

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Bay View Group LLC and The Spalena Company LLC**

*Claimants.*

- v. -

**Republic of Rwanda**

*Respondent.*

(ICSID Case No. ARB/18/21)

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**REQUEST FOR BIFURCATION**

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24 May 2019

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1. This request for Bifurcation (the “**Request**”) is served alongside the Respondent’s Memorial on Preliminary Objections, pursuant to the procedure agreed by the Parties and confirmed in Annex C of the Tribunal’s Procedural Order No. 1 dated 12 December 2018 (“**PO1**”).
2. This Request adopts the abbreviations and definitions as set out in Annex I to the Counter-Memorial on the Merits (although, for convenience, the definitions are also given in the text) and relies in relevant part on the supporting witness statements, expert reports, documentary evidence and legal exhibits listed in Annexures II-IV of the Counter-Memorial on the Merits and Annex I of the Memorial on Preliminary Objections, together with the additional legal authorities listed in Annex I.

## I. INTRODUCTION

3. In accordance with the procedure set out in PO1, the Republic of Rwanda (the “**Respondent**” or “**Rwanda**”) respectfully requests that the Tribunal bifurcate these proceedings and hear the jurisdictional objections (or alternatively, such of those objections as the Tribunal sees fit) set out in the Respondent’s Memorial on Preliminary Objections in a preliminary phase.<sup>1</sup>
4. It is well established that Arbitral tribunals can and should bifurcate proceedings where, as here, the Respondent has identified serious preliminary objections, the resolution of which may result in the dismissal of the case in its entirety or a significant reduction of its scope and complexity.
5. *First*, Rwanda’s objections raise substantial questions concerning the Centre’s jurisdiction and the Tribunal’s competence.
6. *Second*, the case would be dismissed in its entirety if the Tribunal concludes that the Claimants’ claims are time-barred, that the Claimants’ do not have an investment and/or that the Claimants’ are not investors, such that the Tribunal does not have the competence to hear the Claimants’ claims. If accepted, the Respondent’s other objections would result in at least a significant reduction in the scope and complexity of the case.
7. *Third*, each of the preliminary objections set forth in the Respondent’s Memorial on Preliminary Objections and further outlined below, involves issues distinct from those issues that would arise in any subsequent merits proceedings (namely whether the conduct complained of constitutes a violation of the Treaty Between the United States of America and the Government of the Republic of Rwanda Concerning the

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<sup>1</sup> It is acknowledged that the proceedings have already been bifurcated into merits and quantum phases and that this request will create an additional, but necessary, further phase.

Encouragement and Reciprocal Protection of Investment (the “**USA-Rwanda BIT**”) and, if so, what damage, if any, was caused to the Claimants as a result).<sup>2</sup>

8. The efficiency of these proceedings therefore requires that the Respondent’s objections to this Tribunal’s jurisdiction be determined as a preliminary matter. There are numerous issues on the merits and on quantum, which are yet even to have been addressed by the Claimants, the determination of which would be lengthy and costly. Since the Respondent’s objections can be heard as a separate matter, submissions on the merits and the quantum of any alleged damages, and related costs, could be avoided, or considerably shortened, if the Tribunal accepts one or more of the Respondent’s objections. The Respondent also respectfully submits that the Tribunal should give considerable weight to the potential for cost savings in the expenditure of public funds.
9. *Finally*, bifurcation of this case can cause the Claimants no prejudice. Any delay associated with bifurcation would be far outweighed by the benefit to the Parties and the Tribunal in ensuring the most cost-efficient means of resolving the dispute.
10. The Respondent therefore respectfully requests that the Tribunal suspend the proceedings on the merits and resolve as a preliminary matter the Respondent’s jurisdictional objections (or alternatively, such of those objections as the Tribunal sees fit), as set forth in Section III below.<sup>3</sup>

**II. JURISDICTIONAL OBJECTIONS SHOULD BE CONSIDERED AS A PRELIMINARY MATTER IF DOING SO WILL INCREASE THE EFFICIENCY OF THE PROCEEDINGS**

11. The ability to address objections in a preliminary phase is explicitly provided for in the USA-Rwanda BIT, with Article 28(5) stating that “*the tribunal shall decide on an expedited basis [...] any objection that the dispute is not within the tribunal’s competence.*”<sup>4</sup>
12. On this basis alone, the Tribunal has the ability to, and should, decide to hear the Respondent’s objections as a preliminary matter, but in any event, the Tribunal also has

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<sup>2</sup> Treaty Between the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment dated 19 February 2008 and entered into force on 1 January 2012 (**Exhibit CL-006**)

<sup>3</sup> These objections are without prejudice to any additional preliminary objections that the Respondent may raise in this arbitration.

<sup>4</sup> The USA-Rwanda BIT (**Exhibit CL-006**), at Article 28(4) and 28(5), the time periods referred to therein having been dispensed with upon the agreement of the timetable set out in Annex C to PO1, but the principal set out still remaining.

discretion to bifurcate these proceedings under Articles 41(2) and 44 of the ICSID Convention,<sup>5</sup> as well as Rules 19 and 41 of the ICSID Arbitration Rules.<sup>6</sup>

13. Investment tribunals regularly exercise the discretion afforded to them to bifurcate preliminary objections and merits issues,<sup>7</sup> with some even going so far as to say that tribunals “*should definitely resolve jurisdictional issues if it is possible to do so at the preliminary stage.*”<sup>8</sup> Further, as Professor Schreuer’s Commentary on the ICSID Convention states, “*treatment of jurisdictional issues as preliminary questions is standard procedure*” in ICSID Arbitration.<sup>9</sup>
14. This is particularly important in the circumstances of the current case. The Respondent should only be required to go to the cost and expense of defending the merits of the Claimants’ claims only if there is a reasonable prospect that jurisdiction will be held to exist.<sup>10</sup> In this case there is (at least) such a reasonable prospect.
15. With a view to promoting fairness, efficiency and procedural economy, investment treaty tribunals (including those acting under ICSID and other arbitration rules) have identified and consistently applied certain factors in determining whether bifurcation is appropriate. These are:

*“1) Is the objection prima facie serious and substantial?”*

*2) Can the objection be examined without prejudging or entering the merits?”*

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<sup>5</sup> ICSID Convention, at Article 41(2) (“*Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*”); ICSID Convention, at Article 44 (“*Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*”).

<sup>6</sup> ICSID Arbitration Rules, at Rule 19 and Rule 41.

<sup>7</sup> See for example, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent’s Application for Bifurcation (13 June 2013) (**Exhibit RL-126**), at para. 57; *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation (8 August 2013) (**Exhibit RL-127**), at para. 39; *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent’s Request for Bifurcation under Article 41(2) of the ICSID Convention (2 November 2012) (**Exhibit RL-128**), at Section VIII; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) (**Exhibit RL-086**), at para. 33; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004) (**Exhibit RL-129**), at para. 12.

<sup>8</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Partial Award on Jurisdiction (27 February 2004) (**Exhibit RL-130**), at para. 26.

<sup>9</sup> C. H. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2nd Ed., 2009) (**Exhibit RL-058**), in Article 41, at para. 77.

<sup>10</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Partial Award on Jurisdiction (27 February 2004) (**Exhibit RL-129**), at para. 26.

3) *Could the objection, if successful, dispose of all or an essential part of the claims raised?*<sup>11</sup>

16. These factors are helpful and should be considered by this Tribunal as appropriate. Each of these factors, coupled with the explicit ability for objections to be considered in a preliminary phase set out in Article 28(5) of the USA-Rwanda BIT, compels bifurcation of this proceeding for the reasons set out in Section III below.<sup>12</sup>

### **III. BIFURCATION IS THE MOST FAIR, EFFICIENT AND ECONOMICAL METHOD OF PROCEEDING IN THIS ARBITRATION**

17. The Claimants have submitted numerous vague and unsubstantiated claims. First, the Claimants allege a “*pattern of mistreatment*” by Rwanda of NRD and its investors.<sup>13</sup> Second, the Claimants complain that “*their assets suffered physical harm throughout the time period that they were investing in Rwanda*” which Rwanda failed to prevent.<sup>14</sup> Third, the Claimants allege that “*Rwanda expropriated Claimants’ tangible property and assets as well as intangible contractual rights to which Claimants were entitled*”.<sup>15</sup> Fourth, that by requiring NRD to “*re-apply*” for its mining licences, Rwanda did not comply with their National Treatment (“**NT**”) and/or Most-Favored-Nation Treatment (“**MFN**”) obligations.<sup>16</sup>
18. These claims do not meet the requisite conditions for *ratione temporis, ratione personae, ratione materiae, or ratione voluntatis*.
19. Further, each of these objections are *prima facie* serious and substantial, do not require prejudging or entering into the merits and will, if accepted, dispose of all, if not a large majority, of the Claimants’ case.
20. In the event that the Tribunal is of the view, contrary to the Respondent’s case, that one or more of the Respondent’s preliminary objections should not be bifurcated, as they

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<sup>11</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia* (Australia-Hong Kong BIT, UNCITRAL), PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure (14 April 2014) (**Exhibit RL-130**), at para. 109, this test having been recently applied by ICSID tribunals in *Eco Oro Minerals Corp. v. Republic of Columbia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (28 June 2018) (**Exhibit RL-131**), at para. 49, *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) (31 January 2018) (**Exhibit RL-132**), at para. 39; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent Request for Bifurcation (14 December 2017) (**Exhibit RL-133**), at para. 100.

<sup>12</sup> In its Memorial on Preliminary Objections, the Respondent sets out further reasons as to why and how this Tribunal has the power to hear Preliminary Objections.

<sup>13</sup> See Memorial, at Section VI.A-VI.B.

<sup>14</sup> See Memorial, at Section VI.C.

<sup>15</sup> See Memorial, at Section VI.D

<sup>16</sup> See Memorial, at Section VI.E.

are too closely linked to the merits, the remainder may still be bifurcated; each objection should be considered for bifurcation independently.<sup>17</sup>

**A. The Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over the Claimants' claims**

21. As set out in more detail in Section III of the Memorial on Preliminary Objections, the Tribunal and / or ICSID lacks jurisdiction *ratione temporis* over the Claimants' claims arising out of the alleged failure by Rwanda to grant NRD long-term licences, and the decision by Rwanda to instead grant a short-term licence extension in August 2011, because the alleged acts and the facts upon which these claims are based took place prior to the entry into force of the USA-Rwanda BIT. Further, all of the Claimants' claims are time- barred as the acts on which they are based, and the requisite knowledge of the breach and subsequent loss or damage, were acquired outside of the limitation period set out in Article 26(1) of the USA-Rwanda BIT, such that the claims are time- barred and the tribunal lacks jurisdiction *ratione temporis* over them.
22. Rwanda's objections that (i) the Claimants' claims arising out of the alleged failure to grant long-term licences and to instead grant a short-term licence extension in August 2011, fall outside of the scope of the USA-Rwanda BIT, and (ii) in any event all of the Claimants' claims are out of time, and are therefore not afforded protection under the ICSID Convention and the USA-Rwanda BIT, are both serious and substantial. The objections are also separable from the question on the merits of whether Rwanda has acted inconsistently with the USA-Rwanda BIT. Finally, if these objections were upheld, it would result in a dismissal of the entire case, or at the very least the elimination of a large number of the Claimants' claims in their entirety, so that the scope and complexity of the case would be significantly reduced.

**B. The Tribunal and/or ICSID lacks jurisdiction *ratione personae* over the Claimants' claims**

23. As set out in Section IV of the Memorial on Preliminary Objections, the Claimants do not have standing to bring the claims and therefore the Tribunal and / or ICSID lacks jurisdiction *ratione personae*. The Claimants have failed to discharge the burden that is on them to prove that either The Spalena Company LLC ("**Spalena**") or Bay View Group LLP ("**BVG**") have suffered any loss as a result of the alleged acts by the Respondent, and they therefore lack standing under Article 24 of the USA-Rwanda BIT. Additionally, they have also failed to show how BVG, which is not an owner of NRD, has any standing under Article 24 in circumstances where it does not have ownership or control of NRD.

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<sup>17</sup> See, for example, *Philip Morris Asia Limited v. The Commonwealth of Australia* (Australia-Hong Kong BIT, UNCITRAL), PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure (14 April 2014) (**Exhibit RL-133**), at para. 115-116, 122-123 and 130, bifurcating two of the three objections raised.

Because neither claimant has any credible claim to standing, the Tribunal and / or ICSID lacks jurisdiction *ratione personae* over all of the Claimants' claims.

24. Rwanda's objection that the Claimants do not have standing to bring these claims meaning that their claims are not afforded protection under the ICSID Convention and the USA-Rwanda BIT is substantial. The objection is also not linked to the question of whether Rwanda has violated the USA-Rwanda BIT. Finally, if this objection is upheld, it will result in the dismissal of the entire case.

**C. The Tribunal and/or ICSID lacks jurisdiction *ratione materiae* over the Claimants' claims**

25. As set out in Section V of the Memorial on Preliminary Objections, the Claimants never held investments qualifying for protection under the ICSID Convention and the USA-Rwanda BIT and therefore the Tribunal lacks jurisdiction *ratione materiae* over the Claimants' claims. In relation to any licences to mine the concessions, the Claimants have not shown that those are assets of the Claimants, rather than assets of NRD, and in any event have failed to show that they made a substantial contribution of funds or other assets, or a substantial contribution to the economic development of Rwanda, such that any of their alleged investments in fact have the characteristics of an investment. Further, in relation to their interest in NRD, the Claimants have again failed to show that they made a substantial contribution of funds or other assets, or a substantial contribution to the economic development of Rwanda, such that any of their alleged investments in fact have the characteristics of an investment. Accordingly, the Claimants' alleged investments do not qualify for protection under the USA-Rwanda BIT, and the Tribunal lacks jurisdiction *ratione materiae* over all the Claimants' claims.
26. Rwanda's objection that the Claimant's claims are not protected under the ICSID Convention and the USA-Rwanda BIT is substantial. The objection is also not linked to the question of whether Rwanda has violated the USA-Rwanda BIT. Finally, if this objection is upheld, it will result in the dismissal of the entire case.

**D. The Tribunal and/or ICSID lacks jurisdiction *ratione voluntatis* over the claims of The Spalena Company LLC**

27. As set out in Section VI of the Memorial on Preliminary Objections, Rwanda has not consented to arbitrate the claims of Spalena as it did not comply with the mandatory settlement procedure in Article 24(2) of the USA-Rwanda BIT. The notice of intent referred to by the Claimants in their Amended Request for Arbitration at paragraph 6 and their Memorial at paragraph 149, in which the Claimants allege that sufficient notice of the Claimants claims was given to Rwanda, did not identify Spalena as a Claimant to this dispute such that Spalena did not adequately comply with Article 24(2)



of the USA-Rwanda BIT. The notice of intent instead only identified BVG and NRD as companies with alleged claims against Rwanda.

28. Spalena therefore did not notify Rwanda of any dispute concerning Spalena. Spalena also did not seek to settle any dispute whatsoever with Rwanda before filing its RfA. Spalena has thus failed to comply with the requirement in Article 24(2) of the USA-Rwanda BIT to seek, for a period of six months, to settle any dispute arising under the BIT. The Tribunal therefore lacks jurisdiction *ratione voluntatis* over Spalena's claims.
29. Rwanda's objection that Spalena never informed it of, and did not seek to settle any of, the claims it now brings in this arbitration is substantial. This objection is also not linked to the question, if reached, of whether Rwanda has violated the USA-Rwanda BIT. Finally, a determination of this preliminary objection would significantly reduce the scope and complexity of the case by eliminating entirely all claims brought by Spalena, should the Tribunal reach the merits stage.

Respectfully submitted on 24 May 2019 by:

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