

**INTHE MATTER OF AN ARBITRATION**

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

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

**BETWEEN:**

**(1) BSG RESOURCES LIMITED**

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

**(3) BSG RESOURCES (GUINEA) SÀRL**

**Claimants**

**- v -**

**THE REPUBLIC OF GUINEA**

**Respondent**

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**Second Witness Statement**

**Marcus Joannes Paulus Maria Struik**

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**I, MARCUS JOANNES PAULUS MARIA STRUIK, will state as follows:**

1. I gave a detailed account of BSGR's Guinea project in my first witness statement dated 28 February 2016 ("CWS-2"). In this second witness statement, I will respond to certain allegations made against me by the Republic of Guinea ("Guinea") in its Counter-memorial dated 17 June 2016 and accompanying witness evidence. Rather than commenting on each of Guinea'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 Guinea's claim, this should not be construed as an admission on the part of BSGR.
2. I will use the same definitions adopted in CWS-2.

3. 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.

#### **A. The Role of Pentler**

4. I dealt with Pentler briefly in my first witness statement<sup>1</sup>, however given the allegations made in relation to Pentler and its relationship with BSGR in the Counter-memorial I wish to add that the arrangement between Pentler and BSGR was negotiated by Mr Oron, I had no part in it. I just signed a letter dated 14 February 2006 which formalized the arrangement.<sup>2</sup> The arrangement acknowledged Pentler's role in introducing us to the country and its mining opportunities and the potential of the opportunities. The arrangement consisted of two parts: (1) the award of a minority shareholding in BSG Resources (Guinea) Limited (BVI) and (2) the payment of success fees on the basis of certain milestones. I know that the first part of the arrangement was executed but I believe that the second was not. I don't know the reason for that as, as indicated above, I was not involved in the discussions between Pentler and BSGR.
5. I am aware that, in parallel to the 14 February 2006 arrangement, BSG Metals and Mining and Pentler also entered into a Services and Cooperation Agreement.<sup>3</sup> Again I was not involved in the negotiation of this contract but I understood the arrangement to be that if Pentler were to identify new projects, in Guinea or elsewhere, it would first introduce the projects to us. In return Pentler would receive what I call a finder's fee. I believe that this fee was not fixed and would be negotiated on a case by case basis. The Liberia Bong Mine introduction is an example of this arrangement with Pentler. I also remember another one, called Forecariah, which is to the east of Conakry near the border with Sierra Leone. I looked at the potential of those projects and decided that they were not

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<sup>1</sup> CWS-2 (Struik) at [111]-[119]

<sup>2</sup> R-182, Letter from M. Struik (BSGR BVI) to Pentler, 14 February 2006

<sup>3</sup> Exhibit C-0331, (Services & Co-operation Agreement btw BSG Metals and Mining & Pentler dated 15 October 2015)

for us. I believe that Forecariah now belongs Bellzone, and that the opportunity was also offered to Vale. There may have been other potential projects that Pentler suggested which I cannot now remember.

6. I was not involved in the discussions about Pentler's fee for bringing the project to BSGR. The relationship was through Roy Oron who was also the head of the BSGR office in South Africa. I was aware that Pentler was going to be given a minority shareholding on account of having introduced us to Guinea and Simandou. It was not my decision and was not something I concerned myself with.
7. I signed the Milestone Letter because I was a director of BSGR Guinea. Contrary to Guinea's suggestions, it was not Pentler's role to help BSGR achieve the milestones, neither was it obliged to do so.
8. BSGR came to Guinea based on an opportunity in the Simandou region. That opportunity was provided to us by Pentler. So, whatever BSGR might successfully achieve in the country, we would not have been able to achieve if Pentler had not brought us to Guinea. This is in my view the reason why Pentler received the shareholding and was promised success fees according to the achievement of milestones which related to Simandou North and South as well as Simandou Blocks 1 and 2. Although these blocks were not available at the time, we had been told that Rio Tinto was not progressing in these blocks at all and that the licences may be included in the area that Rio Tinto were required to retrocede as required by the Mining Code. Blocks 1 and 2 were a speculative opportunity but, then again, so were Simandou North and Simandou South. Pentler would only get paid if the projects in Guinea took off and these milestones were completed.
9. As stated in my first witness statement BSGR had nothing to do with the contracts Pentler apparently concluded with third parties.<sup>4</sup> For the avoidance

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<sup>4</sup> CWS-2 (Struik) at [112]

of doubt, that includes alleged contracts with Ms Touré, Mr Touré, Mr Aboubacar Bah, Mr Ismail Daou or anybody else.

## **B. Bauxite Exploration Permits**

10. Guinea mis-represent the procurement by BSGR of exploration permits on bauxite deposits<sup>5</sup>. BSGR was informed by the CPDM about a cluster of bauxite permits that were available on the border with Mali, we applied for and were granted these exploration licences in the north of Guinea. Apparently during Mr Oron's meeting with President Conté in July 2005, the President highlighted the importance of someone also developing this part of the country and not only the eastern side.
11. The information that we received from the CPDM also came to us from Mr Cilins and his local business partner Ms Touré. We used to call her the Lady. She was said to have the ear of President Conté. I did not know that she was or claimed to be his fourth wife. While the permits were obtained in a standard way, I was aware of a degree of cajoling from Ms Touré through Mr Cilins, but the cajoling was Ms Touré's for BSGR to apply for the permits, not any cajoling of the government to grant the permits to BSGR. My understanding was that she was trying to please the President by encouraging us to look into bauxite development and create employment opportunities. It was clear that taking these licences would improve BSGR's standing in the country and so I did what I could to ensure this was done, but it was unhelpful to be under pressure to take a concession that the board were unenthusiastic about.
12. There was no relationship, direct or indirect, between BSGR and Ms Touré then or at any time later. Guinea misconstrue the May 2006 email to suggest the invoice was for payment to "*The Lady*". There are two separate sentences, one relates to whether we were happy with the permits, the other relates to Michael

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<sup>5</sup> Counter-memorial at [219] – [230];

asking for payment – there is no request recorded in the email, for payment to be made to Ms Touré.<sup>6</sup>

13. The reference in my email of 10 May 2006 to “No 1” is to the President.<sup>7</sup> The emphasis of my email was supposed to be on looking into Bouke, which is where the bauxite permits were, and Forecariah which was a potential iron-ore mining area. I knew that our investigating those opportunities would please the President. As for my reference to the “Lady”, I was aware that Ms Touré had been chasing Fred about BSGR taking the bauxite permits. He complained to me that she was harassing him. On a practical level Ms Touré had not been involved in the bauxite permits. I sorted that out myself via the CPDM, the standard way, paying the standard fee.
14. I am not aware that we were up against other companies to obtain the bauxite licenses. I don't think that we were because the commercialisation of bauxite requires a lot of power and there was no power available in the north of the country. In any event, we did not pay bribes to anyone to obtain these licences.
15. Because there was no infrastructure in Bouke where the particular permits were located, no-one had investigated the area. My recollection is that Beny Steinmetz was not in favour of the opportunity. However, I thought that it was important that we establish our reputation in Guinea and look into a region that the government wanted to exploit. This helped build a name for ourselves. I managed to persuade BSGR that we should invest a little money into investigating the area. In the end it was Roy's decision. Roy was persuaded to go for it, so the company went ahead.
16. We initiated an exploration programme and used Hatch for a scoping study. We had hoped that we might be able to smelt and refine the bauxite to make aluminium but our drilling tests indicated that the bauxite was low grade and we

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<sup>6</sup> Counter-memorial at [801]; R-205

<sup>7</sup> R-205, Emails between Mr Struik, Mr Oroan, Mr Tchelet and others dated 10 May 2006 -15 May 2006

did not proceed past the initial exploratory work carried out in 2007 and 2008. Our total investment amounted to \$4,935,254<sup>8</sup>.

### **C. Use of Fred Cilins' Bank Account**

17. Guinea misconstrue correspondence to suggest that the transfer of USD \$10,000 in April 2006 to Fred's account, was solely for the purpose of the bauxite permits, which were connected to services provided by Ms Touré.<sup>9</sup> However, the transfer was only partly related to the bauxite permits. At that time, Fred's account was being used to assist us with other Guinea project related expenses.
18. By way of background, when visiting Guinea from South Africa at the start of the project, we were subject to a \$10,000 limitation per person on any one trip. There was also a yearly limit for any one individual. Taking cash out of South Africa was a very formal process due to the very strict foreign exchange controls in place at the time. Our South African bank, Bidvest, would attend our offices with the relevant paperwork and I would take that paperwork with me when going through customs so that I had something to show if stopped. After we had set up an office with a safe we kept our cash in the safe. Once in Guinea we had to change the cash to Guinean currency. Again, this was something which Fred sometimes helped with. Local Guinean employees were paid from the safe in local currency. Local employees did not have bank accounts, which is why we had to pay in cash.
19. Because of the difficulty in getting cash into Guinea, in the early months of the project we transferred some sums directly to Fred's account and he would then give us the equivalent in local currency. I'm not sure whether it was an account in his name or in the name of his business, but I understood that he had it for

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<sup>8</sup> Exhibit C-0332, Statement of Financial Affairs for BSG Resources (Guinea) Limited (Guernsey) for Period Ended 31 December 2009 and Letter from Ernst & Young, p.8 dated 31 December 2009 & 18 February 2010

<sup>9</sup> Counter-memorial at [219]-[223]; R-203, Courriels entre M. Cilins, M. Struik, M. Tchelet et autres

business purposes. To assist us he arranged that Ibrahima would have signing rights on his account. We set up a BSGR Guinea local account in May 2006. Neither Fred nor Ibrahima had signing rights on that account.

20. As can be seen in the initial email from Fred to me on 4 April 2006,<sup>10</sup> the amount of Fred was assisting with an iron ore MOU, arranging Nissan cars for the group, and assisting with the set-up of the villa and office. His email stated that “*For payment of the bauxite permits (we should know the amount by Wednesday) and the bathtubs (usd 1.000) I suggest you don’t wait BSGR Guinea account to be open Tuesday afternoon or Wednesday morning and wire 10.000 usd to the personal account ...*” Fred continues with reference to other activities in the week ahead relating to insurance and taxation.

#### **D. Presentation of BSGR to Guinea Officials 19 September 2006**

21. In my first witness statement I refer to the reception held to mark the official opening of BSGR’s premises in Conakry<sup>11</sup>, and that, contrary to the assertions made by Guinea<sup>12</sup>, Ms Touré was not the event’s “*special guest*” to add credibility to the event. I do not consider that Ms Touré was an individual who would give BSGR credibility. Guinea in its Counter-memorial, use the attendance at the event of soldiers wearing “red berets” to suggest that Ms Touré was escorted by “Presidential Guard”. However, as noted by Mr Sylla<sup>13</sup> the event was also attended by the Minister of Mines, Minister of State and Minister for Higher education all of whom would have been escorted by soldiers wearing “red berets”. Further, it is worth noting that during the time I worked in Conakry, most foreigners involved in the mining sector, upon arrival in Conakry, would have up to five soldiers, who would wear red berets, allocated to be with them, to ensure their security during their stay in Guinea and to report back to the Government. I recall that BSGR had up to five soldiers wearing red berets usually in the field with us, including at the project sites. Therefore, the

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<sup>10</sup> R-203, Courriels entre M. Cilins, M. Struik, M. Tchelet et autres

<sup>11</sup> CWS-2 (Struik) at [40]-[41]

<sup>12</sup> Counter-memorial at [231]-[234]

<sup>13</sup> RWS-1 (Souaré) at [21]

attendance of “red berets” at the reception is of little relevance, and does not represent the image of a “presidential guard” escorting Ms Touré as Guinea suggest.

#### **E. Aboubacar Bah**

22. Part of any foreigner’s experience in Africa is that local people will make constant approaches asking for money and offering their services. This is something that happens all the time, pretty much on setting foot in the airport. It is part and parcel of Africa and is not something that can really be understood by someone who has never worked in Africa. Mr Bah’s approaches were far from unique as an attempt at blackmail. Guinea wrongly suggest that there is truth to be found in his correspondence, and reliance can be placed by the Tribunal on his assertions<sup>14</sup>.
23. I believe that I met Mr Bah once in 2006, in the entourage of Pentler, but I had no idea who he was nor what he was doing there. I was introduced to Mr Bah in Guinea by Fred Cilins. Fred told me that he was an associate of FMA in Mali, although I didn’t know anything more than that and did not know what his role was.
24. Mr Bah spoke French and called me from a +223 number, the Mali country-code, when he called me. I was able to understand what he was saying. Initially, he would ask me questions about the project in Guinea. I did not consider this to be particularly strange behavior. I knew he was a businessman connected to Fred Cilins and he was aware that I represented a foreign investor and was, I suspect, trying to establish a relationship with me. At the start, the calls were bothersome and irritating. I am no longer able to state with any certainty at which point in time the calls became threatening, but I do recall mentioning the matter to Michael Noy who said that he would deal with the issue.

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<sup>14</sup> Counter-memorial at [441]-[444], [870]

25. He re-surfaced suddenly in June or July 2009. I recall that we picked this up with Pentler and that we were given an indemnity in relation to any claims brought by Mr Bah. This didn't stop Mr Bah though.
26. I have no recollection of making a note of the call I had from Bah on 5 October 2009. However, I am certain that the call did occur and that I reported it to David Barnett. Mr Bah threatened that unless he received US\$4 million by the end of the month, he would issue proceedings against BSGR. I immediately informed Mr Barnett about the call.
27. On 1 December 2009, Roger Williams, an employee of BSGR, forwarded me a letter sent by Groupe Fouta Mondiale Corporation SA claiming the payment of USD 15.2 million. The claim was based on a contract that Mr Bah and Pentler had allegedly entered into on 20 February 2006. I discussed the Bah issue with Mr Barnett. Mr Barnett reiterated that Mr Bah was a Pentler issue and that they had assumed responsibility for dealing with it and that I should ignore the letter - which I did.
28. To me, honestly, this was a non-event. Based on my experience in Africa, I knew that these kind of incidents happened all the time. Of course I noted the timing of the Pentler contract and it occurred to me that they may have paid away some of their BSGR introduction fees to Mr Bah. I noticed too that our Mr Touré was allegedly a party to the same contract and I addressed this with him. He confirmed that he had signed up to these arrangements, but as far as I remember, that he had given up his rights under this document once he had become an employee of BSGR. As it had nothing to do with us or me, we/I ignored this like we/I ignored Mr Bah.
29. In March 2010, however, Mr Bah sent another letter making the same allegations. Mr Bah was Pentler's responsibility and I believe Mr Barnett requested Mr Noy once again to take responsibility for dealing with Mr Bah's threats.

30. However, this again did not work. On 5 May 2010 we received another letter from Mr Bah in which he alleged that I had witnessed Mr Oron paying him USD 425,000 and Mr Ismail Daou USD 75,000. That is untrue. The tone of the letter was nasty and menacing but not particularly worrying. Mr Bah had been making the same threats to sue before and his claims were ludicrous in any event. I passed on the correspondence to Mr Barnett and he, so I now understand, passed it on to Pentler to deal with. I believe he got another indemnity from Pentler, this time from its principals themselves, in relation to Mr Bah's claims. The last time Mr Bah called me and threatened me was in April 2012.

#### **F. Payment to Ms Touré through Ghassan Boutros/LMS**

31. Guinea alleges that BSGR made payments to Ms Touré and her company, Matinda through Ghassan Boutros.<sup>15</sup> As far as I know, no such payments were made nor did we use Mr Boutros as an intermediary to make payments to Matinda or Ms Touré. The only thing I know is that Mr Boutros was one of our suppliers for equipment, like generators, air conditioners, satellite internet link and road construction and mining equipment. Mr Avidan was in charge of the operations and he can provide more details about the relationship with Mr Boutros.

#### **G. Mr Daou**

32. Guinea alleges that BSGR took steps to contract with Mr Daou in an effort to gain access to President Conté<sup>16</sup>, without providing any evidence to substantiate this falsehood. As stated in my first statement and above, BSGR had nothing to do with the contracts Pentler apparently concluded with third parties<sup>17</sup>.

33. I believe I met Mr Daou only once. I went to Senegal once for around four to five days and conducted in Senegal exactly the same sort of initial fact-finding mission and had similar discussions with the equivalent of the CPDM there as I

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<sup>15</sup> Counter-memorial at [387] –[416], [872]

<sup>16</sup> Counter-memorial at [193]

<sup>17</sup> CWS-2 (Struik) at [112]

did when I first arrived in Guinea. Fred had suggested that there might be opportunities in Senegal and introduced me to Mr Daou who I understood to be the FMA representative there. From the email I think it was in mid-2006. In the end it was a wasted trip as there was nothing suitable for BSGR and I reported to Mr Oron, that in my view, there was nothing to follow-up.

**H. Mr Ibrahima Sory Touré**

34. Further to my evidence regarding Mr Touré in my first witness statement<sup>18</sup>, I note that Mr Touré was not authorised to make and [as far as I am aware] did not make any payments or provide any gifts to government officials or Ms Touré on behalf of BSGR. He worked for us and he was on our pay-roll. He did not receive any extraordinary benefits or payments, apart from the bonus payment in 2010, after the deal with Vale was concluded. I recall that at some point we changed his official title to Vice President of BSGR Guinea SARL. This new title was not a promotion strictly speaking, but as our company was growing we also wanted to add more weight to our external relationships. This new title reflected our intent.

**I. 2009 Feasibility Study Review**

35. In my first witness statement, I addressed the payment for catering and payment to the members of the Committee which reviewed BSGR’s feasibility study as well as the process.<sup>19</sup> [PROTECTED]

[REDACTED]

<sup>18</sup> CWS-2 (Struik) at [14], [36]-[37]

<sup>19</sup> CWS-2 (Struik) at [78]-[90]

<sup>20</sup> Counter-memorial at [850]

<sup>21</sup> [PROTECTED]

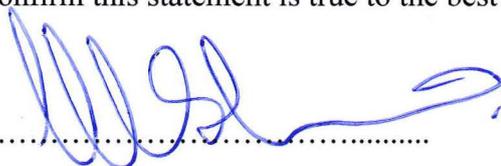


**J. Withdrawal of Rio Tinto's Rights**

36. I have already addressed in my first witness statement the process and by which Rio's Tinto's rights were revoked and granted to BSGR.<sup>22</sup> For the record, I oppose Mr Nabé's comments that *"everyone knew that they had to give the retroceded licences to BSGR. It was not a secret that the president's wife was behind it."*<sup>23</sup>

37. Further, in relation to comments throughout Guinea's Counter-memorial that Guinea would have been better off if the rights had continued in the hands of Guinea (despite the evidence regarding Rio Tinto's apathy detailed in my first witness statement), I note that it took Rio Tinto until around June 2016 to submit a feasibility study. Having spent a reported US\$3 billion on the project and despite only weeks earlier submitting a "bankable feasibility study", Rio Tinto has recently announced that it will be shelving the Simandou project.<sup>24</sup>

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



Marcus Joannes Paulus Maria Struik

Dated: 10 January 2017

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<sup>22</sup> CWS-2 (Struik) at [27], [55]-[69]

<sup>23</sup> RWS-5 (Nabé)

<sup>24</sup> C-0289 - MINING.com (4 July 2016) "Iron ore surges past \$55 as Rio Tinto exits Simandou"; C-0290 (4 July 2016) Reuters "Rio Tinto chief shelves giant Guinea iron ore project: newspaper"