

**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

**BSG RESOURCES LIMITED
(Claimant)**

v

**THE REPUBLIC OF GUINEA
(Respondent)**

**CLAIMANT'S REJOINDER TO
THE REPUBLIC OF GUINEA'S REQUEST
UNDER ARTICLES 28(1) AND 39(1) OF THE
ICSID ARBITRATION RULES**

**Karel Daele
James Libson
Mishcon de Reya Solicitors
Summit House
12 Red Lion Square
WC1R 4QD
London
Tel: +44 (0) 20 7440 7060
Fax: +44 (0) 20 7831 3487**

I. INTRODUCTION

1. This is the rejoinder of the Claimant (“BSGR”) to Guinea's Request made under Articles 28(1) and 39(1) of the ICSID Arbitration Rules.
2. BSGR established in its Response dated 5 June 2015 why Guinea's requests were without merit and therefore had to be rejected. In particular, BSGR established that Guinea's requests can only be granted in exceptional and extreme circumstances and that no such circumstances are present here, nor is there anything approaching such circumstances.
3. Guinea's Response dated 12 June 2015 makes it clearer than ever before that the sole circumstance on which Guinea relies in support of its requests is an alleged *general* risk that BSGR will be unwilling or unable to pay costs. However, such risk is inherent in any arbitration or litigation and it has never before justified the grant of measures that Guinea is seeking here.
4. If Guinea prevails (and it should obviously not), re-allocating advances on costs and ordering security will become the norm in ICSID arbitration, whereas to date such measures have never been granted in ICSID history except for in the notorious *RSM v. St Lucia* case.
5. In that case, the re-allocation of the advances on costs and the security for costs were not granted on the basis of a *general* risk of non-payment. They were granted on the basis of a *specific and proven* risk of non-payment. This risk had been proven by (1) the claimant's documented track record of not paying costs, (2) the claimant's admission of being unable to pay the costs and (3) the claimant's admission that it was third party funded.

6. Guinea's requests are not based on such incontrovertible evidence. They are based on speculation and conjecture only and therefore they should be rejected.
7. Before turning to the detail of Guinea's requests, BSGR unequivocally and strongly denies the suggestion that it has a political agenda. As the Tribunal will have noticed, BSGR's Response contained 107 paragraphs, only two or three of which refer to President Condé and his Government. The other 105 paragraphs make factual or legal points only. Guinea's accusation that BSGR's Response is "*out of context*" and "*outrageously defamatory*" is therefore rejected in the strongest possible terms.

II. ADVANCES ON COSTS

2.1 Guinea's consent to pay advances

8. In paras 15 and 16 of the Reply, Guinea asserts that because a Tribunal can re-allocate the advances on costs "*at any stage of the proceeding*", its payment of the first advance and its initial consent to pay its share of the advances would be of no relevance. Surely, that cannot be correct.
9. The discretionary power of a Tribunal to re-allocate advances allows a Tribunal to re-assess the situation when circumstances change. For example, where parties agree at the start of the proceeding to share the costs, that situation may change in the course of the proceeding in the face of a claimant who no longer has the required assets or has expressed its unwillingness to pay a cost award later on. The fact that the respondent consented at the start to pay its share (but is no longer willing to do so given the new circumstances), can then not be used against it.
10. Here, the situation is different. Each one of the circumstances that Guinea invokes to justify the re-allocation of the advances was well-

known to it from the start of this arbitration. If Guinea was truly concerned about BSGR being a holding company, Mr Steinmetz's tax dispute or the impact of the payment of the advances on its fight against Ebola, Guinea should not have consented, four days before the First Session was held, to pay its share of the advances going forward. Up to and until at least four days before the First Session, Guinea did not consider the re-allocation of the advances to be urgent, let alone necessary. This is relevant, especially taking into account the fact that Guinea had received the draft Procedural Order No. 1 from the Secretary of the Tribunal on 26 February 2015 and had thus enjoyed over two months to consider these issues.

11. Guinea does not explain how a re-allocation, in a spell of 96 hours and without any significant change in the financial situation of the parties or the strength of its case, suddenly became urgent and necessary.
12. The most likely explanation is that, in agreement with the law firm that had the primary responsibility for reviewing and agreeing to Procedural Order No. 1, Guinea was simply going to pay its share of the advances and was not even contemplating the measure it is seeking now. The possibility of a re-allocation was probably raised as a tactical move by Guinea's second law firm, who looked into the draft Procedural Order No.1 for the first time in the final days leading up to the First Session.
13. Guinea is playing on formalities when it submits that it had expressed its intention to file the present requests prior to the actual signing of Procedural Order No. 1. The signing of Procedural Order No. 1 is not relevant, but Guinea's expressed consent prior to that to pay half of the advances.

2.2 The advances on costs decision in *RSM v St Lucia*

14. In paras.13 and 24 of the Reply, Guinea understands BSGR's position to be that a re-allocation of advances can only be granted in circumstances identical to the circumstances in *RSM v. St Lucia*. If this is not a deliberate attempt to mislead the Tribunal, Guinea must be misunderstanding BSGR's position.
15. Obviously, two cases are never identical. In its Response, BSGR analysed the circumstances in *RSM v St Lucia* in some detail to demonstrate how exceptional these were and to make the point as to how high the threshold for re-allocating advances on costs had been set. However, BSGR did not submit that the circumstances in *RSM v St Lucia* were the only possible circumstances under which advances on costs could be re-allocated.
16. The statement in para. 22 of BSGR's Response that "*none of the circumstances on which Guinea relies to justify its request comes even close to the circumstances that justified the advances on costs decision in RSM v St Lucia*" does not rule out that other circumstances than the ones in *RSM v. St Lucia* may exist which may justify a re-allocation of the advances, for as long as they are equivalently *exceptional* and *extreme*. Applying this approach, BSGR then looked into the circumstances advanced by Guinea to conclude in para. 72 of the Response that "*none of the circumstances presented by Guinea are exceptional, let alone justify departing from the principle that advances on costs are to be borne by parties equally in ICSID proceedings*".
17. Apart from making the obvious point that a Tribunal's discretionary power to re-allocate advances should not be limited to the exact and unique circumstances that were presented in *RSM v St Lucia*, Guinea does not engage with that case. It is noteworthy that Guinea does not go into the details of it, such as the claimant's proven track record of not paying costs or its third party funding, nor does Guinea explain how these circumstances compare to the present case. Guinea is

probably fully aware that these cases simply do not stand any comparison.

2.3 The circumstances on which Guinea relies

18. Guinea advances three grounds as to why the Tribunal allegedly ought to set aside the presumption in favour of the principle of equal payment of advance payments: (1) BSGR is allegedly exploiting the arbitral proceedings, (2) the cost of the arbitral proceedings allegedly conflicts with Guinea's desire to focus on its battle against Ebola, and (3) Guinea allegedly has a serious defence.

2.3.1 The alleged exploitation of the arbitral proceedings

19. The Tribunal will recollect that under this heading Guinea is trying to string together a number of issues. BSGR has already rebutted these points in paras. 24 to 67 of the Response. In its Reply Guinea makes a couple of additional points which BSGR will address in the following sections.

a. BSGR's public announcements are legitimate

20. In relation to BSGR's objective not to see its Mining Rights being awarded to a third party while the present proceeding is pending, Guinea must admit in para. 29 of the Reply that restitution is a remedy that is available under international law. As Guinea does not contest that restitution is also available under Guinea law¹, it must be presumed to also admit that point.
21. Where (1) restitution is available under the law, (2) BSGR is seeking restitution and (3) BSGR's public announcements are in line with the relief it is seeking in this arbitration, those announcements cannot be

¹ BSGR's Response of 5 June 2015, at para. 28.

illegitimate. BSGR's announcements are intended to preserve its right to restitution and enable the enforcement of an award ordering restitution.

b. BSGR is not delaying this arbitration

22. In paras. 33 and 34 of the Reply, Guinea makes some new points which should illustrate how BSGR is delaying this arbitration. None of them is convincing.
23. First, Guinea suggests that BSGR wasted time by filing its Notice of Dispute of 7 May 2014.² Guinea submits that such a notice has no legal value whatsoever in an ICSID arbitration and BSGR takes notice of that.
24. For the sake of completeness, however, BSGR points out that the present proceeding is brought, *inter alia*, on the basis of Article 184 of the 1995 Mining Code which provides in relevant part that, before a mining dispute involving Guinea can be submitted to ICSID, the mining investor and Guinea should attempt to settle the dispute amicably.³ In the Notice of Dispute BSGR explicitly requested Guinea to indicate whether it was willing to settle the dispute amicably.⁴

² Exhibit C-25.

³ Article 184: "*Disputes between one or several mining investors and the State with regard to the extent of their rights and obligations, the performance or non-performance of their undertakings at the end of their titles, assignment, transfer, or subleasing of their rights arising therefrom may be subjected to an amicable settlement procedure. If one of the parties feels that the amicable settlement has failed, the dispute is to be brought before either the appropriate Guinean court or international arbitration in accordance with the agreement of March 18 1965 for the settlement of disputes with respect to investments between States and nationals of other States, established under the aegis of the Banque Internationale pour la Reconstruction et de Développement*" (Exhibit CL-2).

⁴ "*Nous vous demandons en outre de bien vouloir nous préciser par écrit, au plus tard le 15 mai 2014, si votre gouvernement a l'intention de résoudre le litige de BSGR à l'amiable et, dans l'affirmative, ses propositions de règlement. Tout défaut de réponse de votre part dans le délai imparti sera réputé confirmer que le litige de BSGR ne sera pas résolu à l'amiable*" (Exhibit C-25).

25. In addition, BSGR's Notice of Dispute had no effect whatsoever on Guinea's intentions to award the Mining Rights to a third party. In its response to the Notice, Guinea reserved all rights to award those rights to a third party.⁵
26. Secondly, Guinea submits that BSGR should have appointed its nominee in the Request for Arbitration. However, the arbitration clauses on which BSGR was relying did not provide for a method for the constitution of the Tribunal. Therefore, BSGR proposed a method in its Request for Arbitration. It was only after Guinea agreed to the proposed method (with a few amendments) that BSGR was in a position to appoint its nominee.⁶ It did so without undue delay.
27. Thirdly, Guinea submits that BSGR could have prepared and filed its Statement of Case on the day of the First Session. BSGR could, however, not anticipate the direction this arbitration would take. It was not aware, for example, whether Guinea was seeking to bifurcate the proceeding in a jurisdictional and a merits stage. If a proceeding is bifurcated, there is little point in preparing (and filing) a submission on the merits from the outset.⁷
28. In addition, Guinea's argument ignores the fact that BSGR is fighting different battles at the same time, with parallel proceedings in the LCIA, in the District Court of the Southern District of New York (the RICO proceedings involving Vale and Rio Tinto) and investigations being conducted in several jurisdictions. Taking into account that

⁵ Letter from Orrick on behalf of Guinea to Mishcon de Reya dated 15 May 2014 ("*Enfin, vous demandez, dans votre courrier, que le gouvernement confirme qu'il 'ne lancera pas d'appel d'offres quant aux droits de BSGR'. A cet égard, la République de Guinée est conduite, d'une part, à vous répondre que BSGR n'a aucune qualité pour demander une telle confirmation et, d'autre part, à vous indiquer qu'elle réserve tous ses droits sur la réattribution des droits miniers dont il s'agit*"), (Exhibit C-26).

⁶ For example, Guinea could have proposed a Sole Arbitrator or to have a three member Tribunal with ICSID appointing the members thereof.

⁷ As far as necessary, this is also confirmed by the agreement reached between the parties at the First Session to bifurcate the proceedings in a jurisdiction and liability stage and a quantum stage. If BSGR would have had its Statement of Claim ready for the First Session, it would have spent a substantial and unnecessary amount of money and time on its expert evidence and the quantification of its damage.

BSGR is using one law firm, whose staffing resources are not unlimited, BSGR has to ensure that the procedural timetables in the different proceedings are aligned as much as possible, which means that, without delaying, it does not necessarily opt to short-track proceedings.

29. Fourthly, Guinea blames BSGR for agreeing to bifurcate the arbitration. To BSGR, this is one of the best examples of how weak Guinea's requests really are.
30. It was Guinea who proposed, at the First Session and without having given prior notice to BSGR, to bifurcate. In a spirit of good faith and in accordance with the Tribunal's subtle indications that it preferred the parties to reach consensus on as many procedural issues as possible, BSGR merely agreed to this proposal. If BSGR would have objected, Guinea would now most probably be referring to that objection as another example of BSGR's alleged abuse of this arbitration.
31. In addition, in light of Guinea's announced jurisdictional objections and the efforts that will be required to quantify the damages in this matter, it was just common sense for BSGR to consent to bifurcate. Again, to BSGR, the fact that Guinea now has to rely on of its own proposals to accuse BSGR of abusive and delaying behaviour, proves nothing but the weakness of the present applications.

c. BSGR is not manipulating the media

32. Whereas BSGR has already established in the Response that its media announcements have been extremely moderate compared to the media storm in the centre of which it has found itself in the last two years, Guinea is now accusing BSGR of manipulating the media.

33. "By way of example", Guinea relies on an article that was published in the Sunday Times on 1 June 2014.⁸ Guinea submits that this article contained numerous inaccuracies, all of which would have been based on declarations made by BSGR only.⁹
34. Nothing in the article suggests, however, that it was based on declarations made by BSGR. On the contrary, the article explicitly states that "*BSGR, Soros and Rio Tinto declined to comment*". What is more, from the overview that BSGR has given of its public announcements in or around the period of the article, it is clear that BSGR had not made any public declarations in relation to bringing English Court proceedings against Mr Soros.¹⁰ The article only refers to declarations made by a campaign group funded by Soros (Global Witness), not to declarations made by BSGR.
35. Guinea even goes a step further by asserting that BSGR directly ordered the said article.¹¹ BSGR did not. Guinea's only "evidence" in support of this allegation is that a former superior (Rory Godson) of the journalist who wrote the article (Danny Fortson) was BSGR's director of public affairs.¹² To BSGR, this is another very good example of the weakness of Guinea's case.
36. First, there is no evidence whatsoever, and BSGR strongly denies, that it gave instructions to Mr. Godson. For the record, the latter is and has never been BSGR's director of public affairs. Guinea knows that. In its letter of complaint to the Sunday Times, Guinea qualified Mr Godson as "*the architect of Mr Steinmetz's public relations*

⁸ Exhibit R-52.

⁹ Guinea's Reply, para. 37 ("*L'article en question comportait de nombreuses inexactitudes qui étaient fondées sur les seules déclarations de BSGR*").

¹⁰ BSGR Response, footnote 26.

¹¹ Reply, para 37 ("*[...] l'ensemble des articles de presse rédigés sur le seul fondement de ses déclarations ou commandites directement par elle. A titre d'exemple, le Sunday Times [...]*").

¹² *Ibid.*, para. 38 ("*la manipulation de la presse par BSGR est évidente. En outre, le directeur des relations publiques de BSGR est l'ancien supérieur direct du journaliste du Sunday Times qui a écrit l'article en question*").

campaign", not as BSGR's director of public affairs.¹³ Mr. Godson was in fact working for an independent public relations company called Powerscourt, with whom BSGR had an arm's length service agreement. BSGR replaced Powerscourt a few months ago. If BSGR would really have ordered this article (and it did obviously not), it surely would have read differently. For example, the article refers to *"Frederic Cilins, an agent claiming to work for Steinmetz, offering millions of dollars to the former wife of the dictator who gave BSGR the rights if she handed over allegedly incriminating documents. The woman, Mamadie Toure, had become an FBI informant"*. BSGR has always denied (and continues to do so) that Mr Cilins was an agent of BSGR. BSGR has also denied any relationship with Mamadie Toure.

37. Secondly, there is no evidence whatsoever that Mr. Godson subsequently instructed Mr. Fortson. For various reasons this is very unlikely, if not impossible. Mr. Godson and Mr Fortson never worked together at the Sunday Times. Mr. Godson left the Sunday Times somewhere before 2002, when he set up Powerscourt. Mr. Fortson only joined the Sunday Times five years later, in 2007.¹⁴ In those circumstances, BSGR fails to see how Mr. Godson would have (or would ever had had) the authority to instruct Mr. Fortson, let alone why the latter would follow such instructions.
38. In any event, what is clear is that Guinea also brought the alleged relationship between BSGR/Godson/Fortson to the attention of the English press regulator, the Independent Press Standards Organisation ("**IPSO**"), but that the latter did not find any breach of the Editors' Code of Practice in this respect.¹⁵

¹³ Exhibit R-54.

¹⁴ LinkedIn profile of Danny Fortson (Exhibit C-75).

¹⁵ Exhibit R-55.

39. Turning to the "*numerous inaccuracies*" in the disputed article, IPSO did find two breaches of the Editors Code of Practice, neither of which however related to BSGR or Beny Steinmetz. The first breach related to the newspaper's failure to contact Guinea for comment before the article's publication in relation to the circumstances in which Rio Tinto had lost part of its mining rights in Simandou.¹⁶ The second breach related to inaccuracies in the reporting on Rio Tinto's mining rights.¹⁷
40. More importantly, the three accounts of inaccuracy in relation to the expropriation of BSGR's mining rights of which Guinea had complained were all dismissed.¹⁸ IPSO found no breach of the Code of Practice in respect of those accounts and denied Guinea the opportunity to reply in the newspaper under Article 2 of the Code.¹⁹
41. Furthermore, what Guinea's response to this newspaper article illustrates is that not BSGR but Guinea is manipulating the media. One of Guinea's complaints related to the newspaper's qualification of Mr. Cilins as being "*an agent claiming to work for Steinmetz*". In Guinea's view this was not good enough. In Guinea's own words:

"It would be more accurate to report that Frederic Cilins was acknowledged by BSGR, in formal submissions to the Guinean inquiry, to have acted as its agent in acquiring the rights to Simandou and Zogota [...] the US department of Justice alleged that Mr Cilins was acting on behalf of BSGR and was assisted by numerous other agents of BSGR in the operation [...] Mr Cilins stated in the FBI intercepts that he was acting on the personal direction of and reported directly to a man identified by the United States government as "co-conspirator no. 1" in the criminal complaint, who has subsequently been identified as a result of the published transcript of the intercepts as Mr Beny Steinmetz."

¹⁶ *Ibid.*, para. 2.

¹⁷ *Ibid.*, para. 3.

¹⁸ *Ibid.*, paras. 4-6.

¹⁹ *Ibid.*, para. 7.

42. The Sunday Times resisted Guinea's attempt to manipulate the news coverage. The newspaper's refusal was subsequently approved by IPSO, by confirming that Guinea's spin would have potentially misread readers:²⁰

"Finally, the Committee noted the complainant's position that the newspaper should have made clear that BSGR had accepted that Frederic Cilins acted as its agent in acquiring the rights to Simandou, and that Mr Cilins has subsequently been convicted of obstruction of justice. [...] The Committee agreed, however, that this formulation suggested that BSGR accepted that its representatives had engaged in fraudulent conduct, and where this was not the case this additional information would potentially have mislead readers. There was no breach of the Code on this point"

43. Finally, what Guinea's response further establishes is that it has instructed two professional media consultancy firms on its dispute with BSGR: Mrs Celia Gremy of Momentum Consulting Africa²¹ and Mr Chris McShane of Hillingdon Cresswell, a leading communications management consultancy with offices in London and Paris.²² In his letter to the Sunday Times, Mr. Kerfalla Yansane, Minister of State and Minister of Mines and Geology of Guinea instructed the newspaper to *"direct your response to my attention, with a copy to Mrs Celia Gremy and Mr Chris McShane, our media consultants"*.²³

d. No unnecessary duplication of proceedings

44. In paragraphs 39 to 40 of the Reply, Guinea accuses BSGR of multiplying the proceedings. It is indeed correct that two subsidiaries of BSGR have issued a Notice of Dispute on 9 April 2015.²⁴ As the

²⁰ *Ibid*, para. 6.

²¹ Profile of Celia Gremy and Momentum Consulting Africa (Exhibit C-76).

²² Profile of Chris McShane and Hillingdon Cresswell (Exhibit C-77).

²³ Exhibit R-54.

²⁴ Exhibit R-56.

Tribunal will undoubtedly remember from the discussions at the First Session, BSGR had legal reasons for doing so which go back to the Zogota Base Convention and signatories to that agreement. In addition, if and when the parties reach that stage, BSGR can ensure Guinea and this Tribunal that it will make every effort to consolidate or otherwise align the proceedings so as to conduct the arbitration(s) as cost and time efficient as possible. For sure, this does not constitute abusive behaviour.

2.3.2 Guinea's budgetary constraints in times of Ebola

45. BSGR has explained its position in relation to the handling and the financial impact of Ebola in its Response. Guinea's reply, in paras. 42 to 45, is basically political rhetoric.
46. In paras. 46 to 48 of the Reply, Guinea elaborates on its decision to instruct two international law firms. First, Guinea submits that BSGR has no knowledge of Guinea's contractual arrangements with the law firms. To an extent this is correct. However, Guinea could easily have countered BSGR's criticism by disclosing those arrangements together with the Reply but it has decided not to use that opportunity.
47. Secondly, BSGR does have some idea of what those arrangements are from the fact that Guinea is claiming a security for costs in the amount of € 3 million. According to paras. 60 and 89 of its Requests, this amount would cover its lawyers' fees and unidentified "other costs". Whereas this amount is not unheard of, it nonetheless sits uncomfortably with Guinea's assertion that the fees of its Paris based lawyers "would be notoriously" lower.
48. Finally, Guinea's explanation as to why both law firms have to be involved – i.e. DLA having investigated the circumstances in which BSGR acquired the mining rights and Orrick having advised the CTRTCM on the withdrawal of the Mining Rights – does not

convince taking into account that (1) this ICSID arbitration is obviously of a very different nature and requires a very different skillset and (2) both DLA and Orrick are GAR 30 law firms and have the requisite ICSID expertise to run this arbitration alone. Guinea's retainer of both firms is thus not a question of efficiency but rather of doubling the costs.

49. Unfortunately, this is not the only example of Guinea's spending spree. As indicated above, Guinea did not instruct one but two media consulting firms in relation to this matter.

3.4 **Guinea's assertion that it has a serious defence**

50. Although both sides agree that the present security for costs proceeding is not appropriate to go to the heart of the corruption issue, Guinea continues to comment thereon.
51. In para. 54 of the Reply, Guinea denies that Mamadie Toure's withdrew her claims under the three alleged contracts with BSGR in June 2010.²⁵ Guinea submits that Mamadie Toure's letter of withdrawal was not in fact coming from her but from a bailiff without a proper mandate. Guinea's submission is contradicted by Mamadie Toure herself, in a statement that she made and signed on 27 April 2012, in which she certified that (our underlining):²⁶

"the annulment of the [blackmail] letter has been signed in my name to clear my name and reputation. I can also confirm that I was shocked when I was informed of this affair and have requested the immediate annulation of this attempt by the same individual involved."

²⁵ Exhibits R-27 to R-29.

²⁶ Affidavit of Mamadie Touré ("Je certifie par ailleurs que l'annulation de cette lettre a été dument signée et mon nom afin de nettoyer mon nom et ma réputation. Je peux confirmer également que j'ai été choquée quand j'ai été mise au courant de cette affaire et ai demandé une annulation immédiate de cette initiative par les mêmes personnes responsables.") (Exhibit C-78).

52. Further in relation to Mamadie Toure, it is striking that Guinea has not engaged at all with the various contradictions that BSGR highlighted in her witness statements.

53. [PROTECTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

54. Guinea further submits that BSGR's possession of these documents allegedly would in and of itself obstruct the criminal proceedings because the publication of these statements could influence the testimony of future witnesses. Guinea's alleged concern about the preservation of the integrity of the ongoing investigations can obviously not be taken seriously when Guinea itself has published the witness statement of Mamadie Toure of 2 December 2013 on its website.²⁸

55. [PROTECTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

27 [PROTECTED]
[REDACTED]

28 BSGR will not deal with Guinea's request not to publish the exhibits and to delete paragraph 60 of BSGR's Response in the present submission. BSGR reserves the right to do this separately, in correspondence between the parties and the Tribunal.

29 [PROTECTED]
[REDACTED]
30 [REDACTED]
[REDACTED]
[REDACTED]

[PROTECTED]

3.5 **Conclusion**

56. BSGR is not abusing these proceedings. At no point has BSGR unnecessarily delayed or duplicated the arbitration proceedings. Contrary to Guinea itself, BSGR has not manipulated the media.
57. Guinea has not argued that it does not have the financial means to pay the advances. It would not be a credible argument either, taking into account that Guinea can afford to instruct two international law firms and two media consultancy firms. It has also admitted that its economic prospects are good.
58. Guinea's evidence of BSGR's corruption is questionable to say the least. For the avoidance of doubt, BSGR denies the allegations of corruption in the strongest terms.
59. In sum, none of the circumstances presented by Guinea are exceptional or even mount to "good cause". Just as the other 400 ICSID Tribunals before it, this Tribunal should proceed on the basis of Article 14(3)(d) of the ICSID Administrative and Financial Rules according to which both parties pay half of each advance on costs.

IV. **SECURITY FOR COSTS**

4.1 **A general risk of non-payment is not sufficient**

[PROTECTED]

60. In para. 74 of the Reply, Guinea suggests that it is BSGR's position that security could only be granted in the unique and sole circumstances that were present in *RSM v Lucia*. This is an incorrect summation of BSGR's position and BSGR invites Guinea to point the Tribunal to the paragraph in the Response where BSGR has defended that position.
61. BSGR, from its side, points the Tribunal to paras. 75 and 76 of the Response in which it explicitly acknowledged the Tribunal's jurisdiction to grant security (be it in exceptional and extreme circumstances only) and in which it referred to nine other ICSID cases in which no such exceptional and extreme circumstances were found.
62. In para. 79 of the Reply, Guinea refers to *Commerce Group v. El Salvador* to support its argument that also in other circumstances than the ones in *RSM v. St Lucia* a security may potentially be granted, such as abuse or serious misconduct. BSGR agrees, but immediately notes that Guinea does not invoke serious misconduct on the part of BSGR to justify its request, let alone proves such misconduct. As recorded in paras. 69 and 90 of the Reply, Guinea's request is exclusively based on a risk of non-payment by BSGR.³¹
63. In para. 78 of the Reply, Guinea asserts that the mere risk of non-payment would be sufficient to award security. By referring in a footnote to a decision in *Victor Pey v. Chile*, it even suggests that this argument has been approved in ICSID jurisprudence. This is plainly incorrect.

³¹ "La République de Guinée a également démontré que cette mesure est justifiée par un risque d'insolvabilité de BSGR" (para. 69); "au vu de l'ensemble de circonstances de l'espèce, le risque de non-remboursement des dépens est tout le moins probable ou vraisemblable" (para. 90).

64. As BSGR pointed out in para. 98 of the Response, the Tribunal in *Victor Pey v. Chile* came to exactly the opposite conclusion: a risk of non-payment (assuming it have been proven to exist) did not make an order for security necessary and therefore the request for such an order was rejected (our underlining):

"Si le danger de non-paiement a bien été allégué d'une façon générale, il n'a pas été démontré ni rendu particulièrement probable ou vraisemblable que ce risque soit présent en l'espèce ni, à le supposer établi, qu'il rende nécessaire la recommandation de la mesure conservatoire sollicitée"

65. The Tribunals in *Commerce Group v. El Salvador*, *Burumi v. Albania* and *RSM v. Grenada* came to the same conclusion, as did one of the majority arbitrators in *RSM v. St Lucia*.

66. Guinea's attempt to mislead the Tribunal in relation to the status of the case law is simply deeply deplorable.

4.2 Guinea's alleged exceptional circumstances that would justify a security for costs

67. Guinea identifies three allegedly exceptional circumstances justifying a security for costs: (1) the holding structure of BSGR; (2) the financial situation of BSGR and (3) the actions of Mr. Beny Steinmetz.

4.2.1 The holding structure

68. In paras. 86 to 92 of the Response, BSGR dealt with Guinea's criticism on the holding structure. In para. 91 of its Reply, Guinea raises one additional point, i.e. the lack of transparency of Guernsey holding companies which would complicate the enforcement of an award against BSGR.

69. However, it is difficult to see how an (alleged) lack of transparency relates to an inability to pay or an unwillingness to pay. The fact that the assets of a company may not be transparent, does not justify a conclusion that those assets are not there. On the contrary. It is often because the assets are there, that a company (or its shareholders) prefers lesser publicity. There is also no direct relationship between (a lack of) transparency and an unwillingness to pay. It is not because a company is not transparent that it will refuse to pay when it obliged to do so. It may well be willing to pay, for example to avoid the reputational damage that inevitably comes with being caught out as an unreliable investor who does not comply with an ICSID award.
70. Further, Guinea suggests that it would be inappropriate for a company to be based in a "tax paradise" such as Guernsey. Guinea refers in this respect to Guernsey's 15th position on the Financial Secrecy Index.³² This is not the time and place to discuss the criteria on the basis of which a country is ranked and the relevance of these criteria for the present applications. However, it is worth noting that respectable countries such as Singapore (5th), the USA (6th), Germany (8th) and Japan (10th) all precede Guernsey in the ranking and that countries such as Canada (17th), Austria (18th) and the UK (21st) follow on the heels of Guernsey.³³ Would a Tribunal order security on the basis that the claimant is based in the US, Japan or Germany?
71. Guernsey is an established offshore jurisdiction providing world-class financial services in a well regulated, stable and reliable environment. The Organisation for Economic Development has placed Guernsey on its "white list" along with jurisdictions such as the UK and the US and the International Monetary Fund ranks Guernsey among the leading international finance centres. There are hundreds of resources groups established in Guernsey, including

³² Exhibit R-56.

³³ Financial Secrecy Index, Results 2013, (Exhibit C-79).

companies such as Glencore, Areva, Potash Corporation of Saskatchewan, Kolar Gold, Zimplats, Central Rand Gold, Baker Steel Resources, and so forth.

72. In response to BSGR's point that Guinea accepted the risks (if any) resulting from BSGR's holding structure by awarding it the Mining Rights in the first place, Guinea replies in para. 92 that those rights were granted at the time the corruption occurred. Aside from the fact that the alleged corruption did not take place at all, Guinea's argument is too simplistic.
73. Guinea ignores the fact that Mamadie Toure's husband, if indeed he was, was no longer President when the Base Convention, which granted BSGR's exploitation rights, was signed on 16 December 2009.³⁴ At that time, General Konaté was the acting President, Lansana Conté had been dead for almost a year and Mamadie Touré had fled the country (also about a year earlier). The Base Convention was signed by Mahmoud Thiam and Captain Mamadou Sandé, and ratified by a decree from General Konaté on the same day. Mamadie Touré can have had no influence in that: so what would be the point in paying her vast sums of money?
74. In addition, the Base Convention was negotiated following the submission by BSGR of a 450 pages Feasibility Study, demonstrating the existence of a commercially operational iron ore deposit in the Zogota area. It was the first Feasibility Study ever to be submitted to the CPDM.
75. The CPDM conducted an initial review of the Feasibility Study and recommended to the Ministry of Mines that BSGR be invited to commence negotiations for a mining concession. On 1 December 2009 Minister Thiam established a Commission for the examination

³⁴ Exhibit C-10.

of the Feasibility Study and the negotiation of a mining agreement between BSGR and the Government of Guinea.

76. The Commission consisted of the following members from numerous governmental departments, the Central Bank and the National Company of Mining Infrastructure³⁵:

- (1) Dr Aboubacar Koly Kourouma (President; General Secretary of the Ministry of Mines and Energy);
- (2) Maitre Momo Skaho (Vice President; Senior Advisor to the Presidency, responsible for Natural Resources and Sustainable Development);
- (3) Mr Cécé Noramou (Rapporteur; Advisor to the Minister of Mines and Energy);
- (4) El Hadj Mohamed Aly Thiam (Rapporteur; Advisor Representative of the Minister of Justice);
- (5) Mr Bouna Sylla (Legal and Fiscal Advisor);
- (6) Mr Tidjane Yansané (Advisor for Infrastructures);
- (7) Mr Saadou Nimaga (Legal Advisor for the Minister of Mines and Energy);
- (8) Mr Alkaly Yamoussa Bangoura (Technical Advisor for the Minister of Mines and Energy);
- (9) Mr Ibrahima Kalia Touré (Economic and Fiscal Advisor of the Minister of Mines and Energy);
- (10) Mr Ibrahima Kalil Souman (Executive Director of the CPDM/Ministry of Mines and Energy);
- (11) Mr Sada Baila Ly (Executive Director of the National Company of Mining Infrastructures);
- (12) Mr Ibrahima Sory Sangaré (Advisor of the President of the Republic of the Ministry of the Presidency for the Economy and Finances);

³⁵

Exhibit C-9.

- (13) Mrs Louise Juliette Darchicourt (Legal Advisor for the Ministry of the Presidency for the Economy and Finances);
- (14) Mr Mamadou Saliou Daillo (Legal Adviser to the Minister of the Environment and Sustainable Development);
- (15) Mr Jean Pierre Condé (Legal Advisor for the Planning Minister);
- (16) Dr Younaussa Koita (National Director of Land Transport);
- (17) Mr Halabi Ahmed Salim (Legal Advisor for the Ministry of Transport);
- (18) Mr Cécé Loua (Advisor for the Minister of Territorial Administration and Political Affairs);
- (19) Mr Roger Patrick Millimono (Main Advisor for the Governor of the Central Bank);
- (20) Mr N'fa Fofana (Director of Mines and Energy at the ACGP).

77. [PROTECTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

78. Finally, BSGR notes that Guinea fails to address the decision in *Libananco v. Albania* in which it was determined that the fact that an investor was a shell company without sufficient assets of its own was not a sufficient ground to order a security.

4.2.2 BSGR's financial status

79. In para. 95 of the Reply, Guinea submits that in accordance with good accountancy practices the claims that have been filed against BSGR in the LCIA and the RICO proceedings should be accounted for as liabilities. This is not correct. The International Accounting Standards Board (IASB) defines a liability as (our underlining) "a present obligation of the enterprise arising from past events, the

*settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits".*³⁶ BSGR's auditors have concurred with BSGR in their treatment of not having to raise a liability in relation to Vale's and Rio Tinto's claims.

80. In para. 96 of the Reply, Guinea submits that BSGR's assets of USD 700 million are largely insufficient in light of Vale's claim of USD 1.2 billion in the LCIA arbitration and Rio Tinto's treble damages claim in the RICO proceedings. Again, this is mere conjecture.
81. In relation to the LCIA arbitration, Guinea's argument rests on no less than three hypothetical situations. One, Vale will prevail in the arbitration. Two, BSGR will be ordered to pay USD 1.2 billion. Three, Vale will enforce the award so that there will be no assets left for Guinea. However, other scenarios are far more than realistic. One, Vale's claims are dismissed on the ground that BSGR did not obtain the Mining Rights by paying bribes (which BSGR will also establish in the present proceedings). Two, Vale prevails but the damages awarded are substantially lower than the damages claimed. It is no secret that tribunals are generally skeptical of damages claims and often award a tiny fraction of the claim. Three, Vale and BSGR settle their dispute. Four, the enforcement of the LCIA award is stayed in attendance of an award of this Tribunal on liability.
82. Also Guinea's reliance on the RICO proceedings is built on several hypothetical situations. One, the US court will find jurisdiction over BSGR. Two, Rio Tinto will prevail on the merits. Three, the US court will condemn BSGR to pay treble damages in the millions. Again, other scenarios are more realistic. One, the US court finds no jurisdiction over BSGR. Two, Rio Tinto's claims are dismissed on the merits. Three, Rio Tinto prevails but no treble damages are awarded or the damages are limited.

³⁶ IFRS Framework, F.4.4 (b) (Exhibit C-80).

83. Furthermore, Vale's case against BSGR and Rio Tinto's case against both Vale and BSGR are interrelated and mutually exclusive. Vale and Rio Tinto cannot both prevail against BSGR. For Rio Tinto to win in the RICO proceedings it will have to establish that Vale and BSGR conspired to steal Rio Tinto's data on Blocks 1 and 2 and used this information to corrupt Guinean officials. But if that is established (and BSGR denies that it will be established), Vale cannot prevail in the LCIA arbitration where it argues that it was not aware of, let alone involved, in any corruption to obtain those mining rights. In other words, the doom scenario that Guinea sets out according to which BSGR has to pay both USD 1.2 billion to Vale and millions of treble damages to RIO Tinto is completely unrealistic and imaginary.
84. In para. 97 of the Reply, Guinea refers to the restructuring of loans within the BSGR group. First, these restructurings involve companies that are not involved in these proceedings, such as Scorpio Real Estate.³⁷ Secondly, such restructurings do not establish a risk of non-payment or of insufficient assets. For example, one of the articles on which Guinea relies reports that "*according to the plan Steinmetz will inject \$100 million*". Thirdly, like any other mining company operating in Guinea, Sierra Leone or Liberia, BSGR's financial results have suffered from the Ebola outbreak. However, as Guinea admits, the tide is turning and the prospects are positive again.
85. BSGR further notes that Guinea has not engaged at all with the four commercial arbitration cases referred to in para. 102 of BSGR's Response in which security was ordered. These cases confirm BSGR's position that security can only be ordered where the claimant is suffering very serious and acute financial difficulties. If Guinea would have found case law in which a different and lower threshold

³⁷

Exhibit R-61.

had been applied, it would surely have produced it. However, it has not done so.

86. In sum, BSGR's alleged risk of non-payment is built on speculation and doom scenarios only. If assets of over USD 700 million do not suffice to dismiss a security for cost application, this Tribunal will set a precedent on the basis of which this provisional measure will become available in 99.9% of the cases.

4.2.3 Mr Beny Steinmetz

87. In paras. 98 to 101 of the Reply, Guinea continues its crusade against Mr Steinmetz despite BSGR's explanation that he is not a party to this arbitration and that his financial situation is irrelevant for the purposes of the present application.

88. Guinea submits that Mr Steinmetz would control the assets of BSGR simply because he would be the ultimate beneficiary. No doubt that Guinea has little (if any) familiarity with foundations and trust structures and this is not the place, nor the time to educate Guinea on the subject. In short, trusts and foundations are controlled by a board and the directors who sit on it. Mr Steinmetz is not one of them. Mr Steinmetz is also not sitting on the board of any of the BSGR companies, nor is he an employee of any of the BSGR companies. He is therefore not controlling the assets of BSGR.

89. But even if for the sake of argument, Mr Steinmetz would be in control (and he is not), Guinea's own evidence values Mr Steinmetz assets at USD 3.4 billion.³⁸ Arguably, there is little risk of an inability to pay when it comes to Mr Steinmetz.

90. That leaves the risk that Mr Steinmetz would be unwilling to pay. Guinea refers in this respect to Mr Steinmetz dispute with the Israeli

³⁸ Exhibit R-62.

tax authorities. First and as already indicated in the Response, this dispute is completely unrelated to BSGR and the BSGR group. Secondly, what this dispute illustrates is that Mr Steinmetz does not agree with a claim that the Israeli tax authorities made. Such tax disputes are nothing unusual, certainly not when the taxable basis is substantial. What this dispute does not illustrate, contrary to what Guinea suggests, is that Mr Steinmetz, once he is ordered to pay by a national court or an international arbitration tribunal, is unwilling to do so. This is what, however, what Guinea would have to demonstrate and it fails to do.

4.3 Conclusion

91. There is no doubt that Guinea has the burden to demonstrate why the Tribunal should order security.
92. In accordance with established case, such security can only be ordered in exceptional and extreme circumstances.
93. Guinea has not advanced any new evidence to establish that such circumstances exist.
94. BSGR repeats that there is nothing exceptional about BSGR's corporate structure and it has never been an issue with Guinea before. BSGR's financial standing is solid. Nothing suggests that BSGR will place assets away when it is requested to pay costs or that it will face bankruptcy as a result of defeat in other legal proceedings.
95. There is no material, serious and present risk that BSGR will not comply with a hypothetical cost award. Therefore Guinea's request must be rejected.

V. COSTS OF THESE PROCEEDINGS

96. In light of the weakness of Guinea's arguments and the inadequacy of its evidence in support of both of the requests, BSGR invites the Tribunal to conclude that this Request is without merit and to order BSGR's costs of responding to the Request in full now.
97. Taking into account that BSGR has only had one week to prepare the present submission and that a translation of Guinea's Reply was only available halfway the week, BSGR has not had the time to submit details of its costs with this Rejoinder³⁹ and it awaits the Tribunal's directions in this respect.

VI. CONCLUSION

98. For the foregoing reasons, BSGR asks the Tribunal to reject both the requests, and to award its costs of responding to the requests. For its position as to whether a hearing is needed, BSGR refers to para. 129 of the Response.

Signed



Mishcon de Reya

Submitted for and on behalf of BSG Resources Limited

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Karel Daele
James Libson
Mishcon de Reya Solicitors
Summit House
12 Red Lion Square
WC1R 4QD London
Tel: +44 (0) 20 7440 7060
Fax: +44 (0) 20 7831 3487

³⁹ BSGR Response, para. 126.