

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION
RULES OF THE LONDON COURT OF INTERNATIONAL ARBITRATION**

CASE NO 142683

BETWEEN

VALE S.A.

Claimant

and

BSG RESOURCES LIMITED

Respondent

Second Witness Statement

JOSEPH TCHELET

I, JOSEPH TCHELET, will state as follows:

A. INTRODUCTION

1. I provided an account of my involvement in the subject matter of this dispute in my first witness statement dated 30 June 2015 (“**Tchelet-1**”). In this second witness statement, I will respond to certain allegations made against me by Vale in its Statement of Reply (“**SoR**”) and accompanying witness evidence. Rather than commenting on each of Vale’s claims, I have sought to limit myself to addressing those allegations and inaccuracies which I understand to be the most central to the issues in these proceedings. Where I do not comment on a particular aspect of Vale’s claim, this should not be construed as an admission on the part of BSGR.

2. The contents of this witness statement are true to the best of my knowledge and belief. Where the facts and matters referred to are not within my own personal knowledge I state the source of my knowledge and belief.

B. PAYMENT PROCESSES

Vale's criticism of payment process

3. In Tchelet-1, I provided details of the payment process in relation to the BSGR group of companies, including the checks and balances which formed a part of that process.
4. In the SoR Vale contends that BSGR's payment processes were not fit for purpose. It even goes so far as to imply that the payment approval processes were designed to provide cover for corrupt payments. I reject these claims. Even a cursory look at the paperwork associated with every payment which was made shows very clearly that BSGR made no attempt to conceal any payments. In fact it was careful to ensure that there was a documentary record for each payment it made. Vale does not appear to understand the function of the payment process, and the reality within which it operated.
5. As with most businesses in the world, including many with which I am familiar, the main function of BSGR's payment process is to ensure that each payment made by BSGR is being made (i) to a proper payee; (ii) for reasons which fall within the ordinary course of business of the Group; and (iii) for an amount which appears to be reasonable in the circumstances. The circumstances which determine whether a payment can be approved on these bases include the amount which the directors have approved under budgets for specific activities or projects, as well as reassurances received by persons who hold specific positions within the group or have relevant knowledge.
6. As I explained in Tchelet-1,¹ the people responsible for activities in each country were often best placed to advise whether a payment should be made. The BSGR finance team proceeded on the basis of trusting individuals in positions of

¹ Tchelet-1 [25] and [29.2]

responsibility within the BSGR group when determining whether a payment was proper in the circumstances. This would include the very few cases – only a handful out of about 16,000 in the case of the Guinea project - where a supplier did not provide an invoice prior to a payment being made. Explanations provided by the local representatives in relation to payment requests would usually have appeared in writing, within relevant emails. However, sometimes the details of those explanations, particularly in reply to any query, would have been provided orally, pursuant to a phone call or conversation with me seeking clarification and authorisation. Provided I was satisfied with the explanation given on these occasions, I would have approved the payment. The payment would then be subject to the approval of at least one other person, at the time that the payment was authorised on the banking system.

7. The directors of BSGR were all fully aware that this was the way in which payments were approved. The country managers were trusted, and it was understood that transacting business in Africa sometimes presents administrative challenges, not least where electronic communications are erratic at best and frequently absent altogether. Given that we were making tens of thousands of payments per year, some for many millions of dollars, the system works reasonably well.
8. Viewed in light of this background, I believe that Vale's criticisms of the process by which a number of payments were approved are without merit. Nevertheless, I will deal with certain payments briefly.

Vale misconstrues the meaning of "Travel Allowance"

9. At paragraph 615 of the SoR Vale complains that prior to May 2006 "*it was easy to withdraw funds for one purpose, and use them for another*" within the BSGR system. They deduce this from wrongly thinking that the expression "travel allowance", a term describing money which travelers leaving South Africa are allowed to take with them under the Exchange Control Regulations of the South African Reserve Bank, was used to describe the purpose for which monies were to be expended in Guinea. It was not. Cash spent in Guinea was controlled and accounted for based on actual use.

Payments to CW France and FMA International on 27 February 2006

10. Vale asks what support I have for believing the payment² of US\$125,000 to Pentler on 27 February 2006³ to have been a legitimate payment for expenses. Roy Oron had approved it in writing. He also explained to me orally that the payment was to cover direct expenses relating to the Memorandum of Understanding, which related to local lawyer fees and arranging the logistics of the negotiations. As the CEO of BSGR, and with knowledge of the project, if he was confident that it was payable that would have been sufficient.

Payment to FMA International Trading on 16 May 2006

11. Vale alleges⁴ that my attempt to understand a payment of US\$250,000 to the Pentler associated company, FMA International, on 16 May 2006, was deliberately silenced by Marc Struik. This allegation is entirely wrong.
12. By my email to Roy Oron on 11 May 2006 I asked Mr Oron to supply further information as to what the payment was for.⁵ Vale asserts that Marc Struik “silenced” this request and “simply responded that ‘this is correct and as agreed with them...’”, whereupon I “backed off” and “abandoned [my] request for further details”.
13. Vale ignores the fact that, before Mr Struik had written this message,⁶ Roy Oron had already replied to my request on the previous day, clarifying that the payment was for “Fred [Cilins] services and success fees”.⁷ Far from silencing my request for an explanation, Mr Struik was in fact providing *confirmation* of the explanation which I had sought. Confirmation from Mr Oron and Mr Struik that the payment was legitimate was sufficient.
14. Vale also focuses on a reference in this email chain to “the Lady”. At the time, I had no idea to whom this might have been referring, and would have had no reason to consider the reference worth looking into, even if I noticed it, which I do not recall

² Via CW France and FMA International Trading (Pty) Ltd

³Exhibits R-178 and C-525.

⁴ SoR [620].

⁵ Exhibit R-179.

⁶ Exhibit R-179.

⁷ Exhibit R-179.

that I did. It was not unusual for me to see emails with references to facts or people in the locality of which I had no relevant knowledge. Mr Oron had specifically approved the payment and therefore I did not seek further explanations.

Other Payments to Pentler

15. During the period from March 2006 to May 2008, several payments were made to individuals and companies associated with Pentler pursuant to a number of invoices, each of which indicated that the money being paid was for services in relation to the Guinea project. As far as I can recall, I approved each of these payments for loading on the banking system following Roy Oron's or Marc Struik's express authorisation. The request to pay either came directly from Mr Oron (or Mr Struik), or I would have spoken with him either by phone or in person in our offices. I do not now recall the details of each one. Confirmation from Mr Oron (or Mr Struik) that these could be paid would have been sufficient for me to process the payment.
16. I cannot today state precisely what these payments related to. I know from speaking with Marc Struik and Asher Avidan that Pentler paid for logistical expenses e.g. travel and accommodation out of its own pocket and then requested re-imburement. Mr Oron received these periodic demands for payment from Pentler, and passed them for payment in the months before he left BSGR in May 2007, because he believed they were properly due.

Payments from Local Guinea Account

17. At paragraphs 623-625, Vale allege that from March 2007 BSGR Guinea staff were spending cash without any or any adequate controls, and suggest that the amounts involved might have been as much as US\$400,000 per month or even more. In fact, BSGR Guinea was restricted by the bank in Guinea to withdrawing a maximum of c. US\$5,000 per working day in cash, which is c. US\$100,000 per month. Cash expenditure was carefully recorded. Larger amounts were paid through the banking system. The details of both cash and non-cash payments would be reported to BSGR Guernsey and the directors of BSGR on a monthly basis.

Payment to Earthcons

18. Vale criticises a payment of US\$70,000 to Earthcons, made on 6 August 2008, because the payment form is marked "*as per Yossie instructions*" and "*approved & released before being checked*". I believe that I was requested to make this payment by Marc Struik. It is probable that in this case the request was made by Mr Struik orally, but there might have been a written request as well, which does not appear on the payment file. The "check" referred to here had nothing to do with authorising payments, but was a simple check that was usually carried out to avoid administrative errors: after a member of staff in Guernsey had filled in a payment form with details of a payment to be inserted into the online payment system, a second member of staff would normally check to make sure that the correct details were correctly entered into the payment system. The latter person would then sign the "checked by" section of the form. I would assume that, in the present case, the usual check could not be completed due to the absence of the other staff members from the office. However, I would have checked the details myself before approving the payment within the banking system.

Payments made in respect of the various Logistique, Maintenance et Services ("LMS") LMS invoices⁸

19. I addressed the question of payments to LMS at paragraphs 37 and 38 of Tchelet-1, but Vale persists in its case⁹ that I acted inappropriately in approving a payment of US\$1.3 million to LMS on 17 August 2009. To be clear, as CFO of BSGR, handling thousands of payments per year, I did not consider it my duty to carry out forensic investigations into requests for payment to LMS as Mr Avidan had introduced LMS to me as a regular service provider to the project when I visited Conakry and as he had requested and approved the payment.
20. I viewed the payment request as altogether unremarkable. I believed then (and believe now) that it was a genuine demand from a known supplier for equipment which, as I understood it, was needed, ordered and, in due course, delivered.

⁸ Tchelet-1 [37] and [38].

⁹ SoR [628].

21. Vale claims¹⁰ that we should have investigated the fact that some of Ghassan Boutros's invoices were self-evidently not for "consultancy". I knew Mr Boutros was a supplier and did not need to investigate that fact. It was evident to me that in the absence of an invoice BSGR staff had simply been using the term "consultant" as a default or catch-all, as described below. I made this clear in relation to another LMS invoice on 29 March 2010 when I wrote to David Clark saying:

"...all payments to Ghassan relate to transport, electrical, site preparation etc...none of it is anything remotely resembling consulting, but actual work as per the descriptions previously."

C. PROJECT MANAGEMENT ACCOUNTS

22. Vale has alleged that two emails which I wrote to Helen Nicolle, on 21 April 2009 and 26 April 2009,¹¹ were written to hide the existence of Pentler. This is wrong. Those emails reflect my efforts to maintain a clear accounting division between BSGR Guernsey, where capital expenditure relating to share purchase belonged, and BSGR Guinea where they did not.
23. In Tchelet-1, I made reference to a number of functions which were carried out by the BSGR finance staff, other than processing payments. One of these roles was the preparation of management accounts. The main purpose of these accounts was to allow the directors to be kept aware of the state of various projects and investments in which BSGR was engaged.
24. In general, and like many other groups of companies, the BSGR group is careful to segregate the financial information and documentation relating to each entity within the group. I believe that this is a basic principle of good accounting and corporate governance. It also ensures that, if and when, annual or quarterly audited accounts are prepared for such an entity the relevant information required for those accounts all appears in one place, and there is little or no extraneous data included.

¹⁰ SoR [627].

¹¹ Exhibits C-540 and C-650.

25. However, by its nature, the preparation of management accounts for a specific project will often involve the amalgamation of financial data relating to a number of different entities, each of which is somehow connected with the project in question. In the case of Guinea, the monthly management accounts were compiled from early 2006 onwards, once the project was seen as an investment. As of 2009 the monthly management accounts were compiled using the data from three different entities: BSGR Guernsey, BSGR Guinea and Resources Advisory Services.
26. Helen Nicolle had been recruited in Guernsey as the offshore financial accountant for the Guinea project in February 2008. Since Guernsey was now the centre of corporate governance for BSGR, it made sense to task Ms Nicolle with the preparation of the monthly management accounts for the Guinea project. I asked Tania Rakitina, the Finance Manager in Guinea, to assist Ms Nicolle with the preparation of these accounts. This was largely both because Ms Nicolle was less familiar with the project and was a less experienced accounts manager, whereas Ms Rakitina was more experienced and was part of the management team on the ground, and therefore in a much better position to ensure that the management accounts, including budgeting and forecasting, were properly compiled. At the same time, Ms Rakitina had the capacity to assist, and took a keen interest in ensuring the smooth operation of the Guinea project.
27. Since both Ms Nicolle and Ms Rakitina were happy to work on this basis, I was willing to allow the arrangement to proceed, so long as it respected BSGR's policy of good governance.
28. The tone of the two emails which Vale consider is rather sharp. This is not surprising in the context. Firstly I have been criticised more than once for being less than diplomatic in my correspondence. Indeed I unfortunately upset David Clark specifically because of this.
29. Secondly, there had been an incident with Ms Nicolle a few weeks before. On 9 March 2009 Ms Nicolle had sent to Ms Rakitina a list of names detailing February expenses and had included names which should not have been sent. That was sloppy. I had replied to Ms Nicolle on 10 March¹² saying:

¹² Email sent 10 March 2009 at 13:48 (R-356)

"Why was this sent with names – very bad!!

I specifically asked you not to include names and take care for good reason!"

30. Ms Nicolle wrote an email of apology on the same day. However, in my response I decided to impose controls on her. In particular I wrote the same day:

*"From now on all Gsy [Guernsey] correspondence must be sent to me only not to Tania or anyone in Guinea."*¹³

31. By 21 April 2009 Ms Nicolle was again dealing with Guinea project matters. She had prepared a costs report for Guinea which was to be presented to the Board of Directors of BSGR and had, in my mind foolishly, included capital payments to Pentler which were the first payments under the Share Purchase Agreement. To me it was obvious that these were capital payments for purchase of shares of the project, not expenditures in relation to the Guinea project itself. I wrote to Ms Nicolle:¹⁴

"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.

Please confirm if this [is] clear or if there are other questions."

Reading this now, I can see that it is short tempered in tone. I was exasperated by what I saw as Ms Nicolle's failure to account for things correctly. I was particularly annoyed having stressed a similar error to her a few weeks previously. However what I am not doing is constructing a subtle plot to hide the existence of Pentler from a potential future purchaser of the project who has not even been identified, or from BSGR employees, which is what Vale suggests.

¹³Exhibit R-356, email sent 10 March 2009 at 14:08:47

¹⁴Exhibit C-650.

32. I wrote to Ms Nicolle again on 26 April 2009. I took the opportunity of re-iterating to her both of the points which had caused me to lose my temper with her. In particular I said:

"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 her or 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."

33. This is largely a repetition of what I had said before. I was seeking to re-emphasise the need to keep accounts properly. Looking at it now, it seems that I was being a bit heavy-handed in my approach. I was being emphatic about good accounting; it was not part of a complex cover up.
34. The reason that certain names were to be kept from Guinea was to comply with the requests of certain individuals to be paid outside of Guinea. This was not BSGR's initiative. Not including those names within Guinea accounts was consistent with such requests, and provided the figures in the accounts were correct and properly recorded, I did not see any problem with anonymising the relevant entries in the Guinea accounts.

D. PAYMENTS IN RELATION TO AIR TRAVEL

35. Vale notes¹⁵ that a reimbursement apparently on its face for a flight by Mr Thiam was probably in fact a flight taken by Mr Fofana. I accept that, on closer inspection, their observation may be correct, and I qualify paragraph 45 of Tchelet-1 accordingly. I also note that due to a typographical error in Tchelet-1, the wording suggests that this reimbursement was for a flight taken on 7 May 2009. That is not the case. The date 7 May 2009 should have been attached to the following clause, which should have read "On 7 May 2009, BSGR reimbursed Mr Thiam US\$4,680.02 for flights taken in April"

¹⁵ SoR [515]

E. CORPORATE STRUCTURE

Transfer of Guinea interests to BSGR Guernsey

36. In Tchelet-1, I explained how the shares in BSGR Guinea had been transferred to BSGR Guernsey by BSGR Guinea BVI at the beginning of 2009.
37. In the SoR Vale appears to suggest that the purpose of this restructuring was to conceal all of the offshore entities that had previously held interests in mining rights, including Pentler – even though Pentler had ceased to be a shareholder nearly one year before the restructuring. This is not true. The reason the interests were transferred to a Guernsey company was that BSGR had determined that it would be advantageous for the holding company for the Guinea project to be a Guernsey company rather than a BVI company. This was because BSGR was planning to attract significant investment for the project from third parties. It therefore wanted to ensure that it was able to provide the holding company for that project with the same level of corporate governance as was already being provided to the main holding company BSGR. It was determined that the best way to achieve this would be by having the holding company incorporated and located in Guernsey. This would give potential investors the comfort of knowing that the seat of governance employed key administrators in its offices and was located in a more transparent jurisdiction subject to a robust regulatory environment being enforced by regulators – for example, the requirement for resident directors and submission of annual financial reports. The shares in BSGR Guinea were accordingly transferred to BSGR Guernsey pursuant to an agreement with BSGR BVI dated 18 February 2009.¹⁶
38. This was not the only time that the BSG Group has established a Guernsey holding company for a specific business for the purposes of enhanced corporate governance, with a view to making the underlying business more marketable:

¹⁶ Sale, Purchase and Transfer of Registered Shares in BSGR Guinea (R-357)

- i. As explained in Tchelet-1,¹⁷ BSGR itself was migrated to Guernsey in March 2007.
- ii. BSG Capital Markets PCC was set up in May 2007, and the capital markets business of BSG, formerly based in BVI, was transferred to this new Guernsey company.
- iii. In October 2011, BSGR Diamonds Holdings Limited was set up in Guernsey as a subsidiary of BSGR. It was set up for the purpose of becoming the holding company for the group's Koidu Diamond operations in Sierra Leone, which had until then been held by two BVI companies, as well as other diamond mining interests which were held by BVI companies. As it turned out, the transfer of the BVI interests did not proceed, as a sale of the business became unlikely in view of changing market conditions.

39. Vale claims¹⁸ that BSGR hid BSGR Guinea BVI's role in the corporate structure. This is not true. Vale itself contradicts this claim by proceeding to refer to the 2008 Consolidated Financial Statements which BSGR disclosed, and which clearly refer to BSGR's ownership of BSGR Guinea BVI. Furthermore, other documents which were disclosed in the data room evidence BSGR BVI's role within the corporate structure. For example, BSGR Guinea BVI's ownership of BSGR Guinea at the time of the latter company's establishment in 2006 is clearly demonstrated within the constitutional documents of BSGR Guinea.¹⁹ The transfer of BSGR Guinea from BSGR Guinea BVI to BSGR Guernsey is described and approved in the Board Minutes of BSGR Guinea dated 17 February 2009.²⁰

40. Vale appears to complain about the fact that BSGR disclosed the loan agreement with BSGR Treasury dated 1 February 2006, and its assignment to BSGR Guernsey, suggesting that doing so was somehow meant to deceive Vale. That is false. The loan agreement was disclosed in response to Vale's specific request, contained in Section 6.1 of its Legal Due Diligence Questionnaire,²¹ to provide copies of all funding arrangements of BSGR Guernsey and its subsidiaries. That this is the case is clear from the fact that the document appeared in Section 1G of the data room, together

¹⁷ Tchelet-1 [53]

¹⁸ SoR [245] and [246].

¹⁹ Statuts de BSGR Resources (Guinea) Limited dated 15 Sept 2006 (which appeared Section 1(A)(iii) of the data room) at page 2, Exhibit R-358.

²⁰ R-359. These minutes appeared as part of Section 1(I) of the data room.

²¹ Exhibit C-233.

with copies of several other funding arrangements; and Section 1G was specifically referenced in BSGR's reply to the Vale request in Section 6.1.

41. In the same section of the SoR Vale claims that

"BSGR however represented to Vale that its consolidated financial statements included 'subsidiaries and joint ventures . . . from the date on which effective control was acquired up to the date control ceased to exist' . . . This suggests that BSGR Guinea BVI should therefore, on BSGR's own case, have been disclosed in BSGR's consolidated financial statements no later than 2006 – not 2008 . . ."

It would appear that Vale is referring to a sentence which appears in each of the annual consolidated accounts of BSGR from 2006 to 2008. However Vale has omitted crucial wording and thereby distorted the meaning of the words quoted. The full sentence²² reads as follows:

"The results of the subsidiaries and joint ventures are included from the date on which effective control was acquired up to the date control ceased to exist."

Thus, the representation here is limited to the inclusion of financial data from subsidiaries within the consolidated accounts for the Group. I can confirm that the results from BSGR Guinea BVI and its subsidiary BSGR Guinea were indeed included in the consolidated accounts for 2006 and 2007. This is evident from the accounts themselves, which specifically refer to the amounts invested in the Guinea project each year.²³

Publication of the existence of the Minority Interest and the value of the Guinea Investment

42. In July 2007, as part of the process of placing the TMI bond, BSGR underwent a rating agency review by Standard and Poors Maalot, who awarded an A+ credit rating. This was followed by BSGR providing a prospectus and road show

²² Exhibit C-292, pages 40 and 209; exhibit R-214, page 18 (emphasis added)

²³ Exhibit C-292, pages 56 and 226;

presentations to 42 major Israeli financial institutions interested in the bond.²⁴ These documents were also provided to the Israeli Tax Authority due to the bond being a public issuance in the Israeli market. These documents set out the background of BSGR and the projects and investments with which it was involved. This included information on BSGR's Guinea investment. The relevant sections showed very clearly that BSGR only owned 83% of the Guinea opportunity, thereby openly demonstrating that there was also a minority interest, being the interest which was held by Pentler.²⁵ At that time, the estimated value of the BSGR Guinea interest was less than US\$100 million.

43. By late 2007, BSGR's further presentation to Maalot and Israeli financial institutions which had invested in the bond included BSGR's revised estimated value for the Guinea investment, which was between US\$200 million and US\$300 million.²⁶ This presentation also reveals the minority shareholding in the company undertaking exploration in Guinea, showing that BSGR only held 83% of the company.²⁷

Windpoint Overseas Limited

44. Vale seeks²⁸ to make something out of the fact that in April 2012 I requested the staff in Guernsey to proceed with the liquidation and closure of Windpoint, over a year after it had made the final payment to Pentler under the Settlement Agreement. The reason I requested its liquidation was straightforward. As I explained in Tchelet-1, Windpoint's main purpose was to serve as the BSG Group's holding company for the Baku Steel Company. By 2010, Windpoint had accrued significant amounts of cash as a result of its investment in the Baku Steel Company, and it was therefore a convenient company to use for the payments to Pentler. BSG sold its interest in the Baku Steel Company in 2011, and it was therefore perfectly sensible to proceed with the liquidation of the holding company, Windpoint. I believe I wrote that it should be done as soon as possible, simply because the liquidation was already well overdue.

F. USE OF WORD "CONSULTANT" WITHIN BSGR GROUP

²⁴ Prospectus "Issue of Bonds for Capital Market - TMI Ltd - of BSGR Group - July 2007", Exhibit R- 174

²⁵ Pages 15 and 30 of Prospectus

²⁶ "BSGR projects in advanced business development stages - Presentation to Maalot" dated October 2007, at page 3, Exhibit R-360.

²⁷ *Ibid.* at page 8.

²⁸ SoR footnote 584.

45. Although some of the BSGR companies have employees working for them, most of the individuals who provide services to the BSGR companies do so on a non-employment, contractual basis. This provides for more flexibility in a cross-border environment, particularly in relation to the early stages of a project. It enables the group to hire people for the precise periods required and not to be involved in local employment law issues. Internally within the group, and in particular in its accounting records, these service providers are commonly referred to as “consultants”. Essentially, the term is used by the BSGR group to distinguish any external service providers from employees. Thus for example it is used for high level people working full time for companies in the BSGR Group. I work for BSGR pursuant to a “consultancy” agreement between BSGR and the company that employs me, as did Asher Avidan and a number of others. Resources Advisory Services Ltd contracts with BSGR under a “Consultancy Agreement” dated 16 February 2009; the services provided under the terms of the agreement include information technology/computer services, administration and marketing. The term “consultant” has come to be used internally as a default catch-all category for a variety of service-providers.
46. Within the BSGR accounting system, there are a number of specific pre-selected categories which can be entered in relation to payments made. This allows management to keep track of how funds are generally being spent. Some of these categories relate to very specific areas relating to BSGR's business, for example “site preparation”, “sampling” and “telecommunications”. However, there is also a “consulting” category, which is often used as the default category where no other category applies. Although it was the default, we did try where possible to avoid using the “consulting” category where there was a more appropriate category. I frequently found myself helping colleagues determine how a supplier should be categorised within the accounting system. Where a more suitable category did not exist I would advise the use of “consultant”.

G. DUE DILIGENCE PROCESS AND VALE ACQUISITION

47. In Tchelet-1, I set out details of the due diligence process in relation to the transaction with Vale.²⁹ As I explained, I was responsible for the electronic dataroom which was

²⁹ Tchelet-1 [81] – [90].

used for the transaction, which was an updated version of the dataroom which we had set up for previous joint venture transactions which were ultimately aborted. Before uploading any documents to the dataroom, I would seek approval from BSGR's board, as well as Skadden Arps Slate Meagher & Flom LLP ("**Skadden**"), who were BSGR's legal representatives throughout the due diligence processes, both with Vale and the earlier transactions with other companies which were not completed. I also explained that some of Vale's requests in their due diligence were in the form of questionnaires which required answers.³⁰

48. Skadden were intrinsically involved at every stage and Michael Hatchard was forwarded the various questionnaires which Vale had requested BSGR to complete. I assume that he then circulated these questionnaires among his team. I also sent BSGR's proposed responses to the questions raised by Vale to the Skadden team for their review. I also had a number of phone calls with Gary DiBianco, Sandro de Bernadini and Michal Berkner about the due diligence questions and the appropriate responses. Having refreshed my memory, I recall that on 29 March 2010, I forwarded to Skadden the following questionnaires, together with BSGR's proposed responses:

- i. Legal Due Diligence Questionnaire dated 24 March 2010;³¹
- ii. Compliance Due Diligence Questionnaire dated 25 March 2010;³² and
- iii. Due Diligence Request List dated 25 March 2010.³³

49. Clifford Chance and Skadden discussed the due diligence questionnaires during a conference call on 30 March 2010. I was not on that call. Following the call Clifford Chance sent Skadden a supplemental due diligence questionnaire. I then worked on the answers to this questionnaire together with BSGR management and the Skadden team. On 2 April 2010, I copied Skadden in when I sent the following questionnaires to Vale, which had been provided by Vale and had been completed by BSGR:

- i. Follow Up Due Diligence Request List³⁴
- ii. Supplemental Compliance Due Diligence Questionnaire dated 31 March 2010³⁵

³⁰ Ibid, paras 82-83.

³¹ Exhibit C-233.

³² Exhibit C-30.

³³ Exhibit C-235.

³⁴ Exhibit C-44.

50. As I recall, representatives of Skadden were also present at all of the meetings between the representatives of BSGR and Vale which took place in London in April 2010 that I attended, with the exception of the side-meeting which I had with Mr Monteiro, to which I will refer below.
51. Under the Heads of Terms between Vale and BSGR dated 19 March 2010, it was agreed that the deal, including all due diligence and execution of documentation, would be completed by 29 April 2010.³⁶ Early in the due diligence process, BSGR communicated to Vale its concerns that their request for full due diligence on BSGR was unrealistic, given the time available.³⁷ Gary DiBianco of Skadden raised the issue with Vale's lawyers on behalf of BSGR. The matter was subsequently discussed in a conference call between the parties, in which I participated. Vale was represented by its in-house counsel Daniela Chimisso Dos Santos. It was agreed on that call that the due diligence would be limited to BSGR Guernsey (the target company) and its subsidiaries. Vale's due diligence questionnaires were worded accordingly. Where Vale's due diligence questionnaires were too broad, BSGR amended the questions to accord with the parties' agreement to narrow the scope of the exercise.
52. Another point which relates to the scope of the due diligence exercise was the definition of the Simandou Project, which was defined in Due Diligence Questionnaires as relating to Simandou Blocks 1 & 2. At all times the focus of the due diligence was on Blocks 1 & 2 which was the most valuable asset of the company at the centre of this deal. I believe that the definition of Simandou Project properly reflected the mindset on both sides of the transaction. In general terms all of BSGR's answers to the questionnaires were framed within this context.
53. BSGR's various due diligence questionnaires were sent to me, as I was the contact point at BSGR for the due diligence process. I was selected as the coordinator of the due diligence responses because of my corporate and accounting background, my experience in dealing with due diligence for previous transactions in the BSG Group and given that I was someone who either had access to many of the relevant documents or knew who to ask for them. When I received each questionnaire, I

³⁵Exhibit C-43.

³⁶Exhibit R-40, Section 2.

³⁷Tchelet-1 [80].

circulated it amongst colleagues with the relevant knowledge within the BSGR management team, and arranged conference calls at which the questionnaire would be discussed, with a view to answering the various requests. Most of the time the relevant knowledge was with Asher Avidan and/or Marc Struik, who I viewed as our people on the ground in Guinea, albeit that, of the two of them, Asher Avidan tended to have greater and more up to date knowledge of what was happening on the ground. Other than the project head office in Conakry, I personally had never visited the Zogota site or the Blocks 1 & 2 sites. Where we had any difficulties understanding any part of a questionnaire or working out how to respond to it, we contacted one of the Skadden lawyers for advice – usually either Sandro De Bernardini, Michal Berkner, or Gary DiBianco. Sandro was in daily regular contact with me on all due diligence matters throughout the transaction from beginning to end.

54. In all the other due diligence processes I had been through the accountants on the other side of the deal would start the process by analysing the accounts and documents behind the accounts, thus highlighting the expenses and payments they wished to consider. In this particular transaction the accountants came in at the end of the process. I assumed, during the period we were filling in the questionnaires with Skadden's assistance, that the accountancy due diligence would throw up further questions. However, in the event the accountancy due diligence was conducted very late in the process, and over a period of only about three days. Whilst we did provide all documents requested, in fact relatively few documents were asked for as I explain in greater detail in Tchelet-1 and also below. Insofar as there were any failings in any of the replies given to the questionnaires they were unintentional and a result of the speed and nature of the entire due diligence process.

H. PENTLER

55. None of the BSGR team considered Pentler to be a consultant or intermediary. I was not aware and was not told that Pentler did anything other than to provide logistical support. I did not believe and I was not told that the Pentler team assisted BSGR to obtain the relevant permits. In addition, I recall being told that Michael Hatchard had advised that it was not necessary to disclose Pentler during the due diligence process. I believe that this was communicated to me following a meeting in London between Mr Steinmetz, Mr Barnett and Mr Hatchard. Although I was not present at the

meeting Mr Steinmetz and Mr Barnett briefed me about the discussion and I proceeded on this basis.

56. I understand that Vale is contending that BSGR deliberately misled Vale concerning the 17.65% which was previously held by Pentler in BSGR Guinea BVI.³⁸ This allegation appears to be based on Alex Monterio's Second Witness Statement, in which he presents his version of the conversation that we had concerning BSGR's restructuring and the 17.65% minority interest.³⁹ Mr Monteiro's version of the conversation is not accurate.

57. Mr Monteiro says that I told him:

*“that the minority shareholder was not an external third party but rather was a company within the Balda Group that provided services for BSGR in Guinea, as did other group companies.”*⁴⁰

Mr Monteiro's recollection is incorrect. I stand by my account of this conversation as set out in Tchelet-1.⁴¹ He never asked me the identity of the minority shareholder. And at no point did I tell him that the minority shareholder was part of the Balda Group, or that it was not an external third party. I knew that Pentler was an external company, and I would not have told Mr Monteiro information which I knew to be wrong.

58. Mr Monteiro further states that I:

*“claimed that the affiliated entity received the shares in the first place simply for tax planning purposes and that the buy-out in April 2009 was likewise to optimize tax planning.”*⁴²

Once again, Mr Monteiro is incorrect. That is simply not true. Furthermore, I note that the buy-out of Pentler's minority shareholding did not take place in April 2009; it

³⁸ SoR [269].

³⁹ Monteiro 2nd WS [6] - [7], [11] - [14].

⁴⁰ Monteiro 2nd WS [12].

⁴¹ Tchelet-1 [86].

⁴² Monteiro 2nd WS [12].

was concluded in March 2008. Also, the BSGR Consolidated Financial Statements made it abundantly clear that the minority shareholder was a third party.

59. I recall that Mr Monteiro specifically asked me to join him alone in a separate room in order to have this specific conversation with me. I recall that because it sticks in my mind as the only time during the process that I was asked by Mr Monteiro specifically to go into a room with him exclusively without other BSGR and/or Skadden personnel present, as Mr Monteiro had some accounting questions. Had Mr Monteiro asked his questions in the main meeting room, in the presence of our respective lawyers and colleagues, there would be a number of people who would be able to confirm my version of the conversation. I do not know why Mr Monteiro chose to deal with this particular question, in this somewhat unorthodox way.
60. In Tchelet-1, I referred to the Statement of Financial Affairs for BSGR Guernsey, dated 31 December 2009, which was approved and signed off by Ernst and Young in a letter dated 23 February 2010, as an agreed-upon procedures report for BSGR Guernsey.⁴³ I note that Mr Monteiro dismisses the US\$22 million goodwill figure appearing in that Statement of Financial Affairs, saying that it is “merely include[d] as a line item to Note 7”.⁴⁴ In fact, the notes to the Statement of Financial Affairs are designed to highlight points of particular interest. Monteiro is wrong to be dismissive of their importance.
61. Vale⁴⁵ also complains that Pentler was not named as the former minority shareholder in BSGR Guernsey’s 2008 financial statements and the 2009 Statement of Financial Affairs. It is a principle of accounting that accounts should be consistent. There is no requirement to include the name of the selling entity under the relevant International Financial Reporting Standard relating to Business Combinations.⁴⁶ As a matter of general practice, BSGR does not mention in its accounts the name of the selling shareholders when describing a shareholding interest which has been purchased. Thus, for example, the audited BSGR Consolidated Financial Statements for 2008

⁴³ Tchelet-1 [80] and [85].

⁴⁴ Monteiro First WS [8].

⁴⁵ SoR [270].

⁴⁶ *International Financial Reporting Standard 3 - Business Combinations*, at paragraphs 3.59 and 3.61 and Appendix B Exhibit R-362) ; Ernst & Young's *Good Group International Limited - International GAAP Illustrative financial statements for the year ended 31 December 2010*, particularly note 5 on page 49 (Exhibit R-363).

make reference to no fewer than 14 relevant acquisitions made by BSGR or its subsidiaries.⁴⁷ In none of these cases is the selling entity mentioned by name.

62. By way of example: on the very same page of those Consolidated Accounts as the acquisition of 17.65% minority shareholding of BSGR Guinea is mentioned, and elsewhere in the accounts,⁴⁸ the Koidu Holdings SA deal is also mentioned. The BSGR Group had bought out the 40% minority interest of Energem Resources, a company listed on the Toronto Stock Exchange. In neither case is the identity of the entity who sold the interest provided.

63. Mr Monteiro acknowledges that we discussed the 17.65% minority shareholding. I repeat, however: he never asked me to identify the shareholder. Had Mr Monteiro, or indeed any member of the Vale team, asked me the identity of the minority shareholder at any time, I would have told them it was Pentler. Had they asked me for any back-up documents relating to the sale I would have provided them. The due diligence process was demand-led. We populated the data room pursuant to requests made by Vale. Vale never asked for any document relating to the US\$22 million sale, even though they were aware of it, and it was not concealed.

64. Vale complains that the letter dated 23 April 2010 from Ernst and Young to the directors of BSG Guernsey, with a draft financial report for 2009 for BSG Guernsey attached, was not in the data room, when I mistakenly suggested that it was.⁴⁹ I would like to clarify the position as follows:

1. BSGR had created a Statement of Financial Affairs for BSGR Guernsey dated 2009 in accordance with the standards of Agreed Upon Procedures, which was approved and signed off by Ernst and Young by a letter dated 18 February 2010. This document was supplied to Vale in the data room as an agreed alternative to IFRS audited accounts for 2009 for BSGR Guernsey, which were not yet finalised. In an audit conducted under agreed-upon procedures, the auditor provides only factual findings and does not offer opinions, conclusions or assurances in the final report. Instead, the auditor's report simply presents the facts, with the audit facilitators drawing their own

⁴⁷ Exhibit R-214, particularly pages 41-49 and 63.

⁴⁸ *Ibid.* page 42.

⁴⁹ SoR [271] and [272].

conclusions from the findings. Vale accepted this and did not demand an IFRS based audit of BSGR Guernsey. This is the document which is referred to at the end of paragraph 80 of Tchelet-1, and which appears as exhibit C-290 in these proceedings. This was also the document which BSGR had intended to exhibit as R-215; however, a different document was in error exhibited as R-215.

- ii. The document which now appears as exhibit R-215 is a letter dated 23 April 2010 from Ernst and Young to the directors of BSGR Guernsey, to which is attached a draft financial statement for BSGR Guernsey (company only) for the 10 months ending 31 December 2009. The letter was written subsequent to Ernst and Young having been engaged by BSGR on 16 April 2010 to audit both the consolidated and company only financial statements of BSGR Guernsey. Those audits were requested because David Clark and I expected that Vale might demand an IFRS based audit of BSGR Guernsey. It was never intended that this process would be completed prior to the completion of the Vale deal. As at the date of the letter, the audit of the company only statements had not been completed, and the consolidated statement had not yet been prepared. Nevertheless, BSGR had requested Ernst and Young to report on the current position in relation to the two audits. BSGR asked for this report so that it would be in a position to provide accurate responses to any questions which Vale might raise in relation to the ongoing audits, as part of Vale's due diligence for the deal with BSGR.

65. Vale mentions⁵⁰ that an earlier draft of the letter dated 23 April 2010 from Ernst and Young includes a reference to Pentler, whereas the final letter does not. I do not understand how Vale sees as relevant a change by Ernst and Young in a letter which was not placed in the data room and that Vale did not see. The purchase of the minority shareholding for US\$22 million was clearly flagged, and noted by Vale. The existence of the shareholding was also clearly flagged in both versions of the letter. In fact the Ernst & Young letter of 23 April 2010 was designed to report on the progress of Ernst and Young in relation to their company only audit of BSGR Guernsey. Whilst they had accounted for the US\$22 million in the consolidated accounts they

⁵⁰ SoR [272].

were enquiring how, if at all, the US\$22 million should be booked in the company only accounts of BSGR Guernsey.

I. FOFANA AND BOUTROS

66. Vale also alleges that we deliberately failed to disclose Mr Fofana and Mr Boutros to them. This is wrong. As already explained, populating the data room was done in response to particular requests. I had tried to obtain a written contract for Mr Fofana but none had been provided. When asked to provide contracts of consultants, no document existed to trigger my inclusion of him. I believe this omission was simply an oversight. However, payments to Fofana appeared clearly in the accounting documents made available to Ernst and Young when they visited Guernsey as part of the due diligence process.

67. Ghassan Boutros was a supplier of electrical and other equipment, and a variety of services. Accordingly, it would not have made sense to include him as a consultant for the purposes of an FCPA type due diligence.

J. MATERIAL AGREEMENTS

68. Vale alleges that BSGR deliberately failed to disclose copies of all material agreements, documents or arrangements. This is not true. In relation to the various contracts between BSGR and Pentler, I did not consider these to be material because I saw Pentler as an issue which fell outside of the agreed scope of the due diligence. Skadden were aware of the SPA and the Settlement Agreement with Pentler. At no time did they advise that these should be disclosed as material contracts.

K. CLAIM BY MR BAH

69. Skadden advised in relation to the correspondence from Bah. As I have explained, in the lead up to the Vale deal Skadden reviewed our responses to the Due Diligence questionnaires. It was clear to me that Skadden turned their mind to the question of whether there was any litigation which needed to be disclosed. They specifically advised that the allegation raised by Rio Tinto ought to be disclosed. They also knew about Mr Bah's threats but did not advise that such threats needed to be disclosed. Had Skadden advised to disclose Mr Bah's threats to Vale, we would have done so.

There was certainly no discussion of deliberately withholding Bah's name so as to keep him or his threats hidden. In any event Mr Bah was someone with whom BSGR had no relationship and to whom BSGR owed no obligations. Pentler had confirmed this, and Pentler and its individual shareholders had provided indemnities for these claims.

L. ERNST & YOUNG AUDIT IN GUERNSEY

70. In Tchelet-1 I recounted how three individuals from Ernst and Young ("**the EY Auditors**"), acting on behalf of Vale, arrived in Guernsey on 28 April 2010 for a financial audit. There are certain additional details concerning that visit that I believe it is important to mention.

71. For the duration of their visit, the EY Auditors were given full access to all documents which were held by BSGR in relation to the activities and investments in Guinea. This included documents belonging to BSG Guernsey, as well as other documents relating to the projects in Guinea I specifically asked my colleagues in the Guernsey office to allow the auditors to review whatever documents they wanted to see onsite, so that there would be no need to email large numbers of documents to them.⁵¹ This enabled the EY Auditors to go through and review all of the project payments. Furthermore, I and my colleagues David Clark, Sarah Bryce and Helen Nicolle made ourselves available to answer any questions which the EY Auditors might have had, and to provide any BSGR documents that they wished to see. Sandro de Bernadini from Skadden was in attendance throughout the visit by the EY Auditors. I recall at the time being surprised that as opposed to sending a team of due diligence accountants, Vale had opted to send an auditor and two forensic accountants from Ernst and Young's Fraud Investigation & Disputes Services Department, just two days before the closing of the transaction.

72. I believe that a number of documents referring or relating to Pentler were available in Guernsey for the EY Auditors to inspect. I base this belief on both my general recollection and the fact that such documents were still stored in the filing cabinets in Guernsey as at March 2015, when an inventory of the files was conducted⁵². These

⁵¹ Email to David Clark, Sarah Bryce and Helen Nicolle dated 28 April 2010 (Exhibit R-364).

⁵² See index of files prepared in March 2015 (Exhibit R-365)

documents include the following, some of which would have been of interest to any auditor examining a company of BSGR Guernsey's size:

- i. A copy of the Settlement Agreement between BSGR Steel and Pentler⁵³
- ii. Copies of Invoices for three payments made to Pentler between 16 April 2008 and 28 July 2009, totaling US\$8 million,⁵⁴ payment for which was made out of the BSGR Guernsey bank account
- iii. A one-page document titled "BSGR Guinea – Project Summary Reporting – summary of audit trail", found in the folder labelled "Guinea Consul Workings". This document sets out the structure of monthly project reports which BSGR Guernsey produced in relation to the projects in Guinea. The document indicates that BSGR Steel BVI had been involved in the "*Buy out of Pentler*" and the "*buy out of minority*"⁵⁵
- iv. Board Minutes of BSGR dated 28 March 2008 supporting BSGR Steel's purchase of Pentler 17.65% minority interest⁵⁶

73. Amongst the documents which the EY Auditors actually inspected were the payments files, which contained details of payments which had been made in relation to the Guinea project, other than those which had been paid by BSGR Guinea. The payment files that were available to them included all of the documents evidencing payments made to the companies associated with Pentler, Ibrahima Kassory Fofana, Ghassan Boutros and Logistic and Maintenance Services SARL, details of which I set out in Tchelet-1.⁵⁷

74. During their visit to the Guernsey office, none of the EY Auditors asked about the US\$22 million of goodwill which had been included in the accounts. In hindsight, I find that surprising, given that it was such a significant element of the company's valuation. Nor did they ask any questions about the related minority shareholding, which I had previously discussed with Mr Monteiro.

⁵³Exhibit R-33.

⁵⁴Exhibits R-207, R-208 and R-209.

⁵⁵Exhibit R-366.

⁵⁶Exhibit R-224.

⁵⁷Tchelet-1 [37] and [42].

M. ACCOUNTING PROCEDURES FOLLOWING THE ACQUISITION BY VALE

75. Following the transaction with Vale, Vale essentially took control of BSGR Guernsey (VBG Guernsey). It therefore took over the finance and accounting functions of VBG Guernsey and its subsidiaries, as had been expected and stipulated under the terms of its agreements with BSGR. All of the documents listed above which mentioned or dealt with Pentler, were kept in the Guernsey office and remained available for Vale to inspect at any time after the transaction documents were signed on 30 April 2010, for as long as Vale retained its controlling interest in VBG Guernsey. Nothing was removed or concealed.
76. Although Vale was now responsible for funding the Guinea project, BSGR had expected that Vale would openly share financial information concerning VBG Guernsey and its subsidiaries. However this is not what happened. In particular, Vale never provided consolidated accounts for VBG Guernsey. As a result BSGR was not able to determine how the funding provided by Vale, whether by way of loan or equity, was being used by the various VBG subsidiaries. For example, it could not determine how much of that funding was being spent on the feasibility study which was being carried out by VBG Guinea in Simandou. This information was particularly relevant, since it had been agreed that certain project expenses, such as those relating to the feasibility study, would be funded through equity provided by Vale, and not through loans.

N. THE VALUE OF BSGR'S GUINEA INTERESTS IN EARLY 2008

77. In its pleadings, Vale assigns to BSGR Guinea BVI valuations of US\$6.5 million and US\$19.1 million, as at the end of 2007 and 2008 respectively.⁵⁸ Apparently, Vale has taken these figures from a table of "Exploration and Evaluation Asset –Analysis by area and year" appearing in the Statement of Financial Affairs of BSG Guernsey dated 31 December 2009.⁵⁹ However, Vale is mistaken. As is clear from the information contained in the Statement and the covering letter from Ernst and Young,

⁵⁸ SoR [284].

⁵⁹ Exhibit C-290.

the figures referred to by Vale simply represent the *annual expenditure* on the Guinea project during each of the years 2007 and 2008 respectively. They are certainly not representations of the value of the company at any specific date.

78. In fact, as mentioned above, BSGR had estimated a valuation of USD\$200-300 million for its interests in Guinea, and had included this valuation in a presentation that it provided to Maalot, the Israeli Bond rating company, in October 2007.⁶⁰

I confirm this statement is true to the best of my knowledge and belief.



Joseph Tchelet

17 July 2016

⁶⁰ Presentation by BSGR to Maalot dated October 2007 - "BSGR - projects in advanced business development stages" (Exhibit R-360)