

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

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

**BETWEEN:**

**(1) BSG RESOURCES LIMITED**

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

**(3) BSG RESOURCES (GUINEA) SARL**

**Claimants**

**-v-**

**THE REPUBLIC OF GUINEA**

**Respondent**

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**First Witness Statement**

**SANDRA MERLONI-HOREMANS**

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I, **SANDRA MERLONI-HOREMANS**, will state as follows:

**A. Introduction**

1. I am a Belgian citizen. My native language is Dutch and I also speak French, English and Italian.
2. I make this statement in relation to the claim made by BSGR, BSG Resources (Guinea) Limited ("BSGR Guernsey") and BSGR Resources (Guinea) Sarl ("BSGR Guinea")

against the Republic of Guinea ("Guinea"). Save where I indicate otherwise, the facts and matters set out in this statement are based on my first-hand knowledge of the events in question. Where I do not comment on an aspect of Guinea's allegations, this is not an acceptance of those allegations.

3. This witness statement has been prepared with the assistance of BSGR's lawyers, Mishcon de Reya LLP. I have refreshed my memory by looking at correspondence and other documents from the relevant time.

### **B. Personal Background**

4. I started my career in 1989 as an administrative and trading assistant to the rough diamond trading division at R. Steinmetz & Sons NV in Antwerp (Belgium). In 1994 I resigned from R. Steinmetz & Sons NV and moved to Onyx B.V.B.A. (Belgium), where I worked as a senior management assistant between 1994 and 1998.
5. From 1998 to December 2014 I worked as Director and Head of Administration of Onyx Financial Advisors S.A. in Geneva and Onyx Financial Advisors Ltd, B.V.I. including its subsidiaries in the United Kingdom, the Netherlands, Italy and South Africa ("Onyx").
6. While working for Onyx, I was responsible for the administration of the Onyx Financial Advisors S.A. team based in Geneva. This involved keeping the clients' corporate back up office and maintaining the clients' corporate files, constitutional documents, minutes, books and legal files. I also acted as director, proxy holder or company secretary to boards of directors of clients' companies if and where required. I provided clients with advice as to fiscal optimization of international holding and trading structures for both private and corporate clients. I also assisted the clients' M&A teams and front offices for

transactions related to diamonds, mining & metals, natural resources, energy, real estate and capital markets.

7. When working at Onyx, I reported to Dag Cramer, but in relation to the day to day matters I operated mostly independently. I only contacted him to discuss the bigger strategic points when I felt that it was necessary to do so.
8. Throughout the time period relevant to these proceedings, 2005 to 2013, I refer the Tribunal to the structure chart of the Onyx group detailing the Onyx group of companies which is correct as at 31 December 2014.<sup>1</sup> One of Onyx's main clients was the BSG group of companies. Onyx Financial Advisors Limited BVI was under contract to the Balda Foundation, which ultimately holds the BSG group of companies. Onyx provided management, corporate, administrative and financial services to the foundation and the underlying companies. As pointed out above, my main responsibility in Geneva was to keep the corporate back office of the BSG group of companies and other clients' companies. As a representative (not legally appointed) of the foundation council,<sup>2</sup> I also sit on most boards of the BSG companies to look after the interests of the foundation and its beneficiaries. I was a non-executive board member, meaning that I did not get involved in the day-to-day management of companies but rather controlled the executive directors and /or managing directors. Thus, Guinea's suggestion that the BSGR group was basically managed by me and Dag Cramer is wrong.<sup>3</sup>
9. Since January 2015, I am no longer employed by Onyx.

### **C. Guinea's Allegations**

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<sup>1</sup> Exhibit C-0150, Onyx Group Structure Chart dated 31 December 2014

<sup>2</sup> Exhibit C-0327, Bylaws to the Balda Foundation Regarding the Exercise of Responsibilities, para 9.1(a) and 9.1(b) of the Statutes.

<sup>3</sup> Counter-memorial at [71]

**(a) Neither BSGR nor Onyx controlled Pentler Holdings Limited**

10. Guinea suggests that Pentler was founded and controlled by BSGR as a shell company that was intended to function as vehicle for the implementation of a corruption scheme in Guinea and which was controlled by BSGR via myself, Dag Cramer and Onyx<sup>4</sup>. It is alleged that under my and Mr Cramer's direction, contracts with Mamadie Toure and payments to her thereunder were approved. These allegations are completely untrue.
11. Neither Onyx nor BSGR has ever exercised any control over Pentler nor has the latter been used to implement to the best of my knowledge a corruption scheme. I will describe in detail below the nature of the relationship between Onyx and Pentler. BSGR has never been a shareholder of Onyx. As I say above, BSGR was simply one of Onyx's clients.

**(b) The sale of Pentler Holdings Ltd by Onyx Financial Advisors Ltd (BVI)**

12. In February 2006 I was contacted by Yossie Tchelet, the current Strategic Financial Specialist of BSGR, who asked me if I could assist a business partner of BSGR in South Africa with the acquisition of a B.V.I. shelf company. I confirmed to Mr Tchelet that we would be able to help his business partner with this request. He put me in contact with Mr Michael Noy.
13. At the time, Onyx had several "dormant" shelf companies in the BVI and other jurisdictions in case one of our clients needed a company quickly. During the last decade Onyx created hundreds of shelf companies that were available for, and then used as special purpose vehicles for Onyx's clients. Pentler Holdings Limited ("Pentler") was

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<sup>4</sup> Counter-memorial at [73]-[76], [115], [152]-[166], [173], [179], [788], [861], [1133]

one of these shelf companies that was incorporated on 28 October 2005 in the British Virgin Islands by our agents Mossack Fonseca & Co, and which Onyx had purchased from its agents as a shelf company.<sup>5</sup> As per our standard procedure for shelf companies, Onyx held 100% of its shares and Margali Management Corporation (a subsidiary of Onyx) was appointed as first and sole Director of the company.<sup>6</sup> Peter Veenendaal, Onyx's accountant, two nominee directors provided by the BVI agents, Imogene Wilson and Marta Edghill, and I were authorized signatories and directors of Margali Management Corporation.

14. I had initially reserved Pentler for another client's project. Since that project had never materialized, the company remained dormant, but ready for immediate re-activation. Mr Cramer did not know about the intended sale of the shelf company. It was an everyday transaction, which hardly involved any administrative efforts or financial responsibilities. Thus, I did not even consider informing or consulting him beforehand.
15. On 13 February 2006 I had a call with Mr Noy<sup>7</sup> regarding the intended sale of the BVI shelf company I had discussed with Mr Tchelet. He told me that he and his co-shareholders would urgently need a new company and asked me if I could assist them with setting up a BVI company. I explained to Mr Noy that I had shelf companies available and orally agreed to reserve a company for him and his fellow shareholders. On the same day I confirmed by email to him that I had reserved Pentler and provided him with the company details: the date of incorporation, the registration number, the

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<sup>5</sup> Exhibit R-176, Pentler Incorporation Documents dated 28 October 2005

<sup>6</sup> *Ibid.*,

<sup>7</sup> Referred to in Counter-memorial at [155]

registered address, that the share certificate only allowed for nominal shares and that the share capital was \$50,000 divided over 50,000 shares of which \$1 had been paid up.<sup>8</sup>

16. I also sent him the copies of the Certificate of Incorporation, Memorandum and Articles of Association, Appointment of First Director, Memorandum of First Director and the Share Certificate #1. I also informed him that the price of the company was US\$1,500. In case he wanted to purchase the company, I asked him for his full contact details, details of directors to be appointed (or alternatively to confirm whether he wanted me to arrange two nominee directors), details of the new shareholders and details of persons who should be granted a general Power of Attorney.
17. On 13 February 2006, Mr Noy confirmed the purchase of Pentler and asked me to provide him with our bank details. He promised to send all further details on 14 February 2006, which he did.<sup>9</sup>
18. Mr Noy provided me with an address in France, his details and the details of the two other shareholders Frédéric Cilins and Avraham Lev Ran. Mr Noy asked that a Power of Attorney be issued to him and Mr Lev Ran and that the shares be kept by Onyx as trustee until further notice. This was the first time I had heard of Mr Cilins and Mr Lev Ran. I recall receiving Mr Noy and Mr Cilins once in our Geneva office for a brief courtesy visit prior to transferring the administration of Pentler to their new administrator at the end of 2006. I have never met and to the best of my knowledge never spoken with Mr Lev Ran. Mr Noy asked me to send the Power of Attorney as soon as possible. We did not discuss why he would need the Power of Attorney so urgently. Mr Noy also asked me to send him the Deed of Trust whereby Onyx BVI confirmed that it will act as

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<sup>8</sup> Exhibit R-178, Email chain between Sandra Merloni-Horemans and Michael Noy dated 13 February 2006; referred to in Counter-memorial at [156]

<sup>9</sup> *Ibid.*,

nominee shareholder and hold the shares of Pentler on behalf of the three individuals. I sent him an invoice on 14 February 2006.<sup>10</sup>

19. I agreed to act as a trustee of the shares in order to help him out in the short term, but at the same time recommended to them that they should find their own independent administrator/trust company in order to avoid a potential conflict as Onyx was also providing services to the BSG group of companies. It took longer than expected for Mr Noy and his partners to provide me with the details of their own independent administrators and this is why the formal transfer only took place in November 2006. In any case, in order to avoid a conflict of interest arising from the fact that Margali was a director of Pentler and a director BSG Resources (Guinea) Ltd ("BSGR Guinea BVI") at the same time, I decided to resign Margali as director of Pentler as soon as the sale to Mr Noy and his partners had taken place. I asked Pentler's BVI agents to provide me with two nominee directors, Xiomara Smith and Michelle Moses, who would constitute the board of Pentler going forward.
20. On 15 February 2006 a written board resolution was signed confirming the resignation of Margali Management Corporation as Director of Pentler and the appointment of the new directors. I was still administering Pentler while Onyx remained shareholder of the company on the basis of the Deed of Trust. Pentler finally appointed a new administrator in Geneva, Mr Bilman of Agefor SA and upon Mr Cilins' request I transferred the administration to him. On 14 December 2006, I informed the registered agent of Pentler that the share certificate had been cancelled. Mr Bilman, as the new administrator, was copied into this email. Onyx charged a service fee for the administration of Pentler of

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<sup>10</sup> Exhibit R-181, Invoice from Onyx to FMA International Trading dated 14 February 2006; Counter-memorial at [159]

US \$1,000. Apart from the courtesy visit in 2006 in Geneva, this was also the only time that I was in contact with Mr Cilins in respect of Pentler's business.

**(c) My involvement in contracts with BSGR and Pentler**

21. As I had been with the Onyx Group since its inception and had been on the board of most BSG companies since their respective incorporations, I had earned the trust, knowledge and authority to execute most documents (whilst of course respecting the corporate governance decision making chain, liaising with management, boards of directors, the foundation council and looking after the interest of the ultimate beneficiaries). Moreover, I had a limited travel schedule (compared to my co-directors and managers) and as a result I was always available for immediate execution of documentation.

**(d) BSGR had no control over Pentler**

22. I am not aware that Pentler was ever controlled by me or BSGR<sup>11</sup>. BSGR has never been a shareholder of Pentler and had no involvement whatsoever with the business of Pentler. Pentler became a minority shareholder in BSGR Guinea BVI between 2006 and 2008, but BSGR had no control over Pentler and certainly not through Onyx. I describe below my involvement in the relationship between Pentler and BSGR.

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<sup>11</sup> Counter-memorial at [73], [173], [788], [861]



**(e) Pentler Contracts**

23. It is suggested by Guinea<sup>12</sup> that I was aware of the contracts that were apparently signed by Pentler with Ms Touré and other parties because I issued the Power of Attorney. It is also alleged that payments have been made to Ms Touré under my and Mr Cramer's direction. These allegations are completely wrong.
24. Guinea is specifically referring to emails from Michael Noy's secretary dated 15 February 2006 mentioning conversations between me and Michael Noy.<sup>13</sup> I do not recall what we discussed. I am confident that I did not discuss or comment on the substantive terms of the documents which Pentler appeared to be executing with third parties. Looking at these emails now, I am quite certain that if we had a discussion it most likely focused on the identity of the proper signatory to the agreements. The signature block in the original draft, which I seem to have received from Mr Noy's assistant on 15 February 2006 at 16.23<sup>14</sup> provided for Margali Management Corp as the signatory. I would have pointed out to Mr Noy that Margali could not sign on behalf of Pentler given its resignation. As new directors from the BVI were in the process of being appointed, a power of attorney had to be prepared for Mr Lev Ran. The draft that was sent to me by Mr Noy's assistant on 15 February 2006 at 16.23<sup>15</sup> seems to reflect our discussion as Margali Management was substituted by Mr Lev Ran as signatory for Pentler.
25. It was an uncontroversial administrative act for Onyx, the trustee of Pentler's shares, to issue a Power of Attorney to Mr Noy and Mr Lev Ran. I provided Mr Lev Ran and Mr

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<sup>12</sup> Counter-memorial at [181].

<sup>13</sup> Counter-memorial at [172] & Exhibit R-186.

<sup>14</sup> R-0186

<sup>15</sup> R-0187

Noy, at their request, with a Power of Attorney so that they could immediately start running their business, as is common with all our other clients that request nominee directors instead of being appointed directors themselves. I did not and still do not see a problem in providing them with the Power of Attorney. They needed it urgently and, as they had confirmed and paid for the company, I considered them as the new owners of the company. The final transfer was a simple formality. I did not question why they needed the Power of Attorney and certainly not what they needed it for.

26. As far as I was concerned I was helping one of BSGR's contacts as a matter of courtesy. Pentler's contractual arrangements with third parties were not my business. The suggestion that I was drafting and commenting on the terms of Pentler's contracts on behalf of BSGR is totally wrong. I was not aware of nor have I approved any of these contracts Pentler apparently signed with Ms Touré and other parties in 2006 and afterwards.<sup>16</sup> I have certainly not executed any payments to anyone on behalf of Pentler. I was simply administering the company by keeping original document files in my office in Geneva, until November 2006. I believe that I printed and filed the documents sent to me by Michael Noy's assistant, in accordance with our standard policy. I maintained separate files for each of the companies administered by Onyx. I did not consider Pentler to be part of the BSG Group and I did not provide copies of these documents to anyone within the BSG Group. To have done so would have been unprofessional and a breach of the confidentiality obligations which I owed to Pentler. I take my professional obligations, and in particular obligations of confidentiality, very seriously.

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<sup>16</sup> Counter-memorial at [189]

**(f) Pentler as shareholder of BSGR (Guinea) Limited B.V.I.**

27. On 1 March 2006, I received an email from Marc Struik, attaching a letter from BSGR Guinea BVI to Pentler dated 14 February 2006. In the letter BSGR Guinea BVI promised Pentler a 17.65% shareholding. Mr Struik requested me to formalise the Memorandum of Understanding and arrange for the shares to be allotted accordingly. As I was a director of BSGR Guinea BVI, and thus responsible for the issuance, cancellation and signing of share certificates, I issued and signed a share certificate on 10 March 2006 transferring 8,825 shares to Pentler.<sup>17</sup> The shares were transferred from BSGR Steel Holdings Limited BVI ("BSGR Steel"), which had hitherto held 100% of the shares in BSGR Guinea BVI. In July 2007, I was asked to sign, on behalf of BSGR Steel, a Shareholder Agreement between BSGR Steel, Pentler and BSGR Guinea BVI<sup>18</sup> as well as a Management Agreement between BSGR Steel and BSGR Guinea BVI in respect of the day to day management of BSGR Guinea BVI.<sup>19</sup>

28. Until the formalities in relation to the share transfer were complete, Onyx held the shares on trust for Pentler. As it was Onyx's standard policy to hold shelf companies 100% through Onyx BVI, I issued a Deed of Trust confirming that 8,825 shares were held by Onyx BVI on behalf of Pentler. However, upon checking my files afterwards, I realised that 100% of the shares of BSGR Guinea BVI were already transferred by Onyx BVI to BSGR Steel on 16 January 2006 and that the Deed of Trust by Onyx on 13 February 2006 was thus erroneous because Onyx BVI did not hold the relevant shares. However, as the formal share transfer of the BSGR Guinea BVI participation to Pentler occurred shortly thereafter, on March 10, 2006, I did not recall or cancel the Deed of Trust as the

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<sup>17</sup> Exhibit C-0328, Share Certificate of BSGR (Guinea) BVI detailing Pentler's shareholding dated 10 March 2006.

<sup>18</sup> Exhibit C-0331, Shareholder Agreement between BSGR Steel, Pentler and BSGR Guinea BVI dated 19 July 2007.

<sup>19</sup> Exhibit C-0329 Management Agreement between BSGR Steel and BSGR Guinea BVI dated 19 July 2007.

understanding between Pentler and BSGR Guinea BVI (as per the letter by Mr Struik of 14 Feb 2006) remained valid and binding.

**(g) The buy-out of Pentler and the Settlement Agreement**

29. On 28 March 2008 Mr Tchelet asked me to sign a Share Purchase Agreement ("SPA"),<sup>20</sup> pursuant to which BSGR Steel bought back Pentler's 17.65% shareholding in BSGR Guinea BVI for \$22 million. At the time of the execution of the Pentler SPA I had many hundreds of active companies under my administration. I did not get involved in or familiarise myself with the details of each and every asset. I had to rely on the recommendations given to me by the management of the companies who would report back to me and my fellow directors and who would occasionally ask us to sign various documents.

30. I do, however, not sign documents without reading through them first. Accordingly, I would have read the terms of the Pentler SPA before signing the document. I remember discussing the draft Pentler SPA with Mr Tchelet and David Clark, although I cannot recall the specific content of our discussions. I spoke to Mr Clark almost daily so it is difficult for me to recall a specific conversation from nine years ago. I do know that they were each in a better position than I was to judge whether the price set out in the SPA was reasonable and I would have deferred to their judgment in this regard. In the context of the BSG Group as a whole the figure of US\$22 million is not extraordinary in the least. I had signed much larger deals for the Group.

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<sup>20</sup> Exhibit C-0084, Share Purchase Agreement between BSGR Steel and Pentler dated 28 March 2008

31. Given that the SPA was being entered into by a BVI subsidiary of BSGR, for which Margali was the only director, I felt comfortable to sign the SPA on the basis of the recommendation from Yossie, on behalf of BSGR's management. This was not something which needed full board authorisation by the BSGR board. Nonetheless, David Clark wanted to make sure that the transaction was documented at the "Top Co" level and therefore convened a board meeting of BSGR to approve the SPA too.
32. As far as I can recall, the SPA also contained a payment schedule on which BSGR later defaulted in April 2009. In the following months, some unfriendly letters were exchanged between Pentler and BSGR. I was not involved in the drafting of any of these letters, I simply signed them. The parties reached an agreement on 25 July 2009 (the "Settlement Agreement")<sup>21</sup> and I signed this Settlement Agreement on behalf of BSGR Steel. Again, I was not involved in the negotiations of the Settlement Agreement, but was simply asked to sign it as director of the company.
33. I also signed the Settlement Agreement in July 2009 on the basis of a recommendation from the management. At that time the recommendation came from David Barnett, a lawyer within the BSG Group. I also ensured that a written memorandum approving the transaction and authorising me to sign was signed on behalf of Margali.
34. I can recall that at some point after the Settlement Agreement was executed I received threatening letters from a Mr Bah, addressed to me at Onyx's Geneva office. As his name was not familiar to me, I sent all letters to Asher Avidan, who confirmed that he would deal with them. I only noticed when I was reviewing the Pentler file in 2013 that one of the unsigned protocols refers to Mr Bah. I can recall that it was around the same

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<sup>21</sup> Exhibit C-0330, Settlement Agreement between BSGR Steel and Pentler dated 25 July 2009.

time that Mr Avidan gave me a claim letter and a subsequent affidavit by Ms Touré,<sup>22</sup> testified by a notary, confirming that she did not have any claim against BSGR to put into the corporate files.

#### **D. My involvement in the Guinea project**

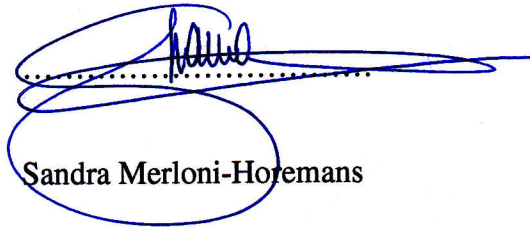
35. I sat as a non-executive director on several boards of companies of the BSGR group. These companies had many more projects other than the Simandou Project in Guinea, which at the beginning in 2006 was a very small project compared to other projects that BSGR was involved in. We did not know whether it would turn out to be profitable at all. In any case, all I knew about the project was what was reported during the BSGR board meetings by Mr Avidan and Mr Struik, who will be more capable of giving details about the project in Guinea. I have never been to Guinea. During the board meetings, we were informed about the progress of the projects and the budget required. We did not, however, go into any real detail about how the budget would be allocated.
36. I cannot recall that any bribery or corruption issues were discussed during the BSGR board meetings until 2012-2013. Before that, Pentler was only discussed in relation to its shareholding in BSGR Guinea BVI, and never in relation to any contracts, it allegedly signed on behalf of BSGR. I recall that when Mr Cramer presented the allegations of the Technical Committee to the BSGR board, everyone was shocked. The board decided to commence internal investigations and the Balda Foundation, which was also informed about these events, commissioned an external forensic specialist to provide an audit of BSGR's accounts.

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<sup>22</sup> Exhibit C-0114, Document invalidating the claimed attestation of 2 August 2009 dated 8 June 2010 and Exhibit C-0116, Letter from Nassif Moussi to BSGR 23 June 2010.

Witness Statement of Sandra Merloni-Horemans

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



Sandra Merloni-Horemans

Dated: 10 January 2017