

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

- v -

THE REPUBLIC OF GUINEA

CLAIMANTS' REPLY

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I INTRODUCTION

1.1 Preliminaries

1. This Reply is served on behalf of:

- (i) BSG Resources Limited (“**BSGR**”);
- (ii) BSG Resources (Guinea) Limited (“**BSGR Guernsey**”); and
- (iii) BSGR Resources (Guinea) Sàrl (“**BSGR Guinea**”),

together, the “**Claimants**”.

2. This Reply sets out Claimants' responses to Guinea's Counter Memorial dated 17 June 2016 (“**Contre-Memoire de la Republique de Guinee**” or “**CMRG**”).

3. Attached to this document are:

- (i) The following witness statements: Second Witness Statements of Benjamin Steinmetz (CWS-8); First Witness Statement of Sandra Merloni-Horemans (CWS-9); Second Witness Statement of Asher Avidan (CWS-10); Second Witness Statement Joseph Tchelet (CWS-11); Second Witness Statement of Marc Struik (CWS-12); Second Witness Statement of Dag Cramer (CWS-13); First Witness Statement of Cesare Morelli (CWS-14); First Witness Statement of Yuval Sasson (CWS-16).
- (ii) Exhibits C-0161 to C-0348; and
- (iii) Legal authorities CL-0031 to CL-0059.

1.2 Corruption is the central issue

4. Guinea purports that the only real issue in this arbitration is whether BSGR acquired its mining rights in Guinea by corruption.¹ BSGR agrees. As will become clear throughout the present Reply, all the other issues, be it jurisdiction, admissibility or expropriation, centre around the issue of corruption.
5. Guinea's case can be summarized as follows. Mamadie Touré was the key figure in the BSGR's corruption scheme. Through the direct intervention of her alleged husband, the late President Conté, she would have ensured that BSGR obtained its mining rights without any difficulty.² According to Guinea, the amount of evidence against BSGR would be staggering and unprecedented.³ The size of BSGR's corruption would be "*simplement stupéfiante*".⁴ Guinea further accuses BSGR of rewriting the history of this case.⁵ This is Guinea's case and it is up to Guinea to make that case. As will be set in great detail further below, it does not even come close.
6. The truth is that Mamadie Touré had very little, if any, influence on President Conté and did not otherwise materially intervene in BSGR's procurement of the expropriated mining rights. The truth is further that also President Conté himself did not materially intervene in BSGR's procurement of its expropriated mining rights. BSGR did not procure the expropriated mining rights by bribing Mamadie Touré and/or President Conté nor by bribing any other Guinean government or public official.
7. BSGR procured its mining rights in accordance with the applicable legislation, by making the appropriate applications that were reviewed by the various relevant and competent authorities and following arms lengths negotiations with those same authorities. Whereas BSGR does not deny that it has built, as any other mining company operating in any part of the world, cordial relations or has tried to build relations with the local authorities, including

¹ CMRG, para. 3.
² CMRG, para. 5.
³ CMRG, para. 7.
⁴ CMRG, para 8.
⁵ CMRG, para. 16.

President Conté or Minister of Mining Mahmoud Thiam, those relations were not unlawful and did not result in the procurement of the mining rights.

8. In what follows, BSGR will first set out the facts surrounding the acquisition of each of the disputed mining rights (part II). BSGR will then discuss the legal framework of corruption (part III) and establish that the disputed mining rights were not obtained by corruption (part IV). In part V BSGR will discuss evidentiary issues, in part VI Guinea's jurisdictional objections and in part VII Guinea's unfounded counter-claims.
9. In Annex A, BSGR will address Guinea's corruption allegations. BSGR does so because most of the allegations do not deal with the mining rights that are the subject of the present arbitration. Therefore they cannot be the basis for withdrawing these rights. However, to avoid the impression that by not dealing with these allegations, BSGR would not have a good answer, BSGR does deal with each one of them, be it in an annex and not in the main body of the Reply Memorial.

II THE FACTS

2.1 The acquisition by BSGR of its mining rights in Simandou Blocks 1 and 2

2.1.1 The unlawful award of Rio Tinto's mining rights in Simandou Blocks 1 to 4 between 1997 and 2006

10. On 25 February 1997, Simfer S.A. (a 95% local subsidiary of Rio Tinto and hereafter referred to as Rio Tinto) was awarded 4 prospecting permits on the Simandou mountain. Together these permits covered a perimeter of 1460.97 km². These permits were valid for a 3 year period.⁶

⁶ CMRG, para. 83.

11. On 30 May 2000, these permits were renewed for a two year period. In accordance with the 1995 Guinean Mining Code, Rio Tinto retroceded 50% of its original perimeter. Rio Tinto thus maintained a perimeter of 736 km² to explore in.⁷ In light of the registration of these permits in the mining registry, the mining authorities numbered the zones covered by the 4 permits: block 1 covering a distance of 30 km and a surface of 202 km², block 2 covering a distance of 25 km and a surface of 230 km², block 3 covering a distance of 32 km and a surface of 136 km² and block 4 covering a distance of 23 km and a surface of 169 km² (hereafter referred to as the "**the '2000 Perimeter**"). Blocks 1 and 2 covered the northern half of the Simandou mountain and covered a total distance of 55 km. Blocks 3 and 4 covered the southern half of the mountain and equally covered a total distance of 55 km.
12. Upon the expiry of the first renewal of the Blocks 1 to 4 permits, Rio Tinto applied for a second renewal of two years. As Guinea admits in its Counter-Memorial, the Guinean law applicable at the time provided for the mandatory retrocession of 50% of the perimeter upon the second renewal of prospecting permits.⁸ If the law had been correctly applied, Rio Tinto would have retroceded an area of 368 km² and renewed its rights in the remaining 369 km². However, in breach of Guinean law, Rio Tinto did not retrocede any territory at all and the Blocks 1 to 4 permits were renewed in an unlawful manner for the entire are of 736 km².⁹
13. A few weeks later, on 26 November 2002, Rio Tinto and Guinea concluded a base convention in which the Government committed itself to grant Rio Tinto a mining concession in the perimeter covered by the Blocks 1 to 4 permits, i.e. 736 km².¹⁰ The base convention thus consolidated Rio Tinto's unlawful entitlement to mine in an area of 736 km² and was therefore in and of itself unlawful.
14. The base convention further provided that Rio Tinto had to finalize and submit a global and integrated feasibility study and establish the commercial development of the mine by 30

⁷ CMRG, para. 84.

⁸ CMRG, para. 85.

⁹ CMRG, paras. 85-86.

¹⁰ Exhibit R-0156, Article 4.1

May 2006.¹¹ It also emphasized the crucial importance of the investments to be made in the railway and port infrastructure (emphasis added):¹²

"L'exploitation et la valorisation des gisements de minerai de fer de la concession sont étroitement conditionnées par la réalisation d'infrastructures en dehors du périmètre de la concession comprenant notamment des routes ainsi que la réalisation de voies ferroviaires et d'installions portuaires très importants [...]"

15. As admitted by Rio Tinto itself, there were allegations that Rio Tinto had paid bribes to secure its base convention and the prior renewals of the Blocks 1 to 4 permits.¹³ A note prepared by a senior Guinean official, Mr Soriba Bangoura, Vice President of the National Direction National des Mines entitled "*Analyse de deux conventions minières viciées au départ et mal contrôlées dans leur exécution*" confirms in this respect that "*les 736km² que Rio Tinto s'évertuera par mille intrigues à conserver pour elle-même afin qu'ils fassent l'objet de sa convention de base*".¹⁴
16. As the renewal of Rio Tinto's rights in Blocks 1 to 4 in 2002 was only valid for a period of two years, these rights should have been renewed again in October 2004, together with a 50% retrocession of the perimeter. However, it seems that nothing happened around this period and that both Rio Tinto and the Government ignored the expiry of the permits.
17. In April 2005 Rio Tinto applied for two mining concessions covering an area together of almost 3,000 km²: (i) one concession with a perimeter of 1,903 km² on the southern half of the Simandou mountain (around Pic de Fon and Environs Sud et Nord) and (ii) another concession with a perimeter of 1,075 km² on the northern half (Simandou North).¹⁵ Rio

¹¹ *Ibid*, Article 5.3, final para.

¹² *Ibid.*, Article 17.

¹³ Letter from Rio Tinto to the Prime Minister dated 16 May 2005 (Exhibit C-0161) ("*Des rumeurs circulent faisant état que Rio Tinto a corrompu des personnes pour faciliter l'octroi des Permis de Recherches sur le Simandou ainsi que dans la procédure de promulgation de la Convention. Ces supputations si elles s'avéraient vérifiables constituent une flagrante violation de l'éthique de travail et de gestion de Rio Tinto et si l'évidence d'une telle pratique pouvait être établie, elle devrait être immédiatement portée à l'attention du Président de la Société Rio Tinto*").

¹⁴ Note from Mr Soriba Bangoura, undated but presumably from August or September 2008 (Exhibit C-0162).

¹⁵ *Ibid.*

Tinto's application thus covered an area four times the size of its (unlawful) base convention and Blocks 1 to 4 permits (736 km²) and eight times the size of the area to which it was legally entitled (369 km²).

18. Rio Tinto justified these perimeters on the basis of the size of the investment to be made in the infrastructure to export the iron ore from Simandou, i.e. the Transguinean railway and the port infrastructure. To recoup this investment, an annual production of 40 to 45 million tons of high quality iron ore was required over a concession period of at least 50 years and the concession perimeter needed to be sufficiently large to guarantee the production in these quantities:¹⁶

"Des études antérieures relatives au développement des gisements de minerai de fer en Guinée avaient établi que les coûts d'investissements et les coûts opératoires d'un chemin de fer Transguinéen et d'un port en eau profonde rendaient le projet non économique. Pour apporter un changement dans ces données économiques, des gisements de haute teneur et en quantité suffisante pour supporter une production annuelle de 40-45 millions de tonnes et ce, sur une durée d'exploitation de plus de 50 ans constituaient un préalable. Rio Tinto a estimé que la chaîne du Simandou et ses extensions pouvaient receler de telles ressources".

19. Rio Tinto knew all too well that its request was completely unacceptable as it was aware that the Government was reluctant to award the entire area to one single mining company: "*Rio Tinto a compris que le Gouvernement s'inquiète d'une monopolisation d'une ressource particulière par une compagnie minière*".¹⁷
20. Following a meeting with Minister of Mines Souaré of 26 April 2005, Rio Tinto withdrew its application for a perimeter of almost 3,000 km² but it refused to accept any retrocession of the perimeter of 736 km² of Blocks 1 to 4.¹⁸

¹⁶ *Ibid.*

¹⁷ Letter from Rio Tinto to the Prime Minister dated 29 April 2005 (Exhibit C-0163) ("*Rio Tinto a compris que le Gouvernement s'inquiète d'une monopolisation d'une ressource particulière par une compagnie minière...*").

¹⁸ Letter from Rio Tinto to the Minister of Mines dated 16 May 2005 (Exhibit C-0161, page 3) ("*Rio Tinto propose de revenir sur le projet initial défini par la convention*").

21. In addition to a dispute over the perimeter of the mining concession, the April 2005 communications also reveal another controversial issue that would keep haunting Rio Tinto and frustrating the Government in the following years, i.e. Rio Tinto's lack of progress and delay in the development of the Simandou deposits:¹⁹

"Si nous n'avons pas arrêté de travailler durant ces deux dernières années, car nous avons confiance en la probité du Gouvernement guinéen, nous avons du ralentir considérablement nos activités. Je peux notamment mentionner les retards pour l'importation de plusieurs machines de forages nécessaires à la continuation des programmes de recherche et d'évaluation des ressources, impliquant des coûts considérables que nous ne pouvons pas prendre en l'absence de garanties de l'Etat."

22. Minister of Mines Souaré initially refused to give in to Rio Tinto's unlawful demand for a perimeter of 736 km². In his undated letter in response to Rio Tinto's letter dated 16 May 2005, the Minister justified his refusal as follows (emphasis added):²⁰

"Cependant, s'agissant de l'octroi de la concession minière, il convient de rappeler:

1- Que le renouvellement de vos permis de recherche en 2002, autorisé sur demande de Rio Tinto à toute l'étendue des permis octroyés en 2000 et dans le seul but d'avoir une meilleure connaissance des potentialités du territoire, n'a été suivi d'aucune rétrocession.

2- Que la signature d'une convention de base et/ou sa ratification par l'Assemblée Nationale n'enlèvent rien aux obligations du titulaire quant au respect des dispositions du Code Minier. Or, sur les conditions d'octroi, le Code Minier stipule: «la concession minière n'est accordée qu'en cas de découverte d'un ou de gisements dont l'évidence est dûment établie par une étude de faisabilité et dont l'exploitation nécessite des travaux et des investissements d'une importance particulière». Tel n'est malheureusement pas le cas aujourd'hui pour le projet, où l'objectif de votre société d'identifier un seuil minimum de ressources initiales ne porte que sur un seul des 15 indices connus. Cela est insuffisant et ne saurait permettre au Département d'engager l'Etat par un acte qui demeurera pour toujours la base de référence pour la conduite des affaires du projet;

¹⁹ Letter from Rio Tinto to the Prime Minister dated 29 April 2005 (Exhibit C-0163).

²⁰ Letter from Ministry of Mines Ref No./MMG/CAB/200 to Rio Tinto (Exhibit C-0164).

3- Que mon Département n'a en fait reçu de Rio Tinto qu'une étude conceptuelle et une étude d'ordre de grandeur pour la mise en exploitation du gisement du Pic de Fon, non une étude de faisabilité complète. Et c'est là un autre handicap majeur, dans la mesure où l'Etat, dans le domaine minier, n'entend plus s'engager dans des dossiers d'une telle importance sans avoir au préalable une idée aussi claire que possible des ressources et réserves en substances concernées dans le périmètre visé.

4- Que l'obligation pour le Gouvernement d'octroyer une concession minière dans un délai maximum de 90 jours, suppose naturellement que Rio Tinto ait pu produire auparavant son étude de faisabilité ; à date, celle-là n'est toujours pas disponible;

5- Qu'en vertu de l'article 42 du Code Minier, la superficie pour laquelle la concession minière est accordée se définit dans l'acte institutif, et doit correspondre autant que possible, sauf dérogation, aux limites du ou des gisement(s) tel(s) que défini(s) dans l'étude de faisabilité. Dans le cas présent, le périmètre de la concession sollicitée est déterminé non point par les limites de gisements (à l'exception du pic de Fon), mais plutôt en fonction des limites de 15 indices identifiés, dont 14 n'ont encore fait l'objet d'aucune étude de faisabilité.

Ces considérations font aujourd'hui que l'Autorité estime à juste titre ne pas devoir apposer sa signature sur aucune des versions du projet de décret portant attribution à RIO TINTO/SIMFER -SA d'une concession minière, ce, conformément aux dispositions de l'article 12, alinéa 2 du Code Minier.

23. Describing the situation as "a crisis" that required to be resolved, Minister of Mines Souaré made two – to use his own words – "creative" proposals to Rio Tinto: either (i) dividing the Simandou mountain in two equal blocks and allowing Rio Tinto to choose one block for its mining concession (which amounted in fact to a retrocession of 50% of the perimeter) or (ii) granting a mining concession without retrocession but on the condition that Rio Tinto financed at least 60% of the costs of the Transguinean railway and the port infrastructure (emphasis added):²¹

"Dans ces conditions, mon Département, soucieux de préserver les acquis de sa fructueuse coopération avec votre société, doit faire preuve d'imagination à travers de nouvelles propositions réalistes susceptibles de favoriser une sortie de crise acceptable pour toutes les parties. Dans cette optique, je vous fais

²¹ Ibid.

parvenir ci-joint, pour examen et avis, les dernières propositions de mon Département sur la question :

Première proposition : Diviser la chaîne du Simandou en 2 blocs nord et sud, et laisser à RIO TINTO/SIMFER - SA le soin d'en choisir un, un seul pour sa future concession minière. Cette variante prévoit l'adjonction automatique au bloc qui sera retenu, d'une nouvelle zone ayant fait l'objet de demande de permis de recherche de la part de votre société;

Deuxième proposition : Octroyer à RIO TINTO/SIMFER - SA une concession minière couvrant les 4 permis de recherches dans leurs limites actuelles, sous réserve d'un engagement ferme et précis de sa part (Protocole d'accord à annexer à la Convention de base signé le 21 mai 2002 et faisant partie intégrante de cette dernière) à financer par ses propres moyens et dans un délai raisonnable, à hauteur de 60% au moins, les coûts de réalisation des infrastructures ferroviaires et portuaires du Transguinéen (TGR), entièrement en territoire guinéen".

24. BSGR has not been provided with Rio Tinto's reaction to Minister Souaré's proposals. However, six months later, the issue of a retrocession of Rio Tinto's perimeter was still not resolved and it compelled Minister Souaré to verify Rio Tinto's work on the ground during a special visit on 28 and 29 November 2005. During this visit, Rio Tinto committed to start the production of iron ore in Simandou in 2013 (emphasis added):²²

"Vous vous rappellerez qu'au cours de la visite de notre président, Sam Walsh, en novembre dernier, l'ensemble du programme de développement du Projet Simandou a été discuté et que Rio Tinto a pris une série d'engagements pour la réalisation de chacune des études sectorielles ainsi que pour la réalisation du Rapport (final et intégré) de Faisabilité afin d'avoir les meilleures chances de démarrer la production de minerai de fer à Simandou en 2013".

25. Following that visit, Guinea's mining authority competent to advise the Minister of Mines on the award (or not) of mining concessions - the Centre de Promotion et de Développement Miniers or CPDM - strongly advised against awarding a concession without retrocession (emphasis added):²³

²² Letter from Rio Tinto to Minister of Mines Souaré dated 12 May 2006 (Exhibit C-0165).

²³ Letter from the CPDM to Minister of Mines dated 1 December 2005 (Exhibit C-0166).

"[...] Excellence Monsieur le Ministre, en vertu des dispositions de la convention minière existant entre l'Etat et la société SIMFER S.A, convention déjà ratifiée par notre Assemblée Nationale, SIMFER S.A. a droit à une concession minière couvrant l'ensemble des 4 permis de recherches, dans leurs limites actuelles. Malheureusement, accepter une telle réalité équivaut à recréer, pour cet autre trésor national, la même inextricable situation imposée 42 ans durant à notre pays du fait de la convention de base de C.B.G, et qui s'est traduite par l'impossibilité pour l'Etat de disposer librement de son propre patrimoine et d'en jouir comme bon lui semble. Non! aucun guinéen patriote n'a besoin de la réédition d'une telle situation pour le pays.

Cette situation qui vous a constamment préoccupé, et en particulier depuis votre arrivée à la tête du Département des Mines et de la Géologie, vous a même conduit, les 28 et 29 novembre dernier, dans une expédition spéciale qui vous a permis de survoler toute la chaîne du Simandou pour vous rendre compte par vous-même, des réalités sur le terrain. Ainsi, ce voyage sur le Simandou, effectué en compagnie de hauts responsables de Rio Tinto, vous a offert l'occasion d'apprécier la qualité et l'importance des travaux engagés par Rio Tinto, notamment sur le Pic de Fon. Il vous a également permis de savoir que la minéralisation n'est pas continue sur toute la chaîne, mais occuperait des parties de la montagne où la transformation des roches-mères (itabirites) est complète. Naturellement, l'occasion vous a été également donnée de savoir, avec certitude, qu'un seul des 15 indices identifiés, à savoir celui du Pic de Fon, a fait l'objet de travaux d'exploration systématiques qui y ont permis la mise en évidence de 1,2 milliards de réserves, dont Rio affirme ne pouvoir en extraire que la moitié, ce, par soucis de préservation de l'environnement. Dès lors, il convient d'être prudent, dans la mesure où personne, y compris Rio Tinto, ne connaît aujourd'hui le contenu réel du Simandou en minerais de fer.

C'est pourquoi, nonobstant l'existence d'une convention minière particulièrement contraignante pour l'Etat, il ne faut jamais oublier qu'une concession minière s'octroie sur la base d'une étude de faisabilité portant sur des gisements à paramètres bien connus. Or, au Simandou, à part le Pic de Fon, il n'est question encore aujourd'hui que d'indices, non de gisements.

Peut-on, dans ces conditions, ne s'en tenir qu'à la seule obligation faite à l'Etat de donner la concession minière, quand les préalables à l'octroi de ce titre ne sont pas réunis ?

Le C.P.D.M ne saurait vous le recommander, surtout lorsque cette attribution concerne l'ensemble de cette chaîne de montagnes censée abriter de grands gisements métamorphiques de cette espèce au monde".

26. However in light of the pressure that Rio Tinto was putting and the illegal manners by which Rio Tinto was used to obtain what it wanted, the CPDM toned down its position slightly and proposed two new alternative solutions that should have been acceptable to Rio Tinto:²⁴

"C'est le lieu de souligner qu'au regard de l'importance la pression exercée à l'époque par la société [Rio Tinto], et dans la crainte d'une signature par circuit parallèle de ce document, le CPDM s'était exercé à en proposer deux versions améliorées, comportant un certain nombre de dispositions garantissant les intérêts supérieurs de l'Etat. Au moment de la signature, ces versions furent tout simplement éliminées au profit d'une autre sans contrainte particulière pour Simfer".

27. A first solution consisted in awarding Rio Tinto a concession without retrocession but only on the condition that if mining reserves in excess of 2 billion tons were discovered, the exceeding reserves had to be retroceded to the Government:²⁵

"Dans ces conditions, les travaux d'exploration programmés doivent permettre la mise en évidence, sur l'ensemble des 15 indices identifiés, de réserves exploitables de minerais (rocheux et poudreux) de 2 milliards de tonnes. Toutefois, les indices étant disséminés dans toute la chaîne, il ne serait pas raisonnable à ce stade d'en exclure certains de la concession minière, étant donné que personne, y compris à Rio Tinto, n'est en mesure d'en faire une discrimination objective. Pour permettre à la société de mener un programme d'exploration susceptible de garantir le seuil de réserves indiqué ci-dessus, la concession minière doit inclure l'ensemble des indices répertoriés sur la chaîne. Dans ce cas de figure, précisément, la Convention doit comporter une ou des dispositions prévoyant le retour dans le portefeuille de l'Etat, et dans un (1) an au plus tard à la fin desdits travaux, des réserves excédentaires au cas où ces travaux permettraient d'en mettre en évidence au-delà des 2 milliard de tonnes de minerais requis"

28. A second solution consisted in awarding Rio Tinto a concession with a perimeter of 2/3 of Blocks 1 to 4 (which would amount to a retrocession of 33% of the perimeter) but only on the condition of a binding commitment by Rio Tinto to substantially investment in the construction of the Transguinean railway:²⁶

²⁴ Note from Mr Soriba Bangoura, undated but presumably from August or September 2008 (Exhibit C-0162).

²⁵ Memo of the CPDM dated 29 December 2005 (Exhibit C-0167).

²⁶ Second Memo of the CPDM dated 29 December 2005 (Exhibit C-0168).

"Par contre, il est possible et même recommandable, compte tenu des contraintes résultant pour l'Etat de la convention de base, et sous réserve de garanties fermes et précises de la part de Rio Tinto sur l'épineuse question du Transguinéen, l'octroi immédiat à SIMFER S.A d'une concession minière portant sur les parties sud et centrale de la chaîne, sur une longueur de 68,34 km (environ les 2/3 de la chaîne), le reste revenant dans le portefeuille de l'Etat"

29. Despite the Tribunal's order to produce all documents in relation to the granting of Rio Tinto's mining rights in Blocks 1 to 4, Guinea has not produced any responsive documents covering the period between 29 December 2005 and 12 May 2006. This is however an important period as it is exactly in this period that the Government actually granted Rio Tinto its mining concession in Blocks 1 to 4. It is even more important taking into account that the mining concession was granted without any retrocession whatsoever and without any binding and concrete commitment of investment in the required infrastructure.²⁷ Whereas Minister of Mines Souaré and the CPDM had resisted this scenario for over a year, they now suddenly recommended this solution.²⁸
30. This raises very serious concerns as to the circumstances in which Minister Souaré and President Conté awarded the mining concession. These concerns are corroborated by the testimony under oath by Mr Momo Sakho (legal advisor to Minister of Mines Souaré at the time of the award) in the Swiss Proceedings, highlighting the dubious role of Minister Souaré:

"Pour revenir au retrait des concessions de Simandou, à l'époque c'était Rio Tinto qui les détenait toutes les quatre. Je précise que c'était contre la volonté du Gouvernement. J'explique que les concessions avaient été octroyées à Rio Tinto contre la promesse de les rendre, une promesse qui n'avait pas été tenue [...]."

Les efforts de Alpha MADY [the previous Minister of Mines] n'ont pas été couronnés de succès. Il faut dire que Rio Tinto était très puissante et avait littéralement infiltré tout le pays. C'est encore le cas aujourd'hui. Rio Tinto est

²⁷ Exhibit R-157, Article 1 ("*il est accordé à la société Simfer [...] une concession minière d'une superficie de 738 km² pour la recherche et l'exploitation du minerai de fer au Mont Simandou*").

²⁸ *Ibid.*, last para. of the preamble ("*sur recommandation du Ministère des Mines et de la Géologie*").

en général au courant de tous mes actes avant qu'ils arrivent à mes destinataires.

Alpha MADY a été demis et a été remplacé par Ahmed Tidiane SOUARE.

Le 30 mars 2006, SOUARE, plus fin que Alpha MADY, a octroyé les 4 concessions à Rio Tinto, dans les termes de la convention de 2002, soit sans obligation d'investir. Je dis qu'il était plus fin car il avait compris que s'il s'opposait à Rio Tinto il serait lui aussi remercié"

31. Given the Government's refusal to produce responsive documents to shed further light on this period and Mr Sakho's testimony, it would not be inappropriate for the Tribunal to draw inferences as to the illegality of Rio Tinto's concession.
32. However, such inferences are not even necessary as the Government admits that Rio Tinto's 2006 mining concession in Blocks 1 to 4 was not lawfully granted. Indeed, the preamble of the Government's 2011 settlement agreement with Rio Tinto provides that "*Simfer [Rio Tinto] et L'Etat sont en désaccord quant à la légalité de la manière dont la concession a été accordée à Simfer en 2006*". As Rio Tinto has always maintained that its concession was granted in legal manner, this statement can only mean that the Government is of the view that Rio Tinto's mining concession in Blocks 1 to 4 was granted not granted in a legal manner. This is exactly the determination that BSGR requests this Tribunal to make.
33. It is further noteworthy that Article 4 of the mining concession provides that, at the time of awarding the concession, the knowledge of the potential of iron ore in the conceded perimeter was still limited and that additional exploration and prospecting work was required in the next 15 years to understand the potential of the area (emphasis added):

"L'état de connaissance du potentiel en minerai exploitable de la concession étant limité au moment de la signature du présent Décret, SIMFER S.A. doit approfondir, durant les quinze (15) premières années à compter de la date de signature du présent Décret, les travaux de recherches et de prospection permettant de réaliser une évaluation aussi complète que possible de ce potentiel [...]."

34. This admission is remarkable taking into account that Rio Tinto had held Blocks 1 to 4 since 1997, i.e. 9 years. It simply confirms that Rio Tinto had done very little work in Simandou

during this period, hence the lack of knowledge as to its real potential. It also contradicts Guinea's argument in paragraph 89 of the Counter Memorial according to which by 2002 the commercial potential of the Blocks 1 to 4 was well known.

35. Article 5 of the mining concession provides that Rio Tinto would use its best efforts to start the production of iron ore in the Pic de Fon area – which covered only a small area of the perimeter – in 2009: "*[...] RIO TINTO et SIMFER SA. feront tous leurs efforts pour démarrer la production du gisement Pic de Fon en 2009 [...]*".²⁹
36. However less than 2 months after the award of the mining concession, Rio Tinto had already given up on the timetable and informed the Government that it was delaying each aspect of the project with another 2 to 3 years:³⁰
- (i) the technical studies were delayed from between May 2006 and December 2007 to April 2010;
 - (ii) the social-economic and environmental studies were delayed from between May 2006 and December 2008 to April 2010; and
 - (iii) the studies on the Transguinean railway and the ports were delayed from between May 2006 and March 2008 to April 2010.
37. On the basis of these new deadlines, Rio Tinto should have started the construction of the mines and the railway and port infrastructure in April 2010 and should have started production in the entire concession area by December 2013, sixteen years after being granted Blocks 1 to 4.³¹ Recent information confirms that Rio Tinto did not even meet that deadline. It filed its feasibility study in March 2016, with a delay of six years, and pulled out of the Simandou project in October 2016.

²⁹ *Ibid.*

³⁰ Letter from Rio Tinto to Minister Soauré dated 12 May 2006 (Exhibit C-0165).

³¹ *Ibid.*

2.1.2 The withdrawal in 2008 of Rio Tinto's Blocks 1 to 4 was lawful

38. It was well-known within the mining community that Rio Tinto had done very little to develop the Simandou deposits, especially the northern ones (i.e. Blocks 1 and 2). Indeed, in the course of Mr Struik's earliest discussions with the Government regarding the Memorandum of Understanding, the Government expressed its frustration about Rio Tinto's lack of progress.³² As will be seen further on in the Reply Memorial, also multiple former Guinean officials, including two of Guinea's own witnesses, have testified as to Rio Tinto's failings.
39. Moreover, in 2007 BHP Billiton had launched a hostile takeover bid against Rio Tinto. In defence of the bid and in an attempt to prevent shareholders from tendering their shares, Rio Tinto gave a presentation to investors in which it estimated the iron ore reserves within Simandou Blocks 1-4 at around 8-11 billion tonnes.³³ Rio Tinto had hitherto been telling the Government that it estimated the iron ore reserves in Simandou Blocks 1-4 at around 1.5 billion tonnes. Rio Tinto's duplicity in this regard further damaged the Government's trust in the company.
40. It is Guinea's witness evidence that by December 2007, the Government was re-examining all the mining permits and concessions so as to determine whether the mining companies had complied with their obligations and commitments.³⁴ [PROTECTED]

[REDACTED]

[REDACTED].³⁵

[PROTECTED]

³² CSW-2, paras 26 and 57.

³³ CWS-2, para. 61.

³⁴ RWS-4, para. 38.

³⁵ [PROTECTED]

[PROTECTED]

41. That President Conté took an active interest in Simandou is not extraordinary and certainly not an indication of corruption. Just like any other Government leader would have done in any part of the world, the President took an interest in the biggest mining deposit in his country, especially taking into account that its development could, as Guinea admits in its Counter-Memorial, change the course of the country and finally free the Guinea population from decades of poverty:
42. On 25 February 2008, the Legal Advisor in the Ministry of Mines Mr Sakho provided a note to President Conté which concluded that Rio Tinto's 2002 base convention had been awarded in breach of the law and should be therefore be reviewed:³⁶

"malgré la déclaration de la société SIMFER [Rio Tinto] de respecter la réglementation en vigueur il est constant qu'elle l'a contournée en plusieurs circonstances [...] Plusieurs autres anomalies pourraient être relevées. Elles autorisent la partie guinéenne à entreprendre la révision de cette convention"

43. Also the legality of the Presidential Decree dated 30 March 2006 – by which Rio Tinto's mining concession had been awarded – was reviewed and it was concluded that the Presidential Decree was in breach of the Mining Code and could therefore be withdrawn.³⁷
44. Rio Tinto was informed in a detailed and reasoned letter dated 22 May 2008 of the Government's intention to revoke the mining concession on the grounds of illegality, in that it contained terms which contravened several provisions of the 1995 Mining Code:³⁸

"Suite à un contrôle de légalité des services compétents de la Présidence de la République, il apparaît que le Décret no D-2006/008/PRG/SGG du 30 mars 2006 qui accorde à votre Société une Concession Minière pour l'exploitation du minerai de fer du Mont Simandou est entaché d'irrégularités qui oblige son auteur à le reconsidérer."

³⁶ Memo dated 15 February 2008 on the irregularities of Rio Tinto's Base Convention (Exhibit C-0169).
³⁷ Government's action plan for the correction of Presidential Decree 2006/008/PRG/SGG (Exhibit C-0170).
³⁸ Exhibit R-228.

Ces irrégularités tiennent au fait qu'en la forme, ce décret ne comporte aucun visa de l'étude de faisabilité prescrite par le Code Minier. Laquelle étude doit établir l'existence d'un ou des gisements économiquement exploitable et ressortir l'importance des travaux et des investissements à réaliser pour votre projet.

Dans son contenu, les articles 2, 4 et 5 de ce Décret semblent également contrevenir aux prescriptions des articles 41, 43 alinéa 2 et 46 de la Loi no-95/036/CTRN du 30 juin 1995 portant Code Minier guinéen, en ce qui est d'une part des conditions d'obtention d'une concession minière, de sa durée, des modalités de son renouvellement [...] et d'autre part des droits qu'elle confère à votre Société dans la mesure où l'obligation principale d'investir à bref délai pour l'exploitation est méconnue pour des droits de recherche qui peuvent perdurer au-delà de 15 années sans aucune décision d'investir."

45. The Government further pointed out that Rio Tinto's mining rights effectively amounted to a freeze of Guinea's resources, contrary to Government's ambition to speed up the valorisation of its resources so as to increase the revenue of the state and fight the poverty in the country:³⁹

"Finalement, l'on retient de la lecture de ce Décret et de la Convention qui y est attachée, un procédé commode de gel de nos ressources minérales contraire aux efforts du Gouvernement de voir valoriser rapidement ces ressources pour accroître les revenus de l'Etat et mieux lutter contre la pauvreté de nos populations"

46. Not surprisingly, Rio Tinto and its 5% shareholder in the Simandou project, International Finance Corporation reacted immediately and denied any wrongdoing.⁴⁰
47. By Presidential Decree dated 28 July 2008, the Government suspended Rio Tinto's mining concession for breach of the 1995 Mining Code: *"Vu les manquements aux articles 41,43 alinena 2 et 46 du Code Minier ... est et demeure rapporté le Décret du 30 mars 2006*

³⁹ *Ibid.*

⁴⁰ Letter from Rio Tinto to Sam Soumah dated 11 June 2008 (Exhibit C-0171); Letter from International Finance Corporation to Sam Soumah dated 13 June 2008 (Exhibit C-0172); Letter from Rio Tinto's counsel Herbert Smith to Sam Soumah dated 25 July 2006 (Exhibit C-0173).

accordant à la société Simfer ... une concession minière ..." (hereafter the "**Suspension Decret**").⁴¹

48. Article 2 of the Suspension Decret expressed the Government's willingness to conclude a new base convention with Rio Tinto and grant a new mining concession in Simandou, be it that these new titles would have to comply with the applicable mining legislation.⁴²

"Il sera octroyé à ladite Société une concession minière pour l'exploitation du minerai de fer du Mont Simandou conformément aux prescriptions du Code Minier définissant les droits et les obligations de l'entrepreneur minier, la durée de la concession et les modalités de son renouvellement. La convention minière qui sera attaché à cette concession minière définira à titre principal, les meilleures conditions de l'exploitation qui respectent les prescriptions de la loi minière"

49. Article 3 of the Decret provided that Rio Tinto's rights as a holder of prospecting permit would be determined in a Ministerial Decret in accordance with the mining legislation.

50. The Suspension Decree was provided to Rio Tinto by letter dated 30 July 2008 from the Secretary-General of the Presidency. The letter contained a list of the Government's grievances against the company, including (i) Rio Tinto's prospection of only 1 area out of 15 over a period of 11 years; (ii) Rio Tinto's failure to submit a feasibility study and (iii) Rio Tinto's total freezing of the mining asset.⁴³

"To this day and for eleven (11) years you have only prospected a single block in the Mount Simandou range, where according to technical sources you have displayed several billion tons of proven deposits and according to yourselves 2.25 billion without having submitted a Feasibility Study to start the works in the three (3) years following the date of obtaining the mining concession.

That is to say that on your part there is a clear wish to freeze the deposit, not just in this block but also in other parts of the Simandou range.

⁴¹ Decret D/2008/041/PRG/SGG dated 28 July 2008, Article 1 (Exhibit C-0092).

⁴² *Ibid.*

⁴³ Exhibit C-0093.

The Government cannot tolerate this situation since in law the undertaking of mine working obliges you to take all necessary measures for the extraction and commercial shipment of the ore.

This is the definition that the Mining Code gives to working a mine.

In other words, the delay in implementing the infrastructure, extraction and removal is a breach of the legal undertakings linked to obtaining the mining concession granted under Decree No. 2006/008/PRG/SGG of March 30, 2006.

That is why we again ask you to comply with the national mining law, by producing a Feasibility Study that will specify the first commercial shipment of iron ore at the earliest possible date. In the meantime the Government is bound to assume its responsibilities towards the population in its efforts to reduce poverty in our country, by awarding the commercialization of its natural resources to more conscientious partners."

51. The validity of the Suspension Decret was confirmed by the Guinean mining authority administration, the Commission de Contrôle et d'Evaluation des titres miniers (CCETM) in a memo to President Conté dated 20 August 2008: *"il s'agit d'une prise de décision responsable au niveau de l'exécutif sur un document dont il est initiateur et dont il est ainsi corrigé les entorses par rapport à la réglementation en vigueur"*.⁴⁴
52. As to the way forward, the CCETM proposed holding a working meeting with Rio Tinto and *"pour toute autre négociation, Simfer est tenue de rétrocéder les 50% des 738 km², soit 369 km², qu'elle détient toujours sans fondement; en plus du paiement d'une amende forfaitaire (à votre discrétion) pour violation des lois et règlements miniers en vigueur ..."*.
53. A delegation of senior officials within the Ministry of Mines met with Rio Tinto on the same day and they agreed to meet again on 1 September 2008.⁴⁵
54. Rio Tinto also reached out directly to President Conté himself by letter dated 20 August 2008 and requested him to reconsider and overrule the Suspension Decret.

⁴⁴ Memo No 005/CCETM/2008 dated 20 August 2008 (Exhibit C-0174).

⁴⁵ Minutes of meeting dated 20 August 2008 (Exhibit C-0175).

55. One week later, on 27 August 2008, Ministry of Mines Kanté established a technical committee within the Ministry of Mines to review Rio Tinto's rights in Blocks 1 to 4 (hereafter "**the Technical Review Committee**").⁴⁶ The Technical Review Committee consisted of 9 officials of the Ministry of Mines: (i) Alsény Bangoura; (ii) Mme Camara Fatou Diallo; (iii) Soriba Bangoura; (iv) Fassama Kourouma; (v) Fara Mongouno; (vi) Alsassane Camara; (vii) Thierno Amadou Diallo; (viii) Arafan Cisse and (ix) Marie Celine Ajavone. Not one of these officials is presented by Guinea as a witness to testify on the alleged intervention by Mamadie Touré or President Conté (or anybody else) and not one of these officials has been accused of bribery.

56. On the same day, Minister of Mines Kanté was replaced by Minister of Mines Nabé. In his witness statement Mr Kanté relates his replacement to the withdrawal of Rio Tinto's mining rights, but there is no evidence whatsoever in support of this statement.⁴⁷ **[PROTECTED]**

[REDACTED]

[REDACTED]

[REDACTED].⁴⁸

[PROTECTED]

[REDACTED]

57. In its Counter-Memorial Guinea suggests that BSGR would be behind this replacement and the earlier replacement of Prime Minister Lansana Kouyate.⁴⁹ This is obviously not serious. It seems indeed to be standard practice in Guinea to replace Prime Ministers and Ministers of Mines. Over a six and a half year period, between 23 February 2004 and 24 December 2010, the Prime Ministers of Guinea were: François Lonsény Fall (23 February 2004 to 30 April 2004), Cellou Dalein Diallo (9 December 2004 to 5 April 2006), Eugène Camara (9 February 2007 to 26 February 2007), Lansana Kouyaté (1 March 2007 to 20 May 2008),

⁴⁶ Note de service No 0049/MMG/CAB/2008 dated 27 August 2008 (Exhibit C-0176).

⁴⁷ RSW-4, para. 43.

⁴⁸ **[PROTECTED]**

⁴⁹ CMRG, paras 304 and 316.

Ahmed Tidiane Souaré (20 May 2008 to 24 December 2008), Kabiné Komara (30 December 2008 to 26 January 2010) and Jean-Marie Doré (26 January 2010 to 24 December 2010). The various Ministers of Mines have also had similarly short tenures : Alpha Mady Soumah (February 2003 to 2004), Ahmed Tidiane Souaré (8 March 2005 to June 2006) Ousmane Sylla (29 May 2006 to March 2007), Ahmed Kante (March 2007 to August 2008), Dr. Louncény Nabé (27 August 2008 to 22 December 2008), Mahmoud Thiam (January 2009 to December 2010), Mohamed Lamine Fofana (January 2011 to 2013), Kerfalla Yansané (January 2014 to January 2016), Abdoulaye Magassouba (January 2016 to September 2016).

58. Turning back to the chronology of the dispute, on 28 August 2008, the Council of Ministers established an inter-ministerial committee to determine the Government's position in response to Rio Tinto's letter dated 20 August 2008 (hereafter "the Inter-Ministerial Committee").⁵⁰ The Inter-Ministerial Committee was presided by the Minister of Justice Bachir Touré (i) and consisted 5 other ministers and/or senior officials, including (ii) Minister of Mines Nabé, (iii) Minister of Public Affairs Makalé Traoré, (iv) Minister of Environment Kourouma, (v) Legal adviser to the Minister of Mines Mr Nimaga and (vi) Mr Fassama Kourouma of the Direction Nationale des Mines. Notably, President Conté was not a member of the Committee. According to Minister Nabé, the Inter-Ministerial committee was put in place to allow the Government to follow the discussions with Rio Tinto.⁵¹ Except for Mr Nabé himself, not one of these officials has been presented by Guinea as a witness to testify on the alleged intervention by Mamadie Touré or President Conté (or anybody else) and not one of these officials has been accused of bribery.
59. The Inter-Ministerial Committee met on 1 September 2008.⁵² They started the meeting with a discussion of a memo that had been drafted by the Technical Review Committee on the

⁵⁰ Letter from Minister of Mines Nabé to Rio Tinto dated 16 September 2008 (Exhibit R-0233).

⁵¹ RWS-5, para. 12.

⁵² Minutes of the meeting dated 1 September 2008 (Exhibit C-0177).

legality of Rio Tinto's rights. According to the memo, both the 2002 base convention and the 2006 mining concession had been granted unlawfully:⁵³

"Il ressort de l'analyse que des dispositions du Code minier n'ont pas été respectées aussi bien par le décret d'octroi que par celui de retrait. Il en est ainsi également de la convention de base signée le 26 novembre 2002....

Contrairement aux affirmations de SIMFER S.A contenues dans son recours gracieux, la conformité du décret du 30 mars 2006 octroyant la concession minière est discutable notamment en ce qui concerne les articles 11, 30, 41 et 85 du Code minier ...

En tout état de cause, aucun argument juridique ne peut être invoqué pour soustraire la société de l'obligation de rétrocession et de dépôt de rapport de faisabilité. La société elle même ne s'en défend pas de manière convaincante dans son recours gracieux...

Dans cette logique, le Ministère des Mines et de la Géologie pourra, entre temps, écrire à la société pour lui faire part de l'inexécution par elle de certaines de ses obligations en la rappelant notamment ses obligations de rétrocession et de dépôt de rapport de faisabilité".

60. The Inter-Ministerial Committee then determined the position to be taken with Rio Tinto, without however being blind to the weaknesses in its own story including (i) the failure of its mining administration to monitor the award of the mining convention and mining concession to Rio Tinto; (ii) the fact that the Suspension Decree did not refer to mining convention and (iii) even if Rio Tinto had not retroceded any territory, the administration was not obliged to grant the concession. These weaknesses, however, did not justify Rio Tinto's failure to retrocede, to submit a feasibility report and to produce the results of its work and Rio Tinto's other weaknesses.⁵⁴

"Toutefois, il a été retenu que ces faiblesses de l'Administration ne sauraient en rien justifier la non rétrocession des 368 km², la non remise des résultats des travaux ainsi que du rapport de faisabilité [...].

En tout état de cause, les obligations de rétrocession, de remise des résultats des travaux de recherches et dépôt de rapport de faisabilité demeurent mais ne constituent pas les seules faiblesses de la position de Rio Tinto car il y a bien

⁵³ Note by the Technical Review Committee dated 1 September 2008 (Exhibit C-0178).

⁵⁴ Minutes of the Inter-Ministerial Committee's meeting of 1 September 2008 (Exhibit C-0177).

d'autres questions tout aussi graves telles que la prise en compte des besoins de communautés locales des zones d'exploitation, les questions fiscales, environnementales et sociales, les infrastructures etc"

61. The Inter-Ministerial Committee concluded unanimously that a negotiated solution, acceptable to both the Government and Rio Tinto, in accordance with the legal provisions, was the way forward:

"Les membres du comité ont conclu que le décret offre l'occasion d'évoquer l'ensemble de ces questions. Ils ont, à cet effet, demandé aux membres de l'équipe technique de tenir compte des orientations politiques données au niveau Gouvernemental à savoir trouver une solution négociée à ce problème en tenant compte de la demande sociale forte.

Ils ont demandé aux membres de l'équipe de réfléchir sur différentes hypothèses afin d'aboutir à un résultat qui sera de nature à satisfaire les deux parties. Dans la mesure où dans le cadre d'une négociation, une position importante au départ peut être discutée et faire l'objet d'une solution de rechange, la question de la rétrocession des 368 k:m2 peut être valablement discutée mais en ne prenant aucune décision de nature à violer les textes légaux et réglementaires [...].

Enfin, les membres du Comité ministériel sont unanimes qu'il n'est pas question de répondre favorablement au recours gracieux et ont instruit aux membres de l'équipe technique de mener toutes les négociations e11 restant dans le strict cadre légal et réglementaire".

62. On 16 September 2008, Minister of Mines Nabé established a multi-disciplinary committee to conduct negotiations with Rio Tinto (hereafter "the Negotiation Committee").⁵⁵ In negotiating with Rio Tinto, this Committee did not only have to take into account the legal and technical issues of the mining rights but also the broader interest of the Guinean population.⁵⁶

"Tout en insistant sur le respect des lois et règlements, le Ministre des Mines et de la Géologie, au nom du comité interministériel a donné des instructions à la commission technique de conduire les discussions en tenant compte non seulement des aspects juridiques et techniques, mais aussi des retombées du projet sur les populations"

⁵⁵ Exhibit R-232.

⁵⁶ Note from Minister Nabé to Prime Minister Souaré dated 10 November 2008 (Exhibit C-0179).

63. The committee consisted of 8 senior public officials: (i) Mr Nimaga, (ii) Mr Mamadou Diaby, (iii) Dr Yamoussa Bangoura, (iv) Madam Camara Fatou Diallo, (v) Mr Sidiki Condé, (vi) Mr Soriba Bangoura, (vii) Mr Fassama Kourouma and (viii) Alsény Bangoura. They represented four different agencies with technical knowledge and knowledge of the file: (i) ITIE; (ii) Service Juridique et Contentieux; (iii) Direction Nationale des Mines and (iv) Direction Nationale de la Géologie. Not one of the officials has provided a witness statement or otherwise testified on the intervention by Mamadie Touré or President Conté, neither has any of these officials been accused of bribery.
64. The Negotiation Committee and Rio Tinto met on 17 September 2008.⁵⁷ The opinion of Minister of Mines Nabé on the outcome of that first meeting was fairly positive.⁵⁸
65. Upon the request of the Inter-Ministerial Committee, Minister of Mines Nabé requested Rio Tinto by letter dated 19 September 2008 to provide the Negotiation Committee with a (i) retrocession plan and (ii) the results of all the work carried out on Blocks 1-4 to date.⁵⁹ These results were important because they would have allowed the Government to assess the quantity of iron ore in and the value of Rio Tinto's area. This in turn would have allowed the Government to evaluate Rio Tinto's argument that it could not retrocede any territory (see further below) because of the economics of the projects.
66. Rio Tinto responded by letter dated 30 September 2008.⁶⁰ This letter is important for three reasons. First of all, the letter sets out that the Government's frustration with Rio Tinto was widespread within the Government and that this frustration was based on several issues:

"Par ailleurs, nous sommes préoccupés par certains commentaires de la part de membres éminents du Gouvernement de Guinée concernant Rio Tinto et l'utilisation qu'elle ferait de sa Concession. Nous souhaitons donc, à travers le Comité Interministériel, comprendre l'ensemble des préoccupations du

⁵⁷ Notes from the meeting with Rio Tinto (Exhibit C-0180).

⁵⁸ *Ibid.*, RWS-5, para. 13 ("*J'avais le sentiment qu'on pouvait aboutir à une entente*").

⁵⁹ RWS-5, para. 13; Exhibit R-234.

⁶⁰ Letter from Rio Tinto to Minister Nabé dated 30 September 2008 (Exhibit C-0181).

Gouvernement afin que nous puissions les aborder de façon ouverte et productive.

A travers les correspondances et discussions que nous avons eues ces derniers mois, nous, pour notre part, avons pu noter que les préoccupations majeures de l'Etat sont :

- *Le rééquilibrage de la convention afin que la République de Guinée et ses populations jouissent pleinement de l'exploitation de ses ressources et ce à court-terme et à long-terme.*
- *Que Rio Tinto entendrait « geler » les ressources de Simandou;*
- *Que Rio Tinto n'aurait pas exécuté l'ensemble de ses obligations au titre de la Convention et de la Concession ; et*
- *Que Rio Tinto contrôlerait une part trop importante des ressources de Simandou et doit rétrocéder une partie de son périmètre actuel ou accepter de travailler en partenariat (joint venture) avec un tiers"*

67. Secondly, the letter establishes that Rio Tinto refused to discuss any retrocession of its perimeter. Using the same arguments that it had used in 2005, Rio Tinto purported that given the economics of the project, its perimeter had to be maintained without any retrocession.⁶¹

"Il ne fait aucun doute que Simandou recèle de ressources de minerai de fer de premier plan. Mais les infrastructures de transport requises pour leur exploitation sont extrêmement coûteuses. Ces coûts augmentent de façon fulgurante à cause d'une forte demande mondiale dans le domaine de la construction. Il faut donc plusieurs milliards de tonnes de fer de haute qualité pour couvrir ces coûts et rendre le projet éventuellement rentable. Nous avons actuellement identifié 2,25 milliards de tonnes de Ressources Indiquées conformément aux normes JORC. Or, une quantité bien plus importante serait nécessaire, même aux cours actuels du minerai de fer.

A ce jour, nous pensons que des ressources supplémentaires de l'ordre de 8 milliards de tonnes se trouveraient sur la chaîne de Simandou. Ceci reste à prouver. Pour identifier, avec un degré suffisant de certitude, ces ressources supplémentaires, nous dépensons actuellement plus de 20 millions de dollars par mois dans les travaux de forage sur l'ensemble du périmètre de la Concession et dans d'autres travaux d'ingénierie. Si notre périmètre de Concession devait être réduit, l'économie du projet, tel qu'il est actuellement conçu, serait compromise de

⁶¹ *Ibid.*

façon dangereuse du fait de la quantité réduite de minerai qui resterait disponible pour la durée de vie visée par le projet La base réduite de ressources affecterait inévitablement les choix relatifs aux infrastructures"

68. Thirdly, Rio Tinto announced that (i) its budget for the on-going programs was coming to an end in November 2008, (ii) it had difficulties in contracting engineers, (iii) it was about to start to demobilize from the mining site and (iv) additional substantial delays in the development of the project were around the corner (emphasis added).⁶²

"Le budget pour nos programmes courants se termine à la fin Novembre. Vu le climat d'incertitude, nous faisons face à plusieurs questionnements de la part du comité d'investissement du Groupe à qui nous demandons un financement pour phases du projet prévues pour l'année prochaine. Ce même climat engendre des difficultés de rétention des firmes d'ingénieurs qui sont vivement sollicitées par d'autres projets, à travers le monde, qui leur paraît plus sûrs. Enfin, nous sommes, malheureusement, confrontés à une perspective de démobilisation avec comme conséquence des retards très importants au calendrier du projet. Nous avons déjà dû reporter une partie importante du programme d'infrastructures suivant la contestation de notre Concession".

69. Rio Tinto followed up with a second letter dated 6 October 2008, attaching some documents and information on its exploration results.⁶³ In relation to the required retrocession, Rio Tinto created for the first time an opening, be it that it was a very limited one:

- (i) First of all, Rio Tinto warned the Government that in case of a retrocession, its investments in the required infrastructure would have to be reviewed⁶⁴:

"En laissant pour le moment de côté les aspects juridiques sur lesquels nous pourrions naturellement revenir à tout moment à votre demande, il convient de souligner que, sur le plan économique, ce projet a été bâti ces 10 dernières années sur le fondement que Rio Tinto disposerait de l'entière superficie de la Concession.

Ce sont des milliards de tonnes de minerais de fer de haute qualité qui sont nécessaires pour pouvoir faire face au coût considérable de réalisation du projet Simandou. Or, nous n'avons pour le moment, découvert que 2,25

⁶² *Ibid.*

⁶³ Exhibit R-151.

⁶⁴ *Ibid.*

milliards de tonnes de Ressources conformément au Code JORC et une quantité bien plus importante de minerai sera nécessaire pour couvrir lesdits coûts, même au cours actuel du minerai de fer.

Ainsi et afin de pouvoir nous assurer avec suffisamment de certitude, tel que cela est requis, de l'existence de ces quantités additionnelles, nous investissons en ce moment et tous les mois plus de 20 millions de dollars US pour des travaux sur toute la superficie de la Concession dont les deux-tiers (2/3) sont consacrés à l'activité de forage. Cet investissement considérable se transformerait en pure perte si la superficie de notre Concession était diminuée. Par ailleurs, les fondamentaux- économiques du projet, tel qu'il est actuellement conçu, seraient gravement atteints du fait de la diminution des quantités de minerais disponibles qui en résulterait.

Une diminution de ces quantités ne pourrait notamment avoir pour résultat que de remettre en question les options concernant les infrastructures [...].

[...] étant toutefois entendu qu'une telle rétrocession, si elle devait être concrétisée, serait susceptible de porter atteinte aux fondamentaux économiques du projet et, en conséquence, de limiter les options possibles concernant les infrastructures. Nous serions dès lors amenés, au vu de telles circonstances, à envisager en étroite liaison avec le Gouvernement, une autre solution pour l'évacuation et l'exportation des minerais".

- (ii) Secondly, the area that Rio Tinto was reluctantly considering to retrocede was limited to 17% of the perimeter and consisted of areas in which it had done no exploration whatsoever;⁶⁵
- (iii) Thirdly, any retroceded area had to be awarded to one of the leading mining companies and not to BSGR who – according to Rio Tinto – had failed to develop its own mining area.⁶⁶

"Toute superficie qui serait susceptible d'être volontairement rétrocédée serait sur la bordure nord de la Concession, contigüe de la très vaste superficie non développée détenue par BSGR qui est, au demeurant, deux fois plus grande que celle détenue par Rio Tinto. Nous supposons par ailleurs qu'il a, de la même façon, été demandé à BSGR de procéder à une rétrocession similaire [...].

⁶⁵ R-151 ("Parmi ces solutions pourrait d'ailleurs fort bien être envisagé une rétrocession volontaire de certaines parties convenues de notre actuelle Concession et, par exemple, celles sur lesquelles Rio Tinto n'a, à ce jour pas encore réalisé de forages ou de travaux substantiels d'exploration [...]"); Letter from Minister Nabé to Rio Tinto dated 28 October 2008 (Exhibit R-235).

⁶⁶ Exhibit R-151.

Afin de ne pas retarder le développement du projet Simandou et de compromettre l'efficacité des opérations à venir, il serait essentiel que tout tiers à qui seraient attribuées les superficies rétrocédées de Simandou ait le niveau d'expérience concernant le minerai de fer, l'expertise technique, la capacité et les ressources financières, y compris pour faire face aux coûts des infrastructures pour l'évacuation et l'exportation des minerais extraits de toute la chaîne des Monts de Simandou, ainsi que la maîtrise de méthodes de fonctionnement réputées équivalentes à celles de Rio Tinto. Il n'y a que très peu de sociétés minières dans le monde qui répondent à ces critères et l'introduction sur l'actuelle superficie d'une société qui n'aurait ni l'expérience ni la réputation requises ne pourrait que gravement compromettre les chances de financement et de développement des gisements de Simandou".

- (iv) Finally, Rio Tinto required that if the new owner of the retroceded area did not comply with its investment obligations within a specified period of time, the retroceded area would automatically or upon demand of Rio Tinto revert back to Rio Tinto.⁶⁷

"Nous souhaiterions aussi dans l'hypothèse d'une rétrocession volontaire, que le principe soit accepté selon lequel toute superficie rétrocédée serait retournée à Rio Tinto automatiquement ou sur l'option de Rio Tinto, dans le cas où toute société tierce attributaire d'une superficie rétrocédée à l'Etat ne respecterait pas ses engagements concernant la dite superficie au cours d'une période de temps donnée".

70. By letter dated 14 October 2008, Minister Nabé acknowledged receipt of Rio Tinto's letter dated 6 October 2008. He further inquired about the CD's that were outstanding (containing all the required technical and geological data) and reserved the Government's position on Rio Tinto's proposal.⁶⁸
71. By letter dated 28 October 2008, and based upon the review Rio Tinto's submission and partial information by the Government's technical departments, Minister Nabé informed Rio Tinto of the Government's position. He highlighted the inadequacy of Rio Tinto's proposal and required them to submit a retrocession plan covering 50% of its perimeter within 8 days.

⁶⁷ *Ibid.*

⁶⁸ Letter from Minister Nabe to Rio Tinto dated 14 October 2008 (Exhibit C-0182).

Upon the instruction of the Inter-Ministerial Committee, he further reserved the Government's right to enforce retrocession on Rio Tinto if it failed to meet the 8 day deadline.⁶⁹

72. By letter dated 29 October 2008, Rio Tinto dragged its feet in relation to the CD's containing the mining and geological data. Rio Tinto was reluctant to provide CD's and proposed a meeting instead allegedly to better understand the Government's requirements.⁷⁰
73. By letter dated 4 November 2008, Rio Tinto responded in substance to the Government's letter of 28 October 2008. Rio Tinto dodged the Government's request for a retrocession plan once again, claiming that an enforced retrocession would threaten the viability of its project and could jeopardise a potential partnership, in respect of which Rio Tinto was apparently in advanced discussions.⁷¹

"En ce qui concerne votre demande visant à ce que nous vous proposons un plan de rétrocession, je fais suite à nos récentes discussions au cours desquelles je vous ai informé que Rio Tinto menait actuellement des discussions avancées avec un partenaire potentiel qui serait susceptible d'apporter son aide au développement de l'intégralité de la chaîne de Simandou, et permettrait à la Guinée d'en retirer des bénéfices supplémentaires. Nous espérons être en mesure de vous fournir e plus amples détails dans les deux semaines à venir, et de vous présenter les représentants de ce partenaire d'ici la fin du mois de novembre. Toute décision prise dans le même temps et qui viserait à imposer à Rio Tinto la rétrocession d'une partie du périmètre de sa Concession mettrait sérieusement en cause cette opportunité pour la Guinée [...].

En vue d'assurer la meilleure issue possible tant pour la Guinée que pour Rio Tinto, je vous prie de bien vouloir attendre, avant de prendre une quelconque décision, que nous ayons terminé les discussions que nous menons actuellement avec notre partenaire potentiel, afin que toutes les options puissent être envisager"

74. Minister Nabé replied by letter dated 7 November 2008 maintaining its request for a 50% retrocession. According to Minister Nabé this request was a very reasonable one because the

⁶⁹ Exhibit R-235; Memo by the Ministry of Mines dated 16 December 2008 (Exhibit C-0183).

⁷⁰ Letter from Rio Tinto to Minister Nabé dated 29 October 2008 (Exhibit C-0184).

⁷¹ Letter from Rio Tinto to Minister Nabé dated 4 November 2008 (Exhibit C-0185).

Government could request the retrocession of 50% of the area that had been explored by Rio Tinto, thus excluding from the calculation the areas that had not been explored.⁷²

"En second lieu, j'ai noté que vous souhaitez conserver l'intégralité de votre concession en dépit de mes différents courriers vous demandant de procéder à la rétrocession de 50% de la superficie occupée actuellement par votre société.

Je voudrais attirer votre attention sur le fait que cette demande de notre part contenant en elle-même une position très souple car légalement, la rétrocession porte normalement sur les 50% des zones travaillées excluant dans le calcul toute superficie qui n'a fait l'objet d'aucune exploration".

75. By letter dated 10 November 2008, Rio Tinto finally transmitted 3 CD's containing further technical mining data of the works it had undertaken in its concession area.⁷³
76. Minister Nabé informed the senior members of the Government, including Prime Minister Souaré and the President of the Inter-Ministerial Committee Minister of Justice Traoré of the status of the negotiations with Rio Tinto. This is established by Minister Nabé's letter dated 10 November 2008 which included a briefing memo and referred to two earlier memos that Minister Nabé had circulated and which Guinea has failed to produce.⁷⁴
77. Confronted by Rio Tinto's continued stonewalling, the Technical Review Committee itself put together a retrocession proposal covering 50% of Rio Tinto's perimeter, taking into account the little exploration work which Rio Tinto did have conducted.⁷⁵ The plan proposed the retrocession of the northern half of Rio Tinto's area.⁷⁶ This was exactly the same plan that the CPDM had already proposed in 2005, long before the arrival of BSGR in Guinea. This will also be the plan on which the Government of President Condé and Rio Tinto will settle in 2011 (see further below).

⁷² Exhibit R-0236.

⁷³ Letter from Rio Tinto to Minister Nabé dated 10 November 2008 (Exhibit C-0186).

⁷⁴ Letter from Minister Nabé to the Prime Minister dated 10 November 2008 (Exhibit C-0179).

⁷⁵ Note from the Technical Review Committee dated 14 November 2008 (Exhibit C-0187).

⁷⁶ Exhibit R-163, 6 sixth and final page.

78. From 24 to 26 November 2008, a high level delegation of Rio Tinto met with Minister Nabé and Prime Minister Souaré in Guinea.⁷⁷ The details of these meetings are not known to BSGR, but it seems that Rio Tinto proposed some new options, including the intervention of another partner company. By letter dated 28 November 2008, Minister Nabé requested more detailed information from Rio Tinto in this respect.⁷⁸
79. By letter dated 3 December 2008, Rio Tinto effectively pulled the trigger over its mining rights on the Simandou mountain by informing the Government that it was substantially reducing its investment in the area, terminating its subcontracts with local companies and delaying any construction projects:⁷⁹

"Alors que nous revoyons le Projet, et à la lumière de l'incertitude concernant notre Concession, du besoin d'une ressource très importante en minerai et de la situation économique globale, les dépenses pour le Projet Simandou vont être réduites en 2009 pour l'ensemble des travaux non essentiels. Rio Tinto espère que cette réduction sera temporaire mais Rio Tinto a besoin de certitude avant d'investir d'avantage de fonds dans ce projet [...].

Dans le court terme et tant que nous ne disposerons pas de la certitude que notre Concession est juridiquement sécurisée, Rio Tinto va différer les activités nécessitant de lourds efforts en investissements et recentrer ses ressources sur des activités essentielles. L'avenir du projet dépend du succès de l'issue de nos discussions avec l'Etat guinéen et des revues financières qui en résulteront [...]

A compter de décembre 2008, Rio Tinto réduira de manière significative le nombre de ses sous-traitants et reportera tous nouveaux projets de construction nécessitant de nouvelles embauches de travailleurs pour le projet Simandou jusqu'à ce que les examens financiers et les discussions avec l'Etat soient achevés".

80. Rio Tinto's withdrawal was part of a broader exercise to review its expenses and investments worldwide in light of the market conditions. Rio Tinto justified its decision on the basis of the uncertainty surrounding its concession, the astronomical costs of the required investments and the global financial crisis:

⁷⁷ Letter from Rio Tinto to Minister Nabé dated 11 December 2008 (Exhibit C-0188).

⁷⁸ Exhibit R-237.

⁷⁹ Letter from Rio Tinto to Minister Nabé dated 3 December 2008 (Exhibit C-0189).

"Rio Tinto effectue actuellement une revue globale de ses dépenses sur ses projets à la lumière de l'évolution des conditions actuelles. Trois facteurs principaux font du Projet Simandou un projet à haut risque. Premièrement, l'incertitude liée au retrait par l'Etat de notre Concession. Deuxièmement, un montant d'investissement très élevé qui nécessite une ressource importante en minerai de fer et un projet de grande envergure. Troisièmement, les défis posés par le ralentissement économique mondial rendent encore plus aiguës les questions soulevées par l'incertitude concernant notre concession et l'importance des investissements devant être réalisés [...]."

Rio Tinto a besoin de certitude quant à sa Concession. Rio Tinto a investi près de 400 millions de dollars US dans de très importants travaux de recherche pour permettre l'exploitation d'une mine de classe mondiale et pour évaluer les options de mise en valeur de ces ressources. La majeure partie de ces investissements a été réalisée en raison des droits octroyés par l'Etat guinéen à Rio Tinto en 2002, 2003 et 2006 qui ont confirmé les périmètres de notre Concession Minière.

Rio Tinto a rétrocédé 50 % de ses surfaces de recherche en 2000. Il nous est aujourd'hui demandé de rétrocéder une partie supplémentaire de notre Concession. Une Concession réduite signifie un accroissement du risque que le projet n'atteigne pas l'échelle de grandeur et la taille critique.

Rio Tinto a besoin d'avoir la certitude qu'elle disposera d'un gisement suffisamment important pour permettre les investissements nécessaires au développement d'une mine de classe mondiale à Simandou. Un gisement important et sécurisé, incluant la ressource JORC publiée de 2.25 milliards de tonnes et un potentiel d'expansion très important sur la durée de vie de la mine, est nécessaire pour rentabiliser les milliards de dollars en coûts de construction nécessaires pour développer le projet Simandou.

Par ailleurs, le ralentissement économique mondial a exacerbé les problèmes liés à l'incertitude entourant notre concession et le besoin d'une ressource importante. Ce ralentissement mondial est caractérisé par la forte chute de la demande des consommateurs en produits finis métalliques conduisant les producteurs d'acier à réduire leur production de plus de 30 %. En Amérique du Nord, dans l'Union Européenne et en Asie, les Etats mettent actuellement en place un nombre important de mesures visant à soutenir leurs économies.

81. The following day, the Inter-Ministerial Committee presented a report to the Council of Ministers on the status of its negotiations with Rio Tinto and on Rio Tinto's failure to retrocede 50% of the perimeter. Following a discussion within the Council of Ministers, the

Government instructed Minister Nabé to take the necessary measures to apply the Mining Code and to proceed with the appropriate retrocession of Rio Tinto's perimeter.⁸⁰

82. The following day, a high level delegation of Rio Tinto held a meeting with the Government represented by Minister Nabé, the Minister of Finance, the Minister of Environment and the Minister of Local Development, the technical, legal and economic advisors of the respective ministers and a number of other public officials to clarify Rio Tinto's decision to stop the works on the ground. The Government listened and informed Rio Tinto that it would communicate its position shortly.⁸¹
83. By letter dated 9 December 2008, Minister Nabé provided Rio Tinto with the Ministry's retrocession decision of 50% of Rio Tinto's perimeter and with the coordinates of its new area.⁸² In accordance with Rio Tinto's own suggestion dated 6 October 2008, it maintained those areas in which it had done exploration work, i.e. Blocks 3 and 4. It lost the area's in which it had done no exploration works, i.e. Blocks 1 and 2.
84. By Ministerial Decree dated 29 February 2009, and in accordance with Article 3 of the Suspension Decree, Minister of Mines Thiam granted the second renewal of Rio Tinto's prospecting rights in Simandou Blocks 3 and 4.⁸³
85. Conclusion. It has been established that:
- (i) Rio Tinto's mining rights in Blocks 1 to 4 had been granted in an unlawful manner from the very early days, or at least from 2002, when the rights were renewed without any retrocession;

⁸⁰ RWS-2, para 42.

⁸¹ Minutes of the meeting with Rio Tinto of 5 December 2008 (Exhibit C-0190).

⁸² Exhibit R-0238.

⁸³ Exhibit R-0163.

- (ii) Rio Tinto froze Guinea's mining reserves by delaying the exploration works and by concentrating the little exploration on a tiny area of the perimeter, with no exploration whatsoever in the rest of the perimeter;
- (iii) Rio Tinto was reducing its investments and further delaying the first commercial exploitation of the Simandou reserves;
- (iv) President Conté took legal advice from the Ministry of Mines that the Base Convention and the mining concession had to be reviewed and or withdrawn;
- (v) After the suspension of the mining concession, several technical and legal committees who analysed Rio Tinto's rights confirmed that these rights had been granted unlawfully and needed to be revised;
- (vi) Between August and December 2008, the Government negotiated in good faith with Rio Tinto to find an amicable solution but Rio Tinto simply refused to compromise over its perimeter. In addition, it announced scaling back its investments as a result of a worldwide internal review of its mining assets and the financial crisis; and
- (vii) 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. The decision to withdraw Blocks 1 and 2 was taken by the Council of Ministers, without the involvement of President Conté who was very sick at the time and would die 2 weeks later.

86. Summarizing, the withdrawal of Rio Tinto's rights in Blocks 1 and 2 was taken in a lawful manner, or at least without any pressure or influence from Mamadie Touré or President Conté. This will be further addressed below in a separate section.

2.1.3 The award of the mining rights in Simandou Blocks 1 and 2 to BSGR was lawful

87. In light of the above-mentioned frustrations of the Guinea Government with Rio Tinto's lack of progress and its monopolisation of the Simandou deposits, BSGR was almost certain that Rio Tinto's mining rights would be taken away or at least reduced.⁸⁴ Accordingly, on 12 July 2007 BSGR wrote to Minister of Mines Kanté to express its interest in acquiring exploration permits for Blocks 1 and 2.⁸⁵ A few weeks earlier, BSGR had also written to Minister Kanté to express its interest in diamond exploration rights.⁸⁶
88. As Minister Kanté did not respond to BSGR's letters of 18 June 2007 and 12 July 2007, BSGR reached out by letter dated 16 August 2007 to Secretary-General Soumah to request his favourable intervention in support of BSGR's interest in Blocks 1 and 2 and diamond permits. On 22 August 2007 Mr Soumah forwarded BSGR's request to Minister Kanté, indicating that BSGR had his support.⁸⁷ Mr Soumah did not instruct Minister Kanté to grant BSGR exploration permits over Blocks 1 and 2.
89. Minister Kanté replied to Mr Soumah on 26 September 2007.⁸⁸ Although he expressed some reservations about the number of mining rights that BSGR was already holding and the risk of freezing these assets, he was nevertheless prepared to consider BSGR's application if it could present results in its existing permits:

"Ces permis de recherche permettent à la société BSGR de participer à l'évaluation du potentiel minier de la Guinée. La question que l'on se pose est comment BSGR va mettre toutes ces ressources minières en exploitation sans les geler? Toutefois, les nouvelles demandes formulées peuvent être examinées de la manière suivante:

- *le fer BSGR doit justifier sa nouvelle demande par la présentation des résultats de travaux de recherche sur les permis qui lui sont octroyés*

⁸⁴ CWS-1, para. 62.

⁸⁵ Exhibit R-214.

⁸⁶ Letter from BSGR to Minister Kanté dated 18 June 2007 (Exhibit C-0191, page 4).

⁸⁷ Letter from Mr Soumah to Minister Kanté dated 22 August 2007 (Exhibit C-0191, page 2)

⁸⁸ Letter from Minister Kanté to Mr Soumah (Exhibit C-0192, page 2). This document is undated, but BSGR's letter of 20 November 2007 refers to Minister Kanté's letter to Mr Soumah of 26 September 2007, which must be the same one.

- *le diamant: la zone sollicitée est sous Concession Minière, et ne peut pour le moment faire l'objet d'octroi à une nouvelle société sans que les droits miniers de cette société ne soient éteints".*

90. Minister Kanté's response in relation to the diamond application in comparison with his response in relation to the iron ore application. Whereas in relation to the diamonds, he simply refused to entertain an application because another mining company was holding a mining concession over the requested zones. However, he was willing to entertain BSGR's application over Blocks 1 and 2 although these rights were, just as the diamond concession, still attributed to another mining company, i.e. Rio Tinto. This markedly different approach by the Minister of Mines to BSGR's diamond and iron ore application is further evidence of the Government's own agenda to open the Simandou mountain to competition and invite additional mining companies.
91. It is a mystery to BSGR how Minister Kanté can reconcile the above-mentioned letter with his written witness statement before this Tribunal in which he testifies as follows:⁸⁹

Après ce rendez-vous, je suis allé à mon bureau au Ministère, où Ibrahima Sory Touré et Asher Avidan se sont annoncés près d'une heure plus tard. Je les ai reçus à mon bureau.

Asher Avidan s'est adressé à moi comme si le Président avait donné des instructions formelles que je devais exécuter concernant Simandou. C'était comme s'ils revenaient pour dire «voilà, on vient finaliser tout ça ». Je ne sais pas ce qui s'était passé entre temps, mais c'était paradoxal qu'ils reviennent vers moi, une heure après, pour me dire ça. J'aurais pu croire que l'entretien à la Présidence s'était passé sans moi.

Je leur ai répondu que, pour moi, aucune instruction n'avait été donnée. Rio Tinto détenait une concession attribuée par décret du Président, et il n'y avait qu'un décret qui pouvait leur retirer leurs droits. Je leur ai dit que leur démarche était illégale. Ils sont donc repartis"

92. In his letter of 26 September 2008 Minister Kanté does not even mention Rio Tinto's mining concession, let alone that BSGR's interest in Blocks 1 and 2 is qualified as illegal. The letter suggests that Minister Kanté is willing to consider BSGR's application but that he is only

⁸⁹ RSW-4, paras. 27-29.

concern is that BSGR will not, as so many other mining companies operating in Guinea and elsewhere in Africa, freeze the mining assets by not actually exploring and prospecting the perimeters awarded them.

93. Thus, on 20 November 2007 BSGR wrote to Mr Kanté, inviting him to propose a date for a meeting in December 2007 at which BSGR would present its exploration results.⁹⁰ BSGR received no response.
94. During that period BSGR continued its active, costly investments in exploration work in relation to the iron ore deposits. This included geological studies, drilling work, and development of infrastructure to facilitate the explorations works. This further included BSGR's participation in a new transport and infrastructure committee that was set up by Minister Kanté to examine and develop the infrastructure that was required to export the iron ore from Guinea.⁹¹
95. A couple of months later, on 30 April 2008, BSGR reached out again to Ministry Kanté Mines to inform him that it had returned 9 permits (in respect of bauxite and uranium) and to clarify that it now had the capacity to extend its rights to Blocks 1 and 2.⁹² BSGR did not receive a response until 10 July 2008 and, when it did, it was rebuffed. Minister Kanté rejected BSGR's proposal, noting that Blocks 1 and 2 were under concession to another mining company.⁹³
96. Following the Government's withdrawal of Rio Tinto's mining concession on 28 July 2008, BSGR renewed its application for exploration permits over Blocks 1, 2 and 3 by letter dated

⁹⁰ Letter from BSGR to Minister Kanté dated 20 November 2007 (Exhibit C-0193) ("*Nous avons le plaisir de vous informer que notre groupe est dispose à vous présenter les résultats des travaux de recherches déjà réaliser sur les dits permis et éventuellement vous justifier la portée géologique d'une telle extension. Aussi, nous vous invitons de nous proposer une date à votre convenance dans la première semaine du mois de Décembre 2007 pour cette présentation à laquelle nous espérons obtenir une issue heureuse de vos services techniques*").

⁹¹ Letter from BSGR to Minister Kanté dated 7 December 2007 (Exhibit C-0194).

⁹² Letter from BSGR to Minister Kanté dated 30 April 2008 (Exhibit C-0195).

⁹³ Letter from Minister Kanté to BSGR dated 10 July 2008 (Exhibit C-0196).

5 August 2008.⁹⁴ Mr Asher Avidan indicated in his first witness statement that two other companies (AfriCanada and a Chinese company) also submitted applications.⁹⁵

97. As part of the document production phase, was Guinea ordered to produce any other application that it had received in relation to Blocks 1 and 2. Guinea has produced only one other application, from a company called Africanada.⁹⁶ BSGR therefore requests the Tribunal to draw the inference that only two companies had applied to be granted Blocks 1 and 2, itself and Africanada.
98. By letter dated 19 August 2008, Minister Kanté acknowledged the receipt of BSGR's application.⁹⁷ He explained that the required permits were not available yet because, as per the Suspension Decree of 28 July 2008, the Minister of Mines first had to redefine Rio Tinto's mining concession in accordance with the Mining Code. He further explained that the Government was looking for technically and financially strong partners who could develop projects within a set chronogram and committed to the financing of infrastructure works outside of the project. As indicated above, a few days later Minister Kanté was replaced by Minister Nabé, for reasons unknown to BSGR.
99. As indicated above, the Government's started its negotiations with Rio Tinto over an amicable retrocession of its perimeter by the end of August 2008. However, two months later the Government had still made no real progress was made. Rio Tinto continued to stonewall the Government's reasonable requests, much to the frustration of the entire Government including President Conté.
100. It is against this background that Minister of Mines Nabé reached out to BSGR by letter dated 3 November 2008, requesting additional information and a confirmation that BSGR was willing to make a series of important commitments. Minister Nabé indicated in his letter

⁹⁴ Exhibit C-0098; CWS-3, para 34.

⁹⁵ *Ibid.*, para 34.

⁹⁶ Letter from Groupe Africanada dated 7 September 2008 (Exhibit C-0197).

⁹⁷ Letter from Minister Kanté to BSGR dated 19 August 2008 (Exhibit C-0198).

that this information would assist the Government in its decision making and in the award of the blocks that might become available:

"A ce propos, nous voudrions vous informer que le Gouvernement est en train de mettre en application les dispositions du décret D/041/PRG/SGG du 28 juillet 2008 qui rapporte le décret D/2006/008/PRG/SGG du 30 mars 2006 octroyant une concession minière sur les Monts Simandou. Des discussions sont en cours avec le partenaire qui pourrait être concerné par les dispositions de cet acte.

A cet effet, le Gouvernement se doit d'examiner les conséquences éventuelles des décisions qui seront prises concernant les Monts Simandou à la suite des différentes demandes formulées par des sociétés dont la vôtre en vue d'obtenir des permis portant sur des périmètres qui seraient libérés par l'application du décret du 28 juillet 2008.

Dans ce cadre, nous vous demandons de bien vouloir nous faire parvenir par écrit:

- *les résultats détaillés de vos travaux sur les permis qui vous sont déjà octroyés dans la zone de Simandou;*
- *la preuve de vos capacités techniques et financières à réaliser les infrastructures minières nécessaires à l'exploitation des gisements de fer des Monts Simandou, en particulier le Chemin de fer et le Port;*
- *votre engagement à faire face en lieu et place de la République de Guinée aux conséquences financières de toute action arbitrale ou judiciaire à laquelle la Guinée aurait à répondre en relation avec l'octroi d'un permis de recherches dans la zone des Monts Simandou;*
- *la confirmation de la mise en place d'une caution d'un montant raisonnable en vue de faire face au moins partiellement aux points visés ci haut ;*
- *votre engagement à payer un bonus de 20 000 000 USD et à réaliser des projets de développement dont la nature et le montant minimum seront déterminés en cas de découverte d'un gisement économiquement exploitable"*

101. Guinea purports in its Counter-Memorial that Minister Nabé wrote that letter under pressure from BSGR and President Conté. His evidence as to the alleged pressure is that BSGR came to see him and express its interest in Simandou. This is obviously not exerting pressure. BSGR had formally applied for Blocks 1 and 2 on 6 August 2008 and Minister Nabé had been appointed as the new Minister of Mines on 27 August 2008. There is nothing

suspicious, let alone unlawful, in BSGR visiting the newly appointing mining minister and advocate for its pending mining applications.

102. In terms of his evidence as to the alleged pressure from the President, it is noteworthy that Minister Nabé does not refer to any meetings or direct communications with President Conté himself or Mamadie Touré. He merely refers to a call with Prime Minister Souaré who had passed on a message from the President that "*il faut y aller car le Président devient impatient*".⁹⁸ [PROTECTED]
[REDACTED]
[REDACTED]. In addition, even if the call would have been made, the President's alleged direction does not refer to BSGR at all. In light of the Government's failure to make real progress in the negotiations with Rio Tinto (see supra), it is far more likely that the President's message related merely to the negotiations with Rio Tinto and not BSGR's application for Blocks 1 and 2.
103. BSGR's reply of 6 November 2008 gave all the requested commitments and warranties and attached the geological data relating to the exploration work conducted over BSGR's existing permits:¹⁰⁰

"[...] La Société BSGR a décidé de fournir à l'Administration Minière ci-joint toutes les données des résultats géologiques opérés au niveau des permis qui nous sont déjà octroyés.

Par ailleurs, BSGR rassure le Gouvernement sur ses capacités financières et techniques à faire les recherches et à réaliser les infrastructures nécessaires quant à la mise en valeur des dits gisements.

Permettez-nous, excellence Monsieur le Ministre, de vous mettre en pièce jointe notre courrier en date du 07 Décembre relatif à la participation de notre Société à la réalisation des projets miniers Transguinéen et port en eau profonde).

⁹⁸ RWS-5, para. 16.

⁹⁹ [PROTECTED]

¹⁰⁰ Exhibit C-95.

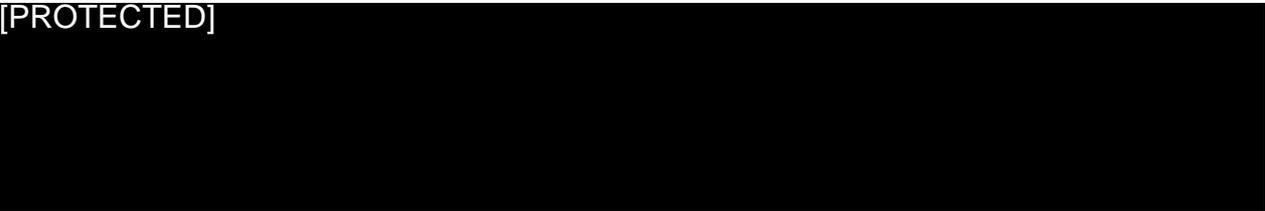
Concernant le paiement du bonus, comme indiqué dans le courrier, en cas de découverte d'un gisement économiquement exploitable, le dit bonus sera à votre disposition pour la réalisation des projets de développement.

En fin, nous nous engageons également que pour toute action arbitrale ou judiciaire entreprise contre la République de Guinée en relation avec la mise en valeur des gisements de fer du Mont Simandou, à supporter aux frais et dépenses liées à cette procédures arbitrale ou judiciaire"

104. In his memo to Prime Minister Souaré and the President of the Inter-Ministerial Committee Minister of Justice Traoré dated 10 November 2008 Minister Nabé confirmed that he had received BSGR's documents and that BSGR met the conditions (emphasis added):¹⁰¹

"Certaines de ces conditions ont déjà été satisfaites par la société BSGR Guinée à travers un courrier adressé au Ministre par lequel, elle s'engage à réaliser les infrastructures ferroviaires et portuaires et à faire face aux conséquences éventuelles de toute action qui serait engagée contre la Guinée ainsi qu'à réaliser des projets en cas de découverte d'un gisement économiquement exploitable. Elle transmet un rapport du cabinet Ernst & Young LLP donnant des indications sur ces capacités financières et techniques"

105. BSGR assumes that Minister Nabé also requested the other applicant Africanada to meet the same conditions. Given that Guinea has failed to produce any documents in relation to Africanada meeting these conditions, BSGR requests the Tribunal to draw the inference that Africanada did not meet these conditions and that BSGR was therefore the only applicant to meet the Government's conditions to be granted Blocks 1 and 2 if and when they became available.

106. [PROTECTED]
- 

¹⁰¹ Memo from Minister Nabé to Prime Minister Soaré dated 10 November 2008 (Exhibit C-0179).

[PROTECTED]

102

[PROTECTED]

107. As indicated above, by letter dated 3 December 2008 Rio Tinto informed the Government that it was scaling down its investment in Simandou as result of a global review of its mining assets and the financial crisis. The following day, the Council of Ministers decided to enforce a 50% retrocession of Rio Tinto's perimeter and instructed Minister Nabé to take the necessary steps.
108. In the following days, the CPDM recommended to Minister Nabé what areas Rio Tinto had to retrocede and Minister Nabé informed Rio Tinto accordingly by letter dated 9 December 2008.¹⁰³ In parallel, the CPDM recommended Minister Nabé to award the retroceded area's (which corresponded to Blocks 1 and 2) to BSGR. In accordance with the CPDM's recommendations, Minister Nabé granted Blocks 1 and 2 to BSGR.¹⁰⁴
109. Conclusion: It has been established that:
- (i) BSGR's application in 2007 to be awarded Blocks 1 and 2 was rejected because as long as these Blocks belonged to Rio Tinto;
 - (ii) BSGR re-applied for Blocks 1 and 2 in August 2008 when Rio Tinto's rights on Blocks 1 to 4 were suspended;

102

[PROTECTED]

103

Exhibit R-238.

104

Exhibit C-0010.

- (iii) BSGR's application was only entertained when the Government negotiations with Rio Tinto to find an amicable solution stalled and the Government's frustrations grew;
- (iv) The Government set out a number of substantial conditions that the applicants for the mining rights had to meet; BSGR was the only applicant to meet those conditions;
- (v) BSGR was awarded Blocks 1 and 2 by Minister Nabé who acted upon the recommendation of the CPDM.

110. In summary, BSGR was awarded Blocks 1 and 2 in a lawful manner and without any inappropriate intervention of Mama Touré or President Conté, let alone by bribing them. This will be further developed in a separate section.

2.1.4 Rio Tinto's repossession of its mining rights in Simandou Blocks 3 and 4 was unlawful

111. On 22 December 2008, President Conté died and Captain Moussa Dadis Camara (after a coup) became the new President. He appointed Mr Thiam as Minister of Mines in January 2009.

112. In January 2009, Rio Tinto wasted no time, sending an aggressive letter to the new President, Daddis Camara, in an attempt to recover the areas lost to BSGR. Its determination to recover to Blocks 1 and 2 included its unabashed denigration of BSGR, including to provide a self-serving, inaccurate table, comparing the work of BSGR and Rio Tinto in Guinea during the 11 years prior.¹⁰⁵

113. Soon after Minister Thiam's appointment, a delegation from Rio Tinto met with him to try to persuade him to overturn the previous government decision to withdraw its mining concession and its mining rights in Blocks 1 and 2. Rio Tinto did so by making very serious

¹⁰⁵ Letter from Rio Tinto to President Camara dated 22 January 2009 (Exhibit C-0199). During this period Rio Tinto were actively engaged in a smear campaign against BSGR in both local and international media (Exhibit C-0200).

allegations of corruption against BSGR, although they did not provide any evidence in support of their allegations. Minister Thiam described this meeting as follows:¹⁰⁶

“I met with representatives from Rio Tinto, including the local managing director, his CFO, and the head of public relations. They were accompanied by 5 or 6 Guinean officials including a few ministers and members of the ruling military committee that was in power. They made a very vigorous argument that we should overturn the previous government’s withdrawal decision, and made multiple allegations against BSGR. These included that BSGR was a corrupt organisation involved in arms trading, that Beny Steinmetz’s French passport had been revoked on account of his connection to corruption, that no major bank was prepared to do business with BSGR Guinea and that the company had no experience in the mining sector.”

114. In a later letter to President Condé dated 26 November 2012, Minister Thiam wrote:¹⁰⁷

“Representatives of Rio contacted members of my family, endeavoured to discover the address of my mother, etc... Upon my arrival, the company [Rio Tinto] dangled all sorts of political gifts in front of me, including the dream of resolving all Guinea’s water and electricity problems... it was clear to me that Rio Tinto was pursuing all lines of attack in an attempt to recover its rights to blocks 1 and 2, including making allegations against BSGR...”

115. Minister Thiam investigated Rio Tinto’s allegations and found them to be untrue. He therefore *“advised Rio Tinto that it should accept the withdrawal and concentrate on developing its mining concession at Simandou blocks 3 and 4”*.¹⁰⁸

116. Rio Tinto, however, did not take no for an answer and started a harassment campaign against BSGR. It:

(i) informed BSGR that it had no legal right to carry out work in Blocks 1 and 2;¹⁰⁹

¹⁰⁶ CWS-5, para. 19.

¹⁰⁷ Exhibit C-0136; CWS-5, para. 21.

¹⁰⁸ Exhibit C-0136.

¹⁰⁹ Letter from Rio Tinto to BSGR dated 11 June 2009 (Exhibit C-0201).

- (ii) disrupted operations by encouraging demonstrations against the company and deploying low flying helicopters over Blocks 1 and 2 to intimidate BSGR staff,¹¹⁰
- (iii) it refused to move its equipment from Blocks 1 and 2¹¹¹ (finally removed in July 2009 after Guinea had threatened to suspend all Simfer’s activities); and
- (iv) conducted a press campaign designed to undermine BSGR.

117. In June 2009, Thiam had to write to Rio Tinto again. He said in that letter that Guinea had evidence that they had:¹¹²

“engaged in a subversive press campaign and in a defamation campaign against the Guinean State, its government, and some of its representatives... These activities are dangerously approaching an attempt at destabilising civil peace and weakening our socio-economic stability. We possess, I repeat, very clear evidence of these acts...”

118. On 14 July 2009, Rio Tinto was again asked by Guinea to remove its equipment from Simandou Blocks 1 and 2.¹¹³

119. This conduct by Rio Tinto continued into later 2009, including false allegations made by Rio Tinto that BSGR and Mr Steinmetz were linked with a corruption investigation against a former Israeli Prime Minister. On 21 September 2009 BSGR was forced to write to the CEO of Rio Tinto, Tom Albanese in London about this. BSGR said¹¹⁴:

“We are in possession of evidence showing that Mr Jordan Feildars of Simfer is engaging in an underhand and unlawful smear campaign against BSGR as well as against Mr Beny Steinmetz and others...”

The article, drafted by Mr Feildars and then published at his instigation, sets out a prejudicial, unsupported and erroneous description of relations between Mr

¹¹⁰ Letter from BSGR to Simfer Rio Tinto dated 23 June 2009 (Exhibit C-0202).
¹¹¹ Letter from Minister Thiam to Rio Tinto dated 28 May 2009 (Exhibit R-259).
¹¹² CWS-5, para. 56.
¹¹³ *Ibid.*, para 57.
¹¹⁴ Letter from BSGR to Rio Tinto dated 21 September 2009 (Exhibit C-0203).

Ehud Olmert, the former Israeli Prime Minister, BSG and Mr Steinmetz, and purports to create a link with the corruption investigation relating to Mr Olmert...

The text prepared by Mr Feildars was reproduced in its entirety in a highly damaging article which appeared in L'Aurore, a Guinean newspaper, in edition 112 published on 7 September 2009... The article was also published on L'Aurore's web site and is, we have been informed, due to be broadcast by radio shortly as a result of Mr Feildar's efforts...

the only basis on which your representative has procured the publication of these materials and is pursuing a campaign to expand publication is in an attempt to prejudice the perception of us in the region and our activities in Simandou – in the context of your own attempts to resurrect Simfer's activities in that region.”

120. Despite its conduct, Minister Thiam continued to treat Rio Tinto and BSGR with equality, as demonstrated in his letters to local authorities.¹¹⁵
121. In around March 2010, Rio Tinto entered into a JV with Chinalco. In return for a payment of USD 1.35 billion by Chinalco to Rio Tinto, Chinalco was awarded a 44.65% interest in Blocks 3 and 4.¹¹⁶
122. In April 2011, Rio Tinto reached a settlement with President Condé's government, paying USD 700 million to reinstitute its mining concession in Blocks 3 and 4. Although the text of the settlement agreement stipulates that these funds would be used for public purposes, this payment has never been accounted for nor has it been audited how this amount was spent. Given a number of other incidents that will be discussed in further detail below, it is not unreasonable to assume that part of this money was paid to persons or entities within the business or family circle of President Alpha Condé.
123. This is particularly the case taking into account the circumstances in which the Rio Tinto and Guinea settlement agreement came about. Recently revealed e-mails had revealed the payment by Rio Tinto of USD 10.5 million to a middleman Francois de Combret for his

¹¹⁵ For example Exhibit R-0254.

¹¹⁶ CWS-5, para. 75.

services in securing that deal and his access to President Condé, out of which 8 million was further paid on to President Condé's, either directly or through the UAE bank account of his son Mr Mohammed Alpha Condé.

124. In an internal e-mail between senior executives of Rio Tinto, Mr de Combret's involvement was described as follows:¹¹⁷

“The result we achieved was significantly improved by Francois’ contribution and his very unique and unreplaceable services and closeness to the President [...]

He vouched for our integrity when it was needed and helped bring us together when things were looking extremely difficult. These services were of the most unique nature [...]

My belief is that we had a very low probability of resecuring [sic] 3 and 4, but through a combination of the negotiations and Francois’ unique help to me and Rio Tinto, we were able to close [...]

[Mr de Combret is an] extremely valuable insurance that things do go smoothly as we bed down the arrangements with the [government of Guinea][...]

I am extremely worried if we lose the direct connection to the president that I have cultivated with Francois [...]”

125. This e-mail was then passed on to the CEO of Rio Tinto, Mr Albanese (Rio's then CEO), confirming that there was "no question" that Mr de Combret had "delivered sizeable value" and proposing that the funds be placed in Mr de Combret's account and released once the first shipment from Simandou took place.¹¹⁸ Mr Albanese agreed with this approach but warned about the optics: "think about optics to the government of Guinea".¹¹⁹ Upon the approval of Mr Albanese, Mr Walsh wrote back to Mr Davies saying he was prepared to pay the full US\$10.5 million "but only holding an amount in escrow in his name subject to first shipment". He concludes "I know you won't like this, but put your thinking cap on".¹²⁰

¹¹⁷ Email from Alan Davies (a senior executive of Rio Tinto) to Sam Walsh (then head of iron ore of Rio Tinto) dated 10 May 2011 (Exhibit C-0204, page 2).

¹¹⁸ Email from Sam Walsh to Mr Albanese dated 10 May 2011 (Exhibit C-0204, page 1).

¹¹⁹ Email from Mr Albanese to Sam Walsh dated 10 May 2011 (Exhibit C-0204, page 1).

¹²⁰ Email from Sam Walsh to Mr Davies dated 10 May 2011 (Exhibit C-0204, page 1).

126. Rio Tinto's payment to de Combret and President Condé remained a well-kept secret until the above-mentioned emails were leaked on the internet on 29 August 2016, forcing Rio Tinto to conduct both an internal investigation and an external one, by Kirkland and Ellis. These investigations led to the sacking of Mr Alan Davies (Energy and Minerals chief executive) and Debra Valentine (Legal & Regulatory Affairs Group executive), and more importantly to Rio Tinto reporting itself to the UK, Australian and US anti-corruption authorities.¹²¹
127. A couple of days after the dismissal of Rio Tinto's top executives, the news agency France 24 broke the news that they had a recording of a conversation with Mr de Combret in which he gave the following account of his conversation he had with the Guinean president: "*Rio Tinto is a huge company ... But the president told them, 'Listen, if there's no downpayment', I'll cancel the concession.' And he would have done it.*"¹²²
128. While Rio Tinto may have sacked two of its top executives over this corruption saga, the investigations by the US and UK anti-corruption authorities will obviously continue. No doubt that these investigations will reveal other breaches of the anti-corruption legislation both in Guinea and elsewhere. The payment of Mr De Combret will turn out to be only the tip of the iceberg.
129. In October 2016 Rio Tinto announced that it withdrew from the Simandou project after almost 20 years.¹²³ The mask finally fell off. Rio Tinto has transferred its 51% share to its joint venture partner Chinalco who is now 100% owner. Chinalco has announced that it hopes to start operating the mine within 5 years. That will be 25 years after Rio Tinto obtained the rights initially. All this time, it has held on to this asset so as to keep it out of the hands of its competitors. By doing so, it also avoided 50 additional million tons of iron

¹²¹ Press reporting on Rio Tinto corruption scandal (Exhibit C-0205).

¹²² France 24, "*Audio recordings drag Guinea president into mine bribery scandal*" (Exhibit C-0206); Audio Recordings (Exhibit C-0207.1 and C-0207.2).

¹²³ Exhibit C-0289 and C-0290.

ore coming annually to the market and managed to keep the iron ore price high. Admittedly, it has invested a substantial sums over the years. However, this was the cost of holding onto the asset and preparing a feasibility and part of what it needed to do hold onto or to sell the asset, rather than any real effort to develop and produce.

2.2 The conclusion of the Zogota Base Convention

2.2.1 Exploration permits in Simandou North and Simandou South and the Memorandum of Understanding

130. BSGR described here above how Minister of Mines Souaré refused to grant Rio Tinto a mining concession in Blocks 1 to 4 in May 2005 and proposed to split the Simandou mountain range in two large areas. Basically, and as acknowledged by Rio Tinto itself, the Government did not wanted the entire Simandou region being monopolized by one mining company. It wanted to create competition and invite other mining companies.
131. It is against this background that Minister Souaré met with BSGR's Roy Oron on 20 July 2005 and discussed the possibility of iron ore exploration in the Simandou region. BSGR confirmed its interest in its letter dated 2 August 2005 to Minister Souaré and the Prime Minister.¹²⁴
132. A few months later, in December 2005, BSGR visited Guinea again to explore the potential of the Simandou area in greater detail. It is Minister Souaré's evidence in the present proceedings that the first meeting that he remembers to have held with BSGR was in December 2005 in the President Conté's office, together with Mamadie Touré. During that meeting, President Conté would merely have stated that the Ministry had to facilitate BSGR to invest in the country.¹²⁵

¹²⁴ Letter from BSGR to Minister Souare dated 2 August 2005 (Exhibit C-0344).

¹²⁵ RWS-2, paras. 9-10 ("*Le Président a simplement dit qu'il fallait leur faciliter la tâche pour investir dans le pays*").

133. [PROTECTED]

[REDACTED]

134. In other words, whereas in the present proceedings Minister Souaré testifies that BSGR went first to President Conté and Mamadie Touré, he declared in the Swiss proceedings that BSGR came first to the Ministry of Mines and the CPDM. As will be detailed below, this is unfortunately not the only contradiction in Minister Souaré's version of the events that took place in the beginning December 2005.

135. Before doing that, it is also important to put this point of the record straight. Minister Souaré testifies that Mr Steinmetz may have attended that alleged meeting with President Conté but that his memory is not very clear on this. For the avoidance of doubt, Mr Steinmetz did not attend any meeting before 2008 as he had never travelled to Guinea before that year.¹²⁷

136. In his evidence in the present proceedings, Mr Souaré testifies how BSGR would have visited Rio Tinto's mining blocks without his authorisation, how he would have reprimanded BSGR in no uncertain terms and how he would have directed BSGR to the CPDM, away from President Conté.¹²⁸

"Le lendemain de cette réunion, un incident important s'est produit avec la direction de BSGR.

¹²⁶ [PROTECTED]

¹²⁷ CWS-1, para. 59.

¹²⁸ RWS-2, paras. 11-21.

Ce jour-là, j'ai reçu un appel de la Banque Mondiale à Washington m'informant qu'un promoteur minier avait atterri avec un hélicoptère présidentiel à Simandou sur une zone qui était sous permis de Rio Tinto. La Banque Mondiale souhaitait savoir si j'avais autorisé cela. Il faut savoir que Rio Tinto travaillait avec la Société Financière Internationale sur le projet Simandou à l'époque. Je pense que c'est pour ça que la Banque Mondiale s'est impliquée dans cet incident. Cet incident a causé un scandale.

Je n'étais pas au courant de cette mission. Surpris, j'ai donc fait faire des vérifications par tous mes services, de la Direction générale des mines jusqu'au personnel sur le terrain. J'ai appris qu'il s'agissait de BSGR. Puisqu'ils avaient fait le déplacement avec l'hélicoptère de la Présidence, j'en ai déduit qu'ils avaient obtenu la permission de la Présidence directement.

J'ai immédiatement informé le Président Lansana Conté par téléphone, puis j'ai convoqué les représentants de BSGR dans mon bureau pour taper du poing sur la table.

Les représentants de BSGR sont venus à ce rendez-vous accompagnés de Mamadie Touré. Je ne me souviens plus des noms des représentants de BSGR à part Ibrahima Sory Touré qui était toujours présent aux rencontres avec BSGR. C'était connu qu'il agissait pour le compte de Mamadie Touré.

Mamadie Touré n'a pas beaucoup parlé pendant la réunion car la discussion était technique, mais sa présence ne m'a pas surprise. Le fait que cela ait eu lieu après la réunion de la veille chez le Président enlevait toute ambiguïté sur le fait que BSGR était venu en Guinée pour Simandou et avait le soutien de la Présidence. Mamadie Touré était là comme pour dire « le Président a dit ».

Au cours de la réunion, BSGR n'a pas donné d'explication sur la mission et l'incident de l'hélicoptère. Je leur ai expliqué qu'ils ne pouvaient pas commencer les affaires en Guinée par la confrontation. J'ai fermement expliqué aux représentants de BSGR qu'ils ne pouvaient pas se rendre sur une zone attribuée à une autre compagnie sans autorisation préalable, de même qu'ils ne pouvaient exploiter le moindre centimètre carré de Simandou qui avait déjà été attribué à Rio Tinto. Je leur ai clairement expliqué que les mines guinéennes ne fonctionnaient pas ainsi.

Les représentants de BSGR ont plaidé pour obtenir un permis de recherches sur Simandou. Mamadie Touré a appuyé la demande.

J'ai rappelé à BSGR qu'ils pouvaient demander un permis de recherches pour toute zone qui n'était pas encore soumise à un permis. Je les ai donc renvoyés auprès du service technique du CPDM pour introduire une demande d'obtention de titre minier conformément à la procédure qui était prévue dans le Code minier de 1995.

Si mes souvenirs sont bons, suite à l'incident, j'ai fait le compte-rendu au Président pour être sûr que nous soyons en phase. J'ai alors dit au Président qu'il n'était pas possible de donner le moindre droit sur la zone de Simandou qui était déjà sous permis accordés à Rio Tinto. J'ai ajouté que tout promoteur minier était le bienvenu mais qu'il devait se concentrer sur des zones non occupées.

Les représentants de BSGR se sont alors adressés, comme ils auraient dû le faire depuis le début, au CPDM".

137. Unfortunately for Minister Souaré and Guinea, his witness evidence is fundamentally contradicted by the documentary record. This record establishes that it was in fact Minister Souaré himself who approved the trip, that a Mining Engineer and mapping specialist of the CDPM - Mr Soriba Bangoura - headed the field mission and that the co-ordinates of the places to visit and to take samples from had been agreed with and approved by the CPDM.¹²⁹

"Une Mission de reconnaissance urgente recommandée par son Excellence Monsieur le Président de la République, Chef de l'Etat Guinéen a été dépêchée par son Excellence Dr Ahmed Tidjane SOUARE, Ministre du Département des Mines et de la Géologie.

La mission était composée de :

- 1. Monsieur Soriba BANGOURA, Ingénieur des Mines et Cartographe, DGA du Centre de Promotion et de Développement Miniers du MMO, Chef de Mission;*
- 2. Monsieur Iyin BEY DOW, Expert Géologue de la Société BSGR Ressources ;*
- 3. Monsieur CAMARA Ibrahim, interprète, choisi pour la mission par les Représentants de la société;*
- 4. Monsieur Le Capitaine SAMPOU Ibrahima, Pilote de l'hélicoptère ;*
- 5. Monsieur Le Soldat Mara Laye, Copilote.*

Avant de quitter Conakry le Vendredi 02 décembre 2005 à 10H00', tenant compte de la spécificité des sites à visiter, de l'enjeu et du temps alloués à la mission, les cibles ont été répertoriées, géoreférencées, et intégrées au GPS par le Groupe d'Experts (Mrs BANGOURA des Mines, Iyin du BSGR Ressources et le Capitaine SAMPOU, 1er Pilote de la mission), afin de positionnements corrects au sol pour des prises d'échantillons pendant le trajet.

¹²⁹

Rapport de Mission dated 2 December 2005 (Exhibit R-0175).

138. This report confirms that BSGR involved the CPDM from day one and operated in complete transparency and in accordance with the Mining Code. It also contradicts Guinea's allegation that BSGR needed to use alleged intermediaries such as Mr Bah, Mamadie Touré and Mr Dao because BSGR was not making any progress.¹³⁰ During the field trip, two places outside Rio Tinto's perimeter and two places at the extremity of the perimeter (because geologically iron deposits often continue along the same lines) were visited.
139. There is further documentary evidence that Minister Souaré's recollection of the events is wrong. By letter dated 24 November 2005, BSGR provided Minister Souaré with a second draft of a Memorandum of Understanding ("*deuxième projet, novembre 2005*").¹³¹ This document confirms that BSGR was already engaging with the Ministry before or at least in parallel with the above-mentioned meeting (if that took place, which is denied). The preamble of the document stipulates that the perimeter of the mining rights is described in an Annex but unfortunately Guinea has not produced this annex. Minister Souaré testifies however that the perimeter included the areas that had been awarded to Rio Tinto.¹³² Again this is wrong. In the course of the document production exercise, Guinea has produced another version of this second draft which makes clear that the perimeter under discussion included the Simandou North and Simandou South zones which had not been awarded yet:

"Dans le cadre de cette politique LA REPUBLIQUE DE GUINEE entend faire valoriser les importantes ressources minières de fer de haute teneur des ZONES DE SIM OU NORD ET SUD par leur exploitation, leur transformation et leur commercialisation [...]"

Le présent protocole d'accord a pour objet de fixer les conditions juridiques, économiques, techniques et financières devant régir les relations entre les parties pour la promotion et le développement des gisements de minerai de fer de SIMANDOU couvrant les ZONES NORD ET SUD telles qu'elles sont décrite dans les annexes 1 et 2".

¹³⁰ CMRG, paras. 132-138.

¹³¹ Exhibit R-0173.

¹³² RSW-2, para 24.

140. By letter dated 6 January 2006, BSGR provided Minister Souaré with a new draft of the Memorandum of Understanding. The annex to this draft does include the perimeter that BSGR was applying for and confirms that BSGR applied for Simandou North and Simandou South (which had not been awarded yet) and did not include Rio Tinto's Blocks 1 and 2.¹³³ BSGR acknowledges that in the final version of the Memorandum of understanding that was signed on 20 February 2006 reference is made in the annex to Blocks 1 and 2, but it is uncertain about how that reference found its way in. Probably, it was inserted at the request of the Government itself.
141. In any event, it is clear from the recommendation of the CPDM to Minister Souaré, recommending the signing of the Memorandum of Understanding, that it was not the parties' intention to replace Rio Tinto by BSGR. The intention was to grant BSGR zones that had not been explored before to obtain a better understanding of the potential of the Simandou region (emphasis added):

[...] Cette société se propose de faire l'Etude de Faisabilité du gisement de fer du Simandou dans le but de fournir des informations fiables sur les réserves exploitables.

La connaissance des réserves en place constitue le fondement essentiel pour monter et exécuter tout projet d'exploitation minière.

Cela est rendu nécessaire par le fait que depuis 1997 Rio Tinto qui prospecte le gisement de fer du Simandou n'a fourni à l'administration minière aucune étude de faisabilité.

Or, Rio Tinto a signé avec l'Etat Guinéen une Convention Minière depuis 2002 et demande que lui soit octroyée une concession Minière en se basant seulement sur une étude conceptuelle.

2. PROPOSITION DE LA SOCIETE BSGR :

La Société BSGR Limited ayant la capacité financière et technique souhaite établir l'Etude de Faisabilité de tout le Simandou sur financement au moyen de prêt additionnel et faire la promotion du gisement auprès de grands groupes miniers.

¹³³

Letter from BSGR to Minister Souaré dated 6 January 2006 (Exhibit C-0208).

Les engagements demandés à l'Etat se résument à la fourniture à BSGR de l'ensemble des informations récentes et disponibles, la fourniture du support logistique nécessaire [...].

3. RECOMMANDATIONS

A notre avis, la proposition de la société BSGR mérite d'être examinée car les Etudes de Concept et de Faisabilité qu'elle se propose de faire peuvent permettre de connaître les réserves en place.

Une telle option peut aider l'Etat Guinéen dans ses relations avec tout autre partenaire désireux de mettre en valeur l'important gisement de fer du Simandou.

Cependant, il ne s'agit pas de substituer BSGR à Rio Tinto qui est déjà titulaire de plusieurs permis de recherches et d'une Convention Minière.

Il s'agit d'octroyer à la Société BSGR les parties Nord et Sud du Simandou que Rio Tinto convoite.

Ceci permettra à l'Etat de mettre à côté de Rio Tinto, une Société concurrente capable de faire des études appropriées permettant ainsi de conforter notre position.

Toutefois, l'Etat fera en sorte que la Société BSGR intervienne dans le Comité Tripartite de transport relatif au TransGuinéen en participant à sa conception, sa réalisation et son exploitation au même titre que les autres. Ainsi, notre pays y trouverait son compte dans la diversification des partenaires au lieu de continuer à s'enfermer dans des schémas rigides dont la pratique a montré des limites.

Après avoir négocié avec la Société BSGR le projet de protocole d'accord, l'Administration Minière devra mettre à sa disposition le Nord et le Sud du Simandou"

142. This document also contradicts another point in Minister Souaré's witness statement. He stipulates that "*cependant, j'ai compris que je ne pouvais pas rejeter tout le document car BSGR avait le soutien du Président*". He thus suggests that he personally and the mining administration were opposed to BSGR and its proposal to explore Simandou North and South and that it was only because of the support of the President (and or Mamadie Touré) that BSGR obtained its exploration rights. The memo from the CPDM establishes that the mining administration CPDM, in accordance with the mining law, recommended to grant the rights to BSGR and enter into the Memorandum of Understanding.

143. Guinea also purports in its Counter-Memorial that Mamadie Touré would have called Minister Souaré directly because the exploration permits were not forthcoming and that shortly after the call the permits would have been granted.¹³⁴ There is no evidence in support of this, except for Mamadie Touré's self-serving and unreliable declaration of 2 December 2013. BSGR further notes that Minister Souaré himself does not mention any telephone conversations with Mamadie Touré in his witness statement.
144. On 6 February 2006, and upon the recommendation of the Guinean mining administration, BSGR is awarded its exploration permits in Simandou North and Simandou South. As will be set out in further detail below, it is Guinea's own evidence that these rights were granted lawfully.
145. On 20 February 2006, BSGR and the Government entered into the Memorandum of Understanding. Guinea purports that Minister Souaré would have signed this document under pressure of Mamadie Touré and refers in this respect to Minister Souaré's witness statement in these proceedings.¹³⁵ [PROTECTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] In any event and as will be discussed in further detail below, it is Guinea's own evidence that the Memorandum of Understanding was entered into in accordance with the mining legislation.
146. BSGR's exploration permits in Simandou North and Simandou South were renewed on 10 June 2009, upon the recommendation of the CPDM and in accordance with the mining legislation.¹³⁷

¹³⁴ CMRG, para. 150.

¹³⁵ CMRG, para. 204; RWS-2, para. 25.

¹³⁶ [PROTECTED]
[REDACTED]

¹³⁷ Exhibit C-0012.

2.2.2 Examination by and negotiation with Technical Base Convention Committee

147. On 16 November 2009, BSGR filed a Feasibility Study in respect of the Simandou South area, now called the Zogota Project. Running to some 450 pages, it demonstrated the existence of a commercially operational iron ore deposit at Zogota. The CPDM conducted an initial review of the Feasibility Study and recommended to the Ministry of Mines that BSGR and its subsidiaries be invited to commence negotiations for a mining and infrastructure agreement.
148. On 1 December 2009 Minister Thiam established a Technical Commission to evaluate the feasibility study and negotiate a mining convention with BSGR conduct these negotiations (hereafter "Base Convention Committee").¹³⁸ The Base Convention Commission consisted of 20 members from numerous governmental departments, the Central Bank and the National Company of Mining Infrastructure:
- (1) Dr Aboubacar Koly Kourouma
 - (2) Maitre Momo Sakho
 - (3) Cece Noramou
 - (4) El Hadj Mohamed Aly Thiam
 - (5) M. Bouna Sylla
 - (6) M. Tidjana Yansané
 - (7) M. Saadou Nimaga
 - (8) Dr Alkaly Yamoussa Bangoura
 - (9) M. Ibrahima Kalil Touré
 - (10) M. Ibrahima Kalil Soumah
 - (11) M. Sada Baila Ly
 - (12) M. Ibrahima Sory Sandaré
 - (13) Madame Louise Juliette Darchicourt
 - (14) M. Mamadou Saliou Diallo

¹³⁸ Exhibit C-0015.

- (15) M. Jean Pierre Condé
- (16) Dr Younoussa Koita
- (17) M. Halabi Ahmed Salim
- (18) M. Cece Loua
- (19) M. Roger Patrick Millimono
- (20) M. N'fa Fofana

149. Not one of these officials have been presented by Guinea to testify on the negotiation and the award of the Base Convention, let alone to testify on the pressure that Mamadie Touré, President Conté, Minister Thiam or any other official would have exercised to make them approve the Feasibility Study and the Base Convention.

150. Mr Avidan and Mr Struik led the negotiations on behalf of BSGR. They were assisted by Tania Rakitina (a financial manager working in BSGR Guinea's Conakry office), Mohamed Doumbia (BSGR Guinea's local counsel) and Ibrahima Sory Touré (BSGR Guinea's Director of External Relations).

151. The Commission met every day from around 9am to 6pm, and met with BSGR on several of those days. BSGR paid for the catering during these negotiations and also paid each member of the Commission a daily (per diem) allowance. BSGR made this payment upon the request of the President of the Committee and Secretary General of the Ministry of Mines Aboubacar Kaly Kourouma. [PROTECTED]

[REDACTED]

[REDACTED] :139

[PROTECTED]

[PROTECTED]

[REDACTED]

[REDACTED]

[REDACTED]

152. [PROTECTED]

[REDACTED]

[REDACTED]

140 [PROTECTED]

[PROTECTED]

[REDACTED]

[REDACTED]

153. Guinea purports in its Counter-Memorial that Minister Thiam would have threatened to fire those Committee members that would be against BSGR.¹⁴³ Apart from one newspaper article, Guinea does not provide any evidence. Certainly, no members of the Committee have testified to that effect. Guinea can also not point to any member that was in fact fired or replaced.
154. Contrary to Guinea's allegation in its Counter-Memorial that the Base Convention Committee would not have done a thorough job, it analysed the feasibility study and the base convention in great details, as evidenced by a series of questions that it had going to all the various issues of the mining project, including geological, exploitation, infrastructure, transport, tax, financial issues and environmental issues:

"2. Partie Géologique

La partie guinéenne estime que suivant la maille de prospection, l'étude de faisabilité ne présente que des ressources, elle souhaite que les travaux géologiques soient approfondis pour ressortir les réserves exploitables.

3. Partie Exploitation des Réserves (mine)

¹⁴¹

[REDACTED]

¹⁴²

[REDACTED]

¹⁴³

CMRG, paras. 371.

Pourquoi ne pas envisager l'exploitation du minerai magnétite pour augmenter la durée de vie de l'entreprise au delà de 15 ans?

4. Partie Transport Chemin de Fer Conakry - Kankan

a) Chemin de Fer Conakry- Kankan

- *La compensation de l'évacuation du minerai de fer par le Libéria est la reconstruction du chemin de fer Conakry - Kankan. A cet titre, il ne doit pas y avoir de décalage dans sa réalisation par rapport à celle du projet? C'est pour cette raison que la partie guinéenne souhaite que la reconstruction de ce chemin de fer débute à la première phase du projet. Il ne doit pas avoir d'incertitude sur la réalisation de ce chemin de fer en terme de délai (début et fin) et de financement.*
- *Quel est le niveau des études du chemin de fer Conakry - Kankan ?*
- *Le chemin de fer Conakry- Kankan es -il un don?*

b) Chemin de Fer pour l'Évacuation du Minerai de Fer par le Libéria

Quelle est la vision de BSGR sur le développement du chemin de fer (propriété mode de gestion) qui sera réalisé en Guinée pour la jonction avec le chemin de fer existant au Libéria.

5. Partie Économique et Financière

- *La taxe minière ou redevance Code Minier à 7 % pour le minerai qui n'a pas subi de traitement et de 3,5% pour celui qui a subi un traitement. Pourquoi, l'étude a considéré 3%?*
- *L'impôt sur les Bénéfices Industriels et Commerciaux (BIC), Code Minier 35 %. Pourquoi 30%?*
- *Pourquoi les droits de douanes sont de zéro (0)? alors que le Code Minier fixe ces droits suivant les phases de réalisation du projet.*
- *Pourquoi l'étude ne ressort pas les aspects suivants qui ont un coût sur la rentabilité du projet?*
 - ~ *Les droits de transits des équipements et intrants.*
 - ~ *Les droits d'utilisation des infrastructures au Libéria.*
 - ~ *Les taxes, impôts et redevances à payer au Libéria.*
- *Comment se fera le financement du chemin de fer Conakry- Kankan et le remboursement?*
- *Quelle est la période du paye back du projet?*

6. La partie Environnement et Développement Communautaire

L'étude fait état brièvement des aspects environnementaux et ne fait pas mention du développement communautaire. Quelle est la vision de BSGR sur le

développement du projet en termes de protection de l'environnement et de développement communautaire de la zone d'influence du projet?

155. All of these questions and many others were discussed with BSGR at the meeting of 4 December 2008. BSGR sent a detailed explanation in writing by letter dated 7 December 2008.¹⁴⁴ Because of the length of BSGR's response, the entire response will not be quoted here. It suffices to set out the questions to which BSGR responded to understand that the Base Convention Committee was thoroughly analysing BSGR's proposal on its merits and was negotiating hard so as to obtain the best possible deal for the country on which BSGR was willing to sign off:

"1. Le coût de réhabilitation de la voie ferrée (la ligne de Conakry à Kankan) est-il compris dans le coût de réalisation du projet de Zogota?

2. l'Etat guinéen sera-t-il requis au remboursement du coût de réhabilitation de la ligne ou bien ladite réhabilitation sera faite à titre gratuit au bénéfice du pays?

3. Pourquoi les travaux de réhabilitation de la voie ferrée ne commenceront seulement qu'en 2012 et non en 2010?

4. Quelle sera la qualité de la voie ferrée - quelles sont ses caractéristiques?

5. Quel est le niveau des études du chemin de fer Conakry-Kankan?

6. Qui sera propriétaire de la voie ferrée allant de Sanniquellie à Zogota?

7. Quelles sont les deux sociétés qui assisteront BSGR Guinée dans la gestion de notre environnement, en tenant compte des aspects socio-économiques du projet? Quels sont les plans environnementaux et socio-économiques envisagés pour le projet?

8. Quelle est la relation entre BSGR Guinée et BSGR International?

9. Pourquoi BSGR Guinée propose-t-elle une redevance de 3% de la production alors que le code parle de 7% pour le minerai et 3,5% pour la matière concentrée?

10. Quelle est le délai de remboursement du projet?

¹⁴⁴

Letter from BSGR to the Minister of Mines dated 7 December 2007 (Exhibit C-0209).

11. Pourquoi les droits de douanes sont de zéro (0) alors que le Code minier fixe ces droits suivants les phases de réalisation du projet?

12. Que deviendra le projet après 15 ans (Ex: la magnétite sera-t-elle exploitée)?

13. Vu la durée de vie de 100 pour l'exploitation de la totalité du projet, que proposez-vous en terme de ressources énergétiques dans la deuxième phase? Vu la durée de vie de 100 ans d'exploitation, envisageriez-vous la construction d'une raffinerie?

14. Quelle est la taxe de transit et d'exportation qu'envisage le gouvernement du Libéria sur nos minerais traversant ce pays?

15. Quel plan Arcelor Mittal envisage-t-elle quant à sa voie ferrée allant de son projet Nimba à Buchanan?"

156. BSGR's responses convinced the Base Convention Committee who reported to Minister of Mines Thiam, concluding that BSGR's project accorded with the Government's objectives and recommending entering into the Base Convention and awarding a mining concession:¹⁴⁵

"3 -CONCLUSIONS

a) Sur le Plan Minier

La commission a conclu que le projet dans sa conception minière est rentable économiquement et financièrement et les éléments suivants militent en faveur du projet:

- *La volonté du Gouvernement de voir les gisements de minerai de fer en exploitation dans les meilleurs délais, pour diversifier l'exploitation de ressources minières;*
- *La création d'un nouveau pôle de développement économique à l'extrême Sud Est du pays;*
- *La création d'emplois;*
- *La réalisation rapide du projet du fait de la proximité des gisements de Zogota aux frontières du Liberia qui dispose d'infrastructures ferroviaires et portuaires appropriées.*

b) Sur la Plan des Infrastructures d'Évacuation

¹⁴⁵

Report of the Base Convention Committee to Minister of Mines Thiam (Exhibit R-0268).

La reconstruction du chemin de fer Conakry - Kankan - Kérouané en contrepartie de l'évacuation du minerai par le Libéria. La reconstruction de ce chemin de fer permettra de donner un souffle nouveau au développement socioéconomique du pays et d'accroître le transit du fret de la République du Malien Guinée. Après plusieurs décennies de promotion des méga projets non concrétisés, il était temps d'envisager une autre stratégie pour réaliser un grand projet avant 2015.

4- RECOMMANDATIONS

Compte tenu de ce qui précède, la commission recommande au Ministre en charge des Mines :

- De communiquer les termes du présent rapport sur ce projet minier, au Conseil des Ministres afin qu'il autorise la signature de la Convention de base et;*
- Qu'il soit autorisé à faire attribuer par le Président de la République la Concession Minière à la société BSGR;*
- De même le Conseil devra recommander au Président de la République la ratification et promulgation de la Convention par voie d'Ordonnance";*

2.2.3 Examination by and negotiation with the Council of Ministers

157. Minister of Mines Thiam subsequently reported to the Council of Ministers, summarizing the key elements of the project and requesting the Council to approve it, in accordance with the recommendation of the Base Convention Committee.¹⁴⁶

"Avec ce projet, il y a un véritable espoir pour que la Guinée amorce réellement son développement socio-économique. En effet, le projet minier de Zogota couplé à la réalisation du chemin de fer Conakry -Kankan- Kérouané dans la même période servira de véritable tremplin à la création d'une zone économique de grande ampleur avec des effets multiplicateurs notamment en matière d'emplois directs et indirects dans différents domaines comme l'agriculture, l'élevage, les PME, PMI, le tourisme etc.

Au regard de l'importance du projet, de son impact socio-économique et du délai de réalisation, il est nécessaire qu'une décision politique accompagne le projet et que le Conseil des Ministres décide de son lancement immédiat".

¹⁴⁶

Report of Minister of Mines Thiam to Council of Ministers dated 15 December 2008 (Exhibit C-0210).

158. The Council of Ministers discussed the project on 16 December 2008 and decided to set up a sub-committee to look into the five following technical financial and infrastructure issues (spelling mistakes in the original):¹⁴⁷

"1. Could BSGR supply an engagement letter on support to the convention stating the 50% of the tracee of the transguinean railroad (mamou-kerouane) will be done and attach to it realisation time table for the whole tracee?? Which length for phase 1 Bogota (Conakry -mamou as agreed) and time table, same for phase 2 (Block1&2) mamou-kankan with timetable for Kankan-kerouane.

2. In the event the gouvernement prioritize the realisation of an electric dam in the kerouane region instead of the extension of the railroad from kankan to kerouane, would that be agreeable to bsgr to finance the construction of the dam (300 Millions usd) in place of the extension?there is a 100 MW feasibility study available concluding a 300 millions USD investment cost for the dam. if yes what could be the timetable?Another alternative to financing the dam mr camara suggest to considere would be for BSGR to realise the extension of the rairoad from kankan to kerouane and build the Dam in a BOT basis and share the electricity for for phase 2 unstead of a thermal powerplant. Need BSGR comment on this earlist tomorrow am.

3. Could BSGR supply a bussiness plan indicating revenus and cost for the 5 to 10 first years of operation??

4. What are the exact figure of emploiment. seem there was a 22 000 employe mentioned at the meeting but need clarification on exact figure for construction period, operation period for direct and indirect employment.(request by mr camara) we supplied him immeditly whith the feasibility study figures but if you have more precise data please advise.

5. Transguinean. Will the autorisation togo tru buganan impact negatively(prevent) on the construction of a mining railroad from kerouane to matakan?we gave the strategy of saturation toward liberia at phase 2 whith 130MTPA forcing the only reamining route for simandou and nimba operation to be toward matakan in synergy whith belzone."

159. The Council of Ministers met again on 18 December 2008 and a lot of the outstanding point were either clarified or accepted:¹⁴⁸

¹⁴⁷ E-mail to Minister Thiam dated 17 December 2009 (Exhibit C-0211).

¹⁴⁸ E-mail from Kalil Touré to Minister Thiam dated 18 December 2008 (Exhibit C-0212).

"Voici le compte rendu du conseil de Ministre extraordinaire sur la convention de Zogota.

1. Ajouter la RTS (retenu sur traitement et salaires). Ceci est ok car pris en compte dans la convention:

2. Taux de BIC maintenu à 30%.

3. Ajouter IRVM (impôt sur le revenu des valeurs immobilières) au taux de 15% comme prévu dans le code minier. Cet impôt n'est accepté par aucun minier car il entraîne l'effet de la double imposition. C'est pour cette raison qu'il n'avait pas été proposé par la commission de rédaction de la convention. Je pense qu'il n'est proposé par le Ministre des finances que pour rattraper les 5% d'abattement sur le BIC.

4. Contribution au Développement Communautaire à être indexée sur le chiffre d'affaires et non sur le bénéfice brut comme prévu dans la convention. Le PM propose de faire une simulation pour comparer les revenus aux communautés dans les deux cas et fixer un taux d'indexation sur le CA qui donne un résultat voisin à celui correspondant à 1% du bénéfice brut comme prévu dans la convention.

5. Introduire le paiement des droits d'enregistrement de la convention.

6. Envisager une prise de participation de l'état au capital à hauteur de 15% à financer par les redevances de l'état.

7. Extention chemin de fer kankan- kerouane maintenu, mais le gouvernement demande d'engager BSGR pour un BOT sur le barrage hydro-électrique de kamarato dès la première année du projet. Ce point a été largement critique par madame la secrétaire d'état de l'énergie qui a largement expliqué que cela n'était pas vraiment rentable car ne pouvant pas résoudre les problèmes énergétiques visées.

8. Paires en sorte que 50% du fret maritime à partir du Liberia revienne à des bateaux battant pavillon. Cela existe dans la convention à cout compétitif"

160. The following day, the Base Convention Committee reported to the Prime Minister and clarified the last couple of issues and repeated its recommendation to enter into the Base Convention.¹⁴⁹

¹⁴⁹ Explanatory Note from the Base Convention Committee to Prime Minister Kouyate dated 19 December 2009 (Exhibit C-0137).

"En conclusion et pour tous ces motifs, nous recommandons dans l'intérêt de notre patrie la signature de cette Convention sur Zogota pour que ce projet soit une réalité sur notre Terre et que nous ne perdions pas encore une fois l'opportunité d'un investissement historique à même de nous faire espérer des lendemains meilleurs. Toutes les questions fiscales, communautaires, environnementales ou autres trouveront leur cadre de résolution dans les Annexes à cette Convention qui sont déjà reconnues par les parties comme documents contractuels.

L'Histoire retiendra que des fils de ce pays ont encore compromis ses chances de réussite économique pour des raisons inavouées. Mais un grand Chef d'administration se reconnaît par sa capacité à apprécier l'opportunité des actes à poser pour le bien de la Collectivité. L'histoire jugera"

161. The parties signed the Base Convention on 20 December 2008. By letter dated 6 January 2010, Secretary-General of the Ministry of Mines Kourouma provided the Minister of Work with a copy of the Base Convention summarizing the Government's views on the Base Convention and the positive impact that it was expected to have as follows:¹⁵⁰

"La société BSGR a présenté au Gouvernement une étude de faisabilité pour l'exploitation des gisements de fer de Zogota dans la préfecture de N'Zéré'koré. Cette étude a été examinée par une commission interministérielle dont les conclusions sont favorables au développement du projet pour les raisons suivantes:

- *Les gisements de fer de Zogota sont nouveaux dans le paysage du potentiel minier guinéen.*
- *Le délai de réalisation du projet (3 ans).*
- *La création d'emplois,*
- *La réalisation du chemin de fer Conakry - Kankan avec son prolongement sur Kérouané en contre partie du droit d'évacuation du minerai de fer par le Libéria,*
- *La diversification de l'exploitation des ressources minières,*
- *Le contexte financier international qui raréfie les investissements.*

La convention a été négocié en prenant en considération les préoccupations de l'heure dont entre autres la protection de l'environnement, le développement communautaire, le traitement du minerai de basse teneur pour augmenter la durée de l'activité.

¹⁵⁰

Letter from Kourouma to Minister of Employment and Public Works dated 6 January 2010 (Exhibit C-0213).

Le projet devant se réaliser entre deux Etats (Guinée et Libéria), le Gouvernement Guinéen se rapprochera du Gouvernement libérien afin de conclure un accord pour les facilités à accorder à la société notamment:

- *Les conditions d'utilisation du chemin de fer au Libéria,*
- *Les conditions de mise à disposition de la zone portuaire à Buchanan,*
- *Les conditions d'emploi de la main d'œuvre guinéenne au Libéria,*
- *Les modalités de transit des équipements, matériels et consommables en provenance de Buchanan destinés à la mine de Zogota*

L'évacuation du minerai de fer de Zogota par le Libéria ne met pas en cause le schéma de réalisation du Transguinéen.

Ce projet de par son investissement (2 452 000 000 US \$) et la taille (30 millions de tonnes de minerai de fer) créeront une nouvelle zone économique au Sud Est du pays"

162. The Base Convention entered into force on the day of its ratification by a Presidential Decree of President at interim General Sékouba Konaté.¹⁵¹
163. Today Guinea suggests that this was a bad agreement for the country and it was only signed because of undue influence. However, Guinea ignores that at the time that the Base Convention was concluded BSGR's project was by far the most interesting and promising of all mining projects in the country. BSGR's project was the only project that gave the Government an avenue to commercial production of any mineral deposit within a relatively short time frame. As the following overview of the status of the other projects in the country establishes, there was no other project that offered a similar avenue or even came close (emphasis added):¹⁵²

"III- Projets en Développement

1) Projet d'Usine d'Alumine de Sangarédi

Conçue et piloté par Guinea Alumina Corporation (GAC SA), ce projet va rentrer dans sa phase de construction active dès le premier trimestre 2010, suite à une amélioration sensible du marché de l'aluminium.

¹⁵¹ Exhibit C-0016.

¹⁵² Report of Minister of Mines to Council of Ministers dated 23 December 2009 (Exhibit C-0214).

Le Département est en phase de finaliser les accords nécessaires à la société pour son accès aux infrastructures de kamsar (chemin de fer et Port).

Dès janvier 2010 le port de kamsar connaîtra le début de construction par GAC, d'un nouveau quai commercial pour les besoins du projet.

Durant toute l'année 2009, en dépit des contraintes lourdes, le Conseil d'Administration de GAC a maintenu toutes les activités de terrain pour apprêter le projet par un relancèrent rapide avec une reprise du marché.

Coût estimé du projet : 5 milliards USD

Durée de construction : 4 années

Réserves de bauxite : 800 millions de tonnes

2) *Projet d'Exploitation des minerais de Fe de Zogota (N'Zérékoré)*

Ce projet mené par BSGR vient d'enregistrer l'acceptation de son étude de faisabilité par un Comité Interministériel.

L'année 2009 a été consacré à:

- La confection d'une étude de faisabilité

- La poursuite de l'évaluation de réserves estimées à date à 500 000 000 tonnes (hématites) avec un potentiel de 3 milliards (Magnétite)

Coût du Projet : 2 Milliards USD

Début des travaux: Avril2010

Première production : Mai 2013

La réalisation de ce projet permettra à la Guinée d'être présent sur le marché du minerai de fer dès 2013.

Financièrement, le projet contribuera à renflouer les caisses de l'Etat pour plus de 100 millions USD/an en 1ère phase et plus de 500 millions USD/an en phase de croisière avec l'entrée en production des blocs 1 et 2 du Simandou.

A ce projet est liée la reconstruction du chemin de fer Ckry-Kankan.

3) *Projet d'exploitation des minerais de Fer de Kalia (Faranah)*

Conduite par la Société Bellzone SA, ce projet qui vise l'exploitation des minerais de fer mis en évidence à kalia

Réserves directement exploitable : 1 milliard de tonnes

Réserves potentiels : plus de 8 milliards de tonnes

Composantes du projet:

- Une mine de 30 millions tpa de capacité

- Un chemin de fer de 300 Kms reliant kalia et Matakang
- Un port en eau profonde

La réalisation de ce projet jettera les premiers jalons de réalisation du Transguinéen Sud dédié à l'évacuation des minerais.

4) *Projet Boffa-Santou Houda*

Ce projet en phase de conception par Bhp Billiton, vise la construction d'une raffinerie d'alumine dans la zone de Boffa.

Composantes :

- Une mine de bauxite
- Une raffinerie d'alumine
- Des infrastructures d'évacuation (chemin de fer+Port)

Les contours exacts du projet seront précisés par les études en cours.

Date potentielle de la 1ère production: 2015.

Les activités pilotées par Bhp Billiton au nom de SMFG, se sont concentrées en 2009 sur:

- La poursuite de l'évaluation environnementale avec la participation de tous les acteurs : Etat Guinéen, PNUD, UNESCO, PNUE, Guinée-Ecologie, etc;
- La poursuite de l'évaluation des ressources aux fins d'augmenter le potentiel.

Des nouveaux permis à Diécké et Nimba ont été acquis et étudiés dans ce sens.

Seulement le permis de Diécké, qui semble avoir un fort potentiel, n'a pu être étudié à fond en raison des problèmes soulevés par la société SOGUIPAH.

5) *Projet d'usine d'alumine de kamsar*

Ce projet est piloté par le couple Alcoa/Rio Tinto-Alcan. Les conditions du marché de l'aluminium ont entraîné en 2009 un ralentissement des activités de ce projet. Néanmoins les activités suivantes ont été réalisées : Signature du Decret de P.I.P;

Négociations avec le Comité des personnes à déplacer pour leur compensation/relocation ;

Discussions avec les structures gouvernementales sur :

- L'accord portuaire ;
- Le plan de Sécurité Sociale des futurs travailleurs;
- La concession minière (call option).

Aussi le "terme sheet" pour le contrat de fourniture de bauxite pour la CBG a été finalisé et signé par les parties.

6) *Projet d'exploitation des minerais de fer du Simandou*

Rio Tinto/Simfer s'est concentré au courant de 2009 à:

- *une meilleure évaluation du potentiel minier des blocs 3 et 4 du Simandou*
- *des discussions avec l'Etat en vue d'une redéfinition du projet. Un protocole fut signé entre les parties pour une feuille de route. Un projet de Décret pour une concession centrée sur les blocs 3 et 4 est en cours de préparation ;*
- *la poursuite de l'évaluation environnementale et l'audit du plan de gestion environnement et sociale ;*

7) *Projet d'exploitation des gisements de fer du Nimba*

En raison de certaines contraintes de stratégie de développement, ce projet n'a pas connu d'avancée notable en 2009.

8) *Projet d'exploitation de bauxite et de raffinerie d'alumine de Dian-Dian*

Piloté par la Société RUSAL, ce projet a connu une certaine léthargie tout le long de l'année 2009.

Pendant cette année les activités déclarées par le projet se résument :

- *A la finalisation de l'étude de faisabilité sur la base des observations du Comité Technique de MMEH ;*
- *La poursuite de l' étude environnementale et sociale par le cabinet Royal Haskoning;*
- *La construction de la route d'accès.*

A ce jour, le chronogramme du projet doit être revu pour donner plus de visibilité à la phase de réalisation".

164. Taking into account that the Government, like many other Governments all over the world, wanted to see its mineral deposits developed as soon as possible, the Government's approval of the Base Convention (and the subsequent Mining Concession) was proper and understandable and certainly not the result of corruption.

165. Conclusion: It has been established that:

- (i) BSGR's feasibility study and mining convention was thoroughly and independently evaluated by an inter-ministerial committee of 20 experts; the committee raised a series of technical, legal, infrastructural, environmental and financial issues that BSGR had to deal with:
- (ii) The Base Convention Committee recommended the Minister of Mines to approve the agreement and the Minister of Mines passed on the recommendation to the Council of Ministers;
- (iii) The Council of Ministers evaluated the draft Base Convention critically and raised a number of additional technical, financial and infrastructural issues that the BSGR and the Base Convention Committee dealt with;
- (iv) Following a second recommendation by the Base Convention Committee, the Council of Ministers approved the Base Convention;

2.3 The acquisition of the Mining Concession

166. On 19 March 2010, Guinea's new President, General Sékouba Konaté granted BSGR Guinea a mining concession in relation to the Zogota deposit (an area of 1,024 square kilometres within Simandou South), in accordance with Article 8 of the Base Convention.¹⁵³ Guinea has not made any specific allegation of corruption in relation to the Mining Concession, nor has it produced any documentary evidence or witness evidence that undermining the validity and lawfulness of this right.¹⁵⁴

2.4 The measures implemented by Guinea against BSGR were politically motivated

167. From the inception of this arbitration, it has been BSGR's case that the expropriation of its rights in Simandou was part of a massive conspiracy by President Condé to reward the political backers of his 2010 presidential election with the highly valuable mining rights. This is addressed in Paragraphs 145 to 154 of BSGR's Memorial.

¹⁵³ Presidential Order No. D2010/024/PRG/CNDD/SGG dated 19 March 2010 (Exhibit C-0017).
¹⁵⁴ CMRG, para. 377.

2.4.1. Mr Sammy Mebiame

168. BSGR has now obtained a substantial body of evidence that vindicates BSGR's position and overwhelmingly proves that President Condé withdrew these rights only for corrupt reasons. This evidence is the result of litigation in the United States by the federal authorities and the report from Rio Tinto to anti-corruption authorities in multiple countries mentioned above.
169. On 16 August 2016, BSGR obtained access to documents which proves that President Condé was bribed by international companies in return for mining rights. These are documents obtained by US federal agents in cases against Mr Mebiame and the company Och-Ziff during which it was overwhelmingly proved that in a criminal conspiracy with Och-Ziff, Mr Mebiame bribed President Condé in return for the grant of mining interests ("**Mebiame documents**").
170. Samuel Mebiame is a national of Gabon. His father was the former Prime Minister of Gabon so Mr Mebiame was politically well-connected in the African region, including Guinea. Since 2003, Mr. Mebiame worked for Palladino Holdings ("**Palladino**"), a company incorporated in Turks & Caicos (referred to in the Criminal Complaint and other US documents as 'the Turks & Caicos entity'). Mr. Mebiame reported to Mr Walter Hennig, a wealthy South African individual who owned Palladino (referred to in the Criminal Complaint as 'Co-Conspirator #1').¹⁵⁵
171. From about January 2008 to 2015, Mr Mebiame and Mr Hennig also worked for African Management Limited ("**AML**"), as a consultant and director respectively.¹⁵⁶ AML was a joint venture between Palladino and Och-Ziff Capital Management ("**Och-Ziff**"). Och-Ziff is is the largest listed hedge fund in the world¹⁵⁷ with between USD 35 to 50 billion in assets

¹⁵⁵ Bloomberg, "*U.S. Case Into Fixer for Och-Ziff Venture Gets Support in Guinea*" dated 18 August 2016 (Exhibit C-0215).

¹⁵⁶ 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).

¹⁵⁷ The Financial Times "*US seeks scalps in Och-Ziff bribery investigation*" dated 12 September 2016 (Exhibit C-0218).

under management, depending on the fluctuation of the stock market and the period of time.¹⁵⁸

172. Mr. Mebiame's job was to source and secure mining opportunities in Africa for AML and its portfolio companies.¹⁵⁹ One of those portfolio companies was called African Global Capital I (“AGC I”), formed in 2007. A subsequent portfolio company was called African Global Capital II (“AGC II”) and was formed in 2008. Those portfolio companies were used for the funnelling of bribes to, amongst others, President Condé and senior Guinean government officials.
173. BSGR described in some detail the involvement of those persons in its witness evidence (Cramer,¹⁶⁰ Thiam,¹⁶¹ Avidan¹⁶²).

2.4.2 The US Criminal Complaint against Mr Mebiame

174. On 12 August 2016, US Federal Agents issued a Criminal Complaint in the United States District Court, Eastern District of New York, against Samuel Mebiame (“**the Criminal Complaint**”). Over two days in June 2015, Mr Mebiame voluntarily met with US Federal Agents and made statements.¹⁶³
175. The US federal agents were also able to obtain a large number of previously unseen “*documents, records and reports*”¹⁶⁴, including ones obtained by court-authorized searches. The categories of documents obtained and examined by the US federal agents, and forming evidence of the corrupt scheme, included business records obtained from Och-Ziff, emails,

¹⁵⁸ The New York Times "*Bribery Arrest May Exposes African Mining Rights Scandal Tied to Och-Ziff*" dated 16 August 2016 (Exhibit C-0219).

¹⁵⁹ Criminal Complaint, para. 4. (Exhibit C-0216).

¹⁶⁰ CWS-7, paras. 39-43.

¹⁶¹ CWS-5, paras. 133-150.

¹⁶² CWS-3, paras. 178-182.

¹⁶³ Criminal Complaint, page 4 (Exhibit C-0216).

¹⁶⁴ *Ibid.*, pages 2 to 3, para. 2.

corporate records, bank records, travel records, witness statements and Mr Mebiame's own voluntary admissions to the US authorities.¹⁶⁵

176. The purpose of the Criminal Complaint was to set forth only the facts necessary to establish probable cause for arrest of Mr Mebiame. Hence, despite the volume of evidence in the Criminal Complaint, there is it seems more evidence which the US agents did not feel necessary to include for the purposes of establishing a basis for his arrest and detention.¹⁶⁶
177. The Criminal Complaint was accompanied by a letter to the Judge from the US Government Attorney dated 16 August 2016 (“**the Arrest Letter**”)¹⁶⁷. It said that “*Mebiame was arrested by federal agents on August 16, 2016 on a complaint, which charged Mebiame with conspiring to bribe foreign officials in multiple African countries to obtain mining licences*”. Mr Mebiame was ordered to be detained pending trial at Brooklyn Metropolitan Detention Centre.¹⁶⁸
178. The US Government Attorney made clear that the evidence of Mr Mebiame’s bribery was supported by an array of documents and was “overwhelming”:¹⁶⁹

“the evidence against the defendant is overwhelming and includes his own voluntary admissions made to federal agents on two separate days, highly incriminating e-mail messages, bank records, and other records that show the defendant’s corrupt scheme.”

179. Of concern to the US government was that foreign officials would have a motive to help Mr Mebiame flee the United States because he has information about corruption by high-ranking government officials in, amongst others, Guinea.¹⁷⁰

¹⁶⁵ *Ibid.*, para. 8.

¹⁶⁶ *Ibid.*, page 2, footnote 1.

¹⁶⁷ Letter from the US Government Attorney to Judge Tiscione dated 16 August 2016 (Exhibit C-0220).

¹⁶⁸ Order of Detention Pending Trial dated 16 August 2016 (Exhibit C-0221).

¹⁶⁹ Exhibit C-0216, page 3.

¹⁷⁰ *Ibid.*, page 3 (“*Based on statements made by the defendant to federal agents and other evidence, the defendant has information about corruption by high-ranking government officials in at least Niger, Chad, Guinea and South Africa. These officials would have a motive to help Mebiame flee the United States and avoid the possibility that a trial would shed further light on the foreign officials’ own illegal behaviour... Mebiame*”).

2.4.3 Mr Mebiame pleading guilty to corruption of Guinean officials including President Condé

180. On 1 September 2016, Mr Mebiame entered into “*plea negotiations*” with the Government, for an initial period of one month from 15 September 2016 until 15 October 2016.¹⁷¹

181. On 9 December 2016, Mr Mebiame pleaded guilty to the offence of corruption of Guinean officials including President Condé and entered into a plea agreement. According to the press release issue by the US Department of Justice:¹⁷²

"In addition, Mebiame paid bribes to high-level government officials in Guinea as an agent of the Turks and Caicos entity to obtain business opportunities and mining rights in that country.

In Guinea, during a time when the conspirators were seeking to establish a state-owned mining company there, Mebiame made corrupt payments to gain special access to senior Guinean government officials. Mebiame provided the officials with cash and other benefits, including an S-Class Mercedes Benz vehicle and the use of private planes, in exchange for special access and confidential information"

182. On the same day, the US authorities published another document providing more details of Mr Mebiame's corrupt scheme in Guinea, making explicit references to mining rights and President Condé (described as Guinea Official #1):¹⁷³

"The defendant SAMUEL MEBIAME worked on behalf of the Joint Venture, the Turks & Caicos Entity and the Mining Company as a "fixer" to obtain rights to mineral concessions in various African countries by routinely paying bribes to foreign government officials. MEBIAME bribed officials in, among other countries, Niger, Chad and Guinea.

would thus have extraordinary means available to him to assist in a flight from prosecution, including substantial financial assistance and possible foreign consular assistance to obtain travel documents.")

¹⁷¹ Order of the United States District Court for the Eastern District of New York, dated 1 September 2016 (Exhibit C-0221A).

¹⁷² Press Release US Department of Justice dated 9 December 2016 (Exhibit C-0222).

¹⁷³ US Department of Justice, Information Document dated 9 December 2016 (Exhibit C-0223), paras 16 and 19.

Furthermore, in or about and between June 2010 and June 2012, MEBIAME engaged in negotiations for mineral rights and opportunities on behalf of CC-1 and the Turks & Caicos Entity, including the opportunity to be partners with a Guinean state-owned mining company (the "SOMC"). The defendant SAMUEL MEBIAME had special access to mining opportunities in Guinea because of payments he provided to senior government officials in Guinea in exchange for such access. For example, in 2010, MEBIAME provided an S-class Mercedes Benz sedan to Guinea Official # 1 while he was a candidate for office. On or about March 15, 2011, MEBIAME arranged to pay \$440,000 to rent a private Airbus jet for Guinea Official #1's use. MEBIAME's financial support to Guinean officials included, but was not limited to, approximately \$100,000 to \$200,000 in cash payments provided by MEBIAME to Guinea Official #2. In return, Guinea Official #2 arranged a secret meeting with the heads of the SOMC and provided MEBIAME secret information, which provided MEBIAME leverage in negotiations with the government".

183. According to Mr Mebiame's plea agreement, he will shortly be sentenced to the maximum prison sentence of 60 months.¹⁷⁴

2.4.4 The Settlement with Och-Ziff

184. Och-Ziff has agreed to settle with the Securities and Exchange Commission by the payment of a criminal penalty of USD 213 million for “*corruption of a foreign public official*” and almost USD 200 million by way of disgorgement, for its involvement in the Mebiame Issue. Och-Ziff admitted responsibility for criminal conspiracy in order to obtain *inter alia* mining business, in violation of the anti-bribery provisions of the Foreign Corrupt Practices Act. In the coming three years Och-Ziff is obliged to work under the supervision of an anti-corruption monitor. This is recorded in an order of the Securities and Exchange Commission dated 29 September 2016¹⁷⁵.
185. The Commission found that Och-Ziff entered into transactions in which corrupt payments were made to high ranking government officials.

¹⁷⁴ US Department of Justice Plea Agreement dated 9 December 2016 (Exhibit C-0224).

¹⁷⁵ 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 dated 29 September 2016 (Exhibit C-0225).

186. This included in 2011 a fraudulent transaction to purchase shares from Mr Hennig in order to leave him with USD 52 million. Of that sum, USD 25 million was paid to President Condé as bribes (which was done via the Palladino deal), USD 1 million to Mr Mebiame as his reward, USD 2.1 million to be returned repay a debt to Och-Ziff, and the rest (USD 23.9 million) to be kept by Mr Hennig and his business partners.
187. The deals presented to Och-Ziff included funding a presidential campaign: “*One deal presented to Och-Ziff Employee A in March 2007 by South African Business Partner would have cost “\$20-\$25 million (includes \$5 million for the ongoing Presidential campaign”.*”¹⁷⁶ This demonstrates that Mr Hennig and his cronies operated by using schemes to corruptly assist presidential campaigns (as they did for President Alpha Condé in Guinea).
188. As reported in the press in October 2016, according to the Commission’s findings:

*“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.”*¹⁷⁷

2.4.5 The relevance of the Mebiame documents

189. As pleaded by BSGR, and contrary to Guinea’s protestations, this evidence is of central relevance to this arbitration. In sum, this evidence is relevant to Guinea's fabricated tale of BSGR's corruption. This rather explains Guinea’s dismissive reaction to it thus far in order to avoid dealing with it properly.¹⁷⁸
190. The Mebiame documents prove, without a shadow of a doubt, that Mr Mebiame was a fixer for Och-Ziff's fund and in this capacity he bribed the Guinean government to gain access to mining rights, including those of BSGR. The facts established by the Mebiame documents are set out below.

¹⁷⁶ *Ibid.*, page 12, para 36.

¹⁷⁷ *The Och-Ziff equity fund’s double entry bookkeeping*, Africa Energy Intelligence dated 18 October 2016 (Exhibit C-0226).

¹⁷⁸ CMRG, paras. 1153-1156.

a. *Mr Mebiame's role as a fixer for Och-Ziff's fund*

191. Samuel Mebiame worked on behalf of AML, Palladino and the AML portfolio companies as a “fixer” to obtain mining rights by paying bribes to foreign officials in (amongst others) Guinea. The Criminal Complaint states this absolutely clearly:

*“The defendant SAMUEL MEBIAME worked on behalf of [AML, Palladino and AGC] as a “fixer” to obtain rights to mineral concessions in Africa by routinely paying bribes to foreign government officials. MEBIAME bribed government officials in at least each of Niger, Guinea and Chad.”*¹⁷⁹

192. The Arrest Letter also confirms this:¹⁸⁰

“Mebiame...engaged in corrupt conduct in Guinea, where he paid cash bribes to government officials and made other in-kind payments, which included luxury travel and arranging the rental of a private Airbus jet for a government official's use. In return, Mebiame was given an exclusive opportunity, which he shared with the beneficial owner of the Turks & Caicos entity [i.e. Palladino], to become a partner with a Guinean state-owned mining company. The opportunity did not come to fruition at least in part due to negative press reports surrounding the deal.

Mebiame was paid millions of dollars for his work as a fixer on behalf of the Mining Company [AGC I/II] and the Turks & Caicos entity [Palladino], including more than \$2 million into overseas bank accounts in Cyprus. In addition, the beneficial owner of the Turks & Caicos entity [Mr Hennig] paid substantial expenses on Mebiame's behalf and provided him cash. For example, in an e-mail dated August 27, 2012, Mebiame detailed not only his extensive foreign contacts and ability to travel but some of his expenses for which he sought repayment, including car rentals for “Rolls Royces, Porsche cars, Range Rovers, Mercedes, Ferrari, etc.” for when his family visited him in Miami.”

193. Just in relation to Guinea, the figures are very substantial: *“The government is aware of evidence that at least \$2 million flowed into these accounts related to the Guinea scheme alone.”*¹⁸¹

¹⁷⁹ Criminal Complaint, para 7 (Exhibit C-0216).

¹⁸⁰ Letter from the US Government Attorney to Judge Tiscione dated 16 August 2016, page 2 (Exhibit C-0220).

¹⁸¹ *Ibid.*, page 3.

b. Negotiations with President Alpha Condé

194. From June 2010 to June 2012, Mr Mebiame engaged in negotiations with President Condé and other Guinean government officials for mining rights on behalf of Mr Hennig and Palladino:

“In or about and between June 2010 and June 2012, MEBIAME engaged in negotiations for mineral rights and opportunitites on behalf of Coconspirator #1 [Mr Hennig] and the Turks & Caicos Entity [Palladino], including the opportunity to be partners with a Guinean state-owned mining company (the “SOMC”)”¹⁸²

195. The “state-owned mining company” is a reference to Société Guinéenne du Patrimoine Minier (“**SOGUIPAMI**”), which was created by Alpha Condé after he became President and was to take a minimum 15% share of all mining operators. That would equate to billions of dollars.¹⁸³

196. The timing of the start of these negotiations, in June 2010, is no coincidence. On 27 June 2010, Alpha Condé won just 18% of the vote and looked like he would fail to win election to the presidency. By 7 November (some 5 months later, after documented meetings in July and August between Mr Mebiame and Condé, including in Paris, and promises of exclusivity over a new state mining company in exchange for Mr Mebiame and Mr Hennig’s assistance), at the second vote, Condé won 52% of the vote (but scandal surrounding it meant that it was not confirmed until December 2010).

c. Mr Mebiame was given exclusivity over mining opportunities in Guinea

197. Contemporaneous e-mails record that Mr Mebiame had been given “exclusivity” over those opportunities in Guinea:¹⁸⁴

¹⁸² Criminal Complaint, para. 40 (Exhibit C-0216).

¹⁸³ Exhibit C-0028, para 54.2.

¹⁸⁴ Criminal Complaint, para 40 (Exhibit C-0216).

“MEBIAME sent e-mail messages to Coconspirator #1 [Mr Hennig], which stated that he (MEBIAME) had “exclusivity” over such opportunities in Guinea.”

198. The Och-Ziff settlement refers to an email with Mr Mebiame in July 2010 which noted that *“the [senior Guinean government official] [i.e. Alpha Condé] has instructed [mining company] [i.e. SOGUIPAMI] to deal only with me as a first proposal, **exclusivity**...” (emphasis added)*¹⁸⁵.

d. Mr Mebiame helped set up the Guinea state mining company in which Mr Hennig and his group would be granted a stake

199. Not only that, but President Condé invited Mr Mebiame to help set up the state owned mining company, SOGUIPAMI:¹⁸⁶

“According to MEBIAME, a senior Guinean government official (“Guinea Official #1”) [Alpha Condé], an individual whose identify is known to your deponent, requested MEBIAME’s assistance in setting up the SOMC [SOGUIPAMI].”

200. That is extraordinary. It can only have been done because this was the means by which AML/Palladino was to be repaid for its corrupt assistance to President Condé.

e. Mr Mebiame and Mr Hennig involved in re-writing the Mining Code

201. Furthermore, Mr Mebiame and Mr Hennig were involved in re-writing the new Guinean Mining Code itself (which was used as the purported justification for the review of BSGR’s mining rights):¹⁸⁷

¹⁸⁵ Cease and Desist Order, 29 September 2016, para. 78 (Exhibit C-0225).

¹⁸⁶ Criminal Complaint, para. 40 (Exhibit C-0216).

¹⁸⁷ *Ibid.*, para. 41.

“E-mail records show that in or about and between February and March 2011, [Mr Hennig] and MEBIAME, among others, were involved in re-writing the Guinean mining code.”

202. The new Mining Code is presented by Guinea as a step taken by President Condé as a means of increasing transparency and legitimacy in the state mining industry. This new evidence (supported by email records seen and examined by US federal agents) entirely undermines that. The new Guinean Mining Code determined what share of the mining operators would be taken by SOGIUPAMI (in which Mr Mebiame and Mr Hennig were to be granted a share via Palladino), and provided for a “*systematic review of all mining conventions*”¹⁸⁸ which is what President Condé, Mr Mebiame and Mr Hennig required in order to take mining assets from their current holders including BSGR. Indeed it was in purported compliance with that new Mining Code that the Technical Committee process against BSGR was commenced, as Guinea accepts.¹⁸⁹
203. Guinea makes no reference to Mebiame and/ or Hennig involvement in the drafting of the Mining Code from 2011 or the review program¹⁹⁰, but it is now clear that review was brought about with the direct involvement of Mr Mebiame and Mr Hennig in order to free up mining assets to reward them. Indeed, the signatories of the Palladino loan were the same individuals who presided over the Strategic Committee which determined that BSGR's mining had to be revoked.¹⁹¹
204. Guinea also ignored the recommendations of SOFRECO, who had been specifically engaged for their expertise in the reform of mining legislation. In January 2010, a draft of a new mining code was submitted to the Ministry of Mines, headed at the time by Minister Thiam. SOFRECO was engaged in 2009, with the assistance and financial support of the French Agency for Development, during the transition period, to consider the reform of

¹⁸⁸ Technical Committee, “CTRTCM’s Mission” (with translation), <http://www.contratsminiersguinee.org/about/mission-ctrtem.html> (Exhibit C-0227).

¹⁸⁹ CMRG, para. 1045.

¹⁹⁰ CMRG, para. 540.

¹⁹¹ See Credit Agreement between the Republic of Guinea and Palladino Capital Limited (Exhibit C-0228, pages 14 and 15) and Exhibit C-0227.

Guinean mining legislation. SOFRECO were engaged to analyse the draft of the mining code and. As detailed in its report of July 2012:¹⁹²

- (i) In February 2011, SOFRECO submitted an amended draft of the Mining Code to the Ministry of Mines then directed by Lamine Fofana;¹⁹³
- (ii) On 18 April 2011, a small working group formed around the Minister-Advisor to the Presidency on mining matters and former Minister of Mines, Mr Kanté¹⁹⁴, suggesting significant amendments to the February draft. The other members of this working group are unknown.
- (iii) On 20 May 2011, a final “Presidential” draft was submitted by “the advisors of the President” to SOFRECO for review. It contained major modifications and amendments, with different strategies for the Guinean Mining Industry. It was also circulated to Revenue Watch Institute, the NGO ran and funded by Mr George Soros, and the World Bank for their review.
- (iv) During summer 2011, SOFRECO and the Revenue Watch Institute submitted their comments and a further version of the draft mining code was prepared.¹⁹⁵
- (v) The “Presidential draft” of the mining code, was the version adopted by the Comité National de Transition on 9 September 2011. By a letter to Minister of Mines, dated

¹⁹² SOFRECO Report (Exhibit C-229).

¹⁹³ A meeting was held on 17 February 2011 with the Ministry of Mines, with some of the biggest mining companies in Guinea, such as Rio Tinto, BHP Billiton or Rusal and SOFRECO to discuss the draft of the new mining code. It is noteworthy that BSGR and Vale were not included.

¹⁹⁴ Ahmed Kante was nominated Minister-Advisor to the Presidency on mining matters in March 2011 by the President Alpha Conde. <http://soguipami-gn.com/index.php/2014-08-02-11-48-38/2014-08-02-13-14-48/biographie>

¹⁹⁵ SOFRECO refer to meetings they had with the Minister of Mines, Mohamed Lamine Fofana on 2 and 5 August 2011. It is noteworthy that those meetings are not listed in the annex gathering the minutes of all meetings held in the course of SOFRECO’S assistance to Guinea – Annex 1. SOFRECO also listed the persons that were consulted in this review process and added the dates of those consultations. This list ends at February 2010 and doesn’t refer to anyone after this date, even though it is clear from the final SOFRECO report that a new working group was set up.

9 September 2011, SOFRECO expressed its reluctance in giving its certification to the Mining code enacted by Guinea.¹⁹⁶

205. In its final report, SOFRECO expressed major reservations on the new Mining code notably:

- (i) that investment in Guinea was not encouraged by the new code, with the new mining code more inclined to “punish” and show mistrust of investors rather than attracting them in Guinea.
- (ii) regarding 15% free carry to the State of Guinea, and the option that the State could acquire additional participation up to 35%, which was not in line with mining legislation in other countries, as demonstrated in its comparative study of African countries’ mining codes. SOFRECO considered this approach counter-productive to Guinea’s interests.
- (iii) the creation of the SOGUIPAMI – La société Guinéenne du Patrimoine Minier to manage the government's stakes in mining projects. SOFRECO detailed the problems with the sort of public company envisaged stating:

“Le succès d’une telle société dépend en grande partie de sa capacité d’agir comme une société de droit privé et de professionnalisme de son staff.

Les exemples de réussite sont rares, et les bénéfices pour le développement économique et les finances publiques n’arrivent pas à attendre les objectifs escomptés.

Les différentes versions du projet de code présentent une évolution importante de ses attributions. Initialement envisagée comme opérateur unique, elle est envisagée maintenant comme devant gérer les actifs de l’Etat liés à ses participations dans les sociétés minières.

Nous recommandons que la SOGUIPAMI, si elle est maintenue, fasse l’objet d’une loi spécifique après une analyse (audit) quant à son rôle exact et les objectifs poursuivis compte tenu du potentiel de conflit

¹⁹⁶ Annex 10, Sofreco Report (Exhibit C-0230).

existant. Le design d'une telle société nécessite un appui institutionnel pour définir ses attributions (rôle de gestionnaire et non opérateur potentiel), analyser les interactions avec les autres acteurs, définir un plan de développement des capacités avec une approche pragmatique gage d'efficacité...)."

f. Mr Mebiame and Mr Hennig drafted letters, to be signed by Guinean minister, notifying existing permit holders of issues with their mining licences

206. What undermines Guinea's position even more is that Mr Mebiame and Mr Hennig drafted the very letters that were sent to existing holders of mining rights by the Government of Guinea telling them there were legal issues with their mining permits. This was the shake down that was required to release assets to repay Mr Hennig, Mr Mebiame, Och-Ziff and their corrupt group. This also explains why the document C_0035 (Notification of changes to the mining sector from M Sakho dated 10 February 2011) has only been located in English.

207. The Criminal Complaint could not be clearer about this:¹⁹⁷

"Coconspirator #1 and MEBIAME prepared and transmitted draft correspondence, to be printed on "Republic of Guinea Conakry Letterhead" and signed by a Guinean minister, which would be used to notify existing permit holders of legal issues with their mining permits"

208. This new evidence demonstrates that Mr Mebiame and Mr Hennig *were* centrally involved in the review of mining rights triggered by President Condé as soon as he came to power. It was done to reward Mr Mebiame, Mr Hennig, Och-Ziff and their group; not because of any legitimate basis. Guinea can no longer maintain that BSGR's "*theory*" is not supported by substantial evidence.¹⁹⁸

209. [PROTECTED]

¹⁹⁷ Criminal Complaint, para. 41 (Exhibit C-0216).
¹⁹⁸ CMRG, para 1161

[PROTECTED]

199

g. *Substantial sums paid by Mr Mebiame to gain access to Guinea mining rights*

210. Mr Mebiame systematically paid substantial sums in bribes and in-kind payments to President Condé and Guinean government officials. He did so to smooth the path to the Guinean mining rights that he, Mr Hennig and Och-Ziff and their group wanted.

211. There are multiple examples of this set out in the Criminal Complaint, and they are corroborated by documentary evidence. At paragraph 43, it notes:²⁰⁰

“During his interview with federal agents, MEBIAME stated that he had special access to mining opportunities in Guinea because of payments he provided to senior government officials in Guinea in exchange for such access.”

212. Bribes were given to President Condé both before and after he became president, as well as to Yansane Kerfalla, the former Minister of Finance. As set out above, Mr Kerfalla was (not coincidentally) a signatory of the Palladino Agreement and a member of the Strategic Committee which concluded that VBG's rights should be revoked.²⁰¹ The bribes included:

(i) In 2010, shortly before he was elected President, an S-Class Mercedes Benz sedan to Alpha Condé: *“For example, in 2010, MEBIAME provided an S-class Mercedes*

¹⁹⁹ Exhibit C-0135, page 9: *“He [Mr Cissé] said: “Listen, Sam, really, you are a nice brother, and everything, OK ... I've got something that could interest you, I've got a file on BSGR; perhaps it could help you, you never know. We talked, and in the end he gave me a copy of the file, and I think that those who are behind BSGR found out and got worried - got worried -that Cisse had given me a copy of the file. And my partner- who is like my brother, Walter [Hennig] -I gave a copy of the file to him too. I said to him: “Walter, here's a copy of the file, perhaps it could be leverage, you never know, one day”;* [PROTECTED]

²⁰⁰ Criminal Complaint, para 43 (Exhibit C-0216).

²⁰¹ See Exhibit C-0228, pages 14 and 15 and Exhibit C-0227.

*Benz sedan to a candidate for high political office in Guinea, who was later elected and became Guinea Official #1 [i.e. President Alpha Condé].*²⁰²

- (ii) On or about 15 March 2011 (after the election), payment for the rental of a private Airbus jet for President Condé, in an amount of US\$440,000;²⁰³
- (iii) On or about 29 June 2011, cash payments to Mr Kerfalla of approximately US\$100,000 to US\$200,000, in return for Mr Kerfalla arranging a secret meeting with the heads of SOGUIPAMI and providing Mr Mebiame with secret information to secure mining rights;²⁰⁴
- (iv) Between 2011 and 2012, Mr Mebiame provided in kind payments – flights, upgrades and hotels – to Mr Kerfalla, and President Condé’s son, Mohammed Alpha Condé. These are demonstrated by contemporaneous records, emails and statements obtained by the US federal agents;²⁰⁵

213. As noted above and in the Criminal Complaint, these matters were not only confirmed by Mr Mebiame to US federal agents, but are supported by emails and contemporaneous documents obtained by those federal agents. For example: *“Bank records corroborate MEBIAME’s statements and show that on or about June 29, 2011, MEBIAME arranged for the transfer of approximately \$150,000 to [Mr Kerfalla].”*²⁰⁶

²⁰² Criminal Complaint, para 43 (Exhibit C-0216).

²⁰³ *Ibid.*, para. 43 (“E-mail messages sent and received by MEBIAME show that on or about March 15, 2011, MEBIAME arranged to pay \$440,000 to rent a private Airbus jet for [President Alpha Condé’s] use”).

²⁰⁴ *Ibid.*, paras. 44-45 (“MEBIAME told federal agents that his financial support to Guinean government officials included, but was not limited to, approximately US\$100,000 to \$200,000 in cash payments provided by MEBIAME to another senior Guinean Government Official ([Mr Kerfalla]), an individual whose identity is known to your deponent. MEBIAME said that [Mr Kerfalla] arranged a secret meeting with the heads of [SOGUIPAMI] and provided MEBIAME secret information, which provided MEBIAME leverage in negotiations with the government”).

²⁰⁵ *Ibid.*, para. 47 (“Bank records, e-mails and MEBIAME’s statements show that between 2011 and 2012, MEBIAME provided additional in-kind payments to Guinean government officials including, but not limited to: (a) business class airfare to Paris for [Mr Kerfalla]; (b) a first-class upgrade for [Mohammed Alpha Condé]; and (c) hotel arrangements for [Mr Kerfalla] worth approximately \$1,000”).

²⁰⁶ *Ibid.*, para 45.

h. July / August 2010 – Mr Mebiame’s frank explanations to Och-Ziff

214. Och-Ziff were aware of Mr Mebiame’s extensive contacts with President Condé from before the election. As noted in the Och-Ziff Settlement:²⁰⁷

“In 2010, Och-Ziff Employee B became aware that South African Business Partner had high-level contacts with a senior government official in the Guinea and his family, and that such contacts provided access to potential mining deals in that country.”

215. The “*South African Business Partner*” is Mr Hennig, and the “*senior government official*” is President Condé.

216. In July 2010, communications with Mr Mebiame revealed the extent of his dealings with President Condé and what was being offered in return for the assistance of Mr Mebiame, Mr Hennig, Och-Ziff and their group:²⁰⁸

“Communications involving Och-Ziff Employee B and others at AGC with a consultant [i.e. Mebiame] in July 2010 noted that “the [senior Guinean government official] [i.e. Alpha Condé] has instructed [mining company] [i.e. SOGUIPAMI] to deal only with me as a first proposal, exclusivity...iF YOU ARE INTERESTED AND ABLE TO FULLFILL [sic] their request i can organize ASAP a meeting for you with the representative and the [senior Guinean government official’s] son in Paris this week...”

217. This email:

- (i) reconfirmed that President Condé had offered exclusive access to participate in the state mining company, an opportunity worth potentially billions of dollars;
- (ii) said that this opportunity was available if Mr Hennig, Och-Ziff and their group was “*interested and able to fulfil their request*”. From other evidence it is clear that the request was to help Alpha Condé win the election;

²⁰⁷ Cease and Desist Order dated 29 September 2016, para 78 (Exhibit C-0225).

²⁰⁸ *Ibid.*, para. 78.

- (iii) was sent in July 2010, in between the votes in Guinea – and by November, at the second vote there was a huge swing towards Condé;
- (iv) said that, if they were to take up this offer (as evidence regarding the Palladino loan shows they did), there was to be a meeting in Paris with Alpha Condé’s son in Paris that week. That meeting was plainly to discuss how Condé’s “request” was to be fulfilled.

218. In August 2010, another email with Mr Mebiame demonstrated his access to classified information and that he was travelling to the US with Alpha Condé, such was the closeness of their relationship:²⁰⁹

“Another email in August 2010 with the consultant stated that he had “access to Guinee Mining and Energy [sic] classified information” through his contact with the this Government official and his family. The consultant [i.e. Mr Mebiame], who worked directly with South African Business Partner [i.e. Mr Hennig], also let AGC and Och-Ziff Employee B know that he was traveling to the United States with this senior Guinean government official to demonstrate his influence.”

i. February 2011 – Mr Hennig sought Och-Ziff’s assistance to get money to President Condé

219. After President Condé’s election victory (which was confirmed in December 2010), discussions followed between Och-Ziff and Mr Hennig as to how the reward for Mr Mebiame, Mr Hennig, Och-Ziff and their group would be provided. This required Mr Hennig to seek assistance from Och-Ziff, described in the Och-Ziff Settlement as follows:²¹⁰

“Beginning in February 2011, [Mr Hennig] sought assistance from Och-Ziff, and in particular Och-Ziff Employee B, to create a means for [Mr Hennig] and

²⁰⁹ *Ibid.*, para. 78.

²¹⁰ *Ibid.*, para 79.

potentially AGC II to benefit financially from future Guinean government actions [...]

Och Ziff Employee A and Och-Ziff Employee B, along with the CEO of AML and [Mr Hennig], conceived of a related-party transaction that would accomplish these goals...Ultimately a scheme was devised that would leave [Mr Hennig] with \$52 million from AGC II's purchase of shares in this mining company. According to the deal documents, [Mr Hennig] was to buy 31.5 million shares in the oil and gas company from the South African conglomerate for \$77 million and then immediately resell 18.5 million of those shares to AGC II for \$77 million."

220. As noted by the Securities and Exchange Commission, this is all corroborated by the deal documents that the Commission has obtained.

221. In order to provide Mr Hennig with USD 52 million (to be used as partial reward for Mr Mebiame and Mr Hennig and his colleagues, as well as a means to buy into, at a massively knock down price, the state owned mining company and hence obtain mining assets) the fraudulent scheme was that "*[Mr Hennig] bought 31.5 million shares in this mining company for only \$25 million, and then immediately resold 18.5 million shares in that same company to AGC II for \$77 million, providing South African Business Partner with \$52 million and an additional 13 million shares in the company*".²¹¹

222. The USD 52 million in Mr Hennig's hands was then paid by Mr Hennig as follows:²¹²

"US\$2.1 to Och-Ziff to satisfy an outstanding debt";

"\$25 million to the government of Guinea to try to secure access to valuable mining investments there";

"\$1 million to the agent affiliated with the a high level Guinean government official and his family", i.e. Mr Mebiame; and

"the remainder [i.e. \$23.9m] to personally benefit himself and his business partner."

²¹¹ *Ibid.*, para 81.

²¹² *Ibid.*, para 81.

j. *The Palladino loan – provision of USD 25 million to Guinea in March and April 2011*

223. The USD 25 million was paid to Guinea via a loan from Palladino, which was designed to be defaulted upon and result in Palladino gaining up to a 49% stake in SOGUIPAMI.²¹³

“In or about March 2011, a company controlled by [Mr Hennig] entered into an agreement with the Guinean government, which gave the company the option to buy into [SOGUIPAMI].

On or about April 29, 2011, an affiliate of [Palladino] loaned the government of Guinea \$25 million as part of a deal to become a partner in [SOGUIPAMI]. [Mr Hennig] raised the US\$25 million through a related-party stock sale to [AML].

MEBIAME signed the loan document on behalf of the affiliate of [Palladino].

According to MEBIAME, the partnership with [SOGUIPAMI] ultimately did not go forward due to negative press accounts, which indicated that the deal between the Guinean government and [Mr Hennig] was corrupt.”

k. *August 2011 – team sent by Mr Mebiame and Mr Hennig to ensure Condé kept up his side of the deal*

224. In around early August 2011, Mr Mebiame’s associates met with Alpha Condé and the Minister of Mines in several meetings. Mr Mebiame and Mr Hennig had concerns that Alpha Condé was not keeping his side of the deal (no doubt since the Palladino loan route had been exposed), and a “new team” had been making it clear to him that this was not optional.

225. On 6 August 2011, Mr Mebiame sent an email to Mr Hennig about this. This is set out at para. 46 of the Criminal Complaint:²¹⁴

““New team” is doing lots of progress as they all went to Guinee last friday and had several meetings with [President Condé] specifically regarding our Group.

²¹³ Criminal Complaint, para 42 (Exhibit C-0216).

²¹⁴ *Ibi.*, para 46.

Following those meetings essentially to clarify our Business position, [President Condé] instructed the Minister of Mines to meet them and to call me all together: which they did. Minister of Mines actually sent you his best regards and asked me to tell you that you'll now be fine.. The outcome looks very interesting as they clearly asked me on the phone what could they give us immediately: [mining concessions] etc .. difficult to answer for me ..It is clear now that the "New team" has cleaned the mess there and re-explain [President Condé] how important it is to re-organise the relation with us by also keeping [President Condé's] word. It also makes no doubt now that we (you and me) will have to go there soon to finalise that "asset identification and allocation strategy" that I have put in place and asked "New team" to implement."

226. What is clear from that is:

- (i) there were several meetings between President Condé and Mr Mebiame's associates in around early August 2011;
- (ii) the Minister of Mines knew Mr Hennig. The reference to "you'll now be fine" was to the concern that Mr Hennig, Och Ziff and their group were not going to be repaid for their illicit assistance to Alpha Condé leading up to the election;
- (iii) the Government of Guinea asked what they could give Mr Mebiame and his group in terms of mining concessions;
- (iv) they discussed how important it was that President Condé keep his "word". This is a reference to the promise he made (prior to the election and in return for their assistance, and as noted in emails referred to above) to provide access to mining rights in Guinea.
- (v) there was an "asset identification and allocation strategy" in place, by which Mr Mebiame, Mr Hennig and their team would be provided access to mining rights. Mr Mebiame and Mr Hennig were to go to Guinea to discuss this with President Condé so that it could be "implemented". Later events demonstrate that the plan was indeed implemented: contrary to its stated intention, the Technical Committee did not carry out a review of *all* mining conventions, but only those of BSGR.

227. [PROTECTED]

215

l. Mr Mebiame's contemporaneous admission of corruption

228. One of the e-mails found by the US law enforcement agents was dated 14 September 2009. In it, Mr Mebiame wrote an email to "an employee of AML" following a dispute about his shareholding in AGC I. Mr Mebiame explained his (and AML's) bribery and corruption activities in Africa. This leaves no room for doubt as to his activities:²¹⁶

"I am calling from wednesday international press from America and Europe as Well as African press to explain how your company is trying to delete my shares [in AGC I] to hide its illegal procedures to secure assets in Africa:

According to the RSA[...] laws and also English and American laws, you are not supposed to invite, commission or bribe any member of an administration were you were competing for tenders etc...

You sistematically used corruption in Africa to get the assets you have.

I have proofs of what i am stating and several witnesses that also feel cheated by your company are ready to testify.

But more than that, i have proofs from several Bank transfers linking you directly to corruption.

You even made direct and indirect payment to several people directly responsible in some African Administration for the projects you were trying to get in some African countries.

...

If I am not given the money that i have worked for several years turning a [the Mining Company] with 0 assets to a Multi million dollar company, including giving your companies top African network that you are today using for free, i can assure you that you will also loose a lot, because i will let the world know what kind of international crooks you are."

2.4.6 Unlawful corruption investigation into BSGR employees

²¹⁵ [PROTECTED] CWS-7, paras 15-23; CWS-5 paras 126-143; CWS-3 paras. 95-100.

²¹⁶ Criminal Complaint, para. 13 (Exhibit C-0216).

229. As part of its unlawful expropriating of BSGR's mining rights, Guinea also arrested and prosecuted two of BSGR's employees, Mr Issiaga Bangoura and Mr Ibrahima Soury Touré. These arrests were made respectively on 16 April 2013 and 19 April 2013 on the ground of passive corruption.²¹⁷
230. On 13 November 2013, both employees filed a complaint of violation of human rights at the Registry of the ECOWAS Community Court of Justice. They relied *inter alia* on Articles 9 and 14 of the International Convention on Civil and Political Rights (ICCPR), Articles 7, 9 and 10 of the Universal Declaration of Human Rights (UDHR) and Articles 6 and 9 of the African Charter on Human and Peoples' Rights (ACHPR).
231. On 16 February 2016, the ECOWAS Court of Justice delivered a damning verdict against Guinea in relation to its so-called corruption investigation.
232. First of all, Guinea was found guilty of arbitrary detention of both Mr Issiaga Bangoura and Mr Ibrahima Soury Touré:²¹⁸

"Whereas the applicants should have been granted provisional release since 06 August 2013; whereas their continued detention beyond this date, without a legal base, until 29 November 2013, the date of the release order, constitutes arbitrary detention and consequently violates Articles 9 of the ICCPR and of the UDHR"

233. Secondly, Guinea was found guilty of violating Mr Bagoura and Mr Ibrahima Soury Touré's so-called right to an effective recourse (emphasis added):²¹⁹

83. Whereas the right to effective recourse is guaranteed by international protection mechanisms of human rights, including Article 7 of the ACHPR, Article 8 of the UDHR and Article 2.3 of the ICCPR; whereas Article 2.3 of the aforementioned Covenant provides that:

²¹⁷ Judgment of the Court of Justice of the Economic Community of the West African States dated 16 February 2016, paras. 12, 15 and (Exhibit C-231).

²¹⁸ *Ibid.*, para. 82.

²¹⁹ *Ibid.*

“3. Each State party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective recourse, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted”.

84. Whereas effective recourse, according to Pierre MERTENS in his article “The right to an effective recourse before the national competent authorities in international agreements on the protection of human rights”, is a recourse that is not purely formal, but that would offer all the required guarantees of effectiveness and a chance of success, leading to a decision that could materialize into practice: whereas an effective recourse, therefore, would enable its initiator not only to file an application with the competent authority (judicial or administrative), but also to obtain from it a decision that can materialize into practice;

85. Whereas in the case at hand, the applicants filed with the Indictment Chamber of the Court of Appeal of Conakry applications for cancelling the judicial investigation proceeding initiated against them, which they consider to be a violation of their fundamental rights; whereas it is apparent from the file that these applications were received by the said Chamber under number 24 on 13 May 2013;

86. Whereas they also filed an application to close the investigation on 25 February 2014 at the office of the investigating judge;

87. Whereas, however, no decision regarding these appeals has been given by these courts to date; whereas by failing to address the applications for cancellation and for ending the investigation filed by the applicants, the Indictment Chamber of the Court of Appeal of Conakry and the investigating judge at the office of the Court of Dixin violated the applicants’ right to effective recourse”

234. Thirdly, Guinea was found guilty of violating the principles of adversarial proceedings and equality of arms (emphasis added).²²⁰

²²⁰

Ibid.

96. *Whereas equality of arms is one of the inherent elements of the concept of fair trial; whereas it expects that each party be offered a reasonable possibility to present its cause under conditions that do not place it in a disadvantaged position relative to its opponent and requires that a fair balance should be maintained between the parties; whereas the adversarial principle implies the possibility of the parties to know and discuss all the produced elements of proof and all the presented observations, and thereby to influence the decision of the Court; whereas this principle is closely related to the equality of arms and these principles have been enshrined by Articles 10 of the UDHR and 14 of the ICCPR; whereas a violation of equality of arms would then result in an imbalance caused by one court between the parties to a proceeding in the presentation of their cause; whereas the violation of the adversarial principle would imply the fact that an accused person cannot obtain knowledge and discuss the elements of evidence on which his accusation is based; whereas the ECHR, in its decision in the case of *Kuopila vs. Finland* (No. 27752/95 of 27 April 2000), found that failure to communicate evidence to the defense may prejudice both the equality of arms and the adversarial principle; whereas the same Court, in its decision in the case of *Matyjek vs. Poland* (No. 38184/03 of 24/04/2007) found the fact that the defendant had limited access to his file and to other documents to be an infringement of equality of arms; whereas in its decision in the case of *Rowe and Davis vs. the United Kingdom* (No. 28909L/95 of 16/02/20002), it pointed out that the adversarial principle requires the prosecuting authorities to communicate to the defense all the relevant evidence in their possession, whether incriminating or exonerating;*

97. *Whereas in the case at hand, it appears from the file that the applicants were not placed under the same conditions as the prosecution as part of their defense during the investigation procedure; whereas, in fact, on the one hand they did not receive documents pertaining to the proceeding within sufficient time to enable their adequate defense, while, on the one hand, some documents were not provided at all;*

98. *Whereas an interrogation on the substance scheduled for the 09 May 2013 had to be deferred to 10 May 2013 because the file had not been provided to the applicants; whereas the said interrogation held on the 10 May took place in the presence of third parties without them being informed thereof in advance;*

99. *Whereas the report of Chief Superintendent CONDE was not provided to them, although it was an essential element of the proceeding; whereas this report relates to investigative actions, including the searches carried out at the home of Ibrahima Sory TOURÉ and Issiaga BANGOURA; whereas in fact this is the report of the performed searches that resulted on the one hand in items being seized and on the other hand, in the applicants' being held for questioning;*

100. *Whereas its provision was therefore necessary to enable the applicants to discuss its content; whereas by not providing it to the applicants in the course of the proceeding, the judicial authorities, in particular the investigating judge of*

Office 2 of the Court of First Instance of Kaloum, violated the adversarial principle;

101. Whereas with regard to the foregoing, it must be concluded that the State of Guinea, through its judicial authorities, violated the principles of equality of arms and the adversarial principle in the proceeding initiated against the applicants"

235. Fourthly, Guinea was found guilty of violating Mr Bagoura and Mr Ibrahima Soury Touré's right to be tried within a reasonable time (emphasis added).²²¹

*109. Whereas Articles 7 of the ACHPR, 9 paragraph 3 and 14 of the ICCPR establish the right of any citizen to have his case heard within a reasonable time; whereas in accordance with the ECHR, the concept of reasonable time is assessed according to the circumstances of the issue, especially the complexity of the case, the conduct of the applicant and that of the competent administrative and judicial authorities (ECHR, *Boddaert vs. Belgium*, 12 October 1992, Series A no. 235-D);*

*110. Whereas in determining the length of a criminal proceeding, its starting point is the date on which the person is charged (ECHR decision in the *Eckle* case of 15 July 1982, Series A no. 51, and it ends on the date of the final ruling;*

111. Whereas in the case at hand, the applicants Ibrahima Sory TOURÉ and Issiaga BANGOURA were charged on the 06 of May and 09 May 2013, respectively on serious grounds of passive corruption; whereas the investigating judge in charge of the case carried out their interrogation on the substance on the 10 of May and 20 May 2013, respectively; whereas to date, namely more than two (02) years after being charged, no ruling has yet been given regarding the charges brought against them;

112. Whereas, however, it has not been established that the charges brought against the applicants were of a complexity requiring long investigations; whereas, in fact, there were only two persons charged in the proceeding, and they were questioned on the substance of the case; whereas searches were carried out and objects were seized; whereas the investigating judge did not file any instrument trying to establish the truth after the interrogation of the accused on the substance; whereas these are offenses that, in principle, do not require a long period of investigation;

²²¹

Ibid.

113. Whereas therefore, in light of the nature of the charges brought against the applicants and the lack of complexity of the proceeding, a period of two (02) years without delivery of a court decision does not seem reasonable;

114. Whereas it may be concluded that their right to be tried within a reasonable time was violated"

236. To repair Guinea's violations, the ECOWAS Court of Justice ordered Guinea to indemnify Mr Mr Bagoura and Mr Ibrahima Soury Touré's and pay them respectively CAF 15 million and 30 million.²²²

122. Whereas in the case at hand, the Court has found that the applicants were victims of arbitrary detention during the period between 06 August 2013 and 29 November 2013 and of violation of the principle of adversarial proceeding and equality of arms, the right to be tried within a reasonable time and the right to effective recourse, within the proceeding initiated against them;

123. Whereas thereby, the Court should order the reparation of such violations by indemnifying the applicants;

126. Whereas the applicants lost their jobs due to their provisional detention, which has an arbitrary character;

127. Whereas the loss of their job has inevitably caused them a financial loss;

128. Whereas consequently it would be appropriate to order the compensation of this loss by granting damages to each of the applicants;

129. Whereas furthermore, the violation of the adversarial principle, of the right to effective recourse, of equality of arms and of the right to be tried within a reasonable time also caused them losses that should be remedied;

Orders the Republic of Guinea to pay the sum of thirty million (30,000,000) CFA francs to Ibrahim Sory TOURÉ and the sum of fifteen million (15,000,000) CFA francs to Issiaga BANGOURA for all the damage they suffered"

237. The above establishes that whereas Guinea arrested two of BSGR employees on account of passive corruption in April 2013 - this is over 3.5 years ago - Guinea never found any hard evidence of corruption and never followed true by bringing BSGR's employees or BSGR itself before a court. Whereas Guinea purports in the present arbitration that the amount of

²²²

Ibid.

evidence against BSGR is overwhelming, its failure to take BSGR or its employees to court demonstrates the opposite. This lack of action is not only detrimental to Guinea's case against BSGR, it is also undermines the credibility of Guinea's anti-corruption agenda (if any).

2.4.7 Conclusion

238. The above is overwhelming and irrefutable evidence of the bribery and corruption of President Condé leading to the taking of BSGR's rights to repay his backers. As this evidence demonstrates, Guinea had no genuine lawful basis on which to expropriate BSGR's mining rights and there was no fraud by BSGR. On the contrary, BSGR was the subject of a corrupt political witch-hunt by a corrupt President.

239. Guinea will hopefully stop its avoidance tactics now and deal with this extremely serious evidence properly.

2.5 **The measures implemented by Guinea against BSGR were supported and/or partly funded by George Soros and his Foundations**

240. Immediately after coming to office, President Condé announced a plan “*to revise the country's mining code to give the state a 33 percent stake in mining projects*”²²³.

241. A few weeks after commencing his term in office, President Condé held a meeting with VBG representatives on 8 February 2011 detailed in the Claimant's memorial²²⁴, during which he informed BSGR and Vale that “*BSGR [was] going to have to pay the price for not respecting Guinean laws... BSGR should have informed the Guinean government that it was negotiating its rights and concessions with Vale.*” He stated that he would claim 50% of the

²²³ Reuters, “*Guinea's Conde enlists Soros aid with mining code*” (Exhibit C-0232).

²²⁴ CMRG, para. 105.

money that BSGR received from the joint venture agreements. He commented, “*it is inconceivable that people get rich thanks to assets that should belong to Guinean people*”.²²⁵

242. His comments were inaccurate. As detailed in BSGR's Memorial, the Government was fully informed of the Vale negotiations²²⁶. Further, even if BSGR had not informed Guinea about its negotiations with Vale, this would have not been in breach of the Mining Code. By Article 62 of the Mining Code, the Minister of Mines must approve the final joint venture agreement, but the parties are not required to keep the Ministry of Mines up to date on its negotiations²²⁷.
243. President Condé then demanded payment from BSGR of USD 1.25 billion.²²⁸ Guinea denies that this money was ever meant to be paid to the President himself and alleges that this request was a tax “*imposition fiscale*”,²²⁹ which was legitimate and of which BSGR representatives were aware. However, Guinea has not produced any evidence of or reference to the relevant tax provisions that BSGR had allegedly breached. In addition, BSGR's tax advisors Ernst & Young confirmed at the time that the Vale transaction did not trigger any tax payments.²³⁰
244. Further, as part of the document production exercise, Guinea agreed to produce documents responsive to Request 23 which sought all documents in relation to the meeting of 8 February 2011 and the Government's payment request, including (i) documents created in anticipation and for the purpose of the meeting, (ii) documents created at that meeting, (iii) documents recording the discussions during the meeting, (iv) documents containing an analysis of the meeting; and (v) documents reporting about that meeting. However, Guinea has failed to produce any responsive document. If President Condé's payment request would have been legitimate, surely this would have been recorded in some documents or communications (for example with the Guinean tax authorities).

²²⁵ Email from Daniel Pollak to Asher Avidan dated 9 February 2011 (Exhibit C-0034).

²²⁶ CMRG, paras. 89 and 90.

²²⁷ CWS-5, para. 77.

²²⁸ CMRG, para. 108.

²²⁹ *Ibid.*, 555.

²³⁰ Exhibit C-0286.

245. This is all the more true taking into account: (i) the amount of requested payment, i.e. USD 1.25 billion, (ii) the fact that Guinea claims it concerned the payment of a tax obligation and (iii) Guinean law provides for the automatic conservation and preservation of all government and public officials' e-mails, minutes and other documents. As Guinea has not provided any explanation for its failure to produce any responsive document, BSGR requests the Tribunal to draw the inference that President Condé's request for a payment of USD 1.25 billion was unlawful.
246. Furthermore, Article 72 of the 2010 Guinean Constitution provides that “*Statutes shall determine the rules governing: [...] the base, rates and methods of collection of all types of taxes and compulsory contributions*”. In other words, only the legislator is entitled to enact a tax, to establish its basis or the methods of its collection²³¹. The payment of USD 1.25 billion was demanded by the President himself and was not provided for in any applicable statutes.
247. This attempt to extort unjustified significant sums from BSGR, had the blessing, encouragement and involvement of George Soros and his foundation, the Open Society Foundation. From inception, President Conde’s regime was propped up by the support of Mr Soros and his foundations which were “*acting on behalf of the Republic, in order to discuss possibilities of aiding the Republic in meeting a portion of its current and anticipated revenue shortfalls*”.²³²
248. When BSGR refused to pay the demanded USD 1.25 billion, it was the Open Society Foundation (“OSF”), via Chris Canavan (chris.canavan@soros.com), in March 2011, acting on behalf Guinea, who approached Vale in an attempt to negotiate with VBG a memorandum of understanding titled “*Regarding a Possible Advance Payment of Tax on Mining Substances from Projects in the Republic of Guinea.*” The terms of the draft

²³¹ Article 72 of the 2010 Guinean Constitution provides “*La loi fixe les règles concernant: [...] - l'assiette, le taux et les modalités de recouvrement et de contrôle des impôts de toutes natures, et des contributions obligatoires; [...]*” (Exhibit CL-004).

²³² Joint Press release, Guinea and OSF, 2 March 2011 (Exhibit C-0233); see also Exhibit C-0213.

agreement provided that the joint venture would be required to pay the Government USD 500 million, disguised as “*advance payment of the tax*”.²³³

249. Not only does this draft memorandum of understanding demonstrate Soros’ direct involvement in attempting to extort mining companies, but it also shows how he and/or OSF were intent on the Guinean government revoking BSGR’s rights. Tellingly, the memorandum states in the second whereas clause that “*the Parties are dedicated to ensuring Vale’s successful long term investment in the country*”. Vale never agreed to these proposed terms, and Soros, OSF and/or their agents sought other means to rid BSGR of its mining rights.
250. It is noteworthy that the Soros Fund Management LLC was one of Vale’s major shareholders in the first semester of year 2010.²³⁴ The report submitted in June 2010 to the Securities and Exchange Commission (SEC) reveals that the Soros Fund Management LLC had invested over USD 350 million into the Brazilian company. This shareholding ceased in the second semester of the year.²³⁵ The exact date of the investment withdrawal is unknown. However, it is clear that the Soros Fund Management LLC has benefited from the announcement to the market of the joint venture between BSGR and Vale and the subsequent raise of the share price. This major shareholding demonstrates that Mr Soros’ involvement into Guinea’s affairs was more driven by a desire to line his own pockets under a ruse of philanthropy.
251. From the day that President Condé had come to power, it was clear that if BSGR did not agree to “play ball” on the terms set out by OSF, Mr Soros was going to ally with President Condé so as to ensure BSGR would no longer have any footing in Guinea at all. The list of examples is long.

²³³ Email chain Subject: Draft MOU – VBG – Open Society Foundation, March 2011 (Exhibit C-0234).

²³⁴ Soros Financial report to the SEC dated 30 June 2010 (Exhibit C-0235).

²³⁵ Soros Financial report to the SEC dated 31 December 2010 (Exhibit C-0236).

252. Within a month of taking power, in January 2011, the Revenue Watch Institute (“RWI”)²³⁶, published “*Preliminary Recommendations for the mining concessions’ review process*”, for the expressed purpose of assisting Guinea in renegotiating better conditions. RWI was instructed by President Condé to review BSGR’s mining rights first²³⁷.
253. In the beginning of March 2011, press conferences were held and press releases jointly issued by OSF and by Mamoudou Kouyaté, the “advisor to President Alpha Condé”, to announce the future enactment of a new mining code and the review of all mining contracts. This initiative was said to be supported by “*George Soros and his Open Society Foundation*”.²³⁸ As discussed above, that mining code review was rotten to its core.
254. In April 2011, a small working group, close to President Condé was formed around Ahmed Kanté the Minister-Advisor to the Presidency on mining matters²³⁹. This working group, whose composition is, to date, still unknown, circulated a “presidential draft” of the new mining code, which included major modifications and new strategies for Guinean mining industry, to Revenue Watch Institute for its review. RWI submitted its comments and a new version of the draft circulated during the summer 2011²⁴⁰. The complaint issued in the US criminal proceedings against Mr Mebiame and Mr Henning confirms that Mr Mebiame and Mr Henning were involved in the drafting of the mining code, which assists in understanding the parties making up the “working group”.
255. In June 2011, Mr Soros contacted Vale to pass on a message of President Condé’s. According to an internal Vale document, Mr Soros said that President Conde wanted “*to reinforce Guinea’s interest in maintaining and developing the relationship with Vale ... he said that President Alpha Condé does not recognise the contract with the businessman (“dealer”) Steinmetz. There’s an on-going investigation. However the relationship with*

²³⁶ The Revenue Watch Institute is funded by Soros and was previously part of the OSF.

²³⁷ Procedural calendar of the Technical Committee review, February 2012 (Exhibit C-0237, p. 4).

²³⁸ See C-0232.

²³⁹ See - <http://soguiipami-gn.com/index.php/2014-08-02-11-48-38/2014-08-02-13-14-48/biographie> . Ahmed Kanté was appointed Minister-Advisor to the Presidency on mining matters by President Alpha Condé in March 2011.

²⁴⁰ Exhibit C-0229.

Vale is not to be affected by the outcome of this investigation... it is necessary that a parallel channel of negotiation be opened."²⁴¹

256. In September 2011, Mr Soros hosted a dinner at his home in the US inviting President Condé, his son Mohamed Condé, and special advisor Mamadou Kouyaté, as well as all of the companies with significant interests in exploration or extraction of iron ore in Guinea, to discuss the industry. BSGR, despite having a significant interest in the industry in Guinea, was not invited or notified about the event.
257. An internal memorandum discussing the procedural calendar of the Technical Committee review reveals that, in February 2012, it was Mr. Soros' organisation, RWI, that was tasked with setting the order of the contracts to be renegotiated as well as drafting the questionnaires to be answered by the mining rights' holders. The memorandum also confirms the relationship between Mr. Soros, his lawyer Scott Horton of DLA Piper, Chris Canavan and their involvement in the Technical Committee process.²⁴²
258. Mr. Soros' lawyer, Scott Horton of DLA Piper, was paid by Mr. Soros and instructed to investigate BSGR's mining interests and its joint venture arrangements with Vale. [PROTECTED]
[PROTECTED]
[PROTECTED]. The Veracity Report was prepared by Stephen Fox, CEO of Veracity Worldwide, a private investigator tasked with finding evidence of corruption against BSGR²⁴³. Stephen Fox reported that "*The evidence provided by Cilins made him subject to civil and criminal prosecution*". However, this Veracity can hardly be taken serious:

- (i) It contains no evidence in support of the matters raised therein;
- (ii) Guinea has not produced Mr Fox as a witness in these proceedings; and

²⁴¹ Email from Ferreira to Ledsham dated 6 June 2011 (Exhibit C-0238).

²⁴² Procedural calendar of the Technical Committee review, February 2012 (Exhibit C-0237).

²⁴³ Exhibit R-0165.

(iii) most importantly, Mr Fox' evidence has recently been severely criticized by an ICSID Tribunal in the *Getma* arbitration against Guinea. The ICSID tribunal stated that:

*“Le Tribunal arbitral note que le Tribunal CCJA a constaté que M. Steven Fox n’a pas été témoin, direct ou indirect, des faits de corruption qu’il rapporte, qu’il ne se réfère à aucun document, et que ses allégations sont invérifiables, pour conclure que son attestation « ne permet pas d’accorder la moindre pertinence au grief particulièrement grave de corruption”*²⁴⁴

259. [PROTECTED]

[REDACTED]

[REDACTED]. If that was true, Mr Mebiame obtained the documents in Guinea in late 2008. However in the transcript of a later conversation between Mr Mebiame and Minister Thiam, he refers to getting the documents from Mamadie Touré in Jacksonville, USA, when she

²⁴⁴ *Getma International v. The Republic of Guinea*, ICSID Case No. ARB/11/29, Award dated 16 August 2016, para. 185: translation “*Mr. Steven Fox was not a direct or indirect witness of corruption he reports, he does not refer to any document and that his allegations are unverifiable. His statement is not relevant to the particularly serious complaint of corruption.*” (Exhibit C-0239).

²⁴⁵ [PROTECTED]

was with her husband Mr Cissé.²⁴⁶ Surely, the facts as to the time and place of obtaining the documents would be consistent if this narrative was the truth.

260. The Technical Committee served merely to create the illusion of legitimacy and accorded BSGR no due process whatsoever. With no staff or trained investigators, the Technical Committee outsourced its work to Mr Soros's agents, who operated out of New York, and based its conclusions on the reports conceived of and funded by Mr Soros and OSF in the first instance. Further undermining the legitimacy of the Technical Committee is the fact that despite being charged with investigating all of the country's mining contracts, its work was apparently focused on investigating BSGR, the one company that refused to pay.

2.6 The measures implemented by Guinea against BSGR were improperly encouraged and supported by BSGR's competitors and ex business partners

2.6.1 Rio Tinto

261. Despite the obvious conflict of interest and Rio Tinto - after losing its mining rights to BSGR - demonstrating it had an axe to grind with it wielded aggressively towards BSGR and Mr Steinmetz²⁴⁷, Guinea relied upon information provided by Rio Tinto and involved Rio Tinto in the process that led to the expropriation of BSGR's rights.

262. [PROTECTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁴⁶ Exhibit C-0135, p.9.
²⁴⁷ Reply section 2.1.4.

263. [PROTECTED]
[REDACTED]
[REDACTED]
[REDACTED]

264. [PROTECTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

265. Further details concerning Rio Tinto's actions against BSGR have been detailed in Section 2.1.4 hereabove.

2.6.2 Vale

266. President Condé has repeatedly stated that whereas he wanted to get rid of BSGR, he wanted to keep Vale in Guinea.²⁴⁸ That approach suited Vale well. In early 2010, against the backdrop of an inflated commodities market, Vale had exercised its option to buy into the joint venture, stopping Chinalco and Rio Tinto from expanding its iron ore deposit holdings, and representing a value to Vale of over USD 20 billion.²⁴⁹ However, in July 2011 and prior to any allegations of corruption being made against BSGR, Vale appointed a new CEO and changed its strategic direction. As a result of the deflating commodities prices, it considered its Simandou asset no longer economically viable and it started to look for an easy exit or, to use Vale's own words, keen to “*initiate the divorce*”²⁵⁰.

²⁴⁸ Email from Ferreira to Ledsham dated 6 June (Exhibit C-0238); Main Items of the Conversation between PRMF and President Alpha Condé of Guinea, 25 July 2011 (Exhibit C-0241); Email chain from Rezende to Saad, 6 January 2012 (Exhibit C-0242).

²⁴⁹ Vale presentation: Project Trojan Horse, April 2010 (Exhibit C-0243).

²⁵⁰ Email chain from Rodrigues to Ledsham, 30 July 2011 (Exhibit C-0244).

267. President Condé's actions against BSGR suited Vale perfectly and provided the perfect excuse to terminate its joint venture with BSGR and, more importantly, its potential payment obligation of USD 2 billion to BSGR. This explains why Vale made no effort to support BSGR when it was accused by the Government of unlawful behaviour and why it refused to join BSGR in the present action.

2.6.3 Sitarail

268. A few weeks after coming to power, President Condé's government appointed Sitarail to review the work that VBG-BSGR was doing on the Trans-Guinean railway project under the Base Convention. Sitarail is a subsidiary of the leading player in Africa's railway sector including passenger transport, railway logistics and project management.

269. Sitarail carried out its review during February and March 2011 and recommended to halt the work on the railway. Sitarail purported that BSGR's work was below standard pointed and advised Guinea to organize a tender to find another contractor (presumably another company within Sitarail's group).²⁵¹ Sitarail further claimed that the budget was incorrect and that the railway system had to be changed from a standard to a "metric" system.

270. On 8 April 2011 and without providing VBG/BSGR with the analysis of Sitarail (let alone with an opportunity to respond to Sitarail's findings), the Ministry of Transportation halted all works on the Trans-Guinean railway and announced the completion of the railway would be put out to tender.²⁵² Guinea seeks to justify the cessation of the Trans-Guinean railway work by BSGR on the basis of the report. However, Guinea chose to have the report prepared by a competitor for the completion of the Trans-Guinean railway, instead of an independent organisation. The conflict of interest is obvious.

2.6.4 Conclusion

271. BSGR has been the victim of a complex web of conspirators and their schemes, including *inter alia* the Government of Guinea, Rio Tinto, Och-Ziff, Mr Mebiame, Mr George Soros

²⁵¹ Sitarail, Report of VBG Transguinean railway project, March 2011 (Exhibit C-0245).

²⁵² Letter from Minister of Transport El Hadj Tidiane Traoré to BSGR dated 8 April 2011 (Exhibit C-0039).

and his foundations, Palladino , Waymark and Mr De Crombret. The on-going investigations against a number of these conspirators are likely to reveal other participants in the future. BSGR has summarized this web in Annex 2 to the Reply Memorial.

III LEGAL FRAMEWORK OF CORRUPTION

3.1 Applicable law

272. Article 42(1) of the ICSID Convention provides that "*the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable*".
273. Guinea's position on the law that applies to the present case is unclear as it refers both to international law²⁵³, English law²⁵⁴, US law²⁵⁵, French law²⁵⁶ and Guinean law²⁵⁷. As far as BSGR is concerned, Guinean law applies.
274. If Guinea agrees with BSGR, then Guinean law will apply pursuant to the first sentence of Article 41(1) of the ICSID Convention. If Guinea does not agree, the second sentence of Article 41(1) of the ICSID Convention provides that the applicable law is "*the law of the contracting party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable*". The law of the host State, in this case Guinean law, is thus the principal source of law to be applied. The question is whether there is a secondary role to play for international law. The answer is negative.
275. In *Klöckner v Cameroon*, the ad hoc Committee determined that:²⁵⁸

²⁵³ CMRG, paras 727-728.

²⁵⁴ CMRG, para. 729.

²⁵⁵ CMRG, paras. 730 and 732.

²⁵⁶ CMRG, paras. 735-737 and 740.

²⁵⁷ CMRG, paras. 738-739.

"Article 42 of the Washington Convention certainly provides that 'in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute ... and such principles of international law as may be applicable.' This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is, complementary (in the case of a 'lacuna' in the law of the State), or corrective, should the State's law not conform on all points to the principles of international law. In both cases, the arbitrators may have recourse to the 'principles of international law' only after having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to one principle, even a basic one) and after having applied the relevant rule of the State's law".

276. The ad hoc Committee in *Amco v. Indonesia* was even more explicit.²⁵⁹

"It seems to the ad hoc Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms"

277. Pursuant to *Klockner v. Cameroon* and *Amco v. Indonesia*, international law thus only applies if it has been established that there is a lacuna in the law of Guinea or Guinean law is in collision with international law. As no such lacuna, nor collision has been established in the present case, Guinean law applies to the exclusion of international law.

278. The ad hoc Committee in *Wena v. Egypt* departed slightly from the *Klockner v. Cameroon* and *Amco v. Indonesia* jurisprudence in that it decided that domestic law and international law stand as two equally applicable laws and a tribunal has the discretionary power to apply international law *"if this is justified"*.²⁶⁰ In the present case, there are three fundamental reasons why it is not justified to apply international law.

²⁵⁸ ICSID Case No. ARB/81/2, Decision on Annulment dated 3 May 1985, para. 69 (Exhibit CL-0031).

²⁵⁹ ICSID Case No. ARB/81/1, Decision on Annulment dated 16 May 1986, 1 ICSID Reports 509 (1993), para. 20 (Exhibit CL-0032).

²⁶⁰ *Wena v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment dated 5 February 2002, para. 40 (Exhibit CL-0033).

279. First of all, the vehicle of consent to arbitrate this dispute under the ICSID Convention is not a source of international law such as a bilateral investment treaty. The vehicle of consent is the Base Convention between BSGR and the Government of Guinea (which provides in Article 1 for the application of Guinean law), the BOT Act (which provides in Article 13.1 for the application of Guinean law) and the 1995 Mining Code (which is a source of domestic law). In other words, all the relevant sources of law point to Guinea.
280. Secondly, it has been Guinea's own choice NOT to apply international law to issues of corruption. For example, Guinea relies on the UN Convention Against Corruption dated 31 October 2003 ("the UNCAC").²⁶¹ Whereas this Convention was signed on 15 July 2005 under the former regime of Guinea, it took the Guinean Government another eight years to ratify the UNCAC and the UNAC only entered into force only on 28 June 2013.²⁶² In other words, the UNCAC did not apply at the time when the alleged corrupt acts took place and, in accordance with Article 28 of the Vienna Convention of the Law of Treaties of 1969, the UNCAC cannot be applied retroactively.²⁶³

"Unless a different intention appears from the treaty or is otherwise established, its provision do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

281. The same applies to the application of the *African Union Convention on Preventing and Combating Corruption*²⁶⁴ ("ACPCC") which was signed by Guinea on 16 December 2003, but only ratified on 5 March 2012²⁶⁵ and entered into force in Guinea on 12 May 2012.²⁶⁶

²⁶¹ Exhibit RL-25.

²⁶² <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>; Depository Notification Confirmation by General Secretary of the United Nations dated 29 May 2013 (Exhibit CL-0034).

²⁶³ Vienna Convention of the Law of Treaties, 1969 (Exhibit CL-0035).

²⁶⁴ Exhibit RLA-26.

²⁶⁵ List of Countries which have signed, ratified/acceded to the African Union Convention on Preventing and Combating Corruption (Exhibit CL-0036).

²⁶⁶ According to Article 23(2) of the African Convention on Preventing and Combating Corruption "The Convention shall enter into force thirty (30) days after the date of the deposit of the fifteenth instrument of ratification or accession." The ratification was deposited with the African Union on 12 April 2012, Exhibit CL-0036.

Guinea cannot rely on it either, as the ACPC was not in force in Guinea when the alleged corrupt acts occurred and it cannot be applied retroactively.

282. Guinea also refers to other international treaties in relation to corruption, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions²⁶⁷, the Criminal Law Convention on Corruption of the Council of Europe²⁶⁸ and the Civil Law Convention on Corruption of the Council of Europe²⁶⁹. However, Guinea has not ratified any of these Conventions and they do therefore not apply to the case at hand.
283. In addition, even where Guinea did ratify the international anti-corruption treaties such as the UNCAC and ACPC, in reality it continues to fall materially short of its own obligation to fight corruption and take the steps necessary to implement these international treaties.
284. For example, while Guinea has formally established an Anti-Corruption Agency (ANLC), it has been described by the UN as "*relying on thin legal basis*" and "*one of the least funded anti-corruption bodies in West Africa*"²⁷⁰ Despite President Condé's promise of a "*new era*" after his "*democratic*" election in 2010, six years later, the country is 4th most corrupt country in the world.²⁷¹ Remarkably, this result is worse than before President Alpha Condé came to power.
285. Thirdly, in corruption matters, the domestic law of the country in which the corruption occurred is considered to be the objective law or, to use Professor Mayer's words:²⁷²

²⁶⁷ Exhibit RLA-22.

²⁶⁸ Exhibit RLA-23.

²⁶⁹ Exhibit RLA-24.

²⁷⁰ UNODC, "*Guinea assesses its national anti-corruption legislation with UNODC support*" (Exhibit C-0279).

²⁷¹ According to Trace Matrix Corruption Ranking 2016, Guinea resides on place 196 out of 199 countries (Exhibit C-0246).

²⁷² Pierre Mayer, *Loi applicable et respect des lois de police*, in *Les Commissions illicites* (1992), 49, 57-58, (Exhibit CL-0037).

"[S]i l'arbitre est désireux de réagir contre la corruption, il lui est en quelque sorte plus facile de dire simplement qu'il appliqué la loi locale parce qu'elle est objectivement applicable, plutôt que d'invoquer des considerations morales."

3.2 Corruption under Guinean criminal law

286. Guinean identifies three relevant criminal offences: (i) the offence of passive corruption, (ii) the offence of active corruption and (iii) the offence of trading in influence. Importantly, each offence has its own constituent elements. Each of these elements is necessary to constitute the particular offence.

287. The difference between passive and active corruption relates to the person who commits the offence. As Article 191 of the Guinea Criminal Code makes clear, the person who is corrupting another is committing the offence of active corruption, while the person that is being corrupted commits the offence of passive corruption:

"La corruption est une infraction dite passive lorsqu'elle résulte du fait par une personne d'être corrompue, et active lorsqu'elle résulte du fait de corrompre"

288. As will be explained further below, the Guinea Criminal Code does not make a similar distinction, between active and passive, in relation to the offence of trading in influence. Only the passive form of trading in influence triggers criminal liability.

289. Under the heading "*passive corruption*", Article 192 of the Criminal Code provides in relevant part:

"Sera puni d'un emprisonnement de 1 à 5 ans et d'une amende double de la valeur des promesses agréées ou des choses reçues ou demandées sans que ladite amende puisse être inférieure à 100.000 francs guinéens, quiconque aura sollicité ou agréé des offres ou promesses, sollicité ou reçu des dons ou présents pour:

1°) étant investi d'un mandat électif, fonctionnaire public de l'ordre administratif ou judiciaire, militaire ou assimilé, agent ou préposé d'une administration publique ou citoyen chargé d'un ministère de service public,

faire ou s'abstenir de faire un acte de ses fonctions ou de son emploi, juste ou non, mais non sujet à salaire [...]".

290. As this definition makes clear, this offence can only be committed by a public official, meaning a person holding an elected, executive, administrative, judicial or military office or performing a public function.

291. Under the heading "*active corruption*", Article 194 of the Guinean Criminal Code provides:

"Quiconque, pour obtenir, soit l'accomplissement ou l'abstention d'un acte soit une des faveurs ou un des avantages prévus aux articles 192 et 193 aura usé de voies de fait ou menaces, de promesses, offres, dons ou présents ou cédé à des sollicitations tendant à la corruption, même s'il n'en a pas pris l'initiative sera, que la contrainte ou la corruption ait ou non produit son effet, puni des mêmes peines que celles prévues auxdits articles contre la personne corrompue".

292. The offence of active corruption thus has the following three constituent elements: (i) the promise, offering or giving of offers, promises, gifts or presents; (ii) to a public official; and (iii) with the intention of obtaining that the public official acts or refrains from acting.²⁷³ [to verify: an indirect offer, made e.g. through a third party, does not fall under this provision]²⁷⁴

293. Under the heading "*trading in influence*", Article 195 of the Guinean Criminal Code provides:

"Sera punie d'un emprisonnement de 1 à 5 ans et de l'amende prévue par le premier alinéa de l'article 192 toute personne qui aura sollicité ou agréé des offres ou promesses, sollicité ou reçu des dons ou présents pour faire obtenir ou tenter de faire obtenir des décorations, médailles, distinctions ou récompenses, des places, fonctions ou emplois ou des faveurs quelconques accordées par l'autorité publique, des marchés, entreprises ou autres bénéfices résultant de traités conclus avec l'autorité publique ou avec l'administration placée sous le contrôle de la puissance publique ou, de façon générale, une décision favorable d'une telle autorité ou administration et aura ainsi abusé d'une influence réelle ou supposée. Toutefois, lorsque le coupable est une des personnes visées au

²⁷³ Exhibit CER-1.

²⁷⁴ Exhibit CER-1.

paragraphe premier du premier alinéa de l'article 192 et qu'il a abusé de l'influence réelle ou supposée que lui donne son mandat ou sa qualité, la peine d'emprisonnement sera de 2 à 10 ans"

294. Trading in influence thus has the following constituent elements: (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 or supposed influence; and (iii) to obtain from a public official an undue advantage or a favourable decision.
295. As only the solicitation or acceptance of offers and promises is captured by Article 195, it is clear that it only applies to passive trading in influence. The active form of influence trading, i.e. the promise or offering to a person of an advantage in order that the latter abuses his or her influence, does not trigger any liability. Guinea is not the only country in which active influence trading is not outlawed. As summarized by Mr Scherer:²⁷⁵

"In most countries, they describe a situation where a private person, independent of local decisionmakers, sells his influence, real or imagined, to a principal. Many countries do not ban contracts with such lobbyists, influence peddlers or 'agents d'influence' as long as no money or other advantage flows directly or indirectly to a public official. In fact, it stands to reason that influence is the main stock in trade of any agent. Only a foolish principal would retain an agent without influence."

296. Under Guinean criminal law, legal persons can only be held liable for criminal offences if that is explicitly provided for in the Guinean Criminal Code. Article 411 of the Guinean Criminal Code is such a provision, providing explicitly for the criminal liability of legal persons for offences related to drug trafficking. Similar wording is missing in the provisions sanctioning corruption and influence trading. In other words, under Guinean law, legal persons such as BSGR cannot commit these offences.²⁷⁶

²⁷⁵ M. Scherer, Circumstantial Evidence in corruption cases before international arbitral tribunals, in *International Arbitration Law Review*, Ed 29, 2002, p. 2, (Exhibit RL-0048).

²⁷⁶ See Articles 382, 399 and 405 of the Penal Code of Guinea.

297. Whereas it is true that Article 26 of the UN Convention Against Corruption provides that "*each state party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention*", the reality is that Guinea has not adopted any measures to establish the criminal liability of legal persons for any of the three offences related to corruption and influence trading.

3.3 Corruption under Guinean civil and or administrative law

298. Guinea purports in para. 737 that "*fraud*" would be generally defined as "*an act of bad faith, of dishonesty, committed in order to prejudice rights that one should respect*". Guinea continues that the "*fact for a person of buying the public authority or the influence of a third party on the public authority to obtain a right to which that person was not entitled to constitutes fraud*".

299. Guinea does not cite any legal authority, be it under Guinean law or French law that supports this gratuitous statement. More importantly, however, Guinea does not establish that BSGR has bought a public authority or the influence of a third party on a public authority to obtain a right to which BSGR was not entitled.

300. BSGR, on the contrary, has established here-above that it has procured its mining rights absolutely lawfully. BSGR was thus entitled to obtain the rights that it obtained. In addition, in Annex A, BSGR will establish that it did not buy a public official, nor a third party with influence on a public official. Guinea's desperate attempt to rely on French civil and administrative law must therefore fail.

3.4 Proof of corruption

3.4.1 Burden of proof

301. Although it has been established that Guinean law applies to the matter at hand, Guinea fails to establish what the burden of proof is under Guinean law, let alone that it has established that it has met that burden. For that reason alone its case must fail.

302. In the unlikely scenario that the Tribunal would be minded to apply international law to the issue of the burden of proof, Guinea purports that under international law it is an established legal principle that each party has the burden of proving the facts upon which it relies (the *actori incumbat probatio* maxim).²⁷⁷ BSGR agrees. For example, in *Rompetrol Group N.V. v. Romania* the Tribunal determined that:²⁷⁸

"[the Tribunal] can safely rest, so far as the burden of proof is concerned, on the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence [...]. A claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration. The respondent does not in that sense bear any 'burden of proof' of its own"

303. Also in *Metal-Tech Ltd v. Republic of Uzbekistan* the Tribunal determined that "*the principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals.*"²⁷⁹

304. However, in paras. 746 and 747 of its Counter-Memorial, Guinea goes a step further and purports that once a party has established the facts on which it relies *on a prima facie basis*, the burden of proof would shift to the other party so that the latter would then have the burden of disproving the facts alleged by the first party. Guinea is wrong.

305. Several international arbitration tribunals have confirmed that the burden of proof cannot not be shifted, even in corruption cases:

²⁷⁷ CMRG, para. 745.

²⁷⁸ *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 179 (Exhibit CL-0038).

²⁷⁹ *Metal-Tech Ltd v. Republic of Uzbekistan* ICSID Case No. ARB/10/3, Award dated 4 October 2013, para. 237 (Exhibit RL-0021).

- (i) In *Rompetrol v. Romania*, the Tribunal determined that “[it] is not enamoured of arguments setting out to show that a burden of proof can under certain circumstances shift from the party that originally bore it to the other party, and then perhaps in appropriate circumstances shift back again to the original party. To the mind of the Tribunal, arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence”²⁸⁰
- (ii) In *Siag v Egypt*, the Tribunal held that “the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards”²⁸¹;
- (iii) In *Oostergetel v The Slovak Republic* the Tribunal ruled that “international arbitration is not an inquisitorial system where the Tribunal establishes the facts for a denouncing party, nor a system where it is sufficient to make a prima facie case relying on the opponent to rebut that case.”²⁸²; and
- (iv) In *Liman Caspian Oil v Kazakhstan* the Tribunal acknowledged that “it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption.... It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption.”²⁸³

²⁸⁰ ICSID Case No. ARB/06/3, Award dated 29 April 2013, para 178 (Exhibit CL-0038).

²⁸¹ ICSID Case No. ARB/05/15, Award dated 1 June 2009, para 316-17 (Exhibit CL-0026).

²⁸² *Oostergetel v The Slovak Republic*, UNCITRAL Case, Award dated 23 April 2012, para. 148 (Exhibit CL-0039)

²⁸³ *Liman Caspian Oil v Kazakhstan*, ICSID Case No. ARB/07/14, Award dated 22 June 2010, paras. 422-424 (Exhibit CL-0040).

306. Whereas BSGR strongly disagrees that Guinea would have established the existence of corruption on a *prima facie* basis, Guinea's suggestion to shift the burden on BSGR is fundamentally wrong and contrary to evidentiary legal principles. The rule that a party is required to prove the facts upon which it relies in support of its case has been described as a principle of transnational public policy. The idea of shifting the burden of proof to BSGR is extraordinary, especially, after BSGR has on its part fully met its burden of production of documents by disclosing thousands of documents in response to document production requests both in the LCIA proceedings and in this arbitration. The fact that after such extensive document production exercise Guinea submits that all it needs is to make a *prima facie* case of its corruption allegation is telling. It is because the facts as they are fail to establish what is required of a corruption claim. Put simply – Guinea cannot prove corruption because BSGR did not engage in any corrupt activity.
307. Moreover, even if the Tribunal were to accept the flawed suggestion that a party alleging corruption may satisfy its burden of proof through *prima facie* evidence, then the reversal of the burden of proof should be accepted only where the other party has control of the relevant evidence and failed to produce it to respond to the allegations against it. This is certainly not the case here. The party who should have control of the relevant evidence to prove the alleged corruption is Guinea. It should do so by producing Mamadie Touré as a witness. However, Guinea chose not to do so, no doubt because Mamadie Touré's word is totally unreliable. Likewise, Guinea chose not to produce any other witnesses to attest Mamadie Touré's alleged receipt of illicit payments.
308. Guinea produces only one legal authority in support of its argument to shift the burden of proof once the *prima* evidence has been offered.²⁸⁴ This position is however contradicted by the above-mention case law and not shared by other legal commentators such as the

²⁸⁴

Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, Transnational Dispute Management vol. 3, 2013, para. 62 and 66 (Exhibit RL-0043) ("**So we come to my second proposition:** *plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation [...] once a certain prima facie threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on that issue*").

President of the ICC Court of Arbitration who is of the view that "*a reversal of the burden of proof does not seem to be acceptable or compatible with the right to a fair trial*".²⁸⁵

3.4.2 Standard of Proof

309. Corruption is a very serious offence. Whether referred to in a criminal or in a civil law context, the seriousness of the offence requires the application of a heightened standard of proof, which is not only accepted but widely applied by international arbitral tribunals (see below).
310. Guinea is thus wrong to suggest that this raised standard of proof would not be justified²⁸⁶ and that either (i) no standard of proof should apply to corruption claims or (ii) if the Tribunal decides to apply a standard of proof it should be lowered.²⁸⁷
311. Guinea submits that because this Tribunal is composed of "*professionel du droit*",²⁸⁸ it is not required to apply any standard of proof. This is nonsensical. Guinea's suggestion that the standard of proof is not intended to be applied by tribunals composed of legal professionals but only by laymen is contrary to basic evidential and due process principles. While the Arbitral Tribunal is "*the judge of the admissibility of any evidence adduced and of its probative value*",²⁸⁹ it is not free to ignore rules of evidence. A Tribunal that does so breaches its duty to decide the dispute according to the rules and principles applicable to the dispute. Accordingly, this Tribunal cannot decide whether BSGR engaged in corrupt activities without regard to the applicable threshold on the standard of proof, whether it is under Guinean or international law. Ignoring any standard of proof would not only be contrary to the applicable rules of evidence, but more importantly, it would be contrary to fundamental principles of due process.

²⁸⁵ Alexis Moure, "*Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*," *Arbitration International* 22 (2006) paras. 95, 103 (Exhibit CL-0041).

²⁸⁶ CMRG, para 742.

²⁸⁷ *Ibid.*

²⁸⁸ CMRG, paras 750-751

²⁸⁹ ICSID Arbitration Rules, article 34

312. Guinea submits that if the Tribunal does decide to apply a standard of proof to Guinea's corruption allegations, then it should not apply the criminal standard such as "*beyond reasonable doubt*"²⁹⁰ or a superior civil standard of "*clear and convincing evidence*"²⁹¹, because an application of a higher standard than "*balance of probabilities*" would be unjustified.²⁹² Guinea is wrong to suggest that a lower standard of proof would suffice as an evidentiary threshold for allegations of such seriousness.
313. As stated above, corruption is a serious allegation and the standard of proving it should be accordingly high: "*the graver the charge the more confidence must there be in the evidence relied on.*"²⁹³ Furthermore, a higher standard of proof is crucial when the party that alleges corruption is itself engaged in corruption, as Scherer states: "*[t]he question as to whether it is appropriate in corruption matters to apply a higher standard of proof can be left open. There is no reason to relax the standard of proof, especially if the party that accuses the other of corruption was itself a party to the corruption contract.*"²⁹⁴ By their very nature, Guinea's allegations suggest that its officials and representatives were parties to the alleged corruption scheme. Therefore, it is not viable to argue that a lower standard of proof should apply.
314. Guinea cannot have it both ways. It cannot make serious allegations against BSGR and at the same time claim that there should either be a lower or no standard of proof to prove those allegations.
315. Guinea alleges "corruption" in this context, but fails to identify whether it relies on a criminal and/or civil law concept. In any case and whichever law is applicable, the offence is serious enough to require a high standard of proof to be applied by this Tribunal. This is confirmed by international and local laws, which will be established below.

²⁹⁰ CMRG, para 755.

²⁹¹ CMRG, para 756.

²⁹² CMRG, paras. 754-755

²⁹³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 29 April 2013, para. 182 (citing Separate Opinion of Judge Higgins in the Oil Platforms Case (*Islamic Republic of Iran v. United States of America*) (Exhibit CL-0038).

²⁹⁴ Scherer, *Circumstantial Evidence in corruption cases before international arbitral tribunals*, *International Arbitration Law Review*, Issue 2, London 2002, Exhibit RL-0048.

a. *Standard of Proof in International Arbitral practice*

316. It is well established that in order to prove a claim or defence, a party has to fulfil two duties: (i) proving the facts upon which it relies to assert its claim or defence and (ii) reach the level of persuasion required to prove its claim or defence.²⁹⁵ According to Guinea, in this case the first duty is simply fulfilled by adducing prima facie evidence and the second duty is non-existent.
317. Guinea relies on *World Duty Free v. Kenya* in support of its suggestion that the Tribunal should establish corruption without applying any standard of proof.²⁹⁶ Guinea's submission is quite obviously misleading.²⁹⁷ In *World Duty Free*, the Tribunal relied on explicit evidence from Mr Nassir Ibrahim Ali, a CEO and shareholder of World Duty Free that he personally handed over USD 2 million in a suitcase to the then Kenyan president Daniel Arap Moi.²⁹⁸ The evidence could not have been clearer and more convincing. Indeed, in those circumstances the Tribunal did not even need to apply any standard of proof on the payment of substantial bribe to a public official. This is in stark contrast to the case at hand; there is no clear and convincing evidence that would establish the payment of bribes by BSGR to any Guinean public officials. None of Guinea's witnesses or any of its submitted evidence demonstrates clearly or convincingly that BSGR has directly paid any bribes to Guinean public officials.
318. Contrary to Guinea's submission, there is a general consensus among international arbitration tribunals and in legal doctrine that a higher standard of proof should be applied to allegations of corruption.²⁹⁹ The dominant trend in International Arbitration therefore is to require a "high" standard of proof.³⁰⁰

²⁹⁵ *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 29 April 2013 para. 178 (Exhibit CL-0038).

²⁹⁶ Exhibit RL-19.

²⁹⁷ *Ibid.*, para 130 et seq.

²⁹⁸ *Ibid.*, para 166.

²⁹⁹ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009, para. 221(Exhibit CL-0025); M. Hwang, *Corruption in arbitration – law and reality*, Asian International Arbitration

319. This is confirmed by numerous investment arbitration tribunals which have applied a heightened standard of proof:

- (i) In *African Holding v the Republic of Congo*, the Tribunal held that it was “*disposé à considérer toute pratique de corruption comme une affaire très grave, mais exigerait une preuve irréfutable de cette pratique, telle que celles qui résulteraient de poursuites criminelles dans les pays où la corruption constitue une infraction pénale*”,³⁰¹
- (ii) In *Saba Fakes v the Republic of Turkey* the Tribunal held that “*the burden of proof of any allegations of impropriety is particularly heavy.*”³⁰²
- (iii) in *Fraport v Philippines* the Tribunal determined that “*in view of the consequences of corruption on the investor’s ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred.*”³⁰³
- (iv) In *TSA Spectrum v Argentine Republic* the Tribunal ruled that “*an accusation of bribery requires the most rigorous level of proof*”³⁰⁴.

Journal; Kluwer Law International 2012, p 24, Mr Hwang refers to a survey of arbitral case law in corruption in which it was found that in just one out of 25 cases a "low" standard of proof was applied, whereas in 14 cases a high standard of proof applied described as "certainty", "clear proof", "clear and convincing evidence" and "conclusive evidence"; (Exhibit CL-0042)

³⁰⁰ Mohamed Abdel Raouf, *How Should International Arbitrators Tackle Corruption Issues?*, ICSID Review (2009) 116, at p 123, (Exhibit CL-0043).

³⁰¹ *African Holding Company of America, Inc et Societe Africaine de Construction au Congo S.A.R.L. v. La Republique Democratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les declinatoires de competence et la recevabilite dated 29 July 2008, para 52 (Exhibit CL-0044).

³⁰² *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award dated 14 July 2010, para 131 (Exhibit CL-0045).

³⁰³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award dated 10 December 2014, para. 479 (Exhibit CL-0046).

³⁰⁴ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008, para. 172. (Exhibit CL-0047).

- (v) In *Himpurna vs PT. (Persero) Perusahaan Listrik Negara* the Tribunal said "[s]uch grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumors or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat."³⁰⁵
- (vi) In *SPP v. Egypt* the Tribunal held "the allegations concerning irregular contacts and connections are not supported by the evidence in the record and are based on suppositions, guilt by association and what [Egypt] describes as 'commencement de preuve'".³⁰⁶
- (vii) In *EDF v Romania* the Tribunal held that "the seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence."³⁰⁷ and
- (viii) In *Siag v Egypt* the Tribunal stated that "the standard suggested by the Claimants was the American standard of 'clear and convincing evidence', that being somewhere between the traditional civil standard of 'preponderance of evidence' (otherwise known as the balance of probabilities)" and the criminal standard of 'beyond reasonable doubt'. The Tribunal accepts the Claimants' submission. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof."³⁰⁸

³⁰⁵ *Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia)*, Award dated 4 May 1999, paras. 219 and 220, published Yearbook Commercial Arbitration 2000 - Volume XXV, Volume XXV (Kluwer Law International 2000) pp. 11 – 432 (Exhibit CL-0048).

³⁰⁶ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, para. 132 (Exhibit CL-0049).

³⁰⁷ Exhibit CL-0024, para 221.

³⁰⁸ Exhibit CL-0026, para. 326.

320. Similarly, arbitral tribunals in commercial arbitrations have routinely applied a heightened standard of proof to corruption claims. For example, in *Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines* the tribunal held that “*fraud in civil cases must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance, and cannot be justified by a mere speculation. This is because fraud is never to be taken lightly*”.³⁰⁹
321. In a survey conducted on international arbitration case law on bribery, a lower standard of proof was only applied in one out of twenty five awards was applied. A high standard of proof, on the contrary, was used in fourteen awards. The heightened standard of proof was described as “*clear and convincing evidence*”, “*clear proof*”, and “*conclusive evidence*”,³¹⁰ or as one author suggested the standard “*appears to approximate the 'beyond reasonable doubt' in criminal law*.”³¹¹
322. Commentators are also of the opinion that tribunals should apply a heightened standard of proof. For example, Gary Born writes:
- “In some national legal systems, certain allegations require more convincing evidence than others. For example, allegations of wrongdoing, particularly serious wrongdoing such as criminal acts, fraud, corruption and the like, require more convincing evidence than other facts.”*³¹²
323. O’Malley, in the leading treatise on evidence in international arbitrations, says:³¹³

³⁰⁹ ICC Case No. 6401, *Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*, Award of December 19, 1991, in Mealey's Int. Arb. Report, January 1992.

³¹⁰ A. Crivellaro, *Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*, in *Arbitration, Money Laundering, Corruption and Fraud, Dossiers- ICC Institute of World Business Law* (September 2003) 109 in Kluwer. (Exhibit CL-0050).

³¹¹ M. Hwang, *Corruption in arbitration – law and reality*, *Asian International Arbitration Journal*; Kluwer Law International 2012, p 24 (Exhibit CL-0042).

³¹² Born, *International Commercial Arbitration*, Chapter 15 p 2314 (Exhibit CL-0051).

³¹³ Exhibit CL-005.

“Other claims, such as those brought on the basis of fraud or forgery, will attract a higher standard of proof which is articulated as requiring evidence that is clear and convincing or higher.” The reason for this practice is to “discourag[e] baseless allegations of misconduct.”

324. In Inan Uluc's paper on *Corruption in International Arbitration*, the author demonstrates that the *"the heightened standard of proof...is applicable when a rigorous standard of proof is needed to tackle the "more astonishing" party allegations. Thus, corruption, particularly bribery, is deemed as conduct contra bonos mores that requires the application of the heightened standard of proof."*³¹⁴
325. In response to BSGR's reliance on the heightened standard of proof applied in *EDF v Romania* and *Siag & Vecchi*, Guinea submits that both tribunals based their decisions on an incorrect assumption that the serious nature of corruption would make any allegation of corruption less probable and justified a differential treatment.³¹⁵ Guinea's submission is misleading and incorrect. Both tribunals applied a heightened standard of proof because of the seriousness of the allegation and not its unlikely nature that requires a heightened standard of proof. Further, Guinea's reliance on a Decision on Jurisdiction in *Tokios Tokeles* is erroneous and not relevant to this issue.³¹⁶ While the Award in *Tokios Tokeles* does indeed mention the Claimant bearing the *"burden of proving its claims"*, this was in relation to breaches of the relevant treaty, not corruption committed by the parties. Further, this supports BSGR's argument that the higher standard of proof should apply in that the Claimant in that case didn't meet the necessary threshold to uphold their claims.³¹⁷ In this case, it is clear that Guinea's corruption allegations against BSGR are serious, and therefore a heightened standard of proof must be applied.
326. Guinea's reliance on *Rompetrol* does not assist either. While, the *Rompetrol* Tribunal did not apply a heightened standard of proof it also did not apply the *"balance of probabilities"*

³¹⁴ I. Uluc, *Corruption in International Arbitration*, Thesis dated 13 April 2016 (Exhibit CL-0052).

³¹⁵ CMRG, para. 757.

³¹⁶ Exhibit RL-40.

³¹⁷ *Tokios Tekeles v. Ukraine*, ICSID Case No. ARB/02/18, Award dated 26 June 2007 (Exhibit CL-0053).

standard, but held that while applying the standard it “*will where necessary adopt a more nuanced approach and will decide in each discrete instance whether an allegation of seriously wrongful conduct by a Romanian state official at either the administrative or policymaking level has been proved on the basis of the entire body of direct and indirect evidence before it.*”³¹⁸

b. *Standard of Proof under English law*

327. Guinea refers to English law as example that the tribunal should apply the balance of probability test³¹⁹, but ignores that several legal authorities and case law confirm that in practice a heightened standard of proof is applied in fraud cases.

328. Clerk & Lindsell says that (emphasis added):³²⁰

*“Nevertheless, even if the standard is the civil standard, in practice more convincing evidence will often be required to establish fraud than other types of allegation. The reason is the straightforward one given by Lord Nicholls [in *Re H (Minors)*³²¹]: ‘When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence...”.*

329. In *Smith New Court Securities Ltd v Citibank SA*, Lord Steyn referred to (emphasis added):³²²

“the undisputed proposition that while as a matter of law fraud only has to be proved to the civil standard, proof to that standard must necessarily take into account the consideration that the more serious the allegation is, the greater the proof is needed to persuade a court that it can be satisfied that the allegation is established. In other words, the very gravity of an allegation of

³¹⁸ Exhibit CL-0038, para. 183.

³¹⁹ CMRG, para 760.

³²⁰ *Clerk & Lindsell on Torts* (21st edn, 2015), at [18-04]: RL-37.

³²¹ *Re H (Minors)* [1996] AC 563, at 586-87: RL-121.

³²² *Smith New Court Securities Ltd v Citibank SA* [1997] AC 254, at 274: (Exhibit RL-126).

fraud is a circumstance which has to be weighed in the scale in deciding as to the balance of probabilities.”

330. In *Bonham-Carter v SITU Ventures Ltd*, Asplin J said:³²³

“the standard of proof to be applied is the normal civil standard of the balance of probabilities but that the seriousness of an allegation such as fraud may be relevant because the court is entitled to have regard to the inherent probability or improbability of any allegation. The court is therefore, entitled to have regard to the fact that in the main, people do not engage in acts of fraud.”

331. In *Jafari-Fini v Skillglass Ltd (in administration)*, the Court of Appeal said (emphasis added):³²⁴

“Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct.”

332. In *Jugnauth v Ringadoo*, the Privy Council said (emphasis added):³²⁵

“In practice ... as a matter of common sense rather than law, the court is unlikely to be satisfied on the balance of probabilities that there has been bribery, unless there is cogent evidence to that effect.”

3.4.3 Causal link

333. Further, tribunals require the existence of a causal link between the act of corruption and the procurement of the investment. ICSID tribunals have repeatedly considered the evidence to assess whether the investment agreement was concluded as a direct result of the act of corruption.

334. In *World Duty v Kenya*, the tribunal "*consider[ed] first whether a bribe has been paid by Mr. Ali to President Moi in the present case, and whether the 1989 Agreement has been procured as a result of such a payment. If so, the Tribunal will have to examine the*

³²³ *Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589, at [132]: (Exhibit RL-14).

³²⁴ *Jafari-Fini v Skillglass Ltd (In Administration)* [2007] EWCA Civ 261, at [40]: (Exhibit RL-87).

³²⁵ *Jugnauth v Ringadoo* [2008] UKPC 50, at [19]: (Exhibit RL-91).

consequences of the bribe on the enforceability and the validity of the Agreement, both under ordre public international and the applicable laws."³²⁶

335. In *Niko Resources v BAPEX and Petrobangla*, the tribunal found that:³²⁷

"the question of causation must be addressed... there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link... neither at that occasion nor at any time thereafter did the Respondents declare the JVA, the GSPA or the arbitration clauses contained in them as avoided. To the knowledge of this Tribunal, the Respondents continue to enjoy the benefit of these agreements... the Tribunal is of the view that, in the absence of a clear declaration by the Respondents and given that there is no illegality in the content of the Agreements or in their performance, it may not treat the Agreements as avoided or invalid"

336. It is BSGR's primary position that it has not corrupted President Conté, alleged family members of President Conté or any other Guinean official for that matter. ON this basis alone, Guinea's case should fail. However, in subsidiary order and in the unlikely hypothesis that the Tribunal would determine that BSGR did commit acts of corruption (which is denied), it is BSGR's position that there is no causal link between the acts of corruption and the procurement of its mining rights.

337. BSGR obtained its mining rights in Blocks 1 and 2 because (i) these rights were first lawfully withdrawn from Rio Tinto; and (ii) BSGR lawfully applied for and obtained these right, given also that there were only 2 applicants and BSGR had objectively the much better file. Whatever bribes BSGR may have paid or promises may have made (and for the avoidance of doubt it is denied that it paid such bribes or made such promises), this had no impact on the award and thus procurement of the mining rights.

³²⁶ *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7, Award dated 4 October 2006, para. 129 (Exhibit RL-19).

³²⁷ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, paras. 453, 455, 462 and 464 (Exhibit RL-20).

338. The same is true for the Zogota Base Convention and Mining Concession. these rights were first lawfully withdrawn from Rio Tinto; and (ii) BSGR lawfully applied for and obtained these right, given also that there were only 2 applicants and BSGR had objectively the much better file. Whatever bribes BSGR may have paid or promises may have made (and for the avoidance of doubt it is denied that it paid such bribes or made such promises), this had no impact on the award and thus procurement of the mining rights.

3.5 Abuse of power on the part of Guinea

339. Guinea completely lacks good faith and has abused its powers as the host State. In *LG&E v. Argetina*, the arbitral tribunal defined this doctrine as:³²⁸

"It is apparent from the Bilateral Treaty that Argentina and the United States wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments. Certainly a State that fails to base its actions on reasoned judgment, and uses abusive arguments instead, would not "stimulate the flow of private capital."

340. The tribunal in *EDF v. Romania* further supplemented this definition and stated that an abuse of power contains the following elements:

"a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

³²⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, Decision on Liability, 3 October 2006, para. 158 (Exhibit CL-0058).

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure."³²⁹

341. Further, in *AES v. Hungary*, the tribunal identified the characteristic elements of an abusive act by the host State:

"10.3.7 There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.

10.3.8 A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.

10.3.9 Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."³³⁰

342. The standard in this test has certainly been met in the present circumstances. It is overwhelmingly clear that Guinea certainly did implement measures that inflicted damage on BSGR without providing any apparent legitimate purpose and was based on the discretion of President Condé. The policies implemented by Guinea - such as the re-writing of the Mining Code, the unlawful request of USD 1.25 billion following the transaction between Vale and BSGR, and most importantly the withdrawal of BSGR's mining rights after they have been awarded in a lawful manner - have absolutely no logical explanation and there is no correlation between its objective and the measures taken to implement it.

IV THE MINING RIGHTS WERE NOT OBTAINED BY CORRUPTION

³²⁹ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 303 (Exhibit CL-0025).

³³⁰ *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Final Award, 23 September 2010, paras. 10.37-10.3.9 (Exhibit CL-0059).

4.1 BSGR did not obtain the mining rights by corruption

343. Guinea purports that BSGR's scheme of corruption would simply be astonishing. It further purports that BSGR executed this scheme through three key people: (i) Mamadie Touré; (ii) Frederic Cilins and/or his company Pentler and (iii) President Conté. Unfortunately for Guinea the evidence tells a very different story.

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[REDACTED] [REDACTED] [REDACTED]
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[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]

³³¹ Swiss Statement dated 9 July 2015 (Exhibit C-0076).
³³² Guinean Statement dated 8 May 2013 (Exhibit C-0011).
³³³ Swiss Statement dated 9 July 2015 (Exhibit C-0006).

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345. There is not one witness that has testified either in these proceedings, the Swiss criminal proceedings or the Guinean criminal proceedings that BSGR has paid bribes or that a government official has received bribes from BSGR, directly or indirectly. For reasons that will be set out further below in the Evidentiary section, Mamadie Touré does not qualify as a witness and her story cannot be relied upon in any event.

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[REDACTED] [PROTECTED] [REDACTED]
[REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]

341 [PROTECTED]
342 [REDACTED]
343 [REDACTED]
344 [REDACTED]
345 [REDACTED]

RWS-4 (Kanté), para. 24.

[PROTECTED]

[REDACTED]

[REDACTED]

[PROTECTED]

[REDACTED]

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[REDACTED]

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347. [PROTECTED]

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[PROTECTED]

Souaré does not exclude that he may have met Mr Cilins but he is not sure and admits that his memory is not clear.³⁶⁵

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[REDACTED]

[REDACTED] [REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

³⁶⁵ RSW-2 (Souaré), para. 9.

³⁶⁶ [PROTECTED]
³⁶⁷ [REDACTED]

[PROTECTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

350. This overview should suffice to convince the Tribunal to reject Guinea's allegations of corruption on a general level. In what follows, BSGR will zoom in on each of the three mining rights individually and highlight the evidence that militates against any unlawful action by BSGR and its representatives.

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4.2 **BSGR did not procure Blocks 1 and 2 by corruption**

4.2.1 Blocks 1 and 2 were lawfully withdrawn from Rio Tinto

351. The factual narrative of how Rio Tinto lost its mining rights over Blocks 1 and 2 has been set out in paras. 38 to 86. This narrative, compiled by reference to the documentary evidence, belies any suggestion that BSGR engaged in corruption to have these rights withdrawn from Rio Tinto.
352. On 30 March 2006, President Conté granted Rio Tinto a mining concession over Blocks 1-4 for a period of 25 years, tacitly renewable for another 25 years and subsequently for periods of 10 years.³⁷³ However, if President Conté had been bribed by BSGR or if Mamadie Touré had been bribed by BSGR to put pressure on President Conté to give Blocks 1 and 2 to BSGR, the last thing President Conté would have done was to lock these Blocks up for 50 years by approving Rio Tinto's mining concession. This is all the more true if Guinea's story is to be believed that Mamadie Touré (i) was promised millions in cash and a 5% shareholding in return for Blocks 1 and 2 and (ii) had a strong influence over President Conté. By granting Rio Tinto a mining concession in Blocks 1 and 2, President Conté in fact killed Mamadie Touré's alleged right to millions of dollars.
353. The decree awarding Rio Tinto its mining concession was not revoked until 28 July 2008, well over two years after BSGR (through Pentler) had allegedly entered into the commission contracts with Mamadie Touré and even then Blocks 1 and 2 did not become available to BSGR. That significant lapse of time hardly suggests a dedicated lobbying campaign by or on behalf of BSGR – quite the opposite.
354. Further, the documentary records shows that Rio Tinto's mining rights in Blocks 1 to 4 had been granted in an unlawful manner to start with and that President Conté sought legal advice *before* suspending Rio Tinto's concession. Legal and technical advice sought *after* the

³⁷³ Exhibit R-157, Article 2 together with Exhibit R-156, Article 4.2.

suspension confirmed the Government's right to review Rio Tinto's rights. The documentary evidence further documents that the Government was generally frustrated about Rio Tinto's freezing of the Simandou mining deposits and that the review of Rio Tinto's rights was part of a larger exercise which started already in 2007 of reviewing all the mining titles and the mining companies' compliance with their mining obligations.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(ii) In the present proceedings, Minister Souaré testifies that "*malheureusement pour Rio Tinto, je suis revenue aux affaires en 2008 et j'ai pu constater qu'ils n'avaient pas tenu tous les engagements qu'ils avaient formulés quand ils ont obtenu leur concession en 2006 alors que j'étais ministre des mines*"³⁷⁵;

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[PROTECTED]

³⁷⁵

RWS-2, para. 44.

(iii) In an interview with Guinean news media Minister Souare stated when Minister Nabé withdraw Blocks 1 and 2 from Rio Tinto in December 2008, he was "*acting in full responsibility and loyalty to the Republic*";³⁷⁶

(iv) Minister Kanté says in the present proceedings that "*il était communément admis que Rio Tinto n'avait pas honoré certains engagements sur ses titres. En effet, Rio Tinto était en retard d'une rétrocession d'une partie de son perimetre et il était frustrant de constater que l'étude de faisabilité n'avait toujours pas été présenté*"³⁷⁷ and acknowledges "*le fait de pouvoir enlever les blocks 1 et 2 à Rio Tinto*"³⁷⁸

(v) [PROTECTED]
[REDACTED]
[REDACTED]

(vi) [PROTECTED]
[REDACTED]

[REDACTED]

[REDACTED]

376 Exhibit C-0248.
377 RWS-4, para. 39.
378 RWS-4, para. 41.
379 [PROTECTED]
380 See BSGR's Memorial, para. 64.

[PROTECTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4.2.2 Blocks 1 and 2 were lawfully awarded to BSGR

356. The factual narrative of BSGR was awarded its exploration permits in Blocks 1 and 2 has been set out in paras. 87-150. This narrative, compiled by reference to the documentary evidence, belies any suggestion that BSGR engaged in corruption to obtain these rights.
357. Even on Guinea's case, BSGR did not apply for exploration permits over Blocks 1 and 2 until July 2007. If BSGR had been intent on obtaining these rights from February 2006, when it allegedly sought Mamadie Touré's assistance, there can be no good reason why neither BSGR nor Mamadie Touré did anything about it for almost 18 months.
358. Moreover, following the revocation of Rio Tinto's mining concession it took a further four months for Rio Tinto's exploration permits over Blocks 1 and 2 to be revoked because of the Government's subsequent actions. First, it instigated a review into the legality of the withdrawal of Rio Tinto's mining concession. Unsurprisingly, that review concluded that the withdrawal was legitimate. Second, the Government chose to negotiate with Rio Tinto as to the area it would retrocede. It is difficult to see why the Government would have undertaken this process of negotiation, had it been under pressure to issue these rights to BSGR; rights.
359. In addition, in Minister Nabe's own words, it was from sure that Blocks 1 and 2 would be granted to BSGR. There were other candidates as well. In an internal memo dated 10 November 2008 to Prime Minister Souaré and Minister of Justice, Minister Nabé wrote (emphasis added):

"Il n'est pas envisageable à ce stade d'octroyer des permis à quelque société que ce soit car il faudrait que la zone rétrocédée sur laquelle doit porter le permis soit identifiée. C'est seulement après cette étape que la possibilité d'octroyer des permis à d'autres partenaires dans la mêmes zone sera envisagée."

360. The grant of exploration permits over Blocks 1 and 2 to BSGR was far from automatic. On the contrary, BSGR's requests were either ignored or rebuffed by the Ministry of Mines. Even when it was clear that some of Rio Tinto's exploration rights were going to become available, the Government did not simply hand the rights over to BSGR. Rather, it sought commitments and assurances from BSGR in order to ensure that Guinea was getting a good deal. Thus, it was not until BSGR had (1) submitted detailed results of its exploration work

on the Simandou mountain; (2) provided evidence of its technical and financial abilities to invest in and develop the required railway and port infrastructure; (3) committed to pay a USD 20 million fee and to pay for additional development works in the country in the event it discovered a viable deposit; and (4) taken responsibility for the financial consequences of taking over Rio Tinto's permits that the Government was content to grant them.³⁸¹ Again, this is inconsistent with Guinea's case that the Government was under pressure from the Presidency to grant Block 1 and 2 to BSGR.

361. Of course, it was in Guinea's interests to re-allocate Blocks 1 and 2 quickly. Guinea's paramount concern was to develop its mining assets and avoid a freeze upon resources. This could only be achieved if a company had permission to conduct exploration work. The documentary record establishes that there were two only companies who had applied for the rights in the first place, BSGR and Africanda. The big mining companies, such as Vale and BHP Billiton, did not submit an application. BSGR had an advantage over Africanada because it met the Government's financial and technical conditions, it was already active in Simandou and had gained the trust of the Government by demonstrating its technical and financial capability to undertake to and complete exploration work – it had discovered Zogota.

362. [PROTECTED] [REDACTED]
[REDACTED]

³⁸¹ Memo dated 10 November 2008 (Exhibit C-0179).
³⁸² [PROTECTED] [REDACTED]

[PROTECTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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363. Finally, it is most revealing that Guinea has failed to adduce a single witness statement from the members of the Council of Ministers (save for the self-serving statements of Mr Nabé and Minister Souaré). It was the Council of Ministers that both revoked Rio Tinto's exploration permits over Blocks 1 and 2 and awarded them to BSGR. The Council of Ministers is a body comprising over a dozen Ministers from numerous different departments

383 [PROTECTED]
384 [REDACTED]
385 [REDACTED]

within Government. If the Council members felt that they were under pressure from the Presidency to grant Blocks 1 and 2 to BSGR, and had no choice in the matter, one would expect Guinea to have adduced numerous witness statements to that effect. The absence of such evidence speaks volumes.

4.2.3 Guinea's witness evidence does not establish undue interference

364. Throughout its Counter-Memorial Guinea is trying to paint a picture of a President Conté who frequently intervened and directed his Ministers to take specific decisions in favour of BSGR. Logically, this is of course the story that Guinea that needs to tell if it wants to give any credibility to the allegation that he was under pressure from Mamadie Touré and that the latter was bribed by BSGR and or Pentler. However, this story is not supported by Guinea's own evidence.

365. On the contrary, most of this evidence demonstrates that President Conté was just genuinely concerned about the mining situation in his country. Although he was indeed frustrated about the general lack of progress and actual commercialisation of the country's mining resources, he did not dictate his Ministers not take certain decisions, let alone decisions in favour of BSGR.

366. [PROTECTED]

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[REDACTED]

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367. [PROTECTED]

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[REDACTED]

[REDACTED]

[REDACTED]

387 *Ibid.*

[PROTECTED]

[REDACTED]

[REDACTED]

[REDACTED]

368. [PROTECTED]

[REDACTED]

[REDACTED]

369. In the present proceedings, Minister of Mines Nabé has testified as follows in relation to an alleged meeting with the President in September 2008:³⁸⁹

"[...] Le Président était impatient. Il s'est adressé au Premier Ministre et à moi à propos de Rio Tinto en disant : « S'ils n'acceptent pas, il faut les chasser ». Il parlait de la rétrocession d'une partie du périmètre accordé à Rio Tinto sur Simandou. Le Président a dit qu'il fallait faire vite [...].

Je me souviens que le Premier ministre Ahmed Tidiane Souaré a objecté que, pour faire cela, il fallait suivre une procédure spécifique. Or, la question du périmètre accordé à Rio Tinto dans la zone de Simandou et que Rio Tinto devait rétrocéder restait à déterminer. Le Président n'a pas répondu mais avait une mine contrariée".

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[REDACTED] RWS-5, paras 8-10.

370. Two conclusions can be drawn from this last statement. First of all, President Conté did not give instructions as to the granting of rights to BSGR. His inquiries were limited to the retrocession by Rio Tinto. Secondly, apparently President Conté's Ministers had no difficulty to disagree with him and when they did so President Conté vindicated their position.
371. As regards Guinea's other evidence in respect of Blocks 1 and 2, it has not even attempted to weave a consistent story from the evidence of the various Government ministers, because it cannot: their stories simply do not stack up. This is particularly evident from the inconsistent accounts of Mr Kanté (who is one of Guinea's witnesses) and former Prime Minister Lansana Kouyaté (who, tellingly, is not one of Guinea's witnesses).
- (i) Mr Kanté claims that Mr Kouyaté was in cahoots with Mamadie Touré, telling Mr Kanté that *"we have to find a solution to her problem"* and saying to Mamadie Touré, in response to resistance from Mr Kanté, *"see, this is what I was telling you about him"*.³⁹⁰
 - (ii) Mr Kouyaté, however, claims to be incorruptible, having stated publically, *"I dared say no to Conté, I dared say no to his wife Mamady, I dared say no to Beny, who promised me colossal sums of money..."*.³⁹¹
 - (iii) Mr Kanté claims that the revocation of Rio Tinto's rights was a result of its own failings, and a different issue to the award of those rights to BSGR: *"the fact that we could remove Blocks 1 and 2 from Rio Tinto did not give BSGR any rights..."*.³⁹²
 - (iv) Mr Kouyaté, on the other hand, claims that the revocation of Rio Tinto's rights and their award to BSGR were one and the same thing: *"I was dismissed on May 20; on*

³⁹⁰ RWS-4, para. 35-37.

³⁹¹ Guinée Information, *"Ahmed Tidiane Souaré, le dernier premier ministre du Général Lansana Conté répond aux accusations de son prédécesseur Lansana Kouyaté"* (Exhibit C-0248).

³⁹² RWS-4, para. 38-41.

*the 22nd, two days after my departure, they gave lots 3 and 4 of Simandou to Beny, because I refused”.*³⁹³

372. These inconsistencies are easily explained. Both Mr Kouyaté and Mr Kanté want to stay on the right side of President Condé’s government by telling a tale which supports Guinea’s defence in these proceedings. But they also want to keep their own noses clean. So Mr Kanté portrays himself as the honest Minister and Mr Kouyaté as the corrupt PM, while Mr Kouyaté portrays himself as the saint and Mr Souaré as the sinner.³⁹⁴ Both narratives are false.

4.3 The Base Convention was not obtained by corruption

4.3.1 No corruption in the review of BSGR's Feasibility Study

373. Guinea seems to have wilfully ignored the detailed evidence given by Mr Thiam's witness statement regarding the process of negotiation for the Base Convention in late 2009.³⁹⁵ It is clear from that evidence, and from Guinea’s own disclosure, that the Base Convention was the result of BSGR’s own hard work and a fair, arm’s length negotiation with Guinea.

374. After years of exploration work, BSGR submitted its Feasibility Study on the Zogota Project to the Ministry of Mines on 16 December 2009.³⁹⁶

375. Although the Feasibility Study was officially received by Mr Thiam in his capacity as Minister of Mines, he was not responsible for reviewing it. That task was entrusted to a technical department within the Ministry of Mines in accordance with the prescribed procedure.

³⁹³ C-0248, page 3. Of course, Kouyaté’s account is wrong in a number of respects – BSGR was not awarded Rio Tinto’s rights until December 2008, and it was awarded prospecting permits over Blocks 1 and 2, not 3 and 4. Steinmetz’s trip to Guinea in May 2008 was not for the purpose of lobbying for the revocation of Rio Tinto’s rights. He was there to visit BSGR’s operation and does not believe he met with President Conté.

³⁹⁴ And Souaré blames President Conté who, of course, cannot defend himself.

³⁹⁵ CWS-5, paras. 58-72.

³⁹⁶ CWS-5, para. 59.

376. Contrary to Guinea's suggestion, the review of the Feasibility Study did not begin only upon Mr Thiam's creation of the Inter-Ministerial Committee on 1 December 2009 – the technical department of the Ministry of Mines had been reviewing the Feasibility Study for some weeks beforehand.³⁹⁷ Indeed, it was this technical department which, following a detailed review of the Feasibility Study, recommended to Mr Thiam that he set up the Inter-Ministerial Committee to negotiate the terms of a mining convention.³⁹⁸
377. Guinea does not allege that BSGR bribed or otherwise corrupted the members of this technical department (and it is right to make no such allegation). Consequently, Guinea must accept that, on its own case, the technical department considered BSGR's Feasibility Study to have merit and the company itself to be worthy of a mining convention.

4.3.2 BSGR did not bribe the Inter-Ministerial Committee

378. There is no evidence whatsoever that BSGR bribed the Inter-Ministerial Committee in order to obtain the Base Convention. This allegation ought never to have been made.
379. Guinea truly scrapes the barrel by alleging the BSGR's payment of USD 1,000 to each member of the Inter-Ministerial Committee amounts to bribery.
- (i) First, BSGR was open about this payment in its Statement of Case.³⁹⁹ Such openness is at odds with the suggestion that the payment was intended to influence the decision-making of the Committee.⁴⁰⁰
- (ii) Second, the fact that USD 1,000 is around three times the average wage in Guinea is neither here nor there.⁴⁰¹ It is well known that Guinea is a very poor country, but it is

³⁹⁷ *Ibid.*, 59; CWS-3, para. 58; CMRG, para. 373 and 838, where Guinea states that the Feasibility Study was approved and the Base Convention was negotiated in a record time of two weeks (i.e. between 1 December 2009 and 14 December 2009).

³⁹⁸ CWS-5, para. 59.

³⁹⁹ BSGR's Memorial, para. 75; CWS-2, para. 82.

⁴⁰⁰ CMRG, para. 850.

to be expected that senior Government officials such as the Committee members earned considerably more than the average wage.

(iii) Finally, in paras. 151 and 152, BSGR has adduced abundant evidence that such payment was in accordance with standard practice and, what is more, requested by the Guinean authorities themselves. It is remarkable that, out of 20 members of the Inter-Ministerial Committee, Guinea has not served a witness statement from a single one.

380. The fact that the Base Convention was concluded in an efficient manner does not suggest a lack of “*real diligence*”.⁴⁰² In fact, the reason the negotiations were concluded in a matter of weeks is that the Base Convention Committee and BSGR worked hard at them, meeting every day from 9am to 6pm.⁴⁰³

381. The Base Convention Committee challenged BSGR’s Feasibility Study by asking questions. For example, on 4 December 2009 the Committee submitted a list of 13 questions on the Zogota Project. BSGR promptly submitted full responses on 7 December 2009.⁴⁰⁴ The Committee’s tough negotiating stance belies the suggestion that the process was tainted by bribery and corruption.

382. Moreover, it was neither Mr Thiam nor the Base Convention Committee who had the power to approve the signing of the Base Convention. That authority belonged to the Council of Ministers. When a final draft of the Base Convention was presented to the Council of Ministers, it debated the terms and submitted detailed technical and financial questions in Guinea’s favour to the Base Convention Committee and BSGR. These issues were

⁴⁰¹ CMRG, para. 850.

⁴⁰² CMRG, para. 838.

⁴⁰³ CWS-5, para. 60; see also CWS-2, para. 81-83.

⁴⁰⁴ Email from BSGR to Minister Thiam enclosing Technical Committee Answers dated 6 December 2009 (Exhibit C-0251). Guinea has not provided a shred of evidence to support what was “*usual procedure*” regarding the feasibility study process.

discussed, following which the Council of Ministers voted in favour of signing the revised agreement.⁴⁰⁵

383. Again, Guinea (rightly) does not allege that BSGR bribed or otherwise corrupted the members of the Council of Ministers. Consequently, Guinea must accept that, on its own case, the Council of Ministers considered that BSGR had the ability to develop its mining projects and that the Base Convention represented a good deal for Guinea.

384. As regards the Government's decision to grant BSGR an exclusive right to export iron ore through Liberia:

(i) Mr Thiam had decided, prior to commencing negotiations with BSGR, that Guinea's longstanding policy of refusing export through Liberia ought to be amended in order to prevent mining companies from using the cost of exportation through Guinea as an excuse for failing to develop their mining projects;⁴⁰⁶

(ii) Mr Thiam decided that the right to export through Liberia ought to be granted on an exclusive basis in order to ensure that other companies were still incentivised to develop a trans-Guinean railway;⁴⁰⁷

(iii) BSGR was actually Mr Thiam's third choice of company to take on the right to export through Liberia. Negotiations with BHP Billiton had failed and Rio Tinto was not interested;⁴⁰⁸

(iv) BSGR did not receive this exclusive right for nothing. The *quid pro quo* was a commitment by BSGR to build, at its own expense, a passenger railway from Conakry to Kankan, for the benefit of the Guinean people.⁴⁰⁹

⁴⁰⁵ CWS-5, para. 69; see also Amendment A Apporter A LA Convention - BSGR dated 21 December 2009 (Exhibit C-0252).

⁴⁰⁶ CWS-5, para. 62-63.

⁴⁰⁷ CWS-5, para. 63.

⁴⁰⁸ CWS-5, para. 64-66.

385. Thus, there is nothing about the signing of the Base Convention which suggests that it can only have been achieved through corruption. The Base Convention was, of course, of great benefit to BSGR, but it was also of great benefit to Guinea.

386. It is even more telling that Guinea has not prosecuted any member of the Committee, despite firmly alleging in these proceedings that they accepted bribes from BSGR. It is hard to see why President Condé's administration, which supposedly has an anti-corruption agenda, would allow the Committee members to get off scot-free. The answer, of course, is that Guinea knows perfectly well that the Committee members (and BSGR) did nothing wrong.

4.3.3 BSGR did not bribe Mr Thiam

387. As Guinea knows, there is not a jot of evidence that BSGR bribed Mr Thiam in order to obtain the Base Convention. To prop up its crumbling case, Guinea makes a number of other allegations in a failed attempt to cast general suspicion over Mr Thiam's relationship with BSGR.

388. Guinea's case is based on unjustifiable inferences from the documentary evidence. Indeed, Guinea has once before recognised the weakness of its case in relation to Mr Thiam (though it seems to have forgotten those weaknesses for the purposes of these proceedings): Guinea included in its Allegations Letter of 30 October 2012 the claim that BSGR had bribed Mr Thiam. However, there is no mention of this claim in the Technical Committee's final report, no doubt because Guinea realised it could not substantiate it.

389. BSGR responds herein to each of Guinea's allegations. They are all baseless and, to the extent that they do not concern the rights which are the subject of BSGR's claim, they are also irrelevant.

⁴⁰⁹ CWS-5, para. 66.

a. Mr Thiam's motivation

390. Mr Thiam left a successful and lucrative banking career in the USA to take up the office of Minister of Mines in 2009. He felt a patriotic duty to contribute to the development of his home country as much as possible. His actions were driven by the interests of Guinea, not by a desire to line his own pocket.⁴¹⁰
391. As set out below, Mr Thiam did not have a special relationship with BSGR while he was Minister of Mines – he helped many mining companies to find joint venture partners, because it was in the interests of Guinea for mines to be brought into production. He acted properly in confirming BSGR's rights to Blocks 1 and 2, not only because they had been validly revoked from Rio Tinto but also because it created certainty about Simandou, which was essential to its development.

b. Mr Thiam's renewal of the exploration permits for Simandou North and Simandou South was proper

392. Mr Thiam renewed BSGR's exploration permits for Simandou North and Simandou South on 10 June 2009.⁴¹¹ Guinea appears to suggest that the Tribunal ought to infer from Mr Thiam's actions that he was bribed by BSGR.⁴¹² That is ludicrous.
393. In accordance with Articles 29 and 30 of the 1995 Mining Code the permits were issued for an initial period of three years and were renewable twice for periods of two years each. Also in accordance with Articles 29 and 30, BSGR proposed a retrocession of 50% of the area covered by the permits when it applied for renewal in January 2009.⁴¹³ Thus, BSGR's application was entirely in accordance with Guinean law.

⁴¹⁰ CWS-5 (Thiam), paras. 13-17.

⁴¹¹ Exhibit C-0012.

⁴¹² CMRG, paras. 836-837.

⁴¹³ CWS-2, para. 54.

394. Moreover, Mr Thiam did not simply grant the renewal as soon as he received BSGR's application. On the contrary, the renewal was only granted in June 2009, some five months after BSGR had requested it. The delay was caused by Mr Thiam's referral of the application to the CPDM for review and recommendation.⁴¹⁴ Any inference that Mr Thiam must have received a financial or other incentive from BSGR in order to grant the renewal is completely unjustified.

c. Mr Thiam acted properly in upholding BSGR's rights to Blocks 1 and 2

395. As a starting point, there is nothing inherently suspicious about Mr Thiam upholding BSGR's permits over Blocks 1 and 2. There were two very good reasons for him to do so: (i) BSGR had obtained the permits legitimately; and (ii) it was in the interests of Guinea to create certainty about the rights to Simandou. Without certainty, there could be no progress in the development of Simandou, and consequently no mining income for Guineans.

396. The importance of certainty applied as much to Rio Tinto's blocks as BSGR's. Thus, on 11 February 2009 Mr Thiam wrote to the local authorities of Kerouané and Beyla to inform them that BSGR *and* Rio Tinto held official documents authorising them to conduct exploration activities, which they should be allowed to pursue without obstacle.⁴¹⁵ Contrary to Guinea's suggestion, this letter displayed no favouritism towards BSGR.⁴¹⁶

397. It took Mr Thiam some time to conduct his investigation into Rio Tinto's allegations against BSGR, which undermines Guinea's suggestion that the investigation was a mere pretence.⁴¹⁷ Rio Tinto approached Mr Thiam almost immediately after he had taken office (in January 2009).⁴¹⁸ But it was not until 5 May 2009 that the validity of BSGR's exploration permits

⁴¹⁴ CWS-5, para. 58.

⁴¹⁵ Exhibit C-0096.

⁴¹⁶ CMRG, para. 355.

⁴¹⁷ CMRG, para. 356.

⁴¹⁸ CWS-5, para. 18.

over Blocks 1 and 2 was confirmed. BSGR was not able to begin work in earnest at Blocks 1 and 2 until Mr Thiam's investigation was complete.⁴¹⁹

398. As to the substance of Mr Thiam's investigation, it was comprehensive and rigorous. The Tribunal is respectfully referred to paragraphs 35 to 57 of Mr Thiam First Witness Statement, where Mr Thiam describes the process in detail. The investigation had three parts:

- (i) The withdrawal of rights from Rio Tinto: Mr Thiam tracked the Government's increasing frustration with Rio Tinto's lack of progress and found that Rio Tinto was awarded its mining concession in violation of the Mining Code. Even Vale agrees that Rio Tinto's rights were lawfully withdrawn.⁴²⁰
- (ii) The award of exploration permits over Blocks 1 and 2 to BSGR: Mr Thiam found nothing untoward in the award of Blocks 1 and 2 to BSGR. Unlike its main competitor for the permits, BSGR was already active in the area and had the technical and financial capability to carry out the necessary prospective works, as well as the motivation to see the development through to production⁴²¹.
- (iii) Allegations against BSGR: Rio Tinto made a number of baseless allegations about BSGR's business and personnel, e.g. that Mr Steinmetz's passport had been withdrawn, that US banks refused to do business with BSGR and that BSGR did not have mining experience. These were easily disproved.⁴²²

399. Having (correctly) concluded that Rio Tinto's rights were properly withdrawn, and that its allegations were baseless, it is hardly surprising that Mr Thiam intervened when Rio Tinto refused to remove its equipment from Blocks 1 and 2, thus preventing BSGR from carrying

⁴¹⁹ CWS-3, para. 48.

⁴²⁰ Para. 704 of Vale's reply in the LCIA proceedings (Exhibit R-0352).

⁴²¹ CWS-14 (Morelli).

⁴²² CWS-5, para. 52.

out its drilling work.⁴²³ As well as demonstrating a lack of respect for Mr Thiam's decision, Rio Tinto's obstruction was detrimental to the Government's interest in getting mining projects into production as soon as possible.

400. Rio Tinto continued its obstruction of BSGR's work well into 2010, even after the joint venture with Vale had been concluded. In particular, Rio Tinto was putting about a story that Blocks 1 and 2 were imminently to be returned to it.⁴²⁴ This was detrimental to the work of VBG (and thus to the interests of Guinea). For that reason, the Prime Minister sent Rio Tinto a letter stating that the Government would not reconsider its decision to revoke Rio Tinto's rights in Blocks 1 and 2.⁴²⁵ Mr Thiam provided a copy of this letter to BSGR, to enable it to refute the rumours.⁴²⁶ That was not improper, nor does it evidence a particularly close relationship between Thiam and BSGR.

401. Thus, although Mr Thiam, as Minister of Mines, played a role in defending BSGR's rights to Blocks 1 and 2, there is no reason to suppose that he was paid by BSGR for this purpose. Mr Thiam acted in the interests of Guinea by delivering certainty in relation to Blocks 1 and 2, and by promoting progress in the development of BSGR's and Rio Tinto's mining projects.

d. Mr Thiam's involvement in joint venture negotiations was in the interests of Guinea

402. Mr Thiam's involvement in BSGR's efforts to find a joint venture partner was entirely usual and appropriate. The Government involvement in joint venture negotiations gives the Government an opportunity to ensure that its aims are met by the partnership. As regards BSGR, Mr Thiam and his team at the Ministry of Mines considered BSGR to have great potential and Mr Thiam believed it was in the interests of Guinea to assist BSGR in

⁴²³ CWS-3, para. 48; CWS-5, para. 56-57.

⁴²⁴ Second Witness Statement of Mahmoud Thiam in the LCIA Arbitration dated 15 July 2016 (Exhibit C-0253, para. 20).

⁴²⁵ Email from Minister Thiam to BSGR enclosing letters to Rio Tinto dated 26 June 2010 (Exhibit C-0254).

⁴²⁶ Exhibit C-0253, para. 20.

developing its mining project.⁴²⁷ In that context, it was part of Mr Thiam’s role to encourage and support the process of finding a suitable joint venture partner for BSGR.⁴²⁸ It was therefore entirely appropriate for Mr Thiam to (i) communicate with the Libyan Investment Authority;⁴²⁹ and (ii) meet with representatives of CIC in July 2009, to promote a joint venture with BSGR.⁴³⁰

403. Although BSGR was grateful for Mr Thiam’s interest and assistance with CIC, it neither asked for Mr Thiam’s assistance, nor paid for it. Indeed, Mr Steinmetz suggested to Alexander Rocos (who set up the CIC meeting) that it was “*more appropriate and efficient that we should be in contact directly*”.⁴³¹

404. Similarly, Mr Thiam’s involvement in the BaoSteel negotiations was not inappropriate, and does not suggest that he promoted the interests of BSGR above those of other mining companies. In fact, Mr Thiam travelled to meet with potential investors in the projects of other companies in Guinea, including Bellzone, Guinea Alumina Corporation, Société Minière de Dinguiraye and China Power Investment.

405. Once again, Mr Thiam’s efforts were not made for personal benefit, but for the benefit of Guinea. In order to monetise its mineral wealth, the Government had to ensure that mines were brought into production. That was more likely to happen where mining projects were run by strong partnerships which had the financial capability and technical expertise to develop their assets. Mr Steinmetz recognised that this was Mr Thiam’s motivation – he appealed to it when asking the minister to attend the meeting with BaoSteel: “*I think it is highly important for Guinea to have the best resource SOE (state owned ent[er]prise) to join our [i]ron ore project in Guinea!*”⁴³²

⁴²⁷ Exhibit C-0253, para. 16.

⁴²⁸ Exhibit C-0253, para. 17.

⁴²⁹ CWS-5, para. 78; CMRG, para. 454 and 838.

⁴³⁰ Email from Minister Thiam to BSGR dated 15 July 2009 (Exhibit C-0255); Exhibit C-0253, para. 18.

⁴³¹ Email from Minister Thiam to BSGR dated 27 July 2009 (Exhibit C-0256).

⁴³² Emails between BSGR and Minister Thiam dated 30 December 2009 (Exhibit C-0257).

406. As for Mr Thiam's role in Project Hills, his reassurance to Vale that BSGR's rights to Blocks 1 and 2 were valid was an entirely proper exercise of his ministerial power. The suggestion that it demonstrates that Mr Thiam was promoting BSGR's interests is absurd.⁴³³ Mr Thiam merely confirmed to Vale what he had set out in a ministerial decree the previous year⁴³⁴ and assured Vale that the Government had no objection to the proposed joint venture.⁴³⁵

e. BSGR did not reward Thiam

407. There is no credible evidence that BSGR paid or otherwise rewarded Mr Thiam. Guinea's contrived efforts to prove otherwise smack of desperation.

408. As to payment for Mr Thiam's travel expenses:

- (i) As Mr Thiam has already stated in his first witness statement, it was standard practice for mining companies in Guinea to pay for the travel of ministers on certain occasions.⁴³⁶ Mr Thiam has been open about his travel arrangements, both at the time of travel and in these proceedings. For example, when Mr Thiam travelled on Steinmetz's private plane, he landed officially in Conakry and was greeted by state protocol.⁴³⁷ That is hardly the behaviour of someone who has received a back-handed bribe, as Guinea alleges;
- (ii) Despite Mr Thiam giving full details in his witness statement of the circumstances in which he allowed mining companies to pay his travel expenses, Guinea has adduced no evidence to suggest that Mr Thiam's practice was inappropriate or illegal. Rather,

⁴³³ CMRG, para. 838.

⁴³⁴ Exhibit C-0013.

⁴³⁵ CWS-5, para. 82-83.

⁴³⁶ CWS-5, para. 89-89.5.

⁴³⁷ CWS-5, para. 89.5.

it makes a bare assertion that there was an “*illegal arrangement*” between BSGR and Thiam.⁴³⁸

- (iii) Besides, Guinea is wrong to say that BSGR “*paid*” Mr Thiam USD 23,444.26 in travel costs.⁴³⁹ The vast majority of this sum was not paid to Mr Thiam at all. BSGR arranged his flights through its travel agent, Diesenhaus-Unitours, and subsequently paid Diesenhaus-Unitours’ invoices;
- (iv) The French case that Guinea invokes is not on point. In that case, it appears that the airline tickets were purchased in order to obtain from the beneficiary Minister the renewal of oil exploration permits. Moreover, it appears that this favour was requested by the Minister himself. In the present case, the Base Convention had already been awarded and the granting of the Mining Concession was provided for in Article 8 of the Base Convention. In addition, this decision is an isolated one and not a binding precedent for this Tribunal.

409. One of Guinea’s most desperate claims is that one can infer corruption from the fact that Mr Thiam and various BSGR representatives addressed each other in an informal manner in emails. That suggestion is so ludicrous, and so very far from being evidence of corruption, that it barely merits a response. BSGR would only draw the Tribunal’s attention to paragraph 85 of Mr Thiam’s first witness statement, where he notes that, as part of his role, he developed excellent relationships with those mining companies which were advancing their projects (like BSGR).⁴⁴⁰

410. As to Mr Thiam’s property purchases:

⁴³⁸ CMRG, para. 839.

⁴³⁹ CMRG, para. 839.

⁴⁴⁰ The suggestion that Mr Thiam has a tendency to ignore conflicts of interest is even less worthy of a response, hence its relegation to a footnote. Guinea does not explain how the matters described at paragraph 14 of Mr Thiam’s first witness statement about to a conflict of interest – they plainly do not. In any event, it is certainly not evidence of corruption.

- (i) As Mr Thiam has explained, he had a successful 15-year career in banking prior to taking up the role of Minister of Mines.⁴⁴¹ It is a matter of general knowledge that bankers are very well-remunerated through salary and bonus – even more so before the financial crisis;
- (ii) It is therefore not surprising, and certainly not suspicious, that Mr Thiam was able to purchase expensive real estate in the US;
- (iii) As regards the apartment in New York “worth 1,522,383 USD”,⁴⁴² Mr Thiam did indeed complete the purchase of this apartment in October 2009. However, this was only the conclusion of a saga which had begun years earlier. In March 2006 (when Mr Thiam was working for UBS) Mr Thiam had exchanged contracts for the purchase of a new-build for \$6.5 million, payable in instalments. By the time construction of the property was complete, the financial markets had crashed and the value of the apartment had diminished significantly. Mr Thiam refused to complete the transaction. Following a dispute with the developer, the developer offered to put Mr Thiam’s USD 1.3 million deposit towards the purchase of a smaller apartment worth USD 1.5 million. Mr Thiam agreed and paid the developer the difference of USD 200,000, thus completing the purchase of that smaller apartment in October 2009.⁴⁴³ Accordingly, the purchase of this apartment had nothing to do with BSGR – 85% of the purchase price had been paid in 2006, long before Mr Thiam became Minister of Mines.⁴⁴⁴
- (iv) The 771 Duell Road property, which was bought for around USD 3 million, was not in fact purchased by Mr Thiam, but by his friend. The property was purchased as an investment and selected on Mr Thiam’s recommendation. Mr Thiam agreed to rent it as a vacation property and, in return for lower than market rent, to carry out renovations at his own expense. At the time of the purchase both Mr Thiam and his

⁴⁴¹ CWS-5, para. 9-12.

⁴⁴² CMRG, para. 366.

⁴⁴³ Exhibit R-0456, para. 199.

⁴⁴⁴ *Ibid.*

friend were living outside the United States. Mr Thiam's wife therefore signed for the property using a power of attorney.⁴⁴⁵

f. Recent corruption allegations against Mr Thiam unrelated to BSGR

411. Through the press BSGR has been informed that Mr Thiam has recently been arrested by the US authorities and charged with two accounts of money laundering. According to the press release that the US authorities have circulated on 13 December 2016:⁴⁴⁶

"The complaint alleges that in 2009 and 2010, Thiam took part in a scheme to launder, into the United States and elsewhere, approximately \$8.5 million in bribes he received from senior representatives of a Chinese conglomerate. In exchange for the bribes, Thiam allegedly used his official position in the Guinean government to enable affiliates of the Chinese conglomerate to obtain exclusive and highly-valuable investment rights in a wide range of sectors of the Guinean economy, including near total control of Guinea's valuable mining sector.

In order to conceal the bribes, Thiam allegedly opened a bank account in Hong Kong and misrepresented his occupation to conceal his status as a government official. Thiam later transferred millions of dollars in bribe proceeds into the United States, where he allegedly lied to two U.S. banks to conceal both his position as a foreign government official and the source of the funds. Thiam allegedly spent the bribe proceeds on, among other things, construction work on his estate in upstate New York".

412. BSGR has no knowledge whatsoever, let alone any involvement, in the scheme (if any) mentioned above. In any event, it must be emphasized that although the US authorities' notice of complaint is detailed and 17 pages long, it does not make any reference whatsoever to BSGR, Pentler or any other individual or entity linked, directly or indirectly, to BSGR or Beny Steinmetz.⁴⁴⁷ This is in and of itself an important indication that BSGR did not bribe Mr Thiam.

⁴⁴⁵

Ibid.

⁴⁴⁶

US DoJ press release "*Former Guinean Minister of Mines Charged*" dated 13 December 2016 (Exhibit C-0258).

⁴⁴⁷

Complaint dated 12 December 2016 (Exhibit C-0259).

413. In addition, and as the US authorities correctly points out, "*a complaint is merely an allegation, and the defendant is presumed innocent until and unless proven guilty beyond a reasonable doubt*".⁴⁴⁸ In other words, Mr Thiam is still innocent and BSGR is absolutely confident that any further investigations into Mr Thiam's personal dealings will clear his name and reputation.

4.4 The Zogota Mining Concession was not obtained by corruption

414. On 19 December 2009 Mamo Sakho, the Vice-President of the Inter-Ministerial Committee, wrote to the Prime Minister to recommend that the Base Convention be ratified.⁴⁴⁹

415. As there was no Parliament at the time, on 19 March 2010 General Konaté, the interim President, issued (i) an Ordinance ratifying the Base Convention and (ii) a decree granting BSGR a mining concession in respect of Zogota.⁴⁵⁰

416. There is no allegation that BSGR engaged in bribery and corruption to procure that interim President Konaté took these confirmatory actions. It follows that if the Base Convention was legitimately obtained (which it was), so too was the Zogota Mining Concession. Its expropriation by Guinea was therefore illegal.

4.5 Conclusion on the expropriation of BSGR's mining rights

417. This claim is about the expropriation of BSGR's mining rights in Blocks 1 and 2, the Base Convention and the Zogota Mining Concession. It is only if Guinea can prove that BSGR committed corruption and it is through this corruption that BSGR acquired its mining rights that BSGR's claim fails.

⁴⁴⁸ US Authorities press release dated 13 December 2016 (Exhibit C-0258).

⁴⁴⁹ CWS-5, para. 70.

⁴⁵⁰ Exhibit C-0016; Exhibit C-0017; CWS-5, para. 70.

418. BSGR has shown, in the preceding sections, that each of the rights was obtained fairly and legally. For that reason, its claim ought to succeed. It has also established that whatever corruption there may have (it is denied that there has been), this had no significant impact on the granting of BSGR's rights.
419. Rather than face this truth, Guinea has engaged in a mud-slinging exercise by making a series of corruption allegations which are, for the most part, unrelated to the process by which BSGR acquired the rights at issue in these proceedings. To that extent, these allegations are therefore irrelevant.
420. However, because the allegations are also completely unfounded, BSGR takes this opportunity to respond to them in Annex 1.

V EVIDENTIARY ISSUES

5.1 Mamadie Touré

5.1.1 Guinea cannot rely on Mamadie Touré's statement

421. Although Guinea has referred not less than 464 times to Mamadie Touré in its Counter-Memorial, Guinea has not presented her as a witness in these proceedings. She has not produced a signed witness statement and will not be available for question by the Tribunal, nor for cross-examination by BSGR at the evidentiary hearing. This is absolutely unacceptable.
422. It should be absolutely clear that Mamadie Touré's declaration to the US authorities⁴⁵¹ is not a witness statement for the purposes of these proceedings. Procedural Order No. 1 describes a witness statement as "*a written and signed witness statement...submitted to the Tribunal.*"⁴⁵² Therefore, declaration cannot be given the weight of a witness statement.

⁴⁵¹ Exhibit R-35.

⁴⁵² Procedural Order No. 1, Article 18.1.

423. Second, even if Mamadie Touré's statement were to be considered as a witness statement, it should be disregarded as Guinea will not produce Mamadie Touré as a witness at the evidentiary hearing:

- (i) Procedural Order No. 1 states that the "*[t]he Tribunal shall not consider and shall strike from the record the witness statement of a witness who fails to appear and does not provide a valid reason.*"⁴⁵³
- (ii) Under Article 4(7) IBA Rules on the Taking of Evidence, "*[i]f a witness whose appearance has been requested...fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.*"
- (iii) In *Churchill Mining and Planet Mining v Republic of Indonesia*, the Tribunal found that:

*"Mr. Noor, who had given a witness statement on behalf of the Respondent and whose cross-examination had been requested, did not appear. Having heard the Parties on the Claimants' application of 30 July 2015, 49 the Tribunal informed the Parties at the hearing of its decision to disregard Mr. Noor's witness statement in accordance with paragraph 16.9 of the Procedural Order No 1 and, by analogy, Article 4.7 of the IBA Rules."*⁴⁵⁴

- (iv) Further, in the recent decision in the case *Croatia v MOL*, the tribunal rejected Croatia's allegations of corruption and, just like in these proceedings, "*the allegations of bribery at the heart of the case were based on concocted testimony of a single witness who had every reason to assist the Croatian authorities in their quest to*

⁴⁵³ Procedural Order No. 1, Article 18.13.

⁴⁵⁴ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, para. 84.

wrestle back control over INA, the crown jewel of the Croatian economy."⁴⁵⁵ Further, in these proceedings, the single individual on whom Guinea's entire corruption argument is based will not even provide testimony let alone a witness statement.

424. Third, Mamadie Touré's declaration has never been subject to proper examination in the US, Switzerland or Guinea. Nor is Mamadie Touré one of Vale's witnesses in the LCIA proceedings. Accordingly, BSGR will have no opportunity in any forum to challenge Mamadie Touré's account, nor will any court of law or international tribunal have the opportunity to test her credibility and the truthfulness of her allegations.
425. Finally, it is astonishing that Guinea has decided not to prosecute Mamadie Touré although it claims that (i) she is the central figure in one of the biggest if not the biggest corruption schemes in the world; (ii) fighting corruption is an absolute priority of the Government and (iii) she has no immunity from prosecution.
426. In these circumstances, BSGR requests the Tribunal to disregard Mamadie Touré's declaration dated 2 December 2013 and to confirm that it will not take Mamadie Touré's declaration into account when determining the merits of this case, nor any argument that is advanced by Guinea on the basis of this declaration.

5.1.2 Mamadie Touré is not a reliable source

427. In the unlikely hypothesis that the Tribunal is not prepared to disregard Mamadie Touré's declaration entirely, the Tribunal should give very little, if any, weight to the declaration and this for four reasons.
428. First of all, BSGR has discovered that Mamadie Touré has been paid at least six times by the Government of Guinea. These payments were made by Mr. Mamoudou Kouyaté, Special Assistant to President Condé and were made by bank cheque. The total amount of these

⁴⁵⁵ See comments by lead counsel for MOL in <http://globalarbitrationreview.com/article/1079276/tribunal-rejects-croatias-allegation-of-corruption-by-former-pm> (Exhibit C-0273). The final award in this matter is not publicly available as yet. BSGR will produce it as soon as it becomes publicly available.

payments is USD 50,000.⁴⁵⁶ These payments took place over a period of 3 months in the beginning of 2013, i.e. the period during which she was meeting and calling with Mr Cilins and trying implicate Beny Steinmetz.⁴⁵⁷ These are just the payments that BSGR has been able to discover, but BSGR has no doubt whatsoever that there must have been others. In addition, it is known that since she has started to co-operate with the Guinean authorities, Mamadie Touré has resided from time to time in Guinea in a luxury flat in Conakry provided and paid for by the Government.

429. Secondly, the documentary record establishes that Mamadie Touré was offered US citizenship by the US authorities if she could obtain evidence against Mr Cilins, Mr Thiam and of course BSGR.⁴⁵⁸ Taking into account that she had the Guinean nationality and that, according to her declaration in to the Public Prosecutor in Guinea, she was fearing for her own life and the life of her family in Guinea,⁴⁵⁹ American citizenship was a very valuable prize to her, a prize for which she would probably say and incriminate just anybody. The fact that she was willing to also incriminate Mr Thiam tells a lot about her credibility, given

⁴⁵⁶ Payments to Mamadie Touré from Mamoudou Kouyaté; Jan – May 2013 (Exhibit C-0247).

⁴⁵⁷ See Exhibit R-0037.

⁴⁵⁸ Audio Recording of CW Cilins on 25 March 2013 – transcribed: CW meeting with Cilins, Audio dated 25 March 2011 (Exhibit C-0343) At 00:12: *FBI Agent Angela Hill: “This is special agent Angela Hill. It is March 25 2013, at 8:41 am. This is going to be consensually monitored conversation between ... Names”*

MT: “Mamadie Touré”

AH: “And who’s the target?”

MT: “Frédéric Cilins”...

At 1:06: *The interpreter: “Vous vous souvenez des trois points de la conversation?”*

MT: “oui”

*The interpreter: “Vous parlez du passé”, “ensuite Thiam”, “**ensuite tu peux être Américain!**” [emphasis added]*

MT: “oui?”

The interpreter: “Oui”

⁴⁵⁹ Exhibit C-0086 (“*C’est en raison de l’insecurité qui planait sur ma personne en particulier et à ma famille en général que j’ai pris la responsabilité de quitter la Guinée pour me réfugié en Sierra Leone ou d’ailleurs je réside jusqu’à nos jours. [...] J’attire votre attention sur le fait que si le militaire Issiaga BANGOURA est informé de ma présence à Conakry, il est capable de recruter des gens pour attenter à ma vie ou à celle de ma famille*”).

the fact that only three weeks earlier she had given the names of those public officials who had allegedly intervened to procure BSGR's rights and she had not mentioned Mr Thiam.⁴⁶⁰

430. Thirdly, whereas as part of the US criminal proceedings against Mr Cilins the American authorities did forfeiture some of the assets of Mamadie Touré, she entered into a deal with the authorities according to which she was allowed to keep half (in value) of her real estate properties in the country.⁴⁶¹ In other words, after securing a US passport, she also secured a place to life for the rest of her days.

431. Finally, it is plain that Mamadie Touré's word is inherently unreliable. The narrative she currently peddles (and on which Guinea relies) has already been disclaimed by her once,⁴⁶² and several of her claims are inconsistent with either her own previous evidence or BSGR's documentary evidence.⁴⁶³

5.1.3 No witness corroboration of Mamadie Touré's allegations

432. Guinea has failed to produce a single witness who can attest to Mamadie Touré's alleged receipt of illicit payments. The evidence of Guinea's witnesses falls far short of evidence of bribery:

- (i) Guinea proffers Mr Souaré's personal impression (which he apparently never sought to confirm) that Mamadie Touré's presence at a meeting between BSGR and the President indicated that "*BSGR had knocked on her door and that she had asked the*

⁴⁶⁰ *Ibid.* ("Je ne saurais vous confirmer ou pas de la remise d'une somme d'argent aux personnes qui ont intervenu clans le traitement de ce dossier que sont Monsieur Sam SOUMAH, ancien Directeur du Protocole d'Etat à la Presidence de la Republique; Monsieur Ousmane Sylla, ancien Ministre des mines; Monsieur Kassory FOF ANA, ancien Ministre de l'Economie et des Finances; Monsieur Fode SOUMAH, ancien Ministre de la Jeunesse et des sports; Monsieur Lounceny NABE, ancien Ministre des Mines (actuel Gouverneur de la BCRG)")

⁴⁶¹ Exhibits C-345, 346 and 347.

⁴⁶² *Ibid.*, LCIA SoD [216]. Mamadie Touré attempted to extort money from BSGR in June 2010. When BSGR threatened her with litigation, she withdrew her false story in full: (Exhibits C-0114 to C-0117).

⁴⁶³ *Ibid.*, LCIA SoD [220(ii)] (regarding her claim to the US authorities that she had received valuable gifts from BSGR, having made no such claim just months earlier to the Guinean authorities); LCIA SoD [215] (regarding her claim that she met Steinmetz in Dubréka in 2006. The documentary evidence shows that Steinmetz did not travel to Guinea until 2008.)

President to help them”;⁴⁶⁴ and Mr Nabé’s personal conclusion that Mamadie Touré’s presence at a meeting “*said it all*”.⁴⁶⁵ As evidence of bribery, Mr Souaré’s and Mr Nabé’s subjective understanding of Mamadie Touré’s role is worthless. Notably, they do not say that they were aware that Mamadie Touré was receiving payment or benefits from BSGR.⁴⁶⁶

- (ii) Mr Kanté also offers no evidence that BSGR bribed Mamadie Touré. In fact, Mr Kanté’s evidence supports BSGR’s case that Mamadie Touré had little influence over President Conté – he recalls the President dismissing Mamadie Touré from a meeting with the line, “*I had told you to stay out of these mining problems.*”⁴⁶⁷. insert comments of no instructions!

433. Guinea’s case that Mamadie Touré was behind the award of Blocks 1 and 2 to BSGR is based on two unreliable sources – Mamadie Touré’s untested evidence, and Mr Nabé’s personal understanding about what was going on. It is notable that Mr Nabé does not claim that Mamadie Touré attended his meetings with Mr Avidan and Mr I.S. Touré about BSGR’s interest in Simandou.⁴⁶⁸ Nor does he claim that Mamadie Touré was part of any meeting or phone call he had about the award of Rio Tinto’s rights.⁴⁶⁹ He does not even claim that the Prime Minister told him that Mamadie Touré was putting pressure on the President. But he nevertheless feels able to state that “*For me, it was clear that...BSGR was supported by the President’s wife, Mamadie Touré.*”⁴⁷⁰ That evidence is not worth the paper it is written on.

5.2 Negative inferences

⁴⁶⁴ RWS-2, para 9.

⁴⁶⁵ RWS-5, para. 9.

⁴⁶⁶ It is common in Africa for leaders to be surrounded by a large entourage at meetings, which often includes assistants, family members and the like: CWS-1(2) Second Witness Statement of Benjamin Steinmetz (“**Steinmetz 2**”) para. 10.

⁴⁶⁷ RWS-4, para. 33.

⁴⁶⁸ RWS-5, para. 16.

⁴⁶⁹ *Ibid.*, para.17.

⁴⁷⁰ *Ibid.*,.

5.2.1 Negative inferences that must be drawn from Guinea's failure to produce documents

434. In its letter dated 27 October 2016, the Tribunal stated that, "*to the extent the Claimants wish to claim that non-compliance with Procedural Order No. 7 entails legal consequences, such as for instance adverse inferences, they may do so in the further course of the arbitration, specifically in their further scheduled written submissions and at the hearing.*"
435. Following from this, BSGR requests that the Tribunal draw a number of adverse inferences. The below requests only relate to adverse inferences relating to Guinea's failure to produce documents relating to issues stated in BSGR's first memorial. The other requests for adverse inferences are mentioned at other instances in this submission.
436. In its letter dated 15 October 2016, BSGR complained to the Tribunal about Guinea's failure to produce entire categories of documents. Specifically, Guinea failed to produce:
- (i) any e-mail communications with or from Guinean Ministers or Guinean Ministries;
 - (ii) any e-mail communications with or from other senior (or junior) Guinean officials;
 - (iii) any minutes of meetings, reports or deliberations held by the Government, its Ministries and agencies (with the exception of two documents); and
 - (iv) any documents whatsoever responsive to a number of specific requests.⁴⁷¹
437. This is in spite of the fact that domestic Guinean law provides for the conservation of such government documents. The Act L/95/014/CTRN on the Management of Archives in Guinea dated 15 May 1995 (hereafter "Conservation Act") provides for the mandatory protection and conservation of any documents, irrespective of the form or material support, created or received by ministers and other public officials or public bodies including e-

⁴⁷¹ Procedural Order No. 7, Request Nos. 2, 4, 8, 11, 15, 16, 23 and 33.

mails, minutes of meetings, letters, written notes or any other document. These documents are either preserved at the Ministry or agency that created the documents (if the documents continue to be useful for on-going matters) or at the centralised Direction of Archives.

438. Counsel for Guinea has confirmed in its letter to counsel for BSGR dated 11 October 2016 that the Conservation Act applies to the case at hand.⁴⁷² In fact, Guinea has also demonstrated that the law is followed in practice.⁴⁷³

439. The following sections of the Conservation Act are relevant:

- (i) Article 1(1) defines the Archives as "the totality of documents of whatever date, form or material support, created or received by any natural or legal person, any public or private body in the exercise of their activity".
- (ii) Article 1.2 provides that the "conservation of these documents is guaranteed".
- (iii) The Act makes a distinction between public and private archives. Article 2 defines the public archives as "all the documents produced at the central level by the Ministries, State Secretaries, Directions and National Agencies and at the local level by the provincial administrations, regional or sub-regional bodies. Are further public archives all documents produced by mixed bodies and mixed companies."
- (iv) Pursuant to Articles 4 and 5, documents in the public archives are conserved either by the service or body that created the document (for as long as they require these documents for current work purposes) or by the management of the Direction of Archives (once the documents are no longer required for current work purposes by the service or body that created the document).

⁴⁷² Exhibit C-0352.

⁴⁷³ When BSGR requested Guinea by letter dated 15 August 2016 how it had obtained the e-mails from former Minister of Mines Mr Thiam's yahoo e-mail address, Guinea replied that those e-mails were part of the public archives. Guinea repeated this position in the above-mentioned letter dated 11 October 2016. If that is the case for Mr Thiam's emails that must obviously be the case for all the other ministers of the Guinean Government.

- (v) Article 9 provides that when documents are in a poor condition, the Director of the Archives must notify the Secretary General of the Presidency who in turn must take the appropriate measures to preserve and conserve the documents.
- (vi) Article 10 provides that that when a public body wants to destroy documents it must first address a request for approval to the Director of the Archives. It further provides that no document can be destructed unless with the prior written consent of the Director of Archives.
- (vii) Violations of the Act are punishable with a prison sentence of 6 to 12 months (and/or the payment of fines).

5.2.2 The adverse inferences that must be drawn

440. As a result of Guinea's failure to produce these documents, and it addition to the inferences that BSGR has requested the Tribunal to draw elsewhere in this Reply Memorial, BSGR requests that the following adverse inferences be drawn.

441. Request 13: The Tribunal ordered Guinea to produce documents exchanged between between Guinea and the Government of Liberia in relation to the Liberian Transport Solution between 1 December 2009 and 2014.⁴⁷⁴ In response to this request, Guinea has only produced 7 copies of the same letter emailed by Mr Thiam to various people and an agreement between Liberia and Guinea. Needless to say, this is insufficient. BSGR request that the Tribunal draw an adverse inference that once President Condé and his government were in power, they tried to impede BSGR's investment by obstructing its efforts to continue with the Liberian Transport Solution and to comply with the Article 4 and 10(1) of the Base Convention.

⁴⁷⁴ Procedural Order No. 7, Annex A, Request 13, p. 30.

442. Request 14: The Tribunal ordered Guinea to produce documents including internal correspondence and memoranda, records of deliberations, minutes of meetings, analyses, reports, and other documents from November 2010 to 2014 in relation to: (a) the decision to grant Sable Mining Africa permission to export iron ore through Liberia; and (b) the decision to grant other companies permission to export iron ore through Liberia, noting that this order excludes Simandou Blocks 1 & 2.⁴⁷⁵ Guinea only produced one email chain from Mr Thiam to Bellzone dated November 2010 and one letter from Mr Mohamed Fofana to West Africa Exploration S.A. dated 13 August 2013. Therefore, BSGR requests the Tribunal to draw the adverse inference that once Alpha Condé and his government came to power, they tried to impede BSGR's investment by obstructing its efforts to continue with the construction of the LTS and to comply with Article 4 and 10 (1) of the Base Convention and; Alpha Condé allowed other companies, including Sable Mining Africa, to export iron ore through Liberia, confirming that Alpha Condé's decisions were arbitrary and not based on any legitimate reasons.
443. Request 16: The Tribunal ordered Guinea to produce documents including communications from June 2010 – January 2011 created and/or received by Alpha Condé and/or any person involved in his presidential campaign, including but not limited to Mohamed Alpha Condé, which refer or are addressed to Aboubacar Sampil and people related to Sable Mining; Palladino Capital and; Mohamed Lamine Fofana.⁴⁷⁶ Guinea produced no documents in response to this request. Guinea is withholding these documents as they will show that Alpha Condé deprived BSGR of its investment to satisfy his own interests and the interests of third parties. Therefore, BSGR requests the Tribunal to draw an adverse inference that Alpha Condé was conspiring with third parties during his pre-election campaign and after his election as president to strip BSGR of its investment in Zogota, Simandou Blocks 1 and 2.

⁴⁷⁵ Procedural order No. 7, Annex A, Request 14, p. 32.

⁴⁷⁶ Procedural order No. 7, Annex A, Request 14, p. 40.

444. Request 17: The Tribunal ordered all documents and communications, including reports, minutes of meetings and records of deliberations relating to Respondent's policy to receive a stake in all mining contracts existing from 9 December 2010 to the end of 2014.⁴⁷⁷ Guinea produced only 5 documents in response to this request and it is inconceivable that this covers all of the documents that must be available and given the economic and political importance of the subject matter and the period covered. Therefore, BSGR requests the Tribunal to draw an adverse inference that Guinea's measures were not only in violation of its commitments towards its investors, but also in breach of Article 9 of its Constitution and Article 7-2 of the African Charter on Human Rights (which is applicable in Guinea by virtue of the Preamble and Article 151 of the Constitution).
445. Request 22: The Tribunal ordered that Guinea produce all documents passing between the Respondent and Vale between March 2010 and the end of 2014 in relation to: (a) Vale's investment in Guinea; (b) the Feasibility study for Simandou blocks 1 and 2; (c) Guinea's decision that VBG cease works in Guinea; (d) the export of iron ore via Liberia by VBG; (e) the decision of Guinea to evaluate the relationship with VBG Guinea; (f) the technical committee investigation; (g) meetings with Roger Agnelli, Eduardo Ledsham, Jose Carlos Martins, Jose de Castro Alves, Clovis Torres, Pedro Rodriguez Raphael Benke or Ferreira Murillo; (h) settlement discussions in relation to the Simandou or Zogota projects; and (i) meeting with President Lula in his capacity as Vale's representative.⁴⁷⁸ Guinea produced 15 documents, all of which were responsive to only the above mentioned request (f). BSGR requests the Tribunal draw adverse inference that Guinea was politically motivated to expropriate Claimants' rights, while at the same time keen to keep Vale as investor in Guinea.
446. Request 26: The Tribunal ordered that Guinea produce the following documents in relation to the construction of the Trans-Guinean Railway: (a) financial and/or technical; and/or commercial analysis of the rehabilitation of the Trans-Guinean Railway between 16 December 2009 and 8 April 2011; (b) negotiation of the Protocole d'Accord between 16

⁴⁷⁷ Procedural order No. 7, Annex A, Request 14, p. 43.

⁴⁷⁸ Procedural order No. 7, Annex A, Request 22, p. 63.

December 2009 and 8 April 2011; (c) the considerations and/or grounds for deciding that BSGR and/or VBG cease works between November 2010 and 28 March 2014 (C-0039); (d) the documents generated by the interruption & cessation of railway works; (e) the considerations and decision that the execution of the Trans-Guinean Railway project will be the subject of a call for tender (C-0039); and (f) the decisions after April 2011 regarding the award of Trans-Guinean Railway project.⁴⁷⁹ In its production, Guinea failed to produce documents in response to request 26(c), (d) and (e) and only document was produced in response to request 26(f). This is clearly not the entirety of documents in Guinea's possession. BSGR requests that the Tribunal draw an adverse inference that the decision to cease works on the Trans-Guinean railway was taken in order to enable President Condé to allocate the project to his supporters.

447. Request 27(a)-(d): The Tribunal ordered the production of the following documents from January 2011 to June 2012 in relation to the considerations and/or grounds for: (a) Respondent's decision to stop all of VBG and/or BSGR Guinea's works in Guinea; (b) Respondent's decision to cancel the passage through Liberia for Blocs 1 & 2; (c) Respondent's decision to award the passage through Liberia only for Zogota and; (d) Respondent's decision to award any Mining Company passage through Liberia for Guinea mining product export.⁴⁸⁰ This is clearly not the entirety of the documents in Guinea's possession. There must be emails, deliberations etc. in relation to the decisions to order BSGR to stop working and the decisions on the Liberian export route. BSGR requests that the Tribunal draw the adverse inference that the notices to cease works on the Trans-Guinean railway were unlawful and unjustified, and demonstrative of a decision already taken by Guinea to revoke the mining rights of BSGR prior to the Technical Committee process commencement.

448. Request 28: The Tribunal ordered the production of the following documents in relation to: (a) the information received in relation to the claim regarding BSGR's violation of the Mining Code and/or the legislation regarding commercial companies dealing with conflict of

⁴⁷⁹ Procedural order No. 7, Annex A, Request 26, p. 72.

⁴⁸⁰ Procedural order No. 7, Annex A, Request 27, p. 75.

interest regulatory requirements determining the relationship between a director and a company; (b) the information received with respect to the claim that certain directors of BSGR are also sub-contractors; (c) the considerations and/or grounds for the decision (and the decision), communicated to BSGR by letter dated 31 October 2011 to suspend all sub-contracting contracts with companies in which officers or directors of BSGR hold interest; and (d) the considerations and/or grounds for the decision (and the decision) to request BSGR to provide Guinea with an account of the wage status of all the Guinean and expatriate workers, in particular the engineers.⁴⁸¹ Guinea produced a single document which was not responsive to the request. This in itself establishes Guinea's breach of Procedural Order No. 7. BSGR requests that the Tribunal draw an adverse inference that the accusations and demands in the 31 October letter issued by Guinea were not legitimate and BSGR did not act in violation of the Mining Code.

449. Request 31(a)-(d): The Tribunal ordered that BSGR produce all documents in relation to: (a) the reasons for setting up the Technical Committee and to review and/or inquire all Mining rights holders in the Republic of Guinea; (b) the identification of rights holders whose titles or permits were reviewed; (c) the considerations and/or grounds for the decision and the decision to investigate the manner in which the Claimants obtained their mining rights; (d) the considerations and/or grounds for the decision not to review the Rio Tinto/Simfer mining permit; (f) the considerations and/or grounds for the decision not to review the Sable Mining permits following the Global Witness report into corruption and; (g) the nomination of each member of the Technical Committee.⁴⁸² In relation to 31(a)-(c), Guinea has not produced any documents from the Technical Committee and Guinea has produced no documents that are responsive to request 31(d). Guinea has not produced any documents on how the mining companies were ranked, the considerations for this ranking and the identity of the companies ranked and reviewed. The documents that Guinea produced refer to undisclosed presentations of the working groups on the review of the various mining companies. BSGR requests that the Tribunal draw the adverse inferences that the (i) the reasons for the constitution of the Technical Committee were simply politically motivated and not legally

⁴⁸¹ Procedural order No. 7, Annex A, Request 28, p. 78.

⁴⁸² Guinea agreed to Request 31(g). Procedural order No. 7, Annex A, Request 31, pp. 86-87.

required (ii) the decision to review BSGR's mining rights was arbitrary as other companies have not been subject to such review, like e.g. Sable Mining Africa, thus, resulting in an unequal treatment of Claimants and (iii) that the Committee was personally selected and controlled by the president Alpha Conde himself.

450. Request 32: Guinea agreed to produce documents exchanged between the members of the Technical Committee and president Alpha Condé or any other member of Alpha Condé's government dealing with the review of BSGR's Mining Permits between the date of their nomination until the submission of their conclusion on BSGR's rights, i.e. on 21 March 2014.⁴⁸³ Guinea failed to produce a single document in response to this request. BSGR requests that the Tribunal draw an adverse inference that the Technical Committee was not established as an independent body and that its members were not impartial and therefore the mandate of the Technical Committee was to make sure that the investigations led to the loss of BSGR's Mining Permits.

VI JURISDICTION

6.1 Jurisdiction to determine claims made by BSGR Guinea

451. In paras. 3 and 8 of Annex 1 to Guinea's Counter-Memorial, Guinea confirms that this Tribunal has jurisdiction over the claims issued by the third Claimant, BSGR Guinea. As Guinea does not contest the jurisdiction *ratione personae* of the First and the Second Claimant, it must be concluded that this Tribunal has jurisdiction *ratione personae* over all three Claimants.

6.2 Jurisdiction to determine claims under the 1995 Mining Code

452. In paras. 10 to 14 of Annex 1 of Guinea's Counter-Memorial, Guinea objects to the jurisdiction of this Tribunal to hear disputes under the Mining Code. It refers to Article 171

⁴⁸³ Procedural order No. 7, Annex A, Request 32, p. 88.

of the Mining Code which would grant exclusive jurisdiction to an "Administrative Court" in Guinea and draws a distinction between disputes over the "*existence*" of mining rights (which should be determined by the Administrative Court) and the "*extent*" of the mining rights and obligations. These arguments must be rejected.

453. Article 184 of the Mining Code provides as follows:

“Disputes between one or several mining investors and the State with regard to the extent of their rights and obligations, the performance or non-performance of their undertakings at the end of their titles, assignment, transfer, or sub-leasing of their rights arising therefrom may be submitted to amicable settlement procedure.

If one of the parties feels that amicable procedure has failed, the dispute is brought before either the appropriate Guinean court or international arbitration in accordance with the agreement of March 18 1965 for the settlement of disputes with respect to investments between States and nationals of other States, established under the aegis of the Banque Internationale pour la Reconstruction et de Développement.

In cases where the Centre International pour le Reglement des Différends relatifs aux Investissements (CIRDI) declines jurisdiction over a dispute referred to it, the dispute shall be settled by the arbitration court of the Chambre de Commerce Internationale (CCI) according to its own rules and procedures.

In any other case disputes arising out of the interpretation and application of this Code are brought before the appropriate Guinean Courts”

454. This case concerns a dispute between BSGR and Guinea with regard to the extent of BSGR's rights. BSGR purports that these rights should be re-instated following Guinea's unlawful withdrawal of the rights, Guinea purports that these rights were lawfully withdrawn following BSGR's alleged corruption. Pursuant to the second paragraph of Article 184 of the Mining Code, disputes over the extent of mining rights can be arbitrated at ICSID.

455. Further, the fourth paragraph of Article 184 of the 1995 Mining Code makes it clear that an ICSID tribunal has the fullest jurisdiction and that it is only in circumstances where ICSID (in first instance) or the ICC (in second instance) has no jurisdiction that the Guinean courts

have jurisdiction: "*in any other case disputes arising out of the interpretation or application of this Code are brought before the appropriate Guinean courts*".

456. Finally, Article 171 of the Mining Code relates to disputes "*arising out of an administrative act issued under this Code*". The words "*this Code*" refer to the 1995 Mining Code. The administrative acts by which BSGR's mining rights were withdrawn were not issued under the 1995 Mining Code but under the 2011 Mining Code. [PROTECTED]

[REDACTED]
[REDACTED]
[REDACTED].⁴⁸⁴ Disputes in relation to administrative acts issued under the 2011 Mining Code are not governed by Article 171 of the 1995 Mining Code. In addition, and for the avoidance of doubt, Article 171 does not contain the word "*exclusivity*" or other words of that nature and thus does not provide for exclusive jurisdiction.

6.3 Jurisdiction to determine claims over Blocks 1 and 2

457. In paras. 15 to 19 of Annex 1 of Guinea's Counter-Memorial, Guinea purports that the Tribunal has no jurisdiction to determine BSGR's claims in relation to its mining rights over Blocks 1 and 2 because those rights would have expired on 9 December 2011 (or 9 December 2013 at the latest). This is not correct.

458. [PROTECTED]

[REDACTED]
[REDACTED]⁴⁸⁵ This means that the mining rights over Blocks 1 and 2 must necessarily have existed on 18 April 2014 as there is no point in terminating mining rights that ceased to exist 2.5 years earlier.

6.4 Jurisdiction to determine BSGR Limited claims based on the Mining Code

484 [PROTECTED]

485 [PROTECTED]

459. In paras. 20 to 22 of Annex 1 of Guinea's Counter-Memorial, Guinea purports that the Tribunal has no jurisdiction to determine BSGR Limited claims based on the 1995 Mining Code because BSGR Limited would not hold mining rights and thus not qualify as a mining investor. This is not correct.

460. Article 184 of the 1995 Mining Code does not define the term "*mining investor*", nor does any other provision of the Mining Code. In the absence of a restrictive definition, the term must be interpreted in the ordinary meaning of the words, meaning that a mining investor is an entity, be it a natural or a legal person, that invests in the mining sector in Guinea.

461. It is not disputed that although BSGR Limited itself did not hold the mining rights in Guinea, the funds flowing into Guinea were financed by BSGR Limited. [PROTECTED]

[REDACTED]

On these grounds, BSGR Limited must be considered to be a mining investor and the Tribunal does have jurisdiction over BSGR Limited's claims based on the Mining Code.

462. It must further be noted that Guinea does not dispute that BSGR Guernsey and BSGR Guinea are mining investors and that Tribunal thus has jurisdiction to determine their claims based on the Mining Code.

6.5 Jurisdiction to determine BOT claims

463. In paras. 23 to 33 of Annex 1 of Guinea's Counter-Memorial Guinea purports that the Tribunal has no jurisdiction to determine BSGR's claims based on the BOT Act because, in the absence of a BOT agreement, the BOT legislation would not apply.

464. BSGR has already established in paras. 196 to 212 of its First Memorial that the Base Convention is a BOT agreement and that the BOT Act thus applies. BSGR will not repeat

486

[PROTECTED]

itself here. It suffice to emphasise that the BOT Act explicitly refers to mining infrastructure (Art. 1(2)) and that the Base Convention contains provisions dealing with each component of an infrastructure project as governed by the BOT Act, i.e. its construction (Art 10(1) and 12 Base Convention), operation, maintenance (Art 16.2.1 Base Convention), financing (Art 11 and 12 Base Convention) and transfer.

465. Guinea's sole argument is that the Base Convention would not explicitly refer to the BOT Act. This is not convincing. The BOT Act does not impose any formal requirements, what matters are the rights and obligations that a contract provides. Article 1.1 of the BOT Act defines a BOT agreement broadly as "*any operation of financing, construction, operation, maintenance, and potentially transfer of ownership of development infrastructures by the private sector, in all its different variants [...]*".
466. Guinea further purports that to the extent that the Base Convention would constitute a BOT agreement, the Base Convention would only apply to the Zogota mining rights and not to Blocks 1 and 2. Again this is incorrect. Article 10(2) of the Base Convention relates to infrastructure works in relation to Blocks 1 and 2.

VII COUNTERCLAIMS

467. Guinea's counterclaims are completely exaggerated and unsubstantiated. In short, Guinea has claimed damages from BSGR for its own failure to develop its local iron ore industry and the corruption that has been rife in Guinea for decades. These are mammoth claims that are not supported with even a shred of documentary evidence and are virtually impossible to quantify.
468. Guinea first became aware of the alleged corruption scheme it refers to in 2011 or 2012. Given the significant damages Guinea claims to have suffered, Guinea should have taken the initiative to institute arbitral proceedings when it first became aware of the facts underlying

its claims. Unlike the majority of investment claims, this dispute is grounded in contract so Guinea would have been able to initiate arbitral proceedings if it had so wished.⁴⁸⁷

469. For example, in *Atlantic Triton v Guinea*, another ICSID case which involves Guinea, the tribunal held that:

"In broader terms, it must be underscored that if Guinea itself considered Atlantic Triton responsible for the significant damages it claims to have suffered, it is surprising that Guinea did not take the initiative and institute arbitration proceedings following the recession of the Management Agreement but waited until Atlantic Triton filed its request for arbitration before making its claims."⁴⁸⁸

470. Guinea has requested damages on three factual bases: (i) BSGR's illegal activities deprived Guinea of the chance to develop iron ore; (ii) the costs of investigating the alleged corruption claims; and (iii) the tarnished reputation of Guinea due to the alleged corruption and the alleged damaging disclosure of BSGR surrounding this arbitration.

471. Unsurprisingly, Guinea has not produced any contemporaneous documents and witness or expert evidence to attest these claims which, in addition to their outlandish nature, renders them meaningless. As a matter of fact, Guinea has not even made an effort to provide an explanation of the legal basis for these claims. BSGR deals with each of these points below.

7.1 BSGR is not the cause of Guinea's failure to develop its own natural resources

472. BSGR is not responsible for Guinea's own failure to develop its local iron ore industry. In fact, to the contrary, BSGR was supporting the economic growth of Guinea by making a major investment in the country.

473. BSGR files expert evidence from Mr. Francois Ferreira, addressing the hypothetical situation of whether Guinea could have developed its iron ore deposits successfully

⁴⁸⁷ Article 38 of the Base Convention; Article 184 of the Mining Code.

⁴⁸⁸ *Atlantic Triton v. Guinea*, Award, 21 April 1986, 3 ICSID Reports 19, 37-41 (Exhibit CL-60).

assuming BSGR would not have been involved.⁴⁸⁹ Mr. Ferreira establishes a number of reasons as to why the iron ore industry in Guinea has not been developed. These reasons have absolutely no connection to BSGR.

474. First, the Simandou project is not viable as it simply does not have all of the conditions required for a viable project. Mr. Ferreira explains that there are a number of factors required for such an iron ore project to be successful.

"Under normal circumstances, a new bulk mining project such as an iron ore mine, would be considered viable / potentially profitable / to have value if and only if the project met each of the following conditions:

- a. The cost per tonne of the project is projected to be within the range of the lowest quartile of production costs within the industry;*
- b. A significant portion of its production were committed to off-take agreements with customers;*
- c. Economic conditions predicated long term prices that could support an IRR in excess of 15%, depending on the company's cost of capital;*
- d. Medium term price forecasts confirmed that the project would deliver a 6 – 8 year payback on capital invested;*
- e. The project was located in a stable host country with the required long term confidence of security of tenure and ownership, and*
- f. The producer could clearly demonstrate the ability to raise the required capital to build the project with a commensurate low project risk premium"⁴⁹⁰*

475. Mr. Ferreira then concludes, "*[t]he current predicament of the Simandou project is such that only the first condition is fulfilled. It follows in my opinion that the project cannot be considered viable in the current market"*.⁴⁹¹

476. Second, it is for exactly this reason that the Simandou project is falling apart. Even Rio Tinto eventually abandoned the project. As Mr. Ferreira confirms:

*"The position is vividly illustrated by the recent announcement by **Rio Tinto** that it is walking away from its own Simandou project after an investment in excess*

⁴⁸⁹ Expert Report of Mr. Francois Ferreira (Exhibit CES-1).

⁴⁹⁰ *Ibid.*, para. 74.

⁴⁹¹ *Ibid.*, para. 75. Note that this position assumes that it would have been possible to export through Liberia.

*of \$2bn and a 19-year involvement in the project. Rio Tinto's announcement follows the collapse of a number of West African iron ore projects, many of which have shares trading in the market at less than 2% of their 2011 peak values. This underscores the risks associated with the mining sector in general and exploration and greenfield projects in particular. When these projects do get the timing right and when they do benefit from a few early, profitable production years then the profits and return on capital can be spectacular. However, if the timing is wrong and / or the project gets delayed, the outcome can be disastrous."*⁴⁹²

477. As reported recently, even the World Bank has decided to pull out of the Simandou project.⁴⁹³ This is further proof of the host of problems facing this project, which includes "*a slump in prices since 2011...an Ebola outbreak and difficulties in finding partners to fund infrastructure expected to cost more than \$10 billion*".⁴⁹⁴
478. It is wishful thinking on the part of Guinea to believe that any continued negotiations with Simfer/Rio Tinto would have resulted in a retrocession ahead of the settlement agreement in 2011.⁴⁹⁵ In the first instance, it was Guinea that decided to withdraw Rio Tinto's rights to Simandou Blocks 1 to 4 from Simfer on 28 July 2008 by Presidential Decree. The Government even provided Rio Tinto with a written list of its grievances which included Rio Tinto's failure to submit a Feasibility Study despite discovering several billion tonnes of proven deposits, Rio Tinto's failure to prospect a single block in 11 years and Rio Tinto's desire to freeze the deposits.⁴⁹⁶
479. Further, Guinea implies that Guinea would have been in a better position if the status quo regarding Simfer / Rio Tinto remained, and BSGR had not taken up the permits previously held by Simfer / Rio Tinto.⁴⁹⁷ However:
- (i) at the time of retrocession, Rio Tinto had not achieved any real development or indicated intention to produce a feasibility study or timeline towards production.

⁴⁹² *Ibid.*, para. 76 (emphasis added).

⁴⁹³ Mining Journal "*World Bank wants out of Simandou*" dated 11 October 2016 (Exhibit C-0260).

⁴⁹⁴ Bloomberg "*IFC to Quit Rio's \$20 Billion Iron Project in Latest Setback*" (Exhibit C-0261).

⁴⁹⁵ CMRG, para. 1144.

⁴⁹⁶ Letter from Guinea to Rio Tinto dated 30 July 2008 (Exhibit C-0093).

⁴⁹⁷ CMRG, paras. 97, 144, 308-313, 323, 1072- 1076, 1144.

Guinea refer to the diplomatic cable reference to Sam Soumah having “*cancelled lucrative iron ore mining contract .. held by Rio Tinto*”⁴⁹⁸. That cable does not refer to BSGR having any involvement in the process. It also refers to a “lucrative” contract, but the benefits of the contract had only impacted on Rio Tinto and its share price. There was no “lucrative” flow of royalties or public rail infrastructure that should have been, but were not developed by Rio Tinto;

- (ii) Rio Tinto had not been honest and transparent with Guinea regarding the assessment of asset value;⁴⁹⁹
- (iii) Rio Tinto often used improper pressure and influence to have Guinea act in its interests⁵⁰⁰;
- (iv) If Rio Tinto honestly believed the retrocession to be wrong and illegal it would have sued BSGR and or Guinea;
- (v) Rio Tinto’s aggressive and improper smear campaign against its competitor BSGR, demonstrated that it was unwilling to permit healthy competition in the mining industry in Guinea, which would be to Guinea’s detriment and;
- (vi) the first proper feasibility study was only delivered by Rio Tinto in 2016 which was followed soon after by a decision to suspend its project to mine iron ore at Simandou because of the collapse of demand from China. According to the 26 July 2016 article published on Africa Mining intelligence, the Minister of Mines and Geology sent a warning letter to Rio Tinto about the situation.

⁴⁹⁸ CMRG, paras. 308-309.

⁴⁹⁹ CMRG, para. 97, Rio Tinto evaluated Simandou, in 2008 as having 2.5 Billion tons of iron ore, in its attempt to counter the aggressive take over attempted by BHP, but had not been officially declared to Guinea. It was only through this process that Guinea discovered the real potential of Simandou

⁵⁰⁰ CMRG, para. 144. Rio Tinto by way of example, in Guinea’s own evidence had representative of the World Bank call Guinean ministers, when Rio Tinto’s interests were potentially compromised. CWS-5, paras. 19-21. Rio Tinto also had very close relationship with ambassadors from and to the US and the UK.

480. Moreover, as BSGR has elaborated in its Memorial, Guinea's decision to kick Simfer out had nothing to do with BSGR.⁵⁰¹ [PROTECTED] confirmed that Guinea's frustration with Simfer's inactivity on the ground predated BSGR's arrival in the country and that their withdrawal was based on proper legal advice.

481. In the alternative, Guinea contends that even if a retrocession could not be agreed with Simfer, Guinea could have assigned the rights to a "more skilled operator" or "an investor of good faith".⁵⁰⁴ This scenario is also highly unlikely. The fact that 2.5 years after the mining rights have been withdrawn from BSGR these rights have not been granted to another investor suggests indeed that there are no other interested investors for the moment. Mr. Ferreira's evidence goes in the same direction:⁵⁰⁵

"There is no investor confidence in the sector and certainly no appetite to invest large sums of capital into an industry that has been so volatile, and has gone from boom to bust over the last decade. In summary therefore, I do not consider that the project is currently economically viable. Had VBG been able to retain its rights, it would have been obliged to develop the mine and associated infrastructure for Blocks 1 and 2 within two years of completing the feasibility study. This multi-billion dollar investment would have been incurred and the project would have come on stream just as prices started their dramatic collapse. VBG would have been in a worse position having committed more capital to the project, and would have been at risk of not being able to recoup the expenditure incurred on the project at least not for the foreseeable future."

482. Third, it is President Condé who cancelled this investment for corrupt reasons and created the delays that resulted in the current situation. Having dug its own grave, Guinea is now looking for external stakeholders to blame.

⁵⁰¹ See paragraphs 63-68, BSGR's Memorial.

⁵⁰² [PROTECTED]

⁵⁰³ [PROTECTED]

⁵⁰⁴ CMRG, paras. 1145, 1148.

⁵⁰⁵ Exhibit CES-1, para. 83.

483. Since this arbitration commenced, BSGR's position has been that President Alpha Condé expropriated its rights so that he could reward the political backers who assisted him with rigging the 2010 election campaign with the highly valuable mining rights. As explained above, on 16 August 2016, BSGR obtained documents which overwhelmingly prove that in a criminal conspiracy with Och-Ziff, Mr Mebiame bribed President Condé in return for the grant of mining interests.⁵⁰⁶ BSGR cannot be held responsible for any losses flowing from President Condé's corrupt actions.
484. In light of all this, Guinea can hardly complain that it is now challenging to attract potential investors because iron ore prices have dropped, in an empty effort to transmute liability to BSGR. As Mr. Ferreira confirms, this is an issue that has impacted the entire market:

*"[T]he average iron ore price is forecast to remain below \$60/t to the end of this decade... For VBG's projects in Guinea, or for that matter any other undeveloped west African iron ore project, to be considered valuable there would need to be a consensus expectation that iron ore prices can be sustained at an average price above \$80/t - \$85/t for a minimum 10 years. However, the current consensus is that prices will average \$50/t, whilst some argue that \$40/t could become the 'new normal'."*⁵⁰⁷

485. There were a multitude of reasons for the current state of affairs of the local iron ore industry in Guinea, not least of which include President Conde's own corrupt actions. Even if the Tribunal were to find that BSGR was corrupt (which is fully denied), there is no method for the Tribunal, given all these other factors, to assess the impact of each factor on the local iron ore industry. As a result, this claim is simply futile and should be dismissed by the Tribunal.

7.2 Guinea has to pay for the costs of investigating its own allegations

⁵⁰⁶ Paras. 169-228.

⁵⁰⁷ Expert Report of Mr. Francois Ferreira, paras. 78-79.

486. Guinea created the allegations of corruptions against BSGR to mask the corrupt reasons behind President Conde's decision to cancel this investment. In doing so, Guinea generated massive costs for BSGR in having to defend these claims in a number of jurisdictions. Now, Guinea, incredibly, wants BSGR to also fund Guinea's costs in investigating its own allegations. The utter absurdity of Guinea's claim is underscored by the complete lack of any legal or evidentiary basis for BSGR to be liable for these costs.

7.3 BSGR is not responsible for Guinea's tarnished image

487. Guinea claims damages for the tarnishing of Guinea's image and the alleged damaging disclosure by BSGR surrounding this arbitration.⁵⁰⁸ This claim must be rejected.

488. As Guinea accepts, corruption has been rampant in the country for fifty years.⁵⁰⁹ However, since President Alpha Condé came to power in six years ago, matters have even gone worse. The United Nations has described Guinea's Anti-Corruption Agency as "*one of the least funded anti-corruption bodies in West Africa*".⁵¹⁰ The 2016 TRACE Matrix, a global business bribery risk index that was developed in collaboration with the RAND Corporation and that was first published in 2014, ranks Guinea as the 4th most corrupt country in the world, on a total of 199 countries.⁵¹¹ Further, the massive conspiracy behind President Alpha Condé's election is still unravelling, as evidenced by the Mebiame documents and the scandal involving Rio Tinto and Chinalco.

489. In summary, the causes of the Guinea's tarnished image are not a result of the presence or conduct of BSGR in Guinea, as asserted by Guinea, but rather, flows from factors including:

⁵⁰⁸ CMRG, paras. 1152-1166.

⁵⁰⁹ CMRG, para. 51.

⁵¹⁰ <https://www.unodc.org/westandcentralafrica/en/guinea-corruption-self-assessment.html>

⁵¹¹ Exhibit C-0246. The TRACE Matrix examines various issues that public sector corruption to flourish, including (1) the nature and extent of government interaction; (2) the existence and enforcement of anti-bribery laws; (3) the degree of financial transparency required of public officials and civil servants; and (4) the ability of civil society to monitor and expose corruption. The TRACE Matrix then aggregates relevant data obtained from leading public interest and international organizations for each of these four heads. Each country is then assigned an overall score as well as scores for each of the four domains and nine subdomains. Companies can use this information to assess the risk of bribery in each country so that they can then design compliance and due diligence programs targeted to those risks

- (i) the corruption exposed by the Palladino affair and expounded upon in documents supporting the arrest of Samuel Mebiame and settlement with Och Ziff;
- (ii) The conduct leading to the GETMA dispute;
- (iii) The corrupt and unfair allocation of rights to Sable mining as detailed in the Claimants' memorial and further detailed in the Sable mining Global Witness report
- (iv) The conduct of President Condé as detailed in paragraphs above as well as his government and security forces' violent conduct towards political opponents and;
- (v) The conduct of President Condé's son, Mohamed Condé.

490. Given all this, it is ludicrous for Guinea to claim that it is BSGR that has tarnished Guinea's reputation.

491. Guinea also states that BSGR has no evidence of President Condé's corruption.⁵¹² As stated in its extended correspondence to the Tribunal, BSGR now has the evidence to substantiate these claims.⁵¹³ The Mebiame documents and Rio Tinto e-mails prove, without a doubt, that President Condé was indeed receiving bribes from foreign companies in exchange for bribes. All of this evidence only confirms Dag Cramer's witness statement in the English High Court.

492. Guinea also cannot complain about the evidence BSGR was legally obliged to provide in other proceedings. The public proceedings in the New York courts were initiated by Rio Tinto and the SFO proceedings in the UK were triggered by Guinea's own request for assistance to the UK authorities. BSGR did not initiate these claims and had no choice but to put forward all of the evidence it had.

⁵¹² CMRG, para. 1153.

⁵¹³ Letters dated 22 August, 13 September and 26 September 2016.

493. BSGR has also never disseminated untrue information.⁵¹⁴ As an international company, BSGR is obliged to issue press releases, explaining the reasons it commenced an arbitration against a government. Further, in order to conceal the real corruption behind President Alpha Condé's election, Guinea purposefully invented a fanciful tale of BSGR's corruption which significantly damaged *BSGR's* reputation. In order to maintain its other client relationships and remain an attractive investor, BSGR must be as transparent as possible and provide information publicly on its position in this arbitration.

7.4 Guinea has not provided a legal or evidentiary basis for any of its counterclaims

494. Guinea has not provided the proper legal basis on which moral or economic damages are being claimed. Guinea has simply stated that Article 17 of the Mining Code 1995 allows the application of Section 1098 of the Guinean Civil Code which forms the legal basis for all its counterclaims. Given the potential value of these claims, Guinea has to particularise its claims in more detail in order for the Tribunal to understand the threshold that must be met under Guinean law for damages to be awarded.⁵¹⁵

495. Guinea also cannot be awarded moral damages in this instance. Moral damages are only awarded in exceptional circumstances. In fact, to date, there is not a single public investment arbitration in which the respondent State has been awarded moral damages. For example, in *Europe Cement v Turkey*, Turkey requested "*an award of monetary compensation for the moral damage it has suffered to its reputation and international standing*" but the Tribunal

⁵¹⁴ CMRG, paras. 1159-1166.

⁵¹⁵ *AMTO LLC v. Ukraine*, Arb. No. 080/2005, Award dated 26 March 2008, para. 118 (Exhibit CL-0054). In this case, Ukraine had filed a counterclaim for EUR 25,000 in damages for claimant's alleged dissemination of untrue information about Ukraine's state owned enterprises. The Tribunal rejected the counterclaim, determining that "*Article 26(6) ECT provides that the applicable law to an ECT dispute is the Treaty itself and 'the applicable rules and principles of international law'. The Respondent has not presented any basis in this applicable law for a claim of non-material injury to reputation based on the allegations made before an Arbitral Tribunal. Accordingly, the Arbitral Tribunal finds that there is no basis for a counterclaim of this nature and it is accordingly dismissed*".

commented that "*it did not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages.*"⁵¹⁶

496. There are plainly no exceptional circumstances present which would justify an award of moral damages to Guinea in this arbitration. Further, in the unlikely event Guinea succeeds on the merits of its case, any damage suffered by Guinea will be remedied by the final award so there is no necessity for the Tribunal to consider awarding moral damages.⁵¹⁷

497. Significantly, Guinea has not put forward a *single* document to evidence its claims – there is simply no proof to substantiate these claims and this in itself is sufficient for these claims to be dismissed. In *Quiborax v Bolivia*, the tribunal held that:

*"That said, had the Tribunal entertained this claim, it would in any event have denied it for lack of evidence of any specific moral injury. Indeed, the Tribunal agrees with Bolivia and Lemire that the threshold to award moral damages is high. It also shares Bolivia's view that the Claimants' case and the evidence on record do not meet the exacting criteria required in order to grant moral damages. In addition, the Tribunal shares the opinion of other tribunals according to which moral damages are an exceptional remedy."*⁵¹⁸

498. The truth of the matter is Guinea is grasping at straws, in the hope of advancing its defence. Guinea's counterclaims have no basis in law and fact, given their complete failure to provide the proper legal basis and any evidence to substantiate their counterclaims. BSGR respectfully requests that the Tribunal dismiss these counterclaims.

499. Guinea have alleged that Minister of Mines Kanté was removed from office as a result of his attitude to BSGR⁵¹⁹ but there is no evidence in support. Rather it is clear that the role of minister of mines has rarely been held as a long term tenure. In fact, Minister Kanté's role

⁵¹⁶ *Europe Cement Inv. & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/02, Award dated 13 August 2009, para. 181 (Exhibit CL-0055).

⁵¹⁷ *Cementownia v Turkey*, para. 171 ("*In any case, since the Arbitral Tribunal has already accepted the Respondent's request with respect to the fraudulent claim declaration, the Respondent's objective is already achieved.*"); See *Europe Cement*, para 181 (Exhibit CL-0056) ("*any potential reputational damage suffered... will be remedied by the reasoning and conclusions set out in this Award, including an award of costs...*").

⁵¹⁸ *Quiborax SA and another v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award dated 16 September 2015, para. 618 (Exhibit CL-0057).

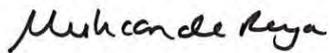
⁵¹⁹ CMRG, paras 314-316.

was in fact longer than several others. Further, Kanté admitted that he never directly talked with Mamadie Touré, so her influence at that time remains conveniently ambiguous.⁵²⁰

ANNEX 1: BSGR WAS NOT INVOLVED IN A CORRUPT SCHEME IN GUINEA

ANNEX 2: PRESENTATION

Signed



Mishcon de Reya LLP

Submitted for and on behalf of BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL

10 January 2017

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⁵²⁰ Exhibit C-81.

ANNEX 1

BSGR WAS NOT INVOLVED IN A CORRUPT SCHEME IN GUINEA

I BSGR DID NOT BRIBE MAMADIE TOURÉ

- 1.1 BSGR did not enter into any contracts with Mamadie Touré
 - 1.1.1 *The 2007 and 2008 contracts are forged*
 - 1.1.2 *Cilins' conviction does not implicate BSGR*
 - 1.1.3 *Pentler's contracts with Mamadie Touré/Matinda in 2006 were not made on behalf of BSGR*
 - 1.1.4 *Pentler did not enter the August 2010 contracts with Mamadie Touré on BSGR's behalf*
- 1.2 BSGR did not ask Mamadie Touré to exert influence on her husband
 - 1.2.1 *1.2.1 Mamadie Touré did not intervene in the procurement of BSGR's mining rights and/or had no influence*
 - 1.2.2 *Mamadie Touré had no involvement in the award of exploration permits over Simandou North and Simandou South*
 - 1.2.3 *Mamadie Touré had no involvement in the award of exploration permits over Blocks 1 and 2*
 - 1.2.4 *Mamadie Touré had no involvement in the award of exploration permits for bauxite and uranium*
- 1.3 BSGR did not distribute payments or gifts to Mamadie Touré
 - 1.3.1 *BSGR did not give Mamadie Touré two Land Cruisers*
 - 1.3.2 *BSGR did not pay Mamadie Touré \$250,000 in May 2006*
 - 1.3.3 *BSGR did not give Mamadie Touré cash payments*
 - 1.3.4 *BSGR did not use Ghassan Boutros to make payments to Mamadie Touré*
 - 1.3.5 *Pentler's payments to Mamadie Touré in July-August 2010 were not made on behalf of BSGR*
 - 1.3.6 *Pentler's payments to Olympia in March-April 2011 were not made on behalf of BSGR*
 - 1.3.7 *Olympia's disbursement of \$936,451.02 to Mamadie Touré in May 2012 was not made on behalf of BSGR and was not related to Mamadie Touré's attestation*

II BSGR DID NOT BRIBE PRESIDENT CONTÉ

III BSGR DID NOT BRIBE I.S. TOURÉ

- 3.1 BSGR's relationship with I.S. Touré
- 3.2 BSGR's payments to I.S. Touré were legitimate

IV BSGR DID NOT BRIBE IBRAHIMA KASSORY FOFANA

V THERE IS NO INDIRECT EVIDENCE OF CORRUPTION

- 5.1 Context of endemic corruption

- 5.2 BSGR's use of 'consultants'
 - 5.2.1 *Pentler and its principals*
 - 5.2.2 *Bah and Daou*
 - 5.2.3 *Boutros*
- 5.3 BSGR has not attempted to conceal its activities
- 5.4 Project Hills
 - 5.4.1 *Project Hills was an expedited deal*
 - 5.4.2 *The role of Skadden*
 - 5.4.3 *BSGR was co-operative and open in its provision of documents*
- 5.5 BSGR has not attempted to destroy evidence
- 5.6 The existence of unresolved criminal proceedings is not evidence of BSGR's guilt

I BSGR DID NOT BRIBE MAMADIE TOURÉ

1.1 BSGR did not enter into any contracts with Mamadie Touré

1.1.1 The 2007 and 2008 contracts are forged

1. Each of the BSGR signatures on the contracts with Mamadie Touré/Matinda dated 20 June 2007, 27 February 2008 and 28 February 2008 has been forged. BSGR did not enter into any contracts with Mamadie Touré.⁵²¹
2. It is especially clear that the two contracts purportedly signed by Mr Avidan on 27 and 28 February 2008 are forgeries – Mr Avidan was in Israel on those dates.⁵²²
3. It would not have been difficult for Mamadie Touré to obtain copies of Struik’s and Avidan’s signatures in order to create these forgeries during the Presidency of President Conté – their signatures were on numerous letters and other formal documentation which had been submitted to the Government in the course of BSGR’s exploration of Simandou North and South. Also Mr Mebiame may have forged these documents. It is Guinea's case that it obtained these documents for Mamadie Touré through Mr Mebiame.
4. Moreover, the following five factors individually and cumulatively indicate that the contracts are not genuine.
5. First, it is highly unlikely that experienced businessmen such as Mr Struik and Mr Avidan would have committed illegal agreements to writing. Indeed, on Guinea’s case, BSGR took great care to maintain distance from Mamadie Touré, by using Pentler as an intermediary for agreements with her.

⁵²¹ LCIA Statement of Defence [218(i)] (Exhibit R-0456); CWS-3, paras 108 and 137; CWS-2, paras. 108-110
⁵²² Second Witness Statement of Asher Avidan in the LCIA Arbitration dated 18 July 2016, paragraph 18, page 5 (Exhibit C-0262); Expenses of Conakry Head Office (Exhibit C-0263); Diesenhaus Unitours’ records of flights taken by Asher Avidan in 2008 (Exhibit C-0264).

6. Second, if BSGR was inclined to commit bribery contracts to writing, it certainly would not have done so in such a random fashion. Each of the three contracts was allegedly entered into by a different BSGR entity: the 2007 contract was entered into by BSGR Guinea Sàrl;⁵²³ the 27 February 2008 contract was entered into by BSGR;⁵²⁴ and the 28 February 2008 contract was entered into by BSGR Guinea.⁵²⁵ Nor does it make any sense to speak of granting Mamadie Touré “5% of [BSGR Guinea’s] shares of Simandou blocks 1 and 2”, as the 28 February 2008 contract purports to do.⁵²⁶ There are and were no shares in Simandou Blocks 1 and 2 – there were shares in BSGR Guinea (i.e. the BVI company), which held all BSGR’s mining rights at that time (including those to Simandou North and Simandou South).
7. Third, the 20 June 2007 contract is a commercial nonsense, whichever way one reads it. Guinea has not bothered to analyse the contract, perhaps because it realises that there is no sensible explanation for it, on its own case. The contract purports to grant Matinda a 5% stake in BSGR Guinea Sàrl. That can be interpreted in one of two ways:
- (i) as a re-affirmation of the 5% which BSGR had allegedly already granted Mamadie Touré on 20 February 2006 (using Pentler as an intermediary).⁵²⁷ But if all BSGR was doing was ‘re-affirming’ existing rights, Mamadie Touré was not rewarded at all. She obtained nothing extra for her alleged assistance in obtaining uranium permits;
 - (ii) alternatively, the 20 June 2007 contract can be interpreted as granting Mamadie Touré a further 5% stake in BSGR Guinea Sàrl as a reward. Of course, this alternative explanation makes even less sense – it is ludicrous to suggest that BSGR would so willingly have given away as much as 15% of the equity in BSGR Guinea Sàrl (around 5% through her 33% stake in Pentler, 5% promised in Dubréka later in

⁵²³ Exhibit R-27.

⁵²⁴ Exhibit R-28.

⁵²⁵ Exhibit R-29.

⁵²⁶ Exhibit R-29.

⁵²⁷ Exhibit R-24.

2006 (according to Mamadie Touré’s own declaration⁵²⁸) and then a further 5% in June 2007).

8. Fourth, Mamadie Touré does not claim to have been the one demanding these new contracts. On Guinea’s case, by the end of 2006 BSGR had already promised Mamadie Touré a shareholding (both directly and through Pentler). Mamadie Touré therefore already had plenty of incentive to assist BSGR. In the absence of further demands from her, there is no reason why BSGR would have promised her anything more. Mamadie Touré’s claim that she was asked to sign the 2008 contracts “*because Struik was no longer manager of BSGR in Guinea*”⁵²⁹ is nonsense – Mr Struik was never the manager in Guinea (Oron held that position before Avidan). Even if Mr Struik’s role changed slightly following Mr Avidan’s arrival, he was still very much involved in the Guinea project and there would have been no reason to require new contracts with Mamadie Touré.
9. Fifth, Guinea’s surmise that the 28 February 2008 contract “*probably confirmed the participation of up to 5% granted to Mrs. Touré within the project, via Pentler*” is unavailing.⁵³⁰ Even if there had been some concern that Mamadie Touré’s indirect stake in BSGR Guinea (held through her shareholding in Pentler) was about to disappear as a result of the contemplated buyback of Pentler’s shares in BSGR Guinea, on Guinea’s case that hole had already been plugged by the 20 June 2007 contract, which granted Matinda a direct 5% stake in BSGR Guinea. Moreover, on Guinea’s case, BSGR had just promised Matinda \$2 million (the 27 February 2008 contract). It is a nonsense to suggest that, in those circumstances, BSGR would have decided to grant Matinda a further 5% shareholding a day later.
10. In short, the inauthenticity of these contracts is established both by documentary evidence (the documents proving that Avidan was in Israel at the time the February 2008 contracts were allegedly signed) and basic common sense.

⁵²⁸ Exhibit R-0035.

⁵²⁹ Exhibit R-0035, paragraph 18.

⁵³⁰ CMRG, para. 281.

1.1.2 Cilins' conviction does not implicate BSGR

11. In support of its case that the contracts directly between BSGR and Mamadie Touré are genuine, Guinea relies on the FBI transcripts of Mr Cilins' conversations with Mamadie Touré in 2013 and his subsequent conviction for obstructing a federal criminal investigation.⁵³¹ In fact, Mr Cilins' actions do not assist Guinea's case against BSGR.
12. Mr Cilins went to the US of his own volition. Mamadie Touré had once before made and withdrawn her allegations (in 2010), and Mr Cilins was going to ask her to withdraw them again. BSGR knew that he was going to do that and indeed it would have been very useful if that had been obtained: how could the Technical Committee have continued if Mamadie Touré provided a more up to date statement withdrawing the allegations on which the Technical Committee relied? The declaration which Mr Cilins sought from Mamadie Touré was true: she had never signed a contract with BSGR, either directly or indirectly; she had not intervened with government officials on BSGR's behalf; nor had she received money from BSGR, either directly or indirectly; nor had BSGR ever promised to pay her anything.⁵³²
13. BSGR had no idea that Mr Cilins would offer money to Ms Touré nor that he would ask her to destroy documents.⁵³³
14. BSGR does not know why Mr Cilins offered her money or asked her to destroy documents. It makes no sense to destroy the documents, since there were already multiple copies in existence (e.g. the ones that Walter Hennig had produced when he tried to blackmail Mr Avidan – one of many extortion attempts that BSGR rebuffed). Mr Noy has explained that Pentler's business relations with Mamadie Touré were unrelated to BSGR.⁵³⁴ They were not

⁵³¹ CMRG, para. 785.

⁵³² Witness Statement of Daniel Pollak in the LCIA Arbitration, para 56 (Exhibit R-0383); CWS-3, para. 108; CWS-2, paras. 94-102, 108-110 and 117.

⁵³³ CWS-3, para. 170; CWS-1, para. 47.

⁵³⁴ Exhibit R-0456, para. 223 (iii).

entered into for or on behalf of BSGR or at its direction or as its agent or on any other basis with BSGR. They did not involve it.

15. Guinea has focused on the fact that Mr Cilins, in his conversations with Mamadie Touré, said that Steinmetz had sanctioned the offering of money.⁵³⁵ Mr Steinmetz says in terms (and can be cross-examined on it) that he did not offer any money, nor did he know that Mr Cilins was going to do so (nor that he was going to ask for documents to be destroyed).⁵³⁶ Mr Cilins says that he used Steinmetz's name in order to persuade Mamadie Touré, but that Mr Steinmetz knew nothing about his approach. In fact, it is Mamadie Touré who first mentions Steinmetz and continues to do so (asking in effect, a number of times, "*Is this from Beny*").⁵³⁷ This is not surprising given that, as discussed in paras. 428-429 of the main body of the Reply Memorial, it has been established that she had been paid 50,000 USD by the Guinean Government and was promised US citizenship by the US authorities. Realising that this was what she wanted to hear, Mr Cilins took the bait and pretended he had been sent by Mr Steinmetz in order to persuade Mamadie Touré to destroy the documents.⁵³⁸ It has happened on many occasions in the past and it will happen in the future that people have used Beny Steinmetz's in the hope that it would open doors or draw attention. But, in truth, neither Mr Steinmetz nor BSGR was behind Cilins' approach.
16. As for Mr Cilins' guilty plea, this did not implicate BSGR. Mr Cilins pleaded guilty to one charge of obstructing a criminal investigation.⁵³⁹ The particulars of the offence were that he

⁵³⁵ CMRG, paras. 607-609.

⁵³⁶ CWS-1, para. 47.

⁵³⁷ CW meeting with Cilins, Audio dated 25 March 2011: At 0.12: *FBI Agent Angela Hill: "This is special agent Angela Hill. It is March 25 2013, at 8:41 am. This is going to be consensually monitored conversation between ... Names"*

MT: "Mamadie Touré"

AH: "And who's the target?"

MT: "Frédéric Cilins" ...

At 1:06:

The interpreter: "Vous vous souvenez des trois points de la conversation?"

MT: "oui"

The interpreter: "Vous parlez du passé", "ensuite Thiam", "ensuite tu peux être Américain"

MT: "oui?"

The interpreter: "Oui"

⁵³⁸ Witness Statement of Michael Noy in the LCIA Arbitration, para. 118; Exhibit R-0169, paragraph 6.

⁵³⁹ Letter from the US Department of Justice to William J. Schwartz dated 7 March 2014 (Exhibit C-0265).

“agreed to pay money to an individual in exchange for that individual’s agreement to provide to [Cilins], for destruction, documents that were to be produced before a grand jury in the Southern District of New York”. These particulars do not suggest, still less expressly state, that Mr Cilins acted as an agent for BSGR when he offered money to Mamadie Touré.

17. Nothing in the FBI recordings indicates that BSGR obtained its mining rights by bribing Mamadie Touré – an inconvenient truth which Guinea skirts over.

18. Guinea seek to represent the declaration of Mamadie Touré as being part of the Cilins proceedings in the US, referring to it as *“testimony before the US authorities”*⁵⁴⁰ when her December 2013 declaration appears to have had nothing to do with Mr Cilins’ arrest and conviction, with the US authorities not even having possessed or considered the contracts which were alleged to be “original” contracts at that time. It is noteworthy that the contemporaneous letter of the Technical Committee to VBG dated 4 December 2013⁵⁴¹ refers to this affidavit as *“a statement from Mamadie Touré”* and not as *“testimony before the US authorities”*. The United States Forfeiture Court documents, seeking to recover Mamadie Touré’s assets, do not describe her evidence as evidence obtained in the US. To the contrary, it refers to the *“facts set forth”* as being based upon admissions she made *“in a signed declaration published by the Government of Guinea”* and elsewhere, as facts *“drawn from a declaration signed by Mamadie Touré that was published on a Guinean government website.”*⁵⁴²

1.1.3 *Pentler’s contracts with Mamadie Touré/Matinda in 2006 were not made on behalf of BSGR*

⁵⁴⁰ CMRG, para. 650.

⁵⁴¹ Exhibit C-0073

⁵⁴² Exhibit C-0345 Verified Complaint for Forfeiture *in Rem, United States v. Real Property*, No. 3:14-cv-01428-TJC-PDB (M.D. Fla. 2015).

19. Contrary to Guinea's assertion, the contracts between Pentler and Mamadie Touré were not under the control of BSGR and made on its behalf.⁵⁴³ At the time they were entered into, BSGR knew nothing about Pentler's contracts with Mamadie Touré.⁵⁴⁴
20. Indeed, the only 'evidence' Guinea cites in support of its assertion that Pentler acted on behalf of BSGR is the role of Mrs Sandra Merloni-Horemans in 'managing' Pentler until March 2006.⁵⁴⁵ This is a total red herring.
21. Mrs Merloni-Horemans was Director and Head of Administration of Onyx Financial Advisors between 1998 and 2014. As part of that role, she worked as director, proxy holder or company secretary to boards of directors of client companies when required.⁵⁴⁶ The BSG group of companies was one of Onyx's main clients, but it was not its only client.⁵⁴⁷
22. In February 2006 Mr Cilins, Mr Noy and Mr Lev Ran decided to form a company dedicated solely to their business affairs in Guinea. Mr Oron suggested that Onyx may have a shelf company which they could purchase.⁵⁴⁸ Mr Tchelet put Mrs Merloni-Horemans in touch with Mr Noy, once she had confirmed that Onyx could assist with the acquisition of a BVI company.⁵⁴⁹
23. Pentler was one of dozens of dormant shelf companies owned by Onyx at the time. In accordance with its standard procedure for shelf companies, Onyx held 100% of the shares in Pentler and Margali Management Corporation (**Margali**, a subsidiary of Onyx) was appointed the first and sole director. Mrs Merloni-Horemans and three other people were authorised signatories and directors of Margali.⁵⁵⁰

⁵⁴³ CMRG, para 787.

⁵⁴⁴ CWS-3, para. 141 and 161; CWS-2, paras. 111-113; Exhibit C-0456, para. 218.

⁵⁴⁵ CMRG, para 788.

⁵⁴⁶ Witness Statement of Sandra Merloni-Horemans in the LCIA Arbitration, paras. 5-6 (Exhibit R-115).

⁵⁴⁷ *Ibid.*, para. 8; First Witness Statement of Dag Lars Cramer ("CWS-7"), para. 10-11.

⁵⁴⁸ Exhibit R-0456, para. 215.

⁵⁴⁹ Exhibit R-115, para. 12.

⁵⁵⁰ *Ibid.*, para. 13.

24. On 13 February 2006 Mr Noy confirmed that he and his business partners would buy Pentler.⁵⁵¹ Mrs Merloni-Horemans agreed to act as trustee of Pentler's shares in the short term, but recommended that Mr Noy should find his own administrator/trust company in order to avoid a conflict of interest, since Onyx was also providing services to BSG. Further, in order to avoid a conflict of interest arising from the fact that Margali was a director of Pentler and a director of BSGR Guinea, Mrs Merloni-Horemans decided to resign Margali as a director of Pentler as soon as the sale had taken place. On 15 February 2006 a written board resolution was signed, confirming the resignation of Margali as director of Pentler.⁵⁵²
25. Mrs Merloni-Horemans continued to administer Pentler until Mr Noy provided the details of another administrator in November 2006.⁵⁵³
26. Thus, Guinea is wrong to say that, at the beginning, Pentler could only sign contracts with the express authorisation of "the BSG group".⁵⁵⁴ That statement treats Mrs Merloni-Horemans as an employee of the BSG group, which she plainly was not. Onyx (and therefore Mrs Merloni-Horemans) was an agent of the BSG group, but it was also (temporarily) an agent of Pentler, to which it owed fiduciary duties. Indeed, the potential conflict between Onyx's duties to the BSG group and its duties to Pentler is the very reason Margali resigned as a director.
27. Whenever Mr Noy sent copies of contracts between Pentler and third parties to Mrs Merloni-Horemans, he sent them to her, and she received them, in her capacity as Pentler's fiduciary agent. She did not send them to anyone within the BSG group. As Mrs Merloni-Horemans states, to have done so would have been unprofessional and a breach of her confidentiality obligations to Pentler.⁵⁵⁵

⁵⁵¹ *Ibid.*, para. 17

⁵⁵² *Ibid.*, para. 19-20.

⁵⁵³ *Ibid.*, para. 19.

⁵⁵⁴ CMRG, para. 788.

⁵⁵⁵ Second Witness Statement of Sandra Merloni-Horemans in the LCIA Arbitration, para. 6 (Exhibit C-0266).

28. Therefore, Mrs Merloni-Horemans' receipt of Pentler's contracts with third parties does not fix BSGR with knowledge of those contracts. Moreover, as Mrs Merloni-Horemans explains in her witness statement, her discussions with Mr Noy about the contracts he sent her (which included the 20 February 2006 agreements with (1) Mamadie Touré and (2) Aboubacar Bah and I.S. Touré) likely related to who should sign them. It was not appropriate for Mrs Merloni-Horemans to sign them on behalf of Margali, as Margali had resigned as a director of Pentler.⁵⁵⁶ Contrary to Guinea's assertion, she was not involved in drafting Pentler's third party agreements.⁵⁵⁷

1.1.4 Pentler did not enter the August 2010 contracts with Mamadie Touré on BSGR's behalf

29. Pentler did not enter into the August 2010 contracts on behalf of BSGR and that BSGR had no knowledge of them.

30. The contract dated 8 July 2010, which refers to Simandou and which purports to bear Mr Noy's signature, is a forgery. Pentler's contracts with Mamadie Touré had nothing to do with Simandou, and nothing to do with BSGR. It appears that one of the (genuine) 3 August 2010 contracts has been modified to refer to the Simandou project, thereby implicating BSGR.

1.1.5 BSGR's position on the contracts with Mamadie Touré has been consistent and clear

31. In order to shore up its incoherent case on the contracts allegedly entered into (either directly or indirectly) between BSGR and Matinda/Mamadie Touré, Guinea attempts to cast suspicion on BSGR by claiming it has performed a 'U-turn' on its position.⁵⁵⁸ It has not. BSGR has always asserted and continues to assert that the three contracts allegedly concluded directly between BSGR and Matinda/Mamadie Touré are forgeries.

⁵⁵⁶

Ibid.

⁵⁵⁷

CMRG, para. 171.

⁵⁵⁸

CMRG, para. 784.

32. As regards the contracts between Pentler and Mamadie Touré/Matinda, Guinea criticise BSGR for asserting that they were false.⁵⁵⁹ Those assertions were made genuinely at the time, and prior to BSGR having an opportunity to question Mr Noy (who is neither an employee nor an agent of BSGR) about the contracts between Pentler and Mamadie Touré. At that time, BSGR had real concerns regarding the authenticity of those contracts. However, Mr Noy has subsequently confirmed that they are genuine.

1.2 **BSGR did not ask Mamadie Touré to exert influence on her husband**

33. Guinea asserts that the only reason for the existence of the contracts between BSGR/Pentler and Mamadie Touré/Matinda was to pay for the influence of Mamadie Touré over President Conté and the Government of Guinea more generally.⁵⁶⁰ Insofar as Pentler is concerned, that is not true – Pentler and Mamadie Touré had an independent commercial relationship, as described in Mr Noy’s witness statement.

34. Insofar as it relates to BSGR, Guinea’s statement harms rather than helps its case on the authenticity of the contracts between BSGR and Mamadie Touré/Matinda. That is because it is clear from Guinea’s *own* evidence that Mamadie Touré did not have influence over President Conté.⁵⁶¹ It follows that any contracts between BSGR and Mamadie Touré/Matinda would have served no purpose.

35. In any event, BSGR did not need to use Mamadie Touré (or I.S. Touré – addressed further below) to gain access to President Conté. Mr Avidan was able to arrange these meetings himself, by contacting the President’s head of security or the Secretary General’s office.⁵⁶² Maintaining contact with the President was a major part of Mr Avidan’s role, and he was trained for it.⁵⁶³

⁵⁵⁹ CMRG, para. 784 and footnotes 857, 858 and Exhibit R-455.

⁵⁶⁰ CMRG, para. 790.

⁵⁶¹ See paragraph 432(i) above.

⁵⁶² CWS-3, para. 132.

⁵⁶³ *Ibd.*,

36. BSGR addresses below the so-called evidence of Mamadie Touré’s influence over the decisions to award mining rights to BSGR.

1.2.1 Mamadie Touré did not intervene in the procurement of BSGR's mining rights and/or had no influence

37. It is Guinea's case that Mamadie Touré was exercising pressure on Guinean officials to grant mining rights to BSGR. However, as established in para. 346 of the Reply Memorial not less than twelve Guinean officials who were involved in the granting of BSGR's rights have testified under oath that they did not even know who Mamadie Touré was or that they did not have any contact with her in the context of this matter:

38. Mr Avidan testified that *“the President was highly dismissive of and rude to Ms Touré, as well as extremely aggressive towards her. It did not seem to me to be the kind of relationship that would allow her to hold any influence at all over him”*.⁵⁶⁴

39. Similarly, Mr Struik *“find[s] it difficult to believe that she could have had an influence on him at all.”*⁵⁶⁵ He recalls being called to the Presidential Palace in the early hours of the morning sometime in 2007. President Conté was watching a football match on television and Mamadie Touré was with him. He asked questions about BSGR’s work and, when he was interrupted by Mamadie Touré he *“went completely mad. He shouted at her and ordered her to shut up as this was none of her business. At some point I even feared that he would hit her in front of us.”*⁵⁶⁶

40. In light of the abundant evidence that Mamadie Touré was not involved and had no influence in any event, it matters little whether she was the President's wife or not. However, for the record, BSGR maintains that she was not President Conté's wife. As part of the document production exercise, Guinea was ordered to produce documents in relation to the

⁵⁶⁴ CWS-3, para. 135.

⁵⁶⁵ CWS-2, para. 107

⁵⁶⁶ *Ibid.*

marital status of Mamadie Touré, including (i) any marriage registration certificate or other official document certifying Mamadie Touré to be the wife of President Conté; (ii) any marriage registration certificate or other official document certifying President Conté to be the husband of Mamadie Touré; (iii) any certificate or other official document certifying Mamadie Touré being the fourth wife of President Conté; (iv) all internal and external documents, including communications, memoranda, notes and/or formal invitations between 2005 and 2010 in relation to the wedding of Mamadie Touré and President Conté; (v) all documents relied on for, or that confirm Mamadie Touré being the widow of President Conté; and (vi) all documents and communications in relation to Mamadie Touré's application for a diplomatic passport and/or for its renewal.⁵⁶⁷ As Guinea did not produce a single document responsive to this request, BSGR requests the Tribunal to draw the inference that Mamadie Touré was not President's Conté's fourth wife.

41. BSGR's request for an inference to be drawn is further supported by the fact that:
- (i) Guinea have not produced any evidence of Mamadie Touré being part of the funeral arrangements or mourning entourage following President Conté's death;. In fact, contemporaneous press reports following President Conte's death mention only two of his *three* wives being present at the funeral proceedings.⁵⁶⁸ As confirmed by video footage of the mourning party inside the People's Palace, Mamadie Touré did not attend her supposed husband's funeral;⁵⁶⁹
 - (ii) Guinea have not produced any evidence of Mamadie Touré inheriting from President Conté's estate;

⁵⁶⁷ Annex A, Request 7, Procedural Order No. 7 dated 5 September 2016.

⁵⁶⁸ New York Times "*Thousands Mourn Guinea dictator*" (Exhibit C-0267); ABC news "*Guinea Coup Leader Vows to Fight Corruption*" (Exhibit C-0268).

⁵⁶⁹ Video footage of Henriette Conte and Kadiatou Seth Conte attending the funeral of President Lansana Conte inside the People's Palace in Conakry, Guinea:
<http://www.itnsource.com/en/shotlist/RTV/2008/12/27/RTV3617008/>

- (iii) The passport issued to her in 2006, allegedly 6 years after her marriage to President Conté is not a diplomatic passport, and makes no reference to her alleged status as a spouse of the Republic of Guinea, only to her being an “*Administrative Editor*”⁵⁷⁰;
- (iv) Guinea assert that Mamadie Touré was observed in the presence of “red berets” on various occasions, which indicates her status as deserving of a “Presidential Guard”.⁵⁷¹ However, the presence of red berets near Mamadie Touré is not evidence of her relationship with President Conté. As one example, Guinea attempt to paint the presence of red berets at the September 19, 2006 reception held by BSGR as a consequence of the presence of Mamadie Touré, rather than the presence of Minister Souaré, who Guinea admit was also attending the reception.⁵⁷² However, although Guinea acknowledge that Minister Souaré was no longer Minister of Mines on the day of the reception, they conveniently neglect to inform the Tribunal that Souaré was in fact then present in his capacity as Guinean Minister of State for social and cultural domain, making him a high-level member of President Conté’s cabinet, and thereby entitling him to the protection of the Presidential Guard, if they were in fact Presidential Guard and not regular red beret soldiers.
- (v) Guinea’s own exhibit referring to “Mamamdi Conté” as fourth wife, also refers to Aisha Koné being “*sometimes referred to as Conté’s “fourth wife”*”⁵⁷³;

42. The only document that Guinea has produced as evidence of Mamadie being the wife, is a declaration of Mamoudou Kouyate about the union of Mamadie Touré with Lansana Conte. He refers to what he was told by Yarie Touré, Mamadie's elder sister on 6 July 2013. Whereas Guinea claims that she has passed away, it is telling that the death announcement that Guinea is producing in support of this claim is ten years wrong when it comes to the date of birth of the sister. Mamoudou Kouyate also refers to a discussion he had with a local imam that did not attend the wedding. The wedding would have been celebrated by Colonel

⁵⁷⁰ C-0348.
⁵⁷¹ CMRG, paras 231-233.
⁵⁷² CMRG, para. 231.
⁵⁷³ Exhibit R-84

Diallo, old friend of President Conté. As mentioned here above, Mamadou Kouyate is a special advisor of President Alpha Condé and he paid her 50,000 USD to cooperate with the Government against BSGR. There is no reason to believe that he obtained any of those information from the sister and the imam by other means. The Tribunal should therefore be extremely reluctant to give any weight to Mr Kouyaté's declaration.

1.2.2 Mamadie Touré had no involvement in the award of exploration permits over Simandou North and Simandou South

43. The award of exploration permits over Simandou North and Simandou South had nothing to do with Mamadie Touré. BSGR applied for those permits during its negotiations with the Government over the Memorandum of Understanding.⁵⁷⁴
44. As regards Mr Souaré's evidence of a meeting between the President and BSGR in November or December 2005, this has been addressed in the main body of this Reply Memorial.
45. As regards to Mamadie Touré's evidence that she would have intervened in the award of BSGR's exploration permits in Simandou North and South, BSGR refers to the witness evidence in the main body of the Reply Memorial according to which these permits were awarded by the CPDM and Minister of Mines Souaré in accordance with the Mining Code and without any involvement of Mamadie Touré.
46. As regards the allegation that Beny Steinmetz would have met President Conté in Guinea in 2005⁵⁷⁵ or 2006, there is a wealth of documentary evidence showing that Steinmetz did not visit Guinea until 2008.⁵⁷⁶

⁵⁷⁴ CWS-1, para. 39; C-0087.

⁵⁷⁵ For example RWS-2, para. 9.

⁵⁷⁶ CWS-1, para. 19, 59; Exhibit C-0269;

- (i) BSGR has produced copies of Steinmetz's Israeli and French passports for the period 2006 to 2008, and they show that he was not in Guinea before 2008. Steinmetz has confirmed that these are the only passports he held during that period and that he was not in Guinea prior to February 2008.⁵⁷⁷

- (ii) As part of the document production exercise, the Tribunal ordered Guinea to produce all documents showing all entry and exit records of Benjamin Steinmetz to and from the Republic of Guinea between 1 January 2005 and 31 December 2008.⁵⁷⁸ Guinea has failed to produce any evidence responsive to this request claiming that these records would have been destroyed. However, taking into account that Guinean law provides for the automatic protection and preservation of these documents and even imposes criminal sanctions such as fines and prison sentence in case documents are destroyed, Guinea's explanation is not credible. This is all the more taking into account that Guinea has failed to provide any evidence of the destruction of these documents, such as for example a witness statement from the Director of the National Archives. In these circumstances, BSGR requests the Tribunal to draw the reasonable inference that Mr Steinmetz did not visit Guinea before 2008 and therefore had no meetings with President Conté to discuss the exploration permits in Simandou North and Simandou South.

- (iii) In the main body of the Reply Memorial BSGR has addressed Guinea's failure to produce documents in relation to a number of specific meetings that Mamadie Touré has claimed to have organized and the inferences that are required to be drawn in this respect.

1.2.3 Mamadie Touré had no involvement in the award of exploration permits over Blocks 1 and 2

⁵⁷⁷

CWS-1, para. 19

⁵⁷⁸

Annex A, Request 8, Procedural Order No 7 dated 5 September 2016.

47. BSGR let it be known that it was eager to apply for permits over Rio Tinto's blocks.⁵⁷⁹ It did not lobby the Presidency or the Ministry of Mines to revoke Rio Tinto's mining rights.⁵⁸⁰ Nor did it ask Mamadie Touré to lobby on its behalf.⁵⁸¹ In fact, lobbying the Government about Rio Tinto was directly contrary to Steinmetz's advice on BSGR's strategy – in 2007 he advised Struik and Avidan that Rio Tinto's position was "*not our problem and government should do their own decision*".⁵⁸²
48. There is nothing about the process by which BSGR was granted exploration permits over Blocks 1 and 2 which suggests that BSGR used Mamadie Touré to obtain the permits, let alone paid for her assistance. On the contrary, the documentary evidence shows that the process was entirely above board. The Tribunal is respectfully referred to paragraphs 87 to 109 of the main body of the Reply Memorial.

1.2.4 Mamadie Touré had no involvement in the award of exploration permits for bauxite and uranium

49. Guinea claims that Mamadie Touré was involved in acquiring all of BSGR's exploration permits, including those for bauxite and uranium.⁵⁸³ That bold assertion is made without a scrap of credible evidence.
50. The only evidence of Mamadie Touré's involvement in BSGR's acquisition of exploration permits for uranium is the contract of 20 June 2007. As set out above, that document is clearly forged. Notably, Mr Sylla (who was Minister of Mines at the time the uranium permits were granted) does not say in his witness statement that Mamadie Touré had any involvement in BSGR's application for uranium permits or that she tried to pressure him into awarding them to BSGR.

⁵⁷⁹ CWS-3, para. 32; CWS-2, para. 64

⁵⁸⁰ CWS-2, para. 64.

⁵⁸¹ CWS-2, para. 98; CWS-3, para. 131.

⁵⁸² Exhibit R-215.

⁵⁸³ CMRG, paras. 219, 239 and 781.

51. The evidence of Mamadie Touré’s involvement in the award of bauxite permits is even feebler.
52. First of all, Mr Souaré (Minister of Mines at the time the permits were granted) says nothing whatsoever about the bauxite permits in his witness statement, let alone links them to Mamadie Touré. On the contrary, he testifies that after the award of the permits in Simandou North and Simandou North and signing of the Memorandum of Understanding in February he had no further dealings with BSGR, nor Mamadie Touré.⁵⁸⁴ The bauxite licences were only granted three months later, on 9 May 2006.⁵⁸⁵
53. Second, the 2006 contract between Pentler and Mamadie Touré which refers to BSGR’s bauxite permits does not state that Mamadie Touré provided any assistance in obtaining them. It merely confirms that these permits “entail” Mamadie Touré’s shareholding, through her shareholding in Pentler. Indeed, the fact that the contract does not purport to confer any additional benefits on Mamadie Touré indicates that she was not involved in obtaining the bauxite permits.
54. Third, Mr Struik was aware of a degree of cajoling by Mamadie Touré (through Cilins) to apply for the bauxite permits.⁵⁸⁶ However, Mr Struik’s evidence is that he received information regarding the availability of bauxite permits directly from the CPDM⁵⁸⁷ – he did not need to rely on Mamadie Touré. In any event, BSGR (and Steinmetz as advisor to the board) was not enthusiastic about the bauxite permits. In the end, Mr Oron decided that BSGR should apply for them in order to establish a good reputation in Guinea.⁵⁸⁸ BSGR did not ask for Mamadie Touré’s help in respect of these permits it did not really want – and it certainly did not pay for such help. In any event, BSGR returned these permits to the Government before their expiry.

⁵⁸⁴ RWS-2, paras 29 and 31.

⁵⁸⁵ Exhibit R-204.

⁵⁸⁶ CWS-12 para. 11-13

⁵⁸⁷ CWS-12 paras. 10, 11

⁵⁸⁸ CWS-12 para.15

55. Fourth, contrary to Guinea’s assertion, there is no evidence whatsoever that Mamadie Touré received any payment in respect of the bauxite permits. Guinea quotes two sentences from an email from Mr Struik to Mr Oron in May 2006. The first sentence refers to a telephone call from Mamadie Touré to Mr Cilins, asking whether BSGR was happy with the bauxite permits. This does not establish payment, let alone prove that she had any role in their award. The second sentence refers to a *separate* phone call from Mr Noy in which he asked for payment of an invoice from CW France for \$250,000 for its assistance in relation to the bauxite permits. Guinea blithely asserts that “*there is no doubt that one part of the payment of USD 250,000 was assigned to Mrs. Touré.*”⁵⁸⁹ On the contrary – there is every doubt for the following reasons:

- (i) There is nothing in the documentary evidence which suggests that a portion of \$250,000 was intended to be paid on to Mamadie Touré;
- (ii) Guinea has traced a number of payments from Pentler and its principals to Mamadie Touré/Matinda. Had a part of this \$250,000 been paid on by Pentler to Mamadie Touré, one would expect that payment also to have been traced. It has not.
- (iii) On Guinea’s case, BSGR subsequently had to assure Mamadie Touré that she would receive her compensation, hence the 2006 contract referring to the bauxite permits.⁵⁹⁰ This contract would have been unnecessary had Mamadie Touré been compensated with a portion of the \$250,000 payment to CW France.

1.3 BSGR did not distribute payments or gifts to Mamadie Touré

⁵⁸⁹ CMRG, para. 227.

⁵⁹⁰ CMRG, para. 229. As explained above, this contract did not confer any additional benefit on Mamadie Touré – it merely confirmed the rights she already had.

56. BSGR did not pay Mamadie Touré, nor give her gifts or other benefits. Guinea’s allegations are based on unreliable, unchallenged (and unchallengeable⁵⁹¹) evidence and a wilful conflation of Pentler and BSGR. BSGR addresses each false allegation below.

1.3.1 BSGR did not give Mamadie Touré two Land Cruisers

57. Mamadie Touré alleges that she received “several presents” from BSGR, including two Land Cruisers, a necklace and a white gold chain “adorned with seven diamonds”.⁵⁹² Strangely, Guinea does not cite each of these alleged gifts in support of its case that BSGR bribed Mamadie Touré, but it does rely on the alleged gift of two Land Cruisers.⁵⁹³

58. There is no evidence whatsoever to support Mamadie Touré’s claims that she received the Land Cruisers (or any of the other alleged gifts) at all, let alone that she received them from BSGR. The total absence of evidence supporting the gift of two Land Cruisers is especially telling – they are difficult gifts to conceal. In short, Mamadie Touré has lied about these gifts and Guinea has not a shred of evidence to suggest otherwise. If she has lied on this topic, it is likely that she has lied on others. Given that BSGR is unable to cross-examine her on her declaration, the Tribunal should attribute no weight to her evidence.

1.3.2 BSGR did not pay Mamadie Touré \$250,000 in May 2006

59. BSGR has addressed this false allegation fully at paragraph 56. No part of the \$250,000 payment to CW France was intended to be passed on to Mamadie Touré, and there is not a jot of evidence which suggests otherwise.

60. Guinea cannot even keep its story straight on this allegation. At paragraph 227 of the Counter-memorial it alleges that “one part” of the payment to CW France was assigned to

⁵⁹¹ Given the conspicuous failure to produce Mamadie Touré and Ghassan Boutros as witnesses.
⁵⁹² Exhibit C-0064, Declaration of Ms. Mamadie Touré dated December 2, 2013, p.39; para. 26
⁵⁹³ CMRG, para. 303.

Mamadie Touré. However, at paragraph 801 Guinea states that Mr Struik gave instructions to pay the *whole* amount of \$250,000 to Mamadie Touré. Both allegations are baseless.

1.3.3 BSGR did not give Mamadie Touré cash payments

61. Guinea relies on two further unsupported allegations made by Mamadie Touré in her 2013 declaration:

(i) That, around the time that Rio Tinto's rights to Blocks 1 and 2 were revoked, Mr Avidan showed Mamadie Touré \$1 million on a bed in BSGR's office, which he then gave to her.⁵⁹⁴ Guinea recognises that Mr Avidan has already denied this allegation, but it does not adduce any further evidence to support it.⁵⁹⁵

(ii) That a representative of Mr Avidan gave Mamadie Touré \$50,000 in cash on a beach near Freetown, a few months after President Conté's death.⁵⁹⁶ Again, Mr Avidan has confirmed that this allegation is false⁵⁹⁷ and Guinea has adduced no further evidence to gainsay his denial.

62. Perhaps the reason Guinea says so little about these allegations is that they do not fit with Guinea's narrative. On Guinea's case, BSGR was very careful to maintain distance from Mamadie Touré by funnelling payments through Pentler. Those efforts to disguise its payments would have been for nothing had BSGR thrown caution to the wind and personally handed Mamadie Touré huge amounts of cash. In short, even Guinea cannot deny that Mamadie Touré's allegations are incredible. The Tribunal ought to reject them, along with the rest of her untested and unsupported evidence.

1.3.4 BSGR did not use Ghassan Boutros to make payments to Mamadie Touré

⁵⁹⁴ CMRG, para. 343.

⁵⁹⁵ CMRG, para. 344.

⁵⁹⁶ CMRG, para. 381.

⁵⁹⁷ CWS-3, para 155.

63. As a starting point, Guinea's backstory to the alleged payment of Mamadie Touré through Boutros is false. Guinea claims that, on 2 August 2009, Issiaga Bangoura (on behalf of BSGR) signed a contract agreeing to purchase Mamadie Touré's 5% stake in BSGR for \$4 million, payable in four quarterly instalments.⁵⁹⁸
64. Until Guinea served its Counter-memorial, no one at BSGR had ever seen the contract of 2 August 2009.⁵⁹⁹ When I.S. Touré wrote on behalf of Mr Avidan to Nassif Moussi, the legal process server through whom Mamadie Touré attempted to extort money from BSGR in June 2010, he confirmed that Mr Avidan had never seen the 2 August 2009 contract.⁶⁰⁰ Moussi's response, three days later, withdrew all Mamadie Touré's allegations and said that she would withdraw all fraudulent documents.⁶⁰¹ He thereby implicitly confirmed that the 2 August 2009 contract was fraudulent i.e. a forgery.
65. Mr Avidan has also confirmed that, if Mr Bangoura did visit Mamadie Touré and promise her money (which is doubtful, though BSGR is no longer in touch with Mr Bangoura and cannot confirm the position with him), he had not been asked to do so by BSGR and no-one at BSGR had granted him authority to promise Mamadie Touré \$4 million, or any sum at all.⁶⁰²
66. Once again, Guinea has struggled to keep its story straight throughout its Counter-memorial. While the more detailed section of Guinea's submissions treats the alleged payments through Boutros as payment under the 2 August 2009 contract,⁶⁰³ later in the Counter-memorial Guinea claims that the Boutros payments related to the (forged) contract of 27 February 2008.⁶⁰⁴

⁵⁹⁸ CMRG, paras. 382-386.

⁵⁹⁹ Exhibit R-269.

⁶⁰⁰ Exhibit C-0115.

⁶⁰¹ Exhibit C-0116.

⁶⁰² CWS-3, para. 156.

⁶⁰³ CMRG, paras. 385-416.

⁶⁰⁴ CMRG, paras. 802.

67. BSGR had a legitimate commercial relationship with Boutros⁶⁰⁵. Guinea attempts to cast suspicion on this relationship by noting that payments to Boutros were often recorded as “*consulting fees*”, when Boutros had supplied machinery. In fact, there is nothing suspicious about this at all.
68. The word “*consultant*” was used very widely within BSGR – it denoted any non-employee who carried out work for BSGR. Thus, the fact that any such non-employee received payment which was described by BSGR as “*consulting fees*” (or similar) does not suggest that BSGR was attempting to conceal the true purpose of the payment. As Mr Tchelet explains in his second witness statement, the “*consulting*” category for payment allocation was often used as the default category where no other category applied⁶⁰⁶ (or, in the case of some of the Boutros payments, where the correct category was not known prior to receipt of an invoice).
69. Mr Boutros is a prime example of a non-employee whose payments were recorded as consulting fees, even though the work to which they related had nothing to do with consulting. On 15 February 2009 Mr Tchelet instructed Mrs Sarah Bryce to load a payment of \$100,000 to Boutros. Mr Tchelet stated that the payment was “[*t*]o be regarded as *consulting fees (external)*”. However, it is clear from the accompanying invoice that the work carried out by Mr Boutros did not involve consulting – it comprised the purchase of a generator and work on the route to the Zogota mine.⁶⁰⁷ Another payment of \$100,000 at the end of July 2009 was also recorded as “*consulting*”, although the accompanying invoice described the purchase of another generator and further road works.⁶⁰⁸ Again, in August 2009 BSGR’s payment of \$1.3 million for two Caterpillar tractors/excavators and a

⁶⁰⁵ BSGR and VBG paid about USD 5.5 and 4.5 million respectively for provision of a diverse array of equipment and services to Mr Boutros and related entities during the years 2008 – 2014. Vale’s use of Mr Boutros and his companies’ services, despite Vale’s own resources, reinforces the reliance of Guinean mining operators on the equipment and services provided by Mr Boutros.

⁶⁰⁶ Second Witness Statement of Joseph Tchelet in the LCIA Arbitration, paras. 21, 45-46 (Exhibit C-0284).

⁶⁰⁷ Exhibit R-272, Payment instructions from BSGR TS to Boutros, dated 18 February 2009

⁶⁰⁸ Exhibit R-273, Payment instructions from BSGR TS to Boutros, dated 30 July 2009.

generator were recorded as “consulting fees”.⁶⁰⁹ And in February 2010 BSGR paid \$1,000,000 in “consulting fees” for road works and the supply of machinery by Boutros.⁶¹⁰

70. Tchelet informed the accounting team that the description of payments to Boutros as consulting fees was wrong. On 29 March 2010 he sent a message to David Clark, in an email copied to Helen Nicolle and Sarah Bryce, stating:

“[A]ll payments to Ghassan relate to transport, electrical, site preparation etc – Sarah has the allocations, we are missing the last 3-4 invoices but they are en route from Guinea. [A]ll allocated to Simandou Blocks 1 & 2 – none of it is anything remotely resembling consulting but actual work as per the descriptions previously, I am pushing constantly on the outstanding invoices.”⁶¹¹

71. Following this email, three more payments were made to Mr Boutros in April 2010. The payment instructions recorded specifically what the payments were for, namely “diggers/dozing”,⁶¹² “solar panels”⁶¹³ and “Completion of road and drainage works”.⁶¹⁴
72. Furthermore, contrary to Guinea’s assertion, Mr Tchelet’s instructions to Mrs Helen Nicolle regarding the documentation of payments to Mr Boutros was not part of some elaborate cover-up. He was merely emphasising to Nicolle the need to keep accounts properly.⁶¹⁵
73. Guinea alleges that the \$4 million which BSGR had promised to Mamadie Touré when it bought back her 5% shares was paid through Boutros as follows.

⁶⁰⁹ Exhibit R-278.

⁶¹⁰ R-284, Payment instructions from BSGR TS to LMS, dated 16 February 2010.

⁶¹¹ R-289, Payment instruction from BSGR TS to Adama Sidibe, dated 29 March 2010.

⁶¹² R-290, Payment instruction from BSGR TS to Adama Sidibe, dated 9 April 2010.

⁶¹³ R-291, Payment instruction from BSGR TS to Adama Sidibe, dated 12 April 2010.

⁶¹⁴ R-292, Payment instruction from BSGR TS to Adama Sidibe, dated 21 April 2010.

⁶¹⁵ Exhibit C-0284, para. 32.

74. First, in August 2009, BSGR paid Mr Boutros \$1.3 million to purchase two Caterpillars (a tractor and an excavator). Mr Boutros purchased the Caterpillars from Matinda for \$1 million but they would never have been delivered.⁶¹⁶ That is nonsense.
75. The two Caterpillars *were* delivered, as evidenced by the import declaration dated 17 August 2009.⁶¹⁷ The payment to Mr Boutros was not a backhanded way of funnelling bribes to Mamadie Touré. BSGR did not know that Mamadie Touré was the supplier of the machinery,⁶¹⁸ but in any event she was part of a legitimate commercial transaction.
76. Second, on 16 February 2010, BSGR paid Boutros \$1 million. The corresponding invoice was for \$998,870. Mr Tchelet explained that the difference was due to bank charges.⁶¹⁹ Guinea notes that \$998,870 “*visibly corresponds*” to a payment of \$998,000 which Mamadie Touré claims to have received in Freetown on an unspecified date from an unspecified person (though apparently she “understood” it to come from BSGR).⁶²⁰ The gaping hole in Guinea’s case is that Boutros himself says nothing about passing on this payment to Mamadie Touré. If he had forwarded \$998,000 as alleged, it is astonishing that he failed to mention this in either his evidence to the Conakry Court of Appeal or his evidence to the Swiss Prosecutor.⁶²¹ Guinea has added two and two together and made five.
77. Third, between March 2010 and April 2010 BSGR paid seven invoices from Mr Boutros totalling \$2.137 million.⁶²² Guinea appears to suggest that Boutros transferred \$2 million of

⁶¹⁶ CMRG, para. 400-403.

⁶¹⁷ Guinean Import Declaration (Exhibit C-0270). See also Vale’s March 2010 presentation on Project Hills, which, on page 33, refers to a “*CATD9R*” as among VBG’s equipment (Exhibit C-0282). A Caterpillar D9R was one of the machines purchased by BSGR in August 2009.

⁶¹⁸ CWS-3 para. 157.

⁶¹⁹ R-285, Email from Tchelet to Clark attaching an invoice for LMS, dated 24 February 2010.

⁶²⁰ CMRG, para. 412; Exhibit C-0064, p.40 para. 34.

⁶²¹ Exhibit R-0270.

⁶²² CMRG, para. 413. Again, Guinea attempts to make something of the fact that “*practically all transfer orders of BSGR were denominated as “consulting fees”*”. As explained above, this is not indicative of subterfuge on the part of BSGR, but in any event it is wrong. All but two of the seven invoices contain some more explanation of what the payment is for, e.g. “*solar panels*” (R-291) and “*diggers/dozing*” (R-290).

these payments to Mamadie Touré's bank account in Conakry. That allegation is based on Boutros's evidence to the Swiss Prosecutor⁶²³ and is unfounded for two reasons:

- (i) It is based on a misunderstanding of Mr Boutros' (albeit false) evidence to the Swiss Prosecutor. Mr Boutros does not allege that the \$2 million came from his account. On the contrary, the whole point of the alleged scheme was to transfer money from BSGR's account to Mamadie Touré's account, using Mr Boutros's name to disguise the payment. Thus, Guinea's case amounts to the absurd allegation that BSGR paid \$2.137 million of bogus invoices to Boutros, and then directly transferred a further \$2 million to Mamadie Touré.
- (ii) There is absolutely no evidence to support Mr Boutros's claim that he was used to make a \$2 million cash deposit into Mamadie Touré's account. Boutros stated in his *procès verbal* that Mr Avidan (through Tatiana Rakitina) asked Mr Boutros to accompany Mr Camara to the bank.⁶²⁴ Mr Avidan denies this.⁶²⁵ Neither Guinea nor BSGR has produced the deposit receipt, which is little wonder – it does not exist because the transaction did not happen. This is an entirely new part of Mr Boutros's story. It did not feature in his evidence to the Conakry Court of Appeal in 2013. Further, despite Mr Boutros choosing a common Guinean name to insert into his story, BSGR had no employee called Mr Camara in its office. Such a recent and substantial addition suggests that Mr Boutros is under pressure to give evidence which will support Guinea's defence in these proceedings. Perhaps most tellingly of all, Mamadie Touré does not mention this \$2 million cash deposit either.

78. In *Getma v Guinea*, in relation to a witness who had admitted being bribed, but who was not prosecuted, the Tribunal were unwilling to seriously consider the evidence of that witness.⁶²⁶ In circumstances where Mr Boutros and Mamadie Touré have not been prosecuted, punished

⁶²³ CMRG, para. 414-416.

⁶²⁴ Exhibit R-0270, page 9.

⁶²⁵ Second Witness Statement of Asher Avidan in the LCIA Arbitration ('**Avidan 2**'), (Exhibit C-0285) paras.2 and 14.

⁶²⁶ Exhibit C-0239, para. 193.

or penalised in Guinea⁶²⁷, have not given witness statements for the purpose of this or any parallel arbitration which would enable examination of their evidence, the Tribunal should not accept their evidence.⁶²⁸ To the contrary, Mr Boutros continues to trade⁶²⁹, including providing communication services to the Government of Guinea and being awarded hugely lucrative telecommunications contracts in Guinea, possibly a result of his co-operation with Guinean authorities in peddling the anti-BSGR story.

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

79. Guinea's case regarding 'BSGR's' other alleged payments to Mamadie Touré erroneously treats Pentler and BSGR as one and the same entity. As explained by Ms Merloni-Horemans⁶³⁰, they were not the same entity and BSGR had no control over Pentler. Pentler was an independent company with its own independent commercial relationships.
80. BSGR had a business relationship with Pentler through the latter's shareholding in BSGR, and the subsequent buyback of that shareholding. Separately, Pentler and Mamadie Touré had a business relationship which was nothing to do with BSGR. Payments made by Pentler and its principals to Mamadie Touré in July and August 2010 related to Pentler's business with Mamadie Touré and were not made on behalf of BSGR.⁶³¹

⁶²⁷ Guinea confirmed in its Redfern Schedule that there is no concept of immunity, but assert that Mamadie Touré and Mr Boutros have admitted involvement in criminal offenses punishable by imprisonment under Articles 192 and 195 of the Guinean Criminal Code.

⁶²⁸ There may also be some level of collusion between Mamadie Touré and Mr Boutros with the invoice of Matinda exhibited at R-280 appearing to be signed by Mamadie Touré, but the invoice also allegedly from Matinda exhibited at R-282 containing the signature of Mr Boutros on behalf of Matinda. Mamadie Touré's evidence alleging receipt of funds via Boutros was only alleged in her statement of December 2013, which appears to have been prepared as part of the technical committee procedure.

⁶²⁹ Page 2 of R-270, that he has opened shops "*which I still have today*"

⁶³⁰ CWS-9 para. 10, 11

⁶³¹ Exhibit R-0456, para. 218 (iii).

81. Guinea tries to link these payments to BSGR by noting the coincidence of the timing of the payments with the withdrawal of Mamadie Touré’s 2010 extortion attempt.⁶³²
82. In fact, there is no coincidence of timing. Mamadie Touré, acting through Moussi, first withdrew her claims on 23 June 2010, three days after I.S. Touré wrote to Moussi denying the claims and threatening to sue. The withdrawal occurred:
- (i) a month to six weeks before Pentler’s four payments to Mamadie Touré;
 - (ii) six weeks before Mr Noy *actually* travelled to Sierra Leone to enter into new contracts with Mamadie Touré; and
 - (iii) two weeks before Guinea *alleges* that Mr Noy travelled to Sierra Leone.
83. Thus, Mamadie Touré withdrew her claims without any financial incentive at all. It is notable that Guinea completely ignores Mamadie Touré’s withdrawal of 23 June 2010 in the Counter-memorial.
84. Guinea further attempts to link Pentler’s payments to BSGR by noting that Mr Lev Ran invoiced BSGR for \$3 million on 5 August 2010 (the same day Cilins and Lev Ran paid Mamadie Touré \$150,000), which BSGR paid “[w]ithout any apparent justification”.⁶³³ This attempt also fails.
85. Guinea has access to the parties’ submissions and most of its evidence in the LCIA proceedings. It therefore ought to know that the payment of \$3 million on 5 August 2010 was made pursuant to a further agreement between Pentler and BSGR regarding the settlement of the share purchase dispute. After a long negotiation, BSGR and Pentler agreed in July 2010 on a further and final payment of \$4.5 million. \$3 million was paid on 5 August 2010 and \$1.5 million was paid on 22 March 2011.⁶³⁴ Thus, there was a clear justification for the payment for BSGR’s payment on 5 August 2010.

⁶³² CMRG, para 504.

⁶³³ CMRG, paras 512-513.

⁶³⁴ Exhibit R-168, paras. 50-51.

86. It is not surprising that Pentler made payments to Mamadie Touré at the same time or shortly after it received settlement money from BSGR. Pentler was an offshore company without assets – it could only pay its creditors when it was in funds. So when BSGR paid Pentler, Pentler paid Mamadie Touré. That does not mean that the payments were made on behalf of BSGR: they were not.

1.3.6 Pentler's payments to Olympia in March-April 2011 were not made on behalf of BSGR

87. Pentler and its principals paid some of the money due to Mamadie Touré under the 3 August 2010 contract into an escrow account of a US lawyer.⁶³⁵ The lawyer's company was called Olympia. These payments had nothing to do with BSGR.⁶³⁶

1.3.7 Olympia's disbursement of \$936,451.02 to Mamadie Touré in May 2012 was not made on behalf of BSGR and was not related to Mamadie Touré's attestation

88. Guinea insinuates that Olympia's disbursement of \$936,451.02 to Mamadie Touré in May 2012 was compensation for signing her attestation of 5 May 2012, and was paid on behalf of BSGR.⁶³⁷ Pentler did not receive any money from BSGR in return for obtaining the attestation Mamadie Touré provided in May 2012, nor did Pentler compensate Mamadie Touré for it.⁶³⁸

II BSGR DID NOT BRIBE PRESIDENT CONTÉ

89. Guinea's allegation that BSGR bribed President Conté can only be described as an own goal. Like the rest of Guinea's case, there is not a shred of credible evidence to support the allegation, but, more importantly, it undermines the crux of Guinea's case regarding Mamadie Touré. If BSGR was able to bribe and influence President Conté directly, as

⁶³⁵ See Exhibit R-0456, para. 218

⁶³⁶ *Ibid.*,

⁶³⁷ CMRG, paras. 520-521.

⁶³⁸ See Exhibit R-0456, para. 220.

Guinea claims, BSGR's alleged bribery of Mamadie Touré was totally redundant. Guinea's allegation therefore has the effect of undermining the evidence of Mamadie Touré, on which it relies so heavily.

90. It is no answer for Guinea to suggest that President Conté was corrupted by the payments made to Mamadie Touré.⁶³⁹ The basis for that suggestion is that, when BSGR offered money to President Conté directly in return for his support, he instead invited BSGR to take care of Mamadie Touré.⁶⁴⁰ Thus, Guinea says, BSGR promised Mamadie Touré a 5% stake in its mining project and millions of dollars.⁶⁴¹ But that does not explain the alleged contracts between BSGR and Mamadie Touré, which required Mamadie Touré to assist BSGR in obtaining mining rights. She was not receiving something for nothing.
91. In short, Guinea's case on the alleged bribery of President Conté exposes an irreconcilable contradiction in Mamadie Touré's declaration. On the one hand she says that BSGR directly gained the support of President Conté by making payments to her in accordance with his wishes. On the other hand, she says that BSGR paid her to use her influence on President Conté, so that he would support BSGR. Both accounts cannot be true and it is therefore clear that Mamadie Touré's declaration is untruthful in some respect.
92. Of course, the truth is that Mamadie Touré's account is untruthful in almost all respects. BSGR did not bribe Mamadie Touré, and it did not bribe President Conté. BSGR addresses each of Guinea's allegations regarding President Conté below.
93. It is difficult to respond to Guinea's allegation that President Conté welcomed BSGR many times and supported their requests to the Ministers of Mines, because the reference for this allegation is to a section of the Counter-Memorial which does not refer to BSGR's relationship with President Conté.⁶⁴² Again, and in any event, the fact that BSGR had a good

⁶³⁹ CMRG, para. 825.

⁶⁴⁰ CMRG, para. 822; Exhibit R-0035, para. 23.

⁶⁴¹ CMRG, para. 823.

⁶⁴² CMRG, para 815 and footnote 907.

relationship with President Conté is not indicative of bribery. It was part of Avidan's job to maintain a good relationship with President Conté.⁶⁴³

94. It is true that a Presidential decree was necessary to revoke Simfer's mining concession, but President Conté had good reason to issue it as detailed above.
95. Nor does the award of a research permit over Blocks 1 and 2 establish corruption on the part of BSGR. This allegation has been fully addressed above and, in the interests of brevity, the Tribunal is respectfully referred to those paragraphs. Again, even if Guinea could make good its claim that President Conté supported BSGR in respect of the award of Blocks 1 and 2, that is no evidence that BSGR paid President Conté to do so. Indeed, BSGR's dedicated exploration work and discovery of iron ore in Zogota and its good relationship with local communities were more than sufficient reasons for the President to look favourably upon the company.⁶⁴⁴
96. None of the BSGR personnel knew that Cilins planned to offer a watch to President Conté – he was not acting with BSGR's authority when he did so. BSGR do not give watches as corporate gifts.
97. The Allegations Letter (allegation 8) states: *“As part of efforts made in an attempt to obtain rights for the Simandou and Zogota deposits, Mr. Oron, accompanied by Mr. Cilins and other BSGR representatives, obtained a private interview with President Conte in 2005. On that occasion, Mr. Oron, on behalf of BSGR, offered President Conte a gold watch set with diamonds, explaining that the diamonds had been prepared and mounted on the watch by Mr. Steinmetz's diamond workshops. That watch had a value of at least USD 60,000.”* It is not clear what evidence Guinea relies upon for this detail. The Cilins “interview” by Veracity on 5 October 2011⁶⁴⁵ only states: *“FC asserted that the President had not demanded anything for himself and that no agreement was signed. Nonetheless, RO*

⁶⁴³ CWS-3, para. 44 and 45.

⁶⁴⁴ CWS-2, paras 42-54 and 68.

⁶⁴⁵ Exhibit C-0053.

presented the President with the watch. At one point, during a conversation between FC and MB, the two speculated that the watch had an approximate value of US\$60,000. FC stated that without diamonds, the watch had a value of US\$2,000 to US\$3000 but that it was encrusted with diamonds which was the “metier” of BSGR. There is no reference to Mr Steinmetz or his involvement or involvement by companies of which he was a beneficiary, in the preparation of the watch. It is also not referred to by Mamadie Touré or any of the other many people who would have been present when the watch was allegedly given to President Conté.

98. The allegation that the model car (which Mr Struik gave to President Conté in 2006) was a bribe is preposterous. Mr Oron had publically given an identical model car to Minister Souaré in front of journalists and other Government officials at the signing of the BSGR/Government MOU in February 2006.⁶⁴⁶ [PROTECTED]

[PROTECTED]

99. Guinea alleges that BSGR offered the President two Land Cruisers, but cites Mamadie Touré’s declaration in support of this allegation, which actually states that the cars were given to her.⁶⁴⁸ In any event, both iterations of this allegation are false, for the reasons already given. Further, Guinea’s reliance on a photograph of a Land Cruiser surrounded by

⁶⁴⁶ CWS-2, para. 32.

⁶⁴⁷ [PROTECTED]

⁶⁴⁸ CMRG, para. 824.

two ‘red berets’ of the Presidential Guard is unavailing⁶⁴⁹ – there is no evidence whatsoever to link that particular Land Cruiser (or any other) to BSGR.⁶⁵⁰ The registration plates on the vehicle are RC-7750-0. The RC stands for Region Côtière (Coastal Region) and is a license plate used by civilians in Guinea, standing in contrast to license plates that are assigned for diplomatic, government, or consular vehicles.⁶⁵¹

III BSGR DID NOT BRIBE I.S. TOURÉ

100. Guinea’s case that BSGR bribed I.S. Touré is thin indeed, and can be easily rebutted. It is based on unjustifiable inference and unsupported evidence.

3.1 BSGR’s relationship with I.S. Touré

101. Struik and Avidan have already set out the history of BSGR’s relationship with I.S. Touré in their first witness statements.⁶⁵² For the avoidance of doubt:

- (i) I.S. Touré’s assistance to BSGR had nothing to do with the fact that he was Mamadie Touré’s half-brother. In fact, when I.S. Touré first started to help BSGR, Mr Struik did not know about his connection to President Conté or his relation to Mamadie Touré.⁶⁵³

⁶⁴⁹ It is impossible to tell from this picture [R-0460] if these soldiers are from the Presidential Guard (Bataillon autonome de la sécurité présidentielle, BASP) or from other units that wear red berets in Guinea, such as the Autonomous Battalion of Airborne Troops (Bataillon autonome des troupes aéroportées, BATA) and the Rangers. *"The Presidential Guard is an elite military unit comprised of several hundred men. Under former President Conté, the Presidential Guard was situated within a unit called the Autonomous Presidential Security Battalion (Bataillon autonome de la sécurité présidentielle, BASP), and were largely from the Sousou ethnic group. They were one of several elite units that typically wore red berets; the others being the Autonomous Battalion of Airborne Troops (Bataillon autonome des troupes aéroportées, BATA) and the Rangers."* Human Rights Watch Report, Dec. 17, 2009

⁶⁵⁰ CMRG footnote 921, citing Exhibit R-0460.

⁶⁵¹ http://www.worldlicenseplates.com/world/AF_GUIN.html (Exhibit C-0280). In the LCIA proceeding, Vale specified alternative vehicle registration numbers which it alleged to be the registration numbers for the vehicles given to Mamadie Touré by BSGR. Upon detailed investigation by BSGR, those vehicles were found by BSGR to have existed within the fleet of VBG vehicles in Guinea.

⁶⁵² CWS-2, paras. 14-17, 36-37; CWS-3, paras. 11 and 45.

⁶⁵³ CWS-2, para 36.

- (ii) Because I.S. Touré was Guinean he was more likely to be granted a meeting with the President than a representative of a foreign mining company.⁶⁵⁴ All large mining companies in Guinea, including Rio Tinto, BHP and Rusal have a local representative tasked with assisting the foreign company in public and government relations.
- (iii) It was not unusual for there to be a long wait for a meeting with a minister. I.S. Touré would wait on behalf of Mr Avidan, and then let Mr Avidan know when he could see the minister.⁶⁵⁵
- (iv) I.S. Touré was bright and he had very good contacts on the ground throughout Guinea in business, politics and mining.⁶⁵⁶ He also appeared to be passionate about the development of his country.⁶⁵⁷
- (v) I.S. Touré's role was not restricted to the period during which President Conté was alive. He continued to be employed by BSGR to help execute its Guinean investments, and after the joint venture arrangement with Vale, continued to assist VBG in Guinea;
- (vi) Despite being arrested in April 2013 and held in custody for over 7 months, he was never tried, convicted or found guilty of any offence.

102. Thus, contrary to Guinea's suggestion,⁶⁵⁸ BSGR had good reason to employ I.S. Touré in a public relations role. One of Guinea's more preposterous allegations is that it was *illegal* for BSGR to employ I.S. Touré, as a relative of President Conté.⁶⁵⁹ First, BSGR does not accept that I.S. Touré was a relative of the President, as Mamadie Touré and President Conté were

⁶⁵⁴ CWS-3, para. 45.

⁶⁵⁵ *Ibid.*, para. 45.

⁶⁵⁶ *Ibid.*, para. 11.

⁶⁵⁷ CWS-2, para 36.

⁶⁵⁸ CMRG, para. 829.

⁶⁵⁹ CMRG, para. 833.

not married. Second, Guinea fails to identify the particular law which prohibited BSGR's employment of I.S. Touré, because it does not exist.⁶⁶⁰

3.2 BSGR's payments to I.S. Touré were legitimate

103. Consistent with its mischaracterisation of the relationship between BSGR and Pentler, Guinea erroneously treats the contract between Pentler and I.S. Touré/Aboubacar Bah as a BSGR contract. It was not. The contract came about as follows:⁶⁶¹

- (i) In 2005 a Malian businessman named Ismaila Daou introduced Cilins to Guinea, following which Cilins, Lev Ran and Noy began selling consumer goods and pharmaceuticals in Guinea.
- (ii) Daou introduced Cilins to I.S. Touré and Aboubacar Bah, a Malian businessman residing in Guinea with whom Daou did business.
- (iii) I.S. Touré and Bah assisted the Pentler principals with deals in Guinea and introduced them to different industries and traders.
- (iv) Following the award to exploration permits over Simandou North and Simandou South to BSGR, there was for the first time an indication that the opportunities to which the Pentler principals had introduced BSGR might bear fruit. On that basis, BSGR rewarded Pentler with a shareholding in BSGR Guinea. Pentler considered it fair that it should enter into agreements to remunerate its local partners.
- (v) Accordingly, Pentler entered into a milestone agreement with Bah and I.S. Touré and awarded Daou a small shareholding in Pentler (which was repurchased in September 2007). As explained at paragraphs 0 to 27 above, BSGR had no knowledge of these

⁶⁶⁰ See Expert Report of Pierre Olivier-Sur, para. 47; ("*Private companies are, however, not prohibited from employing relatives of public officials, among which relatives of the president, as long as the public official does not have a mission to supervise or administer the company in which his/her relative is employed.*").

⁶⁶¹ Exhibit R-0456, para. 80, 109-117.

contracts. They were not entered into on behalf or at the behest of BSGR and Merloni-Horemans' receipt of them does not prove otherwise.

104. It was Pentler who introduced BSGR to Guinea. The fact that Daou, Bah or I.S. Touré may have introduced Pentler to Guinea does not give rise to any obligation towards them on the part of BSGR. There is no reason why BSGR would want to pay them millions of dollars and it did not do so.
105. Thus, it was Pentler who paid Bah and I.S. Touré the initial milestone payment of \$425,000 – indeed, the protocol recording this payment does not suggest otherwise.⁶⁶²
106. Bah's claim that Mr Oron handed over \$425,000 in cash to him, and \$75,000 in cash to Daou at the Novotel in February 2006 has been dismissed by Struik as nonsense.⁶⁶³ Indeed, it is an inherently improbable claim, given Mr Tchelet's evidence regarding the difficulty of moving cash from South Africa (where Struik and Oron were based) to Guinea. There was an allowance of only \$10,000 per trip.⁶⁶⁴ It is also notable that Daou has never corroborated Bah's account, nor sought any payment from BSGR. If Daou's contract with Pentler was in reality a contact with BSGR, it is astonishing that he has never tried to enforce his rights. His failure to do so indicates that, like Bah, his relationship is solely with Pentler.
107. There is nothing suspicious or untoward about BSGR paying I.S. Touré a regular salary – he was a BSGR employee. The real scandal would be if BSGR *had not* paid him for his work.
108. Following the joint venture with Vale, I.S. Touré, along with many other BSGR employees/officers, received a bonus. The payment of bonuses in private businesses is neither unusual nor a cause for suspicion – especially after the conclusion of a large and successful deal.

⁶⁶² Exhibit R-290.

⁶⁶³ Exhibit R-192, para. 128.

⁶⁶⁴ CWS-12 para.18

109. In short, BSGR's relationship with I.S. Touré has always been a legitimate employer/employee relationship for which I.S. Touré has been appropriately remunerated. Guinea's allegation that it was a corrupt relationship is a feeble attempt to bolster its defence of BSGR's claim.

IV BSGR DID NOT BRIBE IBRAHIMA KASSORY FOFANA

110. The alleged 'bribery' of Fofana can be dealt with briefly. As Mr Avidan has explained, Fofana provided high level strategic advice for a short period in 2008, for which he was paid.⁶⁶⁵
111. BSGR was entitled to engage the services of Fofana. He had not held office in the Government of Guinea since 2000. BSGR's payments to Fofana are in no way indicative of corruption – they are indicative of a legitimate commercial relationship. It is true that Thiam and Fofana are friends, and have been for many years, but (1) Thiam has stated that they did not engage in any private business matters together while he was Minister of Mines; and (2) even if BSGR used Fofana to lobby Thiam, there is nothing illegal about that – it is what lobbyists do.

V THERE IS NO INDIRECT EVIDENCE OF CORRUPTION

112. Recognising that the direct evidence of bribery by BSGR is, at best, weak and, at worst, non-existent, Guinea seeks to bolster its case by relying on indirect evidence which it says is sufficient to establish corruption.⁶⁶⁶ That is wishful thinking on the part of Guinea – none of this so-called 'evidence' is indicative of corruption and the inferences which Guinea urges upon the Tribunal are no substitute for real evidence.

⁶⁶⁵ Exhibit C-0262, para. 22.

⁶⁶⁶ CMRG, para. 852.

113. Much of the material on which Guinea relies has already been addressed. In the paragraphs below, BSGR refers the Tribunal to earlier paragraphs in the Reply where appropriate, in the interests of brevity.

5.1 Context of endemic corruption

114. The first matter on which Guinea relies is the context of “*a Republic of Guinea riddled with corruption*”.⁶⁶⁷ That context calls into question every single mining contract (or other Government contract) in Guinea. It is not evidence of the particular corruption of which BSGR is accused. Furthermore, a general climate of corruption cannot substitute for clear and convincing evidence.⁶⁶⁸

5.2 BSGR’s use of ‘consultants’

115. It is not clear what point Guinea is trying to make by pointing out that BSGR operates largely through consultancy contracts.⁶⁶⁹ As it points out, even BSGR’s Guinean salaries were booked as consulting fees,⁶⁷⁰ and there is nothing inherently suspicious about that. The crux of Guinea’s allegation – that BSGR paid local and foreign consultants millions of dollars without justification – is demonstrably false.⁶⁷¹

5.2.1 Pentler and its principals

116. It is true that, in 2006, Mr Cilins, Mr Noy and Mr Lev Ran were not experienced in the mining sector.⁶⁷² Their value to BSGR came not from their mining knowledge, but from their knowledge of Guinea and its institutions. The Pentler principals effectively ‘introduced’ BSGR to Guinea: Mr Noy told Mr Oron about the mining opportunities in

⁶⁶⁷ CMRG, para. 853

⁶⁶⁸ See *Getma v Guinea*, Exhibit C-0239, where Guinea tried to lend plausibility to its witnesses by relying on a general climate of corruption under previous administrations. This argument was dismissed by the Tribunal stating that a general climate of corruption cannot change unconvincing testimony into convincing evidence.

⁶⁶⁹ CMRG, para. 857.

⁶⁷⁰ CMRG, para. 858.

⁶⁷¹ CMRG, para. 859.

⁶⁷² CMRG, para. 861.

Guinea and Mr Cilins introduced BSGR to the CPDM.⁶⁷³ In the early days, Mr Cilins also provided BSGR with practical assistance on the ground – buying cars, opening bank accounts, hiring staff and obtaining insurance.⁶⁷⁴

117. Thus, without the Pentler principals, BSGR would not have been in a position to apply for first exploration permits.⁶⁷⁵ They had performed a valuable role and, when BSGR’s mining project showed promise, it was right to reward them. Accordingly, BSGR awarded Pentler a 17.65% shareholding in BSGR Guinea.⁶⁷⁶
118. According to BSGR’s expert Francois Ferreira, who has more than a decade of experience in the mining sector, the award of carried interests of between 10% and 25% to third parties is not uncommon among mining companies.⁶⁷⁷
119. The award of the 17.65% shareholding was recorded in a letter from Mr. Struik dated 14 February 2006.⁶⁷⁸ That letter also recorded a series of milestones in BSGR’s mining project and corresponding payments to Pentler in respect of each of them. However, these milestones were never an operative part of the agreement between BSGR and Pentler. Mr Struik confirms that Pentler was not expected to, and did not, assist BSGR in achieving the various milestones.⁶⁷⁹
120. As Mr Steinmetz explained in his first witness statement, in 2008 BSGR and Pentler entered into negotiations for the repurchase of Pentler’s shareholding. They agreed on a price of \$22 million, with a bonus of \$8 million payable if BSGR realised a profit of \$1 billion.⁶⁸⁰

⁶⁷³ Exhibit R-0456, para. 30; CWS-2, para.15.

⁶⁷⁴ CWS-2, para.35.

⁶⁷⁵ Exhibit R-0456, para. 45.

⁶⁷⁶ Shareholders Agreement between BSGR Steel Holdings Limited and Pentler Holdings Limited and BSG Resources (Guinea) Limited, dated 19 July 2007, (Exhibit C-0271); and Exhibit R-0115, para. 27.

⁶⁷⁷ Expert Report of Francois Ferreira dated 8 January 2017 (“**Ferreira Report**”), paragraph 58.

⁶⁷⁸ Letter from M. Struik (BSGR BVI) to Pentler, dated 14 February 2006 (Exhibit R-0182).

⁶⁷⁹ CWS-12 para.7Exhibit R-0182.

⁶⁸⁰ CWS-1, paras. 26-28; Exhibit C-0084

121. That was a good deal for BSGR – Mr Ferreira has valued Pentler’s shareholding at between \$44.1 million and \$53 million.⁶⁸¹
122. The purchase price was payable in instalments. As a result of liquidity issues caused by the financial crisis, BSGR did not pay the instalment due on 15 April 2009.⁶⁸² Renegotiated payment dates were agreed in a settlement contract dated 25 July 2009.⁶⁸³
123. However, following the joint venture with Vale (pursuant to which BSGR sold 51% of BSGR Guinea to Vale for a total of \$2.5 billion), Mr Noy sought to renegotiate the price Pentler received for its shares. In May 2010 BSGR and Pentler agreed that, on top of the original purchase price of \$22 million, Pentler would receive the \$8 million bonus (as BSGR’s deal with Vale was worth over US\$1 billion).⁶⁸⁴ Mr Cilins, however, was not happy with this settlement so, in July 2010 a further payment of US\$4.5 million was agreed, representing the milestone payments which would have been due under the letter of 14 February 2006 had the milestones formed an operative part of Pentler and BSGR’s original agreement.⁶⁸⁵ According to BSGR’s expert Francois Ferreira:

"[M]ilestone payments were not at all unusual, and the payments set out in the Milestones Letter are certainly within the range of what might have been expected in terms of milestones themselves. These marked discrete steps towards securing a mining license and coincided with a potentially enormous incremental value uplift for the project. The amounts would have been set in accordance with the targeted resource, targeted size and a guess at the value of the ultimate prize that might be won. Given the value that would have been created if an economically viable iron ore discovery was made, these milestone values would have been considered fairly modest. If progress was not made towards successfully securing the project these milestone payments would not be payable and the partnership would have been dissolved."

124. Thus, there is a clear justification for the sums which BSGR paid to Pentler. Indeed, Guinea was aware of this justification (but chose to ignore it) before it submitted its Counter-

⁶⁸¹ Ferreira Report, para. 68c.

⁶⁸² CWS-1, para. 31.

⁶⁸³ Exhibit R-307.

⁶⁸⁴ R-0465, para. 110.

⁶⁸⁵ R-0465, para. 110; CWS-1, para. 28.

memorial: it is detailed in BSGR's Defence and accompanying witness statements in the LCIA proceedings.

125. The allegation that the BSGR companies "created" Pentler is false, and is once again based on the erroneous equation of BSGR with Onyx.⁶⁸⁶ Pentler was in fact created in October 2005 by Onyx's agents, Mossack Fonseca, and was bought by Onyx as a shelf company. It was originally reserved for a project of another of Onyx's clients, but the project never materialised.⁶⁸⁷
126. As to the allegation that Mrs Merloni-Horemans' knowledge of Pentler's contracts with third parties is proof that Pentler acted on behalf of BSGR, the Tribunal is respectfully referred to paragraphs above including 19 to 30 and 104. As demonstrated in those paragraphs, this allegation is unfounded.

5.2.2 Bah and Daou

127. Contrary to Guinea's assertion, BSGR did not enter into commission contracts with Bah and Daou.⁶⁸⁸ Pentler had contractual arrangements with Bah and Daou of which BSGR had no knowledge. The Tribunal is respectfully referred to paragraphs 28 and 104-107 above.

5.2.3 Boutros

128. The allegation that BSGR used Mr Boutros to funnel payments to Mamadie Touré is similarly false – the Tribunal is respectfully referred to paragraphs 64 to 79 above. BSGR can only assume that Mr Boutros has been pressured by Guinea to give false evidence in order to incriminate BSGR.

⁶⁸⁶ CMRG, para. 861; see also para. 153.

⁶⁸⁷ Exhibit R-115, paras. 13-14.

⁶⁸⁸ CMRG, para. 869.

5.3 BSGR has not attempted to conceal its activities

129. This section of the Counter-memorial mostly repeats allegations which Guinea has made elsewhere, and which BSGR has already answered in this Reply. To repeat:
- (i) BSGR did not create Pentler, nor use it to enter into commission agreements with third parties;
 - (ii) BSGR did not use Boutros to funnel payments to Mamadie Touré;
 - (iii) BSGR did not make payments to Mamadie Touré through Pentler and its principals.
130. The allegation that BSGR created Matinda is utterly false and the ‘evidence’ on which it is based is no evidence at all. It is of no consequence that Matinda and Pentler were both created by Mossack Fonseca and Agefor SA:
- (i) Mossack Fonseca [and Agefor SA] are agents for thousands of companies. It is no great coincidence that they created both Pentler and Matinda.
 - (ii) BSGR did not create and does not control Pentler, so there is no link between BSGR and Matinda in any event.
131. BSGR paid Pentler as Pentler chose to direct it. If BSGR were requested to pay a principal personally or into an account as directed, BSGR did so. There is nothing suspicious about the fact that the Pentler principals were paid in US dollars for direct expenses relating to the signature of the GoG MoU, or that the payment was made to a company other than Pentler. BSGR had no local bank account at the time.

132. Guinea states, as if it were fact, that BSGR deliberately concealed the existence of Pentler and others from Vale during due diligence for Project Hills.⁶⁸⁹ However, as Guinea knows, that allegation is a live issue in the (currently unresolved) LCIA proceedings and is fiercely contested by BSGR, which submitted a 231 page Rejoinder on 18 July 2016. BSGR will not repeat the lengthy and detailed rebuttal of Vale’s claims which is contained in that document. An overview of the due diligence process, which makes clear that there has been no deliberate concealment, is set out below.

5.4 **Project Hills**

5.4.1 *Project Hills was an expedited deal*

133. Project Hills was conducted with extraordinary speed. BSGR and Vale signed Heads of Terms on 19 March 2010.⁶⁹⁰ At that early stage, representatives of Vale and BSGR made clear that they wanted to close the deal by the end of April. Accordingly, a deadline of 29 April 2010 was included in the Heads of Terms.⁶⁹¹ The Framework Agreement and the Shareholders’ Agreement (the “**Transaction Documents**”) were in fact signed on 30 April 2010.⁶⁹² Thus, the entire due diligence process was concluded in just under six weeks.

134. Speed was important to both parties. BSGR was keen to secure a joint venture partner in order to meet its commitment under the Base Convention to start production by the last quarter of 2012.⁶⁹³ Vale was desperate to enter into the joint venture quickly, in order to block a proposed deal between Rio Tinto and Chinalco, which could have potentially cost Vale \$20 billion. Indeed, Vale was so impatient to execute the Transaction Documents that

⁶⁸⁹ CMRG, para. 876.

⁶⁹⁰ Heads of Terms between BSGR and Vale dated 19 March 2010 (Exhibit C-0272).

⁶⁹¹ Second Witness Statement of David Barnett (Exhibit C-0352), para. 8.

⁶⁹² BSGR’s LCIA SoD (Exhibit R-0465, para. 101(ix)); Exhibit C-0129; Exhibit C-0130.

⁶⁹³ Exhibit R-0192, para. 150; First Witness Statement of David Barnett in the LCIA Arbitration (C-0353), para. 43; Exhibit R-0197, para 78.

it did not even wait until Ernst & Young had conducted its audit of BSGR's office in Guinea.⁶⁹⁴

135. The desire to conclude the deal quickly had two consequences:

- (i) First, unsurprisingly, the due diligence exercise was conducted with less rigour than one would expect of a similar exercise conducted over a longer period. That is true of both BSGR, as the disclosing party, and Vale, as the reviewing party.⁶⁹⁵
- (ii) Secondly, the parties agreed to limit the scope of the due diligence in order to complete the process within the expedited timetable.⁶⁹⁶ BSGR and Vale agreed that the due diligence exercise would only extend to those companies in which Vale was purchasing an interest, namely BSGR Guernsey and its subsidiaries.⁶⁹⁷ Agreements falling outside the expressly limited group structure were therefore not disclosed.

136. Furthermore, as a result of the parties' haste, the BSGR principals involved in due diligence did not pause to check with each other that they were interpreting the due diligence requests in the same way. Thus, when Mr Tchelet asked Mr Avidan to identify BSGR's consultants, Mr Avidan took this to mean BSGR's *current* consultants.⁶⁹⁸ As for Mr Tchelet, he (correctly) recognised that the focus of Vale's due diligence was Blocks 1 and 2, rather than Zogota. Indeed, the Compliance Due Diligence Questionnaire defined "*the Simandou Project*" as "*activities relating to prospecting, exploring and mining of iron ore at and in*

⁶⁹⁴ Exhibit R-0197, See internal Vale email during the due diligence process, which states: "*Our recommendations to the business department have been the following, based on legal and commercial risks: 1. If the decision is of sealing the deal, that it be made in escrow (bank financing doesn't eliminate FCPA risk). The lawyers' standing is clear, once we seal it, we run the risk of already be violating the FCPA on D+1, given that we couldn't do a books and accounts review of the 4 companies that come in the acquisition package (located in Guernsey, Guinea, Liberia and BVI);*" (Exhibit C-0283).

⁶⁹⁵ As evidenced by the fact that Vale failed to ask the identity of the minority shareholder disclosed in BSGR's Consolidated Financial Statements for 31 December 2008 (Exhibit C-0274); Exhibit R-197, para. 86.

⁶⁹⁶ Exhibit C-0352, para. 9.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ C-0262, para. 22.

Simandou Blocks 1 and 2 of Simandou South".⁶⁹⁹ Mr Tchelet had this focus on Blocks 1 and 2 in mind when answering the Due Diligence Questionnaires.⁷⁰⁰

137. Vale and Guinea have chosen to ignore this important background to the Project Hills due diligence exercise, because it does not sit comfortably with their narrative of dishonesty on the part of BSGR. But Project Hills should not be analysed in a vacuum. When viewed (as it should be) in the context of the speed with which the exercise was conducted and the measures implemented to achieve that speed, the allegation that Pentler and other third parties were deliberately concealed from Vale loses all credibility.

5.4.2 The role of Skadden

138. BSGR relied heavily on Skadden to advise on all material aspects of the deal. Michael Hatchard of Skadden led the team which advised on the negotiations with Chinalco in 2009 and Project Hills in 2010. He was forwarded the various due diligence questionnaires which BSGR was asked to complete.⁷⁰¹ Hatchard was BSG's relationship manager and it was to him that Mr Barnett first turned for assistance in relation to the dispute with Pentler in 2009.⁷⁰² At the time of Project Hills, Skadden was aware of (among other things):

- (i) the terms of the SPA dated 24 March 2008, clause 6 of which refers to Pentler as a 'consultant';⁷⁰³
- (ii) the 2009 dispute relating to the SPA;⁷⁰⁴ and
- (iii) the correspondence from Aboubacar Bah. In fact, Skadden advised on the drafting of the indemnities which related to Bah's claims.⁷⁰⁵

⁶⁹⁹ C-0349, Compliance Due Diligence Questionnaire, section I.B

⁷⁰⁰ C-0284, para. 52.

⁷⁰¹ C-0284, para. 48.

⁷⁰² Exhibit C-0352, para. 10.

⁷⁰³ Exhibit C-0125.

⁷⁰⁴ Letter from Skadden Arps to Pentler Holdings Limited dated 23 June 2009 (Exhibit C-0275).

139. Skadden never advised that the correspondence from Bah should be disclosed in due diligence. As regards Pentler, Barnett recalls a discussion during which Hatchard advised that it did not fall within the scope of the disclosure requirements, because it related to a company outside the Group structure over which due diligence was conducted.⁷⁰⁶ This advice was also communicated to Tchelet, Steinmetz, Avidan and others.⁷⁰⁷
140. It was reasonable for BSGR to rely on Skadden's advice, given its understanding of the breadth of Skadden's knowledge regarding BSGR's business affairs. The notion that BSGR would or should have challenged Skadden's advice, in circumstances where everyone's aim was to conclude the deal as quickly as possible, is fanciful.
141. Skadden's involvement and advice, and BSGR's reasonable reliance on it, belies Vale's (and Guinea's) claim that the relationship with Pentler and the correspondence from Bah was dishonestly concealed from Vale during due diligence.

5.4.3 *BSGR was co-operative and open in its provision of documents*

142. BSGR did not conceal anything from Vale. All its requests were accommodated very quickly and any document it requested, it received.⁷⁰⁸
143. Shortly before the Transaction Documents were executed, Vale sent three individuals from Ernst & Young to BSGR's office in Guernsey, to carry out a financial audit.⁷⁰⁹ For the duration of their visit, Ernst & Young were given full access to all documents which were held by BSGR in relation to the Guinea project. Tchelet told his colleagues in the Guernsey

⁷⁰⁵ Exhibit C-0352, paras. 10 and 15; Letters between Pentler Holdings Limited and BSGR dated 8 May -5 October 2009 (Exhibit C-0276).

⁷⁰⁶ Exhibit C-0352, para. 11.

⁷⁰⁷ C-0284, para. 55; see also Exhibit R-168 ("Steinmetz 1"), para 78.

⁷⁰⁸ Exhibit R-197, para. 83.

⁷⁰⁹ *Ibid.*, para. 87; C-0284, para. 70.

office to allow Ernst & Young to review whatever they wanted on site and Tchelet, Clark, Helen Nicolle and Sarah Bryce made themselves available to answer any questions.⁷¹⁰

144. A number of documents referring or relating to Pentler were available in the Guernsey office for Ernst & Young to review, such as the Settlement Agreement and Pentler invoices totalling \$8 million.⁷¹¹ The payment files, which contained details of payments made in relation to the Guinea project, were among the documents Ernst & Young actually inspected. The payment files contained documents showing payments to Pentler, Fofana and Boutros.⁷¹² BSGR made no attempt to hide its relationship with any of these payees.

5.5 BSGR has not attempted to destroy evidence

145. Again, the allegation that BSGR has attempted to destroy evidence can be addressed shortly, as it is mostly repetitious of matters which have already been addressed.
146. Guinea has misinterpreted Mr Tchelet's emails to Helen Nicolle in order to claim that BSGR sought to erase its connections to Pentler and Mr Boutros. As regards Mr Boutros, Mr Tchelet's emails merely demonstrate his fastidiousness about proper accounting: see paragraph 71 to 73 above. The emails followed an earlier exchange between Nicolle and Mr Tchelet regarding the appropriate booking of payments to Pentler under the Share Purchase Agreement. Nicolle had erroneously included them in a Guinea costs report when it was clear to Mr Tchelet that they were not a Guinea expense but a capital payment in respect of the project.⁷¹³ Thus, Mr Tchelet was not attempting to conceal the Pentler payments, but to ensure that they were recorded in the correct place⁷¹⁴.
147. As set out in paragraphs 11 to 18 above, Mr Cilins' conviction does not implicate BSGR.

⁷¹⁰ C-0284, para. 71.

⁷¹¹ Ibid., para. 72.

⁷¹² Ibid., para. 73.

⁷¹³ Ibid., para. 31-33.

⁷¹⁴ The shareholding was also publicly disclosed to the market in relation to the TMI bond listing: C-0284, paras. 42-43

148. BSGR has not *concealed* the minutes of the hearing at which Mr Boutros gave evidence to the Swiss Prosecutor.⁷¹⁵ Naturally, BSGR exhibited to its Statement of Case the minutes of those witnesses whose evidence supports BSGR's case. The failure to adduce Mr Boutros's evidence does not amount to an attempt to conceal it. This is all the more true taking into account that Guinea participated in the Swiss criminal proceedings and was in the possession of all the witness statements made in those proceedings, including the statement of Mr Boutros. There was no reason for BSGR to exhibit it to its Statement of Case as it did not form part of its claim against Guinea. In any event, BSGR maintains that Boutros's evidence is false.

5.6 The existence of unresolved criminal proceedings is not evidence of BSGR's guilt

149. Guinea's reliance on the existence of Guinean criminal proceedings as evidence of BSGR's corruption is ludicrous and entirely circular. Those proceedings exist because of the Technical Committee's illegal and politically motivated withdrawal of BSGR's mining rights – they are not further evidence of the matters on which the Technical Committee relied. To the contrary, the unresolved Guinean criminal proceedings against Mr Touré and Mr Bangoura, arrested over three and half years ago in relation to BSGR related corruption but never convicted for any associated crime, demonstrates that BSGR and its associates are not guilty of the corruption alleged against them by Guinea.⁷¹⁶

150. Further, the United Kingdom only issued a section 2 Notice to BSGR (requiring it to produce documents) as a result of a Letter of Request from Guinea, which contained many of the same false allegations which are the subject of the LCIA and these ICSID proceedings. The United Kingdom did not independently decide to investigate BSGR. Guinea misrepresented to the Tribunal the findings made in the Judicial proceedings relating to

⁷¹⁵ CMRG, para. 879.

⁷¹⁶ See also James Libson's witness statement in the SFO proceeding paragraphs 52.1 – 52.2 detailing that Guinea did not prosecute within the statute of limitation periods. The Government of Guinea refuted many disclosure requests on the grounds of criminal investigative secrecy requirements – but it has not demonstrated what investigation it can justifiably be carrying out or under which penal provisions (See Exhibit C-0056, paras. 50, 59-64 & Exhibit C-0277 [JLL1-23 pg.323] that there are no grounds to prosecute and also Exhibit C-0278 [JLL1-24] which indicates that any proceedings against BSGR employees is time barred.

the section 2 Notice⁷¹⁷. The SFO letter to Mishcon de Reya, dated 7 October 2014, stated that the High Court found that BSGR “*simply cannot show an overwhelming case that the letter of request is tainted by bad faith or political motivations*” However, the High Court was convinced by numerous points elucidated in Dag Cramer's witness statement in the Judicial Review proceeding, which shone light on corruption at the highest level of government, and was supported by 9 lever arch files of exhibits. Evidence included:

- (i) Emails and conversations between Dag Cramer and Heine van Neirkerk ("HVN"), in which HVN describes his role in the conspiracy;
- (ii) Emails demonstrating that Mohammed Alpha Condé 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 (with evidence against Sable mining corruption scandal now further supported by the recent May 2016 Global Witness report);
- (iii) Contemporaneous notes of AA's meetings with Walter Hennig;
- (iv) The Palladino contract documents;
- (v) NGO and media reports documenting concerns about Waymark's role in the 2010 election;
- (vi) Legal Consultation by Daniel Labetoulle and Denys De Béchillon in relation to the flawed legal basis of the Technical Committee;
- (vii) Numerous transcripts of interviews with Condé and key ministers, demonstrating the political bias against BSGR;

⁷¹⁷ Counter-Memorial [708], [1156], [1161]

(viii) Internal FTI emails demonstrating that George Soros told Lord Malloch Brown to terminated FTI's relationship with BSGR.⁷¹⁸

151. The High Court's decision included the following relevant comments by way of example:

“8. There is no doubt at all, to my mind, on the present materials that there are some disconcerting features contained in the evidence relating to events which have happened in Guinea: not least, although certainly not solely, because of what appears to have been a possibly arbitrary detention and arrest of two employees of the claimant in Guinea for no very clear reason apart from their being such employees. There are numerous other points that can fairly be made, and are made, in Mr Cramer's statement. ... 12. It seems plain that all matters of this kind are likely to be the subject of detailed examination and detailed evidence in the course of the arbitration proceedings which I gather are extant between the claimant and the Government of Guinea with regard to the purported rescission of the agreements by the Government of Guinea. 13. What the claimant says in this regard may be true. It may not be true. This court, the Administrative Court, simply cannot decide such matters, especially given the evidence is both so contentious and tendentious. More importantly, neither can, nor indeed should, either the defendants decide on such matters.”

152. In September 2013, a rogatory commission letter was sent by a Guinean judge to the Swiss authorities requesting assistance in the illegal procedure initiated against the 2 local employees of BSGR wrongfully detained. Due to the non-stringent rules of assistance in Switzerland, the Helvetic police accommodated the request without any further verification, visiting the office of Onyx and residence of Beny Steinmetz in Geneva. At the end March 2014, counsel for BSGR and Mr Steinmetz agreed to submit to the Guinean and US authorities documents seized during the raids in the spirit of transparency and cooperation. Despite numerous examinations, to date, no criminal charges or findings have been made against BSGR or Mr Steinmetz.

⁷¹⁸ See CWS-13.

153. Guinea details the US case against Cilins to attempt to strengthen an impression of a corruption scheme at play based on the evidence of Mamadie Touré. However, a closer look at how the Cilins case evolved suggests that even the US DOJ doubted the authenticity of Mamadie Toure's contracts, and permitted settlement with Cilins, on the single count of obstruction of justice.
154. Finally, Guinea's reference to the investigation in Romania is an ill-disguised attempt to smear Steinmetz's reputation and prejudice the Tribunal against him.⁷¹⁹ The Romanian proceedings are irrelevant and unrelated to the facts of this claim.⁷²⁰

⁷¹⁹ CMRG, para. 884.

⁷²⁰ Guinea's reliance on the Kroll report does not improve this aspect of its claim. The Kroll report was commissioned by Rio Tinto, which (as Guinea) knows, has had a vendetta against BSGR ever since it was awarded exploration permits over Blocks 1 and 2.

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

- v -

THE REPUBLIC OF GUINEA

CLAIMANTS' REPLY

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Annex 2: Presentation

A photograph of five men in dark suits and ties standing in a row. They are positioned in front of a landscape of rolling green hills with prominent red lines or paths marked on the slopes. The sky is blue with some clouds. In the top right corner, there is a black rectangular stamp with the text 'GuineaGate' in white.

GuineaGate

THE SIMANDOU CONSPIRACY

Conspiracy To Deprive BSGR of its Iron Ore Assets In Guinea

The Partners: **Alpha Conde** - **Och-Ziff** - **George Soros** - **Rio Tinto**

The BSGR Venture into Guinea- Background

- BSGR established its mining exploration project in Guinea in 2006. Having discovered a major greenfield deposit in an area known as Zogota, it invested very large sums of money in its expedited prospection program towards a feasibility study.
- Rio-Tinto had been granted a mining project in 1997 over the Simandou Blocks 1,2,3 & 4, but did no meaningful work on these assets. Therefore, in the summer of 2008, the Government of Guinea, required Rio Tinto to retrocede half of its exploration perimeter – Blocks 1 & 2 - in compliance with the mining code regulations.
- In contrast with the speed at which BSGR had worked, it had taken Rio Tinto 20 years just to deliver their feasibility study (which turned out to show that the project was not economically feasible), and it claims to have spent billions on developing the project using the Guinean rail and port as its export route.
- In Dec 2008, following a competitive application process, BSGR was awarded Blocks 1 and 2 by the Mining Ministry.
- In total, BSGR invested over \$160 million in the ground on its Guinean iron ore projects from 2006 to 2010, developing a greenfield project on the brink of being a high quality bankable mining concession.
- In return for the right of passage through Liberia (the only viable economic export route) BSGR committed to rebuild the passenger trans-Guinea railway, from Conakry to Kankan, at a total cost of up to \$1.2 billion as a present to the people of Guinea.



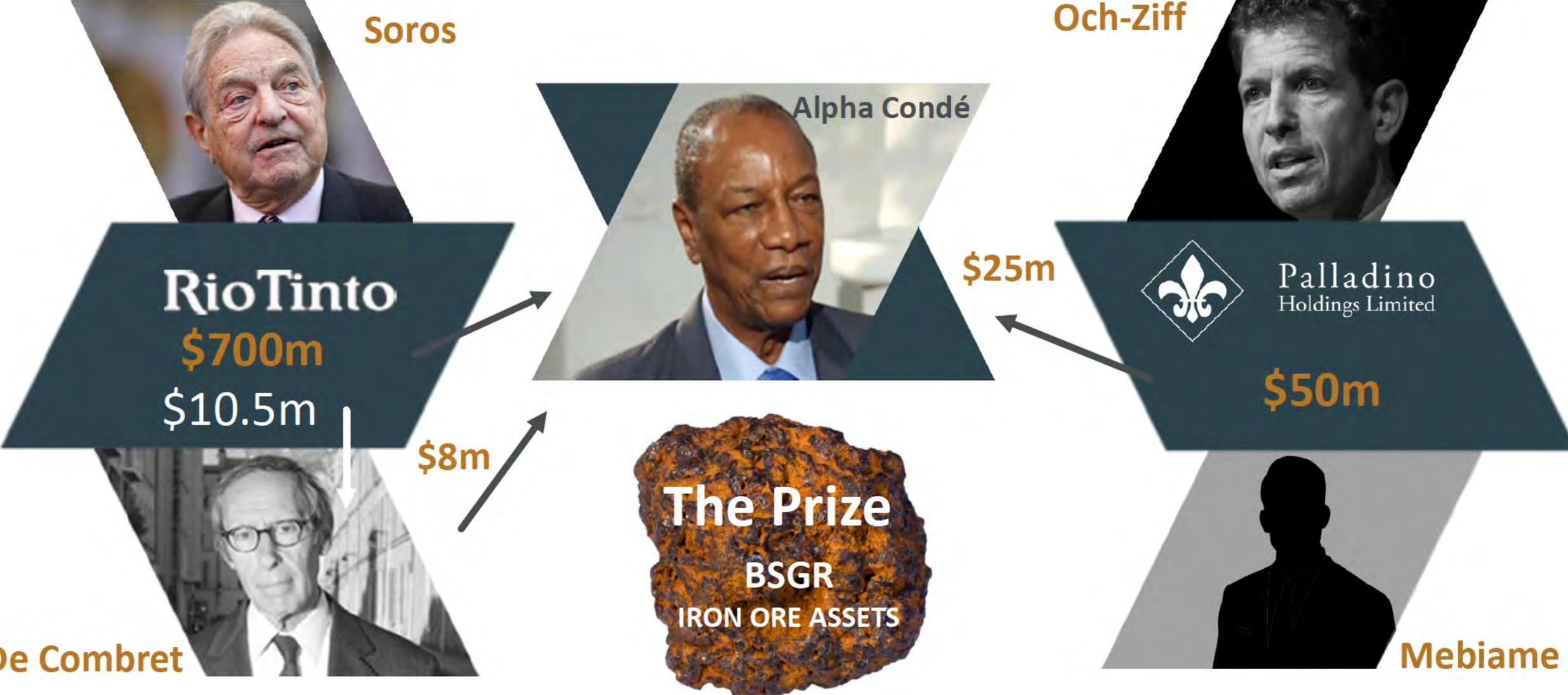
The BSGR Venture into Guinea- Background

- In March 2010, following the ratification of BSGR's Concession Agreement, BSGR set out to sign a MOU for the infrastructure and passage through Liberia.
- In April 2010, BSGR entered into a 51/49% JV with Vale SA of Brazil (one of the largest iron ore mining companies in the world). The deal valued the project at \$5 billion (only \$500 million of which was actually paid to BSGR), and Vale committed to invest over \$10 billion into Guinea and Liberia over the following years.
- In Dec. 2010, following a rigged election financed by a subsidiary of US hedge fund Och-Ziff through a company called Palladino and others, Alpha Condé became President and immediately embarked on a conspiracy scheme against BSGR, targeting to expropriation BSGR's legally acquired rights.
- Condé halted all work on the project, including infrastructure works on the trans-Guinea Conakry-Kankan passenger railway which BSGR had committed to build as part of its social commitment.
- In April 2014, having obsessively campaigned against BSGR with the support of George Soros and Rio Tinto, Condé, expropriates BSGR's mining rights by Presidential Decree on entirely false allegations, despite the JV having spent over \$860 million on the ground.
- BSGR subsequently launched Arbitration proceedings in ICSID against the Government of Guinea.
- Rio Tinto launched an unsubstantiated malicious RICO complaint against BSGR and Vale SA in the US courts, which was later dismissed.

The BSGR Venture into Guinea- Background

- In Oct. 2016, after 20 years of presence in Guinea, Rio-Tinto abandoned Blocks 3 and 4, transferring its participation to its Chinese partner, Chinalco.
- In Nov. 2016, Rio Tinto admitted paying \$10.5M to Francois de Combret (Condé's go-between) in order to secure its rights over Blocks 3 and 4 and improve its chances to recover Blocks 1 and 2. Rio Tinto fired senior employees who were involved in this payment as well as its head of legal and compliance.
- BSGR sent a letter before action to Rio Tinto, claiming damages of \$5 Billion for interfering with its assets. BSGR is considering filing similar claims against other entities in the near future.
- As at January 2017, there is no foreseeable chance that the vast deposits at Simandou will ever be exploited for the benefits of the Guinean people. The actions of Condé and his willing co-conspirators, driven by their greed and corruption, have ensured that the only project ever seriously to commit to Simandou is BSGR's will never happen.

An Orchestrated Conspiracy...



Evidence Of The Conspiracy Exposed And Prosecuted

Rio Tinto GuineaGate

Investigation in USA, UK & Australia

Och-Ziff

Plea settlement paid \$412 million

DPA with DOJ & SEC

<https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213>

Samuel Mebiame

Arrested by FBI in August 2016

Currently in plea negotiations with the DOJ [*add latest DOJ link*]

Mohamed Condé

Ongoing Investigation into corruption by the Paris Parquet National Financier



Australian Government
Attorney-General's Department



SFO

serious
fraud
office

How The Conspirators Executed Their Machiavellian Plan

- The conspiracy to steal BSGR's Assets was planned well before Alpha Condé was elected President BSGR's assets were promised to the backers of his election campaign - Och-Ziff / Palladino.
- [PROTECTED]
- Condé, with the support of Soros, Soros's NGOs and the law firm DLA Piper (who act for both Soros and for Guinea), conceived a new mining code and contract review scheme which would enable the President to easily revoke licenses.
- Mebiame (Och-Ziff's corrupt middle man) admitted to the US authorities being involved in rewriting the mining code as part of the expropriation scheme.
- At several meetings with BSGR in early 2011, Condé "put the squeeze" on BSGR and demanded an immediate extortion payment of \$1.25 million. Condé told BSGR "talk to my son" about the "payment", in order to let the project continue.
- **Condé then sent his agents to pay Mamadie Toure and fabricate evidence in order to execute his premeditated expropriation plan over BSGR assets, which he then finalized by Presidential Decree.**
- Condé also engaged PR advisors and used government agents to smear BSGR's reputation in the media. Government letters were often leaked to the press.
- For instance, Condé fabricated reports that Beny Steinmetz was behind an attempted coup d'état in the French satirical paper Canard Enchaîné in France, supported by statements of his Ministers. BSGR sued for defamation.

Alpha Conde's Tactics - continuation

- Condé denounced BSGR executives as persona non grata in the country, and pushed a judge to open an investigation and illegally arrest and then detain BSGR's local employees for 8 months in jail. Guinea was condemned and fined by the Human Rights court of the ECOWAS for grave violations of law and human rights, for these actions.
- Condé used Mamadie Toure, falsely claiming she was the fourth wife of the former president (for which there is absolutely no evidence) and paid her to falsify her declaration. He paid her at least \$50,000 in checks and it is likely she has received more.
- Mamadie Toure had tried on several occasions to extort money from BSGR, making false allegations which she later retracted.
- Condé used Soros's influence at the highest levels in America to open an investigation against BSGR and Beny Steinmetz.
- In addition, Guinea/Condé sent rogatory letters to the Swiss authorities leading them to open an investigation against Beny Steinmetz, in respect of which Steinmetz has cooperated fully. However, Mamadie Touré has failed to cooperate with the Swiss investigation, refusing to answer questions despite being requested to do so on several occasions.
- As soon as it was made aware of the corruption allegations, the Board of directors of BSGR and the Trustees of its holding Foundation engaged a forensic investigation led by two large leading US legal and accounting firms specializing in forensic investigation and headed by Louis J. Freeh (Ex-head of the FBI 1993-2001). **The investigation found no evidence whatsoever of BSGR having engaged in corruption or any illegal activities.**

The Corrupt Witness Scheme

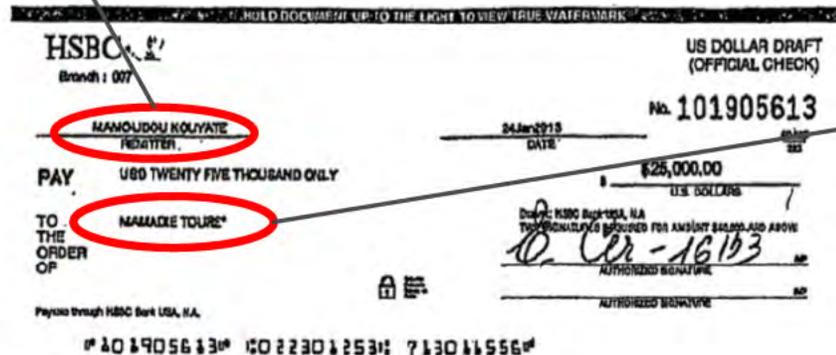


Kouyate

Soros

Condé

Payments were made to Ms. Mamadie Touré for providing false statements against BSGR. These payments were made by Mamoudou Kouyate, the special personal agent of Condé and who was also the official contact person between Condé and Soros. It is interesting to note that the witness statement of Kouyate is the only "proof" of the Guinean government that Mamadie Touré was the fourth wife of the former president- Conte.



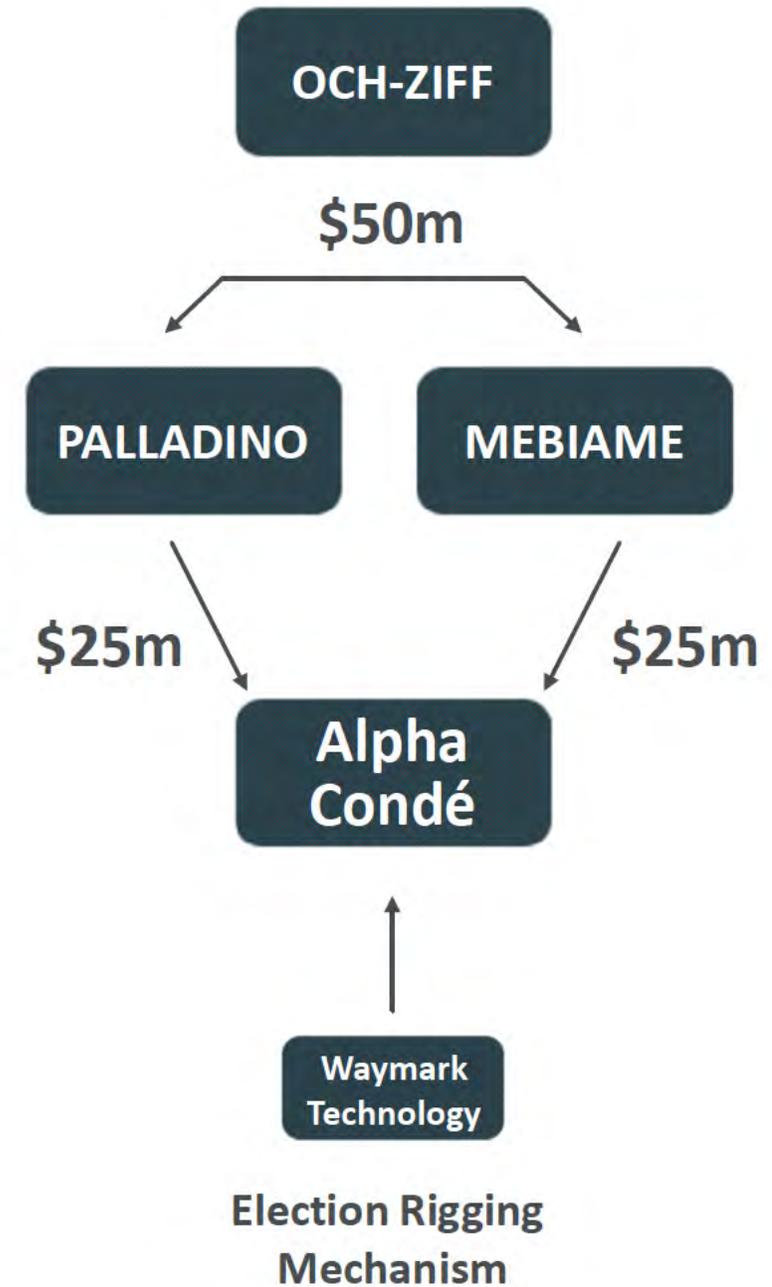
Mamadie Touré

Total Checks
\$50,000

Och-Ziff

Funding & Rigging the Election in Guinea

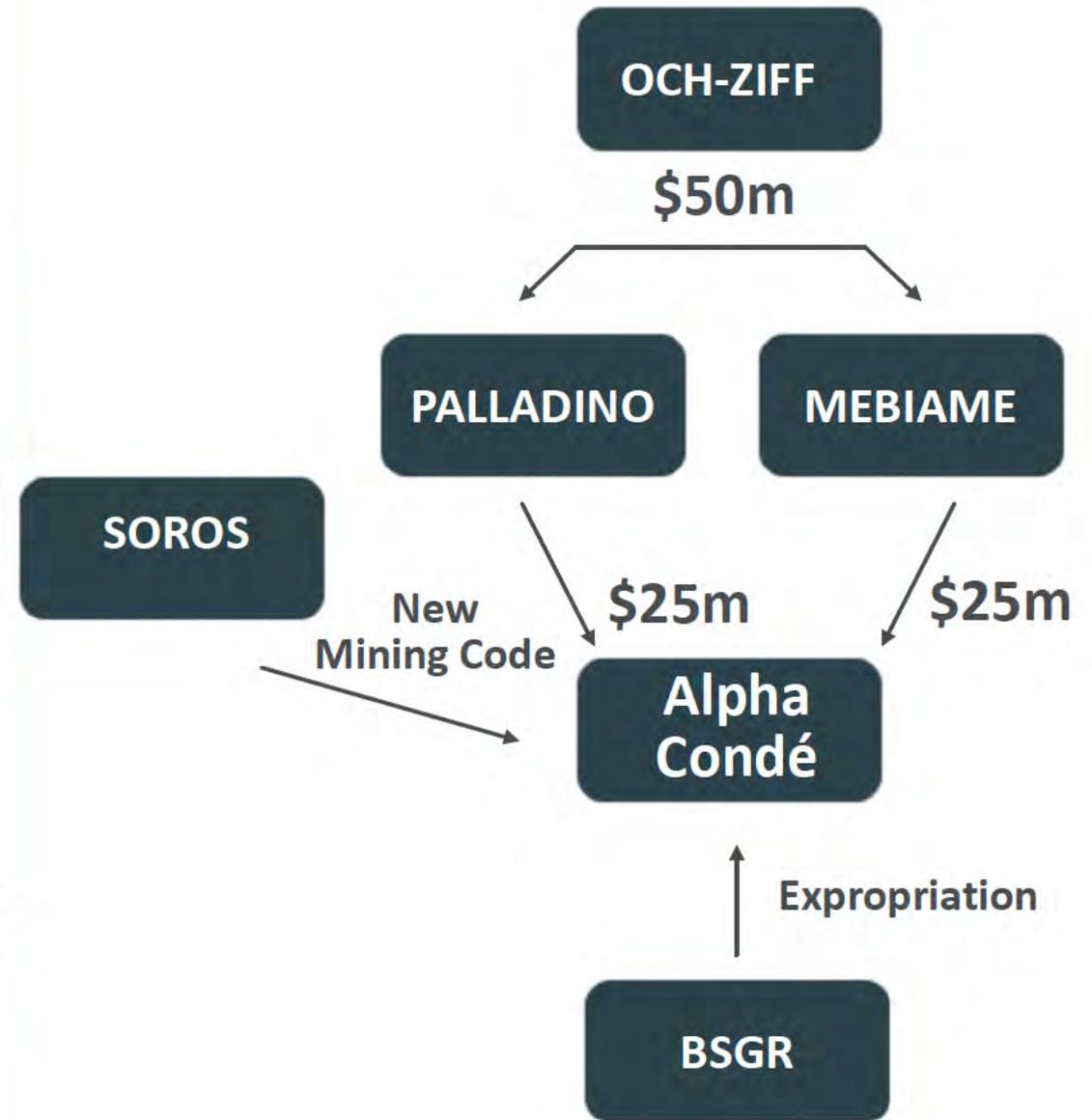
- Conspiracy to steal the rights of BSGR by Funding & Rigging the election
- Och-Ziff is promised BSGR Asset by Condé
- DOJ & SEC & SFO evidence has exposed campaign funding trails



Och-Ziff

New Mining Code & Loan for Shares

- Och-Ziff Finances \$50m for Guinea Project
- Mebiame & OZ team advise Condé on New Mining Code (“NMC”)
- Soros advises Condé on NMC and BSGR contract review.
- NMC grants State Mining Company 15% free carry + 20% participation.
- Palladino Loan default to automatically grant 30% of State Company (“Russians style Loan for shares scheme”).
- “Main Prize = BSGR Iron Ore Assets” says Sami Membiame.

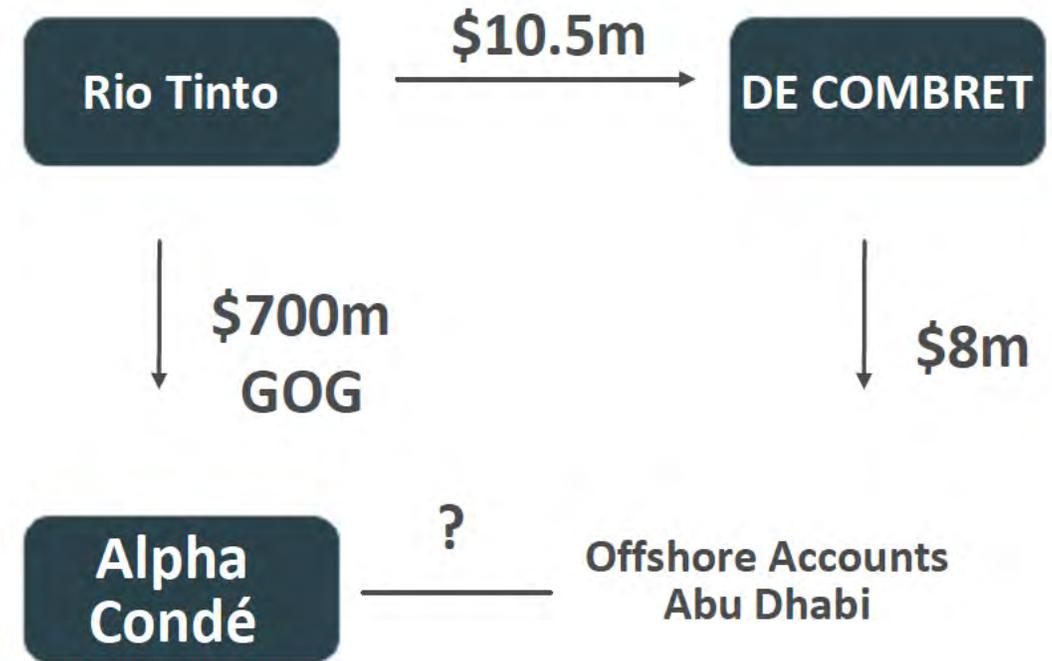


Rio Tinto

GuineaGate

Bribery & Corruption

- Rio Tinto transferred \$700 million to Condé a few months after election
- Transaction & Settlement Agreement supported by George Soros
- Condé promises to help and support Rio Tinto in Guinea
- Down payment bribe of \$10.5m negotiated and funneled through Francois de Combret. Most of these funds went to Alpha Conde and his son Mohamed
- The objective of Rio Tinto's campaign targeted to recover BSGR's Blocks 1 and 2



Rio-Tinto's internal Emails showing its part in corrupting Conde

FINANCIAL REVIEW
PREMIUM

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From: Davies, Alan (RTIO)
Sent: Tuesday, May 10, 2011 02:15 PM
To: Walsh, Sam (RTIO)
Subject: Confidential: Francois de Combret

=====
Sam
Further to our discussions about Francois de Combret's fee and arrangements going forward, I provide the following update and request for approval. I have held discussions with Francois following your discussions with Tom last week. We have reached a final point, where Francois has requested a fee for services on securing 3 and 4 of US\$10.5m. This is clearly stated as his bottom line, and a reduction from his request of US\$15m.
Sam, I accept that this is a lot of money, but I also put forward that the result we achieved was significantly improved by Francois' contribution and his very unique and unreplaceable services and closeness to the President. He vouched for our integrity when it was needed and helped bring us together when things were looking extremely difficult. These services were of the most unique nature, and we will never fully be able to judge the potential outcome if he was not assisting in us in good faith.
My belief is that we had a very low probability of resecuring 3 and 4, but through a combination of the negotiations and Francois' unique help to me and Rio Tinto, we were able to close. There is still an enormous amount to do to secure the investment fully.
Since the signing, Francois has helped me on a number of communication issues with the President and the Minister of Mines, which has been invaluable. I have absolutely no doubt that Francois will not act as a friend of Rio Tinto going forward, and is extremely valuable insurance that things do go smoothly as we bed down the arrangements with the GoG.
I am extremely worried if we lose the direct connection to the President that I have cultivated with Francois. Francois has behaved with the utmost integrity and as I say, I have extreme confidence that he will continue to assist us to improve our relationship with the GoG and the President. There is also now a glimmer of possibility that we may be able to move ourselves into a useful position in relation to 1 and 2.
Irrespective of the good advances I have personally made, I am extremely pessimistic without the invaluable services that Francois has provided. This is not a standard situation, and is indeed extremely unique. I am very worried if we are not able to stabilize the situation and start delivering the project. Finalizing these discussions in a satisfactory way is extremely good insurance for Rio Tinto.
May I please have your approval to agree a final fee with Francois of US\$10.5m I am devoted to transition our relationship onto very stable footing, and see this as a very necessary step to doing that.
Thanks for your understanding Sam

Alan Alan Davies
President International Operations
Rio Tinto Iron Ore

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Politics
Policy
Generations

Message From: Walsh, Sam
Sent: 5/10/2011 2:32:53 PM
To: Davies, Alan (RTIO)
Subject: Fw: Confidential: Francois de Combret

=====
Alan,
Got the figure up to \$10.5 million but only holding an amount in escrow in his name subject to first shipment. I know that you won't like this, but put your thinking cap on.
Sam

From: Albanese, Tom (RTHQ)
Sent: Tuesday, May 10, 2011 06:32 PM
To: Walsh, Sam (RTIO)
Subject: Re: Confidential: Francois de Combret

=====
Sam,
Worth giving this a try, but also think about optics to the GoG.
Regards, Tom

Tom Albanese
Chief Executive Rio Tinto

Rio Tinto Interference: Smearing, Lobbying & Bribery

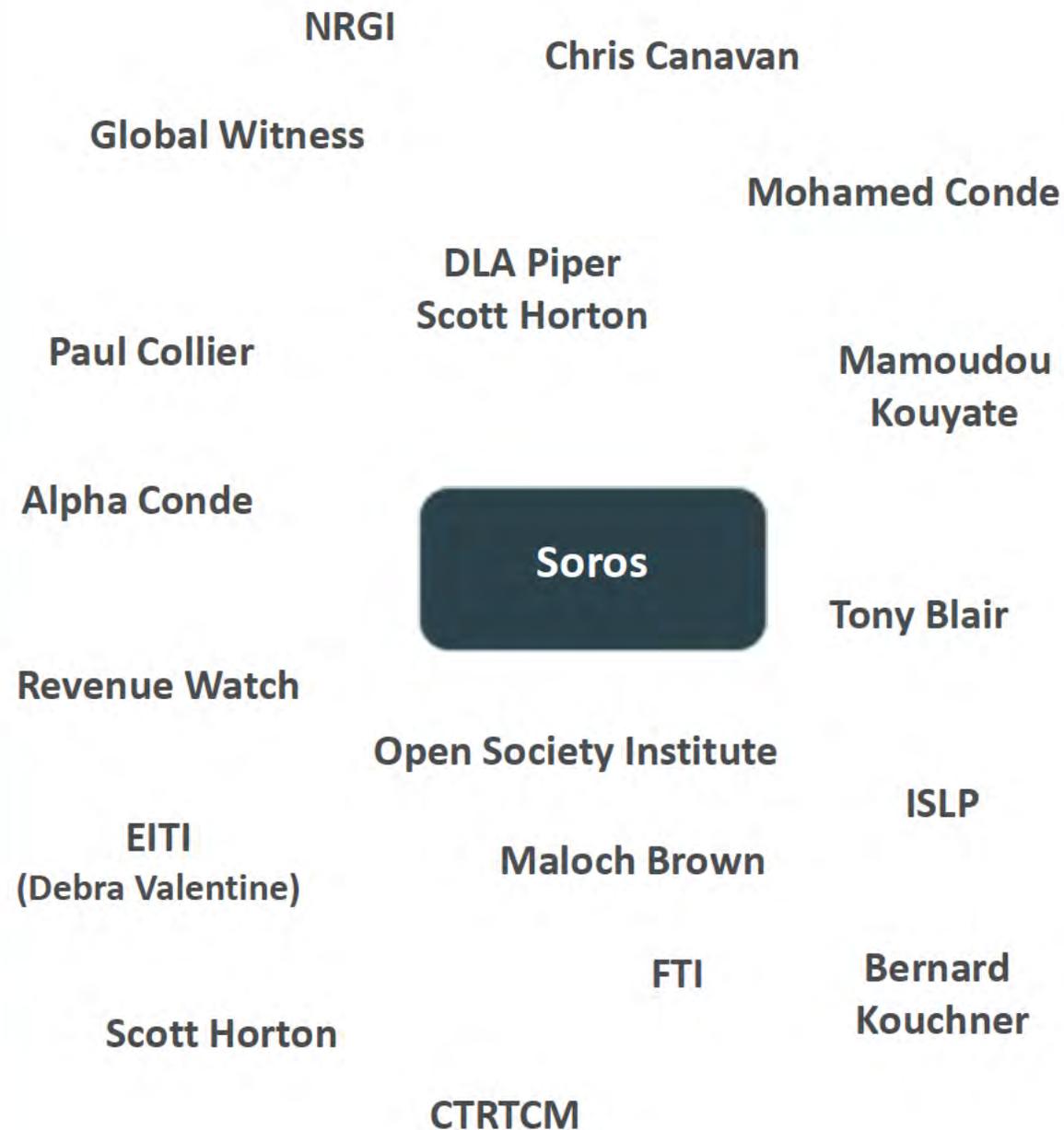
- Rio Tinto launched RICO complaint against BSGR/Vale in 2014 as part of their disruption and smear tactics
- Operational disruptions on ground in Guinea against BSGR activities
- Rio Tinto conducted illegal intelligence operations (employing 6 different intelligent firms) against BSGR
- International political and diplomatic lobbying as well as well organised smearing PR campaign
- Evidence of ongoing Rio Tinto's bribery and corruption continuing through 2016 exposed by the international press (FT, Bloomberg, France 24, AFR, Reuters...)



The Soros Galaxy

Influence & Interference

- Soros facilitated Condé in his scheme, despite his OSI positions against corruption
- Soros provided organizational and international network support to damage BSGR
- Soros interfered in the rights of BSGR in order to benefit of his personal agenda and that of Rio Tinto
- George Soros used his political power and influence in the US at the highest levels as well as the OECD.
- Soros exercised his influence through his controlled NGOs, Open Society, Revenue Watch, and paid personalities such as Tony Blair and Lord Maloch Brown to smear on BSGR and Beny Steinmetz



George Soros

Tortious Interference



George Soros: "I am basically there to make money.... I can not and do not look at the Social consequences of what I do"

Source: PBS 60minutes

- Soros funded and structured Condé's scheme providing him with legal Counsel, through DLA Piper, to fabricate a review process against BSGR.
- Soros makes his best efforts to upgrade Condé's status through political and business meetings in the US and abroad (eg the Davos forum).
- At first, the main mantra of Soros and Condé, was to inform the world that the BSGR project was too profitable.
- Mamoudou Kouyate, the go-between instructed by Condé to fabricate corruption charges against BSGR by bribing a State Witness (Mamadie Touré) was intimate in Soros circles.
- [PROTECTED]
- On behalf of Condé, Soros attempted to extort (through his Soros Fund Management LLC), \$500 m from BSGR and Vale, as the price for them remaining in Guinea (a sum later reduced to \$250m just for the right to negotiate).
- Soros helped Rio Tinto reaffirm its preferential position with the Government of Guinea and explored ways to evict BSGR from the country.

Vale email correspondence evidencing the Soros\Condé “shakedown”

Original Message

From: Eduardo Ledsham

Sent: June 6, 2011 19:45 h ZW3

To: Murilo Ferreira

CC: Eduardo Bartolomeo; Guilherme Cavalcanti; Jorge C. Martins; Mario Barbosa; Ricardo Saad; Tito Martins; Vânia Somavilla

Subject: Re: Soros' phone call

Murilo,

I don't know if I commented to you that in the first week of March Roger and I were in London with Soros, where he suggested that Vale should anticipate US\$ 250 M to the government and as counterpart would get the agreement signed with BSGR guaranteed. One week later, after the draft agreement was ready, he changed position saying that we should pay US\$ 250 M to have the right to sit with the government and discuss the agreement again???. He clearly has a proximity to President Alpha but has no right to speak on their behalf.

This week President Alpha will be talking with BSGR on the subject of payment of the capital gain tax. Still to be confirmed, the Liberian President would like to have a meeting with Vale at the beginning of next week, on the agreement over the export through Liberia. She is interested to accelerate the agreement execution, and wants to know what is preventing it. Saad should participate in the meeting, during which we shall arrange a conditioning for the contract on the export through Liberia for Zogota and blocks 1 and 2.

Yours truly,

Eduardo Jorge Ledsham

Vale

Executive officer – Exploration, Energy and Projects

eduardo.ledsham@vale.com

Tel.: (21) 3814.8888

Fax: (21) 3814.8820

George Soros / DLA Piper

SCOTT HORTON - The Activist Lawyer

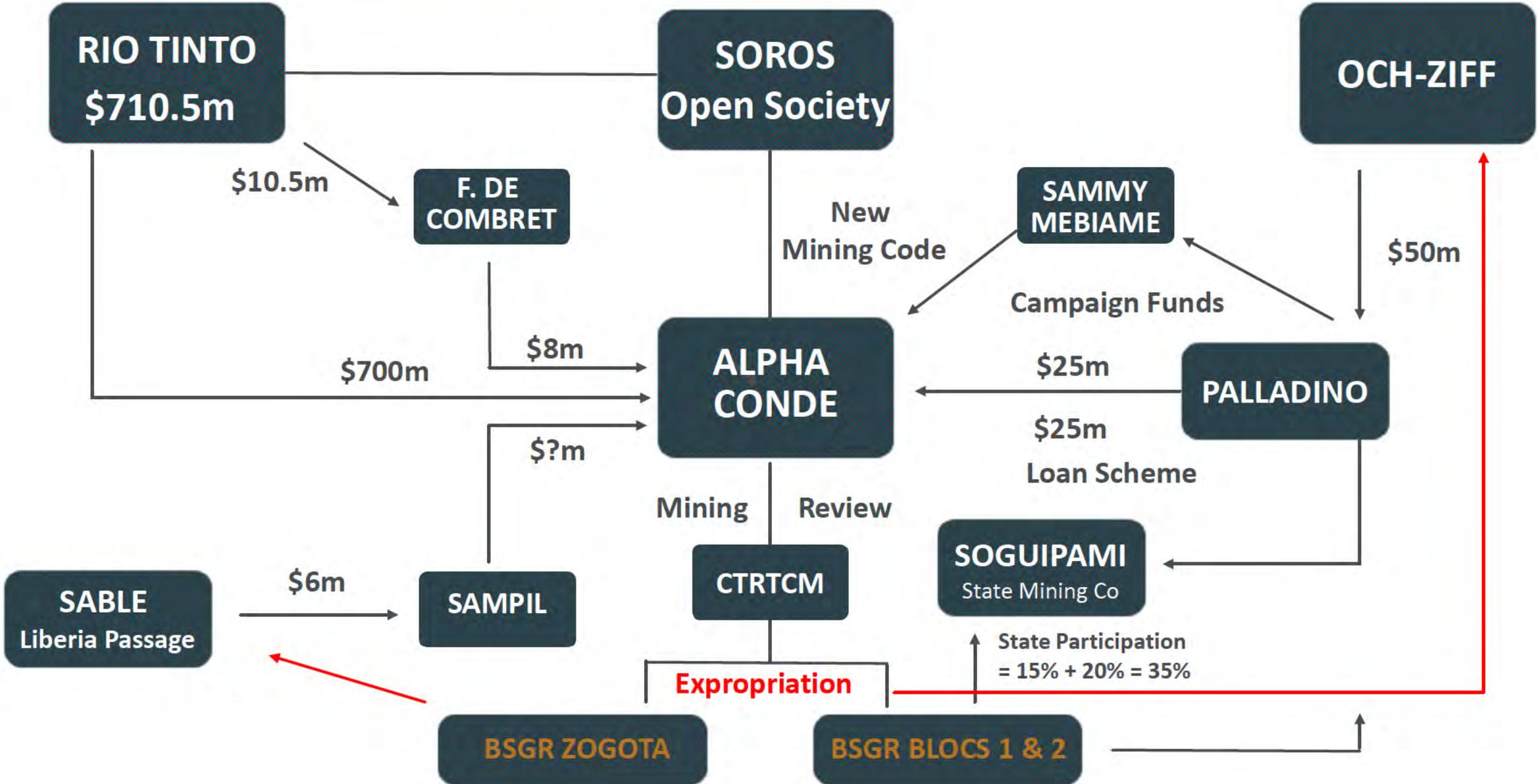


- Scott Horton, a partner at DLA Piper was brought in by Soros to help the Government of Guinea target BSGR, through the mining contract review
- [PROTECTED]
- Scott Horton was the “Chief Conductor” of the expropriation plan, working directly with Condé and his Ministers, Mohamed Condé and Mamoudou Kouyate as well as Chris Canavan of the Soros Fund to drive and execute the illegal strategies targeting BSGR
- Horton was involved in covering up the Palladino corruption scheme
- Horton was key to orchestrating the media strategy and smear campaigns against BSGR. Horton is an Advisor to Open Society.
- Horton facilitated and supported a Guinean judge in drafting malicious MLA requests to induce prosecutions of BSGR and Beny Steinmetz in many jurisdictions
- Horton drafted the retendering documents of Blocks 1 and 2 and is currently representing Guinea at ICSID

The Conspiracy Web



A Complex Conspiracy



Conclusion

- As BSGR has consistently maintained, it is a victim of a huge political and economic conspiracy perpetrated on it by some of the most sinister anti-democratic and unanswerable forces in the world.
- Alpha Conde, with the support of his partners and agents conceived and fabricated fake corruption charges against BSGR to steal its iron ore assets, because it did not agree to pay bribes.
- George Soros illegally interfered in BSGR's venture providing financial, technical and organizational support to the Machiavellian plans of Condé and his cronies.
- Och-Ziff, Palladino and others targeted BSGR's assets to reap huge windfalls from a corrupt scheme by illegally interfering to deprive BSGR of its multi-billion dollar project in Guinea.
- Rio Tinto corrupted Government Officials in its heist to maliciously and illegally interfere with BSGR's rights and ultimately sought to re-acquire these in return for the bribes it paid.
- Condé and his partners' corruption and bribes used a complex structure of "fixers" and intermediaries to siphon millions of dollars from the people of Guinea.
- The damage caused to BSGR is estimated to be between \$5-10 billion. The damage estimated to the Guinea people is the ongoing poverty and the lost opportunity to double Guinea's GDP.
- **BSGR is a victim of its commercial success and honesty. Unlike Rio-Tinto and Och-Ziff, BSGR refused to pay bribes to Condé. BSGR has consequently suffered the expropriation of its assets by Condé supported by George Soros, who gave him the legitimacy and platform to do so.**