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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sàrl

v.

Republic of Guinea

(ICSID Case No. ARB/14/22)

AWARD

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Albert Jan van den Berg, Arbitrator
Professor Pierre Mayer, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

Assistant to the Tribunal
Dr. Magnus Jesko Langer

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18 May 2022

Representation of the Parties

Representing BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sàrl:

Mr. Carl Bowles
Mr. Mark Firmin
Joint Administrators
Alvarez & Marsal Europe LLP
Park House
16-18 Finsbury Circus
London EC2M 7EB
United Kingdom

Representing the Republic of Guinea:

Mr. Michael Ostrove
Mr. Théobald Naud
Mrs. Clémentine Emery
DLA Piper France LLP
27, rue Laffitte
75009 Paris
France

Mr. Scott Horton
DLA Piper UK LLP
160 Aldersgate Street
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and

Mr. Pascal Agboyibor
Asafo & Co.
63, avenue des Champs-Elysées
75008 Paris
France

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TABLE OF ABBREVIATIONS

ABFDE	American Board of Forensic Document Examiners
ASTM	American Society of Testing and Materials
Base Convention	Basic Agreement between the Republic of Guinea and BSG Resources for the Exploitation of the Zogota/N'Zerekore Iron Ore Deposits of 16 December 2009
BOT Act	Act L/97/012/AN of 1 June 1998 on the Financing, Construction, Exploitation, Maintenance and Transfer of Development Infrastructures by the Private Sector
BSG	Beny Steinmetz Group
BSGR	BSG Resources Limited (in Administration since 6 March 2018)
BSGR Guernsey	BSG Resources (Guinea) Limited
BSGR Guinea	BSG Resources (Guinea) Sàrl
BSGR Guinea BVI	BSG Resources (Guinea) Limited
BVI	British Virgin Islands
C-CFER	Claimants' Comments of 12 March 2018 on the Final Expert Report
C-CPER	Claimants' Comments of 24 January 2018 on the Preliminary Expert Report
CEO	Chief Executive Officer
Claimants	BSG Resources Limited (in Administration since 6 March 2018), BSG Resources (Guinea) Limited and BSG Resources (Guinea) Sàrl
CM	Respondent's Counter-Memorial of 17 June 2016
CPDM	*Centre de Promotion et de Développement Minier* (Agency for the Promotion and Development of Mining)
C-PHB1	Claimants' Post-Hearing Brief of 11 June 2018
C-PHB2	Claimants' Reply Post-Hearing Brief of 9 July 2018
C-RFA	Claimant's Request for Arbitration of 1 August 2014
CVRD	*Companhia Vale do Rio Doce* (renamed Vale in 2007)
DA	Document Authenticity
DOJ	Department of Justice
ECOWAS	Economic Community of West African States

EDD	Electrostatic Detection Device
ER1	First Expert Report
ER2	Second Expert Report
ESDA	Electrostatic Detection Apparatus
Exh. C-	Claimants' Exhibits
Exh. CL-	Claimants' Legal Authorities
Exh. R-	Respondent's Exhibits
Exh. RL-	Respondent's Legal Authorities
Experts	Tribunal-appointed Experts Messrs. Todd W. Welch and Gerald M. LaPorte of Riley Welch LaPorte & Associates
FBI	Federal Bureau of Investigation
FER	Final Report of the Tribunal-appointed Experts of 12 February 2018
GC/MS	Gas Chromatography/Mass Spectometry
IBA	International Bar Association
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Investment Code	Ordinance No. 001/PRG/87 of 3 January 1987, amended by Act L/95/029/CTRN of 30 June 1995 constituting the Investment Code of the Republic of Guinea
IRL	Infrared Luminescence
IRR	Infrared Reflectance
LCIA	London Court of International Arbitration
Matinda	Matinda & Co Ltd.
Mem.	Claimants' Amended Memorial of 29 February 2016
Mining Code	Act L/95/036/CTRN of 30 June 1995 constituting the Mining Code of the Republic of Guinea
MoU	Memorandum of Understanding
NMC	National Mining Commission
PO	Procedural Order
RfA	Request for Arbitration

R-CFER	Respondent's Comments of 12 March 2018 on the Final Expert Report
R-CPER	Respondent's Comments of 24 January 2018 on the Preliminary Expert Report
Rejoinder	Respondent's Rejoinder of 31 March 2017
Reply	Claimants' Reply of 10 January 2017
Respondent	Republic of Guinea
R-PHB1	Respondent's Post-Hearing Brief of 11 June 2018
R-PHB2	Respondent's Reply Post-Hearing Brief of 9 July 2018
SAMREC	South African Mineral Resources and Mineral Reserves Code
SWGDOC	Scientific Working Group for Forensic Document Examination
TLC	Thin-layer Chromatography
ToR	Terms of Reference for the Tribunal-appointed Experts of 24 October 2017
Tr. (Merits) [date, page:line]	Transcript of the hearing in Paris of 22 May to 2 June 2017
Tr. (DA) [date, page:line]	Transcript of the document authenticity hearing in Paris of 26 to 27 March 2018
USD	United States Dollar
UV	Ultraviolet
VBG	Vale BSGR (Guinea) Limited
VBG Guernsey	VBG-Vale BSGR (Guinea) Guernsey
VBG Guinea	VBG-Vale BSGR Sàrl
VSC	Video Spectral Comparator
WS	Witness Statement

I. INTRODUCTION

1. The present dispute arises under Ordinance No. 001/PRG/87 of 3 January 1987, amended by Act L/95/029/CTRN of 30 June 1995 constituting the Investment Code of the Republic of Guinea (the "Investment Code"),[1] Act L/95/036/CTRN of 30 June 1995 constituting the Mining Code of the Republic of Guinea (the "Mining Code")[2] and Law L/97/012/AN of 1 June 1998 Authorizing the Financing, Construction, Operation, Maintenance and Transfer of Development Infrastructures by the Private Sector of the Republic of Guinea (the "BOT Act"),[3] as well as under the Basic Agreement between the Republic of Guinea and BSG Resources for the Exploitation of the Zogota/N'Zerekore Iron Ore Deposits of 16 December 2009 (the "Base Convention"),[4] in connection with an investment made by BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) Sàrl in the iron ore mining industry on the territory of the Republic of Guinea.

A. The Parties

1. The Claimants

2. The Claimants in this arbitration are BSG Resources Limited ("BSGR"; "BSGR (in Administration)" by court order of the Royal Court of Guernsey dated 6 March 2018), BSG Resources (Guinea) Limited ("BSGR Guernsey") and BSG Resources (Guinea) Sàrl ("BSGR Guinea") (the "Claimants").

3. BSGR (in Administration) is a company existing under the laws of the Bailiwick of Guernsey, United Kingdom, with registration number 46565, that was incorporated in 2003 as a limited company in Jersey[5] and migrated in March 2007 to Guernsey.[6] Its principal office is in West Wing, Frances House, Sir William Place, St Peter Port, Guernsey.

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1 Investment Code of the Republic of Guinea, 30 June 1995 (Exh. CL-3).

2 Mining Code of the Republic of Guinea, 30 June 1995 (Exh. CL-1).

3 Guinea Act L/97/012/AN on the Financing, Construction, Exploitation, Maintenance and Transfer of Development Infrastructures by the Private Sector, 1 June 1998 (Exh. CL-2).

4 Basic Agreement between the Republic of Guinea and BSG Resources for the Exploitation of the Zogota/N'Zerekore Iron Ore Deposits of 16 December 2009 (Exh. C-69).

5 [redacted]

6 [redacted]

4. BSGR Guernsey is a company registered under the laws of the bailiwick of Guernsey, United Kingdom, with registration number 50001 and its registered office in Guernsey, West Wing Frances House, Sir William Place, St Peter Port, Guernsey GY1 1GX.[7]

5. BSGR Guinea is a company incorporated in accordance with the laws of the Republic of Guinea on 24 November 2006 under number RCCM/GC-KAL/013.755A/2006.[8] Its registered office is located at Immeuble Bleu, 5ème étage Résidence 2000, Moussoudougou-C/Matam, Conakry, Republic of Guinea, PO Box 6389.

6. The Claimants are represented in this arbitration by Carl Bowles and Mark Firmin of ALVAREZ & MARSAL EUROPE LLP, the joint administrators of BSGR in Administration.

2. The Respondent

7. The Respondent is the Republic of Guinea ("Guinea" or the "Respondent").

8. The Respondent is represented in this arbitration by Michael Ostrove, Theobald Naud and Clémentine Emery of DLA PIPER FRANCE LLP, Scott Horton of DLA PIPER UK LLP, and Pascal Agboyibor of ASAFO & CO.

B. The Tribunal

9. The Arbitral Tribunal is composed of:

- Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, President
- Prof. Albert Jan van den Berg, a national of the Netherlands, Arbitrator
- Prof. Pierre Mayer, a national of France, Arbitrator.

10. The Centre appointed Mr. Benjamin Garel as Secretary of the Tribunal.

11. With the consent of the Parties, the Tribunal appointed Dr. Magnus Jesko Langer, a lawyer of the President's law firm, as Assistant to the Tribunal. His curriculum vitae and a declaration of impartiality and independence were circulated to the Parties.

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7 [redacted]

8 Statuts de BSGR Guinée, 16 nov. 2006 (Exh. C-126); [redacted]

II. PROCEDURAL HISTORY

A. Initial phase

12. On 1 August 2014, the Centre received an electronic copy of the Request for Arbitration (the "ROA") submitted by BSGR (or the "Claimant 1") against the Republic of Guinea. On 11 August 2014, the Centre received the original of the ROA together with 27 exhibits (Exh. C-1 to Exh. C-27).

13. On 13 August 2014, the Centre acknowledged receipt of BSGR's payment of the filing fee and transmitted a copy of the Request to the Republic of Guinea in pursuance of ICSID Institution Rule 5(2).

14. The Secretary-General of ICSID registered this arbitration on 8 September 2014 pursuant to Article 36(3) of the ICSID Convention as *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22.

15. On 5 February 2015, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Arbitration Rules.

16. On 26 February 2015, the Secretary of the Tribunal circulated a draft agenda of the first session, as well as a draft procedural order. The Parties submitted their comments on both documents on 20 April 2015.

17. The first session of the Tribunal was held in person on 23 April 2015 in Geneva, Switzerland. In addition to discussing the content of the draft procedural order, it was agreed that this arbitration would not be confidential and that the Parties would state their views on the application of the UNCITRAL Rules on Transparency by 27 May 2015. The discussion also included the Respondent's announced request for provisional measures.

18. On 13 May 2015, the Tribunal issued Procedural Order No. 1 ("PO1"), setting out the procedural rules governing this arbitration and including the calendar for the jurisdictional and liability phase in Annex A.

19. On 17 September 2015, the Tribunal issued Procedural Order No. 2 ("PO2"), which provides the transparency regime of this arbitration. The Tribunal also issued a consolidated text of the UNCITRAL Rules on Transparency as amended by PO2 on 22 October 2015.

20. On 25 November 2015, the Tribunal issued Procedural Order No. 3 ("PO3"), partially granting the Respondent's request that the Claimant pay the advances of arbitration costs and denying the Respondent's request that the Claimant post security for costs.

21. On the same day, the Tribunal issued Procedural Order No. 4 ("PO4") in relation to the Respondent's objections to transparency.

B. Consolidation

22. On 13 October 2015, BSGR Guernsey (the "Claimant 2") and BSGR Guinea (the "Claimant 3") filed a Request for Arbitration against the Republic of Guinea. In that request, they informed the Centre that they would make an application for the consolidation with ICSID Case No. ARB/14/22.

23. The arbitration brought by the Claimants 2 and 3 was registered on 25 November 2015 pursuant to Article 36(3) of the ICSID Convention as *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. 15/46. The Tribunal was constituted on 7 December 2015, pursuant to Article 37(2)(a) of the ICSID Convention. It was composed of the same members as the Tribunal in the arbitration brought by the Claimant 1, i.e. ICSID Case No. ARB/14/22.

24. On 5 February 2016, a common session was held by telephone conference serving as the first session in ICSID Case No. ARB/15/46 and providing an opportunity to address the consolidation of the two arbitrations (ICSID Cases Nos. ARB/14/22 and ARB/15/46), on the basis of an agenda and draft procedural order circulated by the Secretary of the Tribunal on 26 January 2016.

25. Having secured the agreement of BSGR, BSGR Guernsey, BSGR Guinea, and the Republic of Guinea that the disputes be adjudicated by the same Tribunal in one consolidated ICSID proceeding, on 14 February 2016 the Tribunal issued a procedural order which served as Procedural Order No. 1 in ICSID Case No. ARB/15/46 and constituted Procedural Order No. 5 ("PO5") in ICSID Case No. ARB/14/22 concerning the consolidation of the two arbitrations into ICSID Case No. ARB/14/22. On the same day, the Tribunal in ARB/15/46 issued Procedural Order No. 2 taking note of the discontinuance of ARB/15/46 in accordance with ICSID Arbitration Rule 43(1). The consolidated case was registered as *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. 14/22.

C. Start of pre-hearing phase

26. The Claimants filed their amended Memorial (the "Memorial") on 29 February 2016. The Memorial was accompanied by 160 factual exhibits (Exh. C-1 to Exh. C-160) and 30 legal authorities (Exh. CL-1 to Exh. CL-30). The Claimants further attached witness statements of Messrs. Benjamin Steinmetz, Marc Struik, Asher Avidan, Joseph Tchelet, Mahmoud Thiam, Patrick Saada and Dag Cramer.

27. On 11 May 2016, the Tribunal issued Procedural Order No. 6 ("PO6") addressing the Respondent's transparency objections in respect of the Memorial.

28. In conformity with the amended procedural schedule, the Respondent filed its Counter-Memorial (the "Counter-Memorial") on 17 June 2016. In the Counter-Memorial, the Respondent raised various jurisdictional objections. In addition to requesting that the Tribunal dismiss the claims and award it costs, the Respondent also raised counterclaims. The Counter-Memorial was accompanied by 413 factual exhibits (Exh. R-71 to Exh. R-483), 58 legal authorities (Exh. RL-18 to Exh. RL-75). The Respondent further attached the witness statements of Messrs. Ousmane Sylla, Ahmed Tidiane Souaré, Lansana Tinkiano, Ahmed Kanté, and Louncény Nabé. On 4 October 2016, the Tribunal resolved the Parties' transparency objections in respect of the Counter-Memorial.

29. Following the exchange of their requests for production of documents on 8 July 2016, the filing of their objections on 9 August 2016, and the re-submission of new and amended requests by the Claimants on 22 August 2016, the Tribunal issued Procedural Order No. 7 ("PO7") resolving the outstanding document production requests on 5 September 2016.

D. Application for disqualification of the Tribunal

30. On 4 November 2016, the Claimants filed a proposal to disqualify the members of the Tribunal (the "Proposal for Disqualification") in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. On that date, the Centre informed the Parties that the proceedings were suspended until the Proposal for Disqualification was decided pursuant to ICSID Arbitration Rule 9(6).

31. The Respondent responded to the Proposal for Disqualification on 11 November 2016. By email dated 22 November 2016 and with letter of 23 November 2016, the Respondent and the Claimants, respectively, submitted further observations.

32. On 28 December 2016, the Chairman of the Administrative Council rejected the Proposal for Disqualification and the proceedings resumed on that day.

E. Continuation of pre-hearing phase

33. Following the resumption of the proceeding, the Claimants filed their Reply Memorial (the "Reply") on 10 January 2017, accompanied by 188 factual exhibits (Exh. C-161 to Exh. C-348) and 29 legal authorities (Exh. CL-31 to Exh. CL-59). The Claimants attached witness statements of Ms. Sandra Merloni-Horemans and Messrs. Benjamin Steinmetz, Asher Avidan, Joseph Tchelet, Marc Struik, Dag Cramer, Cesare Morelli and Yuval Sasson.

34. In addition to reiterating its requests for relief, the Claimants sought the denial of the jurisdictional objections and the dismissal of the counterclaims.

35. On 23 March 2017, the Tribunal issued Procedural Order No. 8 ("PO8") in relation to the Respondent's transparency objections arising from the Reply.

36. The Respondent filed its Rejoinder on 31 March 2017, accompanied by 89 factual exhibits (Exh. R-484 to Exh. R-572) and 43 legal authorities (Exh. RL-76 to Exh. RL-118). The Respondent also filed witness statements of Messrs. Ousmane Sylla and Bouna Sylla.

37. On 10 April 2017, in accordance with PO1, as amended on 5 January 2017, the Tribunal and the Parties held a pre-hearing telephone conference to discuss the organization of the hearing on jurisdiction and liability (the "Hearing").

38. On 15 April 2017, the Tribunal issued Procedural Order No. 9 ("PO9") on pre-hearing matters.

39. On 24 April 2017, the Respondent informed the Tribunal that all of its witnesses would be available during the Hearing, that they would all testify in French, and that none of these witnesses would also appear as a Party representative.

40. On 26 April 2017, the Claimants confirmed that all of their witnesses intended to attend the Hearing in person, with the exception of Mr. Mahmoud Thiam who is expected to appear at the Hearing if he is acquitted of his charges in the United States. The Claimants further informed the Tribunal that all of their witnesses intend to testify in English and that Mr. Dag Cramer was nominated as representative of BSGR, being exempt from sequestration.

41. On 12 May 2017, the Tribunal issued Procedural Order No. 10 in relation to the Claimants' and the Respondent's transparency objections.

F. Hearing on jurisdiction and liability

42. The Hearing was held at the World Bank offices in Paris between 22 May and 2 June 2017. The following persons attended the Hearing in whole or in part:

- The Tribunal

  Members of the Tribunal

  Professor Gabrielle Kaufmann-Kohler, President

  Professor Albert Jan van den Berg, Arbitrator

  Professor Pierre Mayer, Arbitrator

  Secretary of the Tribunal

  Mr. Benjamin Garel

  Assistant to the Tribunal

  Dr. Magnus Jesko Langer

- Claimants' counsel and representatives

Mr. Karel Daele	Mishcon de Reya LLP
Mr. James Libson	Mishcon de Reya LLP
Ms. Katy Colton	Mishcon de Reya LLP
Ms. Deepa Somasunderam	Mishcon de Reya LLP
Mr. Jack Burstyn	Mishcon de Reya LLP
Mr. David Wolfson	Essex Court Chambers
Ms. Janet Goodvach	
Mr. David Barnett	Barnea & Co
Ms. Gabrielle Peled	Barnea & Co
Mr. Dag Cramer	BSGR
Mr. Peter Driver	BSGR
Mr. Gustaf Bodin	BSGR

- Claimants' witnesses and experts

  Witnesses

  Mr. Asher Avidan

  Mr. Dag Cramer

  Ms. Sandra Merloni-Horemans

Mr. Beny Steinmetz

Mr. Marc Struik

Mr. Joseph Tchelet

Expert

Mr. François Ferreira

- Respondent's counsel and representatives

Mr. Michael Ostrove	DLA Piper
Mr. Scott Horton	DLA Piper
Mr. Théobald Naud	DLA Piper
Ms. Sârra-Tilila Bounfour	DLA Piper
Ms. Andrea Lapunzina-Veronelli	DLA Piper
Ms. Clémentine Emery	DLA Piper
Ms. Eugénie Wrobel	DLA Piper
Mr. Laurent Jaeger	Orrick Herrington & Sutcliffe
Mr. Yann Schneller	Orrick Herrington & Sutcliffe
Ms. Agnès Bizard	Orrick Herrington & Sutcliffe
Mr. Quirec de Kersauson	Orrick Herrington & Sutcliffe
Ms. Valérie Kubwimana	Orrick Herrington & Sutcliffe
Mr. Marius Attindogbe	Orrick Herrington & Sutcliffe
Mr. Nicolas Saul	Orrick Herrington & Sutcliffe
Mr. Mohamed Sidiki Sylla	Sylla & Partners
Mr. Nava Touré	Principal Counsel to the Minister of Mines and Geology of the Republic of Guinea

- Respondent's witnesses

Mr. Ahmed Kanté

Mr. Louncény Nabé

Mr. Bouna Sylla

Mr. Ousmane Sylla

Mr. Ahmed Tidiane Souaré

Mr. Lansana Tinkiano

43. The Tribunal heard opening statements by counsel and evidence from the fact witnesses and expert listed above. The examination of Messrs. Steinmetz and Avidan was conducted by videoconference.

44. The Hearing was interpreted to and from English and French. It was also audio-recorded and transcribed verbatim, in real time, in both English and French. Copies of the sound and audio-video recordings and the transcripts were delivered to the Parties. In accordance with PO2, the Hearing was also broadcast and made publicly accessible by video link on the ICSID website.

45. After having heard the Parties, the Tribunal advised them at the end of the Hearing that it intended to appoint an expert to conduct a forensic inspection of the originals of certain documents that had been impugned by the Claimants in the course of the Hearing (the "Disputed Documents").

46. At the end of the Hearing, the Tribunal and the Parties held a procedural discussion in relation to post-hearing matters according to paragraph 38 of PO9.

G. Designation of Tribunal-appointed forensic experts

47. On 7 June 2017, the Tribunal issued Procedural Order No. 11 ("PO11") relating to the post-hearing matters discussed at the end of the Hearing and setting out the first procedural steps to put in place the inspection of the Disputed Documents (the "Document Inspection"). In particular, the Tribunal would identify an independent forensic expert, prepare his or her draft terms of reference and seek the Parties' comments, and determine the procedure for the Document Inspection.

48. On 13 July 2017, the Tribunal granted the Parties' joint request for an extension of time until 26 July 2017 for the filing of the corrections and redactions to the Hearing transcripts.

49. On 14 July 2017, the Tribunal issued Procedural Order No. 12 in relation to the Documents Inspection.

50. On 20 July 2017 in accordance with paragraph 16 of PO11, the Tribunal informed the Parties that it intended to appoint Messrs. Todd Welch and Gerald LaPorte as independent forensic experts to inspect the Disputed Documents. The Tribunal explained that, after reviewing the profile and experience of a number of candidates, it had selected Messrs.

Welch and LaPorte because of (i) the breadth of their combined expertise and experience, including in proceedings run by law enforcement agencies, (ii) their ability to perform a wide array of forensic examinations, from handwriting and signature inspection to ink and chemical paper analysis, (iii) the convenience of having experts working together in the same firm, (iv) the recognition they enjoyed from their peers and relevant professional organizations, (v) their availability, and (vi) independence from the Parties and their counsel. The Tribunal invited the Parties to submit any comments by 28 July 2017 and stated that, absent any objections, it would proceed with the formal appointment.

51. On 27 July 2017, following another extension, the Parties filed the corrections and proposed redactions to the Hearing transcripts.

52. On 31 July 2017, the Tribunal took note that the Parties had submitted no comments regarding the proposed appointments of Messrs. Welch and LaPorte and circulated draft terms of reference (the "ToR") to the Parties.

53. On 1 August 2017, the Tribunal informed Messrs. Welch and LaPorte that it wished to appoint them as experts (the "Experts" or "Tribunal-appointed Experts") to assess the authenticity of the Disputed Documents. Messrs. Welch and LaPorte accepted their appointment on the same day.

54. On 10 August 2017, the Tribunal issued Procedural Order No. 13 dealing with the Parties' objections to the publication of the Hearing transcripts.

55. On 21 August 2017, the Tribunal had a telephone conference with the Experts as part of the process of preparing the terms of reference.

56. On 28 August 2017, the Tribunal issued Procedural Order No. 14 ("PO14)) dealing with the Document Inspection and attaching the Experts' draft ToR.

57. On 5 September 2017, the Parties provided their comments on the draft ToR.

58. On 9 September 2017, the Tribunal forwarded the Parties' comments on the draft ToR to the Experts. On the basis of these comments, it submitted a series of questions to the Experts in anticipation of a telephone conference with the Parties.

59. On 12 September 2017, the Tribunal transmitted to the Parties the answers it had received from the Experts to such questions.

60. On the same day, pursuant to paragraph 16 of PO14, the Respondent contacted the authorities of the United States of America (the "US") to seek their approval for the conduct of the Document Inspection on the premises of the Federal Bureau of Investigation ("FBI") in accordance with the conditions specified in paragraph 5 of PO14.

61. On 13 September 2017, the Tribunal held a telephone conference with the Parties and the Experts. The following persons participated in the telephone conference: Mr. Karel Daele, Mr. James Libson, Ms. Katy Colton, Ms. Deepa Somasunderam and Ms. Gabrielle Peled (for the Claimants); Mr. Michael Ostrove, Mr. Laurent Jaeger, Mr. Yann Schneller, Ms. Sârra-Tilila Bounfour and Ms. Andrea Lapunzina Veronelli (for the Respondent).

62. On 18 September 2017, the Parties commented on the answers provided by the Experts in writing and orally during the telephone conference. They also filed the information requested pursuant to paragraphs 16 and 17 of PO14.

63. On 21 September 2017, the US Department of Justice ("US DOJ") confirmed that the FBI had the Disputed Documents in its possession and would make them available for the Document Inspection at the FBI's offices in New York City.

64. On 22 September 2017, the Tribunal confirmed that party-appointed experts could attend the Document Inspection and assist the Parties in commenting on the report of the Experts.

65. On 27 September 2017, the Tribunal circulated a revised version of the draft ToR to the Parties and asked whether they would be available for the Document Inspection between 31 October and 3 November 2017.

66. On 30 September 2017, the Tribunal confirmed that the Document Inspection would be held between 31 October and 3 November 2017.

67. On 5 October 2017, the US DOJ informed the Tribunal that conducting the Document Inspection at the FBI offices in New York would not be feasible in light of the heavy equipment needed for the inspection. The US DOJ therefore suggested that the inspection take place at the New York office of one of the counsel, an FBI agent bringing the documents to the inspection location every morning and being present at all times during the inspection.

68. On 6 October 2017, the Respondent advised the Tribunal that the Parties had agreed for the inspection to be conducted at the New York office of DLA Piper.

69. On 9 October 2017, the Parties submitted the list of attendees to the Document Inspection.

70. On 11 October 2017, the Tribunal sent the ToR to the Experts for signature. The Experts did not sign this version because it was still open whether the Document Inspection would be videotaped.

71. On 13 October 2017 and pursuant to paragraph 9(c) of the revised draft ToR, the Claimants wrote that they had located additional comparator documents and would make them available if they were held securely and confidentially, were not shared with anyone except the Experts, and were returned to the Claimants at the conclusion of the Document Inspection. The Respondent objected to the Claimants' proposal on the ground that its counsel and experts needed access to these documents to assess the conclusions of the Experts.

72. On 17 October 2017, the Tribunal ordered the Claimants to submit (i) unredacted versions of the additional comparator documents to the Centre, which would hand them over to the Experts for the Document Inspection, and (ii) redacted versions to the Respondent and the Tribunal. The Tribunal reserved the possibility for the Respondent to request that a confidentiality advisor review the documents, and confirmed that the documents would be returned to the Claimants upon completion of the Documents Inspection.

73. On the same day, the Tribunal advised the Parties of the date, location and schedule of the Document Inspection.

74. On 20 October 2017, the Claimants requested that the Tribunal vary its decision in PO3 regarding the allocation of cost advances and restore the allocation to 50% each.

75. On 24 October 2017, following the FBI's formal consent to the inspection being videotaped, the Tribunal sent the ToR in their final form to the Experts, who signed them on the same day.

76. On 26 October 2017, the Tribunal forwarded the ToR signed by the Tribunal and the Experts, as well as a protocol dealing with practicalities of the Document Inspection (the "Inspection Protocol"). For the sake of transparency, the Tribunal further informed the

Parties, that Dr. Valery Aginsky, one of the party-experts retained by the Respondent, was one of the candidates initially approached by the Tribunal.

77. On 27 October 2017, the Respondent advised the Claimant and the Tribunal that it had dispatched 11 additional comparator documents which it had recently discovered in the archives of the Republic of Guinea.

78. On the same day, the Respondent answered to the Claimants' request of 20 October 2017 to vary the decision in PO3 regarding the allocation of cost advances.

H. Document inspection and Experts' Report

79. On 30 October 2017, the Experts set up the inspection room.

80. The Document Inspection was held from 31 October to 3 November 2017 at the DLA Piper office in New York.

81. In addition to the Experts and the Secretary of the Tribunal, the following persons attended the Document Inspection: Mr. James Libson, Mr. Karel Daele, Ms. Katy Colton, and experts Mr. Dennis Ryan and Ms. Laura Mancebo (for the Claimants); Mr. Scott Horton and experts Mr. Richard Picciochi and Mr. Valery Aginsky (for the Respondent).

82. In the morning of each day of the Document Inspection, an FBI Special Agent brought the originals of the Disputed Documents to the inspection room and retrieved them at the end of the each day.

83. In accordance with the Inspection Protocol, PO14, and the ToR, the morning inspection session ran from 9:00 a.m. to 11:30 a.m. followed by a morning Q&A session, and the afternoon session ran from 12:45 p.m. until 4:45 p.m., followed by an afternoon Q&A session. During the Q&A sessions, the Parties could ask the Experts to summarize the tasks performed during the session just concluded, and the Experts identified the exhibits they had been examining.

84. The Document Inspection was video recorded and the recordings made accessible to the Parties and the Tribunal.

85. On 31 October 2017, following a discussion between the Secretary and the counsel in attendance at the Document Inspection, the Tribunal transmitted to the Parties high

resolution scanned copied of three additional documents (labelled DOC A, DOC B and DOC C by the Experts) that were among the documents handed over by the FBI to the Experts. As will be seen below, it is common ground that the content of DOC A is identical to page 1 of Exh. R-32, DOC B to page 2 of Exh. R-32 and DOC C to Exh. R-33.

86. On 1 November 2017, further to a discussion held between the Secretary and counsel on 31 October 2017 regarding exhibits Exh. R-30 and Exh. R-346, which were not part of the documents in the FBI's possession, the Tribunal specified that, due to limited time available to inspect the originals in the FBI's possession, the Experts would examine exhibits Exh. R-30 and Exh. R-346 in their laboratories after the inspection. The Tribunal further invited the Respondent to file, if possible, a copy created from the original documents of exhibits Exh. R-30 and Exh. R-346, as opposed to one created from copies.

87. On 3 November 2017, the Respondent reverted to the Tribunal replying that it was unable to locate originals of exhibits Exh. R-30 and Exh. R-346 and did not possess "original copies" of these documents either. On the same day, the Claimants wrote to the Tribunal that they could not provide the original or a better copy of exhibit Exh. R-346.

88. On that day, i.e. on the last day of the inspection, and because counsel for the Claimants had to leave the inspection room by 4:00 p.m., it was agreed that a Q&A session would be held at 3:30 p.m., without prejudice to the Q&A session at the end of the day. The Claimants' experts left the inspection room shortly after Claimants' counsel. No Q&A session was held at the end of the afternoon inspection session, as the Respondent's counsel and experts in attendance had no questions for the Experts.

89. On 7 November 2017, the Tribunal issued Procedural Order No. 15 regarding the Claimants' request for reconsideration of PO3.

90. On 12 November 2017, the Tribunal transmitted to the Parties the Summary Minutes of the Document Inspection. Neither upon receipt of minutes nor during the course of the Document Inspection were there any objections raised about the conduct of the inspection.

91. On 5 December 2017, the Claimants requested that the Tribunal order the Respondent to provide more information regarding DOC A, DOC B and DOC C (referred to above in paragraph 85).

92. On 11 December 2017, the Respondent commented on the Claimants' letter of 5 December 2017.

93. On 12 December 2017, the Experts sent the first version of their preliminary report to the Tribunal.

94. On 21 December 2017, in accordance with Section VII of the ToR, the Tribunal informed the Experts that it had reviewed the first version of the preliminary report and requested certain clarifications, which the Experts gave on 22 and 23 December 2017.

95. On 21 December 2017, the Claimants informed the Tribunal that it had become aware of the existence of new documents relating to Mamadie Touré and thus sought the Tribunal's permission to add excerpts of these documents to the record.

96. On 29 December 2017, the Tribunal requested that the Experts add the raw data (ESDA lifts, VSC examinations, TLC plates, etc.) to their report.

97. On 1 January 2018, the Experts forwarded to the Tribunal their preliminary report (the "Preliminary Report"), including annexes and data, which the Tribunal passed on to the Parties on 3 January 2018. The Preliminary Report was also uploaded to the Box folder of the arbitration, in accordance with paragraphs 17 to 19 of PO14 and Annex 2 to the ToR. Specifically, the following files and documents were uploaded to the Box folder:

- A high-quality PDF with the Preliminary Report and its Annexes 1 through 83 and A through J;
- A folder labelled "DATA" containing all data collected and generated during the inspection and examinations, organized as follows:
    - (1) Digital Images of Evidence as Received;
    - (2) Digital Images of Evidence Following Sampling;
    - (3) DOC A;
    - (4) DOC B;
    - (5) DOC C;
    - (6) Exh. R-24;
    - (7) Exh. R-25;
    - (8) Exh. R-26;
    - (9) Exh. R-27;
    - (10) Exh. R-28;

- (11) Exh. R-29;
- (12) Exh. R-31;
- (13) Exh. R-32;
- (14) Exh. R-269; and
- (15) Testing Results.

- For each Disputed Document a parent folder comprising the following three sub-folders:
  - [Disputed Document ID] ESDA Lifts;
  - [Disputed Document ID] High Resolution Scans; and
  - [Disputed Document ID] Microscopic Images.
- A parent folder for "Testing Results" comprising the following three sub-folders:
  - Testing Results – GCMS;
  - Testing Results – TLC (with additional sub-folders for the results from eight different TLC examinations); and
  - Testing Results – VSC.

98. On 4 January 2018, the Respondent provided its comments objecting to the Claimants' request of 21 December 2018 to add new documents to the record.

99. On 10 January 2018, the Claimants requested an extension of the time limit to provide comments on the Preliminary Report until 25 January 2018.

100. On 11 January 2018, the Claimants requested leave to comment on the Respondent's comments of 4 January 2018, which they did on 15 January 2018.

101. On 12 January 2018, the Tribunal extended the deadline until 23 January 2018 for the Parties' comments on the Preliminary Report.

102. On 15 January 2018, the Claimants provided additional comments on their request of 21 December 2018 to add new documents to the record.

103. On 18 January 2018, the Respondent responded to the Claimants' additional comments of 15 January 2018.

104. On 23 January 2018, the Parties submitted their comments on the Preliminary Report, which the Tribunal transferred to the Experts on the following day.

105. On 12 February 2018, the Experts submitted their final report (the "Report" or "Final Report")), which the Tribunal sent to the Parties on 14 February 2018.

106. On 15 February 2018, the Tribunal issued Procedural Order No. 16 in respect of the Claimants' request to file additional evidence.

107. On 21 February 2018, the Respondent requested that the Tribunal provide directions for the post-hearing briefs.

108. On 22 February 2018, the Claimants requested that the Tribunal delay the publication of the FER until further notice, and announced their intention to seek the disqualification of the Experts and a declaration that the FER was inadmissible on the ground of the Experts' lack of impartiality and expressed bias against the Claimants.

109. On 26 February 2018, the Respondent commented on the Claimants' applications of 22 February 2018.

110. On 27 February 2018, the Tribunal informed the Parties that the editing of the video recordings of the Hearing held in May 2017 had been completed and invited the Parties to comment thereon by 20 March 2018. The video recordings, in English and French, had been uploaded to a subfolder within the Box folder.

111. On 28 February 2018, the Claimants provided additional comments to their request of 22 February 2018. In particular, they asked that their applications to disqualify the Experts and declare the FER inadmissible be determined as a preliminary matter.

112. On 1 March 2018, the Tribunal informed the Parties that, in light of the Claimants' applications and the Parties' positions, and with reference to paragraph 24 of the ToR, it had decided that the hearing tentatively scheduled for 26 and 27 March 2018 would need to take place (the "Authenticity Hearing"). The purpose of the hearing would be to address the Claimants' applications and, in accordance with paragraph 24 of the ToR, the authenticity of the Disputed Documents. It would also be to examine the Experts and, possibly, any Party-appointed expert. The Tribunal further instructed the Claimants to file their applications by 12 March 2018, together with their comments on the FER, and the Respondent to file a response by 22 March 2018.

113. On 7 March 2018, the Claimants wrote to the Tribunal that, on the preceding day, the Royal Court of Guernsey had issued an Administration Order in respect of BSG Resources Limited, on which the Respondent commented on 8 March 2018.

114. On 12 March 2018, the Centre sent to the Parties information on the logistical arrangements for the Authenticity Hearing.

115. On the same day, the Parties filed their comments on the FER. In addition, the Claimants filed their applications to disqualify the Experts and declare the FER inadmissible (the "Disqualification/Inadmissibility Applications").

116. On 20 March 2018, the Tribunal issued Procedural Order No. 17 ("PO17") regarding pre-hearing matters.

117. On 22 March 2018, the Respondent submitted its comments on the Disqualification/Inadmissibility Applications.

I. Authenticity hearing

118. The Authenticity Hearing was held on 26 and 27 March 2018 at the ICC Centre in Paris. The following persons attended the Authenticity Hearing in whole or in part:

- The Tribunal

  Members of the Tribunal

  Professor Gabrielle Kaufmann-Kohler, President

  Professor Albert Jan van den Berg, Arbitrator

  Professor Pierre Mayer, Arbitrator

  Secretary of the Tribunal

  Mr. Benjamin Garel

  Assistant to the Tribunal

  Dr. Magnus Jesko Langer

- Tribunal-appointed Experts

Mr. Todd W. Welch	Riley Welch LaPorte & Associates Forensic Laboratories
Mr. Gerald LaPorte	Riley Welch LaPorte & Associates Forensic Laboratories

- Claimants' counsel and representatives

Mr. Karel Daele	Mishcon de Reya LLP

Mr. James Libson	Mishcon de Reya LLP
Ms. Katy Colton	Mishcon de Reya LLP
Ms. Jenny Hindley	Mishcon de Reya LLP
Mr. Mohammed Nazeer	Mishcon de Reya LLP
Mr. David Barnett	Barnea & Co
Mr. Malcolm Cohen	BDO LLP
Mr. Stephen Peters	BDO LLP

- Respondent's counsel and representatives

Mr. Michael Ostrove	DLA Piper
Mr. Scott Horton	DLA Piper
Mr. Théobald Naud	DLA Piper
Ms. Sârra-Tilila Bounfour	DLA Piper
Ms. Andrea Lapunzina-Veronelli	DLA Piper
Ms. Clémentine Emery	DLA Piper
Ms. Rachel Ganem	DLA Piper
Mr. Laurent Jaeger	Orrick Herrington & Sutcliffe
Mr. Yann Schneller	Orrick Herrington & Sutcliffe
Ms. Agnès Bizard	Orrick Herrington & Sutcliffe
Mr. Noël Chahid-Nouraï	Orrick Herrington & Sutcliffe
Mr. Quirec de Kersauson	Orrick Herrington & Sutcliffe
Ms. Marie Chereau	Orrick Herrington & Sutcliffe
Ms. Lucille Coulon	Orrick Herrington & Sutcliffe
Ms. Federica Re Depaolini	Orrick Herrington & Sutcliffe
Mr. Nava Touré	Principal Counsel to the Minister of Mines and Geology of the Republic of Guinea

- Claimants' experts

  Mr. Robert Radley

- Respondent's experts

  Mr. Richard Picciochi

  Dr. Valery Aginsky

119. The Tribunal heard opening statements by Mr. Libson (for the Claimants) and by Messrs. Ostrove, Jaeger, Naud, Schneller and Ms. Bounfour (for the Respondent).

120. The Tribunal further heard evidence from the Tribunal-appointed and party-retained experts listed in paragraph 118 above.

121. The Authenticity Hearing was interpreted to and from English and French. It was also audio-recorded and transcribed verbatim, in real time, in both English and French. Copies of the sound recordings and the transcripts were delivered to the Parties.

122. In accordance with PO2, the Hearing was also broadcast and made publicly accessible by video link on the ICSID website. The audio-video recordings were delivered to the Parties.

J. Post-hearing phase

123. On 4 April 2018, the Tribunal issued Procedural Order No. 18 ("PO18") relating to post-hearing matters. On the same day, the Tribunal informed the Parties that it had decided to deny the Disqualification/Inadmissibility Applications and would provide reasons for this decision in due course.

124. The Parties simultaneously filed their Post-Hearing Briefs ("PHBs") on 12 June 2018.

125. On 9 July 2018, the Parties simultaneously filed Reply Post-Hearing Briefs ("PHB2s").

126. On 15 August 2018, the Tribunal issued Procedural Order No. 19 ("PO19") addressing the Claimants' transparency objections in respect of the Parties' Post-Hearing Briefs.

127. On 10 September 2018, the Tribunal requested the Parties to pay a further advance on costs in an amount of USD 400,000.

128. Pursuant to PO18, the Parties simultaneously filed their statements of costs on 14 September. The Claimants filed a reply statement of costs on 21 September 2018. The Respondent did not file a reply statement. However, on 27 September 2018, the Respondent requested leave to comment on the Claimants' reply statement of cost, which the Tribunal granted on 3 October 2018. On 8 October 2018, the Respondent filed a brief response to the Claimants' comments of 21 September 2018, and the Claimants filed a brief rejoinder on 15 October 2018.

129. On 8 November 2018, the Centre acknowledged receipt of the Claimants' payment of their share of the advance on costs, i.e. USD 200,000.

130. On 31 January 2019, the Centre notified the Parties of the Respondent's default regarding its share of the advance on costs, and invited either Party to pay the outstanding amount within 15 days.

131. On 7 March 2019, the Tribunal invited the Parties to comment on reports published in the press of a settlement agreement concluded between the Parties and on the impact that such a settlement agreement, if confirmed, would have on the proceeding. The Tribunal further informed the Parties that pending receipt of the Parties' comments, it had suspended its work on the Award. The Tribunal also invited the Parties to indicate whether they intended to proceed with the payment of the outstanding amount under the pending request for advances on costs.

132. On 14 March 2019, the Claimants confirmed that the Parties entered into an in-principle agreement and were "working towards a fully comprehensive agreement which will take a little time". The Claimants further requested the Tribunal to pause its work on the Award and stay the proceeding unless either Party requested otherwise.

133. On 16 April 2019, the Claimants reiterated their request for a stay of the proceeding.

134. On 18 April 2019, the Tribunal invited the Respondent to confirm its consent to a stay of the proceeding.

135. On 20 April 2019, the Respondent confirmed its consent to a stay of the proceeding.

136. On 25 April 2019, the Centre reminded the Parties that a payment of USD 200,000 was still outstanding and invited "either Party to make this payment, either in full or, for the time being, in an amount sufficient, taking into account the funds currently in the case's account, to allow the Centre to process the outstanding arbitrators' fee claims as well as their fees incurred in relation to the request for a stay of the proceedings, and the Centre's expenses, i.e. USD 25,000".

137. On 30 April 2019, the Claimants confirmed having made a payment of USD 25,000, receipt of which the Centre acknowledged on 15 May 2019.

138. On the same day, the Tribunal issued Procedural Order No. 20 ("PO20") (i) staying the proceeding, (ii) stating that the stay may be lifted at any time upon motion from either Party

or, if necessary, *ex officio*, and (iii) ordering the Parties to inform the Tribunal about the progress of the settlement discussions on 31 May 2019.

139. On 31 May 2019, the Parties jointly requested an extension of time to inform the Tribunal about the progress of the settlement discussions, until 7 June 2019, which the Tribunal granted on the same day.

140. On 7 June 2019, the Parties informed the Tribunal that they were continuing to work towards a binding agreement and proposed to update the Tribunal further in July 2019, which the Tribunal acknowledged on the same day.

141. On 13 September 2019, the Parties informed the Tribunal that there was still a significant amount of work to be done before a settlement agreement can be concluded and requested the Tribunal to continue the stay of the proceeding. The Parties proposed to update the Tribunal further by early November 2019, which the Tribunal acknowledged on the same day.

142. On 8 December 2019, the Tribunal invited the Parties provide an update regarding to the status of their settlement negotiations and the status of the proceedings.

143. On 17 January 2020, the Parties requested an extension of the stay and proposed to further update the Tribunal in February 2020.

144. On 18 January 2020, the Tribunal informed the Parties that the requested extension of the stay was granted.

145. On 16 July 2020, the Tribunal invited the Parties to provide an update regarding the status of their settlement negotiations and the status of the proceedings.

146. On 7 September 2020, the Tribunal reiterated its invitation to the Parties to provide an update regarding the status of their settlement negotiations and the status of the proceedings. The Tribunal also informed the Parties that its Award could be finalized provided that the outstanding amount of the advances on costs requested on 10 September 2018 (as reduced by the payment made by the Claimants on 30 April 2019) was paid by either Party.

147. On 30 September 2020, the Claimants informed the Tribunal that the administrators appointed on 6 March 2018 had been replaced by new administrators appointed on 8 September 2020, and that the new administrators were not in a position to take any position on either a settlement agreement, a lift of the stay or allowing the Tribunal to proceed to finalize its Award. The Claimants requested leave to provide a more substantial update in 60 days.

148. On the same day, the Respondent informed the Tribunal that no progress had been made between the Parties towards a formal settlement and that the administrators of BSG Resources Limited had indicated that they were not willing to approve a settlement in the terms previously discussed between the Parties. The Respondent also took note of the appointment of new administrators.

149. On 8 October 2020, the Tribunal issued Procedural Order No. 21 ("PO21") (i) ordering the Parties to provide a substantive update on their settlement discussions by 7 December 2020, (ii) extending the stay of the proceeding until 7 December 2020 and (iii) recalling that it may lift the stay of the proceedings at any time upon either a motion from either Party or, if necessary, *ex officio*.

150. On 7 December 2020, the Claimants requested a 60-day extension of the stay of the proceeding.

151. On the same day, the Respondent provided a substantial update on and account of the settlement discussions between the Parties and indicated that no substantial discussions has taken place between the Parties regarding the terms and conditions envisaged in their in-principle agreement and the signature of a final settlement agreement.

152. On 9 December 2020, the Tribunal invited either Party, whichever is more diligent, to indicate within 60 days whether the proceeding should resume or should be discontinued.

153. On 5 February 2021, the administrators of BSG Resources Limited indicated that they were "now in the process of exploring in detail the prospect of reaching a settlement with Guinea" and requested a 35-day extension of the stay of the proceeding.

154. On 8 February 2021, the Tribunal informed the Parties that, subject to any compelling objections that the Respondent may raise by 10 February 2021, the extension of the stay of the proceeding was granted.

155. On 10 February 2021, the Respondent indicated that the latest proposal by the administrators of BSGR, two years after the in-principle agreement was concluded between the Parties, was not serious and could not even be considered by the Republic of Guinea, and therefore expressed its doubts regarding the usefulness of another 35-day extension of the stay.

156. On 11 February 2021, the administrators of BSG Resources Limited submitted that they did not consider that the Respondent raised compelling reasons not to grant the 35-day extension of the stay.

157. On 15 February 2021, the Tribunal invited the Respondent to indicate by 19 February 2021, whether it considered that there was no prospect for a settlement anymore or whether it was open to a last attempt towards an amicable resolution of this dispute.

158. On 19 February 2021, the Respondent indicated that since the administrators of BSG Resources Limited clearly indicated that they cannot approve the terms of the in-principle agreement signed in 2019, there was no longer an agreement between the Parties and, therefore it had difficulty believing that a new settlement agreement could be reached within 35 days. The Respondent nevertheless left it to the Tribunal to decide whether a last extension of the stay should be granted or not.

159. On 22 February 2021, the Tribunal indicated that in the absence of any compelling reasons raised by the Respondent, the extension of stay had been granted on 8 February 2019 and, absent instructions to the contrary jointly submitted by the Parties, the proceeding would resume on 15 March 2021.

160. On 15 March 2021, the administrators of BSG Resources Limited updated the Tribunal on their unsuccessful attempts to further engage with the Respondent during the 35-day extension of stay and indicated they would continue to keep the Tribunal apprised of any developments.

161. On 22 March 2021, the Tribunal informed the Parties that the proceeding had resumed on 15 March 2021.

162. On 6 April 2021, the Centre invited again the Parties to make the payment that remained outstanding pursuant to the request for payment of advances on costs of 10 September

2018 and the notification of default of 21 January 2019 (as reduced by the payment made by the Claimants on 30 April 2019).

163. On 30 April 2021, the Claimants applied for permission to produce documents in the proceedings pending before the United States District Court for the Southern District of New York in which they are plaintiffs ("New York Court Litigation").

164. On 4 May 2021, the Tribunal invited the Respondent to comment on the Claimants' application of 30 April 2021.

165. On 7 May 2021, the Respondent indicated that it had no objection to the Claimants' application.

166. On 17 May 2021, the Tribunal granted the Claimants' application for a permission to produce documents in the New York Court Litigation.

167. On 8 March 2022, the Tribunal informed the Parties that it was in the process of finalizing its award and reiterated its invitation to the Parties to make the payment that remained outstanding pursuant to the request for payment of advances on costs of 10 September 2018 and the notification of default of 21 January 2019 (as reduced by the payment made by the Claimants on 30 April 2019). The Tribunal also informed the Parties that in the absence of available funds to translate the Award, the Parties' failure to make the requested outstanding payment within two weeks would be understood as their consent to the Tribunal's issuing the Award in one language only.

168. On 21 March 2022, the administrators of BSG Resources Limited requested a 28-day stay of the proceeding to attempt to re-engage with the Respondent and re-activate the settlement discussions.

169. On 24 March 2022, the Tribunal invited the Respondent to comment on the administrators of BSG Resources Limited's request and indicated that it was "minded, at this stage, to grant a suspension of the proceeding provided that the outstanding amount due pursuant to the request for further advances on costs dated September 10, 2018 – US$ 175,000 – is paid by either Party".

170. On 24 March 2022, the Respondent expressed its firm opposition to the administrators of BSG Resources Limited's request for a stay of the proceeding.

171. On 29 March 2022, the Tribunal invited the Claimants to submit by 4 April 2022 any comments on the Respondent's communication of 24 March 2022.

172. On 4 April 2022, the administrators of BSG Resources Limited submitted comments on the Respondent's communication of 24 March 2022.

173. The proceedings were closed on 12 May 2022.

III. THE MAIN FACTS

174. The following summary provides a general overview of the present dispute. Additional facts will be discussed in the Tribunal's analysis. Except where otherwise stated, the facts in the following section are undisputed or deemed established. The Tribunal will refer to other facts in its analysis if and when appropriate.

A. The political background in Guinea between 2006 and 2014

175. Following its independence in 1958, the Republic of Guinea was ruled by President Sekou Touré and thereafter until 2008 by President Lansana Conté. The period following between the death of President Lansana Conté in December 2008 until the election of President Alpha Condé at the end of 2010 was characterized by political turmoil and military rule. Captain Moussa Dadis Camara took over power in December 2008, but fled the country following an assassination attempt a year later, at which time General Sébouka Konaté took over control until Alpha Condé finally won the first democratic election.

176. The government of the Republic of Guinea has been reshuffled on numerous occasions, including frequent changes of prime ministers and ministers of mines. Following the departure of Eugène Camara, Lansana Kouyaté was Prime Minister between March 2007 and May 2008. He was succeeded by Dr. Ahmed Tidiane Souaré from May 2008 to December 2008. Dr. Ahmed Tidiane Souaré previously had been Minister of Mines between March 2005 and May 2006. He was succeeded by Dr. Ousmane Sylla (May 2006 to March 2007), who in turn was succeeded by Dr. Ahmed Kanté (March 2007 to August 2008), Dr. Louncény Nabé (August 2008 to December 2008) and Mahmoud Thiam (January 2009 to December 2010).[9]

[9] See: Reply, para. 57.

177. Among the facts just restated, two political events are particularly relevant to the present dispute. First, the death of President Lansana Conté on 22 December 2008. Indeed, the disputed mining rights for Blocks 1 & 2 were granted to BSGR Guinea shortly before, i.e. on 9 December 2008, which leads the Respondent to argue that President Conté was seriously ill and unduly influenced by people close to him, in particular by Ms. Mamadie Touré (the alleged fourth wife of President Conté) when granting the rights.

178. Second, the election of President Alpha Condé in November-December 2010 plays an important part in the Claimants' case, according to which their mining rights were revoked because of allegedly corrupt demands of the new government. While the Respondent argues that President Condé inaugurated a new democratic and transparent regime focused on eradicating corruption in the mining industry, the Claimants argue that a corrupt deal brought President Condé to power in exchange for access to valuable mining rights (including the Claimants' mining rights subject to this dispute).

B. The corporate structure and key players of the BSG companies

179. The Claimants are part of the Beny Steinmetz Group ("BSG").[10] BSG is a group of companies ultimately owned by the Balda Foundation, a Liechtenstein trust, of which Mr. Steinmetz is a beneficiary according to the Claimants.[11] Mr. Steinmetz himself specifies that he has "no role on the board or as an employee of any of the BSG companies or of the Balda Foundation", but is contracted to advise the individual companies making up BSG.[12]

180. The Claimants explain that BSG operates globally in natural resources, real estate and the diamond industry. BSGR is BSG's natural resources company since 2003, with projects in Africa and countries of the former Soviet Union.[13] BSGR's investments were principally

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10 Mr. Steinmetz explains that there is no legal entity called the "BSG group". See: Steinmetz WS1, para. 1.

11 Mem., para. 23. See also: Steinmetz WS1, para. 1.

12 Steinmetz WS1, paras. 1, 15.

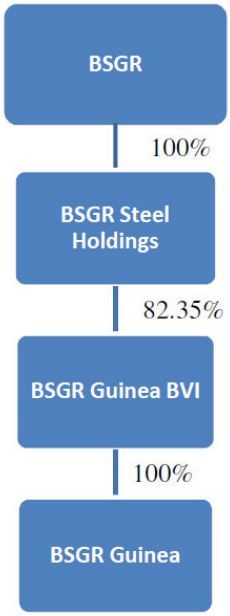
13 [redacted] The Claimants stated that BSGR is BSG's natural resources company since 1999, which is contested by the Respondent since BSGR was constituted in 2003. See: Mem., para. 23; CM, para. 58.

made through in three subsidiaries: BSG Resources (Guinea) Limited ("BSGR Guinea BVI" or "BSGR BVI"), BSGR Guernsey and BSGR Guinea.

181. BSGR's investment structure in Guinea was reorganized on several occasions between 2006 and 2015. The Claimants provide the following information on BSGR's investment structure up to November 2006:[14]

[14] Mem., para. 28.

182. Between November 2006 and March 2008, BSGR held its investment as follows:[15]



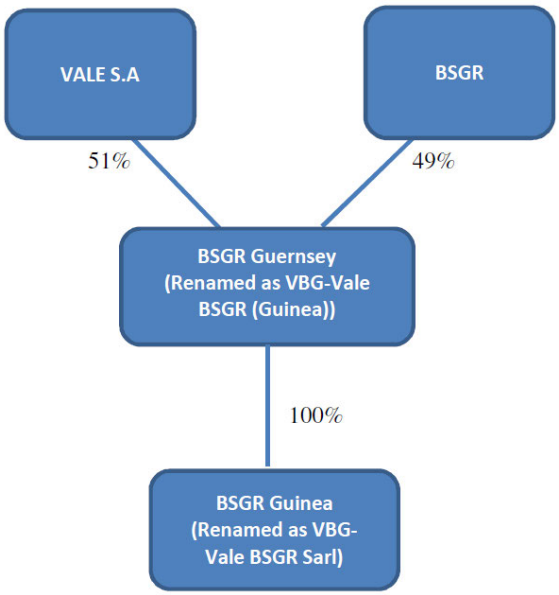
183. Between March 2008 and January 2009, BSGR held its investments as follows:[16]

15 Mem., para. 29.

16 Mem., para. 30.

184. Between February 2009 and April 2010, BSGR Guernsey was inserted into the corporate structure and BSGR Guinea became a 100% subsidiary of the former:[17]

185. Following the sale of 51% of the shares in BSGR Guernsey to Vale S.A. in April 2010, the structure was as follows:[18]



[17] Mem., para. 31. [redacted]

[18] Mem., para. 32.

186. Accordingly, BSGR Guernsey was renamed "VBG-Vale BSGR (Guinea) Limited" and BSGR Guinea was renamed "VBG-Vale BSGR (Guinea) SARL".[19]

187. Finally, on 13 March 2015, BSGR repurchased Vale's shareholding, thus reverting to the pre-April 2010 corporate structure:[20]

188. The Respondent provides a different account of the companies making up BSG, which it calls a "nebulous structure" concentrating power in the hands of few persons.[21] According to the Respondent, Mr. Steinmetz is the founder and ultimate beneficiary of BSG and its companies. He is the "principal beneficiary" of the Balda Foundation, which is administered by Dr. Peter Goop, Mr. Marc Bonnant and the company Rothschild Trust Guernsey Limited.[22] Through the company Nysco Management Corp., the Balda Foundation heads all the activities of BSG. For instance, on the day of BSGR's constitution, Nysco Management Corp. held 80% of its shares.

19 [redacted]

20 Mem., para. 34. [redacted]

21 CM, paras. 66-77 (Translated from the French).

22 CM, para. 67, referring to [redacted]

189. In addition, the Respondent explains that BSG's activities are structured and managed through a "myriad of companies", mostly incorporated in tax havens. These include:[23]

- Onyx Financial Advisors Ltd ("Onyx BVI"), whose principal shareholder is Mr. Dag Cramer;[24]
- Onyx Financial Advisors S.A. ("Onyx Suisse"), a subsidiary of Onyx BVI;[25]
- Margali Management Corp, a subsidiary of Onyx Suisse;[26]
- BSGR Steel Holdings Limited ("BSGR Steel"), a subsidiary of BSGR;[27]
- Windpoint Overseas Limited ("Windpoint"), whose shareholders are not known;[28]
- BSG Resources (Guinea) Limited ("BSGR Guinea BVI" or "BSGR BVI"), a subsidiary of BSGR Steel;[29]
- Onyx Financial Advisors (UK) Limited ("Onyx UK"), a subsidiary of Onyx Suisse;[30]
- BSGR Treasury Services ("BSGR TS"), most likely a subsidiary of BSGR;[31]
- Pentler Holdings Limited ("Pentler"), a subsidiary of Onyx BVI until February 2006.[32]

23 CM, para. 69.

24 [redacted]

25 [redacted]

26 [redacted]

27 [redacted]

28 [redacted]

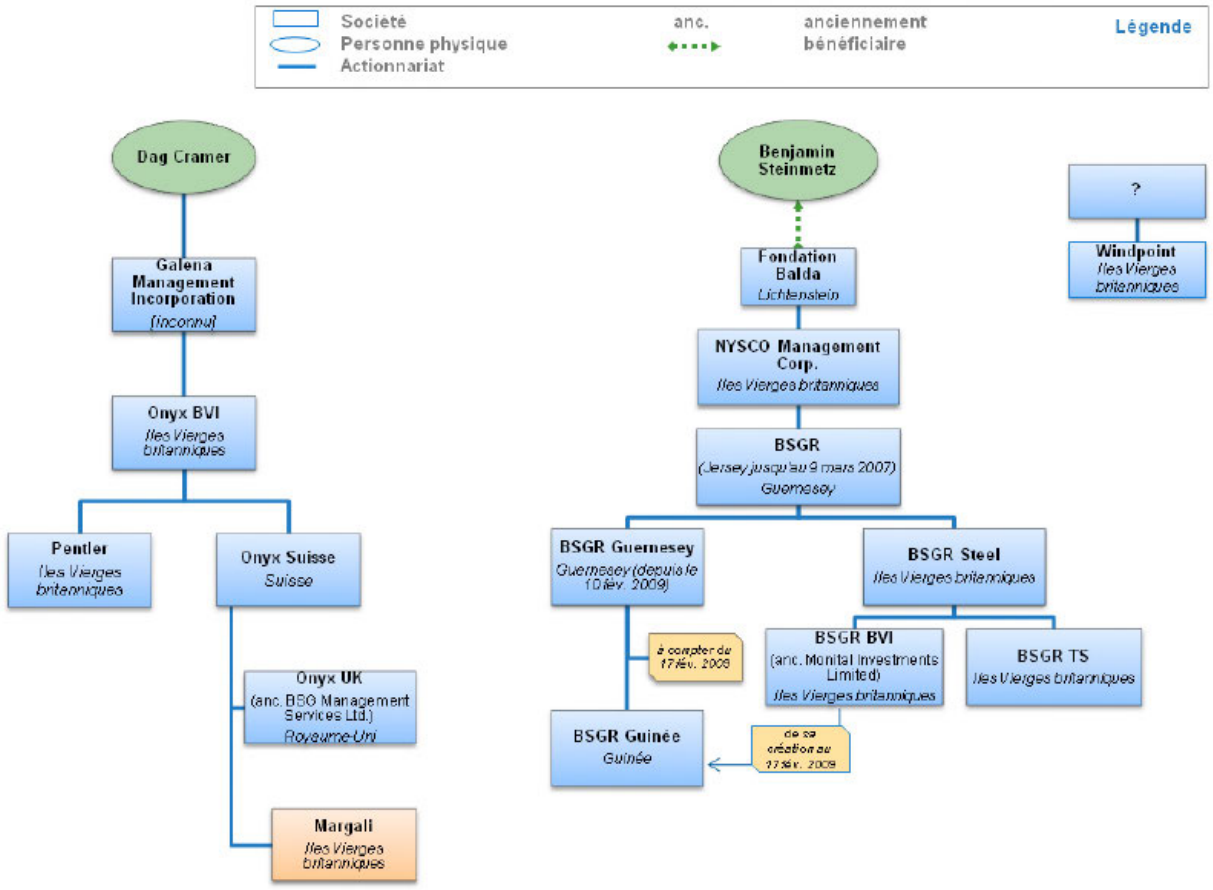
29 [redacted]

30 [redacted]

31 [redacted]

32 [redacted]

190. The following graph provides the structure of the BSG companies as described by the Respondent:[33]



191. The Respondent further argues that essentially two persons close to Mr. Steinmetz administer the complex structure of BSG, namely Ms. Sandra Merloni-Horemans and Mr. Dag Cramer.[34]

192. Ms. Merloni-Horemans (i) participated in Balda Foundation meetings, (ii) managed BSGR, Onyx BVI, Onyx Suisse, Onyx UK and Margali, and (iii) as manager of Margali, signed

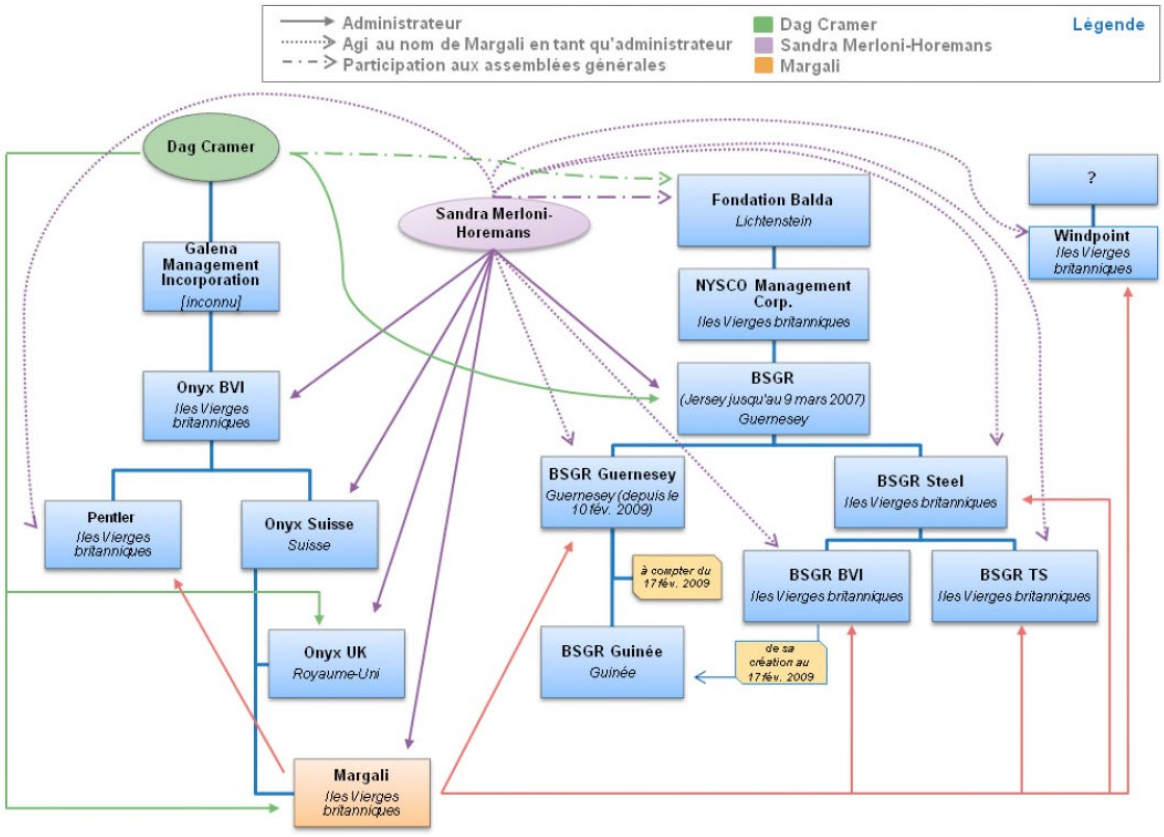
33 CM, p. 18.

34 CM, para. 71.

documents for BSGR Guernsey, BSGR Steel, BSGR BVI, BSGR TS, Pentler and Windpoint.[35]

193. Mr. Cramer (i) participated in Balda Foundation meetings, (ii) was the sole shareholder of the Onyx companies, (iii) managed BSGR, Margali and Onyx UK and was CEO and CFO of Onyx UK, and (iv) as manager of Margali, was authorized to sign documents of BSGR Guernsey, BSGR Steel, BSGR BVI, BSGR TS and Windpoint.

194. The following graph depicts the role of Ms. Merloni-Horemans and Mr. Cramer, as presented by the Respondent:[36]

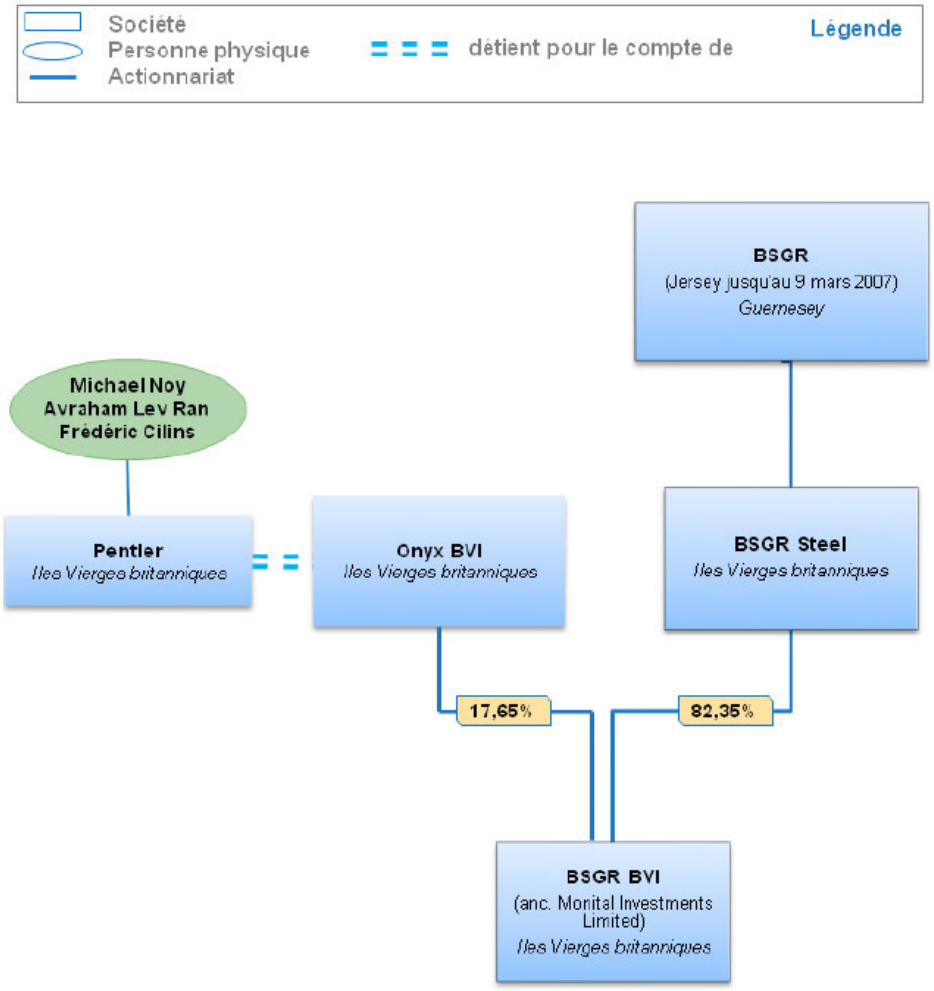


195. The Respondent also particularly points to Pentler, an offshore company allegedly created by BSG as a vehicle to implement and veil its alleged “corrupt scheme”. That company was incorporated in the BVI by the Panamanian law firm Mossack Fonseca on 28 October 2005

35 CM, para. 73.

36 CM, p. 21.

on behalf of Onyx BVI, its sole director being Margali.[37] The following graph depicts the Respondent's position in regard to the shareholder structure of BSGR, BSGR BVI, Onyx BVI and Pentler as of 13 February 2006:[38]



196. Finally, the Respondent identifies six other persons who allegedly played a key role during the activities of BSGR Guinea, which are the subject to the present dispute:[39]

- Mr. Roy Oron, CEO of BSGR until 2007;

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37 [redacted]
CM, paras. 152-154 (Translated from the French).

38 CM, p. 44.

39 CM, para. 73.

- Mr. Marc Struik, COO between 2005 and 2007 and CEO of BSGR since 2007;

- Mr. Asher Avidan, project leader (2006), country manager (2006-2010) and president of BSGR since 2010;

- Mr. Joseph ("Yossie") Tchelet, Strategic Financial Specialist of BSG since 2008;

- Mr. David Clark, Director and Treasurer of BSG (2007-2012);

- Mr. David Barnett, legal director of BSG (2004-2012).

C. The Claimants' mining activities in Guinea

197. Although the present dispute centers around two iron ore mining areas, namely the Zogota and the Simandou projects (see below), the Parties refer to other mining projects undertaken by the Claimants in Guinea as part of the general context in support of their respective cases.

198. The Claimants highlight various BSGR projects throughout Africa to underline the companies' mining experience. Thus, the Claimants argue that by 2005, the BSGR group had "a significant and diverse portfolio of mining and metal assets" in South Africa,[40] Sierra Leone,[41] Zambia[42] and the DRC.[43]

199. For its part, the Respondent indicates that BSGR requested 13 bauxite prospecting permits in January 2006, which requests were granted by ministerial decree dated 9 May 2006.[44] In addition, on 5 February 2007, BSGR requested survey licenses for uranium prospection.[45]

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40 Including a controlling stake, through its subsidiary Arctic Resources, in Anglovaale Mining, a public company with precious metal, base metal, ferrous metal and diamond interests across Southern Africa; a 20% strategic stake in the iron asset Kumba and the steel producer Iscor, in South Africa. See: Steinmetz WS1, para. 13(c)-(d); Mem., paras. 23 and 38.

41 Including investing in the Octea Diamond Group that operates the Koidu Diamond mine. See: Steinmetz WS1, para. 13(a); Mem., paras. 23 and 38.

42 Including owning and operating between 2003 and 2009 the Luanshya Copper Mines. See: Steinmetz WS1, para. 13(h); Mem., paras. 23 and 38.

43 Including founding Nikanor Plc, which focused on exploration and production of copper and cobalt and merged with Katanga Mining in 2008. See: Steinmetz WS1, para. 13(i).

44 CM, paras. 219-223; Reply, Annex 1, para. 52. See also: Arrêté n° A2006/2425/MMG/SGG accordant des permis de recherches minières à la société BSGR (BSG Resources), 9 mai 2006 (Exh. R-204).

45 CM, para. 240.

The Ministry of Mines granted four uranium prospecting permits on 28 February 2007.[46] On 30 April 2008, BSGR informed Minister Kanté of its proposal to return a total of 9 permits, composed of 4 uranium and 5 bauxite permits.[47]

200. Although the bauxite and uranium mining rights are not *stricto sensu* part of the present dispute, the Respondent mentions them in support of its case on the alleged general scheme of the Claimants to obtain mining rights through corruption.[48]

201. Bearing the foregoing in mind, the present dispute concerns two iron ore deposits located in the southeastern part of Guinea, namely the Zogota project (situated in South Simandou) (section C) and Blocks 1 and 2 (section D). The following map shows the location of the two areas:[49]

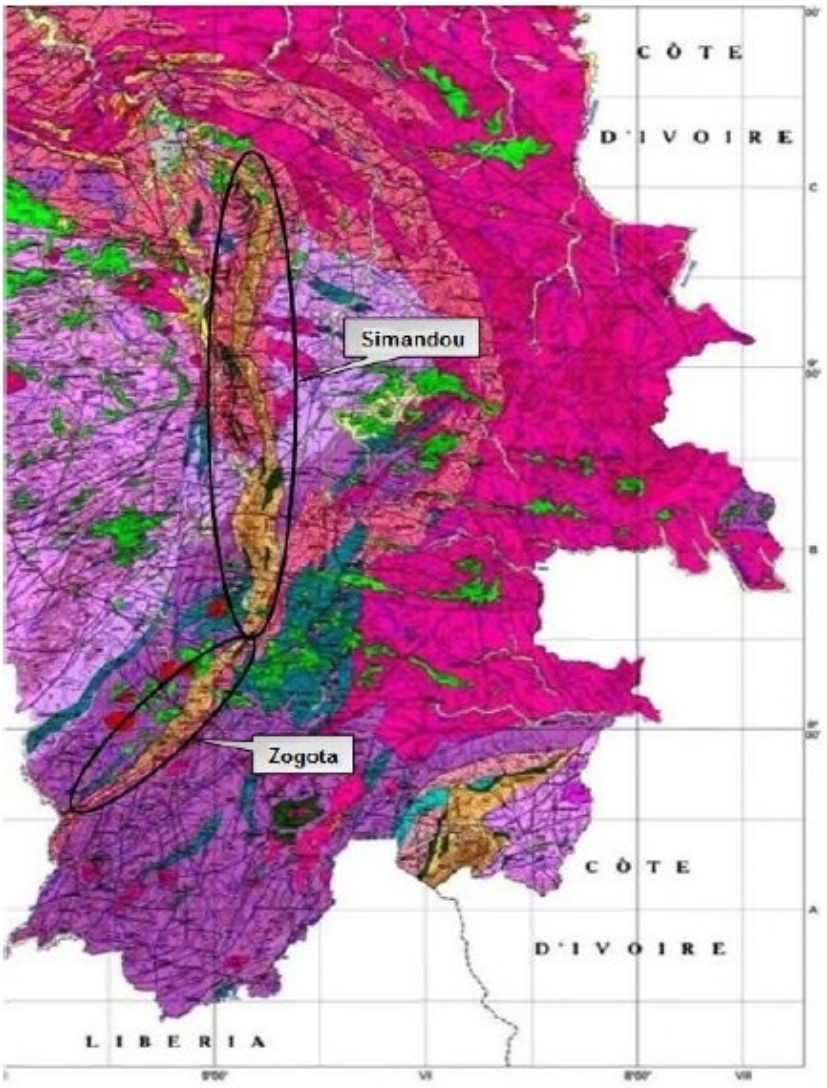
46 CM, para. 241. See also: Arrêté n° A2007/582/MMG/SGG accordant des permis de recherches minières à la société BSGR Guinée, 28 février 2007 (Exh. R-211).

47 Reply, para. 95, referring to Letter from BSGR to Minister Kanté dated 30 April 2008 (Exh. C-195). See also: Reply, Annex 1, para. 54.

48 See: CM, paras. 218-247; Rejoinder, paras. 141, 627-668. For the Claimants' response to the allegation that the bauxite and uranium permits are tainted by corruption, see: Reply, Annex 1, paras. 49-55.

49 Mem., p. 16.

202. The following map shows the known iron ore deposits (depicted in yellow) in Simandou and Zogota:[50]



203. The remaining sections focus on the main facts concerning the process of obtaining mining rights for the Zogota and Simandou projects and the subsequent cancellation of those rights in April 2014.

[50] CM, para. 96.

D. The Zogota project

204. As of 2005, BSGR became aware of vast iron ore deposits in the Simandou area, a mountain range in southeastern Guinea,[51] spanning from the prefecture of Kérouané in the North to the prefectures of Beyla, Macenta, Nzérékoré and Yomou in the South.

205. In January 2006, BSGR applied for prospecting permits for iron ore in areas to the North and South of the Simandou mining area operated by Rio Tinto since 1997.[52] On 6 February 2006, the Minister of Mines, Dr. Ahmed Tidiane Souaré, issued two decrees granting a number of prospecting permits to the North and to the South of the Simandou mountain range.[53]

206. The first decree covered three prospecting permits in the prefecture of Kérouané covering 1286 km², which were valid for three years (the "North Simandou Permits").[54] The second decree awarded four prospecting permits in the prefectures of Beyla, Macenta, Nzérékoré and Yomou covering 2047 km², again for three years (the "South Simandou Permits"; together the "North and South Simandou Permits").[55] The area of the second decree is known as Zogota.

207. After several years, BSGR Guernsey retroceded to the State the mining area covered by the North Simandou Permits.[56] That area is therefore not the subject of the present dispute and facts stated in this connection merely provide general context. The present dispute relates to the Zogota mining area.

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51 Mem., para. 39.

52 See: Attestation de M. Cilins, 26 novembre 2012 (Exh. R-169) and Arrêté n° A/2006/2425/MMG/SGG accordant des permis de recherches minières à la société BSGR (BSG Resources), 9 mai 2006 (Exh. R-204).

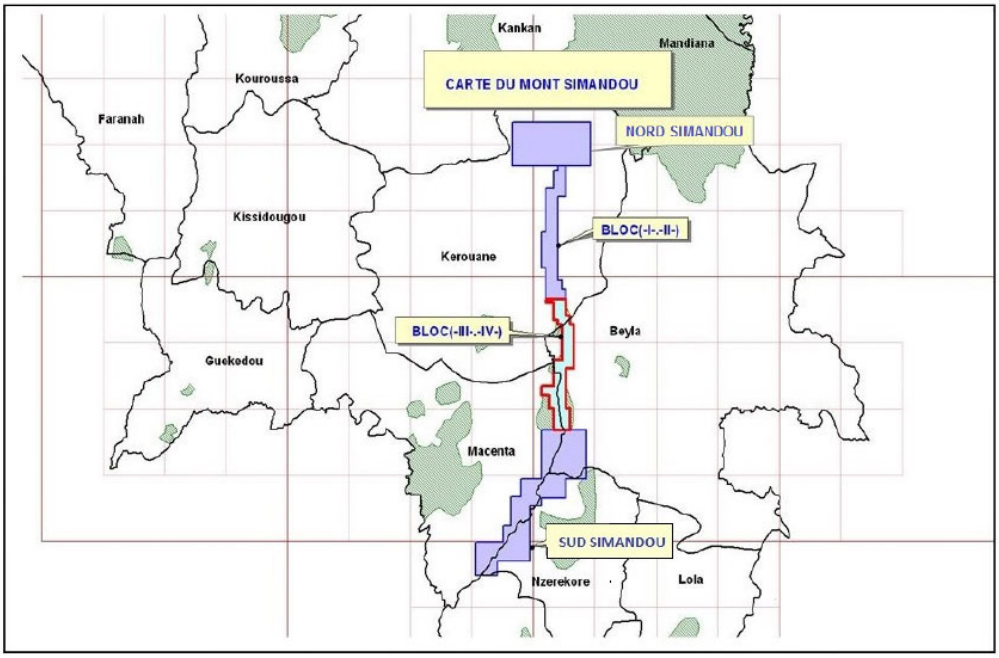
53 Mem., para. 44; Decree No. 2006/706/MMG/SGG of 6 February 2006 (Exh. C-4); Decree No. 2006/707/MMG/SGG of 6 February 2006 (Exh. C-5).

54 This is designation used by the Claimants. See, e.g.: Mem., para. 44. The Respondent calls this area "Nord Simandou" and designates Blocks 1 & 2 as "Simandou Nord (Blocs 1 et 2)". See: CM, para. 94 (Translated from the French).

55 This is designation used by the Claimants. See, e.g.: Mem., para. 44. The Respondent calls this area "Sud Simandou" and designates Blocks 3 & 4 as "Simandou Sud (Blocs 3 et 4)". See: CM, para. 94 (Translated from the French).

56 See, e.g.: Letter from BSGR to Minister Kanté dated 30 April 2008 (Exh. C-195).

208. The following map filed by the Respondent depicts the locations of the North Simandou (designated by the Respondent as "Nord Simandou" and by the Claimants as "Simandou North") and South Simandou Permits (designated by the Respondent as "Sud Simandou" and by the Claimants "Simandou South"),[57] South Simandou being Zogota.[58]



209. On 20 February 2006, BSGR Guinea BVI entered into a Memorandum of Understanding (the "MoU"), whereby it committed to carrying out a feasibility study within 30 months, after which Guinea would grant a mining concession.[59] On 16 November 2009, the feasibility study was submitted to the Agency for the Promotion and Development of Mining (the "CPDM").[60] Negotiations for a mining and infrastructure agreement were conducted by a commission established by Minister Thiam on 1 December 2009 and composed of 20 members from various governmental agencies.[61] The Claimants concede that BSGR

57 CM, para. 94.

58 Cartes du Mont Simandou: Blocs 1 à 4, Nord Simandou et Sud Simandou (Exh. R-150).

59 Mem., para. 52, referring to Memorandum of Understanding between the Republic of Guinea and BSG Resources (Guinea) Limited dated 20 February 2006 (Exh. C-9).

60 Mem., para. 72, referring to Zogota Feasibility Study dated October 2009 (Exh. C-14).

61 Mem., paras. 73-74. Decree No. A/2009/3466/PRG/SGG/MMEH, 1 December 2009 (Exh. C-15).

paid for the daily allowances of each commission member "in line with standard practice",[62] while the Respondent sees it as an element in the alleged fraudulent scheme.

210. On 16 December 2009, a mining agreement known as the Base Convention was signed, setting out the terms on which BSGR Guinea could operate the Zogota Mining Concession.[63] The Base Convention was ratified by Presidential Decree on 19 March 2010.[64] On the same day, the new President, General Sébouka Konaté granted BSGR Guinea a mining concession over Zogota in accordance with Article 8 of the Base Convention (the "Zogota Mining Concession").[65]

211. Following the review of the Claimants' mining rights in pursuance of the 2011 Mining Code and the establishment of the National Mining Commission ("NMC") on 26 March 2012,[66] the NMC's Technical Committee for the Review of Mining Titles and Agreements (the "Technical Committee") [67] recommended on 21 March 2014 to the Strategic Committee the withdrawal of the Zogota Mining Concession and the cancellation of the Base Convention.[68] On 2 April 2014, the Strategic Committee concurred with the Technical Committee's recommendation.[69]

212. On 17 April 2014, President Condé terminated the Zogota Mining Concession[70] and, on 23 April 2014, the Minister of Mines terminated the Base Convention.[71] The Claimants were informed of these measures on 24 April 2014.[72]

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62 Mem., para. 75.

63 Mem., para. 78. Base Convention, 16 December 2009 (Exh. C-69).

64 Mem., para. 81(i), referring to Presidential Order No. 003/PRG/CNDD/SGG/2010 dated 19 March 2010 (Exh. C-16).

65 Mem., para. 81(ii), referring to Presidential Order No. D2010/024/PRG)CNDD/SGG dated 19 March 2010 (Exh. C-17).

66 Mem., para. 120, referring to Decree No. D/2012/041/PRG/SGG dated 26 March 2012 (Exh. C-50).

67 Mem. para. 121, referring to Decree No. D/2012/045/PRG/SGG dated 29 March 2012 (Exh. C-51).

68 Mem., para. 135(ii)-(iii).

69 Mem., para. 137. Reference to the advice of the Strategic Committee can be found in: Decree D/2014/98/PRG/SGG dated 17 April 2014, preambular paragraph 7 (Exh. C-65).

70 Mem., para. 138, referring to Decree D/2014/98/PRG/SGG dated 17 April 2014 (Exh. C-65).

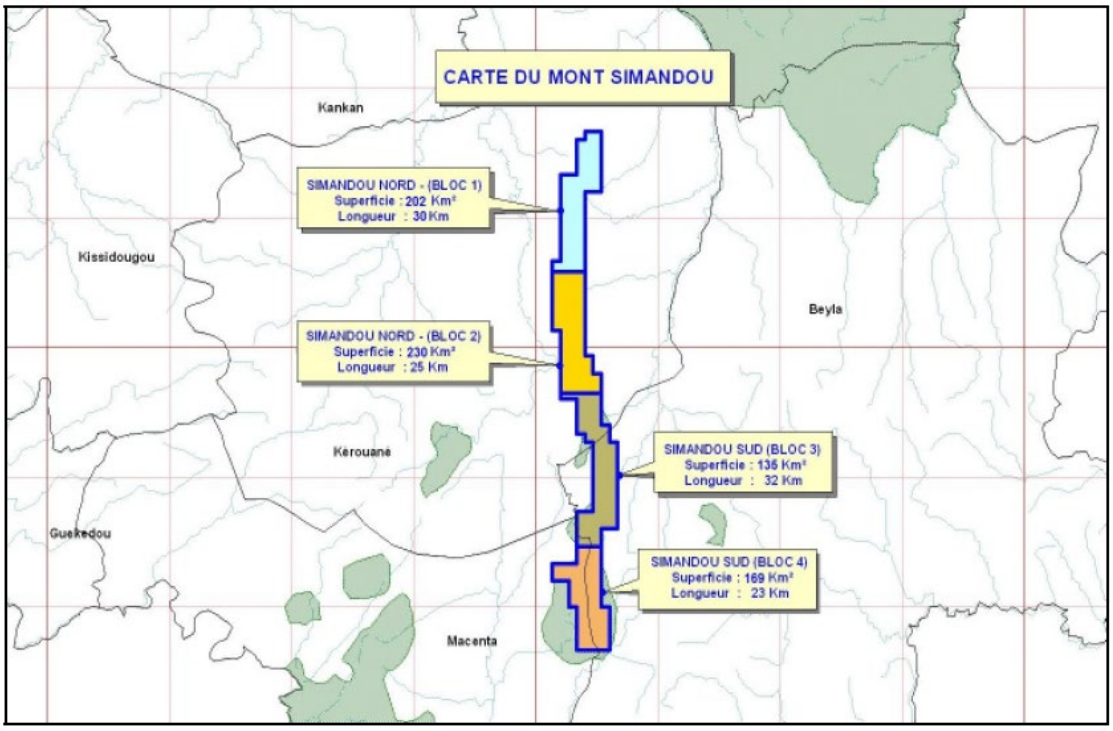
71 Mem., para. 140, referring to Order No. A2014/1206/MMG/SGG dated 23 April 2014 (Exh. C-67).

72 Mem., para. 141, referring to Letter from the Ministry of Mines to VGB-Vale BSGR Guinea dated 24 April 2014 (Exh. C-68).

E. The Simandou project

213. The area south of the North Simandou Permits and north of the South Simandou Permits (Zogota) forms part of the Simandou mining area that pertained to Rio Tinto between 1997 and 2008. It comprises four blocks designated as Blocks 1 & 2 to the north and Blocks 3 & 4 to the south.[73]

214. The following map shows the mining areas covered by Blocks 1 to 4:[74]



215. Rio Tinto obtained four prospection permits over the quasi-totality of the Simandou mountain range in 1997 covering an area of 1461 km².[75] A request in 2000 to renew the prospection permits entailed the reduction of the mining area to 736 km², which area then

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73 The Respondent designates Blocks 1 & 2 as “Simandou Nord” and Blocks 3 & 4 as “Simandou Sud”. See: CM, para. 83.

74 Cartes du Mont Simandou: Blocs 1 à 4, Nord Simandou et Sud Simandou (Exh. R-150); CM, para. 84.

75 CM, para. 83.

became Blocks 1 to 4.[76] The second time extension granted on 16 October 2002,[77] should have required Rio Tinto to return 50% of its mining area. However, no retrocession was ever undertaken.

216. In November 2002, Guinea and Rio Tinto/Simfer S.A. concluded a mining convention for the exploitation of iron ore in Blocks 1 to 4.[78] The mining concession of a duration of 25 years was, however, only granted on 30 March 2006.[79]

217. On 28 July 2008, Guinea revoked the mining rights of Rio Tinto/Simfer S.A. over Blocks 1 to 4.[80] Following a negotiation between Rio Tinto and the State over the 50% retrocession of Blocks 1 to 4,[81] the Minister of Mines Dr. Louncény Nabé issued a retrocession decision on 9 December 2008, whereby Rio Tinto lost its mining rights over Blocks 1 & 2.[82] By ministerial decree of 29 February 2009, Rio Tinto was granted the renewal of its prospecting rights in Blocks 3 & 4.[83] It ultimately withdrew from Simandou in 2016 selling its assets to Chinalco.[84] Blocks 3 & 4 fall outside the scope of this present dispute, except for providing

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76 CM, para. 84.

77 CM, para. 86, referring to Arrêté nº A2002/5371/MMGE/SGG renouvelant le permis nº A2000/1484/MMGE/SGG (Bloc I) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-152); Arrêté n° A2002/5372/MMGE/SGG renouvelant le permis n° A2000/1483/MMGE/SGG (Bloc II) accordé à la société Rio Tinto, 16 octobre 2002 (R-153); Arrêté n° A2002/5373/MMGE/SGG renouvelant le permis n° A2000/1490/MMGE/SGG (Bloc III) accordé à la société Rio Tinto, 16 octobre 2002 (R-154); Arrêté nº A2002/5374/MMGE/SGG renouvelant le permis nº A2000/1488/MMGE/SGG (Bloc IV) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-155).

78 CM, para. 87, referring to Convention de base entre la République de Guinée et la société Simfer S.A. pour l'exploitation des gisements de fer de Simandou, 26 November 2002 (Exh. R-156).

79 CM, para. 88, referring to Décret D2006/008/PRG/SGG accordant la concession de recherche et d'exploitation minières à la société Simfer S.A., 30 mars 2006 (Exh. R-157).

80 Mem., para. 60; CM, para. 93, referring to Décret D/2008/041/PRG/SGG rapportant le décret D/2006/008/PRG/SGG accordant une concession minière à la société Simfer S.A. (Exh. C-92). In their Reply, the Claimants state that Rio Tinto's mining concession was "suspended", pending a negotiation period for the conclusion of a new base convention and mining concession subject to the 50% retrocession of the mining area. See: Reply, paras. 47-52.

81 See: Reply, paras. 47-82.

82 Reply, para. 83, referring to Lettre du Ministre Nabé à Simfer/Rio Tinto, 9 décembre 2008 (Exh. R-238).

83 Reply, para. 84, referring to Arrêté n° A2009/MPCMEH/SGG renouvelant les permis de recherches n° A2002/5371; 5372; 5373 et 5374/MPCMEH/SGG accordés à la société Rio Tinto Mining and Exploration Limited, 24 février 2009 (Exh. R-163).

84 Reply, para. 129.

general context. In addition, as for the Simandou North Permits (paragraph 207 above), the facts surrounding Blocks 3 & 4 may also provide context.

218. Blocks 1 & 2, by contrast, are part of this dispute, more specifically Claimants' access to the mining rights in these blocks and the revocation of such rights. BSGR unsuccessfully applied for mining rights in Blocks 1 & 2 on 12 July 2007.[85] It applied again in respect of Blocks 1 & 2 on 30 April 2008, but the Minister of Mines Kanté rejected that application on 10 July 2008 stating that those blocks were under concession.[86] Following the "withdrawal" or "suspension" of Rio Tinto's mining concession on 28 July 2008, BSGR reapplied again for mining rights over Blocks 1 to 3 on 5 August 2008.[87]

219. On 9 December 2008, in parallel to Rio Tinto's forced retrocession of Blocks 1 & 2, the Minister of Mines Dr. Louncény Nabé granted BSGR a prospection permit over Blocks 1 & 2 (the "Blocks 1 & 2 Permit").[88] Whereas the Claimants request the Tribunal to hold that they obtained the Blocks 1 & 2 mining rights lawfully,[89] the Respondent argues that these mining rights were obtained through corruption.[90]

220. As with the Zogota project, on 21 March 2014, the NMC's Technical Committee recommended to the Strategic Committee the withdrawal of the Blocks 1 & 2 Permit,[91] a recommendation that the Strategic Committee supported on 2 April 2014.[92] Two weeks later, on 18 April 2014, the Minister of Mines terminated the Blocks 1 & 2 Permit.[93] The Claimants were advised of the termination on 24 April 2014.[94]

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85 Reply, paras. 87-88, referring to Lettre de M. Avidan (BSGR Guinée) au Ministre Sylla, 12 juillet 2007 (Exh. R-214).

86 Reply, para. 95, referring to Letter from BSGR to Minister Kanté dated 30 April 2008 (Exh. C-195).

87 Reply, para. 96, referring to Letter from Asher Avidan of BSGR to the Minister of Mines, Louncény Nabé dated 5 August 2008 (Exh. C-98).

88 CM, para. 340 (Translated from the French); Reply, para. 108, referring to Decree No. 2008/4980/MMG/SGG dated 9 December 2008 (Exh. C-10).

89 See, e.g., Reply, paras. 87-110.

90 See, e.g., CM, paras. 248-347.

91 Mem., para. 135(i).

92 Mem., para. 137.

93 Mem., para. 139, referring to Order No. A2014/1204/MMG/SGG dated 18 April 2014 (Exh. C-66).

94 Mem., para. 141, referring to Letter from the Ministry of Mines to VGB-Vale BSGR Guinea dated 24 April 2014 (Exh. C-68).

221. Following these events, Rio Tinto initiated a civil suit against *inter alia* BSGR and Vale in the Southern District of New York pursuant to the Racketeer Influenced and Corrupt Organizations Act (the "RICO Act").[95] That case was dismissed on statute of limitations grounds in November 2015.[96]

222. In summary, the present dispute is about (i) the Zogota Base Convention and Mining Concession and (ii) the Blocks 1 & 2 Permit (the "disputed mining rights").

F. The joint venture with Vale and the LCIA arbitration

223. In February 2010, BSGR entered into negotiations with Vale for the creation of a joint venture and the sale of a stake in BSGR Guernsey.[97] On 19 March 2010, the Minister of Mines Mahmoud Thiam wrote to Vale giving assurances about the validity of BSGR's mining rights.[98] On 16 April 2010, BSGR informed Minister Thiam of the ongoing negotiations, to which the Claimants say he did not object.[99]

224. On 30 April 2010, a Framework Agreement and a Shareholder's Agreement were signed, whereby Vale purchased a 51% stake in BSGR Guernsey (Claimant 2) for USD 2,5 billion, of which USD 500 million were paid up front.[100] As a result, BSGR Guernsey was renamed "VBG – Vale BSGR (Guinea) Guernsey" and, on 14 June 2010, BSGR Guinea was registered as "VBG – Vale BSGR Guinea" by the Guinean Court of First Instance in Conakry.[101] The Respondent argues in this context that Minister Thiam unduly supported

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95 CM, para. 721.

96 CM, para. 724, referring to The Globe and Mail, Court dismisses Rio Tinto suit against BSGR, Vale over Guinea iron-ore mine, 23 November 2015 (Exh. R-452).

97 Mem., para. 88.

98 Mem., para. 89, referring to Letter from Minister of Mines Mahmoud Thiam to E Ledsham of Vale dated 19 March 2010 (Exh. C-23).

99 Mem., paras. 90-91, referring to Letter from BSGR to Minister of Mines Mahmoud Thiam with Endorsement from Minister of Mines Mahmoud Thiam dated 16 April 2010 (Exh. C-24). See also: CM, para. 472.

100 Mem., para. 92; CM, paras. 448, 471-476.

101 Mem., para. 93. The Claimants further specify that on 1 November 2010, Minister Thiam acknowledged the change of name of BSGR Guinea. See: Mem., para. 97, referring to Letter from Ministry of Mines to BSGR dated 1 November 2010 (Exh. C-30).

BSGR in its dealings with Vale and that BSGR misled Vale during its due diligence on the role of Minister Thiam and other officials or persons with influence.[102]

225. Following the revocation of the disputed mining rights in April 2014, Vale initiated a LCIA arbitration against BSGR on 28 April 2014 requesting damages in the amount of USD 3 billion on the grounds that its consent was vitiated and that BSGR dissimulated key information about corrupt practices during Vale's due diligence.[103]

G. The 2011 Mining Code and the mining permit review procedure

226. To root out corruption, the newly-elected President Alpha Condé initiated a reform of the mining sector and, in September 2011, the National Council of Transition adopted a new mining code (the "2011 Mining Code"), which replaced the 1995 Mining Code.[104]

227. On 29 March 2012, President Condé put in place a review process of existing mining rights and conventions under the aegis of the NMC.[105] For this purpose, a Technical Committee, an operational organ composed of 18 members of different agencies, and a Strategic Committee, a political organ composed of five ministers, were established.[106]

228. The Respondent argues that these committees properly reviewed the 19 existing mining projects in Guinea.[107] By contrast, the Claimants submit that the review targeted only BSGR because the latter had resisted President Condé's "extortion attempts", when the other mining right holders had acceded to his payment requests.[108] In addition, the Claimants argue that President Condé instructed Revenue Watch Institute, which is funded by George

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102 CM, paras. 449-470.

103 CM, paras. 712-713, referring to [redacted]

104 CM, para. 527, referring to Code Minier de la République de Guinée, 2011 (Exh. RL-18) (Translated from the French).

105 CM, para. 529, referring to Décret D/2012/045/PRG/SGG portant modalités de mise en œuvre d'un Programme de revue des Titres et Conventions miniers par la Commission Nationale des Mines, 29 mars 2012 (Exh. C-51).

106 CM, paras. 532-536.

107 CM, para. 539.

108 Mem., para. 133; Reply, paras. 226(v) and 227; Avidan (CWS-3), paras. 95-100; Cramer (CWS-7), paras. 17-23.

Soros, to assist the Technical Committee in reviewing BSGR's mining rights "first".[109] Finally, the Claimants argue that the review process was "rotten to its core" and breached the Claimants' due process rights.[110]

H. The revocation of the disputed mining rights

229. On 14 January 2011, President Condé and members of BSGR Guinea discussed the development of railway infrastructure and Vale's acquisition of a 51% stake in BSGR Guernsey.[111] On 8 February 2011, President Condé and the Minister of Transportation, Ahmed Tidiane Traoré again met a delegation of BSGR Guinea. According to the Respondent, President Condé proposed on that occasion to approve the joint venture with Vale against the payment of 50% of the price of the sale to Vale.[112] The Claimants regard that demand for USD 1,25 billion to be an improper and unjustified attempt to share in the proceeds of the Vale transaction. They also note that at that time they had only received USD 500 million from Vale.[113]

230. Following the setting up of the mining permit review process in March 2012 (see above),[114] the Technical Committee sent an Allegations Letter to BSGR Guinea on 30 October 2012 where it "accused the BSGR group of obtaining mining titles by bribery and corruption".[115] Vale responded to that letter on behalf of BSGR Guinea on 26 November 2012[116] and BSGR answered on 26 December 2012.[117]

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109 Reply, para. 252 and fn. 236.

110 Mem., para. 134; Reply, para. 253.

111 CM, para. 546, referring to [redacted]

112 CM, para. 547.

113 Mem., paras. 106-108.

114 The Parties also call attention to the legal advice provided by Heenan Blaikie on 20 December 2011 (Exh. C-105) and by DLA Piper (undated) (Exh. C-240). See, e.g.: CM, paras. 560-564.

115 Mem., para. 123, referring to Letter from the Technical Committee to VBG-Vale BSGR Guinea dated 30 October 2012 (Exh. C-53). See also: CM, paras. 622-627 (Translated from the French).

116 CM, para. 629, referring to Lettre de M. Torres et M. Rodrigues (Vale) au Comité Technique, 26 novembre 2012 (Exh. R-396).

117 Mem., para. 128, referring to Letter from BSGR to the Technical Committee dated 26 December 2012 (Exh. C-54). See also: Lettre de M. Avidan (BSGR) à M. N. Touré (Comité Technique), 26 décembre 2012 (Exh. R-400). The Technical Committee responded on 4 December 2012 to a first response by BSGR dated 28 November 2012, stating that only BSGR Guinea was part to the proceedings as title

231. BSGR Guinea stated its willingness to cooperate with the investigation of the Technical Committee and did not challenge the legality of the process when BSGR disputed the legality of the procedure and ultimately decided not to cooperate with the investigation.[118] BSGR also requested on various occasions the disclosure of the evidence relied upon by the Technical Committee in support of the Allegations Letter.[119]

232. In March 2013, the President of BSGR, Mr. Avidan, was declared *persona non grata* in Guinea with no formal notice.[120] On 16 and 19 April 2013, two BSGR Guinea employees, Messrs. Bangoura and I.S. Touré, were imprisoned on the ground of passive corruption and were only released on 29 November 2013.[121] The Claimants also call attention to various statements made by President Condé, including one on 21 October 2013 where he stated that his government had "started a battle to recover our mines which were acquired fraudulently".[122]

233. At the same time, Ms. Mamadie Touré, the alleged fourth wife of late President Lansana Conté, came under investigation of the FBI in Florida, USA, and became a cooperating witness to set up Mr. Cilins, a shareholder of Pentler. Mr. Cilins was recorded on 25 March, 11 and 14 April 2013 at the airport of Jacksonville, Florida, attempting to obtain the destruction of documents and the signature of an affidavit from Ms. Touré.[123] Arrested on

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holder, not BSGR. In the subsequent communications, BSGR Guinea (which was at that time controlled by Vale) responded to requests for comments that only BSGR could respond to allegations relating to the period 2006 to 2010. See: CM, para. 630.

118 See, e.g.: CM, paras. 638, 640, 641, 645.

119 Mem., para. 128.

120 Mem., para. 130(i); Avidan (CWS-3), paras. 102-103.

121 Mem., para. 130(ii); Reply, paras. 229-236. The Claimants further point out that, on 13 November 2013, both employees filed a complaint before the ECOWAS Community Court of Justice, which rendered a judgment on 16 February 2016 ordering the Republic of Guinea to indemnify the plaintiffs for arbitrary detention and breaches of the right to an effective recourse, principles of adversarial proceedings and equality of arms, and the right to be tried within a reasonable time. See: Judgment of the Court of Justice of the Economic Community of the West African States dated 16 February 2016, paras. 82-87, 96-101, 109-114, 122-129 (Exh. C-231).

122 Mem., para. 130(v).

123 Cf., CM, paras. 566-597.

14 April 2013, Mr. Cilins eventually entered a guilty plea on the count of obstruction of justice, served a two-year prison sentence, and paid a USD 75,000 fine.[124]

234. On 7 May 2013, the Technical Committee transmitted to BSGR Guinea a first set of evidence to support the accusations in the Allegations Letter, including the information that, on 15 April 2013, the FBI had filed a complaint against Mr. Cilins.[125]

235. On 1 November 2013, the Technical Committee submitted to BSGR Guinea rules of procedure, which provided, among other steps, for a hearing.[126] On 7 November 2013, BSGR Guinea confirmed its participation in the hearing and, on 19 November 2013, the Technical Committee also accepted the attendance of BSGR.[127]

236. On 4 December 2013, BSGR Guinea received a second set of evidence, including a declaration of Ms. Touré before American investigators dated 2 December 2013, an affidavit of Mr. Cilins of 26 November 2012, the FBI recordings of their meeting at the Jacksonville airport, payment receipts linking Mr. Cilins and Ms. Touré, and contracts signed by Ms. Touré or Matinda & Co Ltd ("Matinda"), on the one hand, and Pentler or BSGR Guinea, on the other hand.[128] BSGR Guinea was also advised that it could request an eight-day postponement of the hearing, which it did and the hearing eventually took place on 16 December 2013.[129]

237. In the meantime, on 8 December 2013, BSGR had informed the Technical Committee that it would not attend the hearing nor would it further participate in the review procedure.[130] Having obtained a verbatim record, BSGR challenged the conduct of the hearing in a letter of 16 January 2014, as well as the fact that its position had allegedly not been addressed.[131]

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124 CM, paras. 617-618, referring to *United States of America v. Frédéric Cilins*, Tribunal Fédéral du Southern District of New York, Judgment in a Criminal Case, S2 13 CR. 315 (WHP), 25 July 2014 (Exh. R-393).

125 Mem., para. 128; CM, para. 642.

126 CM, para. 646.

127 CM, paras. 648-649.

128 Mem., para. 128, note 89. See, in particular: CM, para. 650.

129 CM, para. 651.

130 CM, para. 652, referring to Lettre de Skadden Arps à M. N.Touré (Comité Technique), 8 décembre 2013 (Exh. C-74).

131 CM, para. 661.

238. Finally, the Technical Committee forwarded its draft recommendation for comments to BSGR Guinea on 21 February 2014,[132] which the latter provided on 25 February 2014.[133] On 27 February 2014, BSGR wrote to again dispute the lawfulness of the process and reject the Committee's recommendation.[134] The Technical Committee responded on 7 March 2014 to BSGR Guinea's comments[135] and then issued its recommendation to the Strategic Committee on 21 March 2014.[136] Thereafter, the Strategic Committee issued a formal opinion supporting the revocation of the Blocks 1 & 2 Permit and the Zogota Mining Concession, as well as the cancellation of the Base Convention.[137]

239. As stated above, following a meeting of the Council of Ministers which found that corruption was established, President Alpha Condé revoked the Zogota Mining Concession on 17 April 2014.[138] The Minister of Mines then revoked the Blocks 1 & 2 Permit on the next day[139] and cancelled the Base Convention on 23 April 2014.[140]

240. These revocations form the core of the Claimants' expropriation case and the review process undertaken by the two NMC committees, as well as the detention of BSGR employees form the core of the Claimants' discriminatory treatment case.[141]

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132 CM, para. 664, referring to Lettre de M. N.Touré (Comité Technique) à M. Vidoca (BSGR Guinée), 21 février 2014 (Exh. R-10).

133 CM, para. 665, referring to Lettre de M. Vidoca (VBG) à M. N.Touré (Comité Technique), 25 février 2014 (Exh. R-419).

134 CM, para. 666, referring to Lettre de M. Vidoca (VBG) à M. N. Touré (Comité Technique), 27 février 2014 (Exh. R-420).

135 CM, para. 667, referring to Lettre de M. N.Touré (Comité Technique) au PDG de VBG – Vale BSGR Guinée, 7 mars 2014 (Exh. R-421).

136 CM, para. 669, referring to Recommendation concernant les Titres miniers et la Convention minière détenus par la Société VBG, 21 mars 2014 (Exh. C-64).

137 CM, paras. 674-676.

138 CM, paras. 677-678, referring to Decree D/2014/98/PRG/SGG issued by Alpha Condé dated 17 April 2014 (Exh. C-65).

139 CM, para. 678, referring to Decree A/2014/1204/PRG/SGG issued by Kerfalla Yansane dated 18 April 2014 (Exh. C-66).

140 CM, para. 679, referring to Decree A/2014/1206/PRG/SGG issued by Kerfalla Yansane dated 23 April 2014 (Exh. C-67).

141 See, in particular: Mem., paras. 142-144, 314-344.

IV. REQUESTS FOR RELIEF

A. The Claimants' requests for relief

241. In their amended Memorial,[142] the Claimants request that the Tribunal issue an award:

(i) Declaring that Guinea's termination of each of the Base Convention, the Zogota Mining Concession and the Blocks 1 & 2 Permit was illegal and unlawful;

(ii) Declaring that Guinea's expropriation and/or nationalization of BSGR's indirect and BSGR Guernsey's direct shareholding in BSGR Guinea, and BSGR's shareholding in BSGR Guernsey, was illegal and unlawful;

(iii) Declaring that Guinea unlawfully failed to ensure that the Claimants' rights were protected in accordance with Guinean and/or international law.

(iv) Ordering that Guinea forthwith:

a) Restore the Base Convention and observe the rights granted to BSGR Guinea and to BSGR Guernsey under the Base Convention;

b) Restore the Zogota Mining Concession and observe the rights granted to BSGR Guinea under the Zogota Mining Concession;

c) Restore the Blocks 1 and 2 Permit and observe the rights granted to BSGR Guinea under the Blocks 1 and 2 Permit;

d) Ensure that BSGR Guernsey's and BSGR Guinea's respective rights, assets and investments are protected in accordance with Guinean and international law;

e) Prevent BSGR Guernsey's and BSGR Guinea's respective rights, assets and investments from being further subject to expropriation and/or nationalization or to any measure having similar effect;

f) Ensure that BSGR Guernsey and BSGR Guinea and their respective investments are treated in a non-discriminatory manner.

g) Ensure that each of BSGR Guernsey and BSGR Guinea have:

a. the right to dispose freely of their property and to organize their enterprise as they wish;

b. the freedom of hiring and firing, subject to prevailing laws and regulations;

[142] Mem., para. 431.

c. unlimited access to raw materials;

d. the freedom of circulation of personnel and products within the Republic of Guinea;

e. the freedom to import goods and services and any necessary funds; and

f. the freedom to dispose of their products on international markets and to export and dispose of products in foreign markets.

(v) Ordering that Guinea:

a) ensure that an accurate summary of the Award is published in the Financial Times (in A3 size) within 30 days of the date of the Award and at the expense of Guinea; and

b) submit the summary of the Award for approval to the Claimants 15 days before publication. Failing an agreement between the Claimants and Guinea on the text of the summary, the text of the summary will be determined by the Tribunal.

(vi) Ordering that Guinea provide prompt, adequate and effective compensation to the Claimants for Guinea's unlawful conduct, described above, in an amount in US dollars to be quantified during this arbitration, as compensation for the losses suffered to date and for any future losses suffered by the Claimants.

(vii) Ordering that Guinea provide an indemnity and/or prompt, adequate and effective compensation to BSGR, in respect of any losses which BSGR suffers (or might suffer) as a result of the claims brought by Vale against BSGR in LCIA Arbitration No. 14283.

(viii) Ordering that Guinea provide prompt adequate and effective compensation and/or a *quantum meruit* in respect of the investments made and/or work done and/or services performed by the Claimants (or each of them), and for which Guinea has taken the benefit but (as yet) provided no compensation;

(ix) Ordering that Guinea pay moral damages in the amount to be determined in the course of these proceedings.

(x) Ordering that Guinea pay interest on such sums and for such periods as the Tribunal deems appropriate.

(xi) Ordering that Guinea pay the Claimants' costs occasioned by this arbitration including, without limitation, arbitrators' fees, administrative costs fixed by ICSID, the arbitrators' expenses, the fees and expenses of any experts, and the legal costs incurred by the parties.

(xii) Granting the Claimants all other relief that the Tribunal deems appropriate.

242. The Claimants further specified that Guinea "remains liable for any future loss suffered by the Claimants (and each of them)",[143] and noted that, since the proceedings have been bifurcated, remedies were left for a separate phase of the proceedings.[144] Finally, the Claimants reserved their right to add to, modify and/or amend their requested relief.[145]

243. These requests were not repeated in the Reply, and thus remained unchanged.[146] However, the Claimants agreed with the Respondent's position that the "only real issue in this arbitration is whether BSGR acquired its mining rights in Guinea by corruption".[147] In this context, the Claimants request that the Tribunal find that 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".[148] Accordingly, the Claimants also request that the Tribunal dismiss Guinea's counterclaims.[149]

B. The Respondent's requests for relief, including counterclaims

244. The Rejoinder reproduces the requests for relief found in the Counter-Memorial,[150] by which the Respondent requests that the Tribunal:

- SUR LA COMPETENCE:
    - de prendre acte du consentement de la République de Guinée à la compétence du Tribunal vis-à-vis de BSGR Guinée au titre de l'article 25(2)(b) de la Convention CIRDI,
    - de se déclarer incompétent pour connaître des demandes des Sociétés BSGR fondées sur le Code Minier 1995,
    - de se déclarer incompétent pour connaître des demandes des Sociétés BSGR fondées sur la Loi BOT,
- SUR LA RECEVABILITE:

143 Mem., para. 432.

144 Mem., para. 430.

145 Mem., para. 433.

146 Cf. C-PHB1, para. 370(i); C-PHB2, para. 158.

147 Reply, para. 4.

148 Reply, para. 6.

149 C-PHB1, para. 370(ii); C-PHB2, para. 158.

150 Cf. Rejoinder, para. 1096 and CM, para. 1167.

- de déclarer irrecevable l'ensemble des demandes des Sociétés BSGR en raison de l'acquisition frauduleuse des Droits Miniers, par voie de corruption,

- A TITRE SUBSIDIAIRE:

  - de déclarer mal-fondé l'ensemble des demandes des Sociétés BSGR en raison de l'acquisition frauduleuse des Droits Miniers, par voie de corruption,

- EN TOUT ETAT DE CAUSE:

  - de déclarer recevables les Demandes Reconventionnelles formulées par la République de Guinée,

  - d'ordonner aux Sociétés BSGR de réparer les préjudices économiques et moraux subis par la République de Guinée en raison des violations par les Sociétés BSGR du droit guinéen, à hauteur d'un montant qu'il conviendra d'évaluer lors de la seconde phase de la présente procédure,

  - de déclarer que les frais de la procédure seront entièrement supportés par les Sociétés BSGR, et

  - D'ordonner aux Sociétés BSGR de rembourser à la République de Guinée l'intégralité des dépenses qu'elle a engagées ou supportées au cours de la procédure et dont le montant sera déterminé en temps utile, selon les instructions du Tribunal.

245. The Respondent further reserved all rights.

V. OVERVIEW OF THE PARTIES' POSITIONS

246. This section only provides a summary of the Parties' positions. The Tribunal will refer to more detailed positions of the Parties in its analysis of each issue before it.

A. Summary of the Claimants' position

247. In essence, the Claimants argue that the disputed mining rights were obtained lawfully and not by way of corruption. Furthermore, the Claimants argue that the disputed mining rights were revoked unlawfully as a result of a corrupt scheme surrounding President Alpha Condé, and that the circumstances surrounding the revocations breached the Claimants' rights under the Guinean Investment Code, the 1995 Mining Code, the BOT Act, the Base Convention and international law.

248. According to the Claimants, the Respondent unlawfully and forcibly withdrew and revoked the following "highly valuable investments held and/or made by the Claimants":[151]

(i) The so-called Zogota Mining Concession, i.e., an iron ore mining concession granted to BSGR Guinea on 19 March 2010 over an area of 1,024 km² on Mount Younon in South Simandou;

(ii) The so-called Base Convention, i.e., a mining and infrastructure agreement dated 16 December 2009 entered into by BSGR Guernsey and BSGR Guinea with the Republic of Guinea regarding largely (though not exclusively) the rights and obligations arising from the Zogota Mining Concession; and

(iii) The Blocks 1 & 2 Permit, i.e., a prospecting permit granted to BSGR Guinea over an area referred to as Simandou Blocks 1 and 2 (covering an area of 369 km² in the prefecture of Kérouané) granted on 9 December 2008, giving rise to (i) an exclusive right to prospect for iron ore and (ii) a right to develop and operate the area (by way of operating permit or mining concession) upon completion of a feasibility study.[152]

249. The Claimants argue that "those and other vested rights" were expropriated and/or nationalized by three executive orders, the effect of which "was *inter alia* to strip BSGR Guinea of all of its relevant assets", as well as BSGR Guernsey's 100% shareholding in BSGR Guinea, and BSGR's shareholding in BSGR Guernsey and its indirect shareholding in BSGR Guinea.[153]

250. In addition, the Claimants claim that Guinea's unlawful conduct further breached various provisions of Guinea's Investment Code (Articles 5, 6 and 30), Mining Code (Articles 11, 21, 22, 26, 41 and 43), the BOT Act (Articles 7.1, 7.2.2, 7.2.7 and 7.2.12), as well as the Base Convention and international law.[154]

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151 Mem., para. 4.

152 Mem., para. 4, items (i)-(iii).

153 Mem., paras. 5, 13.

154 Mem., para. 14.

B. Summary of the Respondent's position

251. In addition to various preliminary objections,[155] the Respondent argues that the Claimants' purported mining rights are null and void since they were allegedly obtained through fraudulent conduct and corrupt practices. More specifically, the Respondent argues that the Claimants introduced themselves to the highest levels of the Guinean State through President Conté's alleged fourth wife, Ms. Mamadie Touré and that they obtained the disputed mining rights by buying the influence of "intermediaries" or "consultants" and bribing public officials.

252. Accordingly, all the claims are inadmissible or, alternatively, meritless. In this context, the Respondent's counterclaims seek to obtain reparation for the economic and moral damages incurred as a result of the corrupt practices prior to obtaining the disputed mining rights, as well as for the moral damages incurred as a result of the Claimants' public media campaign.[156]

VI. ANALYSIS

A. Preliminary Matters

253. Prior to entering the merits of the dispute, the Tribunal will address the applicable procedural law (1), the law governing jurisdiction (2) and the merits of the dispute (3), as well as the relevance of previous decisions or awards (4), and the scope of this Award (5).

1. Applicable Procedural Law

254. This investment arbitration is governed by (i) the ICSID Convention, (ii) the ICSID Arbitration Rules in force as of 10 April 2006 and (iii) the procedural orders adopted in the course of this proceeding, in particular Procedural Order No. 1.

255. At the first session, the Parties agreed on the application of the UNCITRAL Transparency Rules, with a number of adjustments as set out in PO2. More specifically, and subject to confidentiality, the Parties agreed to make the following documents available to the public:

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155 Cf. CM, Annex 1; Rejoinder, Annex 1.

156 CM, para. 1126.

the written submissions, the exhibits, legal authorities, witness statements, and expert reports (including any appended exhibits), the transcripts of hearings, the orders, decisions and the award of the Tribunal. The Parties further agreed to broadcast the hearings and make them accessible by video link on the ICSID website. These agreements were subject to the protection of "confidential or protected" information as addressed in PO2. ICSID acts as the Repository of published information.

2. Law Governing Jurisdiction

256. It is common ground that Article 25 of the ICSID Convention governs the Centre's jurisdiction and the Tribunal's competence. In other words, jurisdiction is governed by international law. National law may be relevant to the interpretation and application of certain jurisdictional requirements depending on the issue in question.

257. This being so, to fulfill the requirement of consent embodied in Article 25 of the ICSID Convention, the Claimants rely on provisions in national legislation and in the Base Convention to which the Tribunal will revert in its analysis of jurisdiction (VI.B.2.a). In other words, this is not a treaty arbitration.

3. Law Governing the Merits

258. Article 42(1) of the ICSID Convention reads as follows:

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

259. It is common ground that Guinean law applies to the merits of this arbitration. The Claimants allege breaches of the Guinean Investment Code, the Mining Code, the BOT Act and the Base Convention, all of which are governed by Guinean law. Article 2 of the Investment Code states that any person is free to invest in Guinea in conformity with the "laws and regulations of the Republic". Article 2 of the Mining Code provides that mining operations "in the territory of the Republic of Guinea […] are governed by the provisions of this Mining Code and all its ancillary provisions". Moreover, Article 13.1 of the BOT Act stipulates that a BOT agreement is "governed by legislation determined jointly by the State and the

Investor; in the absence of indication, the Guinean law in force on the date of signing the BOT Agreement shall be deemed applicable". Finally, Clause 5 of the Base Convention states that the agreement "is governed by the Applicable Laws of the Republic of Guinea", "applicable law" being defined as "the Mining Code and other laws, regulations and decrees, and any other legislative instrument of Guinean law, including rules, regulations, resolutions or other directives or standards that require compliance, published officially, having the force of law, and in effect at the time of their application".

260. The Parties further agree that international law has a bearing on the merits of the claims. The Claimants also allege breaches of rules of customary international law and point to the fact that Article 5 of the Investment Code and Article 21 of the Mining Code specifically refer to rules of international law. In the same vein, the Respondent invokes international law to justify the conduct of its officials.

261. Finally, the parties disagree on the law applicable to corruption, a topic that the Tribunal will address in its analysis below (VI.C.2.a)

262. Accordingly, the Tribunal holds that, under the first leg of Article 42(1), Guinean and international law apply to the merits of this case.

4. Relevance of Previous Decisions

263. In support of their positions, both sides have relied on previous decisions or awards, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a solution reached by another tribunal.

264. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It considers that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

5. Scope of this Award

265. This award deals with the Respondent's jurisdictional defenses (VI.B), the Claimants' claims that their investment in Guinea has been expropriated (VI.C), and the Respondent's counterclaims that the Claimants are liable in damages because they breached Guinean law by engaging in corrupt dealings (VI.D). As reflected in PO1, the Tribunal and the Parties agreed to bifurcate jurisdiction and liability from quantum. Accordingly, and in light of the outcome on liability, this Award does not address quantum.

266. The Claimants essentially argue that BSGR Guinea's mining rights were expropriated as a result of extortion attempts and corrupt dealings within the Guinean government. In addition to raising jurisdictional defenses, the Respondent mainly objects that the disputed mining rights were obtained through corruption and were therefore lawfully revoked. In their Reply, the Claimants agreed with the Respondent that the "only real issue in this arbitration is whether BSGR acquired its mining rights in Guinea by corruption".[157] They further stated that "all other issues, be it jurisdiction, admissibility or expropriation, centre around the issue of corruption".[158]

267. The Tribunal agrees that the corruption allegations are at the core of this dispute. As will be seen below, the Tribunal considers that the Respondent's allegations of corruption go to the admissibility of the claims. Thus, subject to the outcome of the jurisdictional objections (VI.B), the Tribunal will review the legal framework governing corruption (VI.C.2) and then assess the Respondent's corruption defense (VI.C.3).

268. In this latter context, the Tribunal will start by examining the authenticity of various documents which the Respondent invokes in support of its corruption assertions and which the Claimants allege to be forged or of doubtful authenticity (VI.C.3.b).

B. Jurisdiction

1. The Parties' positions

a. Respondent's position

157 Reply, para. 4.

158 Reply, para. 4.

269. For the Respondent, the Tribunal lacks jurisdiction over the majority of the claims.[159] Guinea argues that the Claimants fail to establish the Tribunal's jurisdiction over each Claimant for each legal basis which they invoke in support of their claims, and that they interpret the various offers to arbitrate too extensively.[160] While the Claimants have in common the same ultimate beneficiary and acted in concert, they do not have the same nationality nor do they hold the same rights. Moreover, while it asserts that the issue of corruption is at the heart of the dispute and affects the admissibility and, alternatively, the merits of the claims, the Respondent, unlike the Claimants, considers that its jurisdictional objections are unrelated to acts of corruption.[161]

270. The following table summarizes the Respondent's position on jurisdiction:[162]

Fondement à la compétence invoqué par les Sociétés BSGR / Droits Miniers auxquels se rapportent les demandes des Sociétés BSGR	Code des investissements	Code Minier 1995	Loi BOT	Convention de Base de Zogota
Convention de Base de Zogota / Concession Zogota	Le Tribunal est *compétent* à l'égard des demandes des Sociétés BSGR.	Le Tribunal est *incompétent* à l'égard de l'ensemble des demandes des Sociétés BSGR, en raison de la compétence exclusive des juridictions administratives guinéennes. Subsidiairement, le Tribunal est *incompétent* à l'égard de la société BSGR, qui n'est pas un « *investisseur minier* ».	Le Tribunal est *incompétent* à l'égard de l'ensemble des demandes des Sociétés BSGR, la Convention de Base de Zogota n'étant pas une Convention BOT. Subsidiairement, le Tribunal est *incompétent* à l'égard de la société BSGR, qui n'est pas partie à la Convention de Base de Zogota.	Le Tribunal est *partiellement compétent*, c'est-à-dire uniquement à l'égard des demandes des parties à la Convention : - BSGR Guernesey - BSGR Guinée.
Permis de recherches des Blocs 1 et 2	Le Tribunal est *compétent* à l'égard des demandes des Sociétés BSGR.	Le Tribunal est *incompétent* à l'égard de l'ensemble des demandes des Sociétés BSGR, en raison de en raison de la compétence exclusive des juridictions administratives. Subsidiairement, le Tribunal est *incompétent* à l'égard des demandes des Sociétés BSGR, en raison de l'absence de droits en vigueur au jour où l'acte contesté a été adopté. Plus subsidiairement, le Tribunal est *incompétent* à l'égard de la société BSGR, qui n'est pas un « *investisseur minier* ».	Le Tribunal est *incompétent* à l'égard de l'ensemble des demandes des Sociétés BSGR, la Convention de Base de Zogota ne portant pas sur les Blocs 1 et 2. Subsidiairement, le Tribunal est *incompétent* à l'égard de la société BSGR, qui n'est pas partie à la Convention de Base de Zogota.	Le Tribunal est *incompétent* à l'égard de l'ensemble des demandes des Sociétés BSGR, la Convention de Base de Zogota ne portant pas sur les Blocs 1 et 2.

159 CM, Annex 1; Rejoinder, Annex 1.

160 CM, Annex, 1, para. 2.

161 Rejoinder, Annex 1, para. 3.

162 Rejoinder, p. 249.

271. In essence, the Respondent (i) accepts that jurisdiction exists in respect of claims based on the Guinean Investment Code over all of the Claimants and all of the instruments at issue, i.e. the Zogota Mining Concession, the Base Convention and the Blocks 1 & 2 Permit. By contrast, the Respondent (ii) objects to jurisdiction over claims under the 1995 Mining Code and the BOT Act. Finally, the Respondent argues that (iii) the Tribunal only has jurisdiction under the Base Convention as regards claims relating to Zogota brought by BSGR Guernsey and BSGR Guinea (to the exclusion of BSGR), and (iv) lacks jurisdiction under the Base Convention in respect of claims relating to Blocks 1 & 2.

272. With respect to (i), for reasons of procedural efficiency, the Respondent provides its consent to treat BSGR Guinea, a Guinean company, as a foreign national for the purposes of Article 25(2)(b) of the ICSID Convention.[163]

273. With respect to (ii), the Respondent argues that Article 171 of the 1995 Mining Code provides for the exclusive jurisdiction of the Guinean courts over administrative acts and that Article 184 does not cover disputes over the existence of mining rights (but only over the extent of such rights).[164] In the present case, the dispute exclusively deals with the validity of the revocation and cancellation, hence with the existence, of the disputed mining rights. Furthermore, for Guinea, the Claimants adopt an overly broad interpretation of Article 184 according to which national courts are only residually competent and must give way to arbitration.[165] An extensive reading of Article 184 would be contrary to "principles of international law", such as the principle that unilateral acts of States, including offers to arbitrate contained in legislation,[166] must be interpreted restrictively.[167] Further, so says the Respondent, the Claimants cannot seriously argue that the 1995 Mining Code is irrelevant to ascertain jurisdiction because it was superseded by the 2011 Mining Code, when their claims rest on the 1995 Code.[168] The disputed mining rights were issued when the 1995

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163 CM, Annex 1, paras. 3, 5-8.

164 CM, Annex 1, paras. 10-14; Rejoinder, Annex 1, paras. 5-26.

165 Rejoinder, Annex 1, para. 16.

166 See, for instance: *Mobil Corporation, Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 85 (Exh. RL-118).

167 Rejoinder, Annex 1, para. 18, referring to Commission du droit international des Nations Unies, *Principes directeurs applicables aux déclarations unilatérales des Etats susceptibles de créer des obligations juridiques* (2006), art. 7 (Exh. RL-117).

168 Rejoinder, Annex 1, paras. 20-22.

Mining Code was still in force and therefore that legislation governs their revocation.[169] In fact, the revocation decrees only refer to the 2011 Mining Code in relation to the review procedure leading to the revocation.[170]

274. The Respondent also argues that the Tribunal lacks jurisdiction *ratione materiae* over disputes relating to Blocks 1 & 2 since the mining rights expired on 9 December 2011 or in December 2013 at the latest.[171] Moreover, the Tribunal lacks jurisdiction *ratione personae* over BSGR (Claimant 1), since that company held no title and therefore did not qualify as a mining investor under Article 184 of the Code.[172]

275. Still in respect of objection under the 1995 Mining Code and the BOT Act mentioned above under (ii), Guinea submits that the Tribunal lacks jurisdiction over claims under the BOT Act, since the Base Convention does not qualify as a BOT agreement.[173] According to the Respondent, the Claimants do not dispute that the characterization of the Base Convention as a BOT agreement is a condition *sine qua non* of the Tribunal's jurisdiction over claims under the BOT Act.[174] The Base Convention mentions nowhere the type of BOT operation contemplated, or the deeds imposed for the construction of infrastructure, or a financing plan or payment modalities, while expressly reserving the development of the Trans-Liberian railway project for a separate agreement.[175] In addition, so says the Respondent, the Base Convention only relates to the Zogota project, to the exclusion of Blocks 1 & 2.[176] In any event, BSGR has no standing under the BOT Act since it is not a party to the Base Convention, a fact that the Claimants have not challenged.[177]

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169 Rejoinder, Annex 1, para. 23.

170 Rejoinder, Annex 1, para. 24.

171 CM, Annex 1, paras. 17-18; Rejoinder, Annex 1, paras. 27-33.

172 CM, Annex 1, paras. 20-22; Rejoinder, Annex 1, paras. 34-40.

173 CM, Annex 1, paras. 25-31; Rejoinder, paras. 41-53. The Respondent argues that Article 1 of the Base Convention, which defines the activities under the convention, does not mention infrastructure projects. Similarly, Article 4 relating to BSGR Guernsey's obligations does not mention infrastructure projects either. More generally, the Base Convention does not refer to the BOT Act, although it refers to numerous other legislative acts. Finally, none of the standard clauses of a BOT agreement are contained in the Base Convention.

174 Rejoinder, Annex 1, para. 43.

175 Rejoinder, Annex 1, paras. 46-48.

176 CM, Annex 1, paras. 32-33; Rejoinder, Annex 1, paras. 42, 51-53.

177 Rejoinder, Annex 1, para. 43.

276. The Respondent rejects the Claimants' argument that the disputed mining rights were revoked as a result of a corrupt scheme implemented by President Alpha Condé to reward his political backers during the 2010 presidential election. It also disputes that the Claimants were expropriated of their mining rights or otherwise treated unfairly or in a discriminatory manner. For the Respondent, there is substantial evidence demonstrating that the Claimants secured their mining rights through corruption, thus justifying the revocation of the mining rights.

277. According to the Respondent, the Claimants entered Guinea at a time when a "generalized climate of corruption" prevailed.[178] They had recourse to Ms. Touré, whom the Respondent describes as President Conté's fourth wife and the central figure in the corrupt scheme, to influence President Conté in awarding the disputed mining rights to the BSGR companies.[179] More specifically, Guinea asserts that the Claimants started putting in place a fraudulent scheme in 2005 by introducing themselves at all relevant levels of governmental authority, setting up shell companies through which they paid bribes to gain access to mining rights, following which they sought to buy the silence of those implicated.

b. Claimants' position

278. The Claimants first argue that the four conditions set out in Article 25(1) of the Convention are met. There is a (i) legal dispute about Guinea's alleged breaches of the Guinean Investment Code, the Mining Code, the BOT Act and the Base Convention.[180] That dispute (ii) "arose directly out of an investment", namely the alleged "unlawful withdrawal and/or termination" of the disputed mining permits;[181] (iii) between a Contracting State and a national of another Contracting State, i.e. the Republic of Guinea on the one hand[182] and BSGR, BSGR Guernsey and BSGR Guinea, the first two incorporated in Guernsey, which is a British Crown dependency[183] and the third being treated with Guinea's agreement as a

178 CM, para. 6 (Translated from the French).

179 CM, para. 5.

180 Mem., paras. 375-376.

181 Mem., paras. 377-394.

182 Mem., para. 396. The Claimants indicate that Guinea signed the ICSID Convention on 27 August 1968 and deposited its instrument of ratification on 4 November 1968.

183 Mem., paras. 397-399. The Claimants indicate that the ICSID Convention entered into force in the United Kingdom on 18 January 1967 and that Guernsey was designated as a constituent subdivision pursuant to Article 25(1) and (3) of the Convention on 11 June 1973.

national of another Contracting State under Article 25(2)(b) of the Convention.[184] Finally, (iv) the "Parties have consented in writing to ICSID Arbitration", i.e. pursuant to Article 38 of the Base Convention,[185] Article 28(2) of the Investment Code,[186] Article 184 of the Mining Code[187] and Article 13(2) of the BOT Act.[188]

279. The Claimants highlight that the Respondent accepted in its Counter-Memorial that the Tribunal has jurisdiction over BSGR Guinea (Claimant 3). According to the Claimants, the Respondent did not either dispute the Tribunal's jurisdiction *ratione materiae* over BSGR and BSGR Guernsey, and therefore the Tribunal should conclude that it has such jurisdiction over them.[189]

280. More specifically, the Claimants argue that the Tribunal has jurisdiction to determine claims (i) under the 1995 Mining Code, (ii) over Blocks 1 & 2, and (iii) under the BOT Act.

281. In connection with (i), the Claimants submit that the Respondent erroneously relies on Article 171 of the 1995 Mining Code, which grants exclusive jurisdiction to Guinea's administrative courts. Under Article 184, the Tribunal has jurisdiction to entertain disputes concerning an investor's rights and obligations. Guinea's distinction between the existence and the extent of such rights must be rejected.[190] The Claimants also assert that Article 171 covers administrative acts "issued under this Code", and therefore does not extend to administrative acts taken pursuant to the 2011 Mining Code.[191] Finally, the Claimants counter the Respondent's position that BSGR has no standing under the 1995 Mining Code since it is not the titleholder. While the Claimants do not dispute that BSGR held no mining title, they argue that neither Article 184 nor any other provision of the code defines the term "mining investor".[192] Therefore, the ordinary meaning of this term should not be construed

184 Mem., paras. 400-403. The Claimants point in particular to Articles 1 (definition of control), 7, 36.2, 38.2 and Annex 1 of the Base Convention.

185 Mem., paras. 405-407.

186 Mem., paras. 408-412.

187 Mem., paras. 413-424.

188 Mem., paras. 425-429.

189 Reply, para. 451.

190 Reply, para. 452.

191 Reply, para. 456.

192 Reply, para. 460.

restrictively, and BSGR must be considered a mining investor since it provided the funds flowing into Guinea and was treated as a "group of companies".[193]

282. In regard to (ii), i.e. jurisdiction over Blocks 1 & 2, the Claimants challenge that the rights over the Blocks expired on 9 December 2011 (or two years later). These rights were terminated by Ministerial Decree on 18 April 2014.[194]

283. With respect to (iii), i.e. jurisdiction over the BOT Act, the Claimants' submission is that the Base Convention qualifies as a BOT agreement.[195] In particular, the Base Convention contains provisions dealing with infrastructure projects, such as Articles 10(1), 11, 12, and 16.2.1.[196] The fact that the Base Convention does not expressly mention the BOT Act is irrelevant since that Act does not impose any formal requirements. What matters are the actual rights and obligations enshrined in the contract, as illustrated by Article 1.1 of the BOT Act which defines a BOT agreement 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".[197] Finally, the Base Convention does not only apply to Zogota; Article 10(2) of that Convention addresses infrastructure works related to Blocks 1 & 2.[198]

2. Analysis

284. The Tribunal will first set out the legal framework of ICSID jurisdiction (a) and then address the Respondent's objections under the 1995 Mining Code (c), the BOT Act (d) and the Base Convention (e).

a. Legal framework

285. This arbitration is brought on the basis of Article 25 of the ICSID Convention, which provides that: (i) the arbitration must be between a Contracting State and a national of another

193 Reply, paras. 460-461.

194 Reply, paras. 457-458.

195 Mem., paras. 196-212; Reply, paras. 463-464.

196 Reply, para. 464.

197 Reply, para. 465.

198 Reply, para. 466.

Contracting State, (ii) there must be a legal dispute arising directly out of (iii) an investment, and (iv) the Contracting State and the investor must have consented in writing to ICSID arbitration. In addition, of course, the ICSID Convention must have been applicable at the relevant time.

286. With respect to (i) above, the Tribunal notes that Guinea signed the ICSID Convention on 27 August 1968, deposited its instrument of ratification on 4 November 1968, and that the ICSID Convention entered into force with respect to Guinea on 4 December 1968. The Tribunal further notes that both BSGR and BSGR Guernsey are companies registered under the laws of Bailiwick of Guernsey, that the United Kingdom of Great Britain and Northern Ireland designated Guernsey as a constituent subdivision pursuant to Article 25(1) and (3) of the ICSID Convention, and that Guernsey approved its consent to ICSID jurisdiction. The Tribunal is thus satisfied that BSGR and BSGR Guernsey are nationals of another Contracting State within the meaning of Article 25(1).

287. The Tribunal moreover notes that Guinea has abandoned its jurisdictional objection *ratione personae* pursuant to which BSGR Guinea was not a national of another Contracting State pursuant to Article 25(2)(b) of the Convention and expressly consented to the Tribunal's jurisdiction over BSGR Guinea.[199] The Tribunal adds that by signing the Base Convention, which in its Article 38.2 provides for ICSID arbitration as seen above, Guinea has accepted to treat BSGR Guinea – a signatory of that convention – as a foreign national for the purpose of arbitrating disputes under that instrument. Accordingly, the Tribunal is satisfied that BSGR Guinea is to be considered as a "national of another Contracting State" pursuant to paragraphs 1 and 2(b) of Article 25 of the Convention.

288. With respect to (ii) above, the Respondent does not challenge the Claimants' assertion that the dispute is legal in nature because it concerns the existence or scope of the Claimants' legal rights as well as the nature and extent of the relief to be granted to the Claimants, if any. Indeed, the subject matter of the present dispute relates to Guinea's alleged breaches of the Investment Code, the Mining Code, the BOT Act and the Base Convention, and in particular the alleged illegal and expropriation and/or nationalization of the Claimants'

[199] CM, Annex 1, para. 8.

mining and infrastructure rights without providing prompt, adequate and effective compensation.

289. With respect to (iii) above, the Respondent does not object that the dispute arose directly out of the Claimants' investments in Guinea, including BSGR's shareholding in BSGR Guernsey and indirect shareholding in BSGR Guinea, as well as the shareholding of BSGR Guernsey in BSGR Guinea.

290. With respect to (iv) above, it is undisputed that the ICSID Convention only provides that consent must be given in writing. The basis for the consent which the ICSID Convention requires is to be found in another instrument. Here, the Claimants invoke that the Respondent expressed its consent to arbitrate the present dispute before ICSID through (i) Article 28(2) of the Guinean Investment Code, (ii) Article 184 of the Guinean Mining Code, and (iii) Clause 38(2) of the Base Convention (these provisions are quoted further below). The Claimants further argue that the Tribunal is competent to entertain claims under the BOT Act. Except for the Investment Code and, to a limited extent, for the Base Convention, the Respondent opposes the Claimants' contentions on various grounds, to which the Tribunal will revert below. At this juncture, the Tribunal is satisfied that there is no objection to its competence over the claims brought by all three Claimants under the Investment Code, Article 28(2) of that Code reading in relevant part as follows:

> "However, disputes between the Guinean government and foreign nationals regarding the application or interpretation of this Code, shall, unless otherwise agreed by the parties, be settled by arbitration conducted:
>
> - in accordance with the provisions of the Convention of 18 March 1985 "Settlement of investment related disputes between the States and Nationals of other States" established under the auspices of the International Bank for Reconstruction and Development, ratified by the Republic of Guinea on November 4, 1986 […]."[200]

291. Finally, it is undisputed that international law applies to determine whether the Respondent has consented in writing to ICSID arbitration. As stated in *CSOB v. Slovakia*:

> "The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national

[200] Investment Code of the Republic of Guinea, 30 June 1995, Article 28(2) (Exh. CL-3).

> law. It is governed by international law as set out in Article 25(1) of the ICSID Convention."[201]

292. It is well-established that consent is not to be presumed, that it must be established by an express manifestation of intent or impliedly by conduct that demonstrates consent, and that the burden of proving consent is on the party asserting jurisdiction.[202]

293. The Tribunal further considers it well-established that legislation expressing consent to ICSID jurisdiction is a unilateral declaration of a State interpreted as such. In the words of the *Tidewater* tribunal, which referred to the case law of the International Court of Justice, "the declaration must be interpreted in good faith 'as it stands, having regard to the words actually used'; 'in a natural and reasonable way, having due regard to the intention of the State concerned'".[203] In this context, municipal law is relevant, for instance to determine the validity of the instrument at issue and to determine the intention of the State.

294. The Claimants invoke Article 184 of the 1995 Mining Code, Article 13(2) of the BOT Act and Clause 38(2) of the Base Convention as bases of jurisdiction, all of which are disputed by the Respondent.

295. Article 184 of the Mining Code, which is entitled "Settlement of Disputes", forms part of Title XV entitled "Final provisions", and reads 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-

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201 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 35.

202 *Garanti Koza LLP v. The Republic of Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 21; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175 (Exh. CL-6).

203 *Tidewater Inc & Others v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, para. 102(5), referring to *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 104; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, para. 49. See also: *Certain Norwegian Loans*, Judgment, I.C.J. Reports 1957, p. 27; *Aegean Sea Continental Shelf*, Judgment, I.C.J. Reports 1978, para. 69; ("The Court recalls that, when interpreting a declaration accepting its compulsory jurisdiction, it 'must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having regard to the intention' of the declaring State […]. The Court noted in the *Fisheries Jurisdiction* case that it had 'not hesitated to place a certain emphasis on the intention of the depositing State [...]. The Court further observed that '[t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served'") *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, para. 36.

performance of their undertakings at the end of their titles, assignment, transfer, or subleasing 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 aegis of the Banque Internationale pour la Reconstruction et de Développement.

In cases where the Centre International pour le Règlement 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."

296. Article 13.2 of the BOT Act reads as follows:

> "The BOT Agreement may freely determine the bodies and the procedure for settlement of disputes between the State and the investor.
>
> Any institutional arbitration clause may be stipulated, with the State, through this Law, hereby waiving any immunity from jurisdiction."

297. Clause 38(2) of the Base Convention reads in relevant part as follows:

> "The Parties agree to submit to the arbitration of the ICC any dispute arising from or related to this Agreement that has not be [sic] resolved under clause 38.1, using the Arbitration Convention of this institution.
>
> In addition, the Parties agree to make all requests and submissions to the ICSID or to the International Arbitration Court, depending upon the case, and to undertake any other actions supply all information required to set up arbitration proceedings."

b. Jurisdictional objections under the Mining Code

298. With respect to the 1995 Mining Code, the Respondent's main argument is that it did not consent to arbitrate the claims under the 1995 Mining Code (i), and in the alternative that the Tribunal's jurisdiction does not extend over Blocks 1 & 2 or BSGR (ii).

i. *Objection ratione voluntatis*

299. The Respondent argues that the Claimants raise claims in respect of administrative acts taken by Guinean authorities and that Guinean courts have exclusive jurisdiction over such claims pursuant to Article 171 of the 1995 Mining Code. The Claimants reply that the Tribunal has jurisdiction under Article 184, which provides for ICSID (in the first instance) and ICC (in the second instance) "fullest jurisdiction" to arbitrate disputes under the Code. The Guinean courts only have jurisdiction where ICSID and ICC decline jurisdiction, which derives from the last paragraph of Article 184, according to which "[i]n any other case disputes arising out of the interpretation and application of this Code are brought before the appropriate Guinean Courts". The Claimants add that the measures at issue here were in any event not issued under the 1995 Code but under the 2011 Code and are therefore not governed by Article 171 of the 1995 Code.

300. Article 171 of the 1995 Mining Code, which is entitled "Disputes", forms part of Title XIII entitled "Disputes, offenses and penalties", and reads as follows:

> "Any dispute arising out of an administrative act issued under this Code falls under the jurisdiction of the Administrative Tribunal. Any other dispute is brought before the appropriate court."

301. At the outset, the Tribunal notes that the Claimants invoke Article 184 of the 1995 Mining Code as basis for the Tribunal's jurisdiction over their claims of breaches of that same code.[204] It therefore appears inconsistent for them to argue that other provisions of the same code, especially Article 171, are irrelevant to the Tribunal's jurisdiction, because the disputed administrative acts were issued under the later code of 2011. In any event, the mining rights were issued under the 1995 Mining Code and the administrative acts at issue refer to both the 1995 and the 2011 Codes. Accordingly, the Tribunal will assess its jurisdiction pursuant to the 1995 Mining Code.

302. The Tribunal must first determine the interaction between Articles 171 and 184 of the 1995 Mining Code, which are reproduced above. Article 184 provides that disputes between

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[204] See, for instance, Mem., paras. 287-298. The Claimants argued that "[b]y the filing of its Request for Arbitration, the Claimants each accepted the offer to arbitrate its dispute with Guinea in accordance with Article 25 of the ICSID Convention and within the meaning of Article 184 of the [1995] Mining Code" (Mem., para. 424).

mining investors and the State can be submitted to international arbitration if they relate to the following subject matters:

- the "extent of their [the investors'] rights and obligations" of mining investors;
- the "performance or non-performance of their [the investors'] undertakings at the end of their titles"; and
- the "assignment, transfer, or subleasing of their [the investors'] rights arising therefrom [from the mining titles]".

303. The last paragraph of Article 184 further stipulates that "[in] any other case disputes arising out of the interpretation and application of this [1995] Code are brought before appropriate Guinean courts".

304. By contrast, Article 171 provides for the exclusive jurisdiction of the Guinean administrative courts over disputes arising out of administrative acts issued under the Mining Code.

305. As a result, the Tribunal understands that certain disputes are reserved for the local courts. For instance, only a local court could set aside the revocation of an administrative act such as a mining permit. Other types of disputes can be subjected to international arbitration. These are limitatively listed in Article 184(1). Hence, an arbitral tribunal does not enjoy "fullest jurisdiction" under the Mining Code, contrary to the Claimants' assertion. It has jurisdiction to the extent the dispute before it falls within one of the categories enumerated in Article 184(1). For example, the arbitral tribunal could determine the compensation owing as a consequence of an unlawful revocation of a mining title, such a dispute dealing with the rights of mining investors and falling within the scope of the first category setup in Article 184(1).

306. Moreover, the Tribunal cannot follow the Claimants' argument that the Respondent draws an artificial distinction between the existence and the extent of rights and obligations of mining investors. That distinction emerges from the interaction of Articles 184 and 171. More specifically, the existence of mining rights is in principle contingent upon the adoption of an administrative act (e.g. articles 24, 28, 36, 43 and 61 of the Mining Code), whereas the scope of such rights may not necessarily be so.

307. Consequently, the Tribunal must determine whether the measures complained of are within one of those which can be arbitrated under Article 184. In their Memorial, the Claimants impugn a series of actions of Guinea defined as "the Measures": (i) the 21 March 2014 recommendation of the Technical Committee to the Strategic Committee;[205] (ii) the 2 April 2014 opinion of the Strategic Committee to President Condé and the Minister of Mines and Geology;[206] (iii) the 17 April 2014 Presidential Order terminating the Zogota Mining Concession;[207] (iv) the 18 April 2014 Ministerial Order terminating the Blocks 1 & 2 Permit;[208] (v) the 23 April 2014 Ministerial Order terminating the Base Convention;[209] and (vi) the 24 April 2014 notification by the Government of Guinea of the termination of the Base Convention, the Zogota Mining Concession and the Blocks 1 & 2 Permit.[210] The Claimants add that these acts "individually and collectively resulted in the unlawful revocation and/or termination of the Claimants' mining and infrastructure rights, including (i) the Zogota Mining Concession, (ii) the Blocks 1 and 2 Permit, and (iii) the Base Convention".[211]

308. It is undisputed that measures identified as items (iii) to (vi) qualify as administrative acts. This is clear from the Claimants' statement that 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".[212] As for items (i) and (ii) referred to in the foregoing paragraph, it is plain from the submissions that the Claimants only mention these measures in the context of their challenge of the revocation and termination of their mining rights, not to seek independent relief. For this reason, it does not seem necessary to characterize these acts.

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205 Technical Committee's recommendation concerning the titles and mining agreement held by the company BSGR Guinea dated 21 March 2014, p. 32 (Exh. C-64).

206 See, Mem., para. 137; CM, para. 676. The Tribunal notes that the Parties have not filed the opinion of the Strategic Committee.

207 Decree D/2014/098/PRG/SGG of 17 April 2014 (Exh. C-65).

208 Order No. A 2014/1204/MMG/SGG of 18 April 2014 (Exh. C-66).

209 Order No. A 2014/1206/MMG/SGG of 23 April 2014 (Exh. C-67).

210 Letter of 24 April 2014 from the Ministry of Mines to VBG-VALE BSGR Guinea (Exh. C-68).

211 Mem., para. 142 (Emphasis in the original).

212 Reply, para. 456.

309. As regards the alleged breaches of the Mining Code, the Claimants argue that "the Measures" breached Articles 21, 22, 11, 26, 41 and 43 of the Code.[213] Subject to two exceptions discussed below, in the Tribunal's view, all the alleged breaches refer to "the Measures" identified above. This becomes apparent from the Claimants' own wording whereby the "Measures taken by Guinea as described above violate a number of Guinea's obligations under the Mining Code".[214] Thus, the Claimants submit that Article 21 was breached "by reason of the conduct set out above" [i.e. "the Measures"]; Article 22 was breached "by withdrawing BSGR's right to export iron ore through Liberia" and by failing to "grant and maintain BSGR's [sic] Guinea's mining titles and/or BSGR Guernsey and BSGR Guinea's rights under the Base Convention"; Article 11 was breached by Guinea's failure to perform its obligations and the termination of the Base Convention; Article 26 was breached because, "[i]n implementing the Measures", Guinea failed to "recognise and/or respect BSGR Guinea's exclusive right to prospect for iron ore and/or its exclusive right to an operating permit or mining concession"; Article 41 was breached because, "[b]y implementing the Measures, Guinea failed to recognise and respect BSGR Guinea's exclusive right to carry out all kinds of prospecting and development of deposits of mining substances"; and Article 43 was breached because Guinea failed to grant a mining concession.

310. In other words, these alleged breaches all relate to the revocation and termination of the Claimants' mining rights. As such, they involve administrative acts and do not fall within the categories of subject-matters for which Article 184 contemplates recourse to international arbitration. As a result, the Tribunal cannot but conclude that Guinea did not agree to arbitrate the claim under the Mining Code.

311. Having reached this conclusion, the Tribunal can dispense with examining the other objections which the Respondent raised in respect of the Mining Code. Finally, it is noted that the Claimants also contend that Articles 26 and 43 were breached because Guinea failed to respond to the Blocks 1 & 2 Feasibility Study in September 2011. Here again, these claims do not fall under one of the categories enumerated in Article 184, with the result that the preceding conclusion remains unchanged.

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213 Mem., paras. 287-297.

214 Mem., para. 287.

c. Jurisdictional objections under the BOT Act

312. The Respondent further submits that it did not consent to ICSID jurisdiction under the BOT Act (i) and in the alternative that its jurisdiction does not extend over Blocks 1 & 2 and BSGR (ii).

i. *Objection ratione voluntatis*

313. The Respondent is of the view that the Base Convention does not qualify as a BOT agreement and that the BOT Act thus does not apply. More specifically, the Base Convention contains none of the characteristics of a BOT agreement:

- Article 10.1 of the Base Convention only contains a general list of infrastructures, but should also contain technical clauses ("*cahier des charges*") as required under Article 11 of the BOT Act;
- The Base Convention does not describe the type of BOT operation mentioned in Article 1.3 to 1.11 of the BOT Act;
- The Claimants never submitted a detailed financing plan or a technical-economic proposal as required under Article 8.1 and 8.2 of the BOT Act;
- The Base Convention contains no reference to financing terms as required under Article 12.1 of the BOT Act;
- The term of the Base Convention is tied to the term of the mining concession, without any reference to the time needed to finance the infrastructures;
- The fiscal regime in Article 33 of the Base Convention only refers to the 1995 Mining Code, not to the BOT Act.

314. Guinea adds that the Base Convention itself stipulates that the design, development and management of the railway to Liberia will be subject to a separate agreement. It also notes that the National Assembly ratified the Base Convention without any reference to the BOT Act.

315. By contrast, the Claimants see in the Base Convention a BOT agreement governed by the BOT Act. The latter explicitly refers to mining infrastructure in Article 1.2 and does not

contain any formal requirements, so they say. What matters are the rights and obligations contained in the Base Convention. In this context, the Claimants refer in particular to Articles 10.1, 11, 12 and 16.2.1 of the Base Convention, which they regard as containing "provisions dealing with each component of an infrastructure project governed by the BOT Act".[215]

316. The Tribunal starts by noting that the BOT Act contains no expression of consent to arbitrate disputes before an international tribunal. Article 13.2 merely allows settling disputes through institutional arbitration provided that an agreement to arbitrate is concluded in a BOT agreement. In this context, the Tribunal notes that it is undisputed that Clause 38.2 of the Base Convention (quoted above at paragraph 297) contains an offer to arbitrate disputes before ICSID. The question therefore arises whether the Base Convention qualifies as a BOT agreement adopted pursuant to the BOT Act. The Tribunal will start its assessment by setting out key provisions of the BOT Act, followed by relevant provisions of the Base Convention.

317. Article 1.1 defines a BOT agreement as follows:

> "Any operation of "Financing, Construction, Operation, Maintenance, and potentially Transfer of Ownership" of development infrastructures by the private sector, in all its different variants, as indicated in Article 1.4 below."

318. Article 1.2 defines "Private Sector Infrastructure and Development Project" as:

> "Any Infrastructure and Development project normally financed and operated by the public sector, but which will now be fully or partially undertaken by the private sector, including but not limited to the hydroelectric infrastructures such as dams and plants, mining infrastructures, transport infrastructures such as roads, ports, railways and airports, power installations, telecommunications installations, agricultural infrastructures and developments, public buildings, tourist projects, education and health projects, IT networks and free zones. This type of project must be undertaken under the contractual provisions defined hereunder, and in accordance with any successive modifications approved by the President of the Republic of Guinea."

[215] Reply, para. 464.

319. Articles 1.3 to 1.11 define a series of operations, including "Build-Operate-Transfer" (BOT) in Article 1.3[216] and "Build-Transfer" (BT) in Article 1.4.[217]

320. Article 5.2 provides that an investor may propose a project, provided that he or she submits a preliminary feasibility study and that the project is approved in advance by a decree of the Council of Ministers:

> "Investors may take the initiative to propose a project to the Guinean Government. In this case, the preliminary feasibility study is the responsibility of the investor, and the project shall be the subject of approval in advance by Decree taken in Council of Ministers.
>
> The details relative to the procedure for approval of projects, the formalities of publication and information, the documentation, and the other aspects concerning the initiative and conducting of projects are also fixed by an Implementing Decree of this Law, taken in Council of Ministers."

321. Article 7 sets forth a number of guarantees granted by the Guinean State, while Article 9 contains tax and other incentives and Article 10 provides for the stabilization of the tax regime. Article 8 addresses the undertakings of the investor, including a financing plan (Article 8.1) and "full technical and economical proposal concerning the project subject of the BOT Agreement" (Article 8.2). Article 8.5 states that the investor "must comply with the prescriptions contained in the BOT Agreement and in its specifications, as defined in Article 11 below".

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[216] Article 1.3 defines "Build-Operate-Transfer" (BOT) as follows: "An agreement through which an investor takes on the financing and construction of a given infrastructure or development project, and its operation and maintenance. The investor operates the infrastructure over a determined period during which it is authorised to receive fees, charges, and miscellaneous costs from the user under user tariffs not exceeding the levels indicated in its bid or negotiated and included in the contract, to enable the investor to recover its investment and its costs of operation and maintenance of the project, including its profit margin. At the end of the initial predetermined period, which must not exceed the duration defined in Article 12 below, the investor transfers the infrastructure to the State, in its entirety and free of charge" BSGR Presentation, May 2005 (Exh. CL-2).

[217] Article 1.4 defines "Build-and-Transfer" (BT) as follows: "An agreement through which an investor takes on the financing and construction of a given infrastructure or development project, and after its completion transfers it to the State, in exchange for reimbursement of the investment cost plus a reasonable profit margin, in accordance with a pre-established financing plan approved by the parties. This type of contract may be applied to any infrastructure construction or development project operation, including structures which, for strategic or security reasons, must be operated directly by the State or any entity designated by it" BSGR Presentation, May 2005 (Exh. CL-2).

322. Article 11 describes the content of a BOT agreement in the following terms:

> "The BOT Agreement entered into between the State and the investor, under penalty of nullity, must contain general clauses that will be defined by a Decree taken in Council of Ministers. The special clauses applicable to each BOT operation, or variant of BOT operations, shall be defined on a case-by-case basis."

323. Finally, Article 12.1 speaks to the duration of a BOT agreement:

> "The duration of the BOT Agreement shall be sufficiently long to enable the investor to recover all the costs of investment, operation and maintenance, the financial costs, and a reasonable rate of profitability. This duration shall vary according to the terms of financing adopted for the needs of each project following the feasibility study."

324. The Tribunal now turns to the Base Convention, which was signed on 16 December 2009 and ratified by President Sékouba Konaté on 19 March 2010.[218] Its preamble contains various references to the 1995 Mining Code, but none to the BOT Act. Moreover, Clause 1, which is entitled "Definitions", defines the term "Mining Code", but not the BOT Act. Similarly, the preamble of the Presidential Decree ratifying the Base Convention refers to the 1995 Mining Code and not to the BOT Act.

325. The lack of references to the BOT Act in the Base Convention tends to confirm the Respondent's position that the Base Convention does not qualify as a BOT agreement. However, the Claimants submit that the Base Convention is a BOT Agreement on the basis of the rights and obligations it contains. While it is true that the Base Convention refers on various occasions to railway infrastructure, including the rebuilding of the Conakry-Kankan railway (Clause 10, 10.1(d) and Clause 12) and the construction of the Zogota-Sanniquellie mining railway (Clause 10.1 and Clause 16.1.1), for the following reasons the Tribunal cannot agree with the Claimants that the Base Convention qualifies as a BOT agreement for the purposes of the BOT Act.

326. First, Clause 1 of the Base Convention defines "Infrastructures contract" as "the agreement between the Government and BSGR regarding the design, development and management of the railway running from Zogota to the Liberian border", thus showing that the specifics of that infrastructure project are (or were meant to be) set out in a separate agreement (which may or may not qualify as a BOT agreement). Second, always in relation to the

[218] Presidential Order No. 003/PRG/CNDD/SGG/2010 of 19 March 2010 (Exh. C-16).

Zogota-Sanniquellie railway project, the last paragraph of Clause 16.1.1 specifies that the "terms for design, financing, construction, operation and maintenance of the railway shall be specified by agreement between the Government and the Company", thus again showing that a separate agreement would regulate that project. Third, contrary to what the Claimants argue, Article 11 of the BOT Act does contain formal requirements under "penalty of nullity" if they are not included. While the Parties have not provided the Tribunal with the Ministerial Decree setting out the "general clauses" to be included in a BOT agreement, the Tribunal is of the view that the provisions of the Base Convention do not set out so-called "special clauses" required pursuant Articles 8.5 and 11 of the BOT Act. Fourth, the Claimants did not rebut the Respondent's affirmation that no financing plan or complete technical-economic proposal was submitted as required under Articles 8.1 and 8.2 of the BOT Act. Fifth and finally, as regards the Conakry-Kankan railway project, Clause 12 of the Base Convention also states that a feasibility study would still have to be approved by the Government. The fact that this provision also includes an undertaking by the Guinean Government to grant a full exemption from duties, taxes and fees does not change the Tribunal's view that this provision does not fulfill the requirements set out in Article 11 of the BOT Act.

327. On this basis, the Tribunal reaches the conclusion that the Base Convention does not qualify as a BOT agreement. As a consequence, the Tribunal lacks jurisdiction over the claims asserted under the BOT Act. Having reached this conclusion, the Tribunal need not assess the other objections raised by the Respondent in relation to the BOT Act.

ii. *Objections ratione materiae and personae*

328. These objections relate to jurisdiction under the BOT Act over Blocks 1 & 2 and BSGR. As the Tribunal has just concluded that it has no jurisdiction under the BOT Act at all, there is no need to analyze these objections.

d. Jurisdictional objections under the Base Convention

329. Finally, with respect to the Base Convention, the Respondent argues that the Tribunal's jurisdiction does not extend to Blocks 1 & 2 (i) and BSGR (ii).

i. *Objection ratione materiae*

330. While the Respondent accepts that the Tribunal is partly competent to entertain the claims under the Base Convention, it insists that the Tribunal's jurisdiction only comprises the Zogota project to the exclusion of Blocks 1 & 2. This is so, according to Guinea, because the title and subject matter of the Base Convention only relates to Zogota and Clause 10.2 of the Base Convention mentioning Blocks 1 & 2 speaks of a "Phase 2", which would be defined after the filing of the feasibility study. In addition, the Presidential Decree ratifying the Base Convention only refers to Zogota, not to Blocks 1 & 2. The Claimants rebut the Respondent's objection stating that "Article 10(2) of the Base Convention relates to infrastructure works in relation to Blocks 1 and 2".

331. Article 10.2 of the Base Convention reads as follows:

> **10.2 Phase II: Blocks 1 and 2 Simandou Kérouané**
>
> At this stage the Company undertakes to create the following elements:
>
> - Two iron ore mines,
>
> - Industrial facilities and equipment,
>
> - Suitable railway infrastructure required for removing the iron ore.
>
> - A residential area at Kérouané,
>
> - Extension of equipment and installations to the port of Buchanan.
>
> For Phase II the Company shall present the Government with a feasibility study within 24 months from date of signature of this Agreement.
>
> The conclusions and terms of this study will facilitate defining the terms for the grant of the Mining Concession between the Parties, the terms of operation and shipping from these two Blocks.

332. To the extent that the Base Convention does indeed refer in Clause 10.2 to Blocks 1 & 2, the Tribunal is satisfied that it has jurisdiction to entertain claims relating to Blocks 1 & 2 under the Base Convention. This is in particular so because Clause 38.2 (quoted above at paragraph 297) provides for arbitration relating to "any dispute arising from or related to this Agreement", which obviously also includes Clause 10.2. The Respondent's objection is therefore rejected.

ii. *Objection ratione personae*

333. Finally, the Respondent objects that jurisdiction under the Base Convention does not include BSGR, because the latter did not sign that agreement. The Claimants did not specifically reply to this objection, although they did contest a similar objection raised by the Respondent in relation to BSGR's standing to sue under the Mining Code. In essence, the Claimants argued there that BSGR financed the operation and that Guinea always treated BSGR "at all times" as a "group of companies".[219]

334. The Tribunal notes that the Base Convention was concluded between the Republic of Guinea, on the one hand, and BSGR Guinea and BSGR Guernsey, on the other. BSGR is not a party to that instrument. In reliance on the principle of privity of contracts and the separate legal personality of corporate entities, it would seem that BSGR has no rights, including no procedural rights under the Base Convention. To escape this conclusion, the Claimants contend that BSGR was funding its subsidiaries' operations in Guinea. This may make it an indirect investor, but does not make it a party to the Base Convention. The Claimants further invoke that Guinea treated the BSG companies as a group. This raises the question whether the group of companies doctrine would allow extending the arbitration clause in the Base Convention to BSGR. However, other than asserting that Guinean authorities always treated BSGR as a "group of companies", the Claimants have provided no information, let alone evidence, on the applicability of the group of companies doctrine in the present case. Considering that the Claimants bear the burden of showing consent, this would be sufficient ground to deny jurisdiction on this basis. For the sake of completeness, the Tribunal has nevertheless reviewed the issue and its review confirms the result reached above.

335. Assuming that the group of companies doctrine may apply at all here, a question which the Tribunal leaves open, different legal regimes require different degrees of involvement before extending an arbitration clause to a non-signatory. Each of these legal regimes, however, requires some sort of involvement by the non-signatory in the negotiation, conclusion or performance of the agreement containing the arbitration clause. Thus, jurisdiction may extend to a non-signatory if the latter has shown, through its role in the negotiation, conclusion and performance of the contract embodying the arbitration clause, that it was a

[219] Reply, para. 461.

true party in spite of the fact that it did not formally enter into the contract.[220] In the present case, the Claimants have not shown that BSGR had any particular role in the negotiation, conclusion or performance of the Base Convention, which might justify extending jurisdiction to BSGR under the Base Convention.

336. First, Minister Thiam set up a commission on 1 December 2009 to "conduct the negotiations" of the Base Convention. According to the Claimants, Messrs. Avidan and Struik "led the negotiations on behalf of BSGR".[221] However, except for Mr. Struik, all persons involved in these negotiations were employees of BSGR Guinea.[222] At that time, Mr. Avidan was President of BSGR Guinea[223] and Mr. Struik was COO of BSGR Guernsey and CEO of BSGR Mining & Metals.[224] Significantly, in his capacity of COO of BSGR Guernsey, Mr. Struik reported to the board of BSGR Guernsey that BSGR Guinea was involved in the negotiations and responded to questions raised by the committee.[225] There is thus no evidence that Mr. Struik acted on behalf of BSGR during the negotiations of the Base Convention.

337. Second, Mr. Struik signed the Base Convention in his capacity as Director of BSGR Guernsey and Mr. Avidan signed it in his capacity as Chief Executive of BSGR Guinea.[226] There is thus no indication that BSGR played any role at that specific time.

338. Third, there is no evidence that BSGR played a particular role during the performance of the Base Convention. Whereas the Claimants stated that "the BSGR group, *and BSGR Guinea in particular*, undertook to invest billions of dollars in *inter alia* the Zogota mine and

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220 As stated in *Getma*: "[l]l ne suffit pas de constater que les deuxième, troisième et quatrième Demanderesses appartiennent toutes au même groupe de sociétés et qu'elles ont des dirigeants communs. Pour apprécier si ces trois autres Demanderesses ont bel et bien eu la volonté d'être liées par la Clause compromissoire, il convient d'examiner leur rôle respectif lors de la négociation, la conclusion et l'exécution de la Convention de concession" *Getma International, NCT Necotrans, Getma International Investissements & NCT Infrastructure & Logistique v. Guinean Republic*, ICSID Case No. ARB/11/29, Decision on Jurisdiction, 29 December 2012, para. 153 (Exh. C-239).

221 Mem., paras. 73-74.

222 According to the Claimants, Messrs. Avidan and Struik 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). Mem., para. 74.

223 Avidan (CWS-3), para. 8.

224 Struik (CWS-2), paras. 6-7.

225 [redacted]

226 Base Convention, 16 December 2009, p. 59 (Exh. C-69).

the Trans-Guinean railway"[227] and that "BSGR and its joint venture partner submitted a Feasibility Study",[228] the Tribunal notes that the Claimants generally refer to the BSG group of companies when using the term "BSGR", at times only referring to BSGR Guinea. Thus, for instance, VGB-Vale BSGR Guinea sent in 2011 the Feasibility Study,[229] which was the local vehicle that replaced BSGR Guinea. Accordingly, the Tribunal finds that the Claimants have not provided sufficient evidence to show that BSGR played a significant role in the performance of the Base Convention.

339. For these reasons, the Tribunal is of the view that BSGR is not a party to the Base Convention or the arbitration clause contained therein.

e. Conclusion on jurisdiction

340. To conclude, the Tribunal finds that it has jurisdiction over the three Claimants in respect of claims asserted under the Investment Code. The Tribunal further has jurisdiction over the claims asserted by BSGR Guinea and BSGR Guernsey under the Base Convention, but not over the claims asserted by BSGR under the Base Convention. Finally, the Tribunal does not have jurisdiction over the claims brought under the 1995 Mining Code or under the BOT Act.

C. Claims

1. Parties' positions on the claims

a. Claimants' position

341. The Claimants argue that the disputed mining rights were revoked unlawfully as a result of a corrupt scheme surrounding President Alpha Condé (section i), and that the circumstances surrounding the revocations breached the Claimants' rights under the Guinean Investment Code, the 1995 Mining Code, the BOT Act, the Base Convention and international law (section ii).

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227 Mem., para. 80 (Emphasis added by the Tribunal).

228 Mem., para. 100.

229 Letter from VBG Vale BSGR Guinea to Ministry of Mines dated 14 September 2011 (Exh. C-32).

i. *The Respondent unlawfully revoked the disputed mining rights*

342. The Claimants' main case is that the expropriation of its mining rights was politically motivated and "part of a massive conspiracy by President Condé to reward the political backers of his 2010 presidential election with highly valuable mining rights", including and in particular BSGR's mining rights.[230] The Claimants must only establish that Guinea expropriated their rights without compensation,[231] not to prove the motives behind the expropriation. Be this as it may, the facts reveal a "determined campaign of harassment" to compensate "outside interests" that helped President Condé coming to power.[232] According to the Claimants, the 2010 presidential election was rigged, which is clear from the fact that candidate Condé only received 18% of the votes in the first round and then 52% in the second round.[233]

343. To reward his supporters, so say the Claimants, President Condé entered into the so-called "Palladino Contract" pursuant to which "the provider of a USD 25 million loan in funding for his election was put in a position where it could become entitled to a 30% share in the assets of SOGUIPAMI, the state mining company".[234] Moreover, mining companies could avoid the review of their mining rights or secure new rights in return of illicit payments.[235] However, BSGR refused to make a payment of USD 1,25 billion which President Condé requested for it to keep its mining rights,[236] unlike other companies, such as Rio Tinto, Rusal and Sable Mining Africa, which agreed to pay Guinea several hundred million dollars. That refusal prompted the illegal mining review procedure designed to strip BSGR of its rights.[237]

344. In this context, the Claimants point to the role played by Mr. Sammy Mebiame, a "fixer" for the Och-Ziff Capital Management hedge fund ("Och-Ziff"), who pleaded guilty to corruption of Guinean officials, including President Condé, and entered into a plea agreement with the

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230 Reply, para. 167. See also: Mem., paras. 145-154.

231 Mem., para. 145.

232 Mem., paras. 146-147.

233 Reply, para. 196.

234 Mem., para. 150; Reply, para. 489(i); C-PHB1, paras. 358, 360(ii)-(iii).

235 Mem., para. 151; Reply, para. 489(iii) and Annex 1, para. 150(ii); C-PHB1, para. 360(v).

236 Mem., paras. 108-112; Reply, para. 243, 245-246; C-PHB1, paras. 253, 359.

237 Mem., para. 152.

US Department of Justice on 9 December 2016.[238] The Claimants explain that Mr. Mebiame worked for Palladino Holdings ("Palladino"), a company incorporated in Turks & Caicos, and reported to Mr. Walter Hennig, the owner of Palladino. Messrs. Mebiame and Hennig also worked as consultant and director respectively for African Management Limited ("AML"), a joint venture between Palladino and Och-Ziff.[239] Mr. Mebiame's job was to "source and secure mining opportunities in Africa for AML and its portfolio companies", in particular for African Global Capital I ("AGC I") and African Global Capital II ("AGC II"), two corporations used for the "funneling of bribes" to President Condé and other senior Guinea officials.[240]

345. The Claimants allege that Mr. Mebiame successfully engaged in negotiations with President Condé from June 2010 to June 2012, with the result that he was given the exclusivity over mining opportunities in Guinea,[241] was asked to help set up the state owned company SOGUIPAMI,[242] and was involved in rewriting the Mining Code. Although the Code provided for the systematic review of all existing mining conventions, in reality it targeted BSGR.[243] In the same vein, 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".[244] Messrs. Mebiame and Hennig were also involved in drafting "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".[245] In addition, the Claimants stress that Mr. Mebiame paid substantial sums to gain access to mining rights, including to President Condé and Mr. Yansane Kerfalla, a signatory of the Palladino Agreement and member of the Strategic Committee.[246] The bribes included: (i) an S-Class Mercedes Benz offered to President Condé in 2010, (ii) the payment for the rental of a private plane for President Condé on or around 15 March 2011 in an amount of USD 440,000, (iii) cash payments to

238 Reply, paras. 180-181; C-PHB1, para. 360(ii).

239 Reply, paras. 170-171.

240 Reply, para. 172.

241 Reply, paras. 194-198.

242 Reply, para. 199.

243 Reply, paras. 202 and 226(v).

244 Reply, para. 203. The Claimants also point to the fact that BSGR and Vale were the only companies that were not invited to the meeting of 17 February 2011 with the Minister of Mines to discuss the amended draft of the Mining Code. See: Reply, para. 204(i), note 193.

245 Reply, para. 206.

246 Reply, paras. 210-213.

Mr. Kerfalla between USD 100,000 and USD 200,000 for arranging a secret meeting with heads of SOGUIPAMI, (iv) in kind payments for travel expenses between 2011 and 2012 to Mr. Kerfalla and President Condé's son, Mohammed Alpha Condé.[247]

346. Finally, the Claimants submit that Guinea's investigation, arrest and detention of BSGR's employees, Messrs. I.S. Touré and Bangoura, constitute breaches of Guinea's obligations. The ECOWAS Community Court of Justice recently held Guinea guilty of arbitrary detention and in breach of the right to an effective recourse, principles of adversarial proceedings, equality of arms, and the guarantee to be tried within a reasonable time.[248]

ii. *The Respondent's measures and conduct breach the Claimants' rights*

347. The Claimants argue that the Respondent's actions breach (i) the Base Convention, (ii) the Investment Code, (iii) the 1995 Mining Code, (iv) the BOT Act, and (v) international law. In essence, the Claimants submit that the revocation of their mining rights constitute an unlawful expropriation and that the review process of its mining rights was unlawful and discriminatory. More specifically, the Claimants allege breaches of the following rules:

- Articles 4(ii), 7, 8, 14.2(a), 22.1, 29, 31, 32 and 36.2 of the Base Convention.[249] These breaches give rise to liability on the part of Guinea "to each of BSGR Guernsey and BSGR Guinea, including for losses suffered by each of BSGR Guernsey and BSGR Guinea as a result of those breaches";[250]
- Articles 5, 6, and 30 of the Investment Code;[251]
- Articles 11, 21, 22, 26, 41 and 43 of the 1995 Mining Code;[252] and
- Articles 7.1, 7.2.2, 7.2.7 and 7.2.12 of the BOT Act.[253]

247 Reply, para. 212.

248 Reply, paras. 229-237.

249 Mem., paras. 213-234.

250 Mem., para. 235.

251 Mem., paras. 236-286.

252 Mem., paras. 287-298.

253 Mem., paras. 299-309.

348. Finally, with respect to international law, the Claimants invoke the minimum standard of treatment under customary international law to allege that Guinea's measures breached the obligation not to expropriate, not to adopt arbitrary conduct, to provide full protection and security, to accord fair and equitable treatment, to prevent denial of justice, and not to engage in an abuse of rights.[254]

b. Respondent's position

349. The Respondent's main defense is that the claims are inadmissible because the mining rights were obtained through corruption. The Parties' positions on the corruption defense are set out in detail below (VI.C.2).

350. With respect to the claims, the Respondent essentially argues that the revocation of the mining rights does not constitute an expropriation (i), that the Claimants were not the subject of discriminatory measures (ii), and that the other allegations are unfounded (iii).

i. *The revocation of the mining rights does not constitute an expropriation*

351. Guinea submits that the Strategic Committee revoked the mining rights on the basis of a recommendation of the Technical Committee.[255] When reviewing mining titles and conventions, the Technical Committee had indeed come to the conclusion that there was overwhelming evidence that the Claimants' mining rights had been obtained through corruption.[256]

352. The Respondent further draws the attention to the fact that BSGR Guinea, which at that time was called VBG-Vale BSGR (Guinea) SARL, participated in the process leading to the issuance of the recommendation of the Technical Committee since it did not challenge the evidence or dispute the existence of corruption.[257] For instance, BSGR Guinea never provided any substantial rebuttal to the Allegation Letter, but stated that the corruption allegations targeted events that predated Vale's decision to invest in BSGR Guinea and that

254 Mem., paras. 310-313.

255 CM, para. 934.

256 CM, paras. 939-940, referring to Recommandation concernant les Titres miniers et la Convention minière détenus par la Société VBG, 21 mars 2014 (Exh. C-64).

257 CM, para. 943.

any queries should therefore be addressed to BSGR.[258] The Technical Committee could not accept such an answer as it considered that the change in the ownership of the holder of the mining rights was irrelevant.[259]

353. The Respondent further explains that the Technical Committee forwarded to BSGR Guinea the evidence showing the corruption. However, BSGR Guinea did not comment, be it in writing or at the hearing of 16 December 2013.[260] In fact, it maintained the same position throughout the review procedure, arguing that the corruption allegations only concerned BSGR, which suggests that it shared the conclusions of the Technical Committee.[261]

354. In its Final Recommendation, the Technical Committee noted that BSGR Guinea had neither challenged the probity of the review process, nor provided any plausible explanations on the corruption allegations.[262]

355. With respect to BSGR, which was then the minority shareholder of BSGR Guinea, the Respondent asserts that it provided no proof to rebut the corruption allegations.[263] For instance, BSGR merely challenged the authenticity of the contracts without putting forward any evidence in support.[264] In addition, although it had the possibility, BSGR chose not to attend the hearing of the Technical Committee held on 16 December 2013.[265]

356. For the Respondent, the review procedure was conducted in accordance with the rules and the parties' due process rights. Guinea in particular insists that BSGR Guinea never challenged the regularity of the review process at the time,[266] and that BSGR's criticisms are misplaced since the latter had no standing in that process[267], but was nevertheless

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258 CM, para. 945, referring to Lettre de M. Ferreira de Rezende (VBG) à M. N. Touré (Comité Technique), 28 novembre 2012 (Exh. R-397).

259 CM, para. 946.

260 CM, paras. 948-950.

261 CM, paras. 952-953.

262 CM, para. 954, referring to Recommandation concernant les Titres miniers et la Convention minière détenus par la Société VBG, 21 mars 2014, paras. 111 and 132 (Exh. C-64).

263 CM, para. 956.

264 CM, para. 960.

265 CM, para. 963.

266 CM, paras. 973, 976-984.

267 CM, paras. 1004-1021.

given an opportunity to express its position and decided not to do so.[268] On this basis, the Respondent argues that the review procedure and the revocation of the mining rights on the ground of corruption do not constitute an expropriation. Indeed, since the Claimants' mining rights were null and void, no expropriation could have occurred[269] and the revocation was justified by the exercise of Guinea's police powers.[270]

ii. *The Claimants were not the subject of discriminatory measures*

357. The Respondent also rejects the allegation that the Claimants were subject to discriminatory treatment. First, Rio Tinto/Simfer did not escape the review procedure as alleged by the Claimants. In fact, a technical audit was conducted to review the mining rights for these companies' Blocks 3 and 4.[271] Second, the Claimants' allegations concerning the mining rights of Rusal are only based on rumors found in an isolated press article. In fact, 4 out of the 19 projects that were reviewed concerned Rusal.[272] Accordingly, for the Respondent, the Claimants failed to demonstrate any difference of treatment between themselves and other companies which were also subjected to the review procedure.[273]

iii. *The other allegations are unfounded*

358. Guinea further submits that the allegations concerning 17 breaches of the investment and mining codes, the BOT Act and the Base Convention are unfounded. First, the Respondent did not breach the national treatment obligation under Article 6(1) of the Investment Code. In particular, the Claimants' right to export iron ore from Zogota through Liberia was not revoked. The Respondent simply refused to extend that right to the iron ore of Blocks 1 and 2. In any event, Sable Mining never had a right to export ore through Liberia and there can therefore be no breach of national treatment.[274] The Respondent also refutes the allegation that it breached Article 30 of the Investment Code, since the Claimants do not establish that any guarantee they had received had been restricted.

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268 CM, paras. 985-1003.

269 CM, para. 1064.

270 CM, para. 1065.

271 CM, para. 1076.

272 CM, paras. 1077-1080.

273 CM, para. 1081.

274 CM, para. 1092.

359. The Respondent also denies having breached the Mining Code. In particular, the Respondent rejects any allegation of discriminatory treatment.[275] Moreover, the Claimants are wrong to invoke Article 11 of the Mining Code, since the Base Convention was not modified, but revoked.[276] In the same vein, the exclusive character of the mining rights does not rule out the possibility of a revocation and there is no automaticity in obtaining a mining concession.[277]

360. Similarly, the Respondent asserts that the Claimants did not substantiate any breaches of the BOT Act or the Base Convention. With respect to the BOT Act, the revocation of mining rights for reasons of corruption cannot be assimilated to an anticipated retrocession and there is thus no right to compensation.[278] As for the Base Convention, the review procedure did not violate the stabilization clause contained in that agreement's Article 32.[279]

361. Finally, according to Guinea, the Claimants have not proven any breaches of customary international law. Especially, they invoke a "particularly incomplete and deliberately evasive" definition of minimum standard of treatment without pointing to any supporting cases.[280]

2. Parties' positions on the corruption defense

a. Respondent's position

362. The Respondent raises the defense that the Claimants secured the disputed mining rights by way of corruption and that their claims are consequently either inadmissible or unfounded on the merits.

363. The Respondent essentially argues that the Claimants introduced themselves at the highest levels of the State through Ms. Mamadie Touré, President Conté's fourth wife (i), set up a shell company to ensure the opacity of their actions (ii) obtained their mining rights through

275 CM, para. 1104.

276 CM, para. 1105.

277 CM, para. 1107.

278 CM, para. 1113.

279 CM, paras. 1117-1119.

280 CM, para. 1121 (Translated from the French).

bribery and influence peddling (iii), bought the silence of Ms. Touré and sought to destroy evidence (iv).

i. *The Claimants obtained access to the highest levels of the State through President Conté's fourth wife*

364. The Respondent explains that BSGR, through its CEO Mr. Oron, started to be interested in the Simandou mining opportunities after Messrs. Cilins, Lev Ran and Noy contacted Mr. Oron at the end of 2004 or beginning 2005.[281] Following that meeting, BSGR set up the company BSGR Guinea BVI in January 2005.[282]

365. According to the Respondent, Mr. Cilins developed his network in Guinea by distributing gifts and small sums of money to officials.[283] On 14 July 2005, BSGR wrote to Mr. Cilins to express its interest in the Simandou iron ore deposits[284] and Mr. Cilins arranged on 20 July 2005 a meeting between Mr. Oron and the Minister of Mines, Mr. Souaré.[285]

366. The Respondent further submits that, through Mr. Daou, Mr. Cilins met Mr. Bah, a Guinean businessman, who in turn introduced Mr. Cilins to the Minister of Youth and Sports El Hadj Fodé Soumah.[286] Mr. Soumah then introduced Mr. Cilins to Ms. Touré and to her half brother, Mr. I.S. Touré, who would eventually become BSGR Guinea's external relations officer.[287] According to Guinea, Mr. Cilins promised money to Ms. Touré and her half-brother in exchange for a private meeting with President Conté, which took place at the end of November or the beginning of December 2005 at the Palais des Nations in Conakry.[288] During that meeting, which Ms. Touré attended, Mr. Cilins offered a watch worth several thousands of dollars to Président Conté.[289] The latter then called Mr. Souaré for him to join the meeting. He understood Ms. Touré's presence as meaning that "*BSGR avait tapé à sa*

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281 CM, para. 122. The Respondent explains that Messrs. Cilins, Lev Ran and Noy had been active in the "grey market" since 2004 through their companies FMA International and CW France. CM, para. 119.

282 CM, para. 123. See: Exh. R-121.

283 CM, paras. 124-125.

284 CM, para. 126.

285 CM, para. 127.

286 CM, para. 133.

287 CM, para. 134. See also: Lettre de M. Bah à MM. Lev Ran et Cilins (Pentler), 15 mars 2010 (Exh. R-174); Déclaration de Mme Touré, 2 décembre 2013, para. 7 (Exh. R-35).

288 CM, para. 138.

289 CM, para. 139, referring to Attestation de M. Cilins, 26 novembre 2012, p. 2 (Exh. R-169).

porte et qu'elle avait démandé au Président de les aider".[290] For the Respondent, Ms. Touré appeared as the "ideal person", since her direct intervention secured the award, on 6 February 2006, of seven exploration permits in North Simandou and South Simandou.[291]

ii. *The Claimants set up a shell company to conceal their conduct*

367. The Respondent contends that the BSG group, through the law firm Mossack Fonseca, created the shell company Pentler on 28 October 2005 as a "vehicle to put in place its corruption scheme".[292] At that time, Pentler was wholly owned by Onyx BVI, one of the many BSG companies managed by Mr. Cramer and Ms. Merloni-Horemans.[293] These two individuals also managed Margali, a corporation that was Pentler's sole administrator.[294] On 13 February 2006, Ms. Merloni-Horemans agreed with Mr. Noy to transfer Pentler to Messrs. Cilins, Lev Ran and Noy for USD 1,500,[295] but Onyx BVI kept Pentler's assets in trust for these three gentlemen.[296] Ms. Merloni-Horemans also signed a document by which Onyx BVI promised Pentler a 17.65% stake in BSGR Guinea BVI on condition of the successful award of mining rights by Guinea.[297] Then, on 14 February 2006, Mr. Struik committed that BSGR Guinea BVI would pay to Pentler USD 19,5 million as "success fees […] based on the mutually agreed milestones" for the award of mining rights in Simandou North and South, as well as Blocks 1 & 2.[298] The following table depicts these milestones:[299]

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290 CM, para. 141, referring to Souaré (RWS-2), para. 10.

291 CM, para. 151, referring to Decree No. 2006/706/MMG/SGG dated 6 February 2006 (Exh. C-4) and Decree No. 2006/707/MMG/SGG dated 6 February 2006 (Exh. C-5) (Translated from the French).

292 CM, paras. 152-153 (Translation by the Tribunal).

293 CM, para. 154, referring to [redacted]

294 CM, para. 154, referring to [redacted]

295 CM, para. 155, referring to [redacted]

296 CM, para. 156, referring to [redacted]

297 CM, para. 157, referring to [redacted] See also: CM, para. 158, graph.

298 CM, para. 162, referring to [redacted]

299 [redacted]

Milestone	Total Success Fee	
	Zones North and South	Blocks 1 and 2
Signing of the MOU and issuing of corresponding prospecting permits	USD500,000	USD1,500,000
Completion of a satisfactory feasibility study and registration of "Companie Miniere de Fer de Simandou"	USD500,000	USD1,000,000
Signing of "Convention de Base"	USD500,000	USD1,000,000
Signing of "Decret Presidentiel de la Concession" and issuing of corresponding mining permits	USD1,000,000	USD1,000,000
Commercial production and export of first tonne of iron ore product from Simandou	USD2,000,000	NIL
Commercial production and export of first 10 million tonnes of iron ore product from Simandou	USD4,000,000	NIL
Repayment of all investments by BSGR (Guinea) Limited	USD6,500,000	NIL
Total	USD15,000,000	USD4,500,000

368. The Respondent emphasises that BSGR's main objective was to secure mining rights in Blocks 1 & 2. Indeed, Mr. Struik's letter of 14 February 2006 mentioned above stated that Pentler had "agreed to continue its efforts to reach an agreement for Blocks 1 and 2 and assist in acquiring these blocks for the Simandou Iron Ore Project and assist in any manner possible with the Simandou Iron Ore Project".[300]

369. For the Respondent, the prospect of a 15% share in the mining projects and a remuneration of USD 19,5 million strongly motivated Messrs. Cilins, Lev Ran and Noy to seek to secure the mining rights although they had no experience in the mining sector.[301]

iii. *The Claimants obtained their mining rights through bribery and influence peddling*

370. In addition to having secured the Simandou North and South exploration permits through Ms. Touré's influence, the Respondent contends that Pentler was instrumental in putting in place a corrupt scheme by concluding a series of contracts for "illicit payments" resulting in BSGR obtaining a pre-emptive right on Blocks 1 to 4, the mining rights of which belonged

300 CM, para. 164, referring to [redacted]

301 CM, para. 165.

at that time to Rio Tinto.[302] BSGR repeated this scheme to obtain the Blocks 1 & 2 Permit, the Base Convention and the Zogota mining concession.[303]

371. Turning first to the contracts for illicit payments, Guinea argues that Pentler concluded four contracts on 20 February 2006 to remunerate BSGR's local partners for their assistance in securing mining rights. These include a contract with Messrs. Bah and I.S. Touré (the "Pentler/Bah/Touré Protocol"), a contract with Ms. Touré (the "Pentler/Ms. Touré Protocol of February 2006"), and two contracts with Mr. Daou (the "Pentler/Daou Protocols"). The purpose of the Pentler/Bah/Touré Protocol was to pay Messrs. Bah and I.S. Touré USD 15,652,000 according to agreed milestones for their undefined "advice, services and assistance".[304] The milestones were specified as follows:[305]

Phase	Evolution	Zones Nord et Sud	Blocs 1 et 2
1	Signature du Protocole d'Accord et délivrance des Permis de Recherche correspondants	425.000 USD	1.200.000 USD
2	Etude de faisabilité et création de la Société Mixte	400.000 USD	800.000 USD
3	Signature de la Convention de Base pour les zones Nord et Sud et blocs 1 et 2	400.000 USD	800.000 USD
4	Signature du Décret Présidentiel de la Concession et délivrance des permis correspondants	800.000 USD	800.000 USD
5	Exportation de la 1er tonne de minerai de fer	1.600.000 USD	
6	Exportation de 10 millions de minerai de fer	3.200.000 USD	
7	Retour sur investissement	5.200.000 USD	
	TOTAL	12.025.000 USD	3.600.000 USD

372. On the same day, Pentler entered into a second agreement with Ms. Touré, who was then 24 years old and had no experience in the mining industry. The effect of this agreement was that Ms. Touré would hold a 5% interest in BSGR's Simandou project. The agreement contemplated a proposal, which BSGR Guinea BVI would submit to Guinea, to create the "Compagnie Minière de SIMANDOU", in which BSGR Guinea BVI would hold a 85% stake

302 CM, para. 167 (Translated from the French).

303 CM, para. 169.

304 CM, paras. 174-176, referring to [redacted]

305 [redacted] CM, para. 177. In this context, the Respondent highlights the subsequent email exchanges between Mr. Noy and Ms. Merloni-Horemans, where it was agreed to replace the reference to Margali in the Pentler/Bah/Touré Protocol by a reference to Mr. Lev Ran. As a result, Mr. Noy asked that Ms. Merloni-Horemans transmit the necessary powers to Mr. Lev Ran to sign the agreement.

and Guinea the remaining 15%. Ms. Touré was to receive an indirect stake of 5% in the mining project through her shareholding in Pentler.[306] Since Pentler held 17,65% of BSGR Guinea BVI's shares (the remaining 82.35% were held by BGSR Steel), and Ms. Touré held a 33,30% share of Pentler, Ms. Touré's interest in the mining project was set at 5% (85% x 17,65% x 33,3% = 5%).[307]

373. For the Respondent, this scheme perfectly suited BSGR, since none of these contracts bore the name of a BSG company. Indeed, Mr. Lev Ran received from Ms. Merloni-Horemans the power to sign these contracts, with the result that the name of Pentler appears on the contracts, not that of a BSG company.[308] As to the role of Ms. Merloni-Horemans, the Respondent states the following:

> "Mme Merloni-Horemans a donc validé deux accords qui prévoyaient qu'une partie du capital de BSGR BVI serait utilisée pour rétribuer les "services" de l'épouse du Président de la République et, par ailleurs, que quinze millions de dollars seraient versés à un homme d'affaires et à un journaliste beau-frère du Président Conté."[309]

374. Still on 20 February 2006, so says Guinea, Pentler concluded two other agreements with Mr. Daou.[310] Although the Respondent alleges to ignore the role played by Mr. Daou, it points to a letter dated 15 March 2010 showing that Mr. Daou accompanied Mr. Cilins during his initial meetings with Minister Soumah.[311] Again, the contracts with Mr. Daou, a businessman with no experience in the mining sector, do not specify the nature of the services at issue. The effect of the first agreement was that Mr. Daou would hold a 2% interest in BSGR's Simandou project, by receiving a 13.32% shareholding in Pentler.[312] The

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306 CM, para. 184, referring to Protocole Pentler/Touré de 2006, 20 février 2006 (Exh. R-24). The preambular part reads in relevant part as follows: "Dans le cadre de ce projet, BSGR Guinée a soumis aux autorités guinéennes une proposition qui permet l'actionnariat de la République de Guinée à hauteur de 15% et l'actionnariat de Madadie [sic] TOURE en tant que partenaire locale à hauteur de 5%. A cet effet, la société BSGR Guinée constituera, avec la République de Guinée, une société anonyme à participation publique, qui sera dénommée Compagnie Minière de SIMANDOU".

307 CM, para. 187.

308 CM, para. 188.

309 CM, para. 189.

310 [redacted] Protocole Pentler/Daou n° 2, 20 février 2006 (Exh. R-185).

311 CM, para. 194, referring to Lettre de M. Bah à MM. Lev Ran et Cilins (Pentler), 15 mars 2010 (Exh. R-174).

312 Protocole Pentler/Daou n° 2, 20 février 2006 (Exh. R-185).

second agreement was of the same content as the Pentler/Bah/Touré Protocol, and provided that Pentler would pay USD 2,975,000 to obtain mining rights in Simandou North and South and USD 900,000 for the rights in Blocks 1 & 2, i.e. in total USD 3,875,000.[313]

375. Together with the USD 15,625,000 promised to Messrs. Bah and I.S. Touré, this latter sum adds up to USD 19,500,000, i.e. the amount that Pentler was to receive from BSGR. In other words, Pentler promised to these "consultants" the amount that BSGR would pay in installments based on the same milestones.[314]

376. The Respondent further insists that, on that same 20 February 2006, BSGR Guinea BVI and Guinea concluded a Memorandum of Understanding (the "MoU", which the Respondent calls the Guinea/BSGR BVI Protocol), granting BSGR Guinea BVI a preemptive right (or right of first refusal) over Blocks 1 to 4.[315] According to his testimony, Mr. Souaré signed the MoU under pressure of Ms. Touré and Mr. I.S. Touré.[316] The signature of the MoU was followed by an official reception at the Ministry of Mines where BSGR officials offered a miniature car set with diamonds as a gift for Minister Souaré.[317]

377. Immediately following the signature of the MoU, BSGR (through the intermediary of BSGR TS) transferred USD 125,000 to Pentler for its assistance in the signature of the MoU. The Claimants allege that this amount covered direct expenses incurred in connection with the MoU and Mr. Noy mentioned "direct expenses to obtain the signatures of the M.O.U".[318] However, so states Guinea, the fees of the lawyer assisting the BSG group with the MoU were only USD 8,000.[319] Consequently, the amount of USD 125,000 cannot have been spent on direct expenses such as legal fees but must have been used to buy the signatures of the MoU.

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313 [redacted] CM, para. 198.

314 CM, para. 199.

315 CM, paras. 201-203.

316 CM, para. 204, referring to Souaré (RWS-2), para. 25.

317 CM, paras. 206-207.

318 CM, para. 213, referring to [redacted]

319 CM, para. 210, referring to [redacted]

378. Guinea stresses that Pentler received its 17,65% shareholding in BSGR Guinea BVI on 10 March 2006,[320] and that BSGR repurchased these shares in 2008 for USD 22 million.[321] In other words, the shareholders of Pentler, Messrs. Cilins, Lev Ran and Noy who had bought that company for USD 1,500, collected nearly USD 22 million, while they had provided no services or value but for obtaining the support of Ms. Touré and President Conté.[322]

379. According to the Respondent, that corrupt scheme was repeated to obtain the bauxite and uranium permits, the Blocks 1 & 2 permits, the Base Convention and the Zogota mining concession. Specifically, with respect to the 13 bauxite permits, BSGR solicited Ms. Touré's services and, through Pentler, signed an undated engagement letter confirming that she would have a 5% stake in these permits through her free 33.30% participation in Pentler (see above).[323] In addition, BSGR transferred USD 10,000 to Mr. Cilins for the "payment of the bauxite permits", it being unclear who benefitted from that amount, the Guinean State not having received it.[324] One day after the issuance of the bauxite permits on 9 May 2006, CW France, a company belonging to Messrs. Cilins, Lev Ran and Noy, sent an invoice of USD 250,000 to BSGR for "our assistance and consulting for acceptance of bauxite permits in Republic of Guinea",[325] while Ms. Touré (whom Messrs. Struik and Oron call "the Lady") inquired whether BSGR was "happy".[326] Thereafter, Pentler signed a second engagement letter with Ms. Touré confirming her participation in the bauxite project.[327]

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320 CM, para. 216, referring to [redacted]

321 CM, para. 217; Rejoinder, para. 153, referring to [redacted]

322 CM, para. 217.

323 CM, paras. 220-221.

324 CM, para. 222 (Translated from the French).

325 CM, para. 224, referring to [redacted]

326 CM, para. 225, referring to [redacted]

327 CM, para. 229, referring to Lettre d'engagement n° 2 de Pentler envers Mamadie Touré, non datée, légalisée le 21 juillet 2006 (Exh. R-26).

380. A few months later on 16 November 2006, following the incorporation of BSGR's local vehicle BSGR Guinea, the half-brother of Ms. Touré, I.S. Touré, was appointed director of external relations of that company.[328] After BSGR Guinea obtained four uranium exploration permits on 28 February 2007, BSGR Guinea and Matinda, Ms. Touré's company, signed an agreement on 20 June 2007 transferring 5% of BSGR Guinea's shares to Matinda.[329] While Mr. Struik now argues that this contract is forged, Ms. Touré attested to its authenticity in her statement before the US authorities.[330] The authenticity is corroborated, according to the Respondent, by the fact that the signatures on that contract were legalized on 20 July 2007.[331]

381. Turning next to the Blocks 1 & 2 Permit, the Respondent argues as of July 2007 the "only objective" of the BSG group was to obtain mining rights over these blocks.[332] To achieve that goal, the Claimants again approached Ms. Touré. It alleges that BSGR Guinea applied a first time for mining permits over Blocks 1 & 2 in July 2007, but Minister Kanté did not follow suit because he was of the view that BSGR Guinea lacked technical capacity to exploit even those mining areas that it had been granted in North Simandou and South Simandou.[333] BSGR Guinea then directly approached President Conté. On 18 September 2007, Messrs. Avidan and I.S. Touré met the President who called Minister Kanté. According to Mr. Kanté, the President gave no specific orders during that meeting. However, after the meeting, Messrs. Avidan and I.S. Touré came to his office and acted as if the President had directed that the transaction be finalized.[334] For the Respondent, the email which Mr. Avidan then sent to Messrs. Struik and Steinmetz is revealing:

> "In the next few days I am going to meet some of the key people in the country including the Prime minister, the Lady and maybe the President to

328 CM, paras. 237-238.

329 CM, paras. 241-245, referring to Protocole BSGR Guinée/Matinda de 2007, 20 juin 2007 (Exh. R-27).

330 CM, para. 246, referring to Struik (CWS-2), para. 109; Déclaration de Mme Touré, 2 décembre 2013, para. 17 (Exh. R-35).

331 CM, para. 247, referring to Tinkiano (RWS-3), paras. 9-10.

332 CM, para. 248 (Translated from the French).

333 CM, para. 258, referring to Kanté (RWS-4), paras. 16-17.

334 CM, paras. 260-261, referring to Kanté (RWS-4), para. 28.

> push them forward so as to reduce some technical and administrative problems."[335]

382. The Respondent is of the view that this email puts to rest Mr. Avidan's contention that Ms. Touré "was thought to be a witch and to have magical powers related to voo-doo", since her services were manifestly useful to "resolve some technical and administrative problems".[336] Guinea also calls attention to the response provided by Mr. Steinmetz, who was concerned about a "boomerang effect" if reference to Rio Tinto was made in written communications:

> "On additional iron ore block, say 1 and 2, I agree that we prepare a very good presentation and show how well we have done and doing etc as you suggested. We should NOT talk about Rio in any written paper, as it is not our problem and government should do their own decision and otherwise it can come back to us as a bomerag! [sic]"[337]

383. According to the Respondent, Minister Kanté was summoned to a first meeting with President Conté and Prime Minister Kouyaté and then to a second meeting with Prime Minister Kouyaté to discuss the requests of BSGR Guinea. Ms. Touré was present at both meetings. During the second meeting, so says the Respondent, Prime Minister Kouyaté stated that Ms. Touré was President Conté's fourth wife and that a "solution needed to be found to her problem", which Minister Kanté understood as meaning that a solution needed to be found to give Rio Tinto's rights to BSGR.[338]

384. As Minister Kanté resisted the requests on the ground that Rio Tinto's concession could only be revoked by Presidential decree, BSGR again approached Ms. Touré and two new contracts were signed with her on 27 and 28 February 2008.[339] In the first contract, entitled "*Contrat de commission*", BSGR Guinea committed to transfer USD 4 million "*à titre de commission pour l'obtention des blocs 1 et 2 de Simandou*", of which USD 2 million were for Matinda and the rest for "*les autres personnes de bonne volonté qui auraient contribué*

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335 CM, para. 267, referring to [redacted]

336 CM, para. 268, referring to Avidan (CWS-3), para. 115 (Translated from the French).

337 CM, para. 269, referring to [redacted]

338 CM, para. 273, referring to Kanté (RWS-4), para. 35 (Translated from the French).

339 Rejoinder, para. 245; Kanté (RWS-4), para. 36.

à la facilitation de l'octroi des dits blocs".[340] In exchange, Matinda committed to "*faire toutes les démarches nécessaires pour obtenir des autorités la signature pour l'obtention des dits blocs en faveur de la société BSG RESOURCES GUINEE*".[341]

385. The second contract provided Matinda with a 5% share in Blocks 1 & 2, thus apparently confirming, so says the Respondent, the 5% share granted to Ms. Touré in the project through Pentler.[342] The Respondent stresses that both contracts were signed by Mr. Avidan on behalf of BSGR and by Ms. Touré on behalf of Matinda. Although Mr. Avidan challenges the authenticity of his signature, and the Claimants argue that these contracts are forged, the Respondent rejects Mr. Avidan's testimony and the Claimants' argumentation that these contracts are not authentic.[343] If Mr. Avidan was in Israel at that time, he could have signed the contracts there before forwarding them to Ms. Touré. The argument that the content of the contracts defies "common sense" is unhelpful as there is no room for common sense in illicit contracts. In any event, the BSGR companies performed the contracts, and Ms. Touré received the contractually agreed payments.[344] The authenticity is further reinforced when one considers that Mr. Cilins attempted to invite Ms. Touré to destroy these contracts.[345]

386. Since BSGR Guinea had now concluded direct contracts with Ms. Touré, the next step in the scheme was to sever BSGR's ties with Pentler by repurchasing the 17,65% stake of Pentler in BSGR Guinea BVI.[346] A share purchase agreement was thus concluded between BSGR Steel and Pentler on 28 March 2008 for a value of USD 22 million.[347] Notably, Article 1 of that agreement provided that BSGR Steel would assume the responsibility for all local consultants of Pentler, thus rendering it particularly difficult, according to the Respondent, to argue that BSGR played no role in the corruption scheme.[348] In addition to the

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340 CM, para. 279; Rejoinder, para. 150, referring to Contrat BSGR Guinée/Matinda de 2008, 27 février 2008 (Exh. R-28).

341 CM, para. 280; Rejoinder, paras. 151, 246.

342 CM, para. 281; Rejoinder, paras. 152, 247.

343 Rejoinder, paras. 248-249.

344 Rejoinder, paras. 249-250.

345 Rejoinder, para. 251.

346 CM, para. 283; Rejoinder, para. 153.

347 CM, paras. 284-287.

348 CM, paras. 288-289, referring to [redacted]

USD 22 million, Article 5 provided for the payment of USD 8 million in the event that BSGR Steel generated profit exceeding USD 1 billion. In addition, Article 6 stated that Messrs. Cilins, Lev Ran and Noy would continue to provide consultancy services to BSGR Guinea BVI for five years. On 15 April 2008, BSGR TS proceeded to transfer USD 3 million to Pentler and another million on 16 June 2008.[349]

387. It is the Respondent's submission that the BSGR companies were then set on gaining access to Blocks 1 & 2. According to Ms. Touré, during a meeting with President Conté, Mr. Steinmetz offered money. The President refused, but apparently stated that he entrusted the matter to Ms. Touré, meaning that she was the one to receive illegal benefits, in exchange of his support. The Respondent puts it in the following terms:

> "Que cet arrangement soit le fait d'un homme qui, au crépuscule de sa vie, se préoccupe de sa jeune épouse, fille de son ami, ne change rien au fait essentiel : le Président Conté a accepté, en échange de son soutien, la faveur illicite au bénéfice direct de sa femme à qui il confiait « l'affaire ».'"[350]

388. On 20 May 2008, Mr. Steinmetz visited Conakry. On the same day, President Conté ended the services of Prime Minister Kouyaté and replaced him with the former Minister of Mines Souaré.[351] That move was perceived as favorable to BSGR, since Mr. Kouyaté was reluctant to revoke Rio Tinto's mining rights.[352] On 22 May 2008, the Presidency's Secretary General Mr. Mamady Sam Soumah notified Rio Tinto that its mining rights would be revoked. According to Mr. Souaré, it was unusual for a Secretary General to intervene in a matter that fell within the competence of the Minister of Mines.[353]

389. On 28 July 2008, President Conté revoked Rio Tinto's mining concession over Blocks 1 to 4, with the result that the blocks became "open".[354] On 5 August 2008, BSGR Guinea applied for mining permits over Blocks 1 to 3, but Minister Kanté refused to engage with BSGR since he was of the view that BSGR lacked the financial and technical resources and

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349 CM, paras. 294-296.

350 CM, para. 300.

351 CM, paras. 304-305.

352 CM, para. 304, referring to Avidan (CWS-3), para. 128.

353 CM, para. 307, referring to Souaré (RWS-2), paras. 39-40.

354 CM, paras. 311-313.

had failed to prove its capabilities in Simandou North and South.[355] Mr. Kanté was removed from office and replaced by Minister Nabé on 27 August 2008,[356] who was then invited to a meeting with President Conté in the presence of Ms. Touré to discuss Simandou.[357] According to the Respondent, Mr. Nabé felt the pressure exercised by Ms. Touré in favor of BSGR and President Conté became impatient with stripping Rio Tinto of its mining rights and granting them to BSGR.[358] Guinea adds that BSGR also obtained the support of the former Minister of Finance Ibrahima Kassory Fofana, who was close to President Conté and who called Minister Nabé to urge him to follow the President's instructions.[359] This fact is confirmed by Mr. Thiam, who discussed these details with Mr. Mebiame several years later.[360] Thus, the Respondent argues that Minister Nabé underwent "very strong pressure" by President Conté to strip Rio Tinto of its mining rights and award them to BSGR Guinea.[361]

390. Finally, on 4 December 2008, the Council of Ministers decided the retrocession of Rio Tinto's mining rights over Blocks 1 & 2 and immediately thereafter decided to award these mining rights to BSGR Guinea, all of this in a context where President Conté was gravely ill and under the influence of his wives.[362] On 9 December 2008, Minister Nabé then signed the decree granting exploration permits over Blocks 1 & 2 to BSGR Guinea.[363] Ms. Touré stated that Mr. Avidan then gave her USD 1 million in cash, which the latter denies.[364] However, so stresses Guinea, he remains silent on the fact that on 15 December 2008 BSGR paid Mr. Fofana USD 100,000[365] and that he intervened directly to ensure that

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355 CM, paras. 314-315, referring to Kanté (RWS-4), para. 41.

356 CM, para. 317.

357 CM, para. 317.

358 CM, para. 318, referring to Nabé (RWS-5), paras. 8-9.

359 CM, para. 320, referring to Nabé (RWS-5), para. 20.

360 CM, para. 321, referring to Transcript of meeting between Minister of Mines and Sammy Mebiame (the Mebiame tapes), non-daté (Exh. C-135).

361 CM, para. 322. See also: CM, para. 326 (Translated from the French).

362 CM, paras. 336-339.

363 CM, para. 340, referring to Arrêté n° A2008/4980/MMG/SGG accordant un permis de recherches minières à la société BSGR Guinée Limited, 9 décembre 2008 (Exh. C-10).

364 CM, para. 343.

365 CM, paras. 344-345, referring to [redacted]

Minister Nabé would follow President Conté's instructions.[366] As an email from Mr. Avidan shows, that payment for "special consulting" was approved by Mr. Steinmetz: "Has [been] approved by B."[367] The Respondent also points to an email of 15 December 2008 from Mr. Tchelet from BSGR instructing that the payment to Mr. Fofana be marked as "consulting fees" for South Simandou ("Put it to south").[368] The BSGR companies also paid an invoice of USD 7,125.78 for Mr. Fofana's travel expenses between Conakry, Washington and Paris between 10 and 21 December 2008.[369]

391. President Conté passed away on 22 December 2008. Following his death, the BSGR companies summoned Mr. Fofana on 5 January 2009 to London, apparently to gain his support in favor of Mr. Thiam's appointment as the new Minister of Mines.[370] Mr. Thiam had been Mr. Fofana's financial consultant and was expected to be favorably inclined towards the Claimants.[371] Mr. Thiam apparently paid Mr. Fofana's travel expenses to London for an amount of USD 8,017.60, which amount was then reimbursed by BSGR TS on 15 January 2009.[372] On that same day, Mr. Thiam was appointed Minister of Mines under President Camara, who had succeeded President Conté.[373] According to the Respondent, the Claimants continued to pay Mr. Fofana in order to secure Mr. Thiam's support. For instance, on 5 February 2009, BSGR paid EUR 80,000 to Mr. Fofana "as part of [BSGR Guinea's] investment into the Guinea project", without there being any invoice for services to justify such amount.[374]

366 CM, para. 345.

367 CM, para. 345, referring to [redacted]

368 CM, para. 346, referring to [redacted]

369 CM, para. 347, referring to [redacted]

370 CM, paras. 348-350.

371 CM, para. 350, referring to Aminata, Affaire projet Simandou : un réseau mafieux composé de Kassory Fofana, BSGR et le nouveau Ministre des Mines ?, 12 mai 2009 (Exh. R-249).

372 CM, para. 351.

373 CM, para. 352.

374 CM, para. 354, referring to [redacted]

392. According to the Respondent, Minister Thiam immediately started to promote the Claimants' interests, notably by writing to the prefects in the Simandou region, who had opposed BSGR's activities in Blocks 1 & 2,[375] stating that BSGR was entitled to perform these activities:

> "[L]es sociétés RIO TINTO et BSGR sont détentrices d'actes officiels les autorisant à mener des activités de recherche de minéralisations ferrifères, respectivement sur les moitiés Sud et Nord de la chaîne du Simandou relevant de vos territoires géographiques."[376]

393. The Respondent further notes that Minister Thiam also defended BSGR against Rio Tinto, by feigning to investigate the circumstances by which BSGR Guinea had obtained its mining rights, when in reality there is no trace of any such investigation.[377] For the Respondent, the ties between the BSGR companies and Minister Thiam are clear when considering the "familiarity" in the tone used in their email exchanges, the travel expenses reimbursed by BSGR, including for attending the wedding of Mr. Steinmetz's daughter, and the fact that Mr. Thiam acquired an apartment in New York on 20 October 2009 for an amount of USD 1,522,283.[378] In addition, Mr. Thiam renewed BSGR Guinea's permits over Simandou North and Simanou South on 10 June 2009 and the bauxite permits on 16 September 2009.[379]

394. The Respondent also sees corrupt practices when it comes to Mr. Thiam's role in the conclusion of the Base Convention and the Zogota mining concession.[380] After BSGR Guinea submitted its feasibility study on 16 November 2009, Mr. Thiam set up a commission on 1 December 2009, which issued a favorable report on 14 December 2009, after only two weeks, when such procedures usually take several weeks or months.[381] Only two days later, on 16 December 2009, Minister Thiam signed the Base Convention, which entered into force on 9 March 2010.[382] Finally, on 19 March 2010, President Konaté, the successor of

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375 CM, para. 353.

376 CM, para. 355, referring to Circulaire du Ministre Thiam, 11 février 2009 (Exh. R-254).

377 CM, paras. 356-358.

378 CM, paras. 359-367.

379 CM, paras. 363-364.

380 CM, paras. 368-377.

381 CM, paras. 368-373.

382 CM, paras. 376-377.

President Camara, issued a decree granting BSGR Guinea the mining concession for Zogota.[383]

395. Having secured their mining rights, the BSGR companies started buying out the intermediaries, starting by buying back Ms. Touré's 5% shareholding in BSGR Guinea BVI, for an amount of USD 4 million. For this purpose, in the first months of 2009, Mr. Avidan sent a representative to visit Ms. Touré in Freetown, Sierra Leone, where Ms. Touré lived after her husband's death, to give her USD 50,000 in cash.[384] The security director of BSGR Guinea, Mr. Bangoura, also met Ms. Touré in Freetown to advise her of BSGR's intention to buy back her shares in BSGR Guinea BVI for USD 4 million.[385] On 2 August 2009, Ms. Touré signed a declaration or "*attestation*" in which she accepted to be paid in four installments of USD 1 million each.[386]

396. The amount of USD 4 million was funneled to Ms. Touré through an intermediary Mr. Ghassan Boutros, owner of LMS Sàrl ("LMS").[387] Mr. Boutros issued six invoices for mining machinery, two of which refer to "consulting" services.[388] Interestingly, Mr. Tchelet instructed his accountant, Ms. Helen Nicolle, to "remove Ghassan Boutros' name from Guinea spreadsheet",[389] reiterating the same even more clearly on 26 April 2009 he stated: "what is sensitive is the names in respect of consulting fees paid-please [sic] always check with me first before sending reports which include those details to […] anyone inside Guinea".[390] On 17 August 2009, following the conclusion of the 2 August 2009 "agreement" (see above), BSGR issued a payment order in favor of Mr. Boutros for a "consulting fee", which amount was used to settle the first payment of USD 1 million to Ms. Touré.[391] On 28 August 2009, Ms. Touré then issued an invoice, on the letterhead of her company Matinda,

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383 CM, para. 377.

384 CM, para. 381, referring to Déclaration de Mme Touré, 2 décembre 2013, para. 30 (Exh. R-35).

385 CM, paras. 383-384.

386 CM, para. 385, referring to Attestation de Mme Touré relative au paiement de 4 millions de dollars par BSGR, 2 août 2009 (Exh. R-269).

387 CM, para. 387.

388 CM, paras. 389-390.

389 CM, para. 391, referring to [redacted]

390 CM, para. 392, referring to [redacted]

391 CM, paras. 395-396, referring to [redacted]

for a caterpillar D9R track-type tractor and a caterpillar excavator in the amount of USD 998,000.[392] Later in the year, on 20 December 2009, Ms. Touré issued a second invoice in the amount of USD 2,000.[393] Mr. Boutros then paid Ms. Touré USD 998,000 on 28 August 2009 and USD 2,000 on 20 December 2009.[394] [redacted][395]

397. It is the Respondent's submission that BSGR paid the remaining USD 3 million to Ms. Touré in the following six months, again through Mr. Boutros.[396] On 16 February 2010, BSGR wired USD 1 million to LMS on an account at the Fortis bank in Belgium under the name "Adama Sidibe".[397] Additionally, between March and April 2010, BSGR wired USD 2,137,000 on that account, again labelled as "consulting fees", and Mr. Boutros acknowledged having transferred to Ms. Touré USD 2 million on 18 May 2010.[398]

iv. *The Claimants bought the silence of Ms. Touré and sought to destroy evidence*

398. The Respondent argues that once the Claimants secured their mining rights and obtained USD 2,5 billion from their new joint venture partner Vale, they sought to buy the silence of the intermediaries by making further illicit payments. In particular, the Respondent observes that on 8 June 2010 Ms. Touré withdrew from the 2 August 2009 "agreement" when she heard that BSGR had cashed USD 2,5 billion for a 51% participation when she had only received USD 4 million for her 5%.[399] Thus, ignoring the 2 August 2009 "agreement", she requested (i) the performance of the 2008 commission contract between Matinda and BSGR Guinea whereby the latter agreed to pay USD 2 million to the former and (ii) the performance

392 CM, para. 402, referring to Facture de Matinda, 28 août 2009 (Exh. R-280).

393 CM, para. 405, referring to Facture de Matinda, 20 décembre 2009 (Exh. R-282).

394 CM, paras. 401-405.

395 CM, para. 407, referring to [redacted]

396 CM, para. 409.

397 CM, para. 410.

398 CM, paras. 413-414, referring to [redacted]

399 CM, paras. 492-493.

of the 2008 BSGR Guinea/Matinda protocol whereby BSGR Guinea granted Matinda a 5% stake in the Simandou project:

> "En conclusion, la **Société MATINDA AND CO LIMITED SARL**, ignore totalement l'existence de la fameuse attestation 02 Août 2009 et s'en tient uniquement au contrat de commission du 27 Février 2008 et au protocole d'accord du 28 Février 2008, actes juridiquement valables devant produire pleins et entiers effets entre les parties;
>
> La **Société MATINA AND CO LIMITED SARL** exige de la Société BSG Resources Guinée, l'exécution correcte, complète et de bonne foi de toutes ses obligations contractuelles nées du contrat de commission du 27 Février 2008 ainsi que du protocole d'accord du 28 Février 2008."[400]

399. According to Guinea, while disputing the authenticity of (i) the 7 February 2008 commission contract, (ii) the 28 February 2008 protocol and (iii) the 2 August 2009 contract, BSGR Guinea informally undertook to negotiate a new deal with Ms. Touré. In fact, Messrs. Noy and Saada, the Vice Chairman of BSGR's Sierra Leone subsidiary Octea Ltd, brought her to sign various contracts. The first one, which is undated provides for a payment by Pentler of USD 2,4 million.[401] The second one – also undated – foresaw an additional payment by Pentler of USD 3,1 million, on the condition that these agreements remained confidential.[402] During a second visit to Freetown on 8 July 2010, Mr. Noy agreed to increase the amounts due to USD 5 million.[403]

400. In addition, Ms. Touré received USD 149,970 on 22 July 2010 from Mr. Lev Ran, and a check of USD 100,000 on 27 July 2010 from Mr. Cilins. As a result, Ms. Touré transmitted to BSGR Guinea a letter, in which she cancelled her 8 June 2010 withdrawal from the 2 August 2009 contract.[404] Thereafter, on 3 August 2010, Ms. Touré and Mr. Noy agreed to a payment schedule, according to which the USD 5 million referred to above would be paid in two equal tranches, the first one 24 months after signature and the second one 24 months thereafter. In addition, they replaced the undated contract which provided for a payment of

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400 CM, para. 493, referring to Exploit d'huissier, 8 juin 2010 (Exh. C-114) (Emphasis in the original).

401 CM, paras. 495-497.

402 CM, para. 498.

403 CM, para. 500, referring to Engagement de paiement de Pentler envers Mme Touré, 8 juillet 2010 (Exh. R-30).

404 CM, paras. 502-504, referring to [redacted]

USD 3,1 million with a new agreement for USD 5,5 million,[405] which amount corresponds to (i) the USD 5 million provided in the 8 July and 3 August 2010 agreements and (ii) the amounts transferred to Ms. Touré on 22 and 27 July 2010.[406] The Respondent alleges that Ms. Touré also received other payments. For instance, on 5 August 2010, Mr. Cilins gave her a check of USD 50,000 and on 9 August 2010, she received USD 99,970 from Mr. Lev Ran.[407]

401. There is no doubt in the Respondent's mind that these payments were made on behalf of BSGR, since on 5 August 2010 Mr. Lev Ran forwarded to BSGR an invoice for USD 3 million, there being no cogent explanation for this invoice. It could not relate to the USD 22 million paid by BSGR to Pentler under the 29 July 2009 contract, as this amount had been settled on 17 May 2010.[408] In addition, the Respondent argues that the amount of USD 3 million was transferred to Ms. Touré during 2011, in addition to USD 1,5 million paid by BSGR through Pentler and an intermediary, Mr. Adam Schiffman.[409] [redacted] Mr. Schiffman was used as intermediary to allow Ms. Touré to acquire real estate in the United States.[410] All payments were wired through an account at Wachovia bank under the name of Olympia Title, Inc, a company administered by Mr. Schiffman. On 22 March 2011, through Windpoint, BSGR transferred to Pentler USD 1,5 million and, between March and April 2011, Messrs. Cilins, Lev Ran and Noy made four transfers in the same total amount on the account of Olympia Title, as follows:

- On 31 March 2011, Mr. Cilins transferred USD 100,000 from his account at the Leumi bank;
- On 12 April 2011, Mr. Cilins transferred USD 400,000 from his account at the Leumi bank;

405 CM, paras. 506-508.

406 CM, para. 509.

407 CM, para. 510.

408 CM, paras. 511-513.

409 CM, paras. 514-515.

410 [redacted]

- On 12 April 2011, Mr. Lev Ran transferred USD 500,000 from his account at the Leumi bank;
- On 12 April 2011, Mr. Noy transferred USD 500,000 from his account at the Leumi bank.[411]

402. These amounts were then used by Olympia Title to acquire real estate on behalf of Matinda, Ms. Touré's company.[412] In addition, on 12 September 2011, Messrs. Cilins, Lev Ran and Noy each transferred the following amounts on the account of Olympia Title:

- USD 2,211,000 by Mr. Cilins;
- USD 1,115,000 by Mr. Noy;
- USD 205,370 by Mr. Lev Ran.

403. The Respondent explains that part of these additional payments was transferred by Olympia Title to Ms. Touré in three successive transfers totaling USD 2,163,391.02:

- USD 150,000 on 11 January 2012;
- USD 250,000 on 11 January 2012; and
- USD 936,451.02 on 14 May 2012.

404. Guinea also highlights that Ms. Touré signed two identical declarations on 27 April and 5 May 2012 attesting to the legality of her "commercial" activities in Guinea and denying that on 8 June 2010 she sought to withdraw from the 2 August 2009 contract. As has become apparent from the FBI recordings and the US criminal investigation, Mr. Cilins had prepared these two declarations to protect BSGR and their content is untruthful.[413]

405. Finally, the Respondent relies on the FBI investigation, including the recordings of conversations between Ms. Touré and Mr. Cilins at the airport of Jacksonville as well as on

411 CM, paras. 516-517.

412 CM, para. 518.

413 CM, para. 522.

Ms. Touré's declaration before the US authorities, as "overwhelming evidence" of a massive corruption scheme put in place by the BSGR companies.[414]

406. Between March and April 2013, Mr. Cilins travelled twice to Florida to meet Ms. Touré, who at that time was a cooperating witness in an FBI investigation under the Foreign Corrupt Practices Act ("FCPA") and accepted to be wired to record the conversations with Mr. Cilins. According to the Respondent, these recordings provide damning proof of BSGR's involvement in the corrupt scheme, in particular of the latter's efforts to obtain the destruction of the evidence linking BSGR to Ms. Touré. They also demonstrate how Mr. Cilins sought to buy Ms. Touré's silence and made her sign a declaration.

407. More specifically, Mr. Cilins met Ms. Touré a first time at the Jacksonville airport on 25 March 2013. During that meeting, Mr. Cilins offered to pay USD 1 million for the destruction of the "papers", i.e. the corruption contracts, first USD 300,000 and then USD 700,000.[415]

408. On 11 April 2013, Mr. Cilins again met with Ms. Touré at the Jacksonville airport and *insisted on the urgency of the destruction of the contracts:*

> *"*Il faut détruire ça, urgent, urgent, urgent. Il faut détruire ça très urgent, très très urgent.
>
> […]
>
> Il faut tout détruire, il y a – je t'ai dit ça il y a longtemps – ne garde rien ici, ne garde surtout rien ici, même pas un bout de photocopie et tu dois tout détruire."[416]

409. To convince Ms. Touré, Mr. Cilins presented the confidential DLA Report, qualifying it as "*un document hyper, hyper confidentiel*". He explained that Ms. Touré's links to President Conté made her involvement even more risky:

> "[I]l faut bien savoir une chose. C'est que, en étant considérée comme épouse, tu as un risque supplémentaire. […]

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414 CM, paras. 566-619.

415 CM, para. 574.

416 CM, para. 581, referring to Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 44 (Exh. R-36).

> En étant considérée comme épouse, tu as une responsabilité supplémentaire de surtout ne pas te mêler des affaires. De ne pas avoir à te mêler de quoi que ce soit. Bien sûr encore moins si, de toucher la moindre aide, la moindre commission, la moindre chose comme ça. C'est encore plus risqué et dangereux en tant qu'épouse, qu'en tant que pas épouse. Tu vois ce que je veux dire ?"[417]

410. Mr. Cilins insisted that Ms. Touré had personally a problem:

> *"*Le risque il est très grave pour toi et pour tout le monde. Le groupe, c'est l'histoire du- des permis et ces choses-là. Mais toi c'est personnellement que tu as un problème. Parce que ces documents là, s'ils authentifient que ces documents – parce qu'il y a plein de photocopies qui circulent – s'il y a des documents originaux qui prouvent ça, mais toi tu es la première [inaudible]. Parce que c'est interdit de faire ça."[418]

411. The Respondent further notes that Mr. Cilins confirmed that he would pay USD 1 million for the destruction, but said he could only pay immediately USD 200,000, not USD 300,000 as promised during their last meeting; the rest would be paid once President Condé would have left power.[419] He also said that she could expect a further USD 5 million once the entire case would have been closed.

412. The two met again that same evening of 11 April, but Ms. Touré did not provide the originals. As a result, they had another meeting on 14 April 2013 again at the airport in Jacksonville.[420] Mr. Cilins pressured Ms. Touré anew not to reveal anything to US authorities. The meeting ended with the arrest of Mr. Cilins, who spent two years in jail having pleaded guilty to the charge of obstruction of justice.[421]

413. The Respondent submits that the evidence shows that Messrs. Pollack, Avidan and Steinmetz were aware of Mr. Cilins' trips to Jacksonville. Their statements that they had no idea that Mr. Cilins would offer money for the destruction of the contracts and for false testimony does not withstand scrutiny. During these meetings, Mr. Cilins said that he was

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417 CM, para. 584, referring to Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 51-52 (Exh. R-36).

418 CM, para. 585, referring to Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 55 (Exh. R-36).

419 CM, para. 586.

420 CM, para. 595.

421 CM, para. 597.

acting on instruction of the "number 1" [le "*numéro 1*"].[422] Upon a question from Ms. Touré, he specified: "*Tu sais bien qui. Il y en a qu'un avec qui je parle. Le le le le le…le big boss*".[423] He also dismissed the suggestion that this person might be Mr. Noy:

> "Mais, il [Michael Noy] va rien changer, c'est pas lui […] Il y en a qu'un qui décide […] Il y en a qu'un, c'est celui qui est haut. Et c'est – c'est le seul. Quand moi je te dis quelque chose, que je te dis c'est à 100%, c'est parce que je sais que c'est à 100%. Et il n'y a personne qui peut te dire à 100% si ce n'est pas lui là-haut."[424]

414. In sum, the Respondent submits that the record contains unprecedented evidence of corruption, including:

- The corruption agreements concluded by BSGR's intermediaries with Ms. Touré and Mr. I.S. Touré;
- Accounting and banking information showing cash flows;
- Internal emails of the Claimants;
- Correspondence with third parties who took part in the corrupt dealings;
- Declarations and affidavits of persons involved, such as the declaration of Ms. Touré given to US authorities; and
- Recordings and videos demonstrating the scheme and the involvement of the protagonists

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422 "*FC: […] Mais il y aura encore en plus. Et ça c'est directement de la communication qui m'a été donnée directement par le numéro 1, je ne veux même pas donner son nom. En disant, c'est comme ça. D'accord? Et ça c'est sùr et certain.*

MT: Le numéro un? Michael?

FC: Non, non.. Beny [en chuchotant]". Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 58 (Exh. R-36).

423 CM, para. 609, referring to Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 64 (Exh. R-36).

424 CM, para. 611, referring to Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 70 (Exh. R-36).

415. On that basis, the Respondent requests that the Tribunal hold the claims inadmissible, or, in the alternative, meritless.

b. Claimants' position

416. The Claimants argue that the disputed mining rights were obtained lawfully (i) and not by way of corruption (ii).

i. *The disputed mining rights were obtained lawfully*

417. The Claimants agree with the Respondent that the issue of corruption is at the heart of the present dispute, around which all other issues revolve: "The only real issue in this arbitration is whether BSGR acquired its mining rights in Guinea by corruption".[425]

418. It is the Claimants' case that they obtained their 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 [sic] negotiations with those same authorities".[426]

419. At the outset and to provide context, the Claimants argue that Rio Tinto obtained its mining rights in Blocks 1 to 4 unlawfully[427] and that the withdrawal of those rights in 2008 was lawful.[428] This is so, according to the Claimants, because Rio Tinto was bound to retrocede 50% of its mining area following its second permit extension request in 2002,[429] as well as a further 50% in 2004,[430] and that the 2006 mining concession in Blocks 1 to 4 was "not lawfully granted".[431] [redacted]

425 Reply, para. 4.

426 Reply, para. 7. See also: Mem., para. 47.

427 Reply, paras. 10-37.

428 Reply, paras. 38-84.

429 Reply, para. 12.

430 Reply, para. 16.

431 Reply, para. 32.

[redacted][432] Accordingly, the Claimants argue that the withdrawal of Rio Tinto's mining rights in July 2008 was proper and that the Claimants' interest in these areas was legitimate under these circumstances, especially since they applied for vacant mining fields. In particular, the decision of the Council of Ministers of 9 December 2008 to impose the retrocession of 50% of Rio Tinto's perimeter was proper considering Rio Tinto's letter of 3 December 2008, where the latter informed Guinea that it would substantially reduce its activities in Guinea,[433] as well as the fact that Rio Tinto did not carry out any exploration in Blocks 1 & 2.[434] Finally, the Claimants argue that Rio Tinto's "repossession" of the mining rights for the Blocks 3 & 4 was also unlawful, including the attempts to strip the Claimants of their mining rights in Blocks 1 & 2, the failure to remove its equipment from Blocks 1 & 2 and the fact that Rio Tinto paid bribes to reach a settlement agreement with Guinea in 2011.[435] This latter fact became public in August 2016 leading to the sacking of the top executives and Rio Tinto's announcement in October 2016 that it would withdraw from the Simandou project.[436]

420. The Claimants also submit that they obtained the exploration permits for North Simandou and South Simandou (Zogota) in a lawful manner. They explain that BSGR approached the Guinean authorities, i.e. the Ministry of Mines and the Agency for the Promotion and Development of Mining ("CPDM") in November 2005 to negotiate a memorandum of understanding.[437] On 1 December 2005, BSGR met with President Conté and the Minister of Mines, Dr. Souaré, and made a helicopter trip to the Simandou mining area on the next day. Minister Souaré's testimony according to which that trip created an incident is incorrect, as he had authorized the trip as the record shows.[438]

421. The Claimants further assert that they provided Minister Souaré with a new draft memorandum on 6 January 2006, which contained no reference to Blocks 1 & 2. They are

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432 Reply, para. 30. See also: [redacted]

433 Reply, para. 79, referring to Letter from Rio Tinto to Minister Nabé dated 3 December 2008 (Exh. C-189).

434 Reply, para. 83. See also: Reply, para. 85.

435 Reply, paras. 121-125.

436 Reply, paras. 126-129.

437 Reply, para. 139, referring to Lettre de M. Oron (BSGR) au Ministre Souaré joignant un projet de protocole d'accord, 24 novembre 2005 (Exh. R-173).

438 Reply, para. 137, referring to Rapport de Mission dated 2 December 2005 (Exh. R-175).

"uncertain" how such reference ultimately "found its way" in the Memorandum of Understanding (the "MoU") which was signed on 20 February 2006.[439] Under the MoU, BSGR Guinea BVI committed to carrying out a feasibility study within 30 months of the date of issuance of prospecting permits and Guinea undertook to issue a mining concession six months after the completion of the feasibility study.[440] From the Claimants' perspective, the MoU "was entirely valid and there was no corruption", [redacted][441]

422. The Claimants also note that, on 6 February 2009, prior to signing the MoU, BSGR was awarded the North and South Simandou Permits. For the Claimants, these rights were granted lawfully as Guinea's own evidence shows.[442]

423. Following the incorporation of BSGR Guinea in November 2006,[443] initial fieldwork started in South Simandou (Zogota) in 2007 and continued until 2009 with a total of 180 holes and 16,173 meters drilled,[444] but exploration work ceased in Simandou North because the drilling results were "not encouraging".[445]

424. The Simandou North and South permits were renewed on 10 June 2009 upon the recommendation of the CPDM,[446] so the Claimants observe, and the feasibility study for South Simandou (Zogota) was filed on 16 November 2009.[447] Thereafter, Minister Thiam established a technical commission (the "Technical Commission") to evaluate the feasibility study and negotiate a mining convention. This commission, the so-called Base Convention

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439 Reply, para. 140. See also: Mem., para. 52, referring to Memorandum of Understanding between the Republic of Guinea and BSG Resources (Guinea) Limited dated 20 February 2006 (Exh. C-9).

440 Mem., para. 52.

441 Mem., paras. 53-54, referring to [redacted] See also: Reply, para. 145.

442 Reply, para. 144.

443 Mem., para. 55.

444 Mem., para. 59.

445 Mem., para. 57. The Respondent states in its Reply that the exploration permits for North and South Simandou were renewed on 10 June 2009. See: Reply, para. 146, referring to Decree No. A2009/1327/PR/MMEH/SGG,10 June 2009 (Exh. C-12).

446 Reply, para. 146.

447 Reply, para. 147.

Committee composed of 20 members from various agencies[448] – none of which were presented as witnesses by Guinea[449] –, ultimately recommended entering into the Base Convention and awarding a mining concession.[450] The Base Convention was approved by the Council of Minister and signed on 20 December 2008.[451] It entered into force on 19 March 2009 when it was ratified by Presidential Decree.[452]

425. Finally, on 19 March 2010, pursuant to Article 8 of the Base Convention, President Konaté granted a mining concession for the Zogota project over an area of 1'024 km².[453] The Claimants stress that 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 [sic] the validity and lawfulness of this right".[454]

426. With respect to Blocks 1 & 2, the Claimants insist that they acquired their mining rights legally, as Rio Tinto's rights had been properly revoked.[455] Although the Claimants acknowledge that their prior expressions of interest for Blocks 1 & 2 were rejected by Guinean authorities,[456] they explain that once Rio Tinto was stripped of its mining rights, BSGR Guinea applied for prospecting permits for Blocks 1 to 3 on 5 August 2008, next to "at least two other companies (AfriCanada and a Chinese company)".[457] Minister Kanté then responded on 19 August 2008 that the mining areas applied for were not "yet" available, but that Guinea was "looking for technically and strong partners" also committed to financing infrastructure works outside the project.[458]

448 Reply, para. 148.

449 Reply, para. 149.

450 Reply, para. 156.

451 Reply, para. 161. See: Base Convention, 16 December 2009 (Exh. C-69).

452 Reply, para. 162, referring to Ordinance No. 003/PRG/CNDD/SGG/2010, 19 March 2010 (Exh. C-16).

453 Reply, para. 166.

454 Reply, para. 166.

455 See, generally: Mem., paras. 60-71; Reply, paras. 87-110.

456 See: Reply, paras. 87-95.

457 Mem., para. 61; Reply, para. 96.

458 Reply, para. 98, referring to Letter from Minister Kanté to BSGR dated 19 August 2008 (Exh. C-198).

427. After the replacement of Minister Kanté ("for reasons unknown to BSGR")[459], Minister Louncény Nabé wrote to BSGR on 3 November 2008 to request additional information and obtain BSGR's confirmation that it was willing to "make a series of important commitments".[460] For the Claimants, Guinea is wrong to argue that Minister Nabé wrote this letter "under pressure",[461] since there is nothing suspicious in the fact that BSGR visited a newly appointed minister to advocate for its mining application and there is no evidence that Minister Nabé met or was in direct communications with President Conté or Mamadie Touré. Nor is there evidence that Minister Souaré put pressure on his colleague Nabé.[462]

428. On 6 November 2008, BSGR provided the requested "commitments and warranties".[463] Minister Nabé confirmed a few days later on 10 November 2008 that the government considered that BSGR met all the conditions.[464] In light of the parallel retrocession of Blocks 1 & 2 by Rio Tinto it was perfectly proper, so say the Claimants, that on 9 December 2008 they were awarded Blocks 1 & 2 on the basis of a CPDM recommendation.[465]

429. Therefore, the Claimants submit that "BSGR was awarded Blocks 1 and 2 in a lawful manner and without any inappropriate intervention of Mamadie Touré or President Conté, let alone by bribing them".[466] This is further confirmed by various statements of key officials, such as Minister Nabé, who stated that awarding those rights to BSGR Guinea "did not infringe any provision of the Mining Code",[467] or the then Legal Advisor in the Ministry of Mines Mr. Sakho, according to whom BSGR obtained its permits "at the end of a lawfully followed procedure".[468]

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459 Reply, para. 98.

460 Reply, para. 100.

461 Reply, para. 101.

462 Reply, paras. 101-102.

463 Reply, para. 103.

464 Reply, para. 104, referring to Memo from Minister Nabé to Prime Minister Souaré dated 10 November 2008 (Exh. C-179).

465 Reply, para. 108, referring to Decree No. 2008/4980/MMG/SGG, 9 December 2008 (Exh. C-10).

466 Reply, para. 110.

467 Mem., para. 66, referring to Nabé Declaration of 8 May 2014 (Exh. C-11).

468 Mem., para. 67, referring to Mr Momo Sakho Declaration, 7 July 2015 (Exh. C-8).

ii. *The Respondent's allegations of corruption are unfounded*

430. [redacted][469][redacted][470][redacted][471][redacted][472][redacted][473][redacted][474][redacted][475][redacted][476][redacted][477][redacted][478]

431. [redacted][479][redacted][480]

469 Reply, para. 343.

470 Reply, para. 344(i), referring to [redacted]

471 Reply, para. 344(ii), referring to [redacted]

472 Reply, para. 344(iii), referring to Guinean Statement dated 13 June 2013 (Exh. C-78).

473 Reply, para. 344 (iv), referring to [redacted]

474 Reply, para. 344 (v), referring to Guinean Statement dated 2 June 2014 (Exh. C-80).

475 Reply, para. 344 (vi), referring to [redacted]

476 Reply, para. 344 (vii), referring to [redacted]

477 Reply, para. 344 (viii), referring to Swiss Statement dated 7 July 2015 (Exh. C-8); Guinean Statement dated 10 June 2013 (Exh. C-18).

478 Reply, para. 344 (ix), referring to Guinea Statement dated 20 May 2013 (Exh. C-342).

479 Reply, para. 349.

480 Reply, para. 345.

432. With respect to Mamadie Touré, the Claimants argue that she does not qualify as a witness since she is utterly unreliable.[481] In any event, some twelve senior officials have testified that Mamadie Touré "was not involved in this matter and/or had no influence", including: Minister of Finance Sandé, Prime Ministers Souaré and Doré, Ministers of Mines Kanté and Nabé, Secretary General Kourouma, Technical Advisor Noramou, Economic Advisors Curtis and Ibrahima Khalil Touré, Legal Adviser Sakho and Issiago Bangoura.[482]

433. The Claimants maintain their position that Mamadie Touré was not President Conté's fourth wife, that she was not involved in the issuance of the Claimants' mining rights, and that she had no influence over President Conté.[483] This being so, they also advance that "it matters little whether she was the President's wife or not".[484]

434. For the Claimants, Guinea should not be allowed to rely on Ms. Touré's statement before the US authorities. First, that statement is not a witness statement in these present proceedings, where she provided no witness statement. As a result, Ms. Touré was not available for questioning by the Tribunal or cross-examination by the Claimants, which the Claimants view as "absolutely unacceptable".[485] Even if the statement were considered as a witness statement, it should be disregarded as Ms. Touré was not heard.[486] In addition, Ms. Touré has "never been subject to proper examination" in the US, Switzerland, Guinea or in the LCIA arbitration, thus depriving the Claimants from the possibility of testing her.[487] Finally, the Claimants stress that Guinea has chosen not to prosecute Ms. Touré although she is portrayed as the spider in the web of Guinea's corruption case.[488]

435. The Claimants furthermore argue that the Tribunal should give "very little, if any, weight" to her declaration.[489] First, Ms. Touré has been paid by Guinea on at least six occasions a

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481 Reply, paras. 345, 421-433.

482 Reply, para. 346 (Emphasis in the original).

483 Reply, Annex 1, para. 40. See also: Reply, para. 346.

484 Reply, Annex 1, para. 40.

485 Reply, paras. 421-422.

486 Reply, para. 423.

487 Reply, para. 424.

488 Reply, para. 425.

489 Reply, para. 427.

total amount of USD 50,000.[490] Second, she was offered US citizenship in exchange for evidence against Messrs. Cilins and Thiam and BSGR.[491] Third, while Ms. Touré was forced to forfeit part of her assets, she entered into a deal allowing her to retain half of the value of her real estate in the US.[492] Fourth, Ms. Touré repeatedly changed her story; her accounts are inconsistent internally and contradicted by BSGR's documentary evidence.[493]

436. In any event, the Claimants underline that not a single witness presented by the Respondent "can attest to Mamadie Touré's alleged receipt of illicit payments".[494] In particular, Messrs. Souaré and Nabé's "subjective understanding" of Ms. Touré's alleged influence is "worthless", especially as they do not say that they were aware that she received payments from BSGR.[495] As for Mr. Kanté's testimony, it rather reinforces the Claimants' case that she had "little influence over President Conté".[496]

437. More specifically, the Claimants assert that Ms. Touré had no involvement in the award of the (i) North and South Simandou exploration permits,[497] (ii) the Blocks 1 & 2 exploration permits,[498] and (iii) the bauxite and uranium permits.[499] In addition, the Claimants maintain their position that the contracts with Ms. Touré or Matinda of 20 June 2007, 27 February 2008 and 28 February 2008 are forged.[500]

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490 Reply, para. 428.

491 Reply, para. 429.

492 Reply, para. 430.

493 Reply, para. 431.

494 Reply, para. 432.

495 Reply, para. 432(i).

496 Reply, para. 432(ii).

497 Reply, Annex 1, paras. 43-46.

498 Reply, Annex 1, paras. 47-48.

499 Reply, Annex 1, paras. 49-55.

500 Reply, Annex 1, para. 1. The Claimants argue at the outset, the Mr. Avidan's signature on the 27 and 28 February 2008 contracts are clearly forged, since Mr. Avidan was in Israel at the relevant time. The Claimants point to the following elements showing forgery: First, it is "highly unlikely" that experienced businessmen as Messrs. Struik or Avidan would commit to illegal agreements "in writing". Second, had BSGR had the intention to enter into such contracts in writing, it would not have done so in a "random fashion" by signing them on behalf of different entities. Third, the 20 June 2007 contract is "commercial nonsense", since it would have been "ludicrous" for BSGR to give away 15% of the equity in BSGR Guinea Sarl. Fourth, on Guinea's own case, Ms. Touré already had been promised a shareholding in BSGR, and therefore already had "plenty of incentive" to assist BSGR before and

438. Regarding (i), the Claimants state that the issuance of these permits "had nothing to do with Ms. Touré".[501] These permits were awarded by the CPDM and Minister Souaré on the basis of the 1995 Mining Code, and Mr. Souaré provided contradictory testimony on the meeting between President Conté and BSGR in December 2005.[502] In addition, Ms. Touré's statement that she called Mr. Souaré is unsupported by Mr. Souaré's evidence.[503]

439. With respect to (ii), the Claimants state that BSGR did not lobby the President, the Ministry of Mines or ask Ms. Touré's to lobby on its behalf.[504] For them, nothing about the process suggests that Ms. Touré intervened or that she was paid for her assistance.[505]

440. Finally, in connection with (iii), the Respondent's assertion that Ms. Touré was involved in the issuance of the bauxite and uranium permits is made "without a scrap of credible evidence",[506] nor is there any evidence that she received any payment in this respect. The email exchange between Mr. Struik and Mr. Oron in May 2006 only mentions that Ms. Touré asked whether BSGR was "happy" with the bauxite permits. It does not prove that she had a role obtaining them. Furthermore, nothing supports the suggestion that a portion of the USD 250,000 paid to CW France, a company belonging to Messrs. Cilins, Noy and Lev Ran, was associated to Ms. Touré.[507] Although Mr. Struik was aware of a "degree of cajoling" by Ms. Touré, he testified that he obtained all relevant information about the bauxite permits "directly from the CPDM".[508] The 20 June 2007 contract which provides the only evidence of Ms. Touré's involvement with respect to the uranium permits is "clearly forged".[509]

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there is no reason BSGR would have promised anything more. Fifth, the 28 February 2008 contract did not make any sense since, on Guinea's own case, Matinda already had received a 5% stake in BSGR Guinea through the 20 June 2007 contract. See: Reply, Annex 1, paras. 2-10.

501 Reply, Annex 1, para. 43.

502 Reply, paras. 132-134 and Annex 1, paras. 44-45.

503 Reply, para. 143 and Annex 1, para. 45.

504 Reply, Annex 1, para. 47.

505 Reply, paras. 87-109 and Annex 1, para. 48.

506 Reply, Annex 1, para. 49.

507 Reply, Annex 1, para. 55.

508 Reply, Annex 1, para. 54.

509 Reply, Annex 1, para. 50.

441. Finally, the Claimants insist that the Respondent willfully conflates Pentler and BSGR.[510] Ms. Touré and Pentler had an "independent commercial relationship".[511] In support, they enumerate the following elements. First, the Respondent did not provide any evidence that Ms. Touré received two Land Cruisers, let alone from BSGR.[512] Second, no part of the USD 250,000 payment to CW France was intended to be passed to Ms. Touré.[513] Third, BSGR did not give any cash payments to Ms. Touré, and the Respondent failed to provide any evidence rebutting Mr. Avidan's statement that he never showed USD 1 million on a bed to Ms. Touré or that he gave her USD 50,000 on a beach near Freetown in Sierra Leone.[514] Fourth, contrary to the Respondent's allegation, Mr. Boutros was never used to make payments to Ms. Touré. Quite to the contrary, Ms. Touré sought to extort money from BSGR in June 2010; BSGR never saw the contract of 2 August 2009;[515] and the 27 February 2008 contract is forged.[516] Moreover, BSGR never allowed Mr. Bangoura to promise USD 4 million to Ms. Touré,[517] and BSGR had a "legitimate commercial relationship with Mr. Boutros",[518] who received payments as a "non-employee" recorded as "consulting fees, even though the work to which they related had nothing to do with consulting".[519]

442. The Claimants further allege that Pentler's payments to Ms. Touré in July-August 2010 were not made on behalf of BSGR. Pentler and BSGR are separate entities and BSGR did not control Pentler.[520] Pentler's relationship with Ms. Touré had "nothing to do with BSGR".[521] There is no coincidence in time between Pentler's payments and Ms. Touré's withdrawal of her extortion attempts in 2010.[522] In fact, she withdrew her claims after I.S. Touré threatened

510 Reply, Annex 1, para. 56.

511 Reply, Annex 1, para. 33.

512 Reply, Annex 1, para. 58.

513 Reply, Annex 1, paras. 59-60.

514 Reply, Annex 1, paras. 61-62.

515 Reply, Annex 1, para. 64.

516 Reply, Annex 1, para. 66.

517 Reply, Annex 1, para. 65.

518 Reply, Annex 1, para. 67.

519 Reply, Annex 1, para. 69.

520 Reply, Annex 1, para. 79.

521 Reply, Annex 1, para. 80.

522 Reply, Annex 1, paras. 80-82.

to sue; her withdrawal was "without any financial incentive at all".[523] Concerning the USD 3 million payment on 5 August 2010, the Claimants explain that it related to the settlement of the share purchase dispute between BSGR and Pentler, which amounted to a total of USD 4,5 million, with the second tranche of USD 1,5 million being paid on 22 March 2011.[524] Since Pentler was an offshore company without assets, it is only normal that Pentler paid its creditors when it was in funds. Accordingly, there is nothing suspicious in the fact that "when BSGR paid Pentler, Pentler paid Mamadie Touré".[525] Finally, the Claimants argue that Pentler's payment to Olympia Title in March-April 2011 and Olympia Title's payments to Ms. Touré in May 2012 were not made on behalf of BSGR.[526] Neither BSGR nor Pentler paid Ms. Touré for obtaining her declaration in May 2012.

443. With respect to Mr. Cilins, the Claimants point to the fact that seven senior officials, including Messrs. Doré, Kanté, Nabé, Curtis, Sandé, Kalil Touré and Bangoura, testified that they never met him.[527] In the same vein, not a single witness testified that Messrs. Cilins, Noy or Lev Ran, or their company Pentler intervened in this matter "on behalf of BSGR", save for Mr. Souaré who does not recall whether he met Mr. Cilins or not.[528]

444. The Claimants further argue that BSGR knew nothing about Pentler's contracts with Ms. Touré, which were not made on BSGR's behalf.[529] Ms. Merloni-Horemans, who was not an employee but an agent of the BSG group, testified that she only temporarily administered Pentler, a dormant shell company initially owned by Onyx, until Mr. Noy provided the details of another administrator in November 2006.[530] She only received copies of the contracts "in her capacity as Pentler's fiduciary agent" and did not send them "to anyone within the BSG group".[531]

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523 Reply, Annex 1, para. 83.

524 Reply, Annex 1, para. 85.

525 Reply, Annex 1, para. 86.

526 Reply, Annex 1, paras. 87-88.

527 Reply, para. 347.

528 Reply, para. 348.

529 Reply, Annex 1, para. 19.

530 Reply, Annex 1, paras. 23-25.

531 Reply, Annex 1, para. 27.

445. In connection with Pentler's contract with Ms. Touré dated 8 July 2010, the Claimants assert that it is a forgery.[532] As regards the 3 August 2010 contract, they contend that it had "nothing to do with Simandou" or BSGR, and that it was "modified" to refer to Simandou thus "implicating BSGR".[533] Moreover, in respect of the contracts allegedly concluded between BSGR and Ms. Touré/Matinda, the Claimants persist in arguing that they are forged,[534] whereas they argue that BSGR "genuinely" considered the contracts concluded between Pentler and Ms. Touré/Matinda, as forged until Mr. Noy confirmed that they are authentic.[535]

446. Finally, the Claimants argue that Mr. Cilins' conviction in 2013 for obstruction of justice in the United States did not implicate BSGR. [redacted] that Pentler's business relations were "unrelated to BSGR".[536] Concerning his trips to Florida to meet Ms. Touré, the Claimants argue that, although BSGR "knew that he was going to do that" and that moving her to withdraw her 2010 allegations against BSGR would have been "very useful", BSGR had "no idea" that Mr. Cilins would offer money to Ms. Touré or ask her to destroy documents.[537] For the Claimants, it made no sense to destroy these documents, since there were multiple copies in existence.[538] Mr. Steinmetz confirmed that he did not offer money and was unaware that Mr. Cilins would do so, nor did he ask that documents be destroyed.[539] In view of the fact that Guinea paid Ms. Touré USD 50,000 and that she was offered US citizenship, she clearly had an incentive to try to involve Mr. Steinmetz by baiting Mr. Cilins to "pretend" he had been sent by Mr. Steinmetz. In fact, many people – so say the Claimants – have unduly used Mr. Steinmetz's name in the hope that it would "open doors or draw attention".[540] Finally, the Claimants argue that Mr. Cilins' guilty plea does not

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532 Reply, Annex 1, para. 30.

533 Reply, Annex 1, para. 30.

534 Reply, Annex 1, para. 31.

535 Reply, Annex 1, para. 32.

536 Reply, Annex 1, para. 14, referring to [redacted]

537 Reply, Annex 1, paras. 12-13.

538 Reply, Annex 1, para. 14.

539 Reply, Annex 1, para. 15.

540 Reply, Annex 1, para. 15.

implicate BSGR, since he never expressly stated that he acted as an agent of BSGR when he offered money to Ms. Touré.[541]

447. Turning to the disputed mining rights and starting with the Blocks 1 & 2 Permit, the Claimants argue that, if BSGR had obtained Ms. Touré's assistance since 2006, as alleged by the Respondent, there is no reason why BSGR was only granted its mining rights in December 2008.[542] Various requests were rejected and the mining rights were only granted once BSGR (i) submitted detailed results of its exploration work, as well as (ii) evidence of its technical and financial abilities, (iii) committed to pay a USD 20 million fee and additional development works, and (iv) assumed responsibility for the financial consequences of taking over Rio Tinto's mining areas.[543] For the Claimants, Guinea had an interest in reallocating Blocks 1 & 2 quickly[544] and it is telling that the Respondent filed no witness statement from the members of the Council of Ministers that granted the mining rights to the Claimants.[545]

448. Furthermore, Guinea's own witnesses and evidence fail to establish any undue interference. For the Claimants, President Conté was "genuinely concerned about the mining situation in his country" and "frustrated about the general lack of progress and actual commercialisation of the country's mining resources".[546] Nothing supports the allegation that he ordered to take "decisions in favor of BSGR".[547] For instance, the then Minister of Mines, Ahmed Kanté, stated that "*[t]he President did not give me any instruction*".[548] The evidence further shows that the ministers had no difficulty in disagreeing with President Conté, as illustrated by Mr. Nabé's account that Mr. Souaré rejected President Conté's suggestion to step up the Rio Tinto review.[549] Finally, the evidence of Mr. Kanté and Mr. Kouyaté is contradictory and

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541 Reply, Annex 1, para. 16.

542 Reply, para. 357.

543 Reply, para. 360.

544 Reply, para. 361.

545 Reply, para. 363.

546 Reply, para. 365.

547 Reply, para. 365.

548 Reply, para. 366, referring to [redacted]

549 Reply, para. 369, referring to Nabé (RWS-5), paras. 8-10.

only shows that they are "telling a tale" so as to "stay on the right side of President Condé's government".[550]

449. With respect to the Base Convention, the Claimants state that Guinea "willfully ignored" Mr. Thiam's evidence about the negotiation process of the Base Convention, which was solely the result of "BSGR's own hard work and a fair, arm's length negotiation".[551] The feasibility study for the Zogota project was submitted on 16 December 2009, after two years of exploration work.[552] That study was reviewed by a technical department within the Ministry of Mines, after which an Inter-Ministerial Committee was established on 1 December 2009. The Respondent did not allege that BSGR bribed the members of the technical department,[553] nor is there any evidence that BSGR bribed the Inter-Ministerial Committee. In this context, the Claimants explain that paying a *per diem* for a total amount of USD 1,000 per member was "in accordance with standard practice" and actually requested by Guinea.[554] Moreover, the committee challenged the feasibility study and requested further information, which BSGR promptly submitted on 7 December 2009. In any event, the authority to approve the Base Convention befell on the Council of Ministers and the Respondent has not alleged that the members of the Council had been unduly influenced.[555]

450. Finally, the Claimants deny having bribed Mr. Thiam.[556] There was no special relationship between Mr. Thiam and BSGR.[557] The inference that because Mr. Thiam renewed BSGR's exploration permits for North and South Simandou, he must have been bribed, is simply "ludicrous".[558] The permits were renewed five months after BSGR's request, the delay being caused by the referral of the request to the CPDM.[559] With respect to Blocks 1 & 2,

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550 Reply, para. 372.

551 Reply, para. 373.

552 Reply, para. 374.

553 Reply, para. 377.

554 Reply, para. 379.

555 Reply, paras. 382-383.

556 Reply, paras. 387-413.

557 Reply, para. 391.

558 Reply, para. 392.

559 Reply, para. 394.

Mr. Thiam did not display any favoritism towards BSGR and he rigorously investigated Rio Tinto's allegations against BSGR. In addition, his involvement in BSGR's efforts to find a joint venture partner was "entirely usual and appropriate".[560] Indeed, it was in Guinea's interest that BSGR partnered with a large mining company. In any event, Mr. Thiam did not act for his "personal benefit"[561] and there is no credible evidence that BSGR rewarded him.[562] More specifically, the Claimants state that (i) it was standard practice to pay for travel expenses of ministers "on certain occasions",[563] (ii) BSGR did not pay USD 23,444.26 for travel costs to Mr. Thiam but to BSGR's travel agent,[564] (iii) the informal communications between BSGR and Mr. Thiam are no evidence of corruption,[565] (iv) Mr. Thiam's property purchases are linked to his income as banker and unrelated to his activity as minister, not to speak of the fact that the 711 Duell Road property was not bought by Mr. Thiam, but by a friend.[566] Finally, the Claimants observe that the recent corruption allegations against Mr. Thiam are linked to a Chinese conglomerate and not to BSGR.[567]

451. With respect to the Zogota mining concession, the Claimants stress that Mr. Sakho, the then Vice-President of the Inter-Ministerial Committee, recommended on 19 December 2009 that the Base Convention be ratified. This was done on 19 March 2010, on the day when the mining concession for Zogota was issued. In any event, the Claimants argue that "[t]here is no allegation that BSGR engaged in bribery and corruption" to procure the mining concession.[568]

3. Legal framework applicable to corruption

452. The Parties fundamentally disagree on most aspects of the legal framework applicable to corruption. They disagree whether only Guinean law applies or whether international law

560 Reply, para. 402.

561 Reply, para. 405.

562 Reply, para. 407.

563 Reply, para. 408(i).

564 Reply, para. 408 (iii).

565 Reply, para. 409.

566 Reply, para. 410.

567 Reply, paras. 441-413.

568 Reply, para. 416.

also finds application (a). They further disagree on the scope of Guinean law (b) and international public policy (c) as they relate to corruption. They finally disagree on the burden and the standard of proof (d).

a. Applicable law under Article 42 of the ICSID Convention

453. For the Respondent, both Guinean law and international law govern matters of corruption. Concerning Guinean law, the Respondent asserts that not only criminal law, but also civil and administrative law (*théorie générale de la fraude*) apply.[569] In respect of international law, the Respondent argues that international public policy applies since the Tribunal was constituted under an international instrument.[570]

454. As for the Claimants, in the Request for Arbitration, they argued in general that "[t]he dispute involves Guinea's violation of its obligations under Guinean law and international law".[571] However, in the Reply, they submitted that only Guinean law applies to the issue of corruption.[572] Even if the second sentence of Article 42(1) of the ICSID Convention were to apply, there is no "secondary role to play for international law".[573] According to the Claimants, "three fundamental reasons" justify not applying international law: (i) Guinean law is the "vehicle of consent" in this arbitration, not the ICSID Convention; (ii) Guinea chose not to apply international law to issues of corruption, since it only ratified the UN Convention Against Corruption in 2013 and the African Union Convention on Preventing and Combating Corruption only entered into force in 2012; and (iii) domestic law is to be considered the "objective law" in corruption matters.

455. Article 42(1) of the ICSID Convention contains the following choice of law rule:

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

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569 CM, para. 734; Rejoinder, para. 17; R-PHB1, para. 12.

570 R-PHB1, para. 12.

571 RfA, para. 93.

572 Reply, para. 273.

573 Reply, para. 274.

456. The Parties have not agreed on a governing law, with the result that the Tribunal must look to the second sentence of Article 42(1). That sentence provides for the application of Guinean law and "such rules of international law as may be applicable". As a result, the Tribunal will primarily apply Guinean law and determine if any rules of international law may govern in addition or in lieu of Guinean law. This determination may imply deciding whether a given legal issue is subject to national or to international law, a question that the ICSID Convention leaves open. Prior decisions have confirmed that it is the Tribunal's role to proceed to this allocation.[574]

457. The Tribunal will therefore first describe the content of Guinean law on corruption and then turn to international law. If necessary, it will then decide which law should prevail.

b. Guinean law on corruption

458. The Respondent views the notion of corruption extensively as encompassing "three universal elements", namely "un paiement ou quelconque avantage", "offert à un agent public *ou* à un tiers doté d'une influence apparente ou réelle sur celui-ci", "dans l'intention d'obtenir de la part de l'agent public qu'il entreprenne ou s'abstienne d'entreprendre un acte relevant de ses fonctions".[575] It notes that Guinean law, which is inspired by French law, contains rules against corruption pertaining to civil and administrative law[576] as well as criminal law.[577] For the Respondent, the jurisprudential notion of fraud has been construed extensively to include active trading of influence.[578]

459. By contrast, according to the Claimants, in Articles 192, 194 and 195 of the Criminal Code, Guinean law identifies three criminal offenses in relation to corrupt practices, namely passive corruption, active corruption, and passive trading of influence. The Claimants explain that the offense of active corruption has the following three elements: (i) the promise, offering or giving of offers, promises, gifts or presents; (ii) to a public official; (iii) with the intention of obtaining that the public official acts or refrains from acting. They also stress

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574 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, p. 911 (Exh RL-62); *Burlington Resources Inc. V. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 179 (Exh. CL-22); *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, paras. 116-117.

575 R-PHB1, para. 27.

576 CM, paras 735-737; Rejoinder, paras 36-41.

577 CM, paras 738-739; Rejoinder, paras 42-45.

578 CM, paras. 736-737.

that the Guinean Criminal Code is "very narrow and does not, for example, crimilise [sic] active trading of influence",[579] as "only the solicitation or acceptance of offers and promises is captured by Article 195". Therefore, in reliance on their legal expert, they argue that active trading of influence "does not exist under Guinean law"[580] and that "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".[581]

460. The Tribunal does not consider that only Guinean criminal law is relevant to its assessment.[582] The present proceedings are not aimed at establishing criminal liability, but at determining the admissibility and merits of claims brought forward in arbitration. Therefore, the Tribunal will consider the Guinean legal system in its entirety.

461. In this context, it is worth starting by noting the preamble of the Constitution of the Republic of Guinea which expressly refers to the fight against corruption:

> "Le peuple de Guinée […] réaffirme : […] Sa volonté de promouvoir la bonne gouvernance et de lutter résolument contre la corruption et les crimes économiques. Ces crimes sont imprescriptibles."[583]

462. As for the Guinean Criminal Code, it sanctions three offenses, namely passive corruption, active corruption and passive trading of influence. Specifically, Article 192 of the Criminal Code relates to passive corruption and reads as follows:

> "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 - Etant 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,

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579 C-PHB1, para. 345; Reply, para. 288.

580 Reply, para. 295; First Expert Report of Pierre-Olivier Sur, para. 29.

581 Reply, para. 295.

582 The Claimants' reliance on *Kim v. Uzbekistan* is misplaced here, since the respondent in that case specifically argued that the claimant's conduct was in breach of a specific provision of the Uzbek criminal code. Here, by contrast, the Respondent does not claim that the Claimants' conduct is in breach of a specific provision of the Guinean Criminal Code, but invokes various legal bases, including administrative and civil law.

583 Constitution de la République de Guinée, 7 mai 2010 (Exh. RL-83).

> faire ou s'abstenir de faire un acte de ses fonctions ou de son emploi, juste ou non, mais non sujet à salaire […]."[584]

463. Further, Article 194 of the Criminal Code sanctions active corruption in the following terms:

> "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."[585]

464. Moreover, Article 195 of the Criminal Code addresses passive trading of influence as follows:

> "Sera puni 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 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."[586]

465. The Respondent also cites to Guinean civil and administrative law prohibiting corruption and trading influence[587] and stresses that the Claimants' expert conceded that reference may be made to French law to ascertain the content of Guinean law.[588] Indeed, the Guinean

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584 Code pénal de la République de Guinée, Art. 192 (Exh. RL-36).

585 Code pénal de la République de Guinée, Art. 194 (Exh. RL-36).

586 Code pénal de la République de Guinée, Art. 195 (Exh. RL-36).

587 CM, paras 735-737; Rejoinder, paras 36-41, referring to H.-B. Pouillaude, L'indemnisation d'un fonctionnaire fautif sanctionné hors délai raisonnable, Actualités juridiques de droit administratif, p. 1642 (Exh. RL-33); Conseil d'Etat, 15 octobre 1976, *M. X*, Rec. Lebon, p. 428 (Exh. RL-34); G. Cornu, *Note n° 1 sous "Fraude"*, Vocabulaire juridique (8e ed.), 2007 (Exh. RL-35); S. Renard, *L'acte administratif obtenu par fraude*, Actualités juridiques de droit administratif (2014), p. 782 (Exh. RL-84).

588 Rejoinder, para. 38, referring to First Expert Report of Pierre-Olivier Sur, para. 11.

legal system is strongly influenced by French law, including the French notion of fraud. In the absence of Guinean precedents, the Respondent rightly points out that French case law on fraud adopts an expansive notion.[589] Fraud is indeed defined as "*un acte de mauvaise foi, de tromperie, accompli dans le dessein de préjudicier à [sic] des droits que l'on doit respecter*".[590] Active trading of influence, which is the act of buying a third party's influence over a public official in order to obtain an undue right or advantage, falls within the ambit of such jurisprudential notion of fraud.

466. Similarly, it is noteworthy that the Cour d'appel of Paris has held that influence peddling is contrary to French international public policy:

> "[u]n contrat ayant pour cause et pour objet l'exercice d'un trafic d'influence par le versement de pots-de-vin est contraire à l'ordre public international français ainsi qu'à l'éthique des affaires internationales telle que conçue par la plus grande partie des États de la communauté internationale."[591]

467. To conclude, the Tribunal holds that the notion of corruption under Guinean law includes active and passive bribery and trading of influence. It adds that, even if Guinean law were not to prohibit active trading of influence, *quod non*, the Constitution of Guinea provides that international treaties prevail over national law[592] and that Guinea is bound by treaties containing said prohibition, as will be seen in the following section.

c. International law on corruption

468. The Respondent further relies on international law to submit that international public policy bars acts of influence trading. It asserts that the definition of corruption as a matter of international public policy can be elicited from the following international instruments:

- The OCDE Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997;[593]

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589 The French Conseil d'État "entend assez largement la notion de fraude". Conseil d'État, 15 octobre 1976, *M. X*, Rec. Lebon, p. 428 (Exh. RL-34).

590 CM, paras. 736-737.

591 Société European Gas Turbines SA c. société Westman International Ltd, Cour d'appel de Paris (1Ch. C), 30 septembre 1993.

592 Article 151 reads as follows: "Les traités ou accords régulièrement approuvés ou ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve de réciprocité". Constitution de la République de Guinée, 7 mai 2010 (Exh. RL-83).

593 Convention de l'OCDE sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, 17 décembre 1997 (Exh. RL-22).

- The Criminal Law Convention on Corruption of the Council of Europe of 27 January 1999;[594]
- The Civil Law Convention on Corruption of the Council of Europe of 4 November 1999;[595]
- The African Union Convention on Preventing and Combating Corruption of 11 July 2003;[596]
- The United Nations Convention against Corruption of 31 October 2003;[597] and
- The OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009.[598]

469. The Respondent also refers to the broad definition of corruption in the ECOWAS Protocol on the Fight against Corruption of 21 December 2001 (the "ECOWAS Protocol"), which Guinea ratified on 20 December 2002.

470. For the Respondent, the Claimants' reliance on the award in *Kim v. Uzbekistan* is misplaced since that decision only distinguished between corruption of public officials and corruption in the private sector. While it may be true that international public policy does not extend to corruption in the private sector, so says the Respondent, it does encompass trading of influence to the extent that its aim is to obtain an undue act from a public official.

471. It is the Claimants' position that the Respondent relies on international law because Guinean law does not criminalise active trading of influence. For them, international law has no role to play in a situation where Guinean law exhaustively defines corruption and international public policy lacks the specificity of domestic law. In this context, they rely on *Kim* and in particular on the statement that there is "no clear consensus that the scope of prohibition

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594 Convention pénale du Conseil de l'Europe sur la corruption, 27 janvier 1999 (Exh. RL-23).

595 Convention civile du Conseil de l'Europe sur la corruption, 4 novembre 1999 (Exh. RL-24).

596 Convention de l'Union africaine sur la prévention et la lutte contre la corruption, 12 juillet 2003 (Exh. RL-25).

597 Convention des Nations Unies contre la corruption, 31 octobre 2003 (Exh. RL-26).

598 Recommandation de l'OCDE visant à renforcer la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, 26 novembre 2009 (Exh. RL-27).

on bribery in international public policy at present extends beyond those circumstances that aim at the corruption of government officials".[599]

472. It is undisputed that international law contains a rule prohibiting corruption and bribery and that the international community has adopted a number of instruments to fight corruption.[600] Referring more particularity to the African context, corruption is seen as a "scourge" which has "devastating effects on the economic and social development of the African peoples" and "undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent".[601] The fight against corruption has also been a primary focus on the agenda of many national legislatures.[602] Because it is universally shared, the prohibition of corruption is deemed a matter of truly international or transnational public policy.[603] For instance, in *World Duty Free v. Kenya*, the tribunal stated that "[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy".[604]

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599 C-PHB2, para. 110(iii), referring to *Valdislav Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 598 (Exh. CL-60).

600 See, for instance: United Nations Declaration against Corruption and Bribery in International Commercial Transactions, 16 December 1996, 36 *ILM* 1043 (1997); United Nations Convention against Corruption, 31 Octobre 2003, 43 *ILM* 37 (2004) (Exh. RL-26); Inter-American Convention against Corruption, 20 March 1996, 35 *ILM* 724 (1996); European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 26 May 1997; OECD Convention on Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, 37 *ILM* 4 (1998) (Exh. RL-22); OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, of 26 November 2009 (Exh. RL-27); Council of Europe, Criminal Law Convention on Corruption, ETS No. 173, 27 January 1999 (Exh. RL-23); Council of Europe, Civil Law Convention on Corruption, ETS No. 174, 4 November 1999 (Exh. RL-24); Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, ETS No. 191, 1 February 2005; African Union Convention on Preventing and Combating Corruption, 11 July 2003, 43 *ILM* 5 (2004) (Exh. RL-25).

601 African Union Convention on Preventing and Combating Corruption, 11 July 2003, preambular paragraphs 6, 7, 10, 43 *ILM* 5 (2004) (Exh. RL-25) (Translated from the French).

602 See, for instance: The US Foreign Corrupt Practices Act (1977); UK Bribery Act (2010); The South African Prevention and Combating of Corrupt Activities Act (2004).

603 See, for instance: ICC Cases Nos. 3913, 3916, 6401, reported at ICC Bulletin, *Tackling Corruption in Arbitration*. See also the review of ICC cases in *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, paras. 148-156 (Exh. RL-19).

604 *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 157 (Exh. RL-19).

473. The tribunal in *Niko Resources v. Bangladesh* similarly held that "[i]t is widely accepted that the prohibition of bribery is of such importance for the international legal order that it forms part of what has been described as international or transnational public policy".[605] It is equally well established that an international tribunal is under a duty to uphold international public policy. As stated, for instance, in *Niko Resources v. Bangladesh*, international investment tribunals should be "[m]indful of their responsibility for upholding international public policy".[606]

474. This being so, the Parties diverge on the scope or content of the prohibition of corruption under international public policy. More specifically, they disagree whether the prohibition includes active trading of influence. The content of international public policy in matters of corruption derives from numerous treaties and decisions.

475. Starting with treaties, Article 4 of the African Union Convention on Preventing and Combating Corruption adopts an extensive definition of corruption, which includes active and passive trading of influence. Article 4(1)(b) reads as follows:

> "This Convention is applicable to the following acts of corruption and related offences:
>
> […]
>
> (b) the offering or granting, directly or indirectly, to a public official or any other person, of goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions." (Emphasis added)

476. Article 18(a) of the UN Convention against Corruption also addresses the active form of trading of influence in the following terms:

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605 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras. 431-433 (Exh. RL-20). See also, for instance, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 111 (Exh. RL-62) (stating that corruption is "contrary to international bones mores"); *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 249 (Exh. RL-57) ("It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy"); *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 292 (Exh. RL-21).

606 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ARB/10/18, Procedural Order No. 13, 26 May 2016, para. 7.

> "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act of for any other person."[607]

477. The fact that this provision is formulated in non-mandatory terms (*shall consider adopting*) is indifferent for present purposes. Indeed, as mentioned above, Guinea had already ratified the ECOWAS Protocol on 20 December 2002, which includes active trading of influence, when the UN Convention against Corruption was concluded in 2003.

478. Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions also contains a broad definition of corruption, encompassing influence peddling:

> "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[608]

479. While the Claimants have correctly observed that Guinea has not ratified some of these treaties at the relevant times,[609] they have not disputed – and rightly so – that Guinea has ratified the ECOWAS Protocol, which ratification predates the Claimants' investment in Guinea.

480. The preamble of the ECOWAS Protocol states that the signatories are conscious of the "grave consequences of corruption on investment, economic growth and democracy" and that "transparency and good governance strengthen democratic institutions". Article 6.1 of the ECOWAS Protocol then adopts a broad definition of corruption, which encompasses

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607 Convention des Nations Unies contre la corruption, 31 octobre 2003 (Exh. RL-26).

608 Convention de l'OCDE sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, 17 décembre 1997 (Exh. RL-22) (Emphasis added by the Tribunal).

609 For instance, Guinea ratified the African Union Convention on Preventing and Combating Corruption on 5 March 2012 and the UN Convention Against Corruption on 28 June 2013.

active and passive bribery and trading of influence. In particular, subparagraph (c) applies to active trading of influence:

> "Any person who promises to offer or to grant directly or indirectly any undue advantage to any person who declares or confirms that he can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether or not this influence had been exercised or not, or whether the supposed influence had the desired result or not."[610]

481. In other words, an attempt to exercise influence is sufficient to be captured by the definition of corruption and it is not necessary that the person asserting that he or she can influence a public decision-maker actually exercised his or her influence or achieved the desired result.

482. It is true that, following the ratification of the ECOWAS Protocol, Guinea did not amend its Criminal Code to expressly cover active trading of influence. Yet, pursuant to its Article 3, the ECOWAS Protocol applies "whenever an act of corruption [as defined in Article 6(1)] is committed or produces some effects in a State Party". On the basis of such clear wording and of Article 151 of the Guinean Constitution which stipulates the prevalence of international over national law, the Tribunal is of the view that the Protocol applies even when a Contracting State has not adopted the "necessary legislative and other measures to make the acts of corruption enumerated in this Protocol criminal offences" under Article 6(2) of the Protocol.

483. Turning second to decisions of arbitral tribunals, one notes that contracts providing for influence trading have been held contrary to international public policy. For instance, an ICC tribunal held:

> "Par ailleurs, une majorité de la doctrine, confortée par de nombreuses sentences arbitrales, considère que l'immoralité des pratiques de corruption et de trafic d'influence est fondée sur une règle véritablement internationale de telle sorte qu'il n'est pas douteux que celle-ci appartient à l'ordre public transnational."[611]

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610 Protocole sur la lutte contre la corruption de la CEDEAO, Art. 6.1(c) (Exh. RL-80).

611 ICC case n° 12990, Final Award, December 2005, para. 189 *in* ICC International Court of Arbitration Bulletin, Vol. 24, Special Supplement, 2013, p. 52. See also: ICC case n° 13515, Final Award, April 2006 *in* ICC International Court of Arbitration Bulletin, Vol. 24, Special Supplement, 2013, p. 70 (Emphasis added by the Tribunal).

484. Further, a number of tribunals held that the consequence of corruption, including active trading of influence, is that (all or part of the) claims may be deemed inadmissible or denied on the merits if the underlying investment was made through corrupt practices. In *World Duty Free v. Kenya*, the tribunal concluded that "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal".[612] In *Niko Resources v. Bangladesh*, the tribunal also held that contracts that are in conflict with international public policy "cannot be given effect by arbitrators",[613] further adding that various domestic courts and arbitral tribunals "have found that contracts having influence peddling or bribery as their objectives or motives were void or unenforceable".[614] Other tribunals have shared this conclusion.[615]

485. On the basis of these authorities, the Tribunal reaches the conclusion that international public policy against corruption prohibits, in addition to bribery, both the passive and active forms of trading of influence, to the extent that the latter is exercised to directly or indirectly obtain an undue advantage from a public official. It can be left open whether the relevant legal instruments also target corruption in the private sector as this is not the situation it faces here. It also concludes that conduct irreconcilable with international public policy leads to a finding of inadmissibility of the claims.

486. In sum, the Tribunal holds that active bribery and active trading of influence aimed at obtaining an undue advantage from a public official are prohibited as a matter of Guinean law and international law. Returning to the issue of the law applicable pursuant to Article 42(1) of tte ICSID Convention, the Tribunal can dispense with deciding which of national or international law should prevail as they both reach the same result. In connection with the legal consequence of a finding of breach, international law, which provides for the

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612 *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 157 (Exh. RL-19).

613 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, para. 434 (Exh. RL-20).

614 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, para. 436 (Exh. RL-20).

615 See, for instance: *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/03, Award, 4 October 2013, para. 292 (Exh. RL-21); *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 493 (Exh. RL-79) ("particularly serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy").

inadmissibility of the claims, appears more specific than municipal law. Accordingly, the Tribunal will resort to international law in respect of such legal consequence.

d. Burden and standard of proof

487. Starting with the burden of proof, the Respondent argues that the same general rules apply to instances of corruption as in any other international arbitration.[616] For the Respondent, the rule that each party must prove the facts it alleges is a general principle of international law.[617] Moreover, without pretending to shift the burden of proof,[618] the Respondent argues that the evidence which it brought forward go beyond a *prima facie* demonstration, with the result that the Claimants must now rebut its evidence with precision.[619]

488. The Claimants argue that Guinean law governs the burden of proof and that Guinea has failed to establish "what the burden of proof is under Guinean law".[620] In the event that the Tribunal were to apply international law to this issue, the Claimants are of the view that each party must prove the facts upon which it relies. They deny that the burden of proof shifts to the other party if the one carrying the burden has only established the facts on a *prima facie* basis.[621]

489. In the light of the fact that the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations, the Tribunal deems it appropriate to apply international law to the burden of proof.[622] The Parties agree, and rightly so, that each Party carries the burden of proving the facts on which it relies. Indeed, the maxim *actori incumbit probatio*, or the principle that a party has the burden of proving the facts which it alleges, is widely recognized and applied by international courts and tribunals. The International Court of Justice and arbitral tribunals acting under the ICSID Convention have regarded this rule as a general principle of law.[623] Since the Respondent

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616 CM, para. 743.

617 CM, para. 745.

618 Rejoinder, para. 55.

619 CM, para. 747.

620 Reply, para. 301.

621 Reply, paras 304-306.

622 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 237 (Exh. RL-21).

623 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 437, para. 101; Pulp Mills on the River

is the one alleging acts of corruption, it is also the one carrying the burden of proving such acts. In light of the conclusions that the Tribunal will reach on the evidence in connection with of acts of corruption in the continuation of its analysis, it can dispense with entering into the Parties' debate about shifting the burden of proof.

490. A different question is the standard by which proof adduced in accordance with the principle just set out must be measured. For the Respondent, the Tribunal need not apply any standard of proof, since only the arbitrators' "*intime conviction*" matters.[624] If the Tribunal were nevertheless minded to apply a standard of proof, such standard should be the one applied in civil law countries, namely "balance of probabilities" or "reasonable certainty". The cases where tribunals applied a higher standard of proof are isolated and relate to instances where there was no proof at all. In *Kim*, the tribunal held that the standard of proof should be the one of the host State's law. Since neither Guinean law nor international public policy provide for a standard of proof, it befalls on the Tribunal to exercise its "pouvoir d'appréciation souveraine".[625]

491. By contrast, the Claimants submit that, as a "very serious offense", corruption requires the application of a heightened standard of proof under both criminal and civil law. They put forward that corruption must be proven with clear and convincing evidence, a standard "widely applied by international arbitral tribunals",[626] especially where the party making the allegation is itself engaged in the corruption.[627] In support, the Claimants point to decisions where tribunals have applied a high standard of proof. *African Holding v. Republic of Congo* referred to the notion of "*preuve irréfutable*"; *Saba Fakes v. Republic of Turkey* held that "the burden of proof of any allegations of impropriety is particularly heavy"; *Fraport v. Philippines, EDF v. Romania* and *Siag v. Egypt* made reference to the standard of clear and

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Uruguay (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010, p. 71, para. 162; *Metal-Tech Ltd. v. Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 237 (Exh. RL-21); *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 177; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.13; *Apotex Holdings Inc. and Apotex Inc. v. United States of* America, ICSID Case No. ARB(AF)/12/1, 25 August 2014, paras. 8.8-8.9; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, UNICTRAL, Interim Award, 1 December 2008, para. 138.

624 R-PHB1, para. 31. See also: CM, paras. 748-764; Rejoinder, paras. 67-107.

625 R-PHB1, para. 34.

626 Reply, paras. 309, 315.

627 Reply, para. 313.

convincing evidence, the latter observing that "[i]t is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof"; and *TSA Spectrum v. Argentine Republic* spoke of "the most rigorous level of proof".[628]

492. Except for the Criminal Code which does not apply here, Guinean law does not prescribe a specific standard of proof in matters of corruption. The Tribunal will thus look to international law and to the practice of international tribunals.

493. While it is clear that the criminal law standard beyond reasonable doubt finds no application in arbitration and that mere allegations and innuendos are no proof,[629] there appears to be no settled case law on the standard for proving corruption. Essentially, one can distinguish two groups of cases. A first group applies a heightened standard compared to the measure of proof for facts underlying other claims due to the gravity of a finding of corruption.[630] These are the decisions that resort to the common law standard of clear and convincing evidence, or merely state that the "evidentiary threshold must be high"[631] or that the "case needs to be clearly made out".[632] A second group is less demanding and applies the same standard like for any other claim. Within this group, one finds the cases which employ the common law standards of balance of probabilities or preponderance of evidence or the civil law standard of *intime conviction du juge*.[633] Others in this group adopt the standard of

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628 Reply, para. 319.

629 *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, paras. 150, 154.

630 *African Holding Company of America, Inc et Société Africaine de Construction au Congo S.A.R.L. c. La République Démocratique du Congo*, Affaire CIRDI n° ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008, para. 52 (Exh. CL-44); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 326; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 131 (Exh. CL-45); *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, para. 172 (Exh. CL-47); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 477; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 492.

631 *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 390.

632 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 43.

633 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 124; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 125; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244.

reasonable certainty,[634] which appears close to *intime conviction*. In addition, some tribunals use a hybrid approach[635] or refer to varying formulations, such as for instance evidence having a "sufficient level of cogency".[636]

494. Because corruption is a matter of international public policy and because the activity involving corruption is difficult to prove by nature, the Tribunal deems it reasonable not to resort to a heightened standard. It will thus resort to *intime conviction* or reasonable certainty. In other words, the Tribunal will only make a finding of corruption if, on the basis of the record, it is reasonably certain that acts of corruption have been committed.

495. Irrespective of the standard of proof, in light of the difficulties inherent in establishing corruption, a number of tribunals have expressed the view, which this Tribunal shares, that corruption may be established through circumstantial evidence. *Methanex v. United States*, for instance, speaks of "sufficient circumstantial evidence to justify inferring" the existence of corruption.[637]

496. When assessing circumstantial evidence, tribunals are increasingly relying on so-called red flags, i.e. facts which do not prove corruption in and of themselves but signal conduct of potential concern. A combination of facts of the same nature or, in other terms a cumulation of red flags may constitute evidence of corruption. Some tribunals have also referred to this approach as "connecting the dots".[638]

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634 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 243 (Exh. RL-21).

635 *Getma International, NCT Necotrans, Getma International Investissements, NCT Infrastructure & Logistique v. Guinea*, ICSID Case No. ARB/11/29, Award, 16 August 2016, para. 184 (Exh RL-102). In Kim v. Uzbekistan, the tribunal assessed the impugned conduct against two different standards, i.e. clear and convincing evidence and reasonable certainty. *Valdislav Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 614 (Exh. CL-60).

636 *ECE Projektmanagement International GmbH, Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbG & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, paras. 4.876, 4.879, 4.931.

637 *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part III, Chapter B, para. 38. See also: *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 243; *Mr Albert Jan Ostergetel and Mrs Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 303; *ECE Projektmanagement International GmbH, Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbG & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, paras. 4.876.

638 See, for instance: *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part III, Chapter B, para. 3; *ECE Projektmanagement International GmbH, Kommanditgesellschaft Panta Achtundsechzigste*

497. Professional and industry associations seeking to fight corruption have drawn up list of red flags. For instance, the International Chamber of Commerce ("ICC") issued in 2010 the ICC Guidelines on Agents, Intermediaries and Other Third Parties, identifying the following red flags in connection with intermediaries :[639]

> "[T]he third party's flawed background or reputation or the flawed background or reputation of an individual or enterprise represented by the third party;
>
> The operation takes place in a country known for corrupt payments;
>
> The third party is suggested by a public official, particularly one with discretionary authority over the business at issue;
>
> The third party objects to representations regarding compliance with anti-corruption laws or other applicable laws;
>
> The third party has a close personal or family relationship, or business relationship, with a public official or relative of an official;
>
> The third party does not reside or have a significant business presence in the country where the customer or project is located;
>
> The third party is a shell company or has some other non-transparent corporate structure;
>
> The only qualification the third party brings to the venture is influence over public officials, or the third party claims that he can held secure a contract because he knows the right people;
>
> The need for the third party arises just before or after a contract is to be awarded;
>
> The third party requires that his or her identity or, if the third party is an enterprise, the identity of the enterprise's owners, principals or employees, not be disclosed;
>
> The third party's commission or fee seems disproportionate in relation to the services to be rendered;
>
> The third party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract;

Grundstücksgesellschaft mbG & Co v. Czech Republic, PCA Case No. 2010-5, Award, 19 September 2013, paras. 4.879.

639 ICC Guidelines on Agents, Intermediaries and Other Third Parties, 19 November 2010, pp. 5-6 (Exh. RL-51).

> The third party requests an increase in an agreed commission in order for the third party to "take care" of some people or cut some red tape; or
>
> The third party requests unusual contract terms or payment arrangements that raise local law issues, payments in cash, advance payments, payment in another country's currency, payment to an individual or entity that is not the contracting individual/entity, payment to a numbered bank account or a bank account not held by the contracting individual/entity, or payment into a country that is not the contracting individual/entity's country of registration or the country where the services are performed."

498. In assessing the facts and the evidence before it, the Tribunal will bear these red flags in mind, knowing that not all of them need to be present for a pattern of corruption to emerge and that some may carry more weight than others. In the end, what will matter is that the Tribunal is convinced or reasonably certain that corruption has occurred on the basis of an overall assessment of the record.

4. Merits of the Respondent's allegations of corruption

a. Introductory remarks

499. In this section, the Tribunal will address the Respondent's allegations of corruption. The Respondent submits that the Claimants obtained all of their mining rights through corrupt practices. There is "overwhelming evidence", both direct and circumstantial, says the Respondent, that the Claimants put in place a "fraudulent scheme". The Respondent points to the following elements:

- 15 "*pacts of corruption*", the authenticity of which is now established according to the Respondent, either between BSGR and third parties or between BSGR's intermediary Pentler and third parties, providing for "substantial remunerations" for the local intermediaries. Eleven of these pacts were concluded with Ms. Touré, the fourth wife of President Conté;
- BSGR's effectively benefitting from the influence of Ms. Touré and President Conté to obtain the mining rights;
- Evidence that the intermediaries were paid for exerting their influence;
- BSGR's attempts to dissimulate and destroy evidence of their fraudulous conduct.

500. The Claimants essentially respond that there is no evidence that (i) the mining rights were obtained through corruption, (ii) the so-called "pacts of corruption" (which qualification is

contested by the Claimants) are authentic, (iii) the ministers or President Conté were pressured or influenced by Ms. Touré, and (iv) any of the alleged pacts were performed. More specifically, the Claimants contend that there is no evidence that President Conté was bribed. Nor is there evidence that the Claimants bought Ms. Touré's influence or that she had any influence over President Conté or government officials. There is no evidence either that the Claimants bought the influence of Ms. Touré's half-brother, Ibrahima Sory Touré ("IST") or paid IST to exert influence on the President or other government officials. Finally, there is no evidence that the Claimants bribed any public official to obtain the Base Convention and the mining concession.

501. The corruption allegations target two sets of mining permits covering different mining areas: the exploration permits for North and South Simandou, on the one hand, and the mining permits for Blocks 1 & 2, on the other. The Tribunal will address the corruption allegations for these two sets of permits separately. However, before doing so, the Tribunal will address the Claimants' assertion according to which several documents on record are forged or of doubtful authenticity.

b. Authenticity of Disputed Documents

i. *Introductory considerations*

502. In their pre-hearing written submissions, the Claimants alleged that certain exhibits which the Respondent invoked to prove corruption were forgeries. Later in the proceedings, at the end of the hearing on preliminary objections and merits, the Claimants raised doubts about the authenticity of additional documents (together the "Disputed Documents"). At the end of the hearing, in light of the relevance of the Disputed Documents and their potential impact on the outcome of the dispute, the Tribunal consulted the Parties on the prospect of a forensic inspection to ascertain the authenticity of the documents ("Document Inspection").

503. After having heard the Parties, the Tribunal appointed Messrs. Welch and LaPorte as forensic experts on 1 August 2017 (the "Experts") and set out the Experts' Terms of Reference, which the Experts signed on 24 October 2017. The Experts conducted the Document Inspection between 31 October and 3 November 2017 in New York.

504. In accordance with the Terms of Reference, the Experts submitted a Preliminary Expert Report (the "Preliminary Report") which the Tribunal transmitted to the Parties on 3 January 2018. The Parties commented on the Preliminary Report on 23 January 2018, after which

the Experts handed in their final report (the "Final Report") on 12 February 2018. The Experts were to be heard on the Report at a hearing starting on 26 March 2018.

505. On 12 March 2018, the Claimants applied for the disqualification of the Experts and the exclusion of the Final Report (the "Disqualification Request"). They took issue with paragraphs 8 to 12 of the Final Report, which are quoted here in full for a better understanding of what follows:

> "8. As the Tribunal-appointed experts, it is our duty to inform the Tribunal of some concerns that we have with respect to the actions taken by BSGR and the "BSGR Comments". Per paragraph 17 of the Terms of Reference (ToR) that was executed on 24 October 2017, Party-appointed experts were permitted to attend the inspection and ask questions at the end of each day. The sessions were cordial and informative. The "original" Party-appointed experts for BSGR were present and asked questions that we responded to appropriately. The "original" Party-appointed experts appeared to take notes over the course of the fourday inspection and were given the opportunity to observe our testing procedures. Also, we provided over 1100 electronic files, some of which contained additional electronic files, comprising over 10 gigabytes of information and data. However, BSGR has now retained a "new expert" that was never designated as a Party-appointed expert. We defer to the Tribunal on whether this is a breach of the Terms of Reference; however, we do have a number of other concerns that the Tribunal should be made aware of, not including whether BSGR breached the Terms of Reference.
>
> 9. In our combined 50 years of experience, it appears as though BSGR has engaged in what we commonly refer to in our industry as "shopping for an expert". That is, parties are known to seek out an expert to advocate on their behalf. In this case, BSGR's "original" Party-appointed experts, Mr. Dennis Ryan and Ms. Laura Mancebo, are both Board Certified through the American Board of Forensic Document Examiners (ABFDE), and therefore have demonstrated that they successfully completed a rigorous training program and whose competency in the forensic document field has been tested. It appears that the "original" Party-appointed experts, both of whom are Board Certified, have not issued any comments or findings with respect to their observations of the extensive testing that took place during the inspection phase and presumably reviewing the materials we provided. In some cases, when an expert provides conclusions to a party that do not significantly deviate from an opposing expert and do not support the position of their client then the party may seek out another expert that will support their position. This practice is not entirely uncommon in litigation. However, BSGR has now engaged a "new expert" who did not attend the four day inspection and therefore was not given the opportunity to observe all of the testing and ask questions per the ToR, which has now resulted in a number of queries that would not have been necessary had the "new expert" been present for the testing.

10. We also have a major concern regarding queries 12 through 14. BSGR explicitly states that C-0112, C-0113 and C-0356 were marked “Forged”. First, C-0112, C-0113 and C-0356 are not “Disputed Documents” and not considered as part of the evidence submitted by the FBI. Second, BSGR appears to have inevitably tainted and biased their “new expert” because they are providing biasing information to their expert that some documents were pre-determined to be fraudulent, which to our knowledge have never been forensically examined. Moreover, BSGR and their “new expert” suggest that the Tribunal-appointed experts should consider these documents when reaching our conclusions, but they were not identified as Disputed Documents and were not submitted as “Comparator Documents.” We have no background information regarding these documents such as who marked them “forged”, why they were marked “forged” and what evidence was present to determine they were “forged”. Third, the “new expert” now suggests that we should consider these documents because they are marked “forged”. This is highly inappropriate as BSGR has now tainted the “new expert” with contextual information that has no foundation.

11. We are also concerned that BSGR has not been forthright and did not act in good faith with respect to their request for an extension to respond to the PR on 11 January 2018. As noted in our response on 11 January 2018 regarding BSGR’s request, we were diligent in meeting the deadlines that were agreed upon by all parties. We blocked off our schedules in advance and worked through the Holiday season to honor the ToR. Ultimately, we deferred to the discretion of the Tribunal on whether BSGR’s request was reasonable and justified given that they should have planned appropriately based on the previously agreed upon timeline. It seems obvious that BSGR made their request for an extension because the “original experts” did not dispute the testing we performed or our final conclusions, and then BSGR likely began their search for the “new expert.” In our opinion, BSGR did not, in good faith, disclose their reasoning for an extension as it appears they were seeking a “new expert” to advocate for them.

12. Also, per paragraph 21 and 22 of the ToR, both Parties were to provide comment; however, BSGR instead has provided sixty-five (65) queries, the majority of which are unnecessary if the PR and the supporting data were reviewed thoroughly. Even more concerning is that posing questions in this manner, some of which are rhetorical and without background or foundation, can create confusion for non-experts. Moreover, unlike the Republic of Guinea, BSGR has not provided any comments with respect to whether their “new expert” believes that the Disputed Documents are fraudulent. Nor did they allow their “original experts” provide any comments. Although BSGR’s response does not provide comments, and instead is designed like a cross examination, we opted to provide a response to each of the sixty-five (65) queries in order to mitigate any confusion regarding our final opinion that there is no evidence to show that the Disputed Documents are fraudulent.”

506. A hearing took place as scheduled from 26 to 27 March 2018 in Paris. The purpose was to address the Claimants' Disqualification Request and the authenticity of the Disputed Documents. During the procedural discussion at the end of the hearing, it was agreed that the Tribunal would decide on the Disqualification Request promptly without reasons and that the reasons would be supplied at a later date. On 4 April 2018, the Tribunal informed the Parties of its decision to deny the Disqualification Request. Before turning to the authenticity of the Disputed Documents, the Tribunal will now provide the reasons for such denial.

ii. *The Claimants' request to disqualify the Experts and exclude the Final Report*

(a) Parties' positions

(i) Claimants' position

507. The Claimants submit that the conduct of the Experts has compromised the integrity of the arbitration. In their view, the statements in paragraphs 8 to 12 of the Final Report "raise justifiable doubts as to [the Experts'] impartiality to serve as tribunal-appointed experts in this matter".[640]

508. For the Claimants, Tribunal-appointed Experts must meet the same requirements as arbitrators under Articles 14 and 57 of the ICSID Convention, namely impartiality and independence.[641] Like for arbitrators, proof of actual dependence or bias is not required, as it is sufficient to establish the appearance of bias based on objective elements. Moreover, in respect of the request to strike the report from the record, the Claimants submit that the Tribunal has the power to declare evidence inadmissible pursuant to ICSID Arbitration Rule 34(1).

509. The Claimants point to the following accusations proffered by the Experts against BSGR, its counsel and/or its expert: (i) expert shopping, (ii) appointing a non-qualified expert, (iii) raising unnecessary questions, (iv) biasing its expert, (v) failing to act in good faith, (vi) failing to review the Preliminary Report and the supporting data thoroughly, and (vii)

640 Proposal to Disqualify the Tribunal-appointed Experts of 12 March 2018, para. 1.

641 Proposal, paras. 27-28 and 30-32.

creating confusion for non-experts.[642] For the Claimants, these accusations are wholly unwarranted.

510. First, the Claimants deny having engaged in expert shopping. They stress that their first experts stated that they disagreed with the findings in the Preliminary Report.[643] They submit that the Experts' allegations attack the credibility, professionalism and independence of the Claimants' new expert, Mr. Robert Radley, and create "in and of themselves a very strong appearance of bias*".*

511. Second, the Claimants assert that Mr. Radley is highly experienced and competent. Courts and tribunals have routinely praised his work and ability to act independently. He adheres to English Court rules on expert evidence and is an active member of the American Society of Questioned Document Examiners ("ASQDE").

512. Third, it is the Claimants' submission that the Experts have no power to assess a Party's conduct; only the Tribunal has such power. The Experts attacked the Claimants by stating that they did not act in good faith by not disclosing the true reason for seeking an extension to file comments on the Preliminary Report, when the extension request "was absolutely justified".[644]

513. Fourth, the Claimants contend that the Experts' statement that they raised unnecessary questions is "inappropriate".[645] It adds to the appearance of bias, since the Claimants' comments on the Preliminary Report related to findings made by the Experts after the inspection, and the questions were prepared with the assistance of Mr. Radley.[646]

514. Fifth, the Claimants submit that the Experts raise yet another "direct and unwarranted attack" accusing them of biasing their expert.[647] This accusation suggests that the Experts did not properly engage with Mr. Radley's views "because they considered him to be tainted

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642 Proposal, para. 21.

643 Proposal, paras. 39-40, refering to Letter of Mr Dennis Ryan to Mishcon de Reya dated 8 March 2018 (Exh. C-376).

644 Proposal, paras. 68-69.

645 Proposal, para. 74.

646 Proposal, paras. 74-76.

647 Proposal, para. 79.

and biased".[648] Indeed, the Experts only incorporated edits into the Final Report in relation to 5 out of the 65 comments made by the Claimants.[649]

515. These unwarranted accusations must be considered cumulatively, so say the Claimants, as a result of which any fair-minded observer would have reasonable doubts on the impartiality of an expert putting forward such accusations.[650]

516. Finally, the Claimants submit that the inadmissibility of the Final Report "is the *only* appropriate remedy".[651] For them, the entirety of the Final Report is tainted.[652] In this context, the Tribunal should also consider that, if declared admissible, the Final Report may well find its way into a number of parallel proceedings, where BSGR will have no opportunity "to challenge the Experts or raise its concerns about the impartiality of the Experts".[653]

(ii) Respondent's position

517. For the Respondent, none of the arguments of the Claimants justifies the challenge of the Experts or the exclusion of the Final Report.[654] Therefore, the Respondent asks that the Tribunal deny the Disqualification Request[655] It starts by observing that the conclusions of the Final Report fully coincide with other evidence in the record.[656] Guinea also stresses that the Claimants did not challenge the Experts' independence nor the quality of their work during the inspection process.

518. In terms of applicable standard, the Respondent finds the Claimants' reliance on Article 57 of the ICSID Convention misplaced, resulting in an "unjustified amalgam" between the challenges of arbitrators and of Tribunal-appointed Experts.[657] There is a "fundamental difference", says the Respondent, between the roles of arbitrators and experts, the former

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[648] Proposal, para. 81.

[649] Proposal, para. 81.

[650] Proposal, para. 82.

[651] Proposal, para. 100 (Emphasis in the original).

[652] Proposal, para. 101.

[653] Proposal, para. 102.

[654] Response of the Republic of Guinea to Claimants' Proposal to Disqualify the Tribunal-appointed Experts of 22 March 2018, para. 13.

[655] Response, para. 143.

[656] Response, para. 5.

[657] Response, paras. 43-45; Tr. (DA) (FR), Day 2, 86:3-5 (Jaeger).

having to decide a dispute whereas the latter only provide evidence.[658] Moreover, while the ICSID Convention is silent on the criteria for the disqualification of Tribunal-appointed Experts, Article 6.2 of the IBA Rules on Evidence only refers to the independence and qualifications of an expert. All other considerations, such as impartiality, are only relevant to the Tribunal's assessment of the evidence provided by the Experts.[659]

519. Moreover, assuming that Article 57 of the ICSID Convention were to apply, the Claimants would have to demonstrate the "existence of a manifest and clear lack of impartiality, susceptible of convincing, without any in-depth analysis, a reasonable observer, after having heard the Experts".[660]

520. In addition, Guinea submits that the Claimants fail to establish an "intelligible standard" of admissibility of the Final Report and invoke cases that lack pertinence.[661] Further, the Respondent notes that the criteria enumerated in Article 9.2 of the IBA Rules on Evidence could serve as a reasonable standard. This provision indeed allows a tribunal to declare only part of an expert opinion inadmissible.[662]

521. According to the Respondent, the Experts remained within their mandate by alerting the Tribunal to conduct which they deemed improper. Their comments in this respect do not show partiality. First, the Experts made no defamatory statements.[663] Their comment on expert shopping only reflected what they were observing.[664] Second, in connection with the comment on good faith, the Experts were correct to advise the Tribunal if they considered it their duty. In any event, their concerns proved correct as was demonstrated by the disconnect between the Claimants' alleged reason for seeking an extension and the intervention of their new expert. Third, the Experts were right to criticize the number and nature of the questions asked by the Claimants about the Preliminary Report; several questions actually concerned documents that were not part of the inspection. Fourth, the

658 Response, para. 47 (Translated from the French); Tr. (DA) (FR), Day 2, 86:6-11 (Jaeger).

659 Response, para. 53.

660 Response, para. 66 (Translated from the French).

661 Response, paras. 67-68.

662 Response, paras. 81-82.

663 Response, para. 93.

664 Response, para. 94.

Experts' observations on tainting the expert were justified, as "[t]he mere reference to documents that were not part of the inspection justified the Experts' reaction".[665]

522. Furthermore, the Respondent emphasizes that the Experts made no comment on Mr. Radley's competence and qualifications.[666] The reference to an expert's accreditation does not evince bias.[667] In addition, lauding the Claimants' first experts does not mean criticizing their second expert.[668] In any event, had the Experts considered that Mr. Radley was not qualified, they would not have incorporated comments of his in the Final Report.[669]

523. Finally, the Respondent underlines that the Claimants did not challenge the scientific work undertaken by the Experts. The Claimants do not allege that the Preliminary Report was tainted by partiality.[670] Mr. Radley himself praised the thorough and extensive examination conducted by the Experts.[671] Accordingly, it is clear that the alleged partiality did not affect the Experts' scientific evaluation.[672]

524. In sum, the Respondent submits that the Experts did not falter in their duty to remain impartial. They merely expressed their opinion based on a *prima facie* assessment of facts which they had observed.[673] Accordingly, the Final Report is admissible. In any event, if the Tribunal takes issue with paragraphs 8 to 12 of the Final Report, it should disregard these passages and rely on the remainder of the report.[674]

(b) Analysis

525. It is common ground – and rightly so – that the Tribunal has the power to decide the Disqualification Request. This power derives from Articles 43 and 44 of the ICSID Convention and ICSID Arbitration Rule 34(1).

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665 Response, para. 111 (Translated from the French).

666 Response, paras. 114, 116.

667 Response, para. 115.

668 Response, para. 116.

669 Response, para. 118.

670 Response, para. 124.

671 Response, para. 129.

672 Response, para. 124.

673 Response, para. 134.

674 Response, para. 142.

526. There is no provision in the ICSID framework contemplating the disqualification of a tribunal-appointed expert. The Claimants resort to Article 57 of the ICSID Convention by analogy, a proposition that Guinea opposes arguing that the decision-making function of arbitrators must be distinguished from the role of experts, which is limited to giving evidence.

527. By contrast, Article 6.2 of the IBA Rules on Evidence, to which the Tribunal may look for guidance according to PO1, [675] allows a Party to object against a tribunal-appointed expert at the time of appointment or later. This latter possibility is stipulated in the following terms:

> "After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's *qualifications or independence* only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take." (Emphasis added)

528. This provision only foresees objections to the qualifications or independence of Tribunal-appointed Experts. It does not mention impartiality. Neither does it speak of disqualification or similar terms. Be this as it may, the Tribunal can leave it open whether a party may seek the disqualification of a tribunal-appointed expert for lack of impartiality during the course of his or her mandate. Indeed, the Experts have produced the Final Report which is a piece of evidence in the record of these proceedings. ICSID Arbitration Rule 34(1) provides that the Tribunal is the judge of the admissibility and weight of the evidence. As as result, it may discard evidence, if circumstances so justify. Similarly, Article 9(1) and (2) of the IBA Rules on Evidence provides that the Tribunal "shall determine the admissibility, relevance, materiality and weight of evidence" and "shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for […] (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling".

529. Having canvassed the legal framework, the Tribunal can now address the facts and submissions. The Claimants take issue with paragraphs 8 to 12 of the Final Report. More specifically, they consider that the criticisms contained in these passages (reproduced above at paragraphs 505) raise reasonable doubts about the Experts' impartiality.[676]

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675 Paragraph 25.1 PO1. Further, paragraph 1 of the Terms of Reference of the Tribunal-appointed Experts refers to Article 6(1) of the IBA Rules on Evidence.

676 Proposal, para. 21.

530. Paragraphs 8 to 12 of the Final Report address events that post-date the issuance of the Preliminary Report. The Claimants raise no concern about the Experts' impartiality during the inspection procedure and in relation with the Preliminary Report. That report already contains the bulk of the Experts' scientific findings as well as their conclusions, which remained unchanged in the Final Report and in the Experts' oral testimony. Hence, the Tribunal does not see how the views reflected in paragraphs 8 to 12 about facts that occurred *after the Preliminary Report* could have influenced the Experts' findings that were *already present in the Preliminary Report*. As a consequence, save possibly for the litigious paragraphs that are discussed below, there is no basis for declaring the Final Report inadmissible. Similarly, there is no basis for disqualifying the Experts as a result of the assessments made in these paragraphs.

531. This conclusion is reinforced by the fact that the Experts took into account a number of the Claimants' comments to the Preliminary Report and consequently made amendments to the Final Report. They in particular modified the Final Report in response to five of the questions asked by the Claimants.

532. There remains the question whether paragraphs 8 to 12 must be declared inadmissible. The Tribunal agrees with the Claimants that the Experts use strong language in several places, and that some of their concerns are speculative. That said, the Tribunal understands that the Experts' controversial views were prompted by their "duty to inform the Tribunal of some concerns". Moreover, they qualified their remarks with terms such as "in our opinion", "it appears", "it seems". They also carried out their tasks regardless of the concerns expressed, deferring to the Tribunal to decide whether any consequences were in order.

533. More significantly, certain concerns expressed by the Experts have proven true. For instance, it was established that the Claimants contacted a new expert on 8 January 2018 that is five days after having received the Preliminary Report. It has also been shown that the Claimants' request for an extension of their time-limit to comment on the Preliminary Report was actually prompted by their new expert,[677] when they kept silent on the change of experts in the communication seeking the extension.

534. Similarly, Mr. Radley stated that he played no role in drawing up the 65 questions submitted by the Claimants.[678] His lack of involvement could likely explain the concern raised by the

[677] Tr. (DA), Day 2, 37:16-18, 42:12-14 (Ostrove, Radley).

[678] Tr. (DA), Day 2, 43:7-45:5 (Ostrove, Radley).

Experts that some of these questions were "rhetorical and without background or foundation".[679]

535. More generally, the Tribunal denotes no *animus* in paragraphs 8 to 12 on the part of the Experts vis-à-vis Mr. Radley and the Claimants. This was in particular confirmed during the Authenticity Hearing, when the Experts acknowledged Mr. Radley's standing and professionalism.[680]

536. In sum, the Tribunal is of the view that the Final Report does not show bias against the Claimants or their expert. Accordingly, it denies the Disqualification Request, which as defined above includes the application to exclude the Final Report from the record. That said, the Tribunal does not need to rely on paragraphs 8 to 12 to reach a decision on the authenticity of the Disputed Documents. It will thus disregard these paragraphs in its analysis.

iii. *Identification of the Disputed Documents*

537. As stated in PO14, the Claimants allege that the following documents are forgeries:

Document	Date	Exhibit
(i) BSGR Guinea/Matinda Protocol	20 June 2007	Exh. R-27
(ii) BSGR Guinea/Matinda Protocol	27 February 2008	Exh. R-28
(iii) BSGR Guinea/Matinda Protocol	28 February 2008	Exh. R-29
(iv) « Attestation de cession d'actions de Mme Touré à BSGR »	2 August 2009	Exh. R-269
(v) Payment Letter Pentler/Ms. Touré	8 July 2010	Exh. R-30

538. The first three documents (Exh. R-27 to Exh. R-29) are protocols that were purportedly concluded between BSGR Guinea and Matinda and Co. Limited-Sarl, which is a Guinean company set up by Ms. Touré. The first document (Exh. R-27) bears signatures of Mr. Marc

679 Final Report, para. 12.

680 For instance, Tr. (DA), Day 1, 96:23-97:6 (LaPorte).

Struik and Ms. Touré, although Mr. Struik denies having signed it. The second and third documents (Exh. R-28 Exh. to R-29) bear signatures of Mr. Asher Avidan and Ms. Touré, although Mr. Avidan denies having signed them. The fourth document (Exh. R-269) bears the signature of Ms. Touré, and the fifth (Exh. R-30) of an official of Pentler and Ms. Touré.

539. In addition, the Claimants dispute the authenticity of the following documents:

Document	Date	Exhibit
(vi) Pentler/Ms. Touré Protocol	20 February 2006	Exh. R-24
(vii) Engagement Letter N° 1 Pentler/ Ms. Touré	undated, legalized 21 July 2006	Exh. R-25
(viii) Engagement Letter N° 2 Pentler/ Ms. Touré	undated, legalized 21 July 2006	Exh. R-26
(ix) Pentler/Matinda Contract	3 August 2010	Exh. R-31
(x) Pentler/Matinda/Ms. Touré Contract	undated	Exh. R-32
(xi) Pentler/Matinda Contract	3 August 2010	Exh. R-346

540. The first three documents (Exh. R-24 to Exh. R-26) bear signatures of Mr. Lev Ran and Ms. Touré. The remaining documents (Exh. R-31, Exh. R-32 and Exh. R-346) were purportedly signed by a Pentler official and Ms. Touré.

541. Except for Exh. R-30 and Exh. R-346, the originals of the Disputed Documents were in the custody of the FBI, which accepted to make them available for the inspection.[681]

542. For the inspection, the FBI handed over three additional documents, which the Experts labelled as DOC A, DOC B and DOC C.[682] It is common ground that the content of DOC A is identical to page 1 of Exh. R-32, that the content of DOC B is identical to page 2 of Exh. R-

681 The Tribunal requested that the Parties provide best available copies of Exh. R-30 and Exh. R-346, which they were not in a position to do.

682 High resolution copies of these additional documents were provided to the Parties at the start of the document inspection.

32, and that these documents appear to be initialed and signed by the same persons, although the initials and signatures are different. The content of DOC C appears identical to Exh. R-33, which is not a Disputed Document. The Experts inspected DOCs A to C and reached the following conclusion:

- Page 2 of Exh. R-32 was not originally attached to page 1 of Exh. R-32, and the evidence suggested that page 1 from Exh. R-32 was originally fastened to DOC B, and page 2 from Exh. R-32 was originally fastened to DOC A;
- There is evidence to suggest that Exh. R-30 and DOC C may have been attached to each other at one time.

iv. *Expert Terms of Reference and Document Inspection*

543. After consulting the Parties and pursuant to Article 43(b) *in fine* of the ICSID Convention, ICSID Arbitration Rule 34(2)(b) *in fine*, paragraph 25 of PO1 in combination with Article 6(1) of the IBA Rules on the Taking of Evidence (2010), and paragraph 17 of Procedural Order No. 11, the Tribunal issued Terms of Reference for the Experts, which the latter signed on 24 October 2017.

544. The Experts' mandate was to assist the Tribunal in ascertaining the authenticity of the Disputed Documents by undertaking a full forensic analysis. The Experts were provided the following documents and materials:

    - Original versions of the Disputed Documents, wherever available;
    - Copies of the Disputed Documents;
    - Original versions, or else best available copies, of comparator documents containing contemporaneous signatures of the individuals whose signatures appear on the Disputed Documents.

545. The Experts were instructed to use inspection techniques in accordance with accepted industry practice, in particular standards of the Scientific Working Group for Forensic Document Examination ("SWGDOC"). Except for the minimally invasive examination required for ink testing, the Experts were further instructed to use, in principle, non-invasive and non-destructive inspection techniques.

546. The Terms of Reference also provided that the Experts issue a preliminary version of the report within 45 days of the document inspection, followed by an opportunity for the Parties

to comment, the issuance of the final version of the report, and a further opportunity for the Parties to comment on the Final Report.

547. With the consent of all involved, the Document Inspection was conducted between 31 October and 3 November 2017 at the New York offices of DLA Piper. The Tribunal issued a Document Inspection Protocol setting out logistics and guidance on communications between the Experts and the Parties' representatives and experts. That Protocol in particular required the Parties to raise objections immediately or at the latest at the end of each half-day of inspection.

548. The Experts inspected original versions of all the Disputed Documents listed above, with the exception of Exhibits R-30 and R-346 of which they inspected best available copies. In addition, the Experts inspected DOCs A, B and C referred to above. In the light of their respective specialisations, Mr. Welch conducted the handwriting examinations and Mr. LaPorte the document examinations.

549. In addition to the Experts, the Parties' counsel and forensic experts attended the Document Inspection. As experts, the Claimants retained the services of Mr. Dennis Ryan and Ms. Laura Mancebo, and later Mr. Robert Radley, and the Respondent retained the services of Mr. Richard Picciochi. The Tribunal's Secretary was also in attendance, monitored the process, and prepared daily summary minutes. An FBI agent was also present.

v. *The Final Report*

550. The Final Report, which was issued on 12 February 2018, sets out the Experts' qualifications, lists the documents subject to inspection and comparator documents, describes the examination methods employed, and the Experts' findings.

551. The Experts used the following examination methods: handwriting examinations, various physical examinations, including visual and microscopic, indented writing/impression evidence, rubber hand stamps, interlineations/additions, and ink/toner transfer, as well as optical examinations, including ultraviolet (UV), infrared reflectance (IRR) and infrared luminescence (IRL), and chemical examinations, including thin-layer chromatography (TLC), and gas chromatography/mass spectrometry (GC/MS).[683]

[683] At the Authenticity Hearing, Mr. LaPorte explained that he conducted "multiple exams" of the documents, including visual examination (e.g. paper, stale holes), page substitution, printing (toner,

552. Before assessing each document separately, the Experts analyzed ink and paper. They identified 13 inks, of which 10 were certainly commercially available prior to the purported dates of the documents.[684] The Experts further identified the use of 6 different types of paper,[685] 3 different black toners for Exh. R-24, Exh. R-25, Exh. R-26 and Exh. R-27,[686] and inkjet ink for Exh. R-28, Exh. R-29, Exh. R-31, Exh. R-32, Exh. R-269, Doc A, Doc B and Doc C.[687]

553. The Experts reached the following general conclusions with respect to the Disputed Documents and DOCs A, B, and C:

- There is no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that <u>any of the Disputed Documents were fraudulently produced</u>.
- Page 2 of R-32 was not originally attached to page 1 of R-32. Rather, there is evidence that page 1 from R-32 was originally fastened to DOC B; and page 2 from R-32 was originally fastened to DOC A.
- There is evidence to indicate that R-30 (a non-original electronic PDF) and DOC C may have been attached to each other at one time.
- It has been concluded that Avraham Lev Ran wrote the disputed Avraham Lev Ran signatures on R-24, R-25, and R-26.
- There are indications that Avraham Lev Ran may have written the disputed A.L. initials on R-26.

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inkjet, CPS code), chemical analysis (ink, paper), stamp analysis, interlineations, indentation examination (ESDA), and ink transfer.

684 The Experts could not reach a conclusion on whether the inks they labeled as inks 5, 6 and 9 were commercially available on the "purported date of preparation of the documents" (Final Report, para. 65). Ink 5 was used for the Marc Struik signature and Ink 6 for the Mamadie Touré signature in Exh. R-27. With respect to Ink 5, the Experts explained that this ink was "not extractable in the solvents used for this analysis indicating this is a pigment-based ink". Nor was Ink 6 extractable, but the Experts explained that differences between Inks 5 and 6 were identified during the VSC analysis, adding that "Ink 5 and 6 had slightly different properties when the extract was applied to the thin layer chromatography plate indicating they have different solubility properties". Final Report, p. 41, n. 8-9.

685 Final Report, para. 66.

686 Final Report, para. 67.

687 Final Report, para. 67.

- It has been concluded that Marc Struik wrote the disputed Marc Struik signature on R-27.
- It has been concluded that Avidan Asher wrote the disputed Avidan Asher signatures on R-28 and R-29.
- There are indications that the Lansana Tinkiano (Le Greffier en Chef) signatures on R-25, R-26, and R-27 may have all been written by the same person.
- There are indications that the Mamadie Toure signatures on R-24, R-27 through R-32,
  R-269, R-346.2, DOC B, and DOC C may have all been written by the same person.
- Although no known comparison samples were submitted for comparison with the remaining disputed signatures, no evidence or characteristics commonly associated with traced or simulated forgeries were observed.[688]

vi. *Assessment of the Disputed Documents*

554. The Tribunal will first address some general criticisms which the Claimants raise about the Experts' work (i). Therafter, it will review each Disputed Document separately, by first describing the document, and then setting out the Expert's conclusions, the Parties' positions, the comments by the Party-appointed experts, and its assessment ((ii) – (xii)) before reaching its conclusion (xiii).

(a) General observations

555. The Claimants and their expert criticize the Experts' work on a number of points. First, they take issue with the terminology employed by the Experts when expressing their findings. More specifically, they dispute the Experts' use of the terminology "*no evidence*". Mr. Radley notes that the SWGDOC guidelines do no use that term and it is thus not a "recognized term".[689] He also opines that the words employed by the Experts are potentially misleading and the Tribunal should not understand them to mean that the Disputed Documents are

688 Final Report, p. 9.

689 Radley Report, para. 72.

genuine. Mr. Radley adds that the "absence of evidence is not evidence of absence".[690] As for the Claimants, they rather criticize the terms "no evidence of fraud". Instead of speaking of "no evidence of fraud", Mr. LaPorte should have used the wording "no evidence of alteration". This distinction is "fundamental", say the Claimants. In any event, according to the Claimants, Mr. LaPorte's "no evidence" conclusions are indeterminate, which even the Respondent's expert admitted, calling them "inconclusive".[691]

556. When reviewing these issues of terminology, the Tribunal is aware that there is no common terminology adopted by document examiners and that the way in which conclusions are expressed remains controversial in the industry.[692] In the same vein, it notes that the SWGDOC standards are mere guidelines.

557. The general conclusions in the Final Report use the terms "no evidence of fraud". They state that "[t]here is no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that [the Disputed Documents] were fraudulently produced".[693] It appears to the Tribunal that this language is similar to the Claimants' preferred wording of "no evidence of alteration". In fact, the Final Report does use the words "no evidence of alteration" on several occasions.[694]

558. Further, the SWGDOC Standard Terminology for Expressing Conclusions of Forensic Document Examiners provides guidelines "intended to assist forensic document examiners in expressing conclusions or opinions based on their examinations". That terminology lists "recommended terms" in section 4.1 and "deprecated and discouraged expressions" in section 4.2, which are deemed to be potentially "troublesome". The expression "no evidence" is neither "deprecated" nor "discouraged". Unlike Mr. Radley, the Tribunal does not see why such expression could be "troublesome". Therefore, it discerns no reason to take issue with the Experts' formulation "no evidence of fraud". By contrast, the term "inconclusive",[695] which Mr. Radley often uses appears among the "deprecated and discouraged expressions" listed in section 4.2 of the SWGDOC guidelines.

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690 Radley Report, para. 60.

691 C-PHB1, para. 304.

692 Tr. (DA), Day 2, 157:8-11 and 22-24 (LaPorte).

693 Final Report, p. 9, quoted in paragraph 553 above.

694 See, e.g. Final Report, paras. 89, 109, 134, 157, 174, 188, 198, 210, 226, 240, 251, 258, 264, 274.

695 See, e.g., Radley Report, paras. 180, 189, 204, and in particular with respect to signatures, paras. 14, 17, 261, 305 and p. 85.

559. Finally, Mr. Radley also complains about the frequency with which the Experts employ the term "no evidence".[696] Yet, the authors Kelly and Lindblom, to which the Claimants refer, consider that for each single test and for "each specific page, the document examiner must be able to say that there is no evidence that a word, sentence, or paragraph had been added",[697] adding that "[w]hen the combined results reveal no change, it can be stated that there is no evidence to support that this document was altered".[698] There is thus nothing improper when Mr. LaPorte writes for each test that he found no evidence of alteration or fraud.

560. Second, the Claimants and their expert regard Mr. LaPorte's approach as fundamentally unsound reaching conclusions that cannot be trusted, in particular because he failed to consider alternative propositions and ignored evidence of alteration. The Tribunal does not share this view. At the same time, it notes that all of the experts (Messrs. LaPorte, Radley and Aginsky) who testified on the authenticity of the documents (as opposed to the signatures appearing on the documents) essentially concurred to say that the result of the document analysis was rather neutral. In other words, they seemed to agree that the testing procedures were not capable of showing whether the documents were authentic or not.[699] When making this observation, the Tribunal is mindful of Mr. Radley's statement that he was not concerned about specific alterations, since he was instructed that the documents as a whole were fabricated.[700] Thus, the Tribunal understands that the document examinations do not shed much light on the genuineness of the Disputed Documents. It will therefore mainly focus on the handwriting examinations. That said, the Tribunal will address specific issues or oddities raised by the Claimants and their expert with respect to the documents where necessary.

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696 Tr. (DA), Day 2, 11:1-7.

697 Jan Seaman Kelly, Brian S. Lindblom, *Scientific Examination of Questioned Documents*, Taylor & Francis, 2nd edition, p. 334.

698 Jan Seaman Kelly, Brian S. Lindblom, *Scientific Examination of Questioned Documents*, Taylor & Francis, 2nd edition, p. 335.

699 Mr. Radley stated that the "testing procedures are not capable of detecting the relevant evidence proving authenticity" and that it is equally likely that the documents are authentic or that they are forged (Radley Report, para. 61). Mr. Aginsky agreed that the document examination was overall "inconclusive" (Tr. (DA), Day 2, 137:13-14 (Aginsky). Mr. LaPorte also stated that he agreed with Mr. Radley's statement that the absence of evidence of alteration or fraud does not necessarily mean that the documents are genuine (Tr. (DA), Day 2, 160:9-11 (LaPorte). In fact, he stated that it can never be proven that a document is genuine (Tr. (DA), Day 2, 161:19-20 (LaPorte).

700 Tr. (DA), Day 2, 13:2-8 (Radley).

561. Third, the Claimants and their expert also criticize the handwriting examinations. They are of the view that Mr. Welch failed to address differences or rarities in the disputed signatures, while at the same time conceding that these variations fell outside the range of variation.[701] Definitions of terms such as "variation", "range of variation", and "significant difference" can be found in the SWGDOC Standard for Examination of Handwritten Items. "Variations" are defined as "those deviations among repetitions of the same handwriting characteristic(s) that are normally demonstrated in the habits of each writer" (section 3.3.15). A "range of variation" is defined as "the accumulation of deviations among repetitions of respective handwriting characteristics that are demonstrated in the writing habits of an individual" (section 3.3.10). A "significant difference" is "an individualizing characteristic that is structurally divergent between handwritten items, that is outside the range of variation of the writer, and that cannot be reasonably explained" (section 3.3.11). The SWGDOC guidelines adds the following commentary:

> "Since variation is an integral part of natural writing, no two writings of the same material by the same writer are identical in every detail. Within a writer's range of variation, there are handwriting habits and patterns that are repetitive and similar in nature. These repetitive features give handwriting a distinctive individuality for examination purposes. Variation can be influenced by internal factors such as illness, medication, intentional distortion, etc. and external factors such as writing conditions and writing instrument, etc."[702]

562. On variations and differences, Albert Osborn, who is the authority most cited in matters of handwriting analysis to whom both Parties refer, writes as follows:

> "In a trial in which forgery is alleged the attempt is usually made to account for, or excuse, what often are the most glaring and fundamental divergences in a handwriting by the argument that genuine writing is not always just alike and therefore divergences do not indicate forgery. These attempted excuses for forgery often are ridiculously incredible. The fallacy in the reasoning, of course, is the failure to consider the amount or the nature and the quality of the differences.
>
> The opposite error is made when a trivial difference is made the basis of a charge of forgery and any difference is interpreted as pointing to another personality. The conclusion that a writing is not genuine is only properly reached when it contains divergences in amount and quality beyond the range of variation in the standard writing that cannot reasonably be

701 C-PHB1, para. 321.

702 SWGDOC Standard for Examination of Handwritten Items, at Final Report, Annex C.

accounted for by changed conditions in the writer or surrounding the writer".[703]

563. Accordingly, variations are deviations from handwriting characteristics that are within a writer's habits. A range of variations is the accumulation of such deviations which are still within the writer's habits. By contrast, a significant difference is a deviation that falls outside of the range of variations and cannot be explained by changed conditions, be they internal or external to the writer. Only significant differences are indicative of simulation or forgery. In other words, a mere difference or deviation is not suggestive of simulation or forgery.

564. The Tribunal will bear these explanations in mind when reviewing the evidence in respect of each of the disputed signatures. Only then will it be in a position to determine whether, as the Claimants contend, the Experts have disregarded relevant differences between disputed and undisputed signatures.

(b) Exhibit R-24

(i) Description of document

565. Exh. R-24 is a two-page contract entitled "Protocole d'accord" purportedly concluded between Ms. Touré and Pentler Holdings Ltd. The first page shows Ms. Touré's signature on the bottom-left of the page and an adhesive fiscal stamp affixed with a stamp of the "Greffier en Chef" of the Court of First Instance of Conakry on the top of the document. On the second page, one also finds at the top a fiscal stamp affixed with a stamp of the "Greffier en Chef". There is also a printed line indicating that the document was signed in Conakry on 20 February 2006. In addition, there is a printed signature line with Ms. Touré's name and what appears to be her signature, as well as a printed signature line with Mr. Lev Ran's name, a Pentler Holdings Ltd stamp and what appears to be Mr. Lev Ran's signature to the right. Finally, there is an additional stamp of the "Greffier en Chef", a signature of an unidentified person and a legalization stamp with the handwritten date "02/03/06" (or "09/03/06").

(ii) Experts' findings

566. The Experts' found that "[t]here is no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that R-24 was fraudulently produced".[704] With

[703] Albert S. Osborn, *Questioned Documents*, 2nd edition, p. 205 (Emphasis added by the Tribunal).

[704] Final Report, p. 44.

respect to the handwriting examinations, they stated that the disputed Lev Ran signature reveals "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes" and that there is "no evidence of distortion commonly associated with traced or simulated forgeries".[705] A comparison of the disputed signature with the known writing of Lev Ran showed "numerous significant similarities", including "height relations, proportions, spacial [sic] relations, hooks, tapered strokes, and retraces".[706] On that basis, the Experts concluded that Mr. Lev Ran wrote the disputed signature on Exh. R-24.

567. Unlike Mr. Radley, Mr. Welch considered Mr. Lev Ran's signature as a complex signature that even a skilled forger could not reproduce with the same fluency and fine detail.[707] He explained that the "fine and subtle drag strokes", the "details", and the "flying starts and finishes" were "very difficult" to simulate.[708]

(iii) Comments of the Party-appointed experts

568. Mr. Radley criticizes the Experts' opinion on Mr. Lev Ran's signature for being based on "similarities alone", without any mention of differences.[709] For Mr. Radley, that signature "is not a complex signature" and "is not difficult to copy".[710] The structure of the signature is "very basic in design, effectively three backwards and forwards pen movements and a short, near vertical line".[711]

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705 Final Report, para. 82.

706 Final Report, para. 88.

707 Mr. Welch provided the following explanation: "In a simplistic signature, yes, they may be able to practice that enough to get that with some fluency, and you might see some of those characteristics. In my opinion, in a signature like the Avraham Lev Ran, it's complex. There's a lot of movement: there's nine different movements, ten if you include the terminal stroke. So I would say: yes, in a signature like Mamadie Touré; in my opinion, no, with a signature like with respect to Avraham Lev Ran. They're not going to get all of the handwriting, they're not going to be able to produce the fine and subtle detail in the writing characteristics, with the flying pen starts, the flying pen finishes, the pen drags, the pen pressure variation. Again, when we look at pen pressure variation, all of us let on and off with pressure throughout our signature. We don't think about it, it's an unconscious thing, but it can be very repetitive for that particular person. Well, that's another thing a forger can't get. They can't hold the writing instrument exactly the same way that – a forger can't hold it the same way as the original person whose writing they're trying to duplicate. They don't have the same muscular, they don't have the same skeletal makeup, they don't have the same arm and wrist movement to replicate that same pen pressure and pen pressure variation" Tr. (DA), Day 1, 77:20-78:20 (Welch). See also: Tr. (DA), Day 1, 174:11 (Welch).

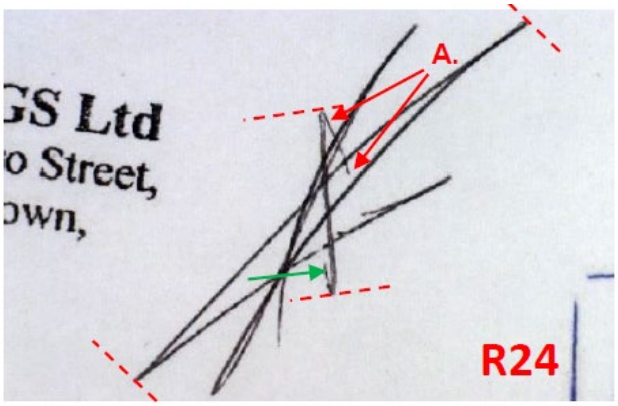
708 Tr. (DA), Day 2, 166:10-17 (Welch).

709 Radley Report, para. 224.

710 Tr. (DA), Day 2, 32:5-6 (Radley).

711 Radley Report, para. 233.

569. Mr. Radley further opines that the "downstroke cutting through the zigzagging lines" is an irregularity that falls outside the range of variation. In particular, the "hesitant long upwards introductory stroke" illustrated at "A" in the image below "is not seen throughout the known writings". Additionally, the "distinct upwards and leftwards hook" at the end of the downstroke, identified with the green arrow in the image below, contrasts with "the vast majority of comparison signatures" and is therefore a "rare occurrence".[712] These "irregularities" are also present in the disputed Lev Ran signatures in Exh. R-25 and Exh. R-26, and should not have been ignored by the Experts.[713]



570. Still according to Mr. Radley, the unusual length of the downstrokes in Exh. R-24 and Exh. R-25 falls outside the range of variation, and the fact that the two documents were purportedly signed four months apart with a black ballpoint pen, is a "considerable coincidence" that could be explained if the two signatures had been simulated at the same time.[714] In conclusion, Mr. Radley states that he had "considerable difficulty in assessing the evidence" and his opinion is that the evidence is inconclusive on whether the signature is authentic or simulated.[715]

571. The Respondent's handwriting expert, Mr. Picciochi, sees no "fundamental differences" in this signature, which he regards as "consistent" and falling "within the known writing variation".[716] The "speed, pressure variation, flying stars and stops" are all present in the

712 Radley Report, para. 250.

713 Radley Report, para. 248, 265.

714 Radley Report, para. 253.

715 Radley Report, para. 261.

716 Tr. (DA), Day 2, 108:8-13 (Picciochi).

known writings and are thus "indicative of naturalness".[717] In addition, the sequence of strokes, including the introductory and terminal strokes of the vertical line, are "very consistent" with known writings.[718] In sum, for Mr. Picciochi, there is "evidence to support the proposition that the questioned signature was made by the author of the known writings".[719]

(iv) Parties' positions

572. The Claimants take "no position as to the authenticity" of Exh. R-24, but argue that the Tribunal should treat this document with "caution".[720] They point to the discrepancy between the signing date on the contract and the legalization date, which the Experts did not address.[721] In addition, the Claimants argue that the terms of the contract are "confusing" and that the Respondent failed to provide evidence of the implementation of the contract.[722]

573. The Respondent stresses that the forensic analysis has now shown that there are no doubts on the authenticity of the Disputed Documents. In particular, Mr. Welch had no reservations or doubts that Mr. Lev Ran signed Exh. R-24,[723] and Mr. Radley did not challenge the Experts' finding when stating that he could not provide any conclusive opinion.[724]

(v) Discussion

574. The Claimants are not alleging that Exh. R-24 is a forged document. Although they expressed doubts on the document's authenticity at the end of the Merits Hearing, the Claimants now merely invite the Tribunal to treat this document with caution. As for their expert, he finds the evidence inconclusive. He finds the proposition that the document is genuine equally likely as the opposite conclusion. In connection with the signature, Mr. Radley focuses on the initial downstroke, and in particular on the initial stroke and the end hook, arguing that these features "contrast to the *vast majority* of comparison signatures" (emphasis added by the Tribunal). Accordingly, Mr. Radley concedes that some

717 Tr. (DA), Day 2, 113:20-22 (Picciochi).

718 Tr. (DA), Day 2, 115:13-15 (Picciochi).

719 Tr. (DA), Day 2, 117:7-11 (Picciochi).

720 C-PHB1, para. 261.

721 C-PHB1, para. 261(ii).

722 C-PHB1, para. 261(iii).

723 R-PHB1, para. 131.

724 R-PHB1, para. 140.

comparators have similar features, which thus are within the range of variation of the known Lev Ran writing. These features are therefore variations, not differences, let alone significant differences.

575. By contrast, the Experts identified "numerous significant similarities", including "height relations, proportions, spacial [sic] relations, hooks, tapered strokes, and retraces".[725] At the Authenticity Hearing, Mr. Welch testified that there was "obvious evidence of genuineness with this particular signature".[726] With respect to the vertical stroke, he stated that "at the top of the vertical stroke [was] a nice long flying start or drag stroke up to the top of the document where it proceeds down. It has a hook down to the bottom left of that vertical, which is another flying ending stroke".[727] He further noted the presence of "unique and subtle details", including the "nice and smooth" line quality, the smoothness of the edges, the variations in the line widths, and pen pressure variation. Mr. Welch also found that these "individual unique handwriting characteristics" fell within the range of variation.

576. The Claimants did not address this assessment of Mr. Lev Ran's signature in their post-hearing briefs. They merely took issue with the Experts' finding that there were only indications that Ms. Touré signed the document. They also referred to matters not within the forensic inspection, which are thus not considered here, namely the "discrepancy" between the date of the document (i.e. 20 February 2006) and the date of its legalization (i.e. 2 March 2006) and the confusing terms of the agreement.

577. The Tribunal sees no reason to doubt the forensic assessment of the Experts. They explained convincingly that the disputed signature showed common characteristics with known writing habits of Mr. Lev Ran. They explained in a similarly compelling manner that divergences were within the range of admissible variations, emphasing in particular "fine subtle details" such as flying starts and finishes or the quality of the lines and edges. More importantly, the Claimants' expert did not identify a single difference beyond a variation. On that basis, the Tribunal cannot but find that there is no element allowing it to doubt that Mr. Lev Ran signed this document.

578. With respect to the signatures of Ms. Touré appearing on Exh. R-24, the Tribunal notes that the Experts did not reach a definitive conclusion because they lacked comparison

725 Final Report, para. 88.

726 Tr. (DA), Day 1, 70:16-17 (Welch). See also: Tr. (DA), Day 1, 175:22-176:4 and 177:6-19 (Welch).

727 Tr. (DA), Day 1, 70:18-22 (Welch).

signatures outside the Disputed Documents. The same applies to the signature of the Greffier en Chef. However, the Experts compared the signatures of Ms. Touré with those in the Disputed Documents and found that there were "indications that the Mamadie Touré signatures on Exh. R-24, Exh. R-27 through Exh. R-32, Exh. R-269, Exh. R-346.2, DOC B, and DOC C may have all been written by the same person".[728]

579. Significantly, the forensic evidence is corroborated by [redacted] according to which Pentler concluded the contract found in Exh. R-24 with Ms. Touré, as the Claimants acknowledged in their Reply:

> "As regards the contracts between Pentler and Mamadie Touré/Matinda, Guinea criticise [sic] BSGR for asserting that they were false. 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."[729]

580. On the basis of the foregoing considerations, the Tribunal comes to the conclusion that the evidence on record shows that Mr. Lev Ran and Ms. Touré did sign Exh. R-24.

(c) Exhibit R-25

(i) Description of document

581. Exh. R-25 is a two-page document entitled "*lettre d'engagement*", i.e. an engagement letter from Pentler Holdings Ltd in favor of Ms. Touré. The first page shows an adhesive fiscal stamp affixed with a stamp of the Greffier en Chef of the Court of First Instance of Conakry on the top right of a document. The top right of the second page also contains a stamp duty with a stamp of the Greffier en Chef. The document is undated. The bottom of the second page contains a Pentler Holdings Ltd stamp and what appears to be Mr. Lev Ran's signature. Finally, there is an additional stamp of the Greffier en Chef, together with the signature of Mr. Tinkiano and a legalization stamp with the handwritten date "21/07/06".

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728 Final Report, p. 9.

729 Reply, Annex I, para. 32 (Emphasis added by the Tribunal). [redacted] reads in relevant part: "Pentler did have contracts with Matinda. These contracts were for legitimate business that they were engaged in, regarding mining, pharmaceuticals, commercial goods and a wider range of business activities. BSGR was not involved in those activities in any way". Footnotes omitted. [redacted]

(ii) Experts' findings

582. The Experts' found that "[t]here is no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that R-25 was fraudulently produced".[730] As with Exh. R-24, the disputed Lev Ran signature reveals "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes" and there is "no evidence of distortion commonly associated with traced or simulated forgeries".[731] A comparison of that signature with known writings of Lev Ran "revealed numerous significant similarities", including "height relations, proportions, spacial [sic] relations, hooks, tapered strokes, and retraces".[732] Moreover, the Experts note the same "fine and subtle details" as for the Lev Ran signature in Exh. R-24 (see above paragraphs 566-567). They in particular consider that all the features identified fall within the range of variation of Mr. Lev Ran's writing.

583. On that basis, the Experts conclude that "Avraham Lev Ran wrote the disputed Avraham Lev Ran signatures on R-25".[733]

(iii) The comments of the Party-appointed experts

584. Mr. Radley disagrees with the Experts' findings and stresses the existence of differences. For him, the disputed Lev Ran signature in Exh. R-25 "appears to be far more of a "star" shape with the extremities of the vertical downstroke through the signature protruding to for additional star 'points'".[734] As with Exh. R-24, Mr. Radley opines that the vertical stroke is "disproportionately long relative to the stroke that determines the width of these signatures".[735] He also points to the "unusually large protrusion either side of the main line" as illustrated at B and C in the image below*:*[736]

730 Final Report, p. 64.

731 Final Report para. 105.

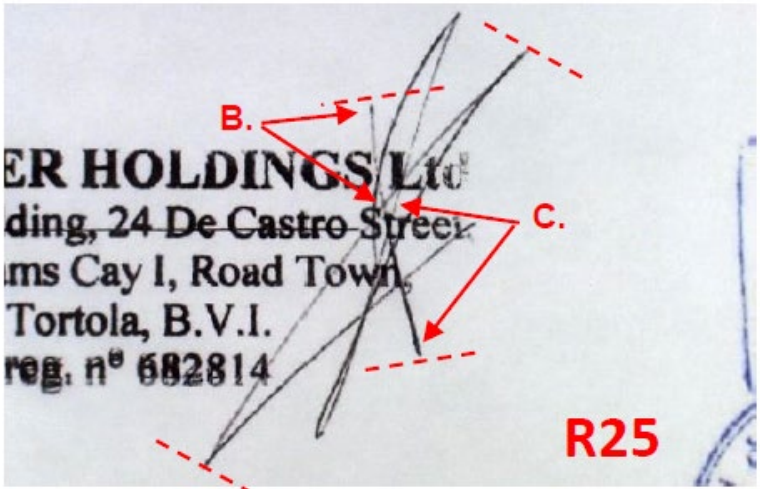
732 Final Report, para. 108.

733 Final Report, para. 108.

734 Radley Report, para. 251.

735 Radley Report, para. 252.

736 Radley Report, para. 251.



585. Mr. Picchiochi opines in the same manner as he did for Exh. R-24 (see above paragraph 571).

(iv) Parties' positions

586. The Claimants call attention to the fact that Exh. R-25 is undated, but legalised on 21 July 2006. Guinea's case that the document was sent to Mamadie Touré in January 2006 and then legalized five months later does "not make sense".[737] Given the contradictions in Mr. Tinkiano's testimony and his inability to say whether Ms. Touré attended the legalization, the Claimants "cannot take a position on the authenticity" of this document. Finally, they stress that the serial numbering on the stamp in Exh. R-25 is lower than the number on the stamp in Exh. R-24, an inconsistency that the Experts have not explained.[738]

587. The Respondent raises the same arguments for Exh. R-25 as for Exh. R-24 (see above paragraph 573).

(v) Discussion

588. For essentially the same reasons as for Exh. R-24, the Tribunal sees no reason to put the forensic assessment of the Experts in doubt. Here again, their explanations were convincing and, more importantly, the Claimants' expert did not identify a single significant difference, which could have led the Tribunal to question the Experts' findings.

589. With respect to the sequencing of the serial numbers found on the adhesive stamps, the record contains insufficient information for the Tribunal to make a finding. In the

737 C-PHB1, para. 265.

738 C-PHB1, para. 267.

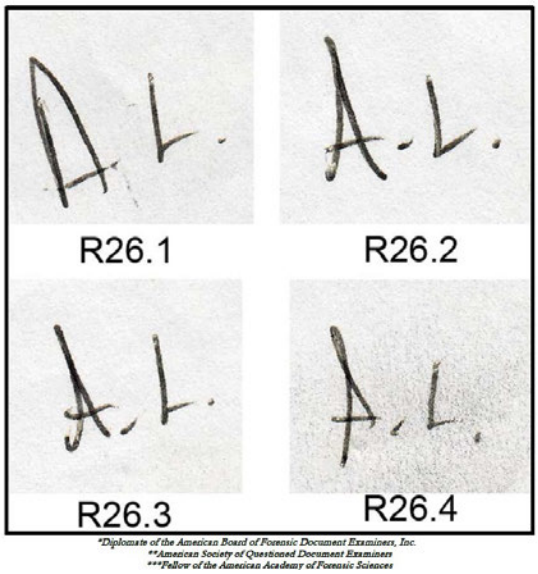
circumstances, that element cannot change the result reached through the forensic examination, and the Tribunal tends to agree with the Experts that "there is no evidence to indicate that the Adhesive Stamps were attached to R-25 on any other date than purported".[739]

590. On the evidence before it, the Tribunal is satisfied that Mr. Lev Ran signed this document.

(d) Exhibit R-26

(i) Description of document

591. Exh. R-26 is a four-page document entitled "*lettre d'engagement*", i.e. an engagement letter from Pentler Holdings Ltd in favor of Ms. Touré. The first page contains an adhesive fiscal stamp affixed with a stamp of the Greffier en Chef of the Court of First Instance of Conakry on the top left of the document. At the bottom right, it also contains the initials "A.L.". The top right of the second, third and fourth pages shows an adhesive fiscal stamp with a stamp of the Greffier en Chef. These pages also contain the initials "A.L." at the bottom right. The document is undated. The bottom left of the fourth page contains a Pentler Holdings Ltd stamp and a signature that appears to be Mr. Lev Ran's. Finally, there is an additional stamp of the Greffier en Chef, together the signature of Mr. Tinkiano and a legalization stamp with the handwritten date "21/07/06". The following image shows the different A.L. initials in this document:[740]



739 Final Report, para. 100.

740 Final Report, p. 78, figure 21.

(ii) Experts' findings

592. As with the previous documents, the Experts' finding is that "[t]here is no evidence of page substitution, text alteration, text addition, or other irregularities to indicate that R-26 was fraudulently produced".[741] The disputed Lev Ran signature is said to reveal "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes" and there is "*no evidence of distortion commonly associated with traced or simulated forgeries*".[742] A comparison of that signature with other known writing of Lev Ran "*revealed numerous significant similarities*", including "height relations, proportions, spacial/size [sic] relations, slant, hooks, and tapered strokes".[743] On that basis, the Experts conclude that "Avraham Lev Ran wrote the disputed Avraham Lev Ran signatures on R-26".[744]

593. Further, the Experts gave evidence that two of the three sets of A.L. initials appear distorted, although they nonetheless "exhibit variation" and there is "some limited internal consistency within each set of initials as well as amongst each other".[745] Thus, the Experts were "unable to determine if they were written by another writer".[746] The comparison of the initials with the known writings of Mr. Lev Ran revealed "some limited similarities", including "height relations, proportions, special relations, and diacritic markings". This led the Experts to conclude that "there are indications that Avraham Lev Ran may have written the disputed A.L. initials on R-26".

(iii) Comments of the Party-appointed experts

594. Mr. Radley deems the evidence "inconclusive" to determine whether the disputed Lev Ran signature is an unusual signature or a simulation.[747] He points to the "significant curve" at the bottom of the vertical stroke. This feature is not seen "in any of the forty seven comparison signatures" and thus falls outside the range of variation.[748] According to the expert, simulators pay little attention to the "way in which the pen is often applied to the

741 Final Report, p. 75.

742 Final Report para. 125.

743 Final Report, para. 133.

744 Final Report, para. 133.

745 Final Report, para. 128.

746 Final Report, para. 128.

747 Radley Report, para. 261.

748 Radley Report, paras. 254, 257.

paper and lifted from the paper".[749] In addition, Mr. Radley states that there are "few other differences worth noting" without, however, identifying these differences in any detail.[750]

(iv) Parties' positions

595. In addition to the arguments already raised in respect of Exh. R-25, (e.g. the 2-month discrepancy between the purported date of signature and the date of legalization), the Claimants argue that the Experts failed to explain why they disregarded the "five inconsistencies" which they identified in their Report, namely that "(i) impressions of the later dated document, R-29, were found on R-26 […]; (ii) a conclusive opinion could not be reached on whether the initials A.L. are those of Lev Ran […]; (iii) in reaching a determination, a set of apparently "rogue" comparator initials were disregarded […]; (iv) ink/toner was found on the front of page 1, and the back of pages 3 and 4, but the source could not be determined […]; and (v) a different font size is used on page 1 compared to pages 2 to 4".[751] For the Claimants, Mr. LaPorte simply speculated instead of addressing these inconsistencies by evaluating alternative propositions.[752] For instance, changing the font size in the middle of a document "is the exception rather than the rule" and thus requires explanation.[753]

596. The Respondent essentially makes the same submissions here as in the context of Exh. R-24 and Exh. R-25 (see above paragraphs 573 and 587).

(v) Discussion

597. The Tribunal has carefully reviewed the arguments raised with respect to the five inconsistencies identified in the Final Report, on which the Claimants insist (see above paragraph 595).

598. The initials A.L. are one of these inconsistencies. It is true that the A on the first page is different from those on pages 2 to 4. It is also true that, while the Experts identified "some limited similarities", including height relations, proportions, special relations and diacritic

749 Radley Report, para. 256.

750 Radley Report, para. 259.

751 C-PHB1, paras. 267 and 307, n. 634.

752 C-PHB1, para. 307.

753 C-PHB1, para. 307.

markings, they were unable to reach a "more conclusive opinion",[754] absent additional comparator initials. This being so, in the Tribunal's view, this inconsistency does not carry sufficient weight to cast doubt on the conclusions of the Experts.

599. Moreover, it is striking that the Claimants' expert did not address any of these inconsistencies in his report. It is equally telling, that, in spite of these inconsistencies, the Claimants did not allege that the document or the signature were forged.

600. Like for the previous documents and for the same reasons, the Tribunal thus follows the conclusion of the forensic analysis. Again, the Experts' explanations are convincing and the Claimants' expert identified no difference susceptible to put the Experts' findings in doubt.

601. Therefore, the Tribunal reaches the conclusion that the evidence indicates that Mr. Lev Ran signed this document.

(e) Exhibit R-27

(i) Description of document

602. Exh. R-27 is a single page document, which is entitled "*Protocole d'Accord*" and entered into between Matinda and BSGR Guinea. The top left contains a stamp duty with a stamp of the Greffier en Chef. The document is dated 20 June 2007, with the day and month written by hand. The bottom of the page contains three signatures. On the left is what appears to be Mr. Struik's signature with the words "*Directeur Général*" written below. On the right is what appears to be Ms. Touré's signature. In between these two signatures, there is an additional stamp of the Greffier en Chef, together with the signature of Mr. Tinkiano and a legalization stamp with the handwritten date "20/07/07".

(ii) Experts' findings

603. The Experts conclude that "[t]here is no evidence of text alteration, text addition or other irregularities to indicate that R-27 was fraudulently produced"[755] and that "Marc Struik wrote the disputed Marc Struik signature on R-27".[756]

754 Final Report, para. 132.

755 Final Report, p. 97.

756 Final Report, p. 9.

604. About Mr. Struik's signature, they find "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes", and "no evidence of distortion commonly associated with traced or simulated forgeries".[757] To the Claimants' questions, the Experts answered that "[t]here is no evidence of any differences that would suggest someone other than Marc Struik signed the document".[758]

605. For Mr. Welch, Mr. Struik's signature is a complex signature that has approximately 20 different movements. He explained that "the line quality is nice: even edges, variations in line widths, movement into and out of the strokes. So there's no evidence of forgery commonly associated with traced or simulated forgeries there".[759] He further confirmed that he did not find "any differences that would be indicative of another writer".[760]

606. Moreover, Mr. Welch opined that the differences identified by Mr. Radley are in fact variations. He stressed that a difference is something "fundamental" indicating that there is forgery, whereas a variation or a slight dissimilarity "doesn't mean that somebody else wrote it".[761] In the Final Report, the Experts noted certain characteristics of Mr. Struik's disputed signature, including height relations, proportions, spatial relations, hooks, tapered strokes, retraces and pen drags. Compared to known writings of Marc Struik, the disputed signature revealed "numerous significant similarities". As a result, they found that Mr. Struik had written the disputed signature on Exh. R-27.[762]

(iii) Comments of the Party-appointed experts

607. Mr. Radley regards Marc Struik's signature as "fairly basic" and not "very difficult [...] to copy". He disagrees with the Experts that there are no differences. As shown in the image below, he identifies eight "demonstrable differences", some of which he qualifies as "rarities rarely found":[763]

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757 Final Report, para. 149.

758 Final Report, Annex L, question 35.

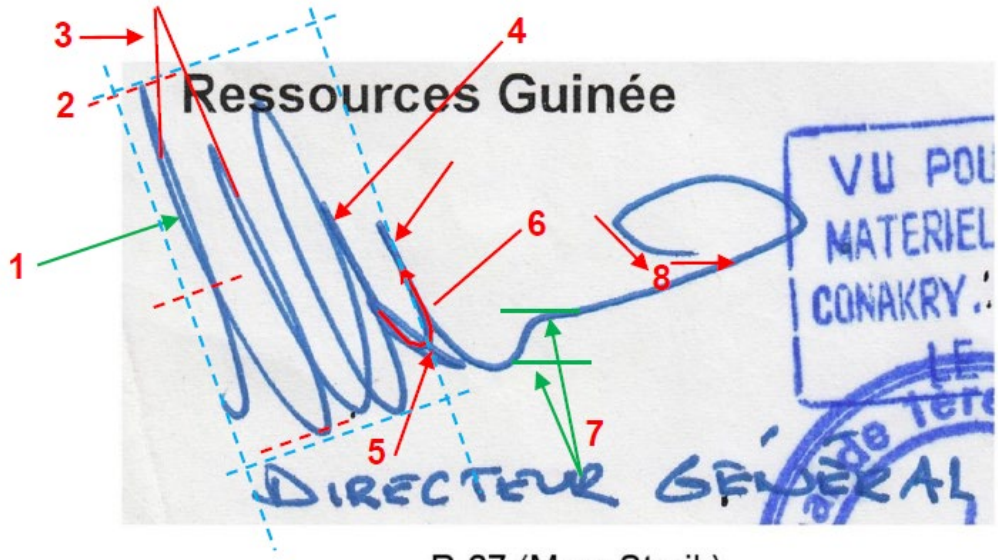
759 Tr. (DA), Day 1, 83:25-84:6, 211:1-6 (Welch).

760 Tr. (DA), Day 1, 186:20-21, 210:15-16 (Welch).

761 Tr. (DA), Day 1, 182:11-22 (Welch).

762 Final Report, para. 156.

763 Radley Report, para. 282. Mr. Radley stated at the hearing that he identified "five differences, say, and a couple of rarities" with respect to R-27. Tr. (DA), Day 2, 27:15-16 (Radley).



R-27 (Marc Struik)

608. With respect to point 1, Mr. Radley argues that the very thin initial loop is an “obvious rare occurrence” since a similar feature only appears in the comparison signature K3.1. Concerning point 2, he finds that the proportion between the length of the first loop and the overall height of the structure is “almost exactly half the height” and is different from all comparison signatures. While other comparison signatures show a thin second loop when looking at point 3, “the combination of a very thin first loop and second loop does not appear to the extent noted in the questioned signatures”. The combined width of the loops is less than in K17.13 for instance. The near retracing and the subsequent retrace of the joining loop in point 4 is not seen “in combination” in the comparison signatures. While similar in K10.13, the loop there is not as thin. The curvature of the joining stroke bending upwards in point 5 is “tighter” than in the comparison signatures. The straight up/down stroke retracing itself in point 6 is not present in the comparison signatures, which show a loop. The small kink in point 7 is more pronounced than in the comparison signatures. It is not as deep in K7.3 or K14.2. This is a “rare feature, but not a true difference”. The angularity of the curving stroke following the anticlockwise dome in point 8 is “significantly different” from the comparison signatures, to the exception of K19.18. Finally, Mr. Radley remarks that,

considering the relative proportions of the height to width of the first five elements, the disputed signature "fits into a far taller rectangle" than the comparator signatures.

609. On that basis, Mr. Radley reaches the following conclusion with respect to Exh. R-27:

> "The combination of differences which fall outside the range of writing variation as shown in the twenty six samples of Mr Struik's signature lead me to the opinion that there is weak to moderate evidence to support the proposition that this was not written by Marc Struik but is a copy of his general signature style. The evidence is, however, far from conclusive but, in my opinion, over the balance of probability."[764]

610. The Respondent's expert, Mr. Picciochi, agreed with the Experts' assessment and criticized Mr. Radley for his focus on structural qualities, whereas he should also have looked at the movement qualities. According to Mr. Picciochi "there are flying starts and stops, varying pen pressure and speed in these. So they appear to be naturally written: there's no evidence of tremor or unusual pen stops, patching and retouching of the signatures. They seem to be reflexively written".[765]

(iv) Parties' positions

611. The Claimants have consistently stated that this document is a forgery.[766] They find support in Mr. Radley's evidence that there are "demonstrable differences" between the disputed Struik signature in Exh. R-27 and the other known handwritings of Mr. Struik. They also insist that Mr. Struik was "disarmingly frank" that he did not sign this document.[767] According to them, Mr. Struik saw an unlegalized version of this document for the first time in a blackmail attempt in 2009. Messrs. Struik, Avidan, Steinmetz and Saada all refuted Ms. Touré's claim that she signed this agreement in their presence.[768] In addition, it is "inconceivable" that Mr. Struik would sign a document where BSGR's name is twice spelled

764 Radley Report, para. 285.

765 Tr. (DA), Day 2, 126:23-127:3.

766 C-PHB1, para. 268.

767 C-PHB1, para. 269(i); Tr. (Merits), Day 4, 200:1-3 (Struik).

768 C-PHB1, para. 269(iii); Saada (CWS-6), para. 8; Steinmetz (CWS-1), para. 40; Avidan (CWS-3), para. 130; Struik (CWS-2), para. 109.

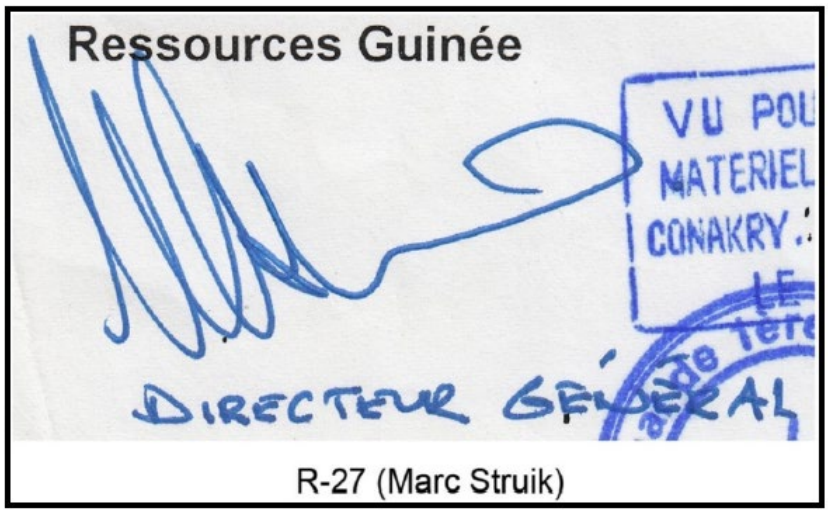
incorrectly.[769] Finally, the terms of the document "do not make sense", thus further suggesting a forgery.[770]

612. The Respondent agrees with the Experts' findings that Mr. Struik signed Exh. R-27 and that the document is authentic.

(v) Discussion

613. Exh. R-27 is the only Disputed Document where Mr. Radley concluded that there was "weak to moderate evidence" that the signature was not written by Mr. Struik.[771] In the same vein, the Claimants assert that Exh. R-27 was forged and Mr. Struik testified that he did not sign this document.

614. The following image depicts Marc Struik's disputed signature in Exhibit R-27:[772]



R-27 (Marc Struik)

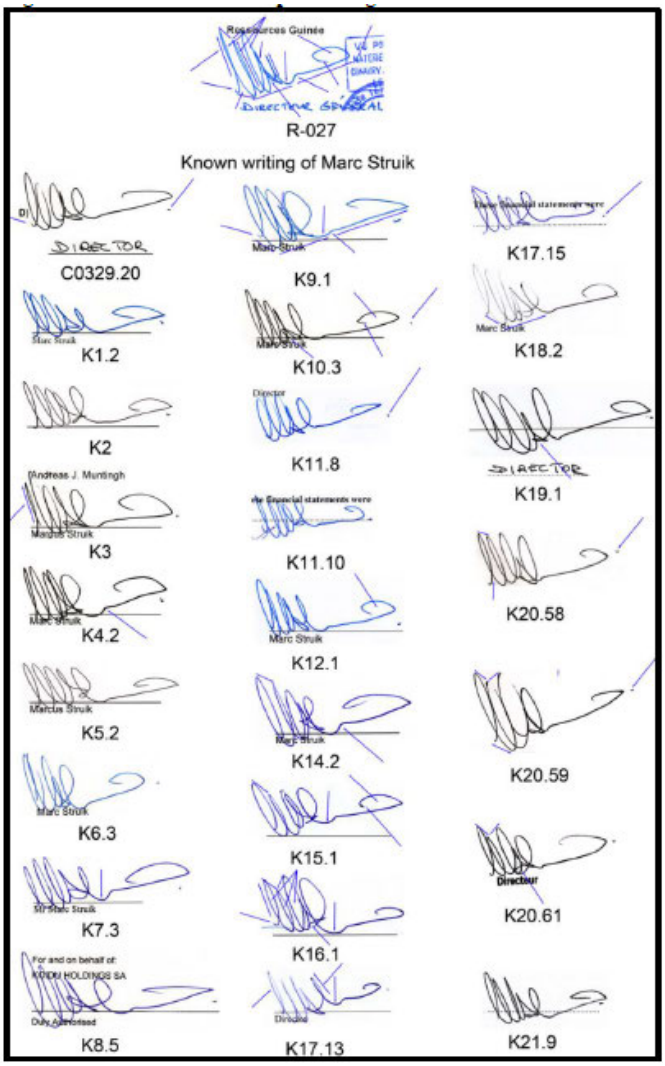
769 C-PHB1, para. 269(v).

770 C-PHB1, para. 270.

771 Radley Report, para. 285.

772 Final Report, p. 102.

615. That signature was assessed in light of the comparison signatures shown below:[773]



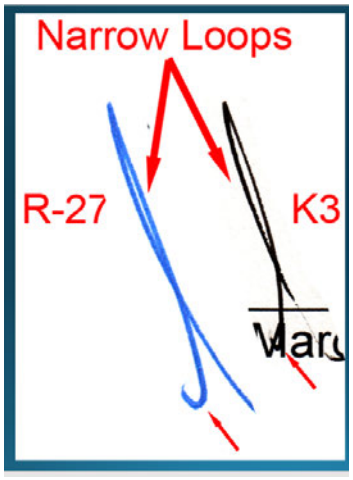
616. The Experts have extensively discussed this disputed signature at the Authenticity Hearing. They have done so on the basis of numerous demonstrative exhibits depicting the "differences" and "rarities" identified by Mr. Radley.

617. The Tribunal starts by noting that Mr. Radley only deemed the characteristic no. 8 relating to the angularity of the curving stroke following the anticlockwise dome (paragraphs 607 and 608 above) to be "significantly different" from the comparison signatures. He did not characterize any of the other "differences" and "rarities" as significant, i.e. differences that cannot be reasonably explained without questioning the identity of the writer. As Mr. Welch explained, rarities do not qualify as "differences", let alone "significant differences", since

773 Final Report, p. 106.

rarities are “handwriting habits that are found within the variation of a writer”.[774] Bearing this in mind, the Tribunal will now address each “difference” or “rarity” identified by Mr. Radley in the image shown in paragraph 607 above.

618. First, Mr. Radley argues that the initial loop (marked as point 1) is “very thin”, which he sees as an “obvious rare occurrence”. Mr. Welch disagrees and explains that the loop in the comparator K3 is also narrow and has a “similar loop size”, with a nice hook at the beginning of the stroke:[775]



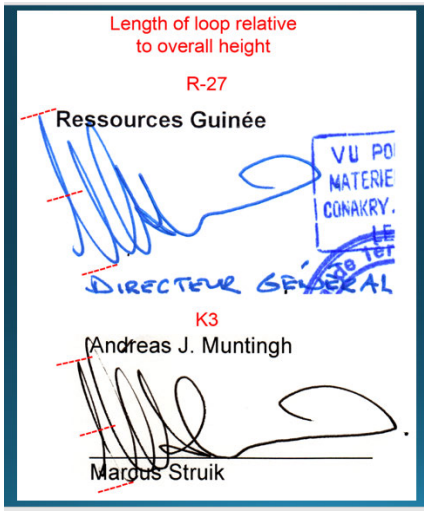
619. Because the comparison signature in K3 is similar, which Mr. Radley acknowledged, the Tribunal agrees with Mr. Welch that this feature does not qualify as a “difference”, let alone a “significant difference”. Accordingly, this feature must be deemed to fall within the range of variation.

620. Second, Mr. Radley argues that the proportion between the length of the first loop and the overall height of the structure (point 2 in the image shown in paragraph 607 above) is “almost exactly half the height” and is different from all the comparison signatures. Mr. Welch responds that the length of the first loop in relation to the overall height of the structure falls within the range of variation and is “consistent with [Mr. Struik’s] handwriting habits”, noting that “the same relative loop size, overall loop size is very similar”:[776]

774 Tr. (DA), Day 1, 218:7-10 (Welch).

775 Mr. Welch’s Presentation, Slide 28.

776 Tr. (DA), Day 1, 212:6-25 (Welch).



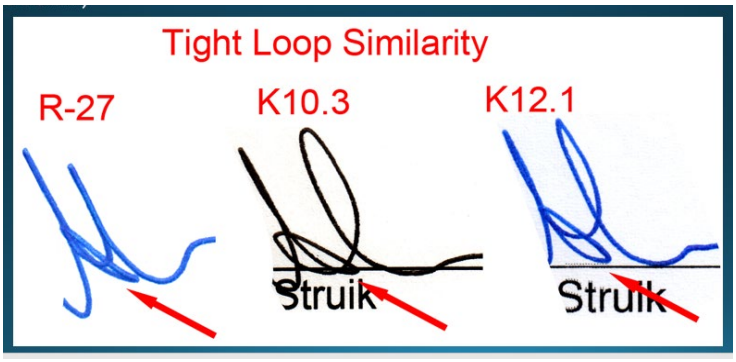
621. As can be seen from the comparison with the signature K3, this feature is within the range of variation of Mr. Struik's writing habits. In this connection, the Tribunal notes that Mr. Radley did not view this feature as a "significant difference".

622. Third, Mr. Radley opines that "the combination of a very thin first loop and second loop does not appear to the extent noted in the questioned signatures" (point 3 in the image shown in paragraph 607 above). According to him, the combined width of the loops is less than for instance in K17.13. Mr. Welch disputes that this feature constitutes a difference. Reviewing the comparison signatures, the Tribunal notes that they show considerable variations among them in this respect. Hence, the Tribunal does not believe that this feature is suggestive of a forgery.

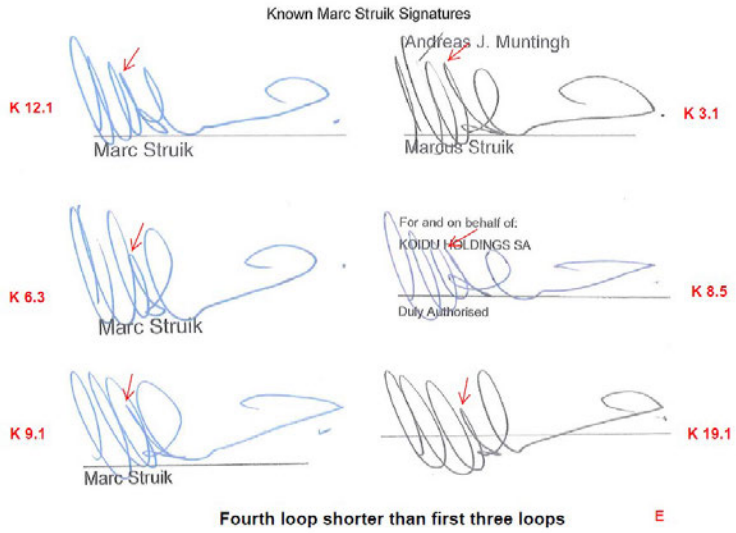
623. Fourth, Mr. Radley opines that the near retracing and the subsequent retrace of the joining loop (point 4 in the image shown in paragraph 607 above) is not seen "in combination" in the comparison signatures. While similar in K10.13, the loop there is not as thin. Mr. Welch disagrees. While he accepts that the loop formation is not wide, he is of the view that this feature is part of the "same movement" and must be attributed to variation.[777] Similar examples can be found in comparison signatures K10.3 and K12.1, which are shown below and demonstrate that this feature is part of Mr. Struik's handwriting habit:[778]

[777] Tr. (DA), Day 1, 214:15-215:23 (Welch).

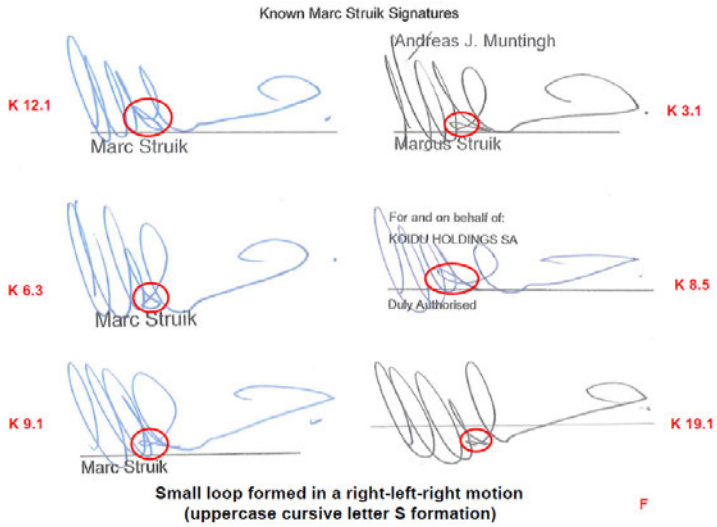
[778] Mr. Welch's Presentation, Slide 31.



624. Mr. Picciochi agreed with Mr. Welch. He further explained that the fourth loop represents an "S" (the first three representing an "M") and that there is "quite a variation" in this feature, which is otherwise consistent as the following images show:[779]



[779] Tr. (DA), Day 2, 100:11-101:15 (Picciochi); Mr. Picciochi's Presentation, Charts E and F (Exh. RDE-RP-1).

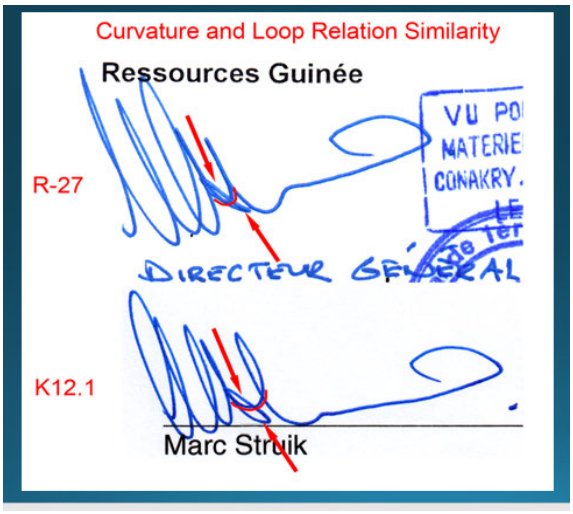


625. There is considerable variation among comparison signatures with respect to this specific feature. Hence, the Tribunal agrees with Mr. Welch that this feature must be attributed to variation. In any event, neither Mr. Radley nor the Claimants have not provided any cogent argument to show that it is a significant difference.[780]

626. Fifth, Mr. Radley opines that the curvature of the joining stroke bending upwards (point 5 in the image appearing in paragraph 607 above) is "tighter" than in the comparison signatures. Mr. Welch concedes that the arch is narrower than in the comparison signatures, but still regards it a variation as it "goes along with [Mr. Struik's] handwriting habits". He emphasizes that, as the illustration below shows, there are similar cuts through the loop into the last upward-down movement: "There's just slight variation in the distance, in the width of that arc or that connecting stroke". Therefore, it is not a "difference which would be suggestive or indicative of another writer".[781]

780 C-PHB1, para. 321(i).

781 Tr. (DA), Day 1, 215:24-216:25 (Welch); Mr. Welch's Presentation, Slide 32.



627. Mr. Welch appears to agree that the feature is a difference, but opines that it "goes along with [Mr. Struik's] handwriting habits" and is therefore not a significant difference suggestive of forgery. In any event, neither Mr. Radley nor the Claimants asserted that this difference was significant.[782] Mr. Radley merely stated that the curvature was "*tighter*" than in any comparator, without however providing any additional assessment of writing habits, fine details or internal/external factors that might shed light on why this difference cannot be reasonably explained. While the curvature in the disputed signature appears to be slightly tighter than in K12.1, for instance, the Tribunal notes that undisputed signatures of Mr. Struik show considerable variation with respect to this particular feature. For instance, the curvature is extremely wide in K8.5, whereas there is no curvature at all in K6.3. The Tribunal is therefore not convinced that this difference is significant enough to warrant a conclusion that the signature is a forgery. Accordingly, the Tribunal accepts that this feature is a difference, but does not view it as a significant difference suggestive of forgery.

628. Sixth, Mr. Radley opines that the straight up/down stroke retracing itself (point 6 in the image in paragraph 607 above) is not present in the comparison signatures, which all show a loop. Mr. Welch disagrees that this feature is a difference. He points out that, while there are no comparison signatures where Mr. Struik "retraces it like that", the height relations and other characteristics are in line with his handwriting habits.[783]

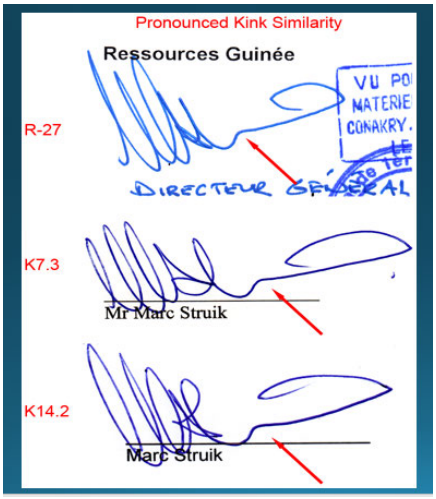
629. While he appears to agree that the feature is a deviation or difference, albeit not a significant one, Mr. Welch still considers it in line with Mr. Struik's writing habits. Here again, Mr. Radley

782 C-PHB1, para. 321(ii).

783 Tr. (DA), Day 1, 219:4-22 (Welch).

did not opine that this difference is significant; nor did the Claimants.[784] That said, the Tribunal notes that a similar feature can be observed in K17.13 and to a lesser extent in K12.1. In these two comparison signatures, the up/down strokes do not retrace themselves as in the disputed signature (it is therefore a difference). However, the loop in these examples is much thinner than in other comparator signatures. By comparison, the Tribunal notes that the up/down stroke in the fourth loop discussed further above also shows significant variation, and that Mr. Struik's habit with regard to this "S" feature includes simple retraces (e.g. K8.5, K9.1, K.10.3, K12.1), whereas most comparison signatures show a loop (e.g. K3.1, K4.2, K5.2, K6.3, K11.10, K15.1, K17.15) or a triangle-shaped formation (e.g. K7.3, K16.1, K17.13, K18.2). This tends to demonstrate that Mr. Struik has a wide range of handwriting habits when it comes to loop formations. Accordingly, the Tribunal does not consider this feature to be a significant difference that suggests forgery.

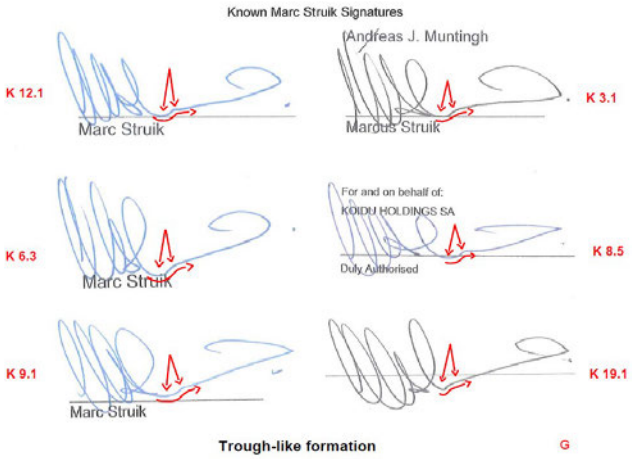
630. Seventh, Mr. Radley stated that the small kink (point 7 in the image in paragraph 607 above) is more pronounced than in the comparison signatures. It is not as deep nor does it have the same curvature as in K7.3 or K14.2. For Mr. Radley, this is a "rare feature, but not a true difference". Mr. Welch agrees that the small kink following the downstroke is not a difference and views it as a variation. He disagrees, however, that it is a "rare feature" as Mr. Radley thinks, since the variations are exhibited in the known handwriting samples mentioned by Mr. Radley. The kink in K7.3 and K14.2, so Mr. Welch says, is "very similar in size and distance relationship" as can be seen below:[785]



784 C-PHB1, para. 321(iii).

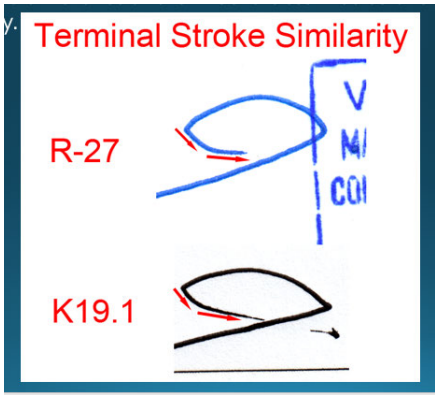
785 Tr. (DA), Day 1, 217:1-20 (Welch); Mr. Welch's Presentation, Slide 34.

631. Mr. Picciochi concurs with Mr. Welch regarding this "trough-like motion". According to him, the small kink following the "S" into an ascending stroke is repeated in the known signatures, although it is not identical every time, as can be seen from the illustration below. However, for Mr. Picciochi, "the spirit of the movement is there all the time".[786]



632. The Tribunal accepts Mr. Welch's and Mr. Picciochi's explanations, especially considering the fact that Mr. Radley conceded that this feature is not a difference.

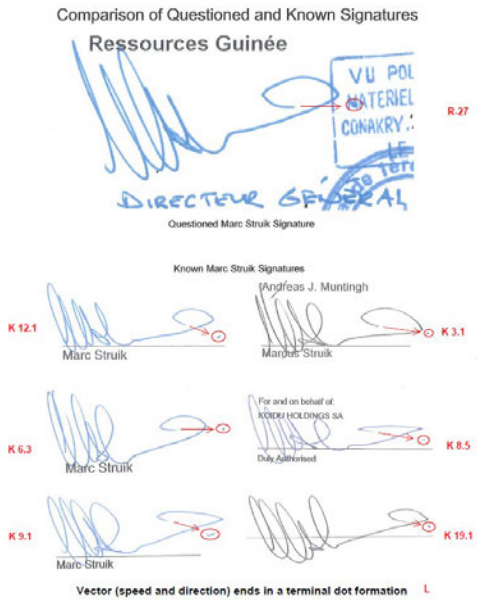
633. Eighth, Mr. Radley opined that the angularity of the curving stroke following the anticlockwise dome (point 8 in the image in paragraph 607 above) is "significantly different" to the other comparison signatures, to the exception of K19.18. Mr. Welch disagreed, finding that the dome-shaped terminal movement in K19.1 for instance was "very similar in its form, size and construction" and "well within Mr. Struik's range of variation":[787]



786 Tr. (DA), Day 2, 101:16-102:2 (Picciochi); Mr. Picciochi's Presentation, Chart G (Exh. RDE-RP-1).

787 Tr. (DA), Day 1, 219:23-220:20 (Welch); Mr. Welch's Presentation, Slide 35.

634. Mr. Picciochi generally agreed with Mr. Welch's conclusions. First, so he testified, while the height and width vary somewhat, the form is essentially the same in all known signatures and it also has an angularity in the left-hand side as is apparent from the illustrations below.[788] Second, according to Mr. Picciochi, the "terminal stroke of this counterclockwise loop does not end abruptly: it flies off the paper and has a nice taper to it. So this means it's written with speed".[789] Finally, Mr. Picciochi stressed that the terminal dot was also present in the disputed signature of Mr. Struik as is shown below, but that it is difficult to see as it is covered by the stamp.[790]



635. On that basis, Mr. Picciochi reached the conclusion that "there is strong evidence to support that the questioned Marc Struik signature is consistent with or genuine when compared to the known signatures. Furthermore, there are no fundamental differences that would indicate forgery".[791]

636. The Tribunal has carefully assessed the opinion expressed by the experts and does not consider this feature as a significant difference indicating forgery. It is true that there is considerable variation in the angularity of the curving stroke following the counterclockwise dome, but Mr. Radley acknowledged that K19.18 shows a similar angularity and the Tribunal

788 Tr. (DA), Day 2, 103:8-18 (Picciochi); Mr. Picciochi's Presentation, Charts I and J (Exh. RDE-RP-1).

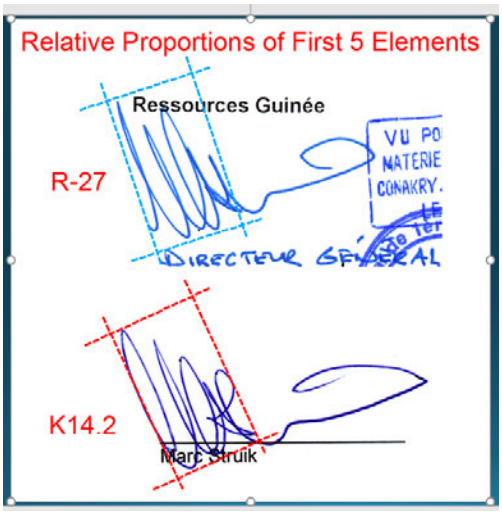
789 Tr. (DA), Day 2, 103:19-24 (Picciochi); Mr. Picciochi's Presentation, Chart K (Exh. RDE-RP-1).

790 Tr. (DA), Day 2, 105:7-12 (Picciochi); Mr. Picciochi's Presentation, Chart L (Exh. RDE-RP-1).

791 Tr. (DA), Day 2, 105:15-19 (Picciochi).

observes that K11.10 also displays some angularity. More importantly, the Tribunal is convinced by the explanations provided by Mr. Picciochi concerning the flying finish and in particular the terminal dot that is aligned with the general direction of the terminal stroke.

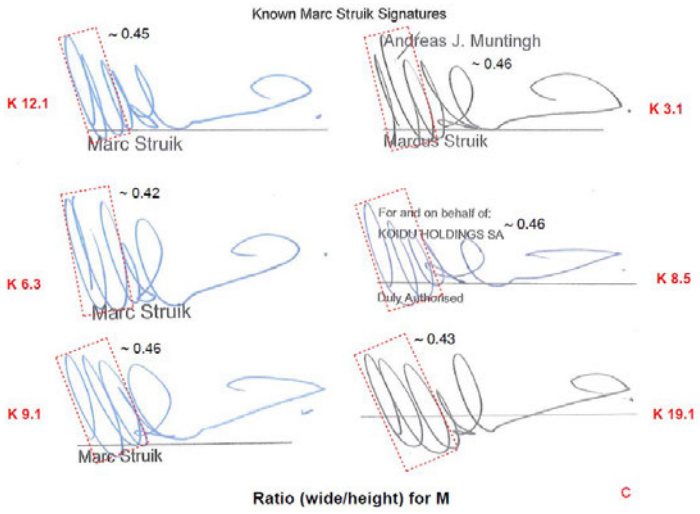
637. Finally, Mr. Radley added that the relative proportions of the height to width of the "first five elements" raise doubts as to the authenticity of the disputed signature. According to Mr. Radley, "the questioned signature fits into a far taller rectangle" than in the comparison signatures. Mr. Welch disagreed, noting that the same proportion can be found in K14.2 as the following illustration shows.[792] Therefore, in Mr. Welch's opinion, this is a variation and not a difference suggestive of another writer.



638. Mr. Picciochi addressed this issue by assessing the first three loops. According to him, these loops represent the letter "M" with a "garland-type 'M' structure": "There is one loop, two loops, three loops, and it has troughs". For him, the ratio of height and width in R-27 is approximately 0.43 and thus falls within the range of variations of the known signatures. The ratios of the comparison signatures depicted in the chart below are as follows: K12.1 ratio is 0.45; K6.3 ratio is 0.42; K9.1 ratio is 0.46; K3.1 ratio is 0.46; K8.5 ratio is 0.46 and K19.1 ratio is 0.43. Accordingly, this is a similarity for Mr. Picciochi, not a difference.[793]

792 Mr. Welch's Presentation, Slide 37. See also: Tr. (DA), Day 2, 169:2-170:16 (Welch).

793 Tr. (DA), Day 2, 97:13-98:25 (Picciochi); Mr. Picciochi's Presentation, Chart C (Exh. RDE-RP-1).



639. The Claimants objected that Mr. Picciochi had measured the height/width ratio of the first three loops only, instead of the "full five loops" as Mr. Radley had done.[794] The Tribunal is unconvinced by Mr. Radley's explanations in this respect. Mr. Radley only raised the height/width ratio at the hearing. His report does not mention it. In addition, Mr. Radley provided no assessment of the range of variation of all comparison signatures, neither did he supply a cogent reason for focusing on the first five loops. By contrast, Mr. Picchiochi, who measured the first three loops, explained that these loops relate to the M of Marc, an explanation that the Claimants seemingly accepted. The Claimants did not dispute either that the height/width ratio of the first three loops falls within the range of variation and is not a difference.

640. Finally, the Tribunal is further persuaded by Mr. Picciochi's analysis of the detail of the handwriting habits. For instance, Mr. Picciochi referred to the relative back slant of the fourth loop, which has an increased slope to the left and is a subtle feature – a "subconscious characteristic" – that a forger is unlikely to pick up.[795] Similarly, the baseline inclination or slope of the entire signature block goes uphill and is therefore, as Mr. Picciochi said, "anything that you do approximately the same way and without thought", or in other words a habit.[796]

794 C-PHB1, para. 328(iii); Radley's annotations to Welch's slide 37, CDE-RR-1.

795 Tr. (DA), Day 2, 99:1-100:10 (Picciochi); Mr. Picciochi's Presentation, Chart D (Exh. RDE-RP-1).

796 Mr. Picciochi's Presentation, Chart D (Exh. RDE-RP-1).

641. On this basis, the Tribunal cannot conclude that the disputed Marc Struik signature is a forgery as the Claimants and Mr. Struik allege. To the contrary, the evidence indicates that it is Mr. Struik who affixed the disputed signature on Exh. R-27.

642. Moreover, the Claimants allege that Mr. LaPorte's document examination of Exh. R-27 was "defective and unscientific".[797] Their criticism concerns the sequencing of the stamp numbers: "the serial number on R-27 bears no resemblance to the sequencing of the serial numbers on R-25 and R-26 also stamped, apparently, by Tinkiano".[798] They lament that there is no evidence in the record "as to the significance of the serial numbers the stamps bear on the basis that the serial numbers relate to the stamps' manufacture (rather than application)".[799] While the Claimants regard this matter as highly significant, they did not cross-examine Mr. Tinkiano on the stamp numbering, nor did they make other submissions, let alone produce evidence, in support of their criticism. In the circumstances, the Tribunal will not speculate on the reasons for the sequencing of the stamps, but to say that there are a number of possible explanations.[800] It will rather rely on Mr. LaPorte's examination which revealed no alteration of the document that could indicate fraud.

643. The Claimants have also argued that it would be "inconceivable" that Mr. Struik would sign a document where the word "Resources" in BSGR's name is spelled with two instead of one "s". This argument was raised for the first time in the post-hearing briefs and Mr. Struik did not mention it in his evidence. As Exh. R-27 is drafted in French, it does not appear "inconceivable" to the Tribunal that the word "Resources" was mistakenly spelled with two "s" like in French. In light of the other evidence, this discrepancy is insufficient to establish that the document was forged.

644. Accordingly, the Tribunal finds that Exh. R-27 and Mr. Struik's signature on this document are authentic.

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797 C-PHB1, p. 126.

798 C-PHB1, para. 312.

799 C-PHB1, para. 312.

800 Including that the numbers may relate to the manufacturing as well as to the application or inadvertance by officials using the stamps.

(f) Exhibit R-28

(i) Description of the document

645. Exh. R-28 is a single page document which is entitled "*contrat de commission*" and concluded between BSG Resources and Matinda. There is a mention in print that the document was signed in Conakry on 27 February 2008. The disputed signature of Asher Avidan appears on the bottom left, together with a BSGR Guinea stamp with the words "*Le Directeur des Opérations*" and the printed text "Mr AVIDAN ASHER" further below. What appears to be the signature of Ms. Touré appears on the bottom right.

(ii) Experts' findings

646. The Experts' found that there was "no evidence of text alteration, text addition, or other irregularities to indicate that R-28 was fraudulently produced".[801] Hence, they concluded that "Avidan Asher wrote the disputed Avidan Asher signatures on R-28 and R-29".[802] In their responses to the Claimants' questions, they further specified that "[t]here is no evidence of any differences that would suggest someone other than Asher Avidan signed the document".[803]

647. According to the Final Report, the disputed signature of Mr. Avidan reveals "numerous significant similarities with the comparison signatures and there is "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes"; thus, there is "no evidence of distortion commonly associated with traced or simulated forgeries".[804] Although this is a stylistic signature lacking readable and well-formed characters, the similarities observed include height relations, proportions, spatial relations, hooks, tapered strokes, retraces and pen drags.[805]

648. Mr. Welch "completely disagrees" with Mr. Radley's identification of differences.[806] The alignment of the right-hand side of the upper and lower loops is part of the handwriting habits and falls within the range of variation. So does the curve of the dome. While the loop

801 Final Report, p. 110.

802 Final Report, p. 9.

803 Final Report, Annex L, Response to BSGR comments on the Preliminary Report, para 43-44.

804 Final Report, para. 149.

805 Final Report, para. 156.

806 Tr. (DA), Day 1, 186:20-21, 193:6-10, 196:13-15 (Welch).

size is not always the same, the movement is similar and is thus not a difference suggestive of a forgery. Finally, the right-angled stroke on the top right hand corner is a feature that fits within the range of variation.

(iii) Comments of the Party-appointed experts

649. Mr. Radley regards the signature of Asher Avidan as a "basic signature".[807] He disagrees with the conclusion of the Experts and identifies the following four differences:[808]

R-28 (Avidan Asher)

650. According to Mr. Radley's report,[809] Point (i) in the image above shows that the vertical line from the right-hand side of the upper loop is in line with the lower loop of the "S" shape; a difference not seen in any of the comparison signatures. Point (ii) refers to the dome at the end of the long horizontal stroke that is "very rounded with a relatively large radius of curvature", whereas the change of direction is "fairly sharp" in the comparison signatures. Point (iii) shows that there is no significant loop but a sideways "V" shape when compared to the clockwise loop with an extended downward tail in the comparison signatures. Finally, at point (iv) there is a deliberate change of direction in the "L" shaped line towards the top right hand corner of the signature. However, because there is "quite a variable structure" in all known signatures, Mr. Radley attaches "little significance" to this fourth element.

651. In sum, Mr. Radley opines that, while there are "clear, demonstrable differences", there is "no clear evidence one way or the other".[810] In other words, the evidence is "inconclusive" as to whether Avidan signed this document.

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807 Radley Report, p. 85.

808 Radley Report, p. 62. The image is reproduced from Mr. Radley's report. It does not identify point (iv), which corresponds to the "L" shaped line on the top right hand corner of the signature and has been identified by the Tribunal with a green arrow.

809 Radley Report, paras. 291-294.

810 Radley Report, paras. 304-305.

652. Mr. Picciochi concurs with Mr. Welch's conclusion and rejects the proposition that the dissimilarities identified by Mr. Radley are differences, let alone significant differences. For him, "the general motion [in Asher Avidan's signature] is very complex".[811]

653. According to Mr. Picciochi, known writings of Mr. Avidan show dissimilarities comparable to those identified by Mr. Radley, which rules out another writer. Specifically, the structure in the lower left hand corner of the signature in Exh. R-28 (point (iii)) is a "very similar motion" as the "9"-shaped structure in R-29.[812] The known signatures show "some variation" in respect of the upper-right tick mark (point (iv)). Therefore, this particular mark also falls within "the known writing variation".[813] The vertical alignment of the two main loops (point (i)) is "not a fundamental difference because it is found in known writings".[814] Finally, the terminal stroke of the last loop (point (ii)), which ends downward vertically in Exh. R-28 and to the right in Exh. R-29, is not a "fundamental difference" either, since in some known signatures the terminal stroke ends downward (like Exh. R-28), others to the left, and yet others to the right (like Exh. R-29).[815]

654. On this basis, Mr. Picciochi concludes that "the known writing and the questioned writing [...] were written by the same person".[816] He is also of the opinion that there are "[n]o fundamental differences" between the questioned and known writings and that "[a]nything that may look dissimilar is attributed to natural variation".[817]

(iv) Parties' positions

655. The Claimants criticize Mr. Welch for dismissing all the differences identified by Mr. Radley as variations, while at the same time conceding that these "variations" fall outside the range of variation. Thus, for instance, Mr. Welch resorted to a "poor" or "appalling quality copy" in

811 Tr. (DA), Day 2, 110:14-15 (Picciochi).

812 Tr. (DA), Day 2, 110:19-111:9 (Picciochi). See also: Mr. Picciochi's Presentation, Asher Avidan, Chart B (Exh. RDE-RP-2).

813 Tr. (DA), Day 2, 111:9-19 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart C (Exh. RDE-RP-2).

814 Tr. (DA), Day 2, 111:20-112:10 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart D (Exh. RDE-RP-2).

815 Tr. (DA), Day 2, 112:11-25 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart E (Exh. RDE-RP-2).

816 Tr. (DA), Day 2, 113:2-8 (Picciochi).

817 Tr. (DA), Day 2, 112:17-18 and 113:8-11 (Picciochi).

K23.3 to dismiss the fourth difference, which "is indicative of the weakness of his argument".[818]

656. The Claimants further state that Mr. Avidan saw versions of these contracts, i.e. the contracts appearing in Exh. R-28 and Exh. R-29, during a blackmail attempt in 2009. The versions which he then saw correspond to Exh. C-112 and Exh. C-113 and display "fundamental differences".[819] For example, the surname appears before the first name (i.e. Avidan Asher) in both the heading and signature blocks, which is not the case of the comparison documents.[820] Moreover, Ms. Touré's signature is above the printed name in Exh. R-28, when it is placed below in Exh. C-112.[821]

657. The Respondent agrees with the Experts' findings that Mr. Avidan signed Exh. R-28 and that the document is authentic.

(v) Discussion

658. Exh. R-28 is another document which the Claimants allege to be forged.[822] The Claimants rely on Mr. Avidan's testimony, according to which "he convincingly and honestly denied having signed the contract […]".[823] The Claimants' expert, however, has not corroborated the Claimants' allegation. For Mr. Radley the evidence is "inconclusive" as to the authenticity of Mr. Avidan's signature. On this basis, the Tribunal could end its analysis here with the finding that the Claimants have not discharged their burden to prove their allegation of forgery. For the sake of completeness and because the Experts and the Parties have examined and debated the authenticity of Exh. R-28 from a forensic point of view, the Tribunal will briefly review the four "differences" identified by Mr. Radley.

659. The following image depicts the disputed Asher Avidan signature in Exhibit R-28:[824]

818 C-PHB1, para. 322, n. 664.

819 C-PHB1, para. 274(ii).

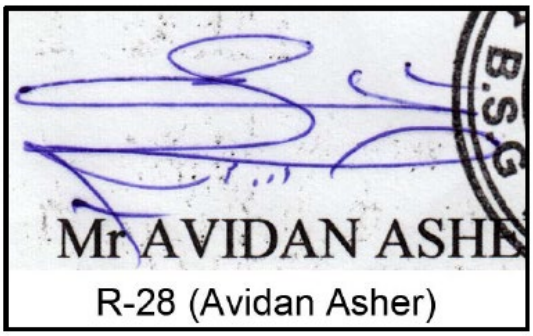
820 C-PHB1, para. 274(i).

821 C-PHB1, para. 274(ii).

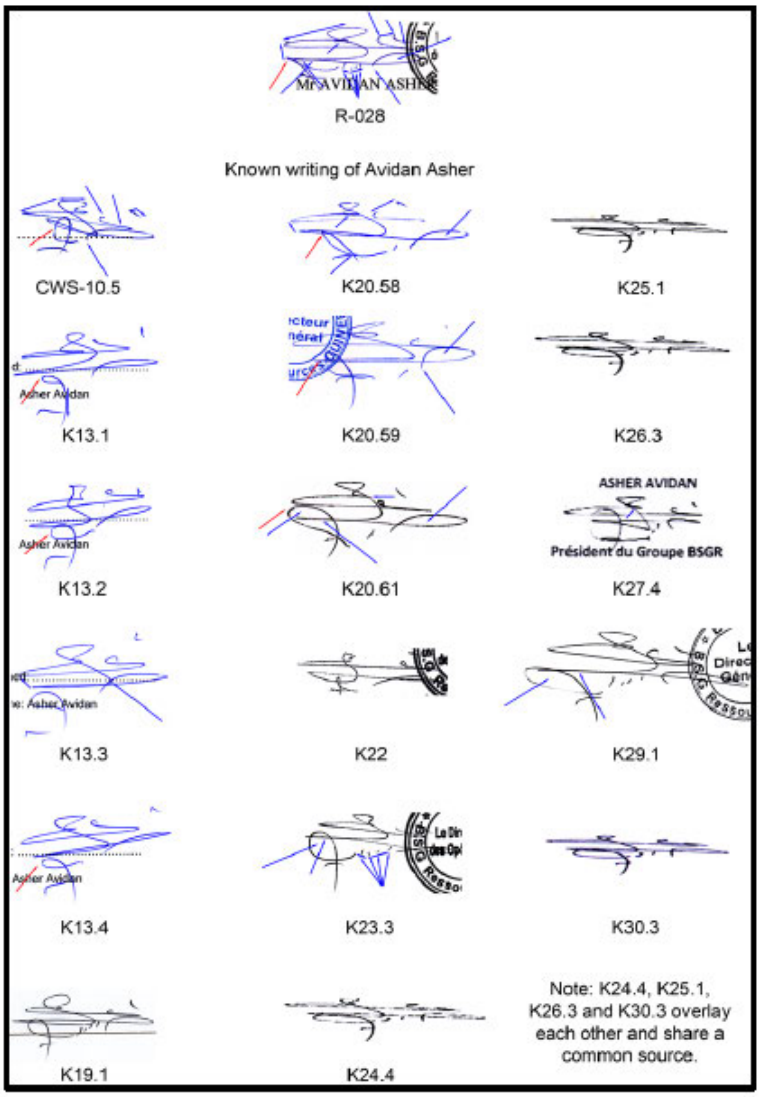
822 Reply, Annex I, para. 31; C-PHB1, paras. 272, 335-336.

823 C-PHB1, para. 274(iii).

824 Final Report, p. 113.

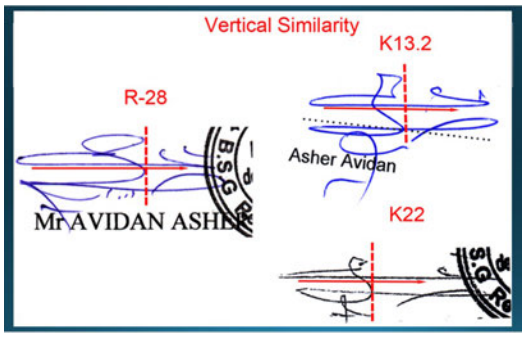


660. The known comparison signatures of Mr. Avidan as compiled by the Experts are found below:[825]



825 Final Report, p. 116.

661. Mr. Radley first argued that the vertical alignment of the right-hand side of the upper loop with the lower loop of the "S" shape (point (i)) is not found in the comparison signatures. Mr. Welch responded that this alignment is part of Mr. Avidan's handwriting habits, which is shown by K13.2 and K22.[826]

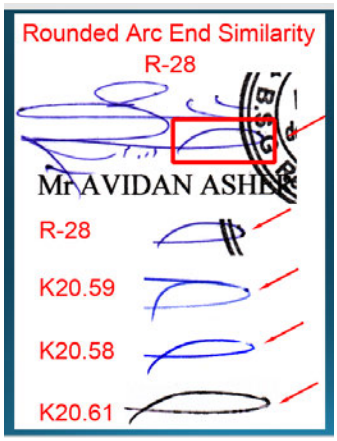


662. Mr. Picciochi agreed with Mr. Radley that most of the known signatures have a slanted, not a vertical line, including the signature in Exh. R-29.[827] However, he also agreed with Mr. Welch that a nearly vertical line appears in K13.2 and K22.1. Looking at the following comparators, the Tribunal is of the view that this feature is within the range of variation of Mr. Avidan's signing habits:

826 Tr. (DA), Day 1, 196:24-197:13 (Welch); Mr. Welch's Presentation, Slide 44.

827 Tr. (DA), Day 2, 111:20-112:10 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart D (Exh. RDE-RP-2).

663. Mr. Radley further argued that the rounded curved dome in Exh. R-28 (point (ii)) contrasts with the "fairly sharp" change of direction in the undisputed signatures. Mr. Welch disagreed and opined that the curve of the dome is a variation, not a difference when assessed with comparison signatures:[828]



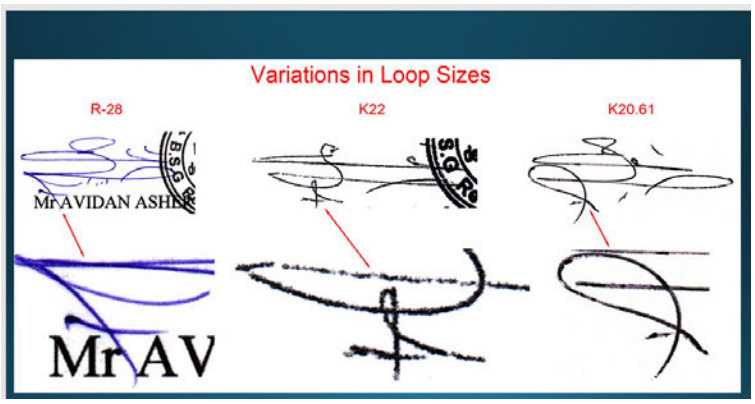
664. Mr. Picciochi did not see any "fundamental difference" either. He supported his view by pointing to the terminal stroke of the curved dome. He observed that such stroke displayed a wide range, sometimes ending downward (like Exh. R-28 or K19.18), other times to the left (like K13.4), and yet others to the right (like Exh. R-29 or CWS-10.5K30.2), as illustrated below:[829]

828 Tr. (DA), Day 1, 197:14-198:13 (Welch); Mr. Welch's Presentation, Slide 46.

829 Tr. (DA), Day 2, 112:11-25 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart E (Exh. RDE-RP-2).

665. Here again, the Tribunal is not convinced that this feature constitutes a difference, even less a significant difference indicating a forgery. Mr. Radley merely asserted that "[g]enerally, the change of direction is fairly sharp in the known writings". However, he provided no analysis of or references to comparison signatures. By contrast, Mr. Welch pointed to comparison signatures displaying rounded domes like in Exh. R-28 without a sharp change in direction. Accordingly, the Tribunal regards this feature as a variation and not a difference.

666. Third, Mr. Radley pointed to the absence of the clockwise loop beneath the main portion of the signature (point (iii)). Mr. Welch partly agreed with Mr. Radley, insofar as the loop size is not always the same. He opined, however, that the movement was similar and thus not a difference pointing to another writer. He noted that Mr. Avidan had a "vast range of variation in how he makes that particular movement", as K22 and K20.61 show:[830]



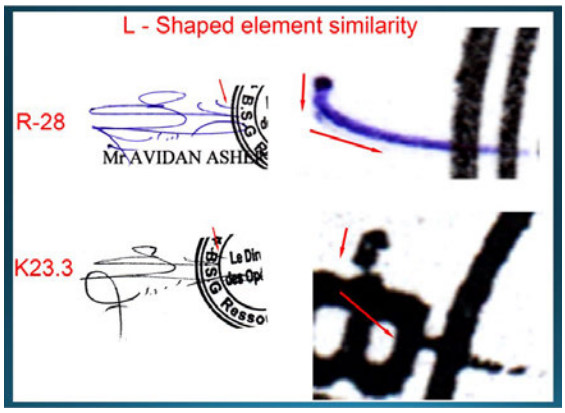
667. For Mr. Picciochi, the structure in the lower left hand corner of the signature in Exh. R-28 is a "very similar motion" as the 9-shaped structure in Exh. R-29.[831]

668. The Tribunal does not consider that this feature qualifies as a significant difference suggesting forgery. While it tends to agree with Mr. Radley that this feature falls outside the observed range of variation in Mr. Avidan's handwriting, it also takes into account Mr. Welch's explanations on the range of movements and, more importantly, the fact that Mr. Radley regarded the evidence as inconclusive.

830 Tr. (DA), Day 1, 198:15-199:24 (Welch); Mr. Welch's Presentation, Slide 48.

831 Tr. (DA), Day 2, 110:19-111:9 (Picciochi). See also: Mr. Picciochi's Presentation, Asher Avidan, Chart B (Exh. RDE-RP-2).

669. Finally, Mr. Radley noted that the right-angled stroke on the top right hand corner (point (iv)) was different from the rest of the known signatures. Mr. Welch did not agree that this feature was a difference, as it fits within the range of variation illustrated below:[832]



670. Mr. Picciochi agreed that the known signatures show "some variation" in respect of the upper-right tick mark, but stressed that such mark also falls within known writing variation:[833]

832 Tr. (DA), Day 1, 199:25-201:17 (Welch); Mr. Welch's Presentation, Slide 50.

833 Tr. (DA), Day 2, 111:9-19 (Picciochi); Mr. Picciochi's Presentation, Asher Avidan, Chart C (Exh. RDE-RP-2).

671. For the Tribunal, this feature is again not a significant difference indicative of a forgery. Indeed, Mr. Radley recognized that Mr. Avidan's signatures displayed "quite a variable structure" and attributed "little significance" to his observation on the right-angled stroke. Accordingly, he acknowledged that this feature was not a significant difference suggesting a forgery.[834]

672. For these reasons, the Tribunal finds that Exh. R-28 and more specifically Mr. Avidan's signature on this document are authentic.

(g) Exhibit R-29

(i) Description of document

673. Exh. R-29 is a single page document that bears the title "*protocole d'accord*" and is entered into by BSR Resources Guinée and Matinda. There is a mention in print that the document was signed in Conakry on 28 February 2008. The disputed signature of Asher Avidan appears on the bottom left, together with a BSGR Guinea stamp with the words "*Le Directeur des Opérations*" and the printed text "*Monsieur AVIDAN ASHER*" further below. What appears to be the signature of Ms. Touré is located on the bottom right.

(ii) Experts' findings

674. The Experts found that "[t]here is no evidence of text alteration, text addition, or other irregularities to indicate that R-29 was fraudulently produced"[835] and conclude that: "Avidan Asher wrote the disputed Avidan Asher signatures on R-28 and R-29".[836]

675. With respect to the document, Mr. LaPorte reaches the same conclusions as with Exh. R-28, except that the examination revealed a transfer of ink/toner on the front of Exh. R-29, but did not reveal the source of such transfer.[837]

676. As regards the signature of Asher Avidan, Mr. Welch comes to an identical conclusion as for Exh. R-28.

(iii) Comments of the Party-appointed experts

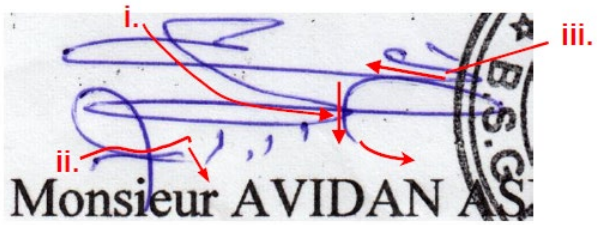
834 Radley Report, para. 294.

835 Final Report, p. 120.

836 Final Report, p. 9.

837 Final Report, para. 191.

677. In addition to the differences identified in the disputed signature in Exh. R-28, which are also present in Exh. R-29, Mr. Radley points to three alleged differences apparent only in Exh. R-29:



R-29 (Avidan Asher)

678. First, Mr. Radley stated that the irregular clockwise bend in the diagonal of the "S" shape (point i) is not seen in the comparison signatures.[838] Second, he explained that the written horizontal dash in the looped 9-shaped element (point ii) is a "waved line" and not as smooth and tapered as in the comparison signatures.[839] In addition, this feature shows a very slight downward hook.[840] Third, the comparison signatures do not show the "pen lifting motion" at the end of the "S" shaped terminal loop (point iii).[841] Mr. Radley added that the terminal strokes in the disputed Avidan signature show differences, namely "angular bends at the end in an irregular fashion".[842]

679. As was the case with Exh. R-28, Mr. Picciochi does not "support the proposition that there are fundamental differences" between the disputed Asher Avidan signature in Exh. R-29 and the known writings,[843] and finds that "[a]nything that may look dissimilar is attributed to natural variation".[844]

(iv) Parties' positions

680. The Claimants allege that Exh. R-29 is a forgery, as Mr. Avidan testified.[845] The Claimants essentially reiterate the same arguments as for Exh. R-28. Additionally, they point out that

838 Radley Report, para. 297.

839 Radley Report, para. 298.

840 Radley Report, para. 299.

841 Radley Report, para. 300.

842 Radley Report, para. 303.

843 Tr. (DA), Day 2, 113:8-10 (Picciochi).

844 Tr. (DA), Day 2, 113:10-11 (Picciochi).

845 Reply, Annex I, para. 31; C-PHB1, paras. 272, 335-336.

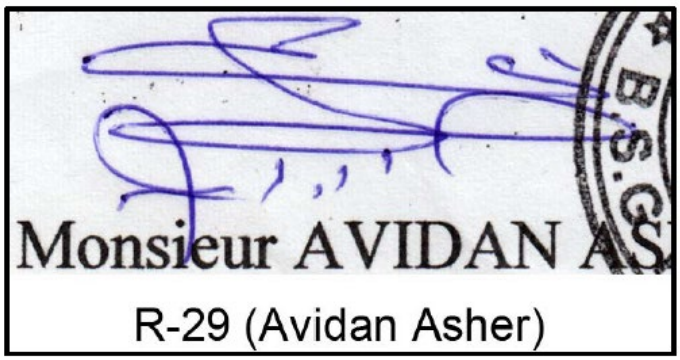
Mr. Welch only relied on "two poor (and distorted) copies" of K22 and K12.3 to discard Mr. Radley's comments on the "elongated anticlockwise curve shape" (point (iii)).[846] In fact, so the Claimants say, Mr. Welch accepted that this feature was "not exactly the same" when comparing Exh. R-29 to K22 or K12.3.[847]

681. The Respondent agrees with the Experts' findings that Mr. Avidan signed Exh. R-29 and that the document is authentic.

(v) Discussion

682. It is the Claimants' allegation that Exh. R-29 is forged.[848] As with Exh. R-28, the Claimants in particular rely on Mr. Avidan's testimony that he did not sign that document.[849] For essentially the same reasons as those set out in connection with Exh. R-28, the Tribunal does not consider that Exh. R-29 is a forgery. Indeed, Mr. Radley did not support the Claimants' case when he called the evidence "inconclusive". While the Tribunal could thus end the inquiry here, it will nevertheless briefly examine the three "differences" identified by Mr. Radley for the sake of completeness.

683. The following image shows the signature of Mr. Avidan in Exhibit R-29:[850]



684. The comparison signatures of Mr. Avidan are reproduced in connection with the discussion of Exh. R-28 at paragraph 660 above.

685. The first "difference" identified by Mr. Radley relates to the clockwise bend in the diagonal of the S shape. Mr. Welch responded that this feature was not a difference, since such

846 C-PHB1, para. 322, n. 664.

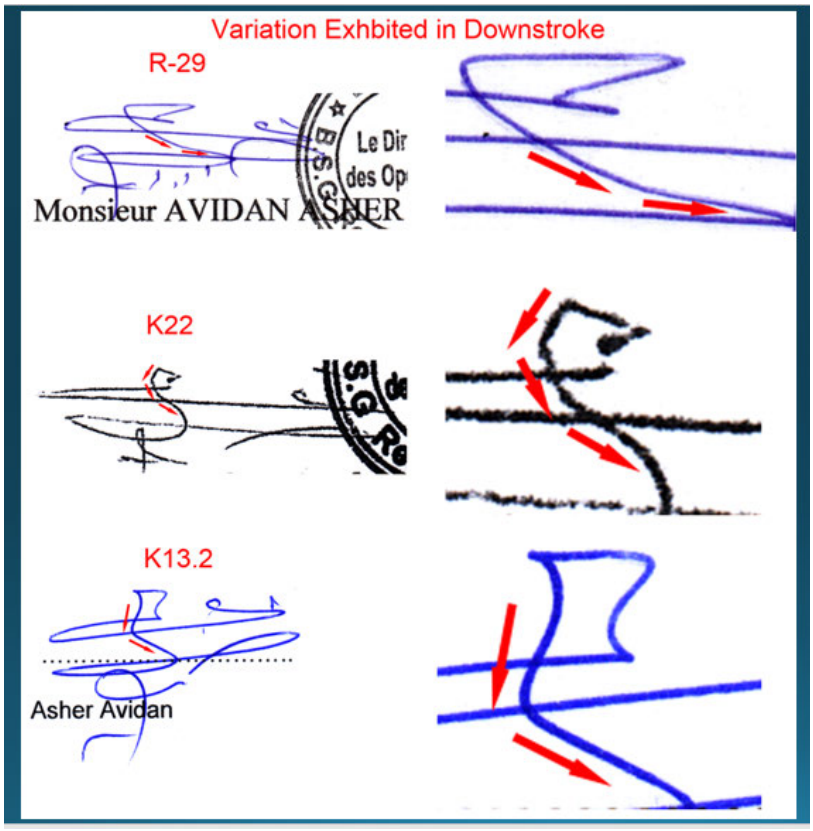
847 C-PHB1, para. 322, n. 664.

848 See, for instance, C-PHB1, paras. 272, 335-336.

849 C-PHB1, para. 274(iii).

850 Final Report, p. 122.

variation is exhibited in the known signatures. The Tribunal agrees relying especially on K13.2:[851]



686. In respect of the Claimants' argument that Mr. Welch relied on "two poor (and distorted) copies" as comparison material, the Tribunal notes that the Experts deemed the comparison samples sufficient for purposes of their examination.[852] More importantly, Mr. Radley concluded his assessment by stating that there was no clear evidence pointing in one or the other direction.[853]

687. The second "difference" identified by Mr. Radley relates to the horizontal dash in the looped 9-shaped element (point (ii)). For him, this "waved line" is not executed with the same smooth movement as in the comparison signatures.[854] In addition, so he says, the "very slight downward hook" is dissimilar to the comparison signatures.[855] These are not

851 Mr. Welch's Presentation, Slide 53.

852 Final Report, para. 170.

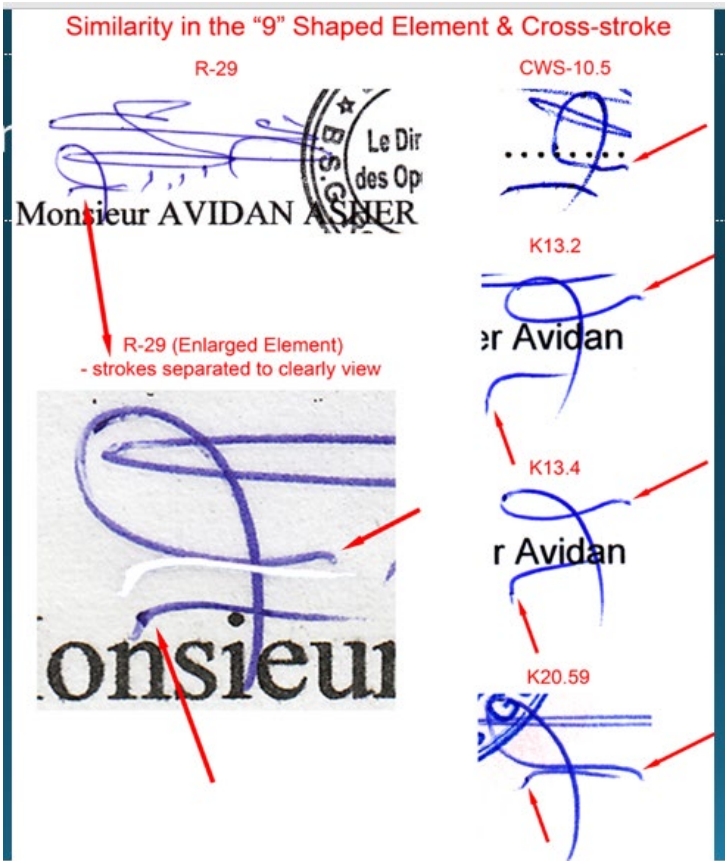
853 Radley Report, para. 305.

854 Radley Report, para. 298.

855 Radley Report, para. 299.

differences according to Mr. Welch, but features that "go to genuineness" and fall within the scope of variation.[856]

688. Here again, the Tribunal starts by observing that Mr. Radley did not regard this second dissimilarity as a significant difference. Moreover, Mr. Welch convincingly rebutted Mr. Radley's arguments. Indeed, the "very slight downward hook" belongs to the ending of the 9-shaped element, not to the "waved line", as Mr. Radley seemed to suggest. The downward hook is found in CWS-10.5, K13.2, K13.4 and K20.59:[857]



689. The third difference identified by Mr. Radley relates to the horizontal direction of the terminal loop in the S shape (point (iii)).[858] Mr. Welch disagrees with Mr. Radley's conclusion, saying that this "characteristic is well within the handwriting habits and variation of Mr. Asher".[859]

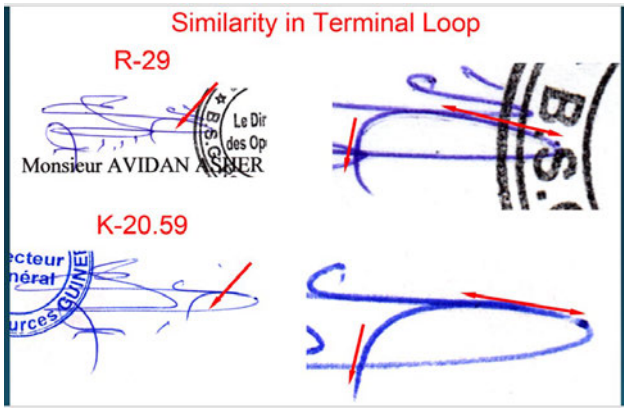
856 Tr. (DA), Day 1, 203:6-205:6 (Welch); Mr. Welch's Presentation, Slide 55.

857 Mr. Welch's Presentation, Slide 55.

858 Radley Report, paras. 300-301.

859 Tr. (DA), Day 2, 209:2-4 (Welch).

690. The Tribunal agrees with Mr. Welch that this feature falls within the range of variation of Mr. Avidan's handwriting. A similar feature can be found in K-19.1 or, as depicted below, in K-20.59:[860]



691. Finally, it is noteworthy that Mr. Radley did not qualify this feature as a significant difference. On this basis, the Tribunal reaches the conclusion that Mr. Avidan wrote the disputed signature in Exh. R-29 and that such document is authentic.

(h) Exhibit R-30

(i) Description of document

692. Exh. R-30 is an untitled document that bears the disputed signatures of Ms. Touré and Mr. Noy from Pentler Holdings Ltd. There is a printed mention that the document was signed in Freetown. The document also bears a handwritten date "8-7-2010" and there is a "Pentler Holdings Ltd" stamp above the disputed signature of Mr. Noy.

(ii) Experts' findings

693. The Experts opined with respect to Exh. R-30: "there [was] no evidence of text alteration, text addition, or other irregularities to indicate that R-30 was fraudulently produced". They further found that there was evidence indicating that "R-30 and DOC C may have been attached to each other at one time".[861]

860 Mr. Welch's Presentation, Slide 57.

861 Final Report, p. 129.

694. About Ms. Touré's signature, the Experts concluded that "[t]here are indications that the Mamadie Toure signatures on R-24, R-27 through R-32, R-269, R-346.2, DOC B, and DOC C may have all been written by the same person".[862]

695. In relation to Mr. Noy's signature, the Experts found that "[a]lthough no known comparison samples were submitted for comparison with the remaining disputed signatures, no evidence or characteristics commonly associated with traced or simulated forgeries were observed".[863]

(iii) Comments of the Party-appointed experts

696. Mr. Radley criticizes the Experts' failure to address alternative propositions. For him, they could equally have concluded that there was "no positive, demonstrable evidence to show that R30 is authentic and was produced on the date indicated".[864] While Mr. Radley agrees that the staining pattern indicates that Exh. R-30 and DOC C "were probably in contact one with another", he finds this observation "irrelevant", since one cannot determine at what point in time the staining occurred.[865]

697. Messrs. Aginsky and Picciochi did not specifically address the authenticity of Exh. R-30.

(iv) Parties' positions

698. The Claimants allege that Exh. R-30 is a forgery.[866] According to them, "one of the (genuine) 3 August 2010 contracts has been modified to refer to the Simandou project, thereby implicating BSGR". In addition, the Experts had no original for inspection and they could therefore not conduct the majority of the relevant tests. Consequently, Mr. LaPorte could not have reached a conclusion of "no evidence" of fraud. Finally, so the Claimants, Mr. Welch acknowledged that his role was "limited" due to the absence of comparison signatures for Ms. Touré and Mr. Noy.[867]

699. The Respondent concurs with the Experts' conclusions, submitting that this document is authentic.

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862 Final Report, p. 9.

863 Final Report, p. 9.

864 Radley Report, para. 153.

865 Radley Report, para. 154.

866 Reply, Annex I, para. 30; C-PHB1, para. 283

867 C-PHB1, para. 283.

(v) Discussion

700. The Tribunal notes that limited examinations were conducted on this document, since the Experts were only provided with a digital image .pdf file. In spite of the limited materials, Mr. Welch conducted some handwriting examinations and found "evidence of fluency with variation in the line width, hooks, and tapered strokes". On that basis, Mr. Welch found "no evidence of distortion commonly associated with traced or simulated forgeries".[868] However, for lack of comparators, he did not undertake a comparison of signatures.

701. On this basis, the Tribunal finds it difficult to draw a definite conclusion from the forensic examination. This being so, it recalls that Mr. Noy did concede in the LCIA Arbitration that he had concluded contracts with Ms. Touré. Taking this admission into account as well as the (limited) results of the forensic examination, the Tribunal comes to the conclusion that there is no evidence on record showing that Exh. R-30 is a forgery and the Tribunal will therefore treat this document as authentic.

(i) Exhibit R-31

(i) Description of document

702. Exh. R-31 is an untitled two-page document. Both pages are dated 3 August 2010 and contain the same content with the same formatting. There is a mention in print that the documents were signed in Freetown and both pages contain the handwritten date of "03.08.2010". The signatures of Ms. Touré and Mr. Noy appear at the bottom left of both pages. The signature of Mr. Pabs-Garnon appears at the bottom right of both pages. The documents contain two stamps; the first on the bottom left reads "PENTLER HOLDINGS LTD" and the second on the bottom right bears the name "Editayo Pabs-Garnon".

(ii) Experts' findings

703. The Experts found "no evidence of text alteration, text addition, or other irregularities to indicate that the R-31 documents were fraudulently produced".[869]

704. The handwriting examination revealed "evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes". On this basis, the Experts concluded that there was "no evidence of distortion commonly associated with traced or simulated

868 Final Report, para. 196.

869 Final Report, p. 134.

forgeries".[870] However, absent known signatures/initials for Mamadie Touré, Michael Noy and Editayo Pabs-Garnon, no comparison could be conducted.

705. As for the document examination, it revealed that Exh. R-31.2 was above Exh. R-31.1 "when the date, Michael Noy, and Editayo Pabs-Garnon signatures were written on R-31.2".[871] In addition, Exh. R-31.1 was above Exh. R-31.2 "when the date and Mamadie Toure signature was written on R-31.1".[872] Finally, "on the basis of the unsourced date, Michael Noy and Editayo Pabs-Garnon signatures impressed into R-31.2, the evidence reveals that another original copy of R-31 or some other document, was dated and signed in the name of Michael Noy and Editayo Pabs-Garnon while on top of R-31.2".[873] The document assessment also revealed some ink/toner transfer on the back of both pages of Exh. R-31, the source of which was not determined. Further, the evidence indicated that Exh. R-31.2 was placed on Exh. R-31.1 "shortly after the Pentler Holdings LTD stamp was placed on the document or some other document with a similar stamp".[874]

(iii) Comments of the Party-appointed experts

706. Mr. Radley takes issue with the Experts' failure to address alternative propositions. In his opinion, they could as well have reached the conclusion that there was "no positive, demonstrable evidence to show that R31 is authentic and was produced on the date indicated".[875] While Mr. Radley concurs that the examinations "support a hypothesis that the two pages of R31 were created at one point in time", he also insists that they provide no positive evidence of the documents' authenticity and the date of their production.[876]

707. The Respondent's experts did not specifically comment on Exh. R-31, but generally supported the Experts' findings.

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870 Final Report, para. 208.

871 Final Report, para. 212.

872 Final Report, para. 212.

873 Final Report, para. 212.

874 Final Report, para. 214.

875 Radley Report, para. 155.

876 Radley Report, para. 156.

(iv) Parties' positions

708. The Claimants "cannot take a position on [the documents'] authenticity", but raise concerns regarding the "very confusing" terms of this contract and add that "the payments apparently due" under this contract do "not add up to the USD 5 million which Guinea claims".[877]

709. The Respondent generally argue that the document is authentic and that the Claimants have not shown that it is forged.

(v) Discussion

710. The Tribunal notes that the Claimants have not taken a position on the authenticity of Exh. R-31. In other words, they have not alleged forgery, and correctly so as there is no evidence on record to this effect. The Tribunal is aware that Mr. Welch only conducted limited handwriting examinations due to the absence of comparison signatures for Ms. Touré, Mr. Noy and Mr. Pabs-Garnon. However, the Tribunal recalls that Mr. Noy conceded in the LCIA Arbitration that he did enter into contracts with Ms. Touré.[878]

711. In sum, there is no evidence establishing that Exh. R-31 is a forgery and the Tribunal will therefore treat it as authentic.

(j) Exh. R-32

(i) Description of document

712. Exh. R-32 is a two-page document containing a contract concluded between Pentler Holdings Ltd, Matinda & Co. Ltd and Ms. Touré. The bottom of the first page contains the initials MT and M.N. The document is undated, but there is a mention in printed text on the second page that the document was signed in Freetown. The signature of Ms. Touré appears on the bottom left of the second page and the signature of Mr. Noy appears on the bottom right of the second page. The signature of Mr. Pabs-Garnon appears below the signature of Ms. Touré, together with a stamp bearing the name "Editayo Pabs-Garnon".

(ii) Experts' findings

713. The Experts concluded: "page 2 of R-32 was not originally attached to page 1 of R-32". According to them, there is evidence that "page 1 from R-32 was originally fastened to DOC

877 C-PHB1, para. 284.

878 The Tribunal notes that the Parties have not addressed the topics of indentation and ink/toner transfer raised by Mr. LaPorte and agrees that nothing can be gained from these subjects for purposes of authenticity.

B; and page 2 from R-32 was originally fastened to DOC A". They also found that there was no evidence to indicate that the Exh. R-32, DOC A, and DOC B were fraudulently prepared".[879]

714. With respect to the document examination, the staple holes in the top left corner on page 1 of Exh. R-32 are not consistently aligned with page 2, but are aligned with DOC B. This is corroborated by a crease (fold line) positioned in the same place on page 1 of Exh. R-32 and DOC B.[880] Similarly, the staple holes on page 2 of Exh. R-32 are aligned with DOC A, in addition to a tan colored stain that is present on both documents.[881] The indentation examinations revealed that DOC B was above page 1 of Exh. R-32 when Ms. Touré's signature was written on DOC B and page 2 of Exh. R-32 was above page 1 of Exh. R-32 when the signature of Mr. Pabs-Garnon was written on page 2 of Exh. R-32. Moreover, DOC A was above page 2 of Exh. R-32 when the initials M.T. and M.N. were written on DOC A.[882] At the Authenticity Hearing, Mr. LaPorte testified that "had we not been able to associate document A and document B with Exh. R-32, that would have been evidence that that document could have potentially been fraudulent".[883]

715. Turning to the handwriting examination, for the Experts, the signatures "reveal evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes", thus showing no evidence of "distortion commonly associated with traced or simulated forgeries".[884] Since no known signatures/initials were available, no comparison was conducted for the signatures of Ms. Touré, Mr. Noy and Mr. Pabs-Garnon.[885]

(iii) Comments of the Party-appointed experts

716. Mr. Radley agrees that page 2 of Exh. R-32 was originally fastened to DOC A and page 1 to DOC B. According to him, this is "most likely" the result of a "mix up" or confusion.[886]

879 Final Report, p. 144.

880 Final Report, para. 216.

881 Final Report, para. 217.

882 Final Report, para. 228.

883 Tr. (DA), Day 1, 41:17-20 (LaPorte).

884 Final Report, para. 224.

885 Finaly Report, para. 225.

886 Radley Report, para. 158.

According to him, the other "limited examinations" "take the matter no further forward" towards determining the documents' authenticity or their date of production.[887]

717. The Respondent's experts did not specifically comment on Exh. R-32, but generally supported the Experts' findings.

(iv) Parties' positions

718. The Claimants argue that Exh. R-32 is part of a "series of confusing documents" and that they "cannot take a position on their authenticity".

719. The Respondent argues that the document is authentic and that the Claimants have not proven that it is forged.

(v) Discussion

720. Here again, the Claimants take no position on the authenticity of the document under examination. Accordingly, they do not allege that Exh. R-32 is forged. The Tribunal considers that the Claimants are right not to make such allegation as nothing in the record proves the existence of a forgery. This observation is reinforced if one keeps in mind that Mr. Noy admitted [redacted] that he had concluded contracts with Ms. Touré.[888]

721. In sum, there is no evidence to demonstrate that Exh. R-32 is a forgery and the Tribunal will therefore consider that it is authentic.

(k) Exh. R-269

(i) Description of document

722. Exh. R-269 is a document entitled "Attestation", which is signed by Ms. Touré. The place and date are printed and indicate Freetown and 2 August 2009. In addition, the document states that Messrs. Abdoulaye Cissé and Issiaga Bangoura signed the document as witnesses.

887 Radley Report, para. 159.

888 Reply, Annex I, para. 32; [redacted]

(ii) Experts' findings

723. The Experts found "no evidence of page substitution, text alteration, text addition or other irregularities to indicate that R-269 was fraudulently produced".[889]

724. The document examinations revealed two sets of staple holes that are consistently aligned. One set of staple holes exhibits rust, thus making it "more likely the documents were once stapled together several years ago and not stapled more recently".[890] Further, they noted that inkjet technology was used to print the text.[891]

725. With respect to the handwriting examinations, the signatures of Ms. Touré and Mr. Cissé "reveal evidence of fluency with good line quality, pen pressure variation, hooks, and tapered strokes".[892] The signature of Mr. Bangoura "likewise bears evidence of fluency especially with respect to the non-horizontal movements which have smooth even lines with tapered strokes and pen pressure variation".[893] On that basis, the Experts concluded that there was "no evidence of distortion commonly associated with traced or simulated forgeries".[894] However, as no comparators were available, Mr. Welch performed no comparison analysis.[895]

(iii) Comments of the Party-appointed experts

726. Mr. Radley opines that the Experts could equally have concluded that no evidence showed that Exh. R-269 was authentic. The "quite extensive" rust marks suggest that the document was stapled "for a fair period of time", although Mr. Radley cannot estimate how long because of the accelerated oxidation in humid climates and the absence of information on the document's storage.[896] The fact that inkjet technology was used "does not necessarily mean" that an office machine was used.

889 Final Report, p. 159.

890 Final Report, para. 232.

891 Final Report, para. 234.

892 Final Report, para. 238.

893 Final Report, para. 238.

894 Final Report, para. 238.

895 Final Report, para. 239.

896 Radley Report, paras. 160-161.

727. The Respondent's experts did not specifically comment on Exh. R-269, but supported the Experts' findings in general terms.

(iv) Parties' positions

728. The Claimants initially claimed that Exh. R-269 was a forgery. In their Post-Hearing Brief, they then argued that the document may be "genuine", but that its content was "false".[897] For the Claimants, Ms. Touré created this document "for illegitimate means". In addition, the Claimants observe that Mr. Welch merely found "indications" that Ms. Touré signed this document. They also note that there is no information on the provenance of this document and that Guinea "was unable to explain how the FBI obtained an '*original*' version".[898] Finally, the Claimants draw attention to the testimony of Messrs. Avidan and Struik according to which they first heard of this document in the context of Ms. Touré's blackmail attempts, but "did not see a copy until these proceedings".[899]

729. The Respondent submits in general terms that the document is authentic and that the Claimants have not established that it is forged.

(v) Discussion

730. The Tribunal notes that the Claimants no longer allege that the document is forged. They assert now that Ms. Touré created the document for illegitimate purposes and that the content does not reflect the truth. In other words, the Claimants accept that Ms. Touré signed Exh. R-269. As a result, the authenticity of the document is not at issue. It will remain for the Tribunal to assess the probative value of the document in the analysis of Guinea's allegations of corruption.

(l) Exh. R-346

(i) Description of document

731. Exh. R-346 is a two-page document that bears the initials N.M. and M.T. on the first page and the disputed signatures of Ms. Touré, Mr. Noy and Mr. Editayo Pabs-Garnon. There is an indication in print that the document was signed in Freetown and it bears the handwritten date of "03-08-2010".

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897 C-PHB1, paras. 279 and 281.

898 C-PHB1, para. 281 (Emphasis in the original).

899 C-PHB1, para. 281.

(ii) Experts' findings

732. Like for many other documents discussed above, the Experts found "no evidence of text alteration, text addition, or other irregularities to indicate that R-346 was fraudulently produced".[900]

733. Exh. R-346 is a digital image .pdf file, with an image of poor quality, which limited the findings. The Experts identified "some limited characteristics that may indicate evidence of fluency in the initials/signatures", but added that this was "far from conclusive".[901]

(iii) Comments of the Party-appointed experts

734. For Mr. Radley, the Experts could equally have concluded that there was no evidence of authenticity,[902] considering that their comments "do not contribute any meaningful evidence with respect to the authenticity of the document or its date of production".[903]

735. The Respondent's experts did not specifically comment on Exh. R-346, but generally supported the Experts' findings.

(iv) Parties' positions

736. The Claimants argue that Exh. R-346 is part of a "series of confusing documents" and that they "cannot take a position on their authenticity".

737. The Respondent generally argues that the document is authentic and that the Claimants have not established the evidence of a forgery.

(v) Discussion

738. Here, the Claimants have taken no position on authenticity, which means that they make no allegation of forgery. There is indeed no evidence on record to this effect and the Tribunal recalls that Mr. Noy [redacted] that he had signed contracts with Ms. Touré.

739. While it is true that the available digital image .pdf file allowed only for limited examinations, it remains that there is no proof that this document is forged.

900 Final Report, p. 172.

901 Final Report, para. 249.

902 Radley Report, para. 165.

903 Radley Report, para. 167.

740. In this context, the Tribunal notes that the content of Exh. R-346 appears largely identical with the one of Exh. R-32. The main difference is that the third clause on page 1 of Exh. R-32 provides for compensation in an amount of USD 3.1 million whereas such compensation amounts to USD 5.5 million in Exh. R-346. A second difference is that Exh. R-32 is undated, when Exh. R-346 bears the handwritten date of 3 August 2010. This being so, since no issue of authenticity arises, the Tribunal will assess these differences in its analysis of the corruption allegations.

741. In sum, there is no indication in the record that Exh. R-346 is a forgery and the Tribunal will thus treat it as authentic.

(m) Concluding comments on document authenticity

742. In the light of the allegations of forgery and the doubts raised by the Claimants about certain documents as well as the relevance of such documents to this dispute, the Tribunal sought an analysis from qualified independent forensic experts. It also heard from equally qualified party-appointed experts. The Tribunal acknowledges all of the experts' professionalism and efficient conduct throughout the document authenticity phase.

743. While the Experts provided a full forensic review, the most relevant aspect of their analysis turned out to be the assessment of the handwritings and thus of the authenticity of the disputed signatures, on which the Tribunal's discussion mainly focused. The Tribunal nonetheless also carefully reviewed the findings resulting from the document examination. It found them to be essentially neutral in the sense that they give no indication on whether a document is forged or not. In any case, they provide no proof that the Disputed Documents are forged. Neither did Mr. Radley's analysis come up with such proof.

744. By contrast, the examination of the signatures, especially those of Messrs. Struik and Avidan in Exh. R-27 to Exh. R-29, produced much clearer evidence demonstrating that the disputed signatures are indeed authentic. Accordingly, the Tribunal cannot but conclude that Mr. Struik signed Exh. R-27 and that Mr. Avidan signed Exh. R-28 and Exh. R-29. The forensic evidence thus contradicted the testimony of Messrs. Struik and Avidan, who had stated to the Tribunal that they did not sign Exh. R-27 (for Mr. Struik) and Exh. R-28 and Exh. R-29 (for Mr. Avidan).

745. While the Experts could not reach definitive conclusions with respect to the other disputed signatures, the record contains no evidence pointing to a forgery. To the contrary, among other elements, the Tribunal attributed weight to Mr. Noy's concession [redacted]

[redacted] that he had entered into contracts with Ms. Touré. More specifically with respect to the signature of Ms. Touré, the Tribunal notes that the Claimants do not argue that her signature was forged, since their case appears to be that Ms. Touré (or an unidentified third person) created these documents for illegitimate purposes.

746. For the reasons stated above, the Tribunal reaches the conclusion that there is no evidence to suggest that the Disputed Documents are forged and that the signatures that appear on them are not authentic.

c. Corruption allegations

i. *Introductory comments*

747. On the basis of its findings on the authenticity of the Disputed Documents, the Tribunal now turns to the assessment of the allegations of corruption and fraud put forward by the Respondent. The present dispute concerns two separate mining areas, the Zogota project and Blocks 1 & 2. The Tribunal will start with the first one, specifically with the exploration permits for North and South Simandou, the Base Convention and Zogota concession (section iv below), and then review the exploration permits for Blocks 1 & 2 (section v below). Because Ms. Touré (section ii below) and Pentler (section iii below) are recurrent actors in respect of the corruption and fraud allegations concerning both areas, the Tribunal will start by analyzing their roles.

ii. *The status and role of Ms. Touré*

748. The Respondent alleges that Ms. Touré was the fourth wife of the late President Conté, which the Claimants deny. For the Claimants, Ms. Touré is an impostor engaging in blackmail and the Respondent has no evidence that she was President Conté's wife or that she had any proximity allowing her to exert influence over him.[904] As a result, the Claimants request that the Tribunal draw the proper adverse inferences.[905] They further argue that Ms. Touré lacks credibility and thus request that the Tribunal give no weight to the statements she made in other proceedings. Finally, they ask the Tribunal to draw adverse inferences from the fact that the Respondent has not produced Ms. Touré as a witness.

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904 See, for instance: Reply, Annex I, paras. 47-48; C-PHB1, paras. 85, 115.

905 C-PHB1, paras. 156-157.

749. Both Parties place much weight on the role of Ms. Touré in this dispute. The Respondent alleges that she is the spider in the web and the central character in the corruption scheme. By contrast, the Claimants submit that Ms. Touré blackmailed them and, for that purpose, used forged documents.

750. Ms. Touré, however, was not presented as a witness and none of the Parties requested that the Tribunal make use of its powers to order her appearance. When towards the end of the Merits Hearing, the Tribunal sought the Parties' views on this possibility, both Parties objected. The Claimants raised due process concerns and the Respondent saw practical difficulties. Therefore, the Tribunal decided not to call Ms. Touré. Under the circumstances, it is unable to draw adverse inferences from the fact that the Respondent did not present Ms. Touré as a witness. The Claimants could have requested that the Tribunal call her as a witness earlier in the proceedings, but they chose not to do so and, when later asked, they opposed the suggestion. The Tribunal will revert below to the Claimants' other requests for adverse inferences.

751. The Tribunal now turns to Ms. Touré's role. As a preliminary point, it is undisputed that she is the half-sister of Mr. Ibrahima Sory Touré and that BSGR Guinea employed Mr. Touré from late 2005 onwards, first on a temporary basis, then as Director of External Relations, and finally as Vice President of BSGR Guinea.[906]

752. It is further undisputed that President Conté had at least three wives, the issue being whether Mamadie Touré was the fourth one. It is common ground that the Respondent filed no certificate or other evidence of a marriage. It indeed alleges that Ms. Touré was married to President Conté in a traditional ceremony according to local customs.

753. Various elements in the record show that Ms. Touré was indeed the wife of President Conté.[907] She held a diplomatic passport, issued on 15 March 2007, stamped and signed by "*Alpha Oumar Diallo, Chef de cabinet*", which mentions "*Epouse P.R.G.*", i.e. "spouse P.R.G.".[908] It seems likely that "P.R.G." stands for "*Président de la République de Guinée*", i.e. "President of the Republic of Guinea".

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906 See, for instance: Mem., paras. 74, 130(ii); Reply, para. 150 and Annex I, paras. 102 and 107; Struik (CWS-2), para. 37; Ibrahima Sory Touré Declaration, 10 May 2013, p. 1 (Exh. C-82); Letter of 26 December 2012 from BSGR to the Technical Committee, p. 7 (Exh. C-54).

907 See also: R-PHB1, para. 205.

908 Photocopie de la page d'identité du passeport de Mme Touré (Exh. R-458).

754. Tellingly, various ministers testified at the Merits Hearing that it was public knowledge that Ms. Touré was the President's wife.[909] For instance, Minister Sylla stated that President Conté introduced Ms. Touré to him as his wife and confirmed that he already knew beforehand that she was his fourth wife:

> "I knew who she [i.e. Mamadie Touré] was, because it was well known in Guinea that his Excellency the President of the Republic had married a fourth wife. So she was indeed his wife."[910]

755. Similarly, Minister Souaré identified the names of the four wives[911] and confirmed that Ms. Touré was one of them:

> "A. Let me tell you this: Mamadie Touré was the President's wife.
>
> Q. This is being challenged.
>
> A. This is what I know. Even if I haven't asked my boss for the marriage certificate, but this is what I know. She is the wife of the President."[912]

756. Minister Nabé also stated in his witness declaration that:

> "Je savais, comme tout le monde, que Mamadie Touré était l'épouse du Président."[913]

757. The Claimants' witnesses acknowledged that Ms. Touré attended various meetings with the President where BSGR's business was discussed and the Claimants have not provided any cogent reason for her presence.[914] The suggestion of Claimants' counsel that President

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909 See, for instance: Kanté (RWS-4), para. 21.

910 Tr. (Merits), Day 7, 25:2-5 (Sylla). See also: ("C'était le cas notamment de Mamadie Touré, qui était la quatrième épouse du Président. Il me l'avait présentée comme telle un jour à Dubréka (elle est native de cette ville), où il m'avait demandé de le rejoindre") Sylla (RWS-1), para. 14. See further: Sylla (RWS-6), para. 3.

911 ("Q. Did you know Mamadie Touré at the time; not now, but then? A. Yes, of course. Q. How did you know what her connection was to the President? A. He is my President; I know his wives. He had four wives. […] Q. Can you give the names of the wives of the President? A. Yes. There is the first lady, Aria Conté. Hadia Kajaset-Conté. Mamadie Touré was the fourth. The third is Hadia Diallo") Tr. (Merits), Day 6, 40:1-7 and 14-17 (Souaré).

912 Tr. (Merits), Day 6, 24:10-15 (Souaré). See also: Souaré (RWS-2), para. 9.

913 Nabé (RWS-5), para. 7.

914 See, for instance: Avidan (CWS-3), paras. 125, 134-135; Struik (CWS-2), para. 106. See further: Souaré (RWS-2), paras. 9-10, 15-16; Kanté (RWS-4), paras. 31 and 35; Nabé (RWS-5), paras. 6-9.

Conté may have simply asked her to stay "for ten minutes" while he was handling some business was denied by Minister Souaré.[915]

758. There is also contemporary evidence of Ms. Touré's marital status on record. So for instance a video shows Ms. Touré attending an official ceremony in October 2008 on the occasion of the fiftieth anniversary of Guinea's independence[916] and contemporary press releases refer to Ms. Touré as the wife of President Conté.[917] Wikileaks also released diplomatic cables from the US embassy in Guinea dating back to September 2008, identifying Ms. Touré as the fourth wife of President Conté.[918] There is also a photograph of her standing next to the President while he receives a foreign investor.[919]

759. The record further demonstrates that the Claimants were aware at the time that Ms. Touré was President Conté's wife. For instance, she attended a reception hosted by BSGR in September 2006 on its premises in Conakry under the protection of so-called "*bérets rouges*" guards.[920] While Mr. Avidan testified that these "*bérets rouges [were] our bérets rouges*" because various ministers requiring protection attended the event,[921] Minister Souaré explained in no uncertain terms that the "*bérets rouges*" did not protect cabinet members and were "only dedicated to the Presidency".[922]

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915 ("MR DAELE: It would not be possible that she would have been there to deal with something that was handled before, and the President said, "I have another meeting for ten minutes, you can stay? A. No. If that were the case, the President would have told her to wait next door. She would not be present at a meeting that was of no concern to her. It's not as if there was no place for her to go in the President's office") Tr. (Merits), Day 6, 44:11-19 (Souaré).

916 Enregistrement vidéo de la cérémonie du cinquantenaire de l'indépendance à Dubréka, 2 octobre 2008, cf. 28'00'' and 31'00'' (Exh. R-457).

917 L'Aurore, BSGR, le ministère des Mines ignoré, 30 septembre 2006 (Exh. R-208); L'Aurore, BSGResources-Guinea, coulisses d'une inauguration, 30 septembre 2006 (Exh. R-209).

918 ("Mamandi [sic] Conte, the fourth wife, is a young Soussou woman (under the age of 30) who stays in the president's village retreat. She was "given" to Conte by a Council of Elders a few years ago and is considered to be more of a nursemaid") Wikileaks, Câble diplomatique de l'Ambassade des Etats-Unis en Guinée, *Power brokering and influence peddling – A look at the Presidency*, 12 septembre 2008, p. 2 (Exh. R-84).

919 Photo de Mme Touré aux côtés du Président Conté (Exh. R-482).

920 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007 (Exh. R-207).

921 Tr. (Merits), Day 9, 92:2-16 (Avidan).

922 ("THE PRESIDENT: [...] Would it be possible that these guards be present because there were ministers attending the reception, like yourself? A. No, madam, because ministers – or at least at the time – our guards were not red berets. They were only dedicated to the presidency, and we just had the police") Tr. (Merits), Day 6, 103:3-8 (Souaré).

760. Mr. Souaré's testimony appears corroborated when one views the video of that reception. The video shows various military men with green, blue and red berets and different uniforms.[923] When Ms. Touré arrived some time later at least six "*bérets rouges*" surrounded her.[924] If those "*bérets rouges*" were indeed part of BSGR's security team to protect high-ranking officials as Mr. Avidan contends, he failed to provide a plausible explanation why Ms. Touré also benefited from their protection, and why she received significantly more protection than other attendees. She was also shown particular reverence and courtesy, with people being introduced to her as if she were an important person.[925] Additionally, a contemporary press release mentions "[l]a présence de la 4ème épouse du Chef de l'Etat" at the BSGR reception,[926] and the subtitle of another one reads "La céréminie [sic] inaugurale du siège de BSGResources- Guinea, à la Minière, présidée par la 4 ème épouse du Chef de l'Etat, Madame Conté née Mamadie Touré, jeune soeur du Chef services Relations Extérieures de ladite représentation, n'a pas connu une grande affluence".[927]

761. Later elements in the record buttress the finding that Ms. Touré was a wife of President Conté and that BSGR knew it. For instance, Mr. Noy wrote an email to Mr. Steinmetz in 2009 specifying that Matinda and Co. was a "company [that] belongs to Mrs TOURE, wife of late president of Guinea".[928] Incidentally, this does away with Mr. Steinmetz's assertion that he never heard the name of Ms. Touré until 2011 or 2012.[929] Moreover, Mr. Avidan confirmed that his discussion in 2012 with Walter Hennig about "the fourth one" related to Ms. Touré.[930]

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923 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007, (e.g. at 12'00'', 13'44'', 14'02'', 14'30'', 15'48'', 16'10'', 16'17'') (Exh. R-207).

924 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007, (at 18'11'') (Exh. R-207).

925 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007 (Exh. R-207).

926 L'Aurore, BSGR, le ministère des Mines ignore, 30 septembre 2006 (Exh. R-208).

927 L'Aurore, BSGResources-Guinea, coulisses d'une inauguration, 30 septembre 2006 (Exh. R-209) (Emphasis added by the Tribunal).

928 [redacted]

929 Tr. (Merits), Day 3, 46:25-47:5 (Steinmetz).

930 Tr. (Merits), Day 9, 122:14-18. See also: Transcript of meeting between Asher Avidan and Walter Hennig, 28 March 2012, p. 2 (Exh. C-107).

762. More significantly, an undercover FBI recording taken at Jacksonville airport on 11 April 2013 shows that Mr. Cilins tried to get Ms. Touré to state she was not President Conté's fourth wife. Six days prior to that meeting, on 5 April 2013, Mr. Daniel Pollack from BSGR had sent a preliminary version of that statement to Mr. Steinmetz, which read in relevant part as follows: "*Je n'ai jamais été mariée avec le Président Conté aujourd'hui décédé. Il paraît qu'on dit que j'ai été sa quatrième épouse, c'est faux*".[931] Although Mr. Cilins presented Ms. Touré with another version not including that denial,[932] he discussed the denial with her, but she refused to make such a statement.[933] Following that meeting, Mr. Cilins contacted an unidentified person to explain that he had obtained a signed declaration from Ms. Touré, which however did not mention that she was not President Conté's wife: "Oui, c'est fait, oui. Euh,, sans l'histoire du mari, parce que [de] toute façon elle [ne] pourra jamais écrire ça, ca [sic] c'est sûr".[934]

763. Finally, Ms. Touré herself confirmed in various declarations that she was the fourth wife of President Conté, and that the wedding was a traditional customary ceremony.[935] [redacted][936]

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931 [redacted]

932 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 60-61 (Exh. R-36).

933 ("FC [Frédéric Cilins]: […] En tant qu'épouse ca [sic] devient plus compliqué, parce que si tu fais des affaires, il faut que tu arrives à prouver que t'as pas profité de ton – ta relation d'épouse. Tu voix ce que je veux dire ? Donc moi je pense que – MT [Mamadie Touré]: Je dois – qu'est-ce que je dois dire par là ? FC: Qu'est-ce que – MT: Qu'est-ce que je dois dire par là ? Je dois dire – FC : Je ne sais pas. Je peux pas te dire que tu dois dire que tu n'es pas épouse. Je ne peux pas te dire de dire ça. C'est à toi de penser est-ce que tu penses que tu dois dire que tu es épouse, ou est-ce que tu penses que tu dois dire que tu n'es pas épouse. Tu peux dire que tu étais – tout le monde t'embêtait avec ça en disant que tu étais une épouse ou pas une épouse. Mais tu étais simplement une amie de la – la famille du Président et ta famille étaient amis depuis longtemps et voilà. MT: Mais je peux pas dire ça parce que – FC: Alors ne le dit pas – [inaudible] MT: [inaudible] sait que je suis la femme du patron donc elle a pu moi-même me donner à la première dame donc – FC: Ecoute, je comprends donc ne mens pas, je ne te demande pas de mentir. Je te dis simplement que tu dois penser à ça") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 52 (Exh. R-36).

934 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 66 (Exh. R-36).

935 Déclaration de Mme Touré, 2 décembre 2013, paras. 4-5 (Exh. R-35).

936 [redacted]

764. Based on all these elements, the Tribunal finds that Ms. Touré was indeed President Conté's wife. In the light of the clear record, it is surprising that the Claimants expended so much effort seeking to cast doubt on this marital relationship. Be this as it may, even if the Tribunal were to consider that Ms. Touré's marital relationship with the President was insufficiently substantiated, *quod non*, it would in any event conclude that Ms. Touré and the President had a very close relationship and that the Claimants were aware at the time that she was exerting influence over him.

765. Indeed, Mr. Struik conceded that Ms. Touré, whom BSGR officers used to call "the Lady",[937] had "the ear" of the President.[938] For instance, in an email of 18 September 2007 to Messrs. Steinmetz, Struik and Saada, Mr. Avidan included her among the "key people in the country", alongside President Conté and the Prime Minister:

> "In the next few days I am going to meet some of the key people in the country including the Prime Minister, the Lady and maybe the President to push them forward so as to reduce some technical and administrative problems."[939]

766. Mr. Avidan's explanation at the Merits Hearing that he wanted to make sure to get her out of the way so as not to interfere with BSGR's business is thus not plausible.

767. Mr. Avidan apparently provided regular reports to Ms. Touré. He admitted that each time before he left Conakry he went to see Ms. Touré and tell her "what we were doing in the field".[940] This is in line with the fact that she attended several business meetings together with the President (paras. 757-758 above).[941]

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937 [redacted]

938 Tr. (Merits), Day 4, 175:18-23. He also called Ms. Touré the "*protégée*" of President Conté: Mr. Struik testified as follows: "Q. And did a lot of people recognize her? A. They probably did. They probably knew that she was the protégée of the President, as I call it. Q. Did [Mr. Cilins] mention to you that she had some kind of special relationship with the President? A. He mentioned to me that she was somehow in the protection of the President". Tr. (Merits), Day 4, 185:11-13 and 210:10-12 (Struik).

939 [redacted] In another email chain of May 2006 between Marc Struik and Roy Oron concerning the payment of success fees to Mr. Cilins, Mr. Struik wrote: "The Lady phoned Fred today (he is back in France) asking him whether I was happy now with these permits". [redacted]

940 Tr. (Merits), Day 9, 193:24-194:4. The fact that Mr. Avidan allegedly told her at one point not to get involved in matters relating to mining does not negate her influence.

941 See, for instance: Avidan (CWS-3), paras. 125, 134-135; Struik (CWS-2), para. 106. See further: Souaré (RWS-2), paras. 9-10, 15-16; Kanté (RWS-4), paras. 31 and 35; Nabé (RWS-5), paras. 6-9.

768. [redacted][942][redacted][943]

769. Finally, several ministers testified that Ms. Touré exerted influence over President Conté,[944] and that it was thanks to her that BSGR had access to the President.[945]

770. To conclude, the record establishes that Ms. Touré was President Conté's fourth wife and that she was in a position to influence him. It further evidences that the Claimants had contemporaneous knowledge of her status and position of influence. Moreover, it is undisputed that the Claimants employed Mr. Touré, who is Ms. Touré's half-brother and President Conté's brother-in-law.

iii. *The role of Pentler*

771. The Respondent alleges that BSGR used the BVI company Pentler as a front company, through which Messrs. Cilins, Lev Ran and Noy could enter into commission agreements with third parties to assist in obtaining mining rights. In particular, Mr. Cilins introduced Ms. Touré to the Claimants who allegedly created Matinda to help Ms. Touré conceal her activities. The Claimants would not have obtained their exploration permits without Pentler's assistance, says the Respondent, and the Claimants used Pentler or its principals to funnel payments to Ms. Touré. The Claimants dispute that Pentler is a front company or that they sought to conceal their activities by using Pentler. They observe that they did not incorporate

942 [redacted]

943 [redacted]

944 ("[T]out cela est arrive parce que BSGR a accede à la présidence. Et BSGR a accede à la présidence grâce à Mamadie Touré") Tr. (Merits) (FR), Day 6, 17:19-20 (Souaré); ("Il était connu que Mamadie Touré usait de son influence pour certaines sociétés et notamment que BSGR avait ses entrées au palais grâce à elle. Je l'ai appris directement de son demi-frère, Ibrahima Sory Touré. Il m'a expliqué quand je l'ai rencontré que BSGR avait le soutien de Mamadie Touré") Sylla (RWS-1), para. 15. See also: Tr. (Merits) (FR), Day 7, 16:26-34; R-PHB1, para. 233.

945 ("Et le premier entretien entre le président, BSGR et moi a été suscité et organisé par Mamdie Touré. Donc, quand je vois Mamdie Touré quelque part dans ce dossier, c'est que c'est l'onction du président") Tr. (Merits) (FR), Day 6, 16:26-28 (Souaré).

Pentler or Matinda, and that Pentler was not used to enter into commission agreements with third parties.

772. It is common ground that until 2006 Messrs. Cilins, Lev Ran and Noy operated in West Africa through the companies FMA International and CW France.[946] It is also unchallenged that they approached Mr. Oron at the end of 2004 or the beginning of 2005 to discuss mining opportunities in Guinea, in particular in the Simandou mountains.[947] It is further uncontroversial that neither of them had mining experience.[948]

773. Turning now to the relationship between the Claimants and Pentler, on 14 July 2005, BSGR wrote to Mr. Cilins to signal its interest in various areas, among which iron mining.[949] Following up, Mr. Cilins organized a meeting between Mr. Oron and Minister Souaré at the end of July 2005 to discuss mining opportunities, including Mount Simandou.[950] Mr. Cilins also met President Conté on 1 December 2005 to discuss mining opportunities for BSGR in Simandou. Ms. Touré was present and the President called Minister Souaré.[951] At that meeting, President Conté authorized BSGR to use his helicopter for a reconnaissance flight the following day, which caused an incident because the helicopter landed in an area held by Rio Tinto.[952] Minister Souaré then called BSGR to his office on 2 December 2005 to

946 C-PHB1, para. 196; Tchelet (CWS-11), para. 5; Extrait Kbis de CW France, 3 mai 2016 (Exh. R-166); Statuts de CW France, 1er mars 2007 (Exh. R-167); [redacted]

947 [redacted] ("It was in November 2005, one month after I joined BSGR that I learnt about an exploration opportunity in Guinea through Mr Oron, BSGR's CEO at the time. He had connections to Michael Noy, Frédéric Cilins and Avraham Lev Ran, who in turn had made him aware of that opportunity. Noy, Cilins and Lev Ran later formed a company together called Pentler Holdings Limited") Struik (CWS-2), para. 9.

948 See, for instance: ("It is true that, in 2006, Mr Cilins, Mr Noy and Mr Lev Ran were not experienced in the mining sector") Reply, Annex I, para. 116; ("[Mr. Cilins] had no mining background and [he was] obviously not going to play any role in the mining activities themselves") Struik (CWS-2), para. 17.

949 ("We have special interest in the deposits of iron at Simandou and Mount Nimba, and have wondered if there would be any room for us to participate in the exploitation and development of these reserves, or any other similar reserves in Guinea. We understand that development of these reserves would require significant infrastructure investment, and here we also have vast experience and capabilities") [redacted]

950 Struik (CWS-2), paras. 10-11. See also: Lettre de M. Oron (BSGR) au Ministre Souaré, 2 août 2005 (Exh. R-171).

951 Souaré (RWS-2), para. 9.

952 Souaré (RWS-2), paras. 11-19.

discuss the incident. According to Minister Souaré, Ms. Touré was also present at that meeting and supported BSGR's bid for an exploration permit over Simandou.[953]

774. These facts evince that Mr. Cilins already knew Ms. Touré and that both of them appeared to act on behalf of BSGR. How Mr. Cilins got to know Ms. Touré is described in a letter that Mr. Bah wrote to Mr. Cilins on 15 March 2010:

> "Mr Frédéric Cillins [sic], rappelez vous que vous étiez venus dans mon bureau à Bamako avec Mr Dao Ismael me voir. Vous m'avez suppliez [sic] de tout faire pour vous aider en faisant que BSGR ait un contrat en Guinée. Et ce malgré un an de démarches infructueuses en Guinée que vous avez effectuées avec Mr Dao Ismaël.
>
> J'ai appelé l'ex ministre Monsieur El Hadj Fodé Soumah qui vous a introduit auprès de Madame Mamady Touré et de Mr Sory Touré.
>
> Ainsi donc c'est grâce à mon réseau et par mon canal que vous les avez connus. Et ainsi donc vous avez pu mettre en place les activités de BSGR."[954]

775. Ms. Touré confirmed this account in her declaration to the US authorities in 2013:

> "J'ai eu affaire à Beny Steinmetz Group Resources ("BSGR") après que Fodé Soumah, qui était alors Ministre de la Jeunesse et des Sports, m'a appelée pour me dire qu'un investisseur désirait me rencontrer. Il s'agissait de la première fois que j'ai rencontré Fodé Soumah, bien que je savais qui il était car il connaissait ma famille. Le lendemain, Fodé Soumah et d'autres individus sont venus chez moi à Dubréka avec Frédéric Cilins. Soumah a présenté les individus présents, dont Frédéric Cilins, qui travaillaient pour Beny Steinmetz et BSGR. Cilins m'a dit que BSGR voulait à tout prix exploiter des mines de fer."[955]

776. The relationship between BSGR and Pentler extended beyond identifying business opportunities. On 14 February 2006, BSGR Guinea BVI and Pentler entered into a contract, whereby the former committed to transfer 17,65% of its shares to Pentler (amounting to 15% in the Simandou project) and to pay success fees in the amount of USD 19.5 million. The Tribunal will revert to that contract below. At this point, it is noteworthy that, the day

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953 Souaré (RWS-2), para. 18.

954 [redacted]

955 Déclaration de Mme Touré, 2 décembre 2013, para. 7 (Exh. R-35). See also para. 8 ("Cilins et Soumah ont dit que BSGR voulait investir dans des mines en Guinée et ont demandé que je les mette en contact avec mon époux. Cilins et Soumah ont dit que, si BSGR réussissait à obtenir des titres miniers, 12 millions de dollars seraient distribués à des Guinéens, dont des ministres et des fonctionnaires, moi incluse, qui seraient nécessaires, en cas de succès de la rencontre avec mon époux").

before, Onyx Financial Advisors Ltd. ("Onyx BVI") had sold Pentler to Messrs. Noy, Lev Ran and Cilins for USD 1,500.[956]

777. Onyx BVI was a company registered in the British Virgin Islands in 1998.[957] Its main shareholder was Mr. Dag Cramer, who had left his job at Anglo American in 2003 "to join BSG and Onyx".[958] Onyx BVI had various subsidiaries, such as Onyx Financial Advisors S.A. ("Onyx Switzerland") and Margali Management Corp. ("Margali"). According to the Claimants, the BSG group of companies was "one of Onyx's main clients, but it was not its only client".[959] In fact, Onyx BVI was "under contract to the Balda Foundation, which ultimately holds the BSG group of companies"[960] and of which Mr. Steinmetz is the ultimate beneficial owner.[961]

778. Ms. Merloni-Horemans was Director and Head of Administration of Onyx BVI and Onyx Switzerland from 1998 to December 2014. Prior to that, she was an administrative and trading assistant in the rough diamond trading division at R. Steinmetz & Sons NV in Antwerp, Belgium. Ms. Merloni-Horemans stated that Onyx provided "management, corporate, administrative and financial services" to the Balda Foundation "and the underlying companies" and one of her main responsibilities for Onyx was to "keep the corporate back office of the BSG group of companies".[962] She also sat on most boards of the BSG companies as a non-executive board member representing the board of the Balda Foundation.[963]

779. Pentler was registered in the British Virgin Islands on 28 October 2005.[964] Pentler was a 100% subsidiary of Onyx BVI until it was sold to Messrs. Noy, Lev Ran and Cilins in February 2006. Ms. Merloni-Horemans, who represented the Balda Foundation on the

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956 [redacted]

957 [redacted]

958 Mr. Cramer held his shares in Onyx BVI through Galena Management Services Inc. Cramer (CWS-7), para. 5 (Exh. C-150).

959 Reply, Annex I, para. 21. See also: ("The Balda Foundation is certainly the Onyx group's largest client, although it is not its only client") Cramer (CWS-7), para. 10.

960 Merloni-Horemans (CWS-9), para. 8.

961 Cramer (CWS-7), para. 4.

962 Merloni-Horemans (CWS-9), para. 8.

963 Merloni-Horemans (CWS-9), para. 8.

964 [redacted]

Board of Onyx BVI, Onyx Switzerland, Onyx UK, Margali and BSGR, signed all the documents on behalf of Pentler in her capacity as administrator of Margali.[965]

780. Thus, while BSGR may never have held Pentler, it is clear that the latter was a dormant company kept by Onyx, BSGR's "corporate back office",[966] and then sold to Messrs. Noy, Lev Ran and Cilins shortly after BSGR had obtained its exploration permits over North and South Simandou.

781. In addition, on the day on which Ms. Merloni-Horemans agreed with Mr. Noy to sell Pentler for USD 1,500,[967] she signed a document promising to transfer to Pentler 17.65% of the shares of BSGR Guinea BVI, subject to the conclusion of a contract between BSGR Guinea BVI and Guinea for the exploitation of iron ore and bauxite in Guinea:

> "Je soussignée, agissant en ma qualité d'administrateur de la société susmentionnée, confirme par la présente que nous, Onyx Financial Advisors SA, domiciliés 25 Voie de Traz, 1211 Genève 5, en Suisse, détenons 8825 actions (huit mille huit cent et vingt cinq actions), de la société BSG Resources (Guinea) Limited, soit 17,65 % de son capital social, pour le compte de:
>
> **Nom : Pentler Holdings Limited**
>
> **Adresse : Akara Building, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands**
>
> Et ce sous réserve de l'exécution du contrat entre BSG Resources (Guinea) Limited et le gouvernement de la République de Guinée relativement à l'exploration miniere [sic] de minerai de fer et de bauxite en Guinée."[968]

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965 CM, para. 73.

966 Merloni-Horemans (CWS-9), paras. 8, 13.

967 [redacted]

968 [redacted] (Emphasis in the original). On 15 February 2006, Mr. Noy and Ms. Merloni-Horemans exchanged various emails about initial drafts of this contract [redacted] The last version sent by Ms. Merloni-Horemans deleted the reference to Margali and replaced it with Mr. Lev Ran (Exh. R-187). Ms. Merloni-Horemans testified that she did not read the content of the contract but only focused on the signature block, while conceding that she didn't "recall what [she] did at the time" (Tr. (Merits), Day 2, 177:3-14

782. Still on 14 February 2006, i.e. the date when Pentler and BSGR Guinea BVI contracted (paragraph 776 above), Mr. Struik wrote to Pentler to clarify "the relationship between […] BSGR Guinea and […] Pentler with regard to the Simandou Iron Ore Project located in the Republic of Guinea" (the "Milestone Agreement"):[969]

> "BSGR Guinea affords Pentler an interest of 15% (free carry) in the Simandou Iron Ore Project. In order to effect this interest, a 17,65% shareholding in BSGR Guinea will be made available to Pentler. Further details of the relationship between the shareholders will be formalized in a shareholders agreement."[970]

783. In addition, Mr. Struik agreed to the payment of success fees in a total amount of USD 19.5 million according to various milestones on the path to obtaining mining rights in Simandou North and South as well as Blocks 1 and 2:

> "With specific regard to the Simandou Iron Ore Project, success fees are based on the mutually agreed milestones as shown in the table overleaf. Amounts payable will be made into a nominated bank account against provision of invoices from Pentler for services rendered in such regard upon meeting the set milestones."

784. Mr. Struik's letter to Pentler includes the following table with the milestones and success fees:

Milestone	Total Success Fee	
	Zones North and South	Blocks 1 and 2
Signing of the MOU and issuing of corresponding prospecting permits	USD500,000	USD1,500,000
Completion of a satisfactory feasibility study and registration of "Companie Miniere de Fer de Simandou"	USD500,000	USD1,000,000
Signing of "Convention de Base"	USD500,000	USD1,000,000
Signing of "Decret Presidentiel de la Concession" and issuing of corresponding mining permits	USD1,000,000	USD1,000,000
Commercial production and export of first tonne of iron ore product from Simandou	USD2,000,000	NIL
Commercial production and export of first 10 million tonnes of iron ore product from Simandou	USD4,000,000	NIL
Repayment of all investments by BSGR (Guinea) Limited	USD6,500,000	NIL
Total	USD15,000,000	USD4,500,000

(Merloni-Horemans)). She also testified that she had no idea who Mr. Bah was (Tr. (Merits), Day 2, 178:3 (Merloni-Horemans)). However, when asked whether the promised remuneration of over USD 15 million should have alerted her, she said that, with hindsight, she should definitely have asked more questions (Tr. (Merits), Day 2, 178:4-19 (Merloni-Horemans)).

969 [redacted]

970 [redacted]

785. Six days later, on 20 February 2006, Pentler entered into a series of contracts with third parties, including Mr. Bah, Mr. Touré, Mr. Daou and Ms Touré. The first contract was with Messrs. Bah and Touré and provided that Pentler would pay these two persons fees in connection with the iron ore project in Simandou and Blocks 1 and 2 on meeting milestones, which were identical to those in the BSGR/Pentler agreement just discussed:

Phase	Evolution	Zones Nord et Sud	Blocs 1 et 2
1	Signature du Protocole d'Accord et délivrance des Permis de Recherche correspondants	425.000 USD	1.200.000 USD
2	Etude de faisabilité et création de la Société Mixte	400.000 USD	800.000 USD
3	Signature de la Convention de Base pour les zones Nord et Sud et blocs 1 et 2	400.000 USD	800.000 USD
4	Signature du Décret Présidentiel de la Concession et délivrance des permis correspondants	800.000 USD	800.000 USD
5	Exportation de la 1er tonne de minerai de fer	1.600.000 USD	
6	Exportation de 10 millions de minerai de fer	3.200.000 USD	
7	Retour sur investissement	5.200.000 USD	
	TOTAL	12.025.000 USD	3.600.000 USD

786. Accordingly, Messrs. Bah and Touré were promised a total of USD 12,025,000 on completion of various steps towards the production and export of iron ore from North and South Simandou. On the same day, Messrs. Bah and Touré also confirmed receipt of USD 425,000 corresponding to the first milestone payment.[971] Indeed, Guinea and BSGR Guinea BVI had concluded the MoU on that day, and the exploration permits had already been issued on 6 February 2006 (paragraph 205 above).

787. Relying on their witnesses, the Claimants contend that BSGR had nothing to do with the contracts that Pentler entered into with third parties.[972] Mr. Struik stated that he met Mr. Bah once in 2006 on the introduction of Mr. Cilins, but had "no idea who he was nor what he

971 [redacted] The Tribunal notes that Mr. Bah sent a letter to Mr. Cilins in 2010 requesting the outstanding payments, while at the same time recalling his role in introducing Ms. Touré to Mr. Cilins. The Claimants maintain that Mr. Bah sought to blackmail BSGR, but there is no evidence of a criminal complaint and, tellingly, Mr. Struik stated that he considered Mr. Bah's alleged blackmail attempts as a "non-event" and that "we/I ignored this like we/I ignored Mr Bah" Struik (CSW-12), para. 28. See Memorandum of Understanding between the Republic of Guinea and BSG Resources (Guinea) Limited, 20 February 2006 (Exh. C-9); [redacted]

972 Struik (CWS-2), para. 112; Struik (CWS-12), para. 32.

was doing there".[973] Mr. Struik also denied having been involved in the negotiation of this contract, of which he allegedly became aware only "much later".[974]

788. Such denial is contradicted by the fact that an initial version of that contract dated 17 January 2006 was found on his laptop.[975] That version referred to payments by an unidentified "Company" which would explore and operate "the Simandou iron deposit", and can only be BSGR Guinea BVI. The final text then referred to Pentler. The initial version read as follows:

> "The Company undertakes to remunerate Mr. Bah and Mr. Touré for their services and advice concerning the development of the project for exploration and operation of the Simandou iron deposit by the Company covering the North and South zones of Simandou as well as Blocks 1 and 2 of the Simandou chain."[976]

789. Mr. Struik admitted that this initial draft was saved on his laptop and that he was in Guinea on 17 January 2006.[977] However, he stated that he had no idea where this document originated from and insisted that he did not draft it nor was otherwise involved in its drafting.[978] The Claimants' explanation that Mr. Cilins used Mr. Struik's laptop when they both stayed at the Novotel in Conakry is not convincing.[979] There is no indication in the record that Mr. Cilins had direct access to Mr. Struik's computer, neither did Mr. Struik state so. Contrary to the Claimants' submission, Mr. Cilins merely obtained "copies of all the *materials prepared by visitors* in the business centre of the Novotel" from the staff of the Novotel.[980] The Tribunal understands this to mean that the staff in the business centre of the Novotel provided Mr. Cilins with copies of documents that were, for instance, printed or photocopied there, not that he had access to Mr. Struik's laptop. Accordingly, the record

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973 Struik (CWS-12), para. 23.

974 Tr. (Merits), Day 4, 125:9 (Struik).

975 Protocole d'accord Pentler/Bah/I.S. Touré, 17 janvier 2006 (Exh. R-584).

976 [redacted]

977 Tr. (Merits), Day 4, 133:18-20 and 135:20-25 (Struik).

978 Tr. (Merits), Day 4, 133:12-17 (Struik). See also: C-PHB1, para. 206.

979 C-PHB1, para. 207.

980 Rapport d'entretien avec M. Cilins, 5 octobre 2011 (probable), p. 3 (Exh. R-165) (Emphasis added by the Tribunal). The Tribunal is mindful that the Claimants dispute that the Veracity Report found in Exh. R-165 is "accurate in its entirety". However, the Claimants cited the quote in the main text above to support their explanation on how the initial draft found its way into Mr. Struik's laptop. See: C-PHB1, para. 207, n. 452; Reply, para. 258.

suggests that Mr. Struik was involved in the drafting of the contract between Pentler and Messrs. Bah and Touré.

790. The second agreement which Pentler entered into on 20 February 2006 was with Ms. Touré. It referred to BSGR's efforts to obtain mining rights in Simandou and granted Ms. Touré a 5% interest in the Simandou project, in the form of a 33% free-carry interest in Pentler.[981] As was seen above, there is no evidence that this agreement was forged [redacted] A draft of that agreement had previously been sent to Ms. Merloni-Horemans.[982]

791. Pentler concluded two further contracts on 20 February 2006, this time with Mr. Daou, by which it agreed to transfer to Mr. Daou a free-carry interest of 13,32% in Pentler amounting to an indirect participation of 2% in the Simandou project.[983] Mr. Daou was also promised payments totaling USD 2,975,000 for North and South Simandou,[984] payable on reaching the same milestones as those found in the agreement with Messrs. Bah and Touré:

Phase	Evolution	Zones Nord et Sud	Blocs 1 et 2
1	Signature du Protocole d'Accord et délivrance des Permis de Recherche correspondants	75.000 USD	300.000 USD
2	Etude de faisabilité et création de la Société Mixte	100.000 USD	200.000 USD
3	Signature de la Convention de Base pour les zones Nord et Sud et blocs 1 et 2	100.000 USD	200.000 USD
4	Signature du Décret Présidentiel de la Concession et délivrance des permis correspondants	200.000 USD	200.000 USD
5	Exportation de la 1er tonne de minerai de fer	400.000 USD	
6	Exportation de 10 millions de minerai de fer	800.000 USD	
7	Retour sur investissement	1.300.000 USD	
	TOTAL	**2.975.000 USD**	**900.000 USD**

792. Accordingly, the aggregate amount of the fees payable to Messrs. Daou and Bah and Touré for Simandou matches the total fees provided in the Milestone Agreement, i.e. USD 12,025,000 + USD 2,975,000 = USD 15,000,000.

981 Protocole Pentler /Mme Touré de 2006, 20 février 2006 (Exh. R-24).

982 [redacted]

983 Protocole Pentler/Daou nº 2, 20 février 2006 (Exh. R-185).

984 [redacted]

793. The Claimants' thesis that Ms. Merloni-Horemans did not read the content of these contracts and BSGR had no knowledge of them does not conform with the facts. Ms. Merloni-Horemans received drafts of the contracts and discussed them with Mr. Noy or his assistant. For instance, Mr. Noy's assistant sent various emails to Ms. Merloni-Horemans containing a draft version of the contract saying "*Pour faire suite à notre conversation*" or "As per your discussion with Michael", showing that the contract had been discussed by Ms. Merloni-Horemans.[985]

794. It emerges from the facts just reviewed that Pentler acted for BSGR and paid intermediaries for the achievement of milestones on the way to the production of iron ore at Simandou. They also show that BSGR used Pentler as a conduit to remunerate intermediaries and conceal its own participation. The contrary explanations provided by the Claimants and their witnesses are not convincing and disproved by the record. In particular, the Claimants' submission that Pentler was created as an empty shelf company on 28 October 2005 and randomly selected to be sold to Messrs. Noy, Lev Ran and Cilins on 13 February 2006 is contradicted by the existence of a Services and Cooperation Agreement between BSG Metals and Mining Limited and Pentler dated 15 October 2005.[986] Mrs. Merloni-Horemans stated that she executed this document after the sale of Pentler and backdated it "at the instruction of the BSGR management team".[987] It can remain open whether she backdated this document to formalize a pre-existing relationship. What is striking is that BSGR gave Ms. Merloni-Horemans instructions, which she qualified as "not ideal",[988] in an apparent

985 [redacted]

986 Services & Co-operation Agreement between BSG Metals and Mining Limited & Pentler Limited, 15 October 2005 (Exh. C-331).

987 "Q. Did it strike you as odd that if you look at the first of this document, as you just said, that is was 'made and entered into effective as of the 15th day of October'? You've just explained – so we've saved some questions – how Mr Tchelet explained to you that this confirmed a pre-existing oral agreement going back. But as a corporate director, did it seem odd to you to sign an agreement that was going to be made and entered into effect prior to the existence of Pentler? A. I did it at the instruction of the BSGR management team. This document formalised the relationship that they had before, the agreement – oral agreement that they had before. And you are right that at the time Pentler did not belong to the three shareholders yet. Q. I'm sorry, Pentler didn't even exist yet, right? Pentler was created on 28th October 2005, and this agreement is made to take effect 13 days before it came into existence, right? A. Mm-hm". Tr. (Merits), Day 2, 163:21-164:14 (Merloni-Horemans).

988 Tr. (Merits), Day 2, 165:2 (Merloni-Horemans).

effort to cover up the reality of the relationship between BSGR and Messrs. Noy, Lev Ran and Cilins.

795. The Tribunal is further unconvinced by the Claimants' assertion that BSGR was not involved with Pentler's dealings with third parties in relation to BSGR's mining rights. Many of the facts analyzed previously demonstrate that a close relationship existed between BSGR and Pentler.

796. An initial version of the Bah/Touré contract of 20 February 2006 was found on Mr. Struik's laptop.[989] The success fees in the Milestone Agreement between BSGR and Pentler match the total amounts in Pentler's contracts with Messrs. Daou, Bah and Touré.[990] Messrs. Cilins, Lev Ran and Noy sent invoices on the letterhead of FMA or CW France for services but the payments were made for different services than those appearing in the invoices, thus suggesting that payments were made on the basis of fake invoices.[991] All the contracts which Pentler concluded with third parties refer to the Simandou mining project "*auquel participe Pentler Holdings Ltd*", which project was carried out by BSGR.[992] The second contract concluded with Mr. Daou on 20 February 2006 in fact expressly referred to BSGR's efforts to develop and exploit the Simandou mining project and stated that BSGR had approached the Guinean authorities to authorize Mr. Daou's indirect shareholding in that project.[993] For that purpose, Pentler committed to transfer to Mr. Daou 13.32% of its own shareholding in BSGR Guinea.[994] The contract concluded between Pentler and

989 [redacted]

990 [redacted]

991 See paragraphs 809 and 815 below.

992 See, for instance: Protocole Pentler/Bah/I.S. Touré, 20 février 2006 (Exh. R-183) to Protocole Pentler/Daou nº 2, 20 février 2006 (Exh. R-185).

993 ("Dans le cadre de ce projet, BSGR Guinée a soumis aux autorités guinéennes une proposition qui permet l'actionnariat de la République de Guinée à hauteur de 15% et l'actionnariat de Monsieur Ismaila DAOU en tant que partenaire local à hauteur de 2%. A cet effet, la société BSGR Guinée constituera, avec la République de Guinée, une société anonyme à participation publique, qui sera dénommée Compagnie Minière de SIMANDOU") Protocole Pentler/Daou nº 2, 20 février 2006 (Exh. R-185).

994 ("Afin d'intéger l'actionnariat de Monsieur Ismaila DAOU la société BSGR Guinée transfèrera 17.65% de son capital à la Société Pentler Holdings Ltd dont 13,32% du capital seront attribués à Monsieur Ismaila DAOU") Protocole Pentler/Daou nº 2, 20 février 2006 (Exh. R-185).

Ms. Touré also expressly referred to BSGR's efforts to develop mining activities in Guinea and stated that Pentler would transfer to her part of its shares in BSGR Guinea.[995]

797. Additional facts reinforce the finding that Pentler served as a conduit to cover up BSGR's involvement with third party intermediaries. In particular, as the assessment below will show, Pentler was largely remunerated for undisclosed services. The allegation that Messrs. Noy, Lev Ran and Cilins were only remunerated for signaling to BSGR the opportunity to mine in the Simandou area does not withstand scrutiny, if one considers that the mining potential of Simandou was public knowledge before BSGR arrived in Guinea. In other words, BSGR did not need Pentler to signal this "opportunity". Moreover, Pentler was not a "local partner" as understood by the Claimants' expert, Mr. Ferreira, nor did Messrs. Noy, Lev Ran and Cilins have any experience or expertise in mining. In fact, the Claimants failed to provide a cogent explanation about the services provided by Pentler or for the level of Pentler's remuneration.

798. More importantly, the letters which Mr. Bah sent to Messrs. Struik and Cilins in 2009 and 2010 tend to support the conclusion that Mr. Struik was directly involved in the negotiation and conclusion of Pentler's contracts with third parties.[996] In other words, Mr. Struik was fully aware that Pentler was contracting with Messrs. Bah, Daou and Touré. This, in turn, suggests that Mr. Struik was aware that the amount of the success fees promised to Pentler under the 14 February 2006 agreement matched the total of the success fees which Pentler committed to pay to third parties in the various 20 February 2006 agreements.

799. Similarly, Mr. Cilins' own statements and those of Ms. Touré show that Mr. Cilins initially acted as BSGR's representative.[997] [redacted][998]

Ms. Touré also stated that, in December 2005, she introduced Mr. Cilins to President Conté as a representative of BSGR,[999] and he also appeared in that capacity at the meeting with Minister Souaré. Moreover, Ms. Touré stated that she asked Mr. Cilins why the 20 February

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995 Protocole Pentler /Mme Touré de 2006, 20 février 2006 (Exh. R-24).

996 Lettre de M. Bah à MM. Lev Ran et Cilins (Pentler), 15 mars 2010 (Exh. R-174); Lettre de M. Bah à BSGR et Pentler, 30 novembre 2009 (Exh. R-311); Lettre de M. Bah à M. Struik (BSGR), 5 mai 2010 (Exh. R-315); Lettre de M. Bah à M. Cilins (Pentler), 12 mai 2010 (Exh. R-316).

997 Attestation de M. Cilins, 26 novembre 2012, pp. 1-2 (Exh. R-169).

998 [redacted]

999 Déclaration de Mme Touré, 2 décembre 2013, para. 10 (Exh. R-35).

2006 agreement was entered into with Pentler instead of BSGR. According to Ms. Touré, Mr. Cilins answered that Pentler was acting on behalf of BSGR.[1000]

800. In addition, it is noteworthy that the Claimants concealed their ties to Pentler or other intermediaries during Vale's due diligence prior to acquiring its 51% interest in BSGR Guinea.[1001] Thus, for instance, the Claimants represented that "BSGR Guinea did not use any intermediary in its application process nor during any further discussions with the CPDM, which is the technical department of the Ministry of Mines, responsible for adjudicating the applications and final awarding of the exploration licenses to the successful party".[1002] BSGR Guinea also failed to identify Pentler as a consultant or intermediary in connection with the Simandou Project, notwithstanding the existence of the 14 February 2006 agreement.[1003]

801. Significantly, Mr. Cilins went to Florida in March-April 2013 to convince Ms. Touré to destroy evidence (in particular the original versions of contracts) and to sign a statement denying her involvement in the Simandou project and her marriage with President Conté.[1004] Mr. Steinmetz acknowledged that he knew of Mr. Cilins' trip beforehand, although he stated that he only told Mr. Cilins to obtain a declaration from Ms. Touré and that he had no knowledge of Mr. Cilins' attempt at tampering with evidence. The Tribunal will review this issue in more detail below and the analysis will show that Mr. Steinmetz in fact wanted to ensure that Mr. Cilins destroyed the evidence. This again shows that BSGR and Pentler were involved in a complex scheme to obtain mining rights through corrupt practices, to dissimulate these undertakings, and to ultimately destroy evidence and silence witnesses.

iv. *The Zogota mining permits and the Base Convention*

802. The Respondent argues that the Claimants obtained their mining rights for North and South Simandou, including the Base Convention and the Zogota Mining Concession, through

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1000 Déclaration de Mme Touré, 2 décembre 2013, para. 9 (Exh. R-35).

1001 [redacted]

1002 [redacted]

1003 [redacted]

1004 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 54 (Exh. R-36).

corrupt practices. In addition to securing the influence of Ms. Touré and her half-brother, Guinea claims that the Claimants resorted to Pentler as a conduit to set up their corrupt scheme and then to cover it up.

803. The Claimants object that they obtained their mining rights legally and deny having engaged in corrupt practices to obtain the mining area of Zogota. In particular, they dispute that Ms. Touré played any role in the award of the mining rights. According to them, Pentler was only instrumental for identifying mining "opportunities" and setting up shop in Conakry and lost its purpose for BSGR once Messrs. Struik and Avidan had established their operations in 2006.

804. The Tribunal recalls that, on 6 February 2006, BSGR Guinea BVI obtained for three years (i) four exploration permits in the prefectures of Beyla, Macenta, Nzérékoré and Yomou ("Sud Simandou" or "Zogota")[1005] and (ii) four exploration permits in the prefecture of Kérouané ("Nord Simandou") (see maps at paragraphs 201 and 208 above).[1006] On 20 February 2006, Guinea and BSGR Guinea BVI entered into a MoU setting out the framework of their cooperation.[1007] Under the MoU, BSGR Guinea BVI undertook to carry out a feasibility study within 30 months and Guinea committed to grant BSGR Guinea BVI a mining concession within six months of the feasibility study. On 21 January 2009, BSGR Guinea applied to renew the Nord Simandou and Sud Simandou exploration permits, which application was granted on 10 June 2009.[1008] On 16 November 2009, BSGR Guinea submitted the feasibility study for the Zogota project.[1009] On 1 December 2009, Minister Thiam established a commission to review the feasibility study and negotiate the terms of a concession.[1010] On 16 December 2009, the Base Convention was signed,[1011] which the

[1005] Decree No. 2006/706/MMG/SGG, 6 February 2006 (Exh. C-4).

[1006] Decree No. 2006/707/MMG/SGG, 6 February 2006 (Exh. C-5).

[1007] Memorandum of Understanding between the Republic of Guinea and BSG Resources (Guinea) Limited, 20 February 2006 (Exh. C-9).

[1008] Decree No. A 2009/1327/PR/MMEH/SGG, 10 June 2009 (Exh. C-12).

[1009] Zogota Feasibility Study, October 2009 (Exh. C-14).

[1010] Decree No. A 2009/3466/PRG/SGG/MMEH, 1 December 2009 (Exh. C-15).

[1011] Zogota Base Convention, 16 December 2009 (Exh. C-69).

President Konaté ratified on 19 March 2010.[1012] On the same day, the President granted BSGR Guinea a mining concession for Zogota.[1013]

805. For the reasons explained in the following sections, the Tribunal reaches the conclusion that the Claimants obtained the North and South Simandou exploration permits, the Base Convention and the Zogota Mining Concession through corruption. BSGR used Pentler and others to buy the influence of Ms. Touré, her half-brother and other individuals ((a) below) in circumstances where these individuals had no qualifications in the mining sector ((b) below), provided no services for the compensation they received ((c) below), and were selected without any meaningful due diligence ((d) below). In addition, the Claimants sought to destroy evidence of their corrupt practices ((e) below).

(a) Payments and gifts effected by intermediaries for BSGR to buy influence

806. The following section reviews the alleged payments and gifts made by or on behalf of BSGR to various intermediaries and government officials to obtain the disputed mining rights in North and South Simandou, including Pentler, Messrs. Bah, Touré and Daou, Ms. Touré, Minister Thiam and the members of the Technical Commission. As outlined below, the evidence shows that BSGR paid over USD 30 million to intermediaries (including USD 30,385,000 to Pentler and USD 450,000 to Mr. Touré), arranged for intermediaries such as Pentler, Mr. Schiffman or Mr. Boutros to pay USD 9,419,200 to Ms. Touré and USD 425,000 to Messrs. Bah and Touré, and paid government officials in the amount of USD 35,424.68 (including USD 15,424.68 to Mr. Thiam and USD 20,000 to the members of the Technical Commission).

Pentler

807. Starting with Pentler, the 14 February 2006 letter sent by Mr. Struik on behalf of BSGR Guinea BVI to Pentler promised a 17.65% equity interest in BSGR Guinea BVI and success fees of USD 19.5 million if certain milestones were reached.[1014] The letter specified that payment of the success fees would be "made into a nominated bank account against

[1012] Presidential Order No. 003/PRG/CNDD/SGG/2010, 19 March 2010 (Exh. C-16).

[1013] Presidential Order No. D2010/024/PRG/CNDD/SGG, 19 March 2010 (Exh. C-17).

[1014] [redacted]

provision of invoices from Pentler for services rendered in such regard upon meeting the set milestones".[1015]

808. There is no clear evidence that Pentler was paid USD 500,000 corresponding to the first milestone in relation with the North and South Simandou exploration permits and the MoU. However, there are documents showing that Pentler received USD 125,000 in connection with the signature of the MoU dated 20 February 2006. On 27 February 2006, CW France sent an invoice of USD 60,000 for "[o]ur assistance in the signature of the Memorandum of Understanding for the Simandou North and South iron ore deposits in the Republic of Guinea".[1016] On the same day, FMA International Trading Pty Ltd sent an invoice of USD 65,000, with a request for the payment of the balance of USD 60,000 for exactly the same services as CW France.[1017] Both companies belong to Pentler's officials Messrs. Cilins, Lev Ran and Noy. On the same day, Mr. Tchelet gave instructions that these amounts be paid by BSGR TS on behalf of BSGR Guinea BVI and accounted for as expenses "acquisition costs-investment".[1018]

809. In addition, there is proof that BSGR TS remitted to Pentler (through FMA) USD 250,000 in May 2006.[1019] Although on its face this payment appeared tied to the award of the 13 bauxite permits, Mr. Struik stated that it "had nothing to do with bauxite permits" and that it "was the first down payment on the $500,000".[1020]

810. Evidence on record also demonstrates that, on 4 April 2006, Mr. Tchelet instructed his staff to pay Mr. Cilins USD 10,000 for "securing the bauxite permits".[1021] Here again, according to Mr. Struik's testimony, this payment was rather for Mr. Cilins' assistance "with an iron ore MOU, arranging Nissan cars for the group, and assisting with the set-up of the villa and office".[1022] Here too, considering Mr. Struik's testimony, the Tribunal is consequently

1015 [redacted]

1016 [redacted]

1017 [redacted]

1018 [redacted]

1019 [redacted]

1020 Tr. (Merits), Day 4, 165:15-16 and 19-21 (Struik). See also: Tr. (Merits), Day 4, 168:5-15 (Struik).

1021 [redacted]

1022 Struik (CWS-12), para. 20.

inclined to attribute this payment to Pentler's services in relation to North and South Simandou.

811. On 28 March 2008, BSGR Steel and Pentler entered into a Share Purchase Agreement ("SPA"), whereby BSGR Steel agreed to pay Pentler USD 22 million in four instalments for its 17.65% shareholding in BSGR Guinea BVI: USD 3 million by 15 April 2008, USD 1 million by 15 June 2008, USD 9 million by 15 April 2009, and USD 9 million by 15 April 2010.[1023] Clause 5 of the SPA further provided for a settlement of USD 8 million "in the event of BSGR Steel realizing a profit in excess of US$1 Billion" and clause 6 stated that Pentler would continue for another five years to "advise and act as consultant".[1024]

812. BSGR TS paid the first instalment of USD 3 million on 15 April 2008 and the second instalment of USD 1 million on 16 June 2008.[1025] The third instalment, which was due on 15 April 2009, was not paid on time. On 21 April 2009, Pentler requested an explanation for the default and payment within 15 days.[1026] On that day, Mr. Tchelet gave the following instructions to his staff:

> "Please remove the USD3m and 1m purchase fees paid to Pentler from this report ASAP. It should not be included in the Guinea costs report.
>
> I have given the report to our local accountant Tatiana **after having removed the row of the 17.65% purchase fees**. Please note that the report should be sent from now on to Tatiana and myself on a regular basis but without any reference to **17.65% purchase fees**."[1027]

813. Mr. Tchelet reiterated his instructions on 26 April 2009:

> "Also under no circumstances should any details relating to payments to Pentler, past or pending or future be sent to anyone inside Guinea without speaking with me first."[1028]

1023 [redacted]

1024 Contrat de cession d'actions entre BSGR Steel et Pentler, 28 mars 2008, clauses 5 and 6 (Exh. R-219).

1025 [redacted]

1026 [redacted]

1027 [redacted]

1028 [redacted]

814. On 25 July 2009, BSGR TS and Pentler rescheduled the outstanding instalments amounting to twice USD 9 million: USD 4 million would be settled immediately, USD 5 million by 31 December 2009, and USD 9 million by 15 April 2011.[1029] On 28 July 2009, BSGR TS paid USD 4 million to Pentler.[1030] Following the sale by BSGR of 51% of its shares to Vale on 17 May 2010, Windpoint, a company incorporated in the British Virgin Islands used by the BSGR Group to make bank transfers, transferred USD 22 million to Pentler.[1031] According to the Respondent, this amount corresponds to the remainder owing under the 25 July 2009 agreement (5 and 9 million) plus USD 8 million provided in clause 5 of the SPA. In sum, the record evidences that Pentler received USD 30 million between 15 April 2008 and 17 May 2010. This amount corresponds to the total instalments of USD 22 million plus USD 8 million in the event of a profit exceeding USD 1 billion provided in the SPA.[1032]

815. Finally, it is noteworthy in the present context that the documentation used in relation to these payments complicates tracing. Indeed, instead of invoices from Pentler, the Claimants accepted invoices from different companies of Messrs. Cilins, Lev Ran and Noy, such as FMA or CW France. Payments also appeared linked to services in relation to other mining rights, such as bauxite permits, when they in reality were for securing the exploration permits in North and South Simandou. For instance, Mr. Struik stated that FMA's 10 May 2006 invoice for "assistance and consulting" in respect of the bauxite permits in the amount USD 250,000 was in fact part of the consideration due under the 14 February 2006

1029 [redacted]

1030 [redacted]

1031 [redacted]

1032 Contrat de cession d'actions entre BSGR Steel et Pentler, 28 mars 2008, clause 5 (Exh. R-219).

agreement for achieving the first milestone.[1033] The position is similar in respect of the USD 10,000 paid to Mr. Cilins allegedly for the bauxite permits but actually for Simandou.[1034]

Messrs. Bah, Touré and Daou

816. As mentioned earlier, Messrs. Bah and Touré signed a receipt confirming that they had received USD 425,000 on 20 February 2006, the day when they entered into the contract with Pentler.[1035] This amount corresponds to the first milestone with respect to Simandou.

817. In 2009 and 2010, Mr. Bah claimed additional amounts from BSGR, but there is no evidence that he was paid. Specifically, on 30 November 2009, Mr. Bah requested that BSGR pay him USD 15.2 million (corresponding to USD 12,025,000 – USD 425,000 + USD 3,600,000)[1036] in a letter addressed to Mr. Struik as General Director of BSGR and to Mr. Cilins as Director of Pentler. The letter referred to the 20 February 2006 contract concluded with Pentler "under the supervision of Marc Struik".[1037] The letter added that, failing payment, Mr. Bah would start legal proceedings against BSGR (not Pentler).

818. BSGR answered on 3 December 2009, stating that there had never been a connection between Mr. Bah and BSGR. The answer continued that, if he were to persist with his extortion attempt, BSGR would bring a claim against him.[1038] On 31 December 2009, BSGR wrote to Pentler, expressing its concern that the "matter of Mr. Bah has not been resolved".[1039] Mr. Noy replied on the same day that Pentler would "take care of this matter"

1033 Tr. (Merits), Day 4, 165:15-16 and 19-21 (Struik). Mr. Struik also stated remembering discussions between Messrs. Noy and Oron confirming that the USD 250,000 was not for the bauxite permits, but meant to be the first instalment for the first milestone: "Q. Is it you [sic] testimony today that when [you say], "Michael also phoned me saying that we need to process the 'first payment' now", he wasn't talking about bauxite, he was talking about iron ore? A. Because – exactly. Michael Noy had complained about the fact that he had not been paid, and he was discussing this with Oron. I know for a fact that they were doing this in these discussions because sometimes there were heated discussions in the office, and I know this was between Pentler and them because they started talking Hebrew and they get very excited, okay? So". Tr. (Merits), Day 4, 168:5-15 (Struik).

1034 [redacted] See paragraph 810 above.

1035 [redacted]

1036 [redacted]

1037 [redacted]

1038 [redacted]

1039 [redacted]

and do its best "to get Mr. Bah not to disturb BSGR and its operation as a part of [Pentler's] promise to Beni [i.e. Mr. Steinmetz]".[1040]

819. On 5 May 2010, Mr. Bah again claimed USD 15.2 million from BSGR.[1041] He stressed that Mr. Struik had recommended the conclusion of the 20 February 2006 contract and that it was thanks to this contract that BSGR was able to exercise its activities in Guinea, and ultimately to sell 51% of its capital to Vale for USD 2.5 billion.

820. On 12 May 2010, Mr. Bah then wrote to Mr. Cilins referring to a telephone conversation they had on 4 May 2010.[1042] In that letter, Mr. Bah again sought the payment of USD 15.2 million and rejected an offer of USD 1 million, which Mr. Cilins had apparently made. Interestingly, the letter referred to a document that Mr. Bah allegedly signed to exclude him from "the transaction".[1043] This document appears to be an undated amendment to the 20 February 2006 protocol, signed by Messrs. Bah and Touré (but not by Pentler), and which Mr. Noy attached to a message dated 7 June 2009 sent to the email account of Mr. Barnett, the legal director or in-house counsel of the BSGR Group, and addressed to "Beni" [i.e. Mr. Steinmetz].[1044] In that email, Mr. Noy referred to a meeting with Mr. Steinmetz and confirmed that he checked "the issue" with Messrs. Bah and Touré. He further said that both had agreed to release Pentler from "any responsibility, agreements, engagements and obligations" and that an agreement had been reached between Matinda, i.e. Ms. Touré's company, and Mr. Bah providing that "[a]ll responsibilities with regard to [Mr. Bah] are of Mrs. TOURE".[1045] Mr. Noy further stated that "[i]n any case, BSGR has no responsibility whatsoever with regard to Mr BAH".[1046] In other words, on the face of it, Messrs. Bah and

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1040 [redacted]

1041 [redacted]

1042 [redacted]

1043 ("Tu dis que j'ai signé un document m'excluant de la transaction") [redacted]

1044 [redacted]

1045 [redacted] he amendment reads in relevant part as follows: "Monsieur Aboubacar BAH et Monsieur Ibrahima Sory II TOURE se désistent sans réserve ni condition d'aucune sorte de tout engagement ou obligation contracté avec la Société PENTLER HOLDINGS Ltd au profit de la Société MATINDA and Co. Limited, société en formation dont le siège social se situe quartier Manquepas sur la commune de Kaloum - Conakry".

1046 [redacted]

Touré agreed to assign all of Pentler's obligations owed to them to Ms. Touré. In this context, it is noteworthy that Ms. Touré concluded a series of contracts with Pentler in the course of the summer of 2010 whereby Ms. Touré agreed to assume responsibility for any claims by institutions, companies or Guinean individuals against Pentler and/or its partners.[1047]

821. Be that as it may, for present purposes, there is evidence that Messrs. Bah and Touré received USD 425,000 on 20 February 2006. As for the settlement of the first milestone payment due to Mr. Daou, the only indication on record is found in Mr. Bah's letter of 5 May 2010, according to which on 20 February 2006 at the Novotel in Conakry in the presence of Mr. Struik, Mr. Noy gave USD 75,000 to Mr. Daou in cash at the same time as USD 425,000 to Mr. Bah and Mr. Touré.[1048]

822. Finally, it is undisputed that Mr. Touré was employed by BSGR Guinea since 2006 and that he received a regular salary as well as a bonus of USD 450,000 in 2010.[1049]

Ms. Touré

823. Guinea argues that the record proves that the Claimants paid at least USD 9.5 million to Ms. Touré, either directly or through intermediaries, in return for her influence in securing the disputed mining rights. The Claimants deny any involvement with her or with the payments that Pentler made to her either directly or through Adam Schiffman, a US lawyer managing the company Olympia Title. They also dispute having made cash payments or gifts to Ms. Touré.

824. The Respondent's allegations relate to two sets of transfers: one set of USD 4 million made through Mr. Boutros and one set of USD 5.5 million through Pentler directly or indirectly.

1047 See, for instance: ("Madame Mamadie Toure s'engage par la présente de prendre toutes les responsabilités sur toutes actions mené [sic] en Guinée par toute tierce partie contre Pentler et/ou ses associées [sic]") Contrat Pentler/Matinda de 2010 (en deux exemplaires originaux), 3 août 2010 (Exh. R-31); ("La société Matinda & Co. Ltd, Mme Mamadie Toure, ses partenaires et conseillers s'engagent à prendre toute la responsabilité concernant les reclamations, actes, plaintes ou toutes autres demandes de la part des institutions, sociétés, personnes guinéen [sic] à l'encontre de la société Pentler Holdings Ltd et / ou ses partenaires") [redacted] For similar wording, see: Contrat Pentler/Matinda/Mme Touré non-daté (Exh. R-32).

1048 [redacted]

1049 Reply, Annex I, paras. 107-109; C-PHB1, paras. 179-180; [redacted]

825. Starting with the first series of transfers, according to the Respondent, BSGR paid USD 4 million to Ms. Touré through Ghassan Boutros as follows:

- USD 1 million: USD 998,000 on 28 August 2009 and USD 2,000 on 20 December 2009;
- USD 1 million (or USD 998,870) in February 2010; and
- USD 2 million on 18 May 2010.

826. With respect to the first payments totaling USD 1 million, the Respondent argues that the scheme put in place consisted in fabricating invoices for caterpillar equipment that was never delivered.[1050] The record indicates that, on 17 August 2009, Joseph "Yossie" Tchelet, BSGR's Strategic Financial Specialist, gave instructions to his accountant to transfer USD 1.3 million to Mr. Boutros as "consulting fee".[1051] On 18 August 2009, Mr. Boutros drew up an invoice on the letterhead of his company LMS for two caterpillars and a generator in the amount of USD 1.3 million.[1052] On the same day, BSGR, through BSGR TS, paid the amount invoiced by Boutros as "consulting fees", leaving the accounting line "purchase vehicles" empty.[1053] On 28 August 2009, Ms. Touré, on the letterhead of her company Matinda, created an invoice of USD 998,000 for caterpillars.[1054] Then, on 3 September 2009, Mr. Boutros having received the money from BSGR honored Ms. Touré's invoice ordering his bank to transfer USD 998,000 to Ms. Touré's account.[1055] Later, on 20 December 2009, Ms. Touré created a second invoice for the missing USD 2,000 and, although there is no documentary evidence to this effect, she claimed having received it.[1056]

827. [redacted][1057]

1050 R-PHB1, paras. 299-307.

1051 [redacted]

1052 [redacted]

1053 [redacted]

1054 Facture de Matinda, 28 août 2009 (Exh. R-280).

1055 Lettre de LMS au directeur général de la F.I.B., 3 septembre 2009 (Exh. R-281).

1056 Facture de Matinda, 20 décembre 2009 (Exh. R-282); Déclaration de Mme Touré, 2 décembre 2013, para. 33 (Exh. R-35).

1057 [redacted]

[redacted][1058][redacted] [1059] It is true that the Respondent did not proffer Mr. Boutros as a witness and thus the Claimants had no opportunity to cross-examine him. However, the Claimants did not request the Tribunal to call Mr. Boutros, when they could have done so under the rules. [redacted]

828. [redacted][1060][redacted][1061][redacted][1062] Moreover, BSGR Guinea's August 2009 expense report shows that USD 1.3 million were spent on "Other Consultants Headoffice"[1063] and that the line "Purchase vehicles" was left blank.[1064]

829. On the basis of these facts, it is sufficiently established that BSGR paid Ms. Touré USD 1 million, using Mr. Boutros as an intermediary. The cumulation of the concealment through a fictitious sale of heavy equipment when Ms. Touré had no prior dealings in this type of equipment nor did prior business with Mr. Boutros; the absence of any trace of actual caterpillars or documentation showing delivery;[1065] the timing of the transfers first from

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1058 [redacted]

1059 Reply, Annex 1, para. 78.

1060 [redacted]

1061 [redacted]

1062 [redacted]

1063 [redacted]

1064 [redacted]

1065 The Claimants' assertion that the "two Caterpillars *were* delivered" and that "Boutros supplied such equipment" is not evidenced by documents. Reply, para. 75. The Guinean import declaration filled out by LMS and dated 17 August 2009 only shows that an import request was made, not that the equipment was actually imported or delivered. Guinean Import Declaration; RE: CAT D9R, 17 August 2010 (Exh. C-270).

BSGR to Mr. Boutros on 18 August and then from the latter to Ms. Touré on 3 September in conjunction with her "attestation" of 2 August 2009,[1066] all of this leaves no doubts as to the true nature of these transactions.

830. With respect to the second instalment of USD 1 million, the Respondent argues that the Claimants did not explain the payment to Mr. Boutros and that the transaction is therefore "fictive".[1067] The record shows that, on 14 February 2010, Mr. Tchelet ordered BSGR to make an "extremely urgent" payment of USD 1 million to Mr. Boutros.[1068] Ten days later, on 24 February 2010, Mr. Tchelet transmitted to BSGR's accounting team an invoice from Mr. Boutros in the amount of USD 998,870 (comprising a caterpillar for USD 497,000, road works for USD 356,000, a generator for USD 93,000, and canalization works for USD 52,370), specifying that the remaining USD 1,130 corresponded to bank fees.[1069] At the hearing, Mr. Struik stated that road construction was completed by February 2010,[1070] thus contradicting Mr. Tchelet's assertion that the payment for the caterpillar was urgently needed.[1071]

831. In the statement she made on 2 December 2013 to the US authorities, Ms. Touré stated that she spent the money from the first installment to buy real estate in Jacksonville, Florida, and that she received the second installment when she returned to Freetown, Sierra Leone.[1072] [redacted]

1066 Attestation du 2 août 2009 de Mme Touré (Exh. R-269).

1067 R-PHB1, para. 314.

1068 ("BSGR Guinea needs to make payment tomorrow morning amounting to USD 1,000,000 (One Million United States Dollars) as consulting fees in respect of Ghassan Boutros. Please note that payment is extremely urgent") [redacted]

1069 Courriel de M. Tchelet à M. Clark joignant une facture de la société LMS, 24 février 2010 (Exh. R-285).

1070 Tr. (Merits), Day 4, 242:24, 251:18-19, 253:12-20 and 255:15-23 (Struik).

1071 Tr. (Merits), Day 3, 176:19-177:4 (Tchelet).

1072 ("Plus tard en 2009, j'ai reçu un virement électronique de 998 000 dollars auprès de Rokel Commercial Bank, depuis un compte appartenant à Ghassan Boutros, un Libanais. Boutrous [sic] vendait du matériel en Guinée et servait à Avidan pour le transfert d'argent dans cette transaction. J'ai reçu 2 000 dollars séparément, ce qui résulte en un paiement total de 1 000 000 de dollars. Je suis allée à Jacksonville et j'ai utilisé une part de cette somme pour acheter une demeure pour moi-même et pour ma famille. Je suis ensuite retournée à Freetown. *Pendant que j'étais là, j'ai reçu un paiement supplémentaire de 998 000 dollars, que j'ai compris comme venant de BSGR*") Déclaration de Mme Touré, 2 décembre 2013, paras. 33-34 (Exh. R-35) (Emphasis added by the Tribunal).

[redacted][1073]

832. It is true that no document in the record proves the actual transfer from BSGR to Mr. Boutros and from the latter to Ms. Touré. Yet, there is evidence of BSGR's internal payment instruction for an amount corresponding to the second instalment; Mr. Boutros' invoice at about the same time for the same amount; the fact that the same caterpillar scheme was used and that there is no indication of the existence or delivery of such machinery; and Ms. Touré's statement that she received the money. On these facts and because of the connection between the three instalments, the Tribunal is inclined to find that BSGR did make the payment to Ms. Touré. Moreover, the record contains no request for a missing payment, which one would expect if one of the three instalments had remained outstanding.

833. [redacted][1074]
[redacted][1075]

834. Mr. Boutros stated before the Swiss prosecutor that a director of operations of BSGR Guinea told him to assist "a certain" Mr. Camara to transfer the USD 2 million in cash "*sur le compte BSGR auprès de la Banque Populaire Maroco Guinéenne de Conakry*".[1076] According to Mr. Boutros, Mr. Camara, who is not othwerwise identified, asked him to sign the invoice since he did not have an identity card: "*Il est exact qu'en procédant ainsi je*

1073 [redacted]
1074 [redacted]
1075 [redacted]
1076 [redacted]

faisais comme si c'était moi qui avait déposé USD 2 millions".[1077] Mr. Boutros also stated that he thought the monies were for BSGR and did not verify the identity of the recipient: "J'étais persuadé que l'argent allait sur leur compte".[1078] He further said that he gave the receipt to BSGR: "le reçu que m'a remis la banque je l'ai immédiatement remis à la comptabilité de BSGR, sans garder une copie pour moi".[1079] He finally testified that: "je pense aujourd'hui [avoir] été utilisé par BSGR pour virer de l'argent sur des comptes que je ne connaissais pas".[1080]

835. Whether Mr. Boutros was duped or not is irrelevant here. What matters is that the money came from BSGR as evidenced by the fact that Mr. Boutros handed the receipt to BSGR, and that USD 2 million were transferred on Ms. Touré's bank account for unspecified services.[1081]

836. It is also noteworthy that the documentary evidence shows – and Mr. Tchelet confirmed – that BSGR Treasury transferred USD 3,137,000 to Mr. Boutros between 16 February and 21 April 2010.[1082] Mr. Tchelet also stated that he should have exercised more caution with respect to these money transfers.[1083] In fact, he provided a list of the monies transferred to a certain Mr. Adama Sidibe, who was Mr. Boutros' partner in LMS.[1084]

837. These payments were made on an "urgent" basis prior to receiving the corresponding invoices.[1085] It also appears that Mr. Tchelet instructed his accountants to allocate these

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1077 [redacted]

1078 [redacted]

1079 [redacted]

1080 [redacted]

1081 [redacted]

1082 Tchelet (CWS-11), para. 17.

1083 Tr. (Merits), Day 3, 179:10-180:11 (Tchelet).

1084 Tchelet (CWS-11), para. 17, items 9-16. [redacted]

1085 See, for instance: [redacted] ("Invoice to follow") [redacted]

payments as consulting fees.[1086] Mr. Tchelet's explanations at the hearing were not really convincing.[1087] It is not clear why these payments had to be made on an urgent basis, nor why instructions of payment were given before any invoices were received. Nor is it clear why Mr. Boutros would be a "prime example of a non-employee whose payments were recorded as consulting fees", as the Claimants argued.[1088] The Claimants' explanation that the "consulting" category was "often used as the default category where no other category applied"[1089] is misleading, since the purchase of caterpillars would squarely fall within the accounting line referring to "Purchase vehicles". However, this line was left blank. Similarly, the Claimants' explanation that the "consulting" category would be used where the "correct category was not known prior to receipt of an invoice" is also misleading.[1090] For instance, Mr. Tchelet transferred to his staff the invoice from Mr. Boutros for USD 998,870 which had been classified as "consulting fees" without instructing the staff to reclassify the expense.[1091] Finally, the Claimants have not provided any explanation why Ms. Touré's involvement in the delivery of heavy machinery made her "part of a legitimate commercial transaction".[1092]

838. In the light of the fact that USD 2 million were put on Ms. Touré's bank account only 3 weeks after Mr. Boutros (through Adama Sidibe) received the last payment, and considering the testimony of Mr. Boutros, there is a sufficient link between BSGR and Ms. Touré with regard

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("Ghassan-invoice to follow in due course for allocation purposes") ("the invoice will follow in due course") ("Hi-please load payment amount to USD 212k today to Ghassan – invoice is pending")

1086 See, for instance: ("BSGR Guinea needs to make payment tomorrow morning amounting to USD 1,000,000 (One Million United States Dollars) as consulting fees in respect of Ghassan Boutros") ("Hi-attached is the supporting invoice relating to the recent payment to Ghassan as consulting fees last week, slight difference due to bank charges etc, for your records") ("I have been informed this afternoon of a requirement to pay an amount of USD 550,000 as R.A.S. consulting fees in respect of services rendered by Ghassan. Invoice to follow")

1087 Tr. (Merits), Day 3, 177:16-22 and 205:17-23 (Tchelet).

1088 Reply, Annex I, para. 69.

1089 Reply, Annex I, para. 68.

1090 Repy, Annex I, para. 68.

1091 ("Hi-attached is the supporting invoice relating to the recent payment to Ghassan as consulting fees last week, slight difference due to bank charges etc, for your records")

1092 Reply, Annex I, para. 75.

to this payment. The Claimants' explanation that BSGR's payments to Mr. Boutros were based on a legitimate commercial relationship is not sufficiently substantiated. While Messrs. Avidan and Tchelet stated that Mr. Boutros supplied "various equipment and machinery to BSGR",[1093] this has not been corroborated, for instance, by any cogent evidence showing that the caterpillars have actually been delivered. Nor did the Claimants provide a cogent explanation for the round figures of the amounts paid to Mr. Boutros.

839. In summary, on the basis of the record, the Tribunal is satisfied that, between 3 September 2009 and 18 May 2010, Ms. Touré received from BSGR (through Mr. Boutros) the USD 4 million mentioned in her 2 August 2009 "attestation" (the "2 August 2009 Attestation"), whilst of that amount only USD 2,998,000 are proven by documentary evidence.

840. The Tribunal now turns to the review of the second set of payments. The Respondent asserts that, in addition to the payments just discussed, Ms. Touré received USD 5.5 million following her denunciation of the 2 August 2009 "attestation" on 8 June 2010.[1094] It submits that Ms. Touré sought to renegotiate her compensation following the joint venture agreement with Vale in April 2010. For Guinea, this effort culminated in Pentler and Ms. Touré signing a new contract on 3 August 2010 providing for the payment of USD 5.5 million.

841. In its Counter-Memorial and Rejoinder, the Respondent pointed to the following flows of funds: USD 399,940 were transferred between 22 July and 15 August 2010 by Messrs. Cilins and Lev Ran to Ms. Touré; USD 3 million were transferred on 5 August 2010 from BSGR to Pentler; USD 1.5 million were transferred on 22 March 2011 from BSGR to Pentler; USD 1.5 million were transferred between 31 March and 12 April 2011 from Pentler on the bank account of Olympia Title, a company administered by Mr. Schiffman; USD 3.5 million were transferred on 12 September 2011 from Pentler to Olympia Title; USD 500,000 were transferred on 11 October 2011 from Olympia Title to Ms. Touré; USD 400,000 were transferred on 11 January 2012 from Olympia Title to Ms. Touré; USD 936,451.02 were transferred on 14 May 2012 from Olympia Title to Ms. Touré. These

[1093] C-PHB1, para. 188; Tr. (Merits), Day 9, 197:3-6 (Avidan); Tr. (Merits), Day 3, 162:11-163:7 (Tchelet).

[1094] Letter from bailiff Nassif Moussi to BSGR, 8 June 2010 (Exh. C-114).

flows, which are corroborated by documentary evidence, total payments to Ms. Touré of USD 2,236,391.02 being paid by Pentler directly or indirectly through Olympia Title.[1095]

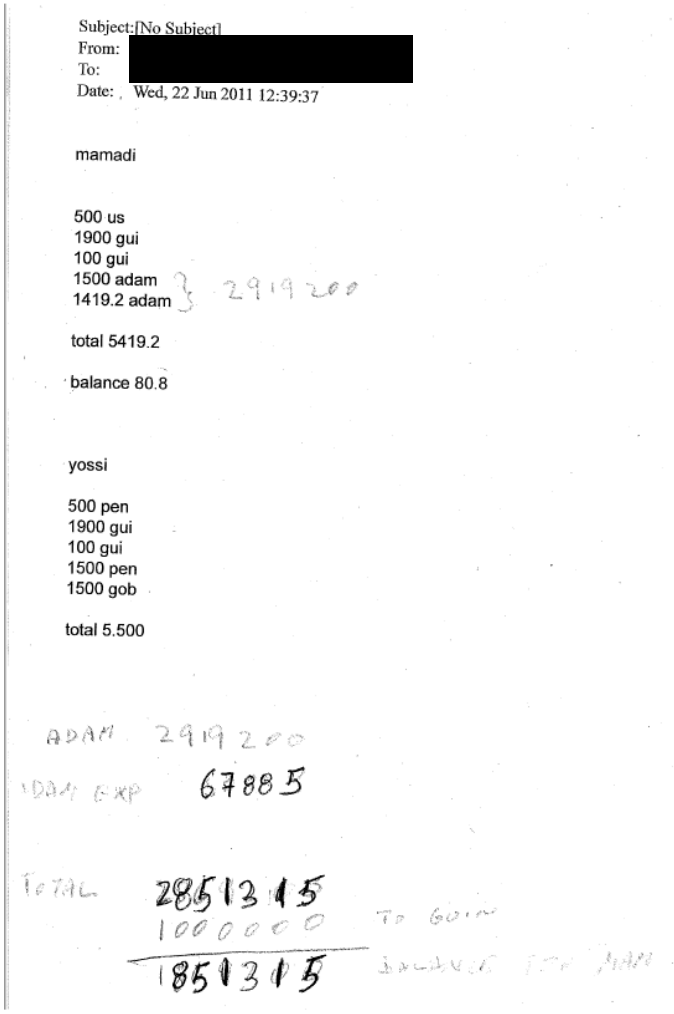
842. The question remains whether Ms. Touré received the balance of over USD 3 million leading to the total of USD 5.5 million and whether these funds originated from BSGR. These questions are answered by supplemental evidence which Guinea filed with its post-hearing brief.[1096]

843. That evidence includes three differently annotated versions of an email dated 22 June 2011 of Mr. Noy to Mr. Cilins, which email contains two columns; the first is entitled “Mamadi” and the second “Yossi”. Both columns list sums for an aggregate of approximately USD 5.5 million. It is undisputed that “Mamadi” refers to Mamadie Touré and that “Yossi” refers to Mr. Joseph Tchelet, BSGR’s financial specialist. This evidence shows that, contrary to BSGR, Pentler maintained a record of the payments made for a total of USD 5.5 million. This evidence also demonstrates a clear link between BSGR, Pentler and Ms. Touré, as well as the implication of Adam Schiffman who managed Olympia Title.

[1095] CM, paras. 502-520; Rejoinder, paras. 425-437; Chèques de Frédéric Cilins en faveur de Mme Touré, 27 juillet et 5 août 2010 (Exh. R-34); United States of America v. Frédéric Cilins, Tribunal Fédéral du Southern District de New York, Government’s Memorandum In Support of Detention Pending Trial, 13 Cr.315(KHW), 6 juin 2013, p. 13 (Exh. R-344); [redacted]

[1096] R-PHB1, paras. 321-337.

844. The first version of the email from Michael Noy to Frederic Cilins reads as follows:[1097]



Subject:[No Subject]
From: [redacted]
To:
Date: Wed, 22 Jun 2011 12:39:37

mamadi

500 us
1900 gui
100 gui
1500 adam
1419.2 adam } 2919200

total 5419.2

balance 80.8

yossi

500 pen
1900 gui
100 gui
1500 pen
1500 gob

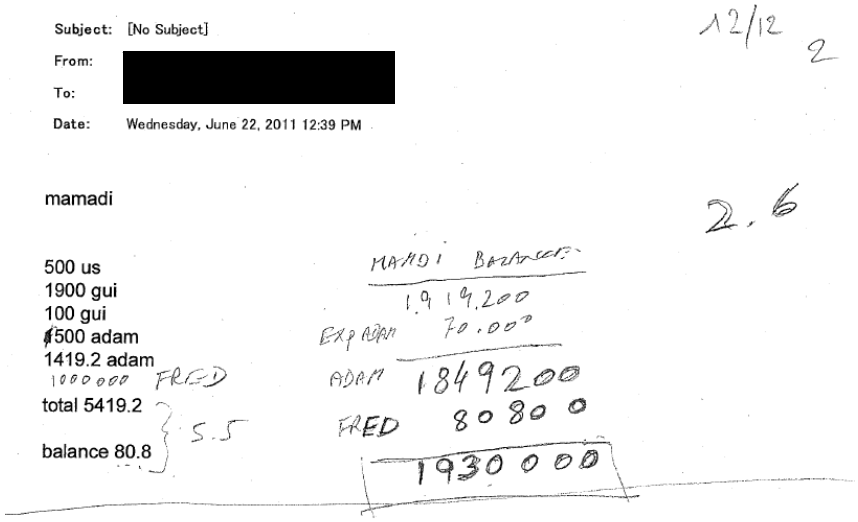
total 5.500

ADAM 2919200
ADAM EXP 67885

TOTAL 2851315
1000000 TO GOIM
1851315 BALANCE FOR ADAM

1097 [redacted]

845. The second annotated version of that email reads as follows:[1098]



Subject: [No Subject]
From: [redacted]
To:
Date: Wednesday, June 22, 2011 12:39 PM

12/12 2

mamadi

2.6

500 us
1900 gui
100 gui
500 adam
1419.2 adam
1000000 FRED
total 5419.2
balance 80.8

5.5

MAMDI BALANCE
1.919.200
EXP ADAM 70.000
ADAM 1849200
FRED 80800
1930000

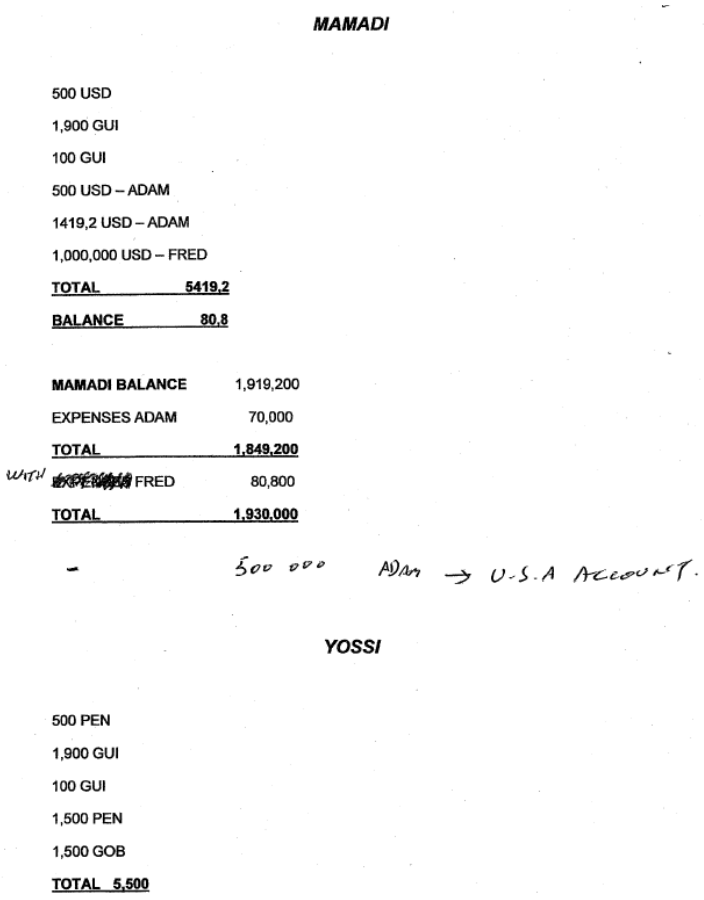
yossi

500 pen
1900 gui
100 gui
1500 pen
1500 gob

total 5.500

1098 [redacted]

846. Finally, the third annotated version reads as follows:[1099]



MAMADI

500 USD
1,900 GUI
100 GUI
500 USD – ADAM
1419,2 USD – ADAM
1,000,000 USD – FRED
TOTAL 5419,2
BALANCE 80,8

MAMADI BALANCE	1,919,200
EXPENSES ADAM	70,000
TOTAL	**1,849,200**
WITH [redacted] FRED	80,800
TOTAL	**1,930,000**

- 500 000 ADAM → U.S.A ACCOUNT.

YOSSI

500 PEN
1,900 GUI
100 GUI
1,500 PEN
1,500 GOB
TOTAL 5,500

847. The Claimants responded that the payments listed under "Yossi" were legitimate payments from BSGR to Pentler and that the use of Mr. Tchelet's name in this email "is not evidence that BSGR used Pentler to make separate payments to Mamadie Touré".[1100] The Tribunal disagrees. It finds the Respondent's explanations about these transfers convincing and considers that this email and the annotations show that BSGR paid Ms. Touré nearly USD 5.5 million, specifically USD 5,419,200.

848. More precisely, the Respondent provided the following explanations on these money transfers, starting with the column entitled "Mamadi". According to Guinea, the entry "**500 US**" corresponds to USD 500,000 paid by Mr. Cilins and Lev Ran between 22 July 2010

1099 [redacted]

1100 C-PHB2, para. 98.

and 15 August 2010 to Ms. Touré, of which the Respondent could retrace USD 399,940.[1101]

[redacted][1102][redacted][1103]

849. The documentary evidence indeed supports the transfers by Mr. Cilins. A first check in the amount of USD 100,000 was issued on 27 July 2010 to Ms. Touré, and a second one in the amount of USD 50,000 followed on 5 August 2010.[1104] A memorandum of the US authorities similarly notes that "[b]ank records also show that this same Avraham Lev Ran – a co-owner of the Surf Road LLCs – transferred $149,970 and $99,970 on July 21 and August 5, 2010, respectively, from an account in Israel to an account in Florida that belonged to the CW [i.e. the Cooperating Witness, Ms. Touré]".[1105] It is noteworthy that the corresponding column entitled "Yossi" indicates that the USD 500,000 were first transferred from BSGR to Pentler and then to Ms. Touré ("500 PEN").

850. The entry **"1900 GUI"** appears to amount to USD 1,900,000, which were transferred on Ms. Touré's bank account on 27 September 2010. The bank records of Ms. Touré at the Banque Populaire Maroco Guinéenne confirm that Ms. Touré received USD 1,900,000 on

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1101 R-PHB1, para. 328. Cf. Chèques de Frédéric Cilins en faveur de Mme Touré, 27 juillet et 5 août 2010 (Exh. R-34); United States of America v. Frédéric Cilins, Tribunal Fédéral du Southern District de New York, Government's Memorandum In Support of Detention Pending Trial, 13 Cr.315(KHW), 6 juin 2013 (Exh. R-344). [redacted]

1102 [redacted]

1103 [redacted]

1104 Chèques de Frédéric Cilins en faveur de Mme Touré, 27 juillet et 5 août 2010 (Exh. R-34).

1105 United States of America v. Frédéric Cilins, Tribunal Fédéral du Southern District de New York, Government's Memorandum In Support of Detention Pending Trial, 13 Cr.315(KHW), 6 juin 2013, p. 13 (Exh. R-344).

that date.[1106] The Claimants particularly took issue with this payment and stressed that Ms. Touré was not able to explain [redacted] on which basis this payment was made.[1107]

851. In the same vein, the Claimants took issue with the entry **"100 GUI"**, which amount corresponds, so the Respondent says, to the USD 100,000 deducted from the USD 2 million, when the USD 1.9 million payment (mentioned above) was made.

852. It is unclear who made the USD 2 million payment. [redacted][1108]

853. Next to the entries for these two amounts of "1900" and "100", it reads "GUI". The Respondent believes that this means that the money came directly from BSGR Guinea. It is true that there is no evidence that Mr. Avidan paid USD 1.9 million and then USD 100,000 to Mr. Cissé. However, there is also no plausible explanation either for how Mr. Cissé would have obtained such large amounts of money. [redacted] This being said, the entries "1900 GUI" and "100 GUI" in the three annotated versions of the email between Mr. Noy and Mr. Cilins are striking and, failing any other sensible explanation, may well suggest that BSGR paid USD 2 million to Ms. Touré.

854. The Respondent further explains that the entry **"1500 adam"** in the first email version corresponds to payments made by BSGR through Adam Schiffman, who managed Olympia Title.[1109] [redacted][1110]

1106 [redacted]

1107 C-PHB2, para. 99.

1108 [redacted]

1109 R-PHB1, para. 329.

1110 [redacted]

855. The evidence shows that, through Windpoint, BSGR transferred USD 1.5 million to Pentler on 22 March 2011.[1111] However, the Respondent argues that the payments were not made as initially assumed, as the three different versions of the Pentler's accounting show. On 6 July 2011, Ms. Touré requested that Mr. Cilins pay her USD 1 million, which the latter did instructing the bank to transfer that amount from the account of Gobain Finance Corp.[1112]

856. This fact is reflected in the second annotated version of the email with a new handwritten entry "1000000 FRED" and a modification of the entry "1500 adam" to "500 adam". The record corroborates that Ms. Touré received close to USD 1 million, precisely USD 991,495.25, on 21 July 2011.[1113] According to Guinea, the difference of USD 8,504.70 represents bank fees,[1114] which the Tribunal finds plausible. The evidence further shows that Olympia Title, i.e. Adam Schiffman's company, wired USD 500,000 to Ms. Touré on 11 October 2011.[1115]

857. Finally, the entry **"1419.2 adam"** corresponds to USD 1,419,200 that were paid by Mr. Schiffman to Ms. Touré through Olympia Title. The Respondent acknowledges that the documents only record payments for a total of USD 1,336,451.02, from Olympia Title to Ms. Touré between 11 January 2012 and 14 May 2012, for a total amount, which is slightly lower than the sum listed in the email. These payments were made in two transfers of USD 150,000 and USD 250,000 on 11 January 2012[1116] and one of USD 936,451.02 on 14 May 2012.[1117]

858. In summary, with respect to the second set of payments, the record shows that Ms. Touré actually received from Pentler directly or indirectly through Olympia Title USD 5,419,200 (out of the USD 5.5 mio.), out of which USD 2,236,391.02 can be traced through wire transfers and/or checks.

1111 Instruction de paiement de Windpoint à Pentler pour 1,5 million de dollars, 22 mars 2011 (Exh. R-353).

1112 [redacted]

1113 [redacted]

1114 R-PHB1, para. 331.

1115 [redacted]

1116 [redacted]

1117 [redacted]

859. As a result, adding the first and second series of payments, it is established that BSGR paid Ms. Touré **USD 9,419,200** between August 2009 and May 2012. Out of that sum, payments for USD 5,234,391.02 are proven by wire transfers and checks and the remainder through other evidence.

860. By contrast, there is insufficient evidence to find that Ms. Touré received additional cash payments and other gifts. In particular, absent further evidence, the Tribunal cannot rely on Ms. Touré's statements that her half-brother gave her USD 200,000 after the award of the North and South Simandou exploration permits.[1118] Neither are her statements sufficient to accept that Ms. Touré received from Mr. Avidan a necklace or a gold chain with seven diamonds.[1119]

Mr. Thiam

861. BSGR does not deny that it reimbursed Minister Thiam's travel expenses of USD 4,680.02 in April 2009 for a round trip to Paris[1120] and of USD 10,744.66 in November 2009 for a trip in September 2009 to attend the wedding of Mr. Steinmetz's daughter in Tel Aviv and for a one-way ticket from Istanbul to Hong Kong.[1121] These favors appear suspicious considering that Mr. Thiam became Minister of Mines in January 2009, that he confirmed the validity of BSGR's exploration permits over Blocks 1 and 2 in May of that year (see further below) and fast-tracked the issuance of Base Convention later in December 2009 of the same year.[1122] Mr. Thiam's explanation that he "simply caught a ride" on Mr. Steinmetz's plane on several occasions for official missions, including specifically his ten-day trip to Paris, is contradicted by the evidence in the record, which shows that BSGR reimbursed a round trip with Air France from Conakry to Paris.[1123] Moreover, there is no evidence in the record corroborating Minister Thiam's evasive statement that he was on an official mission on that occasion.[1124]

1118 Déclaration de Mme Touré, 2 décembre 2013, para. 15 (Exh. R-35).

1119 Déclaration de Mme Touré, 2 décembre 2013, para. 27-28 (Exh. R-35).

1120 [redacted]

1121 [redacted]

1122 Thiam (CWS-5), paras. 55, 70.

1123 [redacted] Minister Thiam flew from Conakry to Paris on 10 April 2009 and returned to Conakry on 20 April 2009. The travel expenses were invoiced on 23 April 2009 by the office of travel agency Diesenhaus-Unitours in Haifa, Israel.

1124 Thiam (CWS-5), para. 89.4.

Technical Commission

862. BSGR does not deny that it paid the members of the Technical Commission set up by Mr. Thiam in December 2009 USD 1,000 each to negotiate the terms of a mining convention. Compared to other payments made by BSGR to Guineans, these amounts may seem insignificant. Yet, they represent five times the amount of the monthly salary of the committee members and twice the salary of a prime minister.[1125] Accordingly, these amounts cannot be considered *de minimis*. The Claimants' argument that "senior Government officials such as the Committee members earned considerably more than the average wage" does not detract from the fact that the committee members received for two weeks' work twice the compensation of the Guinean Prime Minister for one month. The fact that the Claimants were "open" about these payments in the Statement of Claim does not change that fact either.[1126]

863. [redacted][1127]

This raises the question whether such daily allowances were common practice. Asked about it, Mr. Souaré, who was Prime Minister at that time, denied that such payments were customary or otherwise legal:

> "Q. […] There are elements in the file where some people had been speaking about a customary practice relating to review commissions, or commissions that are to examine investor applications, which would be a standard practice for those investors, i.e. to pay certain amounts to the members of the commission that examines their titles. In your experience as Minister and Prime Minister, is this normal practice, that an investor should pay members of a commission that are there to examine the mining titles?
>
> A. It's neither legal within the Mining Code nor traditional. This is not a practice that I experienced as Minister or Prime Minister."[1128]

1125 Tr. (Merits), Day 6, 12:17-13:16 (Souaré).

1126 Reply, para. 379(i)-(ii), referring to Memorial, para. 75; Struik (CWS-2), para. 82.

1127 [redacted]

1128 Tr. (Merits), Day 6, 11:19-12:7 (Souaré).

864. In the light of these explanations and considering the disproportionate amount of the payments when compared to the salary of the Prime Minister, the Tribunal cannot but find that these payments raise red flags.

Other gifts

865. The Respondent alleges that Mr. Cilins gave a watch with diamonds worth "several thousand dollars" to President Conté on BSGR's behalf, that BSGR gave a diamond-encrusted miniature car to President Conté and another one to Minister Souaré, and that BSGR gave President Conté two Land Cruisers.[1129] The Claimants contend that they did not know about the watch given to President Conté and that Mr. Cilins did not act on their behalf.[1130] They further qualify as "preposterous" the allegation that offering a model car to President Conté was a bribe, since an identical car had been accepted by Minister Souaré during the official ceremony for the signing of the MoU on 20 February 2006.[1131] Finally, they deny having offered two Land Cruisers to President Conté, insisting that there is no evidence of these gifts and that Ms. Touré's statements are unreliable.[1132]

866. It is undisputed that Mr. Cilins offered an expensive watch to President Conté, but the circumstances surrounding this present or the value of the watch are unclear. On 5 October 2011, Mr. Cilins apparently told Steven Fox from Veracity Worldwide that he brought a "diamond-encrusted watch" to "a meeting with President Conté", which meeting was also attended by Messrs. Oron and Touré and "three or four other BSGR representatives".[1133] According to that account, Mr. Oron presented the watch to President Conté and Mr. Cilins "speculated" that it was worth USD 60,000 with the diamonds and about USD 2,000 to 3,000 without them.[1134] In 2012, Mr. Cilins similarly stated that he gave a watch to President Conté "at one meeting", but on that occasion he mentioned that the watch was worth less than USD 5,000.[1135] He further said then that he had acted on his own, and had paid for the

[1129] CM, para. 824 (Translated from the French); Rejoinder, para. 121; R-PHB1, para. 462.

[1130] Reply, Annex I, paras. 96-97.

[1131] Reply, Annex I, para. 98.

[1132] Reply, Annex I, para. 99.

[1133] Rapport d'entretien avec M. Cilins, 5 octobre 2011 (probable), pp. 4-5 (Exh. R-165).

[1134] Rapport d'entretien avec M. Cilins, 5 octobre 2011 (probable), p. 5 (Exh. R-165).

[1135] Attestation de M. Cilins, 26 novembre 2012, p. 2 (Exh. R-169) (Translated from the French).

watch. He added that BSGR had not been informed of this initiative and that he had never requested the reimbursement of his expense.[1136]

867. Considering these contradictory statements and the absence of additional evidence, the Tribunal is of the view that there is insufficient proof that the Claimants bribed President Conté with a watch and that Mr. Cilins acted on behalf of the Claimants.

868. Turning now to the miniature car, the Claimants brought a replica of the diamond-encrusted and gold plated miniature car to the Merits Hearing, of which a photograph was taken and added to the record.[1137] It is undisputed that the Claimants gave one such miniature car to President Conté and another one to Minister Souaré. It is unclear when exactly President Conté accepted this gift.[1138] As for Minister Souaré, he confirmed that he accepted the miniature car at the ceremony for the signing of the MoU on 20 February 2006 and stated that he forwarded the gift to President Conté.[1139] [redacted][1140] In the circumstances, the Tribunal has insufficient evidence to conclude that these gifts amount to a bribe as opposed to an admissible corporate gift.

Finally, with respect to the Land Cruisers, the Tribunal notes that Ms. Touré stated that she received two Land Cruisers from Mr. Avidan as a gift from Mr. Steinmetz when the application for the Blocks 1 & 2 permits were pending.[1141] Accordingly, these alleged gifts did not relate to North and South Simandou and the Tribunal will address them further below.

Conclusion regarding the Zogota mining permits and the Base Convention

869. To conclude, there is evidence showing that BSGR paid Pentler, its principals or another company related to the principals (such as FMA and CW France) various amounts in 2006

1136 Attestation de M. Cilins, 26 novembre 2012, p. 2 (Exh. R-169).

1137 Photograph of Model Car (Exh. C-357).

1138 For instance, the Tribunal notes that Ms. Touré stated that Mr. Steinmetz offered a diamond-encrusted miniature car to President Conté at an undated meeting in Brameya and the context of her statement suggests that this was in the context of negotiations surrounding Blocks 1 & 2, i.e. around 2008. Lettre d'engagement nº 1 de Pentler envers Mme Tourénon datée, légalisée le 21 juillet 2006, para. 22 (Exh. R-25).

1139 Tr. (Merits), Day 6, 94:2-19 (Souaré).

1140 [redacted]

1141 Déclaration de Mme Touré, 2 décembre 2013, para. 26 (Exh. R-35).

(USD 385,000, including USD 125,000 in February 2006, USD 10,000 in April 2006 and USD 250,000 in May 2006) and between 2008 and 2010 (USD 30 million, including USD 3 million in April 2008, USD 1 million in June 2008, USD 4 million in July 2009, USD 22 million in May 2010). The record further contains evidence of a payment from Pentler (or its principals) to Messrs. Bah and Touré (USD 425,000 on 20 February 2006), as well as the payment of a bonus of USD 450,000 by BSGR to Mr. Touré in 2010 in addition to his regular salary. In addition, there is direct evidence in the form of wire transfers and/or checks that Ms. Touré received USD 5,234,391.02 between August 2009 and May 2012, although the record actually shows that she received USD 9,419,200 in that period. There is also evidence showing that BSGR reimbursed Mr. Thiam's travel expenses (USD 15,424.68, including USD 4,680.02 in April 2009 and USD 10,744.66 in November 2009). Finally, it is undisputed that the 20 members of the Technical Commission tasked with reviewing the feasibility study and negotiating the terms of the mining concession for Zogota received each USD 1,000 from BSGR for a total amount of USD 20,000.

870. At this stage, the Tribunal finds that BSGR made payments in a total amount of USD 30,835,000 to intermediaries (including USD 30,385,000 to Pentler and USD 450,000 to Mr. Touré). It is further established that, through intermediaries such as Pentler, Mr. Schiffman or Mr. Boutros, BSGR arranged for payments of USD 9,419,200 to Ms. Touré and of USD 425,000 to Messrs. Bah and Touré. Finally, it is established that BSGR paid government officials in the amount of USD 35,424.68 (including USD 15,424.68 to Mr. Thiam and USD 20,000 to the members of the Technical Commission). The question then arises what qualifications these intermediaries had and what services these payments were meant to remunerate.

(b) Qualifications of intermediaries used by BSGR

871. It is commonly accepted that the lack of qualifications of intermediaries can constitute a red flag indicative of corrupt practices. The Respondent alleges that neither the Pentler officials, nor Ms. Touré, nor Mr. Touré had any qualifications in the mining sector and that their services were only retained because of their proximity to President Conté.

Pentler

872. It is undisputed that Pentler operated on the West African "grey market" since 2004 through their companies FMA International and CW France.[1142] Through its West African network, it apparently gained access to President Conté's first wife, Ms. Henriette Conté.[1143]

873. The Claimants concede that in 2006 Messrs. Cilins, Lev Ran and Noy "were not experienced in the mining sector".[1144] This being so, even absent any sector-specific knowledge, consultants can provide relevant experience in other fields, such as providing help in setting up operations in a country. However, the Claimants have not provided any explanations on the roles played by Messrs. Lev Ran or Noy,[1145] other than that they were acquaintances of Mr. Oron who introduced BSGR to the Guinean mining sector. Although he had no mining experience, Mr. Cilins appears to have played a somewhat more important role.[1146] Mr. Struik, for instance, testified that Mr. Cilins was useful at the beginning when he did not yet speak French,[1147] without however providing other details on qualifications justifying retaining his services. Mr. Avidan further stated that Mr. Cilins' initial role was to merely deal with "formalities and practicalities on the ground".[1148]

874. In other words, the Claimants have failed to substantiate the qualifications of the Pentler principals which might possibly have justified their level of remuneration.

1142 CM, para. 119.

1143 CM, para. 121.

1144 Reply, Annex I, para. 116. Mr. Cilins stated in 2012 that his activities in West Africa since 2000 centered on buying and selling pharmaceuticals and that he only got interested in mining in Guinea after having heard from BSGR's existence: "En Guinée, mon activité a notamment porté sur l'achat et la revente de produits pharmaceutiques. En 2005, j'ai appris l'existence de la société BSGR et compris l'intérêt qu'elle pourrait prendre au développement de projets miniers en Guinée. Ayant ainsi une possibilité d'accès au groupe BSGR, je me suis investi dans l'étude des problèmes miniers en Guinée et, fort de ma présence locale, j'ai proposé à BSGR de l'assister et de coopérer avec elle". Attestation de M. Cilins, 26 novembre 2012, p. 1 (Exh. R-169).

1145 Mr. Struik, for instance, stated that Messrs. Lev Ran and Noy were not "on the ground" in the beginning of 2006. Tr. (Merits), Day 4, 113:5-7 ("Q. As for Mr Noy and Mr Lev Ran, were they on the ground in Guinea with you at the time? A. No, they were not").

1146 "Q. And you confirm that Mr Cilins himself had no mining background? A. He had absolutely no mining background. He was a businessman, but nothing in mining at all". Tr. (Merits), Day 4, 112:20-23 (Struik).

1147 See, for instance: Tr. (Merits), Day 4, 114:12-14 (Struik).

1148 Tr. (Merits), Day 9, 46:9-14 (Avidan).

Messrs. Bah and Daou

875. Similarly, the Claimants have provided no input on the qualifications of Messrs. Bah and Daou. While they deny any involvement with these two individuals, the record shows that Mr. Struik was involved in the drafting of the Pentler/Bah/Touré protocol (see paragraph 789 above).[1149] Nonetheless, Mr. Struik did not indicate why Mr. Bah was promised a remuneration for his "services, counsel and assistance" or what qualifications would warrant hiring his services.

Ms. Touré

876. Ms. Touré was born in 1982 in Guinea, and was thus 24 years old in 2006. There is no indication that she received any particular education. [redacted][1150] Hence, there is no indication that Ms. Touré had any qualifications in the mining sector at the relevant time.

Mr. Touré

877. Mr. Touré had no qualifications in the mining sector either, as Mr. Struik conceded.[1151] He was a journalist when he joined BSGR in 2006.[1152] Prior to that, the Claimants note that Mr. Touré assisted "the Pentler principals with deals in Guinea and introduced them to different industries and traders".[1153] However, they provide no information on the type of industry involved. Mr. Touré first worked for BSGR Guinea as a part time employee in

1149 [redacted]

1150 [redacted]

1151 Tr. (Merits), Day 4, 208:23-209:1 (Struik).

1152 See, for instance: ("Q. […] he was a journalist, who didn't have any mining background, and who appeared to you to be very well connected in Guinea. Do you agree with those points? A. He appeared like that, yes") Tr. (Merits), Day 4, 208:20-209:1 (Struik); Avidan (CWS-3), para. 11 ("Mr Touré was a journalist"); Counter-Memorial, paras. 175, 830.

1153 Reply, Annex I, para. 103(iii).

2006[1154] and was then hired as Director of External Relations in the following year[1155] and finally promoted to the position of Vice-President in 2010. According to Mr. Avidan, Mr. Touré advised BSGR, for instance, to enhance its reputation by visiting local communities.[1156] He also sat in the halls of ministries on behalf of Mr. Avidan and told him when he could meet with ministers.[1157] In essence, the Claimants' explanation for retaining the services of Mr. Touré was his "good contacts" in business, politics and mining.[1158] However, as the Respondent pointed out, Mr. Avidan seemingly contradicted the Claimants' position and his own written testimony when at the Merits Hearing he denied that Mr. Touré had such contacts.[1159] In fact, Mr. Avidan's oral testimony was evasive on this point. He said that Mr. Touré only knew "very low-key" bureaucrats and sought to downplay his prior explanation that Mr. Touré had told him he knew President Conté from the time when he was hiding from the then President Ahmed Sékou Touré.[1160]

878. The Tribunal is therefore unconvinced that Mr. Touré had the necessary qualifications in the mining sector to provide valuable assistance to a foreign mining investor. It rather appears, as the analysis below will show, that Mr. Touré was hired because of his family ties with President Conté through his half-sister Ms. Touré, and his resulting ability to exert influence over government officials.

879. In conclusion, the record shows that all the intermediaries lacked experience and expertise in the mining industry. The Tribunal appreciates that an investor seeking to invest in a country unknown to him may also retain the services of professionals outside his industry, to assist with all kinds of administrative, logistical, legal or other matters involved in setting up operations in a new country. Yet, the persons retained would then have qualifications necessary to give assistance in the area of expertise for which they are consulted. Here,

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1154 Struik (CWS-2), para. 36.

1155 Struik (CWS-2), para. 37.

1156 Avidan (CWS-3), para. 23.

1157 Reply, Annex I, para. 101(iii).

1158 Reply, Annex I, para. 101(iv).

1159 R-PHB1, para. 343; ("Q. Okay. But going back to be [sic] Mr Touré's role, you found that he had very good contacts locally, didn't he? A. Well, I knew that he knew the country much better than me, for sure. Q. That wasn't my question. You knew that he had very good contacts, right? A. No. No, not necessarily. It depends with whom. The minister at the time that I came, I remember, Dr Sylla, I think he never met him before I came with him to his chamber. Q. But, Mr Avidan, he had good contacts in politics and in business, didn't he? A. No, I don't think so") Tr. (Merits), Day 9, 68:6-18 (Avidan).

1160 Tr. (Merits), Day 9, 69:24-70:2 and 72:2-73:24 (Avidan).

there are no indications to this effect, which is also confirmed when examining the services provided.

(c) Services

880. The Tribunal will examine what services were performed by each of the payment recipients, starting with Pentler.

Pentler

881. The Claimants argue that Pentler introduced BSGR into Guinea and was remunerated for identifying the mining opportunities and for sharing knowledge about the country and its institutions.[1161] In particular, Mr. Cilins provided "practical assistance" such as buying cars, opening bank accounts, hiring staff and obtaining insurance.[1162] More specifically, the Claimants rely on the report of their expert Mr. Ferreira to argue that a 17.65% shareholding was in line with the "valuable role" played by Pentler.[1163] They further argue that paying Pentler USD 22 million for their shareholding and USD 8 million as an extra profit after the sale of a 51% share to Vale "was a good deal for BSGR".[1164]

882. This being so, the Claimants provide no information on the actual services that could have justified such a high compensation. Quite to the contrary, the Claimants' witnesses sought to downplay the role of Pentler and its principals. For instance, Mr. Struik stated that he had limited use for Mr. Cilins at the beginning of 2006 and that he later sought to get rid of him: "I was introduced to the guy, we used him initially; after that, I've said, "Bye-bye, because I don't need you"".[1165] He also denied having been involved in the drafting of the Pentler/Bah/Touré protocol, although an initial draft of that document was found on his laptop, thus showing that Mr. Struik and Mr. Cilins were actively discussing the terms of contracts which Pentler concluded with third parties.[1166]

1161 Reply, Annex I, para. 116.

1162 Reply, Annex I, para. 116.

1163 Reply, Annex I, paras. 117-118, referring to Expert Report of François Ferreira, 8 January 2017, para. 58.

1164 Reply, Annex I, paras. 120-121.

1165 Tr. (Merits), Day 4, 131:20-22 (Struik).

1166 The Claimants' explanation that Mr. Cilins somehow manipulated Mr. Struik's laptop has already been rejected further above (see paragraph 789).

883. Mr. Avidan also testified that he had no idea that Mr. Cilins was part of Pentler and that he was not aware until 2007 that BSGR had signed "any agreements with Pentler".[1167] He also said that he "knew nothing of Pentler's dealings with third parties" and that he only found out in 2007 through Mr. Struik that Pentler had introduced BSGR to Guinea (although Mr. Cilins stated that he only became interested in mining in Guinea after having got to know BSGR)[1168] and that Pentler was a shareholder of BSGR Guinea.[1169] According to Mr. Avidan, "Pentler and Mr. Cilins played no role in BSGR's projects in Guinea from the end of 2006 onwards" and "certainly played no role after March 2008, when [the] share purchase agreement was signed".[1170] Concerning Mr. Cilins more specifically, Mr. Avidan said that he "preferred not to have him around anymore" and thus asked Mr. Cilins to leave at the end of 2006.[1171]

884. Similarly, the Claimants deny that Pentler or its officials intervened with Guinean authorities on behalf of BSGR,[1172] although Mr. Cilins stated that he presented BSGR to the CPDM and the Ministry of Mines.[1173] They also challenge that BSGR used Pentler as an intermediary to conclude agreements with Ms. Touré.[1174] In fact, the Claimants argue that Pentler's business relations with Ms. Touré were "unrelated to BSGR".[1175] They dispute that Pentler's 2006 contracts with Ms. Touré and Matinda were made on BSGR's behalf. They also contest that Pentler entered into the August 2010 contracts with Ms. Touré on their behalf, that Pentler's payments to Ms. Touré in July-August 2010 were made on their behalf, and that Pentler's payments to Olympia in March-April 2011 were made on their behalf.

1167 Avidan (CWS-3), para. 14.

1168 Attestation de M. Cilins, 26 novembre 2012, p. 1 (Exh. R-169).

1169 Avidan (CWS-3), paras. 141,162.

1170 Avidan (CWS-3), para. 163.

1171 Avidan (CWS-3), para. 165.

1172 Reply, para. 348.

1173 "Au cours de très nombreuses réunions avec le Ministère des mines et le Centre de promotion et de développement miniers (CPDM), j'ai donc présenté BSGR ainsi que les projets menés à bien par ce groupe […] Il n'a jamais été question que je dissimule ma coopération avec BSGR". Attestation de M. Cilins, 26 novembre 2012, pp. 2-3 (Exh. R-169).

1174 Reply, Annex I, paras. 14, 19, 29.

1175 Reply, Annex I, para. 14.

885. In the same vein, the Tribunal is also struck by Mr. Struik's explanation that, in spite of the obligation imposed on Pentler in the Milestone Agreement, the latter was not expected to take any "active role" in achieving BSGR's mining operations in Guinea:

> "Q. Were they expected to take any other active role in the mining operations?
>
> A. No, because they had no mining background. They could not assist there, they could not add any value."[1176]

886. When confronted with the paragraph of the Milestone Agreement providing that Pentler would continue its efforts to *inter alia* "assist in any manner possible with the Simandou Iron Ore Project", Mr. Struik sought to deflect the issue by arguing that this clause had been inserted by Mr. Oron.[1177]

887. For the Tribunal, there is a serious tension between the lack of evidence of services provided by Pentler (beyond the assistance in setting up a presence), on the one hand, and its substantial remunerations, on the other. Indeed, the Claimants fail to give a cogent explanation for providing a 17.65% shareholding to Pentler and promising millions of dollars to individuals who had no mining experience at all. The assistance in establishing presence in Conakry, a service that the Claimants acknowledge, hardly justifies such compensation. Nor is the Claimants' explanation that Pentler introduced BSGR to the opportunity of mining for iron ore in Guinea convincing. Indeed, the presence of iron ore reserves in the Simandou area was well-known since the 1960s and at the latest since Rio Tinto obtained its mining concession over Blocks 1 to 4 in 2002. An official map of 2006 shows that the existence of iron ore in Zogota was publicly known.[1178] Therefore, it is hard to believe that Pentler, without any mining experience, was instrumental in proposing mining opportunities to BSGR.

888. In the absence of proof of effective legitimate services beyond those just accepted, the Tribunal has no choice but to conclude that Pentler and its principals were remunerated for their contacts, and more specifically for their access to President Conté through Ms. Touré and Mr. Touré.

[1176] Tr. (Merits), Day 4, 115:4-7 (Struik).

[1177] Tr. (Merits), Day 4, 119:15-120:4 (Struik).

[1178] Geological map of Guinea, 2006 (Exh. R-164).

Messrs. Bah and Daou

889. With respect to Messrs. Bah and Daou, the Claimants argue that BSGR did not enter into contracts with these individuals and that it had no knowledge of their link to Pentler.[1179] They submit that these individuals only had a relationship with Pentler and consequently deny any involvement with them. As was discussed above, Mr. Struik was aware that Pentler was dealing with Mr. Bah to favor BSGR's interests in Guinea. Indeed, a first draft of the Pentler/Bah/Touré agreement dated 17 January 2006 was found on his laptop. As for Mr. Daou, it is noteworthy that Mr. Bah wrote to Mr. Struik in 2010 that Mr. Oron paid Mr. Daou USD 75,000 in cash and that Mr. Struik was present on that occasion.[1180]

890. Here again, the correspondence between Mr. Bah and Mr. Struik and between the former and Messrs. Lev Ran and Cilins demonstrates that Messrs. Bah and Daou were remunerated for introducing Mr. Cilins to Ms. Touré and her half-brother.[1181]

Mr. Touré

891. The Claimants argue that Mr. Ibrahima Sory Touré was an employee of BSGR Guinea who assumed a number of tasks, including serving as a guide, interpreter and lawyer. Mr. Avidan also stated that Mr. Touré would accompany him "say 80% of the time" to visit ministers or President Conté.[1182] For the Claimants, there is "nothing suspicious" about Mr. Touré receiving a USD 450,000 bonus in 2010, which payment was approved by the BSGR board.[1183] This bonus was given after the conclusion of the joint venture with Vale and Mr. Touré was not the only employee who received a bonus.[1184] In addition, the amount of

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1179 Reply, Annex I, paras. 104 and 127.

1180 ("Et après tout cela, nous sommes retournés à Novotel où Mr Roy a sorti 500 000 Dollars de son sac pour nous les remettre dont 75 000 Dollars pour Mr Ismaël Dao et 425 000 Dollars pour Mr Ibrahim Sory Touré et moi") [redacted]

1181 ("Mr Frederic Cillins, rappelez vous que vous étiez venus dans mon bureau à Bamako avec Mr Dao Ismael me voir. Vous m'avez supplies [sic] de tout faire pour vous aider en faisant que BSGR ait un contrat en Guinée. Et ce malgré un an de démarches infructueuses en Guinée que vous avez effectuées avec Mr Dao Ismaël. J'ai appelé l'ex ministre Monsieur El hadj Fodé Soumah qui vous a introduit auprès de Madame Mamady Touré et de Mr Sory Touré") [redacted] ("Mr Marc Struik, vous devez aussi savoir que c'est moi votre principal interlocuteur et que c'est grâce à moi que BSGR est installé dans mon pays et y exerce ses activités") [redacted]

1182 Tr. (Merits), Day 9, 71:9-12 (Avidan).

1183 C-PHB1, paras. 180-181.

1184 Reply, Annex I, paras. 107-108.

this bonus is only a fraction of the overall bonus pool.[1185] The Claimants further argue that Mr. Touré was "valuable to BSGR in his own right", since he was kept on board after President Conté's death.[1186]

892. The Respondent objects that there is no legitimate justification for hiring Mr. Touré, who was a journalist without experience in the mining sector.[1187] It submits that Mr. Touré was only employed by BSGR because of his proximity to President Conté and thus his capacity to influence his decisions.[1188] In this context, the Respondent rejects the Claimants' explanation that a Guinean would have easier access to the President than a representative of a foreign mining company.[1189]

893. The Claimants do not deny that BSGR hired Mr. Touré as employee and argue that the payment of a salary and a bonus to Mr. Touré was legitimate.[1190] They dispute, however, that Pentler paid Mr. Touré (and Mr. Bah) the initial milestone payment of USD 425,000 on their behalf.[1191] It is established by documentary evidence that Messrs. Touré and Bah received USD 425,000 from Pentler for helping to achieve the first milestone. It is further undisputed that Mr. Touré was employed by BSGR Guinea since 2006 and that he received a regular salary as well as a bonus of USD 450,000 in 2010.[1192]

894. The Claimants have not specified the type of services which Mr. Touré provided to Pentler for his alleged assisting in reaching the first milestone. Neither have they indicated what services Mr. Touré performed entitling him to a bonus of USD 450,000.

895. Based on available records, the total bonuses paid by BSGR in 2010 amounted to approx. USD 12.9 million.[1193] Mr. Touré obtained USD 450,000 in two tranches; the first of USD 250,000 was paid on 14 July 2010 and the second of USD 200,000 was paid on

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1185 C-PHB1, para. 180.

1186 Reply, Annex I, para. 101(v); C-PHB1, para. 180.

1187 Rejoinder, para. 493.

1188 R-PHB1, paras. 342-347.

1189 Rejoinder, para. 494.

1190 Reply, Annex I, paras. 107-108.

1191 Reply, Annex I, paras. 104-105.

1192 Reply, Annex I, paras. 107-109; C-PHB1, paras. 179-180.

1193 [redacted]

10 August 2010.[1194] The only persons having received larger amounts are Dag Cramer (USD 3 million), Marc Struik (USD 2 million), Asher Avidan (USD 2.5 million), Gerry Wilson (USD 800,000) and David Barrett (USD 600,000).[1195] In addition to Mr. Touré, bonuses were paid to other local employees. For instance, Issiaga Bangoura received USD 100,000, Nassirou Bah USD 15,000 and Nyanga Goumou USD 10,000.[1196] Obviously, Mr. Touré received between USD 350,000 and USD 440,000 more than these other local employees. These differences are all the more striking as the Claimants have given no information on the services which Mr. Touré rendered to earn such a bonus. Moreover, BSGR did not disclose Mr. Touré's bonus to the Technical Committee. When asked in October 2012, whether he was offered gifts or benefits,[1197] BSGR told the committee that "all [Mr. Touré] received in exchange for his work was his normal salary, and he was never offered any gifts",[1198] despite the fact that BSGR distinguished between salaries, bonuses and payments for consulting services in accordance with normal accounting practices, as the excel files on record evince. Mr. Avidan's attempt at the Merits Hearing to justify the answer given to the Technical Committee by saying that he considered a "remuneration" to include both the salary and the bonus is therefore unconvincing.[1199]

896. To conclude, while the Tribunal is mindful that Mr. Touré was an employee of BSGR Guinea, it finds that the Claimants failed to show what legitimate services he rendered to receive a bonus of USD 450,000 in addition to his salary. Similarly, they did not make clear what services he rendered to receive (with Mr. Bah) the first milestone payment of USD 425,000.

1194 [redacted]

1195 [redacted]

1196 [redacted]

1197 Letter from BSGR to the Technical Committee, 26 December 2012, pp. 6-7 (Exh. C-54).

1198 Letter from BSGR to the Technical Committee, 26 December 2012, p. 7 (Exh. C-54).

1199 ("THE PRESIDENT: Can I just ask Mr Avidan for a clarification. The reply to allegation 5 says: "… all he received in exchange for his work was his normal salary…" And a moment ago you said the $450,000 was a bonus and was not a salary. Or did I misunderstand you? So now I'm confused, frankly. A. When I say the "rémunération", or his salary, like all of us, we all considered the bonus part like it is one of the rémunération, as a salary. A bonus is a bonus, as it sounds and as it is") Tr. (Merits), Day 9, 80:9-19 (Avidan).

Ms. Touré

897. Similarly, there is no information on record about any legitimate services performed by Ms. Touré, which tends to show that she was compensated for providing direct access to her husband, President Conté.

Mr. Thiam

898. Equally, evidence is lacking in respect of services provided by Minister Thiam to BSGR. The Claimants' argument that it is standard practice to pay travel expenses of government officials in certain circumstances is surprising to say the least and unsubstantiated. Mr. Steinmetz's statement that Mr. Thiam replaced Guinea's President, who had been invited "out of courtesy" to his daughter's wedding but could not attend,[1200] is equally unavailing. Mr. Steinmetz further testified that Mr. Thiam was "scrupulous in ensuring that flights and hospitality […] were only accepted in appropriate circumstances".[1201] Yet, the Claimants have not clarified why these circumstances were appropriate. Nor have they given any legitimate ground for this payment. To the Tribunal, there is nothing appropriate about a private company paying travel expenses of a government official to attend a private wedding.

(d) Due diligence

899. It is generally accepted that, when investing in a country, an investor must exercise reasonable due diligence, including with respect to the use of third parties in transactions with the government.[1202] The level of diligence required depends on the circumstances of each investment, which includes the general business environment.[1203] This is particularly so of investments in a country or sector with a high degree of endemic corruption.[1204] It follows that investors must be more diligent in a corrupt environment, including with respect

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1200 Steinmetz (CWS-8), para. 31.

1201 Steinmetz (CWS-8), para. 31.

1202 *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case NO. ARB(AF)/07/3, Award, 19 May 2010, para. 58 (Exh. RL-107).

1203 *Eduoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 75.

1204 See, for instance: ICC Guidelines on Agents, Intermediaries and Other Third Parties, 19 November 2010, p. 5 (Exh. RL-51).

to third parties,[1205] and especially if the third party has personal, family or business relationships with public officials or relatives of public officials.[1206] In an environment riddled with corruption, it is also generally accepted that common accounting practices must be faithfully adhered to.

900. It is commonly accepted, and none of the Parties denies it, that corruption was pervasive in Guinea during the presidency of Lansana Conté.[1207] As the Respondent pointed out, Transparency International invariably ranked Guinea among the fifteen most corrupt countries in the world between 2006 and 2010.[1208] In spite of this situation, there is no indication that the Claimants engaged in any type of meaningful due diligence with respect to Pentler, Ms. Touré or Mr. Touré. There is no evidence either that they exerted any diligence in respect to Messrs. Bah and Daou. Finally, it appears that the Claimants did not adhere to generally accepted accounting practices.

Pentler

901. The Respondent complains that the Milestone Agreement dated 14 February 2006 was negotiated "in the dark" and without following any regular procedure.[1209] According to the Claimants, BSGR came into contact with the Pentler principals through the connection which Mr. Oron had with Mr. Noy. Mr. Oron negotiated the terms of the Milestone Agreement and Mr. Struik was "clear and consistent" that he was not there to check, disbelieve, or verify Mr. Oron's connections.[1210]

1205 *MTD Equity Snd. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 178; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 506 (Exh. RL-79).

1206 See, for instance: ICC Guidelines on Agents, Intermediaries and Other Third Parties, 19 November 2010, p. 6 (Exh. RL-51).

1207 CM, paras. 6, 853; Reply, Annex I, para. 114.

1208 CM, para. 853, referring to Transparency International, Corruption Perceptions Index 2006 (Exh. R-463); Transparency International, Corruption Perceptions Index 2007 (Exh. R-464); Transparency International, Corruption Perceptions Index 2008 (Exh. R-465); Transparency International, Corruption Perceptions Index 2009 (Exh. R-466); Transparency International, Corruption Perceptions Index 2010 (Exh. R-467).

1209 R-PHB1, para. 80.

1210 C-PHB2, para. 21.

902. Mr. Struik confirmed at the hearing that the Milestone Agreement was informally negotiated between Messrs. Oron and Noy,[1211] and that there was no written record of the contractual history.[1212] He also testified that he was not involved in the negotiation.[1213] He added that Mr. Oron gave him instructions about the content of the agreement which he followed and that Pentler's minority shareholding "was not something [he] concerned [himself] with":[1214]

> "Q. But as a director of the company, did you feel you needed to understand who these people were who were going to actually own a significant minority interest?
>
> A. These people [i.e. the Pentler officials] introduced the project in Guinea to us. They came through the connections that Mr Oron had with Mr Noy. I was not there to check that or disbelieve that or verify that. He was my boss; these were his connections. This is what you do. I followed an instruction."[1215]

903. Mr. Struik also conceded that he did not engage in any due diligence about Pentler or its principals before signing the Milestone Agreement:

> "Q. Before signing this letter, did you conduct any due diligence on who Cilins, Noy and Lev Ran were?
>
> A. No, not really."[1216]

904. On this basis, it is clear that the Claimants did not apply any sort of diligence, let alone meaningful due diligence, with respect to Pentler or its principals.

[1211] ("[T]he arrangement between Pentler and BSGR was negotiated by Mr Oron, I had no part in it. I just signed a letter dated 14 February 2006 which formalized the arrangement") Struik (CWS-12), para. 4.

[1212] ("[My first question is: is there a document […] a previous document [to the Milestone Agreement]? Because generally people who help a big company to find an opportunity, they prefer to ask before what the reward will be, and not be rewarded afterwards; you never know what you'll get, if you get anything. So in your knowledge, is there such a previous document? A. […] No, I cannot recollect any previous document. Discussions took place between Oron and Noy at the time, and I think that in the end resulted in this particular document. I have not seen, I cannot recall seeing any document that existed before this one") Tr. (Merits), Day 4, 272:3-15 (Struik).

[1213] ("I was not involved in the discussions between Pentler and BSGR") Struik (CWS-12), para. 4.

[1214] Struik (CWS-12), para. 6.

[1215] Tr. (Merits), Day 4, 118:1-9 (Struik).

[1216] Tr. (Merits), Day 4, 117:3-5 (Struik).

Ms. Touré

905. The situation is the same in respect of Ms. Touré, even though there were contemporaneous indications, such as press articles, that she was the President's wife.[1217] Mr. Steinmetz himself admitted that he was aware that Ms. Touré at the very least pretended to be President Conté's wife: "She was not also – as far as I was told; I haven't checked it myself, and I'm sure you're going to debate about it – I mean, as far as I was told, she was never the fourth wife of President Conté, but she pretended to be".[1218] Similarly, Mr. Struik heard that she had the President's ear.[1219] Being on notice that this was "what people said", whether they believed it or not, the Claimants should have inquired further rather than conveniently putting their heads in the sand.

906. In the same vein, Mr. Avidan testified Mr. Touré, who he knew was Ms. Touré's half-brother,[1220] had told him that Ms. Touré was an "influential lady" and that "BSGR should keep on the right side of her".[1221] Mr. Avidan also explained that Mr. Touré appeared to fear that Ms. Touré could "harm" BSGR and thus BSGR should keep her happy.[1222] He further insisted that Ms. Touré was "very aggressive" and that "BSGR had to report to her and that BSGR's work in Guinea was her project".[1223] This should have set off the alarm bells and prompted BSGR to investigate. The fact that it did not do so strongly suggests that it was perfectly aware of her role and turned to her for this very reason. The deferential manner in

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1217 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007 (Exh. R-207); L'Aurore, BSGR, le ministère des Mines ignoré, 30 septembre 2006 (Exh. R-208).

1218 Tr. (Merits), Day 3, 54:16-20 (Steinmetz).

1219 Q. When you said, "She was said to have the issue of President Conté", to "have [his] ear" means she had access to him and he would listen to her? A. That's what people said. I personally don't believe it. Q. I'm not asking – I'm just asking to understand what you meant by what you understood people said. A. That's what I understood that people said, yes. But personally I didn't believe that. Q. I'm just asking to understand what you said in your witness statement. When you said, "She was said to have the ear", you mean people around town in Conakry said, "Madame Touré, the President listens to her", whether you believed it or not? A. Correct") Tr. (Merits), Day 4, 175:10-23 (Struik).

1220 ("Shortly after my arrival in Conakry Mr Touré, who was Ms Touré's half-brother, told me about her and said that I should go and see her. He said that she was an influential lady and BSGR should keep on the right side of her. He also said that she told people that she was the wife of the President (i.e. President Conté), but that she actually was not, although she was close to him") Avidan (CWS-3), para. 109.

1221 Avidan (CWS-3), para. 109.

1222 Avidan (CWS-3), para. 111.

1223 Avidan (CWS-3), para. 112.

which Ms. Touré was welcomed at BSGR's September 2006 reception in Conakry is just an additional corroborating factor.[1224]

Mr. Touré

907. No due diligence was carried out either in relation to Mr. Touré, who, as was just mentioned, was known to be Ms. Touré's half-brother.

Messrs. Bah and Daou

908. Here again, the Claimants similarly failed to demonstrate that they applied any due diligence with respect to Messrs. Bah and Daou.

Deficient accounting practices

909. The Claimants' lack of diligence is also apparent from the manner in which they handled their accounts.

910. At the Merits Hearing, Mr. Tchelet, who was BSGR's qualified chartered accountant, accepted that he was under an obligation to act with integrity and objectivity, to ensure that all information was complete and accurate and to set up financial reporting structures to comply with BSGR's corporate governance requirements.[1225] [redacted] Mr. Tchelet described the four-step "checks and balance" process to authorize payments, which he had developed and which included (i) a payment request on the basis of a contract from a person on the ground in Guinea, usually Messrs. Struik and Avidan, (ii) the verification of the "legitimacy" of the payment request by Mr. Tchelet to ensure that there was a "valid explanation" and "documentation" and that the payment was within budget,[1226] (iii) the authorization by Mr. Oron, or later Mr. Struik, and (iv) the execution of the payment.[1227] According to Mr. Tchelet, this process provided him "with the reassurance [he] required in [his] role as CFO, that the payments [he] was asked to authorise had been sufficiently analysed and reviewed and all information obtained, to confirm they were valid".[1228] He also specified that, except in "isolated cases", BSGR's policy was "to obtain

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1224 Enregistrement vidéo de la réception de BSGR à Conakry https://www.youtube.com/watch?v=HOfNE2gZH1o, 19 septembre 2007 (Exh. R-207).

1225 Tr. (Merits), Day 3, 129:7-24 (Tchelet).

1226 Tr. (Merits), Day 3, 132:14 (Tchelet).

1227 [redacted]

1228 [redacted]

and provide all supporting documentation to Head Office before requesting payment".[1229] Thus, "for nearly every single payment made to a person acting for BSGR, there must be both an invoice and a corresponding contract".[1230]

911. However, although this was the stated policy, Mr. Tchelet conceded that "in certain cases we were not able to get both sets of documentation".[1231] In fact, the record contains instances where Mr. Tchelet authorized payments on an "urgent" basis without an invoice or a contract. For instance, he approved two payments to Mr. Fofana in the amount of USD 100,000 and EUR 80,000 having no contract available at the time of approval or at any later time (although he requested it).[1232] Mr. Avidan's mention that the payment was "approved by B." was apparently sufficient for Mr. Tchelet to execute it, although he had no idea of the "special consulting" provided by Mr. Fofana.[1233]

912. Similary, Mr. Tchelet confirmed that there was no agreement between BSGR and Mr. Sidibe[1234] and could not recall whether the contract between BSGR and LMS mentioned Mr. Sidibe,[1235] although Mr. Sidibe received a series of payments as discussed above (see paragraph 836). He also said that he had seen a contract between BSGR and Mr. Boutros, but that contract was not produced.

913. Thereafter, Mr. Tchelet conceded that he followed instructions of Mr. Avidan to pay Messrs. Boutros and Sidibe without having any invoices.[1236] For instance, he sent an email on 14 February 2010 to his staff saying that "BSGR Guinea needs to make payment tomorrow morning amounting to USD 1,000,000 (One Million United States Dollars) as consulting fees

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1229 Tchelet (CWS-11), para. 18.

1230 [redacted] Tr. (Merits), Day 3, 137:19-21 (Tchelet).

1231 ("Q. […] Before payment could be made within BSGR, you would look to see an invoice and a contract; is that correct? A. That is correct. That was what we really strove to do. I can say that – Q. I think you've answered the question, thank you. A. – it wasn't always fulfilled, because in certain cases we were not able to get both sets of documentation") Tr. (Merits), Day 3, 137:22-138:3 (Tchelet).

1232 ("Q. […] BSGR made two payments to Mr Fofana in the amount of $100,000 and in the amount of € 80,000. Was there an agreement between BSGR and Mr Fofana? A. I was not aware of such agreement. I did request on several occasions") Tr. (Merits), Day 3, 159:12-16 (Tchelet).

1233 Tr. (Merits), Day 3, 159:24-160:19 (Tchelet).

1234 ("Q. Were there any agreements between Mr Sidibe and BSGR? A. No, there were not") Tr. (Merits), Day 3, 163:18-19 (Tchelet).

1235 Tr. (Merits), Day 3, 163:20-24 (Tchelet).

1236 Tr. (Merits), Day 3, 165:2-17 (Tchelet).

in respect of Ghassan Boutros".[1237] He further added "[p]lease note that payment is extremely urgent".[1238] Mr. Tchelet's explanation is essentially that, if Mr. Avidan who knew of the payment process requirements gave him the instructions to pay without complying with the requirements, he would follow them,[1239] which shows that the checks and balances in place could easily be disregarded. This lack of compliance with accounting standards was not an isolated occurrence. The record shows numerous instances where payments were made urgently, without supporting documentation.[1240]

914. Another illustration of non-compliant practices is found in the discrepancies between the characterization of services or goods in the accounts and the related invoice. This is particularly the case of Mr. Boutros, whose invoices referred to the delivery of machinery but whose services were systematically classified as consulting services.[1241]

915. Still another unorthodox accounting practice was the concealment on certain names in the accounts. For instance, Mr. Tchelet wrote to his team on 26 April 2009:

1237 [redacted]

1238 [redacted]

1239 ("Q. So the country manager instructed you to make the payment; and regardless of whether or not an invoice exists, you make that payment? A. His instruction was the approval, and with the understanding, knowing – he knew our set of rules and the blueprint – that we must have an invoice. But the circumstances of the project and his requirements were such that the payment was urgent. And if the instructed us that the payment was urgent, our role was to support the project, which had thousands of payments to keep to a rigid timetable") Tr. (Merits), Day 3, 176:19-177:4 (Tchelet).

1240 ("payment is extremely urgent") [redacted] ("'send 300k to Ghassan now to the same banking details in Belgium please' – from yossie skype – very urgent") [redacted] ("Invoice to follow") [redacted] ("Ghassan-invoice to follow in due course") [redacted] ("we need to make payment today to Ghassan") [redacted] (Email subject line "Payment today" with instruction to "please load payment amount to USD212K today to Ghassan – invoice is pending") [redacted] ("invoice pending" for a payment of USD 325,000 to Ghassan) Instruction de paiement de BSGR TS à LMS pour 325.000 USD, 12 avril 2010 (Exh. 291); ("we need to pay usd200k today to lms/ghassan") [redacted]

1241 [redacted]

> "What is sensitive is the names in respect of consulting fees paid-please always check with me first before sending reports which include those details to […] anyone inside Guinea.
>
> Also under no circumstances should any details relating to payments to Pentler, past or pending or future be sent to anyone inside Guinea without speaking with me first."[1242]

916. The next day, Ms. Nicolle sought clarification: "I'm not sure who you mean by consultants as all Guinea salaries are now consulting fees"[1243] to which Mr. Tchelet answered:

> "I am referring to cases where BSGR TS pays on behalf of newco consulting fees to for eg Ghassan [Boutros] or others – those are the type of consulting fees that you should check with me first before sending the details automatically to Guinea local."[1244]

917. Similarly, on 21 April 2009, Mr. Tchelet instructed Ms. Nicolle as follows:

> "Please remove the USD 3m and 1m purchase fees paid to Pentler from this report ASAP. It should not be included in the Guinea costs report."[1245]

918. That instruction was printed out, someone adding by hand:

> "Remove Ghassan Boutros' name from Guinea spreadsheet."[1246]

919. In summary, the record shows that the Claimants did not perform any meaningful due diligence in respect of intermediaries, and failed to comply with their own accounting standards.

(e) Witness tampering and destruction of evidence

920. The Respondent alleges that BSGR sought to buy Ms. Touré's silence and to destroy evidence. The Claimants dispute such attempts and submit that they were the victims of blackmail attempts by Ms. Touré,[1247] Mr. Bah, and Mr. Hennig.[1248] The record does not bear out these allegations. While there is evidence of BSGR complaining, there is no indication

1242 [redacted]

1243 [redacted]

1244 [redacted]

1245 [redacted]

1246 [redacted]

1247 Avidan (CWS-3), para. 149; Struik (CWS-2), para. 110; C-PHB1, paras. 269(ii), 274(ii), 281.

1248 See, for instance: Avidan (CWS-3), paras. 95-100, 151; Struik (CWS-2), para. 22; Reply, Annex I, para. 14; Tr. (Merits), Day 4, 41:12, 22-25 (Wolfson); C-PHB1, paras. 203, 278 n. 591.

of blackmailing by these individuals. The Claimants did not file criminal complaints and did not notify the police, notwithstanding legal advice to the contrary.[1249] In addition, the Claimants' blackmail allegation rests on the erroneous assumption that they were presented with forged documents, which was disproven in these proceedings.

921. Quite to the contrary, the record shows that the Claimants sought to buy Ms. Touré's silence by making her sign confidentiality clauses, and inducing her to make false statements and to destroy evidence. For instance, the contract of 3 August 2010, which purported to put an end to the collaboration between Pentler and Ms. Touré, contained an "irrevocable" undertaking to ensure "absolute" confidentiality:

> "Les deux sociétés Pentler Holdings Ltd. et la société Matinda & Co. Ltd, Mme Mamadie Toure, ses partenaires et conseillers s'engagent irrévocablement à assurer la confidentialité absolue sur toutes nos affaires communes menées en Guinée et à ne pas dévoiler directement ou indirectement une affaire ou des affaires communes."[1250]

922. This contract also prohibited Matinda and Ms. Touré from disclosing contracts with third parties (such as BSGR) and from contacting any third party with which Pentler had worked in Guinea:

> "La société Matinda & Co. Ltd, Mme Mamadie Toure, ses partenaires et conseillers s'engagent à ne pas publier directement ou indirectement des contrats signés avec une partie tierce, à respecter l'entière responsabilité de nos activités en Guinée et de ne pas faire l'usage directement ou indirectement d'aucun document, contrat ou accord signé ou pas signé, écrit ou verbal.
>
> La société Matinda & Co Ltd s'engage par la présente à ne pas prendre contact directement ou indirectement, verbalement ou par écrit, avec aucunes [sic] des sociétés en Guinée avec lesquelles nous avons eu des

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[1249] ("Q. You know that these are fake documents, you're not worried; why don't you go to the police? A. What we did, we went to see a lord – I don't remember his name – that he had some liaison with the police in London. I refused – our lawyers at Skadden at the time told us that we must go to the police, and I really, really refused to do so because I was resident non-domicile in London at the time and I didn't want any – you know, that's an issue, that doesn't concern the local police. I didn't see any use of complicating the things by going to the police over there. But we didn't hide it. We go to our lawyers. We went with Skadden to this lord. Maybe my colleagues there in the room will remember the name of the lord, but – and then we complained, and that's it. For me it was much better than going to the police. Q. So you get legal advice to go talk to this lord about going to the police, and you should file a complaint for this blackmail, but then you decide maybe it's better not to; you make that decision – A. I said – no, I said I don't want to go. Skadden really insisted") Tr. (Merits), Day 9, 130:15-131:11 (Avidan).

[1250] Accord entre Pentler et Matinda, 3 août 2010, clause 4 (Exh. R-346) (Emphasis added by the Tribunal).

> collaborations, des contrats, des accords verbaux ou écrits; de ne pas utiliser directement ou indirectement la voix [sic] de justice sans avoir l'accord préalable écrit de la société Pentler et ses associés."[1251]

923. While prohibitions of the sort and confidentiality undertakings may be perfectly legitimate depending on the circumstances of a given contract, in the present context they tend to support a finding of corruption. That finding is significantly reinforced if one considers the Claimants' efforts to bring Ms. Touré to make false statements and destroy evidence and Mr. Cilins's trips to Jacksonville, Florida, to meet Ms. Touré.

924. Mr. Cilins had various telephone conversations[1252] and meetings with Ms. Touré in March and April 2013.[1253] At that time, Ms. Touré was a cooperating witness for the FBI, with the consequence that the conversations and meetings were recorded. The audio and video recordings and the transcript of these conversations are part of the record.[1254]

925. The first telephone conversations between Mr. Cilins and Ms. Touré served to set up an in-person meeting to address matters that could not be dealt with by telephone.[1255] It appears that Mr. Cilins had already discussed some of these matters with Ms. Touré, including a

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1251 [redacted]

1252 Mr. Cilins and Ms. Touré had telephone conversations on 15, 16 and 20 March 2013 and on 10 April 2013. Mr. Cilins, Ms. Touré and an unidentified third person had a telephone conversation on 11 April 2013 and Mr. Cilins had three other telephone conversations with an unidentified third person on 11 April 2013. Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 2 (Exh. R-36).

1253 Mr. Cilins and Ms. Touré met at Jacksonville airport once on 25 March 2013, twice on 11 March 2013, and once on 14 March 2013. Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 2 (Exh. R-36).

1254 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013 (Exh. R-36); Enregistrements du FBI, enregistrement audio, 15 mars 2013 au 14 avril 2013 (Exh. R-380); Enregistrements du FBI, enregistrements vidéo, 15 mars 2013 au 14 avril 2013 (Exh. R-381).

1255 See, for instance: ("FC: […] Donc je sais pas comment tu veux organiser ça, mais bon on peut pas faire ça par téléphone quoi"), p. 9 ("On peut pas faire ça par téléphone, c'est impossible"), p. 12 ("Donc comme je peux pas en parler par téléphone"), p. 13 ("on va pas parler de tout ça par téléphone") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 2 (Exh. R-36).

request for money upfront[1256] and the destruction of the documents,[1257] and intended to meet her in person to agree on and then proceed with the implementation.[1258] Ms. Touré then asked if "Beny" wanted Mr. Cilins to meet her, which Mr. Cilins confirmed:

> "MT: Frédéric, est ce que Bény tient à ce que vous me rencontrez et que il est d'accord à ce que vous me donnez cette somme?
>
> FC: Bien sûr. Bien sûr, bien sûr."[1259]

926. Mr. Cilins travelled to Florida for the first meeting which took place on 25 March 2013 at Jacksonville airport. He started out by saying that all their troubles were due to the "imbecile" Alpha, who "pissed off" everyone. By that, he meant Alpha Condé, the new President of Guinea, who had ordered a review of BSGR's mining rights. He added that it was a horror

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[1256] See, for instance: ("FC: […] On s'était parlé la dernière fois. Tu m'as dit: "Sur un, est-ce que tu peux avoir une partie avant?" La réponse elle est oui. Et quand – je voudrais qu'on se voit et qu'on parle de tout ça, c'est tout. Tu comprends? Tu m'avais dit: "Est-ce que tu peux avoir deux, trois – est-ce que tu peux faire quelque chose avant et le reste on fait comme tu as dit?" Donc je t'ai dit oui. Maintenant, il faut qu'on se voit. On peut pas faire ça par téléphone, c'est impossible") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 9 (Exh. R-36).

[1257] Interestingly, when Ms. Touré first mentioned the name "Beny", i.e. Beny Steinmetz, Mr. Cilins immediately linked him to the "documents": " MT: De ce qu'on a parlé, là ce [inaudible] c'est-à-dire, je sais pas si vous me comprenez, c'est-à-dire Beny avait demandé… FC: *Oui, de faire avec les documents tout ça ?* Mais euh ça c'est bon ou pas *parce que depuis on en a jamais reparlé*. Donc comme je peux pas en parler par téléphone, de toute façon pour le lundi j'aurai pas tout qui sera prêt hein. C'est impossible. Faut que je voie ensuite avec l'avocat et avec tout ça. *Donc moi c'est surtout pour te voir et pour qu'on parle de tout ça. Pour qu'on voit exactement comment on le fait et comment c'est parce que, la dernière fois, quand on a voulu mettre tout en place, tu m'as dit "de toute façon on peut pas le faire maintenant parce que j'ai pas les documents avec moi et voilà et voilà". Donc je savais pas s'il fallait aller faire ça, dans quel endroit, dans quel pays et tout ça*. Donc euh, moi c'est pour ça que je veux venir te voir. *Pour qu'on regarde très précisément ce qu'on fait et comment on le fait et ensuite il faudra que, à partir du moment où on se met d'accord sur ce qu'on fait et comment on le fait, il faut que je revienne pour qu'on le fasse, on le fasse comme il faut quoi*. Tu comprends ?" Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 12-13 (Exh. R-36) (Emphasis added by the Tribunal).

[1258] ("MT: Tu veux que je vienne avec les dossiers ou [inaudible]? FC: C'est comme tu veux toi. C'est comme tu veux toi. Si tu veux – il faut d'abord qu'on se voit une première fois pour voir comment on fait les details et après on le fait. Mais une première fois il faut qu'on se voit pour en parler quoi") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 3 (Exh. R-36).

[1259] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 13 (Exh. R-36).

story, but that they had no choice.[1260] Ms. Touré said that she was frightened that they would punish her and Mr. Cilins could not help her if "BSGR" was not approving it. This prompted Mr. Cilins to answer that they would do as previously said; she would receive USD 300,000 immediately and more when it was all over.[1261] He added that he would have to come back so that they could destroy "the documents" and that she would then receive the first payment:

> "FC: Je reviens. On détruit ces papiers. Une partie de l'argent tu vas prendre tout de suite, et une partie on va le laisser bloqué chez l'avocat euh le temps que l'on avait dit. Comme je t'avais dit la dernière fois.
>
> […]
>
> Maintenant, je te dis, […] 300 tu vas récupérer tout de suite et le reste on va le laisser chez l'avocat."[1262]

927. Mr. Cilins further told Ms. Touré that, if anyone asked, she should deny any involvement with or having received any money from BSGR. He also indicated that he would return with

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[1260] ("FC: […] Je ne peux plus entendre parler de cette affaire moi, je peux plus entendre parler de cette affaire, j'en ai ras-le-bol mais tu peux même pas t'imaginer, mais est-ce qu'on a le choix ? On a pas le choix. A cause de cet imbécile de gars là, qui est là, qui emmerde tout le monde, qui rend toutes les choses compliquées, on est là qu'est-ce que tu veux que je te dise ? Qu'est-ce que tu veux que je te dise ? MT: Quel gars ? FC: Le…le…le…Alpha, quel gars ? A cause de lui on est comme ça, si c'était pas lui tu sais on discuterait même plus de ces histoires là et à cause de ça, pardon de le dire comme ça, on est, on est dans la merde avec ce gars là. Tu sais, c'est une histoire de fou […] Tu sais ça devient une horreur ce deal là") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 17-18 (Exh. R-36).

[1261] ("MT: Non. [inaudible] donc aujourd'hui j'ai peur. Est-ce que c'est vrai qu'ils vont réellement me punir, Fédéric, quand je parle. Si, c'est-à-dire la société BSGR ne dit pas allez voir Mamadie, vous pouvez pas vous-même décider de m'aider. Vous pouvez pas. […] FC: On va faire ce que l'on a dit l'autre fois, tu vas récupérer trois cent [inaudible], tu vas récupérer trois cent tout de suite et le reste on va le mettre quelque part. Au moins ça déjà, c'est pris tout de suite et ça ça n'a rien à voir avec ce que tu auras quand ce sera terminé, ça sera quelque chose en plus comme je te l'avais dit. C'est que des avantages. MT: Trois cent ? FC: Trois cent mille") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 19 (Exh. R-36).

[1262] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013 p. 20 (Exh. R-36). See also: ("MT: *L'autre fois tu m'avais dit ça, tu m'avais dit le gouvernement il peut venir*, il peut venir chez toi taper la porte. *Si ils viennent tu as dit de détruire*, ou bien de dire que [inaudible]… FC: Voilà, de ne pas garder des choses ici. Maintenant, ces fameux papiers ils sont ici aux Etats-Unis? Mais parce que *quand on va se voir la prochaine fois, il faut que l'on détruise ça*. Comme ça") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 24 (Exh. R-36) (Emphasis added by the Tribunal).

a written statement where it would clearly say what she should answer if she were asked questions in relation to BSGR's business in Guinea.[1263]

928. As anticipated, Mr. Cilins returned to Jacksonville and they met again at the airport on 11 April 2013. At the outset, Ms. Touré told Mr. Cilins that when she went to renew her visa at the immigration office FBI agents had approached her about bribes to obtain mining rights in Guinea and asked her whether she had documents under threat of a subpoena.[1264] When she admitted that she had told the FBI that she had documents, he reacted forcefully insisting that they needed to be destroyed urgently:

> "FC: Les documents, tu leur as dit que tu avais aucun document?
>
> MT: Oui.
>
> FC: Il faut détruire ça, urgent, urgent, urgent. Il faut détruire ça très urgent, très très urgent.
>
> […]

[1263] ("*Tu leur dis simplement que toi tu n'as rien à voir avec tout ça*, tout ce qui se dit c'est des bêtises. Comme on avait fait sur l'attestation, tu te rappelles ? Que moi j'ai rien à voir avec tout ce que vous me dites et voilà… MT: Que je n'ai jamais vu BSGR. FC: Pas que tu ne l'as jamais vu. Tu connais la société, parce que ne peux pas dire que tu n'as jamais vu. Tu connais, t'étais à Conakry, tu étais là-bas, tu vivais en Guinée à l'époque donc tu ne peux pas dire que tu ne connais pas*, mais tu n'as rien à voir avec toutes ces histoires de contrat, de machin, de soi-disant l'argent touché, tu n'as rien à voir avec tout ça, c'est tout, c'est des mensonges*. MT: Si BSGR m'a donné de l'argent ? FC: *Tu dis que tu n'as rien n'avoir. Tu dis que tu n'as jamais touché d'argent de personne*. MT: Avec BSGR ? FC: Et puis voilà. Bien sûr. Bien sûr. […] MT: Au cas où ils doivent venir, je dis je n'ai jamais connu BSGR. FC: Oui, t'as pas d'affaire avec eux. Tu te rappelles les papiers que l'on avait fait ? C'est simple, simplement une attestation disant: "J'ai rien à voir avec ça. Tout ce qui a été dit, tout cette histoire de toucher de l'argent, pas toucher de l'argent, j'ai rien à voir avec ça." Voilà. De toute façon, quand je vais revenir*, je vais revenir avec un truc bien clair. Ça va être écrit.* Tout ce qui a*… Quand on te pose des questions, tout est écrit là-dessus, tout sera avec les réponses à donner*") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 23 (Exh. R-36) (Emphasis added by the Tribunal).

[1264] ("MT: Tu peux pas croire quand je te dis. J'étais là-bas pour l'obtention de mon visa […] C'est là maintenant j'ai vu deux personnes rentrer, une femme et un homme, et ils m'ont parlé que ils sont de la FBI, que ils font une enquête concernant des pots-de-vin – concernant des pots-de-vin des contrats miniers en Guinée. FC: Ouah […] MT: J'ai attendu longtemps, longtemps, longtemps. Je vois deux personnes venir rentrer de la porte, ils ont fait leur badge comme ça là, qu'ils sont de la FBI, qu'ils font une enquête concernant les pots de vins des contrats des mines guinéennes et si j'ai les documents. J'ai dit j'ai pas de documents. Ils ont dit si je refuse de leur parler, ils vont me donner un (subpoena)") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 43 (Exh. R-36).

> Il faut tout détruire, il y a – je t'ai dit ça il y a longtemps – ne garde rien ici, ne garde surtout rien ici, même pas un bout de photocopie et tu dois tout tout tout détruire."[1265]

929. Mr. Cilins then mentioned the existence of a "hyper confidential" report, the so-called DLA Report,[1266] and that a certain Samy, i.e. Samuel Mebiame, had told investigators that Ms. Touré had given him photocopies of the documents.[1267] He again insisted that she destroy the documents and deny any involvement:

> "Tu sais il n'y a pas cinquante solutions. Il faut tout détruire et nier tout ça."[1268]

930. After reading extensive passages of the DLA Report to Ms. Touré, Mr. Cilins reiterated the "hyper-urgent" need to destroy the documents and sought to convince Ms. Touré to deny giving documents to Mr. Mebiame:

> "Donc le problème qu'il y a, c'est que, premièrement comme je t'avais dit, il faut en urgence, urgence, urgence, détruire tout ça, mais c'est hyper urgent. Hyper urgent. Et puis de toute façon, toi tu dis – toi tu n'as rien à voir avec ça, tu n'as rien à voir avec ça, tu as – comment il s'appelle – Samy, tu peux pas dire qu'il n'est pas venu te voir. Tu dis "bien sûr, il est venu me voir mais je ne lui au [sic] jamais rien donné quoi que ce soit. J'ai jamais rien donné puis que j'ai rien."[1269]

1265 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 44 (Exh. R-36).

1266 GuinéeNews, Economie et Politique: la moitié de la concession Simandou de Rio Tinto offerte aux trafiquants d'armes et organisateur de rébellions, 13 décembre 2008 (Exh. R-240). See: ("FC: Aïe aïe aïe. Ça, c'est un document hyper, hyper confidentiel. Ces gens-là qui ont fait l'enquête, ils ont fait un rapport") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 45 (Exh. R-36).

1267 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 45 (Exh. R-36).

1268 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 44 (Exh. R-36).

1269 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 50-51 (Exh. R-36) (Emphasis added by the Tribunal).

931. Mr. Cilins then raised Ms. Touré's marital status and explained that she would be less exposed if she was regarded as a friend rather than as President Conté's wife:

> "FC: Et quand ils t'ont dit "est-ce que vous connaissez BSGR? Est-ce que vous avez fait ça? Est-ce que vous avez fait ça?" […] Tu dis "Ecoutez, moi vous savez je suis une femme seule, je suis jeune. Je m'occupe de mes affaires, de ma famille et, voilà, je ne me suis jamais occupée de quoi que ce soit. J'ai jamais eu ni un role, ni rien du tout. Je suis allez [sic] que très très rarement au Palais quand euh, quand euh, voilà – après il y a une autre question aussi qui se pose. […] Si tu es officiellement mariée, tu rentres dans une catégorie qui est très, on va dire, dangereuse, exposée parce que en tant que mari – en tant que mariée, que femme, qu'épouse – en tant qu'épouse tu rentres dans le cadre familial. En tant que "amie", amie de la famille […]. C'est différent, qu'en tant qu'épouse. Tu comprends ce que je veux dire?
>
> […]
>
> En étant considérée comme épouse, tu as une responsabilité supplémentaire de surtout ne pas te mêler des affaires. […] Bien sûr encore moins si, de toucher la moindre aide, la moindre commission, la moindre chose comme ça. […] Parce que en tant que pas épouse, tu as le droit de faire du business, des affaires, des choses comme ça. En tant qu'épouse ça devient plus compliqué, parce que si tu fais des affaires, il faut tu arrives à prouver que t'as pas profité de ton – ta relation d'épouse. Tu vois ce que je veux dire?"[1270]

932. When Ms. Touré told him that she could not deny being President Conté's wife, Mr. Cilins responded that he understood and continued suggesting that she deny any involvement in BSGR's activities.[1271] He again insisted on destroying the documents urgently,[1272] and summarized the content of the declaration that he wanted her to sign.[1273] Reverting to the

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[1270] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 51-52 (Exh. R-36) (Emphasis added by the Tribunal).

[1271] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 52-53 (Exh. R-36).

[1272] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 53 (Exh. R-36).

[1273] ("FC: […] Le risque il est très très grave pour toi et pour tout le monde. Le groupe, c'est l'histoire du – des permis et ces choses là. Mais toi c'est personnellement que tu as un problème. Parce que c'est interdit de faire ça. […] J'ai amené ici une attestation, tu vas lire, tu vas regarder. Je vais te la lire. Simplement, ça dit simplement que t'as rien à voir avec ça, t'as rien à voir avec ça. Il y a un paragraphe, je sais pas, les avocats disent que IST [i.e. Ibrahima Sory Touré] a travaillé dans le groupe et comme ils disent que IST, étant ton frère, proche de toi, la famille ici et là, il a aidé le groupe là bas,

documents, he stated that he had been asked to watch their destruction so as to be 100% certain that none of them would be in circulation.[1274]

933. The conversation continued with Mr. Cilins offering her USD 1 million, of which USD 200,000 would be paid upfront and the balance once Alpha Condé would no longer be in power.[1275] In addition, she would be paid USD 5 million if BSGR kept its mining rights.[1276]

934. When Mr. Cilins stated that these amounts had been approved by "number 1", Ms. Touré asked if "number 1" was Michael Noy. Mr. Cilins whispered that it was "Beny" who had approved these payments and that he even envisaged that more money could be paid,

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ils ont mis un paragraphe dessus en disant que premièrement IST c'est pas ton frère, c'est ton demi-frère. Et deuxièmement, vous étiez en conflit. Vous n'étiez pas très proches, mais plutôt des rivaux. [inaudible] Malheureusement, malheureusement – parce que j'aime bien quand vous étiez amis – mais malheureusement c'est la vérité. Donc vous êtes un peu des rivaux. Donc ça aussi ça a été mis dedans. Simplement, les avocats pensent que c'est bien que ça montre que tu es pas trop amie avec lui, ok ? Et comme vous êtes pas amis, il n'y a aucune raison pour que – même si toi tu voulais aider, comme tu étais pas trop amie avec euh, tu as aucune raison d'aider BSGR") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 55-56 (Exh. R-36).

1274 ("FC: […] Par contre, ce que – ce qu'on m'a demandé, c'est de voir quand on détruit les documents. C'est pour ça que je te demandais si tu voulais que l'on aille ensemble. De voir, pour être sûr à 100% que tout est détruit et qu'il n'y a rien qui circule. Donc si tu veux que l'on fasse ça aujourd'hui, on peut bien le faire aujourd'hui. […] MT: Je peux le faire, même si vous êtes pas là. Je peux le faire. FC: Je sais. Mais on m'a demandé de voir si c'était fait. Tu comprends? […] Parce que je pensais jamais qu'on – mais là maintenant il y a – je te promets, vu ce que tu m'as dit – il y a urgence, il y a vraiment urgence") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 56 (Exh. R-36).

1275 ("MT: Mais le reste de l'argent maintenant, comment on va faire ? Et combien ? FC: Alors, je t'avais dit qu'il y aurait un million, il y aura un million. Deux cents tu touches maintenant, et les 800 c'est dès que l'autre il est parti […] Mais en tout cas, s'il décède ou s'il va jusqu'à la fin de ce mandat. Il a encore deux ans de mandat. Quand lui il est plus là, tu touches le reste") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 57 (Exh. R-36).

1276 ("FC: 800. Bah je t'ai dit, en tout, il y avait un million. Ça, c'est une chose. Après quand le dossier est terminé, tu dois recevoir ça et ça tu vas le recevoir. Tu vois ce que je veux dire ? Ca c'est deux choses différentes. Ce que tu dois recevoir, les 5 que tu dois recevoir quand le dossier est terminé, s'ils nous mettent pas dehors") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 57 (Exh. R-36).

possibly USD 3, 4 or 5 million more.[1277] Mr. Cilins repeated that Mr. Steinmetz had asked him to ensure that the documents would be destroyed:

> "FC: Personne d'autre. Personne d'autre. Je suis allé exprès pour le voir, pour le voir parler de tout ça, très très bien. Je lui ai toujours dit, je lui ai toujours dit. Encore la semaine dernière, je lui ai dit, je lui ai dit Beny [Steinmetz], toujours répété, qu'elle était – que jamais elle te trahira, jamais elle te trahira, jamais elle donnera les documents à qui que ce soit. Il m'a dit "écoute", il m'a dit "écoute, c'est bien, mais je veux que tu ailles voir. Je veux que tu détruises ces documents." Il m'a dit, tu vois, "fais ce que tu veux mais je veux que tu me dises "j'ai vu Mamadie et les documents, c'est terminé, il n'y a plus de documents."" Et là-dessus, je te dis, je te répète, que ce soit bien clair dans ta tête, les 5 qui sont prévus, tu les auras, quoi qu'il en soit. Tu les auras, si ils sont pas éjectés. S'ils sont toujours dans le projet."[1278]

935. Mr. Cilins thereafter read the prepared statement, which Ms. Touré then signed.[1279] The discussion continued around the insistence of the "big boss" that Mr. Cilins needed to be

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[1277] ("MT: Mais à part les 5, il n'y aura rien. FC: Il y aura les 5 et il y aura les 800. Ca va faire 6 avec ce que tu as en plus. Ca c'est une chose, c'est déjà accepté. […] En fonction de la manière que ca se termine. Si c'est une bonne manière pour lui, qu'on lui coupe pas trop à droite, à gauche, j'en sais rien, il y aura encore en plus. Combien je ne sais pas. Il y aura 3, 4, 5 en plus, j'en sais rien. Mais il y aura encore en plus. *Et ça c'est directement la communication qui m'a été donnée directement par le numéro 1, je ne veux même pas donner son nom.* En disant, c'est comme ça. D'accord ? Et ça c'est sûr et certain. MT: Le numéro un ? Michael ? FC: Non, non.. Beny [en chuchotant]. MT: Ok. FC: Ok ? *Tout ce que je te dis, c'est directement de Beny.* L'autre jour quand je te dis, je suis – j'attends là-bas en rendez-vous, je suis allé en voyage, je me suis déplacé pour aller le voir directement, parler en tête à tête, et avoir – *tout ce que je te dis là, c'est de lui que je le tiens. Personne d'autre*. D'accord ?"; Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 58 (Exh. R-36) (Emphasis added by the Tribunal).

[1278] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 58 (Exh. R-36) (Emphasis added by the Tribunal). See also: ("FC: […] Par contre, ca je t'assure, la semaine dernière, c'était indispensable, il m'a dit "écoute, tu vas, tu vois, je veux que tu me dises, Frédéric, je veux que tu me dises que tu as détruit ces papiers. Je veux que tu me dises") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 59 (Exh. R-36).

[1279] The statement reads as follows: "Je m'appelle Mamadie Touré. Je suis de nationalité guinéenne. J'ai vécu la plus grande partie de ma vie en guinée [sic] et j'habite aujourd'hui aux Etats-Unis. Les représentants de la société BSGR sont venus me voir et m'ont indiqué que la République de Guinée leur reprochait des faits dans lesquels j'aurai été impliquée. Ils m'ont exposé quels auraient été les faits et m'ont demandé si j'étais d'accord pour dire ce que j'en pensais. J'ai été d'accord parce que – parce que – parce que ce qu'ils m'ont rapporté est faux et je souhaite aujourd'hui attester ce qui suit. Ma situation familiale. Je suis la demi-sœur de Ibrahim Touré et non sa sœur. Nous avons jamais [sic] été très proches, mais plutôt des rivaux. Mes relations avec la société BSGR. Il apparait comme dit que j'aurais signé des contrats avec BSGR et que BSGR devait me payer des commissions en contrepartie de mes services en leur faveur. C'est faux. Je n'ai jamais signé aucun contrat avec BSGR

present when Ms. Touré destroyed the documents.[1280] When Ms. Touré left to get the documents, Mr. Cilins called an unidentified person to confirm that Ms. Touré had signed the declaration, but had refused to deny that she was President Conté's wife.[1281]

936. Later on the same day, the two met again and Mr. Cilins clarified that Ms. Touré should lie if she was asked whether she had received any money:

> "Mais bien sûr qu'il faut mentir, tu peux pas leur dire… si tu leur dis, je t'assure tu dois comprendre ça, si tu leur dis oui j'ai touché n'importe quoi, de n'importe qui, pas spécialement de ça, mais de n'importe qui, tu as un très gros problème, mais pas un petit problème, un très très gros problème.[1282]
>
> […]
>
> [T]u doix toujours toujours garder, en disant, j'ai rien à voir avec ça, j'ai jamais touché d'argent, j'ai jamais pris contact, je ne me suis jamais occupé des affaires du pays.[1283]

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ni directement, ni par l'intermédiaire de qui que ce soit. Il parait qu'on dit que j'aurais intercédé auprès de dirigeants officiels de Guinée, en faveur de BSGR pour que BSGR obtienne des droits miniers en Guinée. C'est faux. Je suis jamais [sic] intervenue auprès de dirigeants guinéens en faveur de BSGR. Je n'ai jamais donné d'instructions ni demandé à quiconque de prendre des décisions en faveur de BSGR. Je ne me suis jamais intéressée aux affaires minières du pays. Il parait qu'on dit que BSGR m'aurait versé de l'argent. C'est faux. Je n'ai jamais touché d'argent de la part de BSGR, ni directement, ni indirectement. On parle d'un chèque de 7 millions de dollars qu'ils m'auraient remis, ca [sic] ne s'est jamais passé. On dit qu'ils m'auraient remis de l'argent en liquide, des sommes de 2.5 millions de dollars, c'est faux. Ils ne m'ont jamais versé ces sommes, ni d'ailleurs aucune somme. Ni à moi, ni directement, ni à quelqu'un d'autre pour mon compte. Ils ne m'ont pas non plus promis de verser quoi que ce soit, ni à moi, ni à qui que ce soit, pour mon compte. Enfin, je voudrais dire que c'est ridicule [de dire] que j'aurais déménagé aux Etats-Unis parce que j'aurais eu peur que BSGR porte atteinte à ma personne. Cette idée ne m'est pas passée par la tête. Je suis très choquée par les faits que m'a exposé BSGR en utilisant mon nom, et je n'ai rien à voir avec cette société, ni avec les faits qu'on leur reproche" Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 60-61 (Exh. R-36).

[1280] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 63-64 (Exh. R-36).

[1281] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 66 (Exh. R-36).

[1282] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 71 (Exh. R-36).

[1283] Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 72 (Exh. R-36).

[…]

Tu parles pas de documents, tu parles pas de papiers, de rien du tout."[1284]

937. During the same meeting, Ms. Touré told Mr. Cilins that she only had photocopies and did not yet get hold of the original versions. He was upset and told her to contact him as soon as she got the originals:

> "FC: Les photocopies on s'en fout, moi j'ai pas besoin des photocopies. Tout ce qui est photocopie, il faut dégager tout ça.
>
> […]
>
> Tout ça. Moi je vais détruire ça, t'inquiète pas. Je ne peux pas détruire ça ici, à l'aéroport. Mais dès que j'arrive, j'ai un destructeur de papiers, je vais tout détruire.
>
> […]
>
> Bon écoute, je vais regarder tout ça, bien comme il faut, et je vais détruire tout ça de toute façon, et tu m'appelles quand tu as les autres choses."[1285]

938. It is noteworthy that Mr. Cilins then looked at the documents which he just received. It appears that these were photocopies of documents signed by Mr. Noy in Freetown,[1286] a declaration signed by Ms. Touré,[1287] and a set of documents dated "27 and 28 February",[1288] which the Tribunal understands to be the two contracts signed by Mr. Avidan and Ms. Touré in relation to Blocks 1 & 2.[1289] Mr. Cilins then said that he would destroy these documents,

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1284 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 73 (Exh. R-36).

1285 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 74-75 (Exh. R-36).

1286 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 75 (Exh. R-36).

1287 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 75 (Exh. R-36).

1288 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 75-76 (Exh. R-36).

1289 Contrat BSGR Guinée/Matinda de 2008, 27 février 2008 (Exh. R-28); Protocole BSGR Guinée/Matinda de 2008, 28 février 2008 (Exh. R-29).

asked whether Ms. Touré had additional documents, which she confirmed, and enquired when she would give him the originals, which they agreed would happen at their next meeting.[1290]

939. It is true that the conversation does not expressly refer to the contract signed between Pentler and Ms. Touré on 20 February 2006 (or to the two undated letters of engagement signed by Mr. Lev Ran).[1291] However, it is clear from their discussion that, in addition to the documents mentioned in the previous paragraph, Mr. Cilins reviewed various documents brought by Ms. Touré without mentioning their content; that the only original which Ms. Touré brought to that meeting was not the most important document that Mr. Cilins was seeking to destroy; and that Ms. Touré confirmed having additional documents in her possession.[1292] The Tribunal further notes that the 20 February 2006 contract forms part of the Disputed Documents, the original version of which was in the custody of the FBI before the Document Inspection. Moreover, the two documents signed in Freetown mentioned in the previous paragraph make express reference to a "contract of collaboration" signed in 2005, thus showing that Pentler and Ms. Touré were already cooperating before February 2006.[1293] For these reasons, it is reasonable to understand that the 20 February 2006 contract formed part of the universe of documents that Mr. Cilins wanted to destroy.

940. The two met a last time on 14 April 2013. Mr. Cilins again asked about the FBI investigators who had approached Ms. Touré and wanted to get confirmation that she had told them she had no documents. He insisted that she leave the United States and keep no copies. He said that she could not deny her involvement with BSGR if copies were found with her name,

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1290 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 77 (Exh. R-36).

1291 Protocole Pentler /Mme Touré de 2006, 20 février 2006 (Exh. R-24); Lettre d'engagement n° 1 de Pentler envers Mme Touré, non datée, légalisée le 21 juillet 2006 (R-25); Lettre d'engagement nº 2 de Pentler envers Mme Touré, non datée, légalisée le 21 juillet 2006 (Exh. R-26).

1292 ("FC: Et les autres documents c'est quoi? […] Qu'est ce que c'est qui reste comme document? Parce que c'est des originaux qui doivent rester, parce que là il n'y a pas des originaux. MT: Si, il y a des originaux. FC: Oui, il y en a juste un. Il y en a juste un, mais en plus c'est pas le plus important. [...] Et là où tu as mis les autres choses, tu vas regarder") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 77 (Exh. R-36).

1293 Contrat Pentler/Matinda/Mme Touré non-daté (Exh. R-32); Accord entre Pentler et Matinda, 3 août 2010 (Exh. R-346).

and once more reiterated the need to destroy all documentation.[1294] Shortly thereafter, Mr. Cilins was arrested and taken into custody. He was thereafter convicted for obstructing a federal criminal investigation.[1295]

941. The description of these encounters shows that Mr. Cilins attempted to induce Ms. Touré to make false statements and promised her money in exchange for the destruction of the documents implicating BSGR and Pentler in the corruption allegations concerning BSGR's mining rights. In particular, it evidences that Mr. Cilins was seeking to destroy the 27 and 28 February 2008 contracts concluded by Mr. Avidan and Ms. Touré.

942. Importantly, the facts also make clear that Mr. Cilins acted on behalf of Mr. Steinmetz, who insisted that Mr. Cilins be present when the original documents would be destroyed. Moreover, it shows that Ms. Touré had previously been promised USD 5 million to remunerate her influence that were still outstanding, and that she would receive another USD 1 million for destroying the documents and signing the false declaration.

943. The Claimants argue that Mr. Cilins' actions do not implicate BSGR.[1296] Mr. Steinmetz stated that Mr. Cilins did not travel to Florida on his or BSGR's behalf and that he had no authority to represent BSGR.[1297] He also said that Mr. Cilins was boasting when referring to "Beny" as the person behind his actions and that it was common for people to speak as if they had his authority, when in reality they did not.[1298] In fact, the Claimants concede that BSGR knew in advance that Mr. Cilins was going to meet Ms. Touré to have her sign a declaration. However, they assert that BSGR did not know that Mr. Cilins would offer her

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1294 ("FC: […] C'est pour ça que je te dis, c'est bien de partir. C'est bien de partir […] je t'avais dit, garde rien chez toi […] Même si c'est des photocopies, des choses comme ça après tu peux pas leur dire que t'es pas au courant […] La photocopie c'est pas valable, mais peu importe. C'est pas ça. C'est que, si tu dis à quelqu'un je suis au courant de rien et j'ai rien à voir avec tout ça, mais que, il y a des documents ou des photocopies avec ton nom et tout ça, tu peux pas dire que tu n'es pas au courant, parce qu'il y a ton nom. Pourquoi t'as ça chez toi? Tu sais qu'il faut tout détruire, c'est simple […] Il faut détruire ça vite. Malheur") Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, pp. 104-105 (Exh. R-36).

1295 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013, p. 111 (Exh. R-36). See also: Reply, Annex I, para. 11.

1296 Reply, Annex I, paras. 11-18.

1297 Steinmetz (CWS-1), para. 47.

1298 Steinmetz (CWS-1), para. 48.

money or would ask her to destroy documents.[1299] They simply wanted Ms. Touré to withdraw her allegations against BSGR, so they say, and the declaration she was being asked to make "was true".[1300]

944. These arguments ring hollow. The affirmations that Ms. Touré never "signed a contract with BSGR, either directly or indirectly", or intervened with government officials on BSGR's behalf, or "received money from BSGR, either directly or indirectly", or that BSGR never "promised to pay her anything",[1301] have already been shown not to reflect reality. Yet, at the time of Mr. Cilins' trips to Florida, BSGR had every incentive to have her make a false declaration and, in fact, Mr. Steinmetz reviewed a preliminary draft of such declaration.[1302] In the Tribunal's opinion, taking into account the entirety of the record, it is simply not credible that Mr. Cilins promised to pay Ms. Touré USD 1 million on his own initiative without BSGR's knowledge and approval. In the overall context, it is equally implausible that Mr. Cilins made up Mr. Steinmetz's involvement to impress Ms. Touré.

945. Moreover, the Claimants' objection that it made no sense to destroy documents, since copies were already in circulation, does not withstand scrutiny. Indeed, the unavailability of the originals of the Disputed Documents would render it more difficult to prove their authenticity. In reality, it is thanks to those originals that the Tribunal could finally shed light on the genuineness of these documents. In this context, it is telling that the Claimants took no steps to prove their allegations of forgery. Evidently, they had no interest to do so.

(f) Influence of Ms. and Mr. Touré and acts of bribery

946. The Tribunal starts by recalling that it is sufficient for the purposes of subparagraph (c) of Article 6.1 of the ECOWAS Protocol to show an attempt of active influence peddling. Accordingly, it is not necessary to show that actual influence over public officials has been exerted or that the desired result has been achieved. For the avoidance of doubt, however, the analysis below clearly shows that Ms. Touré and her half-brother actively sought to influence the decision-making process leading to the issuance of the exploration permits for North and South Simandou. The analysis further shows that the Claimants made payments

[1299] Reply, Annex I, para. 13.

[1300] Reply, Annex I, para. 12.

[1301] Reply, Annex I, para. 12.

[1302] [redacted]

to Minister Thiam and the members of the Technical Commission to secure the Base Convention and the Zogota Mining Concession.

947. The Tribunal will first address the exploration permits for North and South Simandou and then turn to the Base Convention and the Zogota Mining Concession.

North and South Simandou exploration permits

948. For the following reasons, the Tribunal is of the view that the Claimants obtained their exploration permits for North and South Simandou because of the influence which Ms. Touré and her half-brother exerted on President Conté and Minister Souaré.

949. The record shows that BSGR obtained access to President Conté through Ms. Touré, who was President Conté's wife, and that the Claimants were aware of this relationship in 2005 and 2006. Minister Souaré testified that BSGR had access to the President through Ms. Touré: "tout cela est arrivé parce que BSGR a accédé à la présidence. Et BSGR a accédé à la présidence grâce à Mamadie Touré".[1303] He also stated that the first meeting between the President, BSGR, and himself was organized by Ms. Touré: "Et le premier entretien entre le président, BSGR et moi a été suscité et organisé par Mamadie Touré. Donc, quand je vois Mamadie Touré quelque part dans ce dossier, c'est que c'est l'onction du président".[1304]

950. Minister Sylla wrote in his witness statement and confirmed at the hearing that it was common knowledge that Ms. Touré exerted influence on behalf of BSGR: "Il était connu que Mamadie Touré usait de son influence pour certaines sociétés et notamment que BSGR avait ses entrées au palais grâce à elle".[1305] He added having heard from officials at the Presidency that Ms. Touré had exerted pressure on his predecessor, Minister Souaré, so that BSGR would get its exploration permits.[1306] While this evidence is hearsay and thus does not carry much weight on its own, Minister Sylla also observed that Mr. Touré had told him that Ms. Touré was using her influence so that BSGR could get access to President Conté.[1307]

1303 Tr. (Merits) (FR), Day 6, 16:34-35.

1304 Tr. (Merits) (FR), Day 6, 15:39-42.

1305 Sylla (RWS-1), para. 15; Tr. (Merits) (FR), Day 7, 16:32-40. See also: R-PHB1, para. 233.

1306 ("J'ai aussi appris qu'elle [i.e. Mme Touré] avait exercé des pressions sur mon prédécesseur, Ahmed Tidiane Souaré, pour qu'il attribue des droits à BSGR") Sylla (RWS-1), para. 15.

1307 Sylla (RWS-1), para. 15.

951. In fact, Ms. Touré was present during the first meeting with President Conté on 2 December 2005. And when President Conté authorized BSGR to use his helicopter to survey the Simandou mountain, which is undisputed,[1308] and an incident occurred, Ms. Touré attended the meeting with Minister Souaré to discuss that incident. [redacted][1309]

952. [redacted][1310]

953. The evidence also suggests that Minister Souaré was pressured into facilitating BSGR's access to mining areas. Instead of first going through the CPDM, on 2 December 2005, BSGR and Mr. Cilins met with President Conté, a meeting that Ms. Touré says she had organized.[1311] Minister Souaré explained that he was called to the meeting and that

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1308 The mission report mentions an "urgent" survey mission recommended by President Conté in the following terms: "Dans le cadre général de l'évaluation des ressources minières en Fer du site des Monts Simandou et ses environs directs, une Société dénommée BSGR Ressources [sic] s'est adressée aux Autorités Guinéene [sic] pour une expertise rapide et systématique des richesses qe recèlerait ledit site. 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 Tidiane SOUARE, Ministre du Département des Mines et de la Géologie". Rapport de mission de M. Bangoura (CPDM), 3 décembre 2005 (Exh. R-175) (Emphasis added by the Tribunal).

1309 [redacted]

1310 [redacted] Tr. (Merits), Day 7, 34:24-35:22 (Sylla).

1311 Ms. Touré stated the following: "Le Président et Cilins se sont rencontrés pour la première fois dans un palais présidentiel à Conakry. J'ai parlé avec le Président pour qu'il accepte la réunion, et j'ai parlé avec la garde présidentielle afin que Cilins et d'autres puissent entrer dans le bureau. J'ai personnellement présenté Cilins au Président, et j'ai expliqué que Cilins représentait BSGR et que BSGR voulait exploiter des mines en Guinée". Déclaration de Mme Touré, 2 décembre 2013, para. 10 (Exh. R-35).

President Conté told him to facilitate matters for BSBR: “Le Président a simplement dit qu’il fallait leur faciliter la tâche pour investir dans le pays. Du fait de la présence de Mamadie Touré à cette réunion, j’ai compris que BSGR avait tapé à sa porte et qu’elle avait demandé au Président de les aider”.[1312] At the hearing, he added that he understood the President to instruct him to assist BSGR: “But when you’re receiving a company as a matter of courtesy, and as a minister you are then summoned by the presidency to receive directives, it means that the visit was a courtesy visit, but that there was a presidential position taken that has to be complied with on this given matter”.[1313]

954. [redacted][1314]

955. Minister Souaré also noted that he felt pressure from the President’s family, i.e. Ms. Touré and her half-brother, at the meeting following the helicopter incident: “[J]e protégeais mon ministère de la pression qu’a exercée la famille du Président, soit Mamadie TOURE et Ibrahima Sory TOURE par leur présence dans mon bureau le lendemain de la visite en hélicoptère du Simandou”.[1315]

956. In addition, Ms. Touré testified that she accelerated the issuance of the exploration permits. According to her, Mr. Cilins complained that the issuance of the permits took longer than expected and she therefore intervened with Minister Souaré: “Après la réunion, BSGR a déposé une demande de permis, mais des titres miniers n’ont pas été accordés immédiatement. Cilins m’a demandé de découvrir pourquoi les permis de BSGR avaient été retardés. J’ai appelé Souaré pour en parler, et BSGR a obtenu deux blocs d’exploitation peu après, et je savais qu’il s’agissait des blocs « Simandou Nord et Sud »”.[1316]

957. As a result, on 6 February 2006, two months after BSGR’s initial encounter with President Conté, the North and South Simandou exploration permits were issued to BSGR, a company with no prior experience in iron mining and no proven track record of financial and

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1312 Souaré (RWS-2), para. 10.

1313 Tr. (Merits), Day 6, 34:15-20 (Souaré).

1314 [redacted]

1315 Mr Ahmed Tidiane Souaré Declaration, 9 July 2015, p. 4 (Exh. C-6).

1316 Déclaration de Mme Touré, 2 décembre 2013, para. 12 (Exh. R-35).

technical capabilities. This is all the more so remarkable as, according to the Claimants, several major companies had applied for the same mining areas.

958. The Tribunal is aware that Minister Souaré testified that the issuance of the exploration permits was done in accordance with applicable procedures.[1317] The Tribunal is also mindful of the fact that Minister Souaré testified that he did not receive direct instructions by President Conté to grant the exploration permits to BSGR.[1318] It may very well be that the CPDM followed the applicable procedures. This does not detract from the fact that Minister Souaré stated that he felt pressured by President Conté, Ms. Touré and Mr. Touré to facilitate matters for BSGR.[1319] Indeed, Minister Souaré stated that he instructed the CPDM to "find non-occupied zones" for BSGR as a means to "escape presidential pressure".[1320] It is further noteworthy that he added that a minister should normally not instruct the CPDM to issue mining permits:

> "Q. It is in keeping with the law that you should give these directives to CPDM?
>
> A. Look here, sir. When you're under presidential instructions, you try and apply those instructions in full compliance with the law. This is not normally done that way; those instructions should not come from the minister. But in order to safeguard the Mining Law, in respect of Simandou, it was necessary to proceed in that fashion."[1321]

1317 Tr. (Merits), Day 6, 68:9-15 and 72:7-9 (Souaré).

1318 Tr. (Merits), Day 6, 173:8-10 (Souaré).

1319 ("Q. Therefore you talk about pressure from the family to influence or to enter into the memorandum of understanding. What did they do exactly? What sort of pressure did they exert? A. You forget that they called me to ask me to help BSGR to work in Guinea. This is the pressure). See also: Tr. (Merits), Day 6, 90:6-18 (Souaré) ("Q. And the pressure that was exerted by the family, is that at the first meeting and the helicopter flights? A. Yes, and each time that they intervened: like Mamadie Touré, when she got back from the helicopter flight, she exerted pressure. But what I wish you to understand is that for a minister, an instruction suffices for the entire file. You can't say: pressure in the beginning, no pressure in the middle; no. I operate on the basis of what the President told me first time around. You can't just ignore this when you are minister". Q. And you say that this contract with BSGR is something for which there was pressure? A. Yes"); Tr. (Merits), Day 6, 87:5-11 (Souaré) ("Q. […] So you're talking about pressure exerted by the President's family, but you do not talk about pressure exerted by the President himself; is that correct? A. Correct. The family of the President is the President himself. In other words, the family doesn't represent anything. The family cannot exert any pressure without the President") Tr. (Merits), Day 6, 89:1-6 (Souaré).

1320 Tr. (Merits), Day 6, 68:17-69:13 (Souaré).

1321 Tr. (Merits), Day 6, 69:14-22 (Souaré).

959. In addition, he testified that the signature of the 20 February 2006 MoU was not standard practice[1322] and that it constituted a "*cocotte Souaré pour la circonstance*" (a so-called "Souaré *casserole dish* for the circumstance"), i.e. a "compromise" that secured him "peace".[1323]

960. In sum, the Tribunal is satisfied that Ms. Touré sought to influence President Conté to grant the North and South Simandou exploration permits to BSGR, and that the Claimants obtained these permits because of this influence.

Base Convention and Zogota Mining Concession

961. Having come to the conclusion that the North and South Simandou exploration permits were obtained through corrupt practices, the Tribunal could dispense with assessing whether the Base Convention and the Zogota Mining Concession were also acquired by way of illegal means. Indeed, the fact that the exploration permits were obtained through active influence peddling equally taints the signature of the Base Convention and the award of the Zogota Mining Concession. For the sake of completeness, the Tribunal will nevertheless assess the circumstances surrounding the award of the Base Convention and the Zogota Mining Concession.

962. The following elements support the Respondent's case that the Claimants made payments to Mr. Thiam and the Technical Commission for which the record contains no legitimate explanations and that they secured the signature of the Base Convention and the grant of the Zogota Mining Concession through corrupt practices.

963. First, the Respondent's allegation that a "great proximity" existed between BSGR and Minister Thiam is exemplified by the fact that BSGR reimbursed Mr. Thiam's travel costs for USD 24,444.26,[1324] including in particular a trip to the wedding of Mr. Steinmetz's daughter, for which the Claimants provided no cogent explanation and which the Tribunal finds

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1322 Tr. (Merits), Day 6, 77:3-5 (Souaré).

1323 ("[…] le protocole d'accord, c'était une "cocotte" Souaré pour la circonstance de 2005, 2006"); Tr. (Merits), Day 6, 144:25-145:1 (Souaré) ("[…] The MOU, I told you, was just a disguise for the circumstances in 2005/2006"). See also: Souaré (RWS-2), para. 25 ("La version finale du protocole d'accord de février 2006 était donc un compromis qui m'assurait la "paix". J'estimais qu'elle protégeait mon ministère de la pression exercée par la famille du Président, nommément par Ibrahima Sory Touré et Mamadie Touré") Tr. (Merits) (FR), Day 6, 77:12-15 (Souaré).

1324 [redacted]

suspicious.[1325] The proximity between Mr. Steinmetz and Minister Thiam is also clear from the informal tone used in their email exchanges.[1326] Importantly, Minister Thiam regularly provided BSGR informal updates containing confidential information on other mining companies such as Rio Tinto.[1327] Moreover, Mr. Thiam went out of his way to make public statements in support of BSGR and was involved in the search for potential partners for BSGR.

964. The Respondent also pointed to WikiLeaks cables from the US Embassy mentioning that Mr. Thiam "has personally benefited from CIF and BSGR, as evidenced by his recent purchase of a $3 million property in New York".[1328] The record indeed shows that, on 20 October 2009, Mr. Thiam bought a house in New York for approx. USD 1.5 million.[1329] However, there is no evidence that the funds used for this purchase came from BSGR. The WikiLeaks cable just quoted is insufficient to establish such a connection.

965. Second, the Tribunal notes the haste with which Mr. Thiam set up the Technical Commission leading to the signature of the Base Convention and the Zogota Mining Concession. That Commission reached its conclusion in a surprisingly short time. On 16 November 2009, BSGR requested a mining concession for Sud Simandou (i.e. Zogota) and

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1325 Thiam (CWS-5), paras. 89.5 and 123. See also: Steinmetz (CWS-8), para. 31.

1326 Courriel du Ministre Thiam à M. Steinmetz, 24 mai 2009 (Exh. R-256); Courriel du Ministre Thiam à M. Steinmetz, 25 mai 2009 (Exh. R-257); Courriel de M. Steinmetz au Ministre Thiam, 26 mai 2009 (Exh, R-258). For instance, on 26 May 2009, Minister Thiam wrote to Mr. Steinmetz from his BlackBerry: "Pres wants to send me to see lybians father or son to clarify. Wants to call father tom to tell him kouyate does not talk for guinea and will never be pres in guinea". Mr. Steinmetz responded on the same day as follows: "Have y given the Letter from PM? Good?", to which Minister Thiam responded later: "Yes. Very good" Courriel de M. Steinmetz au Ministre Thiam, 26 mai 2009 (Exh. R-258). Mr. Thiam also asked Mr. Steinmetz to send him photos "of the two houses he [i.e. Mr. Thiam] likes here in Mykonos" [redacted]

1327 For instance, on 29 April 2010, Mr. Thiam forwarded to Mr. Steinmetz a letter from the Ministry of Mines to Rio Tinto. [redacted] He also sent an email on 26 June 2010 with the subject line "confidential" attaching another [redacted] On 14 September 2010, he transmitted to Mr. Avidan a letter from Guinea's Prime Minister to Rio Tinto. [redacted]

1328 Wikileaks, Câble diplomatique de l'Ambassade des Etats-Unis en Guinée, Mining companies concerned about governement appointments, 25 février 2010 (Exh. R-265). See also: [redacted]

1329 [redacted]

submitted a feasibility study.[1330] On 1 December 2009, Minister Thiam established the Technical Commission, which started its work on 4 December 2009, one day after an assassination attempt on President Dadis Camara. The report of the Technical Commission found that the feasibility study was incomplete, as it only mentioned resources, and did not specify reserves as required.[1331] Similarly, the environmental impact study was rudimentary and there was no assessment of communal development.[1332] In other words, the exploration phase was not completed and the committee's report recorded that "[l]es données dans l'étude seront affinées par les travaux de prospection qui se poursuivent pour avoir exactement les réserves".[1333] Notwithstanding these flaws, on 14 December 2009, the committee issued a report in favor of awarding a mining concession.[1334] This was merely ten days after the start of its work and two weeks after its constitution and in a period when an attempted coup had destabilized the country.

966. Finally, as was already discussed, BSGR paid USD 1,000 to each member of the Technical Commission, which represents five times their monthly salary. The Tribunal has no reason to doubt Mr. Souaré's testimony that such payments were not common practice nor legal.

967. In the light of all these facts, the Tribunal reaches the conclusion that the Claimants engaged in corrupt practices in order to obtain the Base Convention and the Zogota Mining Concession.

[1330] Lettre de M. Avidan (BSGR Guinée) au Ministre Thiam, 16 novembre 2009 (Exh. R-266); Zogota Feasibility Study, October 2009 (Exh. C-14).

[1331] Rapport de la commission chargée d'examiner l'étude de faisabilité et d'élaborer le projet de convention d'exploitation des gisements de minerai de fer de Zogota, 14 décembre 2009, p. 2 (Exh. R-268).

[1332] Rapport de la commission chargée d'examiner l'étude de faisabilité et d'élaborer le projet de convention d'exploitation des gisements de minerai de fer de Zogota, 14 décembre 2009, p. 3 (Exh. R-268).

[1333] Rapport de la commission chargée d'examiner l'étude de faisabilité et d'élaborer le projet de convention d'exploitation des gisements de minerai de fer de Zogota, 14 décembre 2009, p. 3 (Exh. R-268).

[1334] Rapport de la commission chargée d'examiner l'étude de faisabilité et d'élaborer le projet de convention d'exploitation des gisements de minerai de fer de Zogota, 14 décembre 2009 (Exh. R-268).

(g) Conclusion

968. The record contains overwhelming evidence that the Claimants employed corrupt practices to obtain the North and South Simandou exploration permits, the Base Convention and the Zogota Mining Concession.

969. The Claimants retained the assistance of Ms. Touré, knowing that she was President Conté's wife and that she was in a position to exercise influence over him. They also knew that Mr. Touré is her half-brother and hired him as an employee to facilitate access to government officials.

970. The Claimants used Pentler as a conduit to conclude contracts of corruption with third parties and remunerate Ms. Touré or other intermediaries. The contracts concluded by Pentler in 2006 with Ms. Touré and Messrs. Bah, Touré and Daou are authentic and there is evidence that Mr. Struik was directly involved in the drafting of Pentler's contract with Messrs. Bah and Touré. It is particularly striking that the success fees in the milestone agreement between BSGR and Pentler match the amounts provided in Pentler's contracts with Messrs. Daou, Bah and Touré.[1335] Between 2010 and 2012, Pentler was also used to funnel at least USD 2,236,391.02 to Ms. Touré, although there is documentation that Ms. Touré actually received USD 5,419,200 in that same period. In addition, there is evidence that Mr. Steinmetz sent Mr. Cilins to Florida in the spring of 2013 to induce Ms. Touré to make false statements and destroy evidence.[1336]

971. The Pentler principals had no relevant experience in the mining sector and were paid large sums for undisclosed or unsubstantiated services. They used fake invoices for services different from those named in the invoices. There is evidence that Pentler, its principals or other related companies of the principals received from BSGR USD 30 million between 2008 and 2010 in addition to USD 385,000 in 2006.

972. Ms. Touré had no experience or qualifications in the mining sector. Yet, she was promised large amounts of money for her influence over President Conté, which influence she indeed

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1335 [redacted]

1336 Transcription écrite, par constat d'huissier, de l'enregistrement audio de conversations entre M. Cilins et, notamment, Mme Touré réalisé par le Federal Bureau of Investigation aux Etats-Unis, 29 novembre 2013 (Exh. R-36); [redacted] See paragraphs 941-944 above.

exercised to obtain the exploration permits for North and South Simandou for BSGR. She arranged meetings between BSGR and President Conté or Minister Souaré, and she actively promoted the interests of BSGR to facilitate things for BSGR.

973. Although there is insufficient evidence to prove that Ms. Touré received actual cash payments from BSGR or Pentler in 2006, the record shows that she was paid at least USD 5,234,391.02 between August 2009 and May 2012, of which USD 2,236,391.02 were transferred by Pentler or its intermediaries and USD 2,998,000 were transferred through Mr. Boutros. Although it is not totally clear to what extent these payments relate to North and South Simandou as opposed to Blocks 1 & 2, it appears reasonable to conclude that part of these payments relates to the services Ms. Touré provided in 2005 and 2006 in connection with North and South Simandou.

974. In the light of Ms. Touré's status as wife of President Conté, the Tribunal is of the view that the Claimants engaged in active trading of influence by securing Ms. Touré's influence over her husband and other government officials. Notably, there is evidence that Ms. Touré actually influenced the decision-making process and that the desired result was achieved, i.e. BSGR obtained the North and South Simandou Permits. Whether BSGR could have obtained these permits without any influence peddling is irrelevant; the fact is that it did secure undue influence.

975. Mr. Touré did not have any experience or expertise in the mining sector either. Together with Mr. Bah, he received USD 425,000 in February 2006 for his undisclosed services in connection with North and South Simandou. In addition to his regular salary, he also received USD 450,000 as a bonus in 2010, again for services unknown. Here again, considering that Mr. Touré was the half-brother of President Conté's wife, the Tribunal is of the opinion that the Claimants engaged in active trading of influence.

976. Finally, without justification, the Claimants paid several of Minister Thiam's travel expenses in 2009 in an amount of USD 15,424.68. They also paid USD 1,000 to each member of the Technical Commission tasked with negotiating the terms of Base Convention. Accordingly, the Tribunal concludes that the Claimants engaged in corrupt practices to secure the Base Convention and the Zogota Mining Concession.

977. Having engaged in active trading of influence to secure the North and South Simandou exploration permits and in active bribery to secure the Base Convention and the Zogota

Mining Concession, the Tribunal reaches the conclusion that all claims related to these mining rights are inadmissible.

v. *Blocks 1 & 2*

978. The Tribunal now turns to Guinea's contention that the Claimants benefited from the influence of Ms. Touré and her half-brother over President Conté and government officials to fraudulently obtain mining rights in Blocks 1 & 2.

979. The Claimants dispute having obtained these mining rights through corruption. They deny that Ms. Touré was the wife of President Conté or that she otherwise exerted any influence over him, and dispute that Mr. Touré had any influence over the President or members of the government. For them, Rio Tinto's rights were lawfully withdrawn, because Rio Tinto failed to retrocede 50% of its mining area following the second renewal of the exploration permits in 2002, and BSGR obtained mining rights over Blocks 1 & 2 in compliance with applicable regulation procedures.

980. The Tribunal recalls that BSGR Guinea was awarded exploration permits over Blocks 1 & 2 on 9 December 2008,[1337] following a Presidential Decree in July 2008 to take these blocks away from the previous title holder, Rio Tinto.[1338] In 1997, Rio Tinto had obtained four exploration permits in the Simandou mountain region for a period of three years.[1339] These permits were renewed in 2000,[1340] but Rio Tinto had to return 50% of the exploration area under the Guinean Mining Code.[1341] The remaining zones covered by the four exploration

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[1337] Arrêté n° A2008/4980/MMG/SGG accordant un permis de recherches minières à la société BSGR Guinée Limited, 9 décembre 2008 (Exh. C-10).

[1338] Décret D/2008(041/PRG/SGG rapportant le décret D/2006/008/PRG/SGG du 30 mars 2006 accordant une concession minière à la société Simfer S.A., 28 juillet 2008 (Exh. C-92).

[1339] Arrêté n° A97/972/MRNE/SGG accordant un permis de recherches minières à la société RTZ-Mining and Exploration, 25 février 1997 (Exh. R-142); Arrêté n° A97/973/MRNE/SGG accordant un permis de recherches minières à la société RTZ-Mining and Exploration, 25 février 1997 (Exh. R-143); Arrêté n° A97/974/MRNE/SGG accordant un permis de recherches minières à la société RTZ-Mining and Exploration, 25 février 1997 (Exh. R-144); Arrêté n° A97/975/MRNE/SGG accordant un permis de recherches minières à la société RTZ-Mining and Exploration, 25 février 1997 (Exh. R-145).

[1340] Arrêté n° A2000/1484/MMGE/SGG renouvelant le permis de recherches n° A97/975/MRNE/SGG (Bloc I) accordé à la société Rio Tinto, 30 mai 2000 (Exh. R-146); Arrêté n° A2000/1483/MMGE/SGG renouvelant le permis de recherches n° A97/974/MRNE/SGG (Bloc II) accordé à la société Rio Tinto, 30 mai 2000 (Exh. R-147); Arrêté n° A2000/1490/MMGE/SGG renouvelant le permis de recherches minières n° A97/973/MRNE/SGG (Bloc III) accordé à la société Rio Tinto, 30 mai 2000 (Exh. R-148); Arrêté n° A2000/1488/MMGE/SGG renouvelant le permis de recherches minières n° A97/972/MRNE/SGG (Bloc IV) accordé à la société Rio Tinto, 30 mai 2000 (Exh. R-149).

[1341] Mining Code of the Republic of Guinea, 30 June 1995, Art. 30(3) (Exh. CL-1).

permits were designated as Blocks 1 to 4. Blocks 1 & 2 correspond to "Simandou Nord" and Blocks 3 & 4 to "Simandou Sud". Rio Tinto obtained a second renewal of its permits in October 2002, but failed to then retrocede another 50% of its exploration area as it was required to do.[1342] In November 2002, Rio Tinto concluded a mining convention with Guinea.[1343] According to that convention, a mining concession should have been awarded within 90 days, which, however, only occurred in 2006.[1344]

981. Although the Claimants first obtained exploration permits for North and South Simandou in 2006, the record shows that, as of 2005, they were primarily interested in mining in the Simandou mountain range and in particular Blocks 1 & 2 (i.e. Simandou Nord) over which Rio Tinto had a concession. As Mr. Avidan tellingly stated at the Merits Hearing: "Zogota [i.e. South Simandou] was only, I would say, a "bonus" to Blocks 1 and 2".[1345]

982. Mr. Steinmetz testified in the LCIA arbitration that Messrs. Cilins, Lev Ran and Noy introduced Mr. Oron, the CEO of BSGR, to the opportunity to invest in iron ore mining activities in Guinea and especially in the Simandou area. Mr. Cilins described Mr. Oron's role in this period (2005-2006) as the "face of BSGR [who] piloted BSGR's efforts".[1346] According to a declaration made by Mr. Cilins in 2011, Mr. Oron reacted to this opportunity by stating that BSGR would be interested in "obtaining the impossible" (or in French "décrocher la lune").[1347]

[1342] Arrêté n° A2002/5371/MMGE/SGG renouvelant le permis n° A2000/1484/MMGE/SGG (Bloc I) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-152); Arrêté n° A2002/5372/MMGE/SGG renouvelant le permis n° A2000/1483/MMGE/SGG (Bloc II) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-153); Arrêté n° A2002/5373/MMGE/SGG renouvelant le permis n° A2000/1490/MMGE/SGG (Bloc III) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-154); Arrêté n° A2002/5374/MMGE/SGG renouvelant le permis n° A2000/1488/MMGE/SGG (Bloc IV) accordé à la société Rio Tinto, 16 octobre 2002 (Exh. R-155).

[1343] Convention de base entre la République de Guinée et la société Simfer S.A. pour l'exploitation des gisements de fer de Simandou, 26 novembre 2002 (Exh. R-156).

[1344] Décret D2006/008/PRG/SGG accordant la concession de recherche et d'exploitation minières à la société Simfer S.A., 30 mars 2006 (Exh. R-157).

[1345] Tr. (Merits), Day 9, 168:1-2 (Avidan).

[1346] Rapport d'entretien avec M. Cilins, 5 octobre 2011 (probable), p. 2 (Exh. R-165).

[1347] "FC [i.e. Frédéric Cilins] explained that he was a friend of Roy Oron (RO), the former CEO of BSGR, which had no prior experience in Guinea whatsoever. In a conversation in early 2005 in Johannesburg with RO, FC asked him what BSGR was after in Guinea and RO responded that BSGR wanted to "*obtain the moon*" in Guinea, which meant that RO wanted to obtain the Simandou concession". Rapport d'entretien avec M. Cilins, 5 octobre 2011 (probable), p. 1 (Exh. R-165).

983. Mr. Cilins subsequently arranged a meeting between Mr. Oron and the Minister of Mines Souaré on 20 July 2005,[1348] where Mr. Oron expressed his interest for iron mining in Simandou.[1349] Mr. Oron thereafter wrote to Minister Souaré on 2 August 2005, naming Simandou as BSGR's first area of interest. That letter remained unanswered.[1350]

984. While the letter listed other mining opportunities, subsequent exchanges with the Guinean government show that BSGR's reference to Simandou actually concerned the mining areas of Rio Tinto. For instance, between November 2005 and January 2006, BSGR sent two draft memoranda of understanding to Minister Souaré and the CPDM, before a final version was concluded on 20 February 2006. The first draft dated 24 November 2005 shows that BSGR was generally interested in obtaining mining rights in Simandou: "Ce protocole à pour but de permettre la promotion et le développement des gisements des minerais de fer de SIMANDOU, ainsi que les infrastructures y afférents".[1351] Mr. Struik confirmed that Mr. Oron's reference to Simandou did not exclude Blocks 1 to 4.[1352]

985. The record also shows that, because Rio Tinto had extant mining rights in Simandou, the Guinean government sought to redirect BSGR's attention to the mining areas to the north and south of Rio Tinto's concession area, namely "Simandou Nord" and "Simandou Sud". An undated assessment by the CPDM of the first draft MoU sent by Mr. Oron confirms that

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1348 The Tribunal is mindful of the discrepancy between Minister Souaré's witness statement, where he stated that he had a first meeting with BSGR at the Presidential Palace in December 2005 and his testimony at the Merits Hearing concerning the 20 July 2005 meeting or "visit". At any rate, it is uncontroversial that the 20 July 2005 meeting took place. See: Souaré (RWS-2), para. 8; Tr. (Merits), Day 6, 28:22-29:10 (Souaré).

1349 In a letter sent to Minister Souaré on 2 August 2005, Mr. Oron stated the following: "Je souhaiterais profiter de cette occasion pour vous remercier très sincèrement de l'amiable accueil que vous nous avez reservé, à mon équipe et à moi-même, et des propos fort intéressants que nous avons échangés avec vous le 20 juillet 2005. Nous avons trouvé ces discussions très instructives et nous voyons déjà se dessiner plusieurs domaines dans lesquels tant BSG Resources que Bateman pourraient s'investir à l'intérieur de votre pays. Citons notamment les principaux domaines d'intérêt suivants: 1. Les travaux préparatoires de l'exploitation du minerai de fer des Monts Simandou". Lettre de M. Oron (BSGR) au Ministre Souaré, 2 août 2005 (Exh. R-171). Mr. Struik testified: "I was aware that Mr Oron had visited Guinea already a couple of months earlier, in July 2005. During that visit, he had a meeting with the Ministry of Mines and Geology and he expressed BSGR's interest in exploration and mining in the country". Struik (CWS-2), para. 10. See also: [redacted]

1350 [redacted]

1351 Lettre de M. Oron (BSGR) au Ministre Souaré joignant un projet de protocole d'accord, 24 novembre 2005 (Exh. R-173).

1352 "Q. But in the draft that he sent in November, he was expressing an interest in anything in that area? A. Yes. Q. And he didn't exclude Blocks 1, 2, 3 and 4? A. Yes". Tr. (Merits), Day 4, 83:25-84:4 (Struik).

BSGR coveted the entire Simandou mountain range: "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".[1353] The same assessment states that Rio Tinto's concession area could not be attributed to BSGR and that BSGR could eventually conduct feasibility studies to the north and south of Blocks 1 to 4 as a means to create competition.[1354]

986. In addition, although the second draft memorandum dated 6 January 2006 only refers to "Simandou Nord et Sud",[1355] the final version concluded with Guinea on 20 February 2006 contains a right of first refusal clause for the entire Simandou area.[1356]

987. This assessment is further corroborated by the following facts: On 1 December 2005, Mr. Cilins met with President Conté, a meeting which was also attended by Ms. Touré. According to his declaration of 2011, Mr. Cilins pleaded in favor of granting mining rights over Simandou to BSGR at which point President Conté called Minister Souaré, who told him that Blocks 1 to 4 had already been granted to Rio Tinto.

988. Surprisingly, at that meeting, President Conté authorized BSGR to make a reconnaissance flight over Simandou with the presidential helicopter. This flight took place on 2 December 2005 and was the cause of an incident because the helicopter landed on Rio Tinto's concession area.[1357] This again shows that BSGR was primarily interested in the Simandou area over which Rio Tinto had extant mining rights.

989. Mr. Souaré testified that he convened BSGR's representatives the following day to explain the incident. Ms. Touré also attended that meeting. In his witness statement, Mr. Souaré

1353 Mémorandum du CPDM sur le projet de protocole d'accord proposé par BSG Resources Limited relatif au projet des mines de fer de Guinée, 2005 (Exh. R-486) (Emphasis added by the Tribunal).

1354 "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 metre à côté de Rio Tinto, une Société concurrente capable de faire des études appropriées permettant ainsi de conforter notre position". Mémorandum du CPDM sur le projet de protocole d'accord proposé par BSG Resources Limited relatif au projet des mines de fer de Guinée, 2005, p. 2 (Exh. R-486).

1355 Letter from BSGR to Minister Souaré, 6 January 2006 (Exh. C-208).

1356 Clause 3.2.2.7 of the 20 February 2006 Memorandum reads as follows: "Le soutien et l'assurance que, si une quelconque zone du site de SIMANDOU devenait libre de tous droits miniers, la dite zone serait propose en priorité à BSGR Guinea en vue de son exploration et/ou de son exploitation". Memorandum of Understanding between Republic of Guinea and BSGR Guinea, 20 February 2006, clause 3.2.2.7 (Exh. C-9).

1357 Souaré (RWS-2), paras. 11-19.

states that he explained to BSGR that Simandou had already been awarded to Rio Tinto and that they should apply for mining areas that had not yet been awarded to a mining company. However, according to Mr. Souaré, BSGR again pleaded for obtaining the Simandou area: "Les représentants de BSGR ont plaidé pour obtenir un permis de recherches sur Simandou. Mamadie Touré a appuyé la demande".[1358]

990. In the course of January 2006, BSGR came to understand that it could only obtain mining rights to the north and south of the Simandou mountains. As seen above, BSGR eventually obtained exploration permits on 6 February 2006 for North and South Simandou. In this context, the Milestone Agreement of 14 February 2006 sets out milestones and corresponding success fees concerning not only the newly obtained mining permits, but also Blocks 1 & 2:

> "Pentler has agreed to continue its efforts to reach an agreement for Blocks 1 and 2 and assist in acquiring these blocks for the Simandou Iron Ore Project, and assist in any possible manner with the Simandou Iron Ore Project."[1359]

991. The table containing the milestones and the success fees is the following:

Milestone	Total Success Fee	
	Zones North and South	Blocks 1 and 2
Signing of the MOU and issuing of corresponding prospecting permits	USD500,000	USD1,500,000
Completion of a satisfactory feasibility study and registration of "Companie Miniere de Fer de Simandou"	USD500,000	USD1,000,000
Signing of "Convention de Base"	USD500,000	USD1,000,000
Signing of "Decret Presidentiel de la Concession" and issuing of corresponding mining permits	USD1,000,000	USD1,000,000
Commercial production and export of first tonne of iron ore product from Simandou	USD2,000,000	NIL
Commercial production and export of first 10 million tonnes of iron ore product from Simandou	USD4,000,000	NIL
Repayment of all investments by BSGR (Guinea) Limited	USD6,500,000	NIL
Total	USD15,000,000	USD4,500,000

1358 Souaré (RWS-2), para. 18.

1359 [redacted]

992. As the analysis above about the Zogota mining rights has already shown, Pentler concluded on 20 February 2006 contracts with Messrs. Bah, Daou and Touré containing the same milestones regarding Blocks 1 & 2 as those in the Milestone Agreement.[1360] Here too, the aggregate amount of the fees payable to these gentlemen for Blocks 1 & 2 matches the fees provided in the Milestone Agreement, i.e. USD 3,600,000 + USD 900,000 = USD 4,500,000.

993. The fact that BSGR was interested at that time in obtaining Blocks 1 & 2 is further corroborated by Mr. Avidan, who testified that he was aware that BSGR wanted to get Blocks 1 & 2 since the time he arrived in Guinea, i.e. around June 2006.[1361]

994. The record also shows that BSGR renewed its efforts in 2007 to obtain Blocks 1 & 2. Following a cabinet reshuffle and the appointment of Mr. Kanté as Minister of Mines, Mr. Avidan applied for an exploration permit for Blocks 1 & 2 on 12 July 2007, when Rio Tinto still had rights over these blocks.[1362] Mr. Avidan's attempts to cast doubt on the date of that application by stating that the letter was actually sent a year later is contradicted by the receipt stamp that is dated 20 July 2007. In addition, Mr. Kanté testified that he met with Mr. Avidan and Mr. Touré shortly thereafter and that the first reiterated BSGR's interest for Blocks 1 & 2:

> "Je retiens aussi qu'il a formulé aussi des critiques vis-à-vis de leurs voisins, Rio Tinto, au lieu de parler de leur activité à eux: des critiques du genre "ils sont là depuis longtemps et ils ne font rien". Asher Avidan m'a parlé de l'intérêt de la société BSGR pour les blocs de Rio Tinto."[1363]

995. According to Mr. Kanté, he refused to entertain the request and explained to Mr. Avidan that BSGR Guinea had not shown to have the technical and financial means to conduct

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1360 [redacted]

1361 "Q. You were aware that BSGR wanted to get Blocks 1 and 2 from Simandou from the moment you arrived in Guinea, correct? A. True". Tr. (Merits), Day 9, 131:21-24 (Avidan).

1362 "Dans le cadre de notre partenariat avec l'Etat Guinéen, nous avons l'honneur de venir vers vous pour vous exprimer notre volonté d'étendre ce partenariat à la recherché et à l'exploration des gisements de fer du bloc 1 et 2 de la chaîne de SIMANDOU. A cet effet, il nous plairait d'obtenir les permis de recherche correspondants" Lettre de M. Avidan (BSGR Guinée) au Ministre Sylla, 12 juillet 2007 (Exh. R-214).

1363 Kanté (RWS-4), para. 15.

exploration activities within its own permit areas of North and South Simandou and that it should focus on these:[1364]

> "C'est donc vers ça que je les ai orientés: il faut aller travailler les zones que vous avez déjà, avant de pouvoir dire quoique ce soit. J'ai alors dit aux représentants de BSGR que s'ils n'étaient pas satisfaits, ils pouvaient rendre leur permis à la République de Guinée, plutôt que de chercher à obtenir une concession déjà attribuée à une autre société."[1365]

996. Mr. Kanté further testified that, sometime in August 2007, President Conté called him to a meeting attended by Messrs. Avidan and Touré to discuss Blocks 1 & 2.[1366] Having explained to President Conté that Rio Tinto already had a mining concession over Blocks 1 to 4, President Conté apparently told Minister Kanté to make a decision in the interest of the country, which the Minister understood as validating his own point of view.[1367] However, according to Mr. Kanté, Messrs. Avidan and Touré subsequently came to his office and acted as if he had received formal instructions to award them Blocks 1 & 2.[1368]

997. Minister Kanté further refers to a second meeting with President Conté in December 2007 to discuss BSGR and Rio Tinto.[1369] He recalls that "a lady" was standing next to President Conté, whom he assumed to be Mamadie Touré.[1370] Having explained anew that BSGR had a larger mining area than Rio Tinto and had still not provided any exploration results, President Conté apparently told the lady: "je t'avais dit de ne pas te mêler de ces problèmes de mines".[1371]

998. The following day, Minister Kanté was called by the Prime Minister Lansana Kouyaté. The same lady was again present and the Prime Minister introduced her as the fourth wife of the President and said that Minister Kanté should find a solution to her problem.[1372] For

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1364 Kanté (RWS-4), paras. 17-19.

1365 Kanté (RWS-4), para. 19.

1366 Kanté (RWS-4), paras. 22-23; Tr. (Merits), Day 7, 83:5-9 (Kanté).

1367 Kanté (RWS-4), para. 26.

1368 Kanté (RWS-4), paras. 27-28.

1369 Kanté (RWS-4), para. 30.

1370 Kanté (RWS-4), para. 31.

1371 Kanté (RWS-4), para. 33.

1372 Kanté (RWS-4), para. 35.

Minister Kanté, "[i]l était évident que l'objet de la discussion était de trouver un moyen de donner les droits de Rio Tinto à BSGR".[1373]

999. These facts show that the Claimants targeted Blocks 1 & 2 from the outset and increased their efforts from 2007 onwards. Rio Tinto's mining rights over Blocks 1 & 2 were eventually suspended on 28 July 2008, revoked on 9 December of that year, and then awarded to the Claimants on the same day.

1000. With these considerations in mind, the Tribunal will now assess various red flags concerning the manner in which the Claimants secured their mining rights for Blocks 1 & 2. For the reasons set out in the following sections, the Tribunal agrees with the Respondent that the Claimants obtained the Blocks 1 & 2 exploration permits through corrupt practices. The record shows that BSGR, directly or indirectly, made substantial payments to Ms. Touré and other individuals ((a) below). The record further shows that Ms. Touré and other individuals did not have any specific qualifications in the mining sector ((b) below), that these individuals provided unspecified services ((c) below), that the Claimants failed to conduct meaningful due diligence ((d) below), and that the Claimants sought to destroy or tamper with the evidence showing their involvement in this scheme ((e) below). The record finally shows that BSGR, directly or indirectly, bought the influence that Ms. Touré purported to exert over President Conté and other government officials, and that Ms. Touré, her half-brother and other individuals sought to influence the decision-making process ((f) below).

(a) Payments and other gifts

Ms. Touré

1001. The Respondent argues that the record proves that the Claimants paid at least USD 9.5 million to Ms. Touré, either directly or through intermediaries, in return for her influence in securing the disputed mining rights. The Respondent also argues that Mr. Avidan gave Ms. Touré USD 1 million in cash in BSGR's offices in 2008[1374] and USD 50,000 in cash in Freetown shortly after President Conté's death.[1375]

1002. Prior to reviewing the evidence of actual payments, it behooves the Tribunal to set out the promises of payments made to Ms. Touré, and in particular the 27 and 28 February 2008

[1373] Kanté (RWS-4), para. 35.

[1374] CM, para. 343.

[1375] CM, para. 381.

contracts between Mr. Avidan and Ms. Touré, the 2 August 2009 "Attestation" signed by Ms. Touré, and a series of dated and undated contracts believed to be signed in 2010.

1003. On 27 and 28 February 2008, Mr. Avidan and Ms. Touré signed two contracts on behalf of BSGR Guinea and Matinda and Co Limited ("Matinda"). Matinda was founded for Ms. Touré on 17 November 2006 and registered in the British Virgin Islands with the assistance of the law firm Mossack Fonseca.[1376] These two contracts are part of the Disputed Documents, of which the forensic analysis has disproved Mr. Avidan's and the Claimants' claims of forgery.

1004. In the 27 February 2008 contract, entitled "*Contrat de Commission*", BSGR committed to pay USD 4 million to Ms. Touré's company for obtaining Blocks 1 and 2, of which two were for Matinda, i.e. Ms. Touré, and the remaining two for "persons of good will" assisting in the endeavor. The operative part of that contract reads as follows:

> "La société **BSG Resources** s'engage de donner une somme totale de quatre millions de dollars à titre de commission pour l'obtention des blocs 1 et 2 de Simandou situé en République de Guinée et couvrant les préfectures de KEREOUANE et BEYLA.
>
> La société **MATINDA AND CO LIMITED** s'engage pour sa part de faire toutes les démarches nécessaires pour obtenir des autorités la signature pour l'obtention des dits blocs en faveur **de la société BSG RESOURCES GUINEE**.
>
> **La société BSG Resources** se propose de repartir la commission ci-dessus comme suit: Une somme de deux (2) millions pour la société **MATINDA AND CO LIMITED** avec imputation de cent (100) USD déjà versée à titre d'avance.
>
> Le reste de la somme sera repartie [sic] entre les personnes de bonne volonté qui auraient contribué à la facilitation de l'octroi des dits blocs, dans lequel **la société BSG Resources Guinée** diligentera en raison de la qualité de la contribution de chaque partie.
>
> La totalité de la somme sera versée sans délai après la signature du dit document. En outre, **la société BSG Resources s'engage** dans un délai raisonnable à la realisation des infrastructures scolaires sous la propriété de Matinda and co limited en République de Guinée."[1377]

[1376] Jeune Afrique, Guinée: ce que les « Panama Papers » disent de Mamadie Touré dans le scandale de corruption du Simandou, 6 avril 2016 (Exh. R-212); Le Monde, Les Africains du Panama (3): ces barons des affaires qui prospèrent offshore, 5 avril 2016 (Exh. R-213).

[1377] Contrat BSGR Guinée/Matinda de 2008, 27 février 2008 (Exh. R-28) (Emphasis added by the Tribunal).

1005. Through the contract of 28 February 2008, entitled "Protocole d'accord", BSGR Guinea committed to give to Matinda, i.e. Ms. Touré, a 5% share in Blocks 1 & 2:

> "Il a été convenu ce qui suit:
>
> La société **BSG Resources s'engage** à donner 5% des actions des blocs 1 et 2 de Simandou situé en République de Guinée et couvrant les prefectures de Kerouané et Beyla." [1378]

1006. The Claimants' attempts to discard these 27 and 28 February contracts are bound to fail. As was already mentioned, the forensic analysis has not shown them to be forged. Moreover, Mr. Avidan's statement that he was not in Guinea at the relevant time have been proven wrong. [redacted] [1379] At the Merits Hearing, he explained that this statement was based on his review of the tickets bought at the travel agency Diesenhaus.[1380] When confronted with BSGR Guinea's first quarterly report for 2008 showing that Mr. Steinmetz visited Guinea on 24 and 25 February 2008,[1381] he then said that he "probably" left Guinea with Mr. Steinmetz on 24 February 2008, to spend his wedding anniversary with his wife on 25 February 2008 in Israel.[1382] However, according to the flight log of his private airplane, Mr. Steinmetz arrived in Conakry on 25 February 2008 and left on 26 February 2008 for Monrovia in Liberia, before returning to Israel.[1383] Faced with this evidence, Mr. Avidan stated that he "cannot tell […] for sure" but that he was "almost positive" about travelling back with Mr. Steinmetz to Israel.[1384] In the light of the conflicting accounts of Mr. Avidan, the Tribunal attaches no credibility to the testimony of Mr. Avidan on this issue. In consequence, the Tribunal cannot find that Mr. Avidan left Guinea on 26 February 2008. It appears much more plausible that

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1378 Protocole BSGR Guinée/Matinda de 2008, 28 février 2008 (Exh. R-29) (Emphasis added by the Tribunal).

1379 ("I was not even in Guinea on 27 or 28 February 2008. I was in Israel, as is seen from BSGR's expense records at the time") Second witness statement of Asher Avidan in the LCIA arbitration, para. 18 and fn. 11 (Exh. C-262).

1380 Registre des vols de la compagnie Diesenhaus Unitours pris par Asher Avidan, 2008 (Exh. C-264). Tr. (Merits), Day 9, 109:17-110:4 (Avidan).

1381 Rapport de BSGR Guinée pour le premier trimestre 2008, p. 41 (Exh. R-217).

1382 Tr. (Merits), Day 9, 112:11-13 and 113:14-114:1 (Avidan).

1383 [redacted] Passeports et documents de vol de Benjamin Steinmetz, p. 16 (Exh. C-87).

1384 Tr. (Merits), Day 9, 114:18 and 115:3-4 (Avidan).

Mr. Avidan signed the disputed contracts on 27 and 28 February 2008 as the contracts themselves indicate.

1007. The record further contains a document entitled "*Attestation*" signed on 2 August 2009 by Ms. Touré and two witnesses, namely Messrs. Abdoulaye Cissé and Issiaga Bangoura. This document is also a Disputed Document for which the forensic experts have found no evidence of forgery. In the 2 August 2009 Attestation, Ms. Touré states that USD 4 million are owed to her by BSGR in payment of her 5% shares in BSGR Guinea (which she secured in the Touré/Pentler Protocol dated 20 February 2006 by obtaining a free-carry 33% shareholding in Pentler)[1385] and her services and that all her prior contractual commitments towards BSGR, its subsidiaries or intermediaries are abrogated:

> "Je soussignée Madame MAMADIE TOURE, femme d'affaires résidant dans la commune de Dubréka, Directrice Générale de la société MATINDA AND CO LIMITED, en séjour à Freetown REPUBLIQUE DE SIERRA LEONE, reconnais avoir finalisé avec la société BSGR du [sic] versement de la somme de quatre millions (4 000 000 de dollars américain), représentant la valeur totale de l'ensemble de mes actions (5% de participation) ainsi que de mes prestations fournies pour l'obtention des titres miniers en faveur de la société BSGR en terre Guinéenne.
>
> Les dits montants me seront intégralement payés par échéance de quatre trimestres soit un million (1 000 000) de dollars par trimestre.
>
> A chaque échéance de paiement, je m'engage à produire un accusé de réception pour la société qui sera signé et délivré par moi-même.
>
> En foi de quoi j'ai établi cette attestation de manière définitive, qui abroge tous mes engagements contractuels antérieurs (directement ou indirectement) liés à l'égard de la société BSGR, de ses filiales ou toute autre entité intermédiaire représentant la société BSGR après l'échéance totale, pour servir et valoir ce que de droit."[1386]

1008. On 8 June 2010, by a formal writ, Ms. Touré denounced the 2 August 2009 Attestation and requested that the 27 and 28 February 2008 contracts be performed:

> "En conclusion, la **Société MATINDA AND CO LIMITED SARL**, ignore totalement l'existence de la fameuse attestation 02 Août 2009 et s'en tient uniquement au contrat de commission du 27 Février 2008 et au protocole d'accord du 28 Février 2008, actes juridiquement valables devant produire plein et entier effets entre les parties ;

[1385] Protocole Pentler/Mme. Touré du 20 février 2006 (Exh. R-24).

[1386] Attestation du 2 août 2009 de Mme Touré (Exh. R-269).

> La **Société MATINDA AND CO LIMITED SARL** exige de **la Société BSG Resources Guinée**, l'exécution correcte, complète et de bonne foi de toutes ses obligations contractuelles nées du contrat de commission du 27 Février 2008 ainsi que du protocole d'accord du 28 Février 2008."[1387]

1009. By letter dated 20 June 2010, BSGR Guinea, through Ibrahima Sory Touré and acting on behalf of Mr. Avidan, reacted by challenging the authenticity of the 27 and 28 February 2008 contracts and of the 2 August 2009 Attestation".[1388] The letter also claimed that Ms. Touré's allegations constituted an extortion attempt and stated that BSGR would use all available legal remedies to defeat such attempt.[1389]

1010. There appears to be no doubt that Ms. Touré signed the 8 June 2010 writ. As the Respondent suggests, it may well be that Ms. Touré denounced the attestation because she had discovered that Vale was to pay BSGR USD 2.5 billion for a 51% stake and she found that her compensation was too low. [redacted][1390] In any event, the only way to assess the veracity of the 2 August 2009 Attestation is to determine whether any monies were transferred to Ms. Touré, an issue to which the Tribunal will revert.

1011. Continuing chronologically, according to the Respondent, BSGR, through Pentler, then proposed to Ms. Touré to sign a series of documents in the summer of 2010 (the "August 2010 contracts"), starting with an undated document acknowledging that Ms. Touré had been paid USD 2.4 million from Pentler for their cooperation since 2005:

> "Je, soussignée, Madame Mamadie Touré, représentante de la société Matinda & Co. Ltd déclare par la présente avoir reçu de la part de la société Pentler Holdings Ltd. la somme de 2 400 000 USD (deux millions quatre cents mille dollars) dans le cadre de notre contrat de collaboration signee [sic] en 2005." [1391]

1012. In a second undated document, Pentler, Matinda and Ms. Touré note that their cooperation agreement entered into in 2005 has come to an end and that Pentler will pay Ms. Touré an additional USD 3.1 million. They also commit to maintain the confidentiality of their common

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1387 Exploit d'huissier, 8 juin 2010 (Exh. C-114) (Emphasis added by the Tribunal).

1388 Lettre de M. I.S. Touré (BSGR Guinée) à Me Moussi, 20 juin 2010 (Exh. C-115).

1389 Letter from BSGR Guinea to Nassif Moussi, 20 June 2010 (Exh. C-115).

1390 [redacted]

1391 Payment confirmation signed by Ms. Touré, undated (Exh. R-33).

business and contracts, and Matinda undertakes not to contact any third parties having participated in the common enterprise and not to go to court without Pentler's consent:

> "Notre contrat de collaboration signé en 2005 est arrive à son terme. […]
>
> La société Matinda & Co. Ltd recevra la somme de 3.1 millions pour sa part dans toutes les activités menées en Guinée.
>
> Les deux sociétés Pentler Holdings Ltd. et la société Matinda & Co. Ltd., Mme Mamadie Toure, ses partenaires et conseillers s'engagent irrévocablement à assurer la confidentialité absolue sur toutes nos affaires communes menées en Guinée et à ne pas dévoiler directement ou indirectement une affaire ou des affaires communes.
>
> La société Matinda & Co. Ltd, Mme Mamadie Touré, ses partenaires et conseillers s'engagent à ne pas publier directement ou indirectement des contrats signés avec une partie tierce, à respecter l'entière responsabilité de nos activités en Guinée et de ne pas faire l'usage directement ou indirectement d'aucun document, contrat ou accord signé ou pas signé, écrit ou verbal.
>
> La société Matinda & Co. Ltd s'engage par la présente à ne pas prendre contact directement ou indirectement, verbalement ou par écrit, avec aucunes des sociétés en Guinée avec lesquelles nous avons eu des collaborations, des contrats, des accords verbaux ou écrits; de ne pas utiliser directement ou indirectement la voix [sic] de la justice sans avoir l'accord préalable écrit de la société Pentler et ses associés."[1392]

1013. The evidence also includes an agreement signed by Mr. Noy and Ms. Touré dated 8 July 2010 providing for an additional payment of USD 5 million payable in two installments on dates to be set within 48 hours:

> "Sujet a la bonne [sic] déroulement et a la bonne [sic] fonctionnement et la suite de l'opération mené [sic] par nos partenaires au projet de Simandu [sic] en Guinée, la société Paentler [sic] Holdings Ltd s'engage a [sic] payer a [sic] Mamadie Toure la somme supplémentaire de 5 millions USD payable en deux parties (chaque payement de 2.5 million USD).
>
> Les dates définitives de ces deux payements [sic] seront communiquées en maximum 48 heures après la date de signature de ce document."[1393]

1014. With reference to that latter agreement, Ms. Touré withdrew her denunciation of the 2 August 2009 Attestation on 30 July 2010:

[1392] Contract between Pentler, Matinda and Ms. Touré, undated (Exh. R-32).

[1393] Engagement de paiement de Pentler envers Mme Touré, 8 July 2010 (Exh. R-30).

> "That following negotiations led in agreement by both Parties and the Regulations of 08/07/2010, we hereby declare null and void, and with all legal consequences resulting therefrom, the document invalidating the claimed attestation of 2 August 2009 served on 8 June 2010 to BSG Resources Guinée at the request of MATINDA AND CO LIMITED SARL."[1394]

1015. Finally, there are two agreements between Pentler and Matinda/Ms. Touré dated 3 August 2010 before the Tribunal. The first one appears to set the payment dates for the two installments contemplated in the 8 July 2010 agreement, stipulating that Ms. Touré would receive USD 2.5 million two years after signing and the same amount two years after the first installment. In other words, Ms. Touré was to collect USD 5 million within four years:

> "Sujet au bon déroulement et au bon fonctionnement et la bonne suite des operations menés [sic] par Pentler et ses partenaires dans toues [sic] les activités en Guinée (commerciales, medicaments, minières etc), la société Pentler Holdings Ltd s'engage a [sic] payer a [sic] Mamadie Toure la somme supplémentaire de 5 millions USD payable en deux parties (chaque payement de 2.5 million USD). Le premier payement sera effectué 24 mois après la signature de ce document. Le deuxième payement de 2.5 millions sera effectué 24 mois après le premier payement.
>
> La société Matinda & Co. Ltd et madame Mamadie Toure s'engage [sic] par la présente de ne pas faire usage de ce document de quelque manière que ce soit directement ou indirectement et ne pas utiliser ce document contre la société Pentler et/ ou ses partenaires et/ou ses associes [sic] en Guinée ou ailleurs. Madame Mamadie Toure s'engage par la présente de prendre toutes les responsabilités sur toutes actions mené [sic] en Guinée par toute tierce partie contre Pentler et/ ou ses associées."[1395]

1016. The second document dated 3 August 2010 is similar in content to the undated agreement discussed in paragraph 1012 (Exh. R-32), except that the additional compensation of Ms. Touré and Matinda was increased from USD 3.1 million to USD 5.5 million:

> "La société Matinda & Co. recevra la somme de 5.5 millions pour sa part dans toutes les activités menées en Guinée." [1396]

1017. Having described the agreements and other documents on record, the Tribunal now turns to the evidence of payments. As seen above (see paragraph 859), there is documentary evidence in the form of wire transfers and checks showing that Ms. Touré received at least USD 5,234,391.02 between August 2009 and May 2012. Of this amount, the Respondent

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[1394] Letter from Nassif Moussi to BSGR, 30 July 2010 (Exh. C-117) (Emphasis in the original).

[1395] Accord entre Pentler et Matinda/Touré, 3 août 2010 (Exh. R-31).

[1396] Contrat Pentler/Matinda/Touré, 3 août 2010 (Exh. R-346).

traced USD 2,236,391.02 coming from Pentler directly (i.e. USD 399,940 from Messrs. Cilins and Lev Ran on 22 July and 15 August 2010) or indirectly through Adam Schiffman (i.e. USD 1,836,451.02 from Olympia Title between 11 October 2011 and 14 May 2012). Moreover, there is documentary evidence that Ms. Touré received USD 2,998,000 from Mr. Boutros, comprising USD 998,000 in August 2009 and USD 2 million in May 2010.

1018. However, on the basis of the three annotated versions of the email between Mr. Noy and Mr. Cilins examined above (see paragraphs 843-859), it appears that Ms. Touré received at least USD 9,419,200 between August 2009 and May 2012, although only USD 5,234,391.02 can be traced through wire transfers and checks.

1019. It is unclear which payments correspond to what services. For instance, the 2 August 2009 Attestation indicates without any specification that the USD 4 million correspond to the value of Ms. Touré's 5% shareholding and her assistance in securing BSGR's mining rights in Guinea and other documents are not more precise. It is similarly unclear what shareholding is referred to. Is it Ms. Touré's 5% share in Blocks 1 & 2 in accordance with the 28 February 2008 contract with Mr. Avidan (i.e. BSGR) or her 5% share in the Simandou project according to the 20 February 2006 contract with Mr. Lev Ran (i.e. Pentler)? Finally, it is unclear what services are remunerated. In other words, the Tribunal is unable to determine with a sufficient level of confidence which payments remunerated Ms. Touré for her services in securing the Blocks 1 & 2 Permits, as opposed to the North and South Simandou exploration permits, it being understood that Ms. Touré played no role in securing the Base Convention and the Zogota Mining Concession since these were issued after President Conté's death.

1020. One explanation could be that, after President Conté's death in December 2008 and her ensuing inability to influence governmental decision-making, Ms. Touré and the Claimants sought to settle their accounts and that the payments made in 2009 and 2010 referred to Ms. Touré's overall assistance between 2005 and 2008. Another could be that the payments which the Claimants directly funneled through Mr. Boutros correspond to the services contemplated in the 27 and 28 February 2008 contracts, and that the payments made through Pentler, Mr. Schiffman, and Olympia Title correspond to the contractual arrangements between Ms. Touré and Pentler.

1021. The Tribunal need not engage in speculation in this respect. It is sufficient that the facts establish that the Claimants remunerated Ms. Touré with significant amounts for her

influence over several decision-making processes leading to the grant of mining rights in favor of the Claimants, including in particular the exploration rights for Blocks 1 & 2.

1022. Finally, except for Ms. Touré's declarations,[1397] there is no evidence that Mr. Avidan gave Ms. Touré USD 1 million in cash at the time when Rio Tinto's rights to Blocks 1 & 2 were revoked or USD 50,000 in cash shortly after President Conté's death.[1398] Mr. Avidan denied having made any cash payments to Ms. Touré.[1399] In these circumstances, absent any additional evidence, the Tribunal cannot accept that these facts are proven.

Mr. Touré

1023. The Respondent alleges that the Claimants paid Ibrahima Sory Touré more than USD 800,000, directly or through intermediaries, USD 425,000 through Pentler in February 2006 and a "bonus" of USD 450,000 through BSGR Guinea in the summer of 2010.

1024. Of these allegations, the evidence shows that Mr. Touré, who was promoted Vice-President of BSGR Guinea in 2010, received a bonus of USD 450,000 in the summer of 2010, in addition to his regular salary.[1400]

Messrs. Fofana and Thiam

1025. Guinea also argues that the Claimants made payments to Messrs. Fofana and Thiam for their influence in securing the disputed mining rights.

1026. In respect of Mr. Fofana the record indicates that, on 15 December 2008, BSGR wired USD 100,000 to his account.[1401] An email from Mr. Avidan shows that the payment was for "special consulting" and that it was approved by "B.", which Mr. Tchelet confirmed referred to Beny Steinmetz.[1402] An email dated 16 December 2008 further demonstrates that

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1397 Déclaration de Mme Touré, 2 décembre 2013, paras. 28, 31 (Exh. R-35).

1398 Reply, Annex I, para. 61.

1399 Avidan (CWS-3), para. 154.

1400 [redacted]

1401 [redacted]

1402 [redacted] Tr. (Merits), Day 3, 160:18-19 (Tchelet).

Mr. Steinmetz apparently sought to "accommodate" Mr. Fofana's daughter by offering her a job at BSGR.[1403]

1027. On 5 February 2009, BSGR wired a further EUR 80,000 to Mr. Fofana.[1404] In addition, it paid Mr. Fofana's travel expenses totaling USD 26,229.48,[1405] including USD 7,125.78 for a round-trip Conakry-Washington-Paris between 10 to 21 December 2008;[1406] USD 8,017 in January 2009;[1407] USD 2,265.34 in April 2009;[1408] USD 8,347.66 in May 2009;[1409] and USD 473.48 in July 2009.[1410]

1028. In connection with Mr. Thiam, it was observed earlier that BSGR reimbursed certain travel expenses (USD 4,680.02 in April 2009 for a trip to Paris[1411] and USD 10,744.66 in November 2009 for attending the wedding of Mr. Steinmetz's daughter in Tel Aviv and for a trip to Hong Kong),[1412] claiming that it was not unusual "[t]o reimburse travel expenses for Government officials – in particular in countries where the budget is tight".[1413]

President Conté

1029. The Respondent submits that the Claimants made gifts to President Conté, in particular two Land Cruisers in 2008.[1414] However, there is insufficient evidence to show that BSGR offered any vehicles to government officials, let alone two Land Cruisers to President Conté. The record rather suggests that, if BSGR was involved in giving Land Cruisers (which is not established), they were likely meant for Ms. Touré. Indeed, Ms. Touré stated that, when the Blocks 1 & 2 applications were pending, she received two Land Cruisers from Mr. Avidan

1403 [redacted]

1404 [redacted]

1405 Rejoinder, para. 501.

1406 [redacted]

1407 [redacted]

1408 [redacted]

1409 [redacted]

1410 [redacted]

1411 [redacted]

1412 [redacted]

1413 C-PHB2, para. 75(ii).

1414 CM, para. 824; R-PHB1, para. 462, 3rd item.

on behalf of Mr. Steinmetz.[1415] President Conté allegedly told her to keep one and give the second to his children. Guinea points to a photograph in the record depicting two red berets flanking a Land Cruiser. Yet again, the picture is not sufficient proof that the vehicle was intended as a present for President Conté.[1416]

(b) Qualifications

Ms. and Mr. Touré

1030. Since the Claimants deny having retained the services of Ms. Touré, they did not attempt to justify any of her qualifications, except for stating that her alleged delivery of caterpillars was part of a legitimate business transaction. With respect to Mr. Touré, the Claimants argued that he "was bright and he had good contacts on the ground throughout Guinea in business, politics and mining".[1417] His employment had "nothing to do with the fact that he was Mamadie Touré's half-brother".[1418] Moreover, because he was Guinean he would more likely be granted a meeting with the President than a representative of a foreign mining company.[1419] Mr. Touré would often wait on behalf of Mr. Avidan for a meeting with a minister and advise him when the meeting would start.[1420] They further sought to justify his bonus in 2010 because of the conclusion of the joint venture with Vale and his promotion to Vice-President of BSGR Guinea.[1421]

1031. As seen above, it is common ground that Ms. Touré and Mr. Touré had no relevant qualifications and experience in the mining sector. Neither does the record show any other qualifications that may have been of assistance in BSGR's legitimate operations. It appears

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[1415] Déclaration de Mme Touré, 2 décembre 2013, para. 26 (Exh. R-35).

[1416] Photo d'un véhicule Land Cruiser entouré de deux « bérets rouges » de la garde présidentielle (Exh. R-460).

[1417] Reply, Annex I, para. 101(iv); ("Mr Struik introduced me to Frédéric Cilins and Ibrahima Touré, who were apparently working together at the time and had been assisting Mr Struik. Mr Touré was a journalist. He had very good contacts on the ground throughout Guinea and knew lots of people in business, politics and mining. Guinea is a very complex place for a foreigner in terms of outlook and traditions. Having Mr Touré on board, a bright Guinean who acted as an advocate for BSGR, helped us a lot") Avidan (CWS-3), para. 11.

[1418] Reply, Annex I, para. 101(i).

[1419] Reply, Annex I, para. 101(ii).

[1420] Reply, Annex I, para. 101(iii).

[1421] Reply, Annex I, para. 108.

that their proximity to President Conté and other decision-makers is the reason for their involvement in BSGR's mining activities in Guinea.

Mr. Fofana

1032. Finally, with respect to Mr. Fofana, the Claimants argue that he was not a government official when he provided consultancy work for BSGR.[1422] They further stated that it was telling that the Respondent did not put any questions to Mr. Avidan regarding Mr. Fofana's role and that therefore Mr. Avidan's statement that he provided "high level strategic advice" in 2008 remains undisputed.[1423]

1033. There is little information in the record about Mr. Fofana's qualifications. He apparently was a government official prior to 2000 and became Prime Minister of Guinea in May 2018. There is thus no evidence suggesting that he had special qualifications in the mining sector at the relevant time. Moreover, as seen below, the Claimants did not provide any information what his high-level strategic advice in 2008 consisted of.

(c) Services of payment recipients

1034. The Tribunal now turns to the question whether the recipients of the payments established in the foregoing section performed services that could support the Claimants' contention that the payments were part of legitimate business transactions.

Ms. Touré

1035. With respect to Ms. Touré, the Claimants consistently stated that they entertained no business relationship with her, that they never promised or transferred any money to her, and that she manufactured documents for the purposes of extorting money from BSGR.[1424] In other words, the Claimants do not allege that Ms. Touré rendered any services, except for the delivery of caterpillars to Mr. Boutros, although they argue that "BSGR did not know that Mamadie Touré was the supplier of the machinery, but in any event she was part of a legitimate commercial transaction".[1425]

1422 C-PHB1, para. 181.

1423 Reply, Annex I, paras. 110-111; C-PHB1, para. 182.

1424 For instance, Mr. Struik stated that "[t]here was no relationship, direct or indirect, between BSGR and Ms Touré then or at any time later". Struik (CWS-12), para. 12.

1425 Reply, Annex I, para. 75.

1036. As explained above, the evidence shows that, directly or through intermediaries, BSGR paid to Ms. Touré at least USD 5,234,391.02. It is telling that no services are alleged to justify these payments.

Mr. Touré

1037. The Claimants submitted that BSGR Guinea paid Mr. Touré a salary for his work as external relations officer and a bonus of USD 450,000 in connection with the joint venture with Vale.[1426]

1038. As was seen when discussing the payments, the Claimants failed to give a credible explanation justifying a bonus of such magnitude, which was substantially higher than those of other local employees.

Mr. Fofana

1039. The Claimants asserted that Mr. Fofana "provided high level strategic advice for a short period in 2008" and that he was paid accordingly.[1427] Mr. Tchelet also described Mr. Fofana's consultancy work as "duties related to work outside of normal geology or engineering services".[1428]

1040. It is the Claimants' further argument that they were entitled to retain the services of Mr. Fofana, since he had not held a government function since 2000. They also point out that, while Messrs. Thiam and Fofana were friends, Mr. Thiam stated that they did not engage in private business while he was in office as Minister of Mines. The Claimants also submit that Minister Nabé did not say that "Fofana exerted pressure on him", and so there is no proof of any pressure by Mr. Fofana on behalf of BSGR to obtain Blocks 1 & 2.[1429] Finally, the Claimants argue that "even if BSGR used Fofana to lobby Thiam, there is nothing illegal about that", since that is what lobbyists do.[1430]

1426 Reply, Annex I, para. 108.

1427 Reply, Annex I, para. 110; C-PHB1, para. 182; CWS-11 (Tchelet), para. 26.

1428 C-PHB1, para. 182; ("Q. What does 'special consulting' mean? A. I wouldn't have known what he meant, other than it was specifically work that he needed, different to, for example, the normal geology or engineering services; that it was an important factor for promoting the project") Tr. (Merits), Day 3, 160:8-14 (Tchelet).

1429 C-PHB1, para. 183.

1430 Reply, Annex I, para. 111.

1041. The Claimants did not provide any evidence of their allegation of "high level strategic advice", such as a contract or correspondence demonstrating the reality of such advice. Actually, Mr. Tchelet declared in oral testimony that he had in vain requested a contract to justify the payments to Mr. Fofana.[1431]

1042. Minister Nabé, who was directly involved in awarding Blocks 1 & 2 to BSGR Guinea, testified that Mr. Fofana had called him to inquire about BSGR's application for Blocks 1 & 2. On that occasion, Mr. Fofana told him that he had heard that President Conté had given instructions to Mr. Nabé.[1432]

1043. While there is no positive evidence that Mr. Fofana pressured Mr. Nabé or any other government official to favor BSGR Guinea, the Tribunal is struck by the lack of evidence of legitimate consultancy services, which is compounded by the temporal proximity between the award of Blocks 1 & 2 to BSGR Guinea on 9 December 2008 and the USD 100,000 payment to Mr. Fofana on 15 December 2008. The impression of a lack of legitimate services is reinforced by Mr. Nabé's reference to a call from Mr. Fofana, mentioning instructions of President Conté in respect of BSGR's application.

Mr. Thiam

1044. The Claimants contend that they reimbursed "legitimate travel expenses" of Mr. Thiam[1433] (and of Mr. Fofana incurred by Mr. Thiam)[1434] and that it was "standard practice for mining companies in Guinea to pay for the travel of ministers on certain occasions".[1435] They do

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1431 ("Q. Was there an agreement between BSGR and Mr Fofana? A. I was not aware of such agreement. I did request on several occasions. Q. Because in paragraph 28 of the same witness statement, the second sentence – top of the page – you write that: 'Through the audit process, it was brought to BSGR's attention that there had not been a contract in place with Mr Fofana.' A. Yes") Tr. (Merits), Day 3, 159:13-23.

1432 ("Ibrahima Kassory Fofana, qui était un ami proche et pour qui j'avais travaillé lorsqu'il était Ministres des Finances, m'avait par ailleurs appelé pour me parler du dossier. Il n'était plus au gouvernement mais restait un homme d'influence. Je me souviens qu'il m'avait demandé: 'J'ai appris que le Président t'a donné des instructions, donc où on en est?' Je lui ai répondu qu'on était en attente de présentation du dossier au Conseil des ministres. Il était surpris que le Conseil des ministres se prononce sur un permis de recherches, parce que normalement de simples permis de recherche sont décidés au niveau du ministère, mais je lui ai répondu que si le Conseil des ministres ne se prononçait pas, je n'allais rien faire") Nabé (RWS-5), para. 20.

1433 C-PHB1, para. 185.

1434 C-PHB1, para. 186.

1435 C-PHB1, para. 187.

not allege that these reimbursements were in consideration of any services or in the context of the performance of services.

1045. On the other hand, the Tribunal notes that the Respondent essentially links these payments to securing the Base Convention and the Zogota Mining Concession, not Blocks 1 & 2, except for alleging that Minister Thiam helped the Claimants maintain their rights over Blocks 1 & 2 when Rio Tinto challenged their allocation.[1436] Mr. Thiam became Minister of Mines in January 2009, i.e. after the award of Blocks 1 & 2 to BSGR Guinea in December 2008. Hence, the Tribunal is of the view that Mr. Thiam's role in respect of obtaining Blocks 1 & 2 is not relevant and that the assessment carried out above in connection with the Base Convention and the Zogota Mining Concession is sufficient.

1046. To conclude, there is no allegation, not to speak of evidence, of legitimate services performed by Ms. Touré, and there is no cogent explanation for the alleged services provided by Mr. Fofana. Similarly, the Claimants further failed to explain what services justified the payment of a USD 450,000 bonus to Mr. Touré.

(d) Due diligence

1047. The analysis carried out has already shown that the Claimants failed to engage in any meaningful due diligence with respect to Ms. and Mr. Touré. There is no indication either that they engaged in any sort of diligence with respect to Mr. Fofana or other intermediaries such as Mr. Boutros.

1048. In the context of due diligence, the Tribunal also found that the Claimants' accounting practices were deficient, notably allowing "urgent" payments without supporting documentation, not properly accounting for purchases and paying "consulting fees" without corresponding services.

(e) Witness tampering and destruction of evidence

1049. The Tribunal already addressed Mr. Cilins' travels to Florida in the spring of 2013 to meet Ms. Touré. The analysis of the facts, to which the Tribunal refers (see paragraphs 924-945 above), demonstrated that Mr. Steinmetz had sent Mr. Cilins to convince Ms. Touré to make false oral and written statements and destroy the originals of the Disputed Documents.

[1436] Rejoinder, paras. 582-588; R-PHB1, para. 471.

1050. In short, the facts evidence that BSGR was seeking to cover up how it obtained its mining rights over Blocks 1 & 2 (in addition to North and South Simandou as seen above).

(f) Influence of Ms. and Mr. Touré

1051. The Respondent alleges that Ms. and Mr. Touré's intervention was decisive in the attribution of Blocks 1 & 2 to BSGR Guinea. The Claimants deny any involvement of Ms. Touré and dispute that Mr. Touré unduly influenced the decision-making process. The record shows otherwise.

1052. The Tribunal starts by recalling that a showing of actual influence over public officials is not required under the applicable standard, and that it is sufficient for the purposes of subparagraph (c) of Article 6.1 of the ECOWAS Protocol to show an attempt of active influence peddling. As it will become clear through the following analysis, Ms. Touré and her half-brother actively influenced the decision-making process leading to the issuance the BSGR Guinea's exploration permits over Blocks 1 & 2.

1053. Mr. Kanté was Minister of Mines between March 2007 and August 2008. The record shows that he consistently refused to entertain BSGR's requests to obtain mining rights over Blocks 1 & 2 and it appears that he was sacked in August 2008 because of that resistance. He explained to Messrs. Avidan and Touré in August 2007 that Rio Tinto had mining rights over these areas and that BSGR had not evinced the financial and technical capacity to develop the mining areas over which they already had mining rights.[1437] Mr. Kanté was then summoned to a meeting with the President in September 2007. Tellingly, Messrs. Avidan and Touré were already there when he arrived and stayed after he left.[1438] He repeated to President Conté what he had told Messrs. Avidan and Touré the month before.[1439] Some time later, the two gentlemen showed up in Mr. Kanté's office, acting as if President Conté

[1437] Kanté (RWS-4), paras. 16-19.

[1438] Mr Ahmed Kante Declaration, 8 July 2015, p. 3 (Exh. C-81).

[1439] Kanté (RWS-4), para. 25.

had given clear instructions to grant Blocks 1 & 2 to BSGR,[1440] but Mr. Kanté reiterated that he had received no such instructions.[1441]

1054. The record contains an email sent on 18 September 2007 by Mr. Avidan to Messrs. Steinmetz, Struik and Saada. It mentions a meeting with the "Minister of mines" concerning BSGR's requests to have "Aredor and blocks 1 and 2", and includes a section entitled Blocks 1 and 2, which reflects Mr. Avidan's understanding that President Conté would take away Blocks 1 & 2 from Rio Tinto in spite of Mr. Kanté's reluctance:

> "Since we are talking about taking them away from a huge company like Rio Tinto, they will need to have a real argument to hand it over to us. Therefore the minister suggested that we prepare a presentation of all the investments that we have made and all the work that we have done over the past 12 months. *Soon after this presentation, the President will take it away from Rio Tinto who are not doing anything in those two blocks, and will hand it over to BSGR*."[1442]

1055. It is further noteworthy that Mr. Avidan conceded at the Merits Hearing that he complained about Minister Kanté's reluctance to President Conté:

> "I went to the President and I complained that – I went to the President and I complained to him […] I smuggled the fact that Mr Kanté was not happy to give us the block, and he told me, 'Okay, we will organize sometime a meeting with him'. And he really, really, in one of the meetings, called him – I think it was a week afterwards, and he was quite angry on him, I would say."[1443]

[1440] ("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") Kanté (RWS-4), para 28; ("Les gens de BSGR me disaient: voilà, nous sommes là, que faut-il faire à present ? Ils me parlaient comme si j'étais competent, ou si j'avais reçu des instructions, sur la suite à donner à leur demande sur les concessions de Simandou") Mr Ahmed Kanté Declaration, 8 July 2015, p. 3 (Exh. C-81).

[1441] Kanté (RWS-4), para. 28.

[1442] [redacted] Emphasis added by the Tribunal).

[1443] Tr. (Merits), Day 9, 190:9-10 and 20-25 (Avidan).

1056. Most importantly, the 18 September 2007 email ends with a reference to "pushing" "key people in the country", including the President, Ms. Touré, and Prime Minister Kouyaté, to "reduce […] problems":

> "In the next few days I am going to meet some of the *key people in the country including the Prime Minister, the Lady and maybe the President to push them forward so as to reduce some technical and administrative problems*."[1444]

1057. Mr. Avidan's statement at the Merits Hearing that he meant to push Ms. Touré *not* to intervene so as not to *create* problems makes no sense in the context. The email is clear: Ms. Touré was used to "reduce some technical and administrative problems". In other words, the Claimants were relying on Ms. Touré's influence to obtain Blocks 1 & 2.

1058. Mr. Kanté was called to another meeting with President Conté in December 2007 to discuss BSGR's file. This meeting was also attended by Prime Minister Kouyaté and a "lady", who turned out to be Ms. Touré (see below paragraphs 1060-1061). According to Mr. Kanté, he reiterated to the President that BSGR was seeking mining rights over areas attributed to Rio Tinto, upon which President Conté told the "lady": "*je t'avais dit de ne pas te mêler de ces problèmes de mines*".[1445]

1059. Although this does not suggest that President Conté issued instructions to favor BSGR, it does demonstrate that Ms. Touré was involved in BSGR's quest for Blocks 1 & 2 and that she discussed the issue with her husband.

1060. Moreover, Mr. Kanté testified that the following day he was called to another meeting with Prime Minister Kouyaté that was also attended by Ms. Touré.[1446] According to Mr. Kanté, the Prime Minister told him that the lady was the fourth wife of President Conté and that a solution should be found to accommodate her: "we have to find a solution to this problem, this is the President's wife".[1447] Mr. Kanté again refused upon which Mr. Kouyaté apparently

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1444 [redacted] Emphasis added by the Tribunal).

1445 Kanté (RWS-4), para. 33.

1446 Kanté (RWS-4), para. 35.

1447 Kanté (RWS-4), para. 35; ("Il me dit: tu reconnais cette dame, c'est celle qui était hier avec le Président. En effet, c'était elle. Le Premier Ministre me dit: il faut trouver une solution à ce problème, c'est la femme du Président. Le problème dont me parle le Premier Ministre, c'est cette demande de BSGR d'obtenir les concession de Simandou") Mr Ahmed Kante Declaration, 8 July 2015, p. 5 (Exh. C-81) (Translated by the Claimant).

told Ms. Touré: “tu vois, c’est ce que je t’avais dit de lui”, which showed that they had previously talked about his resistance.[1448]

1061. This event again proves that Ms. Touré was directly involved in lobbying Prime Minister Kouyaté to convince Minister Kanté to award Blocks 1 & 2 to BSGR. [redacted][1449]

1062. [redacted][1450]

1063. [redacted][1451]

1064. Moving forward, Ms. Touré stated that, following the conclusion of the 27 and 28 February 2008 contracts, she organized a meeting between President Conté and Messrs. Steinmetz and Struik in April 2008 in Dubreka. [redacted][1452] While Mr. Struik denied attending a meeting with President Conté in the presence of Mr. Steinmetz, Mr. Steinmetz confirmed that “sometime after February 2008” he met with

[1448] Kanté (RWS-4), para. 37.

[1449] Mr Ahmed Kanté Declaration, 8 July 2015, p. 5 (Exh. C-81) (Translated by the Claimant).

[1450] [redacted]

[1451] [redacted]

[1452] [redacted]

President Conté,[1453] who told him that he "was keen that we replicate the work on Zogota in blocks 1 and 2".[1454]

1065. Ms. Touré added that Mr. Steinmetz informed President Conté that he wanted to develop Blocks 1 & 2 and offered the President a diamond-incrusted miniature car as well as some money. President Conté refused the money, but responded that Ms. Touré was there to help BSGR.[1455]

1066. Apparently, a second meeting between President Conté and Mr. Steinmetz was held at the Presidential Palace in April 2008 to discuss BSGR's activities. Mr. Avidan confirmed that he attended that meeting and that Ms. Touré was also present.[1456] According to Ms. Touré, she asked President Conté to give Blocks 1 & 2 to BSGR, which prompted the President to direct Mr. Mamady Sam Soumah, the Secretary-General of the Presidency, to investigate Rio Tinto's mining rights.[1457] Although Mr. Avidan denies any active involvement by Ms. Touré at that meeting, he confirmed that President Conté called Mr. Soumah and instructed him to review Rio Tinto's mining rights.[1458] Ms. Touré mentioned that Mr. Soumah proposed to divide the four blocks between four mining companies, but that President Conté told him to divide them between BSGR and Rio Tinto.[1459]

1067. Mr. Avidan also denies that Ms. Touré organized a follow-up meeting between Mr. Soumah and Mr. Avidan.[1460] However, Mr. Avidan confirms that he had such a follow-up meeting with Mr. Soumah and that he was advised that "the government was going to take Rio Tinto's rights away".[1461]

1453 Steinmetz (CWS-1), para. 20.

1454 Steinmetz (CWS-1), para. 20.

1455 Déclaration de Mme Touré, 2 décembre 2013, para. 23 (Exh. R-35).

1456 Avidan (CWS-3), para. 125; Tr. (Merits), Day 9, 96:11-21 (Avidan).

1457 Déclaration de Mme Touré, 2 décembre 2013, paras. 24-25 (Exh. R-35); Witness Evidence of Mamadie Touré before the Swiss Prosecutor, 6 July 2017, p. 19 (Exh. C-364).

1458 Avidan (CWS-3), para. 125.

1459 Déclaration de Mme Touré, 2 décembre 2013, para. 25 (Exh. R-35).

1460 Avidan (CWS-3), para. 126.

1461 Avidan (CWS-3), para. 125.

1068. Indeed, on 22 May 2008, Mr. Soumah sent a complaint (*notification de griefs*) to Rio Tinto writing that its mining concession was stained with irregularities and would be withdrawn.[1462] Asked about this letter at the Merits Hearing, Mr. Kanté commented that the action of the President's Secretary-General was not "normal", but that they were not "in a normal environment", and short-circuited the prerogatives of the Minister of Mines:

> "THE PRESIDENT: […] The Secretary General of the Presidency writes here a letter to Simfer [i.e. Rio Tinto]. Are you aware of the existence of this letter?
>
> A. I think I have seen it before yes.
>
> THE PRESIDENT: This was during your period as Minister of Mines, 22nd May 2008?
>
> A. Yes.
>
> THE PRESIDENT: A letter mentioning the subject of mining concessions. Does it seem normal to you that the Secretary General of the Presidency should be writing directly to a mining company?
>
> A. No, but you see, in an environment where there were so many things that were not normal, the fact that a representative of a company should appeal directly to the head of state – we were not in a normal environment."[1463]

1069. On 28 July 2008, President Conté suspended Rio Tinto's mining rights over Blocks 1 to 4[1464] and, on 5 August 2008, BSGR Guinea formally applied for Blocks 1 to 3.[1465] The application was sent to the Minister of Mines and copied to the Prime Minister and the Secretary-General of the Presidency. Minister Kanté was dismissed shortly thereafter and replaced by Minister Nabé. Mr. Nabé confirmed that it was "not at all common practice" to copy the Secretary-General of the Presidency on mining applications and added that it was "characteristic" of the presidential involvement:

[1462] ("Pour toutes ces raisons, l'Autorité a décidé du retrait de ce Décret de Concession minière pour cause d'illégalité tout en vous rassurant qu'il vous en sera délivré conformément à la Loi lorsque les termes de votre Convention Minière auront été pertinemment accordés aux prescriptions de notre Code Minier que vous déclarez pourtant respecter en tout point") Lettre du SG Soumah à Simfer/Rio Tinto, 22 mai 2008 (Exh. R-228).

[1463] Tr. (Merits), Day 7, 168:7-22 (Kanté).

[1464] Decree No. D/2008/041/PRG/SGG, 28 July 2008 (Exh. C-92).

[1465] Letter from Asher Avidan of BSGR to the Minister of Mines, Louncény Nabé, 5 August 2008 (Exh. C-98).

> "Q. […] Looking at the bottom of the page you see a mention that says "PM": that probably stands for Prime Minister?
>
> A. Yes.
>
> Q. Then we see "MSGPR". Can you identify "MSGPR"?
>
> A. Minister Secretary General of the Presidency of the Republic.
>
> Q. In your experience, would it be usual for a mining company to send its application for a research permit to the Prime Minister and to the Minister Secretary General of the Presidency?
>
> A. No. It's not at all common practice.
>
> Q. If this is not common practice, what is your opinion of these indications on the letter?
>
> A. It is characteristic of the presidential determination expressed in this case."[1466]

1070. Finally, Minister Nabé also confirmed that Ms. Touré and her half-brother directly intervened on behalf of BSGR to influence his decision-making.[1467] For instance, following his appointment, Mr. Touré introduced himself as the brother of the President's wife and sought to take steps towards the granting of Blocks 1 & 2 to BSGR.[1468] [redacted][1469]

[1466] Tr. (Merits), Day 8, 190:6-20 (Nabé).

[1467] ("A. […] I'm just telling you that a lot of people mentioned it to me and knew Mamadie Touré was interfering in favour of BSGR. Q. What type of intervention in favour of BSGR? What type of intervention are you talking about? A. I told you earlier: as soon as I was appointed, her brother came to visit me in her name, and then I was called to visit the President and she was sitting next to him. This is blatant") Tr. (Merits), Day 8, 138:12-20 (Nabé).

[1468] ("Je savais, comme tout le monde, que Mamadie Touré était l'épouse du Président. Je savais aussi qu'elle avait un frère qui s'appelait Ibrahima Sory Touré. Il était déjà venu me voir au ministère des Mines pour me parler de BSGR et faisait des démarches pour qu'on attribue à cette société des permis sur Simandou. Il se présentait en tant que frère de l'épouse du Président pour ses demandes") Nabé (RWS-5), para. 7. See also footnote 1467.

[1469] [redacted]

1071. More specifically, Minister Nabé testified that Mr. Touré asked him "to use my power, to help BSGR get those blocks".[1470] Seeing that Minister Nabé was "not enthusiastic", Mr. Touré referred to instructions that the President had given to the Minister:

> "And what's more, he knew the President was headed in this direction. He knew it, because he told me very clearly one day, "The President said to Madame that he gave you instructions through the Prime Minister, and the Prime Minister also says that he gave you instructions. So Mr Touré knew that his sister was doing this."[1471]

1072. To conclude with Ms. Touré, the evidence outlined above abundantly demonstrates that she was actively seeking to influence President Conté and high-level government officials on behalf of BSGR. The evidence further shows that Ms. Touré sent her half-brother, Mr. Touré, on her behalf to exert pressure on government officials so that BSGR would be awarded Blocks 1 & 2.

1073. Turning now to Mr. Touré, it is undisputable that he is the half-brother of Ms. Touré. Mr. Avidan conceded that Mr. Touré told him so "[s]hortly after [his] arrival in Conakry" mid-2006 and added that she was an "influential lady"[1472] and that Mr. Avidan should "go and see her"[1473] to "make sure that she was happy".[1474] It is thus beyond doubt that the Claimants were aware of this relationship since 2006.[1475]

1074. It emerges from the record that BSGR used Mr. Touré's family connection to Ms. Touré to gain access to the President, and that Mr. Touré made use of his proximity to the Presidency.

1075. First, the Claimants gave no plausible explanation for hiring Mr. Touré. Mr. Avidan's testimony on this topic lacks consistency. Mr. Avidan said that Mr. Touré arranged meetings with the Prime Minister and the President,[1476] and that "it was more effective for me to take a Guinean national to the government offices when arranging meetings".[1477] He also

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1470 Tr. (Merits), Day 8, 139:14-15 (Nabé).

1471 Tr. (Merits), Day 8, 139:21-140:2 (Nabé).

1472 Avidan (CWS-3), para. 109.

1473 Avidan (CWS-3), para. 109.

1474 Avidan (CWS-3), para. 114.

1475 Avidan (CWS-3), para. 109.

1476 Avidan (CWS-3), para. 132.

1477 Avidan (CWS-3), para. 45.

mentioned that Mr. Touré "knew the country much better than me",[1478] including "the politics, the tradition".[1479] However, when asked whether Mr. Touré had "good contacts in politics and in business", Mr. Avidan answered "[n]o, I don't think so".[1480] He added that Mr. Touré did not have contacts with "the people that we were in touch with in the ministry" and that he only knew "very low-key" bureaucrats in the Ministry of Mines.[1481] Asked further if the essence of his role was "just setting up meetings with low-level people", Mr. Avidan agreed and added that he would also talk to the press and travel to villages to increase the external relations of BSGR.[1482] At the same time, he testified that Mr. Touré would accompany him to high-level ministry meetings "say 80% of the time", and that when he would visit the President, Mr. Touré "was with me, *of course*".[1483] In fact, various ministers confirmed that Mr. Touré attended meetings with Mr. Avidan.[1484] If Mr. Touré's task was to wait in the corridors of ministries to let Mr. Avidan know when a minister was available, as Mr. Avidan describes it,[1485] one fails to see why Mr. Touré would then participate in such high-level meetings.

1076. Second, while there may indeed be good reasons for a foreign investor to seek local expertise, Mr. Touré could offer no such expertise. It is uncontroverted that he was a journalist and had "no mining background", as Mr. Struik conceded.[1486] Neither did he have experience interacting with government officials.

1077. Third, the convergent testimonies of the Respondent's witnesses corroborate that Mr. Touré was making use of his family relationships and proximity to the President as a means to put pressure on relevant decision-makers. Minister Nabé gave evidence that Mr. Touré presented himself as Ms. Touré's brother.[1487] According to Minister Souaré, it was well-

[1478] Tr. (Merits), Day 9, 68:8-9 (Avidan).

[1479] Tr. (Merits), Day 9, 70:4 (Avidan).

[1480] Tr. (Merits), Day 9, 68:17-18 (Avidan).

[1481] Tr. (Merits), Day 9, 69:4-70:2 (Avidan).

[1482] Tr. (Merits), Day 9, 70:6-15 (Avidan).

[1483] Tr. (Merits), Day 9, 71:7-12 (Avidan) (Emphasis added by the Tribunal).

[1484] See, for instance: Kanté (RWS-4), paras. 13, 27; Sylla (RWS-1), para. 19.

[1485] Avidan (CWS-3), para. 45.

[1486] Struik (CWS-2), para. 17.

[1487] Nabé (RWS-5), para. 7.

known that Mr. Touré was acting on behalf of his half-sister.[1488] Minister Sylla similarly stated that Mr. Touré told him that Ms. Touré was using her influence to help BSGR gaining access to the President.[1489]

1078. For all these reasons, there is no doubt in the Tribunal's mind, that BSGR retained the services of Mr. Touré because of his relationship with Ms. Touré in order to facilitate access to the President and that Mr. Touré took advantage of his closeness to Ms. Touré to pressure decision-makers. Minister Nabé confirmed that this was also the case with respect to Blocks 1 & 2.[1490]

(g) Conclusion

1079. There is overwhelming evidence that the Claimants obtained their mining rights for Blocks 1 and 2 through corrupt practices. Since 2005 they were interested in mining Blocks 1 & 2, over which Rio Tinto had existing rights. While they accepted the North and South Simandou exploration permits in 2006 as the best available alternative given the circumstances, they devised a scheme to have Guinea through President Conté strip Blocks 1 & 2 away from Rio Tinto and award them to themselves. Ms. Touré and her half-brother were key players in this endeavor, since they had direct access to the president and top governmental officials.

1080. There is direct evidence that the Claimants bought the influence that Ms. Touré had over her husband and other government officials. Mr. Avidan concluded with her two contracts of corruption on 27 and 28 February 2008, the authenticity of which has been established in these proceedings. The first contract provided for the payment of USD 4 million in exchange for Ms. Touré's assistance in securing the Blocks 1 & 2 Permits (USD 2 million for Ms. Touré via Matinda and USD 2 million to be distributed to persons of goodwill). BSGR Guinea committed in the second contract to grant her a 5% share in Blocks 1 & 2. It is also established through wire transfers and checks that the Claimants paid Ms. Touré at least USD 5.2 million between 2009 and May 2012 (other documents evince that she received

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1488 Souaré (RWS-2), paras. 15, 27.

1489 ("Il était connu que Mamadie Touré usait de son influence pour certaines sociétés et notamment que BSGR avait ses entrées au palais grâce à elle. Je l'ai appris directement de son demi-frère, Ibrahima Sory Touré. Il m'a expliqué quand je l'ai rencontré que BSGR avait le soutien de Mamadie Touré. J'ai appris aussi qu'elle avait exercé des pressions sur mon prédécesseur, Ahmed Tidiane Souaré, pour qu'il attribue des droits à BSGR. Plusieurs cadres qui travaillaient à la Présidence me l'ont dit") Sylla (RWS-1), para. 15.

1490 Nabé (RWS-5), paras. 8-9, 17.

USD 9,419,200 in that period). As discussed above (see paragraphs 843-859 and 1018-1019), the evidence shows that Ms. Touré received from BSGR (directly or indirectly) at least USD 9,419,200 between August 2009 and May 2012, of which USD 5,234,391.02 can be traced through wire transfers and checks, for her services in securing permits for North and South Simandou, as well as Blocks 1 & 2.

1081. The record also shows that Ms. Touré actually exerted her influence over government officials, in particular her husband, and that the coveted mining rights were ultimately awarded to BSGR Guinea on 9 December 2008. Ms. Touré was instrumental in setting up at least one meeting between the President and Mr. Steinmetz after February 2008 to discuss Blocks 1 & 2. As a result, the President instructed his Secretary-General, Mr. Soumah, to short-circuit the Ministry of Mines and to investigate and ultimately take away Rio Tinto's mining rights. Ms. Touré, just like her half-brother, were also instrumental in setting up meetings with the Ministers of Mine, Messrs. Kanté and Nabé, and there is reason to believe, although there is no clear evidence, that they may have played a role in obtaining Mr. Kanté's dismissal when he persisted in refusing to grant Blocks 1 & 2 to the Claimants.

1082. The Claimants also secured the influence that Mr. Touré through his half-sister could yield over government officials. In addition to his salary, Mr. Touré received in 2010 a bonus of USD 450,000, which amount bears no proportion to the bonuses paid to other local employees of BSGR.

1083. Additional factors buttress the fact of corruption. The Claimants and some of their associates went to extraordinary lengths to cover up the corruption practices, using intermediaries to bribe third parties or secure their influence, falsifying invoices, using improper accounting techniques, thus rendering payments untraceable, tampering with evidence, and making statements even before this Tribunal contrary to the facts with respect to the authenticity of key documents.

1084. For the sake of completeness, there is proof that Mr. Fofana received money for unidentified consulting services, but there is insufficient evidence in the record that he sought to influence or pressure decision-makers. Thus, while Mr. Fofana's involvement and remuneration raise red flags, it is not established that his role exceeded regular lobbying activities.

1085. To conclude on the claims, the foregoing review of the facts reveals that all the mining rights from which this dispute arises, i.e. the North and South Simandou exploration permits, the

Base Convention, the Zogota Mining Concession, and the Blocks 1 & 2 Permits, were acquired through corrupt practices. As discussed earlier, the applicable legal norms proscribe corruption. Guinean law sanctions active bribery and trading of influence. Similarly, Article 6.1 of the ECOWAS Protocol, which the Respondent ratified on 20 December 2002, adopts a broad definition of corruption encompassing active bribery and trading of influence, including the mere attempt to exercise influence. Moreover, international public policy prohibits not only active bribery, but also trading of influence to the extent that such influence is exercised to obtain an undue advantage from a public official. In application of these norms and line with other arbitral decisions, the Tribunal held earlier that claims arising from an investment made through corrupt practices were inadmissible. Since all the claims in these proceedings derive from mining rights secured through corrupt practices, they must be declared inadmissible.

1086. In light of this conclusion, the Tribunal must address the counterclaims.

D. Counterclaims

1. Parties' positions

1087. Relying on Article 46 of the ICSID Convention and Article 40 of the Arbitration Rules,[1491] the Respondent requests that the Tribunal declare the Claimants liable for the economic and moral damages it suffered as a consequence of the Claimants' corrupt dealings to obtain their mining rights.[1492] The Respondent further requests that the Tribunal order the Claimants to provide compensation for the moral damages caused by the Claimants' false public statements.[1493]

1088. According to the Respondent, the Claimants' implementation of a "complex scheme of corruption" to obtain their mining rights constitutes a gross violation of Guinean law triggering the Claimants' liability under Article 17 of the 1995 Mining Code and the Base Convention.[1494] The corrupt dealings by BSGR Guernsey and BSGR Guinea deprived Guinea of the opportunity to develop the mining areas.[1495] In addition, Guinea had to expend

[1491] CM, paras. 1129-1131.

[1492] CM, para. 1126.

[1493] CM, para. 1126.

[1494] CM, paras. 1134-1138.

[1495] CM, para. 1141.

significant amounts to uncover the scheme. Finally, the "large scale corruption" undertaken by the Claimants and their "unfounded and untruthful declarations" in the media, including by having recourse to fake emails, about Guinea's alleged attempts to extort money from the Claimants, has tarnished Guinea's reputation.[1496]

1089. The Claimants respond that the counterclaims are "completely exaggerated and unsubstantiated".[1497] For them, the Respondent failed to provide a legal basis to claim moral or economic damages.[1498] In particular, moral damages are only awarded in exceptional circumstances, none of which are present here.[1499] Finally, the Claimants argue that the counterclaims cannot be pursued against BSGR, i.e. Claimant 1, because of the latter's placement under joint administration.

1090. More specifically, the Claimants submit that damages claimed result from Guinea's "own failure to develop its local iron ore industry and the corruption that has been rife in Guinea for decades",[1500] a state of affairs for which the Claimants cannot be held responsible.[1501] Relying on Mr. Ferreira, the Claimants argue that the Simandou project is not a "viable project".[1502] This is demonstrated, for instance, by the fact that Rio Tinto failed to develop Blocks 1 to 4 between 1997 and 2008.[1503] In addition, the Claimants had no involvement in Guinea's decision to withdraw Rio Tinto's mining rights. In the end, Guinea's predicament is due to the fact that President Condé revoked the Claimants' mining rights for "corrupt reasons", which in turn caused "the delays that resulted in the current situation".[1504] Therefore, the Respondent cannot complain about its difficulties in attracting potential investors.[1505]

1091. Furthermore, the Claimants argue that Guinea must bear the costs of investigating its own allegations, especially since it "created the allegations of corruptions [sic] against BSGR to

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1496 CM, para. 1152-1155 (Translated from the French).

1497 Reply, para. 467.

1498 Reply, para. 494.

1499 Reply, paras. 495-496.

1500 Reply, para. 467.

1501 Reply, para. 472.

1502 Reply, para. 474.

1503 Reply, para. 478.

1504 Reply, para. 482.

1505 Reply, para. 484.

mask the corrupt reasons behind President Condé's decision to cancel this investment".[1506] They also claim that they are not responsible for Guinea's tarnished image, in particular since corruption has been rampant in the country for 50 years.[1507] Finally, the Claimants deny having disseminated "untrue information".[1508]

2. Discussion

1092. The Tribunal will first address two preliminary issues, namely its jurisdiction over the counterclaims (a) and the effect of the placement of BSGR in administration under Guernsey law (b). Thereafter, if appropriate, it will rule on the admissibility (c) and merits of the counterclaims (d).

a. Jurisdiction

1093. Article 46 of the ICSID Convention reads in relevant part as follows:

> "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any […] counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

1094. Similarly, ICSID Arbitration Rule 40(1) provides in relevant part as follows:

> "Except as the parties otherwise agree, a party may present [a] counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of consent of the parties and is otherwise within the jurisdiction of the Centre."

1095. The Claimants do not dispute – and rightly so – that these requirements are met. The Tribunal agrees that the counterclaims are within the jurisdiction of the Centre as circumscribed by Article 25 of the ICSID Convention and discussed in paragraphs 285 to 290 above and that it fulfills the connexity requirement ("arising directly out of the subject-matter of the dispute"). This conclusion is subject to the situation that results from BSGR's receivership and is addressed next.

[1506] Reply, para. 486.

[1507] Reply, paras. 487-488.

[1508] Reply, para. 493.

b. Receivership of BSGR

1096. On 7 March 2018, the Claimants notified the Tribunal and the Respondent that, by court order dated 6 March 2018 of the Royal Court of Guernsey, BSGR (i.e. Claimant 1) had been placed under the joint administration of Malcolm Cohen (BDO LLP London) and William Callewaert (BDO Limited Guernsey) (the "Administrators").[1509] On 12 March 2018, the Tribunal requested that the Administrators provide their views on the status of BSGR as a party to the arbitration.

1097. On 19 March 2018, the Administrators stated that it was in the best interests of BSGR that the arbitration be continued by BSGR, but that a statutory moratorium under Guernsey law entailed that counterclaims could not be commenced against a company in administration. Two days later, they clarified that this rule also applied to the continuation of a counterclaim without the consent of the Administrators and added that they did not give their consent.

1098. On 22 March 2018, the Tribunal informed the Parties that Claimant 1 would henceforth be referred to "BSGR (In Administration)". It further took note that the Administrators consented to BSGR pursuing the arbitration, but did not agree with the continuation of the proceedings in relation to the counterclaims.

1099. On 17 April 2018, the Respondent requested the Tribunal to determine that the placement under administration of Claimant 1 had no impact on the continuation of the counterclaims. It essentially argued that Guernsey law had no extraterritorial effects and that there was no justification for staying the counterclaims against BSGR.

1100. It is undisputed that the placement of BSGR under administration has no effect on the counterclaims asserted against BSGR Guernsey and BSGR Guinea (i.e. Claimants 2 and 3). The Administrators confirmed so expressly when stating that "the administration proceedings over the Company [i.e. BSGR] have no direct effect on the status of its subsidiaries, including BSG Resources (Guinea) Limited and BSG Resources (Guinea) Sarl, which continue to have the ability to participate in the arbitration and whose corporate governance remains unchanged".[1510]

1101. Accordingly, the only issue to be resolved is whether the Administrators' missing consent has any effect on the Tribunal's jurisdiction over BSGR or on the admissibility of the

[1509] Letter of 7 March 2018 by the Claimants to the Tribunal.

[1510] Letter of 19 March 2018 from the Administrators to the Tribunal, p. 2.

counterclaims as they are directed against BSGR.

1102. As the analysis below will show, the Tribunal regards the counterclaims as inadmissible. Therefore, it can dispense with assessing the effect on jurisdiction of the Administrators' missing consent.

c. Admissibility of the counterclaims

1103. The counterclaims seek relief for the harm caused to the State by the Claimants' corrupt practices. The legal framework discussed in connection with the admissibility of the claims is thus equally relevant in the present context. Hence, the Tribunal refers to its developments dealing with Guinean and international law governing corruption. In respect of the facts underlying the counterclaims, it recalls that passive corruption as well as passive trading of influence are prohibited as a matter of Guinean and international law. Indeed, Articles 192 and 195 of the Guinean Criminal Code outlaw, respectively, passive corruption and passive trading of influence. Moreover, the broad definition of corruption contained Article 6.1 of the ECOWAS Protocol encompasses active *and* passive bribery and trading of influence.

1104. It goes without saying that the inadmissibility of claims does not automatically lead to a finding of inadmissibility of counterclaims. However, here the harm caused by the Claimants' actions would not have occurred if the Guinean state officials in charge of making the controversial decisions or persons close to them had not been on the receiving end of the corruption scheme. Had they resisted the corruption attempts, BSGR's mining applications would have been processed legally without undue influence, and the damage for which the counterclaims seek reparation would never have been inflicted.

1105. One might object that the relevant government officials acted *ultra vires* and thus their acts cannot be attributed to the State. That objection could not be sustained. As a matter of international law, the conduct of State officials is attributable to the State, even if these officials act *ultra vires.* Article 7 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which reflects the current state of international customary law, so provides:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act

> of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*."[1511]

1106. It results from the foregoing discussion that President Conté acted in favor of BSGR under the influence of his wife who was paid to exercise that influence. Specifically, with respect to the North and South Simandou exploration licenses, President Conté accepted that members of his family, i.e. Ms. Touré and her half-brother, be paid for the influence they exerted over the decision-making process leading to the award of the exploration rights. He also pressured Ministers Kanté and Nabé to award to BSGR the licenses for Blocks 1 & 2, being aware that the Claimants would remunerate his wife. In addition, Minister Thiam accepted bribes from the Claimants to assist in securing the Base Convention and the Zogota Mining Concession. In other words, had President Conté and inister Thiam acted lawfully and refused the favors which they (or members of his family in respect of the former) were offered in exchange for facilitating the grant of mining rights, the counterclaims would never have been brought.

1107. When assisting the Claimants in their unlawful enterprise, President Conté and Mr. Thiam acted in their respective capacities of head of State and minister. Even if they exceeded their powers, their conduct is thus attributable to Guinea.

1108. This state of affairs is aggravated by a number of other elements. Minister Kanté was demoted in August 2008 at the time of the Claimants' attempts to be awarded rights over Blocks 1 & 2. Although there is no direct evidence that Mr. Kanté was demoted because of his opposition to BSGR,[1512] it is plausible that he was dismissed because he was resisting President Conté's pressure for him to grant Blocks 1 & 2 to the Claimants. Mr. Kanté stated that he was the only minister who was removed in August 2008 and he believed that it was because of his "reputation of incorruptible".[1513] There is indeed evidence that Minister Kanté repeatedly opposed BSGR's attempts to obtain Blocks 1 & 2. It is also established that, at least Mr. Avidan, who considered himself to have the "ear of the President"[1514] was very

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[1511] ILC, Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001 (Emphasis added by the Tribunal).

[1512] For instance, his successor Minister Nabé testified that he had no idea why Mr. Kanté had been dismissed. Tr. (Merits), Day 8, 120:19-25 (Nabé).

[1513] Kanté (RWS-4), para. 43.

[1514] Tr. (Merits), Day 9, 191:9-11 (Avidan).

displeased with Mr. Kanté.[1515] In fact, Mr. Avidan testified that he personally complained to President Conté about Mr. Kanté's intransigeance:

> "Yes. I went to the President and I complained that – I went to the President and I complained to him. […] And in one stage I told him – you know, I smuggled the fact that Mr Kanté was not happy to give us the block, and he told me, "Okay, we will organize sometime a meeting with him". And he really, really, in one of the meetings, called him – I think it was a week afterwards, and he was quite angry on him, I would say."[1516]

1109. Another aggravating circumstance is that Guinea did not initiate criminal proceedings against most persons implicated in BSGR's corrupt dealings and in particular not against government officials. For instance, the Respondent alleged that the Claimants bought the influence of Mr. Fofana to pressure Minister Nabé to grant Blocks 1 & 2. There is no indication that Guinea ever opened a criminal investigation into Mr. Fofana's conduct, who became Prime Minister in May 2018. There is no mention either of investigations in Guinea against Messrs. Thiam and Soumah. The Tribunal has not been made aware either of any proceedings initiated against Ms. Touré in Guinea, although the Tribunal understands that Guinea assisted Ms. Touré to cooperate in criminal proceedings in Switzerland and the United States. This lack of action against corrupt government agents and others close to them is particularly troublesome knowing that, as the Respondent concedes,[1517] corruption was pervasive at the highest levels of the Guinean government for decades.

1110. To conclude, President Conté and Minister Thiam acted unlawfully by accepting favors (or letting family members do so) in consideration for exercising their influence over the attribution of mining rights to BSGR. Their conduct is proscribed under Articles 192 and 195 of the Guinean Criminal Code, as well as Article 6.1 of the ECOWAS Protocol. The Tribunal further notes that the Respondent concedes that general principles of international law, such as *nemo auditur propriam turpitudinem allegans*, *ex dolo malo non oritur action*, or *ex turpi causa non oritur actio*, which all bar claims resulting out of the Claimant's own wrongful acts, aim at sanctioning fraudulent or deceitful conduct and render claims inadmissible.[1518] In application of these legal norms and considering the facts at issue, the counterclaims must

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1515 [redacted]

1516 Tr. (Merits), Day 9, 190:9-10 and 20-25 (Avidan).

1517 CM, paras. 49, 51, 853-856; Duplique, paras. 611-614.

1518 CM, paras. 921-923.

also be held inadmissible.

E. Costs

1. Parties' positions

1111. The Claimants request that the Respondent pay the ICSID costs in the amount of USD 2,635,000, and their own legal fees and costs in the amount of USD 7,270,532.78, for a total amount of USD 9,905,532.78.[1519]

1112. The Respondent requests that the Claimants bear the entirety of arbitration costs and that they reimburse the Respondent's fees and expenses.[1520] The Respondent incurred legal fees in the amount of USD 6,512,020.39 (including a success fee of USD 1,302,404.08), expenses in the amount of USD 170,005.77, in addition to advances for ICSID fees in the amount of USD 927,500, for a total amount of USD 7,609,526.16.[1521]

1113. The Claimants argue that the Respondent is not entitled to a success fee, since such success fees do not qualify as reasonable costs incurred in the arbitration under Article 28 of the Arbitration Rules.[1522] According to them, Guinea took the risk to pay the success fee and this risk should not be shifted to the Claimants.[1523] At any rate, the Claimants submit that the amount of the success fee is unreasonable.[1524] Finally, the Claimants note that Guinea should at least have disclosed the basis for its claim and the content of the private fee arrangement.[1525]

1114. The Respondent explains that counsel accepted to charge a reduced rate of legal fees and that the success fee arrangement constituted an "alternative fee arrangement" destined to compensate counsel for non-billed fees.[1526] The Respondent argues that success fees to

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[1519] Memorial, para. 431(xi); C-PHB1, para. 370(i); Claimants' Statement of Costs, para. 2; Claimants' comments on Respondent's Statement of Costs, paras. 13-14.

[1520] CM, para. 1167, items 8-9; Rejoinder, para. 1096, item 4, bullet points 3 and 4; R-PHB1, para. 633, item 4, bullet points 3 and 4.

[1521] Respondent's Statement of Costs, section IV.

[1522] Claimants' comments on Respondent's Statement of Costs, para. 4.

[1523] Claimants' comments on Respondent's Statement of Costs, para. 6.

[1524] Claimants' comments on Respondent's Statement of Costs, para. 9.

[1525] Claimants' reply to Respondent's response to Claimants' comments on Respondent's Statement of Costs, para. 6.

[1526] Respondent's reply to Claimants' comments on Respondent's Statement of Costs, paras. 7-8.

offset a contingency fee arrangement are recoverable.[1527] Finally, the Respondent argues that a 25% success fee is not unreasonable in the circumstances.[1528]

2. Discussion

1115. Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

1116. Article 28(2) of the Arbitration Rules provides in relevant part that:

> "Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding […]."

1117. Article 47(1) of the Arbitration Rules provides that the Award "shall contain […] (j) any decision of the Tribunal regarding the cost of the proceeding".

1118. It is uncontroversial that Article 61(2) of the ICSID Convention grants the Tribunal discretion in allocating the ICSID arbitration costs and the Parties' costs, including legal fees.[1529]

1119. Overall, ICSID tribunals have followed two approaches to costs.[1530] In the first approach, ICSID costs are apportioned in equal shares and each party bears its own costs, whereas in the second approach, the principle "costs follow the event" implies that the losing party bears the costs of the proceedings, including those of the other party, or that the parties bear the costs proportionately to their success or failure. In between these two approaches, solutions vary depending on the weight the Tribunal may place on various circumstances, including the conduct of the Parties in the arbitration and other parameters.

1120. In the circumstances of this case, the Tribunal considers it appropriate to apply the "costs follow the event" principle. Accordingly, the following elements should guide the Tribunal's

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[1527] Respondent's reply to Claimants' comments on Respondent's Statement of Costs, para. 14.

[1528] Respondent's reply to Claimants' comments on Respondent's Statement of Costs, paras. 18-19.

[1529] Claimants' comments on Respondent's Statement of Costs, paras. 6 and 15.

[1530] See, for instance, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 583.

exercise of discretion. First, the Claimants prevailed on the jurisdictional objections in part and the counterclaims. The Tribunal notes in this context that the Parties did not spend significant time to plead these two issues. The Claimants' written submissions on jurisdictional objections amount to 22 pages out of more than 600 pages and the Respondent's submission amount to 20 pages out of more than 750 pages. Similarly, the Claimants' written submissions on the counterclaims amount to 16 pages and the Respondent's submissions amount to 32 pages. In addition, the Parties did not spend any significant time at the hearings to argue the jurisdictional objections and the counterclaims.

1121. Second, the Respondent prevailed on the claims, which have been deemed to be inadmissible in circumstances where the investors started this arbitration in respect of mining rights that have been obtained through corrupt practices. In other words, these proceedings should not have been brought in the first place.

1122. In addition, the Tribunal decided to appoint forensic experts to assess the authenticity of documents, which the Claimants had challenged and which were eventually not proven to be forged or otherwise not authentic. In these circumstances, the Tribunal believes that the costs incurred by the Respondent associated with the document authenticity must be borne by the Claimants.

1123. Third, with respect to the success fees of the Respondent, counsel for the Respondent agreed to a cap of its fees in exchange for an alternative fee arrangement providing for a 25% success fee. Accordingly, contrary to the Claimants' assertion, the success fee does not qualify as a "reward" and does not appear unreasonable, since the total amount of legal fees of both Parties are nearly identical if the Respondent's success fees are taken into account. For these reasons, the Tribunal is of the view that the Respondent is entitled to the success fees due to counsel.

1124. Having pondered all of these elements and exercising its discretion in matters of cost allocation, the Tribunal deems it appropriate that the Claimants bear 80% of the ICSID costs (see paragraphs 1126 and 1127 below), and 80% of the Respondent's costs incurred in these proceedings, i.e. USD 5,345,621.

1125. The Parties have paid the advances on costs requested by ICSID as follows:[1531]

[1531] Because the last advance on costs was not paid in full, the investment income yielded by the Parties' respective contributions has been collected and allocated to the ICSID annual administrative fee, and is therefore considered to be part of the Parties' contributions.

Date of call for funds	Amount requested, in USD	Amount received, in USD	Paid by Claimants, in USD	% of Amount Received	Paid by Respondent, in USD	% of Amount Received
23-Feb-15	250,000	250,000	125,000	50.00%	125,000	50.00%
17-Mar-16	300,000	300,000	225,000	75.00%	75,000	25.00%
15-Mar-17	570,000	570,000	427,500	75.00%	142,500	25.00%
31-Aug-17	40,000	40,000	30,000	75.00%	10,000	25.00%
10-Oct-17	450,000	450,000	225,000	50.00%	225,000	50.00%
9-Mar-18	300,000	300,000	150,000	50.00%	150,000	50.00%
10-Sep-18	400,000	225,000	225,000	100.00%	0	0.00%
SUB-TOTAL	**2,310,000**	**2,135,000**	**1,407,500**	**65.93%**	**727,500**	**34.07%**
Investment Income		9,286.58	6,122.18	65.93%	3,164.40	34.07%
TOTAL		**2,144,286.58**	**1,413,622**	**65.93%**	**730,664**	**34.07%**

1126. The ICSID costs, detailed below, include (i) the fees and expenses of the Members of the Tribunal and the Tribunal's Assistant; (ii) the fees and expenses of the Tribunal-appointed Experts; (iii) payments made by ICSID for other expenses, such as those related to the document inspection and the hearings (catering, court reporters, interpreters, etc.); and (iv) ICSID's administrative fees.

Arbitrators' fees and expenses	
Prof. Kaufmann-Kohler	USD 437,473.89
Prof. van den Berg	USD 292,290.29
Prof. Mayer	USD 228,757.50
Dr. Langer's fees and expenses	USD 238,391.33
Tribunal-appointed Experts' fees and expenses	USD 414,279.18
ICSID's administrative fees	USD 191,941.13
Direct expenses (estimated)[1532]	USD 341,153.26
Total	**USD 2,144,286.58**

[1532] This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

1127. The Claimants have paid, through their contributions during the proceeding, 65.93% of the ICSID costs. In accordance with the cost allocation decided by the Tribunal in paragraph 1124 above (Claimants shall bear 80% of the ICSID costs), the Claimants must therefore pay a further 14.07% of the ICSID costs to the Respondent, i.e. USD 301,807.

1128. The Tribunal notes that, as the Parties have not paid in full the last advance on costs and no further advance on costs was issued during the stay of the proceeding or since the proceeding has resumed,[1533] ICSID has not been able to collect all administrative fees due in this proceeding, resulting in a shortfall for the Centre of USD 114,058.87. The same is true for the Arbitrators and the Tribunal's Assistant who have not been able, for lack of available funds, to request payment of the entirety of their fees. Professor Kaufmann-Kohler has not claimed payment of 79.5 hours; Professor van den Berg has not claimed payment of 45 hours; Professor Mayer has not claimed payment of 12 hours; and Dr. Langer has not claimed payment of 65.25 hours. ICSID will provide the Parties with a final account statement.

VII. TRANSPARENCY

1129. In conformity with the Parties' consent to the publication of the award (paragraph 24.1 of PO1), the transparency regime set out in PO2, and to paragraph 12(iii)(1) of PO2, the award shall be made available to the public. The Parties may therefore notify the Tribunal within 21 days from the issuance of the award whether they seek protection for confidential or protected information pursuant to paragraph 15 of PO2 and section C(c) of PO4. The other Party may then reply within two weeks and the Tribunal will rule thereafter.

1130. Accordingly, the Tribunal will remain in office until it has resolved any transparency objections that either Party may raise.

1131. Finally, the video recordings of the hearings and all documents referred to in Section 12(iii) of PO2 will, upon completion of the case, continue to be made available to the public on the ICSID website in conformity with paragraph 17(vi) of PO2.

[1533] *See* paragraphs 127, 129-131, 136-137, 146,162, 167, 169 above.

VIII. OPERATIVE PART

1132. For the reasons set forth above, the Tribunal renders the following decision:

(1) The Tribunal has jurisdiction over the claims asserted under the Guinean Investment Code;

(2) The Tribunal has jurisdiction over the claims asserted by BSGR Guinea and BSGR Guernsey under the Base Convention;

(3) The Tribunal lacks jurisdiction over the claims asserted by BSGR under the Base Convention;

(4) The Tribunal lacks jurisdiction over the claims asserted under the Guinean Mining Code and the BOT Act;

(5) The claims are inadmissible;

(6) The Tribunal has jurisdiction over the counterclaims asserted by the Respondent;

(7) The counterclaims are inadmissible;

(8) The Claimants shall bear 80% of the ICSID costs (fees and expenses of the Arbitral Tribunal and the Tribunal-appointed Experts as well as ICSID's administrative fees and direct expenses) and thus pay to the Respondent USD 301,807;

(9) The Claimants shall bear 80% of the costs incurred by the Respondent in connection with these proceedings and thus pay to the Respondent USD 5,345,621;

(10) All other claims and requests are dismissed.

(11) Within 21 days from the filing of the Award, each Party may notify the Tribunal whether it seeks protection for confidential or protected information pursuant to paragraph 15 of PO2, after which the other Party may reply within 14 days. The Tribunal will remain in office until it has resolved the transparency objections, if any.

[SIGNED]

Prof. Pierre Mayer

Arbitrator

Date: 18 May 2022

[SIGNED]

Prof. Albert Jan van den Berg

Arbitrator

Date: 18 May 2022

[SIGNED]

Prof. Gabrielle Kaufmann-Kohler

President

Date: 18 May 2022