

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**BAY VIEW GROUP LLC AND THE SPALENA COMPANY LLC**

Claimants

and

**REPUBLIC OF RWANDA**

Respondent

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

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**AWARD**

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***Members of the Tribunal***

Rt. Hon. Lord Phillips KG, PC, President of the Tribunal  
Mr. J. Truman Bidwell, Jr., Arbitrator  
Ms. Barbara Dohmann QC, Arbitrator

***Secretary of the Tribunal***

Mr. Alex B. Kaplan

***Assistant to the Tribunal***

Dr. Anna Loutfi

*Date of dispatch to the Parties: 30 March 2022*

## REPRESENTATION OF THE PARTIES

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and

Ms. Specioza Kabibi  
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Republic of Rwanda

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**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

|                   |                                                                                                                                                                                                                             |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings dated 10 April 2006                                                                                                                                                    |
| Bidega (1)        | Witness Statement of Mr. Dominique Bidega dated 16 August 2019                                                                                                                                                              |
| Biryabarema (1)   | Witness Statement of Dr. Michael Biryabarema dated 23 May 2019                                                                                                                                                              |
| Biryabarema (2)   | Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020                                                                                                                                                 |
| BIT               | Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 1 January 2012 |
| Bosco (1)         | Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019                                                                                                                                                            |
| Buyskes (2)       | Supplemental Witness Statement of Mr. Kevin Buyskes dated 16 August 2019                                                                                                                                                    |
| C-[#]             | Claimants' Exhibit                                                                                                                                                                                                          |
| CCS               | Claimants' Submission on Costs dated 10 September 2021                                                                                                                                                                      |
| Cl. C-Mem.        | Claimants' Counter-Memorial on Jurisdiction dated 17 August 2019                                                                                                                                                            |
| Cl. Mem.          | Claimants' Memorial on the Merits dated 6 March 2019                                                                                                                                                                        |
| Cl. PHB           | Claimants' Post-Hearing Brief dated 13 August 2021                                                                                                                                                                          |
| Cl. Reply         | Claimants' Reply on the Merits dated 13 March 2020                                                                                                                                                                          |
| CL-[#]            | Claimants' Legal Authority                                                                                                                                                                                                  |
| CRRS              | Claimants' Reply to the Respondent's Submission on Costs dated 24 September 2021                                                                                                                                            |

|                     |                                                                                                                      |
|---------------------|----------------------------------------------------------------------------------------------------------------------|
| DRC                 | Democratic Republic of the Congo                                                                                     |
| Ehlers (1)          | Witness Statement of Mr. Anthony Ehlers dated 20 May 2019                                                            |
| Ehlers (2)          | Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020                                               |
| Fiala (1)           | Witness Statement of Mr. Jerry Fiala dated 27 February 2019                                                          |
| Fiala (2)           | Supplemental Witness Statement of Mr. Jerry Fiala dated 11 March 2020                                                |
| Gatare (1)          | Witness Statement of Mr. Francis Gatare dated 24 May 2019                                                            |
| Gatare (2)          | Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020                                               |
| GMD                 | Rwandan Geology and Mines Department                                                                                 |
| Hearing             | Hearing on Jurisdiction and the Merits held on 21 to 30 June 2021                                                    |
| ICSID Convention    | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes                                                           |
| Imena (1)           | Witness Statement of Mr. Evode Imena dated 24 May 2019                                                               |
| Imena (2)           | Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020                                                  |
| Marshall (1)        | Witness Statement of Mr. Roderick Marshall dated 1 March 2019                                                        |
| Marshall (2)        | Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019                                         |
| Marshall (3)        | Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020                                   |
| MINIRENA            | Rwandan Ministry of Natural Resources                                                                                |

|                  |                                                                                                                        |
|------------------|------------------------------------------------------------------------------------------------------------------------|
| Mruskovicova (1) | Witness Statement of Ms. Zuzana Mruskovicova dated 28 February 2019                                                    |
| Mruskovicova (2) | Supplemental Witness Statement of Ms. Zuzana Mruskovicova dated 16 August 2019                                         |
| Mugisha (1)      | Expert Report of Mr. Richard Mugisha dated 24 May 2019                                                                 |
| Mugisha (2)      | Second Expert Report of Mr. Richard Mugisha dated 27 May 2020                                                          |
| Niyonsaba (2)    | Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020                                           |
| NRD              | Natural Resources Development Rwanda Ltd (Rwandan mining company in which the Claimants allege a controlling interest) |
| OGMR             | Regulatory and Supervision Unit of the Rwanda Geology and Mining Authority                                             |
| R-[#]            | Respondent's Exhibit                                                                                                   |
| RCS              | Respondent's Submission on Costs dated 24 September 2021                                                               |
| RDB              | Rwanda Development Board                                                                                               |
| Request, or RFA  | Claimants' Amended Request for Arbitration dated 12 June 2018                                                          |
| Resp. C-Mem.     | Respondent's Counter-Memorial on the Merits dated 24 May 2019                                                          |
| Resp. Mem.       | Respondent's Memorial on Jurisdiction dated 24 May 2019                                                                |
| Resp. PHB        | Respondent's Post Hearing Brief dated 13 August 2021                                                                   |
| Resp. Rej.       | Respondent's Reply on Jurisdiction and Rejoinder on the Merits dated 29 May 2020                                       |
| RIEPA            | Rwanda Investment and Export Promotion Agency                                                                          |
| RL-[#]           | Respondent's Legal Authority                                                                                           |



|                                      |                                                                                      |
|--------------------------------------|--------------------------------------------------------------------------------------|
| RNRA                                 | Rwanda Natural Resources Authority                                                   |
| RRCS                                 | Respondent's Reply to the Claimants' Submissions on Costs dated 24 September 2021    |
| Rupiya (1)                           | Witness Statement of Mr. Prosper Nkanika Wa Rupiya dated 21 May 2019                 |
| Rupiya (2)                           | Supplemental Witness Statement of Mr. Prosper Nkanika Wa Rupiya dated 27 May 2020    |
| Rwamasirabo (1)                      | Witness Statement of Mr. Olivier Rwamasirabo dated 26 February 2019                  |
| Rwamasirabo (3)                      | Second Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020 |
| Sindayigaya (1)                      | Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019                     |
| Sindayigaya (2)                      | Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020        |
| Tr. Day [#], [page:line] ([Speaker]) | Transcript of the Hearing                                                            |
| Tribunal                             | Arbitral tribunal constituted on 3 October 2018                                      |

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 1 January 2012 (the “**BIT**” or “**Treaty**”),<sup>1</sup> and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The claimants are Bay View Group LLC (“**Bay View**” or “**BVG**”) and The Spalena Company LLC (“**Spalena**”), two limited liability companies organized under the laws of Delaware, United States of America (together, the “**Claimants**”).
3. The respondent is the Republic of Rwanda (“**Rwanda**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute relates to the Claimants’ alleged investment in the acquisition and operation of mining concessions in Rwanda.

## **II. PROCEDURAL HISTORY**

6. On 18 May 2018, ICSID received a Request for Arbitration dated 14 May 2018 from Bay View Group LLC and Natural Resources Development Group against the Republic of Rwanda, together with Exhibits A through J, which was supplemented by communication of 31 May 2018. Following questions posed to the Requesting Parties by the ICSID Secretariat, the 14 May 2018 Request for Arbitration was withdrawn and on 12 June 2018, the Claimants submitted an Amended Request for Arbitration (the “**Request**” or “**RFA**”),

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<sup>1</sup> Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 1 January 2012 (“**BIT**”), **RFA Exhibit 05**.

together with Exhibits 01 through 11, which was supplemented by communications of 18 and 21 June 2018.

7. On 22 June 2018, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
9. The Tribunal is composed of the Rt. Hon. Lord Phillips KG, PC, a national of the United Kingdom, President, appointed by agreement of the Parties; Mr. J. Truman Bidwell, Jr., a national of the United States of America, appointed by the Claimants; and Ms. Barbara Dohmann QC, a national of the Germany and the United Kingdom, appointed by the Respondent.
10. On 3 October 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Alex Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. Following the constitution of the Tribunal, by letter dated 5 October 2018, the Respondent requested that Mr. Bidwell provide further clarification to his disclosures made following his appointment; the Respondent also "reserve[d] its right to propose the disqualification of Mr. Bidwell." Mr. Bidwell provided a response by letter of 15 October 2018 transmitted by the Secretary of the Tribunal.

12. By email of 4 November 2018 transmitted by the Secretary of the Tribunal, the President of the Tribunal requested that the Respondent provide an update, by 7 November 2018, as to whether it intends to propose the disqualification of Mr. Bidwell.
13. By email of 7 November 2018, the Respondent confirmed that it “does not intend to propose the disqualification of Mr. Bidwell at this stage.”
14. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 3 December 2018 by teleconference. At the first session, the Tribunal decided that quantum shall be bifurcated from the merits in this proceeding.
15. Following the first session, on 12 December 2018, the Tribunal issued Procedural Order No. 1 (“**PO1**”) recording the agreement of the Parties on procedural matters. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Annex C of PO1 also sets out an agreed procedural calendar in the event that preliminary objections are raised and the Respondent seeks bifurcation of preliminary objections from the merits
16. In accordance with the procedural calendar set forth in PO1, on 6 March 2019, the Claimants filed a Memorial on the Merits (the “**Claimants’ Memorial**”), together with: a Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019; a Witness Statement of Mr. Jerry Fiala dated 27 February 2019 (“**Fiala (1)**”); a Witness Statement of Mr. Joseph Mbaya dated 26 February 2019; a Witness Statement of Mr. Kevin Buyskes dated 27 February 2019; a Witness Statement of Mr. Olivier Rwamasirabo dated 26 February 2019 (“**Rwamasirabo (1)**”); a Witness Statement of Mr. Roderick Marshall dated 1 March 2019 (“**Marshall (1)**”); a Witness Statement of Ms. Zuzana Mruskovicova dated 28 February 2019 (“**Mruskovicova (1)**”); Exhibits C-001 through C-113; and Legal Authorities CL-001 through CL-045.
17. On 24 May 2019, the Respondent filed the following submissions:
  - (i) a request that the Tribunal decide four of the Respondent’s jurisdictional objections as a preliminary question (the “**Respondent’s Request for Bifurcation**”);

- (ii) a Memorial on Jurisdiction (the “**Respondent’s Memorial**”); and
  - (iii) a Counter-Memorial on the Merits (the “**Respondent’s Counter-Memorial**”), together with: a Witness Statement of Mr. Anthony Ehlers dated 20 May 2019 (“**Ehlers (1)**”); a Witness Statement of Mr. Evode Imena dated 24 May 2019 (“**Imena (1)**”); a Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019; a Witness Statement of Mr. Francis Gatara dated 24 May 2019 (“**Gatara (1)**”); a Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019; a Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019 (“**Bosco (1)**”); a Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019; a Witness Statement of Dr. Michael Biryabarema dated 23 May 2019 (“**Biryabarema (1)**”); a Witness Statement of Mr. Prosper Nkanika Wa Rupiya dated 21 May 2019 (“**Rupiya (1)**”); a Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019 (“**Sindayigaya (1)**”); an Expert Report of Mr. Richard Mugisha dated 24 May 2019 (“**Mugisha (1)**”), with Exhibits RM-001 and RM-002; Exhibits R-001 through R-082; and Legal Authorities RL-001 through RL-134.
18. On 21 June 2019, the Claimants filed Observations on the Respondent’s Request for Bifurcation, together with Legal Authorities CL-046 through CL-050.
19. On 28 June 2019, the Tribunal issued Procedural Order No. 2 concerning the Respondent’s Request for Bifurcation (“**PO2**” or the “**Decision on Bifurcation**”). In its Order, the Tribunal decided the following with respect to the Respondent’s four preliminary objections:
- (i) first objection (*ratione temporis*): “granted, save that the Tribunal will reconsider this decision if the Claimants’ Counter-Memorial on Preliminary Objections pleads a viable claim based on matters post-dating the Cut-off Date that require exploration on the merits”;<sup>2</sup>

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<sup>2</sup> Procedural Order No. 2 dated 28 June 2019 (“**PO2**”), ¶ 48(a).

- (ii) second objection (*ratione personae*): granted with regard to Bay View and denied with regard to Spalena;
  - (iii) third objection (*ratione materiae*): denied; and
  - (iv) fourth objection (*ratione voluntatis*): granted.
20. Also in PO2, the Tribunal directed that the Parties jointly determine a procedural calendar for the jurisdictional phase of the proceeding by 15 July 2019.
21. Pursuant to PO2, by joint email of 12 July 2019, the Parties submitted a proposed procedural calendar for the jurisdictional phase of the proceeding. Following exchanges between the Tribunal and the Parties, the Parties submitted a revised procedural calendar on 24 July 2019. By email of 25 July 2019 transmitted by the Secretary of the Tribunal, the Tribunal confirmed the Parties' revised procedural calendar.
22. Pursuant to the agreed procedural calendar, on 17 August 2019, the Claimants filed a Counter-Memorial on Jurisdiction (the "**Claimants' Counter-Memorial**"), together with: a Supplemental Witness Statement of Mr. Kevin Buyskes dated 16 August 2019 ("**Buyskes (2)**"); a Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 16 August 2019; a Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019 ("**Marshall (2)**"); a Supplemental Witness Statement of Ms. Zuzana Mruskovicova dated 16 August 2019 ("**Mruskovicova (2)**"); a Witness Statement of Mr. Dominique Bidega dated 16 August 2019 ("**Bidega (1)**"); Exhibits C-114 through C-130; and Legal Authorities CL-051 through CL-060.
23. Having considered the Claimants' Counter-Memorial, on 28 August 2019, and in accordance with its ruling in PO2, the Tribunal issued Procedural Order No. 3 ("**PO3**") concerning the Respondent's first objection (*ratione temporis*), wherein the Tribunal reconsidered, in keeping with PO2, and denied the request to determine the first objection as a bifurcated preliminary objection.
24. By letter of 30 August 2019, the Respondent informed the Tribunal that it was therefore withdrawing its Request for Bifurcation with respect to the remaining preliminary

objections and requested that the dates reserved for the hearing on jurisdiction be vacated. Upon invitation from the Tribunal, the Claimants confirmed by letter of 3 September 2019 that they had no objection to the Respondent's request.

25. By letter of 4 September 2019 transmitted by the Secretary of the Tribunal, the Tribunal confirmed that the scheduled hearing on jurisdiction was cancelled and invited the Parties to jointly submit a revised procedural calendar by 18 September 2019. The Parties subsequently did so, and by email of 8 October 2019 transmitted by the Secretary of the Tribunal, the Tribunal confirmed the Parties' revised procedural calendar, including a hearing on jurisdiction and the merits scheduled to take place in Paris, France, in October 2020.
26. Following exchanges between the Parties, on 20 December 2019, the Tribunal issued Procedural Order No. 4 ("**PO4**") concerning the production of documents.
27. On 13 March 2020, the Claimants filed a Reply on the Merits (the "**Claimants' Reply**"), together with: a Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020 ("**Marshall (3)**"); a Second Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020 ("**Rwamasirabo (3)**"); a Supplemental Witness Statement of Mr. Jerry Fiala dated 11 March 2020 ("**Fiala (2)**"); Exhibits C-131 through C-199; and Legal Authorities CL-061 through CL-087.
28. On 24 March 2020, the Claimants filed an application to remove Mr. Richard Mugisha as the Respondent's expert witness and to exclude his Expert Report from evidence (the "**Claimants' Application on Expert Evidence**"). Upon invitation from the Tribunal, the Respondent submitted its observations on the Claimants' Application on 14 April 2020 (the "**Respondent's Observations on Expert Evidence**"); together with its Observations, the Respondent filed a Witness Statement of Mr. Richard Mugisha dated 14 April 2020 and Legal Authorities RL-083 through RL-088.
29. On 23 April 2020, the Claimants filed a reply to the Respondent's Observations on Expert Evidence with the request that the Tribunal admit their submission into the record (the "**Claimants' Reply on Expert Evidence**"); together with their Reply, the Claimants filed

a Second Supplemental Witness Statement of Ms. Zuzana Mruskovicova dated 22 April 2020 and Exhibits C-200 through C-205. By email of 24 April 2020 transmitted by the Secretary of the Tribunal, the President of the Tribunal directed that the Claimants' Reply on Expert Evidence be acknowledged and transmitted to the Members of the Tribunal. By letter of later that same date, the Respondent requested leave to respond to the Claimants' Reply on Expert Evidence; the Tribunal granted this request by email of 27 April 2020 transmitted by the Secretary of the Tribunal.

30. Further to the Tribunal's instructions, on 4 May 2020, the Respondent filed a response to the Claimants' Reply on Expert Evidence (the "**Respondent's Rejoinder on Expert Evidence**"); with its Rejoinder, the Respondent submitted a Witness Statement of Mr. Apollo Nkunda dated 27 April 2020 and Exhibits R-089 through R-094.
31. On 14 May 2020, the Tribunal issued Procedural Order No. 5 ("**PO5**" or the "**Decision on Expert Evidence**") dismissing the Claimants' Application on Expert Evidence.
32. Following exchanges between the Parties, on 20 May 2020, the Claimants filed Exhibits C-206 and C-207 as supporting documentation to the Second Supplemental Witness Statement of Mr. Roderick Marshall.
33. On 29 May 2020, the Respondent filed a Reply on Jurisdiction and Rejoinder on the Merits (the "**Respondent's Rejoinder**"), together with: a Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020 ("**Ehlers (2)**"); a Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020 ("**Imena (2)**"); a Supplemental Witness Statement of Mr. Francis Gatware dated 29 May 2020 ("**Gatware (2)**"); a Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020 ("**Niyonsaba (2)**"); a Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020 ("**Sindayigaya (2)**"); a Supplemental Witness Statement of Mr. Jean Bosco Nsengiyuma dated 28 May 2020; a Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020 ("**Biryabarema (2)**"); a Supplemental Witness Statement of Mr. Prosper Nkanika Wa Rupiya dated 27 May 2020 ("**Rupiya (2)**"); a Witness Statement of Mr. David Bensusan dated 15 May 2020; a Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020; a Second Expert Report of Mr. Richard Mugisha dated 27 May 2020



(“**Mugisha (2)**”), with Exhibits RM-003 through RM-007; Exhibits R-095 through R-243; and Legal Authorities RL-135 through RL-167.

34. By joint email of 10 June 2020, the Parties requested a discussion with the Tribunal concerning the upcoming hearing scheduled for October 2020 and contingency arrangements in light of the COVID-19 pandemic. By email of 12 June 2020 transmitted by the Secretary of the Tribunal, the Tribunal invited the Parties to consider contingency arrangements for the upcoming hearing and to consider the option of holding the hearing remotely by videoconference.
35. By emails of 17 June 2020, each Party commented on the Tribunal’s email of 12 June 2020. These communications indicated that the Parties were not in agreement with holding the hearing by remote means.
36. By letter of 24 June 2020 transmitted by the Secretary of the Tribunal, the Tribunal proposed that the upcoming hearing be rescheduled to early April 2021 in Paris, France, and invited the Parties to confirm their availability by 1 July 2020.
37. By letter of 25 June 2020, the Respondent informed the Tribunal that it was not available for an in-person hearing in early April 2021 and requested that the hearing take place by videoconference on the originally scheduled dates in October 2020. By email of 26 June 2020, the Claimants requested leave to respond to the Respondent’s letter by 29 June 2020. By email of later that date transmitted by the Secretary of the Tribunal, the Tribunal granted the Claimants’ request.
38. By letter of 29 June 2020, the Claimants responded to the Respondent’s 25 June 2020 letter, wherein they maintained that the hearing should be conducted in-person.
39. By letter of 1 July 2020 transmitted by the Secretary of the Tribunal, the Tribunal confirmed that the hearing dates scheduled for October 2020 were vacated and invited the Parties to consider holding the hearing in Paris, France, on certain dates in late April or late June 2021. The Parties’ responses were requested by 6 July 2020.

40. By letter of later that date on 1 July 2020, the Respondent informed the Tribunal that it had limited availability during the proposed hearing dates and reiterated its request that the hearing be held remotely in October 2020. By letter of 2 July 2020, the Claimants confirmed their availability to hold the hearing on any of the dates proposed by the Tribunal.
41. By letter of 6 July 2020 transmitted by the Secretary of the Tribunal, the Tribunal directed that each Party indicate its availability, by 10 July 2020, for an in-person hearing during the first half of 2021.
42. On 7 July 2020 the Respondent filed a reinstated request for bifurcation, and a request that the Tribunal order a change of venue for the hearing (the “**Respondent’s Reinstated Request**”). Therein, the Respondent, *inter alia*, requested that (i) its *ratione personae* and *ratione voluntatis* objections again be bifurcated from the merits, with those objections to be heard during a remote hearing in October 2020; and (ii) the venue for a subsequent hearing on the merits be changed from Paris, France, to London, United Kingdom. By email of 8 July 2020 transmitted by the Secretary of the Tribunal, the Tribunal invited the Claimants’ comments on the Respondent’s Reinstated Request by 15 July 2020.
43. Further to the Tribunal’s 6 July 2020 instructions, by letters of 10 July 2020, each Party informed the Tribunal of its availability for an in-person hearing during the first half of 2021.
44. On 15 July 2020, the Claimants filed observations on the Respondent’s Reinstated Request.
45. By letter of 23 July 2020 transmitted by the Secretary of the Tribunal, the Tribunal: (i) informed the Parties that the Respondent’s Reinstated Request was denied; and (ii) confirmed that an in-person hearing would take place in June 2021 in Paris, France.
46. By letter of 30 July 2020, the Claimants wrote to the Tribunal to request certain orders relating to the Respondent’s production of documents. Upon invitation from the Tribunal, the Respondent responded by letter of 7 August 2020. By letter of 10 August 2020, the Tribunal informed the Parties that it would make no further order with regard to the Claimants’ request.

47. By letter of 3 August 2020, the Office of International Claims and Investment Disputes of the Department of State of the United States of America (the “USA”) wrote to the Tribunal to inform that it is considering making a non-disputing third party written submission in this proceeding, pursuant to Article 28.2 of the BIT (the “**USA Application**”), and it requested that the Tribunal fix the deadline for such submission on 19 February 2021.
48. By email of 4 August 2020 transmitted by the Secretary of the Tribunal, the Tribunal requested that the Parties confirm that they had no objection to the USA making a written submission as indicated in its Application; the Parties so confirmed by emails of later that date.
49. By letter of 10 August 2020 transmitted by the Secretary of the Tribunal, the Tribunal granted the USA Application and the deadline proposed therein.
50. On 19 August 2020, the Respondent filed an application for security for costs (the “**Respondent’s Security for Costs Application**”), together with Exhibits R-244 and R-245 and Legal Authorities RL-168 through RL-172.
51. Upon invitation from the Tribunal, on 9 September 2020, the Claimants filed observations of the Respondent’s Security for Costs Application (the “**Claimants’ Observations on Security for Costs**”), together with Legal Authorities CL-088 through CL-091.
52. On 11 September 2020, the Respondent filed a response to the Claimants’ Observations on Security for Costs (the “**Respondent’s Response on Security for Costs**”). By email of later that date, the Claimants informed the Secretary of the Tribunal that they rely on their Observations on Security for Costs and will not file a rejoinder to the Response on Security for Costs.
53. On 28 September 2020, the Tribunal issued Procedural Order No. 6 (“**PO6**” or the “**Decision on Security for Costs**”) denying the Respondent’s Security for Costs Application.

54. Further to the Tribunal's letter of 10 August 2020, on 19 February 2021, the USA filed its written submission as a non-disputing third party in the proceeding (the "**USA Submission**").
55. By email of 22 February 2021 transmitted by the Secretary of the Tribunal, the Tribunal informed the Parties that, should either Party wish to do so, it may respond to the USA Submission by 2 April 2021. No responses were received from the Parties.
56. By letter of 3 March 2021, the Respondent wrote to the Tribunal to request that the upcoming June 2021 hearing be held by videoconference, in light of the ongoing COVID-19 pandemic. Upon invitation from the Tribunal, the Claimants responded by letter of 8 March 2021; in their letter, the Claimants argued that the Respondent's request be denied at this time and the issue be revisited in mid-May 2021. Upon invitation from the Tribunal, the Respondent provided observations on the Claimants' 8 March 2020 letter by letter of 11 March 2021.
57. By email of 31 March 2021 transmitted by the Secretary of the Tribunal, the Tribunal informed the Parties that the June 2021 hearing will take place by videoconference. The Tribunal also proposed the following (the "**hybrid hearing modality**"): (i) the Members of the Tribunal will use their best efforts to sit together in London, United Kingdom; (ii) as such, each Party will need to consent to hold the hearing in London in lieu of Paris pursuant to Article 63 of the ICSID Convention; (iii) core members of each Party's legal team are invited to appear in-person before the Tribunal to make oral submissions and conduct direct- and cross-examinations; and (iv) in the interest of fairness, witnesses should appear remotely. The Tribunal invited the Parties' observations on the hybrid hearing modality by 7 April 2021.
58. Each Party provided its observations on the hybrid hearing modality by letters of 7 April 2021. The Respondent consented to changing the location of the hearing to London and to make oral submissions before the Tribunal in-person, but did not believe it to be necessary for counsel to attend in-person to conduct direct- and cross- examinations. The Claimants also consented to changing the location of the hearing to London and indicated their preference for counsel to attend the hearing in-person for its entirety, including while

conducting conduct direct- and cross- examinations. In their letter, the Claimants requested that their representative, Mr. Roderick Marshall, be allowed to attend the hearing in-person.

59. By letter of 8 April 2021, the Respondent responded to the Claimants' 7 April 2020 letter wherein it, *inter alia*, objected to the in-person attendance of Mr. Marshall at the hearing. The Claimants responded by letter of 9 April 2021.
60. By letter of 18 April 2021 transmitted by the Secretary of the Tribunal, the Tribunal wrote to the Parties concerning the hybrid hearing modality. The Tribunal (i) took note of the Parties' agreement, pursuant to Article 63 of the ICSID Convention, to change the location of the hearing to London, United Kingdom; (ii) indicated its preference that the examination of witnesses be done by both Parties from the hearing room in the presence of the Tribunal; and (iii) determined that, in the interest of equal treatment, Mr. Marshall will not be permitted to take part in the proceedings in the hearing room, whether as a witness or as the Claimants' representative.
61. By email of 14 May 2021, the Secretary of the Tribunal transmitted to the Parties on behalf of the Tribunal a draft Procedural Order No. 7 ("PO7") concerning the hearing protocol and requested their comments by 25 May 2021. The Secretary also inquired as to the Parties' availability for a pre-hearing organizational meeting.
62. By letter of 21 May 2021, the Claimants informed the Tribunal that their counsel would attend the hearing remotely in light of COVID-19 travel restrictions.
63. Also by letter of 21 May 2021 transmitted by the Secretary of the Tribunal, the Tribunal proposed the appointment of Dr. Anna Loutfi as Assistant to the Tribunal and requested the Parties' agreement by 28 May 2021. The Parties subsequently agreed to Dr. Loutfi's appointment by the Claimants' email of 27 May and the Respondent's email of 28 May 2021.
64. By emails of 25 May 2021, the Parties provided to the Tribunal their comments on draft PO7 and noted their areas of disagreement. By email of 26 May 2021 transmitted by the Secretary of the Tribunal, the Tribunal encouraged the Parties to continue their

consultations on draft PO7 with a view to reaching agreement where possible, and to propose a notional hearing schedule before the pre-hearing organizational meeting.

65. On 4 June 2021, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference. Also on 4 June 2021, the Secretary of the Tribunal wrote to representatives of the United States of America to inquire whether they wished to attend and to make oral submissions at the hearing.
66. By email of 8 June 2021, representatives of the United States confirmed that they would attend the hearing but would not make oral submissions.
67. On 9 June 2021, the Tribunal issued the final version of PO7 concerning the organization of the hearing. PO7 clarified, *inter alia*, that in the interest of equality of arms, counsel are not invited to appear in person before the Tribunal, given that one counsel team is unable to travel to London to appear in person at the hearing.
68. Pursuant to PO7, on 17 June 2021, each Party submitted a Pre-Hearing Brief.
69. A hearing on jurisdiction and the merits was held from 21 to 30 June (weekends excluded) by videoconference (the “**Hearing**”). On the first day of the hearing, the Tribunal confirmed that the hearing would be “open to the public” as required by the BIT. The President proposed to the Parties that, in light of the virtual modality of the hearing, the hearing would be made public by posting recordings, with confidential information redacted, of the hearing on the ICSID website. The Parties agreed on the record with the Tribunal’s proposal. Video recordings with the Parties’ agreed redactions were subsequently posted on the ICSID website.
70. In addition to the Members of the Tribunal and the Assistant to the Tribunal attending the Hearing from the International Dispute Resolution Centre in London, United Kingdom, the following persons attended the Hearing remotely:

*ICSID Secretariat:*

Mr. Alex B. Kaplan  
Ms. Colleen Ferguson

Secretary of the Tribunal  
Paralegal

*For the Claimants:*

Mr. Roderick Marshall

Mr. Steven Cowley

Mr. Bryan Harrison

Bay View Group LLC and The Spalena  
Company LLC

Duane Morris, LLP

Duane Morris, LLP

*For the Respondent:*

Ms. Specioza Kabibi

Mr. Narcisse Dushiminana

Mr. Richard Hill QC

Mr. Alastair Tomson

Ms. Michelle Duncan

Mr. Daniel McCarthy

Ms. Danielle Duffield

Ms. Lucy Needle

Minijust, Government of Rwanda

Rwanda Mining Board

4 Stone Buildings

4 Stone Buildings

Joseph Hage Aaronson LLP

Joseph Hage Aaronson LLP

Joseph Hage Aaronson LLP

Joseph Hage Aaronson LLP

*For the United States of America:*

Ms. Lisa Grosh

Mr. John Daley

Ms. Nicole Thornton

Ms. Catherine Gibson

Mr. Michael Coffee

Ms. Donna Chapin

United States Office of International  
Claims and Investment Disputes

United States Office of International  
Claims and Investment Disputes

United States Office of International  
Claims and Investment Disputes

Office of the United States Trade  
Representative

United States Department of Justice

United States Department of Justice

*Court Reporter:*

Ms. Anne-Marie Stallard

The Court Reporter Ltd

*Interpreters:*

Ms. Sarah Rossi

Ms. Eliza Burnham

Mr. Robert Wolfenstein

Mr. Jean Claude Mugenzi

Ms. Rose-Marie Mukarutabana

*Technician:*

Mr. James Watkins

FTI Consulting

71. During the Hearing, the following persons appeared remotely at the hearing and gave testimony:

*On behalf of the Claimants:*

|                           |         |
|---------------------------|---------|
| Mr. Roderick Marshall     | Witness |
| Ms. Zuzuna Mruskovicova   | Witness |
| Mr. Joseph Mbaya          | Witness |
| Mr. Kevin Buyskes         | Witness |
| Mr. Dominique Bidega      | Witness |
| Mr. Jerry Fiala           | Witness |
| Mr. Christophe Barthelemy | Witness |
| Mr. Olivier Rwamasirabo   | Witness |

*On behalf of the Respondent:*

|                               |         |
|-------------------------------|---------|
| Mr. Francis Gatare            | Witness |
| Mr. Evode Imena               | Witness |
| Mr. Anthony Ehlers            | Witness |
| Mr. John Bosco Nsengiyuma     | Witness |
| Mr. John Bosco Kagubare       | Witness |
| Mr. Prosper Knanika Wa Rupiya | Witness |
| Mr. Jean Aime Sindayigaya     | Witness |
| Dr. Michael Biryabarema       | Witness |
| Mr. Richard Mugisha           | Expert  |

72. The Parties filed simultaneous Post-Hearing Briefs (“**Claimants’ PHB**” and “**Respondent’s PHB**”, respectively) on 13 August 2021. The Parties filed simultaneous Submissions on Costs on 10 September 2021 and Reply Submissions on Costs on 24 September 2021.
73. It is noted that Section 25 of PO1 and Section V of PO7, the hearing protocol, confirmed a procedure set out in Article 28(9)(a) of the BIT by which the Claimants or the Respondent could request that a proposed decision or award on liability would be transmitted to the Parties and the United States of America prior to issuance of that decision or Award. Neither Party so requested.
74. The proceeding was closed on 7 February 2021.

### **III. FACTUAL BACKGROUND**

#### **A. THE FOUNDATION OF THE CLAIM**

75. The Claimants in this arbitration are two Delaware Companies, BVG and Spalena, formed by an American citizen, Mr. Roderick Marshall, as investment vehicles for himself and



other American investors. The Claimants allege that they invested in the mining industry in Rwanda by acquiring, on 23 December 2010, a controlling interest in a Rwandan mining company, Natural Resources Development (Rwanda) Ltd. (“**NRD**”);<sup>3</sup> and, thereafter, directing and funding the activities of NRD. In their Memorial, the Claimants submit that they

*invested in the acquisition of the NRD, and all of NRD’s assets, including the Rutsiro, Mara, Sebeya, Giciye and Nemba Concessions.*<sup>4</sup>

76. The Claimants allege that the Rwanda breached obligations owed to them under the BIT.
77. The driving force behind the initiation and conduct of this arbitration on behalf of the Claimants has, unquestionably, been Mr. Marshall. He is the founder, principal shareholder in, and Managing Director of, each of the Claimants. He also acted as the Managing Director of NRD and directed its activities once it had been acquired by Spalena. As the Claimants’ principal witness, Mr. Marshall was cross-examined over a period of some four days. It appeared to the Tribunal that Mr. Marshall was labouring under a burning sense that he – in person and the Claimants’ investments, in the form of NRD and its mining business – had been unfairly treated by Rwanda.
78. The Tribunal’s appraisal of the witnesses will be dealt with in due course, in the context of the evidence that they have given. It is right, however, to observe at the outset that Mr. Marshall’s perception that he was the victim of injustice appears to have led him to give evidence that was repeatedly at odds with contemporary documents and manifestly inaccurate. His response to documents that conflicted with his evidence was frequently to suggest that they were fabricated – suggestions that were not put by counsel to the relevant witnesses in cross-examination. On other occasions Mr. Marshall made, for the first time, allegations of fact that one would have expected to feature in the pleadings or in witness statements and which the Tribunal has not been able to accept. In short, Mr. Marshall was not a reliable witness.

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<sup>3</sup> Cl. C-Mem., para. 98.

<sup>4</sup> Cl. Mem., para. 142.

79. The story starts in or about 2006. At this time, Rwanda was bent on accelerating a policy of privatizing mining that had previously been carried on under control of the State. To this end, standard form contracts (“**Four-Year Contracts**”) were being issued to companies under which they were granted four-year authorisations both to explore and to exploit designated mining concessions, with a view to obtaining long-term licences to mine these concessions at the end of the four-year period.

80. It is the Claimants’ case that

*it was well understood in the mining community that once a company obtained a contract for acquiring a concession the long-term licences were guaranteed.*<sup>5</sup>

81. It is Mr. Marshall’s evidence that he was asked by Rwandan representatives to procure American investment in mining in Rwanda and repeatedly assured that if he invested in a concession he would be granted a right to mine that concession for thirty years, with the possibility of a renewal. He learned that all concession holders received “*the same guarantee*”.<sup>6</sup>

82. Under the influence of these assurances, Mr. Marshall formed BVG to invest in the Rwandan mining industry and, on 23 March 2007, signed on behalf of that Company the standard form Four-Year Contract in respect of a concession at Bisesero (the “**Bisesero Concession**”).<sup>7</sup>

83. Meanwhile, on 10 July 2006, two German investors, each called Zarnack, together with a Rwandan, Mr. Ben Benzinge, formed NRD. The Zarnacks were the majority shareholders, holding 85% of the shares of NRD through a holding company (the “**Holding Company**”), while Mr. Benzinge held the remaining 15% of the shares in NRD.<sup>8</sup>

84. On 24 November 2006, Rwanda concluded a Four-Year Contract (the “**Contract**”) with NRD in respect of the following five concessions: Rutsiro, Mara, Sebeya, Giciye and

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<sup>5</sup> Cl. Mem., para. 38.

<sup>6</sup> Marshall (1), paras. 7-8.

<sup>7</sup> Marshall (1), para. 13.

<sup>8</sup> VAT Certificate of NRD, 28 July 2006, **C-002**.

Nemba (the “**Five Concessions**”).<sup>9</sup> Pursuant to the Contract, on 29 January 2007, Rwanda issued to NRD individual exploration and exploitation “*special permits*” in respect of each of the Five Concessions<sup>10</sup> (the “**Five Special Permits**”). The Zarnacks pledged that they would invest US\$39 million in the Concessions over a five-year period.<sup>11</sup>

85. Towards the end of 2008, the Zarnacks sold their interests in the Holding Company to H.C. Starck GmbH (“**Starck**”),<sup>12</sup> an established German mineral processing company. The Holding Company was renamed “HC Starck Resources GMBH”.<sup>13</sup>
86. On 29 November 2010, NRD, under the direction of Starck, made a licence application to Rwanda (the “**2010 Application**”).<sup>14</sup> It is the Claimants’ case that, at this point, NRD had acquired a contractual right pursuant to the Contract to long-term mining licences for a period of 35 years in respect of each of the Five Concessions covered by the Contract and that the 2010 Application was an application for these long-term licences. Rwanda contends that NRD had failed to qualify under the Contract for the grant of long-term licences and that the 2010 Application was for short-term licences.
87. On 23 December 2010, Starck sold the Holding Company to Spalena (the “**Spalena Purchase Contract**”) for a stated purchase price of [REDACTED].<sup>15</sup> It is the Claimants’ case that BVG contributed to this transaction in a manner that gave it an interest in NRD that founds its *locus standi* as a Claimant in this Arbitration. Rwanda denies this.

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<sup>9</sup> Contract for Acquiring Mining Concessions between Rwanda and NRD, 24 November 2006 (“**Contract**”), C-017.

<sup>10</sup> Letter from Secretary of Water and Mines to NRD re Giciye, 29 January 2007, C-018; Letter from Secretary of Water and Mines to NRD re Mara, 29 January 2007, C-019; Letter from Secretary of Water and Mines to NRD re Nemba, 29 January 2007, C-020; Letter from Secretary of Water and Mines to NRD re Rutsiro, 29 January 2007, C-021; Letter from Secretary of Water and Mines to NRD re Sebeya, 29 January 2007, C-022.

<sup>11</sup> “German Firm Eyes \$40 Million Mining Deal”, *Rwanda Today*, R-010.

<sup>12</sup> NRD, Minutes of Shareholders Meeting, 13 March 2008, C-004; Letter from Ms. Louise Kanyonga to Mr. Roderick Marshall, 27 October 2014, C-005.

<sup>13</sup> Declaration of Name Change for Starck, 23 December 2010, C-007; Registry of Name Change for Starck, 9 December 2008, C-008.

<sup>14</sup> Application for the Renewal of Exploration Licences: Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (“**2010 Application**”), para. 1, C-035. *See also* Letter from MINIRENA to NRD, 2 August 2011, C-062.

<sup>15</sup> Share Purchase Agreement between Starck and Spalena, 23 December 2010 (“**Spalena Purchase Contract**”), C-068, p. 6.

**B. THE CLAIMANTS' CASE IN A NUTSHELL**

88. As explained at paragraph 86 above, it is the Claimants' case that, at the time of their acquisition of NRD, NRD enjoyed a vested right under the Contract to long-term mining licences for the Five Concessions. It is also the Claimants' case that they, and NRD, had and retained a legitimate expectation, which persisted up to 2016, that these long-term licences would be granted by Rwanda. The Claimants allege that conduct on the part of Rwanda that infringed obligations owed to the Claimants under the BIT deprived them of their long-term interests in the Five Concessions and defeated their legitimate expectation.
89. The Claimants make the following arguments. From the time of the 2010 Application up to 2016, Rwanda permitted NRD to remain in possession of the Five Concessions, initially pursuant to a series of short extensions to their special permits, but subsequently pursuant to an unwritten, informal licence. Throughout this period NRD continued to expect to receive long-term licences for the Five Concessions. In the course of this period there was a series of incidents that interfered with NRD's enjoyment of its licences over the Five Concessions. Rwanda was responsible for these incidents and each, individually, constituted a breach of Rwanda's obligations to the Claimants under the BIT, as set out under Section IV below. They were motivated by Rwanda's desire to pressurize NRD into abandoning the Five Concessions by what is sometimes described as "*creeping expropriation*". Ultimately, in 2016, Rwanda expropriated the Five Concessions. Only at this point did it become reasonably apparent to the Claimants that the earlier incidents constituted breaches of the BIT.
90. The reason alleged by the Claimants for Rwanda's wish to drive NRD to abandon the Five Concessions was to facilitate "*smuggling*", this being the marketing of minerals originating in the RDC, sometimes described as the Belgian Congo, as being mined in Rwanda, to the profit of the latter country.
91. At the start of the Hearing the Tribunal asked Mr. Cowley, counsel for the Claimants, for clarification of a matter that was not clear on the pleadings. The Claimants had alleged a number of individual breaches of the BIT over a period of years, culminating in the alleged expropriation of NRD's interests in the Five Concessions. Were the Claimants making

individual claims for damages in relation to each of these incidents, or were they relying on them solely as incidents in a process of expropriation that reached its conclusion in 2016?

92. Mr. Cowley said that it was the latter, but went on to elaborate on this answer at some length.<sup>16</sup> He said that the expropriation was not a one-off event but very long, slow process that bled NRD of all its money over time. A claim could have been made based on actions by Rwanda

*that caused some seizure of property, some blocking of being able to profit and earn revenue from minerals and seizing of other property which wound up in losses with the conduct of their agent, the person they worked through, Mr. Benzinge, or the person they allowed to act in such a malicious way, taking materials[.].*<sup>17</sup>

93. The Claimants had to decide whether to sue for this, but they did not and they had not:

*So as a stand alone event, the seizure of the property and then return of the property, and now equipment is missing, now things are gone, the loss of profits over the period of time that there was no tagging, are not being sued upon independently. They are part of the sustained losses that went into a prolonged expropriation [...].*<sup>18</sup>

94. The Claimants allege that the totality of their losses exceeds US\$95,000,000.<sup>19</sup>

95. The factual investigation that followed at the Hearing involved examining the individual incidents that the Claimants alleged had violated the BIT and constituted stepping stones in the path of expropriation. The Tribunal has followed that course in this Award.

### **C. THE RESPONDENT'S CASE IN A NUTSHELL**

96. Rwanda submits that the claims are misconceived and hopeless. In the first place, they do not fall within the jurisdiction of this Tribunal. Secondly, NRD at no time had any right to be granted long-term licences, nor did NRD or the Claimants have any legitimate

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<sup>16</sup> Tr. Day 1, 83:20–86:8 (Cowley).

<sup>17</sup> Tr. Day 1, 85:13-19 (Cowley).

<sup>18</sup> Tr. Day 1, 85:25–86:

<sup>19</sup> RFA, para. 41.

expectation that NRD would receive these. After 2010, formal short-term licence extensions were granted to NRD to continue to occupy and exploit the Five Concessions. These were followed by a period of informal indulgence on the part of Rwanda in NRD continuing to do so, which Rwanda ultimately terminated. There was no expropriation, nor anything to expropriate. So far as any interferences with NRD's enjoyment of the Five Concessions during the period of short-term licence extensions or informal indulgence, these were, with one exception, not attributable to Rwanda. That exception – the denial of tags needed to market minerals – was properly and lawfully imposed. None of the matters complained of was capable of constituting a breach of Rwanda's obligations under the BIT.

97. Rwanda submits that the allegation that it set out to expropriate the Five Concessions in order to facilitate smuggling is a scurrilous fiction that those representing the Claimants were ultimately not prepared to pursue on the Claimants' behalf.

**D. CHRONOLOGY OF FURTHER RELEVANT EVENTS**

98. This chronology will include each of the incidents that the Claimants allege violated the BIT and, cumulatively, amounted to "*creeping expropriation*" of the Claimants' interests in the Five Concessions. Each of these incidents will be numbered and identified as follows: "**CE No. \_\_**".
99. On 23 March 2007, BVG was awarded a Four-Year Contract<sup>20</sup> in respect of the Bisesero Concession.<sup>21</sup> This did not lead to the grant of any further rights in relation to Bisesero – the Claimants contend that Rwanda "*expropriated*" the Concession in November 2011.<sup>22</sup> No claim has been advanced in respect of this allegation in this arbitration or at all, but it has relevance to BVG's case on jurisdiction.
100. On 11 August 2008, Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (the "**2008 Law**") came into force. This made provision, *inter alia*, for the grant of short-term exploration and exploitation mining rights.

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<sup>20</sup> As defined in paragraph 78 above.

<sup>21</sup> Contract for Acquiring Mining Concessions between Rwanda and BVG, 23 March 2007, **C-126**.

<sup>22</sup> Cl. C-Mem., para. 101.

101. In the 2010 Application, NRD stated that the company had a workforce of 334 permanent employees and 2000 contracted miners. These so-called artisanal miners extracted ore, largely from open sites, and sold it to NRD, for onward sale. Rwanda avers that this remained the nature of NRD’s mining business between 2011 and 2014.<sup>23</sup>
102. Throughout this period there was an exchange of correspondence between NRD and Rwanda in relation to the grant to NRD of licences for the Five Concessions. In some instances, the Parties are at odds as to the nature and length of the licences under discussion. It is the Claimants’ case that representatives of Rwanda continued to reassure NRD that long-term licences would be granted in respect of the Five Concessions.
103. On 2 August 2012, the Office of the Registrar General, under the control of the Rwanda Development Board (“**RDB**”), altered NRD’s Registration to record that Mr. Benzinge, rather than Mr. Marshall, was Managing Director.<sup>24</sup> On 6 August 2012, after complaint from Mr. Marshall, he was re-instated in the Register as Managing Director.<sup>25</sup> The Claimants allege that, in the interim, Mr. Benzinge occupied NRD’s offices, stole minerals, fired employees and caused a brief period of chaos, “*with the RDB’s backing*”<sup>26</sup> (**CE No. 1**).
104. In September 2012, mining operations were suspended in the three western concession areas – Rutsiro, Sebeya and Giciye – purportedly on the ground of environmental concerns arising from illegal mining<sup>27</sup> (**CE No. 2**). NRD was permitted to resume operations in these areas on 10 February 2013.<sup>28</sup> The Claimants allege that during the period of suspension Rwanda permitted illegal mining to take place. This caused environmental damage that resulted in physical damage to NRD’s property (**CE No. 3**).

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<sup>23</sup> Resp. C-Mem., para. 48; RPHB, para. 71.

<sup>24</sup> RDB, Certificate of Domestic Company Registration for NRD, 2 August 2012, **R-026**.

<sup>25</sup> RDB, Certificate of Domestic Company Registration for NRD, 6 August 2012, **R-027**.

<sup>26</sup> Cl. Reply, para. 86.

<sup>27</sup> Letter from NRD to Minister Kamanzi, 14 September 2012, **C-049**; Letter from NRD to RNRA, 14 December 2012, **C-050**.

<sup>28</sup> Letter from RNRA to NRD, 10 February 2013, **C-056**.

105. On 17 May 2013, an Arbitrator, Me Nelly Umugwaneza handed down an award (the “**17 May Award**”) in an arbitration between Mr. Benzinge as ‘Plaintiff’ and NRD as ‘Defendant’.<sup>29</sup> This declared, among other things, that the sale of NRD to Starck was illegal and that Mr. Marshall and Ms. Mruskovicova, Mr. Marshall’s partner, should be removed as Directors. The Award ordered NRD to pay Mr. Benzinge a total of 16.3 million Rwandan Francs, of which 6.3 million was stated to be “*the sum he paid for the company in the present case*” and 10 million to be in respect of advocate fees.
106. No one purporting to act for NRD took part in the arbitration. Mr. Marshall, purporting to act for NRD, challenged the decision, unsuccessfully, on purely procedural grounds, before the High Court<sup>30</sup> and the Supreme Court.<sup>31</sup>
107. Following this there was a period of some two months during which NRD’s property at Kigali and Nemba was seized by a Court Bailiff, Mr. Jean Bosco Nsengiyuma (“**Bailiff Bosco**”), purportedly as part of a process of enforcing judgments outstanding against NRD in favour of miners and others, including Mr. Benzinge. The Claimants contend that Rwanda was privy to these proceedings and that they were not legitimate (**CE No. 4**).
108. Meanwhile, on 20 May 2014, Rwanda Law No. 13/2014 on Mining and Quarry Operations<sup>32</sup> (the “**2014 Law**”) came into force. Subject to exceptions, anyone seeking a mining licence was required to make a fresh application for this in accordance with the provisions of the 2014 Law. Provisions in respect of the length of licences that could be granted were made more flexible.
109. Rwanda had put in place a system under which ore lawfully mined in Rwanda was bagged and tagged. Without tags the ore could not lawfully be sold. In the summer of 2014, Rwanda withdrew the supply of tags from NRD, on the ground that NRD was persisting in carrying on business without formal licences and because there was doubt as to the

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<sup>29</sup> *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Me Nelly Umugwaneza, 17 May 2013, **R-013**.

<sup>30</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Commercial High Court Case RCOMA 0269/13/HCC, Decision, 23 September 2013, **R-014**.

<sup>31</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Supreme Court Case RCOMA 0017/13/CS, Decision, 2 May 2014, **R-015**.

<sup>32</sup> Law No. 13/2014 on Mining and Quarry Operations, 20 May 2014 (“**2014 Law**”), **CL-002**.



ownership of the Company. The Claimants allege that this was discriminatory and unfair (**CE No. 5**).

110. On 18 August 2014, Rwanda requested NRD to re-apply for licences in relation to the Five Concessions in accordance with the 2014 Law.<sup>33</sup> The Claimants allege that this requirement was unlawful, discriminatory and breached the requirements of due process (**CE No. 6**).
111. NRD nonetheless purported to comply with this request under cover of a letter of 18 September 2014.<sup>34</sup> The re-application was rejected by Rwanda on 24 November 2014,<sup>35</sup> subject to a right of appeal. NRD exercised that right, but its re-application was finally rejected by Rwanda on 19 May 2015.<sup>36</sup> It is the Claimants' case that this was the final step in the process of creeping expropriation of their rights in respect of the Five Concessions (**CE. No. 7**) but that they did not reasonably appreciate this to be the case until March 2016 when Rwanda put the Five Concessions out to public tender (**CE No. 8**).
112. On 12 June 2015, Mr. Evode Imena, the Minister of Mining, wrote to Mr. Marshall,<sup>37</sup> referring to Rwanda's letter of 19 May 2015. He stated that his Ministry had appointed a technical evaluation team to check that NRD had complied with Rwanda's mining and environmental laws during its period of occupation of the Concessions. It is Rwanda's case that this letter would have dispelled any doubts on the part of NRD that the previous letter of 19 May was intended to bring NRD's occupation of the Concessions to an end. The Claimants deny that this letter was ever received. Rwanda submits that this is not credible.

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<sup>33</sup> Letter from MINIRENA to NRD, 18 August 2014, **C-064**.

<sup>34</sup> The letter was erroneously dated 18 August 2014: Letter from NRD to MINIRENA, 18 August 2014, **C-084**.

<sup>35</sup> Letter from MINIRENA to NRD, 28 October 2014, **C-119**.

<sup>36</sup> Letter from MINIRENA to NRD, 19 May 2015, **C-038**.

<sup>37</sup> Letter from MINIRENA to NRD, 12 June 2015, **R-025**.

#### IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

##### A. THE BIT

113. The provisions of the BIT that the Claimants allege Rwanda has violated are the following.<sup>38</sup>

##### ***Article 3: National Treatment***

*1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

*2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

[...]

##### ***Article 4: Most-Favored Nation Treatment***

*1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

*2. Each Party shall accord to covered investments treatment no less favorable than it accords, in like circumstances, to investments in its territory of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

##### ***Article 5: Minimum Standard of Treatment***

*1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*

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<sup>38</sup> BIT, RFA Exhibit 05, Arts. 3(1)-3(2), 4, 5(1)-(2), 6(1)(c)

2. *For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

- (a) *“fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
- (b) *“full protection and security” requires each Party to provide the level of police protection required under customary international law.*

[...]

#### ***Article 6: Expropriation and Compensation***

1. *Neither party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except*

[...]

- (c) *on payment of prompt, adequate and effective compensation; [...]*

[A footnote provides that Article 6 is to be interpreted in accordance with Annexes A and B. Annex B provides:]

#### ***Expropriation***

*The Parties confirm their shared understanding that:*

1. *Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.*

2. *An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*

3. *Article 6(1) addresses two situations. [...]*

*4. The second situation addressed by Article 6(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*

*(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry [...]*

## **B. THE CLAIMANTS' ALLEGATIONS OF BREACH OF THE BIT**

114. The Claimants place at the forefront of their case the allegation that Rwanda's conduct repeatedly infringed the duty imposed under Article 5 of the BIT to afford the Claimants' investments "*fair and equitable treatment*". The following breaches are alleged:

- (i) Rwanda "*eviscerated*" the Claimants' legitimate expectation that NRD would be granted long-term licences over the Five Concessions, discriminating in favour of other applicants;<sup>39</sup>
- (ii) Rwanda required NRD to re-apply for licences after the 2014 Law came into force in circumstances where this was contrary to law, in breach of due process and discriminatory<sup>40</sup> (**CE No. 6**);
- (iii) Rwanda refused to supply NRD with tags in 2014, thereby discriminating against NRD<sup>41</sup> (**CE No. 5**);
- (iv) Rwanda barred NRD from the Western Concessions (i.e., Rutsiro, Sebeya and Giciye) in 2012<sup>42</sup> (**CE No. 2**);
- (v) Rwanda colluded in the thefts of NRD's property by Mr. Benzinge in 2012<sup>43</sup> (**CE No. 1**); and

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<sup>39</sup> Cl. Mem., paras. 168-175.

<sup>40</sup> Cl. Mem., paras. 178-179.

<sup>41</sup> Cl. Mem., paras. 184-192.

<sup>42</sup> Cl. Mem., para. 195.

<sup>43</sup> Cl. Mem., paras. 197, 200.

- (vi) Rwanda colluded in Bailiff Bosco's unlawful seizures of NRD's property in 2014.<sup>44</sup>  
(CE No. 4).

115. The Claimants allege that some of the incidents violated Rwanda's obligation to afford their investments "*full protection and security*" pursuant to Article 5:

- (i) Rwanda failed to protect NRD's property in the Western Concessions from damage during the period that mining by NRD was suspended there in 2012-3.<sup>45</sup> (CE No. 3);  
and  
(ii) Rwanda failed to prevent the thefts of NRD's property perpetrated by Mr. Benzinge in 2012.<sup>46</sup> (CE No. 1).

116. It is the Claimants' case that these individual breaches of the BIT, culminating in the events that constituted CE No. 7 and CE No. 8, amounted to unlawful expropriation of the Claimants' investments in violation of Article 6 of the BIT. The confiscation was of the

*Claimants' tangible property and assets as well as intangible contractual rights to which Claimants were entitled.*<sup>47</sup>

117. The Claimants allege that, insofar as treatment of NRD that breached Article 5 was not applied to other investors, Rwanda discriminated against the Claimants in a manner that infringed its obligations under Articles 3 and 4 of the BIT.

### C. RELIEF SOUGHT BY THE CLAIMANTS

118. As this phase of the arbitration is restricted to issues of jurisdiction and liability only, pursuant to the Parties' agreement and the Tribunal's Order captured in Section 14.1 of Procedural Order No. 1, the Claimants simply seek the following relief:

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<sup>44</sup> Cl. Mem., paras. 205, 207, 211.

<sup>45</sup> Cl. Mem., paras. 226-227.

<sup>46</sup> Cl. Mem., para. 228.

<sup>47</sup> Cl. Mem., para. 240.

*Claimants request that the Tribunal find that Rwanda has breached its duties under the BIT and find in favor of Claimants on the issue [of] liability.*<sup>48</sup>

**D. THE RESPONDENT’S CASE**

119. Rwanda contends that the Tribunal has no jurisdiction to entertain any of the claims advanced. As to these claims, Rwanda challenges each and every breach of the BIT alleged by the Claimants:

- (i) The Claimants had no legitimate expectation that long-term licences would be granted to NRD. Nor would such an expectation, if legitimate, found any obligation on the part of Rwanda under the BIT;
- (ii) NRD was properly required to re-apply for licences under the 2014 Law (**CE No. 6**);
- (iii) Rwanda’s refusal to supply NRD with tabs in 2014 was lawful and not discriminatory (**CE No. 5**);
- (iv) The closure of the western concession areas in 2012 was effected by local government on valid environmental grounds (**CE No. 2**);
- (v) If damage occurred in those areas, or property was stolen by Mr. Benzinge or others, this was not attributable to any failure on the part of Rwanda to observe the required standard of “full protection and security” required by Article 5 of the BIT (**CE No. 3** and **CE No. 1**);
- (vi) Seizures and sales of NRD’s property by the bailiff Bosco were carried out in lawful execution in respect of judgment debts owed by NRD and were independent of government (**CE No. 4**);
- (vii) The Claimants owned no interests in the Five Concessions that were capable of being expropriated contrary to Article 6 or at all (**CE No. 7** and **CE No. 8**).

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<sup>48</sup> Cl. Mem., para. 294.

**E. RELIEF SOUGHT BY THE RESPONDENT**

120. Rwanda requests the Tribunal to:

- [1.] *Dismiss the Claimants' claims for lack of jurisdiction [...];*
- [2.] *Alternatively, dismiss the Claimants' claims on the merits;*
- [3.] *Order the Claimants' to pay Rwanda the full costs of this arbitration, including, without limitation, arbitrators' fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with this arbitration;*
- [4.] *Order the Claimants to pay Rwanda interest on the amounts awarded under paragraph [3] above until the date of full payment; and*
- [5.] *Grant any further relief to Rwanda as it may deem appropriate.*<sup>49</sup>

**V. JURISDICTION**

**A. INTRODUCTION**

121. Rwanda challenges the jurisdiction of this Tribunal in relation to the claims brought by each of the Claimants on the following grounds:

- (i) Lack of jurisdiction *ratione temporis*;
- (ii) Lack of jurisdiction *ratione personae*; and
- (iii) Lack of jurisdiction *ratione materiae*.

122. Rwanda further challenges the jurisdiction of this Tribunal in relation to the claims brought by Spalena on the ground of:

- (iv) Lack of jurisdiction *ratione voluntatis*.

123. The Tribunal proposes to address these challenges one by one.

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<sup>49</sup> Resp. C-Mem., para. 479.

**B. LACK OF JURISDICTION *RATIONE TEMPORIS***

**(1) The Claimants' Case**

124. Article 2(3) of the BIT provides:

*For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.*<sup>50</sup>

The BIT entered into force on 1 January 2012.

125. Article 26(1) of the BIT provides:

*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant [...] has incurred loss or damage.*<sup>51</sup>

126. The application of these provisions requires the Tribunal to establish in relation to any alleged breach of the BIT (i) the date upon which the Claimants submitted their claims and (ii) the dates on which the Claimants first acquired, or should have acquired, knowledge of the breaches in question.

127. Section IV of the Claimants' Memorial sets out the basis upon which the Claimants contend that the Tribunal has jurisdiction over the dispute. No mention is made in this Section of the temporal restrictions on jurisdiction set out above. The Claimants' positive case in relation to the temporal issues is to be found in their Counter-Memorial.

***a. The Cut-Off Date***

128. The first question to be resolved is the date on which the Claimants first submitted their claims. The date upon which the original Request for Arbitration was submitted was 14 May 2018. The date on which the Amended Request for Arbitration was submitted was 12 June 2018.

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<sup>50</sup> BIT, RFA Exhibit 05, Art. 2(3).

<sup>51</sup> BIT, RFA Exhibit 05, Art. 26(1).



129. The Claimants have proceeded on the premise that the relevant date is the earlier of the two, citing paragraph 39 of PO2.<sup>52</sup> Thus it is the Claimants' case that the earliest date, or "Cut-off Date", for knowledge of a violation of the BIT capable of giving rise to a claim in this arbitration is 14 May 2015.

***b. Breach Dates***

130. As demonstrated above, almost all the incidents upon which the Claimants rely as constituting breaches of the BIT occurred before 14 May 2015 (**CE Nos. 1 to 6**). The Claimants devote some 31 pages of their Counter-Memorial to explaining how it is that all that these incidents fall nonetheless within the jurisdiction of the Tribunal.
131. The Claimants' primary case, developed over pages 8 to 35, is that all the individual incidents (i.e., **CE Nos. 1 to 6**), formed part of a single process of unlawful expropriation of the Claimants' interests in the Five Concessions, which process was not completed until the final act of expropriation (this being **CE No. 8**). The relevant date for any time bar was that of the last incident:

*Claimants suffered a creeping expropriation based on Respondents' extensive history of mistreatment of their investment. All of these prior acts should be considered in the aggregate for the purpose of determining whether there was an expropriation.*<sup>53</sup>

132. Claimants submit that, where a number of incidents are aggregated in this way, the relevant date for the purposes of limitation is that on which the "*last action or omission occurs*".<sup>54</sup>
133. An alternative way that the Claimants' case is advanced is that Rwanda's final acts of expropriation opened the Claimants' eyes to the true nature of the Respondent's earlier conduct. They assert that up to the final expropriation the Claimants had always expected that NRD would ultimately be granted the long-term licences to which it was contractually entitled. The individual incidents were not incompatible with this expectation. The Claimants had no reason to believe that Rwanda was discriminating against NRD in

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<sup>52</sup> Cl. C-Mem., para. 12.

<sup>53</sup> Cl. C-Mem., para. 87.

<sup>54</sup> Cl. C-Mem., para. 16, citing *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/87, Award, 6 February 2007, **CL-018**, para. 265.

comparison to other concession holders. Only at the moment of final expropriation contrary to Article 6 of the BIT did the Claimants see the earlier events in their true light and appreciate that these were incidents of ill-treatment that violated duties owed by Rwanda under other Articles of the BIT:

*It was not until Respondent expropriated Claimants' investment, in violation of Article 6 of the BIT, that Claimants knew or should have known that Respondent had also violated Articles 3-5 of the BIT and did not treat Claimants' investments fairly and transparently, did not provide full protection and security, and did not treat the Claimants in accordance with the National Treatment and Most-Favoured-Nation obligations.*

*[...] [I]t was not until Respondent effected an expropriation, on or after May 19, 2015, that Claimants realized that all of the bad acts suffered at the hands of Respondent were not merely steps towards getting the long-term licence but were, in fact, designed to harm and damage the Claimants through damage to their investment.<sup>55</sup>*

134. Underpinning all of these submissions is the Claimants' case that the object of the creeping expropriation perpetrated by Rwanda was Rwanda's concern that the presence of NRD in the Five Concessions was inhibiting the smuggling of minerals from the Democratic Republic of Congo ("DRC"):

*The underlying reason for the expropriation was Respondent's desire to better control the smuggling of minerals from the DRC.<sup>56</sup>*

135. This was not an allegation that had featured large in the Claimants' Memorial. That simply alleges:

*Rwanda has given no indication that it cares whether the minerals it tags originate in Rwanda, the DRC, or elsewhere. Instead, Rwanda turns a blind eye to smuggling and the GMD tag managers issued tags when requested, without asking questions.<sup>57</sup>*

136. Now the Claimants allege that smuggling in Rwanda was controlled by a number of powerful Rwandan oligarchs, with close links to the Government. One of these put pressure

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<sup>55</sup> Cl. C-Mem., paras. 90-91.

<sup>56</sup> Cl. C-Mem., Sec. II.B.4.

<sup>57</sup> Cl. Mem., para. 118.

on Rwanda to force the Claimants to cooperate or abandon the Concessions. The Government saw fit to make sure that a company with American investors that was not willing to assist in illegal smuggling would not stand in the way of a very profitable operation – one that brought tax revenues to Rwanda.<sup>58</sup>

## **(2) The Respondent's Case**

### ***a. The Cut-Off Date***

137. Rwanda's submissions were originally made in its Memorial and elaborated in its Rejoinder.
138. Rwanda challenges the Claimants' assumption, based on PO2, that the Cut-Off Date is 14 May 2015. It observes that PO2 refers to May 14 2015 as "*the first 'Cut-Off Date'.*"<sup>59</sup>
139. Rwanda argues that the first Cut-Off Date is derived from the original Request for Arbitration, submitted on 14 May 2018. That Request was rejected by ICSID, according to Rwanda. Rwanda submits that the claim that is the subject of this arbitration is the one advanced by the Amended Request for Arbitration on 12 June 2018; therefore, the true Cut-Off Date is three years prior, i.e., 12 June 2015.<sup>60</sup>

### ***b. Breach Dates***

140. So far as the individual heads of claim are concerned, Rwanda submits that none of these arose after the Cut-Off Date.
141. Rwanda challenges the Claimants' approach of aggregating a series of incidents and attributing to them the date upon which the last one occurred, citing *Rusoro Mining v. Venezuela* for the proposition that

*[...] the better approach for applying the time bar consists in breaking down each alleged composite claim into individual*

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<sup>58</sup> Cl. C-Mem., paras. 71-74.

<sup>59</sup> Resp. Rej., para. 405.

<sup>60</sup> Resp. Rej., para. 410.

*breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately.*<sup>61</sup>

142. On the premise that the refusal to grant long-term licences was an expropriation, which Rwanda denies,

*the Respondent's decision not to grant long-term licences to NRD was clearly known to NRD by 2 August 2011.*<sup>62</sup>

### **(3) The Tribunal's Analysis**

#### ***a. The Cut-Off Date***

143. The Tribunal holds that the Cut-Off Date for limitation purposes is 12 June 2015. The claim advanced in this arbitration is that submitted in the Amended Request for Arbitration of 12 June 2018 and not the original Request for Arbitration. The original Request included claims by NRD, a company that had no *locus standi*. In these circumstances, the Request was withdrawn. This arbitration is founded on the Amended Request for Arbitration.

#### ***b. Breach Dates***

144. The Claimants' case described above was advanced at a time when the Tribunal had directed bifurcation so as to enable questions of jurisdiction to be determined in advance of the merits. In advancing their case, the Claimants emphasized that the Tribunal would be obliged, for the purpose of dealing with objections to jurisdiction, to proceed on the basis that the Claimants' allegations of fact were true. Article 28(4)(c) of the BIT expressly so provides.<sup>63</sup>
145. As the bifurcation did not take place, a hearing on jurisdiction and the merits took place simultaneously. The first 75 pages of Rwanda's Post Hearing Brief are largely devoted to an analysis of the factual evidence given at the Hearing. Rwanda then submits that the Tribunal has no need to assess the merits of the claim but that it should, in the light of the

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<sup>61</sup> Resp. Rej., para. 416, citing *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **RL-012**, para. 231(ii).

<sup>62</sup> Resp. Mem., para. 84.

<sup>63</sup> BIT, **RFA Exhibit 05**, Art. 28(4)(c) reads: "In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) [...]".

evidence given, determine the arbitration in favour of Rwanda on grounds of want of jurisdiction alone.

146. The Tribunal does not propose to follow this approach. The object of the Hearing was to resolve issues both of merits and jurisdiction. The Tribunal proposes to make findings in relation to both.
147. The grounds relied upon by the Claimants in support of their assertion that the Tribunal has jurisdiction *ratione temporae* raise issues of fact that span the period 2012 to 2016. In these circumstances, the Tribunal proposes to defer further findings in respect of this head of the jurisdictional challenge until after it has addressed the merits.

**C. LACK OF JURISDICTION *RATIONE PERSONAE***

148. The Tribunal questions whether this heading is appropriate to cover the matters that Rwanda has raised under it. They would, perhaps, have been more appropriately raised under the heading of lack of jurisdiction *ratione materiae*. Under this head of challenge, Rwanda has submitted that neither of the Claimants has suffered any loss. The Tribunal proposes to address that submission when considering the challenge *ratione materiae*. At this stage, the Tribunal will address the challenge made by Rwanda that is confined to BVG's *locus standi*. This is, in effect, that BVG has not demonstrated that it had any material investment in Rwanda.

**(1) The Claimants' Case**

***a. BVG acquired an interest in NRD***

149. The Claimants' primary case is that BVG invested in Rwanda by acquiring an interest in NRD.
150. The original Request for Arbitration alleged:

*In December 2010, BVG and NRD's ultimate parent company signed a purchase and sale agreement for the sale of NRD's parent to The Spalena Company LLC, a wholly-owned entity of BVG investors. As part of the purchase of NRD's parent, **BVG acquired NRD** and thereby obtained and held the beneficial interest in each*

*of the Acquisition Contracts for the Rutsiro, Sebeya, Giciye, Mara, and Nemba Concessions.*<sup>64</sup>

151. In the Amended Request for Arbitration, the words that the Tribunal has placed in bold type were altered so as to read “**BVG investors acquired**”.

152. The Tribunal refers to the facts set out at paragraphs 83 to 87 above. In their Memorial, the Claimants allege that on 23 December 2010, Starck sold all of its interest in NRD’s Holding Company, HC Starck Resources GmbH, to Spalena for [REDACTED]

[REDACTED].<sup>65</sup> The following extracts from the Memorial address the basis upon which BVG is alleged to have acquired an interest in NRD:

7. *Roderick Marshall formed BVG to invest in Rwanda’s mining sector. [...] Mr. Marshall, as the lead investor in BVG, invested in Rwanda on behalf of BVG and obtained a mining contract from Rwanda. [...] Unfortunately, [...] Rwanda [...] took BVG’s concession in 2012. Despite this, Mr. Marshall desired to continue investing and operating in Rwanda and transferred BVG’s investments in Rwanda to Spalena. As a result, BVG became an investor in Spalena. Through Spalena, Mr Marshall, other investors, and BVG invested in NRD. BVG and Spalena are commonly owned affiliates.*

[...]

10. *Spalena is the primary owner and investor in NRD [...].*<sup>66</sup>

153. The Claimants’ Reply elaborates on this picture:

16. *[...] BVG entered into a Cooperation Agreement with NRD on November 1, 2010. [...] The Cooperation Agreement provided that NRD would manage the operations of the Bisesero Concession for BVG. [...]*

17. *[...] On December 23, 2010, Starck sold all of its interest in HC Starck Resources GmbH to Spalena for [REDACTED]  
[REDACTED] arising out of the BVG-NRD Cooperation*

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<sup>64</sup> Request for Arbitration (original, 14 May 2018), para. 13 [emphasis added by the Tribunal].

<sup>65</sup> Cl. Mem., para. 4.

<sup>66</sup> Cl. Mem., paras. 7, 10.

Agreement. [...]

in the [sic] Spalena's investment in NRD.<sup>67</sup>

154. The Claimants' Counter-Memorial contains more detailed allegations. BVG claims to have standing on the ground that it invested directly in NRD prior to and in connection with the acquisition of NRD's shares by Spalena and also that it exercised ownership and control over NRD indirectly through its ownership interest in Spalena.<sup>68</sup> Details of these allegations are then set out as follows:

97. *In order to assist in the day-to-day operations of the Bisesero Concession, BVG entered into a Cooperation Agreement with NRD on November 1, 2010. [...] The Cooperation Agreement provided that NRD would manage the operations of the Bisesero Concession for BVG. The Cooperation Agreement further stated that BVG would loan NRD \$100,000 for the purchase of mining equipment to be used at BVG's concession. In return, BVG and NRD agreed to split the profits generated from the Bisesero Concession evenly.*

[...]

99.

*As a result, BVG was able to significantly reduce the purchase price of NRD [...]. BVG's write off its [sic] [...] created an equitable interest in Claimants' investment in NRD.*

[...]

101. *In November 2011, Respondent expropriated the Bisesero Concession from BVG. So as not to lose the value of the assets that BVG invested to develop the Bisesero Concession, BVG sold all of its assets, totaling USD \$2,252,502.00, to Spalena in exchange for an ownership stake in Spalena. [...] Prior to this sale, BVG was not an*

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<sup>67</sup> Cl. Reply, paras. 16-17.

<sup>68</sup> Cl. C-Mem. para. 95.

*owner in Spalena. Through this transaction, BVG became a member of Spalena and an indirect investor in NRD.*

102. *Mr. Marshall, as the sole director of BVG, worked as NRD's Managing Director on the ground in Rwanda, overseeing day-to-day operations in order to protect BVG's investment in NRD held indirectly through Spalena. [...]*<sup>69</sup>

These allegations are based, almost verbatim, on Mr. Marshall's Second Witness Statement, dated 16 August 2019.

155. A number of documents are relied upon by the Claimants in support of these allegations. The first in time is a copy of the Cooperation Agreement. This bears the date 1 November 2010 and bears Mr. Marshall's signature on behalf of BVG. It bears an apparent signature "A.Ehlers", followed by a slash and then the initials "TG", on behalf of NRD.<sup>70</sup> Typed at the foot of the document is "Confirmed as of 30 March 2011", beneath which is the signature "Thomas Grey".
156. The other documents include a matching pair of Resolutions (the "**Matching Resolutions**"), each dated 27 March 2012. One is a Resolution signed by Mr. Marshall as President and sole Director of BVG authorizing him to sell assets on "*the attached asset list*" to Spalena, thereby making BVG a part owner of Spalena in accordance with Spalena's Amended Articles.<sup>71</sup> The other is a Resolution signed by Mr. Marshall as the sole Director of Spalena authorizing him to purchase the self-same assets, thereby making BVG a part owner of Spalena.<sup>72</sup> The same two lists of assets are attached to each Resolution, the first totaling US\$2,252,502 in value and the second, which does not appear to duplicate any part of the first, totaling US\$49,646.52.

***b. BVG's 'loan' to NRD***

157. The Cooperation Agreement provided for BVG to pay to NRD US\$100,000 to fund the purchase of mining equipment. It is the Claimants' case that this was a loan that constituted

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<sup>69</sup> Cl. C-Mem., paras. 97, 99, 101-102.

<sup>70</sup> Cooperation Agreement between NRD and BVG, 1 November 2010 ("**Cooperation Agreement**"), C-122.

<sup>71</sup> BVG, Resolution by Unanimous Written Consent of the Sole Director, 27 March 2012, C-123.

<sup>72</sup> Spalena, Resolution by Unanimous Written Consent of the Sole Director, 27 March 2012, C-124.



an independent investment in Rwanda. The Claimants submit that this ‘loan’ had all the elements of an investment, as demonstrated by the relevant jurisprudence. It was (1) a commitment of capital; (2) with an expectation of gain or profit; and (3) a concurrent assumption of risk.<sup>73</sup>

158. The ‘loan’ was to enable NRD to purchase equipment as part of a larger investment operation, namely the development of mining concessions in Rwanda.<sup>74</sup>

## **(2) The Respondent’s Case**

159. Rwanda submits that the case advanced by BVG in an attempt to demonstrate that it has *locus standi* in this arbitration is a fiction. Not merely is it not supported by the evidence, it is contrary to the evidence.
160. Rwanda submits that BVG’s claim to have contributed to the consideration paid to Starck for the acquisition of NRD by writing off liability of [REDACTED] is not made out on the evidence and is implausible.<sup>75</sup> It is contrary to the express terms of the Spalena Purchase Contract between Spalena and Starck<sup>76</sup> and to the evidence of Mr. Ehlers, the Managing Director of NRD at the time of the purchase, and of Mr. Sindayigaya, a Senior Accountant at NRD.
161. As for the allegation that BVG purchased a shareholding in Spalena by selling its assets to Spalena, Rwanda submits that the Matching Resolutions purporting to authorise this transaction have been fabricated by the Claimants.<sup>77</sup> Rwanda relies upon the fact that there is no independent evidence that supports the transaction, when such evidence would be available had it taken place. Mr. Sindayigaya, states that he had never seen the assets in question on Bisesero’s sites.<sup>78</sup>

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<sup>73</sup> Cl. C-Mem., paras. 112 *et seq.*, citing, *inter alia*, *Fedax N.V v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, **CL-059**; *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, **CL-060**.

<sup>74</sup> Cl. C-Mem., para. 122.

<sup>75</sup> Resp. Rej., paras. 457-468; Resp. PHB, paras. 66-70; 215(3).

<sup>76</sup> Spalena Purchase Contract, **C-068**.

<sup>77</sup> Resp. PHB, para. 203.

<sup>78</sup> Sindayigaya (2), para. 15.

162. As for the alleged loan of US\$100,000 by BVG to NRD under the terms of the Cooperation Agreement, it is Rwanda's case that this could not found jurisdiction on the part of the Tribunal for a number of reasons:<sup>79</sup>

- (i) the advance provided for in the Cooperation Agreement was not a loan;
- (ii) there is no evidence that the advance was made; and
- (iii) the advance has no, or no sufficient, connection with the claims advanced in this arbitration.

### (3) The Tribunal's Analysis

#### *a. The 17 May Award*

163. The Tribunal refers to paragraphs 105-106 above. On the Arbitrator's findings, Starck never acquired an interest in NRD. Were this correct it would follow that neither Claimant acquired any interest in NRD from Starck and, in consequence, that neither Claimant has *locus standi* to advance the claims that form the subject of this arbitration. Rwanda has conceded that, while the Arbitrator's findings might be binding as between the parties to that arbitration, namely Mr. Benzinge and NRD, they have no effect more generally *in rem*. Accordingly they provide no basis for challenging the jurisdiction of the Tribunal.<sup>80</sup> The Tribunal endorses that concession.

#### *b. Documentary Evidence*

164. The **Cooperation Agreement** is relevant inasmuch as the Claimants alleged that breach of this led to a liability on the part of Starck to BVG of [REDACTED]. In its Rejoinder, Rwanda did not admit the authenticity of the copy of the Cooperation Agreement originally produced by the Claimants.<sup>81</sup> The day before the Hearing, the Claimants produced an

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<sup>79</sup> Resp. Rej., paras. 473-496.

<sup>80</sup> Resp. PHB, para. 213.

<sup>81</sup> Resp. Rej., para. 67, referring to Cooperation Agreement, C-122.

earlier, and slightly different, version of this document, bearing the signature of Mr. Ehlers.<sup>82</sup>

165. At the Hearing, Mr. Marshall was cross-examined at some length about the two documents. He said that his recollection was that the Agreement was signed “*in counterparts*”. The initials “TG” against the apparent signature of Mr. Ehlers in Exhibit C-121 were those of Mr. Thomas Grey, the Operations Manager. He was not able to state why the two documents differed or which one was binding. He said that he believed that Mr. Ehlers had written the document to memorialize what had been happening between the two companies from August/early September until he wanted it documented as of 1 November 2010.<sup>83</sup>
166. In its Post-Hearing Brief, Rwanda accepts the authenticity of the two versions of this Agreement but submits that neither version represents a genuine agreement as there was no meeting of minds as to its terms.<sup>84</sup>
167. Whether or not these documents evidence a binding agreement their terms have some significance. The C-122 version provides as follows:

*[...] NRD and BVG agree to cooperate in the management of the Bisesero Concession (the “Concession”) as follows:*

- 1. [...] During the period of this agreement, NRD, as represented by Mr. Anthony Ehlers, and under the direction and instruction of BVG, shall manage the operations of the Concession for BVG;*
- 2. As part of doing due diligence and managing the Concession, NRD will buy necessary artisan mining-support equipment for BVG, including such items as shovels, compressors and jack-hammers, etc. using money provided by BVG and will also loan its own equipment to the artisans in the Concession. NRD shall buy (using BVG money) or loan enough artisan support equipment so that the artisans in the Concession may generate the maximum possible minerals. BVG will provide USD 100,000 for this purpose to NRD, and NRD will keep proper financial accounts of the*

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<sup>82</sup> Email from Mr. Ehlers to Mr. Marshall, 7 November 2010, attaching Cooperation Agreement, C-210.

<sup>83</sup> Tr. Day 2, 13:7-23 (Marshall).

<sup>84</sup> Resp. PHB, para. 204.

*transactions made on behalf of BVG and will confirm with Roderick Marshall prior to making such purchase;*

3. *NRD shall loan its bulldozer, wheel loader and tipper trucks to renovate / upgrade / create the Bigugu site, and at other sites in the Concession and for other purposes. Such NRD equipment and machinery shall be provided for such period as shall be determined by BVG. The cost of this operation such as equipment relocation costs, direct operating costs, fuels and oils, spares etc. will be treated as per Clause 5 below. NRD will loan enough machinery and equipment for minerals to be processed on site in Bigugu and at other sites;*
4. *NRD, under the direction of BVG, shall create the same or similar program of cooperative artisanal miners, supervisors and security in the Concession as it has in the concessions operated by NRD elsewhere in Rwanda;*
5. *NRD and BVG will together split the cost of agreed expenses for production for the minerals from the Concession and also from the net profit from the sale of such purchased minerals 50-50;*

*[...]*

7. *This Agreement shall be effective for five months from the date hereof and may be extended by the parties for one year and may be made part of a permanent agreement if agreed by the parties;*

*[...]*

168. The **Spalena Purchase Contract**<sup>85</sup> in respect of the Holding Company of NRD is a formal contract in German and English, recording that it is negotiated in Hanover on 23 December 2010. It is signed by Mr. Marshall on behalf of Spalena and Dr. Jens Grunert on behalf of Starck, as sole shareholder of the Holding Company of NRD. It states at Clause 2(1) that the purchase price is [REDACTED].

169. A statement annexed to the Agreement (labelled “Certificate”), signed by Mr. Ehlers, states that

*other than tax liabilities to the Rwandan State [...] and loans from the majority-shareholder of NRD (H.C. Starck Resources GmbH), the total liabilities of NRD of any kind are less than USD100,000.*<sup>86</sup>

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<sup>85</sup> Spalena Purchase Contract, **C-068**.

<sup>86</sup> Spalena Purchase Contract, **C-068**, p. 36.

170. Clause 3(n) states that to the best knowledge of the seller and the managing director of the seller, the above-referenced statement is correct.

*c. Witness Evidence*

171. **Mr. Ehlers'** First Witness Statement is dated 20 May 2019. It states that he has lifelong experience as a mining engineer; he was appointed, and began working as, Managing Director of NRD in mid-2010. Soon after this Starck decided to sell its shares in NRD. Mr. Ehlers understood that this was because of allegations that Starck was involved in trade in conflict minerals in the DRC, though not in relation to NRD's concessions in Rwanda.<sup>87</sup>
172. In around August or September 2010, Mr. Ehlers was approached “*out [of] the blue*” by Mr. Marshall to enquire about the sale of NRD. Mr. Ehlers was not involved in the negotiations that led to the subsequent sale, though he spent three weeks with Mr. Marshall making sure that he acquired full knowledge of NRD, its assets and its operations.<sup>88</sup>
173. Mr. Ehlers commented that the purchase price of [REDACTED] was a very small sum relative to the value of the equipment that NRD had but that it was obvious to both parties that the business was very risky and would require very significant further investment.<sup>89</sup>
174. Mr. Ehlers' Second Witness Statement is dated 27 May 2020. He does not recollect seeing the Cooperation Agreement. He states:

*[...] When I first met Mr. Marshall in late 2010 and he expressed an interest in purchasing NRD, we discussed a joint venture between BVG and NRD in broad terms – Mr. Marshall wanted to use NRD's equipment to start mining operations at Bisesero. However, we did not take any steps in this regard until after the Sale and Purchase Agreement between NRD and Spalena was signed on 23 December 2010 and NRD did not ever receive 100,000 USD from BVG as set out in paragraph 2 of the Cooperation Agreement.*

*NRD did not steal minerals from BVG's Bisesero concession or use the concession for smuggling from the DRC– that is an outlandish and implausible lie. Based on what I saw when I visited Bisesero*

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<sup>87</sup> Ehlers (1), paras. 5, 9-10, 14.

<sup>88</sup> Ehlers (1), paras. 15-16.

<sup>89</sup> Ehlers (1), para. 17.

*around this time, there were no minerals being produced at BVG's Bisesero Concession to steal. [...]*<sup>90</sup>

175. In paragraphs 260 to 269 of the Claimants' Reply, a series of serious allegations are made against Mr. Ehlers in support of the allegation that he is biased against the Claimants. These are largely based on letters written by Mr. Thomas Grey. Mr. Ehlers refutes these in detail in paragraphs 24 to 33 of his Second Witness Statement. No direct evidence has been tendered from Mr. Grey. Some of the allegations were repeated by Mr. Marshall when he gave evidence..<sup>91</sup>
176. Mr. Ehlers was cross-examined as to credit at some length, though it was not put to him that the more serious of the allegations made against him were true. Most of the evidence of fact that he gave was unchallenged. Mr. Ehlers responded to questions in a straightforward manner. He accepted some instances of inappropriate behaviour on his part and that on termination of his employment he had retained a laptop and other company property in order to put pressure on the company to pay what he alleged were arrears of salary. The Tribunal formed the impression that Mr. Ehlers was seeking to tell the truth and that his evidence could be relied upon in relation to matters that he recollected. His recollection was not, however, comprehensive as indicated by the fact that he did not recollect signing the version of the Cooperation Agreement that bore his signature..<sup>92</sup>
177. **Mr. Sindayigaya** stated in his First Witness Statement dated 21 May 2019 that he joined NRD in January 2010 as Field Accountant and was promoted in early 2011 to Senior Accountant. He left NRD in September 2012..<sup>93</sup>
178. In his Second Witness Statement dated 27 May 2020, Mr. Sindayigaya commented on aspects of the Claimants' case on the *locus standi* of BVG. He stated that the alleged liability of NRD for violation of the Cooperation Agreement could not have existed..<sup>94</sup> No

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<sup>90</sup> Ehlers (2), paras. 23(1)-(2).

<sup>91</sup> Tr. Day 1, 200:6-9 (Marshall).

<sup>92</sup> Tr. Day 6, 24:7-25:7 (Ehlers); Email from Mr. Ehlers to Mr. Marshall, 7 November 2010, attaching Cooperation Agreement, **C-210**.

<sup>93</sup> Sindayigaya (1), para. 6.

<sup>94</sup> Sindayigaya (2), para. 8.

minerals were being produced at Bisesero in 2010, nor would there have been any minerals stored there. He had himself visited Bisesero in March or April 2011 and the only activity that had been happening was the opening of a clinic.<sup>95</sup> NRD would have had to have stolen 15 to 30 tonnes to have accumulated a liability to BVG of [REDACTED] but not even one tonne was produced in 2010.<sup>96</sup>

179. Mr. Sindayigaya also commented on the assets to an alleged value of US\$2,252,502 alleged to have been transferred to Spalena in exchange for an ownership stake in that Company. In several visits to the two mining sites at Bisesero he had not seen any of the assets allegedly transferred.<sup>97</sup> Serious allegations of theft and other misconduct were made against Mr. Sindayigaya in the Claimants' Reply,<sup>98</sup> but these were not put to him in cross-examination. The Tribunal formed the view that he was a careful and truthful witness.
180. **Mr. Marshall** was strenuously cross-examined in relation to all aspects of the Claimants' case on the standing of BVG. He said that the Cooperation Agreement took effect in mid-September, but was not documented until 1 November 2010.<sup>99</sup> He insisted that the US\$100,000 had been advanced by BVG to NRD. When asked how it had been advanced he stated initially that he did not recall, but he was sure that it was advanced. Then he said that the advance had been delayed by a week and that he had had a "*spat*" with Mr. Ehlers about this. Then he said the sum had been paid by instalments as NRD needed it.<sup>100</sup>
181. He stated that minerals had been stored at Bisesero from 2007 and had a value of US\$1-2 million. They had been stolen, possibly by Mr. Ehlers or Mr. Sindayigaya.<sup>101</sup> Mr. Ehlers' statement in relation to NRD's liabilities, annexed to the Spalena Purchase Contract, was a misrepresentation.<sup>102</sup>

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<sup>95</sup> Sindayigaya (2), para. 9.

<sup>96</sup> Sindayigaya (2), para. 10.

<sup>97</sup> Sindayigaya (2), para. 12, referring to BVG, Resolution by Unanimous Written Consent of the Sole Director, 27 March 2012, **C-123**.

<sup>98</sup> Cl. Reply, paras. 270-276.

<sup>99</sup> Tr. Day 1, 190:5-8 (Marshall).

<sup>100</sup> Tr. Day 1, 196:16-198:17 (Marshall).

<sup>101</sup> Tr. Day 1, 201:6-12 (Marshall).

<sup>102</sup> Tr. Day 1, 204:6-205:5 (Marshall), referring to Spalena Purchase Contract, **C-068**, p. 36.

182. When asked why the Claimants had been unable to produce any documents evidencing the sale by BVG to Spalena of the equipment annexed to the two Matching Resolutions, Mr. Marshall replied that Rwanda had seized all of NRD's documents other than those that were kept in a different place – his apartment, to which he would often take documents home.<sup>103</sup>
183. Mr. Marshall was insistent that at least some of the equipment listed in the annexes to the two Matching Resolutions were at Bisesero. Mr. Sindayigaya was not correct to state that none of the trucks or heavy mining equipment was there.<sup>104</sup>
184. When asked why the Claimants had not produced contemporary documents that evidenced his oral evidence, Mr. Marshall's response was that Rwanda had seized all of NRD's documents.<sup>105</sup>

***d. Conclusions***

185. It is now common ground that the two versions of the Cooperation Agreement are authentic documents. Neither Mr. Marshall nor Mr. Ehlers was able to give a coherent explanation about these documents. Why there are two documents in differing terms has not been explained. Nor has it been explained why C-122 concludes with the statement, signed by Mr. Thomas Grey, "*Confirmed as of 30 March 2011*".
186. The Tribunal finds that, prior to 1 November 2010, there were negotiations between BVG, through Mr. Marshall, and NRD, which led to a joint venture agreement between the two companies under which NRD would take over the running of the Bisesero Concession on behalf of BVG, the owner of that Concession, essentially on the terms common to the two versions of the Cooperation Agreement.

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<sup>103</sup> Tr. Day 1, 211:3-8 (Marshall).

<sup>104</sup> Tr. Day 1, 214:4-23 (Marshall).

<sup>105</sup> Tr. Day 2, 24:6-10 (Marshall).



187. Mr. Marshall then decided to attempt to buy out Starck and acquire the ownership of NRD. In this he succeeded, on terms of the Spalena Purchase Contract, signed on 23 December 2010.
188. It would have been logical for the acquisition of NRD to have been by BVG. For reasons that are not clear this was not possible, so Mr. Marshall used Spalena, another investment vehicle that he had formed, to purchase the Company. According to Mr. Marshall the shareholders in BVG and Spalena were the same.
189. At this point the joint venture agreement between BVG and NRD became an agreement between companies in the same group, with the same ultimate beneficial owners, and under the control of Mr. Marshall.
190. The Tribunal rejects the Claimants' case that BVG contributed part of the consideration provided to Starck for the purchase by Spalena of H.C. Starck Resources GmbH, NRD's Holding Company, by writing off a liability on the part of Stark for [REDACTED] in respect of breaches of the joint venture agreement ("**the write-off**"), for the following reasons:
- (i) No mention is made of the write-off in the Spalena Purchase Contract;
  - (ii) The write-off is not consistent with the statement of Mr. Ehlers, annexed to the Spalena Purchase Contract;
  - (iii) The write-off is inconsistent with the evidence of Mr. Ehlers and Mr. Sindayigaya, which the Tribunal accepts; and
  - (iv) The alleged breaches of the joint venture agreement, including the theft of ore to a value of [REDACTED], are not credible, for the following reasons:
    - (a) It is not credible that BVG had, since 2007, been accumulating, rather than marketing, ore extracted on the Bisesero Concession;
    - (b) The production (if any) of ore at Bisesero between the date when the joint venture agreement was implemented, even if this was in September 2010,

and the purchase by Spalena of NRD was insufficient to have a value of [REDACTED];

- (c) It is not credible that, if the alleged theft had taken place, there would be no contemporary documents evidencing that fact. The Tribunal does not accept that the Claimants have been unable to produce such documents because their documents have been seized by Rwanda; and
- (d) It is not credible that, if the write-off had constituted part of the consideration for the purchase from Starck by Spalena of NRD's Holding Company, no mention would have made of this in Mr. Marshall's First Witness Statement.

191. The Tribunal rejects the Claimants' case that BVG made an investment in NRD that is relevant to this arbitration by advancing a loan to NRD of US\$100,000 pursuant to the joint venture agreement/Cooperation Agreement, for the following reasons:

- (i) Clause 2 of the Cooperation Agreement did not provide for the making of a loan to NRD by BVG. It provided for the provision of finance to NRD to enable mining-support equipment to be purchased by NRD "*for BVG*";
- (ii) The equipment was to be used in the Bisesero Concession, not in the Five Concessions that are the subject matter of this arbitration;
- (iii) No documents have been produced evidencing that the advance was made;
- (iv) Mr. Marshall's evidence in relation to the alleged advance was confused and inconsistent; and
- (v) It is Mr. Ehlers evidence, which the Tribunal accepts, that this advance was not made.

192. The Tribunal rejects the Claimants' case that, on the termination of BVG's interest in the Bisesero Concession, equipment owned by BVG to the value of US\$2,252,502 was used to purchase for BVG an interest in Spalena, for the following reasons:

- (i) No document has been produced that evidences the alleged transaction;
  - (ii) It was Mr. Sindayigaya's evidence, which the Tribunal accepts, that in several visits to the two mining sites at Bisesero he did not see the alleged equipment;
  - (iii) The Cooperation Agreement evidences the nature and the scale of equipment required for operation of the Bisesero Concession – essentially support equipment for the artisans working there. An agreement that such equipment owned by BVG should be used to buy a share in Spalena would have required recovery of this equipment from the artisan miners together with a valuation of such equipment as could be recovered, followed by the appropriate documentary formalities to complete the transaction. There is no evidence that any of this occurred;
  - (iv) The Tribunal does not understand the object of such a transaction, as opposed to simply permitting NRD to recover as much useful equipment as possible for use on the Five Concessions; and
  - (v) The Claimants have not satisfied the Tribunal that the Matching Resolutions are contemporaneous or that the attachments to these evidence a transfer of equipment to Spalena. The schedules appear to be historic. The first of the schedules attached to each Resolution values items at cost, where this exceeds their actual value. The date of valuation is unspecified and some of the equipment is stated to be "*in transit*". The origin and nature of the second schedule is unclear.
193. The onus of proving that BVG has *locus standi* as an investor in respect of the investments that form the subject of the claims in this arbitration lies on BVG. For the reasons given BVG has failed to discharge that onus. The Tribunal finds that BVG has no standing to claim in this Arbitration.
194. Henceforth in this Award, where the context so permits, the term "*Claimants*" will bear the meaning "*Spalena*", as personified by its President and chief investor, Mr. Marshall.

195. The Tribunal has deferred for later consideration the question of whether the claims brought by Spalena fall within the jurisdiction of the Tribunal *ratione temporis*. It now turns to the challenge to the jurisdiction of this Tribunal over Spalena *ratione materiae*.

**D. LACK OF JURISDICTION IN RESPECT OF SPALENA’S CLAIM *RATIONE MATERIAE***

**(1) Introduction**

196. Article 25(1) of the ICSID Convention provides, in relevant part:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...].*

197. Article 1 of the BIT includes the following definitions:

*“claimant” means an investor of a Party that is party to an investment dispute with the other Party.*

*“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.*

[...]

*“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristic of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, of the assumption of risk. Forms that an investment may take include:*

[...]

*(b) shares, stock, and other forms of equity participation in an enterprise;*

[...]

*(e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;*

[...]

- (g) *licences, authorizations, permits, and similar rights [...]*

*“investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party [...].*<sup>106</sup>

198. Article 2 of the BIT provides, in relevant part:

*1. This Treaty applies to measures adopted or maintained by a Party relating to:*

- (a) *investors of the other Party;*
- (b) *covered investments; [...].*<sup>107</sup>

199. Article 24 of the BIT provides, in relevant part:

*1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*

- (a) *the claimant, on its own behalf, may submit to arbitration under this Section a claim*
  - (i) *that the respondent has breached*
    - (A) *an obligation under Articles 3 through 10, [...]*
- and*
- (ii) *that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and*
- (b) *the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim*
  - (i) *that the respondent has breached*

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<sup>106</sup> BIT, RFA Exhibit 05, Art. 1.

<sup>107</sup> BIT, RFA Exhibit 05, Art. 2(1).

(A) *an obligation under Articles 3 through 10, [...]*

*and*

(ii) *that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, [...].*<sup>108</sup>

200. This Tribunal will not have jurisdiction unless Spalena is an “*investor*” and is claiming in respect of Rwanda’s treatment of Spalena as an investor or of a “*covered investment*” owned or controlled by Spalena. The onus is on Spalena to establish the existence of these preconditions to the Tribunal’s jurisdiction.

## **(2) The Claimants’ Case**

201. In the Memorial, the Claimants make the following allegations.

137. *The U.S. investors who own BVG funded Spalena’s acquisition of NVD’s parent company, thereby acquiring ownership and control of NRD’s assets, including the mining Concessions.*

138. *BVG and Spalena then capitalized and funded NRD’s liabilities and expenses in order to develop and operate the mining Concessions.*

139. *BVG and Spalena constitute investors of a party to the BIT [...].*

142. *[...] Claimants invested in the acquisition of the NRD, and all of NRD’s assets, including the Rutsiro, Mara, Sebeya, Giciye, and Nemba Concession.*

143. *[...] NRD is the local operating company in Rwanda through which Claimants have made their investments of money, equipment and other assets in order to conduct mining activity in Rwanda. Accordingly, NRD is a “covered investment” under the terms of the BIT.*

[...]

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<sup>108</sup> BIT, RFA Exhibit 05, Art. 24(1).

145. *Additionally, and as contemplated in Article 1 of the BIT, Claimants' efforts to develop the Concessions fall under the BIT definition of "investment" [...].*<sup>109</sup>

202. On the basis of the Claimants' averments set out above, it seems clear that it is Spalena's case that not only NRD but NRD's assets, including Concession rights, constituted "covered investments" directly or indirectly owned or controlled by Spalena. This would seem to be confirmed by the assertion

*Claimants argue that they do have a legal right to the assets of NRD and the Concessions,*

made at paragraph 30 of the Claimants' Observations on the Request for Bifurcation.

203. Rwanda advances detailed particulars of its challenge to jurisdiction *ratione materiae* in its Memorial, supported by a wealth of jurisprudence. The Claimants have not addressed these detailed submissions. This appears to have been on the basis that the Tribunal's direction that this jurisdictional issue should be dealt with together with the merits<sup>110</sup> confirmed that the Claimants did not need to brief this issue further.<sup>111</sup> No such inference could properly be drawn from the Tribunal's direction. It is, however, the Claimants' case that, on the facts of this case, there is no room for doubt as to the existence of a covered investment.

204. The Claimants have in their Reply claimed that, by purchasing NRD, they "*inherited*" the investments made by the previous owners of NRD.<sup>112</sup> On this footing, the Claimants claim credit for investment of US\$17 million by the end of 2011.<sup>113</sup>

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<sup>109</sup> Cl. Mem., paras. 137-139, 142-143, 144. It is also alleged (para. 144) that the Contract between NRD and the Government of Rwanda constituted an "*investment agreement*" as defined by the BIT and an "*investment authorization*". No subsequent submission is made based on this averment and, accordingly, the Tribunal will make no further reference to it.

<sup>110</sup> PO2.

<sup>111</sup> Letter from the Claimants to the Respondent, 13 April 2020, **R-194**, p. 3.

<sup>112</sup> Cl. Reply, para. 36.

<sup>113</sup> Cl. Reply, para. 34.

### (3) The Respondent's Case

205. In its Memorial, Rwanda submits that neither NRD nor the Concessions were protected investments under the BIT and the ICSID Treaty.

#### *a. NRD*

206. Rwanda argues that NRD did not have the “*characteristics of an investment*”. ICSID tribunals have developed a set of cumulative criteria of an investment under which

[t]here must be: (i) a substantial contribution in money or other assets, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the economic development of the host State.<sup>114</sup>

207. Rwanda submits that (i) and (iv) are not satisfied. The Claimants have not demonstrated on what basis they can take credit for investment by previous owners of NRD. As for the Claimants themselves, they have not demonstrated that they have made a substantial contribution. The purchase of the shares in NRD's parent could not, of itself, suffice.<sup>115</sup>

208. Nor did the Claimants' alleged investments result in a substantial contribution to Rwanda's development. Contributions to development may be made in a number of ways beyond the financial, such as paying tax, environmental protection, community engagement, health and safety measures, investing in developing local expertise and contributing to employment. The Claimants' alleged investments fulfilled none of these requirements.<sup>116</sup>

#### *b. The Concessions*

209. As far as the Concessions are concerned, Rwanda submits that they are not investments of the Claimants that are capable of being protected by the BIT. The Concessions were alleged to be owned by NRD, not by the Claimants. In theory the Claimants might have been in a position to advance a claim for the damage done to the value of their shareholding in NRD as a result of expropriation of the Concessions, but no such claim has been advanced.<sup>117</sup>

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<sup>114</sup> Resp. Mem., paras. 126-127, referring to, *inter alia*, *Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (“*Salini v. Morocco*”), **RL-101**, para. 52.

<sup>115</sup> Resp. Mem., para. 130.

<sup>116</sup> Resp. Mem., paras. 141, 143.

<sup>117</sup> Resp. Mem., para. 153.



#### (4) The Tribunal's Analysis

210. Bilateral investment treaties have generated a significant body of jurisprudence on the meaning of investment. These have covered a wide variety of instruments, rights or other matters alleged to have constituted “*investments*”. In *Salini v. Morocco*, from which Rwanda has derived the criteria set out at paragraph 206 above, the alleged investment was a contract to build a road. Other alleged investments have consisted of

*operations such as the purchase of promissory notes or the provision of inspection services to assist the government in determining applicable customs tariffs.*<sup>118</sup>

211. In this case, Rwanda challenges the status as an investment of a controlling interest, via the Holding Company, in the Rwandan company NRD. This is an unusual challenge. Article 1 of the BIT includes “*shares, stock, and other forms of equity participation in an enterprise*” as forms that an investment may take.<sup>119</sup> and a shareholding in a company is a common form of an investment covered by a bilateral investment treaty.

212. Rwanda makes the point that the price paid for the interest in NRD was modest and that NRD did not make a substantial contribution to the economic development of Rwanda.

213. Similar points were considered by the tribunal in *Phoenix v. Czech Republic*, a decision referred to the Tribunal by Rwanda.<sup>120</sup> This Tribunal has found the lucid analysis of the tribunal in *Phoenix* of particular assistance as it deals with particular issues raised by Rwanda in the present case.

214. In *Phoenix*, the claimants in that case purchased two Czech companies and, within a little more than two months, had given notice of an investment dispute, alleging that these were investments in respect of which there had been a denial of justice by the Czech Republic. The business of the two companies involved trading in ferroalloys. At the time of their acquisition both companies were in liquidation. Ultimately, the tribunal ruled that it had no

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<sup>118</sup> *Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, **RL-114**, Sec. II, para. 12(i).

<sup>119</sup> See paragraph 196 above.

<sup>120</sup> Resp. Mem., para. 138, referring to, *inter alia*, *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (“*Phoenix v. Czech Republic*”), **RL-095**, paras. 85, 114.

jurisdiction because the acquisitions had not been made *bona fide*. The relevance of the decision arises from the comments made by the tribunal when considering whether the two companies constituted “investments” for the purposes of the relevant treaties.

215. The *Phoenix* tribunal began its analysis with the following comment:

*In general, it is very easy to ascertain the existence of an investment: for example, nobody would contest that the construction and operation of a power plant is an investment. In this hypothesis, a reference to the ordinary meaning of what constitutes an investment is sufficient and no sophisticated analysis based on several criteria is needed.*<sup>121</sup>

216. That tribunal went on to comment that special circumstances might require investigation of whether an apparent investment fell within the scope of the relevant treaties. This was, indeed, the position in *Phoenix*. The tribunal found that there was no previous “case holding that the acquisition of a local corporation is not an investment”.<sup>122</sup>

217. The *Phoenix* tribunal considered the four criteria of an investment identified in *Salini*. It observed that not all tribunals had accepted the fourth criterion, the contribution to the host State’s development. It expressed its own view that

*the contribution of an international investment to the **development** of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development”. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the **economy** of the host State, [...].*<sup>123</sup>

218. The *Phoenix* tribunal went on to propound its own test:

*To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:*

- 1 – a contribution in money or other assets;*
- 2 – a certain duration;*

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<sup>121</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 79.

<sup>122</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 123.

<sup>123</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 85 [emphasis in original].

- 3 – an element of risk;
- 4 – an operation made in order to develop an economic activity in the host State;
- 5 – assets invested in accordance with the law of the host State;
- 6 – assets invested bona fide.<sup>124</sup>

219. The claimants in *Phoenix v. Czech Republic* had paid US\$334,500 for the two companies. This led that tribunal to remark:

*The Tribunal considers that the existence of a nominal price for the acquisition of an investment raises necessarily some doubt about the existence of an “investment” and requires an in depth inquiry into the circumstances of the transaction at stake. If there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment.*<sup>125</sup>

220. The *Phoenix* tribunal added this comment in respect of its own criterion No. 4:

*The fact that an investment is not profitable cannot disqualify an economic operation as an investment from the outset. The development of economic activities must have been foreseen or intended, but need not necessarily be successful, especially when the problems an investor faces in the development of its activities come from the host State’s actions.*<sup>126</sup>

221. These several observations, which this Tribunal finds compelling, have particular relevance having regard to the facts of this case. The Tribunal turns to those facts. Where they are contentious the Tribunal proposes, for the purposes of argument, to adopt evidence adduced by Rwanda.<sup>127</sup>

222. NRD was established for the specific purpose of participating in Rwanda’s own plans for its economic development. These involved attracting outside investment in order to exploit Rwanda’s mineral reserves. The original founders of NRD had proposed to invest US\$39 million. They had failed to invest anything approaching this sum and had sold ownership

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<sup>124</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 114.

<sup>125</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 119.

<sup>126</sup> *Phoenix v. Czech Republic*, **RL-095**, para. 133.

<sup>127</sup> See Biryabarema (1), paras. 17-19, referring to M. Biryabarema, Explanatory Note on NRD, **R-017**.

and control of NRD to Starck. Starck had invested further sums in NRD, but again these fell far short of reaching the US\$39 million originally proposed.

223. Nonetheless, by the time that Spalena acquired, indirectly, ownership of NRD, NRD had contributed significantly to the economy of Rwanda, as reflected by a substantial tax liability.
224. On 23 December 2010, Spalena acquired indirect ownership and control of NRD for a price of only [REDACTED]. The Tribunal accepts the observation of the tribunal in *Phoenix v. Czech Republic* that such a modest price raises a question as to whether the transaction was *bona fide*. Rwanda has not, however, challenged the propriety of the transaction. The price plainly reflected a desire by Starck to abandon involvement in mining in Rwanda.
225. It is not disputed that Spalena, as personified by Mr. Marshall, hoped that NRD would obtain long-term licences for the Five Concessions, enabling Spalena to raise finance to exploit those licences on the international money market. In this NRD was unsuccessful. NRD continued to operate, albeit with poor returns, as a mining company, up to, at least, 19 May 2015 and remained in existence, and in Occupation of the Concessions, after that date and after the Cut-off Date of 15 June 2015.
226. There is no evidence of any significant external funding being provided to NRD by or through Spalena during this period. NRD's costs were funded from the proceeds of the mining carried on. The Tribunal does not consider that this detracts from the status of NRD as an investment.
227. The Tribunal has concluded that NRD satisfied the six criteria of an investment identified by the tribunal in *Phoenix v. Czech Republic* by way of refinement of the *Salini* criteria. There was a contribution in money or other assets. Spalena aspired to a duration of NRD's activities of thirty years. The venture involved risk. The object of the venture was the development of an economic activity in Rwanda. The assets were invested in accordance with the law of Rwanda and they were invested *bona fide*.
228. Looking at the matter more broadly, NRD falls fairly and squarely within the natural meaning of an "investment" in Rwanda.

*a. The Concessions and Spalena's Loss*

229. Rwanda alleges, under the heading of jurisdiction *ratione personae*, that Salena had suffered no loss. The nature of this allegation appears most clearly from the following allegation in Rwanda's Rejoinder:

*[...] under Article 24 of the USA-Rwanda BIT, a claimant may only submit a claim to arbitration if the respondent has breached an obligation under the USA-Rwanda BIT and the claimant "has incurred loss or damage by reason of, or arising out of, that breach".*<sup>128</sup>

230. The Tribunal considers that this averment, if read literally, is misconceived. It is tantamount to saying that under the BIT the Tribunal will only have jurisdiction to entertain a claim if the claim is valid. Such a contention is nonsensical.

231. The Rejoinder elaborates Rwanda's submission:

*Any loss suffered by NRD would only result in loss for Spalena [...] if Spalena [...] had and [was] said to have had [...] a diminution in the value of [its] shares in NRD as a consequence, which has not been pleaded. The Claimants instead seek damages by way of compensation for an alleged expropriation of the Five Concession Areas and lost profit incurred by NRD, and not damages on the basis of diminution in the share value of NRD. The Claimants have not alleged, nor provided any evidence of, a diminution of value of Spalena's [...] shareholding in NRD.*<sup>129</sup>

232. In essence Rwanda's point appears to be that Salena is advancing a claim under Article 24.1(a) of the BIT that ought properly to be brought under Article 24.1(b). The helpful Submission of the United States of America draws the distinction between the two.

*The U.S.-Rwanda BIT provides two jurisdictional bases for investors to bring claims against a Treaty Party: Articles 24.1(a) and 24.1(b). Articles 24.1(a) and 24.1(b) serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred **directly**, it may bring a claim under Article 24.1(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that*

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<sup>128</sup> Resp. Rej., para. 497.

<sup>129</sup> Resp. Rej., para. 500.

*the claimant owns or controls directly or indirectly,” the investor’s injury is only **indirect**. Such derivative claims must be brought, if at all, under Article 24.1(b).*<sup>130</sup>

233. A footnote is cited therein, to the effect that Article 24.1(b) creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls.
234. The original Request for Arbitration included NRD as a claimant. That was not appropriate or acceptable to ICSID. As a Rwandan company, NRD had no standing *ratione personae*.
235. It may well be that the appropriate course that should then have been taken would have been for Spalena to make a claim on behalf of NRD under Article 24.1(b) of the BIT. Instead, Spalena has advanced a claim in its own right.
236. The essence of the claims brought in this arbitration is that NRD was wrongly deprived of long-term mining licences over the Five Concessions. If made out, the consequent losses caused directly to NRD will have been reflected in the value of the company’s shares.
237. This stage of the arbitration is only concerned with breach, not damages. The fact that Spalena may have pleaded a claim to damages that it will be unable to make good does not, in the view of the Tribunal, provide a ground for dismissing the claim on the grounds of lack of jurisdiction *ratione materiae*.
238. For these reasons the Tribunal has concluded that Rwanda’s challenge to jurisdiction in relation to Spalena’s claim *ratione materiae* is not made out and must be dismissed.

**E. LACK OF JURISDICTION IN RESPECT OF SPALENA’S CLAIM *RATIONE VOLUNTATIS***

239. The following provisions of the BIT are relevant:

***Article 23: Consultation and Negotiations***

*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through*

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<sup>130</sup> USA Submission, para. 15 [emphasis in original].

*consultation and negotiation, which may include the use of non-binding, third-party procedures.*

***Article 24: Submission of a Claim to Arbitration***

[...]

*2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:*

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address and place of incorporation of the enterprise;*
- (b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*
- (c) the legal and factual basis for each claim; and*
- (d) the relief sought and the appropriate amount of damages claimed.<sup>131</sup>*

240. It is Rwanda’s case that its agreement to arbitrate under the BIT was subject to compliance with these conditions (the “**Conditions**”) and that there has been no compliance. It follows that this Tribunal has no jurisdiction over the dispute.

241. Spalena denies that the Conditions had to be satisfied as a pre-condition to jurisdiction but avers that, in any event, they were satisfied.

242. At the heart of this dispute is the fact that the notice of intent dated 12 April 2017, upon which the Claimants have relied as satisfying Article 24.2, identified NRD and BVG as the intended claimants without mention of Spalena.<sup>132</sup>

243. Rwanda has not alleged that failure to comply with the above conditions caused it any prejudice. It would be unfortunate if an arbitration that has progressed over a period of over

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<sup>131</sup> BIT, **RFA Exhibit 05**, Arts. 23, 24(2).

<sup>132</sup> Letter from Duane Morris to Rwanda, 12 April 2017, **RFA Exhibit 06**.

three years should be determined on an issue such as this, which is one of form rather than substance. Accordingly, the Tribunal has decided to defer further consideration of this ground of objection to jurisdiction until after determination of the other issues before it.

## **VI. LIABILITY**

### **A. THE ISSUES**

244. The Tribunal will consider the following issues that arise in relation to liability:

- (1) What is the true construction and effect of the Contract?
- (2) Did NRD acquire a right to long-term licences under the Contract?
- (3) Was the 2010 Application for short-term or long-term licences?
- (4) Did Spalena purchase NRD in the legitimate expectation that it would receive long-term licences?
- (5) After the acquisition of NRD by Spalena, did Rwanda give Spalena a legitimate expectation that NRD would be granted long-term licences?
- (6) Did Mr. Benzinge's activities in August 2012 involve a breach of Rwanda's obligations under the BIT?
- (7) Did the suspension of mining in the western concession areas in September 2012 constitute a breach of Rwanda's obligations under the BIT?
- (8) Did seizures and sales of NRD's property by the Court Bailiff in 2013 constitute a breach of Rwanda's obligations under the BIT?
- (9) Did the denial of the issue of tags to NRD constitute a breach of Rwanda's obligations under the BIT?
- (10) What rights over the Five Concessions did NRD enjoy and when?
- (11) Did Rwanda expropriate any rights of NRD and, if so, when?



- (12) Did Rwanda carry on a campaign of creeping expropriation?
- (13) Did Rwanda discriminate against the Claimants in favour of other investors in breach of its obligations under Articles 3.1 and 4.1 of the BIT?

**(1) What is the true construction and effect of the Contract?**

245. The Contract between the Government of Rwanda and NRD, dated 24 November 2006, is in both English and French. In its English version it provides, *inter alia*, as follows:

*Article 1: Purpose of the contract*

*The Government of Rwanda authorizes Natural Resource Development Rwanda Ltd. to explore and run mining operations within RUTSIRO, MARA, SEBEYA, GICIYE and NEMBA Perimeters for a period of four (4) years.*

[...]

*Article 2: Obligations*

*The Company Natural Resources Development Rwanda Ltd has the following obligations:*

- 1. Make a geographical demarcation of the perimeters;*
- 2. Provide the following documents as part of the contract:*
  - The action plan.*
  - The environmental protection plan.*
  - The investment plan.*
- 3. Proceed immediately to the industrial exploitation in all given sites.*
- 4. Provide progress reports on research activities after two years.*
- 5. Provide evaluation reports of reserves and the feasibility study after 4 years.*

*Article 4:<sup>133</sup> The rights*

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<sup>133</sup> The numbering has gone awry for there is no Article 3.

*After positive evaluation of the submitted feasibility study Natural Resources Development Rwanda Limited will be granted the mining concessions.*

Article 8 provides that the Contract is governed by Rwandan laws.<sup>134</sup>

246. Expert evidence on Rwandan law was given on behalf of Rwanda by Mr. Richard Mugisha, a member of the Rwanda Bar Association and founding senior partner of Trust Law Chambers. The Tribunal is satisfied that he is well qualified to give evidence on Rwandan law and that he gave his evidence carefully and with proper objectivity.
247. Evidence of Rwandan law was also given by Mr. Olivier Rwamasirabo, on behalf of the Claimants. He is also a member of the Rwandan Bar Association, having been admitted on 24 October 2017 and is the Managing Partner of Legal Wise Chambers Ltd. He was not tendered as an expert witness although he did not give any admissible evidence of fact. His precise role is not clear to the Tribunal. It appears from his evidence that he has given general advice to Mr. Marshall.<sup>135</sup> In the view of the Tribunal he appeared to be acting more as an advocate than an impartial legal expert. In particular, he produced a Third Witness Statement dated 13 March 2020 that expressed views favourable to the Claimants on almost every issue in dispute, most of which depended critically on facts that were not within his knowledge, but which he asserted were based on his analysis of the documents and on conversations with Mr. Marshall.<sup>136</sup> The Tribunal has not been assisted by this evidence.
248. Having said that, there was agreement between the two witnesses as to some important aspects of the relevant law.
249. In his First Witness Statement, **Mr. Rwamasirabo** gave the following summary of the effect of the Contract:

*Rwandan law is such that once one party to a contract performs, that party is entitled to the benefits owed to that party under the contract. With respect to NRD, the Contract obligated it to*

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<sup>134</sup> Contract, C-017.

<sup>135</sup> Tr. Day 8, 62:9-15 (Rwamasirabo).

<sup>136</sup> Tr. Day 8, 64:6-23 (Rwamasirabo).

*“[p]roceed immediately to the industrial exploitation” and to perform other research and planning activities. Once NRD complied with these obligations, the Contract prescribed that NRD “will be granted the mining concessions.” In essence, the Contract was an executory contract in which performance by NRD obligated Rwanda to grant to NRD the long-term concessions.*<sup>137</sup>

250. Mr. Rwamasirabo added:

*Under Rwanda administrative practice, it is commonly held that the failure of one party to contest the other party’s performance under the Contract is deemed to be an acknowledgement of performance. Rwanda did not object to NRD’s performance under the terms of Article 4 or Article 8 of the Contract. As a result, consistent with Rwandan administrative practice, NRD’s performance is deemed to be acknowledged.*<sup>138</sup>

251. **Mr. Mugisha** in his First Expert Report agreed with the first passage of Mr. Rwamasirabo’s evidence set out above.<sup>139</sup> He disagreed with the suggested administrative practice, stating that this was contrary to Rwandan law.<sup>140</sup>

252. When giving evidence, Mr. Rwamasirabo agreed that NRD had to perform its obligations under Article 2 of the Contract before it would be entitled to a grant of the mining concessions. He also accepted that it was for the Government to decide whether the feasibility study that NRD had to provide under Article 4 was satisfactory.<sup>141</sup>

253. When giving evidence, Mr. Mugisha confirmed his First Expert Report. He added that, because the Contract did not have any criteria for the feasibility study, this was within the absolute discretion of the Minister.<sup>142</sup>

254. The Tribunal accepts Mr. Mugisha’s evidence. Mr. Rwamasirabo’s alleged administrative practice is contrary to Rwandan law. Nor, had he been adequately informed of the relevant

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<sup>137</sup> Rwamasirabo (1), para. 5.

<sup>138</sup> Rwamasirabo (1), para. 7.

<sup>139</sup> Mugisha (1), para. 13.

<sup>140</sup> Mugisha (1), para. 20.

<sup>141</sup> Tr. Day 8, 39:25–41:20 (Rwamasirabo).

<sup>142</sup> Tr. Day 8, 91:19–92:16 (Mugisha).

facts, could Mr. Rwamasirabo have suggested that there had been a tacit acceptance by Rwanda that NRD had provided a satisfactory feasibility study.

255. When giving oral evidence, Mr. Marshall asserted that it was NRD, not Rwanda, that had to be satisfied by the feasibility study.<sup>143</sup> The Tribunal notes that a similar assertion was made by TINCO, another applicant for a long-term concession, in respect of a similar provision.<sup>144</sup>
256. In their Post-Hearing Brief, the Claimants urge the Tribunal to interpret Article 4 in accordance with Mr. Marshall's oral evidence.<sup>145</sup>
257. The Tribunal appreciates the reasoning underlying this assertion. As the Claimants pointed out it was supported by the evidence of Mr. Buyskes, the General Manager of Rutongo Mines, a company in the TINCO group.<sup>146</sup> Whether mining in a particular Concession would be feasible would seem a matter of greater concern to the contractor entering into a long-term commitment than to Rwanda. Nonetheless the wording of the Contract is clear and the Tribunal is satisfied that it provides that Rwanda must be satisfied with the feasibility study before being obliged to issue a long-term licence.
258. Another issue between the Parties has been the nature and scope of NRD's obligation under Article 2.3 of the Contract to "*proceed immediately to the industrial exploitation in all given sites*".
259. In giving oral evidence, Mr. Marshall asserted that:

*The common parlance in Rwanda for what they mean by industrial exploitation is giving assistance to artisan miners. It will only be that, and it will never be more.*<sup>147</sup>

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<sup>143</sup> Tr. Day 1, 228:14-15 (Marshall); Tr. Day 2, 40:18-42:24 (Marshall).

<sup>144</sup> Letter from TINCO to MINIRENA, 26 October 2012, C-031, p. 2.

<sup>145</sup> Cl. PHB, paras. 30-34.

<sup>146</sup> Tr. Day 4, 136:19-137:16 (Buyskes).

<sup>147</sup> Tr. Day 2, 30:13-16 (Marshall).

260. He said that any additional support beyond a hammer and chisel, anything that moved away from simple buckets and shovels and hammers, was industrialization. He gave examples of bringing in jackhammers, generators and compressors to run the jackhammers.<sup>148</sup>
261. This evidence contrasts with an explanation given by Mr. Marshall in his Third Witness Statement as to the meaning of “*industrial exploitation*”, which included bringing in “*additional heavy machinery, and build[ing] processing plants*” thereby moving “*beyond artisanal mining*”.<sup>149</sup>
262. This explanation accorded with the explanation of industrial mining given by Mr. Ehlers in his First Witness Statement:
- Essentially, industrializing means moving away from heavy reliance on artisanal miners employing basic tools such as shovels and pans, and moving towards a more sophisticated form of mining operation. What is required to industrialise will vary depending on the nature of the site and the minerals present, but will usually involve using plant equipment and/or providing the artisanal miners with advanced mechanized extraction equipment.*<sup>150</sup>
263. The Tribunal has concluded that “*industrial exploitation*” is not a term of art. The phrase must be given its natural meaning in the context in which it was used. As to this, the Tribunal accepts the evidence of Mr. Ehlers and finds this corroborated by Mr. Marshall himself in his Third Witness Statement. The Tribunal does not consider that the phrase bears a precise meaning. It is satisfied, however, that the phrase falls to be contrasted with “*artisanal mining*”. It means extracting and processing ore by machine rather than by hand. This will normally involve the construction of buildings and the installation of a permanent plant.
264. The Tribunal considers that the terms of the Contract, which were in standard form, evidence a degree of naivety on the part of the Rwandan Government. There was a lack of the precision and detail that one would expect in contracts that were, or should have been,

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<sup>148</sup> Tr. Day 2, 33:6–34:12 and 84:22–85:3 (Marshall).

<sup>149</sup> Marshall (3), paras. 23-24.

<sup>150</sup> Ehlers (1), para. 23.

of very considerable commercial significance. Contractors were required to “*proceed immediately to the industrial exploitation in all given sites*”. This was an imprecise obligation that provided no yardstick for the degree of industrialization required or the time frame in which it was to be provided.

265. Even more uncertain by way of contractual commitment was Rwanda’s agreement to grant mining concessions, implicitly for long-terms, albeit that the Contract did not specify the length of these, “*after positive evaluation of the submitted feasibility study*”. If this was to constitute a binding contractual commitment there had to be some positive criteria by which the feasibility study was to be judged. The Tribunal does not find it easy to identify these criteria.
266. It seems likely that the Rwandan Government hoped that established international mining companies would be attracted to invest large sums “*up front*” in revolutionizing the mining industry in the various concessions. But, as Mr. Marshall pointed out, mining companies were unlikely to invest large sums in industrialization without a guarantee of long-term concessions.
267. It is not clear how the Rwanda authorities were persuaded to grant a Four-Year Contract in respect of no less than five concessions to the Zarnack brothers, who do not appear to have had any mining experience. Perhaps their proposal, not in the event implemented, to invest US\$39 million was the reason. Perhaps Mr. Benzinge, whose role in 2006, and indeed thereafter, is not clear to the Tribunal, was influential in obtaining the Contract.
268. If Rwanda’s expectations were optimistic, the same may be true of the expectations of some of those who succeeding in obtaining four-year contracts on the same terms as NRD. Mr. Marshall has stated that he understood that he was guaranteed long-term concessions. In due course the Tribunal will consider whether this was a legitimate expectation. It suspects that other entrepreneurs may have procured contracts in the expectation that these would lead, at the end of the four years, to long-term concessions that would be susceptible to profitable exploitation.

269. In the event, it is perhaps not surprising that, at the end of the four-year period, no long-term concessions appear to have been granted by Rwanda. On 8 August 2011, Mr. Kamanzi, the Minister of Natural Resources, wrote to the Minister of Justice:

*After evaluation based on the progress reports submitted by different companies, most of the reports did not fulfill the terms of the contracts signed.*<sup>151</sup>

**(2) Did NRD acquire a right to long-term licences under the Contract?**

270. It is the Claimants' case that, before it was acquired by Spalena, NRD had satisfied its obligations under Article 2 of the Contract and become entitled to the grant of long-term licences in respect of the Five Concessions pursuant to Article 4 of the Contract.<sup>152</sup> It is Rwanda's case that NRD had not satisfied its obligations under Article 2. In particular, NRD had not proceeded immediately to industrialise the sites of the Five Concessions,<sup>153</sup> as required by Article 2.3 of the Contract, and there had been no adequate provision of evaluation reports of reserves and a feasibility study, as required by Article 2.5 of the Contract.<sup>154</sup> Furthermore there had been no positive evaluation of a feasibility study, as required by Article 4. In these circumstances NRD had no right to the grant of long-term licences.

***a. Article 2.3: Industrialisation***

271. In support of their case on industrialization by NRD, the Claimants rely on the construction of a processing plant at the Rutsiro Concession.<sup>155</sup> They also rely on alleged upgrading of the infrastructure, such as roads and bridges, at each of the Concessions.<sup>156</sup>

272. The Claimants are not in a position to adduce direct evidence of the activities of NRD prior to its acquisition by Spalena. Rwanda has adduced a body of evidence that has not been challenged.

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<sup>151</sup> Letter from Minister Kamanzi to Minister of Justice/Attorney General, 8 August 2011, **R-109**.

<sup>152</sup> Cl. Mem., paras. 44-46; Cl. Reply, paras. 45-67.

<sup>153</sup> Resp. Rej., paras. 132-150; Resp. PHB, paras. 22-35.

<sup>154</sup> Resp. PHB, paras. 36-43.

<sup>155</sup> Resp. Reply, para. 51.

<sup>156</sup> Resp. Reply, para. 52.

273. **Prof. Rupiya** served as Chief Geologist of NRD from February 2008 to February 2012. In his First Witness Statement he states that when he arrived at NRD it was obvious that very little had been done to develop the Five Concession areas under the Zarnacks.<sup>157</sup> Starck invested about US\$1 million to build a mechanized plant at Rutsiro (the “**Rutsiro plant**”) to process wolframite scree. This was not operated, however, as this proved not to be commercially viable as the scree contained insufficient wolframite.<sup>158</sup>
274. Starck also made some “*relatively small investments*” at Nemba, repairing tunnels that had been closed. Two crushers, three compressors and a grinder and some safety equipment were also supplied. Prof. Rupiya described this as “*a pretty low level of investment*”.<sup>159</sup> In oral evidence he accepted that this was the “*beginnings of industrialization for mining*”.<sup>160</sup>
275. No investment of any significance was made in respect of any of the other three Concessions. By around mid-2010, Starck stopped providing any investment to NRD at all, so that Mr. Ehlers was reduced to selling equipment in order to pay the miners.<sup>161</sup>
276. **Mr. Ehlers** confirmed this account in his First Witness Statement,<sup>162</sup> as did **Mr. Sindayigaya** in his First Witness Statement,<sup>163</sup> on the basis of the knowledge that he acquired after joining NRD in January 2010.
277. On 15 July 2009, Dr. Roethe, the Managing Director of NRD, wrote to Mr. Karega, the Minister in Charge of Environment and Mines, seeking, unsuccessfully, a two year extension of the Contract.<sup>164</sup> He commented on NRD’s performance during the first two years of the Contract, when NRD was in the hands of Mr. Christoph Zarnack and his son Jens:

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<sup>157</sup> Rupiya (1), para. 9.

<sup>158</sup> Rupiya (1), para. 10.

<sup>159</sup> Rupiya (1), para. 11.

<sup>160</sup> Tr. Day 5, 46:1-5 (Rupiya).

<sup>161</sup> Rupiya (1), paras. 12, 15.

<sup>162</sup> Ehlers (1), paras. 28-30.

<sup>163</sup> Sindayigaya (1), paras. 9-15.

<sup>164</sup> Letter from NRD to Minister Karega, 15 July 2009, **R-105**.



*Despite firm promises made by these gentlemen they had limited funds and were lacking in expertise in exploration and in mining. Therefore very little progress was made during the first two years until H.C. Starck GmbH [...] took full control over the company in late 2008 [...].*

*All in all we lost about two years to investigate the concessions potential and to evaluate ore grades and reserves.*

278. The 2010 Application contains some passages that throw further light on the question of the extent of industrial exploitation carried on by NRD during the four-year period of the Contract. The construction of the Rutsiro processing plant, which had just been commissioned, was highlighted,<sup>165</sup> but apart from this the Application makes it plain that there had not been any significant industrialization.
279. Reference is made to the proposed investment of US\$39,501,500 under the Zarnacks' original business plan, together with a proposal to invest US\$20 million in a “tungsten mill”. These targets were stated to be

*seriously flawed and inappropriate. [...]*

*Therefore, when H.C. Starck acquired the majority of NRD in 2008, the focus of activities and investments changed from large and unrealistic projects to supporting small scale artisanal mining in multiple places, with an emphasis on increasing the standards of safety in the workplace and protecting the environment. An expenditure of RwF 7.602.990.247 is evidence of the commitment of NRD to the development of a sustainable mining industry of Rwanda and its people..<sup>166</sup>*

280. In their Pre-Hearing Brief, reflecting their Reply, the Claimants comment that it remains entirely unclear what is meant by the term “*industrial exploitation*”, but that by any definition of the term the Claimants met that goal through, at a minimum, building a mineral process plant. NRD also built roads and other facilities that were “*necessary precursors towards full-scale industrial mining*”..<sup>167</sup>

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<sup>165</sup> 2010 Application, C-035, p. 8.

<sup>166</sup> 2010 Application, C-035, p. 9.

<sup>167</sup> Cl. Pre-Hearing Brief, para. 37; Cl. Reply, paras. 50-52.

281. Ultimately there seems little dispute as to the relevant facts. Nor, in the view of the Tribunal, is there any room for doubt as to the conclusion to which these facts lead. Had NRD, under the control of the Zarnacks, immediately embarked on constructing the processing plant at Rutsiro, it would have been arguable that this satisfied the requirement, in relation to that Concession, to proceed immediately to the industrial exploitation of the site, even though the industrialization in question proved misconceived. But the required immediacy was lacking. There was no significant industrialization of the other sites.
282. For these reasons the Tribunal finds that NRD failed to comply with its obligation under Article 2.3 of the Contract.

***b. Article 2.5: Evaluation Reports of Reserves***

283. It is the Claimants' case that the 2010 Application contained Evaluation Reports of Reserves in the form of "*reserve estimates and further plans to calculate reserves*" that satisfied NRD's obligations under Article 2. 5 of the Contract.<sup>168</sup>
284. Page 9 of the 2010 Application is headed "***Resource and Reserve Estimations***". Under this heading are set out estimations of primary wolframite deposits of 18,400 tonnes (provisional) and wolframite scree deposits of 187,000 tonnes at Rutsiro, and Nyakabingo laterite deposits of 172,800 tonnes at Nemba. The following page continues:

*Reserve Calculations 2011 to 2015: A number of projects and deposits have been prioritized and earmarked for follow-up investigations. If preliminary established potentials prove to be of substance, the following reserve calculations will be carried out: [...].*<sup>169</sup>

These were "*detailed calculations*" of specified deposits or reserves at Rutsiro, Nemba and Nyatubindi.

285. Page 36 of the 2010 Application, under the heading "***Exploration***", states:

*During 2008 and 2009, NRD Rwanda conducted a comprehensive sampling campaign over the concessions Rutsiro, Giciye and*

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<sup>168</sup> Cl. Mem., para. 42; Cl. Reply, para. 62.

<sup>169</sup> 2010 Application, C-035, p. 10.

*Sebeya. A special focus area was Nyatubindi, located in southern Giciye and Sebeya. The aim of the programme was to capture all sites with a potential to host potentially economic columbo-tantalite and cassiterite resources, tabulate the results and prioritise the most promising sites for a more detailed follow-up investigation.*

*A total of 115 samples were collected.*

286. **Mr. Evode Imena** was, between October 2008 and May 2012, an Exploration Geologist in the Geology and Mining Research Unit of the Rwanda Geology and Mines Authority. In May 2012, he took up a position as Mining Geologist with the Geology and Mines Department (“**GMD**”). From February 2013 until October 2016, he was Minister of State in Charge of Mining in the Ministry of Natural Resources. In May 2012, he was asked to review the 2010 Application. In his First Witness Statement, he stated that a major weakness in the 2010 Application was that NRD had failed to carry out a sufficient exploration of reserves.<sup>170</sup> They had not conducted any drilling and the sampling was very superficial. It indicated what minerals were to be found in the Concession areas, but not the quantities.

*What we were expecting by this stage was a much more comprehensive report from a recognised expert setting out a professional and detailed study of the level of mineral reserves at each site. However, the documents provided by NRD in the November 2010 Application fell well short of this.*<sup>171</sup>

287. In his evaluation of the 2010 Application, Mr. Imena commented:

*NRD did only some significant preliminary exploration work, but failed to realize the objective of delineating the resources and evaluating the reserves.*<sup>172</sup>

288. The Claimants adduced no expert evidence to counter Mr. Imena’s evidence, nor did they challenge it in cross-examination. In their Reply, the Claimants alleged that Mr. Imena’s

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<sup>170</sup> Imena (1), para. 12.

<sup>171</sup> Imena (1), para. 15.

<sup>172</sup> E. Imena, Evaluation of the Application for the Renewal of NRD’s Exploration/Mining Licenses, 8 May 2012, **R-040**, p. 3.

evidence was put in question by the fact that he had been arrested in 2017 on fraud charges.<sup>173</sup> These charges were, however, dismissed.

289. The Tribunal found Mr. Imena to be a truthful and impressive witness. His evidence that NRD failed to carry out the evaluation of reserves required by Article 2.5 of the Contract is corroborated by the contents of the 2010 Application themselves. It is plain from these that only preliminary exploration rather than evaluation of reserves was carried out by NRD during the four years covered by the contract.

*c. Article 2.5 and Article 4: Provision and evaluation of a Feasibility Study*

290. The Claimants' case on the provision of a feasibility study is set out in their Memorial:

*...the [2010] Application undoubtedly fulfilled the request that a feasibility study be conducted. The Application details the geology of each of the five Concessions held by NRD, details the available minerals and the production from 2007 through 2010. It then goes on to describe the planned activity from 2011 to 2015. Without question, the Application constituted a "feasibility study" and established that the Concessions were viable and likely to produce wolfram, coltan and cassiterite.*<sup>174</sup>

291. In his First Witness Statement, **Mr. Gatere**, currently the Chief Executive Officer of the Rwanda Mines, Petroleum and Gas Board ("**RMB**"), gave a description of "*detailed feasibility study*":

*[...] there is initial surveying to determine things like geology, testing surface samples, checking slopes, and contours, and then a second step which generally involves trenching to understand the geophysics of the concession and to examine the physical properties of the rocks to verify their mineralisation. Then there is the further step of picking samples from underground to test in a laboratory using geochemical analysis. For this, multiple drillings must also take place as part of this process. At the end, the company will have an understanding of the mineral deposits, and volumes of reserves. But that is not the end of it: they must also conduct a mine development study of the best method of mining, comparing the cost of given tools, to ascertain the cost and benefits associated with each method, and what the overall profitability of the most cost-effective*

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<sup>173</sup> Cl. Reply, paras. 256-259.

<sup>174</sup> Cl. Mem., para. 50.

*method is. The feasibility study is then signed off by a qualified expert who can verify that it is a comprehensive and reliable feasibility study.*<sup>175</sup>

292. In his Second Witness Statement, Mr. Imena stated:

*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 maps, the ore reserves as per standard definitions, the mineral reserves models, geotechnical studies, studies on environment, studies on infrastructure, studies on markets, the mine design based on the mineral reserves models, the mine sections and mine plans, the mining methods and extraction sequences, the ore handling processes, the results of metallurgical tests, the process plant design and flow sheet, the mine construction budget and schedule, the production schedule, the capital and operating costs estimate, cash flow study, the financial evaluation and risks analysis.*<sup>176</sup>

293. As a matter of contractual interpretation, the Tribunal does not consider that the “*feasibility study*” required by Article 2.5 of the Contract had to satisfy all the requirements described respectively by Mr. Gatare and Mr. Imena. It considers, however, that the study clearly had to demonstrate the “*feasibility*” from the technical, ecological and economic perspectives of mining ores in the Concessions in question over a thirty-year period.

294. The material included in the 2010 Application signally failed to do this. Broadly speaking, it set out proposals for further exploration that might, if effectively carried out, demonstrate whether long-term mining in some, at least, of the Five Concessions was feasible.

295. The matter does not end there, however. Under Article 4, as interpreted by the Tribunal, it was a condition of any contractual entitlement on the part of NRD to long-term licences that the feasibility study should receive a positive evaluation from Rwanda.

296. On 2 August 2011, Mr. Kamanzi of the Ministry of Natural Resources wrote to NRD in response to the 2010 Application stating that NRD had not fully executed Article 2 of the Contract

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<sup>175</sup> Gatare (1), para. 21.

<sup>176</sup> Imena (2), para. 14.

*as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years.*<sup>177</sup>

Should the Tribunal be incorrect in its view that the 2010 Application does not contain anything that can properly be called a “*feasibility study*”, it is satisfied that there was no possibility of the content of the Application receiving a “*positive evaluation*” by Rwanda.

297. For all these reasons, the Tribunal finds that NRD failed to acquire a right to long-term licences under the Contract. Whether those then in control of NRD believed that it had such a right will be considered in the context of the next issue.

**(3) Was the 2010 Application for short-term or long-term licences?**

298. It is the Claimants’ case that, having become entitled under the Contract to long-term licences in respect of the Five Concessions, the 2010 Application was made by NRD in respect of such licences. It is Rwanda’s case that (i) NRD had not qualified for the grant of long-term licences pursuant to the Contract; (ii) those managing NRD were aware of this; and (iii) the 2010 Application was for five-year licences under the 2008 Mining Act to replace the four-year licences or “*special permits*” that had been issued to NRD pursuant to the Contract on 29 January 2007.
299. The Tribunal has already determined that NRD did not qualify for the grant of long-term licences under the terms of the Contract at the time that its four-year term came to an end.
300. Prof. Rupiya, who was Chief Geologist at NRD at the time, describes in his First Witness Statement how NRD, appreciating this to be the case, applied for new exploration and small-scale mining licences within the Five Concession areas. NRD proposed to carry out further exploratory work over the next five years and hoped that the Government would grant five-year licences and that, at the end of these, NRD might be successful in obtaining long-term thirty-year licences. He states that Mr. Marshall is wrong to assert that the 2010 Application was for thirty-year licences.<sup>178</sup>

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<sup>177</sup> Letter from MINIRENA to NRD, 2 August 2011, C-062.

<sup>178</sup> Rupiya (1), paras. 19-21.

301. Mr. Ehlers describes in his First Witness Statement the information that he gave to Mr. Marshall at the time of the purchase of NRD's Holding Company by Spalena. He explained to Mr. Marshall that the exploration licences for the Five Concessions were due to expire in January 2011 and that NRD had applied to renew these but expected that, if renewals were granted, they would be for short rather than long terms because NRD had not satisfied the requirements of the Contract.<sup>179</sup>

302. Mr. Ehlers' evidence is corroborated by the terms of the Spalena Purchase Contract itself. Clause 4.4 records:

*[...] In particular, the Buyer acknowledges that [...] there are issues associated with the renewal of NRD Rwanda Ltd.'s mining licences.*<sup>180</sup>

303. Dr. Michael Biryabarema, the then Deputy Director General of the Rwanda Natural Resources Authority ("RNRA"), carried out an assessment of the 2010 Application in 2011. This stated that NRD was applying for:

- 1 A continuation of mining and exploration works in the five concessions;*
- 2 Mara to be converted into a mining licence; no resource evaluation report was provided for Mara;*
- 3 For a number of small mining licences within the concessions of Giciye, Rutsiro, Sebeya and Nemba.*<sup>181</sup>

304. The most cogent evidence of the nature of the 2010 Application is to be found in the terms of the Application itself. The Application is titled:

*Application for the Renewal of Exploration Licences  
Nemba, Rutsiro, Sebeya, Giciye, and Mara  
and  
Application for the Allocation of Mining Licences to NRD.*

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<sup>179</sup> Ehlers (1), para. 19.

<sup>180</sup> Spalena Purchase Contract, C-068, Art. 4.4(b).

<sup>181</sup> M. Biryabarema, Assessment of the NRD Report on the Application for Renewal of the Exploration/Mining License, **R-111**, Sec. III.

305. The 2010 Application seeks to

*retain the concessions of Rutsiro, Giciye, and Sebeya as Exploration Licences, albeit with a reduced areal extent [...], to retain Nemba as an Exploration Licence in its original size [... and] to convert the current Licence of Mara from [an exploration and exploitation licence] to a Mining Licence for cassiterite and coltan in its original extent.*<sup>182</sup>

306. The 2010 Application states that it is proposed to apply for a total of 10 Mining Licences in parts of the Sebeya, Giciye and Rutsiro Concessions.<sup>183</sup>

307. In respect of each of the Five Concessions, it is stated that the exploration and exploitation permit is due to expire on 28 January 2011 and that applications for renewal have to be submitted three months before the expiry date.<sup>184</sup>

308. The 2010 Application includes a proposed Activity Plan for Research for the period 29 January 2011 to 28 January 2015 with a total budget of the equivalent of €382,000.<sup>185</sup>

309. These terms of the 2010 Application accord with the evidence of Prof. Rupiya and Mr. Ehlers.

310. Article 14 of the 2008 Law provides for mining licences to be conferred by Ministerial Order. Article 44 provides for the granting of a small mine exploitation licence to persons in possession of a valid research licence. Article 45 provides that a small mine exploitation licence should be valid for five years and that an application for the renewal of such a licence should be submitted at least three months before its expiration date.

311. It is impossible to read the 2010 Application as being for long-term, thirty-year mining licences. All of the information as to what NRD proposed to do under the licences that were being sought related to the next five years. The clear inference was that NRD was

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<sup>182</sup> 2010 Application, C-035, pp. 13-14.

<sup>183</sup> 2010 Application, C-035, p. 16.

<sup>184</sup> 2010 Application, C-035, pp. 25, 53, 55.

<sup>185</sup> 2010 Application, C-035, pp. 9-12.



applying for short-term, five-year licences under the provisions of the 2008 Law, and the Tribunal so finds.

312. Minister Kamanzi so understood the Application. In his letter of 2 August 2011, he noted that:

*[Y]ou applied for five year (5) licences for small mines within each of the five concessions. The new status of the concessions will have to be decided based on the work executed in the light of the contract signed (exploration work and other commitments) and on the provisions of the new mining law. We extend the operation of your license for six (6) months from the day of receipt of this later [sic], to allow us time to determine the future of these concessions.*<sup>186</sup>

313. The documentary evidence suggests that it is possible that, some three years later, Rwandan officials, and perhaps Mr. Imena himself, lost sight of the fact that the 2010 Application had only been for five-year licences and accepted assertions made by Mr. Marshall that the application had been for long-term licences.<sup>187</sup>
314. The Tribunal notes that Minister Kamanzi did not grant the short-term licences requested. Instead, he extended the Five Special Permits that had been granted to NRD in 2007, before the 2008 Law came into force.
315. Thus, the Contract reached the end of its four-year term without NRD having satisfied the conditions that would have given rise to a right to long-term licences. Thereafter, it was of no further effect. Mr. Rwamasirabo expressed the view in his Third Witness Statement that every time that Rwanda extended, expressly or implicitly, the mining licences, it also implicitly extended the Contract.<sup>188</sup> The Tribunal accepts the evidence of Mr. Mugisha, for the reasons that he gives, that this view is unsound.<sup>189</sup>

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<sup>186</sup> Letter from MINIRENA to NRD, 2 August 2011, C-062.

<sup>187</sup> See paragraphs 369 and 371 below.

<sup>188</sup> Rwamasirabo (3), para. 6.

<sup>189</sup> Mugisha (2), paras. 7-10.

**(4) Did Spalena purchase NRD in the legitimate expectation that it would receive long-term licences?**

316. The claim that Rwanda “*eviscerated*” the Claimants’ legitimate expectation that NRD would be granted long-term licences.<sup>190</sup> vividly depicts what the Tribunal has identified as Mr. Marshall’s belief that he has been unfairly treated. The Tribunal is able to accept that Mr. Marshall became involved in mining in Rwanda in the hope of obtaining valuable long-term mining concessions. The Tribunal turns to consider whether any expectations that Mr. Marshall had that NRD would receive such concessions were “*legitimate*”.

317. The doctrine of “*legitimate expectation*” has been developed by English Courts and adopted by some other common law jurisdictions as part of the growth of administrative law over the last fifty years. Where an authorized agent of government has made a lawful representation or undertaking, that an individual will receive a benefit the State may be held bound to that representation in public law proceedings.

318. In its Submission, the USA submits:

*The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.*<sup>191</sup>

319. Prof. Zachary Douglas, in his work *The International Law of Investment Claims* remarks, however:

*Where there is no specific rule of decision to apply, which is invariably the case in investment treaty arbitrations, the tribunal should search for principles of law. For instance, a tribunal would be on safer ground by making reference to the principle of estoppel or legitimate expectations to give content to the fair and equitable*

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<sup>190</sup> Cl. Mem., para. 168.

<sup>191</sup> USA Submission, para. 50.

*standard of treatment rather than appealing to the policy of achieving 'greater economic cooperation'.*<sup>192</sup>

320. In its Rejoinder, Rwanda accepts that Article 5 of the BIT can be infringed by a failure by a State to satisfy the legitimate expectations of an investor provided that (i) failure to comply with the expectations infringed the minimum standard of treatment required by Article 5; (ii) the expectations were founded on a representation that was made or subsisted at the time of the investment; (iii) the representation was reasonably relied upon by the investor in making his investment.<sup>193</sup>
321. The Tribunal endorses these propositions and adds that an expectation will not be reasonable unless based on a representation that was lawful and was made by an official who was authorized to make it.
322. The Tribunal turns to consider the various representations that the Claimants allege were made before the purchase of NRD's Holding Company by Spalena on 23 December 2010.

***a. The understanding of the mining community in Rwanda***

323. The Claimants' Memorial alleges that:

*It was well understood [...] that once an investor obtained a contract for acquiring mining licences and a permit for mining, it would obtain a long term licence from the Government.*<sup>194</sup>

In the Claimants' Reply, this understanding was said to be that a long-term licence was "guaranteed".<sup>195</sup>

324. As Rwanda submits, the understanding of the mining community in Rwanda could not, of itself, found a "legitimate expectation".<sup>196</sup> Mr. Buyskes, a mining engineer who had extensive experience of mining in Rwanda, to which country he returned in 2012, stated in his Second Witness Statement that the general understanding of the mining community in

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<sup>192</sup> Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press: 2009), para. 148.

<sup>193</sup> Resp. Rej., para. 710.

<sup>194</sup> Cl. Mem., para. 170.

<sup>195</sup> Cl. Reply, para. 179.

<sup>196</sup> Resp. Rej., para. 724.

Rwanda was based upon “*the policies and practices of the Government of Rwanda*”.<sup>197</sup> He said that the understanding was that the granting of long-term licences to holders of Four-Year Contracts would be “*a formality*”.

325. In December 2010, the Four-Year Contracts that had been granted under Rwanda’s policy of privatization were reaching the end of their terms. None had resulted in the grant of long-term licences. The alleged understanding of the mining community was contrary to its experience. In any event, that understanding could not, of itself, found a legitimate expectation on the part of the Claimants that NRD would be awarded long-term mining rights.

***b. Government representatives***

326. In their Memorial, the Claimants allege that

*Rwandan officials, on multiple occasions stated that the long term licences were guaranteed.*<sup>198</sup>

327. The only pleaded reference in support of this allegation in the period before December 2010 is to a letter from Dr. Biryabarema, Director of OGMR, to the Director of the National Land Centre dated 20 July 2009. This stated that Four-Year Contracts were expected to be converted into long-term concessions of 30 years “*where there is success in defining economic deposits*”.<sup>199</sup> This falls short of suggesting that long-term concessions were guaranteed and was, in any event, an internal communication.
328. In his Second Supplemental Witness Statement, Mr. Marshall states that Mr. Lambert Mucyo, an employee of RIEPA, led him to believe that so long as a company obtained a short-term licence and began investing, that company would be guaranteed to receive a long-term licence.<sup>200</sup>

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<sup>197</sup> Buyskes (2), para. 5.

<sup>198</sup> Cl. Mem., para. 170.

<sup>199</sup> Letter from OGMR to NRD, 20 July 2009, C-032.

<sup>200</sup> Marshall (3), para. 19.

329. Mr. Marshall refers to an email from Mr. Mucyo dated 12 December 2006.<sup>201</sup> This provided advice as to how to obtain a Four-Year Contract for the Bisesero Concession but does not suggest that obtaining this would guarantee a long-term concession. Nor would Mr. Mucyo have had authority to give such an assurance on behalf of Rwanda.
330. In summary, the Claimants have failed to prove that, prior to their acquisition of NRD, any authorized Government official represented that long-term licences would be guaranteed to any company that succeeded in obtaining a Four-Year Contract. Nor would such a guarantee have been lawful, for it would have purported to abrogate the preconditions to entitlement to long-term licences contained in the Four-Year Contracts themselves.
331. Paradoxically, the Claimants have sought to rely in support of their alleged legitimate expectation on the wording of the Contract itself, inasmuch as Article 4 states that NRD “*will be granted the mining concessions*” following the expiration of the Contract. But as the Memorial goes on to recognize, it was only after compliance with its obligations under the Contract that NRD would be entitled to the long-term licences.<sup>202</sup>
332. For all these reasons the Tribunal finds that when Spalena acquired indirect ownership and control of NRD in December 2010 the Claimants had no legitimate expectation that NRD would be granted long-term licences.

**(5) After the acquisition of NRD by Spalena did Rwanda give Spalena a legitimate expectation that NRD would be granted long-term licences?**

333. It is the Claimants’ case that, after Spalena had acquired indirect ownership and control of NRD, Rwanda continued to give them a legitimate expectation that NRD would be granted long-term licences over the Concessions, which expectation Rwanda ultimately dashed. That case, if made good, might support the plea that Rwanda had failed to accord the Claimants the minimum standard of treatment required under Article 5 of the BIT. Rwanda denies that the Claimants were ever given a legitimate expectation that NRD would be granted long-term licences.

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<sup>201</sup> Email from Mr. Mucyo to Mr. Marshall, 12 December 2006, **C-139**.

<sup>202</sup> Cl. Mem., paras. 170-171, citing Contract, **C-017**, Art. 4 [emphasis added by the Claimants].

*a. Mr. Bidega*

334. The Claimants' alleged expectation that NRD would receive long-term licences was attributed, in large measure, to the intervention of Mr. Dominique Bidega, whose Witness Statement stated that he was from 2008 until 2012 Director of the Regulatory and Supervision Unit of the Rwanda Geology and Mining Authority ("OGMR"). In his Witness Statement, as relied upon in the Claimants' Reply, Mr. Bidega states that he reviewed the 2010 Application "for long-term licences" submitted by NRD.<sup>203</sup> Both he and his superiors considered that the work performed by NRD satisfied their obligations under the Contract. As a result of the high quality of NRD's work, Mr. Bidega provided NRD with a copy of the agreement that Rwanda was using for concessions. He and his team negotiated the terms of the agreement for several months with NRD. Once finalized, it was submitted to Dr. Biryabarema, who approved the draft. It was then sent to the Minister of Natural Resources, who reviewed and approved it and submitted it to Cabinet.<sup>204</sup>

335. In his Second Witness Statement, Mr. Marshall states:

*I was confident that the Cabinet would approve the long term license when Dominique Bidega and his bosses, Dr. Biryabarema and Minister Kamanzi, submitted the long term license to the Cabinet of the Government of Rwanda for approval.*<sup>205</sup>

336. The Claimants' Reply alleges that NRD

*continu[ed] to perform under the Contract as it understood it was required to do in order to receive the long-term licences*

but that the Cabinet neither accepted nor rejected the draft agreement.<sup>206</sup>

337. On 20 May 2020, pursuant to a request from the Tribunal, the Claimants produced Exhibit **C-207**, which consisted of correspondence, to which Mr. Marshall was party, between

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<sup>203</sup> Cl. Reply, paras. 70-71, referring to, *inter alia*, Bidega (1), paras. 3-5.

<sup>204</sup> Mr. Bidega exhibited the draft agreement to his Witness Statement: Contract between Government of Rwanda and NRD (redline version), September 2011, **C-114**.

<sup>205</sup> Marshall (2), para. 23.

<sup>206</sup> Cl. Reply, para.

NRD and Mr. Bidega. This is comprehensively analysed in Rwanda's Rejoinder.<sup>207</sup> In the circumstances that the Tribunal will shortly discuss it is not necessary to analyse the documents making up **C-207** in detail. When considered, together with **C-114**, they lead to the following conclusions:

- (i) **C-114** is not a draft of a long-term licence agreement, but of a five-year small-scale mining licence agreement;
- (ii) **C-114** was one of a series of draft five-year licence agreements originating from NRD and submitted to Mr. Bidega for his *review*;
- (iii) There is no indication that any draft agreement was submitted to Dr. Biryabarema, or to anyone else, *for approval*.

338. Dr. Biryabarema's Second Witness Statement at paragraphs 9 and 10 contains a root and branch refutation of Mr. Bidega's evidence. He states that every aspect of the account given by Mr. Bidega is untrue.

339. Mr. Francis Gatare was, at the material time, PPS to the President of Rwanda and subsequently became Chief Executive Officer of RMB and a member of the Cabinet. In his Second Witness Statement, he states that he reviewed the Cabinet Records and confirms that no application from NRD was submitted to Cabinet. He adds that any such submission would first have had to have received ministerial approval. No application for long-term licences by NRD was approved by MINIRENA.<sup>208</sup>

340. Prof. Rupiya, in his Second Witness Statement, states that he first met Mr. Bidega in January 2011 at a time when Prof. Rupiya was the main contact person between NRD and OGMR. He retired early the following year. Before he retired neither Mr. Bidega nor anyone else at OGMR discussed long-term licences with him. NRD had only applied for a five-year renewal. Neither Mr. Bidega, nor anyone else at OGMR, told him that they had agreed to grant NRD a five-year renewal. No one ever sent him a draft long-term licence

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<sup>207</sup> Resp. Rej., paras. 173-174.

<sup>208</sup> Gatare (2), paras. 12-13.

agreement. He would have been told had OGMR been willing to grant any kind of licence to NRD..<sup>209</sup>

341. Mr. Marshall was cross-examined at length about the role of Mr. Bidega..<sup>210</sup> Despite the evidence to the contrary, which was put to him, he was adamant that Mr. Bidega's Witness Statement was correct:

*I absolutely believed it. [...] I had been told he [Dr. Biryabarema] had approved it and Minister Kamanzi had forwarded it with his approval to the Cabinet..<sup>211</sup>*

342. Having regard to the stark conflict of evidence outlined above the Tribunal awaited Mr. Bidega's oral evidence with some interest. In the event, it did not last long. Mr. Cowley, examining him in chief, asked him when he was employed by OGMR. He replied until 2011 because he was tired and wanted to take a break. He was referred to an email in Exhibit **C-207** dated 13 December 2011; this was part of correspondence with Mr. Marshall about drafting of part of an agreement. Mr. Cowley asked him whether he was still employed with OGMR on that date. He replied that he was not. He had resigned because he was tired. Mr. Cowley asked him whether he had had conversations with Mr. Marshall about a draft contract attached to the email. He replied that he had. Mr. Cowley asked whether conversations with Mr. Marshall about a draft contract for a licence began when he was still employed by OGMR. He replied "No"..<sup>212</sup>

343. Mr. Cowley asked no further questions and Mr. Hill, for Rwanda, did not cross-examine.

344. Mr. Bidega's answers to Mr. Cowley's questions undermined the evidence in his Witness Statement. That statement, in the English language, ended with the customary statement:

*I have prepared this witness statement with the assistance of counsel for the Claimants but the information contained herein is true and accurate to the best of my knowledge..<sup>213</sup>*

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<sup>209</sup> Rupiya (2), paras. 7-8.

<sup>210</sup> Tr. Day 2, 187:16-202:10 (Marshall).

<sup>211</sup> Tr. Day 2, 201:6-24 (Marshall).

<sup>212</sup> Tr. Day 5, 29:22-32:4 (Bidega).

<sup>213</sup> Bidega (1), p. 4.



It was signed at Kigali on 16 August 2019.

345. After Mr. Bidega's evidence, the Tribunal invited Mr. Cowley to explain the process by which statements of foreign language witnesses, such as Mr. Bidega, were produced in English. He answered this question in relation to the Witness Statement of Mr. Bidega. He said that drafts were sent to Mr. Rwamasirabo in Kigali, who engaged a translator. When asked to confirm that the drafts were prepared on the basis of discussions that counsel had with the witness, he answered:

*I wasn't involved in the discussion but I believe the discussions were aided by Mr. Olivier Rwamasirabo connecting us so that we could talk, and being present to answer questions about what words meant. But the idea was that we would send what we understood he said to him in a draft, it would be translated, and we waited to get [it] back.*<sup>214</sup>

346. The Tribunal accepts that Mr. Cowley was not himself involved in the discussions that led to the drafting of Mr. Bidega's Witness Statement. The account given by Mr. Bidega in that Statement was in conflict, not only with his brief oral evidence, but with both the relevant documentary evidence and the evidence of Dr. Biryabarema, Mr. Gatare and Prof. Rupiya, which evidence the Tribunal accepts. The Tribunal finds it hard to accept that the inaccuracies in Mr. Bidega's Statement were attributable to *bona fide* errors in translation. Precisely how and why Mr. Bidega gave the evidence in his Witness Statement remains a mystery.
347. In its Post-Hearing, Brief Rwanda deals briefly with Mr. Bidega's role, submitting that any assistance that he gave related to the drafting of an application for a five-year licence was given in a personal capacity, but that his Witness Statement was entirely undermined by his oral testimony.<sup>215</sup>

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<sup>214</sup> Tr. Day 5, 33:21–34:2 (Cowley).

<sup>215</sup> Resp. PHB, paras. 80-81.

348. In contrast, the Claimants devote seven pages of their Post-Hearing Brief to supporting Mr. Bidega's Witness Statement.<sup>216</sup> The Tribunal is invited to disregard Mr. Bidega's oral evidence as "*incorrect*" and accept that the reality was that:

*Mr. Bidega was authorized to negotiate a long term license with Claimants for all five Concessions, those negotiations were both known and authorized within the RNRA and the Ministry when they occurred, and Claimants reasonably relied on those negotiations with Mr. Bidega to justify their legitimate expectations of a long term license.*<sup>217</sup>

349. For the reasons given, the Tribunal rejects these submissions. Nothing said or conveyed by Mr. Bidega was capable of giving rise to a legitimate expectation on the part of the Claimants that NRD would be granted long-term licences in relation to the Five Concessions, or any of them.

***b. Statements by other agents of Rwanda***

350. It is the Claimants' case that their legitimate expectation that NRD would receive long-term mining licences persisted until 2016. In relation to that assertion it is relevant to consider statements made on behalf of Rwanda up to that year.
351. The response of Minister Kamanzi, dated 2 August 2011, to the 2010 Application is set out at paragraph 312 above. That is explicitly a response to an application for five-year licences for small mines. It extends the existing licences, granted in 2007, for six months to enable consideration of the future of the concessions. The Claimants' Memorial asserts that this response acknowledged NRD's compliance with the terms of the Contract.<sup>218</sup> On the contrary, both the 2010 Application and Minister Kamanzi's response were inconsistent with an expectation on the part of the Claimants that NRD was entitled to and would be granted long-term licences in respects of the Five Concessions.<sup>219</sup>

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<sup>216</sup> Cl. PHB, pp. 19-26.

<sup>217</sup> Cl. PHB, paras. 54-55.

<sup>218</sup> Cl. Mem., para. 52.

<sup>219</sup> In his Third Witness Statement, Mr. Marshall incorrectly asserts that Minister Kamanzi's letter of 2 August purported to terminate NRD's licences: Marshall (3), para. 20.

352. Minister Kamanzi sent this letter to the Minister of Justice, together with responses that he had made to other applicants who had held Four-Year Contracts but not satisfied the conditions in those Contracts for the grant of long-term licences.<sup>220</sup> Rwanda's initial plan for privatization of mining had not been a success and its Government had to reconsider the basis on which long-term privatization would be effected.
353. On 12 December 2011, representatives of NRD, including Mr. Marshall, and of RNRA, including Dr. Biryabarema, met to discuss a new contract with NRD, as evidenced by a letter from Minister Kamanzi to Mr. Marshall dated 26 January 2012.<sup>221</sup> That letter repeated the assertion that the resources evaluation accomplished under the Contract fell far short of the level expected. In view of this, NRD was invited to negotiate an agreement in respect of two of the Five Concessions. If this was not acceptable NRD should vacate all Five Concessions. This was plainly in conflict with any expectation that NRD would receive long-term licences in relation to all Five Concessions.
354. Mr. Marshall wrote back on 31 January 2012, challenging the accuracy of the Minister's account of the meeting.<sup>222</sup>
355. Notwithstanding this letter, Minister Kamanzi wrote to NRD on 28 February 2012 extending NRD's "*special license*" for three months, with effect from 2 February 2012. The letter stated that the object of the exercise was to negotiate the terms of "*the new contract*". It continued:
- I understand the absolute necessity to conclude this agreement as soon as possible for strong investor confidence. [...] I am certain that this is enough time for us to conclude a good contract for this partnership.*<sup>223</sup>
356. The Claimants rely on this statement as reinforcing their expectation that NRD would receive long-term licences. Had the negotiations been in relation to long-term licences there

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<sup>220</sup> Letter from Minister Kamanzi to Minister of Justice/Attorney General, 8 August 2011, **R-109**.

<sup>221</sup> Letter from MINIRENA to NRD, 26 January 2012, **R-018**.

<sup>222</sup> Letter from NRD to MINIRENA, 30 January 2012, **C-039**.

<sup>223</sup> Letter from MINIRENA to NRD, 28 February 2012, **C-034**.

would have been force in this assertion. In the event the terms of the letter do not seem appropriate to what has gone before.

357. In the view of the Tribunal, this letter is indicative of a degree of disorganization on the part of Rwanda. NRD had been left in possession of the Five Concessions without any licence after the previous six-month extension had expired on 2 February 2012. The letter purported to regularize this retroactively. It would not surprise the Tribunal if Rwanda was taking similar retroactive action in respect of other concession holders.
358. This impression is reinforced by the terms of the next letter from Minister Kamanzi to NRD, dated 13 September 2012, over four months after the extended licences had expired. This states:

*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 up to October 2012, to allow for the ongoing work to be completed.*<sup>224</sup>

359. It is impossible to read into this an assurance that NRD was about to be issued long-term licences pursuant to the Contract, or at all. No further extensions were granted after the expiry of the extended licence in October 2012.
360. On 30 January 2013, Mr. Marshall sent to Minister Kamanzi what he described as

*an update of the amended application of [NRD] for a long-term mining concession license.*<sup>225</sup>

He enclosed: (i) a copy of the 2010 Application, which he described as the original request for a long-term mining licence; (ii) an update of NRD's proposed Investment Plan, 9 pages in length, and (iii) a draft long-term Concession Agreement. This was said to be on a template provided by the Ministry, and the Claimants' Reply alleges that these documents were sent pursuant to a request from the GMD.<sup>226</sup>

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<sup>224</sup> Letter from MINIRENA to NRD, 13 September 2012, C-033.

<sup>225</sup> Letter from NRD to MINIRENA, 30 January 2013, C-054.

<sup>226</sup> Cl. Reply, para. 75.

361. Had this been the case, the request would plainly have been capable of giving rise to the expectation of the possible grant of a long-term licence. However Rwanda denies that these documents were requested by the GMD or that the draft contract was on a Ministry template. The draft contract was in identical form to Exhibit **C-114**, with the significant difference that, under Article 2, the “*Rights*” afforded by the draft were stated to be licences for 30 years, rather than (in C-114) a small mine licence.
362. Mr. Imena stated in his Second Witness Statement that the drafts differed significantly from the form that the Government used.<sup>227</sup>
363. The Tribunal does not accept that these documents were requested by GMD. Had they been, Mr. Marshall would have said so in his covering letter. Instead, this letter began:
- This letter is to provide you with an update of the amended application of [NRD] for a long-term mining concession license.*<sup>228</sup>
364. The evidence as a whole leaves the Tribunal in no doubt that Rwanda had no intention at this stage, or indeed at any stage after the termination of the Four-Year Contract, of granting NRD long-term mining licences. The documents sent on 30 January 2013 were sent on the initiative of Mr. Marshall.
365. On 10 February 2013, in a letter primarily concerned with mining in the Western Concessions, Dr. Biryabarema referred to being able to “*proceed with negotiations on your request for new contracts for the concessions*”.<sup>229</sup>
366. On the assumption that this was a reference to Mr. Marshall’s letter of 30 January 2013, this could have been read as accepting that the request related to long-term contracts. It could not reasonably be read as conveying an assurance that such contracts would be awarded.
367. On 2 April 2013, the RDB sent a letter addressed to Mr. Joachim Zarnack as Chairman of NRD. This letter referred to the Contract, stating that it had expired in 2011 and NRD had

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<sup>227</sup> Imena (2), para. 24.2.

<sup>228</sup> Letter from NRD to MINIRENA, 30 January 2013, **C-054**.

<sup>229</sup> Letter from GMD to NRD, 10 February 2013, **C-056**.

been operating on short-term extensions while both parties worked towards concluding a comprehensive agreement. The letter continued:

*As the Government of Rwanda has taken the decision to negotiate license agreements separately for each mining site, we wish to initiate negotiations with the Company for the issuance of a small scale mine exploitation license for the Nemba site. Attached is an initial draft of the small scale mining and exploitation licence agreement for your review, as well as a due diligence questionnaire to be completed by the Company.*<sup>230</sup>

368. The draft agreement has not been put in evidence. At that time, under the provisions of the 2008 Law the duration of a small-scale mining licence was five years. Assuming that this was reflected in the draft agreement the letter could not give rise to or support an expectation of the receipt of a long-term licence.

369. Nonetheless, Mr. Marshall replied on 9 April 2013, noting that the term of the Contract had indeed expired

*without NRD receiving the agreed upon “Long Term License” and we would like to express our appreciation that we can now discuss that.*<sup>231</sup>

370. With one exception,<sup>232</sup> the Claimants have not alleged that, from this point on, Rwanda made any representation that was capable of confirming or supporting an expectation on the part of the Claimants that NRD would be granted long-term mining licences. Rather it is the Claimants’ case that their legitimate expectation continued, notwithstanding statements from Rwanda which, on their face, were inconsistent with such an expectation. The more significant items of subsequent correspondence now follow.

371. On 30 October 2013, Mr. Marshall and other representatives of NRD attended a meeting chaired by Mr. Imena, who had been in post as Minister in charge of Mining for some six months. It is the Claimants’ case that Mr. Imena assured NRD that negotiation on the

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<sup>230</sup> Letter from RDB to NRD, 2 April 2013, **C-057**.

<sup>231</sup> Letter from NRD to RDB, 9 April 2013, **C-058**.

<sup>232</sup> An alleged assurance given by Minister Biruta: see paragraph 378 below.

language of the long-term licences would be resumed shortly.<sup>233</sup> Mr. Imena does not agree. In his First Witness Statement he states that, based on what his Department had learned from visiting the sites and reviewing the materials, NRD did not have the capacity to develop all five Concessions and should focus on two areas.<sup>234</sup> Since that Statement was made, the minutes of the 30 October meeting were found.<sup>235</sup> These confirm the accuracy of Mr. Imena's recollection and the Tribunal accepts his evidence.

372. A further meeting between representatives of the Ministry and Mr. Marshall and other representatives of NRD took place on 8 November 2013. The minutes of the meeting record an impasse.<sup>236</sup> The Ministry was prepared to negotiate on concessions at Nemba and Rutsiro. NRD wanted thirty-year licences for those two concessions coupled with ten-year licences at the others or an indemnity in respect of investment losses in relation to them. There were no further such meetings.
373. On 30 June 2014, the 2014 Law came into force. This introduced a more flexible regime so far as the type and duration of licences was concerned. Under Article 11, a small-scale mining licence would be valid for an initial period not exceeding 15 years and a large-scale mining licence would be valid for a period not exceeding 25 years.<sup>237</sup>
374. There was a degree of confusion as to whether the transitional provisions of that Law conferred any rights on NRD. At all events, on 18 August 2014, Mr. Imena wrote to NRD requesting NRD

*to re-apply for the licences of some or all of the former mining areas. The list of what is required in this application is attached to this letter. Each concession is a separate entity and should be applied for individually i.e. for Nemba, Giciye, Rutsiro, Mara and Sebeya.*<sup>238</sup>

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<sup>233</sup> Cl. Reply, para. 78; Marshall (1), para. 38.

<sup>234</sup> Imena (1), para. 25.

<sup>235</sup> MINIRENA and NRD Meeting Minutes, 30 October 2013, **R-112**.

<sup>236</sup> MINIRENA and NRD Meeting Minutes, 8 November 2013, **R-113**.

<sup>237</sup> 2014 Law, **CL-002**, Art. 11.

<sup>238</sup> Letter from MINIRENA to NRD, 18 August 2014, **C-064**.

The list of requirements was attached as an annex to the letter.

375. In his First Witness Statement, Mr. Imena states:

*Although we were under no obligation to do so, we decided to give NRD a further opportunity to submit an application for long-term licences which complied with the new legal framework. I was determined that NRD should either make proper applications for licences under the new 2014 Law, or cease operating as we could not allow the situation to continue whereby it was operating unlawfully.*<sup>239</sup>

376. Six days before he sent the 18 August letter, Mr. Imena's department had published an assessment of NRD's performance. This started by considering the performance by NRD of its obligations under the Contract. It was highly critical of this. It identified significant failures to satisfy the Contract and commented on the paucity of the money invested, a substantial undeclared and unpaid liability to Rwandan tax and a "*challenged environment management record*".<sup>240</sup>

377. Under the heading "*APPLICATION FOR LONG-TERM LICENSE*" the assessment appears to have treated the 2010 Application as having been the initial application for long-term licences. It made the following recommendation:

*Since the Company has; (i) clearly failed to fulfill its main contractual obligations (exploration and industrial production) and hasn't demonstrated satisfactory managerial, financial and technical competence; (ii) had poor Environment management and failed in effective management of the concessions as shown by rampant illegal activities; (iii) had poor labour relations characterised by numerous disputes; (iv) displayed lack of cooperation in reasonable negotiations, the concessions should revert back to Government. Should the company be willing, it can re-apply for any of the concessions.*<sup>241</sup>

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<sup>239</sup> Imena (1), para. 28.

<sup>240</sup> "Natural Resources Development; Assessment of its Performance", 12 August 2014, **R-118**, Sec. 3.

<sup>241</sup> "Natural Resources Development; Assessment of its Performance", 12 August 2014, **R-118**, Secs. 4-5.



378. On 16 September 2014, representatives of NRD met with Mr. Vincent Biruta, who had recently been appointed Minister of Natural Resources. According to Mr. Marshall, he promised:

*[A]s long as I am Minister, you will not lose your Concessions.*<sup>242</sup>

This led Mr. Marshall to believe that the application for new licences was “*a mere formality*”.<sup>243</sup>

379. Mr. Imena stated that he did not believe that Minister Biruta could have said this. He had a close working relationship with Minister Biruta, who shared his concerns about NRD.<sup>244</sup>

380. Mr. Gatara stated that he discussed this allegation with Minister Biruta, who confirmed that he gave no such assurance or promise.<sup>245</sup>

381. The Tribunal does not accept that Minister Biruta gave the alleged assurance. Having regard to the adverse departmental appraisal of NRD’s performance it is inconceivable that such an assurance would have been given. Mr. Marshall’s evidence was frequently imaginative, and this is one such example.

382. On 18 September 2014, NRD made an application (the “**2014 Application**”) for long-term licences under the 2014 Law. This was under cover of a letter that alleged that the Contract was still in force, that NRD had complied with its obligations under it and invested funds in excess of US\$20 million and that the Government was bound to grant a “*long term license*” of 35 years duration.<sup>246</sup>

383. Details of the 2014 Application are set out in a memorandum from the Licence Evaluation Team dated 29 September 2014. This records that NRD had disregarded the list of what was required that had been attached to Mr. Imena’s letter of 18 August. In effect, NRD was relying on material in the 2010 Application to support an application for a thirty-five-year

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<sup>242</sup> Marshall (1), para. 53; Tr. Day 3, 167:7-9 and 168:23-25 (Marshall).

<sup>243</sup> Tr. Day 3, 168:17-21 (Marshall); Cl. Reply, para. 100.

<sup>244</sup> Imena (2), para. 50.

<sup>245</sup> Gatara (2), para. 28.

<sup>246</sup> The letter was erroneously dated 18 August 2014: Letter from NRD to MINIRENA, 18 August 2014, **C-084**.

licence covering all Five Concessions. The Team recommended that licences should not be granted in respect of the Five Concessions but suggested options under which NRD might be given seven days to appeal, or 30 days to provide the missing information.<sup>247</sup>

384. Mr. Imena adopted the former suggestion. On 28 October 2014, he wrote to NRD observing that NRD had failed to provide all the requested documents and that those that had been provided were unsatisfactory, with the consequence that the Ministry had decided not to grant licences in respect of any of the Concessions. 7 days were given in which to appeal, failing which NRD was instructed to hand over all mining concessions within 60 days.<sup>248</sup>
385. This letter was manifestly inconsistent with any continued expectation that NRD would receive long-term licences. It is the Claimants' case that they nonetheless continued to hold that expectation.
386. Mr. Marshall wrote on 1 November 2014, exercising NRD's right of appeal. His letter complained that NRD had received unequal and unfair treatment and suffered victimization. It then asserted that NRD had a subsisting right to a long-term licence under the Contract and asked for a start of negotiations as soon as possible in order to implement this right.<sup>249</sup>
387. Mr. Imena replied on 12 November 2014, stating that NRD had no subsisting right under the Contract and that the 2014 Application had been refused in accordance with the 2014 Law; annexed to his letter was a schedule of the information requested in the annex to his of 18 August. NRD was given 15 days to make good the deficiencies, so that its application could be reconsidered.<sup>250</sup>

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<sup>247</sup> Memorandum from License Evaluation Team to Minister of Mining, 29 September 2014, **R-020**.

<sup>248</sup> Letter from MINIRENA to NRD, 28 October 2014, **R-022**.

<sup>249</sup> Letter from NRD to Minister of Mining, 1 November 2014, **C-086**.

<sup>250</sup> Letter from MINIRENA to NRD, 12 November 2014, **C-087**.

388. NRD's response on 25 November 2014.<sup>251</sup> was deemed inadequate, but Mr. Imena, on 17 December 2014, gave NRD a further chance to provide the missing information.<sup>252</sup> NRD supplied some further information on 16 January 2016.<sup>253</sup>

389. Thereafter NRD's application was the subject of two assessment reports. The first, dated 26 January 2015, was prepared by two lawyers and Mr. Ntege, the Director of Mineral Research.<sup>254</sup> The second assessment report was signed off by Dr. Michael Biryabarema and dated February 2015. Dr. Biryabarema's recommendations as set down in the latter document were as follows:

- *There is no basis for MINIRENA to grant a mining license to NRD (Rwanda) Ltd for the five 'concessions'. Technically NRD Ltd did not apply for any 'concession'. It was clearly stated in [Minister Imena]'s letter that each 'concession' should be applied for as an entity. Secondly the documents submitted were insufficient and not specific to any 'concession';*
- *The company has not shown any financial or technical viability and is therefore not qualified to such a large and potential area. If it had been cooperative, negotiations for one concession, say Nemba, would be viable and reasonable;*
- *The company has publicly and on several occasions stated that it has so far invested 20M US\$ in the concessions. A look at the list of expenditures includes huge payables without documentation like a reported foreign consultant fees [sic] of about 5 billion Frw. There might be need to request the Auditor General's Office to audit the finances of the company to stop it from making any unsubstantiated claims[.]*<sup>255</sup>

In its Post-Hearing Brief, Rwanda draws attention to Mr. Marshall's suggestion that Dr. Biryabarema's report had been fabricated with assistance from English counsel<sup>256</sup> and observes that this, and other attacks upon the integrity of this witness, were not put to him

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<sup>251</sup> Letter from NRD to Minister of Mining, 25 November 2014, **C-088**.

<sup>252</sup> Letter from MINIRENA to NRD, 17 December 2014, **C-095**.

<sup>253</sup> Letter from NRD to Minister of Mining, 16 January 2015, **C-096**.

<sup>254</sup> R. Ditutu, N. Dushimimana, and A. Ntege, "Assessment Report of Additional Documents Submitted by NRD Rwanda", 26 January 2015, **R-023**.

<sup>255</sup> Mr. Biryabarema, "Assessment Report of Additional Documents Submitted by NRD Rwanda", February 2015, **R-024**, p. 6.

<sup>256</sup> Tr. Day 3, 271:22–272:6 (Marshall).

or to any other witness in cross-examination.<sup>257</sup> The Tribunal considers that this is a point well made.

390. On 19 May 2015, Mr. Imena wrote to Mr. Marshall observing that for the third time NRD had failed to submit complete application files. In these circumstances, the Ministry was not able to grant mining licences for any of the Five Concessions. NRD was accordingly requested to proceed with the closure of its operations and hand over the mining perimeters of each of the Concessions within 60 days.<sup>258</sup>

391. This summary demonstrates that nothing said by other agents of Rwanda was capable of giving rise to a legitimate expectation that long term licences would be issued to NRD.

### *c. The Military*

392. In their Pre-Hearing Brief, the Claimants make, for the first time, detailed allegations in relation to *pro bono* assistance provided over the years by Mr. Marshall and Ms. Mruskovicova to the Rwandan military in a variety of different ways, none of which had anything to do with mining. It is alleged that because of this Mr. Marshall was promised that if he invested in a short-term mining licence a long-term licence was guaranteed.<sup>259</sup>

393. Rwanda challenges this allegation on the ground that it was not merely novel but in conflict with the case previously advanced by the Claimants. Furthermore, for the military to have sought to reward Mr. Marshall by obtaining for him preferential mining rights would have been improper.<sup>260</sup> The Tribunal endorses this submission. No *legitimate* expectation could be founded on improper promises from the military.

### *d. Summary*

394. There are both subjective and objective elements in a legitimate expectation. Subjectively, Party A, asserting a legitimate expectation, must establish that he had that expectation.

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<sup>257</sup> Resp. PHB, para. 112.

<sup>258</sup> Letter from MINIRENA to NRD, 19 May 2015, C-038.

<sup>259</sup> Cl. PHB, paras. 5-7.

<sup>260</sup> Resp. PHB, paras. 44-48.

Objectively, Party B must be shown to have made a promise or representation that has reasonably given rise to that expectation.

395. Anyone who signed a Four-Year Contract with Rwanda could assert that he had a reasonable expectation that, if he complied with the obligations under the Contract and produced a satisfactory feasibility study, he would be rewarded with a long-term licence. Such an expectation flowed reasonably from the terms of the Contract agreed by Rwanda. That is not, however, the expectation that the Claimants seek to establish. They submit that they had a reasonable expectation that anyone who secured a Four-Year Contract would be guaranteed a long-term licence. More particularly they submit that they had a reasonable expectation that NRD would be granted long-term licences for the Five Concessions.
396. The Tribunal has held that NRD did not satisfy its obligations under its Four-Year Contract, nor did it produce a feasibility study that Rwanda should have accepted as satisfactory. The Tribunal has considered in some detail the history of relations between NRD, led by Mr. Marshall and Rwanda. It has concluded that nothing said or done by anyone authorized to act for Rwanda could, at any time, have given rise to a reasonable expectation that NRD would be granted long-term mining licences for the Five Concessions, or for any of them.

**(6) Did Mr. Benzingé's activities in and after August 2012 involve a breach of Rwanda's obligations under the BIT?**

***a. August 2012***

397. Mr. Ben Benzingé, a Rwandan national, had taken part in the founding of NRD in July 2006. He was allocated 15% of the shareholding in the Company, though Mr. Marshall contended that he forfeited his right to these shares because he failed to pay for them. He objected to the transfer of NRD from the Zarnacks to Sparck. From 2012 to 2014, he was an intermittent thorn in the flesh of Mr. Marshall.
398. Mr. Benzingé did not feature prominently in the Claimants' Memorial. This alleges that Mr. Benzingé "*convinced the RDB that he was the managing director*" of NRD and that RDB altered the Company Register to record this fact. After a week, RDB was persuaded that Mr. Benzingé was not Managing Director, and the Register was rectified. During the week that he was in office, Mr. Benzingé is alleged to have wreaked mayhem, taking

control of NRD's offices, changing the locks on NRD's buildings and offices and stealing from the Concessions.<sup>261</sup> It is not alleged that Rwanda was complicit in Mr. Benzinge's wrongdoing, merely that it facilitated this. However, in their Counter-Memorial, the Claimants allege that Rwanda

*by and through the RDB, used Benzinge as a pawn to make clear to Claimants that they could be stripped of their entire investment on a whim.*<sup>262</sup>

399. In their Pre-Hearing Brief, the Claimants allege:

*Claimants could not have known it at the time, but this was one of the first bad acts in a long line of bad acts perpetrated by Respondent in an effort to force Claimants to abandon their investment.*<sup>263</sup>

When Mr. Marshall gave oral evidence, he alleged that Mr. Benzinge had acted in collusion with RDB.<sup>264</sup>

400. The Tribunal rejects this evidence. It is not merely unsupported by contemporary evidence but in conflict with it and with the description of what occurred in the Claimants' Memorial. The speed with which the RDB rectified the Register is in obvious conflict with the suggestion that they were acting in cahoots with Mr. Benzinge.

***b. June to August 2014***

401. In October 2012, Mr. Benzinge brought the arbitration proceedings against NRD in which, *inter alia*, he challenged Mr. Marshall's position as Managing Director of NRD and which resulted in the award of 17 May 2013 (*see* paragraph 105 above). A challenge by NRD to that 17 May Award was dismissed by the Supreme Court on 2 May 2014.<sup>265</sup>

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<sup>261</sup> Cl. Mem., paras. 197-200.

<sup>262</sup> Cl. C-Mem., para. 35.

<sup>263</sup> Cl. Pre-Hearing Brief, para. 19.

<sup>264</sup> Tr. Day 3, 21:7–23:19.

<sup>265</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Supreme Court Case RCOMA 0017/13/CS, Decision, 2 May 2014, **R-015**.

402. The Claimants' Memorial alleges that Mr. Benzinge resumed his hostile activities over a period of about two months starting in June 2014, falsely claiming to own 100% of the shares in NRD and to be Managing Director and, with the assistance of the local police and Bailiff Bosco, seizing NRD's offices, buildings and assets. Complaint is made that Mr. Benzinge, a Rwandan citizen, was receiving assistance from Ministers and others, to the detriment of the Claimants, as foreign investors.<sup>266</sup>
403. In the Claimants' Reply, it is alleged that from June through to August 2014 Mr. Imena declared that Mr. Benzinge owned 100% of the shares in NRD and allowed Mr. Benzinge to take control of NRD's offices and concessions.<sup>267</sup> This allegation was repeated in the Claimants' Pre-Hearing Brief<sup>268</sup> and in Mr. Cowley's opening submissions at the Hearing.<sup>269</sup>
404. Mr. Hill, for Rwanda, described this episode involving Mr. Benzinge as a "*sideshow or smokescreen issue*[ ]".<sup>270</sup> The Claimants' Post-Hearing Brief brought Mr. Benzinge onto centre stage. It alleges:

*the destructive role played by Mr. Benzinge was both furthered and exploited by Respondent, who, in the end, has been unable to give a coherent position concerning its actions in reaction to Mr. Benzinge's arbitration award.*<sup>271</sup>

405. No less than ten pages are then devoted to a speculative thesis, presaged nowhere in evidence or submissions. Under this thesis, Mr. Imena is alleged initially to have relied on the 17 May Award to recognise Mr. Benzinge as owner of NRD "*in an effort to get Claimants to give up and forfeit their Concessions*".<sup>272</sup> Further, Mr. Imena intended to continue to refuse to recognise Mr. Marshall as representing the owners and being in charge of NRD until "*Claimants collapsed and abandoned their investment*".<sup>273</sup> He reversed this

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<sup>266</sup> Cl. Memorial, paras. 202-209.

<sup>267</sup> Cl Reply, para. 88.

<sup>268</sup> Cl. Pre-Hearing Brief, para. 24.

<sup>269</sup> Tr. Day 1, 59:6-24 (Cowley).

<sup>270</sup> Tr. Day 1, 107:19-21 (Hill).

<sup>271</sup> Cl. PHB, para. 74.

<sup>272</sup> Cl. PHB, para. 87.

<sup>273</sup> Cl. PHB, para. 90.

policy as a result of the intervention of the military, who were relying on the good offices of Mr. Marshall to broker a deal between Rwanda, Slovakia and the Czech Republic in relation to the sale and servicing of military equipment and training in the use of this.<sup>274</sup>

406. As the Tribunal understands it, this conduct is alleged to have breached Rwanda's duty under Articles 3, 4 and 5 of the BIT, and constituted incidents in the "*creeping expropriation*" that violated Article 6.
407. Had provision been made for responses to Post-Hearing Briefs, the Tribunal believes that Rwanda would have protested against the submission by the Claimants of the novel case described above. Such a protest would have been justified. Not only was the case novel, it was not founded on evidence but on conjecture.
408. The nature and effect of the 17 May Award has been and remains an enigma as far as the Tribunal is concerned. In the view of the Tribunal, the same is true of the Parties' treatment of the 17 May Award. Rwanda has chosen not to rely upon the 17 May Award, which might have provided a very short answer to the Claimants' assertions on jurisdiction. The Claimants have alleged that the 17 May Award was wrong but have advanced no submissions as to how this contention can be reconciled with the Judgment of the Supreme Court upholding it. The enigma may be attributable to the fact that neither Mr. Marshall nor anyone else representing NRD took part in the hearing. In these circumstances, the Tribunal understands that no appeal could be made on the merits.
409. The 17 May Award provided Mr. Benzinge with the opportunity to make a plausible further challenge in relation to the ownership of NRD and Mr. Marshall's position as Managing Director in particular.
410. Mr. Marshall's allegation that Mr. Imena declared that Mr. Benzinge owned 100% of the shares in NRD is undocumented and uncorroborated. In his First Witness Statement, Mr. Imena said that he told Mr. Benzinge that they would only deal with the person who, according to the RDB records, was the Managing Director and owner of NRD.<sup>275</sup> In his

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<sup>274</sup> Cl. PHB, paras. 91-92.

<sup>275</sup> Imena (1), para. 54.



Second Witness Statement, he stated that he was not willing to get involved in the dispute as to NRD's ownership and was not in a position to decide who was right and who was wrong. He could not side with one party or the other.<sup>276</sup>

411. In his Second Witness Statement, Mr. Imena categorically denies that he unilaterally declared that Mr. Benzinge owned 100% of NRD.<sup>277</sup> The Tribunal accepts Mr. Imena's evidence on this point.

412. In the event, on 19 August 2014, the Concessions were returned to Mr. Marshall's control and Mr. Benzinge was said to have fled the country.<sup>278</sup> A week later, on 26 August 2014, Mr. Marshall wrote to Minister Busingye "*to again express our appreciation for the return of our business*".<sup>279</sup>

413. This return renders the Claimants' allegation that Rwanda was supporting Mr. Benzinge's take-over bid inherently implausible. In contrast, the Tribunal finds it entirely plausible that Mr. Benzinge, armed with the 17 May Award and the decision of the Supreme Court upholding it, was able to create over a period of two months real uncertainty as to who owned and was entitled to manage NRD. Ultimately, in circumstances that are not entirely clear on the evidence, that uncertainty was resolved in favour of Mr. Marshall.

414. The short answer to the allegations made in relation to Mr. Benzinge's activities is given in the Respondent's Post-Hearing Brief:

*The actions of Mr. Benzinge were as a private individual (and not of or attributable in any way to the RDB or any other State body).*<sup>280</sup>

415. Before the more extreme submissions referred to above,<sup>281</sup> it was the Claimants' case that Mr. Benzinge's activities were permitted as a result of a failure by Rwanda to accord to the Claimants "*full protection and security*" as required by Article 5(1) of the BIT. Rwanda

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<sup>276</sup> Imena (2), para. 39.2.

<sup>277</sup> Imena (2), para. 40.

<sup>278</sup> Marshall (1), para. 51.

<sup>279</sup> Letter from BRD to Minister Busingye, 26 August 2014, C-166, p. 1.

<sup>280</sup> Resp. Post-Hearing Brief, para. 137.

<sup>281</sup> See paragraph 405 above.

addresses this submission in detail in paragraphs 402 to 408 of its Counter-Memorial. The Tribunal accepts these submissions. On the facts no case is made out of a failure on the part of Rwanda to satisfy the requisite international standard of provision of protection and security in respect of Mr. Benzinge's activities.

416. For all these reasons, the Tribunal finds that Mr. Benzinge's activities on and after August 2012 did not involve a breach of Rwanda's obligations under the BIT.

**(7) Did the suspension of mining in the western concession area in September 2012 constitute a breach of Rwanda's obligations under the BIT?**

417. In their Memorial, the Claimants allege that they were treated unfairly and inequitably when they were barred on two separate occasions in 2012 from accessing their Western Concessions by local authorities who permitted local miners to continue mining in NRD's absence.<sup>282</sup>
418. In their Reply, they allege that tactics designed to "*force Claimants to walk away*" included "*indiscriminately ceasing Claimants' mining operations*".<sup>283</sup>
419. In his First Witness Statement, Mr. Marshall states that Dr. Biryabarema ordered the closure of NRD's Western Concessions alleging that NRD's mining activities were resulting in environmental pollution. This allegation was untrue; NRD was not working where the pollution was occurring. The pollution was attributable to poor agricultural practices, run-off from historic mine workings, and illegal mining. Out of good will NRD took a number of remedial measures. In July 2013, without addressing any environmental issues, Dr. Biryabarema permitted the NRD Western Concessions to resume mining.<sup>284</sup>
420. Because the allegations were patently untrue and Dr. Biryabarema refused properly to look into the matter, NRD concluded that he was merely following orders.
421. Dr. Biryabarema addresses these allegations in his Second Witness Statement by reference to the letter that he wrote to Mr. Marshall on 10 February 2013. He explains that local

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<sup>282</sup> Cl. Mem., para. 195.

<sup>283</sup> Cl. Reply, para. 253.

<sup>284</sup> Marshall (1), paras. 23-28.

government had stopped NRD from mining at its Western Concessions due to concerns about environmental damage and smuggling. This was pursuant to a local government power to stop mining activities in the short-term if these were giving rise to concern. Thereafter, it was for central Government to decide how to proceed.<sup>285</sup>

422. Mr. Marshall met with Dr. Biryabarema on 6 February 2013. He proposed that NRD should curb the illegal mining that was causing pollution by employing demobilized soldiers. Dr. Biryabarema accepted this proposal and, by his letter of 10 February, gave permission to NRD to resume its activities in the short-term, pending resolution of the application that NRD had made on 30 January 2013 for a long-term mining licence.
423. Dr. Biryabarema was not cross-examined in respect of this evidence when he gave oral evidence.
424. The Tribunal accepts Dr. Biryabarema's unchallenged explanation of this part of the story. The suggestion that NRD was excluded from its Western Concessions while local miners were permitted to continue mining is unsubstantiated. The concern of the local authorities was with damage being caused by illegal miners. When NRD made proposals for preventing this, they were permitted back to the Concessions.
425. The Tribunal finds that there was no unfair or discriminatory treatment of the Claimants or of NRD.
426. This is another area of the case where the Claimants have alleged a failure on the part of Rwanda to accord to the Claimants the level of protection and security required under international law, contrary to Article 5(1) of the BIT. The Tribunal accepts Rwanda's submission that no breach of Article 5(1) is made out.<sup>286</sup> The Tribunal finds that NRD could reasonably have been expected, itself, to take steps to prevent illegal mining in its concessions, as it ultimately did.

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<sup>285</sup> Biryabarema (2), paras. 12-14, referring to Letter from RNRA to NRD, 10 February 2013, C-056.

<sup>286</sup> Resp. C-Mem., paras. 413-416.

**(8) Did the seizures and sales of NRD's property by the Court Bailiff in and after 2013 involve a breach of Rwanda's obligations under the BIT?**

427. In her First Witness Statement, Ms. Mruskovicova alleges:

*Bailiff [Bosco] many times stole assets from Claimants by claiming to seize them pursuant to a court order. He never provided proof that he had a right to seize the assets. For the seizure he always came with the police and sometimes with the military. In total he stole around USD \$800,000. He never followed any Rwandan procedure or rules. He never said or gave us a document explaining what he is going to do with the asset. What he did was simple theft. I always reported him to the US Embassy and Rwanda security services hoping that one day the local police would take action against his criminality.*<sup>287</sup>

428. These allegations were not advanced in the Claimants' Memorial. The Claimants' case in relation to the activities of Bailiff Bosco has developed over time. Initially, the allegation was that he gave improper assistance to Mr. Benzinge. The Claimants' Memorial alleges that, in the two month period from June to August, when Mr. Benzinge was claiming to be the owner of NRD, Bailiff Bosco attempted to "auction much of Claimants' property and assets". NRD complained to Mr. Busingye, the Minister of Justice, who suspended Bailiff Bosco from office, only to reinstate him a month later. Bailiff Bosco, and other bailiffs, continued to seize NRD's assets, purportedly to enforce court judgments.<sup>288</sup> NRD sought assistance from the police but this was not forthcoming:

*[T]he policy [sic] and Rwandan government appeared to be helping bailiffs carry out illegal seizures of Claimants['] property.*<sup>289</sup>

The Claimants' Reply summarises their case as:

*So it came to be that, with Respondents' [sic] blessing, Mr. Benzinge, a Rwandan national, continued to receive assistance to the detriment of Claimants.*<sup>290</sup>

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<sup>287</sup> Mruskovicova, para. 19.

<sup>288</sup> Cl. Mem., paras. 205-212.

<sup>289</sup> Cl. Mem., para. 212.

<sup>290</sup> Cl. Reply, para. 91.

429. At the end of the Reply, there is a heading alleging that Rwanda’s witnesses were biased against NRD, followed by particulars of the alleged bias in relation to each witness. In relation to Bailiff Bosco it is alleged:

*As has been presented above in this Reply, it is Claimants['] belief that Mr. [Bosco] acted in concert with Ben Benzinge to steal from NRD pursuant to fraudulent court orders.*<sup>291</sup>

430. In the Claimants’ Pre-Hearing Brief, it is alleged that Bailiff Bosco, together with Mr. Imena, were at the centre of unfair treatment of the Claimants’ investments in their assistance of Mr. Benzinge. Seizures of NRD’s property by Bailiff Bosco could not “*be credibly passed off as neutral enforcement of a creditor’s judgment*”.<sup>292</sup>

431. Bailiff Bosco denied Ms. Mruskovicova’s allegations in a detailed First Witness Statement. He gave an account of the seizure and ultimate sale of ore owned by NRD in execution of a judgment debt owed by NRD to a Mr. Pascal Rwakirenga.<sup>293</sup>

432. He gave a further account of attempts to enforce the 17 May Award of RwF16,300,000 made in favour of Mr. Benzinge.<sup>294</sup> and judgment debts owed to 25 other litigants, mostly NRD employees. These attempts stalled when the Minister of Justice, as a result of protest by Mr. Marshall, suspended Bailiff Bosco. After he had produced documents demonstrating that he had been acting in the proper performance of his duties as a Bailiff he was reinstated, but was unsuccessful in enforcing the debts, save for US\$9,000 realised by the sale of Mr. Marshall’s car.<sup>295</sup>

433. Bailiff Bosco gave oral evidence.<sup>296</sup> His cross-examination consisted to a large extent of questions as to why documents that would have supported his Witness Statement had not been attached to it. Bailiff Bosco found these questions a little confusing. He stated that he

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<sup>291</sup> Cl. Reply,

<sup>292</sup> Cl. Pre-Hearing Brief, para. 24.

<sup>293</sup> Bosco (1), paras. 9 *et seq.*

<sup>294</sup> See paragraph 429 above.

<sup>295</sup> Bosco (1), paras. 20-30. Bailiff Bosco gave evidence that the car was owned by NRD: Tr. Day 6, 76:23–77:16 (Bosco).

<sup>296</sup> Tr. Day 6, 29:8–80:8 (Bosco).

had produced a very large document, about 100 pages long, that would have included such documents.<sup>297</sup> The Tribunal intervened to suggest that if counsel was going to suggest that Bailiff Bosco's evidence was untruthful it would be fair to make this plain to him.<sup>298</sup> Counsel sought to do this by stating, in relation to an inventory that Bailiff Bosco had referred to in evidence:

*I want to be very clear: I don't believe it exists, I don't believe it is referenced.*<sup>299</sup>

434. It was not clear to the Tribunal, nor can it have been clear to Bailiff Bosco, precisely what the Claimants' positive case was in relation to Mr. Bosco's activities.
435. The Claimants' Post-Hearing Brief has not clarified the position. The Claimants do not advance the express allegation made by Ms. Mruskovicova that Bailiff Bosco was stealing from NRD. Bailiff Bosco's evidence is attacked on the grounds of inconsistencies and lack of supporting documentary evidence. It is alleged that:

*[I]t should be inferred that Mr. [Bosco], with the authority of the Ministry of Justice, was acting to specifically harm NRD for the benefit of Mr. Benzing and others.*<sup>300</sup>

436. Having heard Bailiff Bosco give evidence, the Tribunal is left in no doubt that he was an honest man attempting, in difficult circumstances, to carry out his professional duties as a bailiff. There is quite enough documentary evidence on the record to corroborate his evidence. The fact that the Minister suspended him, in response to protests from Mr. Marshall that proved unfounded, cannot be reconciled with the allegation that he and the Ministry were working in partnership improperly to prejudice NRD. The Tribunal finds that neither Bailiff Bosco nor the Ministry of Justice was guilty of any impropriety and that Bailiff Bosco's activities involved no breach of Rwanda's obligations under the BIT.

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<sup>297</sup> Tr. Day 6, 50:2-11, 60:12-15, and 62:12-14 (Bosco).

<sup>298</sup> Tr. Day 6, 61:13-19 (Lord Phillips).

<sup>299</sup> Tr. Day 6, 64:2-3 (Cowley).

<sup>300</sup> Cl. PHB, para. 103.

**(9) Did the denial of the issue of tags constitute a breach of Rwanda’s obligations under the BIT?**

437. The primary facts in relation to this issue are not in dispute.
438. On 21 July 2010, the United States brought into force the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>301</sup> Section 1502 of this, headed “*CONFLICT MINERALS*”, drew attention to the belief that the exploitation and trade of conflict materials originating in the DRC was helping to finance conflict in that country involving extreme levels of violence, particularly sexual and gender based violence.
439. Rwanda is party to the International Tin Supply Chain Initiative (“iTSCi”) designed to ensure that only minerals mined responsibly enter the international supply chain.<sup>302</sup> To this end, Rwanda takes part in a tagging scheme under which minerals mined in Rwanda are bagged and tagged. This is designed to prevent the smuggling into and sale in Rwanda of minerals originating in the DRC.
440. Up until 2014, tags were supplied to NRD to enable the tagging of minerals mined by NRD. In 2014, however, Mr. Imena procured the suspension of the issue of tabs to NRD. This meant that NRD was unable to market the minerals that it mined. No similar suspension was imposed on any other mining company. The Claimants allege in their Memorial that this constituted a breach of the obligation owed by Rwanda under the BIT to treat the Claimants fairly and equitably.<sup>303</sup>
441. In its Counter Memorial, Rwanda relies on the following explanation given by Mr. Imena:

*In around the summer of 2014, I barred PACT, who coordinated the [iTSCi] programme in Rwanda, from issuing tags for NRD’s minerals. I did so primarily because I wanted to put pressure on NRD to regularise its operations by applying for and obtaining licences for its concessions. By June 2014 NRD had not had a mining licence for any of its concessions since October 2012. However, with our indulgence it was continuing to operate its mines, through the artisanal miners, and was able to buy minerals from the*

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<sup>301</sup> United State Public Laws, Dodd–Frank Wall Street Reform and Consumer Protection Act, 21 July 2010, **CL-004**.

<sup>302</sup> Resp. C-Mem., para. 38.

<sup>303</sup> Cl. Mem., para. 184.

*artisanal miners on its sites and have them tagged following which it was able to sell them to traders in Kigali. It was able to do all of this without a licence and without making any investment into any of its mines.*

*Although I had made clear to Mr. Marshall since I met him in October 2013 that NRD needed to re-apply for its licences, by mid-2014 NRD had not taken any steps to do so and I did not believe that they had any intention of doing so – it seemed quite clear to me that NRD were quite happy to continue operating their mines without a licence so long as they were able to receive tags and that they had no real interest in pursuing their licence applications which would require a commitment to investment and development of the mines. I therefore instructed PACT not to issue any further tags to NRD in order to put pressure on NRD to regulate their position by applying for and obtaining licences. It was not long after I instructed PACT not to issue any further tags to NRD that NRD submitted its September 2014 application for licences.*<sup>304</sup>

442. In a passage not quoted in the Counter Memorial, Mr. Imena continues:

*NRD should not have been operating without a licence and allowing them to continue to have tags while they were operating without a licence was simply compounding the problem and allowing them to operate without regard to any law or regulation.*<sup>305</sup>

443. Mr. Imena adds that he had a secondary reason for barring NRD from receiving tabs. This was the dispute between Mr. Marshall and Mr. Benzinge as to who owned NRD. Mr. Benzinge threatened to commence proceedings against the Mining Department if they issued tags to NRD while Mr. Marshall was there.<sup>306</sup>

444. In his Second Witness Statement, Mr. Imena states that, as a result of protests by Mr. Marshall, the OGMR prepared an opinion that was communicated to him orally by Dr. Biryabarema, which confirmed his decision.<sup>307</sup> That opinion, provided by a “*Legal Counterpart*” commented that NRD had no mining licences for the mining concessions where it operated and, thus, had had to re-apply under the 2014 Law.<sup>308</sup> The re-application

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<sup>304</sup> Resp. C-Mem., paras. 204-206, citing Imena (1), paras. 49-50.

<sup>305</sup> Imena (1), para. 51.

<sup>306</sup> Imena (1), para. 53.

<sup>307</sup> Imena (2), para. 59.

<sup>308</sup> Internal Memo from R. Ditutu to RNRA, 8 December 2014, **R-116**.



was under assessment. NRD had no legal authority to carry on mining operations until its reapplication received a favourable response. Thus it could not be granted tags.

445. At the Hearing, Counsel for the Claimants cross-examined Mr. Imena as to the basis on which tags had been issued to NRD after the last extension to its licence had expired in October 2012. The following exchange took place:

*A. Yes, they were still recognised as the people operating the mines.*

*Q. Well, how is that? Under Rwandan law, how could they be recognised by the Ministry of Mines as both not a licensee at all, but operating the mines and lawfully selling minerals mined there?*

*A. I explained earlier that as long as – for a formal licensee who applied for a new licence, as long as no final decision has been taken, we considered that former licensee as the operator of the mine.*

*Q. So the permission from the initial licence to NRD, your testimony is, you recognised as continuing all the way to the time when you told NRD it had to leave the mining concessions?*

*A. You are right.*

*Q. And that is in 2015; correct?*

*A. That was the final decision, 2015.*<sup>309</sup>

In their Post-Hearing Brief, the Claimants submit that this evidence renders untenable Rwanda's case that Mr. Imena barred NRD from receiving tags because NRD did not have licences. Other mining companies in the same position as NRD received tags.<sup>310</sup> The motive for refusing tags to NRD was to render NRD inactive, so that the miners would sell illegally, and the tags that should have been supplied to NRD could be applied to smuggled minerals.<sup>311</sup>

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<sup>309</sup> Tr. Day 7, 140:6-22 (Imena).

<sup>310</sup> Tr. Day 7, 130:21–131:5 (Imena).

<sup>311</sup> Cl. PHB, para. 127.

446. The Claimants advance no independent claim in relation to financial loss sustained by NRD as a result of being denied tags. The relevance of this issue is the alleged motive behind this denial. Up to the oral hearing the Claimants' case had been that this was unfair discrimination that constituted an incident in the 'creeping expropriation' of NRD's interest in the Five Concessions. The motive alleged in the Claimants' Post-Hearing Brief is a novelty.
447. Rwanda in its Post-Hearing Brief submits that Mr. Imena's conduct was reasonable and that he acted in good faith in a fair, careful and appropriate manner.<sup>312</sup>
448. The Tribunal accepts that the motivation for initially denying tags to NRD was that stated by Mr. Imena. He wanted to put pressure on NRD to apply for a licence and he was apprehensive about providing tags while the ownership of, and the right to manage, NRD was in dispute. Subsequently Mr. Imena received legal advice that it would be illegal to supply tags to NRD, which reassured him that he had acted properly.
449. The Tribunal finds that Mr. Imena acted in good faith for the reasons that he gave and not for the ulterior motives alleged by the Claimants. Nonetheless the Tribunal finds that the propriety of Mr. Imena's action is open to question. Permitting NRD to mine in the Five Concessions but denying NRD the possibility of marketing the minerals mined was self-contradictory and irrational. Neither accorded with the legislative scheme in place in Rwanda for licensing mining – see further below. Each was the result of administrative action outside the confines of the licensing regime. Under that regime NRD should either have been licensed to carry on mining and provided with tags, or denied the right to mine. Administrative shortcomings in the treatment of NRD did not however, of themselves, constitute a breach of Rwanda's obligations under the BIT.

**(10) What rights over the Five Concessions did NRD enjoy and when?**

450. In their Memorial, the Claimants submit:

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<sup>312</sup> Resp. PHB, para. 147.

*The fair market value of the Concessions on the date of the Award is the appropriate compensation for Rwanda's unlawful expropriation [...].*<sup>313</sup>

In their Reply, the Claimants cite several authorities for the proposition that concession rights can be subject to expropriation and that denial of permits can constitute expropriation in violation of an investment treaty. They allege that Rwanda confiscated their tangible property and assets as well as intangible contractual rights to which they were entitled.<sup>314</sup> These submissions accord with the Claimants' practice of equating their rights with the rights of NRD.<sup>315</sup> In the light of the findings made to date, the Tribunal turns to consider what rights over the Concessions NRD enjoyed.

451. At the heart of the Claimants' case is that NRD enjoyed a right to be granted long-term mining licences in respect of the Five Concessions. There were two overlapping bases for this alleged right. The first was that NRD had a vested contractual right to long-term licences under the terms of the Contract. The second was that both NRD and Mr. Marshall, representing Spalena, NRD's ultimate owner, had been given a legitimate expectation that NRD would be granted long-term licences.
452. The Tribunal has considered both those submissions in depth and rejected each.
453. The Five Special Permits<sup>316</sup> were granted in 2007 by Ministerial Decree.<sup>317</sup> The successive extensions of these Special Permits that extended them to October 2012 were made by the Minister of Natural Resources, Mr. Kamanzi. They were granted at a time when the 2008 Law was in force, but there is nothing in that Law that conflicts with the power of the

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<sup>313</sup> Cl. Mem., para. 292.

<sup>314</sup> Cl. Reply, paras. 246-248, referring to *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal Case No. 39, Award No. 425-39-2, 29 June 1989, **CL-013**, paras. 76, 105; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CL-038**, paras. 104-108; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CL-026**, para. 117.

<sup>315</sup> See paragraphs 229-238 above.

<sup>316</sup> See paragraph 84 above.

<sup>317</sup> Letter from Secretary of Water and Mines to NRD re Giciye, 29 January 2007, **C-018**; Letter from Secretary of Water and Mines to NRD re Mara, 29 January 2007, **C-019**; Letter from Secretary of Water and Mines to NRD re Nemba, 29 January 2007, **C-020**; Letter from Secretary of Water and Mines to NRD re Rutsiro, 29 January 2007, **C-021**; Letter from Secretary of Water and Mines to NRD re Sebeya, 29 January 2007, **C-022**.

Minister to grant these extensions of the Special Permits. Although of short duration, the extensions were valuable rights in that they permitted the mining and sale of minerals.

454. Those rights came to an end in October 2012 when the last extension granted of Special Permits reached its term. Thereafter, up to 19 May 2015, NRD was permitted to remain in occupation of the Five Concessions and to exercise the same rights as it had enjoyed under the Special Permits. There is an issue as to the nature of NRD's rights during this period.
455. In their Post-Hearing Brief, the Claimants submit that after October 2012 NRD was in exactly the same legal position as if he had been given a formal licence:

*Critically, express notice of license extensions, like the ones that NRD received in 2011 and 2012, were **not** required. Instead, licences were automatically extended until Respondent told a license-holder otherwise. As Mr. Imena [...] clearly testified, "[a]s long as the Ministry has not made a final decision on your application, you are allowed to continue operating."*

*With respect to NRD, specifically, [...] the Ministry did not need explicitly [to] extend the licenses beyond October 2012 because the extensions were implicit and formal notice of an extension was not required [...]. Therefore, NRD's licenses remained in effect, meaning that they had the right to operate and mine, until at least May 19, 2015, the day that Mr. Imena sent a letter "finally" rejecting NRD's application.<sup>318</sup>*

456. These submissions are founded on the answers given by Mr. Imena under cross-examination set out at paragraph 445 above. They do not fairly reflect Mr. Imena's evidence. He did not say that NRD's licences were implicitly extended to 19 May 2015 but that, after the licences had terminated, NRD was permitted to continue its operations until that date. That forbearance is not to be equated with the grant of a formal licence.
457. The Tribunal considers that the propriety of the ministerial practice of allowing former licence holders to continue mining after expiry of their licences is open to question. Mr. Mugisha commented on Dr. Biryabarema's letter of 10 February 2013,<sup>319</sup> which permitted NRD to resume mining activities while awaiting the result of requests for new

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<sup>318</sup> Cl. PHB, paras. 111-112.

<sup>319</sup> Letter from RNRA to NRD, 10 February 2013, **C-056**.

licences. He said that this did not amount to a licence within the meaning of the 2008 Law. He continued:

*In my experience this short-term authorisation without any formal licence issued under mining law was not exceptional, and I am aware of other cases where operators were given similar sorts of authorisation to continue to operate even where licences had expired in order to give them an opportunity to prove that they should be granted new licences; in practical terms it would have been wrong to require them to cease operations entirely when a new application was made, because that would prove disruptive of operations [...].*<sup>320</sup>

458. The Tribunal appreciates the practical implications of which Mr. Mugisha speaks but considers that, at least once the 2014 Law had come into force,<sup>321</sup> it is hard to identify any lawful justification for allowing an operator who had no licence to extract minerals in Rwanda. The legal advice received by Mr. Imena<sup>322</sup> that NRD had no legal authority to continue to mine after its extended licences had expired appears correct.
459. It follows that after their extended Special Licenses had expired in October 2012 NRD had no extant legal rights over the Five Concessions. They were there on sufferance and could be directed to leave by the Ministry at any moment.

**(11) Did Rwanda expropriate any rights of NRD and, if so, when?**

***a. Mining rights***

460. The Claimants' primary claim is for expropriation of alleged rights to long-term mining licences in respect of the Five Concessions. The Tribunal has found that the Claimants enjoyed no such rights. It follows that the claim in respect of their expropriation fails.

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<sup>320</sup> Mugisha (1), paras. 29-30.

<sup>321</sup> See Articles 4.7 and 8 of the 2014 Law, **CL-002**, which appear, at least implicitly, to put in question the propriety of the practice spoken to by Mr. Mugisha.

<sup>322</sup> See paragraph 444 above.

***b. Tangible property***

461. The Claimants' Memorial makes no reference to alleged expropriation of tangible property. The Claimants' Reply, however, alleges that

*Rwanda expropriated Claimants' tangible property and assets as well as intangible contractual rights to which Claimants were entitled.*<sup>323</sup>

462. No particulars have been given of what tangible property is alleged to have been appropriated or in what circumstances the expropriation is alleged to have occurred. The Claimants have not suggested that when NRD ultimately relinquished occupation of the Concessions in 2016 it was prevented from removing any tangible property. As Mr. Imena remarked:

*Rwanda did not take the Claimants' investments, including NRD itself. In this regard, I understand that NRD is still owned by the Claimants.*<sup>324</sup>

The Tribunal rejects the allegation, in so far as it was pursued, that Rwanda expropriated tangible property owned by the Claimants.

**(12) Did Rwanda carry on a campaign of creeping expropriation?**

463. It would not be satisfactory to leave the topic of expropriation without addressing the allegation made by the Claimants that Rwanda was pursuing a campaign of creeping expropriation designed to force NRD to abandon the Concessions with the object of removing the inhibition that NRD's presence posed to smuggling into Rwanda minerals from the DRC. This is an allegation that has developed over time.
464. In their Memorial, the Claimants alleged that Rwanda turned a blind eye to smuggling and that GMD tag managers issued tags when requested without asking questions.<sup>325</sup>

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<sup>323</sup> Cl. Reply, para. 248.

<sup>324</sup> Imena (2), para. 48.

<sup>325</sup> Cl. Mem., paras. 117-118.

465. The Memorial goes on to allege that the refusal of tags, support for the activities of Mr. Benzing and requiring NRD to re-apply for the Concessions were three acts that evidenced a pattern of mistreatment and a clear plan to drive the Claimants out of Rwanda.<sup>326</sup> The Claimants rely upon this allegation in their Observations on the Request for Bifurcation as an answer to Rwanda's Jurisdictional Challenge *ratione temporis*.<sup>327</sup> In neither pleading was it alleged that Rwanda was trying to drive the Claimants away in order to facilitate the smuggling into Rwanda of minerals from the DRC.
466. Some two months after the latter pleading, the Claimants delivered their Counter-Memorial. This advanced the allegation of "*creeping expropriation*". It went on to make some remarkable, and novel, allegations under the heading:

***The underlying reason for the expropriation was Respondent's desire to better control the smuggling of minerals from the DRC.***<sup>328</sup>

Under this heading it was alleged that a Rwandan oligarch, who had unsuccessfully attempted to persuade NRD to arrange for the tagging of minerals smuggled in from the DRC, had put pressure on Rwanda to force the Claimants to cooperate in the smuggling or abandon their Concessions. The source of this allegation was Mr. Marshall's Second Witness Statement.<sup>329</sup>

467. These allegations were primarily targeted on Mr. Imena, who was alleged to have withdrawn tags from the Claimants and forced them to re-apply for long-term licences in order to "*persuade*" them to voluntarily abandon their investments or fall into line with the "*false tagging programme*".<sup>330</sup>
468. The Claimants' allegations in relation to smuggling were further developed in their Reply, under the heading:

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<sup>326</sup> Cl. Mem., para. 217.

<sup>327</sup> Cl. Observations on Bifurcation, para. 17.

<sup>328</sup> Cl. C-Mem., Sec. II.B.4.

<sup>329</sup> Marshall (2), paras. 18-20.

<sup>330</sup> Cl. C-Mem., paras. 48-57.

*The underlying basis for Rwanda's mistreatment of NRD was Rwanda's participation in illegal smuggling from the Democratic Republic of Congo.*<sup>331</sup>

469. There followed extracts from a spread sheet showing exports of tantalum (coltan), tungsten and tin exported from Rwanda in 2012 and 2013. It was alleged that upwards of 50% of these exports originated in the DRC and that, in the case of coltan, the figure was 90%. It was alleged that the only way that this discrepancy could be explained was by Rwanda smuggling minerals from the DRC, tagging them in Rwanda, and exporting them to the world as Rwandan.
470. The primary source of these allegations was Mr. Marshall's Third Witness Statement.<sup>332</sup> A concrete example of alleged inflated export figures was provided. This related to the mineral production of a mining company called Rwanda Rudniki Company ("**Rudniki**"). It was based on evidence provided by another of the Claimant's witnesses, Mr. Jerry Fiala, who was stated to be the owner and operator of Rudniki.<sup>333</sup> In his First Witness Statement, he expresses, in a single sentence, the belief that approximately 50% of all minerals and 90% of coltan exported from Rwanda originated in the DRC.<sup>334</sup> He does not state the basis of this belief.
471. In his Second Witness Statement, Mr. Fiala states that the production of tantalum and tin attributed to Rudniki on a spreadsheet produced by ITRI was greatly in excess of the amounts actually produced. He concludes that the excess must be smuggled from the DRC; the Government of Rwanda must be tagging smuggled minerals as originating from Rudniki.<sup>335</sup>
472. This evidence was addressed by Mr. Niyonsaba, the Manager of iTSCi in Kigali since 2015. In his Second Witness Statement, he states that the spreadsheet of figures on which Mr. Fiala's evidence was based did not originate from iTSCi.<sup>336</sup> He attributes the increase

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<sup>331</sup> Reply, Sec. I.H.

<sup>332</sup> Marshall (3), paras. 6-8, 11-12.

<sup>333</sup> Reply, para. 135; Marshall (3), para. 8.

<sup>334</sup> Fiala (1), para. 9.

<sup>335</sup> Fiala (2), paras. 6-7.

<sup>336</sup> Niyonsaba (2), para. 11.



in exports from Rwanda that Mr. Marshall alleged originated in the DRC to the continued development of the mining sector and the fluctuating market, giving a detailed explanation of these factors.<sup>337</sup> He accepts that there was illegal mining in Rwanda and a black market in tags, but stated that this accounted for only a very small percentage of the minerals tagged in Rwanda.<sup>338</sup>

473. Claimants' Pre-Hearing Brief states:

*Claimants' witnesses will testify to the widespread smuggling that was (and is) taking place in Rwanda. Claimants' witnesses will further testify that officials at the highest level of government are complicit, whether through active participation or by turning a blind eye to the obvious smuggling that is taking place.*<sup>339</sup>

474. When giving evidence at the Hearing, Mr. Marshall referred to the Claimants' allegations about smuggling on a number of occasions.<sup>340</sup> It was put to him that these allegations were untrue; were Mr. Marshall's invention. He would not accept this.

475. Mr. Fiala was tendered for cross-examination at the Hearing. He said that his role in Rudniki was not a major one. From 2010, he had a 15% share holding in the Company. He was subject to a judgment of the Rwandan Commercial Court which held that he was not a Director of Rudniki. He was dismissed from the Company in 2014. The spreadsheet upon which he based his evidence about smuggling had been found by him on the internet.<sup>341</sup>

476. Counsel for the Claimants made no mention of smuggling in his opening address at the Hearing. In cross-examination he did not put to Mr. Imena, or to any other of Rwanda's witnesses, the suggestion that Rwanda had been motivated by a desire to facilitate the smuggling of minerals from the DRC. The Claimants' Post-Hearing Brief makes no mention of smuggling.

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<sup>337</sup> Niyonsaba (2), paras. 13-15.

<sup>338</sup> Niyonsaba (2), para. 17.

<sup>339</sup> Cl. Pre-Hearing Brief, para. 12.

<sup>340</sup> Tr. Day 2, 138:8-17, 194:17-24, and 229:25-230:6 (Marshall).

<sup>341</sup> Tr. Day 4, 181:21-186:1 (Fiala).

477. In his opening address at the Hearing, Counsel for Rwanda submitted that it was difficult to understand the smuggling conspiracy theory and there was a total absence of evidence to support it.<sup>342</sup> The case was evidentially nonsensical for three reasons:

- (1) It was possible to see on the evidence what in fact happened to NRD's application for long-term licences. There was a contemporaneously documented transparent process. This involved teams analysing NRD's applications and explaining why they were deficient;
- (2) There was no conceivable basis for suggesting that Rwanda was promoting or even condoning smuggling. On the contrary, Rwanda had put in place well observed and thorough processes to prevent smuggling; and
- (3) The Claimants sought, inferentially, to support their theory by misinterpreting or drawing incorrect conclusions from bits of data and statistics.

478. The Tribunal endorses these submissions, but considers that there are additional reasons for rejecting the "*creeping expropriation*" allegation. Had NRD been occupying the Five Concessions under long-term licences and had Rwanda wished to remove NRD from the Concessions, it is possible to envisage Rwanda repeatedly treating NRD unfairly in an attempt to get them to relinquish their licences. But NRD had no right to remain in occupation of the Concessions after 2012 other than that voluntarily conferred by Rwanda. On the facts of this case it would have been open to Rwanda simply to have rejected the 2012 Application. Instead, over a period of about three years, Rwanda first granted NRD repeated extensions of the Special Licences granted in 2007, then invited NRD to make a new application under the 2014 Law and, when a deficient application was made, gave NRD a series of opportunities to remedy the deficiencies. This behaviour was wholly at odds with a wish on the part of Rwanda to get NRD out of the Concessions.

479. The true position was illustrated by a passage in the cross-examination of Mr. Imena by Counsel for the Claimants. The subject was the repeated opportunities that were given to

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<sup>342</sup> Tr. Day 1, 120:24–123:10 (Hill).

Mr. Marshall to submit a satisfactory application for long-term licences under the 2014 Law:

A. *And, by the way, we had no legal obligation to give him an extension. But because we wanted to help him and have him as an investor, we extended to him that opportunity.*

Q. *And that's the reason that you extended it: because you wanted to have Mr. Marshall as an investor in one or more of these concessions?*

A. *You are right.*<sup>343</sup>

480. NRD was permitted to remain in possession of the Five Concessions from 2012 until 2015 and granted repeated opportunities to make a realistic application in respect of one or more of them. This is more indicative of the good will that Mr. Marshall alleges he had earned from *pro bono* assistance given to Rwanda in relation to matters unconnected with mining, than of a desire to oust NRD from the Concessions.

481. In a passage in his cross-examination that dealt with the entire period that NRD was in possession of the Concessions, after the take-over of the Company by the Claimants, Mr. Marshall said:

*It was a very unpleasant time. And we still, to this day, don't know exactly who had what motivations. Was it all to cover up the smuggling? That's speculation.*<sup>344</sup>

482. The Tribunal has concluded that the development over the course of this arbitration of the allegation that Rwanda was bent on a campaign of creeping expropriation in order to further smuggling of minerals from the DRC was the product of Mr. Marshall's imagination.

483. In its Post-Hearing Brief, Rwanda observes that at the Hearing key parts of the Claimants' case, including the false allegations regarding smuggling, were quietly abandoned by the Claimants' counsel, who evidently considered (rightly) that there was no proper basis upon

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<sup>343</sup> Tr. Day 7, 113:9-16 (Imena).

<sup>344</sup> Tr. Day 2, 130 (Marshall).

which they could be put to the Respondent's witnesses.<sup>345</sup> The Tribunal agrees. The allegations were scurrilous and unfounded. They should never have been made.

**(13) Did Rwanda discriminate against the Claimants in favour of other investors in breach of its obligations under Articles 3.1 and 3.2 of the BIT?**

484. The Claimants' primary case has been that NRD had a vested right to long-term licences to mine the Five Concessions, which Rwanda wrongfully expropriated. The Claimants have, however, pursued, as a parallel theme, the allegation that Rwanda discriminated against the Claimants and NRD, by comparison with other investors, in relation to the manner in which NRD was treated during the period when NRD was seeking to obtain long-term licences for its Five Concessions.
485. There was debate between the Parties as to the precise nature of the obligations imposed by Articles 3.1 and 3.2 of the BIT and the interrelation between them, as to which there exists a body of jurisprudence. The Tribunal does not find it necessary to explore this. The Tribunal accepts the Claimants' broad proposition that:

*State conduct is discriminatory and violates the [requirement for fair and equitable treatment] if "(i) similar cases are (ii) treated differently (iii) and without reasonable justification."*<sup>346</sup>

486. Some aspects of the alleged discrimination are not related to the grant of licences. Thus it is the Claimants' case that, in denying NRD access to the Western Concessions for a period and in refusing to supply tags to NRD, Rwanda was subjecting NRD to adverse treatment not imposed on any other contractors. The Tribunal has already addressed these matters. They are indeed examples of treatment that was specifically directed to NRD and not to other contractors. But the treatment was directed in circumstances peculiar to NRD and was, contrary to the Claimants' submissions, imposed in good faith. It did not involve breach of the obligations imposed by either Article 3.1 or Article 3.2 of the BIT.

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<sup>345</sup> Resp. PHB, para. 5.

<sup>346</sup> Cl. Reply, para. 166, citing *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **CL-033**, para. 313; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **CL-032**, para. 261.

487. More pertinent are allegations related to the grant of licences. As to these, the Claimants make three complaints: (1) other investors who had been granted short-term, four-year licences made applications for long-term licences that were successful; (ii) NRD was required to re-apply for long-term licences after the 2014 Law came into force, whereas other investors in the same position were not; and (iii) long-term licences in respect of the Five Concessions were ultimately granted to investors in which Rwanda had an interest.

*a. The grant of long-term licences to other investors*

488. In his First Witness Statement, Mr. Marshall states that the Claimants were encouraged by the fact that Eurotrade International and Rutongo Mines Ltd were both granted long-term licences after three years of negotiation.<sup>347</sup>

489. Only limited evidence was adduced by Rwanda in relation to the applications for licences made by other investors. The Claimants submit that adverse inferences should be drawn from this.<sup>348</sup> Mr. Imena was asked in cross-examination about applications for long-term licences made by other investors that, like NRD, had been granted four-year, short-term licences.<sup>349</sup> From memory he identified ‘Rwanda Minerals and Mining’, ‘Roka Rwanda’ and ‘Trans Africa’ as investors whose applications for long-term licences had been rejected. In his First Witness Statement, he had been able to be a little more specific, naming: Roka Rwanda Limited (a company owned by Congolese and Rwandan nationals), Rogi Mining Rwanda Limited (a company owned by Russian nationals), Gatumba Mining Concessions Limited (a joint venture between a South African Company and Rwanda) and Rwanda Metals Limited (a company owned by Zimbabwean nationals) as companies whose licence applications were rejected.<sup>350</sup>

490. Of the successful applicants Mr. Imena was able to remember ‘Musha Mine’, ‘Rutongo Mine’ and ‘Nyakabingo Mine’. As Mr. Imena explained, the Rutongo Mine was owned by a joint venture company of TINCO and Rwanda, in which Rwanda had, at the time, a

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<sup>347</sup> Marshall (3), para. 40.

<sup>348</sup> Cl. Reply, paras. 117-121.

<sup>349</sup> Tr. Day 6, 97:16–98:14 (Imena).

<sup>350</sup> Imena (1), para. 63.

majority interest.<sup>351</sup> Eurotrade was owned 100% by TINCO. TINCO was a foreign investor.<sup>352</sup>

491. Mr. Marshall himself, under cross-examination, distinguished between NRD's activities and those of Rutongo. Rutongo was a fully operational mine whereas NRD had a greenfield site in the west and only a couple of brick warehouses at Nemba in the east. Rutongo's turnover was nearly 20 times that of NRD.<sup>353</sup>
492. Mr. Imena deals in his First Witness Statement with the difference between Rutongo and Eurotrade on the one hand and NRD on the other.<sup>354</sup> The former were large companies that were well run and well-funded. Their production levels were much higher than those of NRD. Their applications were credible and acceptable. Rutongo's application, for example, was much more detailed than anything submitted by NRD. In the four-year period of the short-term licence Rutongo had invested over US\$20 million on exploration, infrastructure and equipment. Its workforce had grown more than tenfold.
493. It was Mr. Imena's evidence that Rwanda had recognised at an early stage that Rutongo and Eurotrade were proper candidates for long-term licences and that the delay in granting these licences was attributable to discussions about the involvement of Rwanda in the venture as a joint owner of Rutongo.
494. Paragraphs 36 to 41 of the Claimants' Post-Hearing Brief are devoted to allegations of non-disclosure on the part of Rwanda. The Claimants allege that the material referred to by Mr. Imena was the product of cherry-picking. Because the Claimants' case "*arises out of the fact that Respondent treated Claimants different than other similarly situated investors*", Rwanda was under an obligation to produce documents evidencing the details of the applications made by those who succeeded in obtaining long-term licences.<sup>355</sup>

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<sup>351</sup> Tr. Day 7, 25:4-17 (Imena).

<sup>352</sup> Cl. Reply, para. 114.

<sup>353</sup> Tr. Day 4, 35:6-36:6 (Marshall).

<sup>354</sup> Imena (1), paras. 57 *et seq.*

<sup>355</sup> Cl. PHB, para. 39.

Failing such disclosure the Tribunal should draw the inference that there was no justification for preferring their applications to that of NRD.

495. The Tribunal rejects these submissions. They are founded on the premise that, at the end of the four-year, short-term licence period NRD had applied for the grant of long-term licences pursuant to the terms of the Contract. The Tribunal has found that this is a false premise. The terms of the 2010 Application demonstrate that those then in charge of NRD, under Sparck control, recognised that NRD had not satisfied its obligations under the Contract, and hence was not in a position to apply for long-term licences. Instead NRD applied for short-term licences. Rutongo and Eurotrade made applications for long-term licences. The Tribunal finds, on the basis of Mr. Imena's evidence, that they were justified in so doing.
496. In summary, the Tribunal finds that, while NRD was treated differently from those investors that were granted long-term licences, the two were not in the same position and there was reasonable justification for the differential treatment.

***b. The requirement to re-apply after the 2014 Law came into force***

497. Some passages in the Claimants' pleadings suggest that the 2014 Law was specifically targeted at the Claimants.<sup>356</sup> Wisely that suggestion has not been pursued. The Claimants allege, however, that Rwanda unfairly discriminated against NRD by requiring it to make a fresh application after the 2014 Law came into force.
498. Article 52 of the 2014 Law made Transitional Provisions that applied to licences granted under the 2008 Law.<sup>357</sup> They did not apply to NRD because NRD had never been granted a licence under that Law. The grant of the four-year, short-term licences predated it. When the 2014 Law came into force NRD did not hold any licence, nor was it entitled under any pre-existing licence to apply for a renewal or extension of the licence. It was in possession of the Five Concessions under the informal authorisation described above. Mr. Mugisha

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<sup>356</sup> See, e.g., Cl. Reply, para. 95.

<sup>357</sup> 2014 Law, CL-002, Art. 52.

described this as a “*courtesy*”.<sup>358</sup> In these circumstances, if NRD wanted a long-term licence it had to make a fresh application for this.

499. Rutongo and Eurotrade were granted their long-term licences in September 2014, shortly after the 2014 Law came into effect. The Claimants allege that Rwanda discriminated in their favour by not requiring them to make fresh applications. Mr. Imena replies to this by stating that Rutongo and Eurotrade were in a completely different position to that of NRD.<sup>359</sup> They had applied for long-term licences of 30 years while their existing licences were still in place and therefore their applications were treated as a renewal and not as a new application. Both applications were considered together because they were made at the same time by companies with a common shareholder, namely TINCO. Their applications had been found acceptable at an early stage but their processing had been delayed by discussions about the share structure of Rutongo.<sup>360</sup>
500. The Tribunal finds that there were significant differences between the case of NRD and the cases of Rutongo and Eurotrade. There was reasonable justification for treating them differently. Indeed it would have been harsh to make the two companies submit fresh applications for long-term licences when the delay in formally granting these was attributable to Government discussions about matters that were unconnected with the merits of their applications.
501. While, for these reasons, the Tribunal finds that there was no breach of Articles 3 and 4 of the BIT in relation to the treatment afforded to Rutongo and Eurotrade, the Tribunal has difficulty in understanding the basis upon which Mr. Imena suggested that their treatment accorded with the provisions of the 2014 Law. This was not a matter on which he, or Mr. Mugisha, was cross-examined.
502. Mr. Marshall alleges that no concession holder other than NRD was required to “*re-apply*” under the 2014 Law.<sup>361</sup> No evidence was adduced to support this assertion. Mr. Imena

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<sup>358</sup> Mugisha (2), para. 32.

<sup>359</sup> Imena (1), para. 57.

<sup>360</sup> Imena (2), para. 38.3.

<sup>361</sup> Marshall (1), para. 64.



states that it was not correct.<sup>362</sup> He says that all companies that did not have a valid mining licence when the 2014 Law came into effect and who had not previously submitted an application for renewal were required to re-apply under the 2014 Law.

503. The Tribunal accepts Mr. Imena's evidence on this point. More fundamentally, the Tribunal does not see that inviting NRD to make a fresh application after the 2014 Law came into force occasioned any prejudice to NRD. NRD's prior applications had not been successful. Absent a new, and improved, application there was no realistic possibility that NRD would be granted any mining rights in relation to any of the Five Concessions, let alone all of them.

***c. The ultimate grant of licences in respect of the Five Concessions***

504. In their Memorial, the Claimants allege that Rwanda expropriated the Claimants' investments in order to provide them to Nigali Mining, a Rwandan company organized under Rwanda's own Ministry of Defence.<sup>363</sup>

505. Mr. Imena refutes this allegation in his First Witness Statement:

*[...] all of the former NRD concessions were put out for tender by the Government in early 2016 and the successful bidders were approved by the Cabinet in September 2016. None of the new licence holders are Government owned and none are connected with the Ministry of Defence – they are all independent companies. With the exception of Nemba, for which a 15 year licence has been granted, all of the licences are for five years. In addition, each of the licence holders has been required to make a substantial investment commitment.*<sup>364</sup>

***d. Conclusion***

506. The Tribunal accepts this evidence, which was not challenged in cross-examination. It concludes that there was no unfair discrimination against NRD in respect of the ultimate grant of licences for the Five Concessions.

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<sup>362</sup> Imena (1), para. 61.

<sup>363</sup> Cl. Mem., para. 270.

<sup>364</sup> Imena (1), para. 46.

## **B. OVERVIEW OF MERITS FINDINGS**

507. For the reasons given above, the Tribunal finds that Rwanda did not discriminate against NRD in favour of other investors in breach of its obligations under Articles 3.1 and 3.2 of the BIT.
508. The prolix allegations made by the Claimants of breach by Rwanda of the BIT have resulted in a lengthy analysis in this Award. At the end of the day, however, the picture is a simple one.
509. When Rwanda set about privatizing its mining industry, it offered short-term, four-year contracts to investors to enable them to demonstrate not only their aspirations but their abilities to revolutionize Rwanda's mining industry by introducing industrial methods of extracting and processing minerals in place of the artisanal methods under which extraction was done by the wielding of picks and shovels by individual miners, to the detriment of the environment.
510. Rwanda hoped, no doubt, to attract experienced mining companies. The evidence suggests that it did not succeed. Instead, it attracted entrepreneurs without mining experience attracted by the possibilities of profiting from the acquisition of long-term mining licences in Rwanda. Of these Mr. Marshall was one. Mr. Marshall himself remarked that there were no mining companies among the investors. This was certainly the case so far as those behind NRD were concerned. Mr. Marshall described the Zarnacks as a plumbing company from Germany and H.C. Starck as minerals processors who had never carried out mining anywhere in the world.<sup>365</sup> In the event, no less than five concessions were granted to the Zarnacks and Mr. Benzinge. NRD was founded to exploit these concessions. The Zarnacks pledged to invest some US\$40 million, but did not do so. Instead they sold NRD to Starck.

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<sup>365</sup> Tr. Day 4, 51:15–52:7.

511. Starck invested in the construction of a plant at Rutsiro but this was money wasted as the concentration of ore at Rutsiro proved inadequate to make operation of the plant commercially viable.<sup>366</sup>
512. Starck accepted that NRD had not satisfied the obligations under the Contract that were preconditions to the grant of long-term licences and consequently caused NRD to apply for short-term, five-year licences under the 2008 Law. Even this application was optimistic, as was reflected by the statement in Clause 4.4(b) of the Spalena Purchase Contract that there were issues associated with the renewal of NRD's mining licences.
513. The letter from Minister Kamanzi to Mr. Marshall following the meeting on 12 December 2011 made it plain that there was no prospect of NRD being granted licences in respect of all Five Concessions.<sup>367</sup> That stance on the part of Rwanda never changed. Had Mr. Marshall been content to seek short-term licences in respect of one or two concessions, as suggested by Rwanda, there might have been some prospect of success.
514. Mr. Marshall had, however, the *idée fixe* of obtaining long-term licences for all Five Concessions, and persisted in attempting to obtain these. It may be that he believed that the *pro bono* assistance that he had provided to Rwanda, and was perhaps still providing, in areas that had nothing to do with mining, would result in NRD's applications being afforded preferential treatment. Such treatment would have been improper. In the event, NRD's applications were fairly and thoroughly assessed by Rwanda, with the inevitable result that they were rejected.
515. Since NRD was acquired by Spalena it did nothing to advance its claims to the grant of licences. The 2010 Application included a proposed Activity Plan for Research that had a budget of the equivalent of €382,000 to cover four years of exploration. This was a proposal made when NRD was under the control of Starck. Under Spalena, there is no evidence that any part of this relatively modest sum was spent on research. There is no evidence that any exploration was done between 2010 and 2015.

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<sup>366</sup> Ehlers (1), paras. 28-29.

<sup>367</sup> Letter from MINIRENA to NRD, 26 January 2012, **R-018**.

516. Mr. Marshall's aspiration was first to obtain long-term licences and then to raise funding on the international markets to enable him to exploit these. He states:

*NRD needed the long term licence. Without it, potential investors saw NRD as too risky of an investment and were not interested in investing. As a result of Rwanda [sic] delays and ultimate refusal to grant a long term licence, I was never able to trade NRD on the London Stock Exchange. Had I been able to, I expected to raise substantial sums of money that I could have invested into the Concession [...].*<sup>368</sup>

In their Reply, the Claimants make it plain that NRD's only source of investment in mining in Rwanda was income produced by the mining that it was carrying on.<sup>369</sup>

517. In these circumstances, there was no prospect of NRD demonstrating that it was a satisfactory candidate for the grant of mining licences.
518. Meanwhile, NRD continued to oversee the small-scale mining activities carried on by artisanal miners in limited areas of the Five Concessions. In so doing NRD encountered a number of material events, some of them untoward.
519. After 2010, NRD was initially permitted to remain in occupation of the Five Concessions under licences granted in 2007. The licencing regime had, however been materially altered by the 2008 Law. It was further, and more significantly, altered by the 2014 Law. These Laws reflected a growing expertise and proficiency in Rwanda in the regulation of mining activities. NRD does not appear to have recognised the implications of the reforms introduced by the latter Law.
520. Apart from these changes in the law, NRD encountered a number of vicissitudes between 2010 and 2015. These included the malign activities of Mr. Benzinge, the puzzling 17 May Award obtained by him in proceedings in which Mr. Marshall chose not to take part, claims against NRD by unpaid miners and others, leading to enforcement by Bailiff Bosco, environmental damage caused by illegal miners (which led to closure of mining in the

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<sup>368</sup> Marshall (3), para. 24.

<sup>369</sup> Cl. Reply, para. 60.

Western Concessions) and the denial of tags needed for the sale of minerals extracted from any of the concessions.

521. In this arbitration, Mr. Marshall has sought to weave these events into a conspiracy by the Rwandan Government, in breach of the BIT, to rob his company of what he has claimed to be its rights. Both the rights and the alleged conspiracy have been shown to be illusory.

522. For these reasons, the Claimants' case on liability is rejected.

**C. FURTHER CONSIDERATION OF THE CHALLENGE TO JURISDICTION *RATIONE TEMPORIS***

523. The Tribunal has held that the "*Cut-Off Date*" for the purpose of Article 26(1) of the BIT is 12 June 2015. No acts of omissions on the part of Rwanda can found a claim for breach of the BIT unless the Claimants neither knew nor should have known before June 2015 of the breach alleged. This inquiry has become academic in the light of the Tribunal's finding that none of the matters relied upon by the Claimants constituted a breach of the BIT.

**D. FURTHER CONSIDERATION OF THE CHALLENGE TO JURISDICTION IN RELATION TO THE CLAIM BY SPALENA *RATIONE VOLUNTATIS***

524. Arbitration clauses that make provision for a period of negotiations before the arbitration is commenced have become commonplace and have recently spawned a substantial body of both court and arbitral jurisprudence, to some of which the Parties have referred. It is not uncommon, as in the case of this arbitration, for a respondent to challenge jurisdiction on the ground of non-compliance with such a clause, but to accept that the tribunal should defer resolution of the challenge until after the hearing on the merits.

525. Such a course is usually adopted where the respondent has no desire for negotiations but wants another arrow in its quiver when the substantive dispute comes to be heard. This is manifestly unsatisfactory. If a respondent wants a chance to negotiate, the appropriate course is to ask for a stay of proceedings at the outset, to enable negotiations to take place.

526. Tribunals are understandably reluctant to rule that they lack jurisdiction after a hearing on the merits has taken place. One way of so doing, if the circumstances permit, is to find that the relevant clause is, on true construction, not enforceable. The Claimants urge that this

Tribunal should follow this course, at least so far as Articles 23 and 24 of the BIT are concerned.<sup>370</sup>

527. Another approach is to find that the clause goes not to *jurisdiction* but to *admissibility*, leaving it to the discretion of a properly constituted arbitral tribunal, what action, if any, should be taken in respect of the clause. The Claimants come close to this in urging the Tribunal to treat both clauses as being procedural rather than as going to jurisdiction.<sup>371</sup>
528. The Claimants further make the forceful point that both Article 23 and 24 were satisfied in relation to the claims brought in the name of Bay View, and the claims in the name of Spalena are identical. Rwanda can have suffered no relevant prejudice in these circumstances.
529. The Tribunal has decided not to entertain further the challenge that Rwanda has made to its jurisdiction on what are technical and unattractive grounds. The appropriate course is to determine this arbitration on the merits, which the Tribunal will now proceed to do.

\* \* \*

For the reasons given, the Tribunal orders that the Claimants' claim is dismissed in its entirety.

## **VII. COSTS**

### **A. THE CLAIMANTS' COSTS SUBMISSION**

530. The Claimants delivered their Submission on Costs ("CCS") on 10 September 2021.
531. The CCS submits that the Respondent should be ordered to pay all the arbitration costs incurred by the Claimants including legal fees and expenses together with the expended portion of the payments made by the Claimants to ICSID in respect of its costs in relation to this arbitration.

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<sup>370</sup> Cl. C-Mem., paras. 141.

<sup>371</sup> Cl. C-Mem., paras. 137-138.

532. The Claimants have submitted a schedule of legal costs and expenses totalling US\$1,510,414, broken down as follows:

- Lodging Fee and Advance Payments made to ICSID: US\$450,000;
- Fees and expenses of Counsel:
  - From 4 January 2018 to 30 June 2018: US\$47,153;
  - From 1 July 2018 to 31 December 2018: US\$41,434;
  - From 1 January 2019 to 31 March 2019: US\$133,111;
  - From 1 May 2019 to 31 August 2019: US\$99,985;
  - From 1 September 2019 to 21 January 2020: US\$120,210;
  - From 28 January 2020 to 30 June 2020: US\$218,445;
  - From 1 June 2020 to 2 October 2020: US\$49,256; and
  - From 1 April 2021 to 13 August 2021: US\$350,820.

The Claimants' primary case is that they should recover all these costs. This is on the premise that the Claimants' substantive claim has succeeded and that costs should follow the event.<sup>372</sup> The CCS advances, however, a number of criticisms of the manner in which the Respondent conducted these proceedings.

533. The Claimants advance two alternative claims (the “**First and Second Alternative Claims**”). It is reasonable to imply that these are advanced on the premise that the Claimants' substantive claim has been dismissed.

534. The First Alternative Claim is in respect of the costs and fees arising out of the Respondent's preliminary objections in relation to jurisdiction and the associated Request for Bifurcation. The sum claimed in respect of these costs is US\$99,985. This claim is

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<sup>372</sup> CCS, para. 6.

advanced on two bases. The first is on the premise that the Respondent's challenges to jurisdiction have been unsuccessful, so that in relation to this issue costs should follow the event. The alternative basis is that the applications for bifurcation were refused by the Tribunal or withdrawn, so that the Claimants should be treated as the successful Party in respect of these applications.

535. The Second Alternative Claim is in respect of the costs relating to the Respondent's Application for Security for Costs. The sum claimed in respect of these costs is US\$49,256. The ground for this claim is that the Application was rejected, so that the Claimants were the successful Party in respect of this Application.

#### **B. THE RESPONDENT'S COSTS SUBMISSION**

536. The Respondent delivered its Submission on Costs ("RCS") on 10 September 2021.

537. Like the Claimants, the Respondent invokes the principle that costs should follow the event. The Respondent submits, however, that aspects of the Claimants' behaviour should result in "*a substantial costs award in the Respondent's favour, irrespective of the outcome of the case*".<sup>373</sup>

538. The Respondent puts forward a schedule of costs and expenses totalling £1,689,046, broken down as follows:

- Advance Payments made to ICSID: US\$424,950 (i.e, £314,060 as claimed by the Respondent);
- Fees of Joseph Hage Aaronson LLP: £962,766.90;
- Expenses: £399,497.55; and
- Expert fees and expenses: £12,735.55.

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<sup>373</sup> RCS, para. 10.7.



539. The Respondent claims, on the premise that it is the prevailing Party, all the costs. Insofar as there remains a balance in the hands of ICSID, the Respondent seeks an Order that this be paid in full to the Respondent, thereby reducing the Respondent's claim to costs *pro tanto*. Such an Order would not fall within the jurisdiction of the Tribunal. Any balance of funds in the hands of ICSID will be returned by ICSID to the Parties who provided this. The Respondent also claims an award of interest on the costs awarded.

**C. THE CLAIMANTS' REPLY TO THE RESPONDENT'S SUBMISSION ON COSTS**

540. The Claimants' Reply to the Respondent's Submission on Costs ("CRRS") was delivered on 24 September 2021.

541. The Claimants submit that the Respondent has not provided sufficient details of its claim to costs to enable the Tribunal to determine whether these are reasonable and that, in these circumstances, no costs should be awarded to the Respondent.

542. Apart from this, the CRRS is largely directed to meeting the alleged criticisms of the Claimants' conduct advanced by the Respondent in support of the Respondent's contention that a substantial award of costs should be made against the Claimants in any event. As the Tribunal has found in favour of the Respondent on the merits, there is no need to set out these submissions.

**D. THE RESPONDENT'S REPLY TO THE CLAIMANTS' SUBMISSION ON COSTS**

543. The Respondent's Reply to the Claimants' Submission on Costs ("RRCS") was delivered on 24 September 2021.

544. The RRCS rebuts criticisms made by the CCS of the Respondent's conduct of the proceedings. More pertinently it addresses the two Alternative Claims advanced by the Claimants.

545. In relation to the First Alternative Claim, the Respondent submits that its Request for Bifurcation was justified and approved by the Tribunal. The Claimants then shifted their case, resulting in the Tribunal's direction that the challenge *ratione temporis* should be

determined after the merits hearing. In these circumstances, the Respondent reasonably withdrew its Request for Bifurcation in relation to the other jurisdictional issues.

546. In relation to the Second Alternative Claim, the Respondent contends that its Application for Security for Costs was reasonable. Before the application was made, the Respondent sought information about the source of the Claimants' funding of this arbitration. The Claimants did not provide this. Only after the Respondent's Application for Security for Costs did the Claimants state that there was no third-party funding agreement in place and that the Claimants were responsible for the fees associated with the arbitration.<sup>374</sup> In these circumstances, the Respondent maintains that it should recover the costs of the Application for Security for Costs.

#### **E. THE TRIBUNAL'S DECISION ON COSTS**

547. Article 61(2) of the ICSID Convention provides:

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

548. The Tribunal considers that this is pre-eminently a case where the successful party should recover its costs. The Claimants' claims against Rwanda have been demonstrated to be without foundation. Serious and groundless allegations have been made against the probity of Rwanda and its officers. These have ranged over a wide canvas and have been thoroughly addressed by the lawyers acting for Rwanda.
549. Rwanda has not put forward a detailed bill of legal costs. The Tribunal is satisfied, however, that the amount claimed reasonably reflects the legal services provided by Rwanda's lawyers. In so concluding the Tribunal has had regard to the legal costs of the Claimants. Rwanda's costs exceed these, but the major burden has not been that of putting forward the Claimants' case, but of rebutting this. Nonetheless, the Tribunal considers that

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<sup>374</sup> RRCS, para. 15.

a moderate discount should be made when deciding how much of the amount claimed should be recovered from the Respondents – *see* paragraph 552 below.

550. The Tribunal is satisfied that it is right to include in the costs to be recovered by Rwanda those devoted to the Request for Bifurcation. Bifurcation did not take place because the Claimants advanced, after the Request was made, allegations of fact that had to be investigated as part of the Hearing but which proved unfounded.
551. The Tribunal does not, however, consider that Rwanda should recover any costs in relation to the Application for Security for Costs. While it was not unreasonable to make the initial Application, security for costs is only ordered in international arbitrations in exceptional circumstances. Had the Claimants provided information about their funding of the arbitration when the Respondent originally requested this the Application might have been avoided. In the event, the Application was rejected. In these circumstances the Tribunal has concluded that neither Party should recover from the other any costs incurred in relation to the Application for Security for Costs.
552. Such costs form part of the global claim of £962,766.90 in respect of the fees of Joseph Hage Aaronson. The Tribunal considers that justice will be done if the amount that Rwanda is awarded in respect of this item of its claim for costs is reduced to £900,000 to reflect the costs relating to the Application for Security for Costs, and the discount referred to in paragraph 549 above.
553. The costs of the Arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to US\$723,667.44:

Fees and Expenses of the Members of the  
Tribunal and Tribunal Assistant:

|                                 |                |
|---------------------------------|----------------|
| Lord Phillips KG, PC, President | US\$182,937.49 |
| Ms. Dohmann QC, Co-arbitrator   | US\$73,000.00  |
| Mr. Bidwell, Co-arbitrator      | US\$124,851.28 |
| Dr. Loutfi, Assistant           | US\$15,360.97  |
| ICSID's Administrative Fees     | US\$168,000.00 |

|                 |                       |
|-----------------|-----------------------|
| Direct Expenses | US\$159,517.70        |
| <b>Total</b>    | <b>US\$723,667.44</b> |

554. After repayment by ICSID of part of the unused advances claimed in the Respondent's Submission on Costs at paragraph 538 above, Rwanda has contributed to these costs the amount of US\$361,783.72.

555. Accordingly, the Tribunal orders the Claimants to pay to Rwanda:

|                                  |                                             |
|----------------------------------|---------------------------------------------|
| Fees of Joseph Hage Aaronson LLP | £900,000                                    |
| Expenses                         | £399,497.55                                 |
| Expert fees and expenses         | £12,735.55                                  |
| Costs of the Arbitration         | US\$361,783.72                              |
| <b>Total</b>                     | <b>£1,312,233.10 and<br/>US\$361,783.72</b> |

#### **F. INTEREST**

556. Rwanda has claimed interest on costs awarded and the Tribunal considers it just that the Claimants should pay interest, commencing from the date of the Award, and directs that this shall be paid at the Sterling Overnight Index Average (SONIA) for GBP.

## **VIII. AWARD**

557. For the reasons set forth above, the Tribunal decides as follows:

- (1) The claims of BVG are dismissed on the ground that it had no material investment in Rwanda and, in consequence, the Tribunal lacks jurisdiction.
- (2) The claims of Spalena are dismissed on the merits.
- (3) BVG and Spalena are jointly and severally liable for and are to pay:
  - (i) Rwanda's costs and expenses in the sum of £1,312,233.10 and US\$361,783.72; and
  - (ii) Interest on this sum at the Sterling Overnight Index Average for GBP from the date of this Award until the date of payment.
- (4) All other claims are dismissed.

[signed]

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Mr. J. Truman Bidwell, Jr.  
Arbitrator

Date: 27 MAR 2022

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Ms. Barbara Dohmann QC  
Arbitrator

Date:

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Rt. Hon. Lord Phillips KG, PC  
President of the Tribunal

Date:

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Mr. J. Truman Bidwell, Jr.  
Arbitrator

Date:

[signed]

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Ms. Barbara Dohmann QC  
Arbitrator

Date: 24 MAR 2022

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Rt. Hon. Lord Phillips KG, PC  
President of the Tribunal

Date:

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Mr. J. Truman Bidwell, Jr.  
Arbitrator

Date:

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Ms. Barbara Dohmann QC  
Arbitrator

Date:

[signed]

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Rt. Hon. Lord Phillips KG, PC  
President of the Tribunal

Date: 24 MAR 2022