions of the Commission and requesting that the Council approve the draft Base Convention.<sup>138</sup> That was on 16 December 2009.

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<sup>135</sup> Struik/4/236/16-22 ("*They continued to operate. And they were very grateful – this is very important that I explain this – they were very grateful that we continued, and not – they actually told us this: that we didn't flee the country like all the other companies did and left them alone. They were very grateful for the fact that we stayed. I've heard this many times.*"); See also Struik/4/237/18-20 and Avidan/9/149/25 to 9/150/1 ("*A. Yes. They really appreciated that we didn't leave, and we stayed and did continue.*").

<sup>136</sup> Avidan/9/150/8-19 ("*The World Bank had a blank or a prototype convention de base that they sent to Guinea, and Guinea ratified it as a draft for all the companies during the end of 2008. I think it was Minister Nabé and Prime Minister Souaré, they ratified the World Bank prototype for all the companies. So we, a year after, negotiated on the base of this convention de base that came from the World Bank.*").

<sup>137</sup> Exhibit R-0268.

<sup>138</sup> Exhibits C-0210 and C-0138.

70. The Council of Ministers then proceeded to set up its own subcommittee to look into five technical and infrastructure issues.<sup>139</sup> After meeting again on 18 December 2009 (at an Extraordinary Council of Ministers meeting),<sup>140</sup> the Council of Ministers reported to the Prime Minister and recommended that the Base Convention with BSGR be signed.
71. The parties signed the Base Convention on 20 December 2009,<sup>141</sup> and the Base Convention entered into force when it was ratified by a presidential decree from the new president (following the shooting of Dadis Camara), General Konaté on 19 March 2010.
72. There is no evidence whatsoever that Mamadie Touré or President Lansana Conté had any involvement at all in the workings of the Commission or the Council of Ministers, or the grant of the mining concession. President Conté had died over a year before, shortly followed by Mamadie Touré fleeing the country. This is addressed further in later sections of this document.
73. Furthermore, what is notable about Guinea's case is that it fails to explain how this detailed process was unlawful. There are obvious witnesses who could testify in relation to the lawfulness of the negotiation process, being the 20 members of the Commission. The list and position of the people was given in oral opening.<sup>142</sup> Guinea has not called as a witness in this arbitration a single individual from that list who took part in the negotiations. Of the 20 to choose from, Guinea has ignored the 19 who were there, and instead chose to call Bouna Sylla as a witness, who was asked to take part in the Commission but declined.<sup>143</sup> That is extraordinary given that at the centre of Guinea's

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<sup>139</sup> Exhibit C-0211 ("*The [sic] conseil des ministre has set a sub [sic] to analyse the convention and feasibility study and feedback comments tomorrow at the extraordinary council [sic] conseil set at 3pm. members are Finance minister, Environment Minister and rapporteur mr camara, the cabinet [sic] directeur of primature.*").

<sup>140</sup> Exhibit C-0138.

<sup>141</sup> Exhibit C-0069.

<sup>142</sup> Libson/1/26/21 to 1/28/2.

<sup>143</sup> B. Sylla/8/27/12-17 ("*You say in your witness statement in paragraph 14, or beginning with paragraph 14, that you did not take part in the work of the committee that had been entrusted with reviewing the feasibility study within the framework of the negotiations for a mining agreement over Zogota in 2009, if I understood you correctly.*"); B.Sylla/8/40/20-25 (*Q. Is it possible that they might have tried to get in touch with you to inform you of your appointment to this commission, but they failed to join you because you were in Dakar? A. Yes. But when I came home, the work of the commission had started.*"); 8/41/8-14 ("*Even had they got in touch with me, I couldn't have taken part in the commission on the day after the assassination attempt. When you are told that you are appointed to a commission that's going to commit the country for at least 25 years, which is a long period, I don't think this was the priority of the authorities.*"); 8/44/6-13 ("*This is why, on a personal*



case is the allegation that BSGR acquired its rights unlawfully and the Base Convention and the Zogota Mining Concession are two of the three rights that were withdrawn.

74. Why has Guinea not called any of those people? PROTECTED

[REDACTED]

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[REDACTED]

PROTECTED

[REDACTED]

PROTECTED

[REDACTED]

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[REDACTED]

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*basis, I said that I couldn't attend such a negotiation: the context within which it was taking place, when there was an assassination attempt against the head of state, there was a risk of chaos, nobody knew what direction the country would take, and to just sit down and negotiate a convention on the day after the assassination attempt, all the more.").*

144 PROTECTED

145 PROTECTED

146 PROTECTED

75. In a letter dated 6 January 2010, the Chairman of the Commission (and Secretary General of the Ministry of Mines), Kourouma, provided the Minister of Work with a copy of the Base Convention, setting out the reasons why the project was good for Guinea.<sup>147</sup> He concluded by explaining that this project, with its investment of USD 2.452 billion and its size, 30 million tonnes of iron ore, would create a new economic zone in the south-east of the country.
76. On 19 March 2010, in accordance with Article 8 of the Base Convention, President Konaté granted BSGR Guinea a mining concession in relation to the Zogota deposit (i.e. the Zogota Mining Concession).<sup>148</sup> The Zogota Mining Concession complied with Article 41 of the 1995 Mining Code, which permitted rights holders the exclusive and valuable right to carry out prospecting and development of deposits within the area of the concession. This has been set out in detail in BSGR's Reply Memorial dated 10 January 2017 (the "**Reply**").<sup>149</sup>
77. As the documents and the testimony of multiple witnesses have demonstrated, the award of the Base Convention and the Zogota Mining Concession was lawful and followed a high standard of due process.

### **III. GUINEA HAS FAILED TO PROVE THAT BSGR OBTAINED THE MINING RIGHTS BY CORRUPTION**

78. As strong as BSGR's case is on the lawful acquisition of its rights, Guinea's corruption case is weak. Despite the seriousness of its allegations it does not come up with anything close to the required evidence to meet the threshold to prove them. What is more, the burden of proof lies with Guinea.<sup>150</sup> It has to produce the evidence that the elements of corruption as defined under the applicable law are fulfilled. The applicable law is Guinean criminal law for the reasons set out in the Reply.<sup>151</sup> Instead, Guinea picks the Economic Community of the West African States ("**ECOWAS**") Protocol as the

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<sup>147</sup> Exhibit C-0213.

<sup>148</sup> Exhibit C-0016; Exhibit C-0017.

<sup>149</sup> See paras. 166 and 414 to 416 of the Reply.

<sup>150</sup> Reply, Section 3.4.1.

<sup>151</sup> Reply, Section 3.1.

applicable legal standard.<sup>152</sup> This is not correct, given that there is a clear provision under Guinean law that sets out what constitutes corruption. There is no need for substitution.

79. BSGR retains its position: the applicable law at the time when the corruption acts are alleged to have occurred is Guinean Criminal Code. Active and passive corruption, are criminal offences under Guinean law.<sup>153</sup> The elements of active corruption are defined as (i) the promise, offering or giving of offers, promises, gifts or presents; (ii) to a public official; and (iii) with the intention of procuring the public official to act or refrain from acting.<sup>154</sup> Passive corruption consists of the same elements but the person that is being corrupted commits the crime.<sup>155</sup>
80. Active trading of influence under Guinean law is not a criminal offence.<sup>156</sup> Only passive trading of influence constitutes a criminal offence, the elements of which are (i) the solicitation or acceptance of offers, promises, gifts or presents by a person (ii) in order that this person abuses his or her real supposed influence and (iii) to obtain from a public official an undue advantage or a favourable decision.<sup>157</sup>
81. In this section, BSGR will show that not one of these elements of corruption under Guinean or any other applicable rules<sup>158</sup> are fulfilled based on the evidence presented.

### **3.1 No evidence that BSGR bribed or offered bribes to President Conté, Ministers of Mines, other members of the Government or Guinean officials**

82. There is no evidence that BSGR bribed or offered bribes to President Conté. Not a single witness presented at the Merits Hearing accused BSGR of having bribed or offered bribes to the President.<sup>159</sup> The only evidence that was presented during the entire Merits Hearing

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<sup>152</sup> Guinea's Rejoinder Memorial dated 31 March 2017 (the "**Rejoinder**"), paras 29 -34; Ostrove/1/111/1-24.

<sup>153</sup> Reply, Section 3.2.

<sup>154</sup> Section 194 of the Guinean Criminal Code, Exhibit RL-0036.

<sup>155</sup> Section 192 of the Guinean Criminal Code, Exhibit RL-0036.

<sup>156</sup> Reply, para. 295. Active trading of influence is the promise or offering to a person of an advantage in order that the latter abuses his or her influence.

<sup>157</sup> Section 195 of the Guinean Criminal Code, Exhibit RL-0036.

<sup>158</sup> CMRG, para 727; Rejoinder, Section II, para 17 et seq.

<sup>159</sup> Souaré/6/151/22 to 1522/1 ("*Q. Do you know whether the President was bribed? A. Well, you would have to ask him. Q. Does that mean yes or no? Does that mean yes or no? A. Well, that means I don't know. How can I possibly know?*"); Sylla/7/64/13-16 ("*However, in your term as minister and now as consultant, you've never*

was the gift by BSGR of a miniature car during the signing ceremony of the MoU in February 2006. Souaré testified that this was merely a courtesy gift and not a bribe, which he had passed on to the President for his office.<sup>160</sup> There is no other credible evidence in the entire record that suggests, let alone proves that, President Conté was bribed or was offered bribes by BSGR.<sup>161</sup>

83. Evidence was presented at the Merits Hearing by the four Ministers of Mines who were involved in the granting of the mining rights: Souaré, Minister Ousmane Sylla ("**Sylla**"), Kanté and Nabé. Together they cover the period from BSGR's entry into Guinea until the death of President Conté. The four Ministers of Mines testified that they themselves had not been bribed or been offered bribes by BSGR.<sup>162</sup> Even Guinea itself admits that these Ministers were not bribed by BSGR.<sup>163</sup>
84. The four Ministers of Mines were also unaware of other members of the Government or Guinean officials that had been bribed or had been offered bribes by BSGR.<sup>164</sup> Bouna

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*seen any evidence that BSGR had paid any bribes to anyone? A. No, I have no such evidence"); Kanté/7/136/6-15 ("Did you receive any bribes from BSGR? A. No. Perhaps you should ask them who they bribed. Q. Do you know any other officials who received bribes from BSGR? A. No."); Nabé/8/186/9-15 ("Q. To finish, did you receive any bribes from BSGR, from any other persons on behalf of BSGR? A. No, I did not receive any bribes. Q. Do you know other persons involved in this case who have received bribes from BSGR or on behalf of BSGR? A. Aside from what I read in the press many years later, yes, of course, like everybody else."); Nabé/8/186/21-25-8/187/1 ("Q. But you don't have any more concrete details or information: who, when, how? A. Sometimes we hear unverified information. And a journalist, very professional, said in Conakry, "When I write, I have the evidence". But I'm not a journalist, I'm just a reader.").*

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161

Mamadie Touré has stated that BSGR offered money and two Land Cruisers to President Conté (C-0086, para. 26). However, Mamadie Touré has not been presented as a witness in these proceedings, she is inconsistent and unreliable and her untested statement is not supported by any other oral or documentary evidence.

162

Souaré/6/151/16-21 ("*Q. Did you receive yourself any bribes from BSGR personally? A. No*"); Sylla/7/64/13-17 ("*Q. However, in your term as minister and now as consultant, you've never seen any evidence that BSGR had paid any bribes to anyone? A.[...] And I myself was never bribed by anyone*"); Kanté/7/136/6-15 ("*Q: Did you receive any bribes from BSGR? A. No.*"); Nabé/8/186/9-15 ("*Q: To finish, did you receive any bribes from BSGR, from any other persons on behalf of BSGR? A: No, I did not receive any bribes*").

163

Guinea's Counter-Memorial dated 17 June 2016 ("**CMRG**"), para. 889 ("*Guinea has never claimed that Guinean Ministers of Mines at the time, namely Minister Souaré, Minister Sylla, Minister Kanté and Minister Nabé, themselves received bribes or offers of bribery from the BSGR Companies*").

164

See footnote 159.

Sylla gave similar evidence,<sup>165</sup> as did several other Guinean officials in the Swiss proceedings.<sup>166</sup> Even Mamadie Touré stated she was not aware of any bribes being paid or offered to Guinean officials.<sup>167</sup>

### **3.2 No evidence that BSGR procured mining rights through undue pressure by President Conté, Mamadie Touré or Ibrahima Sory Touré**

85. Guinea alleges that BSGR was granted mining rights mainly through the influence Mamadie Touré had on President Conté and other Guinean officials. It is alleged that BSGR would not have acquired the mining rights without her intervention.<sup>168</sup> These are serious allegations that Guinea has failed to prove.

*i. No evidence that the exploration permits in Simandou North and South dated 6 February 2006 were obtained through corruption*

86. The exploration permits in Simandou North and South were granted by Souaré, who was Minister of Mines for almost 1.5 years (8 March 2005-June 2006). When Souaré took up his position, it was the Government's policy to open up and diversify the mining sector, promote investment and attract foreign investors.<sup>169</sup>

87. He testified that during his tenure, he had only one meeting with President Conté in relation to BSGR. The meeting took place in the beginning of December 2005. During this meeting, the President merely instructed Souaré to facilitate BSGR's investment in Guinea. Souaré repeatedly testified that this instruction was in line with the Government's

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<sup>165</sup> B. Sylla/8/85/10-13 ("Q: Do you know some civil servants who, within the framework of this BSGR file, would have been paid bribes from BSGR? A. I have no knowledge of this").

<sup>166</sup> PROTECTED

<sup>167</sup> PROTECTED

<sup>168</sup> CMRG, para. 799.

<sup>169</sup> Souaré/6/18/21-25 ("We had the objective of promoting the mining sector, opening it up, of receiving investors, of proceeding to the exploitation of the mines, promoting processing on site, a host of innovative projects."); Souaré/6/31/25 to 6/32/1("[...] the government was looking for investment in all the mining resources. The government would accept these."); Souaré/6/58/25 to 6/59/1 ("[...] the mission consisted in opening up and receiving as many investors as possible."); Souaré/6/177/6-9 ("When I reached office, we were told that we had to open up, we had to act swiftly to with mining projects. I signed lots of agreements for local mining projects.").

policy and perfectly normal. He told the Tribunal that he had not been instructed by the President to grant BSGR mining rights over Simandou North or South, Blocks 1 or 2 or any other area.<sup>170</sup> He also confirmed that he received no further instructions from President Conté during the rest of his tenure.<sup>171</sup>

88. When it comes to the involvement of Mamadie Touré, Souaré's evidence was limited to the assumption that she had instigated (i) the above-mentioned meeting with the President and (ii) a visit with a helicopter to a number of mining sites, including a site on which Rio Tinto had mining rights.<sup>172</sup> However:

- (i). The assumption that Mamadie Touré had instigated the meeting was based solely on her presence at the meeting.<sup>173</sup> In addition, even if she had instigated the meeting, there was nothing unlawful about the meeting as the President only directed the Minister to apply official Government policy. Mamadie Touré did not intervene in the meeting.<sup>174</sup>
- (ii). His evidence in relation to the helicopter visit was confusing, to say the least. On the one hand, he confirmed that Mamadie Touré could not have given any

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<sup>170</sup> Souaré/6/22/6-10 ("I was telling you that the first directive was: "Well, Mr Minister, here you have people who are interested in your sector. Please make that task easier, facilitate that task. That is perfectly normal."); Souaré/6/173/1-7 ("A: He sees operators, he trusts them, and he calls the minister and he says 'please facilitate things for them'. So far there was nothing to indicate that this was improper or illegal, because that day he did not say specifically that such-and-such zone is to be attributed that is already granted to another company."); Souaré/6/89/10-11 ("[...] because I wasn't asked, the President didn't ask me to give a permit to BSGR, he said help."); Souaré/6/172/8-10 ("The President presented the group as a partner that was keen to go into the mining business in Guinea, and he asked me to facilitate their path and to support them."); Souaré/6/42/24 to 6/43/12 ("Q: Did he instruct you to give BSGR permits on Blocks 1 or 2? A: He didn't go into detail Q: So he did not give specifying directions to grant Blocks 1 or 2 to BSGR? A: No, he did not say that Q: Did he say to give other permits to BSGR? A: He said we were to facilitate the job for the developer that wanted to invest in Guinea Q: But this was the general; policy of promoting investment? A: Yes, up until then, that is correct. There is no problem. That's exactly what I was looking for and it's what the country wanted.").

<sup>171</sup> Souaré/6/173/8-10 ("Were there further instructions given by the President? A. Not directly, as I explained.")

<sup>172</sup> Souaré/6/25/10-15 ("Q: I'm asking you now: what did Mamadie Touré do, apart from this meeting? What else did she do? A: All of that is Mamadie Touré: the helicopter, that's Mamadie Touré. It was Mamadie Touré who brought about that first meeting.").

<sup>173</sup> Souaré/6/44/22 to 6/45/1 ("Q: Did she call you and asked you to come to the Presidential Palace? A: No, it's the President. She cannot call me. Q: It's the President himself? A: No, the protocol."); Souaré/6/45/13-19 ("Q: I will repeat my question. Did the President say during the meeting that Mamadie Touré had organised the meeting? A: I said no, and I said she cannot do that. Q: Did the President say that Mamadie Touré had made some request to him? A: No.").

<sup>174</sup> Souaré/6/43/16 ("No, she did not speak. She did not speak at all.").

instructions to use the helicopter.<sup>175</sup> On the other hand, he also did not say that the President had ordered the flight.<sup>176</sup> A contemporary report from the Vice President of the CPDM suggests that Souaré himself was involved in the organisation of the trip.<sup>177</sup> More importantly however and irrespective of who organised the helicopter flight, the flight itself does not establish corruption. Even if BSGR should not have landed in a block held by Rio Tinto (which is denied), the fact of the matter is that at the time BSGR did not obtain any rights over Rio Tinto's blocks. On the contrary, three months after the helicopter flight, Souaré granted Rio Tinto a 25 year mining concession over these blocks, without any retrocession, without any feasibility study and thus in breach of the Mining Code.

89. Mamadie Touré also did not intervene through her half-brother Ibrahima Sory Touré ("IST"). Indeed, Souaré testified that it was not until the signing ceremony of the MoU on 20 February 2006 (see further below) that he found out that IST was related to Mamadie Touré.<sup>178</sup> **PROTECTED**
90. The truth of the matter is that BSGR obtained the permits in Simandou North and South because (i) BSGR had charmed Souaré;<sup>180</sup> (ii) BSGR had received a positive

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<sup>175</sup> Souaré/6/26/6-9 ("*Q: So you believe that Mamadie Touré was the one who gave out the instructions for the President's helicopter to be used? A: No. Mamadie Touré does not give out instructions.*").

<sup>176</sup> Souaré/6/53/7-23. See especially 6/53/9-11 ("*A: I never said that. I never said that the mission – at no point in time did I say that the mission was ordered by the President*").

<sup>177</sup> R-0175 ("*Une mission de reconnaissance urgente recommandée par son Excellence Monsieur le Président ... a été dépêchée par son Excellence Dr Ahmed Souaré, Ministre du Département des Mines.*"). During the Merits Hearing, Souaré questioned the authenticity of this report (Souaré/6/48/14). However, the report was produced by Guinea, not by BSGR. In addition, it is very unlikely that the CPDM would organise a trip to show a potential investor its resources and then produce a fake report about it. Why produce a report at all if the mission was not authorised or illegal?

<sup>178</sup> Souaré/6/93/15-20 ("*Q: So it's not at that time that you realised that he was the brother? A: It was at that time. Q: At the time of the ceremony? A: At the time of the ceremony. Before that, I didn't know*").

<sup>179</sup> **PROTECTED**

<sup>180</sup> Souaré/6/152/10-14 ("*A: As Minister of Mines they tried to charm me, they put forward all their requests, and they were indeed charming at the outset. They wanted to move fast, and I, as Minister of Mines, was interested in that, obviously, and I feel for their charm.*"); Souaré/6/77/16-20 ("*BSGR tried to make itself very attractive, claiming to have the financial capability, the ability to mobilise the technical resources and the ability to conduct several mining projects at the same time. Of course this is attractive.*"). See also Struik, CWS-2, paras 20-23.

recommendation from the CPDM, based on a qualitative assessment<sup>181</sup> and without any inappropriate pressure from either the President or Souaré himself;<sup>182</sup> (iii) the Government's policy was to attract more investors;<sup>183</sup> and (iv) these permits were freely available.<sup>184</sup>

91. In summary, there is no evidence that BSGR obtained the exploration permits in Simandou North and South through undue pressure by President Conté or Mamadie Touré, let alone by corrupting President Conté or any other Guinean official.

ii. *No evidence that the MoU dated 20 February 2006 was obtained through corruption*

92. On 20 February 2006, BSGR and Guinea entered into the MoU. Souaré testified that the MoU had been negotiated by the relevant and competent mining authority, the CPDM. The CPDM had prepared memorandums, technical proposals, etc. According to Souaré, the CPDM had a substantial file.<sup>185</sup> He further confirmed that he and his team were happy with the end result because the contract was in the interests of the country and they had

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<sup>181</sup> Souaré/6/66/25 to 6/67/1-13 ("Q: Do they also check on the competence and background of the mining promoters? A: Well, yes, of course. One of its missions is to draft sort of an ID card for the promoter, their background, technical competence, et cetera, so as not to enter into business with somebody who is not known at all. Q: And at the end of that work, the CPDM submits a recommendation to the Mining Minister? A: Indeed it does Q: And that recommendation could be either positive or negative? A: Generally positive. It's a kind of filter also. When it is totally negative, they don't even bother to submit anything to the Minister.").

<sup>182</sup> Souaré/6/68/17-23 ("Q: But you were not aware that the CPDM or members of the CPDM may have been in any way influenced by the President? [...] A: Well, for these two permits, I think it wasn't the President [...]); Souaré/6/69/2-4 (Q: So you exerted pressure for them to issue a positive recommendation? A: No"); Souaré/6/70/3-5 ("A: No, I didn't give out anomalous instructions. Not anomalous instructions, no. Instructions to comply with the law, the Mining law.").

<sup>183</sup> Souaré/6/70/25 to 6/71/7 ("Q: So at the time during which the country is actually attracting its investors, and there are zones that are as of yet unexplored and no other promoter has expressed an interest in that area, would it be in keeping with the governmental policy to promote investment and if there's a willing investor who says 'I want to come and invest in that zone', they would have received a permit? A: Yes, yes, that is in keeping with the policy.").

<sup>184</sup> Souaré//6/70/22-24 ("Q: Were other promoters interested in these areas? A: At the time, no. This is the reason why they had not been attributed."); Souaré/6/163/5-6 ("If they asked for them, they would have received them anyway because they were free zones.").

<sup>185</sup> Souaré/6/91/14-19 ("Well, CPDM reports and presents the file for signature, of course, and justifies – Q. At that time the contract was already negotiated, CPDM presents the contract and says, "Excellency, Mr Minister, can you sign the MOU"? A. Yes."); Souaré RWS-2, para. 24 ("le mémorandum préparé par le CPDM, qui avait analysé la proposition de BSGR.").



done a good deal.<sup>186</sup> The MoU was signed at an official signing ceremony where all the services of the Mining Ministry were present.

93. Souaré testified that the President had not pressured him to sign the MoU and that he did not even report to the President on the MoU.<sup>187</sup> He gave no evidence as to any pressure by Mamadie Touré or IST in relation to the signing of the MoU.
94. Souaré also clarified that the MoU did not grant BSGR any mining rights over and above the Simandou North and South exploration permits.<sup>188</sup> "But", he continued, "*as a promise – and this is where BSGR was interested – it was the prospect, the potential of getting part of the Simandou Central part if the retrocession were to occur. And it's my understanding that the company, basically they're looking to support the government's efforts to make the retrocession happen, because they could only get a hold of that if the retrocession actually occurred.*"<sup>189</sup> This statement is interesting because it confirms that it was already the Government's policy in the beginning of 2006 that Rio Tinto had to retrocede parts of its concession area.
95. Guinea's allegations that the signing of the MoU (and therefore the granting of the right of first refusal to BSGR) was a direct result of Pentler apparently signing a series of unlawful compensation agreements are proven baseless in the light of Souaré's evidence.<sup>190</sup> He had never even heard of Pentler, Bah or Daou.<sup>191</sup>

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<sup>186</sup> Souaré/6/92/1-4 ("Q: Why? Because it was a good contract for the country? A: Because, first, it complied with mining law. It was a contract the announcement of which was of interest to the country. We thought we'd done a good deal.").

<sup>187</sup> Souaré/6/89/1-25 ("Q: Therefore you talk about pressure from the family to influence or to enter into the memorandum of understanding. What did they do exactly? What sort of pressure did they exert? A: You forget that they called me to ask me to help BSGR to work in Guinea. This is the pressure Q: This is for the technical report. We're talking here of the memorandum, the MOU. A: Everything is linked. Everything is linked together. Because I wasn't asked – the President didn't ask me to give a permit to BSGR; he said "help". Q: Yes. But to sign the MOU? A: No. The President has other fish to fry. If he is interested in a specific file and tells me to help, it's up to me to see how we can go about it while complying with the law. [...] [I] tried to contain the aggressive wishes of BSGR. Q: You kept the President informed about these negotiations? A: No. No. I don't have to report to the President [...]").

<sup>188</sup> Souaré/6/170/16-20 ("Professor Mayer: But the permits had been granted on February 6th. The memorandum of understanding did not add anything to that. A. No, there was nothing that was added by virtue of this memorandum.").

<sup>189</sup> Souaré/6/170/20 to 6/171/2.

<sup>190</sup> CMRG, para. 167.

96. In summary, there is no evidence that BSGR and Guinea entered into the MoU through undue pressure exerted by President Conté or Mamadie Touré, let alone by corrupting President Conté or any other Guinean government official.

iii. *No evidence that the Bauxite exploration permits dated 9 May 2006 were obtained through corruption*

97. BSGR's bauxite permits were granted on 9 May 2006 by Minister of Mines Souaré.<sup>192</sup> Guinea alleges that these permits were obtained by BSGR through corruption. Guinea's evidence is based on contracts that are alleged to have been entered into by Pentler and Mamadie Touré and on **PROTECTED**

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Even if the Pentler contracts are genuine and were executed, there is also no evidence that Mamadie Touré acted upon the contracts, or received any payments pursuant to the contracts.<sup>195</sup>

98. This is confirmed by Souaré, who did not give any evidence during the Merits Hearing (or in any other proceeding) that President Conté or Mamadie Touré had intervened on behalf of BSGR to obtain the bauxite permits. In any event, these permits were terminated in 2009 and are not the subject matter of this arbitration, as agreed by Guinea.<sup>196</sup>

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<sup>191</sup> Souaré/6/99/24 ("Pentler? No, I don't know that company."); 6/152/17-20 ("Q. Do you know whether Ismaël Daou or [Aboubacar Bah] at one point paid any bribes to Guinean officials? A. Well, I don't even know these people, I didn't even know them."); and 6/99/14-18 ("Q. In everything that we've mentioned this morning, do you know somebody by the name of Ismaël Daou? A. No. Q. Do you know somebody by the name of Aboubacar Bah? A. No.") See also Section V below.

<sup>192</sup> Exhibit R-0204.

<sup>193</sup> **PROTECTED**

<sup>194</sup> **PROTECTED**

<sup>195</sup> See also Section VI

<sup>196</sup> Naud/1/130/7-13.

iv. *No evidence that the uranium permits dated 28 February 2007 were obtained through corruption*

99. The uranium permits were granted by Sylla, who was Minister of Mines for almost 1 year (29 May 2006 to March 2007). Sylla testified that he had never met nor spoken to Mamadie Touré in relation to these permits.<sup>197</sup> He had no information as to any pressure exerted by Mamadie Touré on the CPDM.<sup>198</sup> He was also clear that the President had never intervened in this matter.<sup>199</sup> Sylla remembered that he had had a meeting with the President, unrelated to BSGR, where the President instructed Mamadie Touré to leave before the start of the meeting because the President needed to discuss a state mission with Sylla.<sup>200</sup> This statement suggests that Mamadie Touré was not involved in state matters, contrary to her own statements in other proceedings.

100. The only person that Sylla did meet in relation to BSGR was IST, BSGR's employee and Mamadie Touré's half-brother. IST managed to speed up the process of granting the uranium permits. However, pushing authorities to work faster is not illegal. Sylla testified that even without IST's intervention, the uranium permits would have been granted because BSGR's application complied with the Government's policy to diversify the mining sector.<sup>201</sup>

101. Importantly, Sylla also testified that during his tenure, neither the President, Mamadie Touré, IST nor BSGR discussed iron ore permits with him, let alone Blocks 1 and 2 on

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<sup>197</sup> Sylla, RWS-1, para. 15 ("*elle ne m'en a jamais parlé directement*"); Sylla/7/34/18-24 ("*Q: [...] You confirm that: 'Mamadie Touré never met with me to give me instructions.' A: That is the truth. Q: Did she give you instructions without actually meeting you? A: She did not give me instructions*").

<sup>198</sup> Sylla/7/49/19-21 ("*Q: Do you know whether Mamadie Touré exerted any pressure on the CPDM to give a positive recommendation? A: I have no information on that subject matter*").

<sup>199</sup> Sylla/7/50/16-20 ("*Q: Did the President exert any pressure upon you to approve this positive recommendation? A: The President exerted no pressure upon me whatsoever for me to sign the document*"); Sylla/7/63/23-25 ("*Q: In any case, you never had a meeting with, say, the President as regards the BSGR dossier? A: I had no meetings with the President on that dossier*"); Sylla/7/49/17-25 and 7/49/24 to 7/50//2 ("*A: Your Honour, I can state that the President of the Republic does not intervene in these matter to give instructions to officials*").

<sup>200</sup> Sylla/7/26/1-3 ("*The President wanted the conversation to be just strictly between him and me, and therefore she left.*").

<sup>201</sup> Sylla/7/51/6-12 ("*Q: Had there not been this abnormal pressure, would you have signed the [permit granting the uranium mining rights]?*" A: *It would have taken longer probably. Q: But you would have signed it on the principle? A: I would have signed it within the strategy of aiming at diversification in the mining sector.*").

Simandou. This contradicts Guinea's story that BSGR was always only interested in those Blocks.<sup>202</sup>

102. Stepping aside from the uranium permits briefly, Sylla's testimony was also noteworthy for the fact that, after his tenure as Minister of Mines, he worked for over 1.5 years for BSGR as a consultant. During the Merits Hearing, Sylla was asked a series of questions to test whether during his work as a consultant he had seen evidence that Mamadie Touré had intervened on BSGR's behalf or BSGR had obtained the mining rights through corruption. However, he had not seen such evidence.<sup>203</sup> Sylla's testimony in relation to his work as a consultant was also relevant on another point. When asked whether he had been engaged by BSGR to exercise pressure as a former Minister of Mines on the mining services,<sup>204</sup> Sylla's answer was negative.<sup>205</sup> He had been engaged because of his competence, not because of his contacts.
103. During Sylla's tenure as Minister of Mines, BSGR held a reception inviting a number of government officials. The reception was guarded by the "red berets" as there were high ranking government officials present. Guinea has repeated that the presence of the red berets is evidence that Mamadie Touré was the President's wife.<sup>206</sup> The evidence presented at the Merits Hearing established, however, that the red berets were already

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<sup>202</sup> Sylla/7/57/15-25 and 7/58/1-2 ("Q. (...) You say that the pressure of Ibrahima Sory Touré was only linked to the uranium matter; he never put any pressure for iron ore? A. I never granted any iron ore permit during my nine months. So I was submitted to no pressure whatsoever. Q. You did not grant it, but did he talk about it? A. No, he didn't mention it. I didn't have to attribute it. We were talking about uranium only. Q. Did he convey any instructions of Mamadie Touré concerning iron? A. During my nine months I had no instructions from Mr Sory Touré on iron, given the fact that under my authority there was no application concerning iron.").

<sup>203</sup> Sylla/7/62/10-17 ("Q: Did they inform you about anything- or in any way did they inform you that Mamadie Touré had influenced their dossier in their favour? A: They never told me [...] Q: During that period [end of 2007 until the beginning of 2009] did you see any evidence, any proof that Mamadie Touré was working for BSGR? A: I never saw any proof."); Sylla/7/63/19-22 (Q: Do you know whether there were any meetings between Mamadie Touré and BSGR during that period? A: I can't affirm that, I do not know. I am not aware of any such meetings").

<sup>204</sup> Sylla/7/62/24-25 and 7/63/1-5. ("Q. Did BSGR turn to you in order to exert some pressure or influence on formed colleagues at the ministry? A. No, not at all. I never had to meet my successor in order to talk to him about anything. My role was simply to provide advice to the company in the area of mining diversification. That was precisely the purpose of my work.")

<sup>205</sup> Sylla/7/68/4-7 ("Q: [...] You seem to be suggesting here that they [BSGR] were working with you because you were a source of support, an influential support. A: No"); Sylla/7/69/1-5 ("Q: I wanted to make sure that there was no suggestion here on your side that you were working with BSGR in order to move forward their interests. A: No, no.");

<sup>206</sup> CMRG, paras 231-233.

present at BSGR's premises *before* the arrival of Mamadie Touré.<sup>207</sup> Avidan and Struik have always insisted that the red berets were not there for Mamadie Touré.<sup>208</sup> Avidan confirmed that Mamadie Touré came with one bodyguard which was common practice in Guinea.<sup>209</sup> Struik recounted that the party started around 6pm, and Mamadie Touré arrived later in the evening, at which point the red berets were already present.<sup>210</sup> The presence of the red berets is therefore unremarkable given that government officials were attending the reception.<sup>211</sup> Furthermore, Souaré gave evidence that the reception had not been a big thing, it was an ordinary reception (of which there were many) in which people had little interest.<sup>212</sup>

v. *No evidence that the exploration permits in Simandou Blocks 1 and 2 dated 9 December 2008 were obtained through corruption*

104. The factual narrative of how BSGR acquired its exploration permits in Blocks 1 and 2 has been set out in detail in BSGR's Reply (subsection 2.1) and above in Section II. This section will look into the critical period between March 2007 until December 2008 during which Kanté and Nabé were Ministers of Mines. Their evidence did not support Guinea's allegations that BSGR was granted the exploration rights in Blocks 1 and 2 through corruption.

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<sup>207</sup> Struik/4/185/18 ("*No, they were there already.*"); Struik/4/185/21-25 ("*But they were there already; they did not specifically come with her. There were red berets already at the opening -- at the start of the function. She's not of presidential status; I don't know how many more times I have to say this.*"); See also the video of the opening, showing the presence of the red berets before Mamadie Touré's arrival, Exhibit R-0207, time stamps: 14:02, 14:22, 14:30, 14:34, 16:11, 18:20.

<sup>208</sup> Struik/4/185/16 ("*No, no, they were not there for her.*"); Avidan/9/92/2-3 ("*No, no, the berets rouges was our berets rouges, it wasn't her berets rouges.*").

<sup>209</sup> Avidan/9/92/3-5 ("*She came with one. I think she came with her bodyguard. Everyone in Guinea can have -*").

<sup>210</sup> Struik/4/261/1-13 ("*So I would guess that the party would have started around 6 o'clock in the evening, at night. Q. I think this is a matter of public record: it gets dark at around 7 o'clock, I think, at that time in Guinea? A. Yes, 6.30, 6.45, something like this. Q. Do you recall roughly when Madame Touré turned up? Do you remember was it light was it dark, was it at the beginning of the party, was it later on? A. No, it was later on. She did not make an appearance right from the beginning. Q. Was that before or after the red berets had turned up? A. I think after because, as far as I recollect, the red berets were already there.*"); Struik/4/264/16-17 ("*But she came in later and the party had already started, that is for sure.*"). The video clearly shows it being light when the red berets were present, and therefore before Mamadie Touré arrived in the evening.

<sup>211</sup> Avidan/9/92/10-16 ("*All those berets rouges, we had a pool of at least ten berets rouges that were working with the company. In this reception, you have to understand that we had ministers, previous minister, we had Mr Souaré, we had other previous ministers, we had like 100 people, and the berets rouges was guarding the house. It was part of my pool, not her pool.*").

<sup>212</sup> Souaré/6/101/23-25.

105. Kanté was Minister of Mines for 1.5 years, between March 2007 and 27 August 2008. During this period, President Conté had delegated a number of his powers to the Prime Minister and the Council of Ministers.<sup>213</sup> The policy of the Government for the mining sector was to review all mining agreements and cancel mining rights because Guinea was not benefitting enough from its resources and many companies had received mining permits without the necessary technical or financial capabilities.<sup>214</sup>
106. Kanté testified that he was unaware of any pressure by President Conté, Mamadie Touré or IST on any of his predecessors or the CPDM.<sup>215</sup> Kanté himself had only had two meetings with President Conté in relation to BSGR. The first meeting took place in September 2007. Mamadie Touré was not present, BSGR was.<sup>216</sup> During this meeting, Kanté explained the legal situation regarding Rio Tinto's Simandou blocks to the President. The latter accepted Kanté's explanation without any objections.<sup>217</sup> At the end of the meeting, the President merely instructed Kanté to do what was in the nation's interest.<sup>218</sup> Kanté considered this instruction to be perfectly normal.<sup>219</sup>
107. The second meeting took place in December 2007. It was at this meeting that Kanté met Mamadie Touré for the first time, which is nine months into his tenure as Minister of Mines.<sup>220</sup> She did not, however, engage in the discussions he had with the President.<sup>221</sup> At the meeting, Kanté repeated his position regarding the legal situation of Rio Tinto's

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<sup>213</sup> Kanté/7/88/16-19 ("Look to the tripartite agreement. The President agreed to waive some of his powers, to grant it to the government, that was labelled the "Government of Consensus").

<sup>214</sup> Kanté/7/86/15 to 7/87/3.

<sup>215</sup> Kanté/7/99/16-21.

<sup>216</sup> Kanté/7/108/3-4 ("Q: Was Mamadie Touré present at this meeting? A: No").

<sup>217</sup> Kanté/7/112/24 to 7/113/5 ("I explained to the President that Rio Tinto didn't have a research [permit], they had a convention and a concession, and that a decision of the minister could not contradict a convention that had been ratified by the National Assembly, nor a mining concession which has been signed by the head of state. These are the explanations that I gave him").

<sup>218</sup> Kanté/7/113/6-11 ("Q: And the reaction of the President can be found in your paragraph 26 when you say that "the only indication that the President gave me was to take decisions that comply with the nation's interest". A: Absolutely."); PROTECTED

<sup>219</sup> Kanté/7/113/16-17 ("Q: So this directive was perfectly normal? A: Yes, it complies").

<sup>220</sup> PROTECTED

<sup>221</sup> Kanté/7/120/21-23 ("Q: Did that lady speak in the course of the meeting? A: No.").

mining rights in Blocks 1 to 4.<sup>222</sup> In this instance, the President told Mamadie Touré not to get involved in this business.<sup>223</sup> Once again, the President refrained from giving his Minister of Mines instructions in relation to any mining rights for BSGR.<sup>224</sup> After this meeting, in the further 8 months that he was Minister of Mines, Kanté had no further meetings in relation to BSGR with President Conté, Mamadie Touré or people acting on her behalf.<sup>225</sup>

108. In terms of any influence that Mamadie Touré may have had, it is clear from what transpired at the two meetings mentioned above that Mamadie Touré's attempts to influence the President, if any, were unsuccessful. Kanté, for one, could not say whether Mamadie Touré had influence or not.<sup>226</sup> He did make it very clear, however, that it was of no importance to him that Mamadie Touré or IST may have belonged to the family of the President<sup>227</sup> and Kanté himself did not take a single decision that was not above board.<sup>228</sup>
109. In terms of his contacts with BSGR itself, Kanté testified that he had had only three meetings with BSGR:

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<sup>222</sup> Kanté/7/123/12-17.

<sup>223</sup> Kanté/7/123/24 to 7/124/1.

<sup>224</sup> Kanté/7/123/18-21 ("*And therefore, again, the President didn't give you any specific directives or instructions on that dossier or the status of the permit or the request for permits by BSGR.*"); Kanté/7/124/9-14 ("*A. There was nothing, there was no instruction to give me. He had nothing to say about the explanations I had given. Q. Because they were clear? A. Yes. In my opinion, yes, because he could have said the opposite if he had wanted to*"); Kanté/7/129/15-17 ("*Q: Did the Prime Minister indicate that he had received instructions from the President? A: No.*").

<sup>225</sup> Kanté/7/130/10-19.

<sup>226</sup> Kanté/7/125/1-14 ("*Having influence – or this lady having an influence on the President – is something very difficult to assess from the outside ... I personally could not pass judgment on that at all.*").

<sup>227</sup> Kanté/7/149/3-11 ("*Q. I'd now like to turn to another item which is linked with two different things: first, Mr Ibrahima Sory Touré and his role. First, a general question. The question is the role of the members of the presidential family in Guinea, or intrigues around the presidential family. For you as a minister, is that of any importance at all? A: No. For me, as I said earlier, it had not importance whatsoever.*"); Kanté/7/106/8-21 ("*Q: You say, 'one of the wives of the President'. Did the gossip say which wife was concerned? He was the brother of which wife, since there were several? A Well, look, as far as I was concerned, this was of no importance whatsoever; none. THE PRESIDENT: What was of no importance? A: The fact that he should be the brother of the President's wife. Q: It was of no importance, whatever the wife? A: None. And this was the case throughout the management of the President. He was not the only one. I had to deal with a lot of other people who had permits who claimed that they were linked to Tom, Dick or Harry, but it was of no importance.*").

<sup>228</sup> Kanté/7/136/20 to 7/137/3 ("*Q: Did you make some decisions during this period – because we heard the allegation that there was pressure being exerted. So my question is: had there not been such pressure, are there any decisions that you took at the time that would have different? A: No, it changed nothing as far as I'm concerned, because for me my consistent line of behaviour was being in compliance with the Mining Code. So no decisions were taken that were not in accordance with the Mining Code.*").

- (i). The first meeting took place in August 2008, which is five months after he had become Minister of Mines. Kanté considered this a standard courtesy meeting.<sup>229</sup> Mamadie Touré did not attend this meeting and IST, who was present, did not hold himself out as Mamadie Touré's half-brother.<sup>230</sup>
- (ii). The second meeting was with President Conté and is discussed above.
- (iii). The third and last meeting took place immediately after the meeting with the President. Avidan and IST were representing BSGR and they expressed their interest in the Simandou blocks. Kanté explained why these zones were not available, which was accepted by BSGR and that was the end of the discussions.<sup>231</sup> Kanté testified that he did not consider this as pressure.<sup>232</sup> By doing so, he confirmed what BSGR has repeatedly said.<sup>233</sup> They expressed their interest and promoted their company. That is not illegal, that is what businesses do.

110. Except for a few official letters, Kanté testified that he had no further meetings or calls with BSGR until he was replaced eight months later.<sup>234</sup>

111. Three weeks before he was replaced, President Conté issued the Presidential Decree suspending Rio Tinto's rights over Blocks 1 to 4. Kanté testified that this decree did not confer rights to BSGR.<sup>235</sup>

112. At the end of his testimony, Kanté confirmed that all the decisions taken by both the President and the Government were appropriate and lawful.<sup>236</sup> As to his removal as a

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<sup>229</sup> Kanté/7/91/19 to 7/92/1 ("But in the context of the time, there were close to 100 companies that want to meet with the minister, and it's based on your agenda that you can schedule such meetings. Q: Here you are referring to a letter, so it was formal. BSGR had sent a letter saying that they wished to see you. And you said that this was standard procedure? A: Yes, that's correct.").

<sup>230</sup> Kanté/7/92/6-11.

<sup>231</sup> Kanté/7/105/8-14 ("Q. Is it that they didn't say a thing? Did they object during the meeting, when you said no? A. You know, when you make such a proposal and you're being told that you need to perform better before you get anything else, and that you shouldn't apply for something which is legally granted to somebody else, you can't say anything else. You can't say a thing.")

<sup>232</sup> Kanté/7/131/20-23 ("Well, I don't consider that really to be pressure. They were simply expressing what they wanted to do, and we were just telling them that in light of the regulation it was not feasible.").

<sup>233</sup> Reply, para. 87.

<sup>234</sup> Kanté/7/131/5-11.

<sup>235</sup> Kanté/7/136/1-4.

<sup>236</sup> Kanté/7/148/2-9.



Minister, he thought that it was the Prime Minister who had instigated this event, not the President.<sup>237</sup>

113. Kanté was replaced by Nabé. The latter was only in office for 5 months, from 27 August 2008 until the end of December 2008. Nabé confirmed Kanté's earlier evidence that the President was very ill at the time and had delegated substantial powers to then Prime Minister Souaré.<sup>238</sup> At the start of his tenure, Nabé had a short conversation with President Conté during which the President requested him to undertake the necessary reforms in the mining sector. The President did not mention BSGR or Rio Tinto during this conversation.<sup>239</sup> The Guinean population, on the other hand, was still eagerly expecting its government to finally tap into the country's mining resources.<sup>240</sup>

114. Nabé testified that he had one meeting with President Conté, at the beginning of September 2008, together with Prime Minister Souaré, Secretary-General Kera and Mamadie Touré.<sup>241</sup> This evidence is however not supported by Souaré who could not remember having held such a meeting.<sup>242</sup> Assuming for the present purposes that this meeting did indeed take place, Nabé testified that President Conté had said that Rio Tinto needed to retrocede some of its mining rights. When questioned whether the President had also instructed him to grant mining rights over Blocks 1 and 2 to BSGR, Nabé could not remember this.<sup>243</sup> If the meeting did take place, what is clear, however, is that, once again, Mamadie Touré did not speak during this meeting<sup>244</sup> and that it was Nabé himself

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<sup>237</sup> Kanté/7/166/1-7. Kanté's successor, Nabé could not confirm whether Kanté's removal was related to the BSGR matter (Nabé/8/121/4-7).

<sup>238</sup> Nabé/8/117/1-4.

<sup>239</sup> Nabé/8/114/8-25.

<sup>240</sup> Nabé/8/115/4-10 ("*The people of Guinea knew that the country was very rich in mineral ore, but that mineral ore wealth of the population had not really been used for the benefit of the population. So creating the necessary conditions to tap into that potential so as to improve living conditions, were it only a little bit. That indeed was the expectation of the Guinean people.*").

<sup>241</sup> Nabé/8/135/3-7.

<sup>242</sup> Souaré/6/128/5-8.

<sup>243</sup> Nabé/8/144/6-9 ("*Q: The President told Nabé to grant Blocks 1 and 2 to BSGR. Nabé said that he understood. Do you agree with this description of events? A: I don't recall the details as described here*"); Nabé/8/144/16-19 ("*A: I stand by what I said. I do not recall that Mr Avidan was there during a meeting where I was with the President, nor do I recall that the President himself talked about BSGR*").

<sup>244</sup> Nabé/8/137/16-18.

(as opposed to the President) who made the link between Mamadie Touré's presence, the withdrawal of Rio Tinto's rights and the grant of rights to BSGR.<sup>245</sup>

115. After this alleged meeting, there is no evidence of any intervention from the President and/or Mamadie Touré on behalf of BSGR. Nabé testified, for example, that neither the President nor Mamadie Touré had exercised pressure on the Council of Ministers to determine the conditions that the applicants for Blocks 1 and 2 had to meet.<sup>246</sup> When one of the arbitrators asked Nabé directly about the pressure that Mamadie Touré had allegedly exercised, Nabé could only refer to his meetings with BSGR's employee IST and the fact that IST was the half-brother of Mamadie Touré.<sup>247</sup> He gave no evidence on any concrete actions that Mamadie Touré had undertaken.
116. Furthermore, even if there was pressure on Nabé from the President, Mamadie Touré directly or through her half-brother (all of which is denied), the pressure was not effective because not only did Nabé have discussions with other mining promoters besides BSGR,<sup>248</sup> he also continued discussions with Rio Tinto for more than three months, recommending to them to continue working on the field.<sup>249</sup> It was only after Rio Tinto informed Nabé by letter of 3 December 2008 of its refusal to retrocede 50% and its

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<sup>245</sup> Nabé/8/142/24 to 8/143/11 ("*Q: You're the one who makes the link, not the President. A: You have my answer. I established that link after the visit by her brother coming to see me, and then seeing her in the company of the President... Q: You left the meeting thinking that the President had instructed you to take back the permits from Rio Tinto and to give them back to BSGR as quickly as possible? A: In any event, subsequent events simply turned out to corroborate this interpretation.*"); Nabé/140/12-19 ("*Q: But this is not what happened at the meeting that's described here. When you were there, as was the President and Mamadie Touré, that was not when you received this direction or this instruction. A: For me it was beyond being implicit. Q: But why wouldn't they say so explicitly? There were just the four of you present here. A: I don't know.*").

<sup>246</sup> Nabé/8/160/20-24 ("*Q: Do you remember or do you know whether the Council of Ministers was under pressure from President Conté or from Mamadie Touré in order to establish to set the conditions out? A: Not to set these conditions out at all.*").

<sup>247</sup> Nabé/8/137/4-12 ("*A: Well, you know, if I remember correctly, Mr Touré had been in touch with me on several occasions, more than once. He is the brother of Mamadie Touré. And it was also well known that Mamadie Touré interfered in favour of BSGR [...].*").

<sup>248</sup> Nabé/8/160/18-19 ("*I remember I did have discussions with AfriCanada on the proposals that had been made.*").

<sup>249</sup> Nabé/8/168 to 8/173, in particular 8/173/2-5 ("*Q: [...] When I read this I interpret this to mean that it's sort of a piece of advice to Rio Tinto: "Continue to work in the field"? A: Yes.*").

decision to cut its investments as of 2009, that Nabé requested the Council of Ministers to take a decision.<sup>250</sup>

117. He further confirmed that the decision to withdraw Blocks 1 and 2 from Rio Tinto would have been taken anyway and that the interest of BSGR in these Blocks was merely an accelerator,<sup>251</sup> that the withdrawal decision was legitimate and legal,<sup>252</sup> the decision to grant Blocks 1 and 2 to BSGR was taken by the Council of Ministers by consensus<sup>253</sup> and that this decision complied with the Mining Code.<sup>254</sup>

118.

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119. In summary, in relation to the exploration permits for Simandou Blocks 1 and 2, there is also no convincing evidence (or actually any real evidence) that these rights were granted as a result of corruption on the part of BSGR. It was the Government's rightful decision to withdraw these rights from Rio Tinto and the Government, together with the entire nation, was keen to grant these rights to another mining promoter. Conditions were set and BSGR, as only one of two interested parties, met the conditions. As a result, BSGR was awarded these rights.

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Nabé/8/176/13-17.

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Nabé/8/193/16-25 ("*Q: My question is: the reason to withdraw Blocks 1 and 2, is it because of a desire to grant Blocks 1 and 2 to BSGR? A: The determination to grant it to BSGR was simply an accelerator. Q: Had it not been for BSGR's application for permits for Blocks 1 and 2, was the decision anyway taken to withdraw Blocks 1 and 2? A: Yes. There was already a decree in July 2008, as early as July 2008.*").

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Nabé/8/187/12-18.

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Nabé/8/185/18-20 ("*Q: The decision to grant Blocks 1 and 2 to BSGR, was this decision taken by the Council of Ministers, yes or no?. A: Yes*"); Nabé/8/195/1-3 ("*Q: This reflects the consensus of the council? A: This is without doubt: take it away from Rio Tinto and given to BSGR.*").

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Nabé/8/187/19-25.

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vi. *No evidence that the Zogota Base Convention dated 16 December 2009 was obtained through corruption*

120. A detailed description of how BSGR and Guinea entered into the Zogota Base Convention is set out in Section 2.7 of BSGR's Amended Memorial dated 29 February 2016 ("**BSGR's Memorial**"), Section 2.2 of BSGR's Reply and above in Section II. This section will deal with Guinea's allegations that the Zogota Base Convention was obtained through corruption.<sup>256</sup> The lack of evidence for this allegation is also striking and insofar as it has been dealt with in prior submissions it is not repeated here.<sup>257</sup>
121. Guinea's main arguments to prove corruption are that (i) the negotiations that preceded the signing of the Base Convention were too short for Guinean standards,<sup>258</sup> (ii) BSGR paid a sitting allowance to the Base Convention Commission to be shared between its members<sup>259</sup> and (iii) the then Minister of Mines Mahmoud Thiam was bribed by BSGR to exert pressure on the Commission.<sup>260</sup>
122. In relation to the sitting allowance, it is telling that Guinea made very little of this in its original submissions. Yet it formed a significant part of Guinea's opening submissions at the Merits Hearing, most probably because it is the only payment that BSGR made to government officials. Contrary, however, to Guinea's allegation, this payment did not constitute a bribe.
123. Guinea failed to produce a single witness who participated in the negotiation of the Base Convention and who received a sitting allowance. The only witness that Guinea presented in relation to the work of the Base Convention Commission, Bouna Sylla ("**B. Sylla**"), who had in fact refused to participate in the negotiations.<sup>261</sup> Therefore, B. Sylla could not give direct evidence as to the rationale for and the circumstances in which the sitting allowance had been paid and the pressure, if any, exerted on the Commission. Instead, he

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<sup>256</sup> CMRG, para. 799.

<sup>257</sup> PROTECTED

<sup>258</sup> Bounfour/1/147/9-11; Bounfour/1/149/1-8.

<sup>259</sup> Bounfour/1/150/18-21.

<sup>260</sup> Bounfour/1/153/3 to 1/155/8.

<sup>261</sup> B.Sylla/8/40/20-25 and 8/41/1-11 and 8/44/6-13.

could only speculate. PROTECTED

There was nothing unlawful about the payment of the sitting allowance, which is also established by the fact that Guinea did not charge, let alone prosecute, any of the members of the Base Convention Commission for having received this allowance.

124. Furthermore, BSGR has always been upfront about this payment and never considered it to be illegal.<sup>264</sup> In the words of Struik "*it was all out in the open. This was not some secret*".<sup>265</sup> It was also the Secretary-General of the Ministry of Mines and the chairman of the Base Convention Commission who had requested this allowance and had determined its amount.<sup>266</sup> It was not for BSGR to decide whether this was proper or not, in particular as it was standard practice in the mining industry to pay sitting allowances and to provide for the catering as governments do not have the budget.<sup>267</sup> It is unremarkable that Tchelet could not remember the payment of USD 20,000 as it was little in the scheme of things BSGR was doing at the time.<sup>268</sup> BSGR was spending USD 0.5 million a month just on

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<sup>262</sup> Reply, para. 152; PROTECTED

<sup>263</sup> PROTECTED

<sup>264</sup> Struik, CWS-2, para. 82; Avidan, CWS-3, para. 53.

<sup>265</sup> Struik/4/249/24-25.

<sup>266</sup> Struik/4/248/2-4.

<sup>267</sup> Struik/4/248/7-19 and 4/249/1-9.

<sup>268</sup> Struik/4/251/7-11.

operating the business and on the exploration work in Simandou Blocks 1 and 2 that was ongoing while BSGR was negotiating the Base Convention.<sup>269</sup>

125. In relation to any pressure allegedly exerted by Thiam, Guinea does not provide any evidence apart from a press article<sup>270</sup> and Thiam's own statement that he wanted to get the Base Convention signed within 8 weeks.<sup>271</sup> Guinea alleges that it was impossible to properly review the Feasibility Study within such a short period, let alone negotiate a Base Convention.<sup>272</sup> However, nothing in the record supports the allegation that the Base Convention Commission or the CPDM had done a bad job or did not take their job seriously. There were serious and in-depth discussions between BSGR and the Base Convention Commission and there is direct evidence that the Commission rejected some of BSGR's proposals. **PROTECTED**

For sure, Guinea would have presented witnesses from the Base Convention Commission if anything unlawful had occurred in the negotiation of the Base Convention. It did not do so and BSGR requests that the Tribunal draws the appropriate inference in this respect.

126. In relation to the duration of the negotiations, BSGR acknowledges that the period of negotiation was relatively short. However, as Struik testified, this period was also very intense.<sup>274</sup> The Base Convention Commission was indeed ambitious to work faster in order to make progress with a Base Convention, the implementation of which was in the interests of the country. Again, B. Sylla did not participate in the workings of the Commission and his evidence on the speed of the negotiations is of very little value, if any.

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<sup>269</sup> Struik/4/250/24 to 4/251/6.

<sup>270</sup> Exhibit R-0267.

<sup>271</sup> Thiam, CWS-5, para. 30; see also Bounfour/1/149/15-17.

<sup>272</sup> Bounfour/1/149/18-19.

<sup>273</sup> **PROTECTED**

<sup>274</sup> Struik/4/221/14-20.

127. The only witnesses who participated in the negotiations when President Camara was shot and testified in this arbitration are BSGR's own witnesses. Struik testified that the Guinean officials stayed calm and realised that they could not simply drop everything. They were also very grateful that BSGR did not leave along with the personnel of other companies and abandon them and their project.<sup>275</sup> BSGR demonstrated that it was committed to the project and the country no matter what. This was the reason why they continued to negotiate and did not put their heads in the sand as others would have done.
128. Finally, in relation to the allegation that BSGR bribed Thiam, Guinea has failed to produce any evidence that BSGR paid Thiam in order to gain his support. At the Merits Hearing, Struik reiterated that "*BSGR never paid him any cent, not one single Guinea franc*".<sup>276</sup> BSGR merely covered Thiam's legitimate travel expenses. This is set out in detail in Subsection 4.2(iii) below and confirmed by Tchelet during the Merits Hearing.<sup>277</sup>
129. Having accessed Thiam's bank accounts, emails and documents, the FBI recently established that Thiam purchased a property in the US using funds provided by a Chinese company, not BSGR.<sup>278</sup> Guinea did not contest the findings of the FBI and therefore the earlier allegation that Thiam's property was bought with money from BSGR is utterly groundless.<sup>279</sup> As much as Guinea would like to see the recent conviction of Thiam in the US as evidence to support its case, in reality it is not. First, Thiam was convicted in the US for a completely different matter. Second, whereas Thiam did admit to having received payments from Sam Pa, he clearly denied having received any illegitimate payments and bribes from BSGR,<sup>280</sup> even after being pressed for it by FBI agent Martinez (the same agent who produced an affidavit during the Merits Hearing in relation to the

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<sup>275</sup> Avidan/9/149/25 to 9/150/1; Struik/4/236/16-22 ("*They continued to operate. And they were very grateful – this is very important that I explain this – they were very grateful that we continued and not – they actually told us this: that we didn't flee the country like all the other companies did and left them alone. They were very grateful for the fact that we stayed. I've heard it many times.*").

<sup>276</sup> Struik/4/283/4-5.

<sup>277</sup> Tchelet/3/193/23 to 3/194/2.

<sup>278</sup> Libson/1/65/21 to 66/2.

<sup>279</sup> CMRG, paras. 488, 489 and 839.

<sup>280</sup> Exhibit C-0360, page 100; pages 164 and 168 ("[...] *he never offered me anything.*"); Libson/1/65/1 to 1/69/9.

status of Mamadie Touré). He further confirmed that BSGR's actions had been entirely legal.<sup>281</sup>

130. The Base Convention was ratified on 19 March 2010 by President Sekouba Konaté. There is no evidence that President Konaté or any other Guinean official was bribed to authorise this ratification.

vii. *No evidence that the Mining Convention dated 19 March 2010 was obtained through corruption*

131. For the sake of completeness, BSGR was granted a Mining Concession on 19 March 2010 by President Sekouba Konaté, as set out in BSGR's Reply and Section II above. There is no evidence that President Konaté or any other Guinean official was bribed to grant this concession.

### **3.3 Mamadie Touré is not credible**

132. From the very start of these proceedings, Guinea has always alleged that Mamadie Touré was the central character in BSGR's corruption scheme.<sup>282</sup> However, and despite various unequivocal indications from the Tribunal that they were very interested in Mamadie Touré testifying before this Tribunal, Guinea did not produce her as a witness. As a justification for this failure, Guinea has claimed that Mamadie Touré would not have been allowed by the US authorities to give evidence.<sup>283</sup> However, Guinea has failed to produce any evidence that supports this allegation.

133. What is more, there are several documents on the record that contradict either that a US authorisation was required, or render it incredible that the US authorities in fact refused to give its authorisation:

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<sup>281</sup> Exhibit C-0360, page 168 ("*the process that BSGR followed to request that [2008 prospection] permit followed the mining law to the tee.*".)

<sup>282</sup> CMRG, para. 5.

<sup>283</sup> Ostrove/4/24/25 to 4/25/8 ("*They [the US authorities] are not allowing her to speak in another case. As is the case for the forensic documents, they are not allowing her to speak in another case, a case other than the one that's under criminal investigation in the United States. So we don't have access to Mrs Touré. We are not allowed to ask her to testify without American authorisation, and the US are not granting such authorisation*").



(i). Mamadie Touré's December 2013 statement explicitly indicates that "*I understand that this declaration may be used in legal proceedings in the Republic of Guinea and I authorize such use*".<sup>284</sup> This statement confirms not only that she can participate in other, foreign proceedings but also that she is the one (and not the US authorities) that authorises the use of her own witness statements.

(ii).

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(iii). The declaration of FBI agent Martinez dated 26 May 2017 does not indicate that Mamadie Touré is not allowed to give evidence. It just states that a decision on Mamadie Touré's immigration had been deferred "*to ensure that she remained in the United States to provide testimony as a witness*".<sup>286</sup> At most, this is a suggestion that Mamadie Touré may have been restricted from leaving the US to give evidence in person to the Tribunal but in no way would it have restricted Mamadie Touré from giving evidence by video conference. This was also the Tribunal's understanding.<sup>287</sup>

134. Furthermore, even if Mamadie Touré was not authorised to give evidence in the present proceedings (which is denied), PROTECTED  
Indeed, Cissé is an apparent signatory on Disputed Document R-0269. As Cissé was not restricted from

<sup>284</sup> Exhibit C-0086, para 2. The timing of the declaration is also suspicious: she apparently signed it on 2 December 2013, it was then provided to BSGR by the Comité Technique on 4 December 2013, just 6 days (and 3 working days) in advance of the hearing in relation to BSGR's rights which was initially scheduled for 10 December 2013.

<sup>285</sup> PROTECTED

<sup>286</sup> Exhibit R-0587.

<sup>287</sup> Madam President/8/202/21 to 8/203/1 ("*The second question is whether we should not hear Mamadie Touré. There's no showing, it seems to us, that she cannot give evidence. What we have read is that she cannot leave the United States, and so she might be able to give evidence by way of a video link or in a hearing that this Tribunal could conduct in the United States.*").

<sup>288</sup> PROTECTED

participating in these proceedings as a witness on behalf of Guinea, it is telling that Guinea has failed to produce him as a witness, even if it was just to confirm his wife's story.

135. On the last day of the Merits Hearing and realising that its claim that Mamadie Touré was not authorised to participate in this arbitration did not hold up, Guinea then claimed that Mamadie Touré herself was refusing to participate in these proceedings<sup>289</sup> and that Mamadie Touré was not under Guinea's control. The opposite is true. PROTECTED

[REDACTED]

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<sup>289</sup> Ostrove/9/17/9-14 ("We approached her lawyer in the United States, Ms Mary Mulligan in the United States, and she is categorical: she says that Madame Touré will not voluntarily provide any testimony in any proceeding, in any arbitral proceeding, not before this Tribunal.").

<sup>290</sup> PROTECTED

<sup>291</sup> PROTECTED

<sup>292</sup> PROTECTED see also Reply, para. 428; Reply, Annex 1, para. 42.

**PROTECTED**

This is evidence enough that she was under Guinea's control and consequently her account of events in relation to BSGR.

136. The truth of the matter is that Guinea's failure to produce the key person in BSGR's alleged corruption scheme can only be explained by Guinea's fear that, under cross-examination and questioning by the Members of the Tribunal, Mamadie Touré's story would not hold up. Therefore, BSGR requests the Tribunal draws the appropriate inferences from Mamadie Touré's absence.

137. Whereas Mamadie Touré has not been presented as a witness in these proceedings, some of her statements made in other proceedings are on the record of this arbitration and Guinea has relied substantially on these statements, often as the only "evidence" for making incriminating allegations. For four important reasons, BSGR requests the Tribunal gives no weight whatsoever to these statements.

138. First of all and as indicated above, in none of the proceedings in which Mamadie Touré has made a statement, has she been cross-examined and tested by BSGR's counsel.<sup>294</sup>

139. Secondly, Mamadie Touré clearly had her own agenda when she made these statements. For example, she acknowledges in her 2013 statement to the US authorities that she is making the statement "*to comply with obligations arising from her cooperation with the US Government*".<sup>295</sup> **PROTECTED**

**PROTECTED**

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**PROTECTED**

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**PROTECTED**

**PROTECTED**

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Exhibit R-0035, para. 2.

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**PROTECTED**

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**PROTECTED**

PROTECTED

it is fair to assume that part of the deal is that she can keep at least some assets and property in return for making incriminating statements.

140. Thirdly, Mamadie Touré's ability to recollect events that took place over 10 years ago must be seriously questioned. PROTECTED

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If she cannot even remember these personal issues, the question arises how much she can really remember from her dealings with BSGR and how much is invented "*pour le besoin de la cause*"?

141. Finally, not only are Mamadie Touré's statements inconsistent with one another, her statements are also frequently contradicted by direct evidence on the record. In terms of the inconsistency as between her various statements, the following examples (of many) suffice to demonstrate this point:

(i).

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However, to the US authorities, she declared that she had been approached by BSGR *before* the Simandou North and South permits had been awarded.<sup>302</sup>

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Exhibit C-0064, page 36, para. 7.

(ii). In a letter dated 8 June 2010,<sup>303</sup> she denied that she had ever signed a document dated 2 August 2009,<sup>304</sup> calling it a forgery. However, both in her December 2013 statement to the US authorities **PROTECTED**

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(iii). **PROTECTED**

(iv). In December 2013 she stated that the President had told her to keep one of the two Land Cruisers purportedly given by BSGR and offer the other one to his children.<sup>308</sup> **PROTECTED**

142. There are also numerous contradictions between Mamadie Touré's statements and the direct evidence on the record, as demonstrated by the following examples:<sup>310</sup>

(i). **PROTECTED**

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<sup>303</sup> Exhibit C-0114, page 2 ("[Matinda] *s'inscrit énergiquement en faux contre la fameuse attestation du 2 Août 2009*"; page 3 ("[Matinda], *les soit disant témoins Sergent-chef Abdoulaye Cissé et Adjudant-chef Issaiaga Bangoura ignorent totalement l'existence de la fameuse attestation*"); page 2 ("[Matinda] *ne reconnaît nullement la signature apposée sur la fameuse attestation du 2 Août 2009 au nom de Madame Mamadie Touré*") and ("*Madame Mamadie Touré n'a jamais apposé sa signature et le cachet de [Matinda] sur ladite attestation.*"). **PROTECTED**

<sup>304</sup> Exhibit R-0269, recording that BSGR would pay her USD 4 million as compensation for her alleged 5% shareholding and past services. BSGR's position is that this document is false.

<sup>305</sup> Exhibit R-0035, para. 32; **PROTECTED**

<sup>306</sup> **PROTECTED**

<sup>307</sup> **PROTECTED**

<sup>308</sup> Exhibit C-0086, para. 26.

<sup>309</sup> **PROTECTED**

<sup>310</sup> See also Reply, paras. 427 to 433.

**PROTECTED** Souaré denied such specific instructions and testified that he had merely received a general direction to assist BSGR, without any reference to Simandou North or South.<sup>312</sup>

(ii). **PROTECTED**  
**PROTECTED** However, Souaré has testified that it was the Government's official policy to open up the mining sector, to attract new mining companies<sup>314</sup> and that BSGR would have received the Simandou North and South permits anyway by simply applying for them.

(iii). **PROTECTED**  
**PROTECTED** Souaré has not supported this in his evidence.

(iv). **PROTECTED**  
**PROTECTED** However, Guinea's own report of the helicopter mission shows that he was not on board the helicopter.<sup>317</sup>

(v). She has stated that when the permits for Simandou North and South were not immediately granted following the first meeting with the President, she had

311 **PROTECTED**

312 Souaré/6/173/1-10 ("A: He sees operators, he trusts them, and he calls the minister and he says "Please facilitate things for them". So far there was nothing to indicate that this was improper or illegal, because that day he did not say specifically that such-and-such a zone is to be attributed that is already granted to another company. Q: Were there further instructions given by the President? A: Not directly."); Souaré/6/89/10-11 ("Because I wasn't asked – the President didn't ask me to give a permit to BSGR; he said "help."); Souaré/6/172/7-10 ("The President presented the group as a partner that was keen to go into the mining business in Guinea, and he asked me to facilitate their path and to support them.").

313 **PROTECTED**

314 Souaré/6/18/21-25 ("We had the objective of promoting the mining sector, opening it up, of receiving investors, of proceeding to the exploitation of the mines, promoting processing on site, a host of innovative projects"); Souaré/6/31/25 to 6/32/1 ("[...] the government was looking for investment in all the mining resources. The government would accept these."); Souaré/6/58/25 to 6/59/1 ("[...] the mission consisted in opening up and receiving as many investors as possible."); Souaré/6/177/6-9 ("When I reached the office, we were told that we had to open up, we had to act swiftly with mining projects. I signed lots of agreements for local mining projects.").

315 **PROTECTED**

316 **PROTECTED**

317 Exhibit R-0175.

called Minister Souaré and the permits were granted shortly thereafter.<sup>318</sup> Again, Souaré does not support this account.<sup>319</sup>

(vi). PROTECTED

Sylla testified, however, that he had never spoken to Mamadie Touré<sup>321</sup> and that BSGR would have obtained the permit anyway because its application complied with the government's policy to diversify the mining sector.<sup>322</sup>

(vii). She has stated that around February 2008 she and Souaré received a diamond encrusted car.<sup>323</sup> Souaré does not confirm this. PROTECTED

(viii). PROTECTED

However, there is not a single piece of evidence on the record

<sup>318</sup> Exhibit R-0035, para. 12 ("After the meeting, BSGR filed a permit application, but mining licenses were not granted immediately. Cilins asked me to discover why BSGR's permits had been delayed. I called Souaré to talk to him, and BSGR obtained two exploitation blocks soon after.").

<sup>319</sup> Souaré/6/68/12-16 ("Q. Yes, I'm talking about the permits for the North and the South. A. Yes, the North and the South, and the whole of Simandou, the procedure was respected. I saw to it that it was, because I already knew what was around all of this.").

<sup>320</sup> PROTECTED

<sup>321</sup> Sylla, RWS-1, para. 15 ("[...] elle ne m'en a jamais parlé directement."); Sylla/7/34/18-24 ("Q: [...] You confirm that "...Mamadie Touré never met with me to give me instructions." A: That is the truth. Q: Did she give you instructions without actually meeting you? A: She did not give me instructions.").

<sup>322</sup> Sylla/7/51/6-12 ("Q: Had there not been this abnormal pressure, would you have signed the [permit granting the uranium mining rights]?" A: It would have taken longer probably. Q: But you would have signed it on the principle? A: I would have signed it within the strategy of aiming at diversification in the mining sector.").

<sup>323</sup> Exhibit R-0035, para. 22 ("[Around February 2008] Steinmetz gave the President a small car entrusted with diamonds to 'greet the president'. (Around the same time, I also received one of those cars, and Minister Souaré received one also.").

<sup>324</sup> Souaré, RWS-2 para. 28. PROTECTED

<sup>325</sup> PROTECTED

confirming this claim. The evidence that is on the record establishes that when she was around President Conté, she did not say a word and did not intervene.<sup>326</sup> Souaré even questioned Mamadie Touré's intellectual capacities to advise the President in the first place.<sup>327</sup> Sylla had no opinion on Mamadie Touré's intellectual level, and he did not know whether she had a diploma or even graduated from secondary school.<sup>328</sup>

(ix). **PROTECTED** Again, there is no evidence in the record supporting that claim. There is, however, evidence establishing the opposite. Souaré remembered an incident, unrelated to BSGR, where President Conté instructed her not to intervene on behalf of foreign oil companies.<sup>330</sup> Kanté testified that at a meeting in December 2007 President Conté ordered her not to intervene in mining affairs.<sup>331</sup> Kanté further testified that Mamadie Touré had to go behind the President's back if she wanted to achieve something.<sup>332</sup>

(x). **PROTECTED**

<sup>326</sup> Souaré/6/43/14-16 ("No, she did not speak."); Kanté/7/129/13-14 ("Q: at this meeting, did Mamadie Touré speak? A: No.").

<sup>327</sup> Souaré/6/65/21-25 ("Q: I do not wish to be impolite, but does that mean that you consider her intellectual level not to be very high? A: With all due respect, it isn't a high intellectual level [...] The level is really not a very high level."); Souaré/6/66/1-6 ("Q: Do you think that she was capable of discussing political issues, for instance, she had the capability of approaching political subjects with the President or other ministers? A: Oh, I hardly think so. I don't think she would have been the ideal person to discuss matters political"); Souaré/6/98/15-17 ("As I said, she doesn't have a very good technical level and I presume that she didn't understand everything that was at stake.").

<sup>328</sup> Sylla/7/36/7-14.

<sup>329</sup> **PROTECTED**

<sup>330</sup> Souaré/6/105/17-19 ("She didn't get anywhere because the President dismissed her altogether."); Souaré/6/105/23 to 6/106/2 (Q: But you say that in the course of that meeting with the President and with Mamadie Touré concerning the Hyperdynamics dossier, the President was rather firm and he said "Don't talk about that, you leave here. A: Yes.").

<sup>331</sup> Kanté, RWS-4, para. 34; Kanté/7/124/1-6.

<sup>332</sup> Kanté/7/129/18-21 ("Q: Doesn't that incident show that in fact Mamadie Touré had to go behind the President's back if she wanted to get something done? A: Well, I think that goes without saying.").

<sup>333</sup> **PROTECTED**



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(xi).

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Souaré however testified that before the signing ceremony of the MoU in February 2006 he had not realised that IST was Mamadie Touré's half-brother because he had never seen him with her or with the President.<sup>336</sup> This contradicts the allegation IST was holding himself out as Mamadie Touré's brother. Kanté confirms that at a meeting in August 2007 IST did not mention being Mamadie Touré's brother.<sup>337</sup> The contact between the President and IST during that meeting had also been very cold.<sup>338</sup>

143. In summary, despite paying her legal fees in other proceedings so as to make incriminating statements against BSGR, Guinea has failed to present witness evidence from the alleged central character in BSGR's bribery scheme, Mamadie Touré. BSGR requests the Tribunal to draw the appropriate inferences in this respect.
144. In addition, BSGR requests the Tribunal to give no weight whatsoever to any of the statements of Mamadie Touré on the grounds that (1) BSGR was not able to test these statements by cross-examination and neither was the Tribunal able to question her; (2) these statements were made in return for undisclosed but nevertheless tangible benefits; (3) Mamadie Touré's ability to accurately recollect facts and events is questionable and (4) the sheer number of internal inconsistencies and contradictions in the statements with other evidence on the record is staggering.

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Souaré/6/92/24 to 6/93/3 ("Q: This means that before that, you hadn't realised that he was the brother? A: No, before that time, I didn't know. I never found him at the President's or at Mamadie Touré's before.").

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Kanté/7/92/6-11 ("Q: Do you recall whether Mr Sory Toure mentioned during this meeting that he was linked in any way to the President's family? A: No.").

338

Kanté/7/112/1-7.

### 3.4 Allegations that have not been put to the witnesses

145. Guinea's obfuscation of allegations and evidence continued into the Merits Hearing by not putting its allegations to the respective witnesses when it had the chance to do so. While Madam President pointed to the absence in international arbitration of any strict rules about having to put certain questions to witnesses she equally (and correctly) stated that "[the Tribunal] will assess the record and the evidence on the basis of questions that were put or not put".<sup>339</sup> The issue which prompted Madam President's comment concerned Guinea's failure to put to Tchelet any questions concerning the allegation that Mamadie Touré received a cash payment of USD 1 million from BSGR.<sup>340</sup> Of course, it can be inferred that Guinea chose not to put this question to Tchelet because it correctly recognised that the allegation was unsubstantiated, save by the word of an unreliable and absent witness: Mamadie Touré.<sup>341</sup>
146. The unreliability of Mamadie Touré's statements cannot be in doubt. Guinea recognises this, BSGR knows this and the Tribunal must, it is submitted, find this. At the Merits Hearing, Guinea's efforts to evade scrutiny of Mamadie Touré's statements became clear through its questioning (or lack thereof) of the BSGR witnesses on allegations founded on Mamadie Touré's evidence.
147. To give two examples of many, Mamadie Touré alleges in her statement that (1) she was offered and received two Land Cruisers delivered by Avidan as a thank you for assisting BSGR in obtaining the mining rights,<sup>342</sup> and (2) that Steinmetz offered a cash payment to President Conté in exchange for the granting of Blocks 1 and 2 to BSGR.<sup>343</sup> Both allegations feature prominently in Guinea's Counter-Memorial dated 17 June 2016 (the "**Counter-Memorial**").<sup>344</sup> However, neither of those allegations were put to Avidan or

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<sup>339</sup> Madam President /3/217/7-10.

<sup>340</sup> Rejoinder, para. 158.

<sup>341</sup> In relation to this allegation, see also the question of Prof. Van den Berg to Guinea, Tchelet/3/219/8 to 3/220/9: ("*Q. And this is all the backup you have for this? [...] Any other evidence for that? A. The only other evidence we have that she received cash is her statement that she received the case, which I will put on screen in a moment.*").

<sup>342</sup> Exhibit R-0035, para. 26.

<sup>343</sup> Exhibit R-0035 para. 23.

<sup>344</sup> CMRG, paras 299 and 303.

Steinmetz during their cross-examination by Guinea. BSGR therefore adopts the position that these allegations have been dropped.<sup>345</sup>

148. As an example, Steinmetz is alleged to have met with President Conté on four occasions:
- (i). The alleged meeting held "sometime in 2006" in the courtyard of the palace attended by President Conté, Steinmetz, Cilins, Michael Noy ("**Noy**"), IST, Struik and Patrick Saada ("**Saada**");<sup>346</sup>
  - (ii). The alleged meeting which followed "*sometime in 2006*" at the residence of President Conté attended by Steinmetz, Noy, Cilins, Struik, Saada, Bangoura and IST;<sup>347</sup>
  - (iii). The alleged meeting which occurred sometime in early 2008 at the residence of President Conté attended by Steinmetz, Struik and Cilins;<sup>348</sup> and
  - (iv). The alleged meeting which occurred sometime between February and July 2008 at Brameya attended by President Conté, Steinmetz, Cilins, and Struik.<sup>349</sup>
149. Guinea did not put a single question relating to any of these alleged meetings to Steinmetz. The only questions on the subject came from the Tribunal and they only concerned the meeting with President Conté, which Steinmetz accepts and describes in his witness statement.<sup>350</sup> The failure to challenge Steinmetz's evidence must be regarded as acceptance by Guinea that Steinmetz had no meetings with President Conté before 2008.<sup>351</sup>
150. Guinea's overt reluctance to give air at the Merits Hearing to matters alleged by Mamadie Touré (matters which were placed front and centre in its pleadings) is not confined to its cross-examination of Steinmetz alone. Mamadie Touré alleges that she received cash

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<sup>345</sup> See other examples in this Post-Hearing Brief of allegations that Guinea has failed to put to the witnesses: para. 185 (the allegation that BSGR paying for a minister's travel is illegitimate); paras. 145 and 164 (the allegation that Mamadie Touré received cash payments of USD 50,000 and USD 1 million from BSGR); para 177 (the allegation that Olympia paid Mamadie Touré on BSGR's behalf).

<sup>346</sup> Exhibit C-0086, para. 13; CMRG, para. 246.

<sup>347</sup> Exhibit C-0086, para. 14.

<sup>348</sup> Exhibit C-0086, para. 22.

<sup>349</sup> Exhibit R-0035; Exhibit C-0086 para. 22; CMRG, para. 298.

<sup>350</sup> Steinmetz, CWS-1 para. 22.

<sup>351</sup> Reply, Section 5.2.1 deals with the adverse inferences to be drawn from Guinea's failure to produce documents.

from Avidan on two occasions: first, she alleges that at one meeting Avidan gestured to "1,000,000 US dollars" spread on a bed, which Avidan then "*placed in a bag and gave to [her]*";<sup>352</sup> and second, Avidan is alleged to have delivered USD 50,000 to her in Freetown.<sup>353</sup> These are the only two cash payments alleged to have been paid to Mamadie Touré by BSGR. What then did the Tribunal hear from Avidan in cross examination on these two payments which, if proven, would severely undermine BSGR's position? Nothing, because Guinea did not address a single question to Avidan concerning either of these payments. Why? Because Guinea recognises that the statement of Mamadie Touré is patently false and her credibility is shot. The Tribunal must, it is submitted, find that these allegations have been dropped by Guinea and it should give no weight to the evidence of Mamadie Touré, Guinea's supposedly star – but absent – witness.

151. There are several other key matters, especially in relation to allegations of payments made to Mamadie Touré, which were not put to any of the witnesses. These are mentioned, where relevant, below.

### **3.5 Failure to produce documents from which adverse inferences must be drawn**

152. Request numbers 1, 2 and 7<sup>354</sup> of BSGR's Document Production Requests<sup>355</sup> go to the heart of the arbitration, namely as to (1) were the mining rights acquired legally and in compliance with the relevant laws and procedures; and (2) on Guinea's case, what influence (if any) did Mamadie Touré have on President Conté or any member of the Government of Guinea involved in the granting of the mining rights?
153. Guinea accepted Requests 1, 2 and 7 (acknowledging their centrality to the dispute) but in all three instances Guinea has failed to produce any documents, informing the Tribunal that it had not found any responsive documents.<sup>356</sup> While Guinea similarly failed to

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<sup>352</sup> CMRG, para. 343 and Rejoinder, para. 158.

<sup>353</sup> CMRG, para. 381. See also Guinea's demonstrative exhibit of the flow of funds shown during the Merits Hearing.

<sup>354</sup> These requests are examples for Guinea's failures to produce documents that should have been in its possession. BSGR's request to this Tribunal to draw adverse inferences from Guinea's failure produce documents with respect to all other of BSGR's requests that were granted by this Tribunal, is maintained.

<sup>355</sup> Annex 1 to Procedural Order No. 7, dated 5 September 2016.

<sup>356</sup> Letter from Guinea to the Tribunal 21 October 2016 and Annex 1

produce any documents in respect of other requests,<sup>357</sup> it is Guinea's failure to adduce documentary evidence in respect of Requests 1, 2 and 7 which is deserving of the Tribunal's scrutiny and from which BSGR suggests several inferences should be drawn.

*i. Request 1 – the Lack of Government documentation, Mining applications, submissions, tenders etc*

154. The technical rigour to which BSGR applied itself in pursuit of the mining rights is set out in depth in its Reply and in Section II above. The absence of any documents on the part of Guinea to evidence the corresponding and respective analysis within the Guinean Government has been, and remains, an extraordinary omission of key evidence. Guinea would have the Tribunal believe that the explanation for the lack of documentary evidence is the result of BSGR bypassing the necessary internal procedures dictated by the Mining Code through Mamadie Touré's intervention, i.e. there are no documents because BSGR did not follow the applicable procedures under the Mining Code. This does not make sense in the light of the evidence heard from Guinea's own witnesses as set out in Section II above.
155. It is inconceivable in this modern age that Guinea has apparently adopted such a laissez-faire attitude to the retention of government documents and communications concerning mining issues given their obvious economic and political importance to Guinea. It has to be inferred from the lack of documentary evidence that Guinea has decided to withhold documentation that is of key importance to this case.

*ii. Request 2 - Lack of any documentary evidence of Mamadie Touré's influence on President Conté or the Mining Ministers*

156. The reliability of Mamadie Touré's statements is dealt with above. The Tribunal was not given an opportunity to test Mamadie Touré's evidence as Guinea did not call her as a witness. BSGR requested that Guinea produce documents in relation to meetings between Mamadie Touré and President Conté and/or any member of the Ministry of Mines (or any member of the Government of Guinea) involved in the granting of Mining Permits and

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<sup>357</sup> Letter from Guinea to the Tribunal 21 October 2016 and Annex 1, requests 4 and 32.

Guinea has failed to produce *any*. Guinea relies entirely on the unreliable word of a witness they did not call and on indirect and inferential evidence to prove their central allegation of corruption. If Mamadie Touré's role was so pivotal, there must have been documents that point to or evidence her influence. The lack of documentation adds even more weight, inferentially, to the already obvious conclusion that neither Mamadie Touré nor President Conté exerted any pressure on the Ministers of Mines and any other government officials to grant BSGR mining rights. BSGR requests that the Tribunal draws this adverse inference from the lack of documents.

iii. *Request 7 – Lack of documentary evidence of Mamadie Touré being the fourth wife of President Conté*

157. Having failed to provide anything by way of documentary evidence to prove Mamadie Touré's alleged corrupt influences on Guinean officials, Guinea has similarly failed to produce any credible evidence to show that Mamadie Touré enjoyed any proximity with the President such that her influence (such as it was) could be exerted. Guinea has failed to produce any document to support its claim that Mamadie Touré was President Conté's fourth wife<sup>358</sup> and BSGR therefore requests the Tribunal to draw adverse inference that Mamadie Touré was not President Conté's fourth wife.

### **3.6 Conclusion**

158. BSGR has set out in detail before that Guinea's lack of documentary and witness evidence to prove that BSGR committed acts of corruption under Guinean law is striking. In the light of the evidence heard during the Merits Hearing, there cannot be any doubt that Guinea's claims against BSGR are baseless and should therefore be dismissed:
- (i). Not one of Guinea's witnesses (all public officials and former Ministers of Mines) was offered or had received any bribes from BSGR or anyone allegedly affiliated to BSGR.

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<sup>358</sup>

Letter from Guinea to the Tribunal 21 October 2016 and Annex 1, request 7. See also Reply, paras. 40 to 42.

- (ii). Not one of Guinea's witnesses had witnessed that any other government official was offered or had received any bribes from BSGR or anyone allegedly affiliated with BSGR.
- (iii). Not one of Guinea's witnesses was able to provide evidence that President Conté, Mamadie Toure or her half-brother IST or any other person affiliated with BSGR exerted pressure on them to take a decision with respect to the award of BSGR's Mining Rights, in particular with respect to grant of the permits in Simandou Blocks 1 and 2, the signing of the Zogota Base Convention and the award of the Zogota Mining Concession.

159. It is therefore clear that the offences of active corruption, passive corruption and passive trading of influence have not been made out. There was no promise or offer of a gift to a public official, there has been no abuse of real influence and there was no undue advantage afforded to BSGR.

#### **IV. NO EVIDENCE OF ILLEGAL PAYMENTS**

160. The following section deals with Guinea's allegations that BSGR made illegal payments to: (i) Mamadie Touré; (ii) IST; (iii) Ibrahima Kassory Fofana; and (iv) Mahmoud Thiam, either directly or through intermediaries. Guinea placed great weight during the Merits Hearing on its demonstrative exhibit apparently showing the flow of funds from BSGR to various entities. It made grand statements that each of the 50 payments were supported by "*internal emails, testimony etc*".<sup>359</sup> However, as soon as you scratch the surface, the evidence underlying this demonstrative exhibit is pitifully lacking, as was shown during the Merits Hearing. This section builds on Annex 1 to the Reply.
161. Subsection 4.1 will deal with those alleged bribes for which there is no evidence. Subsection 4.2 will deal with those payments that Guinea has mischaracterised as bribes but were in fact legitimate transactions.

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<sup>359</sup> Ostrove/1/113/1-3 ("*We have direct evidence. We have about 50 payments, with 50 documents proving these payments: we have internal emails, testimony, et cetera.*").

#### 4.1 Alleged payments for which there is no evidence

162. It has already been established above that President Conté has not received any payments from BSGR.<sup>360</sup> This subsection will deal with Guinea's allegations that BSGR made various payments and offered gifts to Mamadie Touré. It will show that each allegation is based on highly unreliable evidence or no evidence at all.

i. *BSGR did not make cash payments to Mamadie Touré*

163. **PROTECTED**  
**PROTECTED** Guinea seems to accept that there is no traceable transaction and alleges that this does not matter as the payment was made in cash.<sup>362</sup> There is no documentary or oral evidence to support this claim.

164. Guinea relies on Mamadie Touré's allegation that Avidan gave her USD 1 million in cash and that a representative of Avidan gave her USD 50,000 in cash.<sup>363</sup> Avidan has denied these allegations<sup>364</sup> and was not even questioned on them in the Merits Hearing. Furthermore, Tchelet has confirmed that he has no knowledge of any payments being made from BSGR to Mamadie Touré or Matinda.<sup>365</sup>

165. These allegations are based entirely on Mamadie Touré's unreliable testimony.<sup>366</sup> Indeed, even Prof. Van den Berg seemed surprised by Guinea's flimsy evidence as he questioned Ostrove on the alleged USD 1 million cash payment:

*"Q. And this is all the backup you have for this? [...] Any other evidence for that?"*

*A. The only other evidence we have that she received cash is her statement that she received the case, which I will put on screen in a moment.*

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<sup>360</sup> See Section III above.

<sup>361</sup> CMRG, paras 227 and 801; **PROTECTED** see also para. 196 below.

<sup>362</sup> Rejoinder, para. 644.

<sup>363</sup> CMRG, paras 343 and 381.

<sup>364</sup> CMRG, para. 34a; Avidan, CWS-3, para. 155.

<sup>365</sup> Tchelet/3/193/10-20; 3/218/3-11; 3/220/10-13; 3/221/10-12.

<sup>366</sup> See Subsection 3.3 above.



*Q. May I ask, Mr Tchelet: are you aware of any payment in cash of \$1 million which is being discussed?*

*A. No, sir, not at all."*<sup>367</sup>

166. There is no documentary or oral evidence that Mamadie Touré received either USD 50,000 or USD 1 million in cash.

*ii. BSGR did not use Ghassan Boutros to make payments to Mamadie Touré*

167. Guinea alleges that BSGR agreed to purchase Mamadie Touré's alleged (and denied) 5% stake in BSGR Guinea for USD 4 million on the basis of a contract dated 2 August 2009. On Guinea's case, this amount was allegedly paid to Mamadie Touré through Boutros on behalf of BSGR in four instalments: (i) USD 998,000 on 3 September 2009; (ii) USD 2,000 on 20 December 2009; (iii) USD 998,000 in February 2010; and (iv) USD 2 million on 18 May 2010.<sup>368</sup>

168. First, BSGR did not know about the 2 August 2009 contract. Second, the contract that allegedly granted Mamadie Touré a 5% stake in BSGR Guinea is false as set out in Section VI below. Third, even if it was genuine, this contract does not make any commercial sense for the reasons set out in BSGR's Reply<sup>369</sup> and below in Section VI. Fourth, the 5% shareholding was never transferred to Mamadie Touré (see also Section VI). Thus, if she has never been a 5% stakeholder in BSGR Guinea, why would BSGR consider buying her out for USD 4 million? Fifth, there is no evidence at all that Mamadie Touré exerted pressure on President Conté or other government officials on behalf of BSGR which again casts doubt on the existence of this contract.

169. Finally, there is no evidence that any of these payments were made to Mamadie Touré through Boutros. The evidence is limited to the dubious – and at times conflicting – testimony of Boutros and Mamadie Touré in other proceedings, without the benefit of cross-examination before the Tribunal. Guinea's excel spreadsheet underlying its demonstrative of payments exposes that for one "instalment" of USD 998,000, again, the

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<sup>367</sup> Tchelet/3/219/8 to 3/220/13.

<sup>368</sup> CMRG, paras 400-416.

<sup>369</sup> Reply, Annex 1, paras 7 and 63-78.

only evidence it has is Mamadie Touré's self-serving statement which refers to USD 998,000 received from an account held by Boutros in late 2009.<sup>370</sup> Yet the connection between this alleged payment and the (false) 2 August 2009 contract is not explicit. Even if she is alleging that connection, her witness statement is unreliable and untested (see Subsection 3.3). If the suggestion is that this payment related to the caterpillars Boutros supplied to BSGR, this was a legitimate business transaction (see Subsection 4.2 below).

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for the remaining payments, Mamadie Touré's statement does not refer to other payments she received from Boutros. PROTECTED

Not even

Mamadie Touré makes reference to such a payment.<sup>374</sup>

170. Boutros' evidence in the Swiss proceedings is unreliable and remains untested and Guinea chose not to present Boutros as a witness in these proceedings to testify to these payments. Nevertheless, even if any of these payments were made (which is denied), this is not evidence of corruption. Boutros has not been prosecuted, punished or penalised in Guinea PROTECTED If Boutros had indeed funnelled illicit payments to Mamadie Touré, he would now be in prison, not prospering as a businessman in Guinea as is in fact the case. Furthermore, whatever Boutros has done with the legitimate business payments received from BSGR is neither of BSGR's concern nor within its control.

171. As for the payments that were made to Boutros, these were legitimate business expenses as set out in paragraphs 188-194 below.

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<sup>370</sup> Exhibit C-0064, page 40, para. 33; Exhibit R-0035, para. 34; Excel spreadsheet "*Mouvements de fonds – fichier indiquant la source de chaque mouvement de fond listé*", as used to create Guinea's demonstrative exhibit.

<sup>371</sup> Reply, Annex 1, para. 76,

<sup>372</sup> PROTECTED

<sup>373</sup> PROTECTED

<sup>374</sup> Reply, Annex 1, para. 77.

<sup>375</sup> Reply, Annex 1, para. 78; PROTECTED

iii. [REDACTED]

172. [REDACTED] As set out below, Struik denies this.

173. [REDACTED]

While BSGR previously relied on Pentler's confirmation that this was paid, as with the agreements, BSGR can no longer take a position on this.

174. [REDACTED]

Accordingly, at the point that Pentler was meant to have paid the first payment of USD 425,000 to Bah/ IST, it had not received this sum from BSGR. In fact – even on Guinea's demonstrative exhibit – the first payment BSGR made to the Pentler principals was USD 125,000 on 27 February 2006. Up until April 2008, the full sums paid to Pentler by BSGR were USD 385,000: not enough to satisfy the USD 425,000 apparently paid by Pentler to Bah and IST on BSGR's behalf. This suggests that Pentler was not a conduit for BSGR, even if the payment was made.

iv. *Pentler's payments to Mamadie Touré in July-August 2010 were not made on behalf of BSGR*

175. Guinea alleges that Pentler made the following payments to Mamadie Touré on behalf of BSGR in July-August 2010: (i) USD 149,970; (ii) USD 100,000; (iii) USD 50,000; and

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376 [REDACTED]  
377 [REDACTED]  
378 [REDACTED]  
379 [REDACTED]  
380 [REDACTED]

(iv) USD 99,970.<sup>381</sup> There is no documentary or oral evidence to show that these were made on behalf of BSGR and on what basis these payments were made. Guinea groundlessly insinuates that such payments were an attempt to buy Mamadie Touré's silence.<sup>382</sup> Guinea did not even raise this at the Merits Hearing. Even if these payments were made, this is not evidence of corruption (see Section III above). Guinea has failed to prove that Mamadie Touré has bribed or exerted pressure on any government official.

v. [REDACTED]

176. [REDACTED]

Guinea has since attempted to adduce documentary evidence at the last minute in the form of a document purporting to demonstrate Olympia referring to a property purchase on behalf of Matinda.<sup>385</sup> [REDACTED]

[REDACTED] Guinea has failed to prove that BSGR had obtained the mining rights through corruption and/or alleged interventions by Mamadie Touré (see Section III).

vi. [REDACTED]

177. [REDACTED]

There is no documentary or oral evidence that the payment was made on behalf of BSGR. Guinea did not even raise this at the Merits Hearing. Even if such

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381 CMRG, paras 502-510.

382 CMRG, paras 502-510.

383 [REDACTED]

384 [REDACTED]

385 [REDACTED]

386 [REDACTED]

payment was made, it is not evidence of corruption. Guinea has failed to prove that Mamadie Touré has bribed or exerted pressure on any government official on BSGR's behalf. Guinea has failed to prove that BSGR had obtained the mining rights through corruption and/or Mamadie Touré's interventions (see Section III).

#### **4.2 Legitimate business payments**

178. Guinea has accused BSGR of paying officials and intermediaries in order to buy their favour. In Annex 1 of its Reply, BSGR documented how Guinea has mischaracterised a number of payments which were in fact legitimate payments and a normal part of the course of business. The evidence of the Merits Hearing serves to confirm this.

*i. Payment of a bonus to IST*

179. As set out in Section 3.2, Annex 1 of the Reply, there is nothing suspicious about an employee of BSGR, as IST was in 2010, receiving a bonus from BSGR.

180. Avidan confirmed that IST received USD 450,000 as a bonus after the conclusion of the joint venture with Vale.<sup>387</sup> He is not the only employee who received a bonus after the successful deal with Vale and the bonus he received was only a very small proportion of the overall bonus pool.<sup>388</sup> Guinea has failed to produce any evidence that the payment to IST was anything other than what it appears to be – a bonus awarded to an employee in recognition of the hard work done to secure a deal.<sup>389</sup> These payments were also approved by the BSGR board.<sup>390</sup> It has to be noted that IST continued to work for BSGR after President Conté's death. This demonstrates that IST was valuable to BSGR in his own right and not because of his alleged connections to the President.

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<sup>387</sup> Avidan/9/76/10-14.

<sup>388</sup> Avidan/9/152/16-21 ("*Q. I guess you're not a mathematician, but do you have an idea that Mr Ibrahima Sory Touré's bonus of \$450,000, what percentage that was of the total bonus pool? A. I would say like maybe 4% or 3%. Q. It's 3.5%. A. Okay.*"); Avidan/9/153/4-9 ("*Q. Yes. It may be a more difficult question now. Do you know what percentage Mr Ibrahima Sory Toure was of the upfront payment of the \$500 million? A. It would be like 0.- something. I don't know. Maybe --. Q. It is 0.09%. A. Yes.*").

<sup>389</sup> Avidan/9/76/17-18.

<sup>390</sup> Avidan/9/76/19-20.

ii. *Payments to Ibrahima Kassory Fofana*

181. As set out in Section IV, Annex 1 of the Reply, BSGR did not bribe Fofana. Fofana was not a government official when he provided consultancy work for BSGR. Thus, any payments to him cannot qualify as bribes.

182. PROTECTED  
PROTECTED It is telling that Guinea chose not to put any question to Avidan regarding Fofana's role, despite the fact that Avidan was the one with most frequent contact with Fofana. PROTECTED  
PROTECTED

183. There is no evidence from any other government official that Fofana was trying to exert pressure on behalf of BSGR to get the exploration rights in Simandou Blocks 1 and 2. For example, Nabé, who was allegedly called by Fofana, does not state that Fofana exerted pressure on him.<sup>394</sup>

184. Guinea fails to prove that any of these payments are evidence of corruption. If BSGR has indeed bribed Fofana, how is it possible that Alpha Condé has appointed the same Fofana as the new Prime Minister of Guinea on 24 May 2018? Given these circumstances, Guinea cannot seriously uphold these allegations against BSGR.

iii. *Payments to Mahmoud Thiam*

185. As set out Section 4.3.3 of the Reply and Section III above, BSGR did not bribe Thiam; the payments made to Thiam were reimbursements for legitimate travel expenses. Guinea has failed to adduce any evidence to the contrary.

391 PROTECTED  
392 PROTECTED  
393 PROTECTED

394 See Section III above; Nabé, RWS-5, para. 20.

186. BSGR has already demonstrated that it reimbursed Thiam USD 8,017 on 15 January 2009 for a flight.<sup>395</sup> This was a reimbursement for a flight which Thiam paid on Fofana's behalf. Prior to taking office as Minister of Mines, various companies approached Thiam for a meeting. BSGR was amongst them. As Thiam did not know BSGR, he insisted upon Fofana's attendance at the meeting. Thiam paid both for his own and for Fofana's airline tickets on the understanding that BSGR would pay for Fofana's, given that Fofana was providing strategic advice to BSGR at the time.<sup>396</sup> Tchelet has confirmed that this was a reimbursement for travel expenses.<sup>397</sup> Given Fofana was providing strategic advice to BSGR, there is nothing suspicious about BSGR paying for Fofana's travel expenses.
187. Regarding flights arranged through BSGR's travel agent Diesenhaus-Unitours,<sup>398</sup> BSGR maintains that it was standard practice for mining companies in Guinea to pay for the travel of ministers on certain occasions.<sup>399</sup> Guinea chose not to put a question to the witnesses regarding the legitimacy of paying for a minister's travel. Guinea also chose not to put any question to the witnesses regarding Thiam's attendance at Steinmetz's wedding on behalf of the President,<sup>400</sup> perhaps recognising that it is natural for businessmen to extend courtesies to public figures, and equally natural for those public figures to accept such a courtesy.

iv. *Payments to Boutros*

188. **PROTECTED** It is correct that BSGR made payments to Boutros, either directly or through Sidibe, between February 2009 and April 2010. These payments are based on a legitimate commercial relationship with Boutros as set out in Section 1.3.4 of Annex 1 of the Reply. **PROTECTED**

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395 **PROTECTED**  
396 **PROTECTED**  
397 Tchelet/3/193/23-3/194/2.  
398 Reply, para. 408.  
399 Thiam, CWS-5, para. 89.  
400 Thiam, CWS-5, para. 123.  
401 **PROTECTED**

PROTECTED

189. Some payments were made to Boutros through Boutros' business partner, Adama Sidibe. In giving evidence, Tchelet confirmed that the financial manager, Tatiana Rakitina, had met him and confirmed he was the business partner of Boutros.<sup>403</sup> If Guinea had any doubts as to the truth of the identity or relationship between Sidibe and Boutros, it is surprising that they chose not to produce either of these gentlemen as witnesses or question Avidan on this point, given that Avidan was the one with most direct contact with Boutros. It is therefore uncontested that Sidibe was indeed the business partner of Boutros.
190. On 17 August 2009, BSGR paid Boutros USD 1,300,000 to purchase a caterpillar tractor and an excavator, which BSGR required for roadworks.<sup>404</sup> Boutros supplied such equipment. PROTECTED  
PROTECTED  
PROTECTED Whilst this may serve to call into question the reliability of the accounting practices of LMS and Boutros, it does not undermine the fact that BSGR paid for machinery which it required for its operations. Indeed, as outlined above, Boutros' evidence in the Swiss proceedings is unreliable and remains untested.
191. The price of this heavy equipment is unremarkable in the context of a large enterprise taking place in a part of the world where it was difficult to obtain such equipment.<sup>407</sup> PROTECTED  
PROTECTED Regarding any money Boutros paid

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402 PROTECTED Tchelet/3/162/11 to 3/163/7.  
403 Tchelet/3/163/13-17.  
404 Struik/4/254/11-12.  
405 PROTECTED  
406 PROTECTED  
407 Tchelet/3/166/16-23; Exhibit C-0270.  
408 PROTECTED Struik/4/279/4-9.



to Matinda for the caterpillars, BSGR did not know that Mamadie Touré was the supplier of the machinery but, in any event, she was part of a legitimate commercial transaction.<sup>409</sup>

192. The use of the word "consulting" on payment instructions appears to have caused Guinea a great deal of alarm. Tchelet provided a clear and convincing explanation for this. If the correct category of payment was not known at the time of the payment, "consulting" was the default category assigned to the payment in the interim.<sup>410</sup>

193. Tchelet confirmed that this is exactly what the administrative team would do if provided with an invoice for machinery,<sup>411</sup> and that the accounting error would be corrected when the correct category was known.<sup>412</sup> **PROTECTED**

194. Guinea did not provide any evidence that the payments made to Boutros and/or Sidibe are evidence of corruption.

v. *Payments to Pentler*

195. As set out in Section 5.2.1 of Annex 1 of the Reply, there is a clear justification for the sums which BSGR paid to Pentler and its principals. Contrary to Guinea's suggestion that BSGR's payments to Pentler are evidence of a scheme of corruption,<sup>414</sup> the evidence at the Merits Hearing demonstrated that these payments were legitimate.

196. As BSGR was unfamiliar with Guinea, BSGR relied on Pentler to understand the country and its institutions and to provide practical assistance in establishing presence. Accordingly, they made the following payments: USD 60,000 to CW France on 27

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<sup>409</sup> Reply, Annex 1, para. 75.

<sup>410</sup> Tchelet/3/205/17-23 ("... the team of accountants that were there were very far removed from any of the project operations, and therefore they would have, on a default basis, allocated almost all payments to "consulting").

<sup>411</sup> Tchelet/3/206/14-17.

<sup>412</sup> Tchelet/3/206/4-12.

<sup>413</sup> **PROTECTED**

<sup>414</sup> CMRG, paras 857-860.

February 2006, USD 65,000 to FMA on 27 February 2006, USD 10,000 to Cilins on 5 April 2006 and USD 250,000 to FMA on 15 May 2006. **PROTECTED**

**PROTECTED**  
**PROTECTED** Steinmetz confirmed that Pentler assisted BSGR with setting up on the ground.<sup>416</sup> Moreover, this was a common practice and one that BSGR has used elsewhere when faced with the challenge of establishing a business in an unfamiliar country.<sup>417</sup>

197. This is in accordance with Ferreira's testimony as to how businesses work with local partners.<sup>418</sup> As for the total price, as explained in Section V below BSGR paid USD 22 million to acquire Pentler's shareholding, with an additional USD 8 million agreed in May 2010 and USD 4.5 million in July 2010. The following payments were part of that USD 34.5 million: USD 3 million on 15 April 2008; USD 1 million on 16 June 2008; USD 4 million on 28 July 2009; USD 22 million on 17 May 2010; USD 3 million on 5 August 2010; and USD 1.5 million on 22 March 2011. As confirmed by Ferreira's testimony, this price was not disproportionate; similarly the 17.65% shareholding was not surprising.<sup>419</sup> Indeed on numerous occasions, Ferreira confirmed that this was a good deal.<sup>420</sup> **PROTECTED**

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415 **PROTECTED**

416 Steinmetz/3/22/10-15 ("*... I don't think this was only introduction. I think at the beginning, till Asher Avidan came to the country and became a country manager, they was working on the ground, as far as I understood.*" Steinmetz/3/22/10-15; "*And all these things I'm saying with the knowledge which I only learned in 2008, not at the time, and not in real time. They opened the office, they bought the cars, they introduced people, they took employees, they ran around and -- et cetera, they discussed the licences.*").

417 Steinmetz/3/22/19-21 ("*And by the way, this has been done by BSGR in many, many other countries, very, very similar. It's not a one off.*").

418 Ferreira/5/39/10-17 ("*[The local partner's] contribution to the achievement is through their ongoing work and support of the project, firstly by not taking any mark-up on their services provided. So you are compensating for direct costs.*").

419 Ferreira/5/22/3-7; Ferreira/5/19/18-21.

420 Ferreira/5/27/15-20 ("*Q. So how can you affirm that there was nothing surprising in Pentler's remuneration if you don't know what services were provided? A. Because I know what they were buying. They were buying shares in what was recently announced as a potentially 1.1 billion tonne deposit.*").

421 **PROTECTED**

198. The evidence arising from the Merits Hearing thus supports BSGR's assertions that the payments BSGR made to Pentler were entirely legitimate. These payments are not evidence of corruption.

## V. PENTLER

199. This section deals with Guinea's allegation that BSGR used Pentler to execute a corrupt scheme to assist BSGR in obtaining its rights.<sup>422</sup> This builds on Sections 1.1.2 to 1.1.4 and 5.2 of Annex 1 of BSGR's Reply, which was reconfirmed by BSGR's witnesses during the Merits Hearing.

### 5.1 Pentler introduced BSGR to Guinea but played no substantive role in it obtaining its mining rights

200. The evidence on Pentler's role in 2005/06 was unanimous: Pentler introduced BSGR to the opportunity to mine iron ore in Guinea.<sup>423</sup> Once BSGR decided to explore the opportunity, Pentler provided practical assistance in establishing BSGR's presence.

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Ferreira also confirmed that it is common practice in Africa to have local partners on the ground looking for opportunities, akin to "brokers".<sup>425</sup> However, Struik was clear: Pentler was not expected to take any active role in the mining operations and they did not do so:

*"...you can't just come in as an investor, say you do poultry farming, and then suddenly you want to do some mining in a country. You have to show that you actually know what you're talking about. So this is my job, this is my background, this has been my career for almost 30 years, this is what I do."*<sup>426</sup>

<sup>422</sup> CMRG, paras 167-193; CMRG, paras 860-873.

<sup>423</sup> Steinmetz/3/18/5-22; Struik/4/294/6 to 4/295/21; Avidan/9/46/9-13; PROTECTED

PROTECTED

<sup>424</sup> PROTECTED

<sup>425</sup> Ferreira/5/16/3-5.

<sup>426</sup> Struik/4/60/5-11; Struik/4/115/4-7

201. Struik further emphasised that Pentler and its principals were "*absolutely not*" involved with negotiating the MoU dated 20 February 2006 with the Government of Guinea.<sup>427</sup> While Cilins was present initially in meetings with BSGR's lawyers, Linklaters, this was because Struik required assistance with French.<sup>428</sup> PROTECTED  
however, this did not occur. As Struik stated: "*I was introduced to the guy [Cilins], we used him initially; after that, I've said "Bye-bye, because I don't need you"*".<sup>430</sup> PROTECTED  
milestone payments are often used when you do not know whether a project will be successful, so that payments can be made in instalments, rather than upfront.<sup>432</sup>

202. Similarly, Avidan confirmed that Cilins was certainly not involved in the negotiations for the Base Convention for Blocks 1 and 2. PROTECTED  
Indeed, Guinea agreed in its opening submission that in the period of 20 March 2008 to 8 June 2010, Pentler was "*not involved at all in the [BSGR] project*".<sup>434</sup>

## 5.2 BSGR had no knowledge of Pentler's purported agreements with Bah, IST or Daou

i. *BSGR did not use Bah, IST or Daou to obtain its mining rights*

203. Struik was clear in his evidence regarding Bah and Daou. He met each of them once, in the entourage of Cilins in early 2006, but did not know why each was there or what their role was. Struik did not deal with either and had no reason to.<sup>435</sup> As regards IST, there is

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<sup>427</sup> Struik, 4/114/9-23.

<sup>428</sup> Struik/4/80/25 to 4/81/1.

<sup>429</sup> PROTECTED

<sup>430</sup> Struik/4/131/19-22; PROTECTED

<sup>431</sup> PROTECTED

<sup>432</sup> Struik/4/291/20 to 4/292/8

<sup>433</sup> Avidan/9/54-55 and PROTECTED

<sup>434</sup> Jaeger/1/158/11-12.

<sup>435</sup> Struik/4/126/14-19 ("*I met Daou once. He was part of the entourage of Cilins, right at the beginning. I don't know why he was there; I think he's related to Senegal, if I'm not mistaken. And that was it. I never dealt with the guy, never consulted him, never asked for any advice, never needed him*"); PROTECTED

no evidence that he exerted undue pressure on any of the Ministers of Mines to obtain mining rights for BSGR.<sup>436</sup> In relation to all three, Struik was "*totally unaware*" that any contracts existed between them and Pentler.<sup>437</sup> PROTECTED

PROTECTED Avidan and Struik were operational on the ground in Guinea: it is simply impossible that Bah and Daou were involved in BSGR obtaining its mining rights and the MoU with Guinea, without either of Struik or Avidan's knowledge. Not only did Struik and Avidan not know about their involvement, even Souaré, who was in charge of granting the mining rights and signing the MoU in 2006 had never met or heard of Bah and Daou.<sup>440</sup> PROTECTED

PROTECTED Clearly, Bah is yet another liar who Guinea is afraid to call as a witness.

204.

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PROTECTED However, this narrative relies only on the letters from Bah during his various extortion attempts.<sup>443</sup> Guinea repeatedly takes these letters at face value, but has failed to call Bah as a witness. The Tribunal must therefore rely on the testimony of those witnesses who were cross-examined. PROTECTED

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436 Section III above.

437 Struik/4/125/22.

438 PROTECTED

439 PROTECTED

440 Souaré/6/152/17-20 ("*Do you know whether Ismaël Daou or [Aboubacar Bah] at one point paid any bribes to Guinean officials? A. Well, I don't know even know these people, I didn't even know them.*"); Souaré/6/99/22-24 ("*Q. You had meetings with a company called Pentler; does that ring a bell? A. Pentler? No, I don't know that company.*"); Souaré/6/100/7-12 ("*Q. And Mr Lev Ran? A no, it's today that I've heard this. Q. Frederic Cilins? A. I think that's BSGR, isn't it? Q. It's Pentler. A. Oh, if you say so. I don't know.*"); see also Section VII below.

441 PROTECTED

442 Rejoinder, para. 223; Naud/1/119/4-11; PROTECTED

443 See Exhibit R-0174, in which Bah claims that Daou introduced Cilins to Bah; Bah presented Cilins to the Minister of Youth and Sports, Minister El Hadj Fodé Soumah; Minister Soumah presents Cilins to Mamadie Touré and IST. This document is relied upon by Guinea as fact: see paragraphs 133 to 135 of CMRG.

PROTECTED

(i). PROTECTED

(ii). PROTECTED

(iii). PROTECTED

Struik dismissed this as untrue in his witness statement,<sup>448</sup> but was not asked about it by Guinea during the Merits Hearing.

205. It comes as no surprise that Guinea has not called Bah as a witness. He is not credible. However, by the same token, Guinea cannot then rely on the self-serving narrative set out in Bah's letters to establish a link between BSGR's mining rights and the agreements said to have been entered into between Pentler and Bah, IST and Daou.

ii. *Struik was not involved in the drafting of the agreement between Pentler, Bah and IST*

206. PROTECTED

444 PROTECTED

445 PROTECTED

446 PROTECTED

447 PROTECTED

448 Struik, CWS-12, para. 30; see also Reply, Annex 1, para. 106.

PROTECTED  
PROTECTED

However, Struik's evidence on this was unequivocal.

207. The only logical explanation is that Cilins used Struik's laptop in the Novotel business centre in Conakry to draft the agreement, which is why it came to be found on Struik's laptop without his knowledge or involvement. This accords with Cilins' description of his working activities in Guinea at the time: that he would use the business centre in Novotel regularly and "*received copies of all of the materials prepared by visitors*".<sup>452</sup> Struik confirmed that he attended the same business centre in the Novotel until April 2006, and was told by Cilins that multiple people left information on their computers and that this is how Cilins gathered intelligence.<sup>453</sup> While Struik did not condone this behaviour, it does paint a picture of Cilins as someone who was comfortable in using other people's laptops.

iii. *Merloni-Horemans was not involved in the drafting of Pentler's agreements*

208. Guinea asserts that BSGR was "*directly involved*" in the drafting of two Pentler agreements<sup>PROTECTED</sup> and R-24) based on versions of them having been sent to Merloni-Horemans prior to their alleged signing.<sup>454</sup> <sup>PROTECTED</sup>

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Exhibit R-0165, page 3 (note: BSGR does not accept that this document (the Veracity Report) is accurate in its entirety).

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Struik/4/160/14 to 4/161/23.

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CMRG, para. 171; Rejoinder, para 236; Reply, Annex 1, paras. 19-28.

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She can only assume that she looked at the signature blocks in the agreements – in her role as a (temporary) administrator for Onyx<sup>456</sup> – and informed the Pentler principals that they were wrong.

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209.

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210. During the Merits Hearing, Guinea also sought to paint Merloni-Horemans as a controlling mind of BSGR, and therefore someone who would (i) be able to input into the drafting of agreements relating to large sums of money and technical aspects of the project in Guinea; and (ii) be able to bind BSGR with her knowledge. Indeed, its

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455 PROTECTED

456 See also Reply, Annex 1, para. 26.

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demonstrative exhibit 4 was described as depicting Merloni-Horemans as a "spider" controlling a large web of BSGR related companies.<sup>461</sup> This fell flat when put to Cramer and Merloni-Horemans. Cramer stated that he believed the depiction was "*a really unfair representation of Sandra's role*".<sup>462</sup>

211. In relation to Merloni-Horemans's role at Onyx (in the context of which she received the agreements) she was responsible for providing all of the company secretarial services and managing administration (rather than being a high level mastermind).<sup>463</sup> In relation to her role on the boards of BSGR companies, Cramer explained that "*if you were to create an organigram or a structure chart like this, and you pulled out any company secretary in any large company, you would find the same kind of representation*".<sup>464</sup> Merloni-Horemans agreed: she held the position of a non-executive director for 100 to 120 companies and in good faith relied on the management of those companies.<sup>465</sup> She simply did not control BSGR: and there is no evidence whatsoever that BSGR knew of the Pentler agreements through Merloni-Horemans (even if she had reviewed their terms, which she did not). Indeed, it appears that Guinea belatedly shares this view, conceding during the Merits Hearing that "*[s]he is the person back in Switzerland who actually handled the back office things*",<sup>466</sup> to which Struik also agreed.<sup>467</sup> This is illustrative of the fragility of Guinea's attempt to depict Merloni-Horemans as the "spider" controlling a web of BSGR companies.

iv. *Pentler was not a conduit for BSGR to make payments to Bah, IST and Daou*

212. Guinea has made much of the milestone payments in the agreement between BSGR and Pentler supposedly matching the total payments agreed between Pentler and Bah/ IST and

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<sup>461</sup> Van den Berg/2/99/21-24.

<sup>462</sup> Cramer/2/100/6-8.

<sup>463</sup> Cramer/2/88/15-17.

<sup>464</sup> Cramer/2/100/6-12.

<sup>465</sup> Merloni-Horemans/2/143/17-19; 2/145/25; 2/214/13-21.

<sup>466</sup> Ostrove/4/122/23-25.

<sup>467</sup> Struik/4/123/1.

Pentler and Daou. On this basis, Guinea alleges that Pentler is simply a vehicle through which BSGR could corrupt.<sup>468</sup> Yet, the evidence on this matter is, at best, confused.

213. First, Guinea relies on a misrepresentation of Struik's witness statement as regards BSGR's Milestone Agreement with Pentler. Struik stated in his witness statement that: "*Contrary to Guinea's suggestions, it was not Pentler's role to help BSGR achieve the milestones, neither was it obliged to do so*". Guinea interpreted this as him being candid and accepting that Pentler's role was not to assist on the ground – but to be the vehicle through which intermediaries would be paid.<sup>469</sup> Struik's oral testimony however put paid to Guinea's theory: he was not aware of the purported agreements with Bah, IST and Daou and they certainly played no part on the obtaining of mining rights.

214. Second, Guinea seeks to rely on the milestone payments listed in the various agreements without analysing the terms under which those payments will be made. **PROTECTED**

[REDACTED]

**PROTECTED**

[REDACTED]

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<sup>468</sup> CMRG, para. 199; Jaeger/1/161/9-14.  
<sup>469</sup> Rejoinder, paras 213 to 216, quoting CWS-12, para. 7.  
<sup>470</sup> **PROTECTED**  
<sup>471</sup> **PROTECTED**

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215. Third, the evidence of the one payment apparently made under these agreements is confusing, and relies on Bah's extortion letters, (as addressed above in paragraphs 172 to 174 and 204).
216. Finally, Guinea's theory as to Pentler passing on all the sums due from BSGR under the Milestone Agreement ignores the fact that Pentler was also granted a shareholding in BSGR. Given this, it was in line to receive more than the milestone payments in the event the project was a success. While Pentler is alleged to have in turn granted a shareholding

in Pentler to Mamadie Touré and Daou (in relation to which, BSGR has no knowledge), this was in relation to 46.62% of its shares.<sup>473</sup>

### **5.3 BSGR had no knowledge of Pentler's purported agreements with Mamadie Touré**<sup>474</sup>

217. Avidan and Struik reconfirmed their written evidence: they were aware of the existence of Mamadie Touré in 2006, but that she played no role in BSGR obtaining its mining rights. As to her agreements with Pentler, Struik was clear that he understood that Cilins (and/or his company, FMA) were doing business with her, but that to his knowledge this business was unrelated to BSGR. Struik understood from Cilins that Mamadie Touré was the distributor in Guinea of goods including pharmaceuticals, soap, condoms, chickens etc.<sup>475</sup>
218. Avidan said he knew there was "*some kind of*" agreement between Mamadie Touré and Cilins, but that he also assumed this was in relation to chicken and/or pharmaceuticals.<sup>476</sup> When pressed on what he understood by Mamadie Touré's references to BSGR's project being "*Cilins's project*" and BSGR having to report to Mamadie Touré, Avidan was clear: he did not take it seriously and did not know that there was an agreement between Mamadie Touré and Cilins/Pentler in relation to BSGR.<sup>477</sup>
219. As to BSGR's implied knowledge of the 20 February 2006 Memorandum of Understanding between Pentler and Mamadie Touré (through Ms Merloni-Horemans), see Subsection 5.2(iii) above.

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<sup>473</sup> Exhibits R-0024 and R-0185.

<sup>474</sup> This section builds on Section 1.1.3 of the Reply, Annex 1.

<sup>475</sup> Struik/4/127/8-16.

<sup>476</sup> Avidan/9/93 and 9/96/4-7.

<sup>477</sup> Avidan/9/95/7 to Avidan/9/96/7.

5.4 **BSGR's re-purchase of Pentler's shareholding in March 2008 was a legitimate business transaction and not linked to Mamadie Touré**

i. *The terms of the SPA do not relate to Mamadie Touré*

220.

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Guinea went to great lengths in its cross examination to seek to link this clause to Mamadie Touré, with whom (on Guinea's case – and denied by BSGR) BSGR had entered into a direct contractual relationship one month before the SPA.<sup>479</sup> However, it was clear from BSGR's witnesses that Article 1 does not have the significance which Guinea seeks to place upon it.

221.

Avidan, Struik and Merloni-Horemans were not involved in the drafting of or negotiation of the terms of the SPA. Neither Struik nor Avidan – who had roles on the ground in Guinea, and therefore would have information on "*local consultants*" – were asked at this time about the "*local consultants*" being used by Pentler. Indeed, Struik and Avidan were unequivocal that in 2008, Pentler had no role whatsoever in BSGR's projects, and therefore no use for local consultants.<sup>480</sup>

222.

Steinmetz confirms that he negotiated the terms of the SPA. In relation to Article 1, he states that it was "*a very common sentence to put in every agreement*"<sup>481</sup> and that he was not aware of any third party rights at the time on the Pentler shares ("*nothing*").<sup>482</sup> When pressed further in relation to this clause, Steinmetz confirmed again that he was not aware that there were consultants and advisors working for Pentler at the time.<sup>483</sup> Steinmetz was also consistent with his witness statements in relation to the rationale for the re-purchase. He recommended that Pentler's shares be bought out when he learnt that they would not

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CMRG, para. 283; Naud/1/134/1 to 1/21/135.

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Avidan/9/50/8-10 ("*For me, they [Pentler] had nothing to do with Guinea whatsoever.*").

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Steinmetz/3/38/9-14.

482

Steinmetz/3/38-41.

483

Steinmetz/3/40/17-19.

be contributing to the increasingly mounting costs of the project.<sup>484</sup> It had nothing to do with Mamadie Touré.

223. In any event, the spin which Guinea seeks to put on Article 1 (and the re-purchase generally) does not work chronologically. BSGR is alleged to have entered into direct contractual arrangements with Mamadie Touré on 27 and 28 February 2008 (which it denies). Steinmetz confirms that he commenced negotiations with Pentler in March 2008.<sup>485</sup> It does not make sense for BSGR to take direct responsibility for Mamadie Touré before it even commenced negotiating with Pentler: as then (on Guinea's theory) it would have a double responsibility to her. This is particularly so given that Avidan confirms that Pentler fought the re-purchase of its shares, and therefore an agreement was not guaranteed.<sup>486</sup> This theory also does not fit with the contract that BSGR is alleged to have signed directly with Mamadie Touré in June 2007 in relation to uranium, in which (on the face of the agreement), BSGR had *already* provided Mamadie Touré with a 5% shareholding in BSGR.

224. Similarly, Guinea seeks to infer something illicit from Article 8 of the agreement, which provides for confidentiality. Merloni-Horemans confirmed that this was not a "*secret agreement*" to her knowledge, and a confidentiality clause is a standard clause for inclusion in agreements.<sup>487</sup>

ii. *The value of the Pentler shareholding was legitimate*

225. Guinea asserts that Pentler received disproportionate consideration in exchange for their shares.<sup>488</sup> Again, this was not borne out in the oral evidence in the Merits Hearing.

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<sup>484</sup> Steinmetz/3/105/11 to 3/106/11.

<sup>485</sup> Steinmetz, CWS-1, para. 27.

<sup>486</sup> Avidan/9/186/18-24.

<sup>487</sup> Merloni-Horemans/2/189/8-19.

<sup>488</sup> CMRG, para. 217.

- a. The [REDACTED] for introducing BSGR to Guinea

226. Steinmetz, Struik and Avidan were convincing in explaining that free-carries of the kind given to Pentler in February 2006 are very common.<sup>489</sup> All three provided examples of other businesses which operated in this way, with Struik comparing it to a "finder's fee".<sup>490</sup> In response to questions from the Tribunal, [REDACTED]  
[REDACTED] In 2006, "there's no value" for the 17.65%, as "98% or 95%, both in exploration, both in start-up, in these kind of high risk ventures, go down and become zero".<sup>491</sup>

227. Ferreira's evidence was in agreement. He repeatedly commented that at the time of granting this shareholding there was no value in the project, and the 17.65% was "not surprising".<sup>492</sup> [REDACTED]  
[REDACTED]

- b. By 2008, the value of the 17.65% had increased substantially

228. Guinea intimated during the Merits Hearing that simply because BSGR only had exploration permits for Simandou North and South in March 2008, the 17.65% was still not worth much – and definitely not USD 22 million. Struik went into great detail over the course of his testimony to explain the difference between exploration permits, the work undertaken to discover a valuable deposit, and then a mining permit. While it is correct that at the time of the re-purchase BSGR held exploration permits (and not a mining licence), by this point the value of those permits had increased substantially from

<sup>489</sup> Steinmetz/3/20/6-23; Struik/4/118/17 to 4/119/3; Avidan/9/185/5-18.

<sup>490</sup> Struik/4/118/19-20 ("[...] *One of the ways we achieved revenue income as a consultant was what we could call a "finder's fee".*").

<sup>491</sup> Steinmetz/3/21/10-15.

<sup>492</sup> Ferreira/5/19/18-21 and 5/23/2-20.

<sup>493</sup> [REDACTED] and 5/23/10-13.

2006, because BSGR had performed drilling.<sup>494</sup> On this basis, Struik goes so far as to state that it may have been "*too cheap a deal*" for Pentler: i.e. the exploration permits in March 2008 may have been worth more than USD 22 million.<sup>495</sup>

229. This assessment was confirmed by BSGR's expert Ferreira. He went into great detail in relation to the drilling reports commissioned on behalf of BSGR in February 2008, in which it was noted that 1 billion tonnes of iron ore had been discovered at Zogota.<sup>496</sup> He described this as an "*Aha*" moment, and stated that on this basis, the project would have been valued at this point USD 300 million, and potentially USD 1 billion if drilling was conducted.<sup>497</sup> On this basis, he concluded that buying Pentler at this time would have saved BSGR an enormous amount of money,<sup>498</sup> that it was a good deal and that whoever negotiated the purchase "*did a good job*".<sup>499</sup>

230. Ferreira was pressed repeatedly by Guinea about what services Pentler performed in consideration of the USD 22 million. On each occasion, Ferreira was clear and consistent: the USD 22 million was not a payment for services, but for the purchase of a shareholding.<sup>500</sup> Ferreira's evidence was not contested.

## **5.5 BSGR did not seek to hide the presence of Pentler from Vale**

231. Merloni-Horemans confirmed that the restructuring of BSGR in January 2009 was not to hide Pentler or dupe Vale. She explained that the transfer of BSGR Guinea BVI from the

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<sup>494</sup> Struik/4/284-285 and in particular 4/285/18-23.

<sup>495</sup> PROTECTED

<sup>496</sup> Annex 4 to the expert report of Ferreira.

<sup>497</sup> Ferreira/5/11-22; 5/28/11-23 ("[...] *the people who had access to this information in 2008 saw an unbelievable opportunity in my view. If I was in that position, I would also try and buy these shares as soon as I could.*"); 5/61/13-14; 5/55/6 to 5/61/8; Annex 4 to the expert report of Ferreira.

<sup>498</sup> The USD 22 million purchase price for Pentler equated to a valuation for the project of USD 125 million, which was under half of Ferreira's valuation for the company at that time.

<sup>499</sup> Ferreira/5/27/15; 5/22/11-12; 5/24/1-4.

<sup>500</sup> Ferreira/5/24/17-19 ("*I don't believe that this acquisition that I'm referring to in paragraph 69 has anything to do with services rendered. This is to do with the purchase of shares.*"); Ferreira/5/27/15-20: ("*Q. So how can you affirm that there was nothing surprising in Pentler's remuneration if you don't know what services were provided? A. Because I know what they were buying. They were buying shares in what was recently announced as a potentially 1.1 billion tonne deposit.*").



BVI to Guernsey was at the request of a previous potential buyer (either the LIA or Chinalco) which was not in favour of BVI companies.<sup>501</sup> There was no illicit motive.<sup>502</sup>

## 5.6 Cilins' conviction does not implicate BSGR

232. Guinea again placed great weight on the transcripts of the conversations between Mamadie Touré and Cilins which were covertly recorded by the FBI, and even played crackly excerpts from the transcripts during the Merits Hearing. But no amount of theatre can detract from BSGR's consistent defence: BSGR did not know that Cilins would offer money to Mamadie Touré or seek to destroy documents.<sup>503</sup> This was abundantly clear during the testimonies of Steinmetz and Avidan.
233. Steinmetz was, again, unequivocal: "*I have never spoken to Cilins about this, never saw him about this contract, and I have never given him any instruction. This is just using my name for free*".<sup>504</sup> He further confirmed that he is not referred to as "number 1" and that Cilins' reference to him was simply bluffing.<sup>505</sup> Indeed, even Mamadie Touré in one of the transcripts (perhaps prior to being asked to implicate Steinmetz) repeatedly asks for a guarantee from Noy – and not Steinmetz: "*I thought that if Michael guaranteed it it would be fine*".<sup>506</sup> (As an aside, this undermines her multiple declarations as to her relationship with Steinmetz).
234. Avidan provided further detail. He stated that he had told Cilins that there was no use in seeking to obtain a declaration from Mamadie Touré: "*at the time we knew that the contracts are forged, we knew that she already signed an affidavit that the contracts are forged, and we knew that she already – what you call? – cooperating with you [DLA Piper] or with Alpha or his son*".<sup>507</sup> Avidan was pressed in relation to his knowledge of the cooperation at the time between Mamadie Touré and President Condé. He gave evidence that **PROTECTED**

<sup>501</sup> Merloni-Horemans/2/197/18-23; 2/213/5-10; 2/207/21-25. See also Reply, Annex 1, para. 132.

<sup>502</sup> See also Reply, Annex 1, para. 146.

<sup>503</sup> See also Reply, Annex 1, paras. 11-18.

<sup>504</sup> Steinmetz/3/80/8-11.

<sup>505</sup> Steinmetz/3/11/24 to 3/12/1 and 3/79/1-8.

<sup>506</sup> Exhibit C-0064, page 75 (page 147 of pdf). The French version is in R-0036.

<sup>507</sup> Avidan/9/129/21-25.

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and (ii) he had been informed by a Presidential Palace guard that Mamadie Touré had visited President Condé and perhaps provided an affidavit to him.<sup>508</sup> This of course accords with the representations provided by Guinea in the chain of custody correspondence: that Mamadie Touré personally handed the "originals" of the contracts directly to President Condé in February 2013.<sup>509</sup> PROTECTED

We will leave it to the Tribunal to determine where the truth lies. But Avidan's evidence does leave a clear impression of BSGR's view at the time: that there was little use in seeking a declaration from Mamadie Touré and there was certainly no reason to seek the destruction of documents which BSGR believed Guinea already had.

235. There was also some confusion during the Merits Hearing about what contracts Cilins had in his possession when he was arrested by the FBI. This was not helped by Guinea's somewhat loose explanations of this, as expanded upon below in Section VI. For the avoidance of doubt, when Cilins referred to contracts dated 27 and 28 February, this was on 11 April 2013, and not on the day he was arrested. In any event, as Guinea acknowledges, Mamadie Touré did not have "originals" of these documents with her (even on 11 April 2013) as she claims to have "sent" them. In previous discussions about sending documents, she referred to sending documents to "Michael".<sup>511</sup> This paints an even more confusing picture: we know that Mamadie Touré had already given copies of certain documents to Samuel Mebiame ("**Mebame**") (as referenced in the transcript). We have been told that she had given the originals to President Condé, but she claimed she had sent the originals to Noy. None of this ferrying around of documents (or indeed attempted destruction of documents) involves BSGR.

508 PROTECTED

509 Letter from Guinea to the Tribunal dated 31 July 2017.

510 PROTECTED see Section III as regards her reliability.

511 Exhibit C-0064, transcript pages 80-82 (pages 152-154 of pdf), transcript pages 80-81 (pages 152-153 of pdf) ("*MT: I sent the original of that one. FC: February 27 and 28 [inaudible] MT: Original. It's the same thing, the original of that one was sent.*"); transcript page 80 (page 152 of pdf) ("*MT: I sent it to Michael. FC: Mailed? MT: Yes*"); transcript page 82 (page 154 of pdf) ("*MT: Yes, there are some originals. FC: Yes, **there is just one. There is just one, and what's more, it's not the most important.***"). It is difficult to know which this "original" is, but it may be the declaration: transcript page 81 (page 153 of pdf) ("*FC: Do you want to keep that or destroy it? It's up to you, it's not needed, it was the declaration which you know we made a long time ago, which you made a long time ago, in April.*") (emphasis added).

236. BSGR does not know why Cilins sought to destroy certain documents: it has repeated that multiple times **PROTECTED**  
**PROTECTED** BSGR also does not need to speculate as to who may have forged at least R-27, R-28 and R-29 (although Guinea did ask BSGR's witnesses to hypothesise).

## VI. THE CONTRACTS

237. Guinea asserts that BSGR used Pentler to implement a corruption scheme to assist BSGR in obtaining its mining rights in Guinea.<sup>513</sup> **PROTECTED**  
**PROTECTED** and Mamadie Touré<sup>516</sup> to assist BSGR to be awarded the mining rights discussed above.

238. The agreements are not proof of corruption, even if they are accepted at face value. First, and as set out in detail above<sup>517</sup> there is no proof that BSGR was awarded any exploration permits or mining rights in Guinea through the involvement of Pentler, Bah, IST, Daou and Mamadie Touré. Not one of Guinea's witnesses could provide evidence that they had been approached or offered any bribes or been put under pressure from Pentler, Bah, IST, Daou and Mamadie Touré. Second, there is no evidence that any of the allegedly promised payments under these agreements have been made in performance of these agreements.<sup>518</sup> Finally, as will be demonstrated in this section, the terms of these agreements are confusing and do not lend themselves to Guinea's narrative, and the authenticity of some of these agreements is at least questionable.

239. Guinea also relies on agreements BSGR allegedly signed directly with Mamadie Touré (R-27, R-28 and R-29). As set out above in Section III, there is no evidence that these agreements are linked to any interventions from Mamadie Touré regarding the award of

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<sup>512</sup> **PROTECTED** see also Reply, para 15, Annex 1; Exhibit R-0169.

<sup>513</sup> CMRG, paras 167-193, 860-873.

<sup>514</sup> **PROTECTED**

<sup>515</sup> **PROTECTED** R-185.

<sup>516</sup> Exhibit R-188.

<sup>517</sup> Sections II and III.

<sup>518</sup> Section IV.

BSGR's mining rights. Guinea's witnesses do not provide any evidence that Mamadie Touré acted upon these contracts and exerted pressure on President Conté. As with the Pentler contracts above,<sup>519</sup> the terms of these agreements do not make sense on their face and BSGR has been consistent throughout that these agreements are forgeries. This will be demonstrated below by looking first at the evidence concerning the provenance of the agreements, second at the evidence on the record and established during the Merits Hearing, and third at the results of the expert procedure.

240. Notwithstanding that the contracts are not evidence of corruption, they have taken on an inflated prominence in this arbitration, and have led to much confusion. BSGR has sought to address this confusion below.

#### **6.1 Guinea's criticisms of BSGR's position in relation to the authenticity of the documents is unfounded**

241. In the Merits Hearing, Guinea criticised BSGR's apparently confused position in relation to the authenticity of contracts in these proceedings.<sup>520</sup> However, BSGR's position has been clear. In relation to the contracts BSGR is alleged to have signed (R-27, R-28 and R-29), it has always maintained that these are forged.<sup>521</sup>

242. In relation to the contracts to which BSGR is not alleged to be a party, BSGR has no first-hand knowledge: it has never claimed to.<sup>522</sup> BSGR's position in its Reply was based on what Noy then told it: that he believed those contracts were genuine, save for R-30 which was forged to make it seem connected to BSGR.<sup>523</sup> This was before Guinea's comments (as to provenance and chain of custody) and Lansana Tinkiano's ("**Tinkiano**") comments (as to legalisation) in the Merits Hearing. BSGR now cannot be certain that Noy's recollection was correct.<sup>524</sup> In fact, BSGR distanced itself from Noy and he has since

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<sup>519</sup> Section V.

<sup>520</sup> See Naud/1/128/19-21; Jaeger/1/156; Jaeger/9/11/15 to 9/13/20.

<sup>521</sup> Cramer/2/115/7-12.

<sup>522</sup> BSGR's original position to the Technical Committee when it was first presented with these documents was that they were forged: BSGR had never seen them before.

<sup>523</sup> Reply, Annex 1, paras. 30 and 32.

<sup>524</sup> Wolfson/4/26/21-25; Libson/9/21/12-22. See also BSGR's second letter to the Tribunal dated 26 June 2017, pages 1 to 2, and paragraph 11 of Procedural Order No. 12.

confirmed that he will not cooperate with BSGR in relation to the provision of information regarding these agreements.<sup>525</sup>

243. BSGR's position as to the contracts to which it is not a party is that:

- (i) R-30 is forged;
- (ii) the authenticity of R-25 and R-26 is seriously in question after Tinkiano's cross-examination;
- (iii) the contents of R-269 are false.<sup>526</sup>

244. BSGR does not have a view on any other contracts to which it is not a party, whether a Disputed Document or not, except to say that any document bearing Mamadie Touré's signature should be approached with extreme caution (see Subsection 3.3 above).

## **6.2 The chain of custody of the contracts raises suspicion as to their authenticity and the role of Guinea**

245. BSGR's knowledge of the provenance of the BSGR contracts is short and consistent: Struik did not see R-27 until these proceedings. Avidan saw R-28 and R-29 in relation to the various shakedown attempts: first when he was arrested in Guinea in September 2009, then in June 2010 when Mamadie Touré's lawyer sent them in an effort to extort money from BSGR and finally in the conversations with Walter Hennig ("**Hennig**") in 2012.<sup>527</sup> When those contracts were created and what happened to those contracts in the intervening period and up to their provision to the FBI is a long and confused story, involving a cast of colourful characters.

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<sup>525</sup> Letter from BSGR to the Tribunal, 31 July 2017, with enclosure from Noy stating that "*I do not have any original copies or any documents relating to this matter. I would appreciate very much not being bothered anymore with this issue*".

<sup>526</sup> i.e. indicating BSGR paid Mamadie Touré USD 2.4 million., It may be "*genuine*" in that it may not have been altered and may have been created authentically – but for illegitimate purposes.

<sup>527</sup> Avidan/9/107/2-14 ("*Q. But the first time you saw these documents was when Walter Hennig came to your office; is that correct? A. No, it was when a lawyer named Moussi sent us a letter with the documents, those particular contracts. Q. Okay -- A. When I was with the general, I didn't see those documents, when I was arrested. Q. Okay. But when that lawyer named Moussi came to you, he had copies of these contracts? A. He came with those contracts, yes. Q. And then later, in 2012, Mr Hennig also had copies of these contracts. A. Yes.*").

246. [REDACTED]

247. [REDACTED]

248. In contrast, Guinea has speculated in correspondence that [REDACTED] [REDACTED] Mebiame played no role in the chain of custody, and had only copies of "some" of the "Disputed Documents" which he showed to Minister Fofana.<sup>531</sup> All BSGR knows is that the role of Mebiame in this saga is suspicious. This, of course, is the same Mebiame who pleaded guilty in the United States to "routinely" paying bribes to senior government officials involved in the award of mining, oil and mineral concessions in Guinea, including Mohammed Alpha Condé and a member of the Strategic Committee which revoked BSGR's rights: he was clearly invested in the removal of BSGR's mining rights.<sup>532</sup>

249. From the FBI transcripts of the conversations between Mamadie Touré and Cilins, BSGR knows that at some point before March 2013, Mamadie Touré met up with Mebiame

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528 [REDACTED]  
529 [REDACTED]  
530 [REDACTED]

531 Letter from Guinea to the Tribunal, 31 July 2017, D(d).  
532 Reply, paras. 206 to 228 and 259.

again.<sup>533</sup> BSGR also knows from Guinea that in February 2013, various (unspecified) contracts were back in the hands of Mamadie Touré and prior to this date, she apparently held the Disputed Documents in the United States.<sup>534</sup> It therefore seems that Mebiame may have returned to Mamadie Touré some of the (unspecified) contracts. The FBI transcripts also suggest that Mamadie Touré may have in turn "*mailed*" some of these (unspecified) contracts to Noy:<sup>535</sup> again, it is unclear.

250. BSGR is also aware – as recognised by Guinea – that at certain points, copies of certain (unspecified) contracts were in the hands of a general in the Guinean army connected to Mamadie Touré and shown to Avidan in 2009, and Walter Hennig (an associate of Mebiame) who again showed certain documents to Avidan in March 2012.<sup>536</sup> Cramer also stated that he had been handed documents by journalists and various business intelligence firms and had "*seen other documents floating around*".<sup>537</sup>
251. This brings us to the information provided by Guinea as to how various contracts then found their way to the FBI. During the Merits Hearing, Guinea submitted on at least four separate occasions that Mamadie Touré gave certain "*original*" contracts directly to the FBI prior to the arrest of Cilins in April 2013 – implying that these were the contracts that Cilins came to destroy.<sup>538</sup> However, BSGR knows now that neither Cilins nor Mamadie

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<sup>533</sup> Exhibit C-0064, page 78 of the transcript (page 150 of PDF) ("*FC: This Samuel [Mebiame] business, it's... Whoever sent him to you, he has a lot to answer for. It's Sampil or I don't know who. He's made a great big mess for you, sending you this Samuel. He's really got you in big trouble, big trouble.*") The French version is in R-0036.

<sup>534</sup> Letter from Guinea to the Tribunal, 31 July 2017, C(a).

<sup>535</sup> Exhibit C-0064 page 80 (page 152 of PDF). In turn, Noy confirmed to BSGR that he does not hold any original documents: see letter from BSGR dated 31 July 2017 with enclosure from Noy.

<sup>536</sup> Letter from Guinea to the Tribunal, 31 July 2017, B(a).

<sup>537</sup> Cramer/2/122/12-21.

<sup>538</sup> Ostrove stated that "*I was very careful in what I said, and I don't believe that I said that Mrs Touré gave those documents [the original contracts] directly to the FBI*" (4/30/1-3). However, the record tells a different story: on four occasions, Ostrove submitted that Mamadie Touré gave the contracts directly to the FBI, despite having direct knowledge to the contrary, and being personally involved in the transfer of contracts from Guinea to the FBI. See for example: Ostrove/4/18/12-17 ("*Then a contract the original of which is held by the FBI. This is how we were able to indicate whether Mrs Touré had these documents or not, because **she was the one who provided the originals to the FBI**, and therefore it was the only way we could determine which were originals and which were not.*"; 4/19-20:"*PROFESSOR VAN DEN BERG: (Interpreted) **You said that these are originals of contracts that Mrs Touré gave to the FBI**, and for this reason they are originals that she mentioned to Mr Cilins? MR OSTROVE: **Yes, these are the documents that she held the originals of, and our suggestion is that when Mr Cilins came to ask to destroy these documents, these are the ones** [...]. PROFESSOR VAN DEN BERG: **Yes, but during this meeting at the airport she had these originals with her***

Touré had in their possession any contracts at the point of Cilins' arrest. It is not clear exactly what contracts they discussed in their conversations: indeed, even though Guinea points to a reference to contracts dated "27 and 28 February", it is clear that Mamadie Touré was **not** holding originals of these.<sup>539</sup>

252. In fact, and as clarified by Guinea following BSGR's intervention, Mamadie Touré gave these "*originals*" to Guinea in February 2013 (i.e. over a month **before** Cilins was arrested),<sup>540</sup> they were scanned in by Ostrove between 3 and 5 April 2013 and were then sent to the FBI on 30 August 2013 (i.e. six months after being received in Guinea). BSGR still has not been informed on what terms Mamadie Touré provided those contracts to Guinea (despite requesting this information on 28 May 2017),<sup>541</sup> and whether the provision related to the payment by Guinea of money to her. This casts even further doubt on Guinea's repeated statements that Mamadie Touré is a credible witness. Guinea has also refused to confirm what documents Mamadie Touré still had in her possession after handing the "*originals*" of the Disputed Documents to Guinea – although it asserts that she made photocopies of an unspecified set of contracts before travelling to Guinea in February 2013.<sup>542</sup>

253. As to whose hands the "*original*" contracts passed through in those six months in Guinea, the position is again unclear. In correspondence (and when pressed) Guinea submitted that Mamadie Touré handed the "*originals*" by hand directly to Alpha Condé. In turn, Alpha Condé apparently kept the documents in a safe to which only he, his son and the Minister of Justice had access. **PROTECTED**

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*precisely, if I remember rightly. She was saying, "I've got the originals somewhere, I need some keys to access them", et cetera, the complete story. MR OSTROVE: Yes, of course, because it was the FBI who held the originals."; 4/20/22 to 4/21/2: "MR OSTROVE: [...] she had no original with her because she had already worked with the FBI at that stage, and she says, "Oh, no, no, I didn't bring them, I put this in a safe place, I don't have the key with me", et cetera, so that he couldn't put his hands on them."; 2/8/12-14: "[...] we know that Mamadie Touré had many of these Pentler contracts with her, because the FBI in fact got hold of these contracts through Mamadie Touré." (emphasis added)*

<sup>539</sup> Ostrove/4/20/10-11.

<sup>540</sup> Letter from Guinea to Tribunal, 16 June 2017.

<sup>541</sup> Letter from BSGR to Guinea, 28 May 2017, page 4, question 5.

<sup>542</sup> Letter from Guinea to the Tribunal, 31 July 2017, D(f).



**PROTECTED** casting doubt on either Guinea's explanation, or her credibility.<sup>543</sup> And there have been serious concerns raised about Alpha Condé's son's role in various corrupt schemes in Guinea, including the attempt to extort USD 1.25 billion from BSGR in February 2011 and the direct receipt of in kind payments from Mebiame.<sup>544</sup> Indeed, Guinea confirmed that it was in fact Alpha Condé's son, Mohammed, who handed over these documents to Ostrove to scan in: and therefore he has played a direct role in the chain of custody.<sup>545</sup>

254. The (limited) confirmations provided by Guinea relate only to those "*originals*" in the FBI's possession: i.e. R-24 to R-29 and R-31 to R-32. We are still at a loss as to the status of at least twelve other documents which have floated around in these proceedings, and which are relied upon by Guinea. Guinea's letter of 31 July 2017 confirmed that it had no information as to the location of originals of R-30 or R-346, or how R-269 came into the hands of the FBI. It later transpired that Guinea sent DOC A, B and C to the FBI on 30 August 2013 (with R-33), but this information was not provided to BSGR until 7 November 2017, after the document inspection. And BSGR has no information as to the provenance or status of **PROTECTED** R-185 **PROTECTED** or **PROTECTED**. Add to this confusion that Mamadie Touré's statement of 8 February 2013 referred to her still being in possession of certain documents (originals or photocopies), but Guinea has stated it is unable to determine from her description what documents she is referring to.<sup>546</sup>

255. While Guinea states (self-servingly) that the chain of custody information is "*not pertinent*", BSGR disagrees.<sup>547</sup> In relation to how these contracts came into existence, BSGR has the word of Mamadie Touré, Bah or Tinkiano: all untrustworthy and/or unreliable characters. But then the story of how some of the contracts came into the hands of the FBI – and for what purpose – becomes even murkier. BSGR knows for

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Steinmetz/3/59/1-7; 3/62/10-13; Reply, paras. 243 to 247 and 212(iv).

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Letter from Guinea to the Tribunal dated 31 July 2017, answer A(g).

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Letter from Guinea to the Tribunal dated 31 July 2017, answer D(g); see also BSGR's first letter to the Tribunal dated 26 June 2017, section 3(ii).

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Jaeger/9/19/15 to 9/20/1.

certain that the contracts passed through the hands of Mebiame, Hennig, Alpha Condé and Alpha Mohammed Condé. All four characters have been accused of corruption, and all four characters had an interest in BSGR's rights being revoked. This adds to the confusing picture surrounding these contracts as established on their terms alone. In short, not a single one of the "contracts" at the heart of this case can be relied upon. As the Experts made clear it cannot be known when they were created or by whom.<sup>548</sup>

### **6.3 The terms of the contracts and agreements are confusing, do not support Guinea's narrative and raise questions as to their authenticity**

256. The story of the contracts is more confusing than just how they came to be created. They make no sense on their face. They make no sense read individually or as a whole. BSGR has tried to understand the contracts but doing so is dependent on IST, Bah, and Daou and the Pentler principals, none of whom gave direct evidence and whose indirect evidence, where made, is not to be believed or now raises questions.
257. As Guinea is short of direct evidence, it has built its narrative of BSGR's culpability around these contracts (and the word of Mamadie Touré), but a proper review of the contracts undermines the sense which Guinea has read into them and what it has tried to present to this Tribunal.
258. Contrary to Guinea's position expressed during the Merits Hearing,<sup>549</sup> BSGR does not have the burden of proof to show that these documents are forgeries. It is Guinea who is relying on these documents and thus, has to prove that these are genuine documents.<sup>550</sup> Furthermore, it is Guinea's burden to explain what these agreements mean and how they

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<sup>548</sup> Expert Hearing/LaPorte/1/247/22-24: ("[...] I do agree with Mr Radley: we can't establish the date of when they were actually printed").

<sup>549</sup> Jaeger/9/1/17-24 ("*Interpreted*) I don't think it is our responsibility to open up this debate concerning documents, since BSGR is the party to allege that they are fakes or forgeries. It's up to them to prove that this is the case, and I consider that on this particular request they are the Claimants. It's not up to us to open the debate. We would like to have the Claimant's position.").

<sup>550</sup> Daele/9/212/8-13 ("*I had a comment in relation to the cost: that obviously it is the burden of proof of Guinea to show that these documents are authentic. So from our point of view, also taking into account that it's a request of the Tribunal, we think the cost should be shared. But that's the only comment I have for the moment.*").

fit together. So far, Guinea has relied on these contracts without having a detailed look at what the agreements actually say.

259. As Prof. Van den Berg rightly noted, "*if you are talking about corruption, you have to be very specific*".<sup>551</sup> BSGR will show below that Guinea has been anything but specific. BSGR will first go through the agreements that were allegedly part of implementing a "corruption scheme" and demonstrate that upon closer examination they do not make sense. In the second part BSGR will deal with the Final Report of the Tribunal Appointed Experts (the "**Experts**") and the Expert Hearing. The picture the Tribunal is left with is a confusing mix of agreements, which do not seem to fit together, and which do not support the narrative of BSGR's conduct which Guinea has tried to peddle.

i. PROTECTED [REDACTED]

260. PROTECTED [REDACTED]

PROTECTED [REDACTED]

PROTECTED [REDACTED]

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<sup>551</sup> Van den Berg/1/190/10-11.

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ii. *R-24: Memorandum of Understanding between Pentler and Mamadie Touré, 20 February 2006*

261. R-24 is a "Disputed Document". BSGR takes no position as to the authenticity of the document, except that it should be treated with caution for the reasons as set out below.

(i). BSGR notes that even the Experts concluded that there were only "indications" that the signatures of Mamadie Touré on the various Disputed Documents were

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552 Paragraph 95 above.

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written by the same person. BSGR's witnesses were clear: they had no knowledge that any such agreement was signed with Mamadie Touré.<sup>555</sup>

- (ii). Guinea claims that the document was signed on 20 February 2006 and places great weight on the MoU between BSGR and Guinea being signed on this same day: i.e. connecting the Government's award to BSGR of the first right of refusal for Blocks 1 and 2 Simandou with the signing of "*four unlawful compensation agreements*".<sup>556</sup> While it has already been set out above that Guinea failed to establish a link between these alleged "unlawful compensation agreements" and the granting of a right of first refusal to BSGR<sup>557</sup> in the MoU, it is not clear at all whether this document was signed on 20 February 2006. There is a discrepancy between the signing date on the contract (i.e. 20 February 2006) and the legalisation date (i.e. 2 or 9 March 2006). The Experts failed to deal with this discrepancy, but simply assume without providing any explanation<sup>558</sup> in their final report (the "**Final Report**") that the document was "*purported to have been signed and "legalized" on 2 or 9 March 2006*".<sup>559</sup> They do not appear to have taken the printed date into account.

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<sup>555</sup> Struik/4/127/21-22 ("*it's not my decision, I wasn't involved with this. This is not my contract.*"); Steinmetz/3/46/25 to 3/47/2 ("*I was not aware about Mamadie Touré till late, 2000 -- I don't remember the date now -- '11/12, probably. Never heard the name.*"); **PROTECTED**

**Merloni-Horemans/2/191/17-21** ("*Q. And at that time you didn't think back to those agreements that you had looked at in February 2006 with Mr Bah, Mr Touré, Madame Touré? A. As I said, I didn't read those agreements in 2006; I only noticed them in 2013.*"); Avidan/9/93/4 to 9/93/10 ("*Q. In fact, Mr Avidan, you were smart enough or savvy enough to figure out in 2006 that Frédéric Cilins must have had some kind of arrangement with her, right? A. No. No. At the time -- at the time I'm not sure that I knew something. He told me that he is doing business with her with chicken or pharmaceutical, and that was the case.*")

<sup>556</sup> CMRG, paras 170 and 201.

<sup>557</sup> See paras 92-96 above. In any event, there is also no evidence that Mamadie Touré intervened on behalf of BSGR to obtain the permits in North and South Simandou and the MoU.

<sup>558</sup> There is no explanation provided by the Experts for why they have not taken the printed date into account (and compare this to their position on R-28 and R-29 regarding the "assumed" date, in relation to which see paras 313-315 below.)

<sup>559</sup> Final Report, para. 69; It may be that the Experts failed to consider the difference in the two dates on the documents, perhaps because they do not speak French and did not understand the phrase "*Signé à Conakry en date du 20 février 2006*". This only justifies BSGR's question to them on their understanding of French, which was of course rebuffed. See Annex L to the Final Report, question 6 ("*Q: Do the Experts speak French? If not, were the Experts provided with translations of the French documents? Do the Experts consider this to be*

(iii). The terms of the agreement are confusing. While Guinea argues that Mamadie Touré was granted a "*free participation*" of 5% within the BSGR project at Simandou, via a 33.3% shareholding in Pentler,<sup>560</sup> it fails to engage with the actual terms of the document (which we will see is a repeated theme) and does not provide any proof that this agreement was implemented at all. The reality is that it was not. The agreement relies on a recital which claims that BSGR submitted a proposal to the Government of Guinea allowing the state a 15% shareholding (in an unspecified entity) and a 5% shareholding for Mamadie Touré as a "*local partner*".<sup>561</sup> Clearly no such proposal was made, nor does Guinea attempt to assert this. There is no evidence that a public company was established or that a shareholding was ever granted to Mamadie Touré.

iii. *R-185: Second Memorandum of Understanding between Pentler and Daou*

262. R-185 is not classified as a "Disputed Document", and there is no information as to its provenance, or whether an "*original*" exists. BSGR takes no position as to the authenticity of the document, except that it should be treated with caution.
263. As with R-24 above, this agreement claims that BSGR proposed to the Government of Guinea that Daou would be assigned a 2% shareholding in the project to exploit Simandou, and that this shareholding will only be granted (via a 13.32% shareholding in Pentler) once the public company is established. There is no evidence of either event occurring, neither Struik nor Avidan dealt with Daou, and Minister Souaré had not heard of him.<sup>562</sup>

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*relevant in relation to the consideration of whether or not anything of substance could have been added to the text of the Disputed Documents? A: [...] Therefore, no changes or edits will be incorporated into the Final Report based on whether we are fluent in French".).*

<sup>560</sup> See CMRG, paras 182 to 192.

<sup>561</sup> Exhibit R-0024, Article 1 claims that the shareholding in Pentler will be transferred only when the public company is established to develop the Simandou project.

<sup>562</sup> See paragraph 95 above.

iv. [REDACTED]

264. [REDACTED]

v. *R-25 and R-26: Letters of commitment from Pentler to Mamadie Touré, undated but legalised on 21 July 2006*

265. R-25 and R-26 are "Disputed Documents". Both letters are undated, but legalised on 21 July 2006. This does not phase Guinea: it simply attempts to fit the letters into a convenient place in its narrative,<sup>564</sup> which does not make sense looking at the terms of these letters.<sup>565</sup> And so with no evidence, Guinea asserts that after BSGR applied for the bauxite licences in January 2006, Pentler sent Mamadie Touré R-25, and then after BSGR obtained the permits (on 10 May 2006), it had to "assure" Mamadie Touré that she would receive compensation, and so sent R-26. There is no evidence for this timing, and in any event, it does not make sense. Why would there be a five month wait (for R-25) and a two month wait (for R-26) between the sending of the letters (on Guinea's case) and their legalisation? It is also unclear why R-26 would be necessary, if the purpose of R-25 was already to assure Mamadie Touré that she was to benefit from the bauxite exploration permits. [REDACTED]

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<sup>563</sup> Section IV

<sup>564</sup> See CMRG, paras. 219 to 230.

<sup>565</sup> Exhibit R-0025 states that BSGR has submitted an application for bauxite exploration permits, and that Mamadie Touré will benefit due to her "indirect" shareholding of 5% in BSGR's project (through a shareholding in Pentler). R-0026 is similar, except it refers to BSGR having obtained bauxite exploration permits, and the coordinates of the areas for those permits differ slightly to those in R-0025. Neither agreement appears to grant Mamadie Touré any additional rights (if she had any in the first place): rather that she has a "de facto" shareholding in the bauxite project, through her 33% shareholding in Pentler (granted by the 20 February 2006 agreement). It is unclear what this means, and there is still no evidence that her shareholding in Pentler was ever granted. As to Guinea's allegation that Mamadie Touré was paid USD 250,000 see Section IV above.

<sup>566</sup> [REDACTED] see also Section IV above.

266. As to the legalisation, Tinkiano's evidence, as noted by the Tribunal itself was extraordinary. First, as a matter of general rule, he said that all documents that came before him were signed and that when he certified them he insisted on ID being provided. Yet, he made an exception in relation to R-25 and R-26. He does not recall asking for proof of ID from Lev Ran. As to Mamadie Touré who did not even sign the documents, he did not need proof of ID because she attended with the "Red Berets" and, on the strength of that, and despite the fact he did not verify the identity of Lev Ran or insist that Mamadie Touré sign the documents, he applied his stamp. This contradicts his witness statement, in which he stated that "*a lady*" accompanied by "*a white man*" asked him to legalise **their** signatures: i.e. indicating they both had signed the document.<sup>567</sup> He had never seen Mamadie Touré before and did not know whether the woman who attended with the Red Berets was, in fact, her. Given Tinkiano's evidence, BSGR cannot take a position on the authenticity of these documents. In fact, even if they are genuine, there are questions as to when the documents were created (which undermines the link to BSGR's bauxite rights) and whether they granted Mamadie Touré any additional rights.
267. The Final Report concludes that there are "*indications*" (i.e. the weakest form of conclusion) that the signatures of Tinkiano on the various Disputed Documents were written by the same person. The agreements were not even signed by Mamadie Touré, and Robert Radley ("**Radley**") raised doubts in relation to the signature of Lev Ran on the documents.<sup>568</sup> The serial numbering on the stamps on R-25 and R-26 are *lower* than the serial numbering on the stamp on R-24, purportedly legalized four months *earlier*.<sup>569</sup> As set out in more detail below, there were five inconsistencies regarding R-26, which were ignored by the Experts.

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<sup>567</sup> Tinkiano, RWS-3, para. 6.

<sup>568</sup> Expert Hearing/Radley/2/32/21-25.

<sup>569</sup> Final Report, paras. 100 and 117.



vi. *R-27: Memorandum of Understanding between BSGR Guinea and Matinda, dated 20 June 2007*

268. This is the first agreement said to have been entered into directly between Mamadie Touré and BSGR. It is a Disputed Document and BSGR has been consistent that this is a forgery.

269. On Guinea's case, BSGR was granted uranium permits on 28 February 2008, and then "*a few weeks later*" signed R-27 with Mamadie Touré to reward her for her contribution in obtaining these permits.<sup>570</sup> To support its case, Guinea relies on (i) Mamadie Touré's declaration confirming she signed the document; and (ii) Tinkiano's legalisation, who are both unreliable for the reasons set out above.<sup>571</sup> It is because of the frailty of this "*evidence*" that Guinea stated during the Merits Hearing that this agreement, together with R-25 and R-26 for bauxite, are "*not within this arbitration because they [BSGR] gave that up later*".<sup>572</sup> Even though Guinea admits that the uranium permits are not subject of this arbitration and despite the lack of evidence that Mamadie Touré had an influence on the award of these permits to BSGR, it still insists that R-27 was a genuine document. This has been proven to be wrong by the evidence heard during the Merits Hearing. In addition to the factors in Section 1.1.1 of Annex 1 to BSGR's Reply, BSGR also draws the Tribunal's attention to the following:

(i). Struik was disarmingly frank about the document. Yes, the signature looks like his, but no, he did not sign it.<sup>573</sup> His French was not good and he would not have dated the document in French or described his job title in French. He does place

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<sup>570</sup> CMRG, para. 242

<sup>571</sup> See Subsection 3.3 and para. 266 above.

<sup>572</sup> Naud/1/130/7-13.

<sup>573</sup> Struik/4/200/1-3 ("A. *I not only contest to sign this document, I also contest drafting this document. I did not do this document, I did not sign this document.*"); 4/201/14 ("*I did not sign this document.*"); 4/203/18-24 ("*I don't know who did that. But it's not my signature. It looks like my signature, but it is not [...] you have plenty of examples of my other signature – of my signature actually, and you see that it's not the same. And also I wouldn't sign a letter like this, by the way.*"); 4/206/2-4 ("*PROFESSOR VAN DEN BERG: In R-27, that is not your handwriting? A. No.*").

a dot at the end of the signature but was content to accept it may have been there under the "M" of "Materielle".<sup>574</sup>

- (ii). Prior to this arbitration, Struik had only seen a version of this contract which had been provided by Mamadie Touré in a blackmail attempt in 2009. Whereas R-27 is legalised, the version which Struik had previously seen (and marked Forged) is not.<sup>575</sup> The Experts were invited to comment on this difference overnight, but did not do so.<sup>576</sup>
- (iii). Guinea relies on Mamadie Touré's claims that she signed this agreement in the presence of Steinmetz, Struik, Avidan, Saada, Bangoura and IST.<sup>577</sup> Struik, Avidan, Steinmetz and Saada<sup>578</sup> refute this (and Guinea failed to put this to Steinmetz or Avidan in the Merits Hearing). As set out above,<sup>579</sup> Mamadie Touré's account is clearly not credible.
- (iv). Tinkiano had virtually no recollection of this document. His evidence was all over the place. He could not recall witnessing the document or verifying the ID of either Struik or Mamadie Touré. The best he could offer was it was likely that a lawyer on behalf of Mamadie Touré may have come to his office to get the document stamped. He could not assist on how he may have checked that lawyer's authority or if, indeed, it did happen. Struik was not even asked by Guinea if he had attended the office of Tinkiano.
- (v). In two places on the document, BSGR is spelt "*BSGR Ressources*", i.e. 's' appears three times in Resources. It is inconceivable that Struik would have signed a document with such a fundamental error.

270. Furthermore, the terms of the agreement do not make sense:

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<sup>574</sup> Struik/4/207/12 to 4/208/10.

<sup>575</sup> Compare C-0356 with R-0027.

<sup>576</sup> Expert Hearing/1/236/9 to 1/237/3.

<sup>577</sup> CMRG, para. 246; Exhibit R-0035, para. 17.

<sup>578</sup> Saada, CWS-6, para 8; Steinmetz, CWS-1, para. 40; Avidan, CWS-3, para. 130; Struik, CWS-2, para.109.

<sup>579</sup> See Section III

- (i). First, there were not a "*few weeks*" between the granting of the permits and the agreement as Guinea states:<sup>580</sup> there were four months. Why would Mamadie Touré wait this long to be rewarded? Second, it states that BSGR approached the Guinean authorities to establish a partnership with Mamadie Touré's company, Matinda, to develop iron ore in Simandou. Yet, the agreement is for uranium, not iron ore, and there is no evidence whatsoever (and indeed none from Guinea's witnesses) that BSGR told the Guinean authorities it was establishing a partnership with Matinda.
- (ii). BSGR Guinea apparently agreed to transfer 5% of its shares to Matinda, in return for the efforts Mamadie Touré apparently made in BSGR obtaining uranium permits. This is nonsensical. It is unclear how this fits with the 5% shareholding she was apparently previously granted by way of R-24, R-25 and again in R-26. And, crucially, there is no evidence that a transfer of shares was ever made.

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The agreement was simply not performed.

271. This is the context in which the findings of the Experts during the Expert Hearing must be considered, in relation to which see Subsection 6.5 below.

vii. *R-28 and R-29: Agreements between BSGR and Matinda, dated 27 and 28 February 2008*

272. These are the second and third agreements said to have been entered into directly between Mamadie Touré and BSGR. They are Disputed Documents and BSGR has been consistent that they are forgeries.

273. In R-28, BSGR allegedly commits to pay USD 4 million as commission for the procurement of Blocks 1 and 2: with USD 2 million to Mamadie Touré and USD 2 million to unspecified parties who apparently assist.

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<sup>580</sup> CMRG, para. 242  
<sup>581</sup> Exhibit C-0271.

274. In R-29, Guinea asserts that BSGR Guinea committed to granting Matinda a 5% share in Blocks 1 and 2. Even if these agreements were genuine, which has always been disputed, there is no evidence that Mamadie Touré has had an influence on the award of the permits in Blocks 1 and 2. Taking the lack of evidence of Mamadie Touré's influence, together with the factors as set out in the Reply<sup>582</sup> and below, there is no doubt that these agreements are forgeries:

- (i). Both R-28 and R-29 refer to Asher Avidan (in both the heading and signature blocks) as "Avidan Asher" (i.e. surname then first name). This does not occur anywhere else in the comparator documents, as this is not how he writes his name.<sup>583</sup> Even Mamadie Touré states that she did not see Avidan sign the contracts: her evidence (as incredible as it is), is that Bangoura brought the contracts to her already signed.<sup>584</sup>
- (ii). The first time Avidan saw versions of these contracts was during a blackmail attempt in 2009. It is clear even to a layman that there are fundamental differences between these versions (Exhibits C-0112 and C-0113) and the so-called "*originals*".
  - a. In C-0112, the signature said to belong to Mamadie Touré is below her printed name; in R-28, the signature is above the printed name. The Mamadie Touré signatures on C-0112 and R-28 also look different: there is a bigger first loop on the left side of the signature on C-0112. In addition, a "Matinda" stamp is present on C-0112, but not on R-28. While C-0112 is a poor copy, the Avidan signature also looks different to that present on R-28, although the stamp and the printed text look exactly the same.
  - b. Similarly, in C-0113, the Mamadie Touré signature is below her printed name; in R-29 it is above. The Mamadie Touré signatures on C-0113 and R-

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<sup>582</sup> Reply, Annex 1, Section 1.1.1.

<sup>583</sup> See Asher Avidan's name in CWS-3 (Avidan's first statement) pages 1 and 48 and CWS-10 (Avidan's second statement) pages 1 and 5.

<sup>584</sup> Exhibit R-0035, para. 19, as relied upon by Guinea in CMRG, para. 282.

29 also look different to each other. And again, whereas C-0113 contains the Matinda stamp, R-29 does not.

The Experts were invited to comment on these differences overnight, but they did not do so. It has been suggested that an explanation for the differences is that the agreements are stated to have been "*fait en double exemplaire*": however, this does not accord with Mamadie Touré's explanation, that she was provided with two contracts (i.e. R-28 and R-29), and signed both.

(iii). Finally, during the Merits Hearing, Avidan was as frank as Struik. He accepted the signatures looked like his.<sup>585</sup> He accepted the stamps looked like genuine BSGR stamps.<sup>586</sup> He accepted many other matters in his evidence, operating under the most severe pressure of giving evidence against his lawyer's advice while being criminally investigated in Israel. But he convincingly and honestly denied having signed the contracts.<sup>587</sup> As to Avidan's location on the purported dates of signing, all Guinea's questioning took us to is this conclusion: Avidan's travel agent does not have records to show he was in Guinea over 27/28 February, but Avidan may have returned from Guinea on Steinmetz's private jet on 26 February 2008, i.e. the day before he was alleged to have signed R-28.<sup>588</sup> In any event, and as set out below, there is much doubt as to the dating of the documents.

275. Furthermore, there is no evidence that under the terms of R-28, Mamadie Touré received USD (i) 100,000 as a deposit for her USD 2 million<sup>589</sup> (ii) a cash payment of USD 1

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<sup>585</sup> Avidan/9/105/21-24 ("*Q. Okay. And if we look down at the signature blocks, my question to you before was whether the signature that appears there appears to be your signature. A. It looks like mine.*"); Avidan/9/106/18-19 ("*Q. Does that also look like your signature? A. It looks like my signature, yes.*").

<sup>586</sup> Avidan/9/105/25 to 9/106/6.

<sup>587</sup> Avidan/9/103/111-15 ("*Q. [...] If I understand your position correctly, you claim that those contracts of 27<sup>th</sup> and 28<sup>th</sup> February 2008 are forgeries. Is that correct? A. Absolutely.*"); Avidan/9/104/11-13 ("*What I know is that I have not signed those contracts. I had no mandate.*").

<sup>588</sup> Avidan/9/112/11-20.

<sup>589</sup> Even on the basis of Guinea's demonstrative exhibit of flow of funds (which is disputed), Mamadie Touré did not receive any monies at all until December 2008.

million from BSGR<sup>590</sup> and (iii) that there were payments of USD 2 million to unspecified helpers, or payments to Mamadie Touré from BSGR (see IV above).

276. R-29 does not actually specify that 5% of the shares in BSGR will be transferred to Matinda. First, there is no such thing as "*shares in Blocks 1 and 2*". Second, the agreement actually states that BSGR will undertake to give 5% of these non-existent shares – without specifying who to. Third, taking all the agreements at face value, Mamadie Touré had already been guaranteed this 5% through Pentler by R-24, which was repeated in R-25 and reconfirmed in R-26, and then R-27 provided for a direct contractual agreement for apparently the same 5% between BSGR and Matinda. In any event, there is no evidence of any transfer of a shareholding ever occurring.

277. This is the context in which the findings of the Experts during the Expert Hearing must be considered, in relation to which see Subsection 6.5 below.

viii.

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278. This document is not classified as a "Disputed Document", nor does Guinea attempt to fit it into its narrative, as again it does not make sense.<sup>591</sup> The agreement was enclosed in an email from Noy to BSGR, but BSGR has no information as to its authenticity and does not take a position in this regard, except that it should be treated with caution.

ix. *R-269: Attestation of Mamadie Touré*

279. This document is a "Disputed Document". BSGR maintains that this document is false: i.e. it may be a "*genuine*" (or unaltered) document but which Mamadie Touré created for illegitimate means (which undermines the entire force of the conclusion of the Experts as to "*no evidence*" that the document was fraudulently produced).

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<sup>590</sup> Section IV above.

<sup>591</sup> Guinea refers to this document only briefly in CMRG, paras. 426 to 428: In this agreement, Bah and Touré appear to transfer any rights under their 20 February 2006 agreement with Pentler, to Mamadie Touré. However, at this point, the milestones under the original agreement would have expired (see Subsection 5.2(iv) above). This also undermines Bah's blackmail attempt in 2009/2010: as if this agreement was genuine, he would no longer be entitled to anything (although this entitlement as regards BSGR is denied).

280. Under this agreement, Mamadie Touré is alleged to have signed away her 5% shareholding in BSGR, and rescind all previous agreements, for USD 4 million. This is denied by BSGR and there is no evidence that any of these payments have been made as set out in Section IV above.

281. As to the authenticity of this document, all BSGR knows is that the content of the agreement is false. The only conclusion Todd Welch ("**Welch**") was able to reach was that there were "*indications*" that the signature of Mamadie Touré on this document "*may*" have been written by the same person as on other Mamadie Touré documents.<sup>592</sup> BSGR has no information as to the provenance of the document, as Guinea was unable to explain how the FBI obtained an "*original*" version.<sup>593</sup> As BSGR noted in its letter of 31 July 2017, Guinea first relied on this document in its Counter-Memorial, at paragraph 385. If this document is in the possession of the FBI, it must have been provided to Guinea at some point: yet, Guinea failed to make enquiries as to its provenance.<sup>594</sup> Avidan and Struik's evidence is that this document was referred to in Mamadie Touré's blackmail attempt, but they did not see a copy until these proceedings.<sup>595</sup>

x. *R-33, R-32, R-30, R-346 and R-31: Series of confusing documents in July and August 2010*

282. Guinea alleges that in July and August 2010, Pentler entered into a series of additional agreements with Mamadie Touré to buy her silence.<sup>596</sup> **PROTECTED**

**[REDACTED]**

However, again, the agreements do not make sense and do not fit Guinea's narrative on flow of funds.

<sup>592</sup> Expert Hearing/Welch/1/64/23 to 1/65/1.

<sup>593</sup> Letter from Guinea to the Tribunal dated 16 June 2017.

<sup>594</sup> Letter from BSGR to the Tribunal dated 31 July 2017, page 2.

<sup>595</sup> Avidan, CWS-3, para. 138; Struik, CWS-2, para. 110.

<sup>596</sup> CMRG, paras. 494 to 509; Reply, Annex 1, Sections 1.1.4 and 1.3.5.

<sup>597</sup> See Guinea's comments on the Final Report, page 4 and CMRG, paras. 800 to 805.

283. BSGR's position is that R-30 is forged.<sup>598</sup> While this is a Disputed Document, there was no original of the document available for inspection and Guinea claimed that it had no information as to the location of the original. Yet, interestingly, the Report of the Comité Technique relied on this document when revoking BSGR's mining rights.<sup>599</sup> Notwithstanding only a copy being available to the Experts, and their admission that they therefore could not perform the majority of tests on R-30<sup>600</sup> this did not stop Gerry LaPorte ("**LaPorte**") including R-30 in his general conclusion of "*no evidence*" that **any** of the Disputed Documents were fraudulently produced. It is clear he could not have reasonably come to that conclusion in relation to R-30, given the sheer number of tests which could not be performed on the copy document. His failure to acknowledge this speaks volumes as to the accuracy of his approach. As to Welch, he acknowledges that there were not known comparison signatures submitted for Mamadie Touré or Noy, such that his role was limited.
284. In relation to the remainder of the documents, BSGR cannot take a position on their authenticity, save for making the general comments that their terms are very confusing, they do not appear to fit together, and the payments apparently due under these contracts do not add up to the USD 5million which Guinea claims.

#### **6.4 BSGR has undertaken no prior forensic examination of the contracts**

285. A further issue during the Merits Hearing was the question of whether forensic examination had already been undertaken on the Disputed Documents. BSGR's witnesses did not have any knowledge of such a forensic examination being carried out and Guinea could not prove any different.<sup>601</sup>

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<sup>598</sup> Reply, Annex 1, para. 30.

<sup>599</sup> Letter from Guinea to the Tribunal, 31 July 2017, section I; Letter from BSGR to the Tribunal, 31 July 2017; Exhibit C-0064, "Piece no. 12", page 480.

<sup>600</sup> The tests that could not be undertaken on the copy included assessing spots in the upper left hand corner; what printer was used to print; what writing instrument was used in the signatures; indentation analysis or examination of ink/toner transfer.

<sup>601</sup> Cramer/2/122/4-11 279-282. In a leading question to Cramer, Guinea asserted that, "*You are aware, are you not, that BSGR did have access to these documents in the FBI laboratory in New York and did a forensic review? A. I recall that through a cooperation agreement at the time of Fred Cilins's arrest in the US, I believe, that his lawyers were cited on these documents. I'm aware of that. But the circumstances, and*



286. The reality is that Guinea itself does not have any knowledge of whether the documents have ever been forensically examined. This is demonstrated by Ostrove's contradicting statements.<sup>602</sup> In fact, there was no forensic examination in the US as confirmed by FBI agent Martinez:

*"BSG Resources, Limited ("BSGR") was not afforded the opportunity by the U.S. Department of Justice to examine any of the documents at issue because it was not a party to the litigation against the U.S. government".*<sup>603</sup>

287. After Guinea's conflicting position had been corrected by Martinez, it sought to rely on Martinez's statement that Cilins did review the "*original documents*" before he pleaded guilty as proof that these documents were "genuine".<sup>604</sup> This is wrong.

288. First, there is no specificity as to which "*original documents*" Martinez referred to. Second, even on the Department of Justice's case, the conclusion of an expert report on the documents was not relevant to Cilins' defence, given that knowledge that documents sought in a grand jury investigation are not genuine provides no basis for a defence to obstruction of justice.<sup>605</sup>

289. Accordingly, despite Guinea's best efforts, there is nothing which can be read into Cilins' examination of unspecified "*original documents*". It is clear that BSGR has never performed a forensic examination of the Disputed Documents (as it did not have access to them) and there is nothing to be inferred from this. Separately, Guinea confirmed in

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*whether it was a forensic examination, I do not know."* ; Steinmetz/3/124/1-3 Steinmetz stated that he did not think that BSGR or its lawyers had the original contracts in order to perform a forensic examination ("A. *I don't think that BSGR or its lawyer had the original signature in their hand. I don't think so. I don't know.*"); Struik/4/200/12-20 and 4/201/7-13 ("*I know that at the time they were going to send these documents, I think, to the United States. Now, I don't know what happened with that. I have no clue actually. I don't know what the results were of this investigation. I don't know when they were sent, and if they were sent back. I don't know where the originals are, so-called.*") Avidan/9/103/24-25 and 9/104/1-13 ("*I'm not really aware whether he [Cilins] hired a forensic expert, not really.*").

<sup>602</sup> Ostrove/4/30/15-16 ("*there were all these forensic exercises that were carried out*") see also Ostrove/4/33/5-7 ("*[s]everal experts have taken a look at these documents, but we have no knowledge of a report of these experts*"); Ostrove/4/22/1-3 and 4/22/20-24 ("*I know the Department of Justice in the US never carried out forensic analysis on this document... we were **not aware** of any forensic analysis carried out on the documents. We know that there was an expert; whether Cilins of BSGR, we don't know. But anyway, we were not aware of this.*"). (emphasis added)

<sup>603</sup> Martinez declaration, 26 May 2017 (Exhibit R-0587). Note also the comments of Libson on behalf of BSGR as regards the prejudicial wording of the Martinez declaration: Libson/8/4/19 to -8/5/25.

<sup>604</sup> Jaeger/8/16/2-25.

<sup>605</sup> Exhibit C-0362, pages 3-4, footnote 2.

correspondence that it had not conducted a forensic examination of the documents and that the Comité Technique never held the "*originals*" (despite its reliance on them).<sup>606</sup>

## **6.5 The Expert evidence supports BSGR's position on R-27, R-28, R-29**

290. The expert evidence needs to be looked at in two ways. First, and regrettably, it is necessary to address the procedural shortcomings of the Expert Hearing conducted on 26 and 27 March 2018. Second, it is necessary to assess the substance of the Experts' conclusions, as weighed against BSGR's and Guinea's experts. The only conclusion which can reasonably be reached is that Radley's position is to be preferred: there are significant doubts as to the authenticity of R-27, R-28 and R-29. This supports the evidence on the record in relation to these contracts, as explained in Section 6.3 above.

### *i. The procedure of the expert examination process and credibility of the Experts*

291. The regime under PO17 that had been set up was simple. It was designed to avoid the multiple exchanges of evidence in rounds and give each side a fair bite of the cherry. The mechanism to implement this was: a preliminary report; on which each side could comment (in an unspecified form); followed by a Final Report; and then the parties' reports/comments. That was to be the totality of the exchanges until each expert attended the Expert Hearing to give evidence on that totality.

292. The document inspection process adopted in PO17 provided for only the Experts to have access to the Disputed Documents. Whether envisaged by the Tribunal or not, a document inspection at which a party's expert has to sit over a metre away from the inspection process with a tower of files and boxes in between is virtually meaningless. It is incumbent in such circumstances (completely unprecedented in BSGR's advisers' experience) on the Experts to engage with any questions that arise from the conclusions of their inspection. This is what PO17 was designed to ensure. Rather, however, the Experts decided to ignore – almost in their entirety – the questions/comments BSGR raised pursuant to paragraph 21 of the Terms of Reference by letter of 23 January 2018 ("**BSGR's Questions**"). It was not until the very eve of the Expert Hearing that the

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<sup>606</sup> Letter from Guinea to the Tribunal, 31 July 2017, C(c) and D(c).

Experts then decided to address the points raised in BSGR's Questions in 173 pages of additional and unsolicited material.

293. This is particularly concerning given the acknowledgement by LaPorte that BSGR's Questions were "*fair and appropriate*".<sup>607</sup> LaPorte's only criticism of BSGR's Questions was that they were "*kind of open-ended*" and that they needed "*context*".<sup>608</sup> He said it was his duty "*to put some context into the questions as well too*".<sup>609</sup> Why was he not able to do so in the Final Report, well in advance of the Expert Hearing to give Radley time to prepare?
294. The effect of this late submission of evidence was that the Experts were allowed (and Guinea's experts too), an entire extra round to address the points made in Radley's evidence without Radley being afforded the same courtesy. Radley was forced to work through the night before the first day of the Expert Hearing to assimilate the responses to his evidence and, rather than with time, equipment and full materials be permitted to respond fully and comprehensively, was required to do so without adequate preparation when giving his evidence.
295. The Experts further undermined their credibility by providing dishonest accounts about (i) the instructions they had received from the Tribunal's Secretary, Benjamin Garel ("**Garel**"); and (ii) whether the material contained in their new material was, in fact, new. Garel communicated the provisions of PO17 to the Experts and the Experts assured him that the new material they were planning to submit accorded with those provisions.<sup>610</sup> That was not true. Daele's cross-examination of Welch revealed that the information contained in each of the slides and, which directly answered the issues posed in BSGR's Questions, was **new**: it was not contained in his Final Report; it was a **new** image created for his presentation to explain a narrative which was not on the record.<sup>611</sup> This is perhaps why Welch and LaPorte, when first asked, could not "*recall*" Garel informing them about

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<sup>607</sup> Expert Hearing/LaPorte/1/97/16.

<sup>608</sup> Expert Hearing/LaPorte/1/97/18; LaPorte/1/169/21.

<sup>609</sup> Expert Hearing/LaPorte/1/169/24-25.

<sup>610</sup> Expert Hearing/1/28/9-12.

<sup>611</sup> Expert Hearing/1/257-269.

the provisions of PO17. Four minutes later, however, Welch's memory had, miraculously, become clear enough to allow him to have a precise recollection of the words Garel used.<sup>612</sup> It is clear that the Experts were dishonest about the "new" material to Garel and were again dishonest when asked about this conversation during the Expert Hearing.

296. This must be viewed in the context of BSGR's request of 12 March 2018 for the Tribunal to disqualify the Experts on the basis of the unprofessional comments they made about BSGR, its counsel and its expert, which raised serious doubts as to their impartiality and independence. The incidents ahead of the Expert Hearing are yet further examples that raise serious doubts about the Experts' professionalism and credibility.
297. There is no explanation for why the Experts were unable to engage with BSGR's Questions. They dismissed them in a high handed and insulting way in the Final Report, leading to BSGR's request for their disqualification. Then, Radley's report arrived. It, politely and respectfully, pointed out several inadequacies with the Final Report. It illustrated assumptions that should not have been made; it pointed out untechnical and loose language; it identified differences in the handwriting that ought to have been examined. Now, the Experts needed to respond and they not only responded, but knowingly decided to introduce new material at the eve of the Expert Hearing to make sure that BSGR and Radley did not have the chance to prepare adequately to respond to this new information. It is BSGR's position that this conduct affected BSGR's right to be heard during the Expert Hearing and the Experts' credibility. As a consequence, their evidence needs to be approached with great caution, if not be disregarded at all.

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<sup>612</sup> Expert Hearing/1/87/22 to 1/88/1; LaPorte says, "*No, I don't recall that*", and Welch says, "*I don't recall specifically. He may have; I just don't recall*"; Four minutes later, however, Welch's memory had, miraculously, become clear enough to allow him to have a precise recollection of the words Garel used. Welch/1/91/16-21 ("*He [Garel] said, 'Any information that you provide must already have been in the record'. And we had this discussion. We [LaPorte and Welch] said 'Everything in my PowerPoint – everything in our PowerPoints, all the images are information that was already in the report and the annexes.'*").

ii. *LaPorte's evidence is fundamentally unsound and his conclusions are not to be trusted*

298. Prior to the Expert Hearing, an assessment of the expert material could only lead to the conclusion that LaPorte's evidence was imprecise and unsound. This was only endorsed by the testimony at the Expert Hearing, during which LaPorte's evidence was even more uncertain than the written material suggested. It was accepted that his conclusions were "indeterminate" at best and should be disregarded by the Tribunal.

a. LaPorte's repeated references to "no evidence of fraud" should actually have been "no evidence of alteration"

299. In relation to each of the Disputed Documents, LaPorte concluded "*there was no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that any of the Disputed Documents were fraudulently produced*".<sup>613</sup> However, during the course of the Expert Hearing, it transpired that this conclusion was a fallacy. LaPorte accepted that his conclusion should have been that there was "*no evidence of... alteration*".<sup>614</sup> The distinction is fundamental to the exercise and to LaPorte's brief and conclusions.<sup>615</sup>

300. The formulations "*no evidence of fraudulent production*" or "*no evidence [that a document] was fraudulently produced*" do not appear in the academic literature or SWGDOC or other industry standards. Kelly and Lindblom, for example say: "*When the combined results reveal no change, it can be stated that there is no evidence to support*

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<sup>613</sup> Final Report, page 9, para. 13.

<sup>614</sup> Expert Hearing/LaPorte/1/250/23-24 ("*So "alteration" is the word that I should be using.*"); LaPorte also asserted that, "*Altered" would mean that it was fraudulent*" (1/130/10-11) only, correctly, to acknowledge seconds later that fraudulent does not mean altered and that a document can be altered for legitimate purposes (1/130/14-17), finally making the important distinction that it needs to be altered for fraudulent purposes for it to be fraudulent (1/130/21).

<sup>615</sup> As a basic example, and as set out above, BSGR's position is that the contents of R-269 are false, but the document may well have been "genuinely" produced by Mamadie Touré (or another party) for illegitimate means: a finding here of no evidence of fraudulent production (rather than the correct articulation of no evidence of alteration) provides an evidential weight which is not justified. See also Radley's comments, 2/50/23-25 ("*Yes. I think the phrase used is relatively meaningless, but when used in volume, as we have here in 65 examples, I think it can be misleading to the layman*"); 2/11/1-7: ("*...to proceed on the basis of everything having "no evidence of fraudulent production", is not a balanced view. The very large number of instances – and Mr LaPorte emphasises this – the very large number of instances where this comes up, it seems to me that this could form a bias*".)

*that this document was altered*" (emphasis added).<sup>616</sup> LaPorte stated that this was *"the language we used"*.<sup>617</sup> However, this is clearly not the case. In example after example, LaPorte fell into the trap of collapsing the conclusion of no evidence of alteration into a conclusion of no evidence of fraud, even after he was corrected.<sup>618</sup>

301. Indeed, a repeated feature of LaPorte's evidence was describing the large number of tests undertaken (approximately 120), and repeatedly implying that these tests were to show whether a document was *"fraudulent"*.<sup>619</sup> The implication being that if **not one** of the tests for *"fraudulence"* (in LaPorte's words) was positive, then it is almost impossible the Disputed Documents are forged. He even went so far as to say that this would then *"lean in the direction that the document is genuine"*.<sup>620</sup> However – and as accepted by LaPorte – he should have referred to 120 tests for **alteration**. This leads to a very different conclusion. (In any event, it is not correct that the 120 tests all resulted in no evidence of

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<sup>616</sup> Quote given in evidence at Expert Hearing/LaPorte /1/129/23-25.

<sup>617</sup> Expert Hearing/LaPorte 1/129/11 to 1/130/3.

<sup>618</sup> Expert Hearing/LaPorte/1/39/18-23 (*"What we feel that our position is, is we're giving you the information about the paper documents themselves and **whether or not there's any evidence of fraudulent activity**. Once again, that's based on -- you know, I'm trying to quantitate that, in a sense -- all of these tests that we conduct."*); Expert Hearing/LaPorte/1/48/11-13 (*"So really what we're doing is **we're trying to focus on whether there was fraud or not**, and whether they were stamped consistently at the same time"*); Expert Hearing/LaPorte/1/50/15-19 (*"In this particular case, we did not find any documents where the earlier-dated document was impressed into a later-dated document. So we had no conclusions - - **there's no indication of fraud** based on those impression examinations"*); Expert Hearing/LaPorte/1/52/1-5 (*"So you'll notice a lot of the things that I'm talking about, the results from these examinations in and of themselves might not prove fraud; but **when you put them all together, then that might suggest strong evidence of fraud**"*); Expert Hearing/LaPorte/1/63/7-20 (*"With respect to our terminology -- and I'm just going to conclude with this. So with respect to our terminology, and just to be clear, **when we say there's no evidence to indicate fraud**, this would be no different than a criminal trial when somebody is found not guilty, right... We do something similar to that in this case, **where there's no evidence to indicate that the documents were fraudulently produced**. We don't know for sure, 100%, Mr Welch and I can't sit up here and tell you with 100% certainty that they're genuine documents."*); Expert Hearing/LaPorte/1/127/3-5 (*"Based on all of the evidence that we looked at, there's **no evidence to indicate that they're fraudulent**."*) (emphasis added).

<sup>619</sup> Expert Hearing/LaPorte/1/37/25 to 1/38/1 (*"So many of the examinations we conducted are designed this way, **to actually show fraud**"*); Expert Hearing/LaPorte/1/38/16-22/14-20 (*"So we're talking about **120 mutually exclusive tests to show that a document is fraudulent**. In this particular case, not a single one of those 120 mutually exclusive tests showed that the documents were fraudulent. Therefore, **that would lean in the direction that the document is genuine**."*); Expert Hearing/LaPorte/1/39/9-11 (*"We conducted examinations; we didn't identify any fraudulent activity with respect to the documents."*); Expert Hearing/LaPorte/1/57/20-23 (*"So the whole idea is to sort of bring you through each one step by step, saying, "Okay, we examined this document, we did this particular test, **we did test X, test Y and test Z, and none of them show fraudulence**"*); Expert Hearing/LaPorte/1/241/21-24 (*"[...] all we need in an exam is to show one thing, whether it's a watermark that wasn't available, whatever that is, **just one test, and you show something is fraudulent**."*) (emphasis added).

<sup>620</sup> Expert Hearing/LaPorte/1/38/21-22.

alteration – as set out below, evidence of alteration was ignored).

302. Even as late as the final moments of his closing remarks LaPorte was unable successfully to make the distinction – or accurately paraphrase the authorities he had relied on the day before. LaPorte again confused fraud and alteration,<sup>621</sup> followed by a wildly inaccurate paraphrasing of the authorities.<sup>622</sup> One is left with a picture of a witness, despite his very many years in the field, who was unable to address the Tribunal or his or Radley's evidence with the precision required. This is just one of many examples of how imprecise and confusing the Final Report is.

303. This not a semantic point. It is one of fundamental substance as addressed by Radley, convincingly and with requisite precision, in both his report and his oral evidence. The Tribunal is encouraged to accept Radley's evidence in this respect which is at paragraphs 57-87 of his report and addressed in his testimony<sup>623</sup> and summed up effectively in answer to Ostrove's questions:

*"Q. And the primary difference between you and them in the conclusions is that they've repeatedly stated there is no evidence of fraudulent modifications or fraud in the preparation of these documents, without saying equally there is no evidence that they are authentic; correct?"*

*A. Yes. I think the phrase used is relatively meaningless, but when used in volume, as we have here in 65 examples, I think it can be misleading to the layman."*<sup>624</sup>

b. LaPorte's "no evidence" conclusion is actually indeterminate

304. LaPorte accepted that "no evidence" meant "indeterminate" in *Patel* but, in relation to

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<sup>621</sup> Expert Hearing/LaPorte/2/158/19-22 ("*But what I think at least we've communicated was – and that's a truthful statement - - there's just no evidence to indicate fraud or alteration. And this verbiage is consistent with some of the authoritative texts in the books: one of them by Ordway Hilton, and the other edited by Kelly and Lindblom.*").

<sup>622</sup> Expert Hearing/LaPorte/2/159/3-10 ("*The Kelly and Lindblom book is actually a textbook from post-2000, I'll say, so it is a more recent textbook, but it is based on one of the older textbooks. But, you know, they specifically state in there that when the combined results of testing reveal no change, it can be stated that there is no evidence to support that this document was **fraudulent**. That's what they tell us in the book too.*") (emphasis added). In fact, as shown above, Kelly and Lindblom actually states that where results show no change, this leads to the conclusion that there is no evidence of "*alteration*" (See Kelly and Linblom, *Scientific Examination of Questioned Documents*, page 335 as exhibited by the Experts).

<sup>623</sup> Expert Hearing/Radley/2/10-13.

<sup>624</sup> Expert Hearing/ Radley/2/50/18-25.

these proceedings, sought to make a distinction because of the number of documents and tests.<sup>625</sup> A term of expert expression cannot mean something in one set of proceedings and something different in another. That is to deprive it of all its usefulness. It is perhaps also why standard industry terminology such as that set out in the SWGDOC guidelines is to be preferred, rather than an individual expert's own favourite formulation. Indeed, LaPorte apologised on behalf of the expert community for the confusion the looseness of language caused<sup>626</sup> (as he was also forced to do in *Patel*) just before he went on to repeat his misformulation and misquoted Lindblom.<sup>627</sup> While neither Valery Aginsky ("**Aginsky**") nor Richard Picciochi ("**Picciochi**") picked this looseness up in their rush to endorse the Final report, Aginsky accepted during the Expert Hearing that LaPorte's results were "*inconclusive*".<sup>628</sup>

- c. LaPorte failed to consider alternative propositions, yet accepted that this is imperative to performing a balanced assessment

305. Radley's other criticism in this respect was that the Experts ought to have set out the alternative proposition for the documents: that is to say the alternatives to the "no

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<sup>625</sup> Expert Hearing/LaPorte/1/140/15-17 ("*Q. But in the Patel case you accepted that "no evidence" was the same as indeterminate? A. (Mr LaPorte) Yes, I agree that it's indeterminate*"); See also the *Patel* transcript, 186/21 to 188/10, (Exhibit C-0383 (pages 209 to 211 of pdf)) ("*Q. So when you express your results in the last sentence of paragraph 54, I think it must be, you say: "Based on the ink dating analysis, there is no evidence to indicate the three signatures on the 2005 will were created after June 2005."* A. *Correct. Q. You could like have said, "There is no evidence to indicate that the three signatures were created before 2005"*? A. *Correct. Q. You could equally have said, "There is no evidence to indicate that it was less than two months ago", or anything, really. What you ought to have said is, "There is just no evidence, full stop"*? A. *Yes, that's why I explained the language earlier in my report, but the idea here is that trying to determine whether or not this document is authentic, all I'm saying is, there is no evidence to indicate that it's older than 2005 or that the signatures were written past 2005. Q. In your summary of conclusions at paragraph 15, you say, based on this: "I conducted an ink dating analysis on the three signatures and did not find any evidence to indicate any of the signatures were written in the past two years." But you could equally have said, "I did not find evidence to indicate any of the signatures were written longer ago than two years"*? A. *Yes, that's correct. Q. Do you not agree that someone reading your conclusion, the way you have phrased it, might infer from your negative that there was not evidence that the signatures were written in the past two years, that there was evidence that the signatures were written in the past two years?* A. **No, I mean, I apologise if there was confusion, because I generally like to make sure that this is very well understood in my report. So my conclusion is that I'm indeterminate. I can't make a decision one way or the other**") (emphasis added).

<sup>626</sup> Expert Hearing/LaPorte/2/158/4-11 ("*So, you know, I'll sort of apologise on behalf of the forensic document examiner community that we haven't come together and gelled in this way, so that when you hear a conclusion from me, Mr Radley and Dr Aginsky, you're hearing the same thing. I get the feeling that you've heard from the three of us on the document authentication part and you kind of all heard something a little different*".

<sup>627</sup> See footnote 622 above.

<sup>628</sup> Expert Hearing/Aginsky/2/137/21.



evidence" mantra. Again, in relation to this argument, the Tribunal is invited to accept Radley's obviously preferable evidence. Not only is it supported by the authorities in the expert community, it was accepted by Guinea's expert<sup>629</sup> and essentially accepted by LaPorte himself. A document introduced by the Experts, entitled "*Cognitive Bias Effects*", produced by the Forensic Science Regulator recommends that an expert opinion should be "*balanced, robust, logical and transparent*". In order to achieve "*Balanced*", it says the experts must "[have] *considered alternative propositions*".<sup>630</sup> When asked if he agreed with this, LaPorte answered "*Absolutely*".<sup>631</sup> Yet, LaPorte also accepted that not a single alternative proposal had been set out in the Final Report.<sup>632</sup>

306. The dogged refusal to consider alternatives matters. Take one example: the different size font in R-26, one of five irregularities identified in the Final Report on which no comment is then made as to how this may affect the "no evidence" conclusion or what may, as an alternative proposition, be suggested by these factors. When pressed for an explanation as to why the change in font size did not merit consideration, LaPorte answered:

*"Because somebody uses a different size font in their document, that doesn't mean it's been altered. That almost seems like common sense; I'm sure we've all used different fonts in our documents."*<sup>633</sup>

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<sup>629</sup> Expert Hearing/Aginsky/2/138/1/18 to 2/139/3 ("[...] *there are always two competing hypotheses: one is that the document is authentic with respect to the date of preparation; and the other is that, no, the document is backdated fraud...So we are looking, depending on the nature of the document and the methods that we apply to the case - - like in the case, all the results that show no evidence that the document was not produced on another date, it's equally applicable to the competing hypothesis that there is no evidence that would show that the documents are not backdated fraud.*").

<sup>630</sup> Expert Hearing/LaPorte/1/133/15-25.

<sup>631</sup> Expert Hearing/LaPorte/1/133/24-25.

<sup>632</sup> Expert Hearing/LaPorte/1/128/12-14 and Expert Hearing/LaPorte/1/128/8-14. LaPorte's reasons for not including the alternative proposition in his report were that: (1) to do so would have made the report too long: "*This report would have been 5000 pages.*" (1/127/11); (2) he had considered the alternative propositions albeit that consideration did not make it into his report: "*we always consider alternative propositions*" (1/135/2). LaPorte had had ample opportunity to set out these alternative propositions he apparently considered. Questions 4 and 5 of BSGR's Questions were addressed to those issues. LaPorte refused to provide the answers; and (3) to consider alternative propositions would be to speculate, which he was not prepared to do. However, LaPorte was unable to differentiate between what was an alternative proposition and what was speculation (1/56/10 to 1/57/2; 1/134/23 to 1/135/3). And he also appeared to be quite happy to speculate in circumstances in which the evidence pointed against his "no evidence" conclusion (see, for example, his speculation about ink transfer on R-26 (Final Report, para. 139 page 95).

<sup>633</sup> Expert Hearing/LaPorte/1/147/17-20.

307. In other words, something that may be an alteration (font size is a relevant factor, otherwise why test for it?) is explained away in the most facile of ways by "*common sense*". Common sense equally could be (should be) that alteration of font size in the middle of a document is the exception rather than the rule and requires explanation. This is just one of five irregularities in R-26 noted by the Experts but dismissed.<sup>634</sup> In fact, what LaPorte has done in relation to R-26 and did many times in his testimony was to speculate, something he said he "never" did.<sup>635</sup>
308. In fact, it appears that the Experts do not understand the theory of alternative propositions (despite agreeing with its importance), and this has infected their entire Final Report. When dismissing Radley's approach, the Experts' defence is that there was no evidence of all the documents being created at the same time by a master forger. But this has never been suggested. Their job was to look at each of the Disputed Documents individually, and consider, in relation to each, what alternative propositions may apply. Instead, they appear to have taken the approach that either all the Disputed Documents are genuine, or all are not: that is the only proposition.<sup>636</sup>

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<sup>634</sup> In the Final Report, the Experts note in relation to R-26 that (i) impressions of the later dated document, R-29, were found on R-26 (Final Report, paras. 135-137); (ii) a conclusive opinion could not be reached on whether the initials A.L. are those of Lev Ran (Final Report, para. 13); (iii) in reaching a determination, a set of apparently "rogue" comparator initials were disregarded (Final Report, para. 128); (iv) ink/toner was found on the front of page 1, and the back of pages 3 and 4, but the source could not be determined (Final Report, para. 138); and (v) different font sizes are used for page 1, compared with pages 2 to 4 (Final Report, para. 134). However, despite these five points, the Experts still concluded that "*there is no evidence of page substitution, text alteration, text addition, or **other irregularities** to indicate that R-26 was fraudulently produced*" (emphasis added) without explaining why these five points were disregarded.

<sup>635</sup> Expert Hearing/LaPorte/1/43/16-18

<sup>636</sup> Expert Hearing/LaPorte/1/244/13 to 1/245/6 ("*We talk about this whole master forger theory. We would have to have a master forger who would have to do all of these signatures, and then that master forger has to exhibit the same variation for each signature that Mr Welch has found in the knowns. It almost sounds like a theory that just doesn't work out, and can never work out. I mean, I can't imagine -- and I worked for the Secret Service, and I used to work intelligence cases, I worked in the intelligence community for years, and we had really good forgers, I worked with really good forgers. But I could not imagine a forger doing this kind of thing over and over for multiple signatures, using different pens, doing it on different documents with different paper, not stacking them on top of each other, using different printing processes. What we've been saying throughout our report is when you look at the cumulative value of the entire report, it makes these things much less likely, if you will.*"); See also Expert Hearing/LaPorte/1/251/19 to 1/253/3.

d. LaPorte's evidence on the serial numbering of stamps exposes his defective and unscientific approach

309. In relation to one document (R-24) LaPorte concluded that numbering in sequence suggests documents were produced chronologically,<sup>637</sup> but in relation to another (R-27) he concluded that out of sequence numbering is not noteworthy.<sup>638</sup> On four separate occasions: in the Preliminary Report, in his answer to BSGR's Questions,<sup>639</sup> in the Final Report,<sup>640</sup> and in oral testimony,<sup>641</sup> LaPorte's evidence and conclusions as to the dating of R-24 and R-27 are based on what can or cannot be derived from the dates the stamps were "applied".

310. However, as soon as LaPorte was pressed on this issue, in his very first answer, he says he should not have used the word "applied" at all:

*"Actually, maybe "being applied" would have been -- the "applied" word probably shouldn't have been used. We should have said "manufactured" ....so we can't tell you exactly when the stamps were applied, nor would we make that kind of assertion. So that was a poor word, and we should have used the word "manufactured before"."*<sup>642</sup>

311. This acknowledgement of the poor choice of words is repeated several times, without, however, an acceptance of the obvious and fundamental difference between the two concepts. Not only are they different processes, they are processes undertaken by different people at different times. LaPorte accepted that *"we can't make any assertions based on the sequences being out"* but did not accept his concession affected his evidence

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<sup>637</sup> Final Report, para. 75.

<sup>638</sup> Final Report, para. 145.

<sup>639</sup> Annex L to Final Report, response to Question 18: *"Without understanding the practice and policy of how the stamps are purchased and **applied** to documents, it would not be accurate or reliable to conclude that R-27 is fraudulent based on the serial numbers found on the Adhesive Stamps."* (emphasis added).

<sup>640</sup> Final Report, para. 75, page 49, in relation to R-26 and Comparator Document K-20: *"Since the "BB" prefix on K20 is expected to follow the "BA" prefix which was used for the Adhesive Stamps on R-24, then the sequencing of the Adhesive Stamps on R-24 is consistent with them being **applied** before 16 December 2009."* (emphasis added).

<sup>641</sup> In LaPorte's opening remarks, he addressed the "fiscal stamps" for a whole seven minutes (Expert Hearing/LaPorte/1/52 to 1/56) and once again, the evidence was all about the stamps' application. LaPorte in fact used the word **applied** four times in his explanation.

<sup>642</sup> Expert Hearing/LaPorte/1/123/15-24.

on the dating of R-24,<sup>643</sup> when he clearly should have.

312. Unfortunately now the Tribunal has no evidence before it as to the significance of the serial numbers the stamps bear on the basis that the serial numbers relate to the stamps' manufacture (rather than application). It is, however, highly significant, that the serial number on R-27 bears no resemblance to the sequencing of the serial numbers on R-25 and R-26 also stamped, apparently, by Tinkiano.

e. LaPorte simply assumed the date of R-28 and R-29, despite claiming he does not "speculate"

313. The most extreme example of speculation – or assumption – relates to LaPorte's evidence on the dates of R-28 and R-29. LaPorte concludes in paragraphs 160 and 177 of the Final Report that the Experts' conclusions in relation to R-28/9 "*are based on the assumption that [R-28/9] was prepared and signed on or around [27/28] February 2008*". Question 38 of BSGR's Questions asked the basis on which this conclusion was made and was, in effect, brushed off.<sup>644</sup> In cross-examination LaPorte's first answer was not logical. He stated that it was not the assumed date of the documents: it was "*the earliest date the document would have been produced*".<sup>645</sup> It does not require expert qualification to understand that a document can be produced and then dated earlier or later. The date on the documents would not, then, of course, be the earliest date the documents would have been produced. (Aginsky understood this. In cross-examination he conceded that there ought to have been an "alternative hypothesis".<sup>646</sup>) After apologising for the word "*assumption*" LaPorte moved on to his next explanation that the date was the "*default date*" of the documents.<sup>647</sup> This is not a phrase that appears anywhere else and it is not clear what it means, but LaPorte used it three times to explain the assumption he had made.

314. LaPorte ought to have acknowledged that he had made a mistake. He could not because

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<sup>643</sup> Expert Hearing/LaPorte/124/16-21.

<sup>644</sup> Annex L to the Final Report.

<sup>645</sup> Expert Hearing/LaPorte/1/116/20-21.

<sup>646</sup> Expert Hearing/Aginsky/2/144/1-4.

<sup>647</sup> Expert Hearing/LaPorte/1/116/24 to 1/117/2, 1/119/4, 1/120/16-19.

he had reinforced the conclusion by repeating it in the Final Report after its illogicality had already been pointed out to him by BSGR. So he stuck to his guns. It is a mark of his quality as an expert that so fundamental an error was made, was uncorrected and was defended. It infects the totality of his evidence and the Tribunal should approach all of his evidence and conclusions with the utmost caution. This is particularly important given that prior to the Expert Hearing, the Experts stated that to determine authenticity was to consider "*was it created and executed on its purported date*".<sup>648</sup> They failed in this fundamental task in relation to R-28 and R-29 (and indeed R-24, in which they seem not to have noticed the purported date of 20 February 2006, as set out above).

315. So the expert evidence in relation to the Disputed Documents is "indeterminate" before the evidence in relation to handwriting is applied. Much time and cost would have been saved had LaPorte accepted this earlier. When the handwriting evidence is applied the Tribunal is left, at its highest, with compelling evidence of potential fraud and significant doubt at its lowest – at least in relation to R27, R-28 and R29, particularly in the context of the information already on the record, as set out above.

iii. *Welch failed properly to address the significant doubts to be applied to the signatures of Struik and Avidan in R-27, R-28 and R-29*

316. During the Expert Hearing, only Radley provided the Tribunal any assistance or clarity in relation to the signatures. He applied the industry standards; and gave compelling evidence on what comprised a difference versus a variation. Welch was, in the end, all over the place, unable to distinguish between a difference, a fundamental difference, a variation or dissimilarity (a word that appeared from nowhere to assume some technical, but entirely impossible to understand, meaning in Welch's explanations). Like LaPorte, his evidence should be disregarded.

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<sup>648</sup> Email from Tribunal Secretary enclosing responses from the Experts, 12 September 2017, para. 1 (repeated in Annex 1 of the Experts' Terms of Reference).

a. Welch failed to explain his terminology and, importantly, the definition of "difference"

317. Like LaPorte, Welch struggled with his industry's terminology. It was common ground between the parties that similarities and differences had to be looked at and they had to be looked at in combination.<sup>649</sup> Why, then, had Welch not identified any differences? "*Because I didn't see any difference of significance*" and then, immediately after, "*I did not see any fundamental differences*".<sup>650</sup> Later, a new concept: "*dissimilarities*".<sup>651</sup> This lack of precision was a constant feature of Welch's evidence and the Tribunal's attention is drawn to the following passages 1/152/6 to 1/153/16; 1/182/10 to 1/183/1; 1/184/7 to 1/186/3; 1/218/11-14; 1/237/4 to 1/239/17.<sup>652</sup>
318. The guidance, however, is clear. The Tribunal questioned the longevity of Osborn's authority in the field and, while it may be surprising, it was accepted by all of the experts that his views remain foundational in the discipline. The Tribunal is urged to read the excerpts from his text books, in particular pp230-2 and 244-5.<sup>653</sup> The comments conclude that: "*This ignoring of the differences, or the failure properly to account for them, is the cause of most of the errors in handwriting identification*".<sup>654</sup> Similarly, the SWGDOC definitions include: "*range of variation*", "*significant difference*" and "*variation*", the significance of all of which has to be evaluated "*individually and in combination*"

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<sup>649</sup> See Expert Hearing/Ostrove/ 1/28/24 to 1/29/9 and Expert Hearing/Welch/1/152/6-18.

<sup>650</sup> Expert Hearing/Welch/1/153/12-16.

<sup>651</sup> Expert Hearing/Welch/1/158/16 to 1/159/1.

<sup>652</sup> One passage serves to illustrate the confusion well. It relates to the 6 identified differences in the AL initials in R-26. Even to a layman there are differences and six were pointed out in question 25 of the 65 Questions. They were met with the standard response. Welch's explanation is at 1/157-159. Insofar as it can be understood he says: the differences are not differences - they are "dissimilarities"; he agrees the initials are dissimilar; but there are more similarities than dissimilarities; his consideration of this took place in the cross-examination process but did not make it to his Report. Madam President also asked for an explanation of the differences. The answers were provided in an utterly baffling exchange at 1/182/10 to 1/183/24.

<sup>653</sup> Exhibit CL-0093.

<sup>654</sup> See also Ordway Hilton in, *Scientific Examination of Questioned Documents*, page 159 as exhibited by the Experts ("*an accurate range of variation through which the writing fluctuates.*" *It is then necessary to demonstrate "that not only the unknown writing has the qualities and habits of the known writing, but also that the deviations from the basic patterns that occur in the unknown writings are such as can be predicted from the variations in the standards.*").

(emphasis added).<sup>655</sup>

319. This is precisely the task undertaken by Radley. The Tribunal is invited to compare Radley's approach set out in paragraph 205 to 21 of his Report with Welch's set out at paragraphs 41-7 of his. Radley's is clearly compliant with both the SWGDOC approach and the academic guidance. Welch's is critically deficient. There is no reference, for example, to the key concept (see SWGDOC and Ordway Hilton) of range of variation. Several of BSGR's Questions were directed to range of variation and differences. They were ignored. In contrast, and as in his report (and taking into account having to work through the night before to deal with the ambush of Welch's evidence), Radley was precise, authoritative and, it is submitted, correct in his approach when he gave evidence. The Tribunal should put the following passages alongside the Welch excerpts cited above by way of comparison: 2/13/14 to 2/15/18; 2/26/4-21; 2/27/13-24; 2/28/3-16; and 2/66/1 to 2/67/24.
320. The theory then needs to be applied to the documents and, given his approach, Radley's conclusions are to be preferred. Again the Tribunal is invited to look at the quality of the two experts' approaches and conclusions side by side, starting with their reports. Take the Struik signature in R-27 as a case in point. (It is slightly ironic that this document had featured so prominently as it is outside the boundaries of this case, given it relates to uranium licenses, a point acknowledged by Guinea in its opening in the Merits Hearing.<sup>656</sup> That said, the evidence strongly points to the document being a forgery). Welch deals with it in 4 lines at paragraph 149 of the Final Report. No differences or the range of variation are noted. Radley deals with it paragraphs 266-283 of his report. Length is not everything, but rigour and discipline are and Radley's analysis is compliant

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<sup>655</sup> Annex C to the Final Report pages 1-2, i.e. the task for document examiners is to (i) consider whether there is an appropriate number of comparator signatures to be able to assess the disputed signature; and if there are: (ii) identify the range of variation in an individual's signatures; (iii) consider what qualities and habits in the questioned signature fall within the range (similarity) and what qualities fall outside the range (difference); and finally (iv) consider the significance of the similarities and differences in combination and make an assessment.

<sup>656</sup> Naud/1/130/7-13.

with the academic literature and the industry standards and is compelling.<sup>657</sup>

b. Even in Welch's "ambush evidence" he was unable to deal with Radley's criticisms

321. Using the Experts' speaking notes (which were not added to the record) as a cross-examination script, Guinea was able to introduce a number of Welch's proposed slides "*responding*" to Radley's report. Relying on his new slides, Welch dismissed each difference as a "*variation*", while at the same time conceding that this apparent 'variation' fell **outside** of the range of variations. Not only was this the first occasion on which Welch even engaged with the range of variation criterion, the material he based his argument on misrepresented Radley's position, in order apparently to 'respond' to the differences Radley had noted. This exposes the weakness of Welch's apparently conclusive opinion. By way of example in relation to R-27:

- (i) Responding to difference '4',<sup>658</sup> (the very thin loop formed after the pen retraces itself), Welch accepted that "*Mr Radley is correct in the assessment that the loop formation is not as wide [as in the comparator documents]*",<sup>659</sup> i.e. the width of the loop falls outside of the range of variations – there is no comparator document which shows such a thin loop. However, despite accepting this, Welch continued that this thin loop "*is absolutely attributed to variation and not a difference*". He relied on slide 31, which shows K10.3 and K12.1: both of which have **wider** loops than in R-27.<sup>660</sup> So even Welch could not find an example to show that the thin loop in R-27 falls within the range of variation, yet still calls this a "*variation*". It is a difference.

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<sup>657</sup> The same was true of Radley's oral testimony. Radley was consistent and convincing always, in the process, acknowledging the correctness of the Experts when he agreed with them (see, for example: 2/11/16-19). The Tribunal is invited to read this entire passage (2/66/1 to 2/81/22) and note how Radley approaches the signature applying the recognized standards (similarities (2/14/4-19), differences (2/14/4 to 2/15/18), range of variation (2/15/13 to 2/15/18), cumulative effect (2/28/2-16)) while dealing head on with Welch's comments (see, for example, 2/68/3-10).

<sup>658</sup> Radley report, page 59 (illustration).

<sup>659</sup> Expert Hearing/Welch/1/215/15-16; Radley Report, para. 276; Expert Hearing/Radley/2/68/5-17.

<sup>660</sup> See also Radley's annotation of this slide 31 in his demonstrative exhibit CDE-RR-1, which demonstrates this point.



- (ii) Responding to difference '5', Welch agreed that the joining stroke element is "*narrower*" than in any of the comparator documents but stated that this is a "*variation*" which "*goes along with his handwriting habits*", relying on slide 32.<sup>661</sup> But slide 32 simply shows a comparator document with a wider joining stroke than in R-27, i.e. even on Welch's best example, the feature in R-27 falls outside of the range of variation. It is a difference.
- (iii) Responding to difference '6', Radley noted there was no final loop in R-27, whereas this featured in all of the comparator documents. In response, Welch agreed that this feature (present in all comparator documents) is not present in R-27, but simply fudged the issue by discussing instead height relations and "*other characteristics that go along with the handwriting habits of Mr Struik*", and on that basis "*I don't see that as a difference*".<sup>662</sup> So Welch agreed that there is no loop in R-27, but there is a loop in all of the comparator documents: how can this not be a difference? This exposes the deficient scientific basis of Welch's approach.<sup>663</sup>

322. Similar points can be made as regards R-28 and R-29.<sup>664</sup>

<sup>661</sup> Expert Hearing/Welch/1/216/11 to 1/217/2; Radley Report, para. 277: Welch is pressed on this point and asked by Guinea "*Have you seen that variation in any of the known writings of Mr Struik*". Welch accepts "*Not as narrow as that particular feature in R-27*".

<sup>662</sup> Expert Hearing/Welch/1/219/4 to 1/222/1; Radley Report, para. 278.

<sup>663</sup> There are other examples too. In response to difference '2', (the length of the loop of the first stroke being almost half the height of the overall signature: a proportion not seen in any of the comparator documents), Welch's slide 30 reproduces Radley's drawing incorrectly (the middle dotted line (to represent the length of the loop) is drawn too high, which clearly affects the proportioning of the length of the loop to the overall length of the signature (similar to Welch's misrepresentation of Radley's report in slide 37, as discussed during the Expert Hearing)). Yet, even on Welch's distorted diagram, the loop of K3 is much larger in proportion to the overall length of the signature than in R-27. Welch baldly states that K3 is "*absolutely similar*", and "*falls within Mr [Struik]'s range of variation*" (1/212/15 to 1/213/4). This is simply not correct: even he could not provide an example to show that the overall proportion of the first loop in R-27 is within the range of variation. It is a difference. See also the discussion of difference '8': Radley refers to a distinct change of pen direction in the two lines **following** the dome of the terminal loop in R-27 compared to the comparator documents. However, in seeking to respond to this point (or perhaps because he cannot), Welch refers to his slide 35, which refers to the **dome-shaped terminal movement** (i.e. not the lines **following** this movement). This is not the point that Radley was addressing, and Welch's misunderstanding of this point is surprising given his expertise (Welch/1/220/20-24; Radley Report, para. 280). Again, a difference identified by Radley was unaddressed by Welch.

<sup>664</sup> For example, and in short, in response to Radley's fourth difference on R-28 (the right angled introductory stroke), Welch refers to slide 50 to argue, of course, that this is simply a variation (Welch/1/200/2 to 1/201/17;

323. The above examples demonstrate the flawed nature of Welch's approach. He recognised (belatedly) that a range of variation exists, but dismissed features that fall outside of this range as "variations". This runs contrary to the authorities, and for good reason: what is the point of establishing the range of variation, if everything outside of it can be discarded as a variation? He had no basis for saying that the apparent "variation" is a feature of the purported signature, and in each case his disregarding of it a difference was pure speculation.<sup>665</sup> This is true even in Welch's own words of what a proper assessment would look like: "*you have to properly reason and evaluate what is significant in the known writing and what is significant in the questioned writing, and you have to evaluate the significance in combination, together*".<sup>666</sup> He has not done this here. Instead, Welch's approach was unscientific and cavalier. In contrast, Radley's scientific, consistent, cautious and logical approach to R-27 allowed him to conclude that when assessing the differences in R-27 as a whole, there is evidence that the signature is not genuine.<sup>667</sup> Radley's conclusion in reaction to R-27 as with every of his conclusions is to be preferred to Welch's.

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Radley Report, para. 294; see also Radley's annotation on slide 50 (Exhibit CDE-RR-1)). The closest Welch can come to the abrupt right-angled bend is K23.3, a poor quality copy, with does not show a right angle (it is difficult to see what it does show, such is the poor quality of the copy). That Welch was forced to rely on such a poor example, is indicative of the weakness of his argument: how can he be so confident of his opinion based on an appalling quality copy which does not appear to illustrate the point he needs to?

Similarly, in response to the elongated anticlockwise curve shape Radley noted in R-29 (and not found in the comparator documents), Welch relies on two poor (and distorted) copies on slide 53 (K22 and K12.3), which, again, do not show the elongated anticlockwise shape Radley referred to. Instead, Welch has to dumb down Radley's observation to noting simply an "S" form: that was not Radley's point. In any event, even on Welch's examples it is a difference. In K22 and K13.2, the line clearly bends in a clockwise direction, which even Welch accepts are "*not exactly the same*" as R-29 (Welch/1/201/19 to 1/202/24; Radley Report, para. 292; see also Radley's annotation on slide 53 (Exhibit CDE-RR-1)).

<sup>665</sup> See Expert Hearing/Radley/2/86/19 to 2/87/1 ("*If it's outside the range of variation it's a difference. We're talking about the samples we're looking at. To categorise it as anything other than a difference, you are speculating that somewhere in the next 100 signatures, you will see this feature. But we have here is a block of known signatures, and from that we establish the range of variation, and it is that which forms the opinion*").

<sup>666</sup> Expert Hearing/Welch/1/239/8-12.

<sup>667</sup> Expert Hearing/Radley/2/81/4-22 ("*Now, assessing that, we obviously have to consider the nature of the differences, the significance of them, and the significance of the accumulation of them. If you have a questioned signature and you have one difference, yes, that could be an accidental. If it has two, it could be two accidentals. If it's got three, that's pretty unusual. If it's got four, yes, you might be very worried about it. If you have six differences, and two of which are rarities, that combination of evidence -- and this is the important point: it is the combination of all those features coincidentally all appearing in one signature -- I think I've probably been very conservative in saying "weak to moderate", and I think some examiners would probably go a lot heavier on it, personally. But that number of features leads me to a positive opinion: weak to moderate evidence supporting the fact -- not the fact, I beg your pardon -- supporting the proposition of it not being genuine.*").

c. Welch's criticism of measuring proportions underlines his unscientific approach

324. In his closing remarks, Welch made the extraordinary remark for an expert that he had to "*kind of chuckle to myself*" when Radley discussed measuring lines in signatures. Welch added that "[t]hese particular measurements and numbers can be very misleading".<sup>668</sup> Instead, it appears that Welch's preferred approach was to base his conclusion (which as Madam President noted, was a very definitive conclusion) on speculation. Welch's rejection of measurements is strange for an expert, especially when dealing with features such as proportioning, which is difficult to gauge with the eye. If the science is there, just with a ruler and a calculator, then that is something that should undoubtedly be used. Welch obviously has not done so.

325. This can be contrasted both with Radley's approach, and even Guinea's expert. Indeed, Picciochi referred to the ratio of the width over the length in R-27 compared with the comparator documents and later confirmed the value of taking "*relative measurements*".<sup>669</sup> (Picciochi's criticisms of Radley's measurements are not accepted: Radley also referred to relative measurements, such that comparison between signatures is meaningful).<sup>670</sup> Radley faced criticism for applying measurements to an assessment of the range of variation: but the alternative is to fall back on speculation, a concept rejected in theory by all experts at the Expert Hearing. In short, Welch was a thoroughly unconvincing witness and just as unable as LaPorte to apply his own industry standards and methods to his conclusions.

iv. *Guinea's experts' evidence should be disregarded*

a. Guinea's Comments on the Final Report were abandoned by their own experts

326. The Tribunal need only spend very little time considering the merits of Aginsky's and Picciochi's evidence. The only expression of their opinion that the Tribunal had the

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<sup>668</sup> Expert Hearing/Welch/2/170/1-8.

<sup>669</sup> Expert Hearing/Picciochi/2/98/16 to 2/99/1 and 2/132/13-14.

<sup>670</sup> See Radley's annotations on slides 30, 37 (Exhibit CDE-RR-1).

benefit of before the Expert Hearing was the sentence in Guinea's comments on the Final Report which said, "*Consequently, it is Mr Picciochi and Dr Aginsky's expert opinion that there is every indication that the Disputed documents are genuine.*" [emphasis added]. The "*consequently*" followed paragraph 5 in which Guinea's experts' agreement with the "no evidence" conclusions was expressed.<sup>671</sup> The "every indication" opinion, therefore, only referred to the "no evidence" part of the Final Report i.e. not the handwriting part. This raises two issues.

- (i) First, in oral testimony, Aginsky agreed that the "no evidence" conclusion should have included the alternative of "*no evidence that would show that the documents are not backdated fraud*".<sup>672</sup> He also confirmed that LaPorte's conclusion was actually inconclusive. This was not reflected in Guinea's Comments.
- (ii) Second, Picciochi agreed that Guinea's Comments did not refer to the handwriting aspect of the Final Report.<sup>673</sup> So the entirety of his evidence at the Expert Hearing was new. Every single word was outside the PO17 regime and should have been excluded in its entirety. No proper opportunity to analyse and answer his material has been afforded to BSGR and the Tribunal should attach no weight to it. In any case, it was self-selected and self-serving.

327. In addition, both Picciochi and Aginsky distanced themselves from the "*every indication*" terminology used in Guinea's Comments, and made clear that they both signed off on the document without properly reading it. Picciochi's excuse was that he did not prepare the document, accepting that "*every indication*" is not a recognized phrase.<sup>674</sup> Aginsky was

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<sup>671</sup> Guinea's Comments on the Expert's Final Report, dated 12 March 2018.

<sup>672</sup> Expert Hearing/Picciochi/2/139/2-3.

<sup>673</sup> Expert Hearing/Picciochi/2/120/6-11 ("*Q. This paragraph – and I will come on to the next paragraph as well - represents the expression of your opinion, but doesn't refer to handwriting at all. A. It does not appear to, no. Q. Do you know why that is? A. No. I did not prepare the document.*"); 2/122/5-11 ("*Q. So up until today, up until an hour ago, the only indication that this Tribunal and we had of your opinion was contained within that word "Consequently" in that sentence? A. Unfortunately, I don't see, just reading it very quickly, if there's anything about the handwriting.*").

<sup>674</sup> Expert Hearing/Picciochi/2/120/18-22 ("*I read that [Guinea's conclusion of "every indication" that the Disputed Documents are genuine]. In retrospect, I certainly wouldn't use "every". And in conveying information "indications" is a weak opinion, because we're combining the document examination with the*

as reckless as Picciochi in his endorsement of Guinea's Comments, his excuse being that he was busy with another case and read Guinea's comments on his phone.<sup>675</sup> He said: "*So of course I would not include the words "every indication"; I don't know what "every indication" means.*"<sup>676</sup> Given that was the entirety of Guinea's experts' represented views before the Expert Hearing and they disowned it in its totality, their evidence before the Expert Hearing was worthless. It was, in effect, non-existent. In fact no expert worth his salt ought to have allowed the phrase to be used in his name and Picciochi and Aginsky should, on reading it, have corrected it. The Tribunal has no means to know what Guinea's experts' views were at the time of Guinea's Comments.

b. Picciochi's oral evidence was self-serving and should be discounted in its entirety

328. Picciochi's evidence aped Welch's no differences arguments and applied his approach of looking only at similarities. It did not follow any of the recommended approaches and is fundamentally unsafe. There are further reasons why the Tribunal should discount Picciochi.

- (i). First, as set out above, it is clear he signed off the endorsement of the Final Report in Guinea's Comments without properly reading it.
- (ii). Second, Picciochi, without any basis whatsoever, gave his evidence assuming that the Avidan signatures were made in Hebrew. This was pure assumption. He said he had gone to textbooks that supported his conclusion and was asked to produce them, but did not.<sup>677</sup> Regrettably, this episode was symptomatic of Picciochi's flawed and unreliable approach and evidence, which must be ignored in its entirety.

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*handwriting examination, and they're really not separate.*"); 2/121/14 ("*Again, I did not prepare this document.*"); 2/1221/23 to 2/122/4 ("*They are moving away from that to more or less a five-[point] scale; that is, "evidence to support the proposition", or "strong evidence to support", or "weak" or "moderate evidence to support". Q. But this [every indication] isn't a phrase that's on that scale either, it is? A. It is not.*").

<sup>675</sup> Expert Hearing/Aginsky/2/145/6-9 ("*As I say, I was preparing to testify [on another case], and was meeting with a lawyer, and the next morning is my testimony. And I received it on my telephone.*").

<sup>676</sup> Expert Hearing/Aginsky/2/145/21-22.

<sup>677</sup> Expert Hearing/Picciochi/2/124/11 to 2/125/10.

- (iii). Third, Picciochi, like Welch, misrepresents Radley's drawings. In demonstrative "C" on R-27, Picciochi calculates the ratio for the width to height in the "M" in R-27 compared with the comparator signatures. However, if he had expanded the box (as Radley did) from the first three loops to the full five loops, then the calculation would show R-27 to be well outside the range of writing variation in the known writings (see Radley's annotations to Welch's slide 37).<sup>678</sup>
- (iv). Finally, Picciochi made no comment on features such as the degree of curvature, the joining strokes, the rather angular bends at the base of the first three loops of R-27 relative to the rounded shape in the known writings, the retrace of the fifth up/down pen movement, or the close packing of the fourth and fifth elements.

c. Aginsky agreed with Radley

329. Aginsky too signed off on Guinea's Comments without reading them properly. This meant an implied endorsement of LaPorte's dating assumption in paragraphs 160 and 177 of the Final Report, when he accepted during the Expert Hearing that actually LaPorte should have included "*the alternative hypothesis*".<sup>679</sup> This was Radley's view and was something Aginsky ought to have said, rather than it being prised out of him in cross-examination. Tellingly too, his evidence at the Expert Hearing (not apparent at all in Guinea's misleading Comments) was that the Final Report in relation to the handwriting "*gives some result*" but in relation to "*the other part of the examination...gives no result*".<sup>680</sup> That is to say, as with the alternative hypothesis point he agrees with Radley and not LaPorte.
330. If Guinea's expert evidence weighs in the balance at all, it is only to endorse Radley. Insofar as it is possible to take anything from Guinea's experts it is: that they accept the requirement for precise, industry recognized terminology and the danger of making unsupported assumptions; that "no evidence" means "indeterminate"; that the cumulative value of the evidence has to be taken into account; and that alternative propositions

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<sup>678</sup> Exhibit CDE-RR-1.

<sup>679</sup> Expert Hearing/Aginsky/2/144/13.

<sup>680</sup> Expert Hearing/Aginsky/2/145/11-13.

should have been stated.

v. *Conclusion*

331. Where does that leave the Tribunal on the expert evidence? With a very clear picture and three simple propositions. (1) No conclusions can be made in relation to the Disputed Documents on the basis of the physical inspections. The position is indeterminate. (2) There are significant (to varying degrees of) doubts in relation to the signatures of Struik, Avidan and Lev Ran and for the reasons as pointed out above in this Subsection; and (3) there are doubts as to the credibility and professionalism of the Experts.
332. All the experts, in essence, agreed with (1) only it had to be forced out of LaPorte. Radley was clear, persuasive and consistent in relation to (2) applying the accepted standards to his analysis, in the face of Welch's inchoate, inconsistent approach that had no foundation in the academic literature or industry guidelines.
333. These conclusions are fortified by the other factors set out above extraneous to the Experts' task, including Struik and Avidan's evidence, the terms of the contracts, the lack of evidence of performance of the contracts, obvious typographical errors in the contracts (including in the names of BSGR and Avidan) and the suspect provenance of the documents.
334. As mentioned above, it is perhaps surprising that so much attention has been paid to the Disputed Documents. Other than R27 to R-29, BSGR has not adopted a position in relation to the documents except to question the suspicious manner in which they seem to have passed through the hands of so many people with interests in the saga on their way to the FBI.
335. As to R27 to R29, they are plainly forgeries, which has been BSGR's consistent position from the first moment anyone associated with BSGR saw them – well before anyone could imagine how they would subsequently feature in the narrative against them. It was only when they looked as if they were being weaponised in the campaign against BSGR that the consequences of the abuse of these forgeries became obvious and BSGR took steps to try to mitigate these. Had the documents been genuine evidence of corruption,

any corrupt party would have done far more to have hidden its tracks than BSGR did when they first came to its attention. Even so, the threat was not taken lightly. Mamadie Touré was asked and agreed to withdraw her allegations<sup>681</sup> and when Hennig showed up with them, BSGR took advice from Ken Macdonald QC the leading criminal silk in the UK.<sup>682</sup> These are not the actions of a corrupt party.

336. Guinea accepts that the authenticity or otherwise of the contracts is not a central issue.<sup>683</sup> BSGR agrees. Or, in any event, it agrees it is not a determinative issue. That said, the expert exercise, taken together with the other evidence, has proved to be deeply instructive. It has, in BSGR's view, allowed the Tribunal to conclude with confidence that R-27, R-28 and R-29 are forgeries and that there are significant doubts about the authenticity of the other Disputed Documents. That is not the, or even, an, end point in BSGR's case, but it is a telling aspect weighing in the balance. It is part of the architecture of the unlawful deprivation of rights and an unedifying glimpse into its methodologies.

## VII. KIM V. UZBEKISTAN

### 7.1 The relevance of Kim v. Uzbekistan

337. BSGR set out the relevance of this decision during the Merits Hearing.<sup>684</sup> It will now respond to Guinea's comments and put this decision in the context of what was heard during the Merits Hearing. Comparing the facts of the present case with *Kim v. Uzbekistan*, the similarity is striking. Guinea tries to play down its relevance by misrepresenting this decision:

*" [T]he alleged payment was such that Madame Karimova, who was behind the sale of the company, was allegedly overpaid – in other words, that the company that had been sold was overvalued – and the tribunal considered that there was*

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<sup>681</sup> Exhibit R-0362.

<sup>682</sup> Cramer, CWS-7, para. 20; Avidan/9/156/12-19.

<sup>683</sup> Expert Hearing/Ostrove/2/221/22-24 ("I'd like to in fact weight the importance of these elements: it's only one amongst many others.").

<sup>684</sup> Libson/1/14/10 to 1/19/12.



*not sufficient evidence to prove that this payment had been in excess of the true value.*"<sup>685</sup> (emphasis added)

338. This is however not what the Tribunal in *Kim v. Uzbekistan* ("**Kim Tribunal**") held. It found that it was difficult to assess:

*"whether or not any overpayment was made since there is uncertainty in valuing the shares themselves. Moreover, even if there were some overpayment, the mere fact of such an overpayment would not in and of itself establish that the overpayment should be regarded as a bribe."*<sup>686</sup> (emphasis added)

339. The Kim Tribunal did not decide upon this point, as Uzbekistan failed to establish the "other elements of bribe-giving". It was in fact not the lack of "overpayment", but the lack of evidence to prove the elements of corruption under the applicable Uzbek Criminal Code, which led the Kim Tribunal to dismiss the corruption claim. This is not dissimilar to the present case.

340. Guinea has completely failed to establish that there were bribes paid to government officials (see Sections III and IV above), and Mamadie Touré was never a government official, as much as Guinea has tried to make this point. Even if she was the fourth wife, which is denied, there is no support under Guinean law that a wife of the President is a public official.<sup>687</sup> In fact, polygamy is prohibited under Guinean civil law.<sup>688</sup> The Kim Tribunal applied an even higher standard. If Ms Karimova, who was undisputedly the daughter of the Uzbek President and has held various governmental positions, was not a public official, Mamadie Touré certainly fails the test. She could at most be a "politically exposed person", although there is no evidence to support even that and it would not in any case render her a public official either.<sup>689</sup>

341. In the *Kim v. Uzbekistan* case Uzbekistan failed to provide witness testimony of Ms Karimova, who was the key person involved in the alleged corruption scheme. Ms

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<sup>685</sup> Ostrove/1/112/9-15.

<sup>686</sup> CL-0060, para. 563.

<sup>687</sup> Reply, para 290; Expert Report of Olivier-Sur, para. 54 ("*even if Mamadie Touré was the wife of the president, which I understand is a contested fact, she would still qualify as a "third party", and not as a "public official".*").

<sup>688</sup> Exhibit, RL-0005, Chapter VI.

<sup>689</sup> CL-0060, para. 571.

Karimova was in the government's custody and Uzbekistan did not explain why it could not produce her. This is again, a striking similarity to the present case. Even if Mamadie Touré is allegedly in the custody of the DoJ in the US, this does not mean that she was restricted from being presented as a witness in these proceedings. Indeed, it did not restrict her from participating in cases brought by Switzerland, Israel and Guinea, and the Martinez declaration presented by Guinea during the Merits Hearing was noticeably silent on the status of Mamadie Touré.<sup>690</sup> Mamadie Touré has also indicated that Guinea has paid her legal fees in relation to these proceedings, which provides further support for Guinea's ability to call her as a witness.

342. The Kim Tribunal also considered that "*the mere fact of an overpayment*" was not enough to be regarded as a bribe. It is telling that Guinea misrepresents this case, but it is equally not surprising given that Guinea's entire case is built on payments, which are as such no proof of corruption.

343. Similar to the present case, there was no direct evidence of corruption in *Kim v. Uzbekistan*, but alleged "red flags", which according to the Kim Tribunal:

*"most often provide only circumstantial, as opposed to direct, evidence. As circumstantial evidence, red flags can play an important role in the assessment of guilt. Whether red flags can directly establish, for example, an element of crime depends on the legal system applicable."<sup>691</sup> (emphasis added)*

344. The Kim Tribunal clearly sees the applicable legal system as determinative to establish whether so called "red flags" constitute a criminal offence. Guinea again misrepresents what the Kim Tribunal considered. Nowhere did the Kim Tribunal state that "*red flags could be sufficient*".<sup>692</sup> It merely considered that red flags could play a role in the assessment of guilt but whether they establish direct evidence depended on the applicable legal system.

345. Unsurprisingly, Guinea does not want to recognise this part of the decision. If this Tribunal follows the Kim approach – which it undoubtedly should – it has to apply the

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<sup>690</sup> Exhibit R-0587.

<sup>691</sup> CL-0060, para. 548.

<sup>692</sup> Ostrove/1/112/22-25.

Guinean Criminal Code to establish whether the purported "red flags" in the present case establish a criminal offence. Considering that the Guinea Criminal Code is also very narrow and does not, for example, criminalise active trading of influence,<sup>693</sup> it comes as no surprise that Guinea is desperate not to apply its own Guinean Criminal Code.

346. In the *Kim v. Uzbekistan* decision, the red flags were two consulting agreements that were concluded between the Claimant and a third party, who among other things (i) introduced the Claimant to the acquisition opportunity; (ii) provided insight into the respective industry; (iii) facilitated the Claimant's introduction to the Sellers; and (iv) acted as an intermediary between the Claimant and the Sellers. He was paid a commission, which was a percentage of the purchase price. The Tribunal rejected Uzbekistan's claim that these "red flags" were evidence of corruption. Even if international public policy was applied, Uzbekistan failed to offer any evidence of any attempt by the third party to secure an advantage from the Government of Uzbekistan by way of a bribe.
347. Like Uzbekistan in *Kim v. Uzbekistan*, Guinea also relies on alleged "red flags" as proof that BSGR obtained its mining rights through corruption. The "red flags" essentially consist of (i) the agreements BSGR concluded with Pentler; (ii) the contracts Pentler apparently concluded with Mamadie Touré, Bah, IST and Daou; (iii) the contracts BSGR allegedly concluded with Mamadie Touré/Matinda; and (iv) several payments that were allegedly made under these contracts to individuals who allegedly acted for BSGR as consultants. It has, however, failed entirely to prove that any of these third parties have gained advantages for BSGR from the Minister of Mines or any other government official in charge of granting the mining rights.
348. BSGR has set out its position as to these agreements and contracts above in Sections V and VI. As regards the payments, BSGR has responded to Guinea's allegations in Section IV. Even if BSGR's position is wrong as to the contracts and payments (which clearly, it is not), and that these contracts do raise "red flags", the Tribunal then needs to look at Guinean criminal law to consider whether the "red flags" constitute a criminal offence.

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<sup>693</sup> Reply, para. 295.

As set out in BSGR's Reply, active trading of influence is not a criminal offence.<sup>694</sup> Thus, these purported contracts would not be an act of corruption in itself. As to the acts of the individuals involved, there is no evidence that any of them committed an act of corruption pursuant to Article 192 of the Guinean Criminal Code or any other rules of international public policy.<sup>695</sup> In fact, not one government official or third party that has apparently been involved in the award of BSGR's mining rights has ever been prosecuted for committing an act of corruption – and indeed Fofana is now the Prime Minister of Guinea.

## **7.2 There is no link between the alleged act of corruption and the procurement of BSGR's mining rights**

349. Even if the Tribunal finds that BSGR committed an act of corruption or that the "red flags" constitute an act of corruption in themselves, which BSGR denies, there is still no evidence that there is a link between these acts and the procurement of BSGR's mining rights in Guinea.

350. There needs to be a causal link between the act of corruption and the procurement of the investment.<sup>696</sup> BSGR's position, which it set out in its Reply<sup>697</sup>, is, unsurprisingly, supported by *Kim v. Uzbekistan*. The Kim Tribunal agreed with the tribunal in *Sistem vs Kyrgyz Republic* that:

*"an important element of the concept of bribery or corruption is the link between the advantage bestowed and the improper advantage obtained."*<sup>698</sup> (emphasis added)

351. It also found that:

*"[P]roof of bribery or corruption may be difficult but it is fundamental that the severe consequences that follow a finding of corruption justify the need for such*

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<sup>694</sup> *Ibid.*

<sup>695</sup> Section III above; Reply, para 292, which sets out the three constituent elements of corruption: (i) the promise, offering or giving of offers, promises, gifts or presents; (ii) to a public official; (iii) with the intention of procuring the public official to act or refrain from acting.

<sup>696</sup> Reply, para 333 et seq.

<sup>697</sup> *Ibid.*

<sup>698</sup> CL-0060, para 589.

*linkage. The casting of doubt or aspersions to the probity of a transaction is not sufficient.*"<sup>699</sup> (emphasis added)

352. The Kim Tribunal essentially found that because of the seriousness of the allegations of corruption and the consequences following a finding of corruption, it is important to establish that a link between the procurement of an investment and the alleged acts of corruption exists.
353. Applying these findings to the present case, Guinea has failed to prove that there was a causal link between the alleged "red flags" and the award of the mining rights to BSGR. Guinea's witnesses confirmed this during the Merits Hearing: not one of them had been put under pressure from any of these individuals related to the purported contracts. Not one of them acted under any such alleged pressure.<sup>700</sup>
354. In every single respect, on the facts in the present proceedings, *Kim v Uzbekistan* is supportive of BSGR's position.

#### **VIII. THE CONSPIRACY AGAINST BSGR**

355. The following section deals with the conspiracy orchestrated by George Soros and involving President Condé to strip BSGR of its mining rights in Guinea. It builds on paragraphs 167 to 271 of the Reply, the First and Second Witness Statements of Benjamin Steinmetz, the First and Second Witness Statements of Dag Cramer<sup>701</sup> and the relevant passages of BSGR's opening remarks at the Merits Hearing.<sup>702</sup>
356. As set out in the introduction, BSGR does not have to prove the conspiracy against it, but it has. As with all other aspects of this case, BSGR's position on this has been consistent and consistently right. In fact, what has happened is that BSGR's skeletal theory of what it had suffered when its rights were stolen (the Palladino affair involving Mebiame and Hennig and the election stealing payback) has been fleshed out as time has passed with further details, each of which has supported and developed the original position.

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<sup>699</sup>

*Ibid.*

<sup>700</sup>

Sections II and III above.

<sup>701</sup>

Exhibit C-0028.

<sup>702</sup>

See Libson/1/10/5 to 1/13/17 and 1/70/12 to 1/90/5.

357. Even since the Merits Hearing and, as recently as the last few weeks, with the Bolloré disclosures, the depths of the Condé regime's corruption are still being discovered and explored. Almost inevitably, President Condé has followed the basic and unimaginative script of all dictators. As his corrupt schemes fail to bear fruit for his country he suppresses dissent and has started to explore constitutional manoeuvres to extend his rule. The Tribunal should recall that this does not operate simply at the level of high political intrigue. Real peoples' lives are affected and that has included the unforgivable treatment of two of BSGR's employees, for which not even an expression of contrition has been made.<sup>703</sup> The Tribunal is urged to take into account the cruelty that has gone alongside the corruption.
358. The Tribunal is also urged to consider the arc of how the corruption has revealed itself. The Palladino affair may have had the air of a John le Carré novel as it stood. It bordered on the unbelievable. But what BSGR knew to be true went from novelistic and out of the ordinary to run of the mill Condé style business as details emerged of him and/or his son accepting bribes from Mebiame (as a "fixer" for Hennig and Och Ziff), Sable Mining, Rio Tinto (either directly or through de Combret) and now Bolloré. Unsurprisingly, Guinea does not want to deal with this. It says the attempt to steal the election argument is a "*red herring*" and "*outside the scope of this arbitration*".<sup>704</sup>
359. Yet, the evidence for President Condé's and Guinea's corruption is overwhelming. The Tribunal is invited to find that, as with at least three other companies, President Condé elicited a bribe from BSGR and that his conduct is powerfully supportive of a regime that would steal back legitimately awarded rights on a concocted basis - especially after his preferred methodology of extortion failed to deliver.
360. There is significant material in relation to these matters and the Tribunal is urged to read it, in particular:

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<sup>703</sup> Reply, paras 229-237.

<sup>704</sup> Ostrove/1/109/3-8.

- (i) The judgment of ECOWAS dated 16 February 2016, concluding that Guinea breached the human rights of the BSGR employees IST and Bangoura;<sup>705</sup>
- (ii) Documents evidencing the ill-fated "Palladino loan" in which the provider of a USD 25 million loan to President Condé to fund his election campaign would become entitled to a 30% share in the assets of a public mining company. The evidence of the illicit motive behind the Palladino loan is now abundantly clear not only from the transcripts of a conversation between Mebiame and Thiam and the loan documents themselves, but from the United States Department of Justice ("DoJ") investigation into, and conviction of, Mebiame and Och Ziff (discussed below). Mebiame pleaded guilty to his role in the Palladino affair and making bribes in Guinea in return for mining rights;<sup>706</sup>
- (iii) Documents from the DoJ relating to the Mebiame conviction, including the "*overwhelming evidence*" that he made corrupt payments to gain access to senior Guinean government officials, including Alpha Condé's son, and Kerfella, a member of the Strategic Committee which withdrew BSGR's rights; paid for the hire of a plane for President Condé; was influential in securing the Palladino loan in order to gain "*exclusivity*" over mining opportunities in Guinea; was involved in the re-drafting of the Mining Code, to allow for the "*review*" into BSGR; and drafted correspondence for Guinea to existing mining rights holders to notify them of "*legal issues*" with their mining permits;<sup>707</sup>

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<sup>705</sup> Exhibit C-0231; Reply, paras 229-239; Libson/1/72/17-20 and 1/87/3 to 1/88/3.

<sup>706</sup> Exhibit C-0028, paras. 19.2 and 54-58; Exhibit C-0228; Exhibit C-0313; Reply, paras 223- 227; Cramer/2/104/15 to 2/106/19.

<sup>707</sup> US Department of Justice, Information Document dated 9 December 2016 (Exhibit C-0223), paras 16 and 19; US Department of Justice Plea Agreement dated 9 December 2016 (Exhibit C-0224); Bloomberg, "U.S. Case Into Fixer for Och-Ziff Venture Gets Support in Guinea" dated 18 August 2016 (Exhibit C-0215); Criminal Complaint, paras. 4 and 7 (Exhibit C-0216); PR Newswire, "Mvelaphanda Holdings, Och-Ziff and Palladino Create Joint Venture to Focus on Natural Resources in Africa" dated 29 January 2008 (Exhibit C-0217); The Financial Times "US seeks scalps in Och-Ziff bribery investigation" dated 12 September 2016 (Exhibit C-0218); The New York Times "Bribery Arrest May Exposes African Mining Rights Scandal Tied to Och-Ziff" dated 16 August 2016 (Exhibit C-0219); Letter from the US Government Attorney to Judge Tiscione dated 16

- (iv) Documents from the United States Securities and Exchange Commission ("SEC") investigation into Och Ziff, which found that *"the profit of \$52 million generated by the [Och-Ziff] operation allowed Walter Hennig (still named as the "South African partner") to grease the palm of government officials in Guinea to acquire mining licenses."*<sup>708</sup>
- (v) Emails demonstrating that President Condé's son was bribed by Sable Mining, and in return awarded Sable mining lucrative mining rights, together with agreeing not to include it in the mining review;<sup>709</sup>
- (vi) The decision of the Common Court of Justice and Arbitration ("CCJA") that Guinea unlawfully expropriated the assets of Getma shortly after President Condé came to power, with Guinea having relied on the untested and not credible testimony of Steven Fox (who also created the Veracity Report relied upon in the DLA Piper Report);<sup>710</sup>
- (vii) Documents leaked to the press disclosing an arrangement between Rio Tinto and de Combret, to funnel USD 8 million to President Condé either directly or through his son, leading to the sacking of Rio Tinto's top executives and investigations into Rio Tinto in the UK, Australia and United States.<sup>711</sup> The only explanation the Tribunal has heard for the USD 8 million commission payment currently is de Combret's: *"Rio Tinto is a huge company ... But the*

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August 2016 (Exhibit C-0220); Order of Detention Pending Trial dated 16 August 2016 (Exhibit C-0221); Order of the United States District Court for the Eastern District of New York, dated 1 September 2016 (Exhibit C-0221A); Press Release US Department of Justice dated 9 December 2016 (Exhibit C-0222);

<sup>708</sup> Libson/1/72/25 to 1/73/9; 1/74/8 to 1/75/4; 1/76/12 to 1/77/2; Reply, paras 168-228.  
 USA Securities and Exchange Commission – Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank – Cease and Desist Order (Exhibit C-0225, paras. 36 and 78); Libson/1/73/10-18 and 1/75/5 to 1/76/11; Reply, paras, 184-188, 191-193, 214-222.

<sup>709</sup> Bloomberg, "Guinea to probe Sable Mining after Global Witness Report" (Exhibit C-0325); Exhibit C-0028, para 59; Sable Mining emails at Exhibits C-0299, C-0300, C-0301, C-0302, C-0303, C-0304, C-0305, C-0306 and C-0307, C-0308; See also Memorial, paras. 133(iv), 150-152 and 274; Libson/1/72/21-24.

<sup>710</sup> *Getma International v. The Republic of Guinea*, ICSID Case No. ARB/11/29, Award dated 16 August 2016, (Exhibit C-0239); Reply, para. 78 and 258(iii). Note, the CCJA award was annulled on a technicality, following the Tribunal members reaching a direct agreement on fees with the parties, which was not allowed under CCJA rules.

<sup>711</sup> Rio Tinto emails (Exhibit C-0204); Libson/1/73/19 to 1/74/1; 1/79/3-22; Steinmetz/3/83/15-23 and 3/115/8-10; Reply, paras 122-127.



*president told them, 'Listen, if there's no downpayment', I'll cancel the concession.' And he would have done it";*<sup>712</sup>

- (viii) Documents related to the USD 1.25 billion shakedown of BSGR by President Condé.<sup>713</sup> Guinea states that there is no evidence for the allegation that President Condé's USD 1.25 billion request was an extortion request. That, of course, is not true. In fact, there was no evidence in these proceedings that it was **not** an extortion request. The Tribunal has the benefit of a witness who was there who confirms the nature of the request,<sup>714</sup> as well as emails from Vale (now an adversary to BSGR) confirming that this extortion request (once BSGR initially refused payment) quickly dropped from USD 1.25 billion to USD 500 million to USD 250 million, thereby undermining Guinea's assertion that this was in any way a repayment of tax due.<sup>715</sup> Those emails also show that as early as June 2011, Soros informed Vale that "*...it is the President Alpha Condé that does not recognize the agreement with the negotiator ("dealer") Steinmetz*". And the extortion attempt is entirely consistent with President Condé's modus operandi;
- (ix) Emails demonstrating the key role Soros played in FTI Consulting terminating its PR relationship with BSGR immediately after the leaking of the Allegations Letter, leaving BSGR unarmed in the media war forged by Soros against it;<sup>716</sup> and
- (x) The recent news coverage of the opening of a French investigation into the company Bolloré, on the basis of allegations that it sponsored President

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<sup>712</sup> France 24, "*Audio recordings drag Guinea president into mine bribery scandal*" (Exhibit C-0206); Audio Recordings (Exhibit C-0207.1 and C-0207.2).

<sup>713</sup> Libson/1/77/8 to 1/78/24; BSGR Reply, paras. 206 to 209 and 243 to 247; Avidan, CWS-3, paras. 88-89.

<sup>714</sup> Avidan/9/160-163. Avidan stated that he wanted to believe that Condé wanted the payment to go the Guinean state and not to him (or his son) personally, "*But the words in French were as I stated: "vous me devrez"*".

<sup>715</sup> Exhibits C-0238 and C-0234.

<sup>716</sup> Libson/1/85/11 to 1/86/4; Reply, Annex 1, para. 150(viii); Exhibit C-0354;

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Condé's election campaign, in return for valuable port concessions once he was elected.<sup>717</sup>

361. In addition to this, there is a plethora of material on the record demonstrating that the decision to revoke BSGR's rights was pre-determined even before the commencement of the Technical Committee review. Each of President Condé, Soros and Horton made statement after statement of the 'fact' of BSGR's apparent guilt, before and during the Technical Committee process.<sup>718</sup> Guinea's comment as to BSGR abandoning its claim as to the fairness of the Technical Committee is not correct.<sup>719</sup>
362. In all these efforts President Condé has been motivated, encouraged and helped by George Soros. Guinea's statement during the Merits Hearing that "*Mr Soros has no particular interest in the Simandou case*"<sup>720</sup> is, again, preposterous and undermined by the evidence on the record – including the emails from Vale, Soros' own statements and the involvement of Open Society and Revenue Watch in BSGR's downfall – and the evidence from BSGR's witnesses.<sup>721</sup> Even an FTI employee commented in 2012 that "*Mr Soros has a personal obsession about BSGR and is determined to ensure that VBG's mining license is withdrawn/cancelled*".<sup>722</sup>
363. There is not a cigarette paper between President Condé and Soros. Soros's lawyers wrote the launchpad (based on contracts shown to Minister Fofana by Mebiame) and the constant presence in the proceedings of Soros's closest lawyer, Scott Horton, has been a reminder of his boss's supervisory role. The Tribunal will not be able to find (because there is not one) a single condemnatory word of President Condé coming from Soros or a Soros sponsored NGO: not in relation to Mebiame and Och Ziff; not in relation to the

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<sup>717</sup> Exhibits C-0385; C-0386; C-0387.

<sup>718</sup> BSGR's Memorial, paras. 129, 130(iii), (iv), (v), 131; Exhibit C-0028, paras 84 to 85.

<sup>719</sup> Rejoinder, para. 920. Guinea also discussed the legitimacy of the Technical Committee's proceedings and its ultimate decision to withdraw BSGR's mining rights in length during the Merits Hearing. BSGR is not going to respond to this as it has set out its position about the way these proceedings were conducted already in the course of these proceedings and in its prior submissions (BSGR's Memorial, paras. 120 to 134 and 310 to 335). In any event, it is exactly this decision by the Technical Committee that is the subject matter of this arbitration. It is therefore upon this Tribunal only to assess the factual and legal positions that are in front of it, independent from the Technical Committee's analysis.

false imprisonment and dehumanising treatment of IST and Bangoura; not in relation to the repeated and violent deprivation of human rights in Guinea; not in relation to Rio Tinto; not in relation to Bolloré; and not in relation to President Condé's recently stated ambition to extend his rule.

364. As against Guinea's "red herring" argument, BSGR's witnesses were consistent and compelling. Guinea wanted, but failed, to portray them as mad conspiracy theorists. Look, for example, at the exchange with Struik.<sup>723</sup> Cramer and Steinmetz were crystal clear in their assessments and in line with all the available evidence and the pleaded case.<sup>724</sup> Guinea sought to confuse the conspiracy issue by asking Struik whether it was Soros who drafted the Bah blackmail letters: this intentionally misses the point.<sup>725</sup> BSGR has never alleged that Soros was behind the Bah blackmail, and Struik has been consistent that extortion attempts are not uncommon in Guinea. What BSGR has said is that motivated and conspired with President Condé to remove BSGR's rights (after it refused to pay a bribe) by disseminating false allegations about the company (including encouraging and paying Mamadie Touré), interfering with BSGR's contractual relations (both on the ground in Guinea and with its PR advisors FTI), re-drafting the Mining Code with Hennig and Mebiame to allow for a "review" of BSGR's rights, and sponsoring and running this prejudicial Technical Committee "review". It gives BSGR no pleasure to say it, but it has been correct since the beginning of this case. Only the thrall in which George Soros is held by the world's media has prevented the attribution of blame to him for the current situation.

365. There is no doubt of President Condé's corruption. Corruption is said to have a blinding effect. Its effect, in this instance, has been to blind Soros - principally because through President Condé, and despite his manifest shortcomings, Soros could get at Steinmetz. It will not blind this Tribunal. The irrefutable picture is of a bad man supported by a zealot

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<sup>723</sup> Struik/4/149/10-16 ("*Q. Do you agree with the position of BSGR in this case that what's really going on here is a conspiracy where George Soros is using my law firm, DLA Piper, and others, to try and take down Beny Steinmetz? A, Based on the evidence and information that we – BSGR has complied over the years since this whole debacle began in 2012, I think yes.*").

<sup>724</sup> Cramer/2/35-44 and 2/104-133; Steinmetz/3/58-63 and 3/108-116.

<sup>725</sup> Struik/4/150/1-16; Ostrove/5/10/13-22.

who have conspired to act unlawfully or, at least, ensure the unlawful treatment of BSGR for which it seeks redress.

366. This is the context in which to view Guinea's counter-claim. Guinea (and specifically President Condé) is the maker of its own misfortune.<sup>726</sup> During the Merits Hearing, Guinea tried to paint itself as a valiant soldier in the fight against corruption; going so far as to say that this arbitration is "*the cornerstone of its fight against corruption*" and that "[t]he new President, Alpha Condé, turned good governance into a priority".<sup>727</sup> With all the evidence of Guinea – and President Condé's corruption – which continues to come to light, this is simply laughable. Even Mebiame reached the conclusion: "...regarding Alpha: 1. That the country will continue in poverty as long as he is in power - that's clear".<sup>728</sup> One only needs to look at the Getma decision by the CCJA; the Mebiame conviction by the DoJ; the SEC Cease and Desist Order against Och Ziff; and the persisting allegations of corruption relating to Rio Tinto, Sable Mining and now Bolloré, to understand the sheer scale of Guinea's continued endemic corruption. President Condé is not fighting against corruption, but inviting it to Guinea with open arms and pockets.

## **IX. CONCLUSION**

367. The purpose of the ICSID Convention, as expressed in its Preamble, is to stimulate economic development through the promotion of private international investment. The recognition that private foreign investment is an important element in development has led many countries to strive to create conditions that attract foreign investors. Not so, unfortunately, in Guinea's case. President Condé's regime has seen a litany of corruption scandals: each one with him at its heart: Och-Ziff, Mebiame, Sable Mining, Rio Tinto, Bolloré. Now he is doubling down on his position and looking for constitutional change that will strengthen his grip on power to the extent that the feted "free" elections of 2010 will become a distant memory, effaced by the reality of an established dictatorship. The very essence of ICSID is to provide predictable and fair rule of law applied to international standards particularly, as in this case, where investors justifiably have little

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<sup>726</sup> See in detail Section 7 of Reply; Libson/1/80/14 to 1/81/5.

<sup>727</sup> Ostrove/1/94/17-24 and Schneller/1/168/21-22.

<sup>728</sup> Exhibit C-0135, page 25.

or no faith in domestic remedies. If, at any point in the foreseeable future, there is to be any prospect at all of investment from anyone other than Condé's cronies, this Tribunal needs to send a clear message rejecting state corruption, upholding due process and allowing an investor – that has demonstrated beyond any doubt whatsoever the bona fides of its investment process – to stimulate economic development in the manner it set out to. Any other conclusion would be to say to other investors: "unless you are prepared to bribe the President, Guinea is closed to private international investment. Not only will you get no return on your investment, you will get no justice when your rights are abused".

368. The moral outrage that rightly gripped the world when the Guptas abused their relationship with Jacob Zuma to partner in state capture of strategic assets, is alarmingly absent in relation to Guinea, where similar tactics have played out. In the end, politics prevailed in South Africa. The same seems unlikely in Guinea. It is up to this Tribunal, then, that has patiently (even heroically) ploughed through thousands of pages of documents, hundreds of hours of evidence and some very contentious submissions to separate BSGR's wheat from Guinea's obfuscatory chaff and send a clear signal to the investment community: if you do it properly, your investment will be safeguarded at the highest levels at which international law operates - even in Guinea.
369. BSGR has gone very far beyond the evidential threshold it was required to reach to show that its investment was made lawfully and honestly; that it did not engage in corruption or dishonesty of any nature; and that, rather than being guilty of corruption, it has been its victim. In summary, BSGR has shown that it obtained its rights lawfully. It has not shown this marginally or with any doubt. It has convincingly established its case with compelling documentation and witness testimony. It has offered up its key participants for cross examination (some even against their own legal advice). It has provided full answers for every allegation of corruption – even as those allegations changed as they were answered. And finally it has been shown to be right in its own allegations of corruption by Guinea. Not only has it done all this unequivocally and overwhelmingly, it has done it in the face of a global endeavor to thwart its efforts to show it had been a victim of corruption. That has included one of the most powerful media campaigns ever

witnessed in relation to this type of case; serial efforts to hide and deny the multiple acts of corruption in which Guinea has been engaged; the refusal to make available to the Tribunal the key witness; and the failure by Guinea to disclose huge amounts of relevant material. Simply put, BSGR has convincingly and persuasively made out its case: Guinea has utterly failed to do the same. And for all of its complexities, for all of the endless amount of material, this case boils down to two simple questions: (1) Did BSGR obtain its rights lawfully? And (2) were those rights removed unlawfully? The answers to both, as has been established beyond any doubt whatsoever, are yes.

370. For these reasons, and, on the basis of all of the material in these submissions and in these proceedings, BSGR requests this Tribunal to grant BSGR

- (i) the relief sought in Section V of its Memorial dated 29 February 2016; and to
- (ii) dismiss Guinea's Counterclaims.

371. The proceedings have been bifurcated, and the question of remedies to which BSGR is entitled<sup>729</sup> is for a separate phase of the proceedings.

**Signed**



**Mishcon de Reya LLP**

Submitted for and on behalf of BSG Resources Limited (In Administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL

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<sup>729</sup> See BSGR's Memorial, para. 131.