

**CLAIM NO. [ ]**

**IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT**

**BETWEEN:**

**BSG Resources Limited**

**Claimant/Applicant**

**-and-**

**(1) The Director of the Serious Fraud Office**

**(2) The Secretary of State for the Home Department**

**Defendants/Respondents**

**-and-**

**Onyx Financial Advisors (UK) Limited**

**Interested Party**

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**WITNESS STATEMENT OF JAMES LEWIS LIBSON**

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I, James Lewis Libson, solicitor, of Summit House, 12 Red Lion Square, London WC1R 4QD, WILL SAY as follows:

1. I am a Partner in the firm of Mishcon de Reya and a solicitor of the senior courts of England and Wales, practising from the above address. I have the conduct of this matter on behalf of the Claimant, BSG Resources Limited ("BSGR") and the Interested Party, Onyx Financial Advisors (UK) Limited ("Onyx").
2. Mishcon de Reya was instructed by the Claimant on 7 December 2012 in respect of a breach of contract matter. It now advises the Claimant generally in respect of all of its UK legal issues. Mishcon de Reya was instructed by Onyx on 6 August 2014 to advise in respect of the Section 2 Notice issued by the Serious Fraud Office ("SFO") to Onyx on 25 July 2014.
3. I am authorised by the Claimant to make this statement on its behalf. Except where I indicate to the contrary, the facts and matters contained in this witness statement are within my own knowledge or derived from instructions given to me by the Claimant.

Where the facts are not within my own knowledge, I have identified my sources of information or belief. All the facts and matters stated herein are true to the best of my knowledge and belief.

4. References in this witness statement to a bundle of correspondence served by the Claimant in this application are in the format [Corr/Tab/Page Number]. All other tab and page references refer to the bundles of supporting documents served by the Claimant, in the format [Exhibit/Tab/Page Number]. Page numbers are only included where necessary.
5. I make this statement in support of an application by the Claimant pursuant to CPR 54.4 for permission to apply for judicial review of the decisions of the SFO and the Secretary of State for the Home Department ("SSHD") ("the Proposed Defendants") to accede to the formal request for assistance of the Republic of Guinea relating to a criminal investigation into BSG Resources Limited ("BSGR"), its agents and its employees.

## **A. SUMMARY**

6. The background to the proceedings and a description of the parties is set out in the witness statement of Dag Lars Cramer dated 25 November 2014.
7. The witness statement of Dag Cramer addresses the factual background relating to the bad faith and political motivation which taints the Republic of Guinea's request for mutual assistance. The statement explains how the President of Guinea, Alpha Condé, set out illegally to expropriate the Claimant's assets to reward his backers in the 2010 Presidential election. The means of this illicit arrangement included the making up and dissemination of false allegations of corruption against the Claimant, which formed the basis of a prejudicial review of the Claimant's mining rights by a "Technical Committee".
8. This statement highlights how the Government of Guinea ("GoG") has expanded the bad faith demonstrated towards the Claimant in the Technical Committee review into the criminal arena, culminating in the request for mutual assistance in respect of a criminal investigation into the Claimant (the "Criminal Investigation"). In particular, the GoG arrested and detained two BSGR employees for seven months, without cause or due process and in clear violation of the right to a fair trial. The case was littered with indicators of political motivation and executive intervention. The GoG has also arrested without any evidence of wrongdoing a series of Israeli individuals it has – falsely – stated are linked to the Claimant on the basis of their citizenship alone and banned the President of BSGR from entering the country for purported security reasons. The statement further highlights the considerable independent research demonstrating the lack of independence of the Guinean judiciary. In this context, there are strong grounds to conclude that the request for mutual assistance in relation to the Criminal Investigation is made in bad faith.
9. This statement also addresses the Claimant's belief that the decision to accede to the request for mutual assistance is unlawful, on the basis of an expert report from the President of the Paris Bar (the "Expert Report"). The Expert Report concludes that (i) as a matter of Guinean law the Claimant cannot be the subject of the Criminal Investigation as a corporate entity cannot be held liable for corruption; and (ii) the Criminal Investigation is likely to be statute barred.
10. Finally, this statement highlights that the Amended Section 2 Notices issued by the SFO are so broad in scope as to be oppressive.

11. This Witness Statement is organised as follows:

B: Bad faith and political motivation in respect of the Criminal Investigation

C: Prejudicial Nature of the Letters of Request

D: Subject of the Criminal Investigation

E: Limitation

F: Volume and scope of material held by Mishcon de Reya, Onyx and Skaddens

G: Conclusion

## **B. BAD FAITH AND POLITICAL MOTIVATION IN RESPECT OF THE CRIMINAL INVESTIGATION**

12. In April 2013, two of BSGR's employees, Mr Bangoura and Mr Toure, were arrested in Guinea and imprisoned in deplorable conditions for seven months. Mr Bangoura was a security agent for BSGR in Guinea. Mr Toure was employed by BSGR first as a communications manager and then as Director of External Relations. It is evident that the prejudice demonstrated against BSGR in the flawed Committee process – on which it is assumed the arrests were based – continued throughout the unlawful detention of and purported investigation into the two employees.

13. The defence team for the arrested employees filed a complaint to the Community Court of Justice of the Economic Community of West African States ("ECOWAS") in respect of the Republic of Guinea's conduct towards the arrested BSGR employees [JLL1/1]. On 13 June 2014, the Clerk at the Community Court of Justice for ECOWAS issued a certificate for default against the Republic of Guinea [JLL1/2]. Notwithstanding this, the GoG has continued with its unjust Criminal Investigation, which on the basis of the below cannot guarantee the right to a fair trial.

### **(i) Failure to inform the employees of the charges against them**

14. As set out on page 14 of the defence's complaint to ECOWAS, in criminal proceedings *"precise and complete information of the charges held against the accused, and therefore the legal qualification which the Court could hold thereagainst, is a fundamental condition for a fair hearing (ECHR, 25 March 1999, PELISSIER AND SASSI versus France, §51)"* [JLL1/1/14]. This aligns with Article 9.2 of International Covenant on Civil and Political Rights (PIDCP) which provides that *"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"* [JLL1/1/13]. These rights are incorporated into the Guinean Criminal Procedural Code at Article 116, which states that, *"[a]t the first hearing, the Investigating Judge should observe the identity of the accused, and should expressly notify him of each of the charges held thereagainst..."* [JLL1/1/13 to 14]. However, in the case of Mr Toure and Mr Bangoura, such a basic and fundamental element of a fair process was not adhered to.

15. I understand from Mr Bangoura's lawyer, Ms Rachel Lindon, that he was arrested on 16 April 2013 and placed in custody. However, no custody warrant or arrest warrant has ever

been produced in respect of Mr Bangoura [JLL/1/12]. The following day, he was questioned on charges of corruption. Yet, on 18 April 2013, Mr Bangoura was suddenly and without an official document served on him, sentenced to one month in prison for being a military deserter [JLL/1/12]. There was no basis for this conviction: Mr Bangoura was excused from military service because he worked for a private company [JLL/1/13]. That the GoG was aware of this seems clear from a press release issued on 22 April 2013 in which it re-characterised the detention of Mr Bangoura as an arrest as a witness to be questioned in the framework of a multi-jurisdictional investigation – fundamentally different from a conviction for military desertion [JLL/1/6].

16. Mr Bangoura had no opportunity to contest the conviction, was not legally represented during his arbitrary sentencing, had no right of appeal and no proper opportunity to present the clear evidence of the injustice of the conviction. Furthermore, when Mr Bangoura was eventually allowed to submit evidence of his authorisation to work for a private company, this evidence was omitted from the investigating bundle, which according to Ms Lindon *"poorly hid the desire to maintain the latter [Mr Bangoura] in detention falling foul of the rule of law"* [JLL/1/13].
17. At the expiration of his military sentence, Mr Bangoura was indicted for corruption and placed in detention on 9 May 2013, without any clarification of whether it concerned active or passive corruption or the dates and location of the alleged offences. It was not until he was interrogated on 20 May 2013 that he was informed of the grounds of his arrest and the charges against him [JLL/1/15]. His spouse was also placed in custody, on 30 April 2013, for three days: she was forced to share a cell with men and was unable to feed her new born child [JLL/1/6].
18. It is now understood by the lawyers representing the two employees that a request was made on 18 April 2013 by the directorate of the criminal police department to the Office of the Prosecutor, asking that the latter open an investigation into corruption *"against the Guinean State by BSGR or its employees"* [JLL/1/4]. No official record of a claim or complaint has been seen by the defence.
19. Mr Ibrahima Sory Toure was arrested on 19 April 2013, in the company of his wife, who was pregnant and who suffered a miscarriage the following day [JLL/1/4]. Again, no custody warrant or arrest warrant has ever been produced in respect of Mr Toure and he did not know the charges against him. Mr Toure remained in custody, without notification of the charges against him, until the interrogation by the Investigating Judge on 10 May 2013. On being asked by Mr Toure's legal representative, the Investigating Judge stated that Mr Toure was accused of passive corruption [JLL/1/14]. The Prosecutor of the Republic specified only that the charges related to events taking place between 2006 and 2011. No further details were ever disclosed.
20. On 5 September 2013, the description of the offence for which the two employees were being held was again re-characterised, not as being for corruption or as witnesses, but as offences described as *"crime, complicity and receivership"* [JLL/1/8].
21. The failure to inform the arrested employees of information as basic as the charges against them fatally undermined their ability to prepare a defence. It further suggested that the motivation for their detention was not to further a bona fide investigation, but simply to keep them behind bars as part of a politically motivated campaign against the Claimant.

**(ii) Arbitrary detention**

22. Pursuant to Articles 60 and 77 of the Guinean Criminal Procedural Code, the maximum term of custody without charge or interrogation is 4 days [JLLI/1/16]. However Mr Toure was arrested on 19 April 2013 and not charged until eight days later, on 26 April 2013, during which time he was held in arbitrary and unlawful custody [JLLI/1/17]. As set out above, the military sentence of one month suffered by Mr Bangoura constituted arbitrary detention.
23. On 13 May 2013, the defence team for the arrested employees filed and served with the Investigating Judge applications for their release and for the annulment of the proceedings against them [JLLI/22]. Two days later, the application for release was dismissed. The applications for annulment in respect of each employee have never been responded to, representing a denial of justice [JLLI/1/24 to 25]. The defence team also sent letters to the Minister for Human Rights and Minister for Justice, highlighting the illegal nature of the detention of the employees, held in a "*shockingly abusive manner*" [JLLI/3 and 4].
24. On 20 May 2013, Mr Bangoura was interrogated by the investigating judge. Since that time he has not been further interrogated nor confronted with any witness testimony whatsoever [JLLI/1/6].
25. On 5 June 2013, following two months of imprisonment and the failure of legal remedies, the defence team for Mr Toure and Mr Bangoura released a statement reporting on their intention to file a complaint against Guinea to supranational bodies, in a bid to place pressure on the GoG to release the employees. The press release stated the complaint related to arbitrary arrest, unlawful detention, lack of effective remedies, lack of fair and equitable trial and violation of the rights of the defence. As set out in the press release at [JLLI/5]:  
  
*"...nearly two months after the incarceration of Mr. Issiaga BANGOURA and Mr. Ibrahima Sory TOURE, no evidence able to prove any bribes has been made... We accuse the judicial authority of denial of justice and violation of the rights of the defence. We accuse the executive power who has been alerted of repeated violations of human rights in this file, of unjustified inertia. Finally, we affirm that Mr. BANGOURA and Mr. TOURE are victims and hostages of a state affair, that goes beyond them".*
26. It is assumed that the "*state affair*" was the prejudicial Committee review into the granting of the Claimant's rights. Indeed, the unlawful detention of Mr Toure and Mr Bangoura was further evidence that the GoG would use all means – including illegal means – to persecute the Claimant and those connected to it.
27. In late June, at a date which is unknown to the defence team (given that it was not served on them), Guinea filed a civil suit against the employees. A request made by the defence for a copy of the civil suit was ignored. Since that date, no further action was taken in the investigation. However, the employees remained in unlawful detention [JLLI/1/7].
28. On 11 July 2013, a further application for release was made with the Investigating Judge. In response, the Investigating Judge ordered the release of Mr Toure and Mr Bangoura, on payment of US\$350,000, which was later converted to two billion Guinean francs (exhibit 24) [JLLI/1/7]. However, the employees were not released.
29. On 6 August 2013, the Investigating Chamber held that:



*"following a thorough examination of the bundle and the proceedings in their current form, there is no legal or factual obstacle to the measure requested by the accused parties [i.e. their release from detention]" [JLLI/1/22].*

30. Notwithstanding this clear judgment that there were no grounds justifying the continued detention of the arrested BSGR employees, the next day, on 7 August 2013, the Public Prosecutor issued an application for appeal against the decision. The Public Prosecutor is a member of the Ministry of Justice. It is therefore inferred that the request against the ruling of the judiciary for the release of the arrested employees was a direct instruction from the executive. This was further evidenced by the grounds on which the appeal was based, described by the defence as *"glaringly weak"* and which were simply inventions to keep the employees detained [JLLI/1/22]. The appeal was not served on the defence. Furthermore, the appeal was *ultra vires*, since Guinean law held that the Office of the Public Prosecutor should have immediately enforced the ruling of the Investigating Chamber ordering the release of the two employees [JLLI/1/22].
31. On 14 August 2013, the defence applied directly to President Alpha Condé for enforcement of the Investigating Chamber's order of release, on constitutional grounds. No response has to date been received in respect of that application [JLLI/1/8].
32. One month later, on 5 September 2013, the Investigating Judge renewed the provisional detention of both employees, arguing that keeping them in detention for over four months was necessary for the *"continuation of the investigations"* [JLLI/1/19]. This was notwithstanding that neither Mr Toure nor Mr Bangoura had been interrogated in substance since their first interrogations six months previously, on 10 May 2013 and 20 May 2013 respectively; no witness had been interrogated in the proceedings since June 2013, five months before; and no investigating document in respect of either detainee was valid and in force in Guinea [JLLI/1/19]. Furthermore, the renewal was based not on corruption, but on crime, complicity and receivership, for which neither of the employees had ever been charged [JLLI/1/8].
33. It was not until 29 November 2013 that the employees were released on bail. Their seven months in arbitrary detention without a conviction, proper interrogation or due process evidences the prejudice of the state of Guinea against individuals believed to be connected to the Claimant. Furthermore, the actions of the state were in breach of ratified international treaties and Guinean law, leaving the two employees in detention for seven months in breach of their rights and with effectively no legal recourse.

### **(iii) Lack of disclosure of information**

34. The Guinean constitution provides at Article 9 that *"Everyone is entitled to a fair and equitable trial, in which the right to defend oneself is guaranteed"*. This is expanded upon in the Criminal Code of Procedure which sets out at Article 84(3) that a copy of all evidential and procedural documents relied upon should be provided to the defence and at Article 120(3) that *"Proceedings should be made available to the counsel of the accused at the latest 24 hours prior to interrogation or confrontation"* [JLLI/1/29].
- 34.1 However, despite repeated requests to have access to the case file, and three official requests for copies of exhibits, made to the Investigating Judge and the Investigating Chamber, the defence representatives have never been granted access to the entire bundle, whether in original or copied form. This only added to the prejudice caused by neither Mr Toure nor Mr Bangoura having been informed of the charges against them. Accordingly,

the case against the two employees represented a significant inequality of arms: the employees had no opportunity to understand the case and evidence against them and accordingly were clearly disadvantaged in defending themselves.

- 34.2 On the day before the first interrogation of Mr Toure, the defence was authorised to consult the prosecution bundle for just 15 minutes. The following day, directly before the interrogation, the defence consulted the bundle for a second time, but observed that “a certain number of documents had purely and simply disappeared from the bundle of the investigating judge (for instance: the report by the CONDE divisional commander, extension of custody, etc.)” [JLLI/1/30]. During the interrogation itself, the Investigating Judge accepted that he was not aware of the exhibits on which the Prosecutor was basing his questions to Mr Toure [JLLI/1/31]. Accordingly, the one interrogation of Mr Toure which was conducted during his seven months in detention occurred without his legal representatives having been provided access to the full prosecuting bundle and with him being required to respond to questions about exhibits he had not seen. This was a clear breach not only of the principle of equality of arms, but also of the Guinean Criminal Code of Procedure.
- 34.3 Further requests by the defence for a copy of the full bundle were simply ignored, notwithstanding intervention by other bodies in the judiciary. On 16 May 2013, the Presiding Judge and the Investigating Chamber sent a letter to the Investigating Judge pursuant to the defence application for sight of the exhibits, requesting the bundle be sent as soon as practically possible to the defence team [JLLI/1/7]. Yet it took a further two months for the documents to be delivered, and only then in incomplete form. A further application for a copy of all the exhibits filed and served was made to the Investigating Judge on 6 June 2013. This was never responded to. On 31 July 2013, the defence again requested a copy of the exhibits from the Presiding Judge at the Investigating Chambers. This again was ignored [JLLI/1/7].
- 34.4 It is to be inferred that the reluctance of the prosecution was in part (i) an intentional attempt to cause the maximum prejudice to the arrested employees, by leaving them incapable of preparing a proper defence; (ii) recognition that there was in fact no proof against the BSGR employees on which the charges were based; and (iii) to cover up the procedural defects which littered the purported investigation. For instance, as noted by the Investigating Chamber in its ruling of 6 August 2013, “although the search warrants were dated 19 April 2013, it appears that in the investigations reports drafted by the central director of the criminal police department, these documents were completed on 23 April 2013, after the date indicated in said reports” [JLLI/1/32].
- 34.5 The failure to disclose key documents in the prosecution was the same as the tactic used by the GoG throughout the Committee process in order to cause the maximum prejudice to the Claimant, by denying it the basic right to defend itself properly.

#### **(iv) Lack of independence**

35. The treatment of the BSGR employees was a stark illustration of the lack of independence of the judiciary, with the Investigating Judge systematically following the instructions of the Prosecutor of the Republic, who operated under the aegis of the Minister of Justice [JLLI/1/27]. From the below, it seems evident that the Ministry of Justice set out to influence the judiciary to ensure the continuance of the unlawful detention of the BSGR employees.

- 35.1 According to Articles 107 and 111 of the Guinean Constitution:

*"Judicial power is independent from the executive power and legislative power. Justice may solely and exclusively be handed down by the Courts and Tribunals".*

*"The Superior Judicial Council shall express its opinion on all matters concerning the independence of Justice, the career of Judges and exercising periods of grace. It shall examine all requests for grace as sent thereunto and shall sent these, with its motivated opinion to the President of the Republic. It shall rule as the disciplinary committee of Judges". [JLLI/1/26]*

35.2 However, the body which is intended to guarantee the independence of the judiciary, the Superior Judicial Council, has not yet been established [JLLI/1/27]. Furthermore, the reference of the criminal complaints against the BSGR employees to an Investigating Judge, infringes the apparent independence of the judiciary. The Prosecutor of the Republic, which works under the authority of the Minister for Justice directly selects the magistrate which will investigate the matter. There are therefore clear risks that the Prosecutor refers to the matter to the most partial judge. According to the defence, *"the Defence was able to clearly observe, that the Office of the Public Prosecutor and the investigating judge took instructions directly from the Ministry of Justice"* [JLLI/1/27]. This would explain the refusal of the Investigating Judge to recognise the clear ruling of the Investigating Chamber for the employees to be released in August 2013 and the renewed application for detention of the employees in September 2013 by the Investigating Judge, notwithstanding that no effort had been made to take any action in the investigation.

35.3 Furthermore, mirroring the prejudicial statements made by the executive throughout the Committee review into BSGR's mining rights, representatives for the Ministry of Justice made prejudicial declarations in respect of the apparent ongoing criminal investigation into the BSGR employees, as set out at JLLI/1/27. Indeed, the prejudice was so apparent that the President of the Bar Association in Guinea was forced to remind the Minister of Justice of the rules and principles inherent in the Guinean constitution, explicitly stating that:

*"...the offices of prosecutors are becoming dedicated bodies, solely focused on fulfilling your decisions. If these allegations were to be confirmed, in addition to conflicts of interest, such an attitude would constitute a breach of the (...) the sacrosanct principle of the separation of powers."* [JLLI/6/96]

#### **(v) Poor conditions**

36. According to their defence team, quoted in a press release issued by the Claimant, the conditions in which the employees were being held fell a long way short of the Minimum Rules for the Treatment of Prisoners set out by the United Nations. This included their lack of access to sanitation, clothing, bedding, food and medical services [JLLI/7].

37. Indeed, the conditions of their seven-month period of detention were deplorable, with more than 60 people held in a single room at night. Mr Bangoura was further denied access to a medical specialist, notwithstanding that his health condition was known to the prosecution at the start of his detention. Consequently, Mr Bangoura suffered serious ill health in detention, with a diagnosis of various colonic conditions which were considered at risk of developing into cancer if not properly treated [JLLI/1/11].



**(vi) Decision of ECOWAS that the GoG defaulted in its investigation**

37.1 On 4 November 2013, and prior to the release of the employees, the defence issued an application against the Republic of Guinea to the Community Court of Justice of the Economic Community of West African States ("ECOWAS"). Pursuant to Article 9(4) of the Additional Protocol A/SP.1/01/05, the Court holds "*jurisdictional competence to rule in the case of infringement of human rights in all Community Member States*". The Additional Protocol is at JLLI/8. The Republic of Guinea signed the Additional Protocol on 18 July 1992 and has been a Member State of ECOWAS since 28 May 1975, as described on the Court's website, at JLLI/9.

37.2 The application set out the numerous human rights abuses committed by the Republic of Guinea in their conduct of the investigation into Mr Toure and Mr Bangoura, namely:

*"- breach of the rights of defence in the framework of the disciplinary proceedings as suffered by Mr. BANGOURA;*

*- breach of the right not to be deprived of liberty in an arbitrary manner;*

*- breach of the right to be able to seek effective redress;*

*- breach of the right to benefit from an independent and impartial court;*

*- breach of the right to a fair trial including the equality of arms and adversarial principle;*

*- breach of the right not to suffer inhumane and degrading treatment."*

[JLLI/1/36]

38. On 13 June 2014, the Clerk at the Community Court of Justice for ECOWAS issued a certificate for default against the Republic of Guinea, concluding that "*the State of Guinea defaulted in the legal proceedings initiated by itself against Messrs Issiaga BANGOURA and Imbrahima SOYA TOURE*". The certificate is at JLLI/2.

**(vii) Failure to close the investigation after release**

38.1 On 10 February 2014, over two months after Mr Toure and Mr Bangoura had been released on bail, their defence team applied to the Examining Judge for the closure of the investigation [JLLI/10]. The letter highlighted that the two BSGR employees were arrested in May 2013, had been interrogated just once, had never been confronted with any witness testimony or evidence against them, and that since June 2013 no other witness had been interrogated and that no investigative deed had been issued. Noting that Article 6(1) of the Universal Declaration on Human Rights provides that "*Any person is entitled to a fair, public hearing in a reasonable timescale*", the letter states:

*"Faced with a lack of investigations for over seven months, the investigation which you were leading would appear to be complete, and should be closed, pursuant to the fundamental principles set forth hereinabove and those set forth under article 181 of the Criminal Procedure Code.*

*As the investigation has failed to bring to light any evidence against Messrs TOURE and BANGOURA, it is additionally requested that a nonsuit be issued..."*

- 38.2 The application was ignored. The lives of Mr Toure and Mr Bangoura are effectively on hold as they continue to be used as pawns in the Government of Guinea's persecution of BSGR. At every stage of the so-called investigation, the employees suffered inequitable treatment at the hands of a judiciary controlled by the executive. The failure to close the investigation despite the lack of evidence against the employees is a further indication of the political motivation inherent in the investigation against them.

**(viii) Arbitrary detention of other individuals believed to be linked to the Claimant**

39. The political motivation in respect of the Criminal Investigation is even more apparent in the context of the GoG repeatedly arresting individuals within its reach whom it states – often baselessly – are linked to the Claimant.
- 39.1 Mr Bangoura's wife was detained with her husband in April 2013 and placed in custody for three days, sharing a cell with men and unable to feed her new baby [JLLI/1/6]. Mr Bangoura's wife has never worked for BSGR. Her arrest and detention without any evidence of wrongdoing formed part of a politically motivated campaign against the Claimant.
- 39.2 As set out in the witness statement of Dag Cramer at paragraph 87.4, on 25 September 2013 the GoG arrested and jailed four Israeli citizens residing in Guinea, whom the GoG claimed were associated with BSGR [DLCI/144]. The individuals were in no way linked to BSGR. Shortly after the legislative elections had taken place, in which President Condé's party achieved a majority, the four Israelis were released without explanation.
- 39.3 Similarly, Avishai Marziano, the CEO of Cellcom West Africa, was denied entry into Guinea in October 2014 and questioned on his purported links with BSGR [DLCI/148]. Again, Mr Marziano has no links to BSGR, save that he is Israeli, as is the President of BSGR.
- 39.4 Mr Marziano further reported to the President of BSGR that four of his Liberian colleagues (of Israeli citizenship) were arrested and jailed in Guinea in the last three to five months, without any case, charges or evidence. Mr Marziano now believes that these arrests are linked to the questioning of him in relation to his links with BSGR.
40. The GoG's political motivation against the Claimant was also evidenced in March 2013, when the President of BSGR, Asher Avidan, was declared *persona non grata* by the GoG. President Condé did not hide his political motivation, stating that "We know why we did that although we cannot reveal all the reasons at this stage. We know... the role they played in some of the political turmoil that we face at the moment in the country" [JLLI/11].
41. The request for mutual assistance represents a furtherance of this prejudicial treatment of the Claimant by the GoG.

**(ix) Independent research demonstrating the lack of independence of the Guinean judiciary**

42. Consistent with the immediate evidence concerning BSGR's imprisoned employees, there is a wealth of independent research demonstrating that the Guinean justice system is manifestly incapable of safeguarding defendants against politically motivated prosecutions or other abuses of the legal process. The following are examples only.

- 42.1 Guinea is ranked 150 out of the 177 countries covered by Transparency International's Corruption Perceptions Index [JLLI/12/118].
- 42.2 The report of the United Nations High Commissioner for Human Rights, dated 11 February 2014, states that:
- "Impunity and weakness in the administration of justice remain a major concern, in particular, the failures in the judiciary which continue to erode the confidence of citizens in the justice system and which has led to the emergence of acts of private justice to the detriment of the rule of law"; and*
- "despite hundreds of deaths, injuries and disappearances caused by inter ethnic violence in July 2013, the judges appointed to investigate these incidents have been obliged to postpone their work for political reasons."* [JLLI/13/120 and 125]
- 42.3 The 2014 World Report by Human Rights Watch, an independent, non governmental organisation that investigates and reports upon human rights issues, which states that:
- "...there continue to be severe shortages of judicial personnel and insufficient infrastructure and resources which, when coupled with unprofessional conduct, including corrupt practices, failing to show up in court, and poor record-keeping, contributed to widespread detention-related abuses"; and*
- "the government has failed to establish the Superior Council of Judges, which is tasked with the discipline, selection and promotion of judges."* [JLLI/14/136 and 137]
- 42.4 The review of Guinea's Anti-Corruption Institutions by AfriMAP and the Open Society Initiative for West Africa, dated September 2013, states that:
- "The independence of the judiciary is guaranteed by the 2010 Constitution and the laws establishing the status of the judiciary and the Judicial Service Commission. However, there are legal provisions that reduce the scope of this independence. Among these provisions are those relating to the organisation of the Bench that subject the judges to the authority of the Ministry of Justice, creating a situation where the Guinean judge is under instructions to act according to the wishes of politicians"; and*
- "Another significant obstacle to the independence of the judiciary is the meagre financial and material resources allocated to it, as well as the low level of qualification of judges."* [JLLI/15/158]
- 42.5 The Access to Justice Assessment by the American Bar Association, dated January 2012, states that:
- "The justice dispensed by courts in Guinea, and the confidence the Guineans have in it, are fundamentally undermined by corruption and improper influence."*
- "Powerful citizens, for example government officials or members of the military, can use their power to influence the results of legal proceedings"; and*
- "Corruption and undue influence are, without doubt, two of the greatest problems affecting the formal justice system in Guinea.".* [JLLI/16/204, 237 and 239]
- 42.6 The Guinea 2012 Human Rights Report prepared by the United States Department of State states that:

*"Although the constitution and law provide for an independent judiciary, the judicial system lacked independence and was underfunded, inefficient and overtly corrupt"; and*

*"...the law provides for a judicial procedure in civil matters... Nevertheless, the judicial process was neither independent nor impartial, and decisions were often influenced by bribes and based on political and social status". [JLLI/17/253 and 254]*

- 42.7 That the investigation appears to be founded upon the conclusions of the Technical Committee which were reached in flagrantly unfair proceedings; that no progress in terms of evidence-gathering appears to have been made in the purported investigation; and that representatives of BSGR (or those suspected of being so) within immediate reach of the Guinean authorities have been unlawfully detained and ill-treated; are all strong indicators that the present Letter of Request is politically driven and made in bad faith. Moreover, there are very strong grounds to show that the Republic of Guinea is not a country which can or should be assumed to offer adequate legal safeguards to those affected by allegations brought for political purposes or in bad faith.

### **C. PREJUDICIAL NATURE OF THE LETTERS OF REQUEST**

43. The Claimant has been denied access to the Letters of Request issued by the GoG to the SSHD dated 19 July 2013 and 22 September 2014 (together the "UK Letters of Request"). However, on the basis of the scant information included in the Section 2 Notices and Amended Section 2 Notices, the Claimant reasonably believes they will largely reproduce the Letter of Request sent to the Swiss authorities on 6 August 2013 (the "Swiss Letter of Request") [JLLI/18]. The Swiss Letter of Request contains statements which are false, misleading and prejudicial to the presumption of innocence: it is reasonably assumed that the UK Letters of Request follow this harmful pattern.

#### **(i) Denial of disclosure of UK Letters of Request and assumption they are similar to the Swiss Letter of Request**

44. At paragraphs 85 to 87 and Section D of the pre-action protocol letter to the Defendants dated 7 August 2014, Mishcon de Reya, on behalf of the Claimants, requested disclosure of sufficient documents to enable the Claimant to be properly informed about the nature of the Guinean investigation and such other matters as justice required [Corr/10/41]. The request included disclosure of the Letter of Request dated 19 July 2013 from the Republic of Guinea, "redacted if necessary" (paragraph 96.3.1 at Corr/10/43). The request was denied by the Defendants. Accordingly, the Claimant is not aware of what information and supporting documents – if any – were included in the Letter of Request.
45. However, the Section 2 Notices and Amended Section 2 Notices repeat almost verbatim sections of the Swiss Letter of Request, leading the Claimant to believe that it is similar, if not identical, to the UK Letters of Request. For instance, the Swiss Letter of Request asks for information concerning "The Company Constructions Labecdd". The Amended Section 2 Notices similarly request information relating to that company, at 1(iii) [Corr/28/178]. However, the Claimant is unaware of any company by that name, a google search returns no company by that name [JLLI/19], and it is difficult to see how the company name could be pronounced given the combination of letters. It is therefore reasonable to conclude that the company name is in fact a typographical error which has been copied directly from the



first UK Letter of Request into the Swiss Letter of Request and the Amended Section 2 Notices.

**(ii) Prejudicial nature of the Swiss Letter of Request**

46. The errors in the Swiss Letter of Request are numerous, as set out in the memorandum of Rachel Lindon, a lawyer acting for Mr Toure and Mr Bangoura [JLLI/20]. The errors include the following:
- 46.1 The Swiss Letter of Request refers to a "major" criminal proceeding (which would carry a prison sentence of over 5 years and a limitation period of 10 years), when in fact the offences under investigation are minor offences [JLLI/20/286].
- 46.2 It refers to a Public State Prosecutor's indictment of 29 April 2013. As set out in the memorandum of Ms Lindon, the first petitions in the Guinean case record were filed on 18 April 2013 [JLLI/20/286].
- 46.3 The reliance on Articles 157 and 671 of the Guinean Code of Criminal Procedure as the basis for the Letter of Request is erroneous. Article 157 provides for letters rogatory within the Guinean territory, not international letters rogatory, and Article 671 provides for the temporary arrest of a foreigner on Guinean territory. Neither of the articles provides for an international letter rogatory [JLLI/20/286].
- 46.4 The Swiss Letter of Request refers to a criminal investigation in the USA concerning the same acts. However, the Guinean criminal investigation open at the time of the request was of passive corruption, whereas in the US it was a case of bribery of witnesses and destruction of evidence. The SFO's letter of 7 October 2014 appears to repeat this fundamental error, stating that an "agent" of BSGR has been convicted of attempting to destroy material evidence [Corr/27/172]. However, Mr Cilins was not convicted as an agent of BSGR and his conviction related to an attempt to persuade a witness in the investigation to leave the United States to avoid questioning [JLLI/21]. It appears that the GoG provided false information – or mischaracterised that information – to both the Swiss authorities and the SFO.
- 46.5 The Swiss Letter of Request requests assistance in relation to the investigation into Mr Toure and Mr Bangoura. However, in the words of Ms Lindon, "[T]here are a great many missions and persons mentioned in the ILR, very broadly defined and having little or nothing to do with the Guinean proceedings" [JLLI/20/287].
- 46.6 The Guinean criminal investigation in respect of Mr Toure and Mr Bangoura accused them of corruption in the period of 2006 to 2010. However, the Swiss Letter of Request (as the Section 2 Notices and Amended Section 2 Notices do) sought documents from 2005 to the present day [JLLI/20/289].
- 46.7 The Swiss Letter of Request relies on the UN Convention against Corruption. However, this was only ratified by the Republic of Guinea on 29 June 2013, which was after the start of the investigation in Guinea, and at a time when Mr Bangoura and Mr Toure had been imprisoned for more than a month without conviction. According to Ms Lindon, "since the Convention against Corruption did not enter force in Guinea until 29 June 2013, it might be argued that Guinea cannot demand evidence earlier than said date, i.e. June of this year. Indeed the pre-trial investigation concerns facts from 2006 to 2010: thus, no action can be requested" [JLLI/20/290].

47. Furthermore, the Swiss Letter of Request was on the face of it prejudicial to the Claimant:
- 47.1 In support of the request, it relies on the Allegations Letter (as defined in paragraph 70.5 of the witness statement of Dag Cramer and at DLC1/88) sent from the Technical Committee to the Claimant on 30 October 2012. As detailed in Mr Cramer's statement, that letter is based on evidence entirely lacking in credibility, with absolutely no supporting documents. Not only is the Allegations Letter itself prejudicial, but the Swiss Letter of Request failed to append the Claimant's detailed response to the Allegations Letter, thereby only presenting a one-sided account of events. In this context, it is difficult to see how the Swiss authorities could exercise their discretion to accede to the request in anything but an unfair manner.
- 47.2 The wording of the Letter of Request is prejudicial to the presumption of innocence. Notwithstanding that no trial has been scheduled and that you cannot be found guilty of an offence before trial, the Letter of Request states in unequivocal terms that the Guinean authorities learned of the "*active participation of Cilins*" from the "*credible*" evidence from Mamadie Touré and her "*convincing documents*" [JLL1/18/277 and 278]. The alleged testimony of Mamadie Touré was not in the prosecution file, the defence therefore had no right to examine her and, according to Ms Lindon, knew that the Guinean investigating judge had not questioned her. The emphasis placed on her "*credible*" testimony is therefore misplaced.
- 47.3 Furthermore, the Swiss Letter of Request states that "*The elements of evidence collected during the Guinean procedure indicate that the allegations of corruption are well founded*" [JLL1/18/277]. Again, this ignores that the GoG was put on notice on multiple occasions of the weaknesses and falsities in the evidence and that it has never been tested. Accordingly, it is erroneous to represent the evidence as "*well founded*".
48. As set out above, the Swiss Letter of Request contains prejudicial assertions, some of which are demonstrably wrong or misleading. In the event the UK Letters of Request are similar or identical to the Swiss Letter of Request, which is assumed, the Defendants cannot accept the assertions contained therein unquestioningly. However, given the nature of the Section 2 Notices and Amended Section 2 Notices, it appears that the Defendants have done so.

## D: SUBJECT OF THE INVESTIGATION

49. The Amended Section 2 Notices state that the Guinean investigation is "*into the affairs of BSG Resources Limited and Others*" [Corr/28/175]. The notices later define BSG as referring to a number of companies, namely "*BSG Resources Limited, its subsidiaries, holding or group companies, affiliates and connected parties, including BSG Resources (Guinea) Limited, BSG Resources (Guinea) Limited Sarl, Onyx Financial Advisors (UK) Limited and VBG-Vale BSGR Guinea*" [Corr/28/175]. Similarly, the Swiss Letter of Request asserts that the Guinean judicial inquiry is "*aim [sic] the company BSGR, and the physical persons or moral persons that are affiliated to it*" (emphasis added) [JLL1/18/278].
50. However, according to the Expert Report prepared by Pierre-Olivier Sur, President of the Paris Bar, at both JLL1/23 and tab 6 of the Application Bundle, pursuant to Guinean law, corporate entities cannot be held liable for the offences purportedly being investigated. As set out in the Expert Report, corporate entities may only be prosecuted for offences where the provisions explicitly provide for such [JLL1/23/323]. The only provision in the Penal Code of Guinea which does provide for this is Article 411, which states that corporate entities can be held liable for drug trafficking offences [JLL1/25/368]. This is not alleged against BSGR. Accordingly, the Expert Report concludes that [JLL1/23/323]:

*"For the avoidance of doubt, BSGR cannot be prosecuted for any offence of corruption or trading in influence. None of the parties referred to as "BSG" in the Section 2 Notice namely, BSG Resources Limited, BSG Resources Limited SARL, Onyx Financial Advisors Limited and VGB-Vale BSGR Guinea can be prosecuted. This is therefore contrary to what is suggested in the SFO communications".*

51. Both the Amended Section 2 Notices and the Swiss Letter of Request make clear that BSGR and its affiliated companies are the subject of the Guinean investigation. This raises a number of issues.
- 51.1 Firstly, any Guinean criminal investigation into BSGR or any corporate entities affiliated with it for either corruption or trading in influence is unlawful and any assistance provided by the Defendants in respect of that investigation would similarly be unlawful.
- 51.2 Secondly, either the GoG is aware of this fact but is carrying on regardless on the basis of its political motivation, or the GoG is not aware of it, which raises questions in relation to the competency of the entire investigation.
- 51.3 Thirdly, the Letters of Request are predicated on fundamentally flawed foundations. There can be no fact more basic in the conduct of a criminal investigation than who the subject of that investigation is. That the GoG got even this fact wrong is further evidence that the Letters of Request are based on demonstrably wrong or misleading assertions.
- 51.4 Fourthly, it is evident that the Defendants did not verify even this most basic of information: instead, they relied without question on the submissions of the GoG to accede to the Letters of Request. Furthermore, the SFO issued the Amended Section 2 Notices even after it had been placed on notice of the numerous indicators of the GoG's political motivation and still appear to have taken its submissions at face value.

## E: LIMITATION

52. The issue of the period of limitation in respect to the offences purportedly under investigation was first raised by the legal representatives of Mr Toure and Mr Bangoura in applications for annulment of the proceedings on 13 May 2013 [JLLI/22]. As set out page 2 of the application:

*"Article 4 of the CPP [Criminal Procedure Code] makes provision as follows:*

*"In criminal matters, public proceedings have a statute of limitations of three years".*

*At the time of interrogation of 10 May 2013, the Prosecutor of the Republic informed the accused and his legal counsel of the claimed passive corruption which took place between 2006 and 2011, without providing any further clarification. To date, no precise date for these supposed crimes have been put forward. However, **unquestionably, the statute of limitations on the public proceedings concerning events prior to 19 April 2010 has now expired.** Consequently, it should be observed that the statute of limitations for the public proceedings pending has now expired" [JLLI/22/294] (emphasis added).*

- 52.1 The reference to 19 April 2010 is three years prior to the date on which the Office of the Prosecutor purportedly instructed the criminal police department to open the investigation into the employees. No response was ever received from the Investigating Court to the applications for annulment and no further information in respect of the dates of the supposed offences has been provided. In addition, as set out above, the defence was denied

access to the full prosecution file. Accordingly, no information was received by the defence which undermined the conclusion that the investigation into the arrested BSGR employees was statute barred.

- 52.2 It is reasonably assumed – although scant information has been provided to know definitively – that the Criminal Investigation is linked to the investigation into the BSGR employees. Accordingly, it is the Claimant's belief that there are good grounds for believing some or all of the conduct under investigation to be barred by reason of the relevant Guinean laws on limitation.

**(i) Lack of disclosure by the Defendants**

- 52.3 The Section 2 Notices dated 25 July 2014 provided no information whatsoever in respect of the nature of the criminal investigation [Corr/1]. Not even the offence being investigated was disclosed. The only information provided was that the investigation was into "the affairs of BSG Resources Limited and Others" (the "others" were not identified) and that it related to "the award of mining rights over mineral deposits in Simandou and Zogata located in Guinea" [Corr/1/1]. The Section 2 Notices requested documents between 1 January 2005 and the present day [Corr/1/3]. There was no further indication of the date the purported offences (whatever those offences are alleged to be) took place within that time frame.

- 52.4 In response, and in order to determine whether the investigation is statute barred, the Claimant's pre-action protocol letter dated 7 August 2014 requested the following by way of disclosure ("the LBC"):

*"96.3.2 Without prejudice to the disclosure of the Letter of Request, details of the Republic of Guinea's criminal investigation into the mining rights of BSGR and others, including:*

- a. The nature of offences under investigation;*
- b. The time and place involved in the offence(s);*
- c. The conduct constituting the alleged offence(s);*
- d. The subjects of the investigation, including the identity of the "others" referred to in the Section 2 Notices; and*
- e. The identity of the investigating authority.*

*96.4 In relation to Issue (1), the SSHD and the SFO should disclose what enquiries they conducted, and on what materials they decided, the limitation issue, so as to ensure that an offence was justiciable in Guinea. If the limitation issue did not form part of their decision-making process, this should be confirmed." [Corr/10/44]*

53. The SSHD's response to the LBC dated 22 August 2014 wholly failed to engage with any of the issues raised in the pre-action protocol letter, extending to the statement that it could "neither confirm nor deny that a request [for assistance by Guinea] was made, what assistance was requested or whether such assistance was given" [Corr/23/112].
54. The SFO's response to the LBC dated 7 October 2014 dismissed the limitation issue in perfunctory terms, stating "The SFO is satisfied that the investigation in Guinea is not statute barred" [Corr/27/174]. No further detail was provided in respect of the basis of this



statement. Furthermore, the purported disclosure contained within the response (and reproduced in the Amended Section 2 Notices issued the same day) consisted of two short paragraphs, disclosing no more than that the investigation is into allegations of corruption involving BSGR and Guinean public officials, as a result of which the former obtained mining rights at Simandou and Zogota and that the offences are being investigated under Articles 191 to 197 of the Penal Code of Guinea [Corr/27/174]. The letter failed to provide the dates of the alleged conduct, its location or how the conduct is said to constitute the relevant offences under the Guinean criminal code. Such details go to the heart of the Claimant's ability to definitively determine whether the investigation is statute barred.

55. This firm's response on 17 October 2014 ("the Second LBC") highlighted that the *"purported disclosure contained within the Reply Letter... is grossly inadequate to discharge the SFO's duty to a person affected by a letter of request to be properly informed about the nature of the foreign investigation and such other matters as justice requires"* [Corr/31/193]. Accordingly, it requested disclosure of *"the evidential basis for its assertion that the offences are not statute-barred as a matter of Guinean law"*.

56. On 31 October 2014, the SFO responded to the Second LBC. The response again made unsubstantiated claims in respect of limitation and disclosure, as follows:

*"In this case, your clients have been aware for some time (at least in general terms) of the nature and scope of the investigation. We understand them to have been engaged in litigation for some time. In those circumstances the disclosure provided appears more than adequate."*

*[...]*

*The SFO understands that this case falls under the provisions relating to major offences [as opposed to "serious" crimes or "felonies"], and that allegedly corrupt payments have been made as recently as 2012 with measures if investigation and prosecution continuing. The SFO understands that the investigation is not statute barred"* [Corr/32/197].

57. Firstly, the Claimant has not been *"engaged in litigation"* with the GoG for some time. The only litigation against the GoG in which the Claimant is engaged is the ICSID arbitration in respect of the illegal expropriation of the Claimant's mining rights as a result of the Technical Committee review, which was issued on 1 August 2014. The only other contentious matter against the GoG in which the Claimant has been engaged is the Technical Committee review itself. As set out in detail in the witness statement of Dag Cramer, that review was prejudicial, and the Defendants were on notice since the first LBC that the Claimant viewed the process as prejudicial. Being engaged in the early stages of an ICSID arbitration which the Claimant issued against the Republic of Guinea, and a prejudicial civil review process, has not in any way provided the Claimant with sufficient information as to the offences purportedly under criminal investigation. Furthermore, such matters cannot reasonably be viewed as a replacement for disclosure.
58. Secondly, no disclosure or evidence was provided to substantiate the claim that payments were made as recently as 2012, including any detail in relation to how this payment was linked (if indeed it was) with any previous conduct under investigation. The Claimant still does not know what conduct is being investigated, the dates of the conduct being investigated, how the conduct is linked or who committed the acts under investigation.

## (ii) Expert Report

59. At JLLI/23 (and tab 6 of the Applications Bundle) is the Expert Report prepared by Pierre-Olivier Sur, an expert in French law and in particular financial criminal law matters including corruption. Monsieur Sur is notably the author of the book *"Course in General Criminal Law,"* Dalloz, 1996. The Guinean criminal legal system directly stems from the French one and Monsieur Sur has studied the relevant Guinean materials. Accordingly, he can provide an opinion on Guinean criminal law.
60. The Expert Report addresses whether the offences under investigation in Guinea are statute barred. By way of background, Monsieur Sur was provided with the correspondence exchanged to date with the Defendants; the Claimant's Request for Arbitration filed with ICSID dated 1 August 2014 in respect of an intended arbitration between BSGR and the Republic of Guinea; and the Letter of Request for assistance from Guinea to Switzerland dated 6 August 2013. His assessment is therefore limited in part to the scant information provided by the Defendants in relation to the Criminal Investigation into the Claimant. A reference document showing the location in the exhibits of the documents referred to by Monsieur Sur is at JLLI/27.
61. The Expert Report is exhibited to this statement in French (signed) and English (unsigned). The relevant provisions of the Guinean Penal Code and Code of Procedure to which the Expert Report refers have also been translated into English and are at JLLI/25. However, the French case law referred to in the Expert Report has not been translated into English [JLLI/24]. We rely on Monsieur Sur's summary of those cases as set out in the Expert Report.
62. The Expert Report concludes that:
- 62.1 Notwithstanding that the SFO's letter of 7 October 2014 stated that the Claimant was being investigated in respect of offences set out in Articles 191 to 197 of the Penal Code of Guinea, only Articles 192 to 195 can in fact apply (paragraph 20.4) [JLLI/23/323].
- 62.2 Furthermore, the Amended Section 2 Notices state that the Claimant is being investigated for active and passive corruption and trading in influence. However, as set out above, the Claimant cannot be held liable in relation to any of these offences. Furthermore, employees or agents of the Claimant who are individuals can only be held liable for active corruption.
- 62.2.1 Whereas active corruption relates to a situation where a person has corrupted, passive corruption relates to a situation where a person has been corrupted. Similarly, trading in influence relates to the action of a person requesting or accepting gifts or presents in order to use his or her influence and therefore can only be practiced in the passive form (paragraph 21) [JLLI/23/323].
- 62.2.2 The Amended Section 2 Notices state that the acts under investigation are the *"making of gifts and the payment of bribes"*. Accordingly, the report concludes that, *"agents or employees of BSGR could not be held liable either for passive corruption or for trading in influence, under Guinean law"* (paragraph 22.7) [JLLI/23/324].
- 62.3 The limitation period for the offences for which employees or agents of the Claimant can be held liable is three years (paragraph 23.3) [JLLI/23/324].
- 62.4 The starting point for the limitation period for corruption is either the day of the corruption agreement, or the day on which the person who has been corrupted carried out

an act pertaining to his office, or the day on which the last advantage (i.e. money transfer) has been obtained in execution of the agreement (paragraph 24.2) [JLLI/23/324].

62.5 The limitation period is interrupted when any measure of investigation or prosecution has been carried out during the three year period, meaning that a prosecution remains possible for another period of three years (paragraph 19.2.1) [JLLI/23/322]. The SFO has not disclosed what the first step in the investigation was. However, the Expert Report assumes that the first step took place on 16 April 2013, being the date that Mr Bangoura was arrested. On this assumption, the last date of an act of execution could be committed for which an individual could be held liable is 16 April 2010 [JLLI/23/325].

62.6 If any offence of corruption has become time barred, an investigative step subsequently taken will not revive it, even if it is linked to later offences of corruption (paragraph 19.2.3) [JLLI/23/322].

62.7 The SFO's conclusion that the limitation period has not expired because there was an alleged corrupt payment in 2012 is doubtful. If payments have been made in 2012 in execution of corruption agreements, the three year limitation period would run from the day on which those payments were made. However, if the allegations disclose several different corruption agreements, then the 2012 payments would only affect the starting point of the limitation period for the agreement to which they relate (paragraph 24) [JLLI/23/324 to 325]. Accordingly, Monsieur Sur states that:

*"I have not been provided with any information enabling me to link the payments allegedly made in 2012 and the corruption agreement(s) investigated, nor do I have any information regarding whether the allegations consist of one corruption agreement or several corruption agreements, which is of central relevance to how the limitation period runs, for the reasons explained at 24. Therefore, I am not in a position to conclude, as the SFO has done, that the limitation period has not expired in Guinean law" (paragraph 27) [JLLI/23/326].*

62.8 Finally, the Expert Report concludes that:

*"Regarding the offences of corruption... the limitation period has expired if the following conditions are met:*

*- the first step in the investigation into the agents and employees of BSGR took place on 16 April 2013; and*

*- the day on which the last act of execution of the corruption agreement was performed took place before 16 April 2010" [JLLI/23/326].*

63. As set out in detail above, the Defendants have not provided the Claimant with either the date the investigation was opened or the dates of the alleged corrupt acts. However, there remains a strong likelihood that the investigation is time-barred. Furthermore, the Defendants have not disclosed what the alleged payment of 2012 relates to or whether it is linked to conduct which took place prior to 2010. As set out in the Expert Report, if the 2012 payment purportedly being investigated is not linked to events which took place before 2010, then conduct which occurred before 2010 would be statute-barred, even if the entire investigation is not.

64. The Defendants are put to proof on the issue of limitation.

## **F. VOLUME AND SCOPE OF MATERIAL HELD BY MISHCON DE REYA, ONYX AND SKADDENS**

### ***(i) Volume of material and duplication of efforts***

65. In a letter dated 31 July 2014 this firm informed the SFO that given the breadth of the Section 2 Notice and the nature and quantity of the documents which potentially fall within its scope, compliance by this firm will necessitate an onerous review exercise [Corr/4]]. There are several boxes of hard copy material in connection with the affairs of BSGR, and a large datasite of electronic material. Each item will need to be reviewed individually by bilingual reviewers to assess, first, whether it falls within the scope of the Section 2 Notice, and, secondly, whether it attracts legal professional privilege.
66. There are nearly 30GB of electronic material (over 180,000 documents) held on a secure server to which Mishcon de Reya and Onyx have access. In one recent experience of comparable disclosure exercises, reviewers require around 1.5 hours for every 200 electronic documents. On that basis, this material alone would take approximately 1,350 hours to review. We estimate that the cost of reviewing all the material is likely to be at least £330,000. This estimate is based on the following:
  - 66.1 Fees of an e-disclosure provider of £27,000 for hosting the documents, processing the data, licensing the review software to five users at this firm and project management; and
  - 66.2 Fees incurred in reviewing the documents of £303,750, based on an hourly rate of £225 (junior solicitor) for 1,350 hours.
67. This is clearly an enormous burden on this firm in terms of both time and cost. Similarly, we understand from Skaddens, BSGR's previous legal representatives in the United Kingdom, that it acted on various matters during the course of its retainer with the Claimant, including advising in relation to BSGR's potential disposal or partial disposal of its mining rights in the Republic of Guinea, including in relation to the transaction with Vale S.A. and in relation to the protection and defence of BSGR's position regarding its mining rights in the Republic of Guinea, in relation to the Technical Committee process and potential proceedings in respect of or against BSGR (including without limitation the United States, Switzerland and the United Kingdom) arising from or connected to that process. Any review would entail the review of a vast amount of documentation (including electronic), and would be a very significant undertaking which Skaddens estimates would take many months, with a dedicated review team in place to work solidly on it across that period.
68. In addition, it appears that no consideration has been given to the inevitable duplication of material held by this firm and by Skaddens. The likelihood of such duplication is all the greater given the fact that this firm did not act for BSGR in connection with its Guinean projects. Mishcon de Reya was first instructed by BSGR on 7 December 2012 in relation to a contractual dispute with its former PR representatives, FTI Consulting Inc. Mishcon de Reya did not provide legal services to BSGR in relation to its operations in Guinea. By the time Mishcon de Reya was instructed by BSGR, the company was already on notice that its mining rights in Guinea were under review by the Technical Committee. Accordingly, any documents in Mishcon de Reya's possession and/or control which date from 1 January 2005 to 7 December 2012 were not provided to the firm contemporaneously but pursuant to the giving of legal advice.
69. Requiring two law firms to undergo onerous review exercises in parallel, when the resultant material is virtually certain to yield significant quantities of duplicate documents, is



an obvious symptom of the SFO giving insufficient consideration to the particular circumstances of this case. The effect is disproportionate and oppressive. This is particularly so given that in response to allegations circulating in the media in relation to the Claimant's interests in Guinea, Skaddens pre-emptively wrote to the SFO on 26 April 2013 informing it that both BSGR and Onyx had taken steps to protect and preserve all potentially relevant documents. The letter states that:

*"BSGR has taken steps to ensure that all documents that may be of potential relevance to the referred investigation are protected and preserved, such that full records are maintained relating to its Guinea Interests. BSGR has requested that Onyx Financial Advisors (UK) Ltd ("Onyx"), BSGR's management and administration services provider in London, takes such steps as regards such documents. Onyx has agreed to that request. In particular, BSGR and Onyx have...*

*(ii) instructed an independent specialist, Navigant, to attend at Onyx's premises in London to image all potentially relevant servers and individual electronic devices using processes in accordance with the Association of Chief Police Officers' Guidance" [JLL1/28].*

70. As the Amended Section 2 Notice is currently drafted, all three recipients are required to search the Navigant server for relevant documents. This is clearly oppressive.

#### **(ii) Scope of Section 2 Notices**

71. The LBC at paragraphs 71 to 84 details how the Section 2 Notices issued on 25 July 2014 were ill defined and too wide in their scope and that as a consequence, they were oppressive [Corr/10/39 to 42]. The SFO responded by revoking the original notices and issuing Amended Section 2 Notices on 7 October 2014. By revoking the Section 2 Notices previously issued, it is clear that the SFO accepted that these were impermissibly ill-defined and/or too wide in scope. It sought to remedy these failings by issuing the Amended Section 2 Notices. In practice, however, the Amended Section 2 Notices are even wider in scope than their predecessors [Corr/28].
72. They include four sets of criteria which purport to define the material which is required to be produced: date, subject-matter, classes of material and names of persons (both individual and corporate).
73. The date period within which the documents are requested is 1<sup>st</sup> January 2005 to 31<sup>st</sup> December 2012 inclusive [Corr/28/178]. This period is arbitrary. It is not referable to the date of this firm's instruction by the Proposed Claimant. It post-dates by a margin of years the departure from office of the individuals alleged to have been the targets of the bribes. In short, there can be no rational justification for the breadth of the date period specified in the Amended s2 Notice.
74. So far as the subject-matter of the Amended s2 Notice is concerned, this is said to be "limited" to:
- "Transactions relating to the acquisition, retention, sale or proposed sale by BSG of mining rights (including permits, concessions and any authorisation or re-authorisation of such mining rights) in Simandou and Zogota in the Republic of Guinea and the joint venture agreement between BSG and Companhia Vale do Rio Doce S.A. ("Vale") in relation to those mining rights." [Corr/28/179].*
75. In ordinary language, this translates as anything and everything to do with BSGR's mining rights in Simandou and Zogota, notwithstanding that the investigation is said to relate to

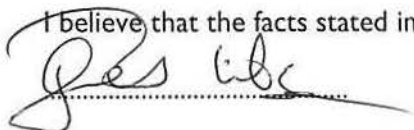
corrupt practices which resulted in the obtaining (only) of those mining rights (which occurred in 2009).

76. The Amended s2 Notice then goes on to provide particulars of the classes of material required to be produced [Corr/28/179]. These are unlimited. The only purported guideline is that they must include: “contracts, agreements, letters of engagement, correspondence, internal memoranda, attendance notes and file notes and other communications” (paragraph 1) as well as “financial and banking records, payment instructions, file notes and internal memoranda relating to all payments made or received”.
77. Finally, a vast list of named individuals and corporate entities is set out, which includes (at sub-paragraph (i)) any individual connected to BSGR and involved in the Simandou and Zogota transactions and (at sub-paragraph (ii)) any or any purported public official/employee/agent of the Republic of Guinea or any of their family members [Corr/28/179]. Given the all-encompassing breadth of these two categories, it is difficult to see what the SFO believes to be added by the 30 separate names listed at sub-paragraph (iv).
78. It follows that the Amended Section 2 Notices are colossally wide in scope and represent nothing more than a fishing expedition on the part of the GoG and which the Defendants are attempting to facilitate.

## F. CONCLUSION

79. At every juncture of its dealings with the Claimant, the Claimant's representatives, or indeed individuals falsely suspected of being the Claimant's representatives, the GoG has acted in a prejudicial manner on the basis of no evidence of wrongdoing and in clear violation of the right to a fair trial. It is the Claimant's belief that the request for mutual assistance from the GoG is simply a furtherance of this politically motivated campaign. Furthermore, there are strong grounds to believe that the Criminal Investigation is unlawful: firstly, as a matter of Guinean law, the Claimant cannot be held liable for corruption; secondly, there exists a likelihood that some if not all of the offences being investigated are statute-barred. Finally, the scope of the Amended Section 2 Notices is so broad that compliance would be oppressive.

I believe that the facts stated in this witness statement are true.



James Lewis Libson

26 November 2014