

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

**BAY VIEW GROUP, LLC, A UNITED STATES ENTITY, AND THE SPALENA COMPANY  
LLC, A UNITED STATES ENTITY**

**(CLAIMANTS)**

**-AND-**

**GOVERNMENT OF RWANDA**

**(RESPONDENT)**

**CLAIMANTS' REPLY MEMORIAL ON THE MERITS**

Case No. ARB/18/21

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March 13, 2020

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1. Claimants submit this Reply Memorial on the Merits (“Reply”) pursuant to ICSID Rule 31 and to the revised procedural calendar proposed by the Parties and accepted by the Tribunal, as communicated to the Parties on October 8, 2019 through the ICSID case manager.<sup>1</sup>
2. Claimants previously submitted a Memorial setting out the basis for their claims and a Counter-Memorial on Preliminary Objections setting out their objections to Rwanda’s preliminary objections. Claimants incorporate both of those documents herein.

## **I. Facts**

### ***A. Rwanda Solicited Claimants’ Investment***

3. Rwanda first reached out to Mr. Marshall in 2003 to solicit Mr. Marshall to provide legal advice with respect to sovereign debt financing, an area in which Mr. Marshall had developed an expertise practicing in Slovakia for nearly a decade.<sup>2</sup> On January 12, 2004, Mr. Marshall, through his firm Jillson and Marshall Associates, signed an engagement letter with RIEPA to provide assistance with respect to “prospective investors, joint venture parties, investment banks, accounting firms and others involved in implementation of your plans to obtain financing for one or more energy generating facilities as well as food processing plants, and in respect of any other matter which you may request from time to time.” Mr. Marshall agreed to provide these services free of charge.<sup>3</sup>
4. Mr. Marshall spent thousands of hours providing these services, free of charge, for more than a decade. Mr. Marshall and other he enlisted to help provided thousands of hours of

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<sup>1</sup> For consistency, Claimants shall continue to use the same defined terms and abbreviations as defined in its Memorial and Counter-Memorial on Preliminary Objections.

<sup>2</sup> Marshall WS, ¶ 2-4.

<sup>3</sup> Engagement Letter from Jillson and Marshall Associates dated 31 December 04, C-132.

free legal advice. Between 2013 and 2016 he and others helped to set up a special economic zone between Rwanda, Burundi, and Uganda. For example, Mr. Marshall helped negotiate a cooperation agreement between Ngali Mining (“Ngali”), a Rwandan Company owned by the government, and Istrochem Explosives, a.s., a Slovak company, regarding the import and manufacture of industrial explosives.<sup>4</sup> Mr. Marshall advised Ngali on the acquisition of helicopters, helicopter training equipment, a helicopter pilot training facility, contracts regarding such acquisitions, as well as a mobile hospital for its peacekeeping focus.<sup>5</sup> Mr. Marshall hosted Rwandan delegations in Europe and facilitated meetings between the Rwandan and Slovak and Czech governments regarding the maintenance of certain military equipment and general military cooperation.<sup>6</sup>

5. Representatives of the RDB specifically solicited Mr. Marshall to also invest in Rwanda’s mining industry, which Rwanda was in the process of privatizing.<sup>7</sup> On August 29, 2005, Rwanda formalized its request to Mr. Marshall to invest in the mining community in Rwanda, specifically, with a letter and brochure on privatization.<sup>8</sup> Rwanda’s solicitations of Mr. Marshall included promises that, if he formed a company and invested in Rwanda’s mining sector, he would be guaranteed to receive what is known as a “long term license,” which meant the company holding such a license would be a Concession Holder under Rwandan Law.<sup>9</sup> The general understanding in the mining

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<sup>4</sup> Email from E. Muvara to R. Marshall dated 1 December 2014 and attached Cooperation Agreement, **C-133**.

<sup>5</sup> Email from A. Nyamvumba to W. Daniel, et al. dated 31 January 2015, **C-134**.

<sup>6</sup> Email chain between R. Oswald and Z. Mruskovicova dated 22-23 March 2015, **C-135**; Email from J. Sauer to R. Marshall, et al. dated 16 December 2014, **C-136**; Minutes of Meeting between VOP Slovakia and Rwanda Armed Forces dated 27 August 2014; **C-137**.

<sup>7</sup> Marshall WS, ¶ 3.

<sup>8</sup> Letter from M. Twanirwa to R. Marshall dated 29 August 2005, **C-138**.

<sup>9</sup> Marshall WS, ¶ 8.

industry in Rwanda was that once a company obtained a short-term license, a long-term license was guaranteed.<sup>10</sup>

6. Mining is an inherently risky business and it takes close to a decade to generate profits. Knowing that his company would receive the long term license reassured Mr. Marshall and ultimately led him to invest in Rwanda's newly privatized mining sector.<sup>11</sup>
7. Mr. Marshall's understanding that his investment company would receive a long term license was confirmed by an early business partner in Rwanda, Lambert Mucyo. When Mr. Marshall first met Mr. Mucyo, Mr. Mucyo worked for the Rwanda Investment and Export Promotion Agency ("RIEPA"). In this role, he provided Mr. Marshall with a draft contract for mining the Bisesero Concession. He also informed Mr. Marshall that he did not have to go through RIEPA and could just write a letter to the Minister of State in Charge of Water and Mines in order to obtain the Bisesero Concession.<sup>12</sup> Mr. Mucyo led Mr. Marshall to believe that, so long as Mr. Marshall obtained a short term license for a company in Rwanda and began investing, the company would be guaranteed to receive a long term license.<sup>13</sup>
8. The assurances from representatives of Respondent and the general understanding in the community ultimately led Mr. Marshall to invest in Rwanda through a Delaware limited liability company called Bay View Group ("BVG") a Claimant in this arbitration. As a result, BVG was awarded the Bisesero Concession.<sup>14</sup>

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<sup>10</sup> Marshall WS, ¶ 8; Buyskes WS, ¶ 7; Rwamasirabo WS, ¶ 6; Fiala WS, ¶ 5.

<sup>11</sup> Marshall WS, ¶ 8-9.

<sup>12</sup> Email from L. Mucyo to R. Marshall dated 12 December 2006, C-139.

<sup>13</sup> Marshall Second Supp. WS, ¶ 19.

<sup>14</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Bay View Group dated 23 March 2007, C-126. Claimants have not brought this arbitration for any violation of the BIT related to BVG. However, it is necessary to set forth facts related to BVG in order to fully understand the assurances made to Claimants and the ownership structure of NRD and the relationship between BVG and NRD.

9. Rwanda routinely confirmed these pre-investment assurances. For example the OGMR, in a July 20, 2009 letter to NRD said that NRD's Licenses "are expected to be converted into long term concessions."<sup>15</sup> Rwanda later told NRD that long term licenses "will be negotiated."<sup>16</sup> These assurances are consistent with the language of the Contract which itself stated that NRD "**will be granted the mining concessions.**"<sup>17</sup>
10. The National Mining Policy submitted on January 13, 2010 ("2010 Policy") did not contradict these early assurances provided to Claimants.<sup>18</sup> The 2010 Policy was a green paper and never adopted by the cabinet or converted into a white paper. Therefore, any potential requirements discussed in that green policy never became binding on Claimants or anyone else. In fact, Rwanda has presented no evidence that Claimants ever saw the 2010 Policy. Nevertheless, the 2010 Policy is instructive because, contrary to Rwanda's current position, the 2010 Policy confirmed for investors that there was an expectation that a short term license would be converted to a long term license. The question left open by the policy was one of ownership structure, not issuance, of long term licenses. Specifically, on page 31, the 2010 Policy reads "these four year licenses have not been guaranteeing the mining companies **the right to sole proprietorship of the long term concession** once detailed resource estimation has been undertaken, i.e. **the government has left open the option to negotiate a joint venture stake after the resource estimation has been completed** (emphasis added)."<sup>19</sup> By its plain language, the 2010 Policy informed investors and potential investors who read the Policy that there were two

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<sup>15</sup> Letter from M. Biryabarema to Director of National Land Center dated 20 July 2009, C-032.

<sup>16</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, C-033.

<sup>17</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Article 4, C-017 (emphasis added).

<sup>18</sup> Government of Rwanda Ministry of Forestry and Mines, Mining Policy, C-015.

<sup>19</sup> Government of Rwanda Ministry of Forestry and Mines, Mining Policy, p. 31, C-015.



options for long term licenses investors may receive (1) sole ownership of the long term license; or (2) a joint venture with the government to own the long term license. The 2010 Policy did not discuss a possibility that an investor could wind up with no ownership of a long term license.

11. Furthermore, the 2010 Policy goes on to represent that it is necessary to “establish criteria for the evaluation of the exploration efforts of the holders of mine concessions. Specifically, the government will set out in Ministerial Orders the criteria for evaluation.”<sup>20</sup> Claimants specifically requested documents corresponding with the Ministerial Orders setting out criteria for evaluation of exploration efforts at Request 66 of their Requests of Documents. Rwanda produced no responsive documents. The Tribunal may therefore take an adverse inference against Rwanda that any Ministerial Orders or other documents setting out criteria for evaluation of exploration efforts have been withheld because they would be detrimental to Rwanda’s case.<sup>21</sup> The only alternative explanation is that Rwanda never issued such Orders or other guidance for the objective and uniform review of Concession Holder submissions were ever created, raising material questions about Rwanda’s good faith intention to treat Concession Holders evenhandedly.

12. Notably, Claimants’ understanding of the Contract is consistent with Rwanda’s description of the process in an internal document reviewing NRD and other companies.

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<sup>20</sup> Government of Rwanda Ministry of Forestry and Mines, Mining Policy, p. 15, **C-015**.

<sup>21</sup> Rwanda cannot rely on the public tender letter, which contained limited criteria on how Rwanda would review an application for a short term license, sent in 2016 to potential investors as if it bears any relevance to its review of Claimants’ Application. The Tender was sent March 5, 2016 and therefore cannot be guidance as to how Rwanda analyzed any application submitted prior to that date. Furthermore, the tender provides information regarding its review of a short term license, not a long term license, and is therefore inapplicable. *See* Republic of Rwanda Ministry of Natural Resources Call for Technical and Financial Proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions dated 5 March 2016, **C-140**.

That document notes that one of the “key points of agreement” is to “provide evaluation reports and the feasibility Study after four years: based on this a concession for 30 years would be signed.”<sup>22</sup>

**B. The Ownership Structure of Claimants and NRD**

13. German investors, Joachim Christopher Zarnack and Jens Christopher Zarnack (together, the “Zarnacks”), and a Rwandan national, Ben Benzinge, formed Natural Resources Development (Rwanda) Ltd (“NRD”) on or about July 10, 2006.<sup>23</sup> The Zarnacks owned 85% of the shares of NRD.<sup>24</sup>
14. By vote of the majority of shareholders on March 13, 2008, the Zarnacks transferred their individual shares in NRD to NRD Holding GmbH on March 13, 2008. Mr. Benzinge was present at this meeting and objected to the transfer. However, the proposal was approved by the majority of the shareholders.<sup>25</sup> By and through NRD Holding GmbH, the Zarnacks continued to control at least 85% of the shares of NRD.<sup>26</sup> The Zarnacks later pledged their shares to Starck, granting 100% ownership of NRD Holding GmbH, and an 85% ownership interest in NRD.<sup>27</sup> NRD Holding GmbH is a wholly owned subsidiary of H.C. Starck GmbH (“Starck”).<sup>28</sup>
15. Starck changed the name of NRD Holding GmbH to HC Starck Resources GmbH.<sup>29</sup>

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<sup>22</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

<sup>23</sup> Full Registration for Domestic Company of NRD Rwanda, p. 1, **C-001**; VAT Certificate, 28 July 2006, **C-002** (confirming the registration of NRD Rwanda).

<sup>24</sup> Meeting Minutes of the Extra Ordinary Meeting of Shareholders of NRD Rwanda, 13 March 2008, pp. 1-2, **C-004**.

<sup>25</sup> Minutes of the Extra Ordinary Meeting of Shareholders of NRD dated 13 March 2008, **C-142**.

<sup>26</sup> Meeting Minutes of the Extra Ordinary Meeting of Shareholders of NRD Rwanda, 13 March 2008, pp. 1-2, **C-004**. By letter dated October 27, 2014, the Rwanda Development Board confirmed that Mr. Benzinge held, at most, a 0.2% interest in NRD. Letter from L. Kanyonga to R. Marshall dated 27 October 2014, p. 3, **C-005**.

<sup>27</sup> Minutes of the Shareholders’ Ordinary General Meeting, 29 October 2008, p. 1, **C-006**.

<sup>28</sup> Letter from G. Roethe to V. Karega dated 30 October 2008, **C-003**.

<sup>29</sup> See, e.g., Declaration of Name Change, 23 December 2010, p. 3, **C-007**; Registry of Name Change, 13 August 2014, p. 1, **C-008**.

16. BVG is a Delaware company incorporated on March 16, 2007.<sup>30</sup> BVG entered into a Cooperation Agreement with NRD on November 1, 2010.<sup>31</sup> At the time that BVG and NRD entered into the Cooperation Agreement, Starck owned NRD and NRD held, in its own name, rights to several other mining Concessions in Rwanda.<sup>32</sup> The Cooperation Agreement provided that NRD would manage the operations of the Bisesero Concession for BVG.<sup>33</sup> The Cooperation Agreement further stated that BVG would loan NRD

[REDACTED]

[REDACTED]

[REDACTED].<sup>35</sup>

17. The Spalena Company, LLC (“Spalena”) is a Delaware entity incorporated on June 9, 1998.<sup>36</sup> On December 23, 2010, Starck sold all of its interest in HC Starck Resources

GmbH to Spalena for [REDACTED]

[REDACTED].<sup>37</sup> BVG’s investors were comfortable with this deal because BVG’s investors and Spalena’s investors are the same. [REDACTED]

[REDACTED]

[REDACTED]

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<sup>30</sup> Arts. of Assoc., 16 March 2007, **C-011**.

<sup>31</sup> Cooperation Agreement Between NRD and BVG dated 1 November 2010, **C-122**.

<sup>32</sup> *Id.* NRD was sold to Spalena on December 23, 2010. (Memorial, ¶ 4). This sale does not impact the cooperation agreement.

<sup>33</sup> Cooperation Agreement, ¶¶ 2-4, **C-122**.

<sup>34</sup> *Id.*, ¶ 2.

<sup>35</sup> *Id.*

<sup>36</sup> Amended Arts. of Assoc., 1 May 2007, p. 1, **C-009**.

<sup>37</sup> Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company, LLC, 23 December 2010, p. 6, **C-068**; Marshall Supplemental WS, ¶ 3-7.

<sup>38</sup> Marshall Supplemental WS, ¶ 3-7.

18. Immediately following the sale of HC Starck Resources GmbH to Spalena, the name of HC Starck Resources GmbH was changed to Natural Resources Development GmbH.<sup>39</sup>
19. In a letter dated November 22, 2011 and delivered to Claimants in March 2012, Respondent announced that it expropriated the Bisesero Concession from BVG.<sup>40</sup> 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 [REDACTED], to Spalena in exchange for an ownership stake in Spalena.<sup>41</sup> Pursuant to the Amended Articles of Incorporation and Memorandum of Operating Agreement for Spalena, BVG obtained an interest in Spalena “based on the amount of cash, property or other benefit that [BVG] contributed to” Spalena.<sup>42</sup> Prior to this sale, BVG was not an owner in Spalena. Through this transaction, BVG became a member of Spalena and an indirect investor in NRD.
20. Respondent’s internal records reflect that, after the sale of NRD to Claimants, Respondent was concerned that Claimants controlled too much land in Rwanda.<sup>43</sup> Rwanda believed that large Concessions, such as the ones held by Claimants should be broken up.<sup>44</sup>
21. Mr. Marshall is the President of both BVG and Spalena. He is also the Managing Director of NRD. At all times that Mr. Marshall was communicating with Rwanda in his role as Managing Director of NRD, he was also acting on behalf of NRD’s primary

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<sup>39</sup> Declaration of Name Change, 23 December 2010, **C-007**.

<sup>40</sup> Letter from S. Kamanzi to R. Marshall dated 22 November 2011, **C-126**. Claimants make no claim for the taking of the Bisesero Concession in this arbitration. The information, however, is relevant to understand the relationship between the Claimants.

<sup>41</sup> Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, **C-123**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, **C-124**.

<sup>42</sup> Amended Arts. of Assoc., 1 May 2007, p. 1, **C-009**.

<sup>43</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

<sup>44</sup> E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971*, 23 March 2013, **C-143**.

investor. Rwanda was always aware of Mr. Marshall's dual role as Managing Director of NRD and as the lead investor in that entity.<sup>45</sup>

22. In addition, 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. Tasked with managing NRD on behalf of BVG in order to protect BVG's investment and ensure a return, Mr. Marshall did not take a salary from NRD. He relied on the value of his investment in BVG and Spalena as the basis for the compensation he would receive for his work managing the operations of NRD.<sup>46</sup>

23. The RDB confirmed on August 7, 2012 that its records reflect that NRD is owned by a holding company, NRD Holding GmbH, which in turn is a wholly owned subsidiary of Spalena.<sup>47</sup> This information remained true through 2016.<sup>48</sup>

### **1. The Arbitration Decision does not Change NRD's Ownership**

24. Rwanda has taken the position in its response that the Arbitration decision rendered by Nelly Umugwaneza changes NRD's ownership structure and annulled three different shareholder meetings. The arbitration decision is fundamentally flawed because (i) NRD protested the appointment of Ms. Umugwaneza and the Arbitration Center did not act on or otherwise address that protest; (ii) the decision is illogical; and (iii) the decision did not annul the shareholder's meeting at which the Zarnacks transferred their shares of

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<sup>45</sup> Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**. Marshall WS, ¶¶ 1, 15, fn. 3.

<sup>46</sup> Marshall Supplemental WS, ¶ 3-7.

<sup>47</sup> Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

<sup>48</sup> Memorandum from License Evaluation Team to Minister of State in Charge of Mining, *Evaluation of NRD Re-application for the 5 Concessions (NEMBA, RUTSIRO, GICIYE, MARA and SEBEYA)*, 29 September 2014, p. 3, **R-020**; Full Registration for Domestic Company of NRD Rwanda, **C-001**.

NRD to Starck, which meant that the decision could not have the effect Respondent ascribes to it.

25. The day before the arbitration was scheduled to occur, NRD wrote to the Chairman of the Arbitration Center to protest Ms. Nelly Umugwaneza's demand that NRD appear for an arbitration. The letter requested that the Arbitration Center investigate the validity of the demand and further requested a meeting to present evidence to support the fact that the demand was improper and to address a fundamental conflict regarding a personal relationship Ms. Umugwaneza and the claimant, Ben Benzinge, that prevented her from acting as an impartial decision maker in any dispute raised by Mr. Benzinge.<sup>49</sup>
26. Pursuant to the Kigali International Arbitration Centre Arbitration Rules and based upon NRD's preliminary objections, the Arbitration Center should have, at a minimum, delayed the arbitration by a week and investigated to address NRD's concerns.<sup>50</sup> Ms. Umugwaneza also had an affirmative obligation to disclose her conflict of interest with the claimant, Mr. Benzinge, which she failed to do.<sup>51</sup> The Arbitration Center's failure to investigate Claimants concerns and Ms. Umugwaneza's failure to disclose her conflict is a violation of NRD's due process rights.<sup>52</sup>
27. In addition, the whole of Ms. Umugwaneza's written decision simply does not make sense. For example, Ms. Umugwaneza purported to annul the meeting minutes of both December 10, 2008 and October 28, 2010 as a result of her "conclusion" that the transfer of shares from Joachim and Jens Zarnack (the "Zarnacks") to H.C. Starck GmbH ("Starck") was improper and illegal. But Ms. Umugwaneza identifies no evidence to

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<sup>49</sup> Letter from R. Marshall to Chairman, Arbitration Center dated 3 April 2013, **C-144**.

<sup>50</sup> Kigali Int'l Arbitration Centre, *Efficiency in Disputes Resolution*, Arbitration Rules (2012), **CL-082**.

<sup>51</sup> *Id.*, at Art. 16.

<sup>52</sup> Rwamasirabo Second Supp. WS, ¶ 43.

support such a conclusion and here decision is incorrect as a matter of law for the reasons set forth below. As a matter of Rwandan law and procedure, Ms. Umugwaneza's decision does not annul or invalidate the meeting minutes at which the transfer to Starck actually occurred.<sup>53</sup>

28. The Zarnacks transferred their 85% interest in NRD to NRD Holding GmbH, which was a wholly owned entity of Starck, at an extraordinary meeting of the shareholders held on March 13, 2008. Mr. Benzinge was present at this meeting and objected to the transfer. However, the proposal was approved by the majority of the shareholders.<sup>54</sup> Thereafter, on May 22, 2008, Apollo Nkunda of Trust Law Chambers, and partner of Richard Mugisha, notified Jens Zarnack that Mr. Benzinge had not exercised his preemption rights under NRD's articles of incorporation and therefore the transfer of their shares to NRD Holding GmbH was permissible.<sup>55</sup> As set forth in the opinion received from counsel, the transfer of shares from the Zarnacks to NRD Holding GmbH was proper and legal. Ms. Umugwaneza's unexplained decision does not somehow deprive those minutes of their lawful effect. Ms. Umugwaneza's decision does not mention the March 13, 2008 minutes at which the transfer was announced. Her failure to address these minutes renders the entirety of her decision unsupportable and strongly suggests that she deliberately ignored relevant facts to reach a pre-determined result.<sup>56</sup>

29. Ms. Umugwaneza's decision also purported to annul the minutes of Board of Directors from a meeting that took place on October 11, 2011. She found that the minutes conferred on Mr. Marshall the "competence of Managing Director and Chairman of the

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<sup>53</sup> *Id.*, ¶ 44.

<sup>54</sup> Minutes of the Extra Ordinary Meeting of Shareholders of NRD dated 13 March 2008, C-142.

<sup>55</sup> Letter from A. Nkunda to J. Zarnack dated 22 May 2008, C-186.

<sup>56</sup> Rwamasirabo Second Supp. WS, ¶ 45.

Board of Directors in violation” of Rwandan law.<sup>57</sup> The minutes from this meeting show that no such decision was made. Instead, the only decision on that date was to “conform to the law No. 07/2009 of 27/04/2009 relating to Companies.”<sup>58</sup> To do so, the Directors present at the meeting amended Article 1 of the NRD’s Articles of Association. They further gave Mr. Marshall the ability to “sign all documents related to conformity to the new company law.” Most importantly, Mr. Marshall already was the chairman and Managing Director and this meeting did not confer those rights on him.<sup>59</sup> Ms. Umugwaneza’s purported basis for annulling these minutes is therefore unfounded, and the effect of her pronouncement appears to be nonexistent.<sup>60</sup>

30. Ms. Umugwaneza then purported to annul meeting minutes from October 28, 2010, and in turn, the share transfer of 100% of the shares of NRD Holding GmbH from the Zarnacks to Starck. As noted above, this decision is unsupportable and simply does not accomplish the supposed result. The Zarnacks’ transfer took place years before the October 28, 2010 meeting. Annulling the October 28 meeting minutes – a flawed decision itself because the evidence establishes that the transfer was valid and Ms. Umugwaneza’s conclusion lacked any basis beyond her self-interest – could not, and did not, undo a transfer of shares that occurred years before the minutes at issue. Ms. Umugwaneza purported to base her decision on a conclusion that the October 28, 2010 minutes violated Article 61 of the “law relating to companies.” Although not specified, she must have been referring to law No. 07/2009 of 27/04/2009. Article 61 of that law

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<sup>57</sup> *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal, 17 May 2013, p. 6, **R-013**.

<sup>58</sup> Minutes of Board of Directors of NRD dated 11 October 2011, **C-145**.

<sup>59</sup> Minutes of Board of Directors of NRD dated 11 October 2011, **C-145**.

<sup>60</sup> Rwamasirabo Second Supp. WS, ¶ 46.



governs the “alteration or revocation of the articles of association of a company.”<sup>61</sup>

There is no correlation between this Article and the Zarnacks’ transfer of their shares.

Article 61 simply does not speak to that transfer and, as such, cannot possibly support Ms. Umugwaneza’s stated conclusion.<sup>62</sup>

31. Ms. Umugwaneza also purported to annul the meetings minutes from December 10, 2008 on the grounds that there was no basis to transfer shares to NRD Holding GmbH and therefore NRD Holding GmbH could not be a shareholder. For the reasons explained above, that contention is incorrect and not supported by the clear documentation to the contrary.<sup>63</sup>

32. More importantly, Rwanda’s official and controlling records during the relevant time period concerning NRD and its parent company confirm that the arbitration decision has no lawful impact on this proceeding. Specifically, the RDB, whose records are determinative of ownership, identified NRD Holding GmbH as the 99.8% owner of NRD. This was true both before and after the flawed arbitration proceeding and Ms. Umugwaneza’s decision.<sup>64</sup> The Respondent gave the arbitration decision no weight in its controlling records for years. Respondent’s change of position only comes now as an effort to avoid liability for its violations of the BIT based on how it treated the known U.S. investors in NRD.

33. Even assuming that Ms. Umugwaneza did attempt to cancel the three meeting minutes above, the RDB, upon reviewing Ms. Umugwaneza’s decision, concluded that “no

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<sup>61</sup> *Rwanda Law No. 07/2009 Relating to Companies*, 27 April 2009, Official Gazette No. 17 of 27 April 2009, **CL-062**.

<sup>62</sup> *Rwamasirabo Second Supp. WS*, ¶ 47.

<sup>63</sup> *Rwamasirabo Second Supp. WS*, ¶ 48.

<sup>64</sup> Full Registration for Domestic Company of NRD Rwanda, **C-001**; Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**; Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

transfer of shares is affected by the cancelled resolution.”<sup>65</sup> The RDB came to the independent conclusion that Ms. Umugwaneza did not address the March 13, 2008 meeting at which the shares were transferred and therefore the transfer was not annulled in any way. The RDB further concluded that the award does not “provide any interim solution waiting the decision of the shareholders” and that “the award does not provide for the fate of shares already paid by NRD Holding.”<sup>66</sup> Finally, the RDB noted that NRD filed replacement resolutions for the ones cancelled by the arbitration decision, which renders the arbitration decision meaningless.<sup>67</sup>

**C. Claimants invested at least [REDACTED] in Rwanda**

34. Rwanda admits that Rutongo invested [REDACTED] by June 30, 2012.<sup>68</sup> In support of that statement, they refer to the Historic Operating Results and investment summary, Rutongo Mines Ltd, attached as R-048 to their Counter-Memorial. Rwanda accepts Rutongo’s accounting of its investment which includes line items like plant and machinery, motor vehicle, office equipment, mining rights, loans, bank accounts, and loans. Based upon this accounting, Claimants had invested [REDACTED] by January 2013.<sup>69</sup> In a separate document titled “Summary of activities, investment and plans on all NRD’s concessions,” Claimants estimated that they had invested [REDACTED] by the end of 2011.<sup>70</sup>

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<sup>65</sup> Summary of the Resolutions of NRD Cancelled by the Court, **C-164**.

<sup>66</sup> Summary of the Resolutions of NRD Cancelled by the Court, **C-164**.

<sup>67</sup> Summary of the Resolutions of NRD Cancelled by the Court, **C-164**.

<sup>68</sup> Claimants’ Requests For Documents, Request No. 62, 11 October 2019.

<sup>69</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2013, p. 10, **C-054**

<sup>70</sup> Summary of Activities, Investment and Plans on all NRD’s Concessions, **C-147**.

35. In addition, after Rwanda expropriated the Bisesero Concession, BVG transferred all of its investment and assets to Spalena for further investment in NRD. The value of this additional investment totaled at least, [REDACTED].<sup>71</sup>

36. Rwanda admits that, at a minimum, NRD's prior investors invested [REDACTED] in NRD in the form of capital investment.<sup>72</sup> Jean Aime Sindayigaya also confirms that "Starck was spending a lot of money – [REDACTED] – on the construction of the plant and the related infrastructure, including building a road and access plant."<sup>73</sup> By purchasing NRD, Claimants inherited that investment.

***D. The Contract and Licenses Awarded to NRD***

37. Rwanda awarded a "Contract For Acquiring Mining Concessions" ("Contract") to NRD on November 24, 2006.<sup>74</sup>

38. In Article 1 of the Contract, the Respondent authorized NRD "to explore and run mining operations within RUTSIRO, MARA, SEBEYA, GICIYE, and NEMBA Perimeters" for an initial period of four years.<sup>75</sup>

39. Article 2 obliged NRD to:

1. Make a geographical demarcation of the perimeters;
2. Provide the following documents as part of the contract:
  - a. The action plan.

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<sup>71</sup> Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, **C-123**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, **C-124**.

<sup>72</sup> Respondent's Counter-Memorial on the Merits, ¶ 86.

<sup>73</sup> Sindayigaya WS, ¶ 15.

<sup>74</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, **C-017**; *see also* Contract for Acquiring the Rutongo Mining Concession Between the Government of Rwanda and Umhlaba Investment Holding (Pty) Ltd dated 27 August 2008, **C-023**.

<sup>75</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 1, **C-017** (capitalization in original).

- b. The environmental protection plan.
    - c. 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.<sup>76</sup>

40. Article 4 states that “[a]fter a positive evaluation of the submitted feasibility study

Natural Resources Develop Rwanda Limited **will be** granted the mining concessions.”<sup>77</sup>

41. After awarding the Contract, Rwanda issued five special permits (the “Licenses”), one for each of the five Concessions, on January 29, 2007, specifically permitting NRD to access the Concessions and begin to fulfill its contractual requirements.<sup>78</sup>

42. These Licenses state that NRD was granted a special small-scale mining exploration and operation permit and that NRD may mine for wolfram, coltan, and cassiterite in each of the five concessions and sets forth the perimeters for each Concession.<sup>79</sup>

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<sup>76</sup> *Id.* at Art. 2 (emphasis added).

<sup>77</sup> *Id.* at Art. 4 (emphasis added). There is no Article 3 in the English version of the Contract.

<sup>78</sup> Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-018**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-019**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-020**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-021**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-022**.

<sup>79</sup> Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-018**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-019**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-020**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-021**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-022**.

43. With the Contract and Licenses, NRD was permitted to immediately begin research and exploitation at the five concessions. Crucially, NRD was granted permission to exploit, not merely to conduct research and exploration.<sup>80</sup>
44. The right to the Licenses is premised upon the Contract. However, both the Contract and the Licenses expressly grant NRD the right to mine and exploit the Concessions.<sup>81</sup>

*E. Claimants Complied with Their Obligations under the Contract*

**1. Claimants submitted a progress report after two years**

45. NRD submitted a 2009 Status Report on the status of its operation consistent with its obligations under the Contract.<sup>82</sup> In this report, NRD identifies how NRD's investors focused on improving the infrastructure at each of its five Concessions in order to expand ongoing and future exploration efforts and mining operations. Prior to this investment by NRD's owners, the infrastructure at the Concessions had long been neglected, with limited road access and limited facilities. Through its owners' investment, NRD erected numerous buildings and substantially improved road access in the Sebeya and Giciye Concessions.<sup>83</sup>
46. The 2009 report demonstrates that NRD's investors also built upon the foundation of technical imagery it created in 2008 to further map and explore the concessions. In particular, NRD acquired more detailed satellite images of its Concessions. The satellite

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<sup>80</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Article 2, C-017. For example, Umhlaba Investment Holding (Pty) Ltd's (now Tinco) Contract for Acquiring the Rutongo Mining Concession did *not* permit Umhlaba to exploit, only to research, rehabilitate, and explore during the four-year term. *See* Contract for Acquiring the Rutongo Mining Concession Between the Government of Rwanda and Umhlaba Investment Holding (Pty) Ltd dated 27 August 2008, Art. 2, C-023.

<sup>81</sup> Rwamasirabo Second Supp. WS, ¶ 6-8.

<sup>82</sup> NRD Rwanda, *Status Report 2009*, C-067.

<sup>83</sup> NRD Rwanda, *Status Report 2009*, p. 8, C-067.

imagery, along with other data and maps further helped NRD identify potential mine site and mineralizations in the Concessions.<sup>84</sup>

47. The studies showed significant wolfram, coltan, and cassiterite deposits in the Rutsiro, Giciye and Sebeya Concessions with an especially high amount of wolfram in Rutsiro.<sup>85</sup> NRD obtained over 100 samples from various sites and found dozens of mining sites with potentially significant deposits at the Rutsiro, Giciye and Sebeya Concessions.<sup>86</sup> In addition, NRD was the only company sampling minerals on a daily basis using the then new XRF technology, enabling NRD to take thousands of samples at each site.<sup>87</sup> At the Nemba Concession, NRD found substantial amounts of cassiterite and coltan, and found cassiterite at the Mara Concession.<sup>88</sup>

48. At the Nyatubindi mine in the Giciye Concession, NRD's owners invested in building three sequential dams in order to minimize the buildup of sediment in the Sebeya River. In addition, NRD proactively stopped artisans from working a number of sites in order to minimize the environmental impact. This was most prevalent in the Giciye Concession where decades of unregulated hydraulic mining by the Belgians led to increased chances of sedimentation in the Sebeya river.<sup>89</sup>

49. In addition, and although not required by the Contract, NRD submitted progress reports in 2007 and 2008.<sup>90</sup> Rwanda viewed these reports as "encouraging."<sup>91</sup>

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<sup>84</sup> NRD Rwanda, *Status Report 2009*, p. 11, **C-067**.

<sup>85</sup> NRD Rwanda, *Status Report 2009*, pp. 20, 21, **C-067**.

<sup>86</sup> NRD Rwanda, *Status Report 2009*, pp. 36-40, **C-067**.

<sup>87</sup> Marshall Second Supp. WS, ¶ 25.

<sup>88</sup> NRD Rwanda, *Status Report 2009*, pp. 53, 64, **C-067**.

<sup>89</sup> NRD Rwanda, *Status Report 2009*, pp. 45, 71, **C-067**.

<sup>90</sup> NRD Rwanda, *Status Report 2008*, **C-024**; see Letter from V. Karega to G. Roethe dated 17 January 2009, **C-028**.

<sup>91</sup> Letter from V. Karega to G. Roethe dated 17 January 2009, **C-028**.

2. **Claimants proceeded to the “industrial exploitation” of the Concessions**

50. Rwanda argues that Claimants failed to industrialize their Concessions in violation of the Contract.<sup>92</sup> Initially, it is worth noting Rwanda’s subtle, but important, modification of the Contract’s actual term. The Contract does not use the term “industrialize the Concessions” as if that is a recognizable and measurable standard. Instead, the Contract references the practical concept “proceed immediately to the industrial exploitation in all given sites.” This is important, because it is symptomatic of Rwanda’s after-the-fact attempt to re-write and reinterpret its contractual obligations in ways never understood or interpreted contemporaneously by the parties. To illustrate this point, Claimants specifically requested that Rwanda produce documents identifying “acceptable levels of industrialization” of mining sites. Rwanda failed to produce **any** responsive documents, even after an order by the Tribunal to look for such documents.<sup>93</sup> Rwanda’s failure to produce such documents demonstrates that it neither wrote nor performed the Contract with an understanding that there was a known, measurable standard of “industrialize[d]” mining sites that Claimants could look to in order to perform their obligations. Instead, the Contract simply contemplated Claimants would perform by working their Concessions in a professional manner to commercialize the mines beyond the historic personal, or artisan, mining carried on by individuals. There can be no legitimate question Claimants met that obligation. As a result, Rwanda has twisted its presentation of the obligation in order to suggest something more, and apparently mysterious was required. To the extent Respondent continues to contend that there is an objective

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<sup>92</sup> Respondent’s Counter-Memorial on the Merits, ¶ 67.1.

<sup>93</sup> Claimants’ Requests For Documents, Request No. 65, 11 October 2019; Procedural Order No. 4 on Document Production relating to Request No. 65, 20 December 2019.

standard of what it means to achieve an “industrialize[d]” mining site, its failure to produce any document identifying that standard should be understood to mean that either the standard never existed or, if it exists, it does not support Respondent’s contention that Claimants failed to meet it.

51. In any event, by any definition of the term, Claimants proceeded to the “industrial exploitation” of the concessions. Claimants built a processing plant at the Rutsiro Concession. This was the only processing plant of its kind in Rwanda.<sup>94</sup> The OGMR recognized this achievement stating that it was “satisfied with exploitation progress made in Rutsiro Mining site, specifically the construction of a washing plant.”<sup>95</sup> Anthony Ehlers, the one-time managing director of NRD, stated that the “Rutsiro plant is operating and we are in the process of fine tuning it.”<sup>96</sup> After Rwanda expropriated Claimants’ Concessions, Jeffrey Lindhorst sought to buy or lease the Rutsiro plant and sent a text to Mr. Mruskovicova, on October 21, 2015 stating that “we are here at the plant. Looks good.”<sup>97</sup> By all accounts, the plant was operational.

52. For Claimants to pursue “industrial exploitation” of their Concessions it was necessary to upgrade the infrastructure at each of the Concessions. For the most part, the roads had been neglected at the Concessions and it was impossible to bring in heavy machinery. For this reason, NRD’s investors substantially improved road access and constructed bridges and buildings to permit more advanced mining.<sup>98</sup> Such road building and facility construction was a necessary step towards further “industrial exploitation.” In this way,

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<sup>94</sup> Mruskovicova WS, ¶¶ 16-17

<sup>95</sup> Letter from B. Christophe to Director General of NRD dated 20 October 2010, p. 1, **C-026**.

<sup>96</sup> Email chain between A. Ehlers and F. Delforge dated 20-22 September 2010, **C-148**.

<sup>97</sup> Email from J. Lindhorst to E. Imena, et al. dated 4 November 2015, **C-150**; Text messages from J. Lindhorst Kazbach to Z. Mruskovicova dated 21 October 2015, **C-151**.

<sup>98</sup> NRD Rwanda, *Status Report 2009*, p. 8, **C-067**; NRD Rwanda, *Status Report 2008*, pp. 8-9, **C-024**.



Claimants could transport heavy machinery in and out of the Concessions transition away from artisanal mining. Jean Aime Sindayigaya confirms that Claimants were improving infrastructure necessary for “industrial exploitation” by spending money “on the construction of the plant and the related infrastructure, including building a road and access plant.”<sup>99</sup>

53. OGMR further recognized that NRD had been working towards “industrial exploitation” through its recognition of “upgraded facilities at Nemba mine like the supply of water and new equipment.”<sup>100</sup>

54. Claimants understood that investment in heavy equipment was necessary in order to develop the Concessions and make them more profitable.<sup>101</sup> BVG made these necessary investments when it managed the Bisesero Concession and then transferred its heavy equipment, including all other operational assets, to Spalena in order for Claimants to further develop and industrially exploit NRD’s Concessions.<sup>102</sup>

55. While pursuing the further “industrial exploitation” of the Concessions, a necessarily long-term process, NRD continued to mine its Concessions supervising and equipping artisanal miners in order to generate short-term income, but short-term continuation of artisanal mining operations was not exclusive of all the activities to develop industrial operations that would exploit the commercial value of the mines well beyond artisanal mining.<sup>103</sup>

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<sup>99</sup> Sindayigaya WS, ¶ 15.

<sup>100</sup> Letter from C.Barthelemy to Director General of NRD dated 20 October 2010, p. 1, **C-026**.

<sup>101</sup> Email from R. Marshall to Z. Mruskovicova dated 19 August 2008, **C-153**; Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, **C-123**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, **C-124**.

<sup>102</sup> Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, **C-123**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, **C-124**.

<sup>103</sup> Email from R. Marshall to Z. Mruskovicova dated 19 August 2008, **C-153**.

56. Moreover, Respondent's criticism of the pace or depth of investment in operating equipment and facilities is highly cynical given its other contention in this proceeding – that Claimants only held short-term rights and did not have an expectation for long term licenses. It is wholly unreasonable to suggest that the parties contemplated the sizable capital investment in equipment and facilities necessary to fully “industrialize” the mines had to occur immediately and that all that investment had to be made immediately while bearing the full risk that no long-term rights would be extended for the investors to exploit the commercial value of the mines and recoup the investment. To state the obvious, if Respondent's various interpretations of the parties' rights and obligations under the Contract were accepted as true, the Contract was written to assure failure of the parties' stated purpose – the privatization of mining rights in Rwanda to encourage investors to undertake the long term investment necessary to do so successfully.
57. Contrary to Respondent's opportunistic reinterpretation of its Contract in a way that undermines the very purpose motivating its entering the Contract initially, Claimants always interpreted the Contract as establishing long-term investment and operational obligations, and equally, long-term commercialization rights. For example, Claimants intended to publically list NRD on the Alternative Investment Market of the London Stock Exchange to raise funds to invest in NRD and Rwanda.<sup>104</sup> Respondent following through on its assurances of long term licenses was a necessary predicate to giving third-party investors confidence that their investment would be safe. Ultimately, because

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<sup>104</sup> Letter from finnCap Ltd Corporate Finance Director to Ministry of Natural Resources dated 30 September 2011, C-154.

Rwanda refused to honor those assurances of long term licenses, Claimants were not able to implement plans to raise this outside investment.<sup>105</sup>

58. Respondent also directly prevented Claimants from further developing the Concessions, setting them up for failure. As detailed more fully below, Respondent permitted a Rwandan national, Ben Benzinge, to illegally take control of NRD for one week in 2012 and then for approximately 10 weeks in 2014. During the 2012 incident, Mr. Benzinge stole minerals, fired employees, changed locks, and undermined the confidence that NRD's employees had in the company.<sup>106</sup> During the 2014 takeover, and under Mr. Benzinge's watch, he and others stole security fencing, roofs, railway lines and ties, water pipes, wagons, hoses, and over 45 tons of tin. The illegal miners also caused extensive damage to the mines by removing support columns and destabilizing the integrity of the mines.<sup>107</sup> Upon regaining control of their Concessions, Claimants were forced to remedy all the harm caused by Mr. Benzinge.

59. In further disruption of Claimants' ability to earn profits from their mining operations that they could re-invest, Respondent, on various occasions, shut down Claimants' Western Concessions without justification and permitted illegal mining by third-parties during these shutdowns that deprived Claimants of revenues.<sup>108</sup> As a result of these shutdowns, Claimants lost substantial sums of money because they could not operate the mines. Claimants also had to contend with the environmental damage caused by these

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<sup>105</sup> Marshall Second Supp. WS, ¶ 24.

<sup>106</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, **C-048**; Marshall WS, ¶¶ 19, 22.

<sup>107</sup> U. Jacquie, *Report on NRD at Nemba Mining Site*, 22 August 2014, **C-075**.

<sup>108</sup> Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, **C-047**; Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

illegal miners.<sup>109</sup> This, in turn, forced Claimants to expend time and energy dealing with environmental damage that they did not cause, which they could have otherwise spent investing in the Concessions.

60. Rwanda, through Minister Imena’s unilateral and unsupported decision, also refused to grant NRD tags without justification.<sup>110</sup> In order to legally sell minerals in Rwanda, the minerals must be tagged, which certifies that the minerals originate in Rwanda.<sup>111</sup> The lack of tags restricted NRD to selling to buyers who did not care about the origin of the minerals, of whom there were few left in Rwanda,<sup>112</sup> or sell minerals illegally. NRD did neither. As a result, NRD was forced to stock pile minerals that it was mining or simply not mine. NRD was therefore unable to generate any income that it could then invest in the Concessions. Rwanda’s decision to deny tags to Claimants lasted through at least May 19, 2015.<sup>113</sup>

61. In June 2014, Claimants had secured a grant of \$1 million from the Dutch Government’s Private Sector Investment Program. However, in order to finally receive the money, Claimants needed a letter from Minister Imena. Claimants requested the permission and, after that failed, asked for a meeting.<sup>114</sup> Minister Imena’s wrote back that he would not engage in any communications with NRD until “its issues of ownership and management are sorted out.”<sup>115</sup> That refusal was not put forward in good faith, since any “issues of

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<sup>109</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, **C-050**; Government of Rwanda Ministry of Forestry and Mines, *Mining Policy*, p. 13, **C-015**.

<sup>110</sup> Marshall WS, ¶ 80; Mbaya WS, ¶ 11, 17; Meeting Minutes of Rwanda Development Board, 23 March 2015, **C-101**; Buyskes WS, ¶¶ 12, 13.

<sup>111</sup> *See generally*, Memorial, § III.

<sup>112</sup> *See* Niyonsaba WS, ¶ 16.

<sup>113</sup> Marshall Second Supp. WS, ¶ 28.

<sup>114</sup> *Id.*, at ¶ 26.

<sup>115</sup> Email chain between R. Marshall and E. Imena dated 25-26 June 2014, **C-155**.

ownership and management” had been settled since at least 2012.<sup>116</sup> Minister Imena’s failure to cooperate with NRD regarding this meeting with the Dutch Embassy cost Claimants \$1 million that NRD could have and would have invested towards “industrial exploitation” at the Concessions.

**3. NRD Fulfilled the Remainder of its Obligations under the Contract and Submitted “Evaluation Reports of Reserves and the Feasibility Study After 4 Years”**

62. On November 29, 2010 NRD Submitted an application for a long term License (“Application”) for each of the five Concessions.<sup>117</sup> The Application contained detailed information regarding the geology of the Concessions, the production over the prior four years at each of the Concessions, further planned investments, reserve estimates and further plans to calculate reserves at each of the five Concessions.<sup>118</sup>
63. The Application also contained an Environmental Impact Assessment Report prepared by Dr. Fabien Twagiramungu, which included an environmental management plan as requested by OGMR. The plan noted some environmental damage that had occurred or predated NRD’s operations and identified the many efforts that NRD had undertaken to remedy environmental damage.<sup>119</sup>
64. The Application fulfilled each of the remaining requirements in the Contract was timely under the Contract because it was submitted “after 4 years” and before the initial term of the Licenses expired.<sup>120</sup>

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<sup>116</sup> Supra, § I.B.

<sup>117</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 5-8, **C-035**.

<sup>118</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 2, 3, 5, **C-035**.

<sup>119</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, § VII, **C-035**; F. Twagiramungu Consulting Report dated September 2010, **C-036**.

<sup>120</sup> Rwamasirabo Second Supp. WS, ¶ 13.

65. The sufficiency of the Application pursuant to the Contract is confirmed by numerous letters and communications between Claimants and Respondent. Most notably, Dominique Bidega the former Director of the Regulation and Supervision Unit of the OGMR determined that NRD had satisfied their obligations under the Contract and therefore submitted a draft long term license, which NRD signed, to the Cabinet for approval, indicating Rwanda's acknowledgement that NRD complied with the terms of the Contract.<sup>121</sup> In order for the draft long term license to be submitted to the Cabinet, Minister Kamanzi first would have had a meeting with the Prime Minister to recommend the draft so that, by the time the draft reached the Cabinet, it was final.<sup>122</sup> The OGMR's Strategic Plan for 2009-2012 lists NRD has having submitted a feasibility study.<sup>123</sup>
66. Rwanda's reliance on a letter from Minister Kamanzi from August 2, 2011 is misplaced.<sup>124</sup> Although Minister Kamanzi states that the Application did not contain an estimate of reserves or a feasibility study, the Application plainly did have both.<sup>125</sup> His letter contradicts the OGMR's strategic plan and there was no indication in any of Respondent's communications or actions that suggested the Respondent adopted or continued to support Minister Kamanzi's statement. Instead, Respondent's ongoing communications and actions were inconsistent with a position that the Application was insufficient or that NRD had not complied with the terms of the Contract.<sup>126</sup> In fact,

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<sup>121</sup> Bidega WS, ¶ 3-4; Marshall WS, ¶ 29; Draft Contract between Government of Rwanda and NRD, September 2011, **C-114**; Email chain between A. Ehlers, R. Marshall, P. Nkanika, et al. dated 14-16 January 2011, **C-156**.

<sup>122</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>123</sup> OGMR's Strategic Plan for 2009-2012 Presentation dated 7 August 2010, **C-157**.

<sup>124</sup> Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>125</sup> See Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 2, 3, 5, **C-035**.

<sup>126</sup> See Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**; Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-045**; Letter from M. Biryabarema to R.

Minister Kamanzi himself wrote to the CEO of the RDB and recommended that negotiations for the long term licenses proceed.<sup>127</sup> All actions by Respondent following the August 2, 2011 letter were consistent with the understanding that the Application was sufficient and complied with the Contract.<sup>128</sup> And that was certainly Claimants' position throughout.

***F. Article 4 of the Contract Requires Rwanda to Grant NRD the Long Term Licenses***

67. Upon NRD's compliance with its obligations under Article 2, Respondent was required to fulfill its obligations under Article 4, which it failed to do. Article 4 of the Contract requires Respondent to evaluate the Feasibility Study and then grant NRD the long term licenses.

68. In direct disregard of that contractual obligation Respondent initially simply ignored the submission of the Feasibility Study.<sup>129</sup> Thereafter, Rwanda provided no comments to Claimants regarding the Feasibility Study.<sup>130</sup> Either Rwanda never evaluated the Feasibility Study, in violation of obligation under Article 4, or its silence after performing the required review is the equivalent of a positive evaluation. Under either analysis Rwanda was obligated to grant NRD the long term licenses, which it did not do.<sup>131</sup>

***G. Rwanda's Campaign to Drive Claimants' out of Rwanda***

69. Beginning shortly after Claimants' submission of the Application, Rwanda undertook a systematic campaign to drive Claimants out of Rwanda and to force them to abandon

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Marshall dated 10 February 2013, **C-056**; Letter from R. Marshall to M. Isibo dated 9 April 2013, **C-158**; Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources dated 9 May 2013, **C-159**.

<sup>127</sup> Letter from S. Kamanzi to Acting CEO of RDB dated 21 January 2013, **C-160**.

<sup>128</sup> Rwamasirabo Second Supp. WS, ¶ 23-24.

<sup>129</sup> Rwamasirabo Second Supp. WS, ¶ 19.

<sup>130</sup> Rwamasirabo Second Supp. WS, ¶ 23-24.

<sup>131</sup> Rwamasirabo Second Supp. WS, ¶ 16-22.

their investment. The steps that Rwanda took to do this have been set forth in the Memorial and Counter-Memorial on Preliminary Objections. However, for the convenience of the Tribunal and coherence of the discussion in this Reply, Claimants re-state some of those facts while replying to Respondent's counter-allegations below below.

**1. Communications and Meetings with Rwanda Between November 2010 – October 2013**

70. In accordance with the stated purpose of completing a long term license, Dominique Bidega of the OGMR provided NRD with a draft long term license and NRD and Respondent began to negotiate the terms of the license because, according to Mr. Bidega, NRD complied with the terms of the Contract.<sup>132</sup> NRD had the opportunity to negotiate the Licenses in the first place because of the high quality and thoroughness of the application.<sup>133</sup> Following the negotiation of the license, Mr. Bidega submitted the draft agreement to his boss, Dr. Biryabarema, who approved it and sent it to the Minister of Natural Resources.<sup>134</sup> The Cabinet process requires that all high level policy, legal or regulatory proposals to be considered by the Cabinet and first be discussed and reviewed by the Interministerial Coordination Committee (ICC) to ensure that the documents are thoroughly analysed and well prepared.<sup>135</sup> As part of this process, Minister Kamanzi would have meet with the Prime Minister to recommend the proposal before the final submission to the Cabinet.<sup>136</sup> The Cabinet is therefore the final stage in the decision-making process. By the time the proposals reach Cabinet, the vast majority of issues and

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<sup>132</sup> Bidega WS, ¶ 3-4; Marshall WS, ¶ 29; Draft Contract between Government of Rwanda and NRD, September 2011, C-114.

<sup>133</sup> Bidega WS, ¶ 3.

<sup>134</sup> Bidega WS, ¶ 3, 5.

<sup>135</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>136</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.



disagreements should have been resolved so that Cabinet can make a swift, well-informed decision.<sup>137</sup>

71. The fact that OGMR submitted the draft long term license for the Claimants to the Cabinet indicates that members of the OGMR, which were the technical experts reviewing the Application, felt that the Application satisfied the obligations under the Contract and that Claimants should receive the long term license. Rwanda's failure to act on the long term license or provide any basis for not acting on it violated NRD's due process right to receive a decision with respect to the draft long-term license and an explanation of that decision.<sup>138</sup>
72. The Cabinet typically acted on all matters submitted to it within one week. However, for reasons Respondent never explained, the Cabinet neither acted to reject or accept the draft agreement.<sup>139</sup> This inaction and silence harmed NRD's rights, because among other reasons, it left NRD continuing to perform under the Contract as it understood it was required to do in order to receive the long-term licenses and it prevented NRD from addressing the reasons for any denial or identifying any other action to take in order to pursue the long term licenses.<sup>140</sup>
73. In accordance with the Cabinet's inaction, Claimants received another extension of their Licenses, this time though May 2, 2012.<sup>141</sup> In granting this extension, Minister Kamanzi, on behalf of Respondent, stated that, "I am certain that this is enough time for us to

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<sup>137</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>138</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>139</sup> Bidega WS, ¶ 5.

<sup>140</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>141</sup> See Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**.

conclude a good contract for this partnership. Allow me to thank you for your continued commitment to invest in the Mineral Sector in Rwanda.”<sup>142</sup>

74. Minister Kamanzi then sent another letter on September 13, 2012, again extending NRD’s Licenses through October 2012, noting that “new contracts...will be negotiated as has been communicated to all the existing concession holders.”<sup>143</sup> Based on this letter and consistent with the assurances made to hem prior to investing Rwanda, Claimants continued to expect that, as with all the other Concession Holders, were guaranteed to receive long term licenses.
75. In January 2013 the GMD requested that NRD submit the previously agreed upon draft of the long term license agreement, together with an updated version of the NRD planning and application documents.<sup>144</sup> Claimants complied.<sup>145</sup>
76. On February 10, 2013, Dr. Biryabarema explicitly permitted NRD to resume mining its Western Concessions, the ones from which NRD had been inexplicably barred beginning in July 2012 (see below).<sup>146</sup> Dr. Biryabarema believed that NRD’s plan to employ demobilized soldiers as security forces at the Concessions in order to curb illegal mining had potential and expressed that NRD should proceed with implementing this plan. Dr. Biryabarema also informed NRD that Respondent will “proceed with negotiations on your request for new contracts for the concessions.”<sup>147</sup> NRD understood the “new contracts” to refer to the long term licenses that they had been promised and that they had begun negotiating in 2011.

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<sup>142</sup> *Id.*

<sup>143</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-045**.

<sup>144</sup> Marshall WS, ¶ 36.

<sup>145</sup> Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, p. 5, **C-042**.

<sup>146</sup> Letter from M. Biryabarema to R. Marshall dated 10 February 2013, **C-056**.

<sup>147</sup> *Id.*

77. In early April 2013, the RDB and Claimants agreed to meet on May 9, 2013 to discuss the “Mining Agreement and due diligence questionnaire we submitted to your company.”<sup>148</sup> Claimants were asking for more time because the proposed mining agreement was long and complex and Claimants needed sufficient time to review to make meaningful comments.<sup>149</sup> Then, at the May 9, 2013 meeting, Sandra Rusagara, a representative of the RDB stated that the RDB was willing to work with Claimants, as demonstrated by the fact that it had provided a draft long term license to Claimants for review.<sup>150</sup> Ultimately, although the initial intent of that meeting was to negotiate terms the long term contract, such negotiation did not take place and the parties agreed to have a second meeting.<sup>151</sup> The promised second meeting never took place.<sup>152</sup>
78. NRD then received a letter on October 16, 2013 from Minister Imena, who had recently been appointed to the newly created position of Minister of State for Mining.<sup>153</sup> The letter requested a meeting to discuss a number of topics, including the long term licenses.<sup>154</sup> The requested meeting took place on October 30, 2013 and Minister Imena assured NRD that the negotiations of the long term licenses would be picking back up shortly.<sup>155</sup> No further negotiations took place.

## 2. Unexplained Shutdowns between 2012 and 2013

79. In March 2012, the Executive Secretary of the Manihira Sector, in the Rutsiro Concession, inexplicably shut down NRD’s mining operations but permitted illegal

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<sup>148</sup> Letter from R. Marshall to M. Isibo dated 9 April 2013, C-158.

<sup>149</sup> Letter from R. Marshall to M. Isibo dated 9 April 2013, C-158.

<sup>150</sup> Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources dated 9 May 2013, C-159.

<sup>151</sup> Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources dated 9 May 2013, C-159.

<sup>152</sup> *Id.*

<sup>153</sup> Letter from E. Imena to R. Marshall dated 16 October 2013, C-060.

<sup>154</sup> *Id.*

<sup>155</sup> Marshall WS, ¶ 38.

miners to continue their activities on the same Concession.<sup>156</sup> Then, on July 25, 2012, the Executive Secretary of the Rusebeya Sector, also in the Rutsiro Concession, suspended NRD's mining activities while also permitting illegal mining by others to take place.<sup>157</sup> Upon a visit to the mines with an ITRI representative, NRD was informed by the rogue miners that the local authorities told them to engage in mining activities at the sites.<sup>158</sup>

80. On September 17, 2012, Minister Kamanzi wrote to the Governor of the Western Province suspending all mining activities in the Western Province.<sup>159</sup>

81. Although other mining companies operating within the Western Province were permitted to resume mining in October 2012, NRD was not. Rwanda falsely attributed the different treatment of Claimants' mining company by claiming to have a concern with "environmental damage." NRD reminded Rwanda that the damage, to the extent there was any, was caused by 75 years of Belgian ground sluice mining. Much of the remediation work that NRD had previously implemented had been destroyed by miners during the time that NRD could not access its Concessions and local Rwandan officials permitted miners not affiliated with NRD to operate.<sup>160</sup>

82. At the same time, and lasting through September of 2012, the Rwandan Military arrested 40 NRD staff within NRD's Concessions and forced NRD to pay 50,000 RwF to secure each person's release.<sup>161</sup> During one such arrest, the Military stole all the minerals stored in NRD's office.<sup>162</sup> No explanation was ever provided for these arrests.

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<sup>156</sup> See Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, **C-047**.

<sup>157</sup> See *id.*

<sup>158</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, p. 1, **C-049**.

<sup>159</sup> Letter from S. Kamanzi to Governor of Western Province dated 17 September 2012, **C-161**.

<sup>160</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, **C-050**.

<sup>161</sup> See Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

<sup>162</sup> See Letter from R. Marshall to District Police Commissioner of Ngororero District dated 3 September 2012, **C-052**.

83. During the indiscriminate shutdowns of NRD's Western Concessions, a representative of the Ministry of Natural Resources met with the Rwandan Military and local officials in the Rutsiro and Ngorerero districts regarding NRD on September 12, 2012.<sup>163</sup> Prior to this meeting, the military had arrested dozens of NRD staff without any basis.<sup>164</sup> During discovery, Claimants specifically requested meeting minutes from this September 12 meeting and the Tribunal granted this request.<sup>165</sup> However, Rwanda has failed to produce these meeting minutes. The Tribunal should therefore take an adverse inference against Rwanda that these minutes would reflect that the Military had no basis for arresting NRD staff and that the Ministry of Natural Resources was conspiring against NRD, and with local officials, to bar NRD from mining its Concessions so that illegal mining and smuggling could take place.

84. Similarly, Rwanda failed to produce documents or communications concerning the shutdown of Claimants mines in the Manihira and Rusebeya sectors in 2012. The Tribunal ordered Rwanda to produce these documents.<sup>166</sup> The Tribunal should therefore take an adverse inference against Rwanda that Rwanda ordered these shutdowns without any basis and the only purpose was to bar NRD from mining its Concessions so that illegal mining and smuggling could take place.

85. Although these actions were ostensibly taken at the hands of local officials, it is clear that the Respondent national government had a role in the shut downs because

Dr. Biryabarema of the GMD expressly permitted NRD to return and continue mining.<sup>167</sup>

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<sup>163</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

<sup>164</sup> *Id.*

<sup>165</sup> Claimants' Requests For Documents, Request No. 18, 11 October 2019; Procedural Order No. 4 on Document Production relating to Request No. 18, 20 December 2019.

<sup>166</sup> Claimants' Requests For Documents, Request No. 18, 11 October 2019; Procedural Order No. 4 on Document Production relating to Request No. 18, 20 December 2019.

<sup>167</sup> *See* Letter from M. Biryabarema to R. Marshall dated 10 February 2013, **C-056**.

This display of control by Respondent was a high pressure tactic to both entice further investment by Claimants to develop their Concessions in the hope of long term reward, while displaying that all could be lost if Claimants did not stay on the right side Rwandan officials.

### 3. Ownership Disputes and Ben Benzinge

86. In August 2012, a Rwandan national, Ben Benzinge, successfully convinced the RDB to change its corporate registration to show that he, and not Mr. Marshall, was the Managing Director.<sup>168</sup> During Benzinge's wrongful control of NRD's offices, with the RDB's backing, he hired guards to patrol the Concessions, fired employees, stole minerals, and changed the locks on NRD's buildings and facilities.<sup>169</sup>

87. The RDB never provided a coherent explanation for its decision to change the corporate registry upon the say-so of one Rwandan national.<sup>170</sup> After the relatively brief chaos caused by this unexplained incident, the RDB corrected its records and made clear that Spalena owns NRD. By letter of August 6, 2012, the RDB wrote that "we have received documentation (herewith attached) from the majority shareholder: Natural Resources Holding GMBH which is the holding company of Natural Resources Development. This documentation shows the legal representation and sole Managing Director of the holding company to be Mr. Roderick Marshall. In this capacity, he is mandated to secure the interests of the holding company in the Rwandan subsidiary company, Natural Resources Development."<sup>171</sup> The following day, the RDB wrote that "the holding company of NRD

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<sup>168</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, **C-048**; Marshall WS, ¶¶ 19, 22; Rwamasirabo WS, ¶ 17.

<sup>169</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, **C-048**; Marshall WS, ¶¶ 19, 22.

<sup>170</sup> Marshall WS, ¶ 20.

<sup>171</sup> Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**.

Ltd, NRD Holding GmbH, is wholly owned by Spalena Company LLC, an American Company, incorporated in Delaware that is in turn wholly owned by Mr. Roderick Marshall.”<sup>172</sup> These two letters confirm that the RDB recognized that Spalena owns NRD and that Mr. Benzinge did not have a claim to the company.<sup>173</sup>

88. Nevertheless, Rwanda again permitted Mr. Benzinge to wrest control of NRD’s operations from Claimants from June 2014 through August 2014. Minister Imena unilaterally, and in direct contradiction of RDB’s records and NRD’s internal documents, declared that Mr. Benzinge owned 100% of the shares of NRD despite the fact that the RDB’s records show that Mr. Benzinge is only a 0.2% shareholder.<sup>174</sup> Mr. Benzinge then took possession of NRD’s Concessions, forcing the NRD staff out. NRD and Claimants complained to Minister Imena.<sup>175</sup> Such complaints fell on deaf ears, because it was Minister Imena that had allowed Mr. Benzinge to take control of NRD’s offices and Concessions in the first instance. Mr. Benzinge, during his government-sponsored control of the Concessions, also hired a court bailiff, Jean Bosco Nsengiyuma (“Bosco”) to auction off much of NRD’s property purportedly to satisfy unspecified court judgments.<sup>176</sup>

89. On or about July 11, 2014, Bosco attempted, albeit unsuccessfully, to auction much of Claimants’ property and assets. A Court had previously found that Bosco had attempted to fraudulently sell NRD’s minerals at least once before.<sup>177</sup>

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<sup>172</sup> Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

<sup>173</sup> Rwamasirabo Second Supp. WS, ¶ 35.

<sup>174</sup> Full Registration for Domestic Company of NRD Rwanda, **C-001**; Letter from L. Kanyonga to R. Marshall dated 27 October 2014, **C-005**; Letter from L. Kanyonga to B. Benzinge dated 6 August 2012, **C-146**; Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

<sup>175</sup> Letter from R. Marshall to E. Imena, **C-106**.

<sup>176</sup> Letter from R. Marshall to J. Busingye dated 14 July 2014, p. 1-2, 11, **C-071**.

<sup>177</sup> Letter from R. Marshall to J. Busingye dated 14 July 2014, p. 11, **C-071**.

90. NRD reached out to Minister of Justice, Johnston Busingye, after notifying the CID of the illegal actions, in an effort to inform the Ministry of Justice of the illegal actions and to stop another planned auction scheduled for July 18, 2014.<sup>178</sup>
91. Minister Busingye wrote to Bosco on July 23, 2014, informing him that he must cease his actions and that he was suspended from working as a Bailiff.<sup>179</sup> Unfortunately, about one month later, Minister Busingye inexplicably rescinded his prior letter, stating that the Attorney General would not help NRD, thereby permitting Bosco to continue to seize assets to settle NRD's alleged debts.<sup>180</sup> So it came to be that, with Respondents' blessing, Mr. Benzinge, a Rwandan national, continued to receive assistance to the detriment of Claimants, foreign investors. Bosco's illegal actions are confirmed by the fact that he tried to solicit a bribe from NRD's CFO after wrongfully seizing a magnetic separator in April 2013. If NRD paid him 50% of the value, he would return it, finding this to be a "win win" scenario.<sup>181</sup>
92. As of August 4, 2014, NRD had not been able to operate its business for about two months. With respect to the Nemba Concession, specifically, Benzinge held a "public shareholder's meeting" and unilaterally announced that the US investors in NRD have no ownership rights in NRD.<sup>182</sup> Of course, this representation was flatly false and contrary to established law and the RDB's records at the time.<sup>183</sup>

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<sup>178</sup> Letter from R. Marshall to J. Busingye dated 14 July 2014, pp. 1-2, **C-071**.

<sup>179</sup> Letter from J. Busingye to J. Nsengiyumva dated 23 July 2014, **C-072**.

<sup>180</sup> Letter from J. Busingye to Z. Mruskovicova, et al. dated August 2014, **C-073**.

<sup>181</sup> *Id.*

<sup>182</sup> Letter from R. Marshall to J. Busingye dated 5 August 2014, **C-074**.

<sup>183</sup> Letter from R. Marshall to Minister of Internal Security of Rwanda dated 16 June 2014, C-065; Full Registration for Domestic Company of NRD Rwanda, **C-001**; Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**; Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**.



93. When NRD was finally granted access back to its Concessions on August 19, 2014, it hired professional court bailiff Jacquie Umurungi to make an official notary record on her findings at the Nemba concession. Ms. Umurungi conducted interviews with the NRD site manager, a subcontractor, a Rwanda Defense Force Officer, and a local official to better understand property that was stolen. They reported that the following property was stolen during the two or so months that Benzinge illegally controlled the site with Respondent's blessing: all security fencing and posts; roofs and windows on most buildings; some railway lines and ties; 12" steel water pipes that had been connected to the lake; other pipes; pieces of mine wagons; steel pipes for compressors; plastic hoses; steel equipment; and over 45 tons of tin as a result of illegal mining. Furthermore, the illegal miners severely damaged mining tunnels by removing support columns such that, tragically, one miner died during Benzinge's illegal control of Nemba.<sup>184</sup> During a second visit to the Nemba Concession, Ms. Umurungi noted that mining could not be fully resumed because of the damage done to NRD's equipment and tools.<sup>185</sup>

94. Rwanda permitted Mr. Benzinge's wrongful seizure of NRD despite the fact that the Full Registration Information for Domestic Company from the RDB identifies the owners of NRD as Natural Resources Development GmbH, which was purchased by Spalena with 99.8% of the shares, and Ben Benzinge with 0.2%, respectively, and Respondent's full knowledge that the law required it to treat that record as conclusive.<sup>186</sup> This was true in 2012 when the RDB confirmed the ownership structure and that Mr. Marshall was the

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<sup>184</sup> U. Jacquie, *Report on NRD at Nemba Mining Site*, 22 August 2014, **C-075**.

<sup>185</sup> U. Jacquie, *Report on NRD at Nemba Mining Site*, 5 September 2014, **C-162**.

<sup>186</sup> Full Registration for Domestic Company of NRD Rwanda, **C-001**; Letter from L. Kanyonga to R. Marshall dated 27 October 2014, **C-005**.

Managing Director<sup>187</sup> and is further confirmed by Rwanda's own internal documents which state that "Certificate of registration dated 10/07/2016 [sic] and as amended on 04/06/2014 was submitted and **it is clear** that NRD owners are, 1. Ben Benzinge 2. Natural Resources Development GmbH."<sup>188</sup> As was clear to the RDB in 2012, Spalena owns Natural Resources Development GmbH.<sup>189</sup>

#### 4. Rwanda's Treatment of NRD After Implementing the 2014 Law

95. Rwanda passed a new mining law that came into effect on March 6, 2014.<sup>190</sup> By its express terms the law did not revoke any licenses that remained in existence at the time of its passage.<sup>191</sup> One of the goals of the 2014 law was to break up the Concessions to reduce them in size.<sup>192</sup> Claimants' Concessions were the biggest in Rwanda and Rwanda was concerned about Claimants controlling a "sizeable part of our former concessions."<sup>193</sup>

96. At the time the 2014 Law was passed, and at all material times thereafter, NRD's Licenses continued to be valid. When Rwanda analyzed NRD's "re-application" after the 2014 Law (see below), the assessment team wrote:

For purposes of complying with article 52 of the law n° 13/ 2014 of 20/ 05 / 2014 on mining and quarry operations which states that '**no mineral or quarry license granted prior to this law shall be extended or renewed . However, where the mineral or quarry license granted prior to this law provided for a right to apply for a renewal or extension of the license, the holder thereof may be**

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<sup>187</sup> Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**.

<sup>188</sup> Memorandum from License Evaluation Team to Minister of State in Charge of Mining, *Evaluation of NRD Re-application for the 5 Concessions (NEMBA, RUTSIRO, GICIYE, MARA and SEBEYA)*, 29 September 2014, p. 3, **R-020** (emphasis added).

<sup>189</sup> Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

<sup>190</sup> *Rwanda Presidential Order No. 63/02, Repealing Presidential Orders Establishing Mining Concession and Allocating Mining Exploitation Licenses*, 12 February 2014, Official Gazette No. Special of 6 March 2014, Art. 5, **CL-001**.

<sup>191</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 52, **CL-002**; see Rwamasirabo WS, ¶ 4, 8; Buyskes WS, ¶ 9.

<sup>192</sup> E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971*, 23 March 2013, **C-143**.

<sup>193</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

**granted, subject to this law, a similar type of license on a priority basis if he/ she meets the requirements'** NRD Rwanda LTD' was allowed to apply for the renewal of the former license, after the company submitted documents clearly indicating its performance track record and its financial viability.

Considering the contract for acquiring mining concessions between the Government of Rwanda represented by the then Minister of State in charge of Water and Mines and Natural Resources Development Rwanda Ltd, represented by the Company's Chairman, Mr. Joachim CHRISTOPH ZARNACK on 24th May 2006 in Kigali, it is in this regard that a technical team was set up and met on 20/01/2015 to assess the documents submitted to respond to the above requirements.<sup>194</sup>

97. The quoted text makes clear that Respondent's assessment team acknowledged that NRD's Contract and Licenses pre-dating the new law remained in effect and the Application was to be assessed under the still applicable Contract and Licenses. The Respondent's current position that Claimant's Contract and Licenses were no longer in effect and NRD had to apply for a license anew under the 2014 Law is entirely inconsistent with its contemporaneous position and representations to Claimants.<sup>195</sup>

98. It was in this context that Minister Imena requested that NRD "re-apply" for its Concessions on April 2, 2014.<sup>196</sup> He further stated that negotiations "shall start in April 2014."<sup>197</sup> Such negotiations did not start in April and in fact never took place. Minister Imena sent a second request on August 18, 2014 that NRD "re-apply" for its Licenses.<sup>198</sup> This request came one day *before* NRD was permitted to regain possession of its

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<sup>194</sup> Dr. M. Biryabarema, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd*, February 2015, **R-024**; see also Technical Team, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd*, 20 January 2015, **R-023**.

<sup>195</sup> Rwamasirabo Second Supp. WS, ¶ 28-30.

<sup>196</sup> Letter from E. Imena to R. Marshall dated 2 April 2014, **C-063**

<sup>197</sup> *Id.*

<sup>198</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 7, **CL-002**; Letter from E. Imena to NRD dated 18 August 2014, **C-064**. The legality of this request is beyond the scope of this Counter-Memorial. Nevertheless, Claimants maintain, as set forth in their Memorial, that this request violated Rwandan law.

Concessions after Minister Imena had permitted Mr. Benzinge to take control of them.<sup>199</sup>

Although NRD had regained control of the Concessions, NRD did not also regain access to their main office in Kigali, where much of the information purported to be sought by Respondent was kept.<sup>200</sup> Claimants were not allowed back into their headquarters, until more than one year later, on September 21, 2015, when Ms. Mruskovicova received a text message at 6 a.m. informing her that the police demanded that she be at the NRD headquarters at 9 a.m.<sup>201</sup> When Ms. Mruskovicova got to the office, she found that the office had been almost entirely cleared out and all computers had been wiped clean.<sup>202</sup>

99. Stated differently, Minister Imena knew he was making a request that Claimants file a new Application at a time that Respondent itself was complicit in rendering Claimants unable to do so effectively. It is worth noting Respondent's similar contemporaneous belief and expectation that Claimants' Contract and License rights continued in force despite a request for a re-application is evidenced by the fact that Respondent helped restore Claimants' control and management of the Concessions at this time. If, as it now sees fit to argue, Respondent actually considered Claimants' Contract and License rights to have been expired before August 2014, there is no explanation for restoring Claimants control and management of the Concessions at that time. In fact, and contrary to Respondent's current position, Claimants and Respondent equally understood and acted upon the expectation that the Contract and License rights and obligations were continuing. That is the only basis for Claimants to have operated the Concessions at that time.

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<sup>199</sup> Marshall WS, ¶ 51.

<sup>200</sup> Marshall WS, ¶ 52.

<sup>201</sup> Text messages from E. Rukangira to Z. Mruskovicova dated 21 September 2015, C-163.

<sup>202</sup> Marshall WS ¶ 43, 67; Mruskovicova WS ¶ 24.

100. While Claimants and NRD did not believe that they needed to “re-apply” for licenses because they already had applied for the long term licenses, were grandfathered in from any sort of “re-application” process,<sup>203</sup> and that such licenses were guaranteed, they made the reasonable business decision that it was best to go along with the request as the best way to avoid Minister Imena perceiving a personal challenge and that it would be the fastest and easiest way to obtain their long term licenses. This belief was strengthened following upon a conversation with Minister Vincent Biruta, the newly appointed Minister of Natural Resources, who assured NRD on September 16, 2014 that “as long as I am Minister, you will not lose your Concessions.”<sup>204</sup> Accordingly, NRD provided the information Minister Imena sought in the “re-application” request on September 18, 2014.<sup>205</sup> With Minister Biruta’s assurances, Claimants and NRD expected the “re-application” process was a mere formality and that they were very close to obtaining the long term licenses.<sup>206</sup>

101. Contrary to Claimants’ expectations, Minister Imena notified NRD that their “re-application” had been rejected.<sup>207</sup> Claimants timely appealed this decision on behalf of NRD<sup>208</sup> and was permitted to submit additional documents, which it did on November 24, 2014.<sup>209</sup> Claimants then supplemented their “re-application” a third time on January

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<sup>203</sup> Rwamasirabo WS, ¶¶ 4, 8; Buyskes WS, ¶ 9.

<sup>204</sup> Marshall WS, ¶ 53.

<sup>205</sup> Letter from R. Marshall to E. Imena dated 18 August 2014, **C-084** (the letter incorrectly states that it was sent on August 18, 2014. It was actually sent on September 18, 2014, as suggested by the date the letter was received by the RNRA and context from the letter); NRD Rwanda, *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014*, **C-085**.

<sup>206</sup> Marshall WS, ¶ 53.

<sup>207</sup> Letter from E. Imena to NRD dated 28 October 2014, **C-119**.

<sup>208</sup> Letter from R. Marshall to E. Imena dated 1 November 2014, **C-086**.

<sup>209</sup> Letter from E. Imena to R. Marshall dated 12 November 2014, **C-087**; Letter from R. Marshall to E. Imena dated 25 November 2014, **C-088**.

16, 2015 at Minister Imena's request.<sup>210</sup> The following month, Minister Biruta confirmed that Respondent had received the submissions and was evaluating them.<sup>211</sup> Claimants specifically requested that Rwanda produce all communications between Minister Evode and Minister Biruta in 2014 and 2015 concerning Claimants' Concessions and the "re-application." The Tribunal ordered Rwanda to produce responsive documents.<sup>212</sup>

Rwanda has not produced any. It is not believe that there would be no such communications based upon the communications, however limited, received from Minister Imena and Minister Birtua, separately. The Tribunal should take an adverse inference against Rwanda for its failure to produce responsive document and find that the withheld documents would show that the 2014 "re-application" was a sham and unilaterally imposed on Claimants by Rwanda in an effort to force them out of the country.

102. Claimants expected that there would be further negotiations of a long term license based upon Respondent's prior communications and established practices with Concession owners. But, Respondent would not engage in further negotiations and Respondent notified Claimants on May 19, 2015 that it had rejected NRD's "re-application."<sup>213</sup> Rwanda's failure to produce any internal documents or communications concerning the May 19, 2015 letter from Minister Evode, after the Tribunal required Rwanda to produce such documents,<sup>214</sup> evidences the fact that the entire "re-application"

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<sup>210</sup> Letter from E. Imena to R. Marshall dated 17 December 2014, **C-095**; Letter from R. Marshall to E. Imena dated 16 January 2015, **C-096**.

<sup>211</sup> Email from V. Biruta to R. Marshall dated 1 February 2015, **C-127**; Marshall WS, ¶ 56.

<sup>212</sup> Claimants' Requests For Documents, Request No. 21, 11 October 2019; Procedural Order No. 4 on Document Production relating to Request No. 21, 20 December 2019.

<sup>213</sup> Letter from E. Imena to R. Marshall dated 19 May 2015, **C-038**.

<sup>214</sup> Claimants' Requests For Documents, Request No. 23, 11 October 2019; Procedural Order No. 4 on Document Production relating to Request No. 23, 20 December 2019.

process and Minister Imena's made the decision to deny the long term licenses to Claimants unilaterally, and without input from other government officials. The Tribunal should take such an adverse inference against Rwanda.

103. Claimants did not expect this decision was final, based on Respondent's lengthy history of increasing its pressure tactics on Claimants, the reversing position and continuing discussions of a long term license.

104. Consistent with Claimants' expectation that Respondent's position was not final, Minister Imena represented to third parties in June 2015 that NRD continued to own and operate mines and that NRD would be worth reaching out to for discussions about mining in Rwanda.<sup>215</sup>

105. Importantly, Respondent did not follow up on Minister Imena's May 19, 2015 letter by pursuing a handover process that applies to terminations of Concessions. Under Rwandan law, Respondent was required to set up a detailed schedule of events to effectuate a hand-over of the Concessions bay the Claimants, and Respondent was required to hire a valuation expert to determine a fair compensation price to be paid to the owners, taking into account the value of, among other things: (1) all assets remaining with the concession(s); (2) potential for future profitability; and (3) infrastructure built during the period of operation, including roads, water systems, dams, pumping systems, rail investment and other investments. Standard handover procedures also would have seen Respondent set up meetings between Claimants and various Ministries in order to settle any outstanding debts, like tax obligations, and ensure that the Concessions were protected from theft and illegal mining.<sup>216</sup> At the end of the process, there would be a

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<sup>215</sup> Email from R. van Wachem to R. Marshall dated 16 June 2015, C-120.

<sup>216</sup> Rwamasirabo Supplemental WS, ¶ 5-8.

transfer of keys, or similar items, from the investor to the Government and the investor and Government would sign a Handover Protocol, formalizing and finalizing the handover.<sup>217</sup>

106. Respondent pursued none of these procedures. Not one meeting took place despite Claimants' repeated attempts to talk with anyone in the Government concerning Minister Imena's letter.<sup>218</sup>

107. This was strange and NRD expected there to be a formal handover like there was for Gatumba. Gatumba voluntarily withdrew from Rwanda in 2014 and had a formal handover of its concessions. In advance of Gatumba's handover, Gatumba and Respondent met regularly to settle all outstanding debts and liabilities and ensure a smooth transition of possession. Gatumba provided a list of assets to the Government and the Government visited the Concessions to take inventory. Following a valuation, Gatumba settled all outstanding issues regarding compensation for their assets and investment. The GMD also held a public auction for the assets that Gatumba turned over during the handover process. At the end of the process, there was a formal handover during which Gatumba provided the Government with keys to their offices and they signed a Handover Protocol, formalizing and finalizing the handover.<sup>219</sup>

108. Instead, Claimants remained in possession of the NRD Concessions for nearly a year following Minister Imena's letter and NRD staff continued to operate the Concessions in order to protect the Concessions from illegal mining and theft, and preserve the remaining value of Claimants' investment.<sup>220</sup>

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<sup>217</sup> Rwamasirabo Supplemental WS, ¶ 10.

<sup>218</sup> Mruskovicova Supplemental WS, ¶ 4; Marshall Supplemental WS, ¶ 31.

<sup>219</sup> Mruskovicova Supplemental WS, ¶ 7; Marshall Supplemental WS, ¶ 33.

<sup>220</sup> Mruskovicova Supplemental WS, ¶ 11.



109. The Respondent has never offered an explanation for Claimants remaining in control and possession of the Concessions for that period if not pursuant to a continuation of rights and obligations under the Contract and Licenses. Notably, it is wholly inconsistent with Respondent's position taken in this proceeding that it believed the Claimants rights under the Contract and Licenses had expired.
110. In fact, the only explanation consistent with the parties' actions is Minister Imena's May 19, 2015 letter was just another tactic designed to convince BVG and Spalena to abandon their investment in Rwanda.<sup>221</sup> If Claimants walked away Respondent would owe no compensation. If Respondent truly believed Claimants had no lawful basis to maintain the Concessions, there is no explanation for its failure to take any action in connection with the Concessions for over a year.
111. Based on negotiations with Respondent, as of August 12, 2015 Claimants expected that Respondent would either follow through on issuing long term licenses for NRD's operating of the Concessions, or would pay compensation for the return of the Concessions.<sup>222</sup> If not Claimants expected Rwanda would proceed with an amicable settlement in lieu of a formal arbitration under the BIT to establish compensation.
112. Through February 2016, Claimants continued to expect that they would remain in control of the Concessions because NRD's staff continued to operate the Concessions and Respondent had still taken no action to effect an actual handover.<sup>223</sup>
113. It was not until March 2016, when Respondent publically tendered NRD's Concessions, that Claimants knew and understood that Respondent expropriated their

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<sup>221</sup> Marshall Supplemental WS, ¶ 35.

<sup>222</sup> Email from R. Marshall to L. Johnson dated 12 August 2015, C-121.

<sup>223</sup> Barthelemy WS ¶ 18; Marshall WS, ¶ 71.

investment and intended to keep the full value for itself without paying Claimants any compensation for their loss.<sup>224</sup>

**a. Rwanda's Treatment of Tinco Under the 2014 Law**

114. Tinco is a foreign investor in Rwanda with two investment vehicles, Rutongo Mines Ltd. (“RML”) and Eurotrade International Ltd. (“ETI”). Both RML and ETI obtained initial four-year contracts with Rwanda around the same time that NRD received its four-year contract. Tinco was of the belief, like Claimants, that upon the submission of the necessary documents at the end of the four-year contract, it would receive the long term licenses.<sup>225</sup>
115. RML and ETI each eventually received the long term license on September 3, 2014.<sup>226</sup> It took Tinco nearly three years of negotiations to obtain the long term license for RML and ETI. Tinco had multiple meetings with Respondent both in Kigali and at the mines.<sup>227</sup> Every three or four months, Tinco would meet with the RDB or Minister Imena and was repeatedly told that the licenses would issue and to be patient.<sup>228</sup>
116. At the time the new law came into effect, Tinco did not yet have long term licenses, Tinco believed it did not have valid short term licenses,<sup>229</sup> but Rwanda treated them as though their short term licenses remained valid.<sup>230</sup> Rwanda did not ask Tinco to

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<sup>224</sup> F. Mukarubibi, *Call for Technical and Financial Proposals for the Development of Mining Perimeters Within the Former Sebeya, Giciye, Rutsiro, Mara and Nemba Mining Concessions*, The EastAfrican, 5 March 2016, **C-102**.

<sup>225</sup> Buyskes WS, ¶ 6; Buyskes Supplemental WS, ¶ 4-5.

<sup>226</sup> Agreement for Large Scale Mining License dated 3 September 2014, **C-025**; Letter from E. Imena to Managing Director of RML dated 10 December 2014, **C-115**; Letter from E. Imena to Managing Director of Eurotrade International s.a.r.l. dated 10 December 2014, **C-116**; Letter from M. Kahanovitz to Rwanda Development Board dated 29 October 2014; **C-117**; Letter from M. Kahanovitz to S. Kamanzi dated 7 June 2011, **C-118**.

<sup>227</sup> Buyskes Supplemental WS ¶ 7.

<sup>228</sup> Buyskes Supplemental WS ¶ 8.

<sup>229</sup> Buyskes WS, ¶ 10; Buyskes Supplemental WS ¶ 6.

<sup>230</sup> Respondent's Counter-Memorial, ¶ 473; Imena WS, ¶ 57.

“re-apply” for its licenses.<sup>231</sup> For all intents and purposes, the new 2014 mining law did not apply to them.

**5. Rwanda’s bases for denying tags to NRD are unfounded**

117. Four months before Minister Imena asked NRD to “re-apply,” NRD could not tag all of the minerals it was producing because the government would not assign sufficient tag manager to the Concessions. By May 2014, Minister Imena had decided that NRD was barred from receiving mineral tags.<sup>232</sup> Without tags, NRD could not sell its minerals. If it could not sell minerals, it had no means to generate revenue. Minister Imena manipulated the mineral tagging process—the same process at the center of the mineral smuggling program—in an effort to pressure Claimants and push them to quietly go along with the scheme, or give up.

118. Rwanda and Mr. Imena claims that they had two bases for denying NRD tags: 1) the ownership of NRD was in dispute and 2) NRD did not have a valid license.<sup>233</sup> He further stated that he “did so primarily because [he] wanted to put pressure on NRD to regularize its operations by applying for and obtaining licenses for its Concessions.”<sup>234</sup> Neither purported explanation constitutes a good faith justification for Minister Imena’s unilateral decision and the quoted representations strongly suggest he has an ulterior motive for denying NRD tags.

119. There simply was no legitimate dispute over ownership of NRD. Instead, the purported “dispute” was merely an artifice contrived by Mr. Benzinge and enabled by Respondent to intimidate the Claimants and get them to walk away from their

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<sup>231</sup> Buyskes Supplemental WS, ¶ 11.

<sup>232</sup> Marshall WS, ¶ 80; Mbaya WS, ¶ 11.

<sup>233</sup> Respondent’s Counter-Memorial, ¶ 204-206; Imena WS, ¶ 49-56.

<sup>234</sup> Imena WS, ¶ 49.

investments. In 2012, after Mr. Benzinge wrongfully took control of the Concessions, the RDB acknowledged that Mr. Marshall was the Managing Director and that Spalena purchased Natural Resources Holding GmbH.<sup>235</sup>

120. The ownership structure of NRD was confirmed again during the Rwanda's evaluation of the "re-application."<sup>236</sup> As the ownership was "clear" to Respondent's evaluation team, it must have been equally clear to Minister Imena who was ostensibly in charge of the evaluation team. Respondent's position, and Minister Imena's claim that he questioned ownership, is further belied by the fact that Minister Imena himself sent a letter to Mr. Marshall as Chairman of NRD on August 18, 2014 and requested that NRD "re-apply" for the Concessions.<sup>237</sup> And on the next day, the Concession were returned to Claimants. Despite current claims of uncertainty, Minister Imena was quite capable of identifying the person responsible for managing NRD at the time. This demonstrates that Minister Imena's claim that there was an ownership dispute was a pretext for the denial of tags to NRD, and the economic pressure that put on Claimants to get out Rwanda.

121. Moreover, even if there was an ownership dispute – and there was not – it is worth noting that Rwanda has failed to adequately explain why the entity, NRD, could not receive tags. Neither Mr. Marshall nor Mr. Benzinge could receive tags in their own names; all tags had to be issued in the name of NRD. Minerals were being mined regardless of a dispute among owners and commercial sales of these minerals – which

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<sup>235</sup> Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**.

<sup>236</sup> Memorandum from License Evaluation Team to Minister of State in Charge of Mining, *Evaluation of NRD Re-application for the 5 Concessions (NEMBA, RUTSIRO, GICIYE, MARA and SEBEYA)*, 29 September 2014, p. 3, **R-020** (emphasis added).

<sup>237</sup> Letter from E. Imena to R. Marshall dated 2 April 2014, **C-063**.

relied on tags being applied – were necessary to keep the operations going. Any issues over ownership is entirely separate and divorced from the Government’s tagging of NRD’s minerals, again evidencing the pretextual nature of Respondent’s position.

122. Rwanda’s and Minister Imena’s second stated basis, the lack of a valid license, for denying tags is equally without merit because, as explained above the evaluation team acknowledged NRD’s Contract and Licenses continued in effect at the time that they reviewed the “re-application.”

123. In addition, NRD had been receiving tags through 2014 when Minister Imena unilaterally decided to prohibit the Government agents from putting tags on NRD minerals.<sup>238</sup> His stated basis that he “did so primarily because [he] wanted to put pressure on NRD to regularize its operations by applying for and obtaining licenses for its concessions”<sup>239</sup> evidences his ulterior motives. NRD had timely applied for the long term licenses in 2010 and they had been waiting patiently for negotiations over the long term licenses to proceed as expected.

124. Although not expressly stated as a basis for denying tags to NRD, there are references to an incident report filed by ITRI against NRD.<sup>240</sup> However, ITRI issued this incident report *after* Minister Imena’s May 19, 2015 letter rejecting Claimant’s “re-application.”<sup>241</sup> By Rwanda’s own admission, ITRI opened an incident report due to illegal mining “after NRD left the concessions.”<sup>242</sup> Such actions obviously cannot be attributed to Claimants. The failure to identify any other incident report against NRD is

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<sup>238</sup> See Letter from R. Marshall to D. Kayigire dated 24 June 2014, C-109; iTSCi Sheet, RW 1021115, C-167; Letter from M. Biryabarema to J. Bosco Nsengiyumva dated 30 January 2014; C-187.

<sup>239</sup> Imena WS, ¶ 49.

<sup>240</sup> Niyonsaba WS, ¶ 17; Respondent’s Counter-Memorial, ¶ 306.

<sup>241</sup> Niyonsaba WS, ¶ 17; Respondent’s Counter-Memorial, ¶ 306.

<sup>242</sup> *Id.*

evidence that there were none and that NRD always complied with the mineral tagging scheme implemented by ITRI/iTSCi. Therefore, there is no basis to support Rwanda's position that NRD's alleged violation of ITRI was a basis not to grant it tags or a long term license.

125. Furthermore, Tinco, which did not yet have a long term license and did not believe that it had a valid short term license continued to receive tags during the negotiations for its long term license. There was never time when Tinco did not receive tags.<sup>243</sup>

***H. The Underlying Basis for Rwanda's Mistreatment of NRD was Rwanda's Participation in Illegal Smuggling from the Democratic Republic of Congo***

126. As set forth in Claimants' Memorial, a significant percentage of the minerals exported from Rwanda does not originate in Rwanda, but instead is mined in and covertly imported from the Democratic Republic of Congo ("DRC").<sup>244</sup> NRD's Western Concessions were located very near the DRC, making them an ideal staging ground for smuggling minerals.<sup>245</sup> NRD refused to participate in the rampant illegal smuggling which resulted in Rwanda forcing NRD from the country.<sup>246</sup>

127. Most of the minerals smuggled from the DRC consists of tantalum, also referred to as coltan. Coltan from Rwanda is mostly black and only slightly radioactive. Coltan from the DRC is a white ash color and is radioactive. Miners typically mix white and black coltan in a 20/80 split in an effort to hide the coloration and radioactivity.<sup>247</sup> Nevertheless, these minerals get tagged by GMD, largely without issue.<sup>248</sup>

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<sup>243</sup> Buyskes WS, ¶ 12-13.

<sup>244</sup> Memorial, § III.B.

<sup>245</sup> Mruskovicova WS ¶ 29; Fiala WS, ¶ 10.

<sup>246</sup> Marshall Supplemental WS, ¶ 19.

<sup>247</sup> Barthelemy WS, ¶ 11.

<sup>248</sup> Barthelemy WS, ¶ 13; Buyskes WS, ¶ 17.

128. It is believed that upwards of 50% of all minerals exported from Rwanda originate in the DRC and that upwards of 90% of the coltan exported from Rwanda originates in the DRC.<sup>249</sup>
129. Traders have an incentive to smuggle minerals from the DRC to Rwanda. Miners in DRC are paid low prices and often only one buyer is available. The DRC imposes a 10% royalty on mineral exports but Rwanda imposes only a 4% royalty, creating an economic incentive to smuggle minerals into Rwanda, obtain tags, and export them at the lower royalty rate.<sup>250</sup> The DRC miners are paid less and Respondent earns reserve on the sale of minerals to which it has no legitimate claim. Additionally, by falsely tagging minerals imported from the DRC as mined in Rwanda allows Rwanda to improve its economic statistics with international institutions and thus attract foreign grants and investors.<sup>251</sup>
130. Rwanda only publicly discloses the amount of minerals exported, but does not release reports on production. In this way, Rwanda can hide behind the fact minerals not produced in Rwanda (i.e. smuggled from the DRC) are exported from Rwanda in order to boost its statistics. The production levels from historically large mines are relatively low which suggests that minerals are being smuggled into the country.<sup>252</sup>
131. The chart below is a summary of an excel spreadsheet created by ITRI that identifies that amount of tantalum (coltan), tungsten (wolfram) and tin (cassiterite) reportedly produced, tagged and exported from the country in 2012 and 2013.<sup>253</sup>

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<sup>249</sup> Fiala WS, ¶ 9; Mruskovicova WS, ¶ 29.

<sup>250</sup> Fiala WS, ¶ 10.

<sup>251</sup> Barthelemy WS, ¶ 14.

<sup>252</sup> Mbaya WS, ¶ 19; Buyskes WS, ¶ 18; Mruskovicova ¶ 28.

<sup>253</sup> Marshall Second Supp. WS, ¶ 4.

<b>Company</b>	Tantalum Ore / Kgs.	Tungsten Ore / Kgs.	Tin Ore / Kgs.
<b>TSL</b> 2012- 2013-	<b>10,450.0</b> <b>154,775.5</b>	<b>70,759.0</b> <b>124,237.5</b>	<b>49,750.0</b> <b>100,921.7</b>
<b>FECOMIRWA</b> 2012- 2013-	<b>96,519.8</b> <b>64,867.1</b>		<b>198,961.5</b> <b>95,507.8</b>
<b>CMS</b> 2012- 2013-	<b>25,290</b> <b>8,770</b>	<b>118,950</b> <b>204,980.7</b>	<b>194,437</b> <b>171,730</b>
<b>Yujin Shoji</b> 2012- 2013-	<b>34,558.5</b> --		
<b>Multiserve</b> 2012- 2013-		<b>25,528</b> --	
<b>ETS Kalinda</b> 2012- 2013-		<b>84,000</b> --	<b>183,575.5</b> --
<b>Rutongo Mining Co (Tinco)</b> 2012- 2013-			<b>1,002,798.0</b> <b>735,055.1</b>
<b>Phoenix</b> 2012- 2013-	<b>27,101.9</b> <b>69,138.0</b>	<b>138,637.6</b> <b>166,660.2</b>	<b>1,146,267.0</b> <b>648,586.5</b>
<b>ETS MUNSAD</b> 2012- 2013-	<b>93,402.5</b> <b>144,004.5</b>	<b>187,858</b> --	<b>151,388</b> <b>50,113</b>
<b>NBM</b> 2012- 2013-		<b>173,483.0</b> <b>158,214.5</b>	
<b>MSA Ltd.</b> 2012- 2013-	<b>341,224.7</b> <b>940,253.5</b>	<b>366,177.5</b> <b>962,027.5</b>	<b>966,786.2</b> <b>1,125,643.0</b>
<b>SEAVMC</b> 2012- 2013-	<b>1,186</b> <b>2,080</b>	-- <b>2,422.7</b>	<b>181,699.0</b> <b>81,966.3</b>
<b>WMP</b> 2012- 2013-		<b>109,638.0</b> <b>36,171.3</b>	<b>84,133.9</b> <b>153,664.5</b>



<b>Company</b>	Tantalum Ore / Kgs.	Tungsten Ore / Kgs.	Tin Ore / Kgs.
<b>TransAfrica Sup Metal</b> 2012- 2013-	-- <b>46,279.5</b>		-- <b>312,196.7</b>
<b>Rwanda Rudniki</b> 2012- 2013-	<b>231,663.6</b> <b>157,064.9</b>		<b>119,983.7</b> <b>66,960.2</b>
<b>Gatumba Mining Co</b> 2012- 2013-	<b>1,483</b> --	<b>723</b> --	<b>30,425.1</b> <b>47,000.0</b>
<b>Corevale Rwanda</b> 2012- 2013-	-- <b>7786.8</b>		
<b>EUROTRADE (Tinco)</b> 2012- 2013-		<b>84,176.0</b> <b>51,843.2</b>	
<b>Rwanda Mineral Resources</b> 2012-			-- <b>701,286.4</b>
<b>TAWOTIN</b> 2012- 2013-	-- <b>430,415.8</b>		-- <b>42,488.6</b>
<b>GIZMAN Trading</b> 2012- 2013-	<b>3,060.5</b> <b>16,544.7</b>		
<b>African Panther Resources</b> 2012-			-- <b>49,863.4</b>
<b>Tantalium Mineral Trading</b> 2012-	-- <b>74,254.5</b>	-- <b>120,735</b>	-- <b>49,906</b>
<b>AD Trade International</b> 2012- 2013-	-- <b>100,899.3</b>		
<b>ETI Nyakabingo (Tinco)</b> 2012- 2013-		-- <b>46,634.8</b>	
<b>Total of ITRI certified Rwandan mineral exports for 2012</b>	<b>865,940.5 kg.</b>	<b>1,359,930.1 kg.</b>	<b>4,310,204.9 kg.</b>

<b>Total of ITRI certified Rwandan mineral exports for 2013</b>	<b>2,217,134.1 kg.</b>	<b>1,873,927.4 kg.</b>	<b>4,432,889.2 Kg.</b>
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132. While ITRI reported increases in the production of all minerals from 2012 to 2013, the largest increase came from the reported increase in production of tantalum. The approximate market value of the minerals is set forth in the chart below using the average mineral prices from the USGS Minerals Yearbook and their average purity.<sup>255</sup>

	Tantalum Ore / Kgs.	Tungsten Ore / Kgs.	Tin Ore / Kgs.
<b>2012 Calculation of weight of ore exported, times the avg ore price, times the average ore purity</b>	865,940.5 kg. (\$108.47/lb. or \$239.13/kg.) = \$207,072,352 x 25% purity = <b>\$51,768,088</b>	1,359,930.1 kg. x \$50.18 per kg =\$68,241,292.40 x 55% purity = <b>\$37,532,711</b>	4,310.2049 MT x \$21,098.2421 per ton = \$90,937,746.50 x 65% purity = <b>\$59,109,535</b>
<b>2013 Calculation of weight of ore exported, times the avg ore price, times the average ore purity</b>	2,217,134.1 kg. (\$117.93/lb. or \$259.99/kg.) = \$576,432,695 x 25% purity = <b>\$144,108,174</b>	1,873,927.4 kg. x \$47.22 =\$88,486,851.80 x 55% purity = <b>\$48,667,768</b>	4,432.8892 MT x \$22,310.7848 per ton = \$98,901,236.80 x 65% purity = <b>\$64,285,804</b>

<b>Rwanda Minerals Export Value 2012 (est. using USGS avg. prices)</b>	<b>\$51,768,088</b>	<b>\$37,532,711</b>	<b>\$59,109,535</b>
<b>Rwanda Minerals Export Value 2013 (est. using USGS avg. prices)</b>	<b>\$144,108,174</b>	<b>\$48,667,768</b>	<b>\$64,285,804</b>

<sup>255</sup> Marshall Second Supp. WS, ¶ 5.

133. In total, based upon the above calculations, ITRI reported Rwanda mineral exports for 2012 total \$148,410,334 and for 2013 total \$257,061,746. These estimates largely track GMD's published disclosure of the total value of mineral exports: \$136.1 million in 2012 and \$226.0 million in 2013.<sup>256</sup> The estimates show that the jump in export values from 2012 to 2013 stem largely from a 250% increase in the reported production and export of tantalum. Rwanda has not, and cannot explain how it increased the exports of mined tantalum by such a great amount when Rwanda tantalum deposits are small and there has only been minimal investment in Rwanda's mining industry. In addition, Claimants could not mine their Concessions and offer their minerals for commercial sale for much of this time period, and Claimants' Concessions are known to have the largest known reserves of tantalum in Rwanda.<sup>257</sup>

134. Rwanda's reported mineral exports have increased dramatically since 2013. However, the evidence does not support a corresponding increase in production from Rwanda.<sup>258</sup> For example, in the first six months of 2018, mines in Rwanda produced 1,525,935 kilograms of cassiterite. Extrapolating for the whole year, Rwanda would have produced 3,051,870 kilograms of cassiterite in 2018, which is approximately 1,300,000 kilograms *less than* the amount of cassiterite reported in either 2012 or 2013. Nevertheless, Rwanda's mineral exports, which are only reported in dollars, not weight, or type, have only increased, seemingly exponentially with claimed mineral exports totaling \$373 million in 2017 and \$638 million in 2018.<sup>259</sup> The only way this could be

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<sup>256</sup> R. Cook & P. Mitchell Analysis Report, *Evaluation of Mining Revenue Streams and Due Diligence Implementation Costs along mineral Supply Chains in Rwanda*, prepared for Rwanda Natural Resources Authority & Federal Institute for Geosciences and Natural Resources, p. 6-7, **R-004**.

<sup>257</sup> Marshall Second Supp. WS, ¶ 6-8.

<sup>258</sup> *Id.*, at ¶ 12; *see* Mbaya WS, ¶ 19; Buyskes WS, ¶ 18; Mruskovicova ¶ 28.

<sup>259</sup> Marshall Second Supp. WS, ¶ 11-12.

possible is if Rwanda is smuggling minerals from the DRC, tagging them as Rwandan, and exporting them to the world as Rwandan.<sup>260</sup>

135. One concrete example of Rwanda's inflated export figures comes from Rwanda Rudniki LTD ("Rudniki"). Rudniki was owned and operated by Jerry Fiala.<sup>261</sup> Rudniki produced 8,217.3 kilograms of tantalum in 2012 and 7,243.9 kilograms of tantalum in 2013.<sup>262</sup> Nevertheless, iTSCi/GMD certified that Rudniki produced 231,663.6 kilograms of tantalum in 2012 and 157,064.9 kilograms of tantalum in 2013.<sup>263</sup> Similarly, Rudniki produced 12,044.1 kilograms of tin in 2012 and 4,461.9 kilograms of tin in 2013 but iTSCi/GMD reported 119,983.7 kilograms of tin in 2012 and 66,960.2 kilograms of tin in 2013.<sup>264</sup> These glaring discrepancies indicate that minerals are being smuggled from the DRC, that Rwanda is providing tags that identify Rudniki as the source, and exporting them as originating in Rwanda.<sup>265</sup>

136. In March 2015, when Claimants were wrongfully forced out of and not mining their Concessions (see above) Ildephonse Niyonsaba of PACT/iTSCi asked how NRD was tagging minerals at its Concessions. Mr. Marshall, on behalf of NRD, could not provide an answer except that it was not NRD and NRD had repeatedly complained to iTSCi of the situation and because, as he pointed out, the Government taggers were prohibited from tagging NRD minerals as a result of Minister Imena's unilateral decision to deny tags to NRD. Claimants could not confirm who was tagging at the Nemba Concession and other concessions.<sup>266</sup> As evidenced by this email exchange, and with the

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<sup>260</sup> *Id.*, at ¶ 12.

<sup>261</sup> Fiala Supp. WS, ¶ 1.

<sup>262</sup> *Id.*, at ¶ 4.

<sup>263</sup> *Id.*, at ¶ 5.

<sup>264</sup> *Id.*, at ¶ 4, 5.

<sup>265</sup> *Id.*, at ¶ 6-7.

<sup>266</sup> Email from I. Niyonsaba to R. Marshall, C-107; Marshall Second Supp. WS, ¶ 13.

Claimants pushed out of the way so they could not observe, or prevent, what was happening, NRD believes that minerals were being tagged as originating at NRD's Concessions even though tags were denied to NRD and NRD was not conducting mining operations. In order for this to happen, Respondent had to be issuing tags to someone for minerals coming from somewhere. It was not NRD's minerals, and very likely were minerals smugglers from the DRC, that Rwanda tagged as if they originated at NRD's Concessions. Mr, Niyonsaba would not confirm or deny the use of NRD tags or the volume being exported from NRD concessions.<sup>267</sup>

137. Since NRD left Rwanda, the problems related to smuggling have only continued. For example, Tinco reported rampant illegal mining and smuggling on its Concessions but the complaints largely fell on deaf ears and Rwanda did not seem terribly interested in resolving the matter.<sup>268</sup>

***I. Rwanda cannot rely on a document titled "Explanatory Note on NRD"***

138. Rwanda cannot rely on the document it attached to its Counter Memorial titled "Explanatory Note on NRD."<sup>269</sup> First, this document is undated and from context it could not be from any time before January 13, 2015 because it refers to a newspaper announcement from that day. Logic dictates that the document was created some time after that date but there is no further clue as to when, and there is no basis to believe it was created for any purpose other than this arbitration. Second, the document is unsigned and there is no indication even what government body, if any, authored it. Third, there is no indication that the document was sent to anyone or relied upon by anyone for any

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<sup>267</sup> *Id.*

<sup>268</sup> Email chain between M. Kahanovitz, M. Biryabarema, et al. dated 22 February to 9 May 2016, **C-169**.

<sup>269</sup> Explanatory Note on NRD, **R-017**.

governmental or business activity. Fourth, the document is internally inconsistent. The first eight pages are about NRD and then there is a chart discussing BVG's Bisesero Concession. Rwanda had expropriated the Bisesero Concession before BVG invested in NRD, and NRD had no interest in the Bisesero Concession, while BVG owned it. In short, there is no explanation why a document would discuss these two mining companies unless someone had put the document together solely to prepare for this proceeding.

## **II. Rwanda Violated the Fair and Equitable Treatment Standard**

139. Claimants appropriately relied on case law applying the autonomous fair and equitable treatment ("FET") standard. Claimants are permitted to import the autonomous FET standard from the BIT between Rwanda and the Belgo-Luxembourg Economic Union ("Belgium-Rwanda BIT") through the Most-Favored-Nation ("MFN") clause in the Rwanda-US BIT. The Respondent's suggestion that another FET standard applies serves to ignore the MFN clause. The fact that Respondent argues that a less favorable standard should be applied is to eviscerate the meaning of the MFN clause. Respondent's position fails as matter of treaty interpretation, which does not permit it to pick and choose among treaty provisions to apply those it favors and ignore those it considers to be a burden.

140. Moreover, Claimants have established that the Respondent has breached the FET obligation even if the minimum standard of treatment ("MST") under customary international law (the "MST-FET standard") were applied instead of the more favorable autonomous FET standard. Claimants have demonstrated that Rwanda acted arbitrarily and in a discriminatory fashion, rendering it impossible for Claimants to succeed and thereby establishing a breach of the MST-FET standard.

**A. The Autonomous Fair and Equitable Treatment Standard Applies to Claimants' Claims Through the Importation of the FET Standard in the Belgium-Rwanda BIT**

141. Claimants are entitled to import the FET standard from the Belgium-Rwanda BIT through the MFN clause in the Rwanda-US BIT.
142. States use the MFN clause as a “tool of the multilateralization and harmonization of substantive standards of investment protection.”<sup>270</sup> In this way, States ensure protection of its investors and covered investments equal to the “maximum level” granted to investors and covered investments of any other State with whom the host State has an investment treaty.<sup>271</sup> Simply put, MFN clauses require that a host State treat investors and covered investment of different nations equally.
143. It is well settled that to achieve the goal of multilateralization, harmonization, and equality, the MFN clause permits an investor to “import” more favorable language from an investment treaty between the host State and a third-party State.<sup>272</sup> As explained by Patrick Dumberry, Associate Professor, Faculty of Law at the University of Ottawa, Canada, “[s]cholars generally agree that the MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties. This is because MFN clauses typically provide that investment of investors should receive *treatment* that is no less favourable than that according to investments of investors of third states. The ‘treatment’ received by an investor concerns the *substantive* rights it is entitled to under a

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<sup>270</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 4 (2016), **CL-062** (quotation omitted).

<sup>271</sup> *Id.*

<sup>272</sup> See e.g. *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 517, **CL-029**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 160, **RL-019**.

treaty.”<sup>273</sup> “Historically, tribunals have tended to construe MFN clauses broadly and they have regularly accepted to import substantive rights into an investment treaty from treaties that the host State has signed with other countries.”<sup>274</sup> The FET standard is a substantive right subject to importation via a MFN clause.<sup>275</sup>

144. “It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties.”<sup>276</sup> When the MFN clause is written broadly enough, it can be used to import FET clauses that predated the BIT that precipitated the arbitration.<sup>277</sup> The *Bayindir v. Pakistan* Tribunal found that the “chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by the Respondent.”<sup>278</sup>

145. Likewise, the Tribunal in *Sergei Paushok et. al. v. Mongolia*, decided under the Russia-Mongolia BIT, imported a more favorable FET standard from Denmark-Mongolia BIT. The Russia-Mongolia BIT entered into force in 2006 and the Denmark Mongolia BIT entered into force in 1995. The Tribunal readily found that the more favorable FET clause from the Denmark-Mongolia BIT could be imported through the MFN clause in the Russia-Mongolia BIT. “[A] clause in a BIT whereby the definition of fair and equitable treatment would be written in broader terms than in the case of the Treaty

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<sup>273</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 4 (2016), **CL-062**.

<sup>274</sup> *Paushok, et al. v. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011*, para. 565, **CL-064**.

<sup>275</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 5 (2016), **CL-062**.

<sup>276</sup> *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para. 179, **CL-065**.

<sup>277</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 3 (2016), **CL-062**; *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 148, **RL-019**.

<sup>278</sup> *Bayindir*, at para. 160, **RL-019**.



would clearly be covered by the MFN clause contained in it.”<sup>279</sup> The Tribunal would not provide the restrictive interpretation adopted by Russia that gave it “a more limited meaning than that found in” the Denmark Mongolia BIT.<sup>280</sup>

1. **The MFN clause in the Rwanda-US BIT is broad and permits the importation of pre-existing rights granted to investors**

146. The Rwanda-US BIT, like most BITs, contains a Most-Favored-Nation (“MFN”)

clause. That clause states:

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 that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>281</sup>

147. The MFN clause does not contain any exceptions, carve-outs, or limitations such as a limitation on the importation of language from pre-existing BITs.<sup>282</sup>

148. Tribunals have interpreted similarly broad MFN clauses to permit the importation of more favorable standards of treatment from pre-existing treaties. The Turkey-Jordan BIT provides “Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors

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<sup>279</sup> *Paushok*, at para. 571, **CL-064**.

<sup>280</sup> *Paushok*, at para. 572, **CL-064**.

<sup>281</sup> Rwanda-US BIT, Art. 4, **CL-006**.

<sup>282</sup> *Id.*; compare *Agreement between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments*, signed 16 March 1995, Art. II(4), **CL-066** (limiting the MFN clause to exclude the importation clauses “(a) relating to any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation”).

or to investments of investors of any third country, whichever is the most favourable.”<sup>283</sup>

The *ATA Construction v. Jordan* tribunal relied on that language to import more favorable language from the Jordan-UK BIT, which predated the Turkey-Jordan BIT.<sup>284</sup>

149. The manner in which Claimants and other tribunals have interpreted these MFN clauses is consistent with the Vienna Convention on the Law of Treaties, which requires that a treaty be “interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>285</sup> The ordinary and plain language of the MFN clause in the Rwanda-US BIT is broad and does not restrict the importation of more favorable standards of treatment from any other investment treaty that Rwanda, the host State, has entered into, at any time, with a third-party State.<sup>286</sup>

150. Therefore, Claimants have correctly imported and applied the more favorable FET standard from the Belgium-Rwanda BIT.

*a. The FET clause in the Belgium-Rwanda BIT is more favorable than the FET clause in the Rwanda-US BIT*

151. The FET clause in the Belgium-Rwanda BIT provides that “[a]ll investments made by individuals or corporations under private law of one Contracting Party shall be accorded fair and equitable treatment in the territory of the other Contracting Party.”<sup>287</sup>

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<sup>283</sup> *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 59, **CL-067**.

<sup>284</sup> *Id.*, at ¶ 125, n. 16.

<sup>285</sup> Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31, **CL-010**.

<sup>286</sup> See P. Dumberry, *The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs*, 32 ICSID Review 116 (2017), p. 128, **CL-063**.

<sup>287</sup> *Belgo-Luxembourg Economic Union and Rwanda Convention Concerning the Reciprocal Encouragement and Protection of Investments*, signed 2 November 1983, Art. 3, **CL-068**.

This quoted text, which does not contain reference to customary international law, or even international law, is the autonomous FET standard.<sup>288</sup>

152. Such clauses are “autonomous” and “are meant to be a guarantee providing a positive incentive for foreign investors.”<sup>289</sup> In this context, the terms “fair” and “equitable” mean “just, even-handed, unbiased, legitimate” and a State infringes this standard with “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”<sup>290</sup> FET clauses without reference to customary international law focus on “the plain-meaning of the terms ‘fair’ and ‘equitable,’ which may result in a low liability threshold and brings with it a risk for State regulatory action to be found in breach of it.”<sup>291</sup>

153. By comparison, the FET clause in the Rwanda-US BIT provides that “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.”<sup>292</sup> Annex A then further sets out the Parties’ “confirmed” understanding of the definition of “customary international law.” This is the MST-FET standard.

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<sup>288</sup> *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 516, **CL-29**.

<sup>289</sup> *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 293, **CL-033**.

<sup>290</sup> *Id.*, at para. 297, citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113, **CL-069** and *S.D. Myers, Inc. v. Canada*, UNICTRAL, Award, 13 November 2000, ¶ 263, **CL-041**.

<sup>291</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 *Arb. Int’l* 1, 6 (2016), **CL-062**.

<sup>292</sup> Rwanda-US BIT, Art. 5, **CL-006**.

154. A breach of the MST-FET standard occurs when a State’s conduct is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>293</sup>

155. In comparing the two standards, the *Saluka* tribunal noted that for states to violate the FET that is linked to the minimum standard of treatment and customary international law, that conduct “may have to display a relatively higher degree of inappropriateness” where was a violation of the autonomous FET standard requires conduct that “displays a relatively lower degree of inappropriateness.”<sup>294</sup> Put differently, under the autonomous standard, foreign investors have more rights and the host State must treat foreign investors comparably better than under the MST-FET Standard.<sup>295</sup>

156. The FET clause in the Belgium-Rwanda BIT is therefore more favorable to Claimants than the FET clause in the Rwanda-US BIT. Claimants are permitted, through the MFN clause, to import it and Respondent’s treatment of Claimants’ and their investment must be treated according to the autonomous FET set forth in the Belgium-Rwanda BIT.

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<sup>293</sup> *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 I.L.M. 967, ¶ 98, **CL-028**.

<sup>294</sup> *Saluka*, at para. 292-93, **CL-033**.

<sup>295</sup> P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 *Arb. Int’l* 1, 6-7 (2016), **CL-062**.

**B. Respondent Violated the both FET Standards**

157. Claimants will set forth the elements of both the autonomous FET Standard and the MST-FET Standard below. It is Claimants’ position that they only need to establish a violation of the autonomous FET Standard in order to demonstrate a breach of the BIT. Claimants also believe that Rwanda’s actions are sufficiently arbitrary, grossly unfair, and discriminatory such that, if the Tribunal were to determine that the autonomous FET Standard does not apply, Rwanda’s action would nevertheless constitute a breach of the MST-FET Standard.

**1. The Elements of the Autonomous FET Standard**

158. The autonomous FET Standard use of the terms “fair” and “equitable” mean “just, even-handed, unbiased, legitimate” and a State infringes this standard with “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”<sup>296</sup>

159. “[T]he commitment of fair and equitable treatment included in [the treaty] is an expression and part of the *bona fide* principle recognized in international law.”<sup>297</sup> At the heart of what encompasses fair and equitable treatment is the principle of good faith.<sup>298</sup> Acting in good faith is a “basic obligation” of the fair and equitable treatment standard.<sup>299</sup>

160. The *Tecmed* Award set forth a basic framework under which to evaluate whether a State has violated the fair and equitable treatment standard as interpreted by international law:

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<sup>296</sup> *Saluka*, at para. 297, **CL-033**, citing *MTD Equity*, at ¶ 113, **CL-069** and *S.D. Myers*, at ¶ 263, **CL-041**.

<sup>297</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Rep. 134, ¶ 154, **CL-026**.

<sup>298</sup> *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 299, **CL-027**.

<sup>299</sup> *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 I.L.M. 967, ¶ 138, **CL-028**.

[Fair and equitable treatment] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>300</sup>

161. Building on the seminal *Tecmed* Award, which held that fair and equitable treatment requires “treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment,”<sup>301</sup> the *Saluka* tribunal found that an investor’s legitimate expectations is the “dominant element of that standard.”<sup>302</sup>
162. “When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be

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<sup>300</sup> *Tecmed*, at ¶ 154, **CL-026**.

<sup>301</sup> *Tecmed*, at ¶ 154, **CL-026** (emphasis added).

<sup>302</sup> *Saluka*, at ¶ 302, **CL-033**; see also *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 420, **CL-070**.

managed.”<sup>303</sup> Legitimate expectations arise when an investor receives an explicit or implicit promise or guarantee from a government related to its investment or the laws that apply to its investment.<sup>304</sup> Legitimate expectations may also arise in the absence of promises but when the circumstances surrounding the investment give rise to legitimate expectations.<sup>305</sup> Once legitimate expectations are found, any action that contradicts those expectations is a breach of the fair and equitable treatment standard.<sup>306</sup> Bad faith is not required.<sup>307</sup>

163. In addition to requiring that an investor’s legitimate expectations are maintained, the FET standard requires that a host State “act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, [or] from exercising coercion.”<sup>308</sup>

164. The requirement to treat an investment with transparency is a “significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework.”<sup>309</sup> Treating investments with transparency requires the absence of any administrative ambiguity or opacity and full candor in the administrative process.<sup>310</sup>

165. The obligation of transparency includes:

that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of

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<sup>303</sup> *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶ 203, **CL-035**.

<sup>304</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, ¶ 331, **CL-030**; *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, 22 September 2014, ¶ 571, **CL-031**.

<sup>305</sup> *Parkerings-Compagniet AS*, at ¶ 331, **CL-030**.

<sup>306</sup> See e.g. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264, **CL-032**.

<sup>307</sup> *Tecmed*, at ¶ 153, **CL-026**.

<sup>308</sup> *Bayindir*, at ¶ 141, **RL-019**.

<sup>309</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 178, **CL-036**.

<sup>310</sup> C. Dugan, et al., *Investor-State Arbitration* (2008), p. 519, **CL-012**; *Waste Mgmt., Inc.*, at ¶ 98, **CL-028**.

being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party...become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.<sup>311</sup>

166. State conduct is discriminatory and violates the FET if “(i) similar cases are (ii) treated differently (iii) and without reasonable justification.”<sup>312</sup> State conduct is arbitrary when it is “founded on prejudice or preference rather than on reason or fact; contrary to the law because it shocks, or at least surprises, a sense of juridical propriety; or wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety; or conduct which manifestly violates the requirements of consistency, transparency, even-handedness and non-discrimination.”<sup>313</sup>
167. The Tribunal in *EDF v. Romania* adopted Professor Christoph Schreuer’s interpretation of the word arbitrary as “(a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (b) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (c) a measure taken for reasons that are different from those put forward by the decision maker; (d) a measure taken in wilful disregard of due process and proper procedure.
168. The Tribunal in *Alpha Projektholding v. Ukraine* expressly tied arbitrariness to an investor’s legitimate expectations and found that “governments must avoid arbitrarily

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<sup>311</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76, **CL-038**.

<sup>312</sup> *Saluka*, at ¶ 313, **CL-033**; *Lemire*, at ¶ 261, **CL-032**.

<sup>313</sup> *Lemire*, at ¶ 262, **CL-032** (internal quotations and alternations omitted).



changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor.”<sup>314</sup>

169. A series or combination of actions can be a breach of the fair and equitable treatment standard even when each act, standing alone, might not be a violation.<sup>315</sup> In those situations, “[a] *creeping violation of the FET standard* could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.”<sup>316</sup> In this way, much like the creeping expropriation (see below), the time at which the violation occurs is the time at which the “last action or omission occurs.”<sup>317</sup> With respect to a creeping violation of the FET standard, all of the same elements of a violation of the FET apply, but it would be unfair and unjust to analyze each violation individually when the cumulative effect of every act results in a violation of the FET standard.

## **2. The elements of the MST-FET Standard**

170. As detailed above, the autonomous FET standard applies to this arbitration through the MFN clause. However, if the Tribunal were to find that the MFN clause does not permit the importation of the autonomous FET standard, Claimants set out the modern interpretation of the MST-FET Standard. Rwanda’s conclusion that it has not

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<sup>314</sup> *Alpha Projektholding GmbH*, at ¶ 420, **CL-070**.

<sup>315</sup> *Gold Reserve*, at ¶ 566, **CL-031**; *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 459, **CL-037** (“The fact that none of the measures analysed – that were not outside the Tribunal’s jurisdiction or not excluded from consideration by the Tribunal because they did not result in any significant damage – were regarded, in isolation, as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina”).

<sup>316</sup> *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 518, **CL-037** (emphasis in original).

<sup>317</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at ¶ 264, **CL-018**.

evolved since *Neer*, a nearly century-old case that involved prisoner rights, not investments, simply is not accurate and is inconsistent with decisions of modern tribunals interpreting the MST-FET Standard.

171. The interpretation of the MST-FET propounded by Rwanda, which is based on the formulation set out in the *Neer* case has been rejected numerous times by modern Tribunals and scholars.<sup>318</sup>

172. The *Mondev* Tribunal summarized *Neer* as follows:

The Tribunal would observe, however that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico.<sup>319</sup>

173. The *Neer* decision did not “deal with the treatment of foreign investors, and consequently the factual circumstances of the case are in any event not directly relevant” to the protection of foreign investors and foreign investments.<sup>320</sup>

174. In deciding to distinguish *Neer* with respect to *Neer's* formulation of the fair and equitable treatment standard at the time, *Mondev* held that:

*Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these

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<sup>318</sup> Respondent's Counter-Memorial, ¶ 238-244; *Waste Mgmt., Inc.*, at ¶ 93, **C-028**; *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 115-118, **CL-072**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 180-184, **CL-073**; *Pope & Talbot Inc. v. Government of Canada*, NAFTA, Award in Respect of Damages, 31 May 2002, ¶ 58-66, **CL-074**; J. Paulsson & G. Petrochilos, *Neer-ly Mised?*, 22 ICSID Review 242 (2007), **CL-075**.

<sup>319</sup> *Mondev*, at ¶ 115, **CL-072**; see *ADF*, at ¶ 180, **CL-073**.

<sup>320</sup> *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award, 27 September 2016, ¶ 352, **CL-077**.

developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.<sup>321</sup>

175. “Both the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer*, i.e to treatment amounting to an ‘outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.’”<sup>322</sup>

176. The *Waste Management* tribunal, in deciding a case under Article 1105 of NAFTA said that “the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>323</sup>

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<sup>321</sup> *Mondev*, at ¶ 116, **CL-072**; see *ADF*, at ¶ 180, **CL-073**.

<sup>322</sup> *Waste Mgmt., Inc.*, at ¶ 93 quoting *Neer*, ¶ 4, **RL-003**; see also *Pope & Talbot*, at ¶ 58-66, **CL-074** (rejecting Canada’s reliance on *Neer*).

<sup>323</sup> *Waste Mgmt., Inc.*, at ¶ 98, **CL-028**.

177. In short, the MST-FET Standard is not static, indeed it evolves over time, and has evolved substantially since the *Neer* decision, especially in disputes relating to sovereigns' treatment of investments in their countries made under the investment of a Bilateral Investment Treaty.<sup>324</sup> "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious," which is the standard set forth in *Neer*.<sup>325</sup> Claimants agree that the MST-FET standard is higher than the autonomous FET standard but the interpretation of the MST-FET standard put forth by Rwanda does not comport with the modern interpretation of that standard and the manner in which it should be applied to protect investors and their investments, in foreign (to them) countries.

***C. Rwanda Eviscerated Claimants' Legitimate Expectations for the Long Term Licenses***

178. Rwanda eviscerated Claimants' legitimate expectations of a long term license in violation of both the "dominant element" of the autonomous FET standard<sup>326</sup> and "the representations made by the host State which were reasonably relied on by" Claimants,<sup>327</sup> which forms the basis of a violation of the MST-FET Standard. Despite the action of Erale Imua, at every step along the way, Rwanda led Claimants to reasonably believe that they would receive the long term licenses but in the end failed to grant the long term licenses Claimants, contrary to its contractual undertakings and numerous representations.

179. At the outset it is imperative to remember that mining is an inherently capital intensive and risky endeavor and it can take nearly a decade to generate any profits from

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<sup>324</sup> *Waste Mgmt., Inc.*, at ¶ 91, **CL-028**.

<sup>325</sup> *Mondev*, at ¶ 116, **CL-072**.

<sup>326</sup> *Saluka*, at ¶ 302, **CL-033**; see also *Alpha Projektholding GmbH*, at ¶ 420, **CL-070**.

<sup>327</sup> *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 I.L.M. 967, ¶ 98, **CL-028**.

the investment necessary to establish and run efficient mining operations.<sup>328</sup> As a result, the general understanding of the mining community in Rwanda was that upon the granting of a mining contract and four-year license, a long term license was guaranteed. No meaningful investment in mining Concessions would make sense if that were not the understanding. Without such a guarantee, Rwanda could not have attracted foreign investors to invest in its mining industry.<sup>329</sup>

180. A RIEPA employee promised Claimants in 2006 that the long term licenses were guaranteed.<sup>330</sup> These guarantees were routinely repeated by Rwanda itself. The OGMR, in a July 20, 2009 letter to NRD said that NRD's Licenses "are expected to be converted into long term concessions."<sup>331</sup> Rwanda later told NRD that long term licenses "will be negotiated."<sup>332</sup> The National Mining Policy Green paper envisioned that the short term licenses would be converted into long term licenses.<sup>333</sup> Rwanda's internal documents from the time period reflect the same understanding.<sup>334</sup> These assurances are consistent with the language of the Contract which itself stated that NRD "**will be** granted the mining concessions."<sup>335</sup> Claimants reasonably expected that upon the submission of the documents required by Article 2 of the Contract, Rwanda would grant them the long term licenses.<sup>336</sup> This was confirmed by the fact that the Minister of Natural Resources and the Prime Minister submitted a long term license agreement, signed by NRD, to the

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<sup>328</sup> Marshall WS, ¶ 8; Buyskes WS, ¶ 7; Rwamasirabo WS, ¶ 6; Fiala WS, ¶ 5.

<sup>329</sup> Marshall WS, ¶ 8-9; *see Parkerings-Compagniet AS*, at ¶ 331, **CL-030**

<sup>330</sup> Email from L. Mucyo to R. Marshall dated 12 December 2006, **C-139**; Marshall Second Supp. WS, ¶

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<sup>331</sup> Letter from M. Biryabarema to Director of National Land Center dated 20 July 2009, **C-032**.

<sup>332</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033**.

<sup>333</sup> Government of Rwanda Ministry of Forestry and Mines, *Mining Policy*, p. 31, **C-015**.

<sup>334</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

<sup>335</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 4, **C-017** (emphasis added).

<sup>336</sup> Rwamasirabo Second Supp. WS ¶ 11-12

Cabinet of the Government of Rwanda for final approval after receipt of NRD's Application in compliance with Article 2 of the Contract.<sup>337</sup> Claimants were not deterred by Minister Kamanzi's letter that purported to terminate the Contract because Mr. Bidega of the OGMR told Claimants to ignore that letter and Minister Kamanzi, jointly with the Prime Minister, sent a favorable transmittal letter with the approved long term license agreement, signed by NRD, to the Cabinet.<sup>338</sup> The fact that the Cabinet did not act on the approved license agreement, despite the fact that the technical experts reviewed Claimants' Application, determined that it complied with the Contract, and approved it with the Prime Minister,<sup>339</sup> indicates a political motive to prevent Claimants from remaining in Rwanda to continue further mining operations at their Concessions. One such explanation is the fact that Rwanda feared that Claimants controlled too much land and Rwanda did not want Claimants to succeed.<sup>340</sup>

181. After the Cabinet failed to act on the draft long term license, Rwanda then expressly extended the Licenses on numerous occasions and Rwanda expressly permitted Claimants to continue mining. In extending the licenses and permitting mining, Rwanda stated that it sought to "conclude a good contract for this partnership," that "new contracts...will be negotiated,"<sup>341</sup> and that Rwanda "will proceed with negotiations on your request for new contracts."<sup>342</sup> These acts confirmed Claimants' expectations that they would receive the long term licenses despite the interferences that took place in the

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<sup>337</sup> Marshall WS, ¶ 29; Marshall Supplemental WS, ¶ 20.

<sup>338</sup> Marshall Supplemental WS, ¶ 20; Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>339</sup> Rwamasirabo Second Supp. WS, ¶ 23.a.

<sup>340</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

<sup>341</sup> Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**.

<sup>342</sup> Letter from M. Biryabarema to R. Marshall dated 10 February 2013, **C-056**.

interim with shutdowns and a dispute over ownership with Mr. Benzinge, which was resolved in Claimants' favor.<sup>343</sup>

182. In May 2013 Claimants believed that they were on the cusp of finally negotiating the terms of the long term licenses when they were invited to do just that at the RDB.<sup>344</sup> Rwanda then reached out again in October 2013, this time through Minister Imena, to negotiate the long term licenses.<sup>345</sup> NRD and Claimants were encouraged by these meetings and the continued indications that Respondent intended to honor its representation to Claimants that Rwanda would grant the long term licenses.<sup>346</sup>

183. During the 2014 "re-application" process that followed, which is a violation of the FET in its own right and discussed below, Claimants were encouraged by Minister Vincent Biruta, the newly appointed Minister of Natural Resources, who assured NRD on September 16, 2014 that "as long as I am Minister, you will not lose your Concessions."<sup>347</sup> Claimants were further encouraged, despite the blatant mistreatment from Rwanda and Minister Imena that allowed Mr. Benzinge to take control of NRD, that they would receive the long term licenses because Rwanda returned the Concessions to Claimants on August 19, 2014.<sup>348</sup> Because Claimants regained access and control of their Concessions, they expected and anticipated that the worst was behind them and that Respondent would continue with negotiations of the promised long term licenses.

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<sup>343</sup> Marshall Supplemental WS, ¶ 27.

<sup>344</sup> Letter from R. Marshall to M. Isibo dated 9 April 2013, **C-158**; Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources dated 9 May 2013, **C-159**; Marshall WS, ¶ 37.

<sup>345</sup> Letter from E. Imena to R. Marshall dated 16 October 2013, **C-060**.

<sup>346</sup> Marshall Supplemental WS, ¶ 29.

<sup>347</sup> Marshall WS, ¶ 53.

<sup>348</sup> Marshall WS, ¶ 51. However, NRD still was unable to access its headquarters in Kigali and would remain locked out indefinitely. Claimants were permitted back to the NRD offices on September 22, 2015 only to retrieve files and documents. However, upon entry, they learned that the offices had been ransacked and that most of the documents and computers had been stolen. Marshall WS, ¶ 52. Therefore, NRD never truly "regained" access to the offices.

Claimants needed to look past Respondent's prior transgressions because they expected to receive the long term licenses and remained very interested in recouping their substantial investment in Rwanda.

184. While Claimants and NRD did not believe that they needed to “re-apply” for licenses because they already had applied for the long term licenses, were grandfathered in from any sort of application process,<sup>349</sup> and that such licenses were guaranteed, they made the reasonable business decision that it was best to go along with the request as the best way to avoid Minister Imena perceiving a personal challenge and that it would be the fastest and easiest way to obtain their long term licenses. At this same time, Mr. Marshall, NRD's primary investor, was performing pro bono services to assist the Rwandan military and the government more broadly with respect to a special economic zone. Given the assurances arising from this work and the fact that Rwanda valued Mr. Marshall as a good partner, Mr. Marshall, on behalf of NRD, was confident of its success.<sup>350</sup>

185. Contrary to Claimants' expectations, Minister Imena notified NRD that their “re-application” had been rejected.<sup>351</sup> Claimants timely appealed this decision on behalf of NRD<sup>352</sup> and was permitted to submit additional documents, which it did on November 24, 2014.<sup>353</sup> Claimants then supplemented their “re-application” a third time on January 16, 2015 at Minister Imena's request.<sup>354</sup> The following month, Minister Biruta confirmed

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<sup>349</sup> Rwamasirabo WS, ¶¶ 4, 8; Buyskes WS, ¶ 9.

<sup>350</sup> Marshall Second Supp. WS, ¶ 16.

<sup>351</sup> Letter from E. Imena to NRD dated 28 October 2014, **C-119**.

<sup>352</sup> Letter from R. Marshall to E. Imena dated 1 November 2014, **C-086**.

<sup>353</sup> Letter from E. Imena to R. Marshall dated 12 November 2014, **C-087**; Letter from R. Marshall to E. Imena dated 25 November 2014, **C-088**.

<sup>354</sup> Letter from E. Imena to R. Marshall dated 17 December 2014, **C-095**; Letter from R. Marshall to E. Imena dated 16 January 2015, **C-096**.



that Respondent had received the submissions and was evaluating them.<sup>355</sup> Claimants expected that there would be further negotiations of a long term license based upon Respondent's prior communications and established practices with Concession owners. But, Respondent would not engage in further negotiations and Respondent notified Claimants on May 19, 2015 that it had rejected NRD's "re-application."<sup>356</sup>

186. During this lengthy process, Claimants' legitimate expectations were reinforced by the fact that Tinco's investment vehicles, Rutongo Mines Ltd. ("RML") and Eurotrade International Ltd. ("ETI"), each received a long term license. RML and ETI each obtained initial four-year contracts with Rwanda around the same time that NRD received its four-year contract. Tinco was of the belief, like Claimants, that upon the submission of the necessary documents at the end of the four-year contract, it would receive the long term licenses.<sup>357</sup>

187. RML and ETI eventually received the long term licenses on September 3, 2014.<sup>358</sup> It took Tinco nearly three years to obtain the long term licenses for RML and ETI. Tinco had multiple meetings with Respondent both in Kigali and at the mines.<sup>359</sup> Every three or four months, Tinco would meet with the RDB or Minister Imena and was repeatedly told that the licenses would issue and to be patient.<sup>360</sup> Observing the lengthy time that it took for Tinco to ultimately obtain its long term licenses and consistent

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<sup>355</sup> Email from V. Biruta to R. Marshall dated 1 February 2015, **C-127**; Marshall WS, ¶ 56.

<sup>356</sup> Letter from E. Imena to R. Marshall dated 19 May 2015, **C-038**.

<sup>357</sup> Buyskes WS, ¶ 6; Buyskes Supplemental WS, ¶ 4-5.

<sup>358</sup> Agreement for Large Scale Mining License dated 3 September 2014, **C-025**; Letter from E. Imena to Managing Director of RML dated 10 December 2014, **C-115**; Letter from E. Imena to Managing Director of Eurotrade International s.a.r.l. dated 10 December 2014, **C-116**; Letter from M. Kahanovitz to Rwanda Development Board dated 29 October 2014; **C-117**; Letter from M. Kahanovitz to S. Kamanzi dated 7 June 2011, **C-118**.

<sup>359</sup> Buyskes Supplemental WS ¶ 7.

<sup>360</sup> Buyskes Supplemental WS ¶ 8.

assurances it received, Claimants reasonably anticipated that the similar assurances they received over the lengthy process waiting for long term licenses would have similar results.

188. The fact that Tinco received the long term license shortly after Rwanda demanded that NRD “re-apply” for the Licenses, further confirmed Claimants’ understanding that they would receive the long term licenses. Claimants’ reasonably expected that upon submission of the “re-application” they too would receive the long term license like Tinco.<sup>361</sup>

189. Even after May 19, 2015, Claimants continued to expect that they would receive the long term licenses because Rwanda did not follow up on their letter.<sup>362</sup> In fact, they held Claimants out as owners of the Concessions to third parties, indicating that Claimants remained in possession of the Concessions.<sup>363</sup> In fact, Claimants remained in control of their Concessions for nearly a year after the May 19, 2015 letter. Respondent has not provided, and cannot provide, a coherent explanation for Claimants remaining in control of the Concessions with no action by Respondent concerning the Concessions, but for continuing recognition of the rights and obligations of the Contract and Licenses.

190. Additionally, Rwanda violated Claimants legitimate expectation of a handover process, like the process followed for Gatumba, should it ever be required to give up the Concessions to Respondent. Standard handover procedures also would have seen Respondent hire a valuation expert to determine a fair compensation price to be paid to

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<sup>361</sup> Marshall WS, ¶ 40.

<sup>362</sup> Claimants did not receive the letter attached to Rwanda’s Counter Memorial at **R-025** which purports to be a letter to NRD on June 12, 2015. Claimants were eager to talk to anyone in Rwanda and would have welcome this letter as the start of further discussions. However, Claimants never received it and no discussions took place. Marshall Second Supp. WS, ¶ 22.

<sup>363</sup> Email from R. van Wachem to R. Marshall dated 16 June 2015, **C-120**.

the Claimants. Rwanda further would have set up meetings between Claimants and various Ministries in order to settle any outstanding debts, like tax obligations, and ensure that the Concessions were protected from theft and illegal mining.<sup>364</sup> At the end of the process, there would be a transfer of keys, or similar items, from the investor to the Respondent and the investor and Respondent would sign a Handover Protocol, formalizing and finalizing the handover.<sup>365</sup>

191. Respondent pursued none of these procedures. Not one meeting took place despite Claimants' repeated attempts to talk with anyone in the Government concerning Minister Imena's letter. No representative of Respondent ever approached Claimants to identify an adequate value to compensate Claimants for the taking, as Claimants expected, and as a result Claimants lost their entire investment.<sup>366</sup>

192. By contract, Gatumba had a formal handover of its Concessions and settled all debts and liabilities. Claimants did not even receive this.

**1. Claimants' legitimate expectations were further confirmed by parallel dealings with Rwanda**

193. Claimants legitimate expectations that the long term licenses were guaranteed was bolstered by the parallel work Mr. Marshall did for Rwanda in his personal capacity. Mr. Marshall was providing pro-bono legal advice to Rwanda with respect to sovereign debt financing.<sup>367</sup> His services to Rwanda expanded into liaising between Rwanda and Slovakia and Czech Republic with respect to military cooperation. He arranged for an agreement between Ngali Mining ("Ngali"), a Rwandan Company owned by the

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<sup>364</sup> Rwamasirabo Supplemental WS, ¶ 5-8.

<sup>365</sup> Rwamasirabo Supplemental WS, ¶ 10.

<sup>366</sup> Mruskovicova Supplemental WS, ¶ 4; Marshall Supplemental WS, ¶ 31.

<sup>367</sup> Marshall WS, ¶ 2-4; Engagement Letter from Jillson and Marshall Associates dated 31 December 04, C-

government and Istrochem Explosives, a.s., a Slovak company regarding the import and manufacture of industrial explosives and advised Ngali on the acquisition of helicopters and a helicopter pilot training facility, as well as a mobile hospital for its peacekeeping focus.<sup>368</sup> Mr. Marshall facilitated meetings between the Rwandan, Slovak and Czech governments regarding the maintenance of certain military equipment and general military cooperation.<sup>369</sup>

194. Mr. Marshall continued to provide these services through 2015 because his contacts in the Rwandan government led him to believe that if he helped them with these military deals, NRD, in which he was an investor, would receive the long term licenses. Although the long term licenses should have been granted without any additional intervention,<sup>370</sup> Mr. Marshall determined that it could not hurt the chances of NRD receiving the long term licenses if he provided these valuable services to the Military.<sup>371</sup> The fact that Mr. Marshall was providing these services in 2015, while the “re-application” was under review by Rwanda, led Claimants to believe that Rwanda would soon grant NRD the licenses. Claimants did not think that the Rwanda military would continue to solicit Mr. Marshall’s help if Rwanda did not intend to grant the long term licenses, as they were required to do.<sup>372</sup>

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<sup>368</sup> Email from E. Muvara to R. Marshall dated 1 December 2014 and attached Cooperation Agreement, **C-133**; Email from A. Nyamvumba to W. Daniel, et al. dated 31 January 2015, **C-134**.

<sup>369</sup> Email chain between R. Oswald and Z. Mruskovicova dated 22-23 March 2015, **C-135**; Email from J. Sauer to R. Marshall, et al. dated 16 December 2014, **C-136**; Minutes of Meeting between VOP Slovakia and Rwanda Armed Forces dated 27 August 2014, **C-137**.

<sup>370</sup> See *Rwamasirabo* Second Supp. WS, § I.

<sup>371</sup> *Marshall* Second Supp. WS, ¶ 16.

<sup>372</sup> *Id.*

195. In all of his dealings with Rwanda and the Military in his capacity as a liaison, he was led to believe that NRD would receive the long term licenses because of the services he was providing for Rwanda and because he was a valuable partner for Rwanda.<sup>373</sup>

196. In addition, Claimants were negotiating the possibility of a joint venture with the Gabiro Mining Group, Ltd, a Rwandan company owned by Ngali Mining. The joint venture agreement was predicated on the fact that all parties expected NRD to receive the long term licenses. Together, Gabiro and NRD were to form “BlackOre,” a new Rwandan company to jointly manage all of Gabiro’s and NRD’s concessions.<sup>374</sup> This joint venture never came to fruition because Rwanda never granted NRD the expected long term licenses.

197. The prospect of this joint venture with Ngali led Claimants to believe that NRD would receive the long term licenses. The parties negotiated the terms of the joint venture under this assumption and, because Ngali is a government-owned company, Claimants expected it would only engage in such negotiations if Respondent too expected NRD would receive the long term licenses. Respondents can offer no coherent explanation for participating, through Ngali, in negotiations premised on Claimants receiving long term licenses if, as it now claims, it did not have that expectation.

***D. Rwanda Violated the FET by Implementing the 2014 Law in a Discriminatory Manner***

198. Rwanda breached the FET by treating Tinco and Claimants differently after the implementation of the 2014 Law. Despite the fact that Tinco and Claimants were in the

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<sup>373</sup> *Id.*

<sup>374</sup> Joint Venture Agreement between Gabiro Mining Group Ltd. and Natural Resources Development Rwanda Ltd, C-170; Marshall Second Supp. WS, ¶ 17.

same position, Rwanda treated Tinco more favorably and granted Tinco long term licenses for RML and ETI.

199. Rwanda has taken the position that Tinco and Claimants were in materially different positions at the time that the 2014 Law came into effect in that Tinco had licenses to mine while Claimants did not.<sup>375</sup> Therefore, according to Rwanda, Tinco did not have to re-apply under the 2014 law.<sup>376</sup>

200. Based upon documentation submitted by Rwanda in this Arbitration, Tinco should have had to re-apply subject to the 2014 Law. In the introduction of a document titled “Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd,” the assessment team wrote:

For purposes of complying with article 52 of the law n° 13/ 2014 of 20/ 05 / 2014 on mining and quarry operations which states that '**no mineral or quarry license granted prior to this law shall be extended or renewed . However, where the mineral or quarry license granted prior to this law provided for a right to apply for a renewal or extension of the license, the holder thereof may be granted, subject to this law, a similar type of license on a priority basis if he/ she meets the requirements**' NRD Rwanda LTD' was allowed to apply for the renewal of the former license, after the company submitted documents clearly indicating its performance track record and its financial viability.

Considering the contract for acquiring mining concessions between the Government of Rwanda represented by the then Minister of State in charge of Water and Mines and Natural Resources Development Rwanda Ltd, represented by the Company's Chairman, Mr. Joachim CHRISTOPH ZARNACK on 24th May 2006 in Kigali, it is in this regard that a technical team was set up and met on 20/01/2015 to assess the documents submitted to respond to the above requirements.<sup>377</sup>

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<sup>375</sup> Respondent's Counter-Memorial, ¶ 473; Imena WS, ¶ 57.

<sup>376</sup> *Id.*

<sup>377</sup> Dr. M. Biryabarema, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd*, February 2015, **R-024**; see also Technical Team, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd*, 20 January 2015, **R-023**.

201. The quoted text makes clear that Respondent’s assessment team acknowledged that NRD’s Contract and Licenses pre-dating the new law remained in effect and the Application was to be assessed under the still applicable Contract and Licenses. The Respondent’s position that Claimant’s Contract and licenses were no longer in effect and NRD had to apply for a license anew under the 2014 Law is entirely inconsistent with its contemporaneous position and representations to Claimants.<sup>378</sup>
202. Despite this, Rwanda is now arguing that because Tinco had licenses, it did *not* have to re-apply for either RML or ETI.<sup>379</sup> That position simply does not comport with its own internal documents interpreting the law.
203. The “Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd” therefore directly contradicts Rwanda’s arguments that Claimants and Tinco were in materially different positions and that the Contract had expired.<sup>380</sup> It is clear that both Tinco and Claimants had to re-apply but Rwanda did not require Tinco to do so. Rwanda did not uniformly apply the 2014 Law to similarly situated foreign investors in the country. Tinco received more favorable treatment because it was not subject to the re-application process that Rwanda imposed on Claimants pursuant to the 2014 law.
204. Rwanda’s treatment of Claimants fit neatly within the definition of discriminatory State conduct: there were similar cases, treated differently, without justification.<sup>381</sup> Rwanda’s discriminatory treatment of Claimants is a violation of the FET.

1. **Additional Evidence Confirms that NRD’s Licenses Remained in Effect**

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<sup>378</sup> Rwamasirabo Second Supp. WS, ¶ 29.

<sup>379</sup> Imena WS, ¶ 61.

<sup>380</sup> See Rwamasirabo Second Supp. WS, ¶ 29.

<sup>381</sup> *Saluka*, at ¶ 313 CL-033; *Lemire*, at ¶ 261, CL-032; see also *Waste Mgmt.*, ¶ 98, CL-028.

205. The existence and validity of Claimants' licenses through at least May 2015 is confirmed by Rwanda's actions, which demonstrated that they believed the Claimants had valid licenses. For example, in February 2013, Dr. Biryabarema expressly permitted Claimants to continue mining the Western Concessions, which had been wrongfully closed.<sup>382</sup> In May 2013, Claimants attended a meeting with the RDB for the express purpose of negotiating the long term licenses, thereby implying that it continued to operate under short term licenses and would be eligible for the long term licenses.<sup>383</sup> Claimants were receiving mineral tags until May 2014, when Minister Imena wrongfully prohibited the Government Tag Managers from affixing them to NRD production.<sup>384</sup>
206. Rwanda's action of temporarily giving NRD to Ben Benzinge in the summer of 2014 further confirms that NRD's licenses remained in effect. With Mr. Imena's consent, Mr. Benzinge wrongfully claimed 100% ownership of NRD and took over operations, which included mining the Concessions.<sup>385</sup> Regardless of ownership, Rwanda permitted NRD, the entity, to operate the Concessions during this time, implicitly extending the terms of the licenses. Rwanda never communicated to NRD at any time that the Licenses expired or that Rwanda deemed them to be expired.
207. Rwanda then returned the Concessions to Claimants' control, never taking the position that the Licenses had expired, preventing their further operation of the Concessions. The act of returning the Concessions further confirmed that Claimants'

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<sup>382</sup> Letter from M. Biryabarema to R. Marshall dated 10 February 2013, **C-056**.

<sup>383</sup> Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources dated 9 May 2013, **CL-159**.

<sup>384</sup> Letter from R. Marshall to D. Kayigire dated 24 June 2014, **C-109**.

<sup>385</sup> Marshall WS, ¶ 41.



Licenses remained valid. If they had not, Rwanda would have had no reason to return the Concessions to Claimants because, without the Licenses, they had no right to be there.

***E. The Manner in which Rwanda Forced Claimants to “Re-Apply” was Fundamentally Unfair***

208. Rwanda forced Claimants to “re-apply” for the Licenses when it knew that NRD did not have access to its corporate offices because Rwanda itself barred NRD from accessing the offices. Rwanda deliberately set Claimants up for failure.

209. As part of Mr. Benzinge’s government-sponsored control of NRD in the summer of 2014, he also took control of NRD’s corporate headquarters in Kigali. Claimants were granted access back to the Concessions on August 19, 2014 but the corporate offices remained closed until September 21, 2015, more than one year later.

210. Notably, Rwanda’s demand for a “re-application” came one day *before* Claimants were granted access back to their Concessions. However, access to the Concession, while crucially important, did not help them put together a “re-application” because the information needed to do so was kept in their corporate office, which Rwanda barred Claimants from accessing.

211. Not only did Rwanda apply the 2014 Law in a discriminatory fashion, but it intentionally set Claimants up for failure. If Rwanda believed that Claimants had to re-apply, it had to provide Claimants with a fair opportunity to prepare that submission, it purposefully failed to do so. This is a violation of the FET.

***F. Rwanda Implemented the 2014 Law With the Ulterior Motive to Force Claimants out of the Concessions***

212. In addition to implementing the 2014 Law in a discriminatory manner, Rwanda intended to use the law to force Claimants out of the Concessions.

213. When Spalena first purchased NRD, Rwanda expressed concern at the purchase.

In an evaluation of various mining companies, Rwanda wrote, with respect to BVG, thereby recognizing the unity between BVG and Spalena, “now [BVG] might control a sizable part of our former Concessions. The takeover of NRD needs to be investigated and if the company has to keep any stake, the size should be significantly reduced.”<sup>386</sup>

214. In advance of implementing the 2014 Law, Minister Imena prepared a memorandum for the Cabinet in support of reducing the size of Concessions in Rwanda.<sup>387</sup> Minister Imena recommended that Rwanda immediately repeal the 1971 Presidential Order setting the Concession boundaries “which will help to increasing production, attracting more and capable investors and for efficient management of such Concessions in the mining sector, one of the key government priorities. This will also help in the ease of implementation of the revised mining law, currently in Parliament.”<sup>388</sup> Minister Imena further stated that “production is relatively very low.”<sup>389</sup> Claimants’ Concessions were issued prior to the 1971 law.<sup>390</sup>

215. The statements from Minister Imena, in connection with Rwanda’s concern about Claimants controlling a “sizable” amount of land in Rwanda, demonstrate that Rwanda sought to push Claimants out of the country and reclaim their Concessions. Although Claimants should not have had to comply with the 2014 Law, Minister Imena forced Claimants to “re-apply” for their Concessions under the new law. As discussed above, Minister Imena set Claimants up to fail because they did not have access to their

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<sup>386</sup> Summary on Performance of Large Mining and Exploration Companies, **C-141**.

<sup>387</sup> E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971*, 23 March 2013, **C-143**.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> Letter from M. Bikoro to B. Benzinge dated 29 January 2007, **C-018**.

headquarters, where the proper documentation for the re-application was kept. Knowing this, Minister Imena intended for Claimants to fail so that Rwanda could re-claim the Concessions, break them up, and distribute them as they saw fit, including to government-owned entities like Ngali and government joint venture like Fair Construction.<sup>391</sup>

216. While the memorandum and subsequent Presidential Order repealing the concession boundaries identify Claimants by name, it is apparent that Rwanda intended for the law to have an outsize impact on Claimants. Rwanda did not want a foreign investor to control that much land. In addition, through the implementation of this order, which Minister Imena orchestrated, Minister Imena was able to harass and discriminate against Claimants during the illegal “re-application” process.

***G. Rwanda Violated Claimants’ Due Process Rights in Violation of the FET***

217. As explained in Olivier Rwamasirabo’s second supplemental witness statement, Rwanda’s failure to evaluate Claimants’ submitted feasibility and subsequent failure to grant the long term licenses to NRD violated NRD’s due process rights.<sup>392</sup>

218. The Contract required NRD to submit a feasibility study after four years, which it did. Upon receipt, Rwanda was required to evaluate the feasibility study, which it did not do.<sup>393</sup> The Contract does not define how Rwanda must evaluate the feasibility study. Therefore, one must look to the mining law in effect at the time of submission of the feasibility study for guidance. For the Application submitted in November 2010, this would be the 2008 mining law. The 2008 mining law is silent on the submission of

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<sup>391</sup> Barthelemy WS, ¶ 20; Buyskes WS, ¶ 19.

<sup>392</sup> Rwamasirabo Second Supp. WS, ¶ 18, 23.

<sup>393</sup> Rwamasirabo Second Supp. WS, ¶ 11-14; 22.

feasibility studies or the standard by which any study or report is to be evaluated.<sup>394</sup>

Absent any law describing the manner in which Rwanda was to evaluate the feasibility study, or specifying the discretion it may exercise in such review, Rwanda was required to review the submitted feasibility study in a manner that afforded NRD due process.<sup>395</sup>

219. Due process required, at a minimum, that Rwanda not use a review of the feasibility study as an excuse to avoid its obligations under the Contract, or as an excuse to deprive NRD of the benefits of the Contract, including the long term licenses. Rwanda violated NRD's due process rights by failing to evaluate the feasibility study that was submitted and then stringing NRD along for years, letting it continue to perform under the Contract, operate and build up the mining Concessions, increasing their value, believing that it would obtain the long term licenses applied for in 2010.<sup>396</sup>

220. Rwanda's failure to accord Claimants due process is a violation of the FET.

***H. Rwanda Arbitrarily Decided to Ignore RDB Records in Violation of the FET***

221. The RDB's records are determinative of ownership but Rwanda ignored these records as a basis to install a Rwandan National into the role of Managing Director and allowed him to control NRD on two separate occasions.

222. In 2012, the RDB changed NRD's corporate information to show that Mr. Benzinge was the Managing Director. The RDB never provided a coherent explanation for its decision to change the corporate registry upon the say-so of one Rwandan national.<sup>397</sup> Nevertheless, after this incident, the RDB made clear that Spalena owns NRD

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<sup>394</sup> *Rwanda Law No. 37/2008 on Mining and Quarry Exploitation*, 11 August 2008, Official Gazette No. 14 of 6 April 2009, **CL-020**.

<sup>395</sup> *Rwamasirabo Second Supp. WS*, ¶ 20.

<sup>396</sup> *Rwamasirabo Second Supp. WS*, ¶ 22.

<sup>397</sup> *Marshall WS*, ¶ 20.

and that Mr. Marshall is the Managing Director of NRD, not Mr. Benzinge.<sup>398</sup> For reasons that are also unknown, the RDB did not update its corporate registry to reflect that Spalena is the owner of NRD, in violation of the Law Governing Companies.

223. Despite the clear confirmation as to ownership in 2012, Rwanda, through the actions of Minister Imena, permitted Mr. Benzinge to retake control of NRD from June 2014 through August 2014. Minister Imena unilaterally declared that Mr. Benzinge owned 100% of the shares of NRD. Mr. Imena says in his witness statement that the RDB records reflected that the Managing Director was Mr. Marshall and that he was put in an uncomfortable position because Mr. Benzinge threatened to sue over the denial of tags. He further says that his “only interest was in ensuring that we were dealing with the rightful owner.”<sup>399</sup>

224. These are astonishing and contradictory statements. Rwanda acknowledges that the RDB records reflected the fact that Mr. Marshall is the Managing Director of NRD. Based on that acknowledgment, Rwanda must also concede it was aware that Spalena was identified as the owner 99.8% of NRD, because the same RDB records contained that information. Nevertheless, Respondent and Minister Imena attempt to justify the refusal to apply the law fairly to the Claimants, because of extortionate threats by Mr. Benzinge, a Rwandan National. Neither Respondent nor Mr. Imena provide any rational, good faith justification basis for their actions.

225. The net result of Rwanda’s inaction and decision to ignore RDB’s records was to allow a Rwandan national to take control of NRD for approximately 10 weeks and

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<sup>398</sup> Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, **C-146**; Letter from L. Kanyonga, Registrar General of the RDB, to R. Louis dated 7 August 2012, **C-070**.

<sup>399</sup> Imena WS, ¶ 54-56.

substantially harm Claimants. These actions were plainly arbitrary, and a violation of the FET, because they served only to harm Claimants' investments in the Concessions without any basis in law or policy, and in violation of RDB records and the law establishing conclusive effect to those records.<sup>400</sup>

**1. The Actions of Ben Benzinge are Attributable to Rwanda**

226. Mr. Benzinge's actions are attributable to Rwanda because he either was acting at the instruction of Rwanda, or he was empowered to act by Rwanda, given that he could not have acted as he did had Rwanda merely enforced its law evenhandedly, without purposefully turning a blind eye to his misconduct.

227. The principle of holding a State liable for the actions of a private party is not new or controversial. As far back as 1885, international arbitral bodies have considered the boundaries of this concept. In *Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v. Venezuela* (the steamer *Apure* case), the tribunal found that “[a] state, however, is liable for wrongs inflicted upon the citizens of another state in any case **where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment.**”<sup>401</sup>

228. A more modern articulation of this standard is found in the International Law Commission's Articles on State Responsibility (“ILC-ASR”). Article 5 of the ILC-ASR states, “[t]he conduct of a person or entity which is not an organ of the State, under article

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<sup>400</sup> See *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 192, **CL-078**.

<sup>401</sup> *Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v. Venezuela (the steamer Apure case)*, opinions of the Commissioners, Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885, p. 258, **CL-079**.

4 but which is **empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law**, provided the person or entity is acting in that capacity in the particular instance.<sup>402</sup>

229. The Tribunal in *EDF (Services) Limited v. Romania* set forth the following test to determine whether an “entity falls within the scope of application of ILC Article 5:”

The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.<sup>403</sup>

230. “Therefore, in order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority.”<sup>404</sup>

231. Article 8 of the ILC-ASR states “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>405</sup>

232. In *Prosecutor v. Tadic*, in reference to Article 8, the Chamber stressed that: “The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control

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<sup>402</sup> International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001), Art. 5, **C-084**.

<sup>403</sup> *EDF (Services) Limited*, at ¶ 193, **CL-078**.

<sup>404</sup> *Id.*

<sup>405</sup> International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001), Art. 8, **C-084**.

may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”<sup>406</sup>

233. The tribunal in *Electrabel S.A. v. Republic of Hungary* broke Article 8 into two distinct parts: (1) acting under the instruction of the government and (2) acting under the direction or control of the government. Referring to the first alternative (“acting under the instruction of”), the ILC Commentary states: “In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves ‘governmental activity.’ Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State.”<sup>407</sup> The commentary states that when determining if actions fall under the second alternative (“acting under the direction or control of”):

More complex issues arise in determining whether conduct was carried out ‘under the direction or control’ of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.

234. Contrary to Rwanda’s argument in the Counter-Memorial, all of Mr. Benzinge’s misconduct was tied to either express authorization from the Government, or the Government’s willful failure to stop the misconduct by fair application of well established law, Mr. Benzinge first wreaked havoc on NRD in 2012 when he wrested

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<sup>406</sup> *Prosecutor v. Dusko Tadić*, UN Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, ¶ 117, **CL-080**.

<sup>407</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility*, p. 110 (2002), **CL-083**.



control of the Concessions from NRD and Claimants for one week. He managed to convince the RDB that he was the managing director of NRD, contrary to the corporate registration information.<sup>408</sup> As a result of the decision of the RDB, an arm of the Rwandan Government, he was able to harm NRD. The RDB's actions empowered him to take control of NRD in violation of Article 5 of the ILS-ASR. Mr. Benzinge's actions are further attributable to Rwanda under Article \* of the ILC-ASR because he acted pursuant to the direction and instructions of the RDB.

235. When Mr. Benzinge again took control of Claimants' Concession in 2014, he did so at the direction of Minister Imena. Inexplicably, and contrary to Rwanda law, Minister Imena unilaterally decided that Mr. Benzinge would be recognized as owning 100% of the shares of NRD.<sup>409</sup> While in control of the Concessions, Mr. Benzinge hired a bailiff, Nsengiyumva Jean Bosco, to execute alleged judgments from the Rwandan Courts, severely impairing Claimants' investments. Claimants appealed to Minister of Justice, Busingye Johnston in an effort to stop Mr. Bosco from illegally seizing Claimants' property, but he failed to do so.<sup>410</sup> Rwanda both allowed these bad acts to occur and failed to stop them. Like in 2012, Minister Imena empowered Mr. Benzinge to illegally take control of NRD and did not try to stop it, despite clear evidence that Mr. Benzinge was not the managing director or majority shareholder. These actions violated Article 5 of the ILC-ASR. In addition, these same actions violate Article 8 of the ISC-ALR because Mr. Benzinge was acting under the instruction and direction of Rwanda.

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<sup>408</sup> See Letter from L. Kanyongi to B. Benzinge dated 6 August 2012, C-146.

<sup>409</sup> Marshall WS, ¶ 41.

<sup>410</sup> Letter from J. Busingye to Z. Mruskovicova, et al. dated August 2014, C-073.

236. In addition, Claimants numerous pleas for help<sup>411</sup> fell on deaf ears because Minister Imena and others in the government could not or would not help Claimants since he was primary individual responsible for Mr. Benzinge’s wrongful seizure of NRD in 2014. As a result Benzinge was permitted to “go at large without being called to account or punished for his offense.”<sup>412</sup>

***I. Rwanda Arbitrarily, Unfairly, and Discriminatorily Denied Tags to NRD***

237. In May 2014, Rwanda unilaterally decided to deny mineral tags to NRD. This decision was illogical, arbitrary, and grossly unfair.

238. Rwanda admits that it took the unprecedented step of denying tags to NRD “to put pressure on NRD to regularize its operations by applying for and obtaining licenses for its concessions.”<sup>413</sup> Rwanda does not, and could not, allege that it denied tags to NRD for any proper purpose, such as a violation of ITRI, because the only incident report against NRD took place *after* NRD had been forced to abandon their concessions.<sup>414</sup>

239. Mr. Imena’s stated basis also does not stand up to common sense. Without tags, NRD would be unable to legally sell minerals and therefore unable to realize the value in the Concessions. Mr. Imena’s decision to deny tags to NRD meant that they would have no ability to “regularise its operations” because they would not be generating any income. Mr. Imena’s decision is simply inconsistent with Rwanda’s stated goal of having NRD “industrialize” the Concessions.

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<sup>411</sup> Letter from R. Marshall to CG, CID dated 30 October 2014, **C-165**; Letter from R. Marshall to J. Busingye dated 26 August 2014, **C-166**.

<sup>412</sup> Steamer *Apure*, at p. 258, **CL-079**.

<sup>413</sup> Imena WS, ¶ 49.

<sup>414</sup> Niyonsaba WS, ¶ 17; Respondent’s Counter-Memorial, ¶ 306.

240. Mr. Imena's additional stated reasons for denying tags are equally as arbitrary and unjust. As has been set out, Rwanda plainly believed that NRD's Contract and Licenses did remain in effect at all relevant times because Rwanda believed that it was reviewing the "re-application" pursuant the Contract and the Licenses. In addition, disputes over ownership had been settled since 2012, when the RDB confirmed that Spalena owned 99.8% of NRD and that Mr. Marshall was NRD's Managing Director.

241. In addition, as noted above, Tinco and Claimants were in the same position at the time the 2014 Law was implemented. However, RML and ETI received tags all throughout the negotiation process with Rwanda and was never denied tags.<sup>415</sup>

242. Rwanda's decision to deny tags was plainly arbitrary, unfair and discriminatory and a violation of the FET, because they served only to harm Claimants, was not based in law or policy, and blatantly ignored RDB records to the contrary.<sup>416</sup>

### **III. Rwanda Expropriated Claimants' Investment in Violation of the BIT**

243. Under Article 6 of the BIT, Rwanda may not expropriate or nationalize (both termed "expropriation" in the BIT) a covered investment, directly or indirectly, unless four stringent conditions precedent have been met.

244. Specifically, Article 6 of the BIT provides, in pertinent part:

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

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<sup>415</sup> Buyskes WS, ¶ 12.

<sup>416</sup> See *EDF (Services) Limited*, at ¶ 192, CL-078.

(d) in accordance with due process of law and Article 5(1) through (3).<sup>417</sup>

245. Rwanda expropriated Claimant's investments and it did so, without qualification or exception, in violation of Article 6.

246. Investment tribunals also recognize that concession rights are subject to expropriation.<sup>418</sup> In the *Phillips Award*, the Iran-US Claims Tribunal dealt with rights arising from a concession agreement, which it held were subject to expropriation:

As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as contract rights involved in the present Case.<sup>419</sup>

247. The Tribunals in both *Metalclad v. Mexico* and *Tecmed v. Mexico* also found that the denial of permits were expropriatory acts in violation of the investment treaty at issue.<sup>420</sup>

248. Here, Rwanda expropriated Claimants' tangible property and assets as well as intangible contractual rights to which Claimants were entitled.

249. The BIT states that an "expropriation" can occur either "directly or indirectly through measures equivalent to expropriation or nationalization."<sup>421</sup> A creeping expropriation is a kind of indirect expropriation in which "the negative effects of government measures on the investor's property rights, which does not involve a transfer

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<sup>417</sup> Rwanda-US BIT, Art. 6, **CL-006**.

<sup>418</sup> *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Trib. Case No. 39, Chamber 2, Award No. 425-39-2, 29 June 1989, ¶ 105, **CL-013**.

<sup>419</sup> *Id.* at ¶ 76.

<sup>420</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 104-108, **CL-038**; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Rep. 134, ¶ 117, **CL-026**.

<sup>421</sup> Rwanda-US BIT, Art. 6, **CL-006**.

of property but a deprivation of the enjoyment of the property.”<sup>422</sup> Generally, a creeping expropriation takes place when a State seeks “to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned.”<sup>423</sup>

250. In the case of a creeping expropriation “[d]iscrete acts, analyzed in isolation rather than in the context of the overall flow of event, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omission, which in the aggregate expropriated the foreign investor’s property rights.”<sup>424</sup> It is the last step in the creeping expropriation that ultimately has a “perceptible effect.”<sup>425</sup> As such, “the time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.”<sup>426</sup>

251. In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, the Tribunal, recognizing that the failure to grant a permit or license can be an expropriatory act, found that a denial of a permit was the first step in a series of acts which *in combination* with other actions gave rise to an expropriation.”<sup>427</sup> The Tribunal provided the follow analysis:

A first series of actions are the actions surrounding the denial of the Permit in April 2008. The Tribunal has already underscored the

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<sup>422</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 437, **CL-030**.

<sup>423</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 101, **CL-054** (brackets in original).

<sup>424</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 231, **CL-018**, quoting M. Reisman, et al., *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BYIL (2003), pp. 123-124, **CL-058**.

<sup>425</sup> *Siemens*, ¶ 263, **CL-018**.

<sup>426</sup> *Id.*, ¶ 265.

<sup>427</sup> See *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 674, **CL-081** (emphasis in original).

fundamental unfairness underlying the manner in which the Claimant was treated by the Venezuelan authorities during the process leading to such denial, which has made the Tribunal conclude that the investor was unfairly and inequitably treated in violation of Article II(2) of the Treaty. For the purposes of the expropriation analysis, the events surrounding the Permit denial constitute the first step in the expropriatory process—the first tangible occurrence of the investor’s rights and the value associated thereto being severely affected as a result of measures attributable to Venezuela.<sup>428</sup>

252. The Tribunal continued that the two other events, in combination with the permit denial, that lead to an expropriation were “governmental officials of the highest level targeted Crystallex’s investment with statements that resulted in a gradual devaluation of the investor’s investment” and statements by Venezuela’s President Hugo Chávez concerning taking back mines.<sup>429</sup> The final act was for the Venezuelan’s government to seize the mine.<sup>430</sup>

253. Much like Venezuela’s actions in *Crystallex*, the cumulative impact of all of Rwanda mistreatments of Claimants resulted in an expropriation. The first step in Rwanda’s expropriatory actions was to fail to act on the draft long term license that OGMR had submitted for approval after determining that Claimants had satisfied their obligations under the contract. Thereafter, Rwanda systematically led Claimants to reasonably expect that they would receive the long term licenses. The long term licenses were guaranteed yet Rwanda ultimately refused to issue them to Claimants after years of stringing Claimants along and resorting to various tactics designed to force Claimants to walk away on their own. In the process, Rwanda “governmental officials of the highest level” interfered with Claimants’ operation of the Concessions by allowing a Rwandan

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<sup>428</sup> *Id.*, at para. 673.

<sup>429</sup> *Id.*, at para. 676.

<sup>430</sup> *Id.*, at para. 678.

National to wrongfully seize control and damage NRD on two separate occasions, indiscriminately ceasing Claimants' mining operations, and wrongfully denying Claimants' mineral tags. The net effect of each acts was a slow and "gradual devaluation of [Claimants'] investment" that ultimately led to an expropriation.

254. Claimants did not and could not have known of Respondent's decision to pursue actions in violation of the BIT until after the May 19, 2015, at the earliest, because it was not until Respondent ultimately expropriated Claimants' property that Claimants understood they would be treated differently than other investors in Rwanda and that their full investment would be misappropriated. Until the expropriation took place, Claimants always had reason to believe, based upon the actions and statements of Respondent, that they would receive long term contracts and that the difficulties they experienced in dealing with the Respondent were only setbacks that were part of a process that would ultimately lead to long term contracts that would honor the Claimants' rights in the Concessions. Upon Respondent's final expropriation of Claimants' investment, Claimants finally learned that Respondent had determined not to honor the Claimants' investments and, instead, to violate the BIT by seizing the value of Claimants' concessions for Respondent's own exploitation without paying the required compensation.

#### **IV. Rwanda's Witnesses are Biased Against NRD**

##### ***A. Former Minister Imena***

255. Former Minister Imena was the Minister of State in Charge of Mining from February 2013 until October 2016.<sup>431</sup> Mr. Imena was fired from his post by President Kagame.<sup>432</sup>
256. On January 31, 2017, the Rwanda National Police arrested Mr. Imena on charges of “favouritism and a litany of fraudulent activities.”<sup>433</sup> “The evidence linked him to favoritism and illegal issuance of official documents.”<sup>434</sup>
257. The arrest stemmed from allegations that Mr. Imena, between 2013 and 2014 fraudulently awarded a mining license to a company which he created and then sold that license to another company for US\$20,000 in 2013 and 2014.<sup>435</sup> It is understood that Mr. Imena and others made “mistakes related to Mineral resources exploitation” during his reign as Minister.<sup>436</sup>
258. In November 2014, after Minister Imena forced NRD to illegally “re-apply” for their Concessions, NRD appealed to Minister Vincent Biruta, the Minister of Natural Resources, for help stopping Minister Imena’s malicious and bad acts that specifically targeted NRD. NRD detailed nearly all of the bad acts taken by Minister Imena to date including, ignoring the RDB, denying tags, denying NRD a grant from the Dutch government, and forcing NRD to “re-apply” for their Concessions<sup>437</sup>
259. The charges against Mr. Imena reveal that Rwanda had sufficient evidence and a good faith basis to bring a claim against him for criminal acts arising out of the granting

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<sup>431</sup> Imena WS, ¶ 6.

<sup>432</sup> *Breaking: Former Minister Evode Imena Arrested*, IGIRE, 30 January 2017, **C-188**.

<sup>433</sup> R. Rwirahira, *Former State Minister Imena Arrested*, The New Times, 31 January 2017, **C-189**; *Former Rwandan Minister Charged with Favoritism*, Xinhua, 16 February 2017, **C-190**.

<sup>434</sup> *Former Minister Imena Arrested*, IGIHE, 30 January 2017, **C-191**.

<sup>435</sup> *Former Rwandan Minister Charged with Favoritism*, Xinhua, 16 February 2017, **C-190**.

<sup>436</sup> *Breaking: Former Minister Evode Imena Arrested*, IGIRE, 30 January 2017, **C-188**.

<sup>437</sup> Letter from R. Marshall to V. Biruta dated 5 November 2014, **C-171**.



of mining licenses. That fact raises significant questions about Respondent's reliance on Mr. Imena's testimony, and its purported belief in the truth of his testimony, in this proceeding.

**B. Anthony Ehlers**

260. Anthony Ehlers was the managing director of NRD prior to the sale to Spalena and immediately thereafter. NRD fired Mr. Ehlers for a number of serious criminal acts.

261. Mr. Ehlers stole more than US\$100,000 from Claimants and also stole iPods, iPads, computers, printers, other miscellaneous computer items, and maps, studies, reports and other confidential business information.<sup>438</sup>

262. Mr. Marshall, as director of NRD's parent, passed a resolution on March 5, 2011 stating that Mr. Ehlers "has acted contrary to the direct instruction of the Director of [NRD's parent] by returning to Rwanda under circumstances which could cause great harm to the business of its sole subsidiary company, [NRD], and has otherwise acted in breach of trust." As a result, it was resolved that Mr. Ehlers "is removed from his position as Managing Director of [NRD's parent] effective immediately."<sup>439</sup>

263. Mr. Ehlers countersigned the March 5, 2011 resolution<sup>440</sup> thereby acknowledging its veracity. Mr. Ehlers also countersigned a letter with the subject line "Notice of Termination" of the same date.<sup>441</sup>

264. Mr. Ehlers was also using company vehicles to engage in human trafficking.<sup>442</sup> He ordered NRD employees to solicit prostitutes and traffic them around Rwanda. If an

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<sup>438</sup> Letter from T. Grey to Labor Inspector dated 22 February 2011, **C-172**.

<sup>439</sup> Resolution by Unanimous Written Consent of the Sole Director of Natural Resources Development, GmbH dated 5 March 2011, **C-173**.

<sup>440</sup> Resolution by Unanimous Written Consent of the Sole Director of Natural Resources Development, GmbH dated 5 March 2011, **C-173**.

<sup>441</sup> Letter from T. Grey to A. Ehlers dated 5 March 2011, **C-174**.

<sup>442</sup> Letter from T. Grey to Labor Inspector dated 22 February 2011, **C-172**.

NRD employee objected, Ehlers suspended or fired that employee.<sup>443</sup> Relatedly, he mistreated female employees by harassing, assaulting and punching them.<sup>444</sup> He also paid three female employees substantially more than was appropriate for their position in exchange for sexual favors.<sup>445</sup> An accountant for NRD approached Mr. Ehlers about this payments and was forced to quit as a result.<sup>446</sup>

265. In reference to all Rwandan people, he said “these people are natural born liars.”<sup>447</sup> Mr. Ehlers also expressed his belief that Rwandan people “cannot work together. They need a white to supervise them.”<sup>448</sup>

266. He accepted responsibility for nearly bankrupting the company in the time period surrounding the sale to Claimants arising out of bad business deals and crooked employees.<sup>449</sup>

267. Mr. Ehlers’ bad acts resulted in his immediate termination on March 8, 2011.<sup>450</sup>

268. Shortly after his termination, and with the maps, studies, and other confidential information he stole from NRD, Mr. Ehlers, on behalf of Mountain Valley Mining Ltd, submitted a license application for the Nemba Concession.<sup>451</sup> It is not clear why he applied or the extent to which his application was accepted, since NRD continued to mine and operate the Nemba Concession, but it is clear that Mr. Ehlers attempted to take control of one of NRD’s Concessions.

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<sup>443</sup> Letter from W. Quam to Director of the Criminal Investigation Division dated 11 March 2011, **C-175**.

<sup>444</sup> V. Mpongo Statement dated 2 May 2011, **C-176**.

<sup>445</sup> Letter from W. Quam to Director of the Criminal Investigation Division dated 11 March 2011, **C-175**.

<sup>446</sup> Letter from W. Quam to Director of the Criminal Investigation Division dated 11 March 2011, **C-175**.

<sup>447</sup> Email from A. Ehlers to R. Marshall dated 6 March 2011, **C-177**.

<sup>448</sup> Email chain between A. Ehlers, R. Marshall, and Z. Mruskovicova dated 8-9 January 2011, **C-178**.

<sup>449</sup> Email chain between R. Marshall, A. Ehlers, et al. dated 18-19 February 2011, **C-179**.

<sup>450</sup> Email from R. Marshall to A. Ehlers dated 8 March 2011, **C-180**.

<sup>451</sup> License Application for the Nemba Concession of Mountain Valley Mining Ltd dated 13 June 2011, **C-**

269. In his witness statement. Mr. Ehlers says that the Rutsiro plant was not operational.<sup>452</sup> However, on September 20, 2010, when he was on site, he stated that the “Rutsiro plant is operating and we are in the process of fine tuning it.”<sup>453</sup> The tribunal should not afford any weight to Mr. Ehler’s vindictive testimony, ten years after the fact, contradiction his contemporaneous representations concerning the functionality of the Rutsiro plant.

**C. *Jean Aime Sindayigaya***

270. Mr. Sindayigaya worked as an accountant for NRD for less than two years.<sup>454</sup> And the end of Mr. Sindayigaya brief tenure at NRD, NRD reported Mr. Sandiyaga to the Kigali Police for various criminal acts that he perpetrated while employed by NRD.<sup>455</sup>

271. Mr. Sindayigaya “rented” NRD’s bulldozer to third-parties and retained the money for himself. At the time, he retained over 32 million Rwandan francs in “rental” payment that belonged to NRD.<sup>456</sup>

272. Mr. Sindayigaya separately altered the accounting records to changes entries more than two months after they had been made. NRD never obtained an explanation for these changes from Mr. Sindayigaya leading NRD to the conclusion that he altered the books in order to enrich himself, like he did with the rentals of the bulldozer.<sup>457</sup>

273. He also stole approximately 300 kilograms of untagged wolfram from Rutsiro. NRD never received an explanation as to what happen to the wolfram. Mr. Sindayigaya

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<sup>452</sup> Ehlers WS, ¶ 29.

<sup>453</sup> Email chain between A. Ehlers and F. Delforge dated 20-22 September 2010, **C-148**.

<sup>454</sup> Sandiyaga WS, ¶ 6.

<sup>455</sup> Letter from R. Marshall to Kigali Chief Police Supervisor dated 20 September 2012, **C-182**.

<sup>456</sup> Letter from R. Marshall to Kigali Chief Police Supervisor dated 20 September 2012, **C-182**.

<sup>457</sup> Letter from R. Marshall to Kigali Chief Police Supervisor dated 20 September 2012, **C-182**.

also “borrowed” four million Rwandan francs to buy minerals but there is no evidence of what that money was actually used for.<sup>458</sup>

274. In October 2011, Mr. Sindayigaya threatened the then-Managing Director, Bill Quam, with vulgar language and threatened to plant evidence of possession of illegal substances in Mr. Quam’s hotel room.<sup>459</sup>

275. As a result of his bad actions that financially harmed NRD, NRD suspended Mr. Sindayigaya in September 2012 and then fired him in October after an investigation.<sup>460</sup>

276. Mr. Sindayigaya’s claim that the Rutsiro plant was not operation is unfounded.<sup>461</sup>

***D. Jean Bosco Nsengiyuma***

277. As has been presented above in this Reply, it is Claimants belief that Mr. Nsengiyuma acted in concert with Ben Benzinge to steal from NRD pursuant to fraudulent court orders.

278. NRD’s belief is reinforced by the fact that Mr. Nsengiyuma contacted Ms. Mruskovicova on April 25, 2015 after taking a magnetic separator in order to negotiate its return for 50% of the cost of the item to be paid to Mr. Nsengiyuma.<sup>462</sup> He said he was looking for a “win win.”<sup>463</sup> In other words, he was asking for a bribe following which he would return the wrongfully taken magnetic separator.

***E. Richard Mugisha***

279. Claimants will shortly file an Application to Remove Richard Mugisha as an expert witness based upon a conflict of interest arising from his prior representation of

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<sup>458</sup> Letter from R. Marshall to Kigali Chief Police Supervisor dated 20 September 2012, C-182.

<sup>459</sup> Email from B. Quam to Z. Mruskovicova, et al. dated 2 November 2011, C-183.

<sup>460</sup> Notice of Termination of J. Aime Sindayigaya dated 5 September 2012, C-184; Letter from Z. Mruskovicova to J. Aime Sindayigaya dated 3 October 2012, C-185.

<sup>461</sup> Sindayigaya WS, ¶ 16-17.

<sup>462</sup> Text messages from J. Bosco Nsengiyuma to Z. Mruskovicova dated 25 April 2015, C-149.

<sup>463</sup> *Id.*

NRD's business interests as well as in relation to filing an arbitration under the BIT and for his failure to disclose such a conflict.<sup>464</sup>

Respectfully Submitted

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March 13, 2020

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<sup>464</sup> Marshall Second Supp. WS, ¶ 28-35; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Disqualification of Mr. Ricover as an Expert in this Proceeding, Regarding Exclusion of the Ricover-Winograd Report, and on the Request for Documentation, 29 August 2012, **CL-085**; International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, Art. 9.3(a)-(e), **CL-086**; *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, ¶ 30, 6 May 2008, **CL-087**.