In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/18/21

Video conference
via Zoom

Monday, 21st June 2021

Hearing on Jurisdiction and the Merits

Before:
RT HON LORD PHILLIPS KG PC
MR J TRUMAN BIDWELL JR
MS BARBARA DOHMANN QC

BAY VIEW GROUP LLC
and
THE SPALENA COMPANY LLC
Claimants

- v -

GOVERNMENT OF RWANDA
Respondent

Secretary to the Tribunal: ALEX B KAPLAN

Transcript produced by Anne-Marie Stallard
and Georgina Vaughn on behalf of Trevor McGowan
APPEARANCES

FOR CLAIMANTS

STEVEN COWLEY, Duane Morris LLP
BRYAN HARRISON, Duane Morris LLP
RODERICK MARSHALL, Bay View Group LLC

FOR RESPONDENT

RICHARD HILL QC, 4 Stone Buildings
ALASTAIR TOMSON, 4 Stone Buildings
MICHELLE DUNCAN, Joseph Hage Aaronson LLP
DANIEL MCCARTHY, Joseph Hage Aaronson LLP
DANIELLE DUFFIELD, Joseph Hage Aaronson LLP
LUCY NEEDLE, Joseph Hage Aaronson LLP
NARCISSE DUSHIMIMANA, Rwanda Mining Board
SPECIOZA KABIBI, MINIJUST, Government of Rwanda

THIRD PARTY OBSERVERS

LISA GROSH, United States Office of International Claims and Investment Disputes
JOHN DALEY, United States Office of International Claims and Investment Dispute
NICOLE THORNTON, United States Office of International Claims and Investment Dispute
CATHERINE GIBSON, Office of the United States Trade Representative
MICHAEL COFFEE, United States Department of Justice
DONNA CHAPIN, United States Department of Justice

INTERPRETERS

SARAH ROSSI, French-English interpreter
ELIZA BURNHAM, French-English interpreter
ROBERT WOLFENSTEIN, French-English interpreter
JEAN CLAUDE MUGENZI, Kinyarwandan-English interpreter
ROSE-MARIE MUKARUTABANA, Kinyarwandan-English interpreter

SUPPORT STAFF

JAMES WATKINS, FTI Consulting
DAVID BRODSKY, FTI Consulting
ANNA LOUTFI, assistant to the Tribunal
COLLEEN FERGUSON, ICSID paralegal
IZABELA CHABINSKA, ICSID intern
<table>
<thead>
<tr>
<th>INDEX</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discussion re procedural matters</td>
<td>1</td>
</tr>
<tr>
<td>Opening statement on behalf of the Claimants</td>
<td>12</td>
</tr>
<tr>
<td>By Mr Cowley</td>
<td>12</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>22</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>33</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>78</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>83</td>
</tr>
<tr>
<td>Opening statement on behalf of the Respondent</td>
<td>90</td>
</tr>
<tr>
<td>By Mr Hill</td>
<td>90</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>110</td>
</tr>
<tr>
<td>MR RODERICK MARSHALL (called)</td>
<td>171</td>
</tr>
<tr>
<td>Direct examination by MR COWLEY</td>
<td>171</td>
</tr>
<tr>
<td>Cross-examination by MR HILL</td>
<td>176</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>211</td>
</tr>
</tbody>
</table>
Day 1 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21 Monday, 21 June 2021

THE PRESIDENT: Welcome, everybody, to Day 1 of this merits hearing, by Zoom, of the ICSID arbitration between Bay View Group and The Spalena Company v the Government of Rwanda.

We have 15 minutes allowed for preliminary matters.

First of all, I understand that Mr Hill will be speaking for the Respondent and Mr Cowley for the Claimants in these proceedings. Is that correct?

MR COWLEY: Yes. When you say "these proceedings", with regard to the --

THE PRESIDENT: Today, in the openings.

MR HILL: Yes, that's correct.

THE PRESIDENT: Good.

Now, according to Procedural Order No. 7, witnesses should not be listening to submissions. I just wanted to raise the question of whether the Respondent wishes this to be applied in the case of Mr Marshall, who will be giving evidence immediately after the opening statements, or whether they prefer to have Mr Marshall listening to what they say in their opening.

MR HILL: No, from our perspective we're happy that the regime stays as it is and Mr Marshall is excluded.

THE PRESIDENT: Very well. So be it.

Next of all, I understand that Mr Hill will be speaking to resolve in this initial stage. The first was the position of Mr Rwamasirabo, who is going to give evidence but there is an issue as to the capacity in which he gives it. I'm not quite sure procedurally what turns on this. Is it whether he gives a 15-minute introduction or makes a presentation?

MR HILL: Just on that, I think from our perspective nothing turns on it for the purposes of the procedure. We are not going to object to him giving a 15-minute presentation. In terms of the positioning in the timetable, he comes at the end. We will be making submissions in due course about the weight to be attached. But in terms of the procedure I don't think there's any problem that arises.

THE PRESIDENT: Well, in that case, there wouldn't seem to be any issue to resolve at this stage; is that right?

MR COWLEY: Agreed.

THE PRESIDENT: Right.

The next matter, and it's a small matter: these proceedings will in due course be screened for the public, but because the proceedings are being conducted remotely, the normal course that ICSID follows will not be followed. What is proposed is that the public screening of these proceedings will take place after the hearing has been concluded, and before the proceedings are screened publicly, they will be shown to each side, so that each side will have the opportunity to draw attention to any matters which are confidential and should not be put into the public arena.

Is that arrangement satisfactory?

MR COWLEY: Claimants agree.

MR HILL: Yes, and the Respondent also.

THE PRESIDENT: Good.

Now, the third matter to be resolved relates to the Claimants' application to adduce additional evidence.

The Tribunal has discussed this application in the light of the Respondent's response to it. We don't wish to invite further argument about it, but there are just one or two matters we would like assistance on.

First of all, Mr Cowley, could you explain why it is that this application has been made only one working day before the start of the hearing?

MR COWLEY: It was the deadline that was agreed to some time ago, when we scheduled all the proceedings. The request for submission of new evidence was set as the deadline of Thursday. We simply followed the order.

THE PRESIDENT: I'm not aware of any order that applications should not be made before a deadline. There is only -- we would raise the question, if we were still in communication; he's had them the whole time. The only -- we would raise the question, if we were still in an earlier phase, as to why it wasn't produced, you know, in response to our request.

THE PRESIDENT: Well, the only question -- I was not inviting argument about whether it should come in; I just wanted to know why it was that the application was made so late.

Could I turn to the three particular items of evidence. The first is documents relating to Tincro's agreement with the Respondent.

Mr Hill, the primary objection that's been made to this is on the grounds of relevance. Relevance is something that we wouldn't wish to predetermine at this stage. Is there any other reason why the Respondent can't deal with this evidence?
12:07 12:11
1. MR HILL: Well, it comes so late -- we don’t actually have
2. the evidence; we haven’t, obviously, looked at it. So
3. we are, at this very short notice, prejudiced by seeking
4. to deal with it at all. As I say, we don’t understand
5. the relevance, and there has been no submission made or
6. explanation given as to why it’s so late. It’s been
7. around for over a year. Trying to explain the degree of
8. prejudice is inherently difficult because we haven’t
9. seen the material. But at the last day, we’re certainly
10. not in a position to deal with it today and we don’t
11. know if we’ll be in a position to deal with it at any
12. stage during this week.
13. THE PRESIDENT: Do you not have the document? It’s
14. a document that evidences what is alleged to be dealings
15. of the Respondent.
16. MR HILL: Well, I’m not in a position to answer that, I’m
17. afraid. But we certainly would be prejudiced in
18. addressing -- even on the assumption we have the
19. document, we would certainly be prejudiced in seeking to
20. deal with it, to discuss it with our witnesses, in the
21. short time available. And in the circumstances where
22. there is a lot in this case and it’s immaterial, we do
23. say it shouldn’t be admitted.
24. THE PRESIDENT: Will it be open to the Claimants to
25. cross-examine on what has occurred since disclosure of

12:09 12:13
1. documents? Because if so, this is going to be put to
2. your witnesses.
3. MR HILL: Well, if there’s a witness that they think it’s
4. relevant to cross-examine on, they can attempt to do so.
5. I would suggest that would be an useless expenditure of
6. their time in cross-examination because it’s
7. an immaterial issue.
8. THE PRESIDENT: Yes. Can we just go into a private session
9. for a moment, please.
10. (12.10 pm)
11. (The members of the Tribunal withdraw)
12. (12.11 pm)
13. THE PRESIDENT: Mr Cowley, can you hear me? Is it your
14. intention that this evidence should be put in
15. cross-examination to any of the Respondent’s witnesses?
16. MR COWLEY: Yes, it was our expectation, it was our
17. understanding of paragraph 22 of Procedural Order 7 that
18. we were only afforded an opportunity to ask for the
19. submission of new evidence for cross-examination.
20. This is something that only became available in the
21. last month to anyone, and not us. We had to obtain this
22. through --
23. THE PRESIDENT: Yes, can you state which witness or
24. witnesses you’re going to ask about this?
25. MR COWLEY: Well, I believe it’s at least directly relevant

12:11 12:13
1. to Mr Evode Imena, but I would not want to say right now
2. that we have mapped out our cross-examination so tightly
3. that we know every topic we are going to cover and all
4. the issues in the documents. So I would say that I know
5. it’s relevant to at least one.
6. THE PRESIDENT: Well, our direction is that by start of
7. business tomorrow you shall have decided which witnesses
8. you are going to put this evidence to, give notice of
9. those witnesses. When you come to cross-examine them,
10. at that point, if an objection is taken, we will deal
11. with it then.
12. MR COWLEY: In the meantime, your Honour, just so
13. I understand, what are we to do with the documents?
14. Respondent’s counsel suggests he doesn’t have them,
15. although they’re actually Respondent’s documents. We’re
16. happy to provide them to them.
17. THE PRESIDENT: You should certainly provide them to the
18. Respondent without further delay.
19. MR COWLEY: I just wanted to know what our next step was.
20. THE PRESIDENT: Yes.
21. MR COWLEY: And we will advise tomorrow who we intend to
22. examine on the topic that’s addressed in the document.
23. THE PRESIDENT: Moving to the second category, which are
24. human rights reports, we decided that these are not
25. going to be admitted at this very late stage. They

Page 5

Page 6

Page 7

Page 8
12:15 1 MR HILL: Well, Mr Ehlers is obviously a mere witness of 
2 ours.
3 THE PRESIDENT: Yes.
4 MR HILL: I would ask for three days.
5 THE PRESIDENT: Very well.
6 MR HILL: Thank you.
7 THE PRESIDENT: 15 minutes. Any other matters of 
8 housekeeping?
9 MR COWLEY: Your Honour, just as clarification, again, what 
10 do we do with the documents? Are we to submit them to 
11 the Tribunal now as additional Claimants' exhibits?
12 I take it that the --
13 THE PRESIDENT: Yes.
14 MR COWLEY: -- Respondent has copies already. So we'll get 
15 them to the Tribunal by tomorrow; is that acceptable?
16 THE PRESIDENT: That's acceptable.
17 MR HILL: Just to clarify, we don't have copies. Mr Ehlers 
18 does not have this email and we haven't seen it, so we 
19 will need to be provided with it.
20 MR COWLEY: We will get that out today, as best we can after 
21 the hearing is over. We'll get them out as soon as we 
22 can. We just need to mark them as the next exhibits.
23 So it's just a step away.
24 Lastly, I hate to be so particular but I don't want 
25 to fail to deliver something that's expected: when we 

Page 9

12:16 1 send out the documents to the Tribunal relating to 
2 number 3, the email and its attachment, do we also send 
3 the Tribunal the two different agreements with Tinco 
4 that are covered by item 1, along with the --
5 THE PRESIDENT: Yes, please.
6 MR COWLEY: Okay, thank you.
7 MR HILL: Could I just raise one more point on that timing?
8 THE PRESIDENT: Yes.
9 MR HILL: We would be keen to have the email and the 
10 cooperation agreement immediately. So while 
11 I understand the idea about marking up exhibits and that 
12 can be done later, just as between the parties, if the 
13 provision of that document could be provided 
14 immediately, that would -- because we've only got three 
15 days in order for Mr Ehlers to comment on it.
16 THE PRESIDENT: That's a reasonable request. Mr Cowley, 
17 could you put in train arrangements so that the 
18 documents are transmitted immediately?
19 MR COWLEY: We will. When you say "immediately", we don't 
20 have any staff in the office, and you're looking at the 
21 entire team, the litigation team, sitting here with you. 
22 So immediately means as soon as we can today, when 
23 someone --
24 THE PRESIDENT: As soon as possible. Very well.
25 MR COWLEY: We do have one other item that we would like to 

Page 10

12:17 1 ask the Tribunal's assistance with.
2 THE PRESIDENT: Yes.
3 MR COWLEY: There is a document in Respondent's production 
4 that is not translated in full from Kinyarwandan to 
5 English, as required by Procedural Order No. 1. It is 
6 only selectively translated, for two paragraphs. It's 
7 Respondent's document R-191. And we would like to ask 
8 that the Tribunal direct Respondent to provide the full 
9 translation of the entire document.
10 THE PRESIDENT: How long is it?
11 MR COWLEY: 11 pages, I believe. 11-15 pages, something 
12 like that.
13 THE PRESIDENT: Can you tell us what the document is?
14 MR COWLEY: It appears to be a judgment of some sort against 
15 Evode Imena, Mr Imena. He cites it for the two 
16 paragraphs, but there are at least ten pages of 
17 additional written something in the order that we cannot 
18 read and translate -- we could hire a translator, but we 
19 can't be assured that we have agreement with the other 
20 side. And I don't think it makes any sense for us to 
21 question Mr Imena line by line to get a reading of the 
22 other paragraphs and try to get agreement as to what 
23 they say, as opposed to have in writing the translation 
24 that we know Respondent agrees to because it has 
25 provided it.

Page 11

12:19 1 THE PRESIDENT: Yes. Mr Hill, can that be done?
2 MR HILL: Yes, I've just had some brief instructions.
3 I understand it is quite a lengthy document and relevant 
4 only in part.
5 THE PRESIDENT: Just on the original point from Mr Cowley, we were 
6 only required to provide excerpts. Obviously, in light 
7 of what the President said, I will find out how easily 
8 it can be done and revert if there is a difficulty.
9 THE PRESIDENT: Alright. Thank you very much.
10 So, Mr Cowley, over to you.
11 (12.20 pm)
12 Opening statement on behalf of the Claimants
13 MR COWLEY: We are bringing up a PowerPoint presentation.
14 It will take just a couple of seconds because we need to 
15 share our screen. This was submitted earlier this 
16 morning to Mr Kaplan. (Pause)
17 So if it hopefully makes more sense of my opening, we 
18 prepared a timeline to direct chronologically what we 
19 believe we presented, and obviously will be explored 
20 further, in much greater detail, by testimony and the 
21 points in context, both by Claimants' witnesses and 
22 Respondent's witnesses.
23 I do not intend to provide the level of detail and 
24 quotes, but for a brief few indications of portions of 
25 documents and portions of testimony. I leave out,
obviously, much detail, and I say that upfront. I'm not  
suggesting that this opening is a comprehensive analysis  
of all the documents on these topics or all the contents  
of the documents we point to. We are trying to provide  
an overview and direction of the case as we see it and  
we believe we presented it, and will obviously defend it  
over the course of the next two weeks in these hearings.  

The Claimants here, and the acts and issues that  
give rise to the claims by the Claimants, all centre  
unquestionably around Mr Marshall's activities in  
becoming an investor in Rwanda, in the mining industry  
specifically in Rwanda, and he brought with him other US  
investors.  

How it came to be that Mr Marshall was in a position  
to identify an opportunity to invest in this industry  
starts actually with who Mr Marshall is and what his  
relationship with Rwanda was prior to making this  
investment. He was not a commercial miner that was  
looking around the world for various opportunities and  
simply, at arm's length, passed in an application for  
concessions. Mr Marshall first developed  
a relationship, a trusted relationship, where he acted  
as both legal advisor and general consultant on business  
to important institutions and individuals within the  
Rwandan Government.  

This relationship goes all the way back to  
December 2004. Mr Marshall, at the time in his career,  
practising in Eastern Europe. He started in the  
United States and moved to Eastern Europe and was  
practising: he was providing advice to international  
companies and to nation states, sovereign entities. And  
he developed a speciality and had relationships with  
a number of governments, countries, agencies within  
governments and companies doing business with him.  

That's how he became introduced to and started  
a relationship with Rwanda.  

(Slide 2) In December 2004 Mr Marshall and his  
partner at the time providing these legal services and  
other transactional advice and consulting signed  
an agreement to provide such services to the Rwandan  
Investment and Export Promotion Agency. And it's a very  
high-level agreement because it's not specific as to  
projects, but agrees and sets the basis for what turned  
out to be a very long-term relationship.  

(Slide 3) And as you can see from -- as we bring up  
some documents, the specific document numbers that are  
referenced on the documents correspond with the document  
in the hearing bundle. I will try to remember them and  
point them out, but the PowerPoint presentation has been  
provided, so all of these documents or snippets from  
documents can be traced back or found based on the  
individual slides: they have the document numbers on  
them.  

So Claimants' Exhibit [132] will show that it's  
a very high-level document, and what Mr Marshall and his  
partner did -- and over time it became primarily  
Mr Marshall who developed this relationship and  
continued working on it -- they provided these services  
on a pro bono basis. Given the nature of Rwanda's early  
stages of privatisation and getting involved in  
international transactions, it was not in a position to  
pay for some of the types of legal services and other  
needs that it had, that other nation states did, and  
Mr Marshall began working with them with that knowledge  
and understanding.  

It became over time a very close relationship. And  
when I say it's long term, this relationship, the role  
of trusted legal and business advisor to elements within  
the Rwandan Government, other institutions -- over time  
it became far more centred on the military and its  
transactional arm -- lasted until 2016, until the events  
that really ended Mr Marshall's investment in Rwanda.  
He worked for them in this role throughout all the  
events we see here, all the events we're going to deal  

with here, as an investor. And it's important -- and we  
point this out now at the beginning, in this opening,  
because keeping in mind the way Mr Marshall's claims,  
even the basic representations about things that were  
provided to him in writing, the accusations back about  
fraud, manipulation, lying, distortion, trying to get  
something from the government, the way he has been  
handled -- not as a good faith dispute or disagreement  
about a contract or its rights, disagreements about what  
happened on the ground, that could happen between  
anybody, but accusing him of actively manipulating and  
lying throughout -- is coming from a government that was  
using Mr Marshall this entire time as a spokesperson, as  
a representative, as a liaison to other governments; as  
someone who would handle not only specific transactions  
but big-picture developing relationships that Rwanda  
felt were important in Eastern Europe for them. They  
relied on him in that role until 2016.  

So hearing now the approach they take and the  
accusations levelled at Mr Marshall, it should always be  
remembered, at the time and in context: how did they  
actually view Mr Marshall, how did they actually treat  
him? Like a liar and someone not to be trusted? Or  
like someone who they trusted so much they could use as  
their voice and their representative with others?
12:28 1 Through this relationship and Mr Marshall's work in
2 understanding about the different types of transactions
3 that Rwanda was looking to get involved in, and his own
4 speciality in working on similar transactions in other
5 countries, specifically in Eastern Europe. Mr Marshall
6 was introduced to and learned about the privatisation
7 efforts. And at one point it focused on the, on
8 the mining concessions. Rwanda was interested in
9 getting foreign investment; specifically, through
10 Mr Marshall, they hoped, US investment, interested in
11 getting in early and helping privatise, build out,
12 Rwandan mines in the mining industry.
13 (Slide 4) Mr Marshall was introduced to this early
14 in his relationship, and by December 12th 2006 there was
15 discussion about what it would look like if he was
16 interested -- he had expressed interest in trying to put
17 together an investment group to get involved -- what the
18 steps would be.
19 And December 12th 2006, one of the communications
20 from RIEPA (C-139) -- I want to point out here because,
21 again, I do this because, in terms of the
22 communications, not by any stretch was this the only
23 one; by no stretch are we saying this email is the
24 agreement on something. There's numerous discussions
25 and conversations. But we point this out because we

12:30 1 think it is indicative of the way business was actually
2 done, how things were actually handled.
3 Again, we think it's completely out of context and
4 completely distorted once it gets into the legal realm
5 that we have now, and we have lawyer positions and legal
6 analysis and reasoning about what documents should mean
7 and what things must have been intended or not because
8 of the language. What I'm trying to draw the court's
9 attention to with this email is: how was business
10 actually done when Mr Marshall was trying to get
11 involved, and later did get involved, and he was dealing
12 with representatives of Rwanda and the ministry that was
13 handling the privatisation of mines? How were they
14 actually handling their own written policies and
15 procedures?
16 Well, we see right here, on December 12th 2006,
17 Mr Marshall was told quite explicitly, "You do not have
18 to go through RIEPA" or the privatisation scheme that
19 was in place, early as it was, loose as it was, in terms
20 of the written programmes. "Don't worry about that",
21 they say, "just write a letter explaining your interest,
22 and we're working with you". And that informality, that
23 "Trust us, this is how we're going to do it; don't worry
24 too much about what things say, let's get involved,
25 let's get you going and get to an agreement about how

12:31 1 we're going to do it", working together cooperatively
2 was how things were handled from the very beginning.
3 So to suggest now, all these years later, when
4 things did not turn out right and Mr Marshall asserts
5 a claim, that it was completely unreasonable to expect
6 that what he was told meant anything, given what was in
7 writing; it wasn't. It wasn't unreasonable because he
8 was always assured and he knew from his experience how
9 things were done, business was actually done, through
10 the personal relationships and working cooperatively.
11 From the get-go, they assured him, "That's how we do
12 things".
13 To draw your attention -- I'm sorry, this turns out
14 to be a lot smaller on my screen and I'm hunching over;
15 I don't mean to do that, but I don't know how to enlarge
16 it. When I say the "cooperative" nature of the
17 relationship, I just want to draw the Tribunal's
18 attention to the last line. In submitting plans and
19 submitting proposals and analysis of what he's going to
20 do, it was made quite clear to them the Rwandan
21 Government was going to be working with him to come up
22 with satisfactory documentation and proposals. They
23 were going to assist in his presentations because they
24 wanted to be successful.
25 It was not handled the way we're now hearing it and

12:33 1 presented, where "You submit something, we'll judge it",
2 and that's all. Instead, it was always a matter of "You
3 help me by telling me what you need; we'll see if we can
4 do it and how we can do it". And that was true from the
5 very beginning.
6 (Slide 6) NRD received its contract for mining
7 concessions on November 24th 2006.
8 (Slide 7) That NRD initial award, the initial
9 licence, is at Claimants' Exhibit C-017. The only thing
10 I'd like to point out and remind the Tribunal at this
11 point is: the initial agreement from its initial
12 investment, NRD -- well, NRD's then owners and investors
13 in NRD acquired the rights to five mines: Rutshuru, Mara,
14 Sebeya and Giciye, four of the mining concessions, were
15 in the Western Province; one, Nemba, was not.
16 The reason I just point that out is, in putting in
17 context as the hearings go on, you'll hear about the way
18 things were done, sometimes only focusing on the
19 Western Provinces and only things that affected those
20 mining concessions. So I just wanted to point out that
21 four of NRD's five mining concessions were located
22 there.
23 (Slide 9) In November 2010 Mr Marshall, who was not
24 with NRD previously, was not one of the initial
25 investors in NRD, became involved, became an investor.
If I could just take a step back, up until this point, or prior to the investment by BVG in NRD, Mr Marshall's initial investment, when he did move forward with RIEPA conversations and ultimately applied for a concession, it was for a mining concession called Bisesero. That is not a concession that's at issue in this case, in the sense that there's no claims asserted about the fact that Mr Marshall's companies do not have long-term concessions there, but it's admitted that they don't.

Things did not work out at Bisesero. And Mr Marshall's company, his investment company, through which he and other American investors put their initial roots, if you will, into the investment that later became the groundwork for the investment in NRD going forward, they initially put that into Bisesero and they were, over time, unable, based on essentially bad relationships and -- bad performance of relationships and who they relied on, disputes about what happened left them in quite a hole, quite a bind there. And when Bisesero was taken from them, Mr Marshall, already facing problems with that investment, made the decision not to fight about Bisesero, not to argue about whether he had rights to continue, but to walk away and to reinvest in other concessions that he knew became available.

The NRD owner originally when the concessions were awarded, Starck company, a German company, wanted out, wanted out of Rwanda. Mr Marshall and others became aware of their interest in transferring their investment, transferring NRD. And Mr Marshall acquired that Starck interest, in a private transaction he acquired -- they acquired the Starck investment in NRD through Spalena, an investment vehicle that was set up simply to address the fact that Bay View Group was no longer recognised and listed in Rwanda as a company registered to do business there. So acquiring NRD in Bay View Group's name was not in compliance with Rwandan law, and Bay View put its money through a new investment vehicle that Mr Marshall and his other investors formed, an affiliate that they controlled.

THE PRESIDENT: Could I just intervene. Is there any evidence in relation to the fact that Bay View was not permitted, under Rwandan law, to take over the business?

MR COWLEY: To make the acquisition of the shares --

THE PRESIDENT: I understood the Claimants' case to be that Mr Marshall had no idea why this was.

MR COWLEY: He had no idea why Rwanda stood its ground and insisted that Bay View Group could not renew its registration when -- and it's in Mr Marshall's...
<table>
<thead>
<tr>
<th>Page 25</th>
<th>Page 26</th>
<th>Page 27</th>
<th>Page 28</th>
</tr>
</thead>
<tbody>
<tr>
<td>12:46</td>
<td>12:48</td>
<td>\begin{itemize}</td>
<td>\begin{itemize}</td>
</tr>
<tr>
<td>1</td>
<td>started with $100,000 invested into NRD in cash from the</td>
<td>2</td>
<td>BVG was already investing in NRD because that was the</td>
</tr>
<tr>
<td>2</td>
<td>transaction it was contemplating working on, heading</td>
<td>3</td>
<td>like payment of tax responsibilities, et cetera. The</td>
</tr>
<tr>
<td>3</td>
<td>toward, and it needed to keep NRD moving, keep it</td>
<td>4</td>
<td>we're not going to cross the line in terms of the</td>
</tr>
<tr>
<td>4</td>
<td>operational. So it had already made its investment</td>
<td>5</td>
<td>bifurcation; we are not to get into how much money was</td>
</tr>
<tr>
<td>5</td>
<td>direct and made the acquisition shortly; and in between,</td>
<td>6</td>
<td>lost and how much damages exist as a result.</td>
</tr>
<tr>
<td>6</td>
<td>before the initial licences expired, NRD submitted this</td>
<td>7</td>
<td>But the idea that money was put in is attacked by</td>
</tr>
<tr>
<td>7</td>
<td>application.</td>
<td>8</td>
<td>saying the document is false, so therefore nothing was</td>
</tr>
<tr>
<td>8</td>
<td>Like the initial licences discussed, it needed to</td>
<td>9</td>
<td>put in. But then nobody explains how years of</td>
</tr>
<tr>
<td>9</td>
<td>have certain information about each investment, its</td>
<td>10</td>
<td>operations, maintenance, security, et cetera, were paid</td>
</tr>
<tr>
<td>10</td>
<td>feasibility study, a projection of how that investment</td>
<td>11</td>
<td>for, if it wasn't BVG putting money, through Spalena,</td>
</tr>
<tr>
<td>11</td>
<td>was going to be used to build out the mining operations</td>
<td>12</td>
<td>into NRD. This was the beginning.</td>
</tr>
<tr>
<td>12</td>
<td>of the concessions, in a way, because environmental</td>
<td>13</td>
<td>(Slide 11) In November 2010 NRD applied for the</td>
</tr>
<tr>
<td>13</td>
<td>analyses were also required, and alleviation was also</td>
<td>14</td>
<td>long-term licences, as its initial licences were coming</td>
</tr>
<tr>
<td>14</td>
<td>a focus of what was required to be submitted as well.</td>
<td>15</td>
<td>to a close. The long-term licences at this time -- and</td>
</tr>
<tr>
<td>15</td>
<td>How it was going to be built out, not only in a way to</td>
<td>16</td>
<td>I'll repeat it in a moment -- were 30-year licences,</td>
</tr>
<tr>
<td>16</td>
<td>get the investor to profits, but in a way that would not</td>
<td>17</td>
<td>that's what it was looking for. And I'll explain that</td>
</tr>
<tr>
<td>17</td>
<td>harm Rwanda's long-term environmental and other</td>
<td>18</td>
<td>in a moment.</td>
</tr>
<tr>
<td>18</td>
<td>interests, all this needed to be explained at the time</td>
<td>19</td>
<td>(Slide 12) Rwanda now has a theory that: well, NRD</td>
</tr>
<tr>
<td>19</td>
<td>of the application.</td>
<td>20</td>
<td>actually have been -- what they were</td>
</tr>
<tr>
<td>20</td>
<td>And because the feasibility aspects, all of which --</td>
<td>21</td>
<td>actually seeking was only a five-year licence. And they</td>
</tr>
<tr>
<td>21</td>
<td>all of those aspects of the required submission are</td>
<td>22</td>
<td>point to language in this long document and long</td>
</tr>
<tr>
<td>22</td>
<td>intertwined in this document and -- I'm sorry, I don't</td>
<td>23</td>
<td>submission that NRD made. Admittedly, this was before</td>
</tr>
<tr>
<td>23</td>
<td>see the ...</td>
<td>24</td>
<td>the full ownership of NRD was acquired from Starck, but</td>
</tr>
<tr>
<td>24</td>
<td>This is Claimants' Exhibit 35. I apologise for not</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>noticing before that it's not on the face of this</td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021
MR COWLEY: Could you bring up C-035 from the bundle. Page 13 of this document?

THE PRESIDENT: Mr Cowley, could we look at the top of page 13 of this document?

MR COWLEY: Yes, and I started with the cover because I know that language is not the only application. It's not only asking them to approve feasibility for only five years, because that's all they were prepared to do. Submit and provide information about, but they're asking for the allocation of mining licences. And thirty years is not mentioned in the document by NRD because it would have been irrelevant. It would have been unusual to think in terms of having to name how long the licence was at the time this was submitted.

THE PRESIDENT: Well, I'll read it slowly:

"It is herewith applied to retain the concessions of Rutsiro, Giciye and Sebeya as Exploration Licences, and the projection out for only five years, as opposed to a 30-year concessions?"

MR COWLEY: Yes, and I started with the cover because I know that Rwanda pointed to that: the "Application for the Analysis and study of feasibility long term in that period of time."

So it was referred to, in terms of the exploration, as: that was the feasibility aspect of the submission that was required by the initial exploration licences, and that was only for five years. I believe in the comparators that we're aware of, one was for six years; everyone else that we're aware of is five years only.

And according to our submissions, our understanding, all the experts, all the people that were working on this in the mining industry would only speak in terms of five or six years and nothing else. So you're right that that language is there, but it's only an issue now because we're looking at this through the prism of Rwanda deciding to change the law. And they changed the law during the course of the process of the negotiations of the contract that was being drafted as a result of this application. They changed the law, and the 2014 law talks about applications for shorter periods and longer periods, and what would be required of each. But not then.

If you go to the next slide (13), what in fact that application for mining licences was governed by, was anybody who would submit it would be referring to, [is] the law that was in existence since 2008. This is marked Claimants' Exhibit 20; again, it's a longer document.

But if you go forward (slide 14), there's various...
12:56 1 MR COWLEY: (Slide 15) Later that year the discussions with 2 Starck culminated. And because of Mr Marshall’s 3 difficulties getting an explanation for how to address 4 BVG going forward with Rwanda’s ministry regarding the 5 corporations registration, they founded Spalena and 6 acquired the ownership interest of NRD and inherited its 7 investment, including its application for a long-term 8 licence. 9 10 (Slide 16) That document is the Claimants’ 11 Exhibit 68.

12:58 1 understanding of the answer to a question like that from 2 Mr Marshall, and the other Claimants’ witnesses that 3 were involved in the mining industry and their own 4 specific mining concessions that they applied for 5 licences, refers to the large concessions as different 6 from small mines, where artisanal mining was the 7 long-term projected only economic use. 8 I haven't asked them to distinguish and identify in 9 writing whether what they refer to as “large” 10 concessions were all the ones designated as “vast”. 11 I can’t say, therefore, that there was a written 12 document between the owners of mining concessions and 13 the licences in Rwanda that specified by name the 14 so-called “vast concessions”, as used in the law of 15 2008. 16 What I can say is the Claimants’ witnesses who I’ve 17 spoken to that are involved in investment in mining 18 concessions talk about and acknowledge an understanding 19 within the industry that there was a divide between 20 large concessions and small concessions, and I have 21 always taken and understood what they reference as the 22 large concessions is the vast concessions as referenced 23 in the law. And someone investing in one of those 24 concessions was being asked to invest in developing, 25 industrialising, making significant long-term inroads to

13:00 1 fully exploit a large quantity of valuable minerals, but 2 it would take a lot of investment over a long period of 3 time to extract them. 4 Someone had to come in with expertise and plan how 5 to do it; not only how to do it profitably, but how to 6 do it safely for Rwandans and the environment, 7 et cetera. They needed to be professionals, those with 8 real experience in the industry that would be paid to 9 come in and get it right. And that’s why they asked for 10 these expert -- that’s why they understood, at least, 11 they were being asked for these expert analyses, 12 feasibility studies, et cetera, to explain how someone 13 comes in and develops out a large-scale mine. 14 On the other side of the divide are mines that 15 no one was contemplating someone would find profitable 16 enough to do something like that, and that it was far 17 more opportunistic mining. Artisanal mining -- the 18 industry uses “artisanal mining” as, seemingly, a term 19 of art that everyone understands. But apparently, as 20 I’ve come to understand it, it could capture under that 21 umbrella individuals with a bucket, a pail and a shovel; 22 and it could include a more professionalised group of 23 workers tapping a vein and running with it. 24 But it wasn’t such a rich vein, it wasn’t so deeply 25 varied that significant equipment and other measures for

13:02 1 safety and significant entry to the vein and extraction, 2 et cetera, was required; individuals could do it with 3 manual labour, working together, and some equipment. 4 And industrialisation imposed as -- not just the vast 5 equipment, but power tools, you know, air compressors, 6 jackhammers, that sort of thing, where it would require 7 some capital, some business investment and oversight and 8 management, and a number of employees. 9 And those different groups -- and I’m sure those are 10 just a couple of permutations in the whole range -- all 11 fit under the umbrella, as I’ve come to understand it, 12 of what’s referred to in the mining industry as 13 “artisanal mining”. 14 As I have had explained to me, the divide in the 15 2008 law between the vast and the non-vast, or the small 16 mines, was the concept that non-vast mines would be 17 long-term artisanal mining, and the idea was to 18 opportunistically -- again, safely and environmentally 19 soundly, but opportunistically -- someone to come in, 20 exploit it and leave, and there was much less concern 21 about long-term damage and other things, because that 22 was never going to be put in the ground. 23 The vast mines include all of these concessions for 24 NRD. All of these concessions are, if not the largest 25 in their category for the minerals that are identified,
13:05 1 from the submission that has already been on file, the application, he takes over those discussions about moving it forward as they anticipated.  
2 Again, his understanding of the process was not new.  
3 Through acquiring through investment the NRD interest, Mr Marshall knew about the process, had the whole understanding of how it worked, who to work with, et cetera, for years, because he was involved with Bisesero and he did understand from his own experience exactly what he was doing.  
4 He gave up Bisesero, in the sense that he was willing to allow it to be taken back without arguing about it, there's no question.  But he was never really gone from the mining industry. He focused on investing in NRD, Starck's interest in taking it over.  
5 So Mr Marshall was involved in the mining industry throughout. He understood it. Taking over -- he was working people he already worked with, people he already knew; he was working with a process he already knew. So this was all very familiar to him, he understood it, and he had ongoing discussions for quite a long time.  
6 Those discussions moved beyond the application.  
7 What was submitted, was it correct, did it have all the information, was the necessary first step, because the initial NRD exploration licences expired in 2010. Their

13:08 1 Mr Bidega worked closely with Mr Marshall or NRD's proposed contract because that's what was expected of them. They wanted the contract to be acceptable to the ministry, and ultimately the cabinet, with the ministry's support. They didn't want it to fail.  
2 So Rwanda now points out that somehow something nefarious must be going on because Yahoo accounts of Mr Bidega were used in these negotiations. That was just true of the time. Having a rwanda.gov email account was relatively new, and how it rolled out for what employees at what time, we can't say. But they had conducted business with their own personal accounts, government business, for years.  
3 And the lingering use of both, when they existed, is true not just for -- and as the course of the hearings go on, we will point out where others, including Rwanda's witnesses, continued to use personal accounts for years. having a rwanda.gov email was relatively new, and how it rolled out for what employees at what time, we can't say. But they had conducted business with their own personal accounts, government business, for years.  
4 And the lingering use of both, when they existed, is true not just for -- and as the course of the hearings go on, we will point out where others, including Rwanda's witnesses, continued to use personal accounts, government accounts, because it was such a long-standing necessity to use those individual accounts for so many years in the country. It continued.

13:07 1 application to go forward and get the long-term licences needed to comply with what they were required to submit. That had to be reviewed.  
2 (Slide 18) It did progress beyond that in the discussions, and there's a witness statement, and you'll hear from the witness -- I apologise, I forgot Mr Bidega's [first] name, and I apologise to Mr Bidega in his absence. Dominique Bidega and Mr Marshall on behalf of NRD undertook, as 2011 went on, to be discussing cooperatively -- just like from the beginning, there's cooperation on "Let us tell you what we're looking for, let us tell you what we're expecting in the contracts, let's look at others".  
3 This was nothing new to Mr Marshall and Mr Bidega.  
4 We saw from the early 2006 emails it was the way things were done. Everybody on the mining industry side wanted the investors to come in and succeed. All the investors came in and wanted to succeed. They worked together to help build this out. It was a new, young industry, in terms of privatisation, on both sides.  
5 The cooperative working together was not nefarious.  
6 The cooperative working together was not clandestine and hidden. I say that, I feel I have to point that out, because that's exactly how it's treated in Rwanda's papers.
know, Dr Michael, the official director, was both on leave for studies abroad and on sick leave at different periods, and therefore Mr Bidega had to assume the responsibilities of director in his absence. Mr Bidega, officially the assistant director -- one of, perhaps -- but for the Rwanda Geology and Mines Authority was working with Mr Marshall. And Mr Marshall understood, as I understand from Mr Bidega -- true of other applicants -- he was working with them on contracts. We're at a stage in 2011 where the administrative agency that's responsible for working with the minister of the mining industry that's ultimately to approve the licences, he's working on behalf of the government, is working on a contract for the long-term licences. That means the application was not rejected, it was not looked at as insufficient, it wasn't looked at as a step that hadn't been met yet. You don't get to talk about a contract until you're talking about finalising what was expected to be approval. Now, we argue the expectations, and that's obviously an issue that the Tribunal's going to decide. But what seems apparent on its face -- is a string of things that led to it and preceded it, and the purpose always was: he should be successful. The Rwandan offices that he was dealing with, the minister ultimately wanted investors to be successful; Mr Marshall had no reason to think otherwise. So the investments by BVG continued. (Slide 20) March 2012, BVG invests more money in acquiring -- over time, it wasn't all at one fell swoop; I'm just suggesting this is the date of the documentation as to the transfer of ownership -- but equipment, heavy, small, e cetera, acquired by BVG, starting with its original investment in Bisesero. Going on and considering building out, developing, meeting the feasibility analysis and expectations that were submitted for the NRD concessions, all required investment in physical equipment. (Slides 21 to 25) Purchases were being made around the world. Significant amounts of equipment were purchased by BVG's investors. These were all transferred to Spalena. So that BVG, the investors, treated the BVG interest as now part and parcel of ownership of Spalena, which owns the parent company, all of which is funnelling the money from the outside investors to NRD in the country to operate/run the mines, and all the equipment that is being acquired and purchased with that long-term development of the mining concessions is transferred for that very purpose, for NRD's benefit and long-term use. Because again, at this time Mr Marshall and his investors' expectation was things were going as they should be going. Keeping in mind that the investment that they had made to date, the investment that they're making in acquiring this large inventory of equipment, is not sufficient to meet the long-term goals in build-out of five mining concessions owned by NRD. The successful progress forward, including the award of the licences, is necessary to fund raise much more significant investment outside. Primarily, again, Mr Marshall was identified again as the person with the contacts in the US for investment. The idea was investors would come in on those contracts with a 30-year period of investment to realise the profits from their investment.
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

13:18
1. So BVG wanted their ownership of Spalena to be clear, and this is how this transaction is documented, so that BVG is clearly a major shareholder in Spalena, and anybody putting money into BVG would be acquiring an interest in the company that owned the parent of NRD.
2. So this internal transaction, and lining it up for future investment, again consistent with the idea that it all matters, that investment is going to be, you know, one of the next steps after getting those long-term licences for the concessions, was to raise more money and more investors. They are lining it up so that that investment vehicle makes sense, Bay View takes a major shareholding in Spalena and it's all uniform: a clean set of investment books for someone to come in from the outside and add more to.
3. So this list we point to as some of the in-kind, the assets, hard investments that BVG made in NRD, through -- transferred to Spalena. (Slide 26) But as 2012 goes on, those discussions that Mr Marshall was expecting face-to-face with the minister or otherwise, who the minister sought to work with, finalising the contract just weren't scheduled, didn't happen, and operational questions, operational blocks for NRD started to pop up. The Rutsiro mining operations, the minister's office shut them down in

13:20
1. March. (Slide 27) C-047 documents Mr Marshall on behalf of NRD's complaint about the fact that this order of shutdown comes and he doesn't understand it. There's no explanation. Why is this happening? Discussions about this getting back on track start taking over. And as we'll see, and as you've already seen in the witness statements, they become what -- all the energy becomes burned up. What all the activity and energy is about is just getting back to the minister treating them as operational and moving forward, and that continues throughout 2012. (Slide 28) I point out that while this was going on, while there seems to have been a gradual -- there certainly was a pause in the discussions of the contract to be signed for the 30-year licences. There seems to be agitation about how the minister feels about Mr Marshall or his investors, NRD as a whole. Perhaps the concessions is the focus, but there seems to be some agitation inside about how to deal with them. Nevertheless, there was no question at that time, contemporaneous, that Rwanda understood there was significant investment in NRD for these five concessions, stand-out investment compared to the other mining concessions at the time.

13:22
1. (Slide 29) So in C-014 you'll see a promotional manual put together by the Respondent, (slide 30) and you'll see NRD identified as one of the investors. Spalena is the owner, they acknowledged that. (Slide 31) They go on to quantify a $39 million investment. So in promoting the idea, soliciting other interests in investment in the mining industry, they're identifying the investors in NRD as already putting in $39.5 million for their concessions.
2. Now we see and hear from Rwanda a very different perspective: that somehow there's all sorts of questions, and Mr Marshall can't document and back up his investment. There was no question at the time. They were so confident of it, they were telling other investors to rely on their information. (Slide 32) In August 2012 Mr Benzinge, one of the early investors with the predecessor to Starck in NRD, starts agitating that somehow he has a greater interest, but he far overstates his interest. And the dispute of that covers a number of topics that you're going to be presented with in the course of the witness testimony, because advising the co-investors at the time as to how to deal with Mr Benzinge's interest and get all that right and move forward so that their interest as a group could be sold to Starck as sole owner, Rwanda's witness

13:24
1. advised on that, his firm advised on that and helped approve. Now it's all called into question, not only by Rwanda but by the same individual. (Slide 33) But Mr Benzinge's calling it into question was promptly resolved by the office in Rwanda responsible for maintaining the records of corporate ownership, registering who the correct owners were. The agency with the final say resolved this concern. [It was a] very disruptive concern for a week, but it was resolved by August 8th. So between August 2nd and August 8th, Mr Benzinge was able to agitate and cause a great deal of stress and problems for Mr Marshall. Now, keeping in mind none of Mr Benzinge's complaints about how he was handled and what was done with his interest involved Mr Marshall. That's not his investment. He bought it from someone who bought what they understood to be all the shares in the company, and the former shareholders, Mr Benzinge included, and the Zamacks, being paid by Starck, all of that was handled before Mr Marshall, through Spalena, made their acquisition from Starck. But a great deal of agitation and disruption to Mr Marshall's on-the-ground directorship and management of NRD through his investor group's ownership was quite a problem that Mr Benzinge forced him to deal with. And

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Page 50

13:28
1. RDB did deal with it, got it straight, and Mr Benzinge
2. was put back out. And the RDB, in analysing the
3. situation, agreed as to who owned controlling shares of
4. the company, who was the majority owner, who had the
5. right to appoint the director.
6. Mr Marshall was restored to that recognised spot,
7. and at that time he thought it was over. It was very
8. disruptive. He was concerned that anyone within the
9. government would let someone like Mr Benzinge do this
10. all these years later, and based on his allegations. He
11. was complaining about it at the time. But it was
12. resolved by those people charged with the responsibility
13. to look into it; at least that's what Mr Marshall
14. believed.
15. (Slide 35) In September 2012, as the period for the
16. discussion about the contract finalisation of its terms
17. in signing the contracts for the long-term licences
18. continued to drag out, to Mr Marshall's frustration at
19. the time, nevertheless the Respondent identified that
20. they were remaining licensee at the concessions while
21. that application was being considered.
22. (Slide 36) I point this out not because, again, it's
23. the only communication about this; as Mr Marshall's
24. statements have made clear, there were numerous
25. conversations, in person and otherwise, about "Where are

Page 51

13:30
1. it was the prior year that a draft contract was -- it
2. was in 2011. We saw a December communication. But in
3. 2011 there were communications about, "Beyond the
4. application, let's start drafting a contract. What are
5. you looking for? What is acceptable?"
6. In September 2012 Mr Marshall is again being told,
7. his investor group is being told, "new contracts ..."
8. will be negotiated". You're only in the phase of
9. negotiating a new contract with the original exploration
10. licence holders if their application was timely
11. submitted and considered appropriately, fully submitted
12. at the end of the exploration licences for the long-term
13. licences. That's all that exists under the law at the
14. time, the law that Mr Marshall thought was applying to
15. him and the other concession holders thought was
16. applying to them.
17. So when being told that, "We will negotiate
18. contracts with you" , there is no question on the table
19. that, "We're considering your application and aren't
20. sure that you timely submitted one, we're not sure you
21. qualify". None of that happens at the time. That's not
22. contemporaneously what they say. [There's] only later
23. an explanation of, "Well, in fact you didn't and it
24. wasn't good enough; you must do something different".
25. But at the time, when Mr Marshall is saying, "That's not

Page 52

13:31
1. our expectation, that's not our understanding, that's
2. not what we were being told", and he's being accused of
3. lying when he's saying it, he points to Respondent's own
4. language, Respondent's own letters, and he says, "No,
5. what I'm saying I expected is what you're telling me to
6. expect; you will negotiate the contract with us. It's
7. just taking longer".
8. (Slide 37) But the disruptions to the actual
9. operations continue.
10. (Slide 38) In September, an example of a letter
11. complaining about, summarising some of those disruptions
12. that are going on with government officials' backing,
13. support, is C-049. Arrests and disruptions of the
14. miners and activities at the concession make it appear
15. that somehow there's a question whether the ownership,
16. the management, can maintain the security. But
17. Mr Marshall complains they're being singled out for such
18. bad treatment, they're being put upon, and the miners
19. are calling into question what is happening when no
20. question should exist.
21. (Slides 40 and 41) Then in September again, just to
22. stop operations.
23. (Slide 42) October, operations were allowed to
24. continue. After the stop in the western regions for
25. everyone, October becomes, "Well, operations may
Day 1 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Monday, 21 June 2021

13:33

1 continue, but not NRD”.
2 (Slide 43) C-050, a December 14th 2012 letter from
3 Mr Marshall, points out, complains about this.
4 Again, why are they being singled out? Why are the
5 other concession holders being treated as if this
6 problem, this concern that’s supposed to shut everybody
down, their operations can continue, they can continue
building out, they can continue trying to make the
8 revenue flow for their miners, et cetera, during this
9 time period; we can’t! You know, why are we being
10 singled out? This becomes the constant theme of the
11 concerns that are going back and forth. Mr Marshall is
12 saying, “But you’re treating NRD differently”.
13 (Slide 44) It wasn’t until February 2013 that
14 finally NRD can resume the mining activities.
15 (Slide 45) “... as we proceed with negotiations on
16 your request for new contracts ...” (C-056)
17 So the disruptions, the problems, the
18 head-scratching lack of answers to what’s happening, the
19 ominous signals that he’s not liked, or his company is
20 not liked, his other investors aren’t liked, the fact
21 that he has these five big concessions isn’t liked;
22 something is off somewhere, it seems, to cause these
23 constant problems. But again, repeated, despite the
24 problems, you’re seeing one thing, you’re experiencing

Page 53

13:37

1 table, it’s going to happen, it’s going to be discussed:
2 “Let’s sit down and talk about the mining licences”.
3 (Slide 49) But look, it’s April to October, it’s
4 still being left as “Let’s schedule a time, let’s have
5 the conversations”. The ability to get the contracts,
6 supposedly just some negotiations and discussions away,
7 but that dangled negotiation didn’t happen.
8 Meanwhile, the entire time, the investment
9 continues. There’s no abandonment of the concessions.
10 There’s no stop of work, to the extent it could be done,
11 there’s no stop of security, there’s no lack of
12 maintenance. The concessions are being invested in just
13 to be maintained.
14 It is not the case that the investment, like a light
15 switch, goes on and off as you generate minerals from
16 a mine. To have roads to bring in the equipment to
17 bring out the minerals, to do things long term that meet
18 the feasibility study, work has to be done, preparations
19 have to be made, money has to be put in the ground. And
20 what is there and what is being done, and what people
21 are making the smaller revenues from artisanal mining
22 that's occurring has to be, again, maintained.
23 Employees have to be there, they have to be housed.
24 Money is going in. Not the kind of money that will
25 flow to build out the full-scale mines after the

Page 55

13:39

1 concessions, but that's doesn't mean nothing. And
2 that's how it's being treated here: as if somehow
3 there's some mystery that Mr Marshall must prove,
4 because records, you know, accounts, payroll, the rental
5 payments, the purchases for the equipment coming in and
6 building roads, because we can't put them on the table,
7 can't be. The roads were there, the people were there,
8 the housing was there. The plant that was, you know,
9 the best industrialisation example in the country at the
10 time, the plant had to be maintained. Whether it was
11 processing tonnes of minerals a day or not, it had to be
12 maintained; it couldn't just sit.
13 So whilst this is not happening in terms of the
14 30-year licence and more money is not pouring in to
15 ratchet up everything, money is still going in.
16 (Slide 50) Then things change. Now suddenly it’s
17 the prism of: well, start over. And that's because the
18 2014 law passed. And in hindsight, the long-awaited,
19 long-dangled but somehow couldn't get held conversations
20 and discussions on the terms of those contracts that are
21 going to issue to you seems to be a stall tactic. It
22 seems to have been a wait-and-see, “This is what we want
23 before we have another meaningful conversation with
24 you”. Because there was no explanation ever given why
25 a meeting couldn't be held about the contract. It was

Page 56

Page 54

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
13:40 1 well underway in 2011. We're now in 2014, and suddenly
2 the world is supposed to change for NRD, because of the
3 enactment of the 2014 law.
4 (Slide 51) The position takes a 180 about-face.
5 We're negotiating new mining negotiations, but under the
6 new regulations. And as Mr Marshall has testified, and
7 as other witnesses have testified, there is an aspect of
8 the claim that is: well, again, NRD is singled out on
9 this. Again, NRD is being treated differently than
10 others on this point that were in the same situation:
11 original exploration licences, applications for
12 long-term licences. And other examples, not even as
13 good a state of current investment and development as
14 NRD, they're not reapplying and starting anew. That's
15 one aspect of it.
16 But the purpose of the selection of these items of
17 communication, to be very blunt about it, is to say: you
18 don't even have to look outside of NRD itself to see
19 a complete and utter change in position, that it does
20 not fit. This is not preceded by any reasonable
21 expectation that an investor prior to this date would
22 have as to what Rwanda's intention was with regard to
23 long-term licences for the five concessions, without
24 even asking: well, what are you doing with the other
25 concession holders?

Page 57

13:42 1 (Slide 52) July 14th, Mr Benzinge comes back and
2 says that he obtained an arbitration award.
3 an arbitration that NRD didn't attend, in which he
4 disputes a transaction that Mr Marshall and his
5 investors weren't involved in, and he says that the
6 result of that arbitration and what he says the
7 arbitrator said his real shareholding should be, that he
8 was deprived of, should allow him to take over NRD as it
9 currently existed.
10 Now, there's an awful lot to be said -- and there
11 has been some discussion by Mr Marshall at least, and
12 Zuzana as well, I believe -- about how challenging this
13 presentation was of Mr Benzinge in terms of going
14 forward with an arbitration where they had identified
15 a conflict of interest with the arbitrator and
16 Mr Benzinge and were expecting that conflict to be
17 addressed, and meanwhile the next thing they hear is
18 an award issued.
19 But more importantly, the logic of an idea that
20 someone who went from less than 1% interest holding to
21 a full 15% interest holding because of a shareholding
22 agreement with two owners removed, those owners who
23 treated him as a less than 1% interest holder in going
24 forward with a transaction, and were paid and left with
25 the money, Mr Benzinge said his award established they

Page 58

13:44 1 didn't treat him correctly. But to come to interest
2 holders later and say, "I want your company", as opposed
3 to going over the Zarnacks, who got the money and,
4 according to your maths, got your share very wrong,
5 "They're fine, I'll leave them alone; I want the
6 company". For a 15% interest holding, he wants the
7 whole company. And the Respondent gave it to him.
8 (Slide 53) Showed up with the bailiffs, took
9 possession, waving around an arbitration provision
10 calling him the 15% holder, 15% interest holding not
11 recognised. And Mr Marshall was put out, Zuzana was put
12 out. Now suddenly they're told, "You're not really the
13 owners/managers/directors; we'll deal with Mr Benzinge".
14 That's first by the bailiff, and then the minister
15 says, "Well, this is a big concern to us", which is, at
16 a whole other level, extremely frustrating to the
17 investors in NRD. Why is the Minister of Mines, the
18 mining industry, getting involved in what a shareholder
19 agreement on a transaction long ago occurred, [that] may
20 have been honoured or not honoured, and what it may mean
21 in terms of what Mr Benzinge is owed, why is the
22 Minister of Mines getting involved in that, if that
23 interest holder wants more money for a 15% share and was
24 treated as less than 1% owner?
25 NRD still exists. NRD has been handling the

Page 59

13:46 1 concessions. NRD has been investing, the entity in its
2 original licences, application for new licences,
3 contract proposal for the terms of those new licences,
4 all on the table. And to say, "Well, we can't deal with
5 you any more because Mr Benzinge says he owns 15%, so
6 nobody is getting anything, nothing's happening. And
7 you know what? You can't even sell your minerals".
8 There are miners. There's money being put in to
9 both secure, protect the concessions and the miners.
10 There's work being done, people are housed, things --
11 weekly, monthly, et cetera, money is going in to make
12 this happen, all relying on the revenues that can be --
13 expecting some revenues to be generated while this
14 continues from that mining. And now suddenly it's all:
15 can't move, can't do anything with it. You can mine;
16 you can't generate a sale. We're just going to prevent
17 you from tagging.
18 And the background of this so-called "tagging"
19 requirement, all put in place to deal with the US import
20 regulations and statutes that prohibited importing
21 minerals or products made from minerals from so-called
22 "conflict countries", requiring assurances, requiring
23 averments about the lack of any such minerals coming
24 into the country from those importing. All this is
25 a huge concern. How are you going to deal with it when,
for Trevor McGowan

13:48 1 for the long history -- as you've heard from some of the
2 Claimants' witnesses -- minerals were coming from Congo,
3 a conflict country, conflict minerals had been in
4 Rwanda? How are we going to assure that they are not
5 what is being exported from Rwanda?
6 (Slide 55) This is the tagging process. There's
7 going to be an independent body in place as to
8 assurances. And the tags are everything, because if
9 it's not tagged, well then it's not assured that it's
10 not a conflict mineral, you can't import it into the US.
11 So you can't really sell it in the open market if the US
12 imports are excluded.
13 (Slide 56) This is the lifeblood of the ongoing
14 industry in artisanal, as it may be at the time, smaller
15 scale, as it may be at the time. The ongoing mining and
16 selling of minerals in Rwanda from its mines requires
17 the application of these tags. Rwanda is in control of
18 it, working with iTSCi. And the Minister of Mines says
19 no more, no more to NRD.
20 If Mr Benzinge is a 1% interest holder or a 15%
21 interest holder, those minerals came from where they
22 came from. Those miners who put in the labour put it in
23 and need to be compensated. NRD needs its share of the
24 revenues to keep paying for the things that allow that
25 to happen and not have it fall apart. There's no

Page 61

13:50 1 question what stopping the tagging means. And the stark
2 disconnect between tagging minerals as validly mined on
3 site in Rwanda and Mr Benzinge saying, "I want what
4 Mr Marshall has, because other people years ago did
5 something that I don't like and that I think is wrong",
6 is astounding.
7 Nevertheless, in justifying this, Mr Evode Imena,
8 the minister at the time who made this decision -- it
9 was a personal decision -- he specifically, looking at
10 NRD, chose not to let them participate in a supposedly
11 neutral, as to be applied to everyone equally, law. And
12 he felt perfectly comfortable. So comfortable he's come
13 to you and said, "Yes, I did that, that's what I did,
14 the decision to specifically say no to NRD, because
15 I want to put pressure on them to regularise their
16 operations".
17 Operations, regularising operations -- operations
18 are being managed by Mr Marshall and his investment
19 group. So Mr Imena, looking at Mr Marshall and the
20 investors, said, "I want to send them a message about
21 what I want to see happening, so I'm going to stop
22 giving them the benefit of the law". That, we say, we
23 start this proceeding with a concession of a violation
24 of a treaty.
25 (Slide 57) The pressure then continues from

Page 62

13:54 1 ever had an expectation that a yes could result after
2 a no, and yet after a "No, sorry, you're done", next
3 communication, at least the next communication I'm going
4 to highlight -- as I pointed out, I do not represent
5 that there are no communications in between; as a matter
6 of fact, I was going to refer to one.
7 (Slide 63) C-087 shows that -- I'm sorry, the date
8 is blocked -- oh, I'm sorry, it's at the top:
9 November 12th 2014. Because you pushed back to the no,
10 we say, "Submit new things": we are back and considering
11 a new application note. So no becomes yes -- well, no,
12 excuse me, I completely misstated that. I did not
13 intend to say it that way. No becomes "Maybe, let's
14 keep talking, keep trying": That's what he's in as
15 of November. That's what the investors are in as
16 of November.
17 Try again but start over. They of course say: we
18 did successfully start the application process, we're in
19 the contract negotiation phase, but they're trying to
20 comply. They're trying to appease Minister Imena.
21 Next slide. Oh, I'm sorry, this goes onto a little
22 bit of a different topic. So we have -- it's been
23 pointed out to me that we have five minutes to a break.
24 Before I jumble back and forth, I ask the Tribunal:
25 would you like us to break now? I will try to summarise

Page 63

Page 64
13:55  1 this thing quickly and finish --
  2 THE PRESIDENT: Yes, I think we'll break now, but we will
  3 come back in 20 minutes.
  4 MR COWLEY: Thank you, your Honour.
  5 THE PRESIDENT: Break now and come back in 20 minutes.
  6 (1.56 pm)
  7  (A short break)
  8 (2.22 pm)
  9 MR COWLEY: Your Honour, may we start again? I'll wait for
  10 your word. (Pause)
 11 THE PRESIDENT: Can everybody hear me now?
 12 MR COWLEY: Yes, sir.
 13 MR WATKINS: Yes, we can.
 14 THE PRESIDENT: Good.
 15 I was apologising for the length of the break, which
 16 was caused by the fact that the Tribunal had been thrown
 17 into confusion by the hearing agenda, which is
 18 defective, in that it suggests that in London we are now
 19 going to sit until 5.00 pm -- that is for two and
 20 three quarter hours -- when it should be 4.00 pm. So we
 21 are going to sit, as I understand it, for one and
 22 three quarter hours now.
 23 At the end of the day I want to discuss tomorrow's
 24 timing because the current timetable is not
 25 satisfactory. The Tribunal needs a break of half

Page 65

14:24  1 an hour at the end of the first session of one and
  2 three quarter or two hours, so that we can eat
  3 a sandwich. And when people are present from Kigali,
  4 they'll also probably want to have a bite to eat at that
  5 stage of the proceedings, rather than waiting until it's
  6 almost time for dinner before we have our lunchtime.
  7 sandwich.
  8 Anyway, we'll sort that out at the end of today.
  9 Meanwhile, let's go ahead until 4 o’clock our time.
 10 MR COWLEY: Yes, sir, and my apologies for the error in the
 11 hearing schedule.
 12 THE PRESIDENT: One other point, please. The Respondent has
 13 vanished from the screen. The Tribunal would be
 14 grateful if the parties always have somebody on screen,
 15 as it were, throughout the hearing.
 16 MR COWLEY: Thank you, sir. May I begin?
 17 THE PRESIDENT: Yes.
 18 MR COWLEY: So in our timeline -- as I mentioned before,
 19 as a reminder, I am not suggesting that this is the next
 20 event. Mr Marshall, Ms Mruskovicova -- I apologise for
 21 mispronouncing her name again -- provided services to
 22 Rwandan entities and agencies, but I highlight a couple
 23 here, just for example purposes, and I'll go through
 24 them really quickly. The substance is not something I'm
 25 going to dwell on.

Page 66

14:26  1 (Slide 65) But in December 2014, in their other
  2 capacity, Mr Marshall and Zuzana were working with
  3 Ngali, which is an entity owned by the Rwandan
  4 Government, at least in part. They were working with
  5 them on a transactional manner, in a consulting and
  6 advising role. (Slide 66) Exhibit C-133.
  7 (Slides 67 and 68) December 2014, another request,
  8 somewhat critical (C-095). They're asking again for
  9 documentation that they want them to -- everything at
 10 this time is from the perspective of "You must reapply".
 11 They're citing the new application guidelines,
 12 requirements; "new" being the 2014 law.
 13 As you know, the parties' positions differ on this,
 14 they have a split of views, and this was consistent at
 15 the time. NRD/Mr Marshall believed that the application
 16 was timely and correct, and accepted under the 2008 law,
 17 and this was just not a point that the minister was
 18 giving on. And Mr Marshall did the best he could to
 19 maintain his position and yet try to comply by
 20 resubmitting a renewed application.
 21 (Slide 70) Work continues in their other capacity:
 22 in this case, on behalf of the Rwandan Government.
 23 Ngali, the entity that's owned by the Rwandan
 24 Government, at least in part, in a United States
 25 transaction, purchased helicopters. Again, I apologise

Page 67

14:28  1 for going quickly here, but I'm not getting into the
  2 substance of the work being done here as important to
  3 this presentation. I will explain shortly the reason;
  4 I'm just laying out the context.
  5 (Slide 72) In February 2015 Minister Biruta confirms
  6 on behalf of the Respondent that the renewed application
  7 is under review. (Slide 73) Again, referring to it as
  8 the "long-term license" application. And still work is
  9 going on.
 10 (Slide 74) The other capacity that Mr Marshall and
 11 Ms Mruskovicova were in the country from the earliest of
 12 days, working with Rwanda in their advisory and
 13 consulting capacity, handling another -- helping to
 14 facilitate. So this is the role of sort of a face,
 15 a representative for Rwanda in making a relationship
 16 connection, so that a transaction could be discussed
 17 between the representatives of Rwanda and the
 18 Slovak Republic.
 19 Again, I stress this as just the context of: this is
 20 a very trusted capacity. Rwanda is relying on
 21 Mr Marshall as a face, as a voice for it in dealing with
 22 very serious, presumably very valuable transactions and
 23 other matters for the country, while this is happening.
 24 (Slide 76) In March, NRD meets with the RDB to
 25 discuss ongoing issues and concerns relating to the

Page 68
| Page 69 |
|---|---|
| 14:31 | operations of NRD, ongoing concerns about how they're being treated and dealt with. They're not in a satisfactory position yet as to how they're being treated on this application, on this side, with regard to the mining investment, at the same time that these other transactions and other relationships with Mr Marshall and Ms Mruskovicova are continuing. (Slide 78) Then we get to May. After a few months of considering it, Mr Imena informs NRD -- Mr Marshall, on behalf of NRD -- that the renewed application is denied. |
| 14:34 | position is: NRD's investors must have known it was over. They had to leave. There was no possible reasonable expectation of a yes from here. Well, if they left, they would have been abandoning the site. The government wasn't taking them over, not from them, and not really ending their control and possession of the concessions; not for quite a long time. (Slide 82) It's not just Mr Marshall who says in this interim period, "I did not believe we were done. I did not think it was over and declared that Rwanda was not going to issue the concessions, not leave us with the concessions, and instead take them back". We see in the record Mr Marshall has presented -- the Claimants have presented other interactions with the government where confusion is expressed as to, "Well, who actually owns it now?" The government is not saying externally or internally to others any clear answer that suggests the Claimants aren't the owners, through NRD, of those concessions and in charge of them. |
| Page 70 |
| 14:32 | responsibly to maintain them and continue them, all through this time has just been the investors in NRD. So that's going to be turned over now because of the no. (Slide 81) That doesn't happen. And just like in 2014, where we were told no, Mr Marshall has provided a witness statement saying, "I didn't expect we were done. I expected the process to continue. We continued to make efforts to negotiate and find what the issue was that was holding up the willingness to issue the 30-year long-term licences, negotiate an agreement on how to resolve it and go forward". He believed sticking with that process was the only way to get what they invested in and have a potentially favourable outcome, as opposed to being done, calling it quits and suing. |
| 14:36 | doing this and inviting them in; this is the government. They refer to Mr Marshall as the owner, and he's reaching out for some information about their concessions and their operations. That's based on information they're getting from the government and whoever they're working with to talk about a potential investment. That is not Mr Marshall causing the confusion: he's just receiving this and recognising they're still being referred to as the owners of the concession. It's June 2015. (Slide 83) There's an iTSCi transaction report (R-226). As we've mentioned earlier, we've heard a lot and you've seen a lot of detailed information about the tagging of the minerals and the import, and who is running it is iTSCi. There's an occurrence report that iTSCi prepares, and this is reporting to the government, and this is an agency that's working with the government to implement its laws, its process of tagging and monitoring the mines for the government. There was a death at one of the concessions in September 2015. The government's arm, the body it worked with to set up and to help it implement its rules and its laws regarding mines, is reporting on its incident report in September 2015: this is an incident at NRD's concession. |

Anne-Marie Stallard for Trevor McGowan

As amended by the Parties
14:37 1 Now, the Respondent is saying here: Mr Marshall is not telling the truth when he says that after May, he considered himself still at the concessions, with potential ongoing interest in them and ownership, and that everything was going to turn out with, you know, right for what they understood all along was eventually a negotiation of a mutually acceptable term for 30-year licences. That's completely unreasonable, he's making that up, couldn't possibly.

10 Internally, so to speak, within the government's dealings with iTSCI, it's not reporting to iTSCI, "Those are our concessions now, so this is an incident where the government is in charge of the area where this death occurred". That doesn't happen until, if you see -- because this is obviously a system that is interactive and ongoing, because if you see in the green at the top, "Rwanda: July to December 2015 (status as [of the] end" -- excuse me, "July to December 2015", and this status, this report, was printed at the end of 2016. So information is being added over time. The initial start date is shown as a September date in 2015; the end date, the last entry, is a date in 2016. That end date entry in 2016 is that the site is to be publicly tendered.

25 The GMD was contacted about the question of NRD and

Page 73

14:39 1 the site is to be publicly tendered. That's reported to iTSCI as to who's in charge, who it should be dealing with to try to remediate/address incidents like a death. The government finally tells it in 2016, "Well, that's us. You're not dealing with NRD anymore; you're dealing with us". And as the Claimants have explained, it's 2016 when they really knew they were done, they really knew they were out.

9 (Slide 84) In September 2015 they were told to take all their belongings and get out of the offices. So it wasn't even until September 2015 that the government took any action to prevent NRD's investors, the Claimants, from operating the main offices. They had them take their materials out, closed off their office to them in October 2015.

16 (Slide 85) C-163 is the text messages in which they were informed that was happening at the moment. No advance notice, just: this is happening now, they're going to close up your offices and you've got to be out, you're not going back in.

21 (Slide 86) In January 2016 Mr Marshall, in response to discussions that he was having -- and I'm going to cover that backwards in a moment -- but despite the discussions that were happening up until then, where he was encouraged that things may not turn out as badly as

Page 74

14:41 1 the May letter suggested, "Stay with the process, don't do anything precipitous" -- I'll come back to that in a moment -- in January 2016 he was told it changed, and now that's no longer a possibility. "Rod, it's not safe for you to come back to the country, it's not safe for you here, it's over".

7 That was January 2016. Between 2014, 2015, through January 2016 and in fact longer, the Claimants were spending the money on security. The Claimants were spending money on maintenance for the equipment and the plant that was on the ground, to keep it ready to be pushed forward and operated for mining. They were paying for all that; the government wasn't. They continued to pay for it even after January 2016, but they were trying to cooperate. And certainly with Zuzana remaining in the country, they weren't going to do anything that made anybody react in a way that Mr Marshall was warned he would be treated if he came back to the country.

20 So from January 2016 on, they tried to appease and just turn over quietly control, and they continued to pay out of their pocket for certain expenses. But he knew then, and for the first time, the concessions were not possibly going to be the Claimants'.

24 The reason I highlighted but didn't spend any time

Page 75

14:43 1 on the substance of the representational capacity in which Rwanda was relying on, utilising, working, cooperating with and trusting the principals of the Claimants throughout 2014/2015 is when Mr Marshall in his witness statement says that he was being encouraged to stay with the process, "Don't do anything precipitous", he firmly believed -- had every reason to believe -- that the people who wanted him there, who wanted him to succeed in his investment, to be a successful investor in Rwanda with the concessions, and continue to be there and work in the capacity as representative of Rwanda, he had every reason to believe they were just as powerful, just as influential; that ultimately their view of what should happen may prevail, and not Minister Imena's.

16 The suggestion by Rwanda that once Mr Imena spoke, the only assumption the Claimants could draw is that he spoke and it's done simply does not align with the reality that it's a very fluid situation, and others who have as much ability to potentially influence and dictate the outcome of this were on the other side, and did not want Rod and the Claimants to leave, did not want them to do anything themselves to end the investment in the concession, and it was entirely reasonable to believe that they may have the ultimate

Page 76

22 (Pages 73 to 76)
Day 1 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21

Monday, 21 June 2021

Anne-Marie Stallard
for Trevor McGowan

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 77

| 14:44 | say. Knowing how closely they worked internally in the Rwandan Government, the Claimants knew the outcome was not determined until it was determined. And that message as to how it was determined was delivered in January 2016. (Slide 87) It wasn't until March 2016 that Respondent actually tendered the concessions and nationalised them, took -- you know, obtained new money, profited from taking back the concessions that were originally awarded to NRD's investors and re-awarding them. (Slide 88) So the violation of expropriation really occurs ultimately in March 2016. There were many steps along the way that impaired the value, but the value was nationalised and taken back and capitalised on in March 2016. (Slide 89) In January 2017 former minister Evode Imena was arrested. (Slide 90) Allegations against him included he was... | 14:48 | import of those two paragraphs, we would like to know the entire context in which they were rendered. We do know that the co-conspirators were found guilty, which wasn't reported by Mr Imena. So the idea that there was nothing to this is greatly exaggerated. (Slide 91) The sum total, in terms of summing up our presentation -- I apologise for going so quickly at the end and slowly up until now, trying to hold to our time. There's four articles of the investment treaty that we say have been breached, have been violated. They are obviously -- as in many cases is true -- overlapping in terms of the conduct and actions that relate to one and relate to the others. (Slide 92) In terms of national treatment, clearly the American investors were not given -- and we've established and we've put forward some of those early exploration licence holders who were in no better position, in submitting applications for long-term licences, to get them, in terms of the very issues that are held out as the reasons for rejecting Claimants in the end. The amount of industrialisation: well, Claimants had more. The status of the investment. Just like the Claimants, the real investment in developing was held out by Tinco as: after the licences are issued, that's... |

| 14:46 | And that these events happened in 2013/2014. Again, raised with the context in terms of whether Mr Imena's position within the government, what he was doing and how people viewed him and what they wanted to see as an outcome, was clearly going to dictate -- Mr Marshall points to this and says the reason why some people felt he was very vulnerable and would not have the final say, and ultimately be around, were reasonable to believe, could very well have turned out to be true, and -- THE PRESIDENT: Is it correct that he was acquitted of these charges? MR COWLEY: The document that you ordered be given to us in full translation will tell us the full content of what was said in one judgment. We're not sure if it's all. We do know that in the document that they point to, there was a private party that was looking for compensation. We know that from the two paragraphs that were translated. I don't have any ability to say, on the face of those two paragraphs and these articles, how those two align. Why a private party would be seeking compensation in a court proceeding, and that be the court proceeding in which criminal liability is determined, I don't know. The primary reason we ask for the full translation is: before we fully comment on the... | 14:50 | when our outside investors will come in and the real money will be put in. Everybody understands why. Everybody gets the nature of big business and what they're looking for in terms of a secure investment. It was accepted as reasonable for Tinco; wasn't accepted as reasonable, or put forward as a ground of, "No, we're not willing to accept it from you, Claimants". (Slide 93) Well, the issue for the treaty is Tinco's joint venture, at the time of the award, with a state-owned mining company, about 90% of that company. So the award, the benefit of the award, the benefit of their interpretation of how these requirements should apply to Tinco was for the benefit of a Rwandan investment, the state itself, and one of its commercial arms, primarily. That only changed very recently in terms of giving Tinco the majority control, and that was another issue in terms of the documents that we talked about this morning. So for the entire period that was applicable to these applications, this different treatment was for Rwandan benefit, primarily. (Slide 94) Most favoured nation treatment, a clause that just inexplicably is not really dealt with by Respondent or the United States, but clearly any investor would look at this. (Slide 95) If they're an American investor, they... |
MR COWLEY: I'm going to answer that it's the latter, but the explanation is it's not as clean cut as one or the other, in this sense: in the loss -- the expropriation was not a one-time event. If our claim is upheld, that means they had the right to those licences at some point, you exhaust the people holding the concessions and make them leave. If they give up, then they have no claim under the treaty or claim under the original licences.

At the end of the day they can't be grossly unfair. And seemingly as a way to just exhaust them and make them come in was constantly being jeopardised and impeded, the award of the licences until more fundraising would be recognised and treated fairly.

MR COWLEY: Well, that's why I described them as being in the hand of someone who has an interest in the country that you're going to invest in, which is the Respondent, you were not going to get the 30-year long-term concessions that you contend your clients were entitled to. That I follow. But during the year 2012, there are a number of incidents that occurred, of which you complain, which would have resulted in loss to NRD, individual losses, such as losses when they were unable to tag minerals for sale. Are you making independent claims for those losses, or is your claim limited to a claim for the deprivation of the 30-year concession?

THE PRESIDENT: Could I ask for a little clarification on this point. I have no difficulty in understanding what you talk about, the real expropriation: your claim, you say, that you didn't appreciate until March 2016 that you were not going to get the 30-year long-term concessions that you contend your clients were entitled to. That I follow.

But during the year 2012, there are a number of incidents that occurred, of which you complain, which would have resulted in loss to NRD, individual losses, such as losses when they were unable to tag minerals for sale. Are you making independent claims for those losses, or is your claim limited to a claim for the deprivation of the 30-year concession?
Day 1 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Monday, 21 June 2021  

**Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda**

**14:58**

<table>
<thead>
<tr>
<th>Page 85</th>
<th>Page 86</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> significant losses were sustained as part of the</td>
<td><strong>1.</strong> property and then return of the property, and now</td>
</tr>
<tr>
<td><strong>2.</strong> expropriation over the period of time.</td>
<td><strong>2.</strong> equipment is missing, now things are gone, the loss of</td>
</tr>
<tr>
<td><strong>3.</strong> I hope that answers the question. I would say it</td>
<td><strong>3.</strong> profits over the period of time that there was no</td>
</tr>
<tr>
<td><strong>4.</strong> this way, I think it's a clear answer this way: in 2015</td>
<td><strong>4.</strong> tagging, are not being sued upon independently. They</td>
</tr>
<tr>
<td><strong>5.</strong> the powers that be that were encouraging Rod to stay the</td>
<td><strong>5.</strong> are part of the sustained losses that went into</td>
</tr>
<tr>
<td><strong>6.</strong> course, do not walk away, continue to press for the</td>
<td><strong>6.</strong> a prolonged expropriation, through which time the</td>
</tr>
<tr>
<td><strong>7.</strong> concessions and this all may turn around, did turn</td>
<td><strong>7.</strong> Claimants were losing money the whole time, waiting it</td>
</tr>
<tr>
<td><strong>8.</strong> around: Minister Imena was replaced at the time, in my</td>
<td><strong>8.</strong> out.</td>
</tr>
<tr>
<td><strong>9.</strong> hypothetical; concessions were awarded.</td>
<td><strong>9.</strong> THE PRESIDENT: Thank you very much.</td>
</tr>
<tr>
<td><strong>10.</strong> Do I believe that under the treaty a claim could be</td>
<td><strong>10.</strong> Does that conclude your opening submissions? If you</td>
</tr>
<tr>
<td><strong>11.</strong> made that, despite owning the concessions for the</td>
<td><strong>11.</strong> need ten more minutes, you're entitled to them, because</td>
</tr>
<tr>
<td><strong>12.</strong> long-term value, being able to work, money was lost</td>
<td><strong>12.</strong> we ate into the time --</td>
</tr>
<tr>
<td><strong>13.</strong> based on actions by the Respondent that caused some</td>
<td><strong>13.</strong> MR COWLEY: (Slide 101) This is the last slide, and I will</td>
</tr>
<tr>
<td><strong>14.</strong> seizure of property, some blocking of being able to</td>
<td><strong>14.</strong> be brief. I think my intention all along was never to</td>
</tr>
<tr>
<td><strong>15.</strong> profit and earn revenue from minerals and seizing of</td>
<td><strong>15.</strong> take the full time, and I didn't do a good job. That's</td>
</tr>
<tr>
<td><strong>16.</strong> other property which wound up in losses with the conduct</td>
<td><strong>16.</strong> my fault. I will just try to briefly summarise.</td>
</tr>
<tr>
<td><strong>17.</strong> of their agent, the person they worked through,</td>
<td><strong>17.</strong> The statute of limitations element is one of the</td>
</tr>
<tr>
<td><strong>18.</strong> Mr Benzinge, or the person they allowed to act in such</td>
<td><strong>18.</strong> defences put forward that says: well, regardless of the</td>
</tr>
<tr>
<td><strong>19.</strong> a malicious way, taking materials? I believe a claim</td>
<td><strong>19.</strong> merits, regardless of how the dispute comes out as to</td>
</tr>
<tr>
<td><strong>20.</strong> could be made, even with the concessions, that that</td>
<td><strong>20.</strong> who did what to whom when, sued too late. The Claimants</td>
</tr>
<tr>
<td><strong>21.</strong> constitutes expropriation of some value of the</td>
<td><strong>21.</strong> did not sue too late. At least one of the claims only</td>
</tr>
<tr>
<td><strong>22.</strong> concessions, some property that was invested, and they</td>
<td><strong>22.</strong> triggers in 2016 and the other claims trigger after</td>
</tr>
<tr>
<td><strong>23.</strong> would have to decide just to sue for that or not, and</td>
<td><strong>23.</strong> 2015. At some point a decision was made not to issue</td>
</tr>
<tr>
<td><strong>24.</strong> they haven't, they didn't.</td>
<td><strong>24.</strong> the licences. But until then, the Claimants were in,</td>
</tr>
<tr>
<td><strong>25.</strong> So as a standalone event, the seizure of the</td>
<td><strong>25.</strong> actually vying for licences that could issue, and well</td>
</tr>
</tbody>
</table>

**15:01**

<table>
<thead>
<tr>
<th>Page 87</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> within the statutory period.</td>
</tr>
<tr>
<td><strong>2.</strong> In terms of personal jurisdiction as to BVG, BVG</td>
</tr>
<tr>
<td><strong>3.</strong> made an investment in NRD before it completed the</td>
</tr>
<tr>
<td><strong>4.</strong> transaction with Starck, selling the owner of NRD to the</td>
</tr>
<tr>
<td><strong>5.</strong> Spalena entity created to take the shares of the holding</td>
</tr>
<tr>
<td><strong>6.</strong> company. It already invested and started to plan for</td>
</tr>
<tr>
<td><strong>7.</strong> pursuing its mining interests through NRD. That's</td>
</tr>
<tr>
<td><strong>8.</strong> sufficient to trigger personal jurisdiction from BVG.</td>
</tr>
<tr>
<td><strong>9.</strong> Arguments about how much to quantify it, nit-picking</td>
</tr>
<tr>
<td><strong>10.</strong> about whether somebody saw every aspect on a list of</td>
</tr>
<tr>
<td><strong>11.</strong> properties that were invested in addition to cash, all</td>
</tr>
<tr>
<td><strong>12.</strong> of which goes to the second stage. Not only were we not</td>
</tr>
<tr>
<td><strong>13.</strong> required to quantify it in detail, we were told we</td>
</tr>
<tr>
<td><strong>14.</strong> couldn't. We're not here to present how big a loss all</td>
</tr>
<tr>
<td><strong>15.</strong> this was.</td>
</tr>
<tr>
<td><strong>16.</strong> So all we've done is show that BVG is a qualified</td>
</tr>
<tr>
<td><strong>17.</strong> investor. Spalena acquired the shares. BVG's money was</td>
</tr>
<tr>
<td><strong>18.</strong> put into it to make it happen, and it became a co-owner</td>
</tr>
<tr>
<td><strong>19.</strong> of Spalena. But even before, when Spalena first</td>
</tr>
<tr>
<td><strong>20.</strong> acquired the shares in the holding company, BVG was</td>
</tr>
<tr>
<td><strong>21.</strong> already directly an investor.</td>
</tr>
<tr>
<td><strong>22.</strong> In terms of subject matter jurisdiction, clearly</td>
</tr>
<tr>
<td><strong>23.</strong> that's a different way of spinning a legal argument on</td>
</tr>
<tr>
<td><strong>24.</strong> the same argument that the investment is not the right</td>
</tr>
<tr>
<td><strong>25.</strong> type of investment. Of course it is.</td>
</tr>
</tbody>
</table>

**15:03**

<table>
<thead>
<tr>
<th>Page 88</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> I don't understand how any US investor, but through</td>
</tr>
<tr>
<td><strong>2.</strong> vehicles such as this, would invest in NRD, but for</td>
</tr>
<tr>
<td><strong>3.</strong> loaning it money to buy operations and pay for</td>
</tr>
<tr>
<td><strong>4.</strong> operations on the ground, putting in more capital so</td>
</tr>
<tr>
<td><strong>5.</strong> that big equipment could be purchased, et cetera. The</td>
</tr>
<tr>
<td><strong>6.</strong> same course would have followed when millions more were</td>
</tr>
<tr>
<td><strong>7.</strong> raised in future investment, as planned, with the</td>
</tr>
<tr>
<td><strong>8.</strong> long-term licences, but it would have been the same</td>
</tr>
<tr>
<td><strong>9.</strong> vehicle and the same transaction. That's the only way</td>
</tr>
<tr>
<td><strong>10.</strong> to invest in these mines for the US investors.</td>
</tr>
<tr>
<td><strong>11.</strong> In terms of consent to arbitrate, it's entirely</td>
</tr>
<tr>
<td><strong>12.</strong> superficial and it is entirely created for the purposes</td>
</tr>
<tr>
<td><strong>13.</strong> of this argument that anybody from the Respondent ever</td>
</tr>
<tr>
<td><strong>14.</strong> asked for a distinction as to which hat Mr Marshall was</td>
</tr>
<tr>
<td><strong>15.</strong> wearing. Spalena or BVG or NRD director; now put on</td>
</tr>
<tr>
<td><strong>16.</strong> a different hat and talk about your managing investor</td>
</tr>
<tr>
<td><strong>17.</strong> role for BVG or Spalena. It's all artificial. Of</td>
</tr>
<tr>
<td><strong>18.</strong> course, as the lead investor, as given control by his</td>
</tr>
<tr>
<td><strong>19.</strong> other investors of both investment vehicles, and as the</td>
</tr>
<tr>
<td><strong>20.</strong> director in charge of all operations of NRD, in which</td>
</tr>
<tr>
<td><strong>21.</strong> their investment was being managed, Mr Marshall was the</td>
</tr>
<tr>
<td><strong>22.</strong> only point of contact.</td>
</tr>
<tr>
<td><strong>23.</strong> So the idea that, in response to BVG's notice,</td>
</tr>
<tr>
<td><strong>24.</strong> Rwanda, who decided it had no intention to talk to him</td>
</tr>
<tr>
<td><strong>25.</strong> about resolving his claims at all and let that pass,</td>
</tr>
</tbody>
</table>

25 (Pages 85 to 88)

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
15:05 1 should have been told -- and Spalena too, to the extent
2 that the transaction that closed the purchase to acquire
3 the shares of the holding companies in Spalena's name --
4 wearing that hat, Mr Marshall also invites you to
5 resolve the loss of his investment based on these
6 claims, then they would have discussed it with him in
7 that hat, is completely artificial, is an attempt to
8 say: we can do everything wrong, but until you tick
9 every box on which capacity you might be talking to us,
10 we are not knowing and [will] not talk to you, but we're
11 saying you're waiving your rights, silently.
12 This is clearly a challenge with no meaning
13 whatsoever in terms of the purpose of the requirement
14 for notice and the parties to try to resolve things
15 without bringing it to this level.
16 I apologise for going a little over what the stated
17 time was, and I appreciate your patience throughout this
18 argument.
19 THE PRESIDENT: Thank you very much.
20 Mr Hill, we'll go on until 4.07 our time, so that
21 you make up the fact that you're starting a little bit
22 late, and we'll shorten the next break by seven minutes.
23 MR HILL: Thank you, Mr President.
24 (3.06 pm)
25

15:07 1 allegations regarding NRD's alleged entitlement to
2 long-term licences over the five concessions. As you
3 know, the gist of the Claimants' case -- and you've
4 heard it again today -- is that there was an assurance
5 and a guarantee of long-term licences, on the strength
6 of which investments were made, and that that guarantee
7 is to be found in the 2006 contract and also in various
8 other assurances they say have been made.
9 The Claimants then say that NRD made an application
10 for long-term licences in November 2010, and they say
11 that while the licences were not immediately awarded,
12 the assurance of long-term licences was reinforced by
13 various extensions that Rwanda gave, or indulgences
14 allowing NRD to stay on in the concessions.
15 The Claimants say that when NRD was not ultimately
16 awarded licences, and in 2015 was told to vacate the
17 concessions, that this amounted to an expropriation and
18 breached the Claimants' rights as investors in Rwanda,
19 through NRD, under the bilateral investment treaty or
20 under customary international law. By the time of the
21 Reply, this case has been, in fact, fleshed out by way
22 of a somewhat absurd, we suggest, conspiracy theory,
23 which does keep growing, and I'll come back to that.
24 Now, none of that case has any substance. We would
25 highlight eleven points at the outset.

Page 90

15:09 1 First, there was quite obviously no guarantee of
2 long-term licences in the 2006 contract. NRD was given
3 a right to four-year licences and, as you would expect,
4 any expectation that this would then lead to long-term
5 licences depended on NRD fulfilling its obligations in
6 the four years and then delivering a satisfactory
7 feasibility study to prove to the government's
8 satisfaction that it was deserving thereafter of
9 long-term licences.
10 Secondly, there were no assurances outside the
11 contract that NRD was automatically entitled to
12 long-term licences or anything like that. We will go
13 through some of the sources for these assurances that
14 have been identified by the Claimants in their memorials
15 and identified by Mr Marshall, and there is nothing in
16 any of them. Much of it consists of what we would
17 suggest is a grotesque misreading of many of the
18 documents in the case.
19 It's worth remembering that Mr Marshall was not on
20 the scene at all vis-à-vis NRD when the NRD contractual
21 relationship started with the government in 2006. He
22 didn't arrive, as regards NRD, until late 2010. There's
23 no evidence whatsoever of any assurance before his
24 arrival, and all the evidence is to the contrary.
25 Now, Mr Marshall, I would say, did have previous
15:10 1 form in running -- unsuccessfully -- a concession at
2 Bisesero, which had been granted to Bay View Group. The
3 licence to that concession was not renewed, as a result
4 of BVG’s underperformance, and no complaint has ever
5 been pursued that that was unlawful. So Mr Marshall
6 cannot seriously suggest he received any assurance in
7 that capacity either, even were that relevant.
8 Thirdly, when Mr Marshall’s company Spalena
9 purchased NRD for just $1 at the end of 2010, he
10 knew that there was no assurance of a long-term licence,
11 and indeed he was specifically told that NRD was
12 unlikely to obtain long-term licences. What he was
13 told -- correctly -- was that the level of exploration,
14 resource estimation and industrialisation done by NRD
15 had fallen far short of what was expected of any
16 operator looking for a long-term licence, and the most
17 that NRD could hope for would be a renewal of five-year
18 exploration licences to give them a chance of doing what
19 they should have done in the first four years, but even
20 that was uncertain.
21 Fourthly, when NRD applied for a renewal of its
22 licences shortly before the expiry of the four-year
23 terms, they didn’t even apply for long-term licences.
24 Because of the limited exploration and industrialisation
25 work that had been done, NRD knew that long-term

Page 93

15:12 1 licences were out of the question, and they applied for
2 a renewal of five-year licences.
3 It’s worth looking at paragraph 18 of the Claimants’
4 pre-hearing brief on this, if that could be pulled up.
5 MR BRODSKY: Yes, I can pull that up. Can you help me:
6 that’s in the pleadings?
7 MR HILL: I don’t know, I’m afraid, is the answer to that.
8 They were filed on Thursday, last Thursday. I don’t
9 know where ... It is, I’m afraid, worth taking a moment,
10 because I’ve got one or two other references to this
11 document. So it would be helpful if that could be
12 located.
13 MR BRODSKY: I will look for that amongst the files that
14 I have access to.
15 MR KAPLAN: I don’t believe it is with FTI, given it was
16 just filed, but I can get it to FTI. It will take a few
17 moments.
18 THE PRESIDENT: Ms Dohmann has got a hard copy. I’ve got
19 a hard copy which I will share. So we can proceed
20 straightaway.
21 MR HILL: I’m very grateful.
22 In paragraph 18, what’s said in the second sentence
23 is:
24 “The contemporaneous evidence demonstrates that
25 Respondent represented to Claimants that it intended

Page 94

15:15 1 [to] negotiate the terms of the long term licences with
2 Claimants, based on the application submitted.
3 Respondent’s after-the-fact characterization of the
4 parties’ discussions cannot change the fact that the
5 understanding at the time was that Claimants’
6 application, styled as a five-year extension, was for a
7 long term licence of the concessions.”
8 It’s difficult to know what’s meant here. There is
9 no contemporaneous evidence at all demonstrating that
10 the Respondent represented that it intended to negotiate
11 long-term licences, and it’s right to say the
12 application was styled as a five-year extension, and
13 that is because it was indeed an application for
14 a five-year extension.
15 What is more, Mr Marshall knew that a five-year
16 extension was all that had been pitched for when he
17 arrived on the scene to acquire NRD at the end of 2010.
18 All of that of itself shows that the case here that
19 there was an expectation of long-term licences is, in my
20 submission, hopeless.
21 Just pausing here, it’s worth just staying with
22 paragraph 18 to get something of a flavour of the way
23 the Claimants’ submissions operate. The next sentence
24 says:
25 “Claimants’ principal, Mr Marshall, was told by

Page 95

27 (Pages 93 to 96)
My fifth point is that the November 2010 application for renewal of the five-year licences was itself thin and unsatisfactory. The lack of progress made by NRD in the four-year period, and the paucity of the exploration and sampling work and the evaluation of the mineral reserves that were required, was obvious on the face of the application. NRD knew at the time -- and Mr Marshall was told when he bought in -- that this application was inadequate even to justify the five-year licences being sought, and very, very far short of what was required to justify long-term licences.

Sixthly, NRD was notified in August 2011 that it had not complied with its contractual obligations and, following that, there were no extant rights of any kind in respect of long-term licences arising from the contract.

Seventhly, the licences themselves expired in January 2011. They were extended consensually until October 2012 to allow for further negotiations between NRD and the government, and after that, there were no further extensions; although the government did, as a matter of indulgence, make temporary allowances for NRD to remain on the concessions while they applied for new licences.

The point here is, again, that none of these assurances or anything of that kind. The repeated refrain that they did is, in our submission, untenable and derives from, at best, a misreading of the documents. Related to that, we would say on our side that the fact that the government did keep making allowances so as to give NRD a chance to make an adequate application for a licence is in fact inconsistent with the Claimants' case theory, and in particular their extravagant case theory about there being a conspiracy to oust NRD from the concessions. If there was such a conspiracy, the government would never have been as indulgent and as generous as it was. What you will see in the evidence is that instead of being harsh on NRD, the government in fact gave NRD chance after chance after chance. While we are on assurances, we have an enhanced story developed by the Claimants in their skeleton at page 10 of that document, and you heard more of it today. This is about personal assurances being given to Mr Marshall by people in the military with whom he says he worked.

Well, it's worth noting that what's said at paragraph 10 about assurances from the director of the military, he says at the end of this paragraph: "... while simultaneously reaffirming its guarantees and continuing negotiations towards the promised long term licenses, which included assurances from the Rwandan military, who valued Mr Marshall's services, so long as he remained patient ... NRD would obtain the long term licenses."

Well, that is not in Mr Marshall's witness statement and goes well beyond what is in Mr Marshall's witness statement. And it's hard, in any event, to understand the relevance of some conversation that Mr Marshall now says he had with someone in the military to his application to the Ministry of Natural Resources for new licences. Those applications, and any application made, obviously need to be considered on its merits, and it would be odd if it wasn't.

One gets a similar point at paragraph 31 of Mr Cowley's pre-hearing brief, where he again makes the claim to have received some special treatment that other investors didn't get, as a result of some personal relationship that Mr Marshall had with the military. Not the proper subject of a claim of this kind.

My eighth point is that throughout the period of the voluntary extension to the licences and the ad hoc indulgences thereafter -- that's after October 2012 -- NRD had every opportunity to put in a compliant and adequate application for long-term licences if it was able to. But it was unable to, and its attempts were weak and unprofessional.

Specifically on those points, what you will see in the evidence is that after the inadequate November 2010 application for a renewed licence, there was an extremely feeble application for long-term licences in January 2013. That had no real substance at all, and NRD could never have expected it to have any real chance of being adequate, and it was interesting to see that that wasn't even mentioned today in the submissions.
15:24 Thereafter, given that the licences had expired in October 2012, NRD had to be, in fact, chased by the government repeatedly to apply for new licences. Again, that all gives the lie to the conspiracy theory of the government trying to get them out. Mr Imena specifically chased NRD repeatedly in late 2013 and then repeatedly in 2014, and eventually in late 2014 the NRD did apply for licences. They did, at that point, apply for long-term licences, but the applications were again palpably deficient, and in particular there was nothing of substance that was additional to the applications that were themselves weak when they were made in 2010. My ninth point is that it was unsurprising that the licence applications after 2010 were unforthcoming, and that when they did come, they were deficient and didn't add materially to the original November 2010 application. The reason for that is that after Mr Marshall and Spalena arrived at the end of 2010, paying, they made no material further investment into NRD, either in industrialising the mining on the concessions or in exploratory work and evaluating the reserves. What they did do instead was to allow artisanal mining to carry on in the NRD concessions and make money out of buying the minerals dug out by individual artisanal miners.

Page 101

15:25 also meant that there was continual environmental damage. It's also worth keeping in mind here that Mr Marshall's whole scheme was evidently to try to secure long-term licences mainly by applying political pressure or bullying, as we'll see in the correspondence, without actually investing in order to obtain them. What he wanted to do -- and he's actually quite candid about this in one of his witness statements -- is obtain financing after, and on the back of, the long-term licences. But the problem with that is that the 2006 contract and the scheme of the government's Mining Policy, published in early 2010, simply don't work that way. Mr Marshall should have known -- and must have known, we would say -- the purpose of the initial short-term licences was for the concession holder to commence industrialisation and undertake proper exploration work. That requires investment, and that was necessary in order to justify the long-term licence. So you had to invest upfront. That's why the Zarnacks' original business plan, right back at the beginning of the NRD contract, envisages as much as $39 million of investment. In fact, it would be generous to think that even a third of that was spent, even on NRD's own figures as contained in its 2010 November application. So Mr Marshall's business strategy of securing long-term licences without spending or sourcing investment to do so could never have worked. Just as an aside, in relation to that $39 million figure, this morning Mr Cowley referred to C-014, which is a document that he said suggested a $39 million investment. The impression given in this morning's submissions was that somehow that investment might have been made in NRD. If that suggestion was meant, it was unfortunate. That reference to $39 million in C-014 is quite obviously a reference to the original projected investment put forward by the Zarnacks in the business plan under which the 2006 contract was granted. I had thought it was common ground -- and all the evidence shows it -- that only around a maximum of $13 million, even taking the Claimants' figures at face value, was in fact invested during the Zarnack and Starck era. The Claimants have never suggested previously that $39 million was invested, and it's inconsistent with what they have suggested. So I hope that wasn't the submission that was really being advanced.

Page 102

Page 103

Page 104

29 (Pages 101 to 104)
My tenth point is that the government behaved both fairly and indeed generously to NRD in dealing with the licence applications when they were made. When the 2014 applications were made, they were evaluated objectively by a team of people who gave a sensible and rational recommendation to the minister, with reasons for why the application should be rejected.

Moreover, NRD was specifically told in late 2014 and 2015 what was deficient or missing in the 2014 applications, and was given three opportunities to submit additional documentation. Those opportunities were met with a feeble response from NRD. And as I've stated, NRD's own deficiencies meant that it could never have put in an adequately compliant licence application, although it's fair to say its efforts to address the problems were meagre.

Eleventh point. When the government finally declined the licence applications in mid-2015, and thereafter put the concessions out to tender, it was fully justified in doing so. This wasn't an expropriation of any kind at all. The licences themselves had in fact expired a very long time previously, in October 2012. NRD was at that point only continuing to occupy at all on a temporary indulgence, to give it the opportunity to make an adequate application. It was unable to do so. And once the licence applications were determined against NRD, it was entirely right that they should leave the concessions, as unlicensed operators with no contractual or other right to occupy or exploit the concessions, and of course entirely right that the concessions should be put out to tender.

So we would submit that those are the essential points on the key area of the case that you will see from the evidence as it emerges this week. Once the facts are seen and understood, they speak for themselves, and there isn't, in our submission, a shred of a case here.

One thing that that summary I've just given doesn't get across is the flavour of the communications by which NRD and Mr Marshall carried on their business. What you will see time and time again is the individuals in the ministries on the Rwandan side doing their job, writing straightforward, sensible, professional letters to NRD; but as they did so, if there was anything that smacked of criticism of NRD or even thwarted Mr Marshall's plans in any way, what one sees is the most extraordinary response from Mr Marshall.

There is letter after letter in which Mr Marshall, on the flimsiest pretext, launches into allegations of expropriation, and even corruption and criminality on the part of ministers and others. In my submission, the Tribunal will have to assess for itself what Mr Marshall was up to in some of this extraordinary correspondence. It is truly littered with distortions of reality.

You will also see that the letters are copied to a number of people in each case, including various other ministers and usually the US ambassador.

We would submit that, on any view, Mr Marshall was seeking to lay a paper trail by his misleading account of things, and in particular for a future arbitration of this kind; but he was also, it appears, seeking to bully and pressurise ministers with the tenor of his correspondence. And we do say that the overall effect is something that it is remarkable to see in a business and commercial context. It's a long, long way from the behaviour you would expect from any serious professional applicant for a mining licence.

So that's the main area of the case. There are also two episodes that the Tribunal will see involving Mr Benzinge. He was one of the original shareholders of NRD. He founded the company along with the Zarnacks. He took issue with the sale of the shares by the Zarnacks to Starck, HC Starck, and in consequence, as a result, took issue with the on-sale to Spalena.

Mr Benzinge challenged the legitimacy of the appointment of Mr Marshall and Ms Mruskovicova, which resulted from their acquisition of shares, and there are two episodes that the Tribunal will see involving Mr Benzinge in this case. None of them actually adds anything to this case or could conceivably give rise to a realistic claim.

The first one was something that happened over a very short period of a few days in August 2012. Mr Benzinge managed to persuade staff at the RDB, the Rwanda Development Board, which deals with public company registration, he managed to persuade them that the correct position was that he should be registered as director on the records, rather than Mr Marshall or Ms Mruskovicova.

Within a very short time, a day or so, Mr Marshall complained to the RDB. The matter was then taken up by the RDB, who dealt with it promptly and professionally. Within three days, Mr Benzinge had been suspended from acting as director while RDB investigated; and within
15:34 1 a further one day, the RDB directed the return of
2 company property to Mr Marshall.
3 So it was a problem that lasted a few days, and
4 where the evidence plainly shows the RDB acted honestly,
5 impartially and fairly.
6 The Claimants complain about the actions of
7 Mr Benzinge and things that he did in that short period,
8 but those of course are the actions of Mr Benzinge as
9 a private individual and cannot conceivably ground
10 a claim in an arbitration of this nature.
11 Just to give, again, a flavour of the way the
12 Claimants are trying to present this case in this
13 arbitration, it's worth taking up the pre-hearing brief
14 again at paragraph 19. They say in relation to this
15 August 2012 episode:
16 "... Mr Benzinge had no role in the company.
17 Claimants could not have known it at the time, but this
18 was one of the first bad acts in a long line of bad acts
19 perpetrated by Respondent in an effort to force
20 Claimants to abandon their investment."
21 Now, two points about that.
22 First, Mr Marshall accepted at the time that the RDB
23 personnel who were initially persuaded by Mr Benzinge to
24 change the registered information were not in any way
25 collusive or acting in bad faith. They were just

15:35 1 persuaded by the information given by Mr Benzinge that
2 this was the correct thing to do on behalf of the
3 company.
4 Secondly, once this difficulty was escalated,
5 because there was a dispute between the shareholders
6 about it, there was a very prompt investigation, and
7 obvious neutrality and professionalism shown by the RDB.
8 I would submit that this sentence about it being
9 a "first bad act[] in a long line of bad acts" is
10 an untenable characterisation of events, and it does
11 demonstrate the kind of way in which the Claimants are
12 putting this case that we will all have to wade through.
13 Now, back to Mr Benzinge. He felt aggrieved at
14 losing that first round, and he pursued his arguments
15 later in 2012, and he did so by launching an arbitration
16 involving him and NRD, which was subject to various
17 inter partes court rulings at the early stages of
18 identifying the arbitrator and the like.
19 So just to flesh out that point, it's not as if this
20 was some private arbitration that the NRD or the
21 Claimants never knew about; they were actually involved
22 in the arbitration at an early stage, in various court
23 hearings dealing with the constitution of a tribunal.
24 THE PRESIDENT: Could I just intervene, because I have been
25 very puzzled by this particular proceeding:

15:37 1 an arbitration in which an individual challenges
2 a company as to who is the correct chief executive of
3 the company. It seems to have its origin in a court
4 order, and I find it difficult to identify any
5 comparable civil proceedings in this country. One would
6 have thought it would be some kind of proceeding under
7 a Companies Act. But we've got very tenuous evidence
8 about this, both from the Claimants and the Respondent.
9 MR HILL: Well, we have some evidence on it from Mr Mugisha.
10 Rather than shooting from the hip, I might make sure
11 I characterise it accurately and come back to you on
12 that, just so that I make sure I'm making the correct
13 submission.
14 THE PRESIDENT: Thank you.
15 MR HILL: What I think I can say, because I'm sure my
16 recollection on this is accurate, is that both parties,
17 both the NRD side -- or the Claimants' side. I should
18 say -- and Mr Benzinge, were consensual about there
19 being an arbitration. I think there was
20 a falling-out -- and this is the subject of the court
21 hearings -- about how the tribunal should be
22 constituted.
23 The Claimants' side wanted a three-man tribunal;
24 Mr Benzinge wanted a one-man tribunal. Initially the
25 Claimants were successful and then Mr Benzinge was

Page 110

Page 111

Page 110

Page 111

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
15:40 1 original position. He would still, obviously, only be
2 a minority shareholder, but the shareholdings would
3 revert, and the subsequent resolutions consequent on the
4 transfer of shares were invalidated.
5 Now, NRD appealed that, and their appeals were
6 rejected at two levels of appeal, the final Supreme
7 Court decision being given in May 2014.
8 It's important to note in relation to those appeals
9 that the Claimants' submission in this case -- and it
10 was a point flagged up in that letter I mentioned -- is
11 that the arbitrator was in some way conflicted or
12 biased. If that were the case, then NRD would indeed
13 have had a valid ground of objection to the arbitration
14 award. But that is not a ground of objection they in
15 fact pursued on appeal, at either level of appeal. It's
16 something they've brought up in these proceedings, and
17 it wasn't a point they took at the time or pursued at
18 the time.
19 Now, on the back of that award --
20 THE PRESIDENT: Sorry. If that award was correct, wouldn't
21 it follow that Spalena has no locus standi of any kind
22 in this arbitration?
23 MR HILL: Well, it certainly could follow. That's the
24 implications of Mr Mugisha's evidence. And we say --
25 THE PRESIDENT: That's a far more fundamental point than any

Page 113

15:43 1 First, the reason why Mr Imena refused to issue tags
2 for minerals was, in fact, twofold. One of the reasons
3 why tags were not issued by him to Mr Marshall was that
4 tags were only supposed to be given to licensed mining
5 operators, and we have other evidence on that. NRD did
6 not have a mining licence, and despite repeated requests
7 from Mr Imena to apply for one, they hadn't done so at
8 that stage.
9 So it was quite right for Mr Imena to say, "You are
10 an unlicensed operator. I've been trying to get you to
11 apply for licences repeatedly. You must now apply for
12 licences, and I'm not going to allow you to keep
13 receiving tags as an unlicensed operator, and benefiting
14 from them, without making the application you should
15 make, and which you're required to make under the
16 scheme".
17 THE PRESIDENT: My understanding is that NRD were given
18 informal permission to act as if they had a licence. Is
19 that correct?
20 MR HILL: They were given informal permission to remain on
21 the concessions, but subject to the fact that from
22 October 2013, and repeatedly in 2014, they were being
23 pressed to apply for licences and were declining to do
24 so.
25 So in our submission, it was entirely fair for the

Page 114

15:41 1 that's been taken.
2 MR HILL: Well, if you look at our pre-hearing brief, we've
3 certainly not accepted that they are proper
4 shareholders, for that reason.
5 Now, on the back of that award, confirmed by the
6 Supreme Court ruling, Mr Benzinge made various attempts
7 to enforce his award. The Claimants complain this
8 resulted in NRD being shut out of their Kigali office
9 and parts of their concessions at the time. And none of
10 those points take Claimants anywhere.
11 Mr Benzinge had the rights that he had under his
12 award and the Supreme Court judgment, and the bailiff he
13 instructed also had his professional rights and
14 obligations to enforce the judgments. The Claimants
15 haven't, in our submission, advanced any coherent case
16 that the bailiff, Mr Bosco, who is going to be
17 a witness, exceeded his rights and duties in any way.
18 But even if he had, none of that involved actions of the
19 state, or participated in by the state in any way.
20 The Claimants do suggest that this episode is
21 relevant on a different area because Mr Imena, the
22 State Minister in Charge of Mining, was unwilling to
23 issue tags for minerals to NRD in part on the basis of
24 Mr Benzinge's claims, and we heard more about that this
25 morning. Two points on that.

Page 115

15:44 1 person issuing tags to say, 'I'm not going to give you
2 the indulgence of keeping on treating you as licenced
3 pro tem while you make an application when you're not in
4 fact making this application'.
5 THE PRESIDENT: Yes. I would be grateful at some stage for
6 a bit of further assistance with the status that they
7 had under these informal permissions that were granted.
8 MR HILL: Yes.
9 THE PRESIDENT: But you needn't deal with that at this
10 point.
11 MR HILL: I'm grateful.
12 I can just foreshadow what will be said, which is:
13 these were not, by any means, formal licences; they were
14 indulements. To take tagging as an example, they should
15 have had proper licences, which they were being asked to
16 apply for, and it went beyond the scheme of the policy
17 to be granting them tags when they were not licensed.
18 That was very much an indulgence. And entirely proper
19 and right to say, "You must now get a licence, and I'm
20 going to stop giving you these tags until you do".
21 So that was the first reason from Mr Imena. And
22 a second reason was that he was faced with competing
23 claims from Mr Benzinge and from Mr Marshall for being
24 the people who were entitled to represent NRD and
25 receive these tags, and in fact he was being threatened
15:45 1 with being sued by Mr Benzinge.
2 So in those circumstances also, fair enough not to
3 issue tags and not to take sides. And we don't accept
4 the suggestion from the Claimants that Mr Imena was
5 siding with Benzinge. He wasn't: he was standing in the
6 middle.
7 Now, just on all those points, we do say that you
8 will notice in the contemporaneous approach by
9 Mr Marshall, and also in the Claimants' case, that they
10 repeatedly underplay the fact that Mr Benzinge had the
11 benefit of this arbitration award, backed by the appeal
12 judgments, and which supported his claims in respect of
13 the management and ownership of the company.
14 So, for instance, going back to the pre-hearing
15 brief, if one goes to paragraph 26, they say:
16 "Mr Imena's argument that there was a dispute over
17 NRD's ownership is unfounded and outrageous. Mr Imena
18 casually admits that, upon threats from Mr Benzinge to
19 sue MINIRENA, he decided to prevent NRD from receiving
20 mineral tags. This is an astonishing admission. He
21 blocked Claimants' ability to operate their investment
22 upon the mere threat of litigation by a Rwandan
23 national."
24 It wasn't a "mere threat of litigation by a Rwandan
25 national", Mr Benzinge had the arbitration award and

Page 117

15:50 1 and there were also judgments from employee claims
2 against NRD from some 25 employees.
3 The ins and outs of the various enforcement
4 processes from Mr Bosco are lengthy. We would suggest
5 they are immaterial to this case. Mr Bosco Nsengiyuma
6 has put in two witness statements which explain his
7 actions in detail. And we will suggest that he's
8 clearly an experienced professional bailiff, clearly
9 doing his best to comply with his duties faithfully and
10 executing on lawful judgments.
11 This is another area of the case where we suggest
12 the Claimants simply don't like what was happening and
13 leap to theories of conspiracy or corruption, where the
14 short point is that there were judgment debts, because
15 NRD was in default and had not paid its debts, and there
16 was a bailiff who was entitled to execute on those debts
17 and who was doing so.
18 As I say, there are a lot of ins and outs. For
19 an active account of the detail, I would commend to the
20 Tribunal the detailed explanation that Mr Bosco gives in
21 his two witness statements. We would also reiterate the
22 point that, in any event, his actions cannot be
23 attributed to the Rwandan Government.
24 That brings me to the third sideshow point, which
25 relates to the conspiracy theory advanced by the

Page 119

15:48 1 "By Mr Imena's own admission, he was using the
2 tagging system as a political tool to harm a foreign
3 investor."
4 That is a quite unfair spin. Mr Imena was acting
5 for these two reasons that I've suggested, and the
6 Claimants haven't even dealt fairly at all with the
7 first reason, which is that tags are for licensed
8 operators and that NRD had declined to apply. And we do
9 say that Mr Imena was entirely justified in the approach
10 he took to tagging.
11 We will also say -- and it will be apparent from
12 some of the correspondence we'll go to -- that at the
13 time Mr Marshall very significantly ignored or
14 underplayed the fact that Mr Benzinge had this
15 arbitration award from an arbitration that NRD had
16 chosen not to attend, and had it backed by Appeal Court
17 judgments.
18 So that's the Benzinge episode. The next episode,
19 or set of episodes, relates to Mr Bosco Nsengiyuma, and
20 he is the professional bailiff.
21 Now, Mr Bosco is a highly experienced bailiff.
22 During the period with which this arbitration is
23 concerned, he was involved in executing a number of
24 judgments against NRD. There was first an unfair
25 dismissal claim; then there was Mr Benzinge's judgment;

Page 118

15:47 1 a Supreme Court judgment which supported his position,
2 although you might not have appreciated that from this
3 paragraph.
4 The Claimants then go on:
5 "Any issue over ownership had already been resolved
6 in Spalena's and Mr Marshall's favour when Mr Benzinge
7 tried a similar trick. In 2012 the RDB expressly
8 recognised Spalena's ownership of NRD and that
9 Mr Marshall was the Managing Director. Mr Marshall
10 provided Mr Imena RDB's registration information and
11 informed him that Mr Benzinge, working with a court
12 bailiff, blocked Claimants from NRD's offices and
13 confiscated NRD's property, on June 13, 2014.
14 Mr Imena's contention that he was unaware of such
15 activity is false."
16 Now, there's a bit of unfortunate sleight of hand
17 here. Whatever the RDB decided in 2012, that's referred
18 to there, was of course before the 2013 arbitration
19 award and before the 2014 Supreme Court judgment. So
20 whatever the RDB thought in 2012, Mr Imena was entirely
21 reasonable to see the position as disputed, and one in
22 which he needed to see a resolution and to consider it
23 would be inappropriate for him to take sides.
24 Then in paragraph 28 of this pre-hearing brief, the
25 Claimants say:

Page 120

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
15:51  Claimants, involving smuggling minerals from the DRC and
2 selling them as Rwandan minerals. It is difficult, in
3 our submission, to even understand the theory. It was
4 set out somewhat vaguely in the Claimants’ Memorial. It
5 grew in the telling by the time of the Reply, and now
6 involves an unnamed oligarch who, at an unspecified time
7 and in an unspecified way, may have wanted NRD to assist
8 in smuggling, which Mr Marshall says they did not do;
9 and in some other unspecified way, it’s then said that
10 the expropriation that Mr Marshall says has occurred is
11 in some way at the behest of this unspecified oligarch.
12 Now, there is a total -- and I mean total -- absence
13 of evidence to support this case. There is also a total
14 absence of sufficient detail even to understand it. But
15 even if those points weren't themselves fatal to this
16 conspiracy theory, the case is evidently nonsensical.
17 First, and most importantly, we can actually see
18 from all the evidence what in fact happened to NRD’s
19 applications for long-term licences. We can see who was
20 involved and we can see what they decided and why they
21 decided what they did. This was a contemporaneously
22 documented, transparent process. It involved teams
23 analysing the applications, explaining why the
24 applications were deficient, and such that it should
25 never have been any surprise that NRD didn't make the

Page 121

15:54  witnesses.
2 So if you turn to the Claimants’ pre-hearing brief
3 again and look at, for instance, paragraph 13, one can
4 see sentences like:
5 “Claimants did not, and would not, participate in
6 smuggling, and therefore NRD was singled out and treated
differently, in violation of the [bilateral investment
7 treaty].”
8 This is, in our submission, simply an allegation not
9 anchored in reality and with no evidence.
10 The next sideshow issue relates to the fact that
11 from time to time, NRD was made subject to requirements
12 to cease mining in parts of their concessions because of
13 local issues arising from illegal mining and
14 environmental problems.
15 The short point here is that there were indeed
16 problems from both illegal mining and environmental
17 issues on NRD’s concessions. These problems got worse
18 over the period in which Mr Marshall and Spalena was in
19 control. One sees in Mr Marshall’s protestations at the
20 time -- and this is repeated by the Claimants -- the
21 allegations that NRD was not being fairly treated, but
22 that is unfair again on the Claimants’ part.
23 On illegal mining, what they say is that Rwanda
24 should have prevented illegal mining on NRD’s

Page 122

15:53  grade. Mr Marshall had, of course, been told of the
2 problems in 2010 when he bought into the company, and
3 hadn’t improved on the position in the years that
4 followed.
5 Secondly, on this conspiracy theory, to the extent
6 one needs to even think about it, one can see that the
7 underlying premise is untenable. Rwanda has, in fact,
8 well observed and thorough processes in place for
9 preventing smuggling, and is a main proponent in the
10 region of measures to prevent smuggling. So, while no
11 systems can be foolproof, there is no conceivable basis
12 for any suggestion that Rwanda is promoting or even
13 condoning smuggling: it does the opposite, extensively,
14 and as observed by third-party partners, such as the
15 representatives of the Tin Council initiative, and it
16 could never be in Rwanda’s interest to condone
17 smuggling, and it does the very opposite.
18 Thirdly, the only material that the Claimants seek
19 to rely on -- and they do so inferentially to support
20 their theory -- is various bits of data or statistics
21 which the Claimants suggest show that more minerals are
22 exported than are produced. Well, the data doesn’t in
23 fact show that. They’ve misinterpreted it or drawn
24 incorrect inferences from the data, and this is
25 a misguided exercise, and that is dealt with by our

Page 123

15:55  concessions. That’s a bad point and it’s not how it
2 works. The duty to prevent illegal mining on the
3 concessions was the concession holder’s, NRD’s. And if
4 they couldn’t do it, if NRD couldn’t do it, that was
5 a function of them having areas of concessions that were
6 too large for what they could cope with, that they
7 simply weren’t working themselves, they were leaving
8 unprotected, and simply too large for the sake of
9 operation and investment that they were engaged in.
10 Indeed, NRD recognised that it was their
11 responsibility at the time, because eventually they
12 promised to do something about it by hiring demobilised
13 soldiers to help police the concessions. And when they
14 did so, when they promised to do so, they were permitted
15 to work again on the concessions. So no unfairness
16 there.
17 On environmental issues, the Claimants repeatedly
18 said and say that the environmental damage in the
19 concessions was not NRD’s fault because it was the fault
20 of the illegal miners or an environmental hangover from
21 colonial mining practices by the Belgians. But neither
22 of these points in fact wash.
23 The illegal miners should themselves have been
24 prevented by NRD, as I’ve just mentioned. And the point
25 about colonial practices is an exaggeration, because

Page 124
what was in fact discovered was that NRD's work, and its failure to control illegal mining, was exacerbating the environmental issues. Even though I'm sure it's fair to say there were some original hangover from the colonial period, the problem was that whatever damage was done in the colonial period was being exacerbated in the way in which the mines were still being exploited during the period of NRD's control.

Now, the last sideshow issue relates to the allegations that other operators, and in particular Tinco and Rutongo Mining, were in some way treated more favourably because they didn't end up with long-term licences. There is nothing in this either.

Quite simply, they were justifiably regarded as having made strong applications because they were some of the best-performing mining operators, unlike NRD.

The documents show at the time that Mr Marshall regarded them as having 20 times NRD's productivity on much smaller concessions. These companies had made properly substantiated, timely applications for mining licences, unlike NRD. So there's no surprising or unfair differentiation and treatment.

Relatedly, there's another allegation about a company called Ngali Mining you might have come across, and that's again focused on by the company now.

But again, the Claimants don't begin to establish that Ngali Mining is in a materially similar situation to NRD so you've got the starting point for some differential treatment by reference to the national treatment standard.

Ngali Mining was in fact a gold miner. It had been granted licences to mine a different mineral -- gold -- to that which NRD mined, using different techniques, against a totally different contractual background, and indeed in a different period, several years later, under a new 2018 Mining Law. So there's just no relevant comparison in order to conduct any useful exercise.

So those are really the issues in the case that we will be covering, and I've given you a cross-section of them by reference to the issues. What I was proposing to do -- and perhaps now would be a good time to break -- is give you a cross-section of the case in a different way, which is chronologically, just trying to divide the period into blocks of time, and just to tell the Tribunal what particular milestones or points that are likely to be covered in the evidence are to be looked out for in each block of time, which I hope will be helpful.

THE PRESIDENT: Thank you. We will break now, but we will break for 40 minutes, not 45 minutes. Thank you.

THE Zarnack era. And that covers the period from 2006, when the Zarnacks and Mr Benzinge incorporated NRD, through to 2008, when the Zarnacks sold to HC Starck, a mining company.

Now, in that first period there was obviously the contract, which was issued in November 2006, and the four-year licences, which were subsequently issued. It's just worth pulling up the contract briefly. It's at C-017. And I would submit it's quite telling that this morning Mr Cowley didn't spend any time on the contract, even though it's said to be where there's a guarantee of rights to a long-term licence.

If we look at page 1, we can see from Article 1 that there is a four-year period, four-year term of the contract. In fact, I'm not sure -- thank you, FTI -- I'm not sure it needs to be blown up, unless anyone particularly wants it. I think one can see from the full screen. So it's an authorisation for four years. There are then a series of obligations, starting in Article 2, which are obligations on NRD. These obligations amounted to conditions of obtaining a long-term licence later, as Mr Mugisha explains. And just in that context, it's worth noting that Article 5 always provides for the ability to terminate for breach of the obligations.
Mr Gatave, in his witness statement, has explained that a number of these licences were issued as part of the privatisation of mining, the goal being to improve production and move away from artisanal mining, which can be as simple as individuals with picks and shovels, towards a more industrial model. The idea of the four-year licence was for the private investors to prove themselves as serious operators. So they were to commence industrialisation and, importantly, conduct exploratory work and evaluate the mineral reserves, so that at the end of the four-year period they could produce a feasibility study. And the government needed to be satisfied about the adequacy of the information and the proposals in the feasibility study, including the resource estimates and the exploratory work done, before it would grant a long-term licence.

You can see this reflected in the contract. So Article 2.2 provides for the provision of an investment plan, as well as an environmental protection plan. And in the case of the Zarnacks, that was the one that resulted in a $39 million proposed investment over the four years. Article 2.3 then provides for the concessionaire to move to industrial exploitation immediately; in other words, as per the government's strategy, don't just continue with artisanal mining. And that is, unfortunately, what NRD very largely did, because -- just jumping ahead -- in three out of its five concessions, on any view there was no industrialisation of any kind at all. In two of them, there was very limited infrastructure work, which I will come back to. Article 2.5 provides for evaluation reports of the reserves. So that would require substantial exploration, drilling and sampling and the like to evaluate reserves. And what's also required is a feasibility study after four years. Now, we've seen this reference to a feasibility study. It's worth understanding what a feasibility study is. And this arises because we fully accept that the previous 4 years. It is not a feasibility study for a professional, industrial mining project, as was required under the contract.

"14. A feasibility study for an industrial mining project should be a comprehensive and detailed document that contains, among other things; the study of the geology, geophysical and geochemical studies, geological, geophysical and geochemical maps, the ore reserves models, geotechnical studies, studies on environment, studies on infrastructure, studies on markets, the mine design based on the mineral reserves as required by the contract.

"15. Where he says he explains further why the November 2010 application -- that's fine. So: "13. First, the report NRD provided talks largely about gathering already existing information (a desktop study) giving an introduction to geology and mineralization, setting out achieved production and providing some information about remote sensing. This kind of information is simply a preliminary description of the concessions and a summary of what NRD produced in the previous 4 years. It is not a feasibility study for a professional, industrial mining project, as was required under the contract.

"16. A feasibility study for an industrial mining project should be a comprehensive and detailed document that contains, among other things; the study of the geology, geophysical and geochemical studies, geological, geophysical and geochemical maps, the ore reserves models, geotechnical studies, studies on environment, studies on infrastructure, studies on markets, the mine design based on the mineral reserves as required by the contract.

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21 Monday, 21 June 2021
Page 129
Page 130
Page 131
Page 132

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
concessions.”

That's in the English. There is an issue about French and English translations that doesn't matter for this purpose. But what's clear is that not only is there an obligation to provide the feasibility study, if the concessionaire is to be provided with a long-term licence, this requires positive evaluation. So in other words, the government needs to be satisfied with the feasibility study before it will grant a long-term licence.

Just pausing there, one can see immediately that the Claimants' case is untenable that there was a guarantee of a long-term contract, because you can see that that doesn't work on the face of the contract. The purpose of the contract was for the concession holder to prove itself; and unless it did, it wouldn't be granted a long-term contract. So it needed to comply with Article 2 and it also needed to have the feasibility study positively evaluated.

So I'm coming to the end of the Zarnack era. That ended in 2008, by which point very little had been done on the concessions at all, and very little invested. That's explained when you see Professor Rupiya's evidence. He was a geologist at NRD. He explains that very little had been done by the end of 2008.

The next period is between 2008 and 2010. In this period NRD was substantially owned by HC Starck, which is a mining company. Now, this was the only period in which any material degree of proper investment was done. They did undertake some infrastructure investment and they also undertook some exploratory work, but even that investment was, in fact, quite limited. It fell very far short of the kind of money envisaged in the Zarnack's $39 million investment plan. It seems at most to have been about $13 million, about a third of the proposed level of investment.

In fact, what one sees in the evidence is that there was a very heavy emphasis and focus by Starck on one single piece of infrastructure, which was a wolframite or tungsten processing plant on the Rutsiro concession. And unfortunately that turned out to be a white elephant, and I'll come back to why in a moment. Mr Ehlers, one of our witnesses, is a mining engineer, and he was the MD of NRD during the Starck era and in the early part of the period after Mr Marshall took over. In his witness statement he explains the state of play in late 2010, when the four-year period was up and when NRD was applying for a renewed licence, and his evidence coincides and chimes very well with Professor Rupiya's, who was also there on the scene as the geologist.

There were five concessions. Starck had focused their investments in one of them, Rutsiro, and specifically on this processing plant, which was expensive, and it was a plant which did end up being a white elephant and it never went into production, although it did have some testing.

As a result of NRD's failure to carry out proper exploratory work in advance of building this plant, the plant could never be commercial. And the main problem was that the premise for the build was that it could be used to process rocks which were in the local scree, which were a result of previous colonial mining, the premise being that that scree was itself rich in tungsten, following which at some point they would be delving into the primary ore, which it was thought was also sufficiently rich in tungsten.

All those premises turned out to be wrong, and as a result there was never the ability to produce a commercially viable amount of ore of the right grade to make the plant worth operating, and as a result the plant never worked at all. When I say "never worked at all", I'm not suggesting that at the testing phase it wasn't operable, but it was never commercially viable and never actually processed any ore.

So Mr Cowley said this morning that whether or not it was processing minerals, the plant had to be maintained. That's actually not correct and not borne out by the evidence. The evidence is that not only did it not work because it was not commercially viable, it actually wasn't maintained and couldn't even have been made to work, or at least not without some further rehabilitation. So that's Rutsiro.

There's then Nemba, which was a tin mine, and the one that already had the most infrastructure as a result of mining from the colonial era. Starck, on that concession, had made also some limited further investment, but in neither of those two concessions was there any significant level of industrialisation.

For the other three concessions, which are Giciye, Mara and Sebeya, there was no industrialisation at all; there was just a continuation of artisanal mining. So that's industrialisation, which didn't comply with the obligations under Article 2. And it wasn't just the industrialisation that was limited; it was also the exploration work and the reserve estimates, which are particularly important when you come to consider the ability to produce a feasibility study.

Professor Rupiya gives evidence about that, and his
16:55 1 point is that NRD had only done superficial exploratory
work and only approximate estimates of reserves, which, as he says, were more guesswork than anything else
because of the superficial level of sampling that had been carried out. That's dealt with, just for your
note, in the witness statement at paragraphs 18-21.

Because of all that, the only hope in the 2010
application was not to get a long-term contract, but to
be given a five-year licence to essentially have another
go, the hope being that NRD might do a better job on the
concession areas in the next five years, and they might
at that point have a shot at a thirty-year licence.

That is why, of course, the 2010 application is
indeed only aimed at a five-year licence. Both NRD and
the government understood that it was an application for
a five-year licence, and Mr Marshall understood that
too, and we will be going to some of the evidence on
that with him in cross-examination.

There is nothing in the 2010 application to support
the suggestion that this was an application for a vast
mining licence under Article 57 of the Mining Law. All
the documents point to this being an application for
a five-year licence under Article 45 and a small mines
exportation licence, and there's nothing in the document
that goes beyond a five-year window.

16:58 1 had been done in the previous era, and specifically
told about the limitations in the application.

He was also specifically told that because of the
limited work done, NRD thought that if any further
licences were granted, these would be on a short-term
basis. So he went in with his eyes open, he paid
a.desultory price for the company, and the
idea that he thought that there were long-term licences
guaranteed and assured is, in my submission, absurd; not
only at odds with the contract in fact in place, but
also at odds with what he was told by NRD at the time
and at odds with the application that had already gone
in.

That application needed to be assessed and was
assessed against Rwanda's 2010 Mining Policy, and that
stressed the need to critically assess and evaluate
applications to make sure that in these four-year
periods, effective exploration work was being done, and
the concessionaires weren't simply conducting artisanal
mining on the concessions.

We've set out quite a long quote at paragraph 19 of
our skeleton. What the policy is effectively doing is
warning against exactly the kind of practices that NRD
was guilty of across its extremely large concessions, in
three of which NRD wasn't even pretending to do anything
other than purely artisanal mining.

17:00 1 While I'm dealing with this shift from artisanal to
industrial mining that Rwanda was seeking to push, can
I just pick up on one point in paragraph 38 of the
Claimants' pre-hearing brief. If I could start in the
middle of the paragraph, the Claimants say:

"Astoundingly, Mr Gatave, in his second witness
statement, states that the Rwandan mining industry
remains largely artisanal."

There's nothing astounding at all about anything
Mr Gatave says in his second witness statement, and at
some point -- we could go to it now, but I'll just note
it now -- paragraph 20 of Mr Gatave's second witness
statement is entirely clear.

What he's saying is the aim and the policy of Rwanda
is to industrialise from artisanal mining, and
concessions are awarded on that basis. But the process
of industrialisation is of course a gradual one, and the
point that he's dealing with in this paragraph is that
for so long as the industry has a largely artisanal
component, you will see fluctuations in production
volumes, because miners and productivity can wax and
wane, depending on things like the price of minerals and
whether mining at an artisanal level is sufficiently
economical for the individual miners as compared with
other activities.

So when you get to a sentence lower down in paragraph 38, the Claimants say:

"Mr Gatare goes a step further and actually dismisses the benefits of 'industrial mines,' such as the ones that NRD was purportedly required to build, because of the 'substantial sunk cost[s]' associated with running such large mines."

Now, this is a regrettable part of the paragraph.

It simply doesn't characterise what Mr Gatare says in his witness statement. He doesn't dismiss the benefits of industrial mining at all in paragraph 20 of his supplemental witness statement, and no fair reader of that statement could have thought he was. He in fact, in that paragraph, explicitly extols the benefit of industrial mining. But he does say that so long as there are still significant levels of artisanal mining, you will have this side effect of fluctuating levels of productivity.

Again, I do say it's unfortunate. I've had to spend time -- and we've all had to spend time -- unpicking points like this because they are simply inaccurate.

Coming back to the acquisition by Spalena of NRD, you will have seen that there is a dispute about whether there were other components or bits of consideration in the purchase of NRD, and those are points that are said to be relevant to Bay View's standing to pursue a claim in this arbitration.

We will go to the detail of all of that with Mr Marshall, and we will be suggesting that the Claimants have cooked up a story about the alleged liabilities that NRD had to Bay View Group at the time of the acquisition. We'll come back to this in evidence.

The other point to note about this period -- this is the early part of Mr Marshall's arrival -- is that there was and is no evidence to suggest that Spalena had, or currently has, any financial substance to it.

The evidence shows that by the end of 2010, when Mr Marshall arrived, NRD itself was in deep financial trouble -- we suggest that that's reflected by the purchase price -- and Spalena didn't bring anything to the table. It didn't invest, and there's no suggestion that it ever had the resources to do so.

So when we get to the 2014 application and we see that one of the problems with the application, as identified by the Rwandan teams at the time, was NRD's inability to demonstrate that it or its owners had any adequate financial resources, that's a deficiency that was inherent in the purchase.

Now, the evidence is that Mr Marshall and his partner Ms Mruskovicova ran NRD as a briefcase company:

they borrowed from traders, they ran up debt, they drained the company's working capital. And this meant that the situation worsened under Mr Marshall's watch:

no investment, drop in production levels from the start times, and less ability to control the concessions in terms of illegal mining and environmental damage.

The November 2010 application was evaluated by Rwanda in 2011. As with the later licence applications, there was an objective evaluation by a senior geologist and staff member, Dr Michael Biryabarema, who is a witness. In line with what NRD themselves expected when they made the application, he determined that the November 2010 application was deficient, in particular in respect of the exploration works and the resource evaluation. Just for your reference, it's at R-111, and we will be going to it in due course.

As we saw in Mr Imena's witness statement that we looked at earlier, there was no proper feasibility study or resource evaluation as required by Article 2 of the contract. So what that means is that Article 2 was not complied with, even before you get to the question of whether there could be a positive evaluation of any feasibility study for the purposes of Article 4.

NRD were informed of this in August 2011 by a letter from Mr Kamanzi. By that point, as Mr Mugisha explains, all rights under the contract to a long-term licence were at an end. But Mr Kamanzi did give NRD an extension of the licences for six months, to give NRD an opportunity to prove it was entitled to be granted any further licences.

Those licence extensions didn't extend the contract, but they did amount to extensions of the licences. And there was indeed a subsequent licence extension, and the last licence extension expired in October 2012. None of these licence extensions -- and we'll look at the documents -- none of them involved any assurance that any long-term contract would ultimately result, or anything remotely of that kind.

Just pausing there, it is unfortunate, we will be submitting, that the Claimants have given so many distorted quotes from these extension letters, to give the impression that these extensions were themselves somehow envisaging or encouraging the Claimants in the belief of long-term licences. They simply weren't, and we can look at the documents.

There is then, still in this period 2010-2012, what we submit is a curious episode which occurs in late...
2011. The Claimants' case, their version of events, is that NRD agreed a draft long-term contract with an employee of the mining industry, Mr Bidega, who is one of their witnesses. The Claimants say that Mr Bidega went so far as to have the contract approved by the minister and submitted to cabinet.

This is inaccurate, and we will be exploring that with the witnesses. Mr Bidega was an employee who was just about to join NRD at this point, and did join NRD immediately after the events in question. We dispute that any draft was ever agreed, or that Mr Bidega would ever have been duly authorised to do so. And no such draft was in fact ever put to, let alone approved by the minister, still less ever submitted to cabinet. That is another factual distortion in the case.

One thing I would say about this episode, and the other factual distortion in the case.

The Claimants say that NRD agreed a draft long-term contract with Mr Bidega, is it quite clearly a draft contract for 2011 draft that Mr Marshall himself prepared and sent to Mr Bidega, it is quite clearly a draft contract for a five-year licence. That's quite an important point, because the Claimants' case is that he always understood that there was an assurance of a long-term licence, and they even say that the November 2010 application was for a long-term licence. It's impossible to reconcile that with what Mr Marshall was up to in late 2011, which is drawing up a five-year licence.

What in fact happened in this period -- we're now at late 2011 -- was that Dr Biryabarema told NRD that it should be applying for short-term licences for only two of the concessions. What he was saying was that NRD should be focusing its limited resources on what it thought were the two most promising concessions. But after this, NRD insisted at all times in holding out for all five concessions, even though it didn't in fact make any renewed application of any kind for any length of licence. And indeed, by this stage NRD had never made any application for a long-term licence.

So that's the end of 2011. The next period is 2012. In that period there was the further licence extension until October 2012, and after that no further formal licence extensions, although we accept there were ad hoc permissions to remain on-site. And just to reiterate, none of the ad hoc permissions either could have been thought to convey any assurance of a long-term licence. Just give me one moment to read my own note to myself. I apologise. (Pause)

Yes, it's just to pick up on one point from this morning. Just to clarify our case, contrary to what Mr Cowley thought our case was, we do certainly accept that there were formal licence extensions up until October 2012, just not beyond. We're not saying there were no licence extensions after August 2011.

In August 2012 we have, just for the timeline, the first incident involving Mr Benzinge and the RDB, which I talked about earlier. And by the end of that year, the way things stood was like this; first, the licences had expired in October 2012; secondly, there had never been an application for long-term licences; thirdly, at this point there were environmental and illegal mining issues in NRD's western concessions, which had led to NRD being suspended from operating in those concessions.

The next block of time is 2013. In January of that year, NRD did put in what purported to be an application for long-term licences. But it was a desultory document, and we do say it was somewhat telling that in his account of things this morning, Mr Cowley didn't even mention this document and it didn't feature on his timeline. The reason for that is that it doesn't fit into his case theory that the 2010 application was still somehow live and that the 2010 application was in some way for long-term licences. It wasn't live, Mr Marshall knew it, and it wasn't for long-term licences. And that's why he put in this desultory document in January 2013.

For your note, that's at C-054. It was quite literally only a nine-page rehash of points in the earlier November 2010 document which had previously been seen as inadequate. There's no new material in it at all. We would suggest that this could not really seriously have been regarded by NRD as a serious and real application.

In May of that year, the RDB countered with what was a realistic and serious position, because they indicated that the RDB would be prepared to negotiate for each concession separately, and they wanted to start discussions for a small-scale five-year licence at the Nembà concession, which was the most productive concession by a distance. So that is a sensible position: there was one apparently productive mine, and they said to NRD, "Focus your resources on applying for a five-year licence for this productive mine".

That discussion led to one of the letters from Mr Marshall to Mr Imena of the kind we'll see a lot of in this case: a tirade of complaints and factual distortions. And one of the distortions was the proposition that NRD was automatically entitled to long-term licences, which Mr Marshall had known from the outset was never the case.

Now, by this stage I should say that NRD -- this is the summer of 2013 -- had been allowed back onto its
17:13 1 western concessions, following its own promise that it could curb illegal mining on its concessions by recruiting demobilised soldiers.
2 Now, later in that year -- so I've just referred to
3 NRD being invited to apply for a Nemba five-year licence. They didn't. And later in that year, it again
4 needed to be the government, specifically Mr Imena, pushing the NRD to apply. He did that in October 2013,
5 making the point to NRD that for a year or so, it had now been operating without a licence; the time had come
6 it needed to apply. And he also reiterated the point that NRD didn't seem to have capacity for five
7 concessions and should focus on two, Nemba and Rutsiro.
8 Again, this advice was ignored. NRD made no new
9 licence application. And we would suggest that despite this prompting and chasing, the failure to do so does
10 demonstrate part of the unprofessionalism of NRD's approach.
11 So that's 2013. We then move to 2014. A new Mining Law came in in the first half of 2014, and NRD needed to
12 apply for a licence under the new law. NRD didn't hold
13 an existing licence, so it couldn't take advantage of the grandfathering provisions. And also another
14 technical issue was that the terms of NRD's licences wouldn't have permitted it to rely on grandfathering

Page 149

17:17 1 of the long term licenses would resume, he inexplicably
2 demanded that NRD 're-apply' for its licenses,
3 supposedly as a result of the enactment of the new 2014
4 mining law. This was entirely inconsistent with prior
5 communications in which Claimants were assured that the stalled negotiations towards completion of long term
6 licenses based upon the submitted application and draft
7 long term license would continue. There was never
8 a discussion of the need to 'reapply' because Claimants
9 had already applied and were in the midst of a process
10 to complete the negotiation of the long term licenses."
11 We would submit that this is part of the pre-hearing
12 brief that loses all contact with reality and what in fact the documents show.
13 First, it's worth flagging up that a feature we see
14 in this paragraph, and also in paragraph 20 just above
15 it, a feature of the Claimants' case approach, both in
16 the Claimants' memorials and in Mr Marshall's witness
17 statement, [is that] whenever a document or a meeting
18 refers at all to an extension being given or discussions being had about a licence, at each point the Claimants
19 interpolate the expression "long term licenses" or "long term contracts", to give the impression that the
20 relevant document or discussion was indeed about a long-term licence and gave the Claimants the expectation that NRD would get a long-term licence.
21 Just to give an example, you'll see one just above it. If you go back to paragraph 20, one can see:
22 "When Respondent provided another explicit extension of the short term license in October 2012, Respondent stated that 'new contracts...will be negotiated as has been communicated to all the existing concession holders' further confirming Claimants' expectation that NRD would receive the long term license."
23 Now, one might get the impression from that that there was something in this letter that did foster the impression that NRD would get or would be negotiating long-term contracts, but that document is not referenced. That document is the one at C-033.
24 I'm going to come back to this pre-hearing brief, paragraph 22 in a minute, but if FTI could also pull up C-033.
25 All that's being said here is -- paragraph 1 refers back to extending the previous licence. It then says: "In view of the ongoing work on reorganizing the mining sector which will have a bearing on the new contracts that will be negotiated as has been communicated to all the existing concession holders, I have the pleasure to extend your license ..."
26 So in other words, all that's being said is: there's

Page 151

17:15 1 provisions anyway.
2 So NRD needed to apply for new licences anyway and it had to be prompted by the government to apply. First it was prompted in April 2014, which NRD ignored, and then it was prompted again in the summer of 2014.
3 I'll come back to that in a moment, because in between those two prompts we have the Benzinge issues coming up again, and that starts to happen after May 2014. Because by May 2014 there had been the arbitration in April 2013, and there had been two rounds of appeal after that, with the Supreme Court decision being given in May 2014. And from that point onwards, Mr Benzinge had the benefit of that award and those judgments.
4 So in August 2014 Mr Imena made his follow-up request that NRD make a new application for licences under the new Mining Law, and this time he gave them a deadline: 30 days. It's worth noting that the request from Mr Imena specifically identified exactly what needed to be provided in the application, and he asked that the application be made on a concession-by-concession basis.
5 It's worth picking up on this: again, the Claimants' pre-hearing brief, paragraph 22, where they say: "Despite assurances from Mr Imena that negotiations

Page 150

Page 152
### Page 153

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>a new law, all concession holders are being told that</td>
</tr>
<tr>
<td>2</td>
<td>the new law will have a bearing on licence applications,</td>
</tr>
<tr>
<td>3</td>
<td>and he's extending the licence. One cannot possibly</td>
</tr>
<tr>
<td>4</td>
<td>read anything in this letter as giving any indication or</td>
</tr>
<tr>
<td>5</td>
<td>assurance about a long-term contract or a long-term</td>
</tr>
<tr>
<td>6</td>
<td>licence. That's just one example, and there are very</td>
</tr>
<tr>
<td>7</td>
<td>many in this case.</td>
</tr>
<tr>
<td>8</td>
<td>But coming back in the pre-hearing brief to</td>
</tr>
<tr>
<td>9</td>
<td>paragraph 22, which I just read, looking at that first</td>
</tr>
<tr>
<td>10</td>
<td>sentence, there was nothing inexplicable in Mr Imena</td>
</tr>
<tr>
<td>11</td>
<td>demanding that the Claimants reapply under the new law.</td>
</tr>
<tr>
<td>12</td>
<td>Mr Imena had already been pressing NRD to apply for</td>
</tr>
<tr>
<td>13</td>
<td>a licence repeatedly, and for nearly one year by this</td>
</tr>
<tr>
<td>14</td>
<td>stage. The application needed to be under the new law</td>
</tr>
<tr>
<td>15</td>
<td>because that was what the law required.</td>
</tr>
<tr>
<td>16</td>
<td>The rest of the paragraph is also a fiction. There</td>
</tr>
<tr>
<td>17</td>
<td>were no &quot;stalled negotiations&quot; in respect of long-term</td>
</tr>
<tr>
<td>18</td>
<td>licences.</td>
</tr>
<tr>
<td>19</td>
<td>The true position is that NRD had made a hopeless</td>
</tr>
<tr>
<td>20</td>
<td>request, in this desultory nine-page document, for</td>
</tr>
<tr>
<td>21</td>
<td>a long-term licence in January 2013. NRD had then been</td>
</tr>
<tr>
<td>22</td>
<td>re-directed, in May 2013, towards making a realistic</td>
</tr>
<tr>
<td>23</td>
<td>application for a five-year licence, starting with</td>
</tr>
<tr>
<td>24</td>
<td>Nembà. Since then, since October 2013, Mr Imena had</td>
</tr>
<tr>
<td>25</td>
<td>repeatedly asked NRD to make a proper application,</td>
</tr>
</tbody>
</table>

### Page 154

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>suggesting they focus on two of the five. They had been</td>
</tr>
<tr>
<td>2</td>
<td>asked again in April 2014 to make an application and</td>
</tr>
<tr>
<td>3</td>
<td>hadn't done so. And he was finally, in August 2014,</td>
</tr>
<tr>
<td>4</td>
<td>giving them a 30-day deadline. Nothing at all</td>
</tr>
<tr>
<td>5</td>
<td>surprising, except all that's surprising is NRD's</td>
</tr>
<tr>
<td>6</td>
<td>failure and unprofessionalism in not applying for</td>
</tr>
<tr>
<td>7</td>
<td>a licence sooner.</td>
</tr>
<tr>
<td>8</td>
<td>So we then go to September 2014, where NRD did make</td>
</tr>
<tr>
<td>9</td>
<td>an application as required by Mr Imena, but that</td>
</tr>
<tr>
<td>10</td>
<td>application was itself hopelessly deficient. It was</td>
</tr>
<tr>
<td>11</td>
<td>another rehash of the 2010 application, and NRD ignored</td>
</tr>
<tr>
<td>12</td>
<td>the request to apply on a concession-by-concession</td>
</tr>
<tr>
<td>13</td>
<td>basis. They declined to provide much of the material</td>
</tr>
<tr>
<td>14</td>
<td>that had been specifically requested. Recall that</td>
</tr>
<tr>
<td>15</td>
<td>Mr Imena helpfully gave a list of what needed to be</td>
</tr>
<tr>
<td>16</td>
<td>provided. That material wasn't provided, and what they</td>
</tr>
<tr>
<td>17</td>
<td>did provide was very far short of what could be expected</td>
</tr>
<tr>
<td>18</td>
<td>for a realistic application even for a short-term</td>
</tr>
<tr>
<td>19</td>
<td>licence.</td>
</tr>
<tr>
<td>20</td>
<td>Just pausing there, the Claimants repeatedly make</td>
</tr>
<tr>
<td>21</td>
<td>the point that NRD didn't have proper access to their</td>
</tr>
<tr>
<td>22</td>
<td>Kigali office. There's nothing in this. There are</td>
</tr>
<tr>
<td>23</td>
<td>evidential points here where we don't accept Claimants'</td>
</tr>
<tr>
<td>24</td>
<td>premise, which we'll be coming to. But leaving all that</td>
</tr>
<tr>
<td>25</td>
<td>aside, the critical deficiencies in the application had</td>
</tr>
</tbody>
</table>

### Page 155

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>nothing to do with whether or not certain material could</td>
</tr>
<tr>
<td>2</td>
<td>or could not be obtained from the office. The critical</td>
</tr>
<tr>
<td>3</td>
<td>deficiencies arose because NRD couldn't possibly ever</td>
</tr>
<tr>
<td>4</td>
<td>supply compliant material because its operations and the</td>
</tr>
<tr>
<td>5</td>
<td>work done on the concessions was so deficient.</td>
</tr>
<tr>
<td>6</td>
<td>To give an example, NRD didn't provide adequate</td>
</tr>
<tr>
<td>7</td>
<td>information about the financial substance of NRD and</td>
</tr>
<tr>
<td>8</td>
<td>those behind NRD, such as the Claimants. They didn't do</td>
</tr>
<tr>
<td>9</td>
<td>so because NRD and those behind it didn't have the</td>
</tr>
<tr>
<td>10</td>
<td>financial substance. If they had had the financial</td>
</tr>
<tr>
<td>11</td>
<td>substance, the material could have been provided.</td>
</tr>
<tr>
<td>12</td>
<td>A similar point arises with information relating in</td>
</tr>
<tr>
<td>13</td>
<td>essence to feasibility study points: exploration,</td>
</tr>
<tr>
<td>14</td>
<td>evaluation of reserves and the like.</td>
</tr>
<tr>
<td>15</td>
<td>We have the 2014 application: it does have</td>
</tr>
<tr>
<td>16</td>
<td>accompanying documentation. That doesn't have any new</td>
</tr>
<tr>
<td>17</td>
<td>material from the 2010 report, and the reason for that</td>
</tr>
<tr>
<td>18</td>
<td>is that there hadn't been any material investment or</td>
</tr>
<tr>
<td>19</td>
<td>exploration or resource evaluation in the meantime. So</td>
</tr>
<tr>
<td>20</td>
<td>it's got nothing to do with what's available in the</td>
</tr>
<tr>
<td>21</td>
<td>Kigali office. Core material that was needed to support</td>
</tr>
<tr>
<td>22</td>
<td>a serious application didn't exist, and couldn't have</td>
</tr>
<tr>
<td>23</td>
<td>existed.</td>
</tr>
<tr>
<td>24</td>
<td>There was also, in the application, misleading</td>
</tr>
<tr>
<td>25</td>
<td>information that was given as to the level of investment</td>
</tr>
</tbody>
</table>

### Page 156

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>from NRD, and we'll come back to that.</td>
</tr>
<tr>
<td>2</td>
<td>I've referred at the beginning of my submissions to</td>
</tr>
<tr>
<td>3</td>
<td>what happened to this application; I'm not going to</td>
</tr>
<tr>
<td>4</td>
<td>repeat it at length. It was evaluated by a team; they</td>
</tr>
<tr>
<td>5</td>
<td>recommended it was rejected, and it duly was. NRD was</td>
</tr>
<tr>
<td>6</td>
<td>given two further opportunities to improve the</td>
</tr>
<tr>
<td>7</td>
<td>application, and was even told exactly what was wrong</td>
</tr>
<tr>
<td>8</td>
<td>with it. By this stage we are going to 2015, and the</td>
</tr>
<tr>
<td>9</td>
<td>further information provided by NRD was desultory.</td>
</tr>
<tr>
<td>10</td>
<td>On each occasion, with each round of further</td>
</tr>
<tr>
<td>11</td>
<td>information, there was an objective review by Rwanda, by</td>
</tr>
<tr>
<td>12</td>
<td>a team; and the recommendation to the minister, quite</td>
</tr>
<tr>
<td>13</td>
<td>rightly, in each case was that the application was</td>
</tr>
<tr>
<td>14</td>
<td>inadequate and that it should be rejected, and that's</td>
</tr>
<tr>
<td>15</td>
<td>duly what happened in May 2015.</td>
</tr>
<tr>
<td>16</td>
<td>Throughout this process, Mr Marshall was still</td>
</tr>
<tr>
<td>17</td>
<td>writing bullying letters. They included letters to the</td>
</tr>
<tr>
<td>18</td>
<td>President and others making what we suggest are</td>
</tr>
<tr>
<td>19</td>
<td>outrageous allegations of corruption, and with</td>
</tr>
<tr>
<td>20</td>
<td>significant distortions of fact which are evident on the</td>
</tr>
<tr>
<td>21</td>
<td>face of the letters.</td>
</tr>
<tr>
<td>22</td>
<td>But one thing that does emerge from these letters is</td>
</tr>
<tr>
<td>23</td>
<td>that if the Claimants did have a claim of any kind, that</td>
</tr>
<tr>
<td>24</td>
<td>claim is, on any view, out of time, because the</td>
</tr>
<tr>
<td>25</td>
<td>Claimants had sufficient knowledge before the cut-off</td>
</tr>
</tbody>
</table>
That's all a whistle-stop tour, and we'll see quite a lot more of the detail with Mr Marshall.
I'm going to mention something briefly about the preliminary objection points. Before I do, could I just pick up one other development in the Claimants' case, which we do suggest is constantly shifting. This relates to the public tender process.
There was a normal, objective tender process, and the winning tenderer was duly chosen. The Claimants have run an entirely false point that the winning tenderer was Ngali Mining, being a company organised under the Ministry of Defence. That is wrong. That's a point made in the Claimants' Memorial at paragraph 270, and it's wrong, as we've explained in detail in our memorials and our evidence.
There is now, in the Claimants' skeleton (paragraph 43), a new allegation that seems to be a variation on this -- it's unpleaded and it's not supported by any evidence -- that the concessions were 'transferred to a Rwandan investor with close ties to [the government]'. That's never been said before.
I apologise, I'll give you the reference; I've not got it in my note.
"... the Concessions ... were transferred to a Rwandan investor with close ties to [the government]."

2014, when NRD was still on the concessions. So the fact that the third parties didn't write to Mr Marshall in 2015 is by the by. The Claimants have repeated this submission this morning as if they hadn't even read the evidence that makes it clear that this is a bad point.
As we explain in our skeleton, there was ultimately a retendering of the concessions. The concessions, once they are retendered, didn't go to the military, didn't go to entities connected with the military. That's just another conspiracy theory.
So, as I said at the beginning of my opening, once one understands and analyses the story, one can readily see that there simply isn't anything in this case.
There's no expropriation or anything like it.
NRD had every opportunity to make well-founded applications for licences. The government was generous in giving them opportunities. The government looked fairly and objectively at all the applications that were made. And the applications fell far, far short of making the grade, as Mr Marshall should always have known they would, because he was told of the problems at the outset when he bought in, and he thereafter did nothing to improve the problems or conduct further exploration or further industrialisation that would have enhanced the position.

As we explain in our skeleton, there was ultimately a retendering of the concessions. The concessions, once they are retendered, didn't go to the military, didn't go to entities connected with the military. That's just another conspiracy theory.
So, as I said at the beginning of my opening, once one understands and analyses the story, one can readily see that there simply isn't anything in this case.
There's no expropriation or anything like it.
NRD had every opportunity to make well-founded applications for licences. The government was generous in giving them opportunities. The government looked fairly and objectively at all the applications that were made. And the applications fell far, far short of making the grade, as Mr Marshall should always have known they would, because he was told of the problems at the outset when he bought in, and he thereafter did nothing to improve the problems or conduct further exploration or further industrialisation that would have enhanced the position.

Page 158

Page 157

Page 159

Page 160
Mr Cowley suggested this morning that the co-conspirators might not have been. We don't even accept that. But in any event, that point is irrelevant. Mr Imena was acquitted. Mr Cowley, on being asked about that, the best he could put it was that he didn't really know and he wanted to look a bit more at the documents. Well, he should simply not be advancing allegations essentially insinuating that Mr Imena was guilty of criminal charges when the evidence shows he was acquitted and Mr Cowley cannot suggest otherwise. That allegation should be withdrawn, and that should happen at some stage this week, in my submission. Just before I move to the second allegation, I didn't give you a reference to the point I made a little earlier about the tender process. It's paragraph 11 of their pre-hearing brief. The other allegation that I would like to mention now is an allegation in the Claimants' evidence, which we suggest is simply untrue, that Mr Marshall received indirectly, via Ms Mruskovicova, a warning from a Rwandan senior policeman that he had angered some dangerous people and his life was in danger. We suggest that is simply untrue. But worse than that, we now see in the Claimants' skeleton, giving the references to our Rejoinder and our Memorial on Preliminary Objections.

skeleton that even this serious allegation has now been distorted to become something even more serious. And if I could just invite you to read what's said at paragraph 11 of the skeleton in the last sentence and what's said in paragraph 44 in the second sentence. These are extremely serious allegations. They are untrue. They are unsupported by any evidence, because the evidence that is given -- and we suggest that that is itself untrue -- which is in the witness statements, it doesn't establish or come close to establishing the propositions advanced in paragraphs 11 and paragraph 44. Again, this is the opposite of taking the kind of care that the Claimants should be taking with extremely serious allegations of this kind. It's inappropriate, it shouldn't have happened. And what's more, this allegation doesn't even form any proper part of the claim in this case. It's not relied on as a breach of the bilateral investment treaty. And we, on our side, don't consider it appropriate for our side even to be required to spend material amounts of time addressing this allegation that falls outside any proper claim that can be advanced. That's what I wanted to say on the substantive merits points. We've also dealt at length in our memorials with the legal analysis, and we've summarised...
place long before the cut-off date. The Claimants knew all about them because NRD -- or Mr Marshall -- was in fact complaining vociferously at the time. We say his complaints were tendentious and without merit, but it's impossible for the Claimants to suggest they weren't fully aware of the matters complained of. They were even complaining at the time that there was a breach of treaty obligations and expropriation by the government. The second area of preliminary objection relates to standing. And in terms of this week's focus, I particularly pick up on the BVG points, because we say BVG simply has no standing because it has no interest in NRD or in Spalena. We'll be spending a little time with Mr Marshall on the Claimants' allegations that BVG somehow did acquire a sufficient interest in NRD as a result of money allegedly lent to NRD under this cooperation agreement, or out of alleged claims that NRD had against BVG out of that agreement, or out of alleged transfer of assets to NRD. Even leaving aside all the legal problems that arise with the way the Claimants' case is put, we suggest that the facts and the evidence relied on for all those points involve a high degree of invention on the Claimants' part, which we will be exploring. The third area of objection relates to the lack of jurisdiction ratione materiae, which we address at paragraphs 67-72 of our skeleton. And for this week, we will be particularly inviting the Tribunal to pay particular regard to the evidence showing the complete lack of any relevant investment or substantial contribution to Rwanda's economic development by the Claimants. Spalena acquired NRD for $[redacted]. You will see at times the Claimants seeking to give the false impression that the investment purportedly made by Starck prior to the arrival of the Claimants was in some way the Claimants' only investment. You'll see an example of this, just to pick up the pre-hearing brief again, at paragraph 35. You see in the middle of this paragraph: "Contemporaneous documents demonstrate that Claimants invested at least €13 million by the end of 2010 ..." By the end of 2010, of course, the Claimants' hadn't; they only acquired NRD for $[redacted] at the end of 2010. That €13 million figure is not a reference to any investment by the Claimants. That is the figure that I said was the Starck and Zarnack -- although in practice almost all Starck -- investment in the prior period, which, as I said, was a third of the amount.
### Day 1 -- Hearing on Jurisdiction and the Merits

**ICSID Case No. ARB/18/21**

**Monday, 21 June 2021**

<table>
<thead>
<tr>
<th>Page 169</th>
<th>Page 171</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>17:43</strong></td>
<td><strong>17:59</strong></td>
</tr>
<tr>
<td>an opportunity to supplement their evidence with</td>
<td>connection with Zoom. I did not understand that when</td>
</tr>
<tr>
<td>evidence-in-chief, but we hope that this doesn't</td>
<td>I said it was being sent now, that it hadn't been</td>
</tr>
<tr>
<td>foreshadow that the Claimants are going to seek to use</td>
<td>completed yet. It wasn't completed during the</td>
</tr>
<tr>
<td>evidence-in-chief to advance extensive new evidence</td>
<td>[opening]; it's being completed now. Mr Harrison will</td>
</tr>
<tr>
<td>that's never been notified to us. We submit that would</td>
<td>stay offline and stay off the Zoom until it goes out.</td>
</tr>
<tr>
<td>not be an appropriate use of their time.</td>
<td><strong>THE PRESIDENT:</strong> Very well.</td>
</tr>
<tr>
<td>I would also add that we would ask Mr Cowley or</td>
<td>Let's continue then with Mr Marshall.</td>
</tr>
<tr>
<td>Mr Harrison, whoever is doing the evidence-in-chief, to</td>
<td>(6.00 pm)</td>
</tr>
<tr>
<td>please avoid putting leading questions to elicit</td>
<td><strong>MR RODERICK MARSHALL (called)</strong></td>
</tr>
<tr>
<td>evidence-in-chief. It goes without saying that the same</td>
<td><strong>MR COWLEY:</strong> Mr Marshall, I would like to ask you to</td>
</tr>
<tr>
<td>applies to re-direct. And if there are any leading</td>
<td>introduce yourself to the Tribunal and, in addition to</td>
</tr>
<tr>
<td>questions, we will -- I just put down a marker -- be</td>
<td>introducing yourself by name, can you provide for the</td>
</tr>
<tr>
<td>inviting the Tribunal to discount any evidence that's</td>
<td>Tribunal a brief explanation of the background of your</td>
</tr>
<tr>
<td>elicited in that way.</td>
<td>professional career?</td>
</tr>
<tr>
<td>So unless I can help further, that's what I wanted</td>
<td><strong>THE PRESIDENT:</strong> Yes, Mr Marshall first of all has to make</td>
</tr>
<tr>
<td>to say by way of opening.</td>
<td>a declaration.</td>
</tr>
<tr>
<td><strong>THE PRESIDENT:</strong> Thank you very much. As I read the</td>
<td><strong>MR MARSHALL:</strong> I solemnly declare upon my honour and</td>
</tr>
<tr>
<td>timetable, you are half an hour ahead of your</td>
<td>conscience that I shall speak the truth, the whole</td>
</tr>
<tr>
<td>allocation.</td>
<td>truth, and nothing but the truth.</td>
</tr>
<tr>
<td><strong>MR HILL:</strong> Well, I've got a lot to get through with</td>
<td><strong>THE PRESIDENT:</strong> Thank you.</td>
</tr>
<tr>
<td>Mr Marshall, so I'm delighted.</td>
<td>You can carry on with the direct.</td>
</tr>
<tr>
<td><strong>THE PRESIDENT:</strong> Very well. I don't know whether Mr Marshall</td>
<td><strong>MR COWLEY:</strong> Thank you, your Honour.</td>
</tr>
<tr>
<td>is immediately available.</td>
<td>(6.01 pm)</td>
</tr>
<tr>
<td><strong>MR HILL:</strong> Also, I should say, I would be happy if everyone</td>
<td>Direct examination by MR COWLEY</td>
</tr>
<tr>
<td>wants to stop for ten minutes to organise --</td>
<td><strong>MR COWLEY:</strong> Mr Marshall, please introduce yourself to the</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page 170</th>
<th>Page 172</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>17:44</strong></td>
<td><strong>18:01</strong></td>
</tr>
<tr>
<td>THE PRESIDENT: Shall we have a ten-minute break? I think</td>
<td>Tribunal and, in addition to introducing yourself by</td>
</tr>
<tr>
<td>that would be very welcome. Thank you very much.</td>
<td>name, please give a brief explanation of the background</td>
</tr>
<tr>
<td>(5.44 pm)</td>
<td>of your professional career.</td>
</tr>
<tr>
<td>(A short break)</td>
<td><strong>A.</strong> My name is Roderick Marshall. I, as a young lawyer,</td>
</tr>
<tr>
<td><strong>MR HILL:</strong> Mr President, while [the witness] is coming in,</td>
<td>moved to Slovakia in the Czech Republic when socialism</td>
</tr>
<tr>
<td>can I just say I'm afraid we still haven't had the</td>
<td>collapsed. I was with a larger firm at that time. We</td>
</tr>
<tr>
<td>Ehlers email. As I understood from the application, it</td>
<td>started advising -- in fact, we were the -- I was the</td>
</tr>
<tr>
<td>was one email with one attached document, and I really</td>
<td>only resident lawyer in Slovakia at that time. There</td>
</tr>
<tr>
<td>struggle now to see why we haven't got it.</td>
<td>were many foreign lawyers in Prague, but only me in</td>
</tr>
<tr>
<td><strong>THE PRESIDENT:</strong> Mr Cowley?</td>
<td>Slovakia.</td>
</tr>
<tr>
<td><strong>MR COWLEY:</strong> Apologies, my understanding is Mr Harrison is</td>
<td>Their biggest problem: they did not have experience</td>
</tr>
<tr>
<td>sending it now. When we were talking before --</td>
<td>of anything to do with the markets, sort of common-sense</td>
</tr>
<tr>
<td>Mr Harrison, like I said, is here with me. Just by way</td>
<td>things that you and I might automatically take for</td>
</tr>
<tr>
<td>of brief explanation, the way our system works, we can't</td>
<td>granted. Their desperate need was for liquidity. They</td>
</tr>
<tr>
<td>be on a Zoom call, we can't be on anything that requires</td>
<td>started a series of financing Slovak Republic -- even</td>
</tr>
<tr>
<td>out-of-office connection, like working from home,</td>
<td>more so when they split from the Czech Republic, end of</td>
</tr>
<tr>
<td>working in a conference room, and be on Zoom. It will</td>
<td>2012, I guess.</td>
</tr>
<tr>
<td>not hold.</td>
<td><strong>So I was -- with only limited background in</strong></td>
</tr>
<tr>
<td>So to be on here and present, you know, attending,</td>
<td>sovereign debt financing, began working with a very</td>
</tr>
<tr>
<td>and to be on the network are two different things. So</td>
<td>senior partner from my then law firm, which was Squire,</td>
</tr>
<tr>
<td>while we're going, once we started up again, he hadn't</td>
<td>Sanders &amp; Dempsey. We provided that service for the</td>
</tr>
<tr>
<td>hit send yet; he had to stop and go back on to the</td>
<td>Slovak Government. There were some conflicts between</td>
</tr>
<tr>
<td>system. My apologies, but we are in our office, but we</td>
<td>the Slovak Government and our law firm, and we split off</td>
</tr>
<tr>
<td>have to maintain a separateness in order to maintain</td>
<td>and we continued performing sovereign debt financing for</td>
</tr>
<tr>
<td><strong>THE PRESIDENT:</strong> (5.57 pm)</td>
<td>the Slovak Government.</td>
</tr>
</tbody>
</table>

46 (Pages 169 to 172)

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
Q. How long did a relationship with Rwanda regarding such

A. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes.

Q. How long did a relationship with Rwanda regarding such

A. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.

Q. In 2003 the market in Slovakia was changing. I was approached by USAID, because we're a very small firm and could provide the sovereign debt financing services cheaply, to provide -- to offer to provide it to Rwanda.

So at the urgency, as I say, of the State Department and USAID, I met with, first, a group of Rwandans in a delegation in Boston. They asked me to come and visit. I visited. We began providing them with pro bono ad hoc assistance on sovereign debt issues.

And at that same time --

Q. Mr Marshall, you've only got ten minutes, so I suggest you don't spend too long in Slovakia.

A. Yes, thank you for that.
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21  Monday, 21 June 2021

18:09 1 president, I can't say for sure. But that company went 18:11 1 evidence on the relationship between Spalena and
2 inactive when the project was over. 2 Bay View Group.
3 Q. You are responsible for giving instructions on behalf of 3 A. Can you make them bigger?
4 both Claimant companies to the Claimants' lawyers in 4 Q. I may have given you a wrong reference, Mr Marshall.
5 this arbitration, Duane Morris; yes? You've given the 5 Can you just tell us what you say the relationship
6 instructions? 6 is between Spalena and Bay View, bearing in mind that
7 A. Primarily. 7 Spalena was incorporated before Bay View?
8 Q. And you presumably read and approved the Claimants' 8 A. Yes, yes. No, it was a question of the circumstances
9 various memorials in this arbitration before they were 9 forced on us by Rwanda that we followed through this
10 served? 10 pattern of changes. Bay View Group was the holder of
11 A. Yes, I believe I did. 11 Bisesero, okay?
12 Q. So that would be the Claimants' Memorial, the Reply 12 Q. Carry on, yes.
13 Memorial and their Counter-Memorial on Preliminary 13 A. Bay View Group was the holder of the Bisesero licence.
14 Objections; yes? 14 It was registered in Rwanda not as a Rwandan corporation
15 A. As far as I recall, yes. 15 but as a Delaware corporation licensed to do business in
16 Q. And in each case you were satisfied that the factual 16 Rwanda.
17 version of events that was set out was the version of 17 Q. Well, just going back to paragraph -- if FTI could look
18 events that you wanted to give to the Tribunal in this 18 at paragraph 6:
19 arbitration; yes? 19 "Spalena is an investment vehicle of [the] Bay View
20 A. Yes. If you're implying somehow that there was 20 Group..."
21 an error, I'm not aware of it. 21 Now, that suggests that Spalena is in some way under
22 Q. Now, The Spalena -- I apologise if my pronunciation 22 the control and owned by the Bay View Group. What do
23 isn't right, but I've called it "Spalena" -- 23 you say is the shareholding relationship between Spalena
24 A. "Spalena". 24 and Bay View?
25 Q. -- Spalena Company was a company incorporated in 1998:

Page 177

Page 178

18:10 1 yes?
2 A. Yes.
3 Q. Bay View incorporated in 2007; yes?
4 A. Yes.
5 Q. Your Memorial --
6 A. That's my recollection.
7 Q. Sorry, I didn't mean to cut across.
8 A. That's my recollection, yes.
9 Q. Your Memorial suggests -- Claimants' Memorial suggests
10 at paragraph 7 (sic) that Spalena is "an investment
11 vehicle of [the] Bay View Group". But Spalena was in
12 fact formed before Bay View and isn't any kind of
13 subsidiary of that group, is it?
14 A. Well, I have to unpack what you just said.
15 Q. Well, why don't you unpack what your Memorial says. Do
16 you want to look at it? I'm sure it can be brought up
17 on the screen. Paragraph 7.
18 A. Yes, but you're using a defined term by saying it was
19 an investment vehicle of -- sorry, Spalena was
20 an investment vehicle of Bay View Group, right? So
21 I don't know when it was ... I can give you
22 an explanation of the dates, of the approximate dates of
23 what occurred when, if that's what you're -- without
24 being able to --
25 Q. I just want to understand, making sure I've got your

Page 179

Page 180

18:13 1 okay? And when -- I don't. you know, want to -- I need
2 to explain to you the background, because otherwise, you
3 know, you're presuming an answer that isn't necessarily
4 correct.
5 Q. Spalena is an investment vehicle of Bay View Group
6 in the sense that Bay View's assets were contributed to
7 Spalena. We had no choice. That was forced on us by
8 the Rwanda Government.
9 Q. Who owns Spalena? Who owns Bay View?
10 A. It's a group of US investors that are the same in both
11 cases.
12 Q. You're saying the same investors own both; yes?
13 A. Yes.
14 Q. We'll come back to that.
15 A. I don't know that that's always been the case, but yes.
16 Q. Can we just look at paragraph 15 of your first witness
17 statement. (Pause)
18 A. This is in a section -- if FTI could just go back
19 a page to see where the section starts. We've got
20 a section entitled "BVG became a Concession Holder and
21 subsequently invested in NRD".
22 A. Yes, through Spalena.
23 Q. Yes.
24 Now, you then get to paragraph 15 of this witness
25 statement. So you're dealing with the question of BVG

48 (Pages 177 to 180)
18:15
1. investing in NRD, and you say:
2. "At the end of 2010, BVG's investors invested in
3. Spalena, so that Spalena had capital to acquire the
4. shares of the parent of NRD. BVG's investors did so in
5. order to continue investing in Rwanda's mining industry.
6. In this way, BVG invested in Spalena, which invested in
7. NRD, which served as the local Rwandan investment
8. vehicle ... BVG and Spalena are commonly owned
9. affiliates. BVG and Spalena then capitalized and funded
10. NRD's liabilities and expenses in order to develop and
11. operate the mining concessions."
12. Do you see that?
13. A. Yes.
14. Q. You were not suggesting in your first witness statement
15. that BVG had any shareholding in Spalena, were you?
16. A. I don't know what you mean. In my first witness
17. statement?
18. Q. In this paragraph you are not suggesting that BVG had
19. any holding in Spalena? The point you're making there
20. is the point, in fact, I think you just made orally that
21. you have common investors: investors of BVG also own
22. Spalena?
23. A. I'm not following you. It says:
24. "... BVG's investors invested in Spalena ..."
25. Q. Yes.

Page 181

18:16
1. A. You're saying it's not that, or what do you mean?
2. Q. No, I'm not at this stage taking issue with your
3. proposition that the same investors own BVG and own
4. Spalena. I'm trying to establish whether you are saying
5. that BVG has a stake in Spalena. And you are not saying
6. that in this paragraph, are you?
7. A. I am saying that in this paragraph.
8. Q. Well, where?
9. A. "... BVG's investors invested in Spalena ..."
10. Q. Yes, but BVG didn't. That's your point: they have
11. common investors. But BVG, on your evidence, has no
12. interest in Spalena.
13. A. (Laughs) I'm sorry, I shouldn't -- yes, I think you're
14. misinterpreting the meaning of that.
15. Q. Well, I'm making what looks like --
16. A. In this way, the second sentence says -- third sentence:
17. "In this way, BVG invested in Spalena, which
18. invested in NRD ..."
19. Q. But "In this way" results from saying, "BVG's investors
20. invested in Spalena". There's no evidence from you
21. about BVG taking any stake in Spalena, is there?
22. A. They had to. We were forced to. We had no choice.
23. Q. If you had considered that BVG had itself any direct
24. interest in Spalena, you would have explained that in
25. this witness statement, wouldn't you?

Page 182

18:18
1. A. No, I think you're misrepresenting it.
2. Q. Well, I'm just reading your statement, in a section --
3. A. "... in this way, BVG invested in Spalena ...
4. Q. I don't think -- I mean, that's pretty clear, right?
5. Q. Well, it's clear. But "In this way" is "BVG's investors
6. invested in Spalena": that's what the first line says.
7. A. Well, I don't read it that way.
8. Q. Well, tell me how you read "BVG's investors invested in
9. Spalena"?
10. A. Well, I would have -- obviously the intention, maybe not
11. to you now, but it was always understood in Rwanda that
12. BVG's assets all got contributed to Spalena, because BVG
13. could no longer function because they were denied the
14. possibility of continuing to be a foreign investor
15. operating in Rwanda. So when we lost that possibility,
16. we had to transfer the assets of BV -- BVG had to
17. transfer the assets to Spalena; and in exchange for
18. that, they became an investor in Spalena.
19. Q. If you think that's inartfully worded, I'm sorry for
20. it. But that's not -- you're -- I'm not going to
21. understand it the way you read it, the way you said you
22. read it.
23. Q. What has in fact happened is that had you considered --
24. sorry, I'll start my question again.
25. Had you considered that BVG did have a direct

Page 183

18:19
1. interest in Spalena, you would have mentioned that in
2. your witness statement, wouldn't you?
3. A. I'm sorry, ask me again. I missed that.
4. Q. Well, Mr Marshall, you're a lawyer dealing in commercial
5. transactions and an intelligent man. You know precisely
6. what I mean when I refer to direct shareholdings. Had
7. you thought that BVG had an interest in Spalena, you
8. would have mentioned that in this witness statement,
9. wouldn't you?
10. A. That's what it said:
11. "... BVG invested in Spalena ..."
12. Q. You recall, don't you, that in May 2019 the Respondent
13. in this arbitration filed a Memorial on Preliminary
14. Objections in which it identified a number of
15. preliminary objections to the Claimants' case, and one
16. of the preliminary objections was that BVG was not
17. an investor in NRD and did not have standing? Do you
18. recall that?
19. A. No.
20. Q. You don't recall that?
21. A. No.
22. Q. Well, in August 2019 the Claimants filed a memorial in
23. response, and that was accompanied by your supplemental
25. If we could go to that statement, we have a section
18:20  1 headed "BVG's Investment in NRD and Control of BVG". Do
  2 you have that? It starts at paragraph 3. I'm just
  3 taking you to your own -- this is your supplemental
  4 witness statement of 16th August.
  5 MR BRODSKY: Thank you. I have two here.
  6 MR HILL: It's the first one, not the second supplemental.
  7 That's it.
  8 MR BRODSKY: Thank you.
  9 MR HILL: Starting at paragraph -- we can start with page 2,
 10 thank you.
 11 So you've got a section headed "BVG's Investment in
 12 NRD and Control of NRD", and you make two points in this
 13 section.
 14 Actually, FTI, don't blow it up, if you would,
 15 unless someone else asks. Can you not blow it up,
 16 because I think it's easy to read.
 17 A. No, it's not. I can't --
 18 Q. Well, I'm going to ask you to look at two pages. Do you
 19 have a small screen which means you can't read it?
 20 A. I don't know. It's micro-print right now.
 21 Q. Alright. In that case, perhaps blow up paragraphs 4 and
 22 5, if FTI can do that.
 23 MR BRODSKY: Simultaneously, it will still be a little bit
 24 small, if they're both on screen at the same time.
 25 MR HILL: Well, at paragraph 4 and paragraph 5 you deal with

Page 185

18:22  1 a claim that you say BVG had against NRD. Perhaps FTI
  2 could blow up [paragraph] 5. It's your witness
  3 statement, so I hope you're reasonably familiar with it.
  4 (Pause)
  5 So you say in those paragraphs that there's this
  6 claim that BVG had against NRD.
  7 Then if FTI could go to paragraph 6. You say there
  8 that the claim was written off and assigned to Spalena.
  9 So that's the first point you make: you've got this idea
 10 of a claim that was written off.
 11 Then you say at paragraph 7 that BVG had assets
 12 totalling $2.25 million, which it transferred in
 13 exchange for an ownership stake.
 14 So that's what you're saying in your supplemental
 15 witness statement. Both of those points were relied on
 16 in the Claimants' Memorial in Response to Preliminary
 17 Objections.
 18 Now, my question -- and I'm just reminding you of
 19 your witness statement -- my question to you is that
 20 neither of these points featured at all in your first
 21 witness statement that you filed in support of the claim
 22 in this arbitration, did they?
 23 A. I don't know.
 24 Q. Well --
 25 A. You'll have to show me that --

Page 186

18:24  1 Q. -- we looked at your first witness statement, where you
  2 dealt with the topic of BVG investing in NRD, and
  3 neither of the points that you make in your supplemental
  4 witness statement feature at all in your first witness
  5 statement, do they?
  6 A. I'm sorry, you're going to have to show me back where
  7 you're --
  8 Q. No, please do. If you could be shown again first
  9 witness statement, paragraphs 13, 14 and 15.
 10 Do you have a hardcopy witness statement with you or
 11 not? Do you have your own witness statements?
 12 A. No.
 13 Q. Okay.
 14 Paragraphs 14 and 15. There, just leave it like
 15 that. Mr Marshall can say if he can't read it.
 16 A. No.
 17 Q. I wonder if over the course of the next day or two --
 18 Mr Marshall, are you in the Duane Morris offices or not?
 19 A. Yes.
 20 Q. I wonder if he could be given a bigger screen, because
 21 it's enormous on my screen. And we've got a lot of
 22 documents to get through and I do need to be able to
 23 pull up a page. Are you on a small laptop screen or
 24 something?
 25 A. I think this is FTI, this is not Duane Morris's screens.

Page 187

18:25  1 Q. But is it a small laptop screen that you're on?
  2 A. Yes, but sideways.
  3 Q. Well, if FTI could, in turn, blow up paragraphs 14 and
  15. Thank you.
  5 So nowhere do you make either of the two points that
  6 you see in your supplemental witness statement, do you?
  7 A. You mean I don't talk here about what those assets --
  8 where it says, "BVG's investors did so in order to
  9 continue investing in Rwanda's mining industry", but it
 10 doesn't list them here; is that what you mean?
 11 Q. It doesn't really say anything, does it? You have made
 12 points in your supplemental witness statement that
 13 simply aren't there in your ...
 14 A. Well, you're character -- I mean, as I understand it,
 15 you're saying that means that it didn't happen. But
 16 this language, to me, what it was intended to say was
 17 that investment was made.
 18 Q. Now, let's go back to paragraphs 4 and 5 of your
 19 supplemental witness statement. I'm going to suggest to
 20 you that you've come up with the versions of events in
 21 this statement in order to meet the Claimants' objections, their preliminary objections. Do you want
 22 to comment on that now or shall we do so afterwards?
 23 You've come up with a version of events that BVG has
 24 a stake in Spalena, haven't you?

Page 188

50 (Pages 185 to 188)

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
18:27  1 A. I'm sorry, I've lost the thread here.
  2 Q. You've come up with this version of events that BVG has
  3     a stake in Spalena, haven't you?
  4 A. I understood that you said that, but where am I looking
  5     at, or where --
  6 Q. I'm asking you. I'm just asking you.
  7 A. Did I, in order -- no. The events on the ground drove
  8     what happened to us and why we had to contribute BVG's
  9     assets to Spalena.
 10 Q. Let's start with paragraphs 4 and 5.
 11 A. We had no choice.
 12 Q. Let's start with paragraphs 4 and 5. So you say that
 13     there was this cooperation agreement between NRD and BVG
 14     on 1st November 2010; that's your evidence, yes?
 15 A. I think that's the evidence in the trial, yes.
 16 Q. Then you say it involved NRD working on the Bisesero
 17     concession; yes?
 18 A. Jointly, yes.
 19 Q. And you say
 20     ; yes?
 21 A. NRD borrowed, yes.
 22 Q. And you say that in the period prior to the acquisition
 23     agreement from Starck -- so this is a seven-week
 24     period -- Is that what
 25     you're saying?
 26 A. Yes, but you're mischaracterising it by phrasing it that
 27     way, I think.
 28 What had happened was we started this cooperation
 29     agreement really in, I would say, mid-September, and it
 30     carried on -- it was not documented until November 1st
 31     by Ehlers, with whoever he, on his NRD board, had to get
 32     permission from. Whether it was a tacit permission
 33     before, I don't know on what basis they were operating,
 34     if they didn't have it authorised before. But it was
 35     memorialised in the November 1st agreement.
 36 Q. Now, this cooperation agreement didn't feature at all in
 37     the Claimants Memorial or in your witness statement; do
 38     you accept that?
 39 A. Didn't feature where?
 40 Q. At all in Claimants' Memorial or your first witness
 41     statement.
 42 A. I don't -- I would have to go through it to see.
 43 Q. Are you able to explain why?
 44 A. I didn't even know it wasn't there, so I can't explain
 45     why.
 46 Q. Your current case in this arbitration is that
 47     amounted to an investment in
 48     NRD. But we saw your witness statement: your first
 18:30  1 witness statement had a whole section of BVG's
 2     investment in NRD, and there's no mention at all of
 3     a , is there?
 4 A. I would be surprised if it isn't there.
 5 Q. You would be surprised if it ...?
 6 A. Is not there.
 7 Q. Well, it's not there.
 8 A. Okay.
 9 Q. And the reason it's not there is because there was no
10     ?
11 A. That's simply not true.
12 Q. Your current case also suggests that there is an alleged
13     Again, if those liabilities had
14     truly existed, they would have been mentioned too in
15     your first witness statement, wouldn't they?
16 A. No, they wouldn't, necessarily.
17 Q. Coming back to C-122, if we could look at this
18     cooperation agreement document, if FTI could bring that
19     up. We can see from the third line of this document
20     that on the face of this agreement, this is NRD and BVG
21     agreeing to cooperate in the management of the Bisesero
22     concession; that's right, isn't it?
18:33 Q. That's presumably because BVG needed to borrow those
from NRD because it didn't have its own; yes?
A. No.
Q. Well, you can see the whole scheme in paragraph 2 of NRD
having to provide --
A. I agree that's what it says, but the function was not
because we didn't have it. We had different kinds of
speciality equipment, which is why he needed our
speciality equipment as well. It was a benefit to him
at the same time.
Q. And you can see at paragraph 3, at the end, that:
"NRD [is to] loan enough machinery and equipment for
minerals to be processed on site ..."
So in other words, BVG is dependent on the loan from
NRD and sufficient equipment to enable minerals to be
processed?
A. Yes, but that -- again, you know, the way -- these
concessions are large areas and there are different
deposits at different places, and Bigugu had what they
had identified was a very promising deposit. And
instead of shifting equipment from somewhere else on our
concession, we agreed that it would be better to bring
in new equipment just for Bigugu.
Q. Now, NRD is, under this agreement, represented by
Mr Ehlers, the managing director, on the face of this
board, or I don't know what authorisation process he had
at NRD internally.
What we were doing was we were running the two
concessions jointly. NRD had substantially more
equipment. They had the plant, which was nearing
completion at that time. They had a lot of staff, a lot
of mining minerals expertise, which was a great boon for
us, since we could cooperate. They needed some of our
equipment for operating the plant. They needed our
staff, who had different kinds of relationships with
different people. And so it was a real cooperation.
This is Anthony Ehlers's attempt to memorialise it
for his board, for our --
Q. Take it in stages. What clearly is involved is that NRD
is going to be conducting, managing the Bisesero
concession, isn't it?
A. That was -- no, it was cooperation in running of it.
It's not like we left and he came in and ran it. That's
a complete misunderstanding.
Q. And it involved lending BVG NRD's bulldozer, wheel
loader and tipper trucks; yes?
A. Yes.
Q. And it involved purchasing equipment with a loan from
BVG; yes?
A. Yes.
Q. When you put this document in in this arbitration, you
didn't say that this was not in fact Mr Ehlers's
signature, did you?
A. I'm sorry, that would never even occur to me. If you
put somebody's name/somebody else's initials, that
suggests, I think universally, that that's not his
signature, but it's authorised by him to sign.
Q. Just explain that again. So you consider that this is
not representing to the reader that this is Mr Ehlers's
signature?
A. No, it is representing to the reader that Mr Ehlers
authorised it and had somebody else sign it because he
wasn't there, or whatever the circumstances were on that
day.
Q. You're a lawyer by profession, Mr Marshall. You don't
really think, do you, that this was telling the reader
that this is not Mr Ehlers's signature but that it's
something else?
A. 100%. If you put somebody's name/somebody else's
 initials, that means somebody else signed it on their
behalf.
Q. I suggest you don't really think that, do you?
A. I suggest you're sorely mistaken. Maybe it's a British
practice which is not the same in the United States.
I don't know any lawyer who wouldn't assume that there
was something that they need to look at with regard to
that signature.
Q. Paragraph 2 of this document refers to a
statement that this was in fact advanced,
I've never understood the convention otherwise.
Q. Paragraph 2 of this document refers to [redacted]. You have suggested in your witness
statement that this [redacted] was in fact advanced, and
that's not true, is it?
A. Yes, it was advanced.
Q. How was it advanced and by what means?
A. I don't recall. But I'm sure it was advanced.
Q. You were aware that the Respondent disputes this, and
you haven't produced a single piece of evidence to
suggest that this [redacted] was advanced, have you?
18:38 A. I don't know whether there's another exhibit which shows that it's been advanced or not. But I'm certain that it was advanced because I was involved in it. In fact, it was somewhat delayed, and Mr Ehlers and I got into a short spot about it; it had been a week late and he had been embarrassed.

Q. Mr Marshall, you're making it up, aren't you? You're making it up. Do you want to answer that? You're making this up.

A. I find that really condescending.

Q. Well, it's a question. Are you denying it?

A. I find it condescending and I'm denying it.

Q. If it had been advanced, you would have been able to produce a bank statement from BVG or some evidence of some kind to support this statement, wouldn't you?

A. No. What you've taken from our offices -- and this is the period -- and still, when your -- all of these documents would have been in our offices, and your client took them. So if we can get all those documents back, I guarantee you you'll be able to show them to you.

Q. Come on, Mr Marshall. You're not suggesting that whatever happened in the office in Kigali in 2014 would have prevented you, BVG, which is a Delaware company, from going to its bankers to establish proof of this?

18:40 A. It would not have been -- it was in -- no. I'm sorry, I think you're missing the essential aspects of how these transactions worked.

Q. The money would have been -- and I don't know which bank account because we had several, because of troubles and various issues going on. The money would have been in Rwanda. The money would have been transferred to Ehlers. He may have insisted on it in cash. Very rarely did you do bank-to-bank transfers.

A. You're suggesting there was a --

Q. You're suggesting there was a --

A. I know that this happened because of the argument that I had with Anthony Ehlers and had to apologise because it was some handful of days late.

Q. You're not suggesting there is a blank, are you?

A. No. It was paid in instalments, over the time as they needed it. We would not have given him blank.

Q. And you would have had no difficulty of getting evidence of this from BVG's bankers to validate this, would you, if it had been true?

A. No, you're again intimating facts that are not -- completely untrue.

Q. You see that NRD was obliged, under paragraph 2, to keep proper financial accounts of these transactions.

Page 197

18:41 Mr Sindayigaya was the senior accountant of NRD at the time; he was not aware of any of these liabilities.

A. You will have to take that up with Mr Sindayigaya.

Q. Mr Cowley can take it up with Mr Sindayigaya. What it demonstrates, doesn't it, is that these liabilities didn't exist; because if they did, NRD's senior accountant would obviously have been aware of them, wouldn't he?

A. Well, I think it's interesting that he calls himself a senior accountant. He was a bookkeeper and he should have been aware of it. My expectation was that he, in fact, would have handled it. For him to deny it is extraordinary and false.

Q. Now, you say at paragraph 5 of your witness statement that: [redacted] That is also something where you haven't identified a single document to establish the existence of this claim, correct?

A. No. I think we may have included it in the police report. That may have been still available from our office; if not from the office, from the police. You know --

Q. If this had been true, Mr Marshall, you would have been able to produce emails between you and NRD, or the controllers of NRD, saying, "Look, there's --

Page 198

18:43 [redacted].

Q. Not a single document has been produced by you to establish this assertion.

A. I don't know whether that's true or not. I know the facts were what the facts were. We had an inventory. Whether it was Mr Ehlers or somebody else -- we believed it was Mr Ehlers. Mr Ehlers committed several embezzlements and that was part of the reason that we fired him, including human trafficking and other things. So we were very, very upset. What we have been focused on, the given all of the other crimes that he was committing at that time, I'm not sure. I'm not sure.

Q. I'm not talking now about the. I'm talking now about what you say is [redacted] --

A. That was the inventory of our minerals in Bisesero, which we had not sold any.

Q. Mr Sindayigaya has heard nothing at all about this alleged claim for [redacted]; and again, he was a senior accountant.

A. Well, he was not a senior accountant, he was a bookkeeper. And he embezzled money, so we fired him.

Q. He also says, in his second witness statement, that it's impossible for that kind of

Page 200
18:44 1. That's correct, isn't it?
2. A. He's mistaken.
3. Q. Which bit is he mistaken about?
4. A. We began operations in Bisgern in 2007. We had -- in retrospect, I would not have stored them and kept them.
5. To me it was like money in the bank. But I believed them to be secure. They disappeared. Whether it was
6. Mr Ebers or Aime Sundayigaya himself, I don't know who
7. stole it. But we did not get the financial benefit from
8. those minerals.
9. Q. Can we look at the sale and purchase agreement between
10. you and Starek. This is C-068 at page 9.
11. A. Steve, this is subject to the non-disclosure agreement.
12. I don't know if there's some process you have to alert
13. somebody that this is subject to a non-disclosure.
14. Q. Let's look at page 9 and f).
15. MR COWLEY: May I ask the Tribunal that I could just
16. reassure Mr Marshall that there has been a process about
17. how to select out for public viewing those materials
18. that are considered confidential by the parties before
19. they become fully public.
20. MR HILL: So looking at f), you will see that:
21. Carry on.

18:48 1. ""
2. Q. "". Sorry, that is on page 12.
3. Again:
4. 
5. 
6. 
7. 
8. 
9. 
10. 
11. 
12. 
13. 
14. 
15. 
16. 
17. 
18. 
19. 
20. 
21. 
22. 
23. 
24. 
25. 

A. No, I don't believe so. I think this refers to only

Q. But . It's saying the target --

A. 

Q. If you go to the last page of the document, this is the
18:51 1 that arises by virtue of an alleged asset transfer from
2 BVG. Do you know what I'm talking about?
3 A. No.
4 Q. Well, your case is that BVG acquired an interest in
5 Spalena because there are assets from BVG, various bits
6 of plant and equipment, that were transferred from BVG
7 to NRD, giving rise to an interest in Spalena; yes? You
8 know that part of the case I'm talking about?
9 A. Yes.
10 Q. Now, can we go to C-123. This is a resolution from
11 7th March 2012.
12 A. 27th March.
13 Q. Yes, sorry, 27th March 2012. So before this document,
14 on any view, Bay View had no interest in Spalena; is
15 that right?
16 A. We were the same people. How do you mean? Bay View
17 Group as an entity? What was the liabilities of
18 Bay View Group versus Spalena?
19 Spalena was -- at the time of the purchase was
20 simply a shell. We wanted Bay View Group to buy the
21 parent of NRD. That would have been the Starek
22 transaction. Starek was aware that Dr Michael had, for
23 reasons we don't know, prohibited Bay View Group --
24 there was -- in 2011 there was an amendment to the
25 corporate laws of Rwanda: all companies had to

18:52 1 re-register. BVG, as a foreign company licensed to do
2 business in Rwanda, was not given that opportunity, and
3 we think it was part of his effort to push us.
4 So we suddenly, with the agreed-upon gentlemen's
5 agreement, BVG could no longer operate in Rwanda.
6 Q. I'm going to come back -- don't worry, you'll get
7 a chance to talk about that bit of the story later
8 because I'm going to come back to that. Let's just
9 focus on this resolution.
10 So this is a resolution from you, as president and
11 sole director of Bay View Group LLC. And we also have
12 the equivalent document for Spalena at C-124, if that
13 could be brought up.
14 A. Yes. Right.
15 Q. Now, were you aware -- and I'm sure you are, because you
16 read the memorials -- that the Respondent doesn't accept
17 the authenticity of these two documents?
18 A. I'm aware that they don't accept the authenticity of
19 almost everything we submitted.
20 Q. Now, the Respondent made its position clear in its
21 Rejoinder. If these had been genuine documents, there
22 would inevitably have been some contemporaneous
23 documents -- emails, drafts -- to demonstrate their
24 existence in March 2012, wouldn't there?
25 A. We were out of -- we had lost Bisese: the police had
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21

Monday, 21 June 2021

Anne-Marie Stallard
for Trevor McGowan
19:05 1 that's not at all an answer to my question. I want you
2 to focus on my question. 
3 A. Okay. 
4 Q. This material was not on site at Bisesero, was it, and
5 BVG did not have it to sell to NRD; correct? 
6 A. No. Some of it was on site and BVG did have it
7 available for sale to Spalena. 
8 Q. No, Mr Sindayigaya was at NRD until September 2012, 
9 nine months after the resolution that we've just been
10 looking at; and not only was he there at NRD, he also 
11 visited the Bisesero site on several occasions and he 
12 also says these assets were not there. And he is 
13 correct too, isn't he? 
14 A. No, he's not correct either. And he was suspended for, 
15 I think, maybe six months of that period, until the end 
16 of 2012. So he was not even in the office during that 
17 time. 
18 Q. There were some of these materials here. Which 
19 ones? I need to get a logistics guy in to say which 
20 ones were there and which ones were not. 
21 Q. He confirms that none of the trucks or heavy mining 
22 equipment that were listed were there, and he's right? 
23 A. No. 
24 Q. And perhaps more significant, he also confirmed that 
25 none of these assets were transferred to NRD. And he's 

19:06 1 right about that as well, isn't he? 
2 A. No. 
3 Q. Well, he would know, wouldn't he? 
4 A. No. 
5 Q. Well, of course he would, because he's doing the books 
6 for this company and he's going to know if all of this 
7 equipment is being transferred to NRD, isn't he? 
8 A. No, it was transferred to Spalena, and Spalena was 
9 transferring it to NRD. What he knew when, we were very 
10 disappointed in him. 
11 Q. This asset transfer never happened and these assets were 
12 never provided to NRD, were they? 
13 A. They were provided to NRD. 
14 Q. This is another invention for the purposes of this 
15 arbitration, isn't it? 
16 A. No, it isn't. 
17 Q. You haven't, in fact, produced any corporate 
18 documentation of either BVG or Spalena which suggests 
19 that BVG has an interest in Spalena, have you? 
20 A. Which BVG ... I thought we had. 
21 Q. Well, you haven't. 
22 Now, let's come back to the US investors. You say 
23 the same US investors are behind both Spalena and BVG. 
24 Who are these investors? 
25 A. Because of the death threats, I don't want to give their
19:09 Q. Well, that's what you were telling RDB, isn't it?
Answer
A. No.
Q. So the US investors are you?
Answer
A. No.
Q. Why were you telling RDB that?
Answer
A. I didn't.
Q. They've got it wrong, have they?
Answer
A. This letter is wrong, and they know it.
Q. That's exactly what you were telling RDB at the time, wasn't it?
Answer
A. No.
Q. I'm going to come on now to the acquisition by Spalena of NRD.
Answer
A. I'm happy to introduce all of the investors to the arbitration panel, but I don't want their names released.
Q. I'm going to come on to Spalena's entry into the NRD story following its acquisition in December 2010.
Answer
Before I do, I just want to ask you about some of your evidence that relates to the period before December 2010, so before Spalena got involved in buying NRD.
Q. You suggest at paragraph 6 of your witness statement that between 2003 and 2007, RDB representatives "urgently asked [you] to form a group and a have
Page 218

19:10 a recognizable US-owned mining investment in Rwanda".
Do you see that at paragraph 6?
Answer
A. Yes.
Q. That's not correct, is it?
Answer
A. Why?
Q. It's simply untrue.
Answer
A. No, that's true.
Q. Can we go to --
Answer
A. Hold on a second. Lambert and his staff were calling me certainly every week.
Q. Shall we go to R-100?
Answer
A. I'm sorry?
Q. Let's go to R-100. This is an email chain involving Ms Mruskovicova, who I know we'll be hearing from.
Can you go to the second page of this document.
Ms Mruskovicova says:
"Here are addresses which I found on internet. Please let me know if they are current or we need to update them. These are institutions we think the material should be send. Also probably to Williams, Alex and some other people in RIPA. I hope you are arround. Or should I ask somebody in RIPA? Please let me know what you suggest."
Then if we go over to the [previous] page, Mr Macyo responds:

Page 219

19:12 "Thank you for your email, i will sent you update email addresses, Tommorrow, some have changes. You will send the proposal with a signed transmission letter ..."
Then he explains what you have to do underneath that with regards to the consulate.
What we can see in this thread is that it is you pitching to the Government of Rwanda, and not the other way round; correct?
Answer
A. No.
Q. That's what was happening: you were making a pitch to the Government of Rwanda and getting the right email addresses to do so; yes?
Answer
A. No. Well, I can imagine that we were being told that this is the process that we needed to send the documents that they had prepared jointly with us to these entities. But this is not our initiative. This is the process as explained to us.
Q. Can you go to C-138. On your side, this is a document that you rely on to demonstrate that Rwanda were soliciting investments from you. This is the material you rely on. Now, this document comes after the email we've just been looking at.
Answer
A. This is 20 --
Q. Sorry, C-138. I think this might be R-138. If FTI can pull up C-138.
MR BRODSKY: My apologies.
MR HILL: That's alright.
So this is the document that your side rely on to demonstrate that Rwanda, you say, were soliciting investments from you or people connected to you, and it comes after the email we've just looked at. And in the third and fourth paragraphs, what's said is -- this is from Rwanda:
"Your proposition are very interesting but for the finalization of the joint venture process in short period, we ask you to send the offer of your company before the 30th September 2005. This includes your identification (certified copies), your experience in the mining industry, your investment plan and your action plan.
"In the preparation of your investment plan, take into consideration our proposition included in the terms of reference sent to you in April 2005. In other words, the investment plan should take into consideration the choice of equipment on the basis of rational methods applied in the research and mining and the treatment of ores."
Again, quite clear that it's you who has been promoting a proposal to Rwanda, and on the Rwandan side they're telling you which targets you need to hit; yes?
19:14  A. Well, I appreciate your interpretation of it, but that's not the way the process worked.

19:14  Q. Well, it's what's evident from the document, isn't it?

19:14  A. I don't know that it's evident from all the documents.

19:14  We -- as I recall, Lambert communicated after this letter to us saying, "Yes, yes, yes, that's the official process, but we need your investment, so here's how this is going to work", and it had nothing to do with this process.

19:14  Q. This is going to be a bit of a refrain, isn't it,

19:14  Mr Marshall, this idea that there are assurances from people which are not reflected in this document; is that right?

19:14  A. I don't know.

19:14  Q. Because the documents do not show any assurances of the kind that you seek to rely on, and in fact they're inconsistent with them.

19:14  A. I don't know that that's going to be the case.

19:14  Q. Shall we go to paragraph 7 of your witness statement now? You say that:

19:14  "The most significant aspect of their solicitation was that our investment in Rwanda would be strongly supported by the Government and State agencies, including guaranteed security for our future company's staff and property. The RDB took me to dozens of meetings with State officials who reassured me that RDB's representations were true and correct. They convinced me that Claimants' investment in Rwanda was so significant to Rwanda that the Government would gratefully work to ensure our business success."

19:14  A. Yes.

19:14  Q. We've seen the documents. It was you trying to seek support from Rwandan officials for your proposals, and you received none of these assurances, did you?

19:14  A. I understand that those are your conclusions from those select documents, but that's not what happened.

19:14  Q. Can we look at paragraph 8.

19:14  A. I'm sorry?

19:14  Q. Just give me one moment, Mr Marshall.

19:14  A. I'm sorry?

19:14  Q. Just give me one moment. (Pause)

19:14  A. I'm sorry?

19:14  Q. Just give me one moment. (Pause)

19:14  I'm just trying to understand what your evidence is.

19:14  Your last answer was to the effect that Rwanda had taken your documents, and that's why the material is not available. But your earlier answer -- and this is at the transcript at 19.15 (page 221) -- you say:

19:14  "[But] I don't know that it's [in evidence] from the documents ... Lambert communicated after this letter ... saying, 'Yes, yes, that's the official process, but we need your investment ...'"

19:14  Q. We're about to look at the contract. But it's right to so-called "assurances".

19:16  meetings with State officials who reassured me that RDB's representations were true and correct. They convinced me that Claimants' investment in Rwanda was so significant to Rwanda that the Government would gratefully work to ensure our business success."

19:16  A. Yes.

19:16  Q. We've seen the documents. It was you trying to seek support from Rwandan officials for your proposals, and you received none of these assurances, did you?

19:16  A. I understand that those are your conclusions from those select documents, but that's not what happened.

19:16  Q. Can we look at paragraph 8.

19:16  A. There were not just written communications, I think you appreciate; you know, not -- in addition to whatever has been taken by the government out of our offices. You're characterising a system which was never in practice in Rwanda; never.

19:16  Q. Well, when you say -- when you just said earlier "not in the documents that" -- one moment. (Pause)

19:16  Q. If you look at paragraph 8, you say:

19:16  "I was repeatedly assured that if I invested in a Concession, the Government of Rwanda would assure that I would receive a long term contract and be the statutorily-defined Concession Holder for 30 years with the possibility of an extension. I learned that all Concession Holders had received the same guarantee."

19:16  That's not true either, is it?

19:16  A. Yes, it is true.

19:16  Q. Just give me one moment, Mr Marshall.

19:16  A. I'm sorry?

19:16  Q. Just give me one moment. (Pause)

19:16  I'm just trying to understand what your evidence is.

19:16  Your last answer was to the effect that Rwanda had taken your documents, and that's why the material is not available. But your earlier answer -- and this is at the transcript at 19.15 (page 221) -- you say:

19:16  "[But] I don't know that it's [in evidence] from the documents ... Lambert communicated after this letter ... saying, 'Yes, yes, that's the official process, but we need your investment ...'"

19:16  Q. We're about to look at the contract. But it's right to so-called "assurances".

19:16  meetings with State officials who reassured me that RDB's representations were true and correct. They convinced me that Claimants' investment in Rwanda was so significant to Rwanda that the Government would gratefully work to ensure our business success."

19:16  A. Yes.

19:16  Q. We've seen the documents. It was you trying to seek support from Rwandan officials for your proposals, and you received none of these assurances, did you?

19:16  A. I understand that those are your conclusions from those select documents, but that's not what happened.

19:16  Q. Can we look at paragraph 8.

19:16  A. There were not just written communications, I think you appreciate; you know, not -- in addition to whatever has been taken by the government out of our offices. You're characterising a system which was never in practice in Rwanda; never.

19:16  Q. Well, when you say -- when you just said earlier "not in the documents that" -- one moment. (Pause)

19:16  Q. If you look at paragraph 8, you say:

19:16  "I was repeatedly assured that if I invested in a Concession, the Government of Rwanda would assure that I would receive a long term contract and be the statutorily-defined Concession Holder for 30 years with the possibility of an extension. I learned that all Concession Holders had received the same guarantee."

19:16  That's not true either, is it?

19:16  A. Yes, it is true.

19:16  Q. Just give me one moment, Mr Marshall.

19:16  A. I'm sorry?

19:16  Q. Just give me one moment. (Pause)

19:16  I'm just trying to understand what your evidence is.

19:16  Your last answer was to the effect that Rwanda had taken your documents, and that's why the material is not available. But your earlier answer -- and this is at the transcript at 19.15 (page 221) -- you say:

19:16  "[But] I don't know that it's [in evidence] from the documents ... Lambert communicated after this letter ... saying, 'Yes, yes, that's the official process, but we need your investment ...'"

19:16  Q. We're about to look at the contract. But it's right to so-called "assurances".

19:18  or that there were documents that have been lost?

19:18  A. I think my memory -- if my memory is correct, I was just looking at that document yesterday or the day before.

19:18  Lambert says, "Yes, you know, there is this process, but what you need to do is just to write the head of the Privatisation Ministry and the process will be finished for you".

19:18  Q. There are no documents suggesting any assurances given and there were in fact no assurances given; that's correct, isn't it?

19:18  A. No.

19:18  Q. Let's go back now to the acquisition of NRD. One of the things you did, when considering whether to acquire the company, was to review the contract between Rwanda and NRD relating to the concessions; correct?

19:18  A. That's the November --

19:18  Q. Yes. One of the things you did when you were thinking of acquiring NRD was review the contract relating to the concessions: that's the November 2006 contract?

19:18  A. Yes.

19:18  Q. Just to place this in time, we're talking about a November 2006 contract and then an acquisition by you in December 2010; yes? Four years later.

19:18  A. That's correct.

19:18  Q. We're about to look at the contract. But it's right to
Q. You don't know what --
A. No.
Q. You don't know what NRD expected, and you didn't yourself have any assurance of a long-term concession, did you?
A. We all had the same understanding of that contract. That's what we were told it represented.
Q. Can you go to paragraph 19 of Mr Gatare's witness statement.
A. Sorry, I just want to add one thing. Because otherwise Rwanda is scamming. You know, this doesn't make any sense. "Please come here, invest $20 million", or however much, "and then we'll tell you whether you can stay"? That never happens in the mining industry.
Q. What they told you --
A. Rwanda was an exception because of their extraordinary history, and that's why.
Q. What they told you was, "Come here, spend four years industrialising and exploring, and if, on the back of that, you can provide a feasibility study that is satisfactory to the government, then you can look at a long-term concession". That's what they told you, isn't it?
A. No. You know, everything that you just described --

Q. So the actual understandings of any parties to this contract at the time, in the course of the negotiations, is not something you can give any evidence on; correct?
A. Well, only to the extent that there's a course of dealings after the signing of the contract.
Q. Well, again, unless it's after the end of 2010, you can't give any evidence on that either, can you?
A. No, hearsay, that's right.
Q. And you haven't called any witness who was involved at the time, have you?
A. No.
Q. So in terms of any understandings about a guarantee of a long-term concession for NRD or anything like that, you don't know, outside the terms of the contract, because you weren't there; correct?
A. No, I would say that the communication between us and the Zarnacks and then us and Starck were several times a week. We understood what they told us.
Q. Well, are you going to suggest that there were communications between the Zarnacks and Starck where...

Page 225

Page 226

Page 227

Page 228

Q. They knew, and you knew, that unless you could do some adequate exploration and industrialisation, and on the back of that, produce a feasibility report that satisfied the government, you wouldn't be getting a long-term concession?
A. It's a feasibility report that satisfied our investors to continue, not the Rwanda Government.
Q. Can we look at Mr Gatare's witness statement at paragraph 19. This relates to your assertion that you were assured that if you invest in a concession, the government would ensure a long-term contract was provided.
A. Yes.
Q. Mr Gatare says:

"I do not believe that Mr Marshall was given any such assurances and even if he had been it would have been clear to him as soon as he read the concession agreement."

A. I think you're a little bit confused. You know, we had all been asked to accommodate Rwanda. Mining companies, nobody -- you, me -- nobody would take a risk: "Here's our millions of dollars of investment, and now you tell us whether we get a licence". This is unprecedented.

Q. Just drilling it down to something you can express accurate evidence on, you have no idea about any understanding on NRD's part in any period before you get involved in late 2010, do you?
A. All I can say is that we met as a group, and there was maybe ten of us, as I started to express before: all of us had the same understanding that that was our safety net for all of us. Everybody had the same -- with slightly different wording in a few places, but everybody had the same contract.

We're investing now because of the guarantee, the representations being made to us now. We understand that Rwanda is disorganised and needs to get their law in place, and several other administrative steps. But we all expected a commercially reasonable long-term concession agreement.
19:25 A. No, long-term licence agreements are not a formality; they are a real negotiation, prior to any works being done. No mining company, with the exception of maybe some very superficial exploratory work, is not going to spend any money and any deposit without knowing in advance that it has a long-term licence concession. You can't afford to.

20 Q. On that argument, Mr Marshall, you would simply have a long-term licence. You wouldn't have what you in fact see, which is a contract for a five-year (sic) exploration licence, coupled with conditions and a requirement for a satisfactory feasibility study.

21 A. It's completely different from what you say was the deal.

22 Q. I'm sorry, you're going to have to rephrase that.

23 A. Well, on your argument, one would simply just move straight to a 30-year licence, wouldn't you?

24 A. Most companies do. Everywhere else tends to: Uganda, Congo, Kenya.

25 Q. In this case, what instead happens is you are given five years to prove yourself before there is a long-term licence being offered; correct?

26 A. No.

27 Q. Just coming back to your earlier answer about what the mining community expects, the mining community would expect what?

19:27 A. Yes, that's what the language says.

2 A. Yes. So you would have known even at that point that, far from being a guarantee of the long-term licence, it was already conditional on whether NRD could meet its obligations; yes?

3 A. No.

4 Q. Well, how else would you have understood it?

5 A. This isn't the only communication. You know, they came to us and said, "Look, we don't have our long-term Mining Act in place". So we're being instructed that we're going to do these short-term arrangements so that we can -- (answer cut off by questioning).

6 Q. Are you suggesting that the real -- are you suggesting that the contract doesn't represent, as you understood it, the rights of NRD?

7 A. No, I would say that the rights of NRD are greater than those obligations of NRD under the contract; yes?

8 A. Yes.

9 Q. And you would have known that if NRD was in breach of its obligations, the contract was capable of being terminated; yes?

10 A. Yes.

11 Q. Then in Article 2, you would have known that there are these obligations of NRD under the contract; yes?

12 A. Yes.

13 Q. And you would have known that if NRD was in breach of its obligations, the contract was capable of being terminated; yes?
19:31  1 Q. Just to be clear, is it your evidence that you knew at the time that this guarantee of a long-term licence was not in the contract?
2     A. It's not in this contract document, but we understood it to be in other documents.
3     Q. So you knew at the time that the contract document that gave --
4     A. We understood the (overspeaking) -- I understand that they don't use the word "guarantee" here. But we understood the meaning of this, the way it was going to be interpreted.
5     Q. Again, Mr Marshall, you are a lawyer, and a transactional lawyer; you know very well that parties' rights are reflected in the contracts that they have, and you knew very well that this did not contain the assurance or guarantee that you now say existed?
6     A. Well, two things: (1) -- and I know you and I will be in an argument about it --
7     THE PRESIDENT: May I just interrupt a moment. It may be that we're going to be cut off. We're just trying to deal with this. We've got a notice saying we're going to be cut off in one minute.
8     MR HILL: Well, if you freeze, then I will stop.
9     A. In Article 4, we were told that that gave us an automatic right to a commercially reasonable long-term agreement --
10    MR HILL: Sorry, stop, Mr Marshall. I think the Tribunal have been cut off. I'll just wait until this is sorted out.
11    (Pause to resolve a technical problem)
12    MR HILL: What I'm wondering, just while the Tribunal is out is -- we're about 25 minutes before time -- whether we should just simply break and try and find this 25 minutes in some other part of the rest of the week.
13    MR KAPLAN: I can definitely relay that request. I know that the President had some administrative points he wanted to raise with the parties. And we do have a full schedule, so there's also the difficulty in finding the 25 minutes.
14    THE PRESIDENT: I can't hear anything you're saying. I can hear me.
15    THE PRESIDENT: What I suggest we do is adjourn until tomorrow morning. We've only got 20 minutes to go. Alright? And we must try and sort this out.
16    MR HILL: Could I just ask -- I know the President can't hear me.
17    THE PRESIDENT: I can't hear anything you're saying. I can see you. But you can obviously hear me.
18    MR HILL: So the first thing I'm going to say is that tomorrow -- now I've lost sight of you. I don't know whether you can even hear me.
19    MR KAPLAN: Can you hear me, Alex?
20    THE PRESIDENT: Yes. The second request -- and I don't know whether this will get to them -- is that the Tribunal would like to have delivered to the hearing room hard copies of the transcripts, printed on both sides of each page. Is that possible?
21    MR KAPLAN: Yes, it's possible.
22    THE PRESIDENT: We can't hear you anyway. But you think that can be done?
23    MR KAPLAN: Yes.
24    THE PRESIDENT: Okay. Well, then I think it remains for us to say farewell until tomorrow morning. We've made good progress, I think.
25    MR HILL: The Tribunal hasn't given the witness warning.
19:38 1 MR HARRISON: Mr Cowley has still stepped out.
2 MR HILL: If you explain what I have said to Mr Cowley, I'm
3 sure he will give the warning to the witness.
4 MR HARRISON: He just came back in.
5 THE PRESIDENT: Alright. Farewell until tomorrow.
6 MR COWLEY: I apologise for being out.
7 MR HILL: Yes. Mr Cowley, where we've got to, the Tribunal
8 has given some directions that can be explained by
9 Mr Harrison. They can't hear us. They weren't able to
10 give the witness warning. So I wonder if you could give
11 the witness warning to Mr Marshall, just about not
12 speaking to anyone about his evidence while he's giving
13 evidence.
14 MR COWLEY: I'm sorry, I didn't hear everything that you
15 said. Are you saying the Tribunal wants to give this
16 instruction or are you asking --
17 MR HILL: No, I'm asking you, because we can't communicate
18 with the Tribunal. So I'm asking you, unless you
19 disagree, to make sure that Mr Marshall understands he's
20 not allowed to speak with anyone about his evidence
21 while he's giving it, in the breaks.
22 MR COWLEY: I have no problem. But if you're putting on me
23 the responsibility, I just want to just agree that the
24 language I read to him is exactly the language as
25 I should be saying it. So if I can ask of you --

Page 237

19:41 1 MR HILL: Thank you.
2 MR KAPLAN: And this will apply to all witnesses, of course,
3 through the hearing.
4 MR HILL: Yes.
5 MR KAPLAN: Okay. Well, Mr Cowley, while you were having
6 a break --
7 MR COWLEY: Indisposed.
8 MR KAPLAN: Indisposed, comfort break -- this is not
9 resolvable right now, the technical issue, so the
10 President had suggested to adjourn for the night. The
11 parties should please produce an agreed schedule for
12 tomorrow that shows the first and second breaks at
13 30 minutes. And we will arrange, upon the Tribunal's
14 request, for hardcopy transcripts to be delivered to the
15 Tribunal as they requested. And that's what you missed.
16 MR COWLEY: Thank you.
17 MR KAPLAN: Sure. We'll see everybody tomorrow.
18 (7.42 pm)
19 (The hearing adjourned until 12.00 noon the following day)

Page 238

because this is sort of a bit of a curve ball to me --
just tell me what provision of the --
MR HILL: Yes, well I'll say it. It's simply that while
he is giving evidence, as he is now, when he has breaks
and overnight breaks, he shouldn't speak with anyone,
his lawyers or anyone else, about his evidence or about
the case. Obviously it doesn't prevent him speaking
about other things, but he shouldn't be speaking about
the case or his evidence to anyone.
MR COWLEY: That's fine. I simply ask, is there
a procedural order section that should be read to him?
I'll make sure he reads it and --
MR HILL: I don't think -- well, I'm not aware of one.
MR KAPLAN: No, it's just -- I don't believe in our
procedural orders we have that. But it is a customary
undertaking at ICSID, given that Mr Marshall is
basically still in the witness chair but will be,
obviously, not physically in it until tomorrow morning,
or tomorrow -- yes, tomorrow morning. So just the
understanding not to --
MR COWLEY: So you're done; you're saying you stated the
warning, nothing else to be read or shown to him?
MR HILL: Mr Marshall obviously understands it because he is
listening; that's right, yes, Mr Marshall?
THE WITNESS: Yes, I understand what you're saying.
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21

Monday, 21 June 2021

Anne-Marie Stallard for Trevor McGowan

Page 1

Anne-Marie Stallard

for Trevor McGowan

As amended by the Parties
Page 2

Anne-Marie Stallard

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Monday, 21 June 2021

Anne-Marie Stallard  
for Trevor McGowan

As amended by the Parties

Page 3
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21

Monday, 21 June 2021

Anne-Marie Stallard
for Trevor McGowan

Page 6

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21
Monday, June 21 2021

Anne-Marie Stallard
for Trevor McGowan

Page 7
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 10

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Anne-Marie Stallard
for Trevor McGowan

---

Page 12

As amended by the Parties.
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits - ICSID Case No. ARB/18/21

Monday, 21 June 2021

Anne-Marie Stallard for Trevor McGowan
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21

Monday, 21 June 2021

Page 15

Anne-Marie Stallard
for Trevor McGowan

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Anne-Marie Stallard
As amended

Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Anne-Marie Stallard
As amended

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Anne-Marie Stallard
As amended

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Monday, 21 June 2021

Anne-Marie Stallard
As amended
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21

Monday, 21 June 2021
Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda

Day 1 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21

Monday, 21 June 2021

Page 19
Day 1 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Monday, 21 June 2021

Anne-Marie Stallard
As amended

Page 21

U

Uganda 230:18
ultimate 76:25
ultimately 21:4, 40:4, 41:37, 43:11, 76:14
under 77:3, 88:4, 91:5
underlying 144:5, 158:6
umbrella 35:21, 36:11
unable 21:17, 83:16
100:16, 102:23
106:1
unaware 118:14
uncertain 93:20
under 1:1, 22:19, 32:24
35:20, 36:11, 42:11
51:13, 54:5, 57:5
67:16, 68:7, 81:20, 21
83:24, 85:10, 91:19
91:20, 102:10, 21
114:5, 115:11
116:7, 126:10
131:6, 132:23
136:7, 137:23
143:4, 143:6
144:24, 149:21
150:17, 153:11, 154:9
157:3, 159:11
184:7, 187:21
197:21, 198:19
207:1, 213:1
211:18, 214:2
213:1
223:23
237:4, 238:4, 4, 19
understanding 36:14
understands 65:19
understanding 225:6
understanding 225:6
understanding 225:6
unprecedented 159:18
unprecedented 2268
unprepared 33:21
unprofessional 100:17
universally 154:9
universally 154:9
unsurprising 33:17
unsurprising 34:1, 6
unquestionably 19:5, 7
unreasonable 63:25
unreliable 167:3
unsatisfactory 97:3
unsatisfied 126:7, 9
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1
unsuccessful 93:1