

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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

**v.**

**Republic of Rwanda**

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

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**RESPONDENT'S COUNTER-MEMORIAL**

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1. This Respondent's Counter-Memorial (the "**Counter-Memorial**") is served pursuant to Rule 31 of the ICSID Arbitration Rules and paragraph 14 and Annex C of the Tribunal's Procedural Order No. 1 dated 12 December 2018.
2. The Counter-Memorial adopts the abbreviations and definitions as set out in **Annex I** (although, for convenience, some definitions are also given in the text), and is served with the following supporting documents:
  - 2.1. the witness statements and expert reports listed in **Annex II**;
  - 2.2. the documentary evidence (exhibits) listed in **Annex III**;<sup>1</sup> and
  - 2.3. the legal authorities listed in **Annex IV**.
3. This Counter-Memorial is also served alongside the Respondent's Memorial on Preliminary Objections which, as set out further at Section III below, sets out the Respondent's objections to this Tribunal's jurisdiction. All submissions made therein, and all documentary evidence and legal authorities served alongside, are fully relied upon and incorporated into this Counter-Memorial the extent that it necessary.

#### **I. INTRODUCTION AND SUMMARY**

4. As Rwanda will explain in this Counter-Memorial, and will demonstrate during the course of these proceedings, this claim represents a transparent and shameless attempt by the Claimants to revive stale and hopeless claims against Rwanda which are (and always have been), as they must know, utterly contrived and without any merit.
5. The Claimants' true intent is betrayed by the baseless and scurrilous allegations made against Rwanda about its alleged support of, and collusion with, the smuggling of minerals from the Democratic Republic of Congo ("**DRC**") via Rwanda. These allegations are demonstrably untrue, and have obviously been made only in a misguided attempt to embarrass Rwanda in these public proceedings into reaching a settlement with the Claimants.
6. Rwanda, which has been and continues to be at the forefront of efforts to prevent smuggling of minerals from the DRC, and has put in place and maintains a robust system of mineral traceability, is not intimidated by the Claimants' transparently motivated threats.
7. The Claimants' claim to be investors in Rwanda, who have invested significant sums, and have suffered losses as a result of Rwanda's expropriation of its investment or other breaches of the USA-Rwanda BIT, is a fiction.

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<sup>1</sup> The translations used in this Memorial, and referred to by witnesses, are largely informal. Should it be necessary, the Respondent might need to make appropriate corrections to these translations, but it is hoped that definitive English language texts can be agreed between the parties in due course. If not, translation evidence may be required.

8. In fact, this case is the clearest possible example of dishonest and dishonourable conduct by investors in developing nations such as Rwanda.
9. The Claimants acquired their interest in Natural Resources Development Rwanda Ltd (“NRD”), the Rwandan vehicle at the centre of this dispute, for just [REDACTED] in 2010 in circumstances where they knew that it held short-term mining concessions which were about to expire, and that long-term licences were unlikely to be granted because NRD had failed over a four-year period to carry out its contractual obligations to invest in exploring and exploiting its concessions and transforming them from unproductive artisanal mines to modern professional industrialised and productive mining operations.
10. Having acquired NRD in these circumstances, the Claimants then showed no interest in their effective management, and failed to invest anything into NRD’s mining operations. They mismanaged NRD’s concessions leading, inter alia, to illegal mining, environmental damage and falling production; purloined its cash and assets; and took no serious steps to persuade Rwanda that they had the competence, skills, mining expertise or financial substance to be granted any long-term concession rights.
11. Instead, the Claimants – through their Chairman Mr. Roderick Marshall – began a campaign of political pressure to try to compel Rwanda to grant mining concessions of which NRD was undeserving, enlisting the US Embassy in Kigali to assist in their endeavours, and attempting to contrive the basis of these proceedings.
12. To Rwanda’s credit, and despite this pressure, it refused to be intimidated and – while allowing NRD countless opportunities to prove that it had the credentials to operate and successfully industrialise and modernise mining concessions in Rwanda – failed to give in to Mr. Roderick Marshall’s bullying tactics.
13. Ultimately, for the justifiable and legitimate reason that NRD could not demonstrate that it was a capable, competent or trustworthy partner, in 2015 Rwanda finally brought the curtain down on its relationship with NRD by refusing to grant it the long-term licences it craved. Rwanda then quite properly and necessarily required NRD to cease operations. The process and the ultimate decision were transparent and fair, and the judgement made by Rwanda was the only correct one in the circumstances. There was no expropriation, and no breach of the USA-Rwanda BIT.
14. Mining rights within the concessions which NRD mismanaged and failed to develop have now been granted to other investors, none of whom – despite the Claimants’ false assertions – have any connection to the Rwandan government or military.
15. It is therefore regrettable that the Claimants have cynically sought to bring these proceedings, which they must know are without any hope of succeeding on the merits. Their claims and the untrue allegations made solely to embarrass Rwanda should never have been made, and should be dismissed in their entirety.

16. In this Counter Memorial on the Merits, Rwanda sets out a comprehensive summary of the factual background to NRD and the history of Claimants' lamentable involvement in the mining industry in Rwanda. In its submissions, Rwanda addresses in detail the factual case put by the Claimants (despite its inadequate, misconceived, wrong and distorted presentation of the material facts). In further contrast to the approach adopted by the Claimants, who attempt no serious exposition of the legal basis of their claims, Rwanda also provides a detailed and developed legal analysis supporting its defence to the claims made on legal and factual grounds.
17. Served alongside this Counter Memorial on the Merits, and to be read with it, is a Memorial on Preliminary Objections in which Rwanda explains why the Tribunal does not need to proceed to assess the merits of the Claimants' claims: the Claimants have failed to establish that the Tribunal and/ or ICSID has and/or should exercise jurisdiction over the Claimants' claims on *ratione temporis*, *ratione personae*, *ratione materiae* or *ratione voluntatis* grounds. Rwanda therefore submits that the proceedings should be bifurcated, and that the Respondent's jurisdictional objections should be heard at outset and the claim dismissed so that time, resources and effort are not expended unnecessarily. The reasons for bifurcation are addressed in the Request for Bifurcation which has been served with this Counter Memorial on the Merits and the Memorial on Preliminary Objections.
18. The Claimants make numerous claims against the Respondent, many of which are vaguely or ambiguously pleaded, lacking in particulars, or otherwise lacking sufficient detail or substantiation. In the circumstances, and for the avoidance of doubt, the Respondent expressly pleads that, save as herein expressly admitted or not admitted, and whether mentioned in this Counter-Memorial expressly or not, each and every allegation in the Memorial is denied as if it were here set out and specifically traversed.
19. Further for the avoidance of doubt, the burden of proof to prove each claim made by the Claimants lies with them. No submission made in this Counter-Memorial in any way detracts from this burden which at all times lies with the Claimants.

## II. STATEMENT OF FACTS

### A. Background

#### 1. The Republic of Rwanda

20. The story of the Republic of Rwanda's recent history is one of unimaginable tragedy and hardship followed by a remarkable transformation which has led to Rwanda being hailed as a beacon of hope in the heart of Africa.
21. The history of Rwanda from its independence from Belgium in July 1962 was tumultuous and bloody culminating in a civil war between 1990 and 1993 followed by a horrific genocide in 1994 which is estimated to have claimed at least a million lives, almost 20% of Rwanda's entire population, in the space of only about 100 days.
22. Since the terrible events of 1994 Rwanda has embarked on a truly inspiring journey of hope and reconciliation, at the centre of which is a strong vision of national development based on a sound and growing economy, underpinned by transparency and proper public and corporate governance, and zero tolerance at any level of the kind of corruption and mismanagement which has dogged the efforts of many other developing economies.
23. Private sector growth, and creating the conditions necessary to sustain and promote it, is key to the economic vision adopted by Rwanda. While there remains much to do in achieving the goals set out, very significant progress has been made.
24. The prime emphasis placed on good governance as the first pillar necessary to achieve Rwanda's goals and the success in building that essential foundation has been endorsed by the standing Rwanda has achieved internationally as one of the best places to do business, not only in Africa, but globally. The World Bank I IFC's "Doing Business" report for 2019 places Rwanda 29th globally overall (ahead of all other countries in continental Africa, and also ahead of both Spain and France; it is the only low income economy in the top 50 economies).<sup>2</sup> According to Transparency International, in 2018 Rwanda was the second least corrupt country in continental Africa, and at 48th place globally out of the 182 countries surveyed, with only Botswana in 34th place being ranked higher.<sup>3</sup> Rwanda again fares better than several European Union countries.
25. Rwanda's economic success story since the genocide of 1994 – which also destroyed its economic base – has been closely supervised and assisted by the International Monetary Fund (the "IMF") and the World Bank. For example, it was supported by a three year Poverty Reduction and Growth Facility between 2002 and 2005, and was granted World Bank Heavily Indebted Poor Country ("HIPC") initiative debt relief in 2005-2006 but emerged to be granted Policy Support Instrument status by the IMF in 2010.

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<sup>2</sup> World Bank Group, *Doing Business 2019: Economy Profile Rwanda* (2019) (**Exhibit R-001**), at page 4; World Bank Group, *Doing Business Economy Rankings* (May 2018) (**Exhibit R-002**) (available at: <http://www.doingbusiness.org/en/rankings>).

<sup>3</sup> Transparency International, *Corruption Perceptions Index 2018* (**Exhibit R-003**), at pages 3 and 11.



## 2. The history of mining in Rwanda

26. There is an almost 100-year mining history for tin, tungsten and tantalum (the “**3Ts**”) ores in Rwanda. In the early 20<sup>th</sup> Century, Belgian stakeholders began growing the Rwandan mining sector, following their success in the sector in the Congo. They brought skilled geologists and engineers, along with investment funds, to Rwanda-Urundi which, at that time, was a League of Nations mandate allotted to Belgium. Major cassiterite deposits were discovered in 1926, and other cassiterite and wolframite deposits were discovered in the subsequent years.<sup>4</sup>
27. After gaining independence in 1962, Rwanda became progressively more involved in the management of the mining companies. The mining sector was progressively consolidated and nationalised through the Société Minière de Rwanda (“**SOMIRWA**”) (which was equally owned by Rwanda and Belgian banks) from 1973 onwards. However, SOMIRWA failed and filed for bankruptcy in 1985 as a result of the collapse of the international tin market, refinancing and foreign exchange issues.
28. From around 1997, the sector started to refocus on development on the base of a progressive re-privatisation process, including attracting significant private investment. This privatisation process accelerated from 2004.<sup>5</sup> By around 2006, the Government was entering into four-year concession agreements with investors, as explained at paragraph 20 of the witness statement of Mr. Francis Gatare, the current CEO of the Rwanda Mines, Petroleum and Gas Board (“**RMB**”), and former director General of the Rwanda Investment Promotion Agency (“**RIEPA**”):<sup>6</sup>

*“The main purpose of the four year concession agreements entered into in around 2006, such as the Contract, was to give the investor an opportunity to assess the feasibility of mining the concession area on an industrial level, and also to demonstrate to the Government, through complying with its obligations, that it was a serious partner to whom a long-term concession should be granted. The concession agreements did not provide any guarantee or certainty that long-term agreements would be entered into.”<sup>7</sup>*

29. As Mr. Gatare also explains, in addition to the detailed feasibility study requirement, these four-year concession contracts required the investors to carry out industrialisation of the mining operations in their concession areas: that is, investing in modern equipment and infrastructure, and re-organising mining activities, to move away from the traditional

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<sup>4</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 (**Exhibit R-004**), at pages 6-7.

<sup>5</sup> Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2019) (**Exhibit C-015**), at pages 6-7.

<sup>6</sup> RIEPA became part of the Rwanda Development Board (RDB) in January 2009. RDB is a “one stop agency for all services that require contact between the Government and private businesses” in Rwanda. See Witness Statement of Mr. Francis Gatare dated 24 May 2019, at paras. 7 and 8.

<sup>7</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 20.

incumbent “artisanal” mining model (unskilled miners using basic hand tools) towards modern, professional, industrial mining:

*“As well as the requirement to submit a feasibility study, another key requirement of the concession contracts we signed with investors in the period around 2006, including the Contract, was industrialisation. This was an important term of the contracts because achieving industrialisation was the very rationale for privatisation of the mining industry in 2006: the Government wanted to increase productivity by professionalising the mining industry. Increasing productivity was and is vital because it facilitates Rwanda’s economic development through mineral royalties. We had no interest in private investors taking over the concessions and maintaining them as artisanal mining operations whereby minerals are extracted using basic tools like hammers and sticks in places we know the minerals to be – maintaining the mines in this way would provide no increase in productivity and no benefit whatsoever to Rwanda’s economy. Our clear policy in 2006 when the mining industry was privatised was to hand over mining sites to private investors to industrialise. This meant carrying out advanced detailed exploration as I have explained above, conducting thorough feasibility studies, developing mining plans, and deploying capital to professionally extract in a modern and highly productive manner. In short, the intention behind the concession agreements was to transform the whole of the mining sector in Rwanda.”<sup>8</sup>*

30. The Rwandan Government supported development of the mining sector through publishing a new mining law in 2008<sup>9</sup> and the development of a national mining policy in 2010,<sup>10</sup> as well as through state-financed regional- and national-scale mineral exploration and prospection activities and implementation of supply chain due diligence measures as outlined below.
31. By 2010, however, when many of the four-year licences were coming up for renewal and the investors were evaluated in relation to their suitability to be granted long-term licences, Rwanda recognised that concessionaires who had been granted these initial four-year concessions had generally not made sufficient progress, as identified in Government policy documents:

***“Ensure that the existing 4 year prospection and extraction permits produce detailed resource statements. The system in Rwanda has been providing for vast concessions to be given to mining companies under exploration and exploitation licences. At the same time, these four year licences have not been guaranteeing the mining companies the right to sole proprietorship of the long-***

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<sup>8</sup> Witness Statement of Mr. Francis Gatere dated 24 May 2019, at para. 25 (footnotes omitted).

<sup>9</sup> Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**).

<sup>10</sup> Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2019) (**Exhibit C-015**).

*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. This was a short-term measure, but is a factor, together with the availability of minerals from the region, in the limited proper exploration that has been undertaken. Hence, many companies are simply using artisanal style mining to extract those minerals that are easily accessible for the lifetime of the exploration/exploitation licence (four years) while continuing to focus mainly on trading minerals. Given that many of these 4 year licences are coming up for renewal in 2010 there is a need to ensure that the owners of the licences are making every effort to undertake effective exploration with a view to developing industrial mining opportunities (resource and ultimately reserve statements). To do this three actions are required:*

***Establish clear criteria for the evaluation of the exploration efforts of holders of mine concessions.*** Specifically, the government will set out in Ministerial Orders the criteria for evaluation, such as the provision of a validated resource statement with effective quality assurance and quality control signed by a member of an internationally recognised professional body. Without such proof of effective exploration, 30year licences will not be granted and without proof of the ongoing development of such resource statements companies will not be given extensions to their 4 year licences.”<sup>11</sup>

32. It was clearly communicated to all concessionaires, therefore, that if operators had not complied with the requirement to industrialise the mining operations in their concessions, and/or if they had not carried out sufficiently comprehensive resource evaluation activities, they would not be granted 30-year concession licences, and could not even count on extensions to their four-year licences in order to continue exploration and exploitation activities in the short term.
33. The Economic Development And Poverty Reduction Strategy II, produced by the Ministry of Finance and Economic Planning (“**MINECOFIN**”) and published in May 2013, recognised the importance of private sector transformation to enable it to play its role as an “*engine of economic growth*”,<sup>12</sup> noting a desire to transform the economy from its reliance on micro and small enterprises which provide low returns to investment and struggle to grow. Rwanda’s mining sector was identified as the subject of the first sector specific intervention.<sup>13</sup>

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<sup>11</sup> Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2019) (**Exhibit C-015**), at page 31 (emphasis in original).

<sup>12</sup> Republic of Rwanda (MINECOFIN), *Economic Development and Poverty Reduction Strategy II* (May 2013) (**Exhibit R-005**), at page 12.

<sup>13</sup> *Ibid* (**Exhibit R-005**), at page 39.

34. As of 2013, the majority of mining undertaken in the country was artisanal and small-scale mining. The 3T ore minerals, taken together, are among Rwanda’s most important export products. In this regard, creating the environment for sustaining and further enabling growth and development of the mining sector became a “*key priority*” for the Rwandan government, and ambitious sector targets were being formulated regarding its contribution to national development.<sup>14</sup>
35. In order to further stimulate the orderly development of a professional industrial mining sector and attract investors committed to assisting in the transition from artisanal mining, in 2014 Rwanda carried out a further reform of its mining law by introducing Presidential Order No. 63/02 *repealing Presidential Orders establishing Mining Concession and Allocating Mining Exploitation Licences* (the “**2014 Presidential Order**”)<sup>15</sup> and Law No. 13/2014 *on Mining and Quarry Operations* (the “**2014 Law**”).<sup>16</sup> This government policy of professionalising and modernising the Rwandan mining industry has led to an increase in exports in minerals since 2014.<sup>17</sup>
36. Minerals became an increasingly important source of revenue for Rwanda, showing potential as an avenue to facilitate growth and economic transformation in the country, and thereby to improve the lives of Rwandans through the alleviation of poverty and the building of public infrastructure. Combined export revenues of 3T ore concentrates (cassiterite, coltan and wolframite) reached USD \$156 million in 2011, USD \$136 million in 2012 and USD \$228 million in 2013.<sup>18</sup> In recent years, the Rwandan mining sector has been frequently cited as a significant driver of economic growth, and Rwanda is now one of the world’s largest producers of the 3Ts.<sup>19</sup> Since the passage of the 2014 Law, and despite a dip in revenues from the 3Ts between 2012 and 2015 and the following years due to oversupply and a consequential drop in prices on the world markets,<sup>20</sup> production of the 3Ts is now increasing significantly, which is testament to the successful reform and modernisation of the Rwandan mining sector and the quality of the operators it has now managed to attract.
37. The focus of Rwanda’s modernisation of its mining industry has not just been economic growth, but the protection of workers and the environment. In 2018, Rwanda passed a new Mining and Quarry Operations Law (Law No. 58/2018 of 13 August 2018) which

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<sup>14</sup> *Ibid* (**Exhibit R-005**), at pages 129-130.

<sup>15</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 (**Exhibit CL-001**).

<sup>16</sup> Rwanda Law No. 13/2014 *on Mining and Quarry Operations* (20 May 2014) published in the Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**).

<sup>17</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 25

<sup>18</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 (**Exhibit R-004**), at page IX.

<sup>19</sup> Export.gov, *Rwanda Country Commercial Guide – Mining & Minerals* (last published on 28 March 2019) (**Exhibit R-006**).

<sup>20</sup> See Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 18.

continued the promotion of professionalism in the sector, with more stringent health and safety, environmental and social impact safeguards.<sup>21</sup>

38. At the same time, since around 2011, Rwanda has been at the forefront of international efforts to promote international due diligence of the trade in the 3Ts to ensure that only minerals mined responsibly enter the international supply chain. The International Tin Supply Chain Initiative (“ITSCI”) has been integrated into Rwanda’s national mining regulatory system and has been jointly implemented by the Geology and Mines Department (“GMD”) and the International Tin Association (generally known under the acronym of its previous name, “ITRI”) (including its contracted implementation partners) across the whole 3T mining and trading sector since 2011. This is discussed in further detail below.

### **3. ITRI and the ITSCI programme**

#### ***i. Background: ITRI and the iTSCi programme***

39. ITRI is the only organisation dedicated to supporting the tin industry and expanding tin use. A primary goal of ITRI is to ensure an innovative, competitive, and sustainable supply chain and market for tin. It intends to assist the tin industry through collection and sharing of information with companies, sustainability and markets, cooperating on projects and communicating a positive and progressive future for the tin industry. ITRI represents more than two thirds of global tin production with a significant tin user engagement. It produces guidelines on responsible production, including in relation to artisanal and small-scale mining, sustainable production and recycling. It has also issued a code of conduct for ITRI members. It is independent of and was instituted prior to the US Dodd-Frank Act requirement<sup>22</sup> that companies using gold, tin, tungsten and tantalum make efforts to determine if those materials came from the Democratic Republic of Congo (“DRC”) or an adjoining country and, if so, to carry out a "due diligence" review of their supply chain to determine whether their mineral purchases are funding armed groups in eastern DRC.
40. In 2010, ITRI piloted the iTSCi programme, which is the industry traceability and due diligence programme. It is designed to address conflict and human rights challenges at source in partnership with governments and civil society. It is a set of guidelines to manage the supply chain of the 3Ts in order to reduce and prevent the infiltration of conflict minerals such as the 3Ts from the Democratic Republic of Congo and adjoining countries into the supply chain. The monitored supply chain allows metal users to source

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<sup>21</sup> Law No. 58/2018 on mining and quarry operation (13 August 2018), published in the Official Gazette No. 33 of 13 August 2018 (**Exhibit R-007**).

<sup>22</sup> See The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law in July 2010 (**Exhibit CL-004**), at section 1502, following which the Securities and Exchange Commission published the Conflict Minerals Rule in August 2012 along with guidance for how companies should report on the source of Tin, Tungsten, Tantalum, and Gold.

responsibly mined metals, while ensuring that miners benefit from access to the international markets.

41. iTSCi works to achieve avoidance of conflict financing, human rights abuses, or other risks such as bribery in mineral supply chains. Its reference is the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas* and the OECD has confirmed that iTSCi is fully aligned with the guidance.<sup>23</sup>
42. In providing assistance on OECD compliance, the iTSCi system assists companies in complying with national and international regulations regarding production of and due diligence relating to the source of tin, tantalum and tungsten. It is implemented by governments, is largely self-funded by the industry and is monitored by civil society and independent auditors. It provides unique and credible information to government, business and civil society, to allow appropriate and effective decisions on due diligence and steps toward improving supply chains.
43. iTSCi produces reports on companies, mines, transport routes, field activity, mineral tonnage data, risk incidents and many other parts of the mining industry. The primary functional aspect of iTSCi is that it vets and monitors mines and transport routes to ensure that they are conflict free, and the minerals produced from the vetted mines are tagged to ensure traceability. Minerals are reviewed at various points during the supply and production chain to ensure that no conflict minerals are smuggled into the system. This allows end users and consumers to be sure that the minerals used are conflict free.
44. As Mr. Gatare explains, and contrary to the unfounded and scurrilous allegations made by and on behalf of the Claimants, Rwanda has been at the forefront of anti-smuggling initiatives in the region:

*"I have read the witness statements served on behalf of the Claimants which make various allegations about Rwanda providing support for mineral smuggling and fraud. These allegations could not be further from the truth: Rwanda is not only fully supportive of the "iTSCi" scheme, but in fact participated in the design of the Mineral Certification Scheme of the International Conference on the Great Lakes Region (ICGLR) and was the first country to implement it. It has worked closely with PACT over the years to ensure that there are no conflict minerals in Rwanda, and in recent years has been the only country in the region, that has been 100% compliant. In recognition of its leadership in this area, last October Rwanda hosted the 59th Annual General Assembly of the Tantalum-Niobium, an industry conference. In short, Rwanda has worked extremely hard to be a regional leader in anti-smuggling initiatives, and has been successful in doing so."*<sup>24</sup>

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<sup>23</sup> iTSCi Press Release, *OECD rates iTSCi programme highest in responsible minerals assessment* (31 July 2018) (**Exhibit R-008**).

<sup>24</sup> Witness statement of Mr. Francis Gatare dated 24 May 2019, at para.31.

## ***ii. How iTSCi works on the ground in Rwanda***

45. iTSCi has been active in Rwanda since 2011. Currently iTSCi monitors more than 900 mining sites in Rwanda of which nearly 300 are active.<sup>25</sup> The process of bringing a raw mineral to the consumer market involves multiple actors and generally includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of end product. The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.
46. On the ground in Rwanda, iTSCi operates in two ways. First, it vets and monitors companies and transport links in the supply chain. iTSCi Field Officers conduct baseline studies at each mine site before a mine is admitted to the iTSCi programme and make estimates of production capacity.<sup>26</sup> These Field Officers regularly visit the mines to inspect and report on production and mining activity and advise the miners and the RMB mineral field officers on how to comply with international standards and to ensure the supply chain remains clean.<sup>27</sup>
47. Second, it uses a system of “tags”. After a mine becomes part of the iTSCi programme, tags are allocated for the expected production based on the baseline studies carried out by the iTSCi Field Officers.<sup>28</sup> The system of “tags” allows due diligence to be completed by providing comprehensive chain of custody information. By placing tags on every bag of minerals produced, at the site at which they are produced, iTSCi is able to physically track the minerals at all points along their trading chain, from their source in the mine to their point of export. This ensures that the same minerals flow through the supply chain, from mine to processor to exporter to smelter, without infiltration of conflict minerals into the system.
48. The iTSCi Field Officers visit each site regularly to monitor production and iTSCi opens an incident report if production at a mine is higher than the baseline report predicted.<sup>29</sup> Incident reports are an important part of the iTSCi programme as they provide iTSCi with an accurate picture of the effectiveness of continual monitoring on the ground.<sup>30</sup> Information about all incidents and how they are resolved is made public on the iTSCi website.

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<sup>25</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>26</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>27</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>28</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>29</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>30</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

49. Most tags are allocated on site at the mine where the tagging managers work closely with the mine managers.<sup>31</sup> If tags are not applied on site, incident reports are opened and the RMB takes appropriate measures against the wrongdoers.<sup>32</sup>
50. Thus there is no proper basis at all for the allegations made by and on behalf of the Claimants as to the alleged involvement of Rwanda in smuggling of the 3Ts from the Democratic Republic of Congo. Mr. Ehlers, who is highly experienced in the mining and mineral trading sectors in Africa including specifically Rwanda refers to Rwanda's "exceptionally robust traceability program utilising the iTSCi programme" and expresses the belief that "it is virtually impossible to export Rwandan minerals without complying with this traceability program."<sup>33</sup> There was a drop in exports from Rwanda in around 2014. Mr. Niyonsaba explains that contrary to the claims of Mr. Christophe Barthelemy, the reason for the drop in Rwandan exports of the 3T minerals in 2014 and 2015 was due to oversupply on the global market for Tin, and a fall in trading volumes of tungsten and coltan.<sup>34</sup> This evidence is confirmed by publicly available data, as set out in Appendix 1 to the Counter-Memorial. Further, in relation to the allegation made by Mr. Mbaya that it would not be possible for Rwanda to be producing two and a half times more minerals today than it was in 2014, Mr. Gatare explains that this is a result of the modernisation and professionalisation of the Rwandan mining industry:

*"To claim that export figures have increased because of mineral smuggling when the figures are carefully verified from the mines in this comprehensive fashion is therefore not credible. Exports of minerals from Rwanda have increased in the past five years, and that is as a result of the policies put in place to modernise and professionalise the Rwandan mining industry with the assistance of private investors, and is testimony to the success of the reform of Rwandan mining law which took place in 2014. Further reform of the law took place in 2018 as part of our continuing drive to professionalise and grow the mining industry in Rwanda."*<sup>35</sup>

#### **4. Natural Resources Development Rwanda Ltd.**

51. Natural Resources Development Rwanda ("**NRD**") was incorporated on 10 July 2006 in Rwanda.<sup>36</sup> Its initial shareholders were Rwandan/Belgian/British national, Mr. Ben Benzinge (as to 15%), with the rest of the shares being owned by two German father and son investors – Mr. Joachim and Jens Zarnack (the "**Zarnacks**") – who held respectively

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<sup>31</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 12

<sup>32</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 12

<sup>33</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 38

<sup>34</sup> Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 17.

<sup>35</sup> Witness statement of Mr. Francis Gatare dated 24 May 2019, para 33.

<sup>36</sup> Memorandum and Articles of Association of Natural Resources Development Rwanda Limited, incorporated on 10 July 2006 (**Exhibit R-009**).



15% and 70% of the shares. Mr. Benzinge was appointed as the original managing director, with the Zarnacks also as directors.

52. NRD was established as a Rwandan operating company to enter into a concession agreement and to hold mining concession licences as negotiated with the Rwandan government, as detailed below.

## **B. The Contract between Rwanda and NRD**

### **1. Negotiations and entry into the Contract**

53. As explained at paragraph 28 above, and in Mr. Gatare's witness statement,<sup>37</sup> in around 2006 the Rwandan mining industry was being privatised, and Rwanda sought to attract investors to explore and then exploit mining concessions, investing in infrastructure, and equipment, and introducing skills and knowhow to transform Rwanda's mining sector from artisanal mining-based to a modern, industrialised, professional sector.<sup>38</sup>
54. It was in this context that in around June 2006, Rwanda started negotiations with Mr. Jens and Joachim Zarnack and their local business partner, Mr. Benzinge, in relation to a very significant investment into the Rwanda mining sector. In relation to these negotiations, although Mr. Marshall claims<sup>39</sup> that Rwanda gave a guarantee to the Claimants that "*they would be awarded the full rights as Concession Holder*" (a) none of the Claimants was associated with NRD at the time of these initial negotiations; (b) it would have been clear from the contractual arrangements that NRD entered into with Rwanda that there was no such guarantee and that the grant of a long-term concession was subject to conditions (which NRD ultimately failed to meet); and (c) the provision at any time of the type of guarantee alleged by Mr. Marshall would have been entirely contrary to the objectives and associated policy of Rwanda in relation to the modernisation of its mining industry, and careful evaluation of potential investors during the course of initial short-term mining licence periods before assessing whether they were suitable to be granted long-term licences.<sup>40</sup> No such guarantee was given at any time by Rwanda, whether during the course of negotiations with the Zarnacks and/or Mr. Benzinge before the contract between NRD and Rwanda was agreed, or at any time subsequently.
55. On 24 November 2006, Rwanda entered into a contract for acquiring mining concessions with NRD (the "**Contract**"), under which Rwanda permitted NRD to occupy, explore and mine in the mining areas of Rutsiro, Mara, Sebeya, Giciye and Nemba (the "**Five Concession Areas**").<sup>41</sup> In turn, NRD was obliged to proceed immediately to industrial

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<sup>37</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 25.

<sup>38</sup> See also Witness Statement of Dr. Michael Biryabarama dated 23 May 2019, para 8.

<sup>39</sup> Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 9.

<sup>40</sup> See the detailed explanation provided in the Witness Statement of Mr. Francis Gatare dated 24 May 2019, at paras. 16-21.

<sup>41</sup> Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**).

exploitation of each of the Five Concession Areas which, in aggregate, covered an area of some 30,000 hectares.

56. As Rwandan media reported at the time, the Zarnacks had pledged to invest “US\$40 million over a period of five years” into the Five Concession Areas and into infrastructure, including a mineral purification refinery which it was hoped would lead to a transformation of the mining industry in Rwanda.<sup>42</sup>
57. In the event, as will be explained below, the Zarnacks failed to make the investments that they had pledged to make, and sold their 85% interest in NRD to other German investors in 2008. In fact, by November 2010 it appears even from NRD’s own documents (which without corroborating evidence are not themselves accepted by the Respondent as reliable) only some USD \$12.7 million had been invested and the required obligations for exploration and industrialisation had not been complied with by NRD.<sup>43</sup>

## **2. The rights and obligations under the Contract**

58. The Contract was executed in both French and in English. Pursuant to Rwandan law, neither has precedence over the other.<sup>44</sup>
59. The Contract provides under Article 1 that its purpose is that Rwanda authorises NRD to explore and run mining operations within the Five Concession Areas for a period of 4 years.
60. In its English iteration it then provides, at Article 2 for NRD’s obligations upon the granting of this 4 year authorisation as follows:

### ***“Articles 2: Obligations***

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

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

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<sup>42</sup> Rwanda Today, German Firm eyes \$40 million mining deal (4 December 2006) (**Exhibit R-010**).

<sup>43</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*, at page 101.

<sup>44</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 6.

*5. Provide evaluation reports of reserves and the feasibility studies after 4 years.*"<sup>45</sup>

61. Article 4 of the English version (there is no Article 3 in the English text, and no Article 4 in the French text, but Article 3 of the French text is broadly equivalent to Article 4 in the English) then provides for the Government of Rwanda's obligation to provide further mining concessions after the initial four-year period as follows:

*"After positive evaluation of the submitted feasibility study Natural Resources Development Rwanda Limited will be granted the mining concessions."*<sup>46</sup>

62. However, the French language column sets out the rights under Article 3:

***"Article 3: Des droits***

*Après examen positif des travaux d'évaluation et l'étude de faisabilité la Société Natural Resources Development Rwanda Ltd a la priorité pour l'obtention de titre minier."*<sup>47</sup>

63. That is, in English translation:

***"Article 3: Rights***

*After a positive review of the assessment and the feasibility study, Natural Resources Development Rwanda Ltd has priority for obtaining a mining title."*<sup>48</sup>

64. Accordingly, it is clear that the text in English differs from the French in two key ways:
- 64.1. First, the French requires the submission of both the assessment and the feasibility study.
- 64.2. Second, the French provides that NRD has priority for obtaining a mining title.
65. However, contrary to the position adopted by the Claimants,<sup>49</sup> both language versions of the Contract make it clear that there is no guarantee of the granting of a 30-year concession.<sup>50</sup> As Mr. Mugisha explains (and contrary to the witness statement of Mr. Olivier Rwamasirabo<sup>51</sup> and the submissions made at paragraph 171 of the Memorial), the

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<sup>45</sup> Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**), at Article 4 (English).

<sup>46</sup> *Ibid* (**Exhibit C-017**), at Article 4 (English).

<sup>47</sup> Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**), at Article 3 (French).

<sup>48</sup> Translation of French language version of Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-011**).

<sup>49</sup> Memorial, at para. 38.

<sup>50</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 12.

<sup>51</sup> Witness Statement of Mr. Olivier Rwamasirabo dated 26 February 2019, at para. 5-6.

obligation of Rwanda to grant “*the mining concessions*” is a conditional one.<sup>52</sup> The conditions which are to be met are:<sup>53</sup>

- 65.1. Compliance by NRD with its obligations under Article 2; and
  - 65.2. Positive evaluation by the Government of the Feasibility Study to be submitted at or before the end of the four-year term of the Contract. In this regard, Mr. Mugisha explains that the obligation under Art. 5(2) for NRD to provide reports of reserves and feasibility study “after 4 years” is properly to be construed as requiring submission of the necessary reports by the end of the Contract.<sup>54</sup> Although in fact NRD ultimately submitted its purported Feasibility Study and Application for new mining concessions shortly after the fourth anniversary of the Contract, Rwanda considered the said report as purported compliance with Article 4 of the Contract to submit a feasibility study although concluded that the contents of this report was not sufficient to allow a positive evaluation, and therefore they could not justify the grant of the new licences requested.
66. Hence, Rwanda was entitled to refuse to grant “mining concessions” after four years if NRD had failed to comply with its Article 2 obligations or failed to submit the necessary feasibility study after four years; and in any event if it was unable to positively evaluate that feasibility study.
67. As will be apparent from the submissions made below, as events transpired:
- 67.1. NRD failed to comply with its Article 2 obligations in that (at least) it failed to proceed immediately (or at all or to any or any significant degree) to industrialise any of the Five Concession Areas once mining licences were granted in January 2007. This was a significant obligation – as Mr. Gatare explains, the intention behind privatisation and the granting of concessions to investors was to transform the Rwandan mining industry from artisanal mining to professional, modern, industrialised mining.<sup>55</sup>
  - 67.2. While NRD did purport to provide a report of reserves and a feasibility study in November 2010 as part of an application for new licences in the concession areas (as described in more detail at paragraphs 83-95 below, the “**November 2010 Application**”, the report and study was superficial and incomplete and was not in substance compliant with the obligation under Article 2(5) (as NRD was aware at the time).<sup>56</sup> It “*fell far short of what was required of a feasibility study.*”<sup>57</sup>

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<sup>52</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 12-23.

<sup>53</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 12-23.

<sup>54</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 10.2.

<sup>55</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 25.

<sup>56</sup> See Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19-20; Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, para. 19-21.

<sup>57</sup> Witness statement of Dr. Michael Biryabarama dated 23 May 2019, para 12.

67.3. In any event, given the superficial and incomplete nature of the November 2010 Application, the Government of Rwanda was unable to make a positive evaluation, and therefore did not grant new mining concessions and was under no obligation to do so: *“On the basis of this application we could not possibly have granted even the short term (5 year) mining licences requested, let alone any long-term concessions.”*<sup>58</sup>

### **3. Licences issued pursuant to the Contract**

68. On 29 January 2007, pursuant to the obligations set out in Article 1 of the Contract for Rwanda to authorise NRD to begin mining operations in the Five Concession Areas for a period of four years, Rwanda issued five *“special small-scale mining exploration and exploitation permit[s]”* to NRD, one relating to each of the Five Concession Areas (**“Licences”**).<sup>59</sup> The licences were issued by way of Ministerial Decree and addressed to Mr. Benzinge in Kigali.

69. The use of the special small scale mining permits was *“specifically reserved for the holder or its authorized representative”*,<sup>60</sup> and was valid for a term of four years.<sup>61</sup>

#### **i. 2007 to 2008 – Zarnack Period**

70. Between the signing of the Contract on 24 November 2006 and around late 2008, NRD remained controlled by the Zarnacks as 85% shareholders. The circumstances in which the Zarnacks ceased to be shareholders of NRD or to have any ultimate ownership rights in relation to NRD’s shares are unclear and apparently disputed as between the Zarnacks, Mr. Benzinge and NRD’s subsequent shareholders. The Claimants are therefore put to strict proof as to the transfers of shares and ownership rights in NRD between its incorporation in 2006 and the commencement of these proceedings. For the avoidance of doubt the submissions made at paragraphs 2 to 5 of the Claimants’ Memorial in relation to the ownership of NRD are not admitted, and the Claimants will be put to strict proof in relation to each of the alleged steps and the validity thereof.

71. Without prejudice to this, the position appears to be as follows.

71.1. On or around 13 March 2008 the Zarnacks transferred their 85% shareholding in NRD to a German holding company, NRD Holdings GmbH. This transfer was objected to at the time and subsequently challenged by Mr. Benzinge as not being

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<sup>58</sup> Witness statement of Dr. Michael Biryabarama dated 23 May 2019, para 12.

<sup>59</sup> Letters from the Minister of State for Water and Mines (B. Munyanganizi) to the Director of NRD (B. Benzinge) Forwarding Ministerial Decree (29 January 2007) regarding the Giciye Concession (**Exhibit C-018**), the Mara Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), and the Sebeya Concession (**Exhibit C-022**). The licences set out the legal framework in place at the time, including the law dated 27 April 1971 amending the law dated 30 January 1967 regarding the Mining Code (**Exhibit R-081**), in particular Article 64, and the Presidential Decree No. 8/07.2 dated 10 January 1974 regarding the organisation of small-scale mining exploration and exploitation (**Exhibit R-082**).

<sup>60</sup> *Ibid* (**Exhibit C-018**), (**Exhibit C-019**), (**Exhibit C-020**), (**Exhibit C-021**), and (**Exhibit C-022**), each at Article 4.

<sup>61</sup> *Ibid* (**Exhibit C-018**), (**Exhibit C-019**), (**Exhibit C-020**), (**Exhibit C-021**), and (**Exhibit C-022**), each at Article 5.

in accordance with NRD's articles or association.<sup>62</sup> In arbitrations proceedings in Kigali on 31 October 2012 brought by Mr. Benzinge, this transfer was declared null and void by the arbitrator.<sup>63</sup> That decision was subsequently upheld on procedural grounds (the substantive merits not being considered) by the Rwandan High Court on 23 September 2013<sup>64</sup> and Supreme Court on 2 May 2014.<sup>65</sup> Further particulars of this dispute are given at below in the context of responding to the allegations made by the Claimants in relation to Mr. Benzinge and the attitude of the Rwandan Government to this dispute.

71.2. NRD Holdings GmbH is alleged to be a wholly owned subsidiary of HC Starck GmbH ("HC Starck"), a German company which was a mineral processor that already procured raw materials from Rwanda.<sup>66</sup> HC Starck was a major producer of tungsten and tantalum products, and purported to have taken over control of NRD by March 2008.<sup>67</sup>

71.3. In around April 2008 Mr. Ernst Jung, a member of the executive board of HC Starck met with the Rwandan Minister of State for Commerce, Industry and Investment Promotion in Rwanda and explained certain complications and disagreements with the shareholder structure in NRD, and proposed the transfer of NRD's contractual rights in relation to mining operations in Rwanda to "*a new company which has a new, more professional and business oriented shareholder structure than the old NRD...*".<sup>68</sup> This proposed transfer did not go ahead.

71.4. By October 2008 HC Starck, through NRD Holding GmbH claimed to be the 85% shareholder in NRD.<sup>69</sup>

72. Little or really none of the USD\$40 million investment pledged by the Zarnacks at the time the Contract was entered into was made in respect of NRD in the period before HC Starck took control around March 2008.<sup>70</sup> As Professor Nkanika Wa Rupiya explains in his witness statement, at the time he commenced work for NRD in around March 2008, no real steps had been taken to develop or industrialise the Five Concession Areas for which

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<sup>62</sup> Letter from Legal Counsel (I. M. Bizumuremyi) to the Minister of Trade and Industry, *Appeal by Mr. Ben Benzinge against the decision of Registrar General to suspend him from the position of Managing Director of Natural Resources Development (Rwanda) Ltd.* (8 August 2012) (**Exhibit R-012**).

<sup>63</sup> *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal (17 May 2013) (**Exhibit R-013**).

<sup>64</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Commercial High Court, Kigali, RCOMA 0269/13/HCC (23 September 2013) (**Exhibit R-014**).

<sup>65</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Supreme Court, Kigali, RCOMA 0017/13/CS (2 May 2014) (**Exhibit R-015**).

<sup>66</sup> Witness Statement of Mr. Francis Gatere dated 24 May 2019, at para. 12.

<sup>67</sup> NRD Rwanda Status Report 2008 (**Exhibit C-024**), at Section 1.

<sup>68</sup> Letter from a Member of the Executive Board of H.C. Starck (E. N. Jung) to Minister of States (V. Karega) *Holderhip of the authorizations to operate the designated mining concessions RUTSIRO, MARA, SEBEYA, GICIYE AND NEMBA* (17 April 2008) (**Exhibit R-016**), at page 2.

<sup>69</sup> NRD Rwanda Status Report 2008 (**Exhibit C-024**), at Section 1.

<sup>70</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28-29

NRD had been granted its small-scale mining licences, they were continuing to work on an artisanal mining basis, and little money appeared to have been invested.<sup>71</sup>

**ii. March 2008 to December 2010 – the Starck Period**

73. Once Starck took control of NRD in around March 2008, they made some very modest investments into the Nemba site and also made the ill-fated decision to invest in expensive plant equipment for the Rutsiro concession in order to process the local scree deposits which they (mistakenly) believed commercially viable quantities of tungsten. However, as Professor Nkanika Wa Rupiya, Mr. Ehlers and Mr. Sindayigaya have explained, this plant proved to be an expensive white elephant: the initial survey which had suggested that the local scree rocks contained commercially viable tungsten was wrong, and the plant (which was ultimately completed and commissioned at the end of 2010) was never able to produce commercially viable tungsten, and has never been used.<sup>72</sup>
74. As a result of this expensive failure,<sup>73</sup> and also apparently as a result of concerns about its involvement in the trade of conflict minerals,<sup>74</sup> Starck decided to withdraw from NRD and started to look for buyers.
75. At the same time, from mid-2010, it ceased providing any funding to NRD,<sup>75</sup> as a result of which equipment had to be sold just to raise funds even to pay miners' wages;<sup>76</sup> and by the end of 2010 it was on the verge of bankruptcy, its financial plight significantly worsened by the discovery that it owed large amounts of tax to the Rwanda Revenue Authority in relation to withholding tax.<sup>77</sup>
76. No investment had been made at any of the other concessions at all, save for some protective gear for miners and some hand tools;<sup>78</sup> and despite Professor Prosper Nkanika Wa Rupiya having been appointed as Chief Geologist in March 2008, no proper exploratory work had been done because Starck seemed to be focussed almost entirely on making money from the ultimately useless Rutsiro plant.<sup>79</sup>

**iii. Summary of NRD's operations as of late 2010**

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<sup>71</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 9-12.

<sup>72</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 10; Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28-29; Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at paras. 9-10.

<sup>73</sup> Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at paras 17; Witness Statement of Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 10.

<sup>74</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 14.

<sup>75</sup> Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at paras 18.

<sup>76</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 15.

<sup>77</sup> Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at para.18.

<sup>78</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 11.

<sup>79</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 13.

77. By 2010, NRD's Five Concession Areas were still largely worked by artisanal miners and had not been industrialised.<sup>80</sup>
78. As alluded to above, and as Mr. Ehlers explains, artisanal mining operations were standard on non-industrialised mines in Rwanda, as in other countries where industrialised mining has not developed.<sup>81</sup> Typically, artisanal miners are not employees of the company that holds the mining concession, but will work independently mining minerals using basic tools, such as shovels and pans. Artisanal miners are allowed to mine by concession-holders, who collect the minerals mined by the artisanal miners, and then sell them to local traders, who will on-sell the minerals to smelters and other users of the minerals.
79. Such artisanal mining can be economic for concession holders because they do not have to make significant investment in the mine infrastructure. However, the purpose of concession licences under Rwanda's minerals framework and policy was to encourage industrialisation of the mining industry, to allow the operations in the country to "*move away from an artisanal mining model towards the more productive and professional industrial model*".<sup>82</sup>
80. Throughout the whole period of 2006 to 2010, NRD was operating the artisanal model, and failed to take any or any significant steps to industrialise any of the concessions, disregarding its obligation and the condition at Article 2(3) of the Contract to "*[p]roceed immediately to the industrial exploitation in all given sites*". As to this:
- 80.1. At Rutsiro, although a processing plant was built, it was never used, because it was unable to become operational. As explained above, NRD had failed to undertake the required or any sufficient exploration at Rutsiro,<sup>83</sup> prior to constructing the plant, and when it was constructed, it was discovered that "the plant machine could not produce sufficient volumes to make its operation economic or commercially viable".<sup>84</sup>
- 80.2. Similarly, Nemba had not been industrialised. It was a tin mine, on a flat mining site, and although NRD had the benefit of infrastructure set up by the Belgians in colonial times,<sup>85</sup> properly industrialising it would have required exploration by way of drilling, and then construction of underground tunnels.<sup>86</sup> NRD continued to use the small amount of infrastructure left over from the Belgian colonial mining times, rather than constructing new tunnels.<sup>87</sup>

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<sup>80</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 14.

<sup>81</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 25.

<sup>82</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 26.

<sup>83</sup> Witness statement of Dr. Michael Biryabarama dated 23 May 2019, para 11.

<sup>84</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 27.

<sup>85</sup> Witness Statement of Mr. Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 11.

<sup>86</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28.

<sup>87</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28.



80.3. No industrialisation at all had occurred at Mara, Sebeya and Giciye.<sup>88</sup>

**iv. 2010 Application: application for four year licences, and grant of short term extension**

81. On 20 October 2010, NRD had been informed by the Ministry of Forestry and Mines (“MINIFOM”) that its four year licences were due to expire shortly, and that no final reporting or feasibility studies for any of the Five Concession Areas had been received, as was required by the Contract.<sup>89</sup> The Claimants assert that in this letter Rwanda “invited NRD to submit its application for the long term contracts”.<sup>90</sup> However, that is to place a very significant gloss on the correspondence which in fact, on a fair reading, demonstrates that Rwanda was far from satisfied with NRD. As to this:

81.1. MINIFOM did not invite NRD to submit an application for long term contracts but rather expressed its dissatisfaction at the progress made by NRD. It stated that there had been “relatively low investment”, and requested that it “give some [Concessions] back to the Government” on the basis of failure to appropriately invest or exploit the Concessions.<sup>91</sup>

81.2. It identified that production appeared to have fallen between 2009 and 2010 across the concessions.

81.3. The language of “long term” licences is not used at all in this correspondence. Indeed, any extensions to the existing licences, in relation to two concessions, are plainly contingent on Rwanda’s evaluation of a large number of requested documents, namely: final reports, feasibility studies, demonstrations of what has been achieved in the last four years, reasons for the need for extension of permits, data for tantalite and cassiterite, an Environmental Management Plan, and information relating to the current shareholding of NRD.<sup>92</sup>

82. In response to this correspondence, and because it was conscious that its five licences were due to expire in January 2011,<sup>93</sup> and because it was aware of its obligation to provide a feasibility report pursuant to Article 4 of the Contact, NRD prepared an application for new licences and what purported to be a feasibility study.<sup>94</sup>

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<sup>88</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 29, Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 12, Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019 May 2019, at paras. 11.

<sup>89</sup> Letter from the Ministry of Forestry and Mines (C. Bazivamo) to the Director General of NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

<sup>90</sup> Memorial, at para. 41.

<sup>91</sup> Letter from the Ministry of Forestry and Mines (C. Bazivamo) to the Director General of NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

<sup>92</sup> *Ibid* (**Exhibit C-026**).

<sup>93</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 16.

<sup>94</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 19. Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19.

83. By an application dated 29 November 2010, NRD applied for exploration and mining licences for the Four Concessions, seeking new exploration and mining licences, albeit with reduced geographical areas. NRD's "*Application for the Renewal of Exploration Licences Nemba Rutsiro, Sebeya, Giciye and Mara, and Application for the Allocation of Mining Licences*"<sup>95</sup> (the "**November 2010 Application**") is specifically time limited to renewal of the licences for a five-year period: a small mine exploitation licence under Article 45 of the 2008 Mining Law,<sup>96</sup> which was under the new regime the equivalent to the licences for small-scale mining and exploration permits granted to NRD for the Five Concession Areas in 2007.
84. It provided a "*Proposed Activity Plan for the Period 29/01/2011 to 28/01/2015*"<sup>97</sup> and a "*Proposed Business Plan*" for the same period,<sup>98</sup> and on that basis made an application "*to retain the concessions*".<sup>99</sup> NRD specifically states that it is "*determined to develop during the course of 2011 to 2015 the licences into sustainable mining operations*".<sup>100</sup> All of the planning, in relation to all of the Five Concessions, is limited to the period between the end of January 2011 and the end of January 2015. Plainly, the November 2010 Application was for five year licences, and not an application for "*long term*" licences, as asserted in the Claimants' Memorial.<sup>101</sup>
85. As submitted above, and as was evident from the contents of the November 2010 Application itself, NRD had failed to industrialise and of the concessions, and had failed to carry out the detailed exploration work that would have enable it to prepare a proper feasibility report. Indeed, NRD was well aware that this was the case as Professor Prosper and Mr. Ehlers both explain.<sup>102</sup> Indeed, the November 2010 Application tried to make a virtue of the fact that under Starck it had apparently abandoned the industrialisation approach which NRD under the Zarnacks and Mr. Benzinge had agreed immediately to pursue under Article 2(3) of the Contract:<sup>103</sup>

*"Therefore, when H.C Starck acquired the majority of NRD in 2008, the focus of activities and investments changed from large and unrealistic projects to supporting small scale artisanal mining in multiple places..."*

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<sup>95</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*.

<sup>96</sup> Rwanda Law No. 37/2008 on Mining and Quarry Exploitation, 11 August 2008, Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**).

<sup>97</sup> *Ibid* (**Exhibit C-035**), at pages 9-11.

<sup>98</sup> *Ibid* (**Exhibit C-035**), at pages 11-12.

<sup>99</sup> *Ibid* (**Exhibit C-035**), at pages 11-12.

<sup>100</sup> *Ibid* (**Exhibit C-035**), at page 17.

<sup>101</sup> See Memorial, at para. 42.

<sup>102</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 17-19. Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19-21.

<sup>103</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*, at page 9.

86. Of course, the reason for this change of strategy was that only a small fraction of the capital investment of approximately USD \$40 million which had been outlined in NRD's business plan in 2006 at the time Rwanda and NRD entered into the Contract had actually been introduced. While the November 2010 Report claimed that expenditure of RwF 7.6 billion (around US\$ 12.7 million using the prevailing exchange rate in 2010)<sup>104</sup> had been made between 2006 and 2010, it was somewhat misleading to claim that this represented investment: as is evident from the summary of expenditure,<sup>105</sup> a very significant element of this expenditure would have been generated from cashflow, not from capital investment from shareholders. In this regard, the Claimants appearing not to have invested any sums into NRD after Spalena's acquisition in December 2011, the sums that they claim to have invested are in fact the relatively modest amounts introduced as capital investment by Starck during the period 2008 to 2010 – likely no more than approximately USD \$3 million.
87. In its 2009 reporting, NRD stated that in 2006-2008, a project infrastructure was developed, production in the Five Concession Areas was initiated, and geological studies were carried out, accompanied by studies into the engineering aspects of mining requirements and ore dressing.<sup>106</sup> In 2009, NRD continued to *"focus on establishing and extending the infrastructure i.e. storage facilities in Kigali, rehabilitating road infrastructure in the five concessions, field offices and storage and processing facilities, housing for staff and visiting experts, as well as setting up of the ore treatment installations"* and made some investments into heavy equipment.<sup>107</sup>
88. NRD itself recognised, in its November 2010 Application, that as at 2010 in its active mine sites, *"ore is extracted from open pits and from mostly shallow underground environments by artisanal miners, concentrated and sold to NRD – which in turn further refines the concentrates obtained to saleable products"*.<sup>108</sup> The purpose of the company in the supply chain at that time was simply *"assisting the artisanal miners, by providing general management and coordination, infrastructure, logistics, security, transport and equipment"*.<sup>109</sup> It stated that also, following acquisition of the Five Concession Areas in 2007, it developed a project infrastructure, and initiated production and geological studies.
89. In relation to its obligation to explore, NRD submitted a preliminary exploration report covering all Five Concession Areas. It stated that the following work had been done:<sup>110</sup>

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<sup>104</sup> 597.8 RwF to US\$ 1.

<sup>105</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*, at pages 99-101.

<sup>106</sup> NRD, Status Report 2009 (**Exhibit C-067**), at page 4.

<sup>107</sup> *Ibid* (**Exhibit C-067**), at page 4.

<sup>108</sup> *Ibid* (**Exhibit C-067**), at page 6.

<sup>109</sup> *Ibid* (**Exhibit C-067**), at page 6.

<sup>110</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*, at pages 6-7.

- 89.1. Acquisition, processing and interpretation of high resolution satellite imagery, for the purposes of ongoing further exploration and exploitation;
- 89.2. A small-scale georadar orientation survey, carried out by a German university, with the intent of determining whether radar was effective in locating concentrations of cassiterite in certain areas;
- 89.3. Evaluation of Wolframite scree deposits in Rutsiro, designed to increase understanding of the average grades and resource base of minerals in the concession;
- 89.4. A sampling campaign in Rutsiro, Giciye and Sebeya, aiming to capture all sites with the potential to host promising resources.
90. As Professor Nkanika Wa Rupiya and Mr. Ehlers explain, and as Rwanda subsequently determined when evaluating the November 2010 Report, these exploratory activities fell far short of what would have been expected, or what was necessary, in order properly to develop professional, modern, industrial mining operations.<sup>111</sup> The proposed business plan included a budget of only €382,000 for research and exploration activities across five concessions.<sup>112</sup>
91. When the exploratory work that was alleged to have been done was assessed by the Government, it was determined that “no systematic exploration was done in any of the concessions to evaluate the resources”.<sup>113</sup> Rather, the work done in relation to exploration was “largely of a reconnaissance nature”<sup>114</sup> and, looking forward, the planned exploration budget was “unrealistic and small compared to the planned activities”.<sup>115</sup>
92. The five year financial plan, as set out in the November 2010 Application, was entirely lacking in detail. It included an intended investment of nearly USD \$10 million from 2011 to 2015, including USD \$3 million to be used for the construction of an ore dressing plant at Nemba. Beyond that, the plan was assessed as having four pillars:
- “ - Research (Exploration): sampling programs, assaying, geophysical surveys, trenching, diamond drilling, geological mapping, remote sensing and evaluation of deposits (only in Rutsiro and Nemba). The proposed budget for this was US\$ 496,514 (€ 382,000);*
- Processing: to be continued in Rutsiro (with the existing plant) and a 50 ton/hr processing plant planned for Nemba;*

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<sup>111</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 18-19. Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19-21.

<sup>112</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*, at page 125.

<sup>113</sup> Explanatory Note on NRD (**Exhibit R-017**), at page 4.

<sup>114</sup> *Ibid* (**Exhibit R-017**), at page 4.

<sup>115</sup> *Ibid* (**Exhibit R-017**), at page 5.

- *Environmental protection: Tree nurseries and dams were planned. The budget for this was US\$ 142,652 (€ 109,751);*

- *Work safety.*"<sup>116</sup>

93. However, the Government analysis was clear that this development plan was "*neither clear nor detailed (no time frame, no detailed budget)*",<sup>117</sup> and that it was unrealistic and insufficient. Again, such research and processing was inconsistent with the requirement to proceed immediately to industrialisation.
94. Overall, prior to 2010, NRD had failed to industrialise, as anticipated by the Contract, and instead its operations were undertaken by artisanal miners, with support and infrastructure provided by NRD, but NRD had taken no or no significant steps to effectively explore, industrialise, or develop action or investment plans.<sup>118</sup> Progress between 2006 and 2010 had been hampered by the failure of the investment envisaged in 2006 to materialise. Further, NRD presented unconvincing and unrealistic plans for future development or investment.
95. Ultimately, as further explained below, when the Government of Rwanda came to consider the November 2010 Application it quite properly and reasonably considered that it did not justify the granting of new licences, and that it demonstrated that NRD had not complied with its obligation under the 2006 Contract.

### **C. Spalena's purchase of HC Starck Resources GmbH, NRD's parent company**

96. In late 2010, HC Starck GmbH ("**Starck**"), which held shares in NRD through a holding company, HC Starck Resources GmbH, decided to sell the holding company. Mr. Marshall approached Mr. Ehlers, who was working for NRD, and told him that he was already operating a concession in western Rwanda at Bisesero, and that he was interested in acquiring Starck's shares in HC Starck Resources GmbH through his company, Spalena.<sup>119</sup> Mr. Marshall's allegation<sup>120</sup> that he had been specifically solicited to form a US-owned mining investment group in Rwanda is incorrect, and it certainly had no formal arrangements with him in terms of the provision of any advice or assistance.<sup>121</sup>
97. In the course of negotiations relating to the sale, Mr. Ehlers ensured that Spalena had the opportunity to do full due diligence on NRD and its assets.<sup>122</sup> He worked with Mr. Marshall for approximately three weeks, taking him to all Five Concession Areas, and demonstrating the equipment owned by NRD, as well as providing copies of all relevant information, including the Contract.<sup>123</sup>

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<sup>116</sup> *Ibid* (Exhibit R-017), at page 7.

<sup>117</sup> *Ibid* (Exhibit R-017), at page 7.

<sup>118</sup> Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 12.

<sup>119</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 15.

<sup>120</sup> Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at paras. 5 and 6.

<sup>121</sup> See Witness Statement of Mr. Francis Gatare dated 24 May 2019, at paras. 14 to 17.

<sup>122</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 16 and 19-22.

<sup>123</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 16.

98. Mr. Marshall, on behalf of Spalena, was informed that NRD held licences to mine at the Five Concession Areas, but that the five mining licences were held for a four-year term as provided for in the Contract, and were due to expire in January 2011. Additionally, Spalena was informed that *“although NRD had on 29 November 2010 requested an extension of the five mining licences which were due to expire, the Government was likely to say that NRD had not sufficiently completed the exploration it had agreed to do in 2006, and had not taken any real steps towards industrialisation”*.<sup>124</sup>
99. Further, Mr. Ehlers explained that the granting of long term licences was in any event conditional on NRD providing evaluation reports of reserves and a study of the feasibility of long term mining in the various concessions at the end of the four year period, and these being approved by Rwanda.<sup>125</sup> As Mr. Ehlers explains:
- “I had also explained to him that although NRD had on 29 November 2010 made an application (the **“November 2010 Application”**, which was made available to Mr. Marshall)<sup>126</sup> for the renewal of the five exploration licences which were due to expire (albeit on slightly different terms) and new mining licences within the area of the requested exploration licences, we thought that even if these were granted it would be on a short term rather than on a long-term basis. That was because, as we fully accepted, NRD had not sufficiently carried out the exploration it had agreed to do in the Contract, and had therefore not been able to provide a feasibility study which contained the detail which would be necessary to satisfy the Government it should grant the concessions to NRD on a long term basis.”*<sup>127</sup>
100. Fully aware of the fact that there was no guarantee of any long-term licences being awarded, and also that new short-term licences could not be taken for granted, on 23 December 2010, Spalena purchased 85% of the shares in NRD, for merely [REDACTED].<sup>128</sup>

#### **D. Summary of NRD’s operations from 2011 to 2014**

##### **1. Day-to-day operation of NRD**

101. As it had from 2006 to 2010, between 2011 and 2014 NRD’s business consisted of buying minerals from the artisanal miners operating on their sites and reselling those minerals to traders in Kigali,<sup>129</sup> such as Mineral Supply Africa. Minerals were collected from the artisanal miners and collated, providing sufficient minerals to sell. However, although

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<sup>124</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19.

<sup>125</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 20.

<sup>126</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**).

<sup>127</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19, internal citations omitted.

<sup>128</sup> Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company LLC (23 December 2010) (**Exhibit C-068**).

<sup>129</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 6.

NRD remained entirely dependent on artisanal miners, it did not treat its staff and contractors well.<sup>130</sup>

102. Professor Nkanika Wa Ripuya and Mr. Sindayigaya describe the way in which NRD operated under Spalena's supposed ownership from January 2011 to early 2012. In short, by the end of 2010 NRD had been on the verge of bankruptcy. Matters got progressively worse once Mr. Marshall took the helm, initially assisted by other American citizens as successive Managing Directors. Rather than invest any money into developing the concessions, Mr. Marshall focussed on the use of political pressure to try to obtain long-term concessions for NRD.

103. As Professor Nkanika Wa Rupiya explains:

*"Mr. Marshall took over control of NRD in early 2011. Mr. Ehlers quickly left, and Mr. Marshall initially brought in an American, Tom Grey, as Managing Director but he stayed only a couple of months. He was replaced by Bill Quam, another American. I understood that Mr. Quam had worked with Mr. Marshall in Slovakia and had been involved in Mr. Marshall's concession at Bisesero which was not renewed because, as far as I was aware, of the poor performance and lack of investment. Other than that, Mr. Quam appeared to have no experience or knowledge of geology or mining. He eventually left too, and the company was then run by Mr. Marshall and his wife, Zuzana Mruskovicova.*

*As I had done with Starck, I proposed to Mr. Marshall that NRD should do some exploratory work and try to develop the concessions. It was immediately clear that he was not interested in developing the concessions, and did not have any money to invest. He was just collecting minerals from the artisanal miners, and selling it to traders. I heard from the company's accountant Jean Aime that a lot of the money that was being made from this trading was being transferred out of Rwanda to Slovakia where Mr. Marshall and Ms. Mruskovicova had interests.*

*By late 2011 or early 2012 the business was in chaos. Mr. Marshall was not paying the miners, and so they started to sell the minerals themselves and also stole company property in order to make up for the earnings they had not been paid. I no longer wanted to continue to work for the company when I saw how it was working and so in early 2012 I requested retirement."<sup>131</sup>*

104. And as Mr. Sindayigaya also explains:

*"From the day he started at NRD, Mr. Marshall showed no interest whatsoever in the mines or the operation of the mines. He did not invest any money in the mines and did not visit them. The new management team that he brought in had no mining experience or expertise. Mr. Marshall's focus was on getting the mining licenses renewed as he believed that this would enable him to raise money in the US and elsewhere. He therefore spent a lot of time visiting the US Embassy, and the Mining*

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<sup>130</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 14.

<sup>131</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 22-24.

*Board, trying to use political pressure to get new licences issued, rather than actually managing NRD.*

*Around May 2012, we stopped paying the miners for their minerals and from then on it was very difficult for me to visit the mines as I would be confronted by hundreds of angry miners asking why they were not being paid. I stopped going to the mines in early July 2012, at which point NRD owed around RwF 50-60 million to the miners. By the time I left the company in September 2012, the miners were owed about Rwf 100 million for minerals that they had sold to NRD but for which they had not been paid.*

*Mr. Marshall started borrowing money from Mineral Supply Africa (“MSA”) in around November 2011 based on forecasted minerals to be supplied by different sites. Given that large amounts of those borrowings would not serve to attend mining sites requirements, rather they would go into general expenses, the miners attitude described at paragraph 14 above, would adversely be affected and the forecasted production could not be materialised. In total, between November 2011 and September 2012 when I left NRD, he borrowed around USD\$300,000. All of the money was given to him personally either in cash or in the form of a cheque made out in his name. I usually accompanied him when he visited MSA to borrow money. So far as I am aware none of the loans were recorded in writing. Although Mr. Marshall put up NRD’s assets as security for these loans, he did not invest any of the loan money in the company but instead used it for his trips abroad and related expenses. I remember when he and the consultant made a trip to Boston to attend “Rwanda Day”. He never produced any expense reports for that trip or any other trip that he had made. He also told me that he had to visit his sisters in the US and explain what he had done with their investment money – on several occasions he claimed that he had paid US\$ 1 million as a down payment to buy the company.*

*From around July or August 2012, Mr. Marshall became increasingly aggressive towards the Government and the Rwandan Mining Board. He knew that the Bilateral Investment Treaty had been signed between Rwanda and the USA and started talking about how much Rwanda would have to pay to get rid of him. He mentioned USD\$15 million on many occasions. On several occasions, he would insinuate that he could hugely harm the highly rated Rwandan Doing Business climate by publishing his difficulties into Washington Post and/or the New York Times. My humble advice to him was that he should give the Government time to carefully evaluate his license renewal/extension requests.*

*I left NRD in September 2012. By then I had had enough – I had not been paid for several months, the company had huge debts to the miners and the RRA, and had made no investment in the mines for a long time.”<sup>132</sup>*

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<sup>132</sup> Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at paras. 21-25.



105. By the time that Mr. John Kagubare joined NRD in second half of 2013 as Director of Operations and Production, matters had deteriorated and the company's operations were out of control.
106. When minerals were collected from the artisanal miners and sold to traders, they would provide a printed record containing details of the sale transaction including the type, weight, grade and price of the product,<sup>133</sup> consistent with the requirements of the iTSCI program.
107. However, the artisanal miners who were working for NRD were easily able to divert large portions of their minerals away from NRD and sell them elsewhere,<sup>134</sup> in part because NRD's Concessions were very large and accordingly were difficult to manage without sufficient investment. It was licensed to mine almost 40,000 hectares across the Five Concession Areas, although it was only actively mining around 100 hectares in total. It ought to have been in control of the total area which it was licenced to mine. However, it initially had a very small security team and so was unable to effectively patrol and police the hectares that it was entitled to mine. As a consequence there were many illegal miners operating in NRD's areas.<sup>135</sup> After Mr. Kagubare joined in mid-2013, he was able to bring matters back under control with an increased security team, which led to a reduction in the extent of the illegal mining.<sup>136</sup>
108. Furthermore, the company was not being run in a professional manner but rather Mr. Marshall and Ms Mruskovicova were effectively running NRD as a "briefcase" company.<sup>137</sup> Additionally, it was a cash only business. All transactions including payments to the miners, fuel, salaries and uniforms were conducted in cash.<sup>138</sup> Records were not kept in NRD's Kigali office.<sup>139</sup> No documents were stored there. Rather, the business was primarily operated out of Mr. Marshall's home.<sup>140</sup>
109. As Mr. Kagubare explains, Mr. Marshall was not interested in making any investments and developing NRD in a way which might give the Government confidence to grant NRD renewed licences:

*"Although I had been hired on the understanding that I would assist NRD in its production strategies and security, which I believed involved industrialising its operations, none of the sort happened, as Mr. Marshall and Ms Mruskovicova were not willing to invest any money in the company. It quickly became apparent to me that NRD was happy to continue buying minerals from artisanal miners and reselling those minerals for a profit rather than investing in and*

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<sup>133</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 11.

<sup>134</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 12.

<sup>135</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 12.

<sup>136</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 13.

<sup>137</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 8.

<sup>138</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 9.

<sup>139</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 10.

<sup>140</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 8.

*developing the company's operations. During the time that I worked for the company [until early 2015], it made very little capital investment. It did not make any investment into industrialising its operations.”<sup>141</sup>*

110. It is perfectly clear, therefore, that the Claimants’ allegations as to the monies invested in NRD once Spalena acquired its interest in NRD are false. Spalena has adduced no evidence that it, or any of its promoters, made investments in NRD. Rather, the investments that the Claimants assert they made were all made by others prior to December 2010.
111. The failure of Mr. Marshall’s management of NRD once he took over in December 2010 is amply demonstrated by the summary production figures showing NRD’s performance from 2007-2013, as analysed by Dr Michael Biryabarema, former Deputy Director General of the Rwanda Natural Resources Authority (“**RNRA**”), when considering NRD’s further application for renewed licences in August 2014.<sup>142</sup>

Product	2007	2008	2009	2010	2011	2012	2013
Cassiterite (Kg)	62,162	150,887	217,894	73,362	62,000	54,000	58,626
Coltan (Kg)	2,324	1,749	10,623	6,200	700	856	605
Wolfram (Kg)	6,046	10,148	32,936	8,400	2,500	2,400	288.5
Mixed	-	-	-	6,365	-	-	1,386.5

112. As is evident from the collapse in the production volumes of coltan and wolfram, in 2011 to 2013 compared to the previous periods, NRD was suffering from serious problems. Cassiterite production (from Nemba) also dropped significantly. The fact that production had already fallen significantly in 2011 gives the lie to the Claimants’ assertion that its output problems were caused by the Government requiring environmental remediation action in 2012, and that it was the dispute with Ben Benzinge which caused production to fall in 2014. In fact, as demonstrated by the evidence of Professor Nkanika Wa Rupiya, Mr. Sindayigaya and Mr. Kagubare, this was down to Mr. Marshall’s woeful mismanagement and neglect of NRD’s operations.

## **2. NRD’s financial position and NRD borrowing from MSA**

<sup>141</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 15.

<sup>142</sup> *Ibid* (**Exhibit R-017**), at page 4, see also Witness Statement of Dr. Michael Biryabarema dated 24 May 2019, at para. 17.

113. NRD 's financial problems under Mr. Marshall's management are also highlighted by the manner in which he borrowed from trading partners in order to generate working capital required for the company's day-to-day operations.
114. A Rwandan trading company, Minerals Supply Africa ("**MSA**"), was interested in working with him and with NRD, in order to develop the Five Concession Areas. Mr. Marshall regularly borrowed money from MSA allegedly for investment in the mines and in infrastructure related to the mines. Between 2011 and in or around 2015, MSA provided around USD\$500,000 to NRD through a series of loans.<sup>143</sup>
115. Initially, those loans were provided without security. NRD eventually agreed to provide some security for the loans, including some asset pledges and transfer of some equipment into the name of MSA, although the value of the pledged assets was far less than the amounts outstanding under the loans.<sup>144</sup>
116. Industry understanding was that Mr. Marshall's intention was to attempt to float NRD on the stock exchange, once he had gathered sufficient licences and funding, rather than attempt to make money directly off the mines.<sup>145</sup>

### **3. Ongoing environmental damage**

117. By October 2011, it was clear that NRD was seriously non-compliant with the terms of its licences in the various concessions. In relation to the Rutsiro concession, the Ministry of Forestry and Mines noted that there was severe environmental degradation and security issues in the concession. It stated:

*"Disposal of sediments from all the mines inside the concession has been consistently contributing to increased salination of River Sebeya and the degradation of the quality of its waters; and diversion of the river from the main stream has also been observed. ... Evidence was also provided about illegal mining taking place on the same concession of which the production is sold to NRD."*<sup>146</sup>

118. It also noted NRD's failure to comply with its business plan, Rwandan law and international mining standards. As a consequence, it indicated that, effective December 2011, all mines in the Rutsiro District would be closed.<sup>147</sup>
119. NRD contested the characterisation of its operations in Rutsiro,<sup>148</sup> and retained an environmental expert, Dr. Fabian Twagiramungu, to direct remediation works. Dr.

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<sup>143</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 17.

<sup>144</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 18.

<sup>145</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 17.

<sup>146</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Chairman of NRD, *Serious issues arising from mining activities in Rutsiro Concession (Exhibit C-040)*.

<sup>147</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Chairman of NRD, *Serious issues arising from mining activities in Rutsiro Concession (Exhibit C-040)*.

<sup>148</sup> Letter from the Chairman of NRD (R. Marshall) to the Mayor/Ngororero District (22 November 2011) (**Exhibit C-044**).

Twagiramungu had written a report in relation to the Nyatubindi mining site in 2010, and prepared a remediation plan for that site and supervised its completion.<sup>149</sup> In his report dated November 2011, he observed that the most significant environmental problems found were:<sup>150</sup>

- 119.1. Continuous pollution of the Sebeya River by sediments from the Nyatubindi mining sites.
  - 119.2. Gully erosion and landslips as a result of mining activities and failure to implement best practice management of erosion and sedimentation control.
  - 119.3. Vertical trenches from mining sites into the Sebeya River.
  - 119.4. Horizontal trenches in bad conditions and not maintained.
  - 119.5. Sedimentation ponds that were not sufficient and not well maintained.
  - 119.6. Continued informal mining resulting in environmental and socio-economic concerns.
120. Dr. Twagiramungu proposed an environmental work plan, including close collaboration between an environmental advisor and the Nyatubindi site manager.<sup>151</sup> A number of immediate remedial actions were proposed, and the report noted that some actions had been undertaken since the previous report.<sup>152</sup>
121. Later environmental reports also indicate a failure to mitigate any environmental issues. Specifically, Dr Biryamarema's explanatory note from August 2014 states that NRD has "*a challenged environmental record*".<sup>153</sup> In Rutsiro and Sebeya in particular, there had been substantial silting in the rivers, which was attributed to illegal miners, but was plainly attributable to NRD subcontractors, acting in "*continuous disregard of environment standards*".<sup>154</sup>

#### **E. Extensions to the Licences**

122. The Rwandan government carefully considered the November 2010 Application, and considered that its contents did not merit the granting of new licences to NRD.
123. However, on 2 August 2011, Rwanda granted a short-term extension of six months, in order to allow it time to determine the future of the concessions.<sup>155</sup> The Ministry of Natural Resources ("**MINIRENA**") granted an extension of NRD operations in the

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<sup>149</sup> Letter from the Chairman of NRD (R. Marshall) to the Mayor/Ngororero District (22 November 2011) (**Exhibit C-044**).

<sup>150</sup> F. Twagiramungu, *NRD Progress Mission Report* (November 2011) (**Exhibit C-043**), at page 2.

<sup>151</sup> F. Twagiramungu, *NRD Progress Mission Report* (November 2011) (**Exhibit C-043**), at page 3.

<sup>152</sup> F. Twagiramungu, *NRD Progress Mission Report* (November 2011) (**Exhibit C-043**), at pages 4-5.

<sup>153</sup> *Ibid* (**Exhibit R-017**), at page 5.

<sup>154</sup> *Ibid* (**Exhibit R-017**), at page 5.

<sup>155</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

Concessions for the period from August 2011 to February 2012. MINIRENA stated that it had considered NRD's November 2010 Application, and that:

*"After considering the exploration report submitted, it was found out that the contract signed between the Government of Rwanda and your company on 24/11/2006 had not been fully executed, more especially in its article 2 as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years.*

*We notice that you applied for five year (5) licences for small mines within each of the five concessions. The new status of the concessions will have to be decided based on the work executed in the light of the signed contract (exploration work and other commitments) and on the provisions of the new mining law. We extend the operation of your licence for six (6) months from the day of receipt of this later (sic), to allow us time to determine the future of these concessions."*<sup>156</sup>

124. In noting that NRD had failed to comply with the obligations and conditions under Article 2 of the Contract, Rwanda indicated that it considered the Contract to have terminated.
125. Rwanda noted in this correspondence in response to the November 2010 Application that NRD had applied *"for five year (5) licences for small mines within each of the five concessions"*,<sup>157</sup> and this was not contested by NRD; indeed, NRD recognised that, like other concession-holders, it had *"submitted a five year extension for review"*.<sup>158</sup>
126. Contrary to the case that is now being asserted by the Claimant, NRD only having made an application for new five-year licences, Rwanda was not required to grant NRD long-term licences in 2011. NRD had not sought these, let alone fulfilled the requirements to justify being granted them. Further, from this letter, it is clear that Rwanda has, from the first time that it considered the issue, noted that NRD has failed to fully comply with the Contract, and that any new or extended contracts would be granted in light of performance of the contract, and the relevant Rwandan mining law. At no point did it even raise the prospect that long-term licences might be available at a later date, despite failure to comply with the requirements of the Contract, far less provide any guarantee that would be the case. Further, it was explicit that the extension was granted *"to allow us time to determine the future of these concessions"*.<sup>159</sup>

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<sup>156</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

<sup>157</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

<sup>158</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *NRD Response to Letter of Minister* (31 October 2011) (**Exhibit C-041**).

<sup>159</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

127. As the expiry of the extension to the Licences approached, on 12 December 2011, NRD and the representatives of the MINIRENA/GMD met to discuss a potential new contract between the parties.<sup>160</sup>
128. As was explained in its letter of 26 January 2012, the MINIRENA was clear at that meeting that *“the resources evaluation accomplished under [NRD’s] previous contract fell far short of the level expected”* and accordingly that it *“would only be prepared to negotiate with [NRD] possible new licences on only two of the five concessions”*.<sup>161</sup> At that time, NRD stated that, if it was unable to continue to hold licences to all Five Concession Areas, it would not accept an offer to negotiate an agreement in relation to two concessions, but rather would relinquish all Five Concession Areas.<sup>162</sup> The MINIRENA repeated in its letter dated 26 January 2012 its position that it had considered NRD’s capacity as demonstrated over the four year period of the initial Contract, and stated that, if NRD would not accept its invitation to negotiate in relation two concessions, the MINIRENA would *“accept your option to relinquish all the five concessions”*.<sup>163</sup>
129. Although NRD took no further steps to convince Rwanda that it was a serious investor who deserved to be granted new licences, in light of the fact that NRD was an incumbent with extant operations Rwanda continued to negotiate in good faith in relation to the concessions.
130. On 28 February 2012, the MINIRENA extended NRD’s special licence for three months, backdated to 2 February 2012 and expiring on 2 May 2012, on the basis that *“it has not been possible to conclude the contract in the above time of extension”*, understanding that it is necessary to conclude the investment as soon as possible in the interests of strong investor confidence and with the intention to *“conclude a good contract for this partnership”*.<sup>164</sup>
131. No further progress was made in relation to licence renewal between the end February 2012 and May 2012. However, on 13 September 2012, the MINIRENA wrote to again extend NRD’s licence. It noted that the previous licence had expired in May 2012, and the Minister of Natural Resources stated that:

*“In view of the ongoing work on reorganizing the mining sector which will have a bearing on the new contracts that will be negotiated as has been communicated to all the existing concession holders, I have the pleasure*

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<sup>160</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Resolution to the issue of the former concessions held by NRD* (26 January 2012) (**Exhibit R-018**).

<sup>161</sup> *Ibid* (**Exhibit R-018**). See also Witness Statement of Dr. Michael Biryabarama dated 23 May 2019, at para.13.

<sup>162</sup> *Ibid* (**Exhibit R-018**).

<sup>163</sup> *Ibid* (**Exhibit R-018**).

<sup>164</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

*to extend your licence up to October 2012, to allow for the ongoing work to be completed.”*<sup>165</sup>

132. NRD acknowledged the extension, and at the same time noted that, in September 2012, local authorities in the Rutsiro and Ngororero Districts had called to a halt mining operations in those areas.<sup>166</sup> That appears to have been as a result of concerns about environmental issues in particular which initially affected all mine operators, although because of specific concerns about NRD it was not allowed to resume operations in October along with other operators.<sup>167</sup>

**F. Licence extensions expire and NRD is operating without Licences**

133. From October 2012, NRD was operating without valid Licences, as the extension granted on 13 September 2012 expired.
134. In November 2012, the MINIRENA requested NRD remediate environmental damage it had caused in Rutsiro and Ngororero Districts, stating that if it did not do so, its concessions would be terminated.<sup>168</sup> NRD responded stating that it had not been mining in those areas since mid-2012, and that any environmental damage was not caused by it but rather by the historic Belgian miners, and by illegal miners.<sup>169</sup>
135. On 30 January 2013, NRD provided what it called an “update of the amended application” of NRD for a long-term mining concession licence (*“For the years dated 2013 to 2043”*), stating that it was updating the original request made over two years earlier, namely the November 2010 Application.<sup>170</sup> It was accompanied by a draft amended contract, prepared by NRD. In relation to this supposed “update”:
- 135.1. the November 2010 Application, as set out above, was not an application for a long-term licence, but an application for five-year small-scale mining licences under the 2008 Mining Law. The application had been rejected in August 2011.<sup>171</sup>

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<sup>165</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsior, Mara and Sebeya (13 September 2012) (**Exhibit C-033**), the Respondent notes that the Claimants’ **Exhibit C-045** and **Exhibit C-066** are identical or near identical copies of this letter.

<sup>166</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi) (14 September 2012) (**Exhibit C-049**).

<sup>167</sup> Letter from the Chairman of NRD (R. Marshall) to the Deputy Director General, GMD, RNRA (Dr. M. Biryabarema (14 December 2012) (**Exhibit C-050**).

<sup>168</sup> *Ibid* (**Exhibit C-050**).

<sup>169</sup> *Ibid* (**Exhibit C-050**).

<sup>170</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

<sup>171</sup> Letter from Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, Status of your mining and Exploration license (2 August 2011) (**Exhibit C-062**).

- 135.2. The covering letter falsely asserted that “NRD has made the largest commitment in the Rwanda mining industry by investing approximately 15 million EURO in this project.”<sup>172</sup>
- 135.3. The “update” itself consisted of a mere nine pages (including the cover page) which amounted to little more than a summarised rehash of the contents of the November 2010 Application. For example, the summary of “*total investment estimation*” for 2007 to 2012, which was in fact a summary of expenditure rather than investment, contained figures which were largely identical to those in the November 2010 Application, save for an estimate of €6 million for “Foreign Consulting and Engineering” which was completely unexplained and unsupported.<sup>173</sup>
- 135.4. The “update” included a summary of “Exploration Highlights” which had simply been lifted from the November 2010 Application.<sup>174</sup> From this it was clear that in two years Mr. Marshall had not caused NRD to carry out any further exploration work, as attested by Professor Nkanika Wa Rupiya.<sup>175</sup>
- 135.5. The “update” included projections of estimated investment of USD \$5.3 million in 2013 to 2018 for a “detailed exploration and feasibility study” – i.e. exactly what Rwanda had expected to be provided with in 2010; and USD \$4.66 million was the estimated investment for semi-industrial mining.<sup>176</sup> Yet no details were provided of from whom NRD would raise this investment, or of the financial substance of Mr. Marshall or Spalena. This was a significant omission given Mr. Marshall’s failure to invest in the Bisesero concession which had not been renewed.
136. As an application for a 30-year mining licence, the first made by NRD at all, and two years after Spalena had acquired NRD, this nine-page document underlined the lack of any serious understanding by NRD or Mr. Marshall as to what was actually required from a prospective operator. As former Minister Imena states, it “*contained very little detail and much of it appeared to have been copied and pasted from the November 2010 Report. There was no proper analysis or supporting documentation with it at all. If Mr. Marshall really considered this to be a serious application for a 30 year licence – the first made by NRD at all – then it demonstrated his fundamental lack of understanding of what was required.*”<sup>177</sup> This point is reinforced by Dr Michael Biryabarema: “*The January 2013*

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<sup>172</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

<sup>173</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

<sup>174</sup> *Ibid* (**Exhibit C-054**), at page 3.

<sup>175</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 24.

<sup>176</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 8.

<sup>177</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 23.



*application was entirely inadequate – it contained none of the detail that would have been required even for short term licences, let alone the 30 year licences now being requested.”*<sup>178</sup> It was nothing but window dressing.

137. As former Minister Imena explains, there was never any prospect of NRD suddenly being granted a 30-year licence given the track record it (and Mr. Marshall) had displayed to date:

*“If NRD had made a serious, complete application, which included all necessary information and documents, we would have given them a five year small mining license under the 2008 Mining Law. A 30 year license would never have been granted until we had an opportunity to assess how NRD performed during the term of the five year small mining license.”*<sup>179</sup>

138. In February 2013, NRD requested and Rwanda agreed to allow the resumption of mining activities in Rutsiro, Sebeya and Giciye Concessions, and to have the opportunity to remedy damage caused by illegal mining.<sup>180</sup> The Rwanda Natural Resources Authority, Geology and Mines Department permitted NRD to “resume activities in the short term as we proceed with negotiations in relation to your request for new contracts for the concessions”.<sup>181</sup> Rwanda was still prepared to give NRD the chance, subject to a proper application procedure, to obtain new five-year mining licences, as former Minister Imena explained.<sup>182</sup> As Dr Biryabarema explains, “*This was a short-term interim measure, and did not involve the granting of any new licences (which could only be done by way of ministerial order).*”<sup>183</sup>
139. In April 2013, the Rwanda Development Board (“**RDB**”) noted that the Contract expired in 2011 and that NRD has been operating on short-term extensions in the interim. It proposed to NRD that it enter into negotiations in relation to a small mine exploitation licence for the Nemba site.<sup>184</sup> NRD agreed to meet to negotiate.<sup>185</sup>

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<sup>178</sup> Witness statement of Dr. Michael Biryabarema dated 23 May 2019, para 15.

<sup>179</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 24.

<sup>180</sup> Letter from the Deputy Director General, GMD, RNRA (Dr. M. Biryabarema to the Chairman of NRD (R. Marshall), *Security Strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**).

<sup>181</sup> *Ibid* (**Exhibit C-056**).

<sup>182</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 19 and 21.

<sup>183</sup> Witness statement of Dr. Michael Biryabarema dated 23 May 2019, at para.16.

<sup>184</sup> Letter from the CEO of Rwanda Development Board (C. Akamanzi) to the Chairman of NRD (J. C. Zarnack), *Invitation to negotiate for a small mine exploration licence between the Government of Rwanda and Natural Resources Development Rwanda Ltd.* (2 April 2013) (**Exhibit C-057**).

<sup>185</sup> Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit, RDB (M. Isibo) (9 April 2013) (**Exhibit C-058**).

140. On 7 June 2013, apparently in the light of discussions with the RDB, NRD sought a meeting with the Minister of Natural Resources in relation to the business, legal and regulatory challenges it was facing, setting out a list of issues for discussion.<sup>186</sup>
141. Accordingly, in October, the Minister of Natural resources invited NRD to discuss its mining licences; environmental, safety and security concerns in the Western concessions; and complaints raised by District authorities in relation to NRD.<sup>187</sup> Former Minister Imena explains the meeting in the following terms, making it clear that Mr. Marshall’s assertion that he “continued to lead NRD to believe that it would receive the long term contracts” is incorrect:

*“In October 2013, I met with Mr. Marshall to discuss NRD – I wanted to learn what his plans were and how we could help him move forward. So far as I can now recall this was my first meeting with Mr. Marshall. I raised with him the fact that NRD had not had a valid licence since their last extension expired in October 2012. I said that this situation could not continue. I explained to him what the requirements were for the granting of any licence and invited NRD to submit an application for licences that complied with these requirements. I explained clearly to Mr. Marshall that if NRD was unable to submit an application that met the requirements, then we would need to end the discussions in which case NRD’s mining operations would be shut down. I was very clear that we were not prepared to allow NRD to continue mining without a license indefinitely. I also advised Mr. Marshall that based on what we had learned from visiting the NRD sites and reviewing the materials they had submitted, NRD did not have the capacity to develop all five sites and I advised him to focus on two sites. He did not accept this advice.”*<sup>188</sup>

142. NRD made no application for new licences after this October 2013 meeting, despite Minister Imena’s entreaty.

### **G. 2014 Law and regulation**

143. On 12 February 2014, the President of Rwanda issued Presidential Order No 63/02 (“**2014 Presidential Order**”). The 2014 Presidential Order repealed numerous previous mining concessions and mining titles,<sup>189</sup> and required the Minister in charge of mining to establish new mining perimeters, in accordance with mining laws.<sup>190</sup> It stated that concessions and mining titles issued before the publication of the 2014 Presidential Order

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<sup>186</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (7 June 2013) (**Exhibit C-059**).

<sup>187</sup> Letter from the Minister of State in Charge of Mining (Minster E. Imena) to the Chairman of NRD (R. Marshall), *Invitation to discuss with the Ministry of Natural Resources* (16 October 2013) (**Exhibit C-060**).

<sup>188</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 25.

<sup>189</sup> Rwanda Presidential Order No. 63/02, *Repealing Presidential Orders Establishing Mining Concession and Allocating Mining Exploitation Licenses* (12 February 2014) published in the Official Gazette No. Special of 6 March 2014 (**Exhibit CL-001**), at Article 1.

<sup>190</sup> *Ibid* (**Exhibit CL-001**), at Article 2.

“shall remain valid until the demarcation of new mining perimeters and issuing of new mining titles”.<sup>191</sup> A number of the concessions which NRD continued to mine were listed in the annex of repealed Presidential Orders: Mara,<sup>192</sup> Nemba,<sup>193</sup> Giciye,<sup>194</sup> and Lutsiro-Sebeya.<sup>195</sup>

144. The 2014 Presidential Order came into force on 6 March 2014, the date of its publication in the Official Gazette of the Republic of Rwanda.<sup>196</sup> As Mr. Mugisha explains, the effect of this law was to repeal the prior law which had set out the boundaries of all concessions in Rwanda.<sup>197</sup>

145. On 2 April 2014, the MINIRENA wrote to NRD, informing it that concessions that it had formerly held licences to mine namely Nemba, Rutsiro, Mara, Giciye and Sebeya were affected by the 2014 Presidential Order No.<sup>198</sup> Accordingly, it requested that NRD, as a former holder of mining licences in relation to those concessions, renegotiate mining agreements under the terms of the new regulations.<sup>199</sup>

146. On 20 May 2014, Law No 13/2014 on Mining and Quarry Operations (the “**2014 Law**”) was enacted. It set out the general principles of the new licencing framework, as well as specific rules concerning acquisition of a mineral licence, and the rights and obligations that attach to licences once granted. It also included transitional provisions, relating to licence-holders who held licences at the time of enactment of the 2014 Law.<sup>200</sup>

147. Former Minister Imena explains the rationale behind enacting the 2014 Mining Law:

*“... The purpose of this law was to allow more flexibility in the granting of licences. Under the previous 2008 Mining Law, there were two types of licences: small-scale mining licences and long-term (concession) mining licences. The long-term concession licences required that the applicant meet the requirements that were contained in their initial contract, such as providing a reserves report, feasibility study, and environmental impact assessment. If these documents were positively evaluated and all of the conditions of the initial contract were met, the applicant would be granted a licence to mine for 30 years. The barrier to entry was however very high. Small-scale licences, on the other hand, only gave a right to mine*

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<sup>191</sup> *Ibid* (Exhibit CL-001), at Article 3, typographical errors amended.

<sup>192</sup> *Ibid* (Exhibit CL-001), at Annex 1(3).

<sup>193</sup> *Ibid* (Exhibit CL-001), at Annex 1(10).

<sup>194</sup> *Ibid* (Exhibit CL-001), at Annex 1(12).

<sup>195</sup> *Ibid* (Exhibit CL-001), at Annex 1(23).

<sup>196</sup> *Ibid* (Exhibit CL-001), at Article 5.

<sup>197</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para. 26.

<sup>198</sup> Letter from the Minister of State in charge of Mining (Minsiter E. Imena) to the Chairman of NRD (R. Marshall), *Plans for NRD* (Exhibit C-063).

<sup>199</sup> Letter from the Minister of State in charge of Mining (Minsiter E. Imena) to the Chairman of NRD (R. Marshall), *Plans for NRD* (Exhibit C-063).

<sup>200</sup> Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014), published in the Official Gazette No. 26 of 30 June 2014 (Exhibit CL-002), at Article 52.

*for a short period such as five years. Mining companies were complaining that this was too short a period; we agreed but also considered 30 years to be very long and far too risky. Accordingly, the law was amended so that the duration of the licences was less fixed and was instead guided by the evidence submitted by the applicant in question. Under the 2014 Law, an initial period shorter than four years could be granted if the applicant could satisfy us that it was able to complete what was required to assess feasibility in less than four years. Similarly, there was no fixed period for the long-term concession licences; these periods would vary depending on the evidence given by the applicants as to their ability to successfully develop and operate the concessions. However, the maximum period that could be granted under this law was 25 years. ...”<sup>201</sup>*

148. The general principles of the 2014 Law were provided for in Article 4:

*Article 4: General principles*

*The general principles relating to mining and quarry operations shall be the following:*

*2° exploration or mining operations shall be carried out by any person who has been granted a mineral licence in accordance with this Law;*

*...*

*4° mineral licences that may be granted under this law shall be the following:*

*a. an exploration licence;*

*b. a small-scale mining licence;*

*c. a large-scale mining licence;*

*d. an artisanal mining licence;*

149. In relation to the issue of a licence, the relevant articles provided:

*Article 5: Mineral licence application*

*Modalities for mineral licence application shall be determined by an Order of the Minister.*

*...*

*Article 7: Issue of a mining licence*

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<sup>201</sup> Witness statement of Imena Evode, at para. 26.

*The Minister shall notify the applicant in writing of his/her decision to grant or refuse to grant a mineral licence. When the application is rejected, the Minister shall explain to the applicant the reasons for rejection.*

150. In relation to large scale mineral licences, the 2014 Law provided that large scale mineral licences consist of four hundred hectares, in contiguous blocks,<sup>202</sup> and in relation to their duration provided:

*Article 11: Duration of a mineral licence*

*A large-scale mining licence shall be valid for an initial period not exceeding twenty-five (25) years or the estimated life of the mineral ore body proposed to be mined, whichever is shorter. Such a licence may be renewed for further periods each not exceeding fifteen (15) years.*

151. Finally, by way of transitional provisions, it provided:

*Article 52: Transitional provision*

*Any mineral licence or quarry permit granted under Law n° 37/2008 of 11/08/2008 on mining and quarry exploitation shall remain into force until expiration of the period for which it was granted. No mineral or quarry licence granted prior to this law shall be extended or renewed. However, where the mineral or quarry licence granted prior to this law provided for a right to apply for a renewal or extension of the licence, the holder thereof may be granted, subject to this law, a similar type of licence on a priority basis if he/she meets the requirements.*

152. The 2014 Law entered into force on 30 June 2014.

#### **H. NRD's applications and position under the 2014 Law**

##### **1. NRD's applications under the 2014 Law**

153. Rwanda tried to engage again with NRD ahead of the introduction of the new 2014 Mining Law in May 2014, and on 2 April 2014 Minister Imena invited NRD to attend negotiations with the RDB later that month.<sup>203</sup> Still, NRD made no further application for new licences, but simply remained operating its former concessions without any licence in place.

154. Then, on 18 August 2014 Minister Imena wrote to Mr. Marshall inviting him to make an application for licences for some or all of its former mining areas.<sup>204</sup> In relation to each area it wished to apply for, NRD was required to make a separate application. So that

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<sup>202</sup> Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014), published in the Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**), at Article 10(3).

<sup>203</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Re: Plans for NRD* (2 April 2014) (**Exhibit C-063**).

<sup>204</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Re: Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

there could be no room for doubt as to what NRD was required to submit, an annex was attached setting out what was required. The application had to be filed within 30 days. Former Minister Imena explains the full context of this letter:

*“By the time the 2014 Law was enacted, NRD did not hold any licences, and were operating unlawfully, i.e. without a licence. Although we were under no obligation to do so, we decided to give NRD a further opportunity to submit an application for long-term licences which complied with the new legal framework. I was determined that NRD should either make proper applications for licences under the new 2014 Law, or should cease operating as we could not allow the situation to continue whereby it was operating unlawfully.”<sup>205</sup>*

155. As noted above, the Annex to the letter provided a list of requirements for re-application, a list of 21 items, including:<sup>206</sup>
- 155.1. Financial information including: Ownership and capital structure information; company structure information; tax and financing information; financial statements; financial status of parent and subsidiary companies;
  - 155.2. Environmental information including: A recommendation from the Rwanda Environmental Management Authority (“REMA”) on the status of the environment in the Five Concession Areas; information on any existing environmental claims, liabilities or suits against the companies;
  - 155.3. Investment and mining plan information including: work plans; investment plans; corporate social investment plans; and employee information.
156. On 18 September 2014, NRD by way of a letter from Mr. Marshall made an application for licences to mine under the 2014 Law (“**September 2014 Re-Application**”). However, it provided what it recognised was only a partially complete application, which it alleged was on the basis of its inability to access its corporate files, but stated that much of the information requested had previously been provided.<sup>207</sup> It asserted that it was entitled to a long-term licence, on the basis of the Contract, to mine the Five Concession Areas for a minimum period of 35 years, renewable.<sup>208</sup> Mr. Marshall repeated the false claim previously made that NRD had invested funds in excess of USD \$20 million into “the project”. It concluded by requesting that the long term licence should be granted.

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<sup>205</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 28.

<sup>206</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD, *Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

<sup>207</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (18 September 2014) (**Exhibit C-084**). The Respondent notes that this letter appears to be incorrectly dated 18 August 2014 when it was sent on 18 September 2014, see Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister E. Imena), *Delivery of a Re-application Letter* (1 November 2014) (**Exhibit R-019**).

<sup>208</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (18 September 2014) (**Exhibit C-084**).

157. Although NRD alleged that it was unable to provide some documents, due to inability to access its offices, the documents requested could have been sourced from other places. Tax clearance certificates could have been obtained from the Rwanda Revenue Authority, a recommendation on the status of the environment at the Five Concession Areas could have been obtained from REMA, and evidence of funding capacity should in any event have been prepared, specifically in relation to the application, with the assistance of NRD's financial advisors.<sup>209</sup>
158. Accompanying the application was a document entitled "Feasibility Study Update 2010 to 2014".<sup>210</sup> Although it ran to some 90 pages, its content was largely generic or derivative, and much of it gleaned from public archives on Rwanda geology. It contained no evidence that any new exploratory work had taken place beyond anything set out in the November 2010 Application, and no new estimates of reserves. Accordingly, knowing that the November 2010 Application had been rejected on the basis, inter alia, of the inadequate nature of the exploratory reports, NRD could not have had any sensible belief that this "Feasibility Study Update" would be any more likely to persuade Rwanda to grant it new licences.
159. In late September 2014, a Licence Evaluation Team from MINIRENA assessed NRD's September 2014 Re-Application. In a report dated 29 September 2014, having reviewed the documents provided by NRD, and noting the absence of a number of required documents, it concluded that NRD should not be re-issued the Five Concession Areas.<sup>211</sup> The Licence Evaluation Team's report sets out the documentation required by MINIRENA, and considers whether each document was provided and assesses its adequacy.<sup>212</sup>
160. The Licence Evaluation Team found that NRD had failed to provide numerous documents that were required, including:<sup>213</sup>
- 160.1. an application letter;
  - 160.2. a Tax Clearance Certificate from the Rwanda Revenue Authority – it is notable that NRD could not provide this as it had not been paying taxes;<sup>214</sup>
  - 160.3. a recommendation from REMA on the status of the environment in Nemba, Mara, Giciye, Rutsiro and Sebeya;
  - 160.4. evidence relating to external loans;

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<sup>209</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 41-42.

<sup>210</sup> See NRD Rwanda, *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014* (**Exhibit C-085**).

<sup>211</sup> Memorandum from the License Evaluation Team to the Honourable 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) (**Exhibit R-020**).

<sup>212</sup> *Ibid* (**Exhibit R-020**).

<sup>213</sup> *Ibid* (**Exhibit R-020**).

<sup>214</sup> See tax filings of NRD (**Exhibit R-021**).

- 160.5. information relating to minimum investments and minimum work commitments in each mining area;
- 160.6. work plans in relation to each mining area;
- 160.7. proposed corporate social investment plans;
- 160.8. proposed infrastructure development plans of each mining area; and
- 160.9. proof of financial capacity to support each commitment, with supporting documents to prove financial capacity.

161. Ultimately, the Licence Evaluation Team recommended that:<sup>215</sup>

*“NRD may not be granted five (5) concessions namely: NEMBA, RUTSIRO, GICIYE, MARA AND SEBEYA. This is because NRD did not submit all the requirements requested and even those that were submitted are deemed not satisfactory according to request for the Minister of State in charge of Mining which requested NRD to re-apply for some or all former mining areas by NRD.*

*The Evaluation technical team analysed documents submitted by NRD and the team found that in the motivation letter for the application of the licence, NRD Rwanda Ltd didn't not indicate what kind of Mining Concession NRD Rwanda Ltd was willing to operate in, the type of licence was also not mentioned according to the new law. And also the company did not indicate the licence period it wanted.”*

162. That is, on the basis of its failure to submit the full suite of required information, and that the information in fact provided was determined to be unsatisfactory in some cases, including unclear as to the nature of the licence sought, the Evaluation Team recommended that NRD was not granted any of the Five Concession Areas.<sup>216</sup>
163. On 28 October 2014, MINIRENA wrote to NRD informing it that, having assessed NRD's applications against the requirements of the 2014 Law, it had decided not to grant any of the mining licences that NRD applied for.<sup>217</sup> MINIRENA stated that it declined to grant the licences, on the basis that, following an evaluation of the documents submitted, NRD failed to submit a number of the documents requested, and those that were submitted were unsatisfactory.<sup>218</sup> Accordingly, MINIRENA was unable to satisfy itself of the suitability of NRD and decided not to grant the mining licences. It also stated that MINIRENA had terminated all other working relationships with the company and accordingly requested NRD to proceed with the closure of the concessions in a period not

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<sup>215</sup> Memorandum from the License Evaluation Team to the Honourable 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) (**Exhibit R-020**), at para. 6.I – 6.II.

<sup>216</sup> *Ibid* (**Exhibit R-020**), at para. 6.I.

<sup>217</sup> Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**).

<sup>218</sup> *Ibid* (**Exhibit R-022**).



exceeding 60 days from the date of receipt of the letter.<sup>219</sup> MINIRENA granted a seven day period for NRD to lodge an appeal of the decision.<sup>220</sup>

164. NRD submitted a formal appeal of the decision,<sup>221</sup> insisting that it had completed the requirements and was entitled to a long-term licence,<sup>222</sup> and also separately submitted a “re-application letter”, stating that it had now provided all the documents required as, aside from the re-application letter, the documents sought were in fact provided on previous occasions by way of submissions of documents in accordance with NRD’s reporting obligations (together, the “**October 2014 Appeal**”).<sup>223</sup>
165. In the course of its October 2014 Appeal, NRD specifically alleged a breach of the USA-Rwanda BIT,<sup>224</sup> having also alleged, inter alia, unequal treatment of NRD compared with another mining company, unfair treatment in terms of the re-application process, and the victimisation now alleged in the Claimants’ Memorial.<sup>225</sup> The letter also questioned MINIRENA’s finding that there had been documents missing from NRD’s application, and the basis for the statement that the documents submitted were unsatisfactory.<sup>226</sup>
166. In response, on 12 November 2014, the MINIRENA clarified that its decision to not grant the licences was made on the basis of Law No 13/2014 of 20/05/2014 on mining and quarry operations, and regulations and practices in mining contract negotiations, as NRD failed to submit the required documentation.<sup>227</sup> Further, it explicitly noted that:

*“The terms of [the Contract] did not give NRD the rights to obtain an automatic and exclusive right for long term mining licences. However, as specified in Articles 4 and 5 of the [C]ontract; granting of mining licence is subject to a positive evaluation of the submitted feasibility study, and fulfilment of obligations under the article 2 of this [C]ontract.”*<sup>228</sup>

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<sup>219</sup> *Ibid* (Exhibit R-022).

<sup>220</sup> *Ibid* (Exhibit R-022).

<sup>221</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (Exhibit C-086).

<sup>222</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term License* (30 January 2013) (Exhibit C-054).

<sup>223</sup> Letter from Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Delivery of a Re-Application letter* (1 November 2014) (Exhibit R-019).

<sup>224</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (Exhibit C-086), at page 3.

<sup>225</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (Exhibit C-086), at page 2-3.

<sup>226</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (Exhibit C-086), at page 2. It is notable that NRD also sought the assistance of the Minister of Natural Resources at this time. Letter from the Chairman of NRD (R. Marshall) to the Minister of Natural Resources (v. Biruta), *Subject: Request for help* (5 November 2014) (Exhibit R-070).

<sup>227</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter* (Exhibit C-087).

<sup>228</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter* (Exhibit C-087).

167. MINIRENA again provided a list of documents outstanding and repeated its request that NRD provide the additional information, giving it yet a further opportunity to provide the additional information, and allowing for Rwanda to reconsider its declination.<sup>229</sup>
168. On 25 November 2014, NRD provided some outstanding documents to MINIRENA, stating that it believed that it had now provided all requested documents, and that it would attempt to provide any further documents required immediately.<sup>230</sup> It set out a response to the documents sought, stating how it believed that it complied with each requirement.<sup>231</sup>
169. MINIRENA reviewed the further documents provided, but again considered that that application was not sufficient, as it was lacking important information and documents, and some information provided was not complete.<sup>232</sup> Further, it was not consistent with the requirements of the 2014 Law, compliance with which was required for the granting of a licence.<sup>233</sup> Accordingly, on 17 December 2014, MINIRENA again notified NRD that it had declined NRD's application, stating that the missing documents fell into two categories, namely proof of the company's capacity to develop the concessions, and detailed plans for the period of the licence being applied for.<sup>234</sup> Again, specific further information was requested.<sup>235</sup>
170. NRD provided a small amount of further information in response.<sup>236</sup> MINIRENA conducted an assessment report of the documents submitted by NRD and reported back first by the technical team,<sup>237</sup> and then by Dr Michael Biryabarema.<sup>238</sup> The Assessments found that:<sup>239</sup>
- 170.1. NRD provided no evidence of its financial viability supported by banks or financial institutions for its present and future mining operations;

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<sup>229</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter (Exhibit C-087)*.

<sup>230</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Requested Documents (25 November 2014) (Exhibit C-088)*.

<sup>231</sup> *Ibid*, (Exhibit C-088).

<sup>232</sup> Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Further response to your application letter concerning the mining licenses for Nemba, Rutsiro, Giciye, Sebeya and Mara concessions (17 December 2014) (Exhibit C-095)*.

<sup>233</sup> *Ibid* (Exhibit C-095).

<sup>234</sup> *Ibid* (Exhibit C-095).

<sup>235</sup> *Ibid* (Exhibit C-095).

<sup>236</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister E. Imena), *Response to your letter dated 17 December 2014 (16 January 2015) (Exhibit C-096)*.

<sup>237</sup> Technical team, *Assessment report of additional documents submitted by NRD Rwanda Ltd (20 January 2015) (Exhibit R-023)*.

<sup>238</sup> Dr. M. Biryabarema, *Assessment report of additional documents submitted by NRD Rwanda Ltd (February 2015) (Exhibit R-024)*.

<sup>239</sup> *Ibid* (Exhibit R-024); Technical team, *Assessment report of additional documents submitted by NRD Rwanda Ltd (20 January 2015) (Exhibit R-023)*.

- 170.2. NRD provided partial and insufficient financial statements, and those provided show it making losses in all the reported years;
- 170.3. NRD provided no documents setting out the parent or ultimate parent companies of NRD;
- 170.4. NRD provided no tax clearance certificate or information on its tax liabilities; and
- 170.5. NRD provided no detailed work or business plans for each concession. The technical report provided was not sufficiently granular to assist in relation to particular concessions.
171. Additionally, the assessments found that separate applications for each concession were not made, as required. Instead, as regards to the *'Feasibility Study Update'*, *"the technical report submitted was of a very general nature and did not present details on the work done in every 'concession'"*.<sup>240</sup> Even when useful information was provided in relation to certain concessions, that was insufficient to constitute "the development of a proper mine plan" for that concession, let alone the other concessions. There were "no substantive technical reports, either submitted in the past or in the recent submitted documents that show advanced exploration work".<sup>241</sup>
172. Accordingly, MINIRENA concluded – plainly reasonably, after detailed consideration – that the Ministry had no basis to grant NRD a licence to the Five Concession Areas, as the company had not made appropriate applications in relation to each concession, had provided insufficient documentation, and had not shown financial or technical viability.<sup>242</sup>
173. In March 2015, NRD wrote to MINIRENA:
- 173.1. requesting that informal consultation and negotiation under the USA-Rwanda BIT begin immediately;<sup>243</sup>
- 173.2. issuing a barely veiled threat that *"the NRD investors are fully cognizant of (and sensitive to) the damage that a public disclosure of its victimisation can have on future Foreign Direct Investment in Rwanda"*.
174. This letter was copied to both the US Ambassador and Commercial Attaché in Kigali and it was clear that NRD was laying the groundwork for these proceedings, and attempting to bully Rwanda into either granting mining licences, or making a settlement payment.
175. On 19 May 2015, MINIRENA again informed NRD that, despite the provision of additional information, which was again found insufficient, its application had been rejected, and

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<sup>240</sup> *Ibid* (Exhibit R-024), at page 4.

<sup>241</sup> *Ibid* (Exhibit R-024), at page 4.

<sup>242</sup> *Ibid* (Exhibit R-024).

<sup>243</sup> Letter from the Chairman of NRD (R. Marshall) to the CEO of RDB (F. Gatere) *Notice under the "Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment"* (23 March 2015) (Exhibit C-100).

directed it to hand over its mining concessions and proceed to closure of its operations.<sup>244</sup> It stated:

*“Upon review of the documents you submitted, it was determined that the information did not meet the requirements for the grant of mining licences under the Law No 13/2014 of 20/05/2014 on Mining and Quarry Operations.*

*Considering the fact that, it is for the third time that your company has been requested to submit complete application files, but failed to do so, despite the forbearance shown by the Ministry. I, unfortunately, regret to notify you that, due to the reasons stated above, the Ministry is not able to grant mineral licences to your company, Natural Resources Development (Rwanda) Ltd, for mining in Nemba, Giciye, Rutsiro, Mara and Sebeya perimeters.”<sup>245</sup>*

176. NRD replied on 25 May 2015 stating that the notification that it had not been granted mining licences:

*“Appears to make little sense given that more than one year ago the Minister expropriated the same mining concessions ... It was due to this expropriation and the Minister’s unwillingness to discuss this matter that, two months ago, we requested settlement negotiations under Article 23 of the [BIT]”.*<sup>246</sup>

177. It also stated that NRD’s operations were “effectively closed by the Minister’s actions more than 18 months ago”.<sup>247</sup> However, the letter did not contest the substance of the evaluation of its application.

178. The MINIRENA then appointed a technical evaluation team to cross-check the compliance of NRD with the mining and environmental laws and regulations in the Nemba, Rutsiro, Mara, Sebeya and Giciye mining perimeters, and requested that NRD works with it in order to carry out the evaluation.<sup>248</sup>

179. Following this, in July 2015, the US Investors in BVG and NRD instructed Norton Rose Fulbright to pursue claims against Rwanda for alleged breaches of the BIT, in relation to investments by the US Investors.

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<sup>244</sup> Letter from the Minister of State in charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (**Exhibit C-038**).

<sup>245</sup> *Ibid* (**Exhibit C-038**).

<sup>246</sup> Letter from the Chairman of NRD (R. Marshall) to the CEO of RDB (F. Gatare) *Notification Letter from Minister of State for Mining* (25 May 2015) (**Exhibit C-112**).

<sup>247</sup> *Ibid* (**Exhibit C-102**).

<sup>248</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Transmission of evaluation schedule for NRD mining perimeters and request for the representative (s) of the afore-mentioned company in the technical evaluation team* (12 June 2015) (**Exhibit R-025**).

## **2. Position of NRD and its concessions under the 2014 Law**

180. Mr. Mugisha also comprehensively sets out the position of NRD and its treatment by the 2014 Law:

*“I understand that NRD’s five four-year Licences, which were granted in 2007 and therefore under the 1971 Law, expired in October 2012, having initially been extended by the Mining Minister at the time when they would otherwise have expired under their own terms in January 2011. Thereafter, I understand that NRD was allowed to continue to operate without any mining licences in the short-term while negotiations continued with Rwanda for a new licence: I refer to the letter sent to NRD by Dr. Biryabarema on 10 February 2013.<sup>20</sup> My interpretation of this authorisation is that it was a courtesy measure granted by Rwanda while both parties continued negotiations for new licences, and that Rwanda was under no obligation to extend such measure to NRD. It did not amount to a licence within the meaning of the 2008 Law as in force at the time.*

*In my experience this short-term authorisation without any formal licence issued under mining law was not exceptional, and I am aware of other cases where operators were given similar sorts of authorisation to continue to operate even where licences had expired in order to give them an opportunity to prove that they should be granted new licences:*

*in practical terms it would have been wrong to require them to cease operations entirely when a new application was made, because that would prove disruptive of operations in case the Government was satisfied that they qualified for new licences. So this was seen as a pragmatic solution for short periods to allow operators to make new applications and for those to be assessed. However in these circumstances the Government was entitled to revoke this authority to continue to mine at any time, subject to notice, as I understand it did with NRD when it assessed that its application for new licences was not sufficiently strong to justify the granting of any new licences.*

*Accordingly, Article 52 of the 2014 Law did not apply to NRD. This was:*

- 1. First because it had never had any licence granted to it under the 2008 Law (the Licences being granted under the 1971 Law); and*
- 2. Secondly because the Licences had already expired in October 2012, and the company was operating solely on the basis of the temporary authorisation granted by Dr. Biryabarema in February 2013*

### **I. NRD’s legal disputes and their consequences**

181. At paragraphs 203-217 of their Memorial, the Claimants make allegations in relation to Rwanda’s handling of a shareholder dispute between Mr. Benzinge, one of NRD’s founder

shareholders and its initial Managing Director, and Spalena. Rwanda has at all times acted properly in relation to what is a private dispute between Mr. Benzinge and Spalena.

### 1. Shareholder dispute: ownership of NRD was disputed

182. There is significant background to the disputed ownership of NRD that does not need to be set out here. It is sufficient to say that, from when the shares in NRD were initially sold by the original shareholders (the “Zarnacks”), Mr. Ben Benzinge had consistently held that his interest in NRD remained, and that the initial transfer from the Zarnacks was inconsistent with the Memorandum and Articles of Incorporation of NRD and so void.
183. On 2 August 2012, the Rwanda Development Board updated the corporate registration for NRD to record that Mr. Benzinge was its Managing Director, seemingly on the basis that there had been no legal documents appointing Mr. Marshall and Ms Mruskovicova as Managing Directors.<sup>249</sup>
184. On 6 August 2012, Mr. Benzinge was suspended from his position as Managing Director of NRD by the Rwandan Development Board (RDB) on the basis of a written complaint from Mr. Marshall claiming that, as Managing Director, Mr. Benzinge had transferred a significant amount of company assets and taken over company premises to the detriment of the company and its shareholders.<sup>250</sup> RDB then wrote to Mr. Benzinge by letter dated 6 August 2012 advising him that the position of Managing Director had been suspended and that no person shall hold this position until complaints had been investigated to ensure that the interests of shareholders were secure.<sup>251</sup> RDB registration information was then updated to reflect Mr. Benzinge’s removal as Managing Director and the suspension of the position of Managing Director.<sup>252</sup>
185. On 7 August 2012, RDB wrote to the Mayor of Bugasera District, copying Mr. Benzinge, stating that it had recently received documents indicating that the holding company of NRD, NRD Holding GmbH, is wholly owned by Spalena, which is in turn wholly owned by Mr. Marshall.<sup>253</sup> Mr. Marshall had submitted copies of a resolution appointing himself as the Managing Director of NRD.<sup>254</sup> As such, RDB requested facilitation of the transfer of NRD’s property to Mr. Marshall.<sup>255</sup> Although Mr. Marshall and other NRD directors

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<sup>249</sup> RDB Certificate of domestic company registration for NRD (2 August 2012) (**Exhibit R-026**).

<sup>250</sup> RDB Full Registration information for Domestic Company for NRD (6 August 2012) (**Exhibit R-027**); RDB Certificate of Domestic Company Registration (6 August 2012) (**Exhibit R-028**).

<sup>251</sup> Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit R-029**).

<sup>252</sup> RDB Full Registration information for Domestic Company for NRD (6 August 2012) (**Exhibit R-027**); RDB Certificate of Domestic Company Registration (6 August 2012) (**Exhibit R-028**).

<sup>253</sup> Letter from the Registrar General of RDB (L. Kanyonga) to the Mayor of Bugesera District (L. Rwagaju), *Appointment of acting Managing Director of Natural Resources Development Ltd* (7 August 2012) (**Exhibit C-070**).

<sup>254</sup> *Ibid*, (**Exhibit C-070**).

<sup>255</sup> *Ibid*, (**Exhibit C-070**).

asserted that Ben Benzinge was no longer a shareholder in NRD, they also continued to invite him to shareholders' meetings.<sup>256</sup>

186. On 8 August 2012, Mr. Benzinge lodged an appeal against the decision of RDB to suspend him as Managing Director of NRD.<sup>257</sup> On 10 August 2012, NRD wrote to the CEO of RDB alleging that Mr. Benzinge had caused considerable harm during the short period in which he acted as Managing Director of NRD, being 2-8 August 2012, although no proper details were provided.<sup>258</sup>
187. On 31 October 2012, Mr. Benzinge commenced arbitral proceedings against NRD. Mr. Benzinge challenged the appointment of Mr Marshall as Managing Director of NRD, the appointment of Ms. Zuzana Mruskovicova and Mr. Marshall as board members, and the transfer of shares to NRD Holding GmbH and H.C. Starck GmbH. NRD was summoned but did not attend or give a reason for its absence, or file any submissions.<sup>259</sup>
188. On 17 May 2013, the arbitrator in those proceedings Nelly Umugwaneza ("**Arbitrator**") held that NRD Holding GmbH and HC Starck GmbH became shareholders in NRD, and Mr. Marshall became Managing Director of NRD, unlawfully.<sup>260</sup> The Arbitrator also declared that Ms. Mruskovicova and Mr. Marshall be dismissed as members of the Board of Directors of NRD.<sup>261</sup> Further, the Arbitrator held that various decisions taken during the meetings of 11 October 2011, 28 October 2010, and 10 December 2008 were unlawful and must be annulled.<sup>262</sup>
189. Mr. Marshall has contested the validity of the process which led to, and language of, the Arbitrator's decision.<sup>263</sup> However, challenges to the Arbitrator's decision, made on procedural grounds, were made and rejected before the High Court,<sup>264</sup> and the Supreme Court of Rwanda.<sup>265</sup>
190. According to Mr. Mugisha, Rwanda's expert on Rwandan law:

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<sup>256</sup> Letter from the Chairman of the Board of Directors (R. Marshall) to Ben Benzinge, Invitation to NRD Rwanda Ltd. Extraordinary General Meeting (10 October 2012) (**Exhibit R-030**), the contradiction in this position was noted by counsel for Mr. Benzinge in a Letter from Legal Counsel at Bar (I. Bizumuremyi) on behalf of Ben Benzinge to Roderick Marshall, *Invitation for Mr. Ben Benzinge for Extra-Ordinary General Meeting of shareholders of NRD-Rwanda Ltd* (15 October 2012) (**Exhibit R-031**).

<sup>257</sup> Letter from Legal Counsel (I. M. Bizumuremyi) to the Minister of Trade and Industry, *Appeal by Mr. Ben Benzinge against the decision of Registrar General to suspend him from the position of Managing Director of Natural Resources Development (Rwanda) Ltd.* (8 August 2012) (**Exhibit R-012**).

<sup>258</sup> Letter from the Chairman of NRD (R. Marshall) to the CEO of RDB, *Natural Resources Development Rwanda Ltd. as Victim by Acts of Ben Benzinge and Others* (10 August 2012) (**Exhibit C-048**).

<sup>259</sup> *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal (17 May 2013) (**Exhibit R-013**), at page 2.

<sup>260</sup> *Ibid* (**Exhibit R-013**), at pages 6 and 11.

<sup>261</sup> *Ibid* (**Exhibit R-013**), at page 10.

<sup>262</sup> *Ibid* (**Exhibit R-013**), at page 11.

<sup>263</sup> See, for example, Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**).

<sup>264</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Commercial High Court, Kigali, RCOMA 0269/13/HCC (23 September 2013) (**Exhibit R-014**).

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

*The effect of the High Court Decision being upheld on procedural grounds by the High Court and Supreme Court, is that the legal shareholders of NRD are Mr. Ben Benzinge, Mr. Joachim Christopher Zarnack and Mr. Jens Christopher Zarnack, whose names are found in the Articles of Association of 10 July 2006. The Arbitrator (who was the only authority charged to examine the merits of the dispute), ruled that the transfers to NRD GmbH and HC Starck, were erroneously done, and both the High Court and Supreme Court ruled that the Arbitration procedures were followed. Consequently, as a matter of Rwandan law, the decision of the arbitrator stands.*

*The arbitral decision ultimately dismissed Mrs Zuzana Mruskovica and Mr. Roderick Marshall from the Board of Directors of NRD, as well as Mr. Roderick Marshall as the Managing Director on grounds that their appointments were a nullity. The effect of this decision, as no replacements were provided, is that the board reverts to the composition that it had before the appointment of Ms. Mruskovica and Mr. Marshall.*

*As a consequence of the Arbitration award as upheld by the Supreme Court, in circumstances where the Zanarcks no longer wish to exercise authority over the company, and the dispute is between Mr. Marshall and Mr. Benzinge, it is Mr. Benzinge who would have authority to act on behalf of the Company.”<sup>266</sup>*

191. In May or June 2014, Mr. Evode, the Minister of State in Charge of Mining, met with Mr. Benzinge who wanted to discuss the dispute.<sup>267</sup>

## **2. Consequences of the shareholder dispute**

### ***i. Registration information***

192. Following the confirmation of the arbitral award by the Supreme Court of Rwanda, representatives of Mr. Benzinge wrote to the RDB requesting that it amend the company information, to indicate that, consistently with the Arbitrator’s decision, Mr. Benzinge is a shareholder and Managing Director of NRD.<sup>268</sup>

193. Mr. Marshall, on NRD letterhead and “on behalf of the shareholders” of NRD, also wrote to the RDB, stating that the arbitral award was incomprehensible and requesting “urgent intervention to tell us what are our rights and if we are still owners of NRD”.<sup>269</sup>

### ***ii. Enforcement of judgments***

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<sup>266</sup> Expert Report of Richard Mugisha dated 24 May 2019, at paras. 45-47.

<sup>267</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

<sup>268</sup> Letter from Lex Chambers Ltd (I. Bizumuremyi) to Rwanda Development Board (The Registrar General) (29 May 2014) (**Exhibit R-033**).

<sup>269</sup> Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**).



194. In early 2014, as set out in the witness statement of Mr. Bosco, NRD was also the subject of numerous court judgment declaring that it owed sums to various parties, particularly many employees.
195. Mr. Benzinge had obtained a monetary judgment against NRD in the arbitral proceedings, which he instructed Jean Bosco Nsengiyuma to enforce.<sup>270</sup> Additionally, 25 former employees of NRD also had money judgments against it in relation to unpaid wages.<sup>271</sup> The Claimants have alleged that Mr. Nsengiyuma unlawfully seized USD 800,000 worth of its assets,<sup>272</sup> but that is incorrect, as explained in detail below.
196. On 9 June 2014, Mr. Nsengiyuma wrote to NRD with a formal demand of payment of the judgment debt owed to Mr. Benzinge and the 25 former employees.<sup>273</sup> The amounts due and demanded were not paid, and accordingly Mr. Nsengiyuma seized all of the equipment in NRD's office in Kigali, and on the mine at Nemba, on 11 June 2014, and informed NRD that he would sell the equipment on 11 July 2014 if the judgment debts had not been paid.<sup>274</sup> Although the Claimants have alleged that the police and military were present, that is not correct.<sup>275</sup>
197. NRD then accused Mr. Nsengiyuma of unlawfully possessing NRD's property, requesting that the Minister of Justice suspend Mr. Nsengiyuma's action,<sup>276</sup> which the Minister of Justice agreed to do. However, following a review of the matter, the Minister of Justice confirmed that Mr. Nsengiyuma had acted appropriately, and informed NRD that it had legitimate judgment creditors who won cases against the company and must be paid.<sup>277</sup>
198. Finally, with the assistance of the police, Mr. Nsengiyuma seized a car owned by NRD in satisfaction of outstanding sums owed under the judgments he was enforcing, which was sold for auction on 20 February 2015.<sup>278</sup> Mr. Nsengiyuma was not engaged in relation to NRD following the seizure and sale of the car.<sup>279</sup>
199. It was clearly appropriate for the administrative arm of the Rwandan government to be responsive to the decisions of the judiciary.

### 3. Further legal disputes

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<sup>270</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 18.

<sup>271</sup> *Ibid*, at para. 17.

<sup>272</sup> Witness Statement of Ms. Zuzana Mruskovicova dated 28 February 2019, at para. 19.

<sup>273</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 20.

<sup>274</sup> *Ibid*, at para. 21.

<sup>275</sup> *Ibid*, at para. 21.

<sup>276</sup> Letter from the Minister of Justice (J. Busingye) to Professional Court Bailiff (J. B. Nsengiyumva), *Suspension from executing judgments against Natural Resources Development (Rwanda) Ltd* (23 July 2014) (**Exhibit C-072**).

<sup>277</sup> Letter from the Minister of Justice (J. Busingye) to Z Mruskovicova, R. Marshall and B. Benzinge, *Execution of judgments against NRD Rwanda Ltd* (August 2014) (**Exhibit C-073**), Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 31.

<sup>278</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 34.

<sup>279</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 35.

200. NRD had a number of legal problems with its employees and contractors and was involved in a large number of court cases concerning claims for unpaid salary, wrongful dismissal or failing to pay the artisanal miners for their minerals.<sup>280</sup>
201. It had a significant dispute with Pascal Rwakirenga, the former head of security of NRD, who had commenced proceedings against NRD in 2011 seeking damages for wrongful termination, improper deductions from his December 2010 salary and legal fees. The claim was heard and determined in Mr. Rwakirenga's favour by the Intermediate Court of Gasabo sitting in the Rusororo on 29 September 2011.<sup>281</sup> NRD appealed the decision, which was ultimately confirmed by the Supreme Court in decisions dated 30 November 2012 and 8 January 2013.<sup>282</sup> Mr. Rwakirenga instructed Mr. Nsengiyuma in April 2013 to enforce the Supreme Court decision.<sup>283</sup>
202. On 10 April 2013, Mr. Nsengiyuma visited NRD's office in Kigali and served a demand for payment of the amount that NRD had been ordered to pay to Mr. Rwakirenga by the Intermediate Court, following the decision being upheld by the Supreme Court.<sup>284</sup> On 16 April 2013, following NRD's failure to pay the sum ordered, Mr. Nsengiyuma seized minerals belonging to NRD that were stored at its warehouse in Nemba.<sup>285</sup> He then transferred the minerals to Mineral Supply Africa's warehouse in Kigali where they could be stored until they were sold.<sup>286</sup>
203. NRD claimed that the seizure was unlawful. However, the claim was dismissed.<sup>287</sup> The GMD and MINIRENA confirmed that the minerals were the property of NRD, and the Court authorised the seizure on 27 December 2013.<sup>288</sup> An attempt was made to sell the minerals by way of public auction, and they were sold on the second auction on 27 January 2014 to Rwanda Mineral Resources Ltd.<sup>289</sup>

#### **J. The decision to prevent NRD from receiving tags from iTSCI**

204. In 2014, in light of the failure of NRD to regularise its status under the 2014 Law, and its ongoing ownership dispute with Mr. Benzinge of which Rwanda had become aware, Rwanda made the decision to bar iTSCI from issuing any further tags to NRD.<sup>290</sup>

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<sup>280</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 14.

<sup>281</sup> *Pascal Rwakirenga v. Natural Resources Development Ltd*, Ruling of file RSOC 065/11/TGI/GSBO of the Intermediate Court of Gasabo sitting in Rusororo hearing cases related to Labour (29 September 2011) (**Exhibit R-034**). See also Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 9.

<sup>282</sup> See Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 9.

<sup>283</sup> *Ibid*, at para. 9.

<sup>284</sup> *Ibid*, at para. 10.

<sup>285</sup> *Ibid*, at para. 10.

<sup>286</sup> *Ibid*, at para. 11.

<sup>287</sup> *Ibid*, at para. 14.

<sup>288</sup> *Ibid*, at para. 14.

<sup>289</sup> *Ibid*, at para. 15.

<sup>290</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 49.

205. Former Minister Imena addresses the allegation that this power was exercised improperly in his witness statement:

*“In around the summer of 2014, I barred PACT, who co-ordinate the International Tin Supply Chain Initiative (“ITSCI”), programme in Rwanda, from issuing tags for NRD’s minerals. I did so primarily because I wanted to put pressure on NRD to regularise its operations by applying for and obtaining licences for its concessions. By June 2014 NRD had not had a mining licence for any of its concessions since October 2012. However, with our indulgence it was continuing to operate its mines, through the artisanal miners, and was able to buy minerals from the artisanal miners on its sites and have them tagged following which it was able to sell them to traders in Kigali. It was able to do all of this without a licence and without making any investment into any of its mines.*

*Although I had made clear to Mr. Marshall since I met him in October 2013 that NRD needed to re-apply for its licences, by mid-2014 NRD had not taken any steps to do so and I did not believe they had any intention of doing so – it seemed quite clear to me that NRD were quite happy to continue operating their mines without a licence so long as they were able to receive tags and that they had no real interest in pursuing their licence applications which would require a commitment to investment and development of the mines. I therefore instructed PACT not to issue any further tags to NRD in order to put pressure on NRD to regulate their position by applying for and obtaining licenses. It was not long after I instructed PACT not to issue any further tags to NRD that NRD submitted its September 2014 application for licences.”<sup>291</sup>*

206. Former Minister Imena goes on to explain that, as well as the problem of NRD operating without a licence, the ownership dispute between Mr. Benzinge and Mr. Marshall further complicated the matter. Minister Imena explains that Mr Benzinge produced a Supreme Court decision which supported his claim to ownership of NRD, and threatened to commence proceedings against GMD if they continued to issue tags to NRD while Mr Marshall purported to act as Managing Director.<sup>292</sup> This dispute placed Minister Imena in a difficult position, as he had no interest in the ownership dispute but wanted to ensure that MINIRENA was dealing with the rightful owner in relation to the issuing of tags, and therefore did not want PACT to issue tags to NRD while this ownership dispute remained unresolved.<sup>293</sup>

## **K. Treatment of other investors following enactment of the 2014 Law**

### **1. Under the 2014 Law**

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<sup>291</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 49-50.

<sup>292</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

<sup>293</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 55.

***i. Investors who were not issued further concessions under the 2014 Law or not allowed to continue to operate***

207. Following the enactment of the 2014 Law, a number of concession-holders' licences were not renewed, on the basis that they failed to meet the requirements of the 2014 Law. These included:<sup>294</sup>
- 207.1. Roka Rwanda Ltd, a company owned by Congolese and Rwandan nationals.
  - 207.2. Rogi Mining Rwanda Ltd, a company owned by Russian nationals.
  - 207.3. Gatumba Mining Concessions Ltd, a joint venture between a South African company and Rwanda.
  - 207.4. Rwanda Metals Ltd, a company owned by Zimbabwean nationals.
208. In each case, a company's application was assessed against the legal framework and if concession-holders failed to meet the requirements of the 2014 Law in their re-applications, they were not granted new or extended licences. There was no discrimination on the basis of nationality of shareholders.
209. Where existing concession-holders were able to meet the requirements of the 2014 Law, they were granted licences accordingly. However, where – as in the case of NRD – the concession-holders were unable to meet the amended requirements, they were not granted licences. This is consistent with the nature and purpose of the legislation, and demonstrates its even-handed application.
210. Further, Phoenix Metals Ltd ("**Phoenix**") is an example of an investor that did not comply with a contract with Rwanda, and accordingly was not allowed to continue to operate. A dispute arose when it became clear that Phoenix was failing to operate the tin smelter that it had bought from the government in 2002 pursuant to a 2002 agreement between Phoenix and the Government which required Phoenix to operate a tin smelter near Kigali and that it refine and export smelted tin of at least 95% content.<sup>295</sup> However, Phoenix did not operate the smelter and instead was simply trading raw cassiterite, which it did not have a license to do.<sup>296</sup> In order to regularise the position, in 2017 the Government asked Phoenix to apply for a license to trade raw cassiterite, but rather than doing so they closed down their operations. A bank to whom Phoenix had pledged the smelter as security for loan then enforced its security over the smelter as a result of Phoenix's failure to repay the loan.<sup>297</sup>

***ii. Rutongo and Eurotrade: granted long term licences prior to the 2014 Law***

211. The Claimants attempt to argue that Rutongo Mines Ltd ("**Rutongo**") and Eurotrade International ("**Eurotrade**") were preferentially treated as compared to NRD. However,

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<sup>294</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 63.

<sup>295</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 34.

<sup>296</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 34.

<sup>297</sup> Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 35.

in fact, both Rutongo and Eurotrade were in vastly different circumstances to NRD, as set out below.

212. Rutongo had applied for long-term licences before its short-term concession agreements had expired.<sup>298</sup> In its application, it submitted documents and evidence that met the requirements for the granting of a long-term licence, including the required feasibility studies, which was detailed had been independently assessed. Additionally, over the course of its short and long term licences, Rutongo made significant investments:

*“They were also able to demonstrate to our satisfaction that in the four-year initial period when working on the basis of a short term licence, they had made significant investments of in excess of USD \$20 million of into exploration, infrastructure, and equipment, making significant strides towards industrial mining and away from artisanal mining.”<sup>299</sup>*

213. Further, they had carried out high quality exploration, and provided comprehensive estimates of reserves and a detailed plan for exploitation. Accordingly, in 2014, when the 2014 Law came into force, Rutongo was operating on the basis of a long term licence that it had been granted to it.
214. Similarly, Eurotrade had applied for long-term licences before its short-term concession agreements had expired.<sup>300</sup> In its application, it submitted documents and evidence that met the requirements for the granting of a long-term licence, including the required feasibility studies, and accordingly Rwanda granted it long-term licences.
215. The grandfathering provisions were also applied to Eurotrade, on the basis that it had existing long term licences as at the date of entry into force of the 2014 Law, on 30 June 2014.
216. Rwanda has strict environmental laws and strictly enforces them.<sup>301</sup> Rutongo and Eurotrade both have strong environmental records for compliance with Rwandan environmental law; both have strong records and have received certificates of recognition for their efforts.<sup>302</sup> Overall their mines have been well recognised as exemplary in terms of development and investment.

**iii. Companies operating without licences prior to the 2014 Law**

217. In contrast, a number of concession-holders other than NRD were required to re-apply for licences when the 2014 Law came into force:

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<sup>298</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>299</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 58.

<sup>300</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>301</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 62.

<sup>302</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 62.

*“All companies who did not have a valid mining license when the 2014 Law came into effect, and who had not previously submitted an application for renewal, were required to re-apply under the 2014 Law.”<sup>303</sup>*

218. This is consistent with the requirements of the 2014 Law,<sup>304</sup> and the policy underlying it.

## **2. Treatment under ITRI/iTSCi**

### ***i. Companies prevented from participating in iTSCi***

219. As set out above, the primary purpose of the iTSCi program was to prevent conflict minerals from entering global minerals markets. The majority of mining companies operating in Rwanda consistently complied with the requirements of the iTSCi programme, as it allowed them to access substantial overseas markets, on the basis of iTSCi certification that minerals sourced from their mines were conflict free, and without which they would have been unable to trade internationally.

220. However, because of its scale (iTSCi monitors over 900 mining sites, including nearly 300 active sites),<sup>305</sup> from time to time, iTSCi discovers mining companies operating inconsistently with the requirements of the iTSCi programme. When non-compliance is discovered, iTSCi may be required to prevent certain mining operators from participating in the system. iTSCi makes recommendations to the RMB to take steps such as suspension, if it finds that participants are acting inconsistently with their obligations.<sup>306</sup> By way of example, in the period 2011- to 2016, iTSCi recorded and monitored 3,063 individual incidents, 351 (approximately 12%) of which have resulted in suspension of mining licences by Governments or suspension of membership by iTSCi.<sup>307</sup>

### **L. The Five Concession Areas are not currently operated by Ngali mining, but were put to tender to private companies in 2016**

221. Contrary to the allegations made in the Claimants' submissions,<sup>308</sup> and in the Claimants' evidence,<sup>309</sup> Ngali Mining does not have any license to or concession over, let alone own, any of the mines or mining sites previously operated by NRD.<sup>310</sup>

222. Fabrice Kayihura sets out the current position of Ngali, and is clear that:

*“In January 2019, Ngali Mining was granted three large scale mining licenses to explore for gold in the Karongi district of Rwanda, at Miyove, Bweyeye and Birambo (the “Exploitation Licences”). These Exploitation Licences were*

<sup>303</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 61.

<sup>304</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 32.

<sup>305</sup> Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>306</sup> Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para.11

<sup>307</sup> Witness Statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 11.

<sup>308</sup> Memorial at paras. 120, 250, 270 and 272.

<sup>309</sup> See, for example, Witness Statement of Ms. Zuzana Mruskovicova dated 28 February 2019, at para. 26-27.

<sup>310</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 10.

*included in the 25 mining and quarrying licenses approved by the Rwandan Cabinet on 28 January 2019.*

...

*Ngali Mining also has an initial three-year exploration licence to explore for gemstones at Ngororero. The licence period expires in July 2019 and we are currently in the process of preparing the comprehensive report and documents required to apply for a long-term exploitation licence. From our experience with the long-term licences granted for our three gold sites, we know that the Rwanda Mining Board (“RMB”) requires thorough evidence of substantial investment and exploration before it will consider granting a long-term exploitation licence. This involves giving a detailed and reliable estimation of reserves. For hard rock mines such as gold, this requires considerable drilling, and for alluvial deposits such as gemstones it requires the taking of comprehensive excavation and sampling. The RMB also requires, among other things, a comprehensive environmental impact assessment, which we are currently in the process of preparing.”<sup>311</sup>*

223. Simply, any assertion that Ngali Mining now operates NRD’s old concessions is untrue. In fact, all of the former NRD concessions were put out for tender by the Government in early 2016.<sup>312</sup> The successful bidders were approved by Cabinet in September 2016.<sup>313</sup> The new licence holders are not Government owned and none have a connection with the Ministry of Defence.<sup>314</sup>

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<sup>311</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para.7 and 9.

<sup>312</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

<sup>313</sup> Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Right Honourable Prime Minister, *Transmission of the Cabinet Paper on Successful Companies for the Development of former Government Mining Concessions* (19 September 2016) (**Exhibit R-035**).

<sup>314</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

### **III. THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE**

224. For the reasons set out in the Respondent's Memorial on Preliminary Objections, this Tribunal and/or ICSID lacks jurisdiction over the Claimants claims.
225. Further for the reasons set out in the Respondent's Request for Bifurcation, these objections to jurisdiction are (i) serious and substantial, (ii) can be examined without prejudging the merits, and (iii) would dispose of all or a large part of the Claimants' claim,<sup>315</sup> such that they warrant the hearing of them as a preliminary phase.
226. For these reasons the Respondent does not set out again here its objections to this Tribunal's and/or ICSID's jurisdiction, but in case the Tribunal should decide not to bifurcate the proceedings and hear the Respondent's Preliminary Objections as a preliminary phase, the Respondent's arguments as to why this Tribunal lacks jurisdiction as set out in its Preliminary Objections are hereby incorporated into this Counter-Memorial.

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<sup>315</sup> Respondent's Request for Bifurcation dated 24 May 2019.



**IV. THE CLAIMANTS HAVE FAILED TO ESTABLISH A VIOLATION OF ARTICLE 5 OF THE USA-RWANDA BIT**

227. In Sections VI.A-VI.C of its Memorial, the Claimants assert that the Respondent's conduct breached Article 5 of the USA-Rwanda BIT. Specifically, the Claimants assert that Rwanda (i) *"did not treat Claimants' investments fairly and equitably"*,<sup>316</sup> (ii) *"failed to treat Claimants' investments transparently"*,<sup>317</sup> (iii) *"failed to provide Full Protection and Security to Claimants' Investment"*,<sup>318</sup> and (iv) *"eviscerated the Claimants' legitimate expectations"*.
228. The Claimants have failed to establish a violation of Article 5 of the USA-Rwanda BIT. Article 5 of the USA-Rwanda BIT provides the following:

*"Article 5: Minimum Standard of Treatment*

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

*2. 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. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

*(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*

*(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law."<sup>319</sup>*

229. Article 5 obliges Rwanda to afford to covered investments treatment in accordance with the customary international law minimum standard of treatment ("**MST**"). Importantly, Article 5 is explicit that the protections given are limited in scope, and the concepts of fair and equitable treatment ("**FET**") and Full Protection and Security ("**FPS**") only apply insofar as they fall within the obligations imposed by the MST. Article 5 does not require treatment *"in addition to or beyond that which is required by [the customary international law] standard, and do not create additional substantive rights."*<sup>320</sup>
230. Further, although the Claimants have attempted to suggest that Rwanda violated Article 5 through its alleged mistreatment of *"NRD and its investors"* (which is denied), the

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<sup>316</sup> Memorial, Section VI.A.

<sup>317</sup> Memorial, Section VI.B.

<sup>318</sup> Memorial, Section VI.C.

<sup>319</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 5.

<sup>320</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 5(2).

limited protection provided for in Article 5 applies only to “covered investments” (which for the reasons set out in the Respondents’ Memorial on Preliminary Objections, the Respondent says the alleged investors do not have) and not to the alleged investors themselves.<sup>321</sup>

231. In the paragraphs that follow, the Respondent asserts, without prejudice to the burden of proof, that the Claimants’ vague and far-reaching claims are not only unsubstantiated, but in fact do not even fall within the protections provided for in Article 5 of the USA-Rwanda BIT.

**A. Rwanda treated the Claimants’ alleged investments consistently with the FET obligations contained within the MST standard**

232. The first of the alleged breaches of Article 5 of the USA-Rwanda BIT is set out in Section VI.A of the Memorial, and alleges that Rwanda did not treat the Claimants investments fairly and equitably through: (i) failing to implement the 2014 Law uniformly,<sup>322</sup> (ii) using the ITRI/iTSCi system to punish Claimants,<sup>323</sup> and (iii) permitting Rwandan nationals to use the police and court systems to harm Claimants’ investments.<sup>324</sup> The Claimants additionally claim that Rwanda did not treat the Claimants’ investments fairly and equitably by failing to conform to the Claimants’ legitimate expectations.<sup>325</sup> These allegations are denied, as further developed below.

**1. The concept of FET within the MST as set out in customary international law**

233. As noted at paragraph 229 above, the concept of FET provided for in the USA-Rwanda BIT is limited in its scope to requiring treatment in accordance with the MST (which includes both FET and FPS). Within the obligations imposed by the USA-Rwanda BIT, FET expressly does not create any substantive rights for claimants additional to those created by MST. The concepts of MST and FET, and how they operate together, is developed further below.

***i. The distinction between the customary international law minimum standard and the various autonomous treaty standards***

234. The USA-Rwanda BIT explicitly provides for treatment in accordance with the MST, and goes so far as to state that the FET standard imposed by the USA-Rwanda BIT does “not require treatment in addition to or beyond that which is required by that [customary international law MST] standard, and do not create additional substantive rights”.<sup>326</sup> Accordingly, it is clear that the applicable standard is the MST standard. However, the Claimants have failed to engage whatsoever with that standard. Instead, the vast majority of the authorities that they cite in favour of the standard of FET obligation which

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<sup>321</sup> Memorial, para 168, 195.

<sup>322</sup> Memorial, Section VI.A.2.

<sup>323</sup> Memorial, Section VI.A.3.

<sup>324</sup> Memorial, Section VI.A.4.

<sup>325</sup> Memorial, Section VI.A.1.

<sup>326</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 5.

they allege applies, in fact deal with an autonomous FET standard under a unique bilateral investment treaty (“BIT”), rather than the relevant MST standard.

235. There is a distinction to be drawn between the MST “floor” and the higher obligations that may be found elsewhere, in certain autonomous, stand-alone FET obligations contained in specific BITs.<sup>327</sup> This distinction is material. The MST is a narrow standard, whereas any autonomous FET standard may well be, and generally is, broader than that MST.<sup>328</sup>

236. It is clear that decisions based on the autonomous standards set out in BITs that go beyond the protections provided for by the MST, do not assist in determining the boundaries of the FET standard applicable in this case, and should not be applied. For example, the decision in *Tecmed v. Mexico*, relied on heavily by the Claimants,<sup>329</sup> is of no relevance, because, as the tribunal held in *Glamis Gold v. America*:

*“Claimant has not proven that [the Tecmed] award, based on a BIT between Spain and Mexico, defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance.”*<sup>330</sup>

237. In light of the title of Article 5 of the USA-Rwanda BIT, and in particular the specific wording contained within the provision, the reference in Article 5 to “*fair and equitable treatment*” is explicitly to be understood not as autonomous treaty language but in terms of the MST. The USA-Rwanda BIT could not be clearer that it is the MST that applies - nothing more and nothing less. The level of this standard is set out in further detail below.

#### **ii. The MST at customary international law**

238. It is generally accepted that the MST is that set out in the 1926 decision of *Neer v. Mexico*:

*“the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful 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>331</sup>

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<sup>327</sup> See, for example, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (**Exhibit CL-009**), at paras. 7.4.5-7.4.11; *Joseph C. Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (**Exhibit CL-032**), at para. 253.

<sup>328</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) (**Exhibit CL-027**), at para. 302, *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award (19 November 2007) (**Exhibit RL-001**), at paras. 203, 236, 238.

<sup>329</sup> See Memorial, at paras. 160-163.

<sup>330</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (**Exhibit RL-002**), at para. 605.

<sup>331</sup> *Neer v. Mexico*, 4 R. Int’l Arb. Awards (15 October 1926) (**Exhibit RL-003**), at para. 4. The *Neer* tribunal continued to explain that its inquiry was limited to “*whether there [was] convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their*

239. Whether this standard has evolved since 1926 “*has not been definitively agreed upon*”.<sup>332</sup> However, the MST standard has evolved at least to the extent that there has been a change in what is considered to be shocking and outrageous. As the *Mondev v. USA* tribunal held:

*“...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 light of these 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>333</sup>

240. That is, in applying the *Neer* standard in modern contexts, a tribunal may find certain acts shocking and egregious which would not have been considered to reach this level in the past. Beyond this, there has been no relevant evolution of the customary international law standard, and indeed the Claimants have provided no evidence or basis for any such development.

241. Recent cases have summarised what is required to establish a breach of the FET standard where the MST standard applies. In particular, the Claimants must demonstrate:

*“a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in [a State’s] regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard.”*<sup>334</sup>

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*duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task.”*

<sup>332</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (**Exhibit RL-002**), at para. 612.

<sup>333</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**Exhibit RL-004**), at para. 116 (emphasis added).

<sup>334</sup> *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (27 October 2015) (**Exhibit RL-005**), at para. 390.

242. In *Waste Management v. Mexico*, the tribunal summarised the MST standard as follows:

*“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.”*<sup>335</sup>

243. The tribunal in *International Thunderbird Gaming v. Mexico* had a slightly different formulation:

*“the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by ... customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”*<sup>336</sup>

244. That the standard is strict and restricted is evident in the abundant and continued use of the specific adjectives throughout various arbitral awards, which are typified by terms such as “a gross or flagrant disregard”, “arbitrarily, grossly unfair” and “a gross denial of justice” in the above quotations.<sup>337</sup>

## **2. The Claimants have failed to prove any changes to the MST**

245. As already mentioned, the concept of FET provided for in the USA-Rwanda BIT, in adopting the MST standard, is very circumscribed in scope. In this Counter-Memorial, the Respondent has set out the established understanding of that MST standard; the burden of establishing any evolution of that standard falls on the Claimants.<sup>338</sup> Regardless of precisely how the standard is formulated, the Claimants (without prejudice to the burden of proof) come nowhere near establishing it.

246. Further, in a footnote, Article 5 of the USA-Rwanda BIT states that it is to be interpreted in light of Annex A, which provides:

*“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment*

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<sup>335</sup> *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 98.

<sup>336</sup> *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 January 2006) (**Exhibit RL-006**), at para. 194.

<sup>337</sup> See also *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (**Exhibit RL-002**), at para. 612, citing various examples.

<sup>338</sup> *Ibid* (**Exhibit RL-002**), at paras. 601-605.

*of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.*<sup>339</sup>

247. As such, Annex A of the USA-Rwanda BIT specifies that customary international law is to be proved by reference to “*a general and consistent practice of States that they follow from a sense of legal obligation*”; that is, the standard requirements for proof of customary international law of state practice and *opinio juris*.
248. The Claimants are required to prove the content of the customary international law obligation they allege and under which they claim protection. They have failed to do so. It is not enough to simply point to previous arbitral awards, which do not constitute either state practice or *opinio juris*.<sup>340</sup> Rather, in accordance with both Annex A of the USA-Rwanda BIT and the established principles of international law, to establish a rule of customary international law requires both consistent state practice and an understanding that that practice is required by law. Arbitral tribunals have consistently held that proof of customary international law, and any changes to it, comprising state practice and *opinio juris* is required where the applicable standard is that of customary international law.<sup>341</sup>
249. The Claimants in this case have manifestly failed to prove that the MST standard has moved beyond, or creates any standard different to, that set out in *Neer v. Mexico*. As in *Glamis Gold v. USA*, the Tribunal should therefore hold that:

*“...the fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment ... an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards...”*<sup>342</sup>

250. Accordingly, the Tribunal should apply the test set out in *Neer v. Mexico*. Whereby the Respondent will only be in breach of the FET obligation contained in the USA-Rwanda BIT if its conduct is “*egregious*”, “*outrageous*” or “*shocking*”.

**3. In any event, on the Claimants’ own authority, the FET standard requires manifest unfairness or inequity**

251. In any event, should the Tribunal find, contrary to the Respondent’s case, that the MST standard is not that as set out above, but that it has been modified such that the

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<sup>339</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Annex A.

<sup>340</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (**Exhibit RL-002**), at para. 605.

<sup>341</sup> *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction (22 November 2002) (**Exhibit RL-007**), at para. 84; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (**Exhibit RL-002**), at paras. 602-603; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-008**), at para. 274.

<sup>342</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit RL-002**), at para. 22.

threshold is now lower, the threshold for finding a violation of an FET standard is in any event “a high one”<sup>343</sup> that the Claimants have failed to meet. According to the Claimants’ own authority, they must show that Rwanda’s conduct was “manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)”<sup>344</sup> in order to establish a breach of the FET standard in Article 5 of the USA-Rwanda BIT.

252. Additionally, it is material that the protection of investments is not the sole purpose of the USA-Rwanda BIT, and the FET standard must be balanced against state interests. The USA-Rwanda BIT must be read in light of its purposes, which include:

252.1. the promotion of greater economic cooperation between the parties;

252.2. stimulating the flow of private capital and the economic development of the Parties;

252.3. maintaining a stable framework for investment that will maximize effective utilization of economic resources and improve living standards.<sup>345</sup>

253. Even though the burden is on the Claimants to prove that there has been a breach of the FET standard,<sup>346</sup> they have not even attempted to demonstrate, let alone do they establish, that any of the actions allegedly taken by Rwanda were in any way unfair or inequitable, let alone manifestly unfair or inequitable, egregious, outrageous or shocking.

#### **4. Rwanda acted consistently with the MST, and in a fair, and equitable manner in enacting and implementing the 2014 Law**

##### ***i. Sovereign exercise of legislative power and the FET standard***

254. The requirement that a state provide FET to foreign investors must be read alongside the undeniable right of states to exercise their sovereign legislative and executive power.<sup>347</sup>

255. The Tribunal in *Rusoro Mining v. Venezuela* summarised the position, holding that:

*“In evaluating the State’s conduct, the Tribunal must balance the investor’s right to be protected against improper State conduct, with other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that States enjoy a sovereign right to amend legislation and to adopt new regulation in the furtherance of public interest. The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general*

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<sup>343</sup> *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 597.

<sup>344</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 309.

<sup>345</sup> USA-Rwanda BIT (**Exhibit CL-006**), in the preambles.

<sup>346</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**Exhibit RL-010**), at para. 154.

<sup>347</sup> *Yuri Bogdanov and Yulia Bogdanov v. Republic of Moldova*, SCC Case No. V091/2012, Final Award (16 April 2013) (**Exhibit RL-011**), at para. 186.

*legislation. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to show a proper conduct both before and during the investment."*<sup>348</sup>

256. As this commentary shows, Rwanda was entitled to implement legislation in furtherance of public interest, although it is not authorised, in the exercise of this sovereign privilege, to act in an arbitrary or discriminatory way. Legislation cannot simply be used to target an investor, but it can and should be designed to advance legitimate public policy.
257. In this case, the legislation complained of by the Claimants consists of Presidential Order No. 63/02 of 12 February 2014, followed by the execution of Law No. 13/2014 on 20 May 2014 (the "**2014 Law**").<sup>349</sup> The 2014 Law was legitimate legislation enacted in the public interest and for the good governance of Rwanda.
258. Further, implementation of the 2014 Law is clearly permissible as long as it was done in a manner consistent with the FET standard which, without prejudice to the burden of proof, it was, as developed further below.

***ii. The enactment and implementation of the 2014 Law was necessary to respond to the challenges faced by the mining industry in Rwanda***

259. Rwanda intended to expand its mining sector, and to encourage investment in it. The purpose of the 2014 law was to introduce more flexibility to the licensing regime.<sup>350</sup> The previous law, passed in 2008, allowed only for short term mining licences of 4-5 years, and so-called long mining licences, valid for 30 years.<sup>351</sup> Mining companies were concerned that the short-term mining licences did not give them sufficient time to undertake the required exploration and associated steps required to establish the commercial viability of mining for longer periods.<sup>352</sup>
260. Accordingly, the 2014 Law was designed to allow flexibility in the licence terms. Licences could be for less than four years, if companies provided evidence to suggest that they could perform in a shorter time period, and similarly there was no fixed period for the longer licences, which could be designed with terms appropriate for each application.<sup>353</sup> The term of the licence "would vary depending on the evidence given by applicants as to their ability to successfully develop and operate the concessions".<sup>354</sup> This allowed

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<sup>348</sup> *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 525.

<sup>349</sup> Rwanda Presidential Order No. 63/02, *Repealing Presidential Orders Establishing Mining Concession and Allocating Mining Exploitation Licenses of 12 February 2014*, published in the Official Gazette No. Special of 6 March 2014 (**Exhibit CL-001**); Rwanda Law No. 13/2014 on *Mining and Quarry Operations* of 20 May 2014, published in the Official Gazette No. 26 on 30 June 2014 (**Exhibit CL-002**).

<sup>350</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 26.

<sup>351</sup> Rwanda Law No. 37/2008 on *Mining and Quarry Exploitation* (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**) at Article 63.

<sup>352</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 26..

<sup>353</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 26.

<sup>354</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 26.



Rwanda to tailor licences to the needs and capabilities of individual mining operators, and so to better manage investment, environmental resource, and impacts on communities.

***iii. The implementation of the 2014 Law in relation to NRD was not unfair or inequitable, let alone manifestly unfair or inequitable***

261. The Claimants allege that the re-application process under the 2014 Law was not fair and equitable, on the basis of allegations that:

261.1. NRD's licences remained in full force following the passage of the 2014 Law, and the requirement that NRD re-apply for its licences was not legitimate and was done only to harass NRD;<sup>355</sup>

261.2. Minister Imena acted inconsistently with the right to due process in Rwandan law, first in indicating that negotiations would take place in relation to the licences, and failing to hold negotiations and secondly in requesting documents that he was aware that NRD did not have access to as part of the re-application process;<sup>356</sup>

261.3. The requirement that NRD re-apply for its concessions was inconsistent with the treatment of other foreign investors.<sup>357</sup>

262. All of these allegations are denied. The implementation of the 2014 Law in relation to NRD was fair and equitable, as developed further below.

*a. NRD was required by the 2014 Law to apply for the licences it sought*

263. The requirement that NRD re-apply for its licences was consistent with the 2014 Law. NRD did not hold *any* licences at the time the 2014 Law took effect, its last extension to the licences granted in January 2017 having expired in October 2012, so was required to comply with the new legal framework and to make an application for new licences under the then-prevailing law.

264. The 2014 Law required at Article 4(2) that "*exploration or mining operations shall be carried out by any person who has been granted a mineral licence in accordance with this Law*".<sup>358</sup>

265. Additionally, Article 52 provided that:

*"Any mineral licence or quarry permit granted under Law n° 37/2008 of 11/08/2008 on mining and quarry exploitation shall remain into force until expiration of the period for which it was granted.*

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<sup>355</sup> Memorial, at para. 177.

<sup>356</sup> Memorial, at para. 178, 179, 181.

<sup>357</sup> Memorial, at para. 182.

<sup>358</sup> Rwanda Law No. 13/2014 on Mining and Quarry Operations of 20 May 2014, published in the Official Gazette No. 26 on 30 June 2014 (**Exhibit CL-002**), at Article 4(2)

*No mineral or quarry licence granted prior to this law shall be extended or renewed. However, where the mineral or quarry licence granted prior to this law provided for a right to apply for a renewal or extension of the licence, the holder thereof may be granted, subject to this law, a similar type of licence on a priority basis if he/she meets the requirements.”<sup>359</sup>*

266. Accordingly, the 2014 Law was clear that to the extent that any of the licences granted to NRD remained extant as at 30 June 2014 (which is denied), the date of entry into force of the 2014 Law, they continued to exist for the period for which they were granted. However, NRD’s most recently held valid licences expired in October 2012.<sup>360</sup> Although NRD continued to operate its mines after October 2012, on the basis of an indulgence from the Rwandan government during the period of negotiation with a goal to grant new licences, there is no basis for any argument that it had ongoing licences on foot. Instead, it was operating, as at June 2014, on the basis of at most hope that it would receive further extensions, rather than on the basis of a right provided in a licence.
267. The position of NRD under the new law was therefore unambiguous: if it wished to continue to operate, it was required by the 2014 Law to apply for a mining licence. There is no question of “grandfathering” of NRD’s licences, as it did not hold a valid licence at the time of entry into force of the 2014 Law.<sup>361</sup> NRD was operating pursuant to a short term authorisation, which the Government was entitled to revoke at any time. As such, the requirement that NRD re-apply for its licences under the 2014 Law was both consistent with Rwandan law,<sup>362</sup> and appropriate. The 2014 Law prohibited the extension or renewal of any pre-existing licences, save for licences which provided for right to renewal or extension. None of NRD’s licences held these rights.<sup>363</sup> Thus, if it wished to have a valid licence, which it was required to have in order to mine, it needed to apply for new licences under the 2014 Law.<sup>364</sup>
268. The Claimants have alleged that the requirement that NRD re-apply for its concessions was inconsistent with the treatment of other foreign investors.<sup>365</sup> This is denied. As set out below in relation to the obligations under Article 4, being the most favoured nation provisions of the USA-Rwanda BIT, these other foreign companies already held valid licences at the time of entry into force of the 2014 Law, and so were in a materially

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<sup>359</sup> *Ibid*, (**Exhibit CL-002**), at Article 52.

<sup>360</sup> Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD *RE: Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

<sup>361</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para. 29-31.

<sup>362</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para. 32.

<sup>363</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para 32; See also Ministerial Decrees (29 January 2007) regarding the Giciye Concession (**Exhibit C-018**), the Mara Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), and the Sebeya Concession (**Exhibit C-022**).

<sup>364</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para. 32.

<sup>365</sup> Memorial, at para. 182.

different legal position to NRD. Therefore, any differential treatment of NRD was based on its different position at law and therefore was not in any way unfair or unequitable.

b. *The requirement that NRD re-apply for its licences was legitimate and appropriate.*

269. The 2014 Law entered into force on its publication in the Official Gazette of the Republic of Rwanda, on 30 June 2014.<sup>366</sup> Prior to the enactment of the 2014 Law, the Ministry had requested that NRD, as a former holder of mining licences in relation to the Five Concessions, seek to negotiate new mining agreements under the terms of the new regulations.<sup>367</sup>

270. Following the enactment of the 2014 Law, although it was not required to do so, on 18 August 2014, the MINIRENA (“**MINIRENA**”) wrote to NRD requesting it to re-apply for licences for the Five Concessions.<sup>368</sup> It stated in particular that:

*“Considering the fact that the negotiating process for the possible renewal of the mining licence for the above mentioned concessions has stalled and did not yield any positive result since its initiation in 2012; considering that a new Law governing the mining sector, Law No13/2014, was published on June 30, 2014 and taking into account the Presidential Order No63/02 of 12/02/2014 repealing Presidential Orders that established the mining concession boundaries of Nemba, Giciye, Rutsiro, Mara and Sebeya and others;*

*... [Rwanda is] requesting NRD Ltd to re-apply for the licences of some or all of the former mining areas.”<sup>369</sup>*

271. MINIRENA required NRD to re-apply for each of the concessions separately, and stated that each application would be assessed on its own merit. This was done in order to assist NRD by allowing it to obtain licences for fewer than five concessions, if it was able to show that it had a sound plan for the industrialisation and development of one or more concession but was unable to produce sufficiently strong applications for all of the five concessions that it had previously held.<sup>370</sup> In this regard, the Respondent considered based on NRD’s performance to date that it did not have the skills, experience, investment capital or manpower successfully to operate all five concessions which covered an area of over 30,000 hectares.<sup>371</sup> MINIRENA was fully transparent in communicating exactly what was required of NRD in order to be granted the concessions,

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<sup>366</sup> Rwanda Law No. 13/2014 on Mining and Quarry Operations of 20 May 2014, published in the Official Gazette No. 26 on 30 June 2014 (**Exhibit CL-002**).

<sup>367</sup> Letter from the Minister of State in charge of mining (E. Imena) to the Chairman of NRD (Mr. R Marshall), *RE: Plans for NRD* (2 April 2014) (**Exhibit C-063**).

<sup>368</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 30.

<sup>369</sup> Letter from the Minister of State in charge of mining (E. Imena) to NRD, *RE: Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

<sup>370</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 30.

<sup>371</sup> Witness statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 13.

separately providing it with a list of requirements for re-application, as required by the 2014 Law, with items including:

- 271.1. Financial information, including: Ownership and capital structure information; company structure information; tax and financing information; financial statements; financial status of parent and subsidiary companies;
  - 271.2. Environmental information, including: A recommendation from the Rwanda Environmental Management Authority on the status of the environment in the Five Concessions; information on any existing environmental claims, liabilities or suits against the companies; and
  - 271.3. Investment and mining plan information, including: work plans; investment plans; corporate social investment plans; and employee information.<sup>372</sup>
272. Rwanda had a legitimate and rational interest in obtaining this information. The rights sought were long-term mining licences, with the potential significantly to impact Rwanda's economy and environment. The application process was designed to ensure that the operations were commercially viable, that there was a suitable and achievable project plan for the long term performance of the concessions, and to ensure no long-term environmental damage would materialise.

*c. The decision not to grant the licences pursuant to the re-application was consistent with the requirements of the 2014 Law*

273. When NRD made its first application for new licences for the Five Concessions in September 2014, it provided only a partially complete application.<sup>373</sup> NRD claimed that it did not have access to all of the documents required to make a complete application, because they were unable to access their Kigali offices. However, (even if correct, which would itself be a troubling matter) those documents could have been obtained from other sources: tax clearance certificates could have been obtained from the Rwanda Revenue Authority (if NRD had been paying taxes), a recommendation on the status of the environment at the five concessions could have been obtained from REMA, and evidence of funding capacity should in any event have been prepared, specifically in relation to the application, with the assistance of NRD's financial advisors.<sup>374</sup>

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<sup>372</sup> Letter from the Minister of State in charge of mining (E. Imena) to NRD, *Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

<sup>373</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State (E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (19 September 2014) (**Exhibit C-084**). The Respondent observes that the document appears to be incorrectly dated 18 August 2014, when it was sent on 18 September 2014, see confirmation in Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister E. Imena), *Delivery of a Re-application Letter* (1 November 2014) (**Exhibit R-019**).

<sup>374</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 41-42.

274. Additionally, NRD applied for a licence of “*a minimum of 35 years, renewable*”,<sup>375</sup> while it was plain on the face of the 2014 Law that the maximum term for large scale mining licences was an initial period of 25 years or the estimated life of the mineral ore body proposed to be mined, whichever was shorter, renewable for further periods of 15 years.<sup>376</sup> This is a simple demonstration of the manner in which NRD entirely ignored the requirements of the 2014 Law when it made its application under the 2014 Law for a large scale mining licence. Not least due to its failure to engage with the 2014 Law, its application was deficient in a number of ways.
275. Initially, the Licence Evaluation Team (“LET”), reporting to MINIRENA, assessed NRD’s application against the requirements of the 2014 Law, on 28 October 2014,<sup>377</sup> and informed it that it had decided not to grant any of the mining licences that NRD had applied for, on the basis that NRD failed to submit a number of the documents requested, including tax clearance, work plans, proposed development plans and proof of financial capacity, and that those documents that were submitted were unsatisfactory.<sup>378</sup> Accordingly, MINIRENA was unable to satisfy itself of the suitability of NRD, and decided not to grant the mining licences. It granted a seven day period to lodge an appeal of the decision.<sup>379</sup>
276. NRD submitted formal appeal of the decision, and also submitted a “re-application letter”, stating that it had now provided all the documents required as, aside from the re-application letter, the documents sought were in fact provided on previous occasions by way of submissions of documents in accordance with NRD’s reporting obligations.<sup>380</sup>
277. In response, on 12 November 2014, MINIRENA clarified that its “*decision to ‘not grant’ the license, was on the basis of the Law No 13/2014 of 20/05/2014 on mining and quarry operations, regulations and practices in mining contract negotiations, whereby NRD failed to submit all requirements...*”.<sup>381</sup>
278. Further, given NRD’s continued reference to the Contract, despite its clear inapplicability by November 2014, MINIRENA explicitly noted that:

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<sup>375</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State (E. Imena), *Re: Natural Resources Development (Rwanda) Ltd. Mining Concessions* (19 August 2014) (**Exhibit C-084**).

<sup>376</sup> Rwanda Law No. 13/2014 of 20 May 2014 on *Mining and Quarry Operations*, published in the Official Gazette No. 26 on 30 June 2014 (**Exhibit CL-002**), at Article 11.

<sup>377</sup> Memorandum from the License evaluation team to the 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) (**Exhibit R-020**).

<sup>378</sup> Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD, *Re: Notification Letter* (28 October 2014) (**Exhibit R-022**).

<sup>379</sup> *Ibid* (**Exhibit R-022**).

<sup>380</sup> Letter from Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Re: Delivery of a Re-Application letter* (1 November 2014) (**Exhibit R-019**).

<sup>381</sup> Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**).

*“The terms of [the Contract] did not give NRD the rights to obtain an automatic and exclusive right for long term mining licences. However, as specified in Articles 4 and 5 of the [C]ontract; granting of mining licence is subject to a positive evaluation of the submitted feasibility study, and fulfilment of obligations under the article 2 of this [C]ontract.”<sup>382</sup>*

279. NRD had included a Feasibility Study Update<sup>383</sup> with its September 2014 Application, but this was insufficient in any event, containing little or no information beyond that which had previously been submitted and found to be insufficient.<sup>384</sup> MINIRENA was clear that any application by NRD must be made under, and would be assessed against the requirements of, the 2014 Law. Additionally, MINIRENA again provided a table of documents outstanding, and repeated its request that NRD provide the additional information.<sup>385</sup>
280. On 25 November 2014, NRD provided some outstanding documents to MINIRENA.<sup>386</sup> However, MINIRENA still considered that that application was not sufficient, as it was lacking important information and documents, and some information provided was not complete.<sup>387</sup> Further, NRD’s application was not consistent with the requirements of the 2014 Law, compliance with which was required for the granting of a licence.<sup>388</sup> Accordingly, on 17 December 2014, MINIRENA declined by letter NRD’s re-application. In this letter, MINIRENA again clearly communicated the basis on which the application was denied, stating that the missing documents fell into two categories, namely proof of the company’s capacity to develop the concessions, and detailed plans for the period of the licence being applied for.<sup>389</sup> Specific further information was again requested.<sup>390</sup>
281. NRD provided a small amount of further information in response.<sup>391</sup> MINIRENA had the documents provided assessed, and the assessment concluded that NRD had not provided sufficient information relating to financial viability, taxation issues, or work planning.<sup>392</sup>

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<sup>382</sup> Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**).

<sup>383</sup> See NRD Rwanda, *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014* (**Exhibit C-085**).

<sup>384</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 33.

<sup>385</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**).

<sup>386</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (E. Imena), *Requested Documents* (25 November 2014) (**Exhibit C-088**).

<sup>387</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re: Further response to your application letter concerning the mining licenses for Nemba, Rutsiro, Giciye, Sebeya and Mara concessions* (17 December 2014) (**Exhibit C-095**).

<sup>388</sup> *Ibid*, (**Exhibit C-095**).

<sup>389</sup> *Ibid* (**Exhibit C-095**).

<sup>390</sup> *Ibid* (**Exhibit C-095**).

<sup>391</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (E. Imena), *Response to your letter dated 17 December 2014* (16 January 2015) (**Exhibit C-096**).

<sup>392</sup> Dr. M. Biryabarema, *Assessment report of additional documents submitted by NRD Rwanda Ltd* (February 2015) (**Exhibit R-024**).

Accordingly, it concluded that MINIRENA had no basis to grant NRD a licence to the Five Concessions.<sup>393</sup>

282. In March 2015, NRD wrote to MINIRENA:

282.1. stating that the formal closure of its business occurred 10 months ago (May 2014); and

282.2. requesting informal consultation and negotiation under the USA-Rwanda BIT begin immediately.<sup>394</sup>

283. On 19 May 2015, MINIRENA again informed NRD that, despite the provision of additional information, its application had been rejected, and directed it to hand over its mining concessions and proceed to closure of its operations.<sup>395</sup> It stated:

*“Upon review of the documents you submitted, it was determined that the information did not meet the requirements for the grant of mining licences under the Law No 13/2014 of 20/05/2014 on Mining and Quarry Operations.*

*Considering the fact that, it is for the third time that your company has been requested to submit complete application files, but failed to do so, despite the forbearance shown by the Ministry. I, unfortunately, regret to notify you that, due to the reasons stated above, the Ministry is not able to grant mineral licences to your company, Natural Resources Development (Rwanda) Ltd, for mining in Nemba, Giciye, Rutsiro, Mara and Sebeya perimeters.”<sup>396</sup>*

284. All decisions made during this process were consistent with the 2014 Law. Indeed, Rwanda was particularly generous, “patient and tolerant” to NRD, giving it numerous opportunities to comply with the requirements for granting the long term licences,<sup>397</sup> over time and following the enactment of the 2014 Law. However, following each re-submission of documents and application materials, Rwanda assessed NRD’s application for long term mining licences and found them to be inadequate. Ultimately, the licences NRD sought simply could not be granted to it because it failed to reach required standards.

*d. Minister Imena acted consistently with Rwandan due process law*

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<sup>393</sup> *Ibid* (Exhibit R-024).

<sup>394</sup> Letter from the Chairman of NRD (R. Marshall) to the CEO of RDB (F. Gatere) *Notice under the “Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment* (23 March 2015) (Exhibit C-100).

<sup>395</sup> Letter from the Minister of State in charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (Exhibit C-038).

<sup>396</sup> *Ibid*, (Exhibit C-038).

<sup>397</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at paras. 39 and 45.

285. The Claimants have alleged (which is denied) that Minister Imena acted inconsistently with the Claimants' rights to due process under Rwandan law, and accordingly with the requirement of FET, on the basis that he:
- 285.1. Offered to enter into negotiations with NRD, but failed to hold negotiations; and
  - 285.2. Requested documents that he was aware that NRD did not have access to as part of the re-application process.
286. The Claimants have failed to establish these claims, which are incorrect as a matter of fact and law.
287. First, the Respondent denies that it failed to negotiate with NRD over the long-term licences. The Respondent further denies that Minister Imena requested documents that he was aware NRD did not have access to as part of the re-application process. As set out above at paragraph 273, the documents sought by MINIRENA could easily have been obtained by NRD from other sources. To the extent they were not produced, that was not because the only copies were locked away in NRD's offices, but because (it appears) they did not, and never had, existed.<sup>398</sup>
288. Second, the Claimants have failed to state which Rwandan law Rwanda is supposedly in breach by virtue of the conduct complained of. The Claimants have, and have plainly, failed to establish a breach of domestic law when they cannot and do not even identify the legal basis for the breach.
289. Third, even if the Claimants' allegations were correct, and the Respondent had failed to negotiate, the Respondent would not be in breach of Rwandan law.<sup>399</sup> Failing to negotiate in circumstances where Rwanda was under no obligation to offer further negotiations in the first place – these negotiations having previously been undertaken over the course of several years and having failed – cannot form the basis of any breach of due process law. Indeed, as previously noted, at this point the Claimants were effectively asking for an indulgence, as they had no entitlement in contract or otherwise to be considered for a long-term licence (or any licence at all).<sup>400</sup>
290. Fourth, the Claimants' case based on Rwandan law is in any event fatally flawed. It is well-established that inconsistency with domestic due process law does not as such amount to a breach of FET as a matter of international law. As the Tribunal observed in *GAMI Investments, Inc. v. Government of the United Mexican States*, "a failure to satisfy the requirements of national law does not necessarily violate international law".<sup>401</sup> Further, neither of the breaches alleged is sufficiently egregious to breach the FET standard which, as set out at paragraphs 244 and 250 above, requires a gross denial of justice.

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<sup>398</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019 at paras. 41-42.

<sup>399</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 54.

<sup>400</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 29.

<sup>401</sup> *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) (**Exhibit RL-013**), at para. 97.



291. Further and in any event, albeit though in relation to legitimate expectation in particular, not FET more generally, the Tribunal in *Arif v. Moldova* was clear that:

*“The international responsibility of a State is not determined by the legality of an act under domestic law, but by the principle of attribution in international law.”*<sup>402</sup>

292. Indeed, even if the steps taken by Minister Imena were inconsistent with Rwandan domestic law, which the Respondent denies, it is clear that they were not done with “gross or flagrant disregard” for NRD’s rights,<sup>403</sup> or a “manifest failure of natural justice”<sup>404</sup> as required to establish a breach of the FET standard under customary international law. Tribunals have been clear that not every failure of process will amount to a breach of the FET standard—rather it is only when the state’s acts or procedural omissions are, on the facts, manifestly unfair or unreasonable, such as would shock a sense of juridical propriety, that the standard can be said to have been infringed.<sup>405</sup> The standard does not counsel perfection.<sup>406</sup>

293. Accordingly, the Claimants’ allegations that Minister Imena acted inconsistently with Rwandan due process law, in a way that was in breach with the FET standard, have no basis and should be rejected.

*e. Treatment of NRD in requiring it to re-apply for its licences was not discriminatory*

294. The 2014 Law was applied in a consistent and non-discriminatory manner.

295. Following the enactment of the 2014 Law, a number of concession-holders’ licences were not renewed, on the basis that they failed to meet the requirements of the 2014 Law. These included:<sup>407</sup>

295.1. Roka Rwanda Ltd, a company with Congolese and Rwandan shareholders.

295.2. Rogi Mining Rwanda Ltd, a company with Russian shareholders.

295.3. Gatumba Mining Concessions Ltd, a JV between South African shareholders and Rwanda.

295.4. Rwanda Metals Ltd, a company with Zimbabwean shareholders.

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<sup>402</sup> *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (**Exhibit RL-014**), at para. 539.

<sup>403</sup> *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (27 October 2015) (**Exhibit RL-005**), at para. 390.

<sup>404</sup> *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017) (**Exhibit RL-015**), at para. 655.

<sup>405</sup> *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010) (**Exhibit RL-016**), at para. 9.3.40;

<sup>406</sup> *Ibid* (**Exhibit RL-0016**), at para. 9.3.40, citing *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (**Exhibit CL-026**), at para. 154.

<sup>407</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019 at para. 63.

296. In the circumstances, it is clear that the 2014 Law was applied equally to concession-holders and that it was not used to “*treat Claimants differently than other investors and generally harass NRD*” as the Claimants allege.<sup>408</sup> Where existing concession-holders were able to meet the requirements of the 2014 Law, they were granted licences accordingly. However, where – as in the case of NRD – the concession-holders were unable to meet the requirements, they were not granted licences. There was no discrimination on the basis of nationality of shareholders. Rather, the 2014 Law was thus applied in an even-handed manner, consistent with the nature and purpose of the legislation which was to improve the performance and governance of the mining sector in order to facilitate Rwanda’s economic development.

##### **5. Rwanda used the ITRI/iTSCi system consistently with the MST**

297. The Claimants seem to allege that due to Rwanda’s actions, NRD was prevented from participating in the International Tin Supply Chain Initiative (“iTSCi”) system in 2014, and as such Rwanda has acted in a manner that was inconsistent with the FET standard. That claim is denied.

##### ***i. Rwanda’s prevention of NRD’s participation in the ITRI/iTSCi system was not unfair or unreasonable***

298. The Claimants allege that Rwanda used iTSCi unfairly or inequitably in preventing NRD from accessing tags. However, these allegations are wholly incorrect. At no point did Rwanda use ITRI/iTSCi inappropriately.

299. The iTSCi programme is a government project and the government is a key partner, heavily invested in iTSCi’s success.<sup>409</sup> Rwanda has been consistently committed to iTSCi, and while strong measures including suspension or retrieval of tags are used when companies are found to have taken part in smuggling or allowing foreign minerals to enter Rwanda,<sup>410</sup> those measures are always used appropriately.

300. NRD had a long relationship with iTSCi. While it was one of the first companies to participate in the iTSCi programme in Rwanda, it had applied for but failed to obtain full membership, of iTSCi.<sup>411</sup>

301. MINIRENA instructed PACT to stop issuing NRD with tags in around June 2014. It did so primarily as a means to put pressure on NRD to regularise its licencing position and operations generally, as it had failed to re-apply for its licences pursuant to the 2014 Law.<sup>412</sup> Rwanda prevented NRD from participating in the ITRI/iTSCi system because it was unable to allow it to continue to operate within the iTSCi Programme without being a properly licensed operator. Although NRD had been provided with an indulgence which

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<sup>408</sup> Memorial, at para. 176.

<sup>409</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 14.

<sup>410</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 14.

<sup>411</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 15.

<sup>412</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 49-52.

allowed it to continue to operate its concessions without a licence in February 2013, it could not continue to operate in that way indefinitely, and Minister Imena had made it clear to NRD that it was required to re-apply for licences under the 2014 Law.<sup>413</sup>

302. The secondary reason that NRD was barred from receiving tags related to a dispute over the ownership of NRD.<sup>414</sup> Initially, the issue as it related to tags came to the attention of MINIRENA because Mr. Benzinge and Mr. Marshall both sought to have NRD's tags issued through them, each claiming rightfully to be regarded as the Managing Director of NRD. Mr. Benzinge had the support of a Supreme Court decision upholding a substantive arbitral award.<sup>415</sup> Mr. Benzinge threatened to sue MINIRENA, and so MINIRENA was put in a difficult position.<sup>416</sup> MINIRENA could not reasonably have been expected independently to adjudicate upon the ownership dispute in relation to which there was a legally binding decision in favour of Mr. Benzinge; that was the responsibility of the courts and the relevant registration authorities. So, when both Mr. Benzinge and Mr. Marshall sought tags for NRD, MINIRENA was unable to issue tags to either of them. Each wanted production to go solely through him; MINIRENA was unable to issue tags or provide tag managers to either of the alleged managing directors while the ownership of the company remained disputed and therefore the suitable recipient of the tags unclear.
303. Accordingly, between the ownership and the desire for NRD to regularise its operations, NRD could not be issued with tags. MINIRENA could not allow NRD to continue to operate, produce and sell minerals unlawfully (i.e. without a licence pursuant to the operative 2014 Law) indefinitely. Additionally, because tags had to be issued in the name of a particular person, and the issuer had to be satisfied that the recipient is an authorised representative of the company, it was not possible to grant tags to NRD. This meant that NRD could not participate in the iTSCi Programme. This was not the fault of Rwanda, but rather it was a consequence of NRD's own management and operational problems. Rwanda was at all times acting to ensure that it was issuing tags only to those who were entitled to them, consistently with the traceability and legitimacy imperatives underlying the iTSCi Programme.
304. The Claimants allege that Minister Imena was not compliant with administrative process in his decision to prevent NRD from accessing tags.<sup>417</sup> That is not correct. Minister Imena was in fact correcting NRD's operations and requiring them to operate within the standard licensing framework, and it was entirely reasonable for him to do so.<sup>418</sup>
305. The Claimants allege that Rwanda wanted to remove NRD from Rwanda and from its concessions in order to advance government-sponsored smuggling operations. This

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<sup>413</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 50.

<sup>414</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

<sup>415</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 43, and 45-46.

<sup>416</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

<sup>417</sup> Memorial at para. 187.

<sup>418</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at paras. 51-52.

allegation is entirely unfounded, and indeed the Claimants have failed to provide any evidence in support of it.<sup>419</sup> That allegation should never have been made. There are no government-sponsored mineral smuggling operations taking place in Rwanda, and Rwanda is recognised for its high level of compliance with traceability requirements designed to prevent conflict materials entering the supply chain.<sup>420</sup>

306. The Claimants also allege that ITRI did not issue an incident report regarding NRD's membership when the Government of Rwanda blocked NRD's participation in the iTSCi programme.<sup>421</sup> However, that is not correct, as an incident was opened in 2015 after NRD left the concessions and PACT discovered that the concessions had been invaded by illegal miners.<sup>422</sup>
307. In the circumstances, Rwanda's decision to prevent NRD from participating in the ITRI/iTSCi system was consistent with the FET standard, and was not unfair or inequitable, let alone manifestly unfair or inequitable.

**6. Rwanda used and allowed the use of the police and court systems consistently with the minimum standard of treatment and the FET standard**

308. The Claimants further allege a breach of the FET obligation on the basis of operations by and use of the courts and police, which is denied. The claims are multifaceted, and in large part out of time, and barred accordingly, but in summary appear to be that:
- 308.1. NRD was barred from accessing its western Concessions and its offices in August 2012 by Ben Benzinge.
- 308.2. The bailiff Jean Bosco seized NRD's assets to settle its debts.
309. The Claimants have failed to establish how these acts are attributable to Rwanda. To the contrary, it is clear that any acts by Ben Benzinge and his private security are not attributable to Rwanda. Further, the steps taken by the bailiff were appropriate and consistent with Rwandan law, and to the extent that he acted inconsistently with his mandate under law, his unlawful conduct is not attributable to Rwanda.

***i. Mr. Benzinge's actions are not attributable to Rwanda***

310. The Claimants allege that NRD was prevented by Mr. Benzinge from accessing its western concessions and its offices in August 2012. It is plain that this was the consequence of the acts of an individual, Mr. Ben Benzinge, and not an act of Rwanda.
311. Mr. Benzinge provided documents to the RDB on 2 August that appeared to authorise him to be named as the Managing Director of NRD, and accordingly the RDB amended

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<sup>419</sup> Witness statement of Mr. Francis Gatere dated 24 May 2019, at para. 31.

<sup>420</sup> Witness statement of Mr. Francis Gatere dated 24 May 2019, at para. 32, Witness statement of Mr. Ildephonse Niyonsaba dated 21 May 2019, at para. 14, Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 37 to 41.

<sup>421</sup> Witness Statement of Mr. Joseph Mbaya dated 26 February 2010, at para. 13.

<sup>422</sup> Witness statement of Mr. Ildephonse Niyonsaba dated 21 February 2019, at para. 17.

NRD's registration. When Mr. Marshall complained, the RDB wrote to Mr. Benzinge by letter dated 6 August 2012 advising him that the position of Managing Director had been suspended and that no person shall hold this position until the complaints have been investigated to ensure that the interests of shareholders are secure.<sup>423</sup> RDB registration information was then updated to reflect Mr. Benzinge's removal as Managing Director and the suspension of the position of Managing Director.<sup>424</sup> The RDB managed this process appropriately, on the basis of the documents that were before it.

312. In order for the Claimants' claims to succeed, it is not enough simply to prove a breach of the MST. They must also establish that this breach can be attributed to the Respondent.<sup>425</sup> The steps that Mr. Benzinge took during the period during which he was registered as Managing Director, which the Claimants allege caused them damage, are not attributable to Rwanda.
313. The fact of registration of Mr. Benzinge as Managing Director, regardless of whether it was in error, is not enough to make Rwanda responsible for his actions. The Claimants have failed to establish how the actions allegedly undertaken by Mr. Benzinge are attributable to the Respondent. It is submitted that they cannot be: it is an elementary principle of international law that acts of private individuals or separate legal entities cannot be attributed to the state.<sup>426</sup>
314. Any actions allegedly undertaken by Mr. Benzinge were acts of private individuals completely independent of the Respondent and concerned a private dispute.<sup>427</sup> The Respondent did not instruct Mr. Benzinge to undertake any of the actions that are alleged to have been taken, and to have thereby caused loss.<sup>428</sup> Nor was Mr. Benzinge acting under the direction or control of the Respondent.<sup>429</sup> Further, the Claimants have failed to present evidence that Mr. Benzinge was granted the right to exercise public powers (which of course, he was not) and that the claims have arisen out of the alleged exercise

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<sup>423</sup> Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit R-029**).

<sup>424</sup> RDB Full Registration information for Domestic Company for NRD (**Exhibit R-028**); RDB Certificate of Domestic Company Registration (6 August 2012) (**Exhibit R-027**).

<sup>425</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**Exhibit RL-017**), at para. 243.

<sup>426</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) (**Exhibit RL-018**), at para. 69; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 119; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (**Exhibit RL-020**), at para. 190; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (**Exhibit RL-021**), at para. 262.

<sup>427</sup> *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001) (**Exhibit RL-022**), at para. 314.

<sup>428</sup> *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award (22 December 2017) (**Exhibit RL-023**), at para.825.

<sup>429</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, (30 November 2012) (**Exhibit RL-024**), at para. 7.64.

of such powers.<sup>430</sup> In *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* the Tribunal observed that:

*“In order for the Respondent to be responsible for the conduct of GHE and EGOTH, the latter must have been granted the right to exercise public powers (puissance publique), and the claims must have arisen out of the alleged exercise of such powers. The Claimant has failed to provide evidence of either in the present arbitration. The Tribunal concludes therefore that the Respondent in any event cannot be held liable for the conduct of GHE and EGOTH, which is not attributable to the State.”*

315. Indeed, in correspondence Mr. Marshall has stated that the relevant acts were taken by Mr. Benzinge, including: writing an intimidating letter to NRD; informing state authorities that they were required to deal only with him; changing the locks; illegally firing employees; placing private security guards at NRD’s business locations; and allegedly smuggling minerals.<sup>431</sup> These are all clearly the acts of Mr. Benzinge as a private individual, and not of Rwanda, and so therefore cannot be attributed to Rwanda.

**ii. Mr. Bosco’s actions are not attributable to Rwanda and in any event were authorised by Rwandan law and were appropriate**

316. Mr. Bosco’s actions cannot be attributed to Rwanda either.

317. First, at no point was Mr. Nsengiyuma acting on behalf of, or instructed by, Rwanda. His alleged acts that form the basis of the Claimants’ claims took place in the context of his attempts to enforce judgments on behalf of NRD’s debtors in his capacity as a professional bailiff. He was instructed by, and acting in furtherance of the interests of, his clients, the debtors, and not as an official representative of the state. In particular, during the time to which the allegations relate, Mr. Nsengiyuma was acting on behalf of Mr. Benzinge and 25 others, who held a judgment enforceable against NRD. Tribunals have rightly held that professionals working in similar capacities to Mr. Bosco, such as bankruptcy administrators, are representatives of the debtor and not of the State, and that therefore their actions cannot be attributed to respondent states.<sup>432</sup> Even if there were links between Mr. Nsengiyuma and the Respondent, which the Claimants have failed to make out and which the Respondent denies, this would not mean that the two are not distinct.<sup>433</sup>

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<sup>430</sup> *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (6 May 2014) (**Exhibit RL-025**), at para. 387.

<sup>431</sup> Letter from the Chairman of NRD (R. Marshall) to the CEO of the RDB, *Natural Resources Development Rwanda Ltd, as Victim by Acts of Ben Benzinge and Others* (10 August 2012) (**Exhibit C-048**).

<sup>432</sup> *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016 ) (**Exhibit RL-026**), at para. 313.

<sup>433</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 119.

318. Secondly, it is plain that Mr. Nsengiyuma was authorised by law to take the steps that he has taken. Mr. Nsengiyuma is a professional bailiff,<sup>434</sup> and was simply performing that function, in enforcing judgments against NRD.

319. Any allegations that the Rwandan military or police were present for the enforcement action taken by Mr. Nsengiyuma are incorrect;<sup>435</sup> they were not required, as the seizure was a standard and straightforward one for a professional bailiff.

**iii. The actions of the illegal miners are not attributable to Rwanda**

320. The position is the same in relation to any alleged harm caused by the illegal miners. Any unlawful acts undertaken by these individuals cannot be attributed to Rwanda: these individuals were clearly not granted the right by, or instructed by, Rwanda to undertake illegal mining.

321. Accordingly, the Claimants have failed to establish that any actions undertaken by Mr. Benzinge, Mr. Bosco, or the illegal miners can be attributed to the Respondent. The Tribunal therefore ought to dismiss these claims on the basis that the Claimants have failed to establish the requisite attribution to the Respondent.

**7. The Claimants did not have a protected expectation to long term licences**

322. In Section VI.A.I of the Memorial, the Claimants claim that Rwanda eviscerated the Claimants' legitimate expectations.

323. The Claimants place a substantial focus on how this is an allegedly "*dominant element*" of the FET standard but do not attempt to explain, let alone prove, that their legitimate expectations are even protected under Article 5 of the USA-Rwanda BIT.

**i. Expectations are only protected under Article 5 of the USA-Rwanda BIT to the extent that failure to comply with them constitutes a breach of the MST**

324. In the first instance, at customary international law, the MST standard may at times be breached by a failure to comply with representations, made by a state and reasonably relied on by an investor. Specifically, as set out in *Waste Management*, the MST is infringed by conduct that 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*". In that context, and in applying that standard, it will be relevant that "*the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*".<sup>436</sup>

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<sup>434</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para.6.

<sup>435</sup> Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 21-22.

<sup>436</sup> *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 98.

325. The Claimants have failed to demonstrate the existence of any customary international law rule at a lower threshold, such as a rule which requires states to regulate in such a manner—or refrain from regulating—so as to avoid upsetting foreign investors’ settled expectations with respect to their investments. Although the Claimants point to cases containing a legitimate expectations standard, crucially, none of them supports the proposition that such a principle became a part of the MST. Further, to the extent that the Claimants rely on *Tecmed* and *Saluka* for the proposition that legitimate expectations are protected, those cases are not remotely relevant as they rest on the determination of an autonomous FET standard, and not on the MST standard.
326. However, there is no basis to find a breach of Article 5 of the USA-Rwanda BIT on the basis of failure to comply with legitimate expectations, short of conduct which constitutes a breach of the MST (which is not alleged or shown).

***ii. In any event, only legitimate expectations, not all expectations, can be protected***

327. In the event that the Tribunal in some way considers that legitimate expectations are independently protected by Article 5 of the USA-Rwanda BIT, it is nonetheless clear, as the case law shows, that not all categories of expectations are protected by the law of legitimate expectations. Even the FET standard only protects expectations that are reasonable and legitimate in light of the circumstances and on which the investor relied when it made its investment, not the investor’s subjective motivations and considerations.<sup>437</sup> The determination of reasonableness and legitimacy of the investor’s expectations requires a balancing of the various interests at stake, taking into account all circumstances.<sup>438</sup>
328. In the words of the *El Paso v. Argentina* tribunal, “*the notion of ‘legitimate expectations’ is an objective concept, that [...] is the result of a balancing of interests and rights, and*

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<sup>437</sup> See, e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602 (“*Protection of legitimate expectations: the purpose of the fair and equitable treatment standard is 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, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.*” (emphasis added)); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008) (**Exhibit RL-027**), at para. 186 (“*Tribunals have considered that fair and equitable treatment was denied when the protection of the investor’s expectations had not been warranted, provided that these were reasonable and legitimate.*” (emphasis added)).

<sup>438</sup> *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012) (**Exhibit RL-028**), at para. 165 (“[L]egitimate expectations are more than the investor’s subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.”); R. Kläger, *FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW* (2011) (**Exhibit RL-029**), at page 186 (“[P]roblems arise in the determination of the legitimacy or reasonableness of these expectations, since of course no subjective expectation is deemed to be protected by fair and equitable treatment. Whether or not an arbitral tribunal ultimately finds an investor to have legitimate expectations is the result of a balancing operation of the different interests at stake undertaken explicitly or implicitly by the tribunal.”).



that [...] varies according to the context.”<sup>439</sup> Similarly, the *Duke Energy v. Ecuador* tribunal confirmed that in assessing the reasonableness or legitimacy of the investor’s expectations all circumstances, including the conditions prevailing in the host State, must be taken into account:

*“To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”*<sup>440</sup>

329. The Claimants claim that they “had a legitimate expectation that after obtaining the Contract it would receive a long term licence for its Concessions thereby permitting it to mine for a period of 30 years”.<sup>441</sup> However, even if the Claimants had such an expectation, this expectation would not be protected under the FET standard.
330. First, the law of legitimate expectations can only protect expectations on which the investor actually relied when it made its investment.<sup>442</sup> Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment.<sup>443</sup> They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment. This is logical and right, as it is the investor’s reliance on a promise which may prompt, or contribute to, its decision to invest and proceed with that investment, and which makes in turn the

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<sup>439</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-037**), at para. 356.

<sup>440</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**Exhibit RL-017**), at para. 340 (emphasis added). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at paras. 192-193 (relying on “all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State” and concluding “In the present case, the Tribunal is of the view that the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract.”). *National Grid plc v. Argentina*, UNCITRAL, Award, 3 November 2008, (**Exhibit RL-030**), at para. 173, (“[FET] protects the reasonable expectations of the investor at the time it made the investment”); *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, (**Exhibit RL-0019**), at para. 190-191; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, (**Exhibit CL-032**), at para. 264.

<sup>441</sup> Memorial, at para. 169.

<sup>442</sup> See, e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602 (“Protection of legitimate expectations: the purpose of the fair and equitable treatment standard is 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, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.” (emphasis added)).

<sup>443</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (**Exhibit RL-031**), at paras. 82, 83; *Saluka Investment BV v. The Czech Republic*, IIC 210 (2006), Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 329; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**Exhibit RL-032**), at para. 372; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008) (**Exhibit RL-027**).

expectation worthy of legal protection.<sup>444</sup> For example, in *Tecmed v. Mexico*, the Tribunal said that for a violation of fair and equitable treatment the investor must have relied on his expectations when making the investment.<sup>445</sup>

331. Further, expectations must be reasonable when assessed against the background of information that the Claimants knew or ought to have known at the time it invested.<sup>446</sup> It follows from the above that any legitimate expectations, in order to be protected by the FET standard, must have existed at the time the investment was made, and must be assessed in light of the Claimants' knowledge at the time of its investment. Expectations created after that date would not be covered by the notion of legitimate expectations as developed in the context of the fair and equitable treatment standard.

**iii. The Claimants cannot have had legitimate expectations to long term licences based on the Contract**

332. The Claimants have explicitly stated in their Memorial that, in deciding to invest in Rwanda, they relied on their "*fundamental understanding of the Contract and Rwandan contract law in Rwanda*".<sup>447</sup>

333. In relation to their reliance on the Contract, it is accepted that legitimate expectations founded on specific assurances or representations made by the State to the investor may be protected,<sup>448</sup> and that, as the Tribunal in *Total S.A. v. Argentine Republic* said:

*"The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law."*<sup>449</sup>

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<sup>444</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit RL-033**), at para. 557.

<sup>445</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (**Exhibit CL-026**), at para. 154.

<sup>446</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (**Exhibit RL-024**), at para. 7.78.

<sup>447</sup> Memorial, at para. 171.

<sup>448</sup> *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 148, ("*The facts, and the reasonableness of the Claimant's reliance in Metalclad, are thus quite different from the instant case. The assurances received by the investor from the Mexican government in Metalclad were definitive, unambiguous and repeated*"); *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) (**Exhibit RL-035**), at para. 643-644 ("*A representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee [...] In the Tribunal's view, this does not amount to specific representations and undertakings to assure the stability of the legal framework with specific reference to Claimant's investment.*")

<sup>449</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) (**Exhibit RL-036**), at para. 117; See also *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, (**Exhibit RL-037**), at para. 611, concerning interference with contractual rights by a regulatory authority; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2,

334. However, the simple existence of a contract is not enough to establish a legitimate expectation. As the tribunal in *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* commented, “a contractual right constitutes a ‘legitimate expectation’ protected by treaty only where there are factors other than the simple fact of the existence of the contract which justify giving the expectation of performance of the contract the status of a legitimate expectation protected by the treaty”.<sup>450</sup> A simple allegation that Rwanda breached the Contract will not be enough to ground international responsibility.
335. The Claimants appear to allege that they had a legitimate expectation based on the language of the contract. They claim reliance on the terms of the Contract which stated “that NRD **will be granted the mining concessions following the expiration of the Contract**”.<sup>451</sup> However, the Claimants have selectively quoted the Contract, and in doing so, propose an interpretation that is not remotely plausible. A critical, and insuperable, problem with the Claimants’ interpretation, and their reliance on that interpretation, is the Contract’s plain words. The Contract in fact provides, in the English version, that “[a]fter positive evaluation of the submitted feasibility study Natural Resources Development Rwanda Limited will be granted the mining concessions” and in the French version (as translated into English), that “[a]fter a positive review of the assessment and the feasibility study, Natural Resources Development Rwanda Ltd has priority for obtaining a mining title”.<sup>452</sup>
336. The Contract states that the granting of a licence is conditional on a “positive evaluation of the submitted feasibility study” or “assessment and feasibility study”. Any reliance simply on the words “**will be granted**”, without paying attention to their context—and in particular the first half of the sentence of the contractual term relied upon—is not only incredible but also was misguided and a failure of due diligence or contractual interpretation. The specific legal obligation assumed by Rwanda under the Contract was to grant mining concessions **only** if a positive evaluation of NRD’s feasibility study and other reporting was made, and if NRD complied with its obligations under Article 2.<sup>453</sup> As the precondition to grant was not met, there was no obligation to grant mining concessions.<sup>454</sup> Nothing in the agreement obliged Rwanda to grant NRD mining concessions on the basis of NRD’s performance alone, particularly where that performance was not complete.

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Award, 29 May 2003, (**Exhibit CL-026**), at para. 154, relating to the replacement of an unlimited licence by one of limited duration for the operation of a landfill.

<sup>450</sup> *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013) (**Exhibit RL-038**), at para. 291.

<sup>451</sup> Memorial, at para. 170 (Emphasis in the original).

<sup>452</sup> Translation of French language version of Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit R-011**).

<sup>453</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 14, 17.

<sup>454</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 14, 17.

337. Additionally, the Claimants state that they relied on “*the general understanding of the mining community*” as a basis for their expectation that after obtaining the Contract they would receive a long term licence.<sup>455</sup> In contrast to the plain words of the Contract, which can legitimately form the basis for a genuine expectation if they were interpreted properly and not self-servingly, the “*general understanding of the mining community*” cannot create a legitimate expectation for which Rwanda can be held accountable. Indeed, the Claimants have failed to provide a single authority in support of this extraordinary proposition.
338. Relying on community understanding – to the extent that any such understanding even existed, which the Claimants have failed to establish – rather than on the actual words of the Contract (or perhaps a clear statement by the State which is intended to be relied upon), is clearly not a legitimate basis for an expectation to a very significant and valuable right to conduct substantial mining operations for an extended period. Even reliance on the specific legal regime existing at the time, without “some promise” or statement from the state, is not sufficient to ground a legitimate expectation,<sup>456</sup> let alone reliance on the supposed views of the mining community as to what the likely outcome of any future application would be.
339. The Claimants also allege that their understanding of the operation of the Contract, in particular its “executory” nature, was based on their understanding of contract law. They attempt to allege that this is the source of a legitimate expectation of their right to further licences. Similarly, reliance on an incorrect understanding of Rwandan law as to the nature of contractual obligations is a failure of due diligence or legal advice. The contract is not “executory”,<sup>457</sup> and in any event, as set out above, to the extent that it understood that it was, or to the extent that it believed that it would be automatically granted long term mining licences, NRD misinterpreted the nature of the obligations set out in the Contract.<sup>458</sup> Rwanda cannot be held responsible under the USA-Rwanda BIT for this failure on the part of the Claimants.
340. The Claimants’ understanding of the Contract or Rwandan contract law, and their position, was not induced by Rwanda. Any failure of due diligence by the Claimants cannot found a legitimate expectation, as such a failure is not objectively reasonable, but rather due to an error by the Claimants. Tribunals have consistently held, as set out by the tribunal in *Parkerings-Compagniet AS v. Republic of Lithuania* that:

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<sup>455</sup> Memorial, at paras. 169, see also para. 170.

<sup>456</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (**Exhibit RL-036**), at para. 117.

<sup>457</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 19.

<sup>458</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 14, 17.

*“The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.”*<sup>459</sup>

341. A putative investor has the burden of performing its own due diligence.<sup>460</sup> Due diligence in this case would have provided the Claimants with information contrary to their alleged expectation. Failure to exercise due diligence in making a decision to invest, and instead relying on the alleged understanding of the mining community undermines the Claimants’ ability to claim the existence of a legitimate expectation.
342. Further, the Claimants allege that their investments were made on the basis of statements made to Mr. Marshall in his personal capacity that if he invested in Rwanda, he would be guaranteed a long term contract.<sup>461</sup> Specifically, Mr. Marshall states in his witness statement that: *“During the period from 2003-2007”* he was *“repeatedly assured that if I invested in a Concession, the Government of Rwanda would assure that I would receive a long term contract”*.<sup>462</sup> The Respondent denies that any such representations were ever made.<sup>463</sup> However, in any event, representations made to Mr. Marshall in his personal capacity almost a decade prior to the Claimants’ incorporation and almost a decade prior to their alleged investment in NRD cannot reasonably be considered to have been relied on years later, or created a legitimate expectation, held by the Claimants, that makes Rwanda subject to international responsibility.

***iv. The Claimants cannot have had legitimate expectations to long term licences when Spalena purchased NRD***

343. As summarised above, in order to be protected, any expectations must be assessed in the factual context in which they arise. Legitimacy does not arise in a vacuum, without attention being paid to the facts. In this case, it is clear that, when Spalena purchased NRD, it was aware that NRD’s position in relation to the concessions was not assured, and that there was no guarantee of long term licences, or indeed any further licences, being granted.
344. Mr. Marshall approached Starck, and Mr. Ehlers was:<sup>464</sup>

*“... tasked with ensuring that Spalena and Mr. Marshall had the opportunity to conduct full due diligence on NRD and its assets, that Mr. Marshall understood the nature of the interests that Spalena was acquiring, that Mr. Marshall was provided with all relevant documentation, and that he had access to all information that he requested regarding NRD’s assets.”*

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<sup>459</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit CL-030**), at para. 333.

<sup>460</sup> *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (26 June 2009) (**Exhibit RL-039**), at para. 254.

<sup>461</sup> Memorial, at para. 172.

<sup>462</sup> Witness Statement of Mr. Roderick Marshall, at paras. 6-8.

<sup>463</sup> Witness statement of Mr. Francis Gatere dated 24 May 2019, at 9.

<sup>464</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 16.

345. Mr. Ehlers informed Mr. Marshall that NRD held five mining licences of a four-year duration as provided for in the Contract, and that they were due to expire in January 2011. He also stated that although NRD had applied for an extension of the five mining licences, that *“even if these were granted it would be on a short term rather than on a long-term basis. That was because, as we fully accepted, NRD had not sufficiently carried out the exploration it had agreed to do in the Contract, and had therefore not been able to provide a feasibility study which contained the detail which would be necessary to satisfy the Government it should grant the concessions to NRD on a long term basis.”*<sup>465</sup> Mr. Ehlers clearly explained to Mr. Marshall that *“NRD had carried out only relatively superficial exploratory activities, such as reviewing satellite imagery and carrying out some pretty basic, not very comprehensive, sampling. Accordingly, we thought the most that would result from submitting the November 2010 Application would be that NRD might convince Rwanda that at least we had the intention to carry out the kind of detailed exploration they would have expected, and now had a plan to do so, even though we had not done it by that point”,*<sup>466</sup> and also that *“NRD had not taken any real steps towards industrialisation, which was also a requirement of the Contract.”*<sup>467</sup> Hence, in Mr. Ehlers’ view, *“I do not think that Mr. Marshall could have had any expectation when he acquired NRD that it would necessarily be granted long term licences or concessions – it should have been (and I believe was) clear to him that (at the least) the steps proposed in the November 2010 Application in terms of further exploration would have to be carried out before there was any chance of the Government being persuaded that long-term licences should be granted to NRD for any of the 5 areas for which it had been granted the initial 4 year licences, and there was no guarantee that those initial 4 year licences would be extended at all.”*<sup>468</sup>
346. Additionally, the share price of ██████████ was a substantial undervalue relative to the value of equipment purchased by Starck, reflecting the highly speculative nature of the purchase.<sup>469</sup>
347. Evidently, on the basis of information provided by NRD itself, at the time that Spalena purchased it, Spalena had no basis for any expectation that long term licences would be granted to NRD; and given (a) the information provided to Mr. Marshall, and (b) the limited consideration Spalena was prepared to pay, it can have had no such expectation.
348. Further, legitimate expectations must be based on specific assurances or representations made by the State to the investor.<sup>470</sup> The requirement that the basic expectations of the

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<sup>465</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19.

<sup>466</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 20.

<sup>467</sup> Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19-21; Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 21.

<sup>468</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 22.

<sup>469</sup> Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 17.

<sup>470</sup> *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 148 (*“The facts, and the reasonableness of the Claimant’s reliance in Metalclad, are thus quite different from the instant case. The assurances received by the investor from the Mexican government*

investor at the time that the investment was entered into “*becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations*”.<sup>471</sup>

349. In addition to the words of the Contract and Rwandan contract law generally, the Claimants attempt to assert that their expectations were based, to some extent, on the conduct of, or representations by, Rwanda or its agents. It is essential that the expectations that were relied upon in making the decision to invest are “*derived from the conditions that were offered by the State to the investor at the time of the investment*”.<sup>472</sup> Their expectations, “*in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances*”.<sup>473</sup> The purpose of the standard is to protect expectations arising from promises that must be respected when relied upon by the beneficiary.<sup>474</sup> In this case, there were no statements made by Rwanda or its representatives at any stage that form a basis for a legitimate expectation held by Spalena that NRD would receive long term licences.
350. Taking the representations and actions by Rwanda or Rwandan officials that allegedly form the basis of the Claimants’ expectation to receive long term licences sequentially, it is plain that none of these is sufficient to ground a legitimate expectation of that outcome.
351. The alleged initial investment occurred in December 2010. Spalena purchased HC Starck Resources GmbH for just [REDACTED], which appears to allegedly constitute its investment in NRD.
352. At the time of Spalena’s alleged investment, purportedly made by way of purchase of NRD’s controlling shareholder, NRD held Special Small-Scale Mining Exploration and Operation Permits for mining exploration and operation within the Nemba, Rutsiro, Sebeya, Giciye and Mara perimeters, which were due to expire on 29 January 2011.<sup>475</sup>

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*in Metalclad were definitive, unambiguous and repeated”); Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania, ICSID Case No ARB/11/24, Award (30 March 2015) (Exhibit RL-035), at paras. 643-644 (“A representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee [...] In the Tribunal’s view, this does not amount to specific representations and undertakings to assure the stability of the legal framework with specific reference to Claimant’s investment.”)*

<sup>471</sup>*Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007) (Exhibit CL-027), at para. 298, citing Embassy Limousines & Services v. European Parliament, (1998) ECR II-4239, (Exhibit RL-040), at para. 8.*

<sup>472</sup>*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007) (Exhibit RL-041), at para. 262, citing Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award (20 May 1992) 32 ILM 1470 (1993) (Exhibit RL-031), at para. 82.*

<sup>473</sup>*Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award (17 March 2006) (Exhibit CL-033), at para. 304.*

<sup>474</sup>*Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007) (Exhibit CL-027), at para. 299.*

<sup>475</sup> Letters from the Minister of State for Water and Mines (B. Munyanganizi) to the Director of NRD (B. Benzinge) Forwarding Ministerial Decree (29 January 2007) regarding the Giciye Concession (Exhibit C-018) the Mara

353. As set out above, on 20 October 2010, NRD had been informed by the Ministry of Forestry and Mines that its four year licences were due to expire shortly, and that no final reporting or feasibility studies for any of the Five Concessions had been received,<sup>476</sup> as was required by the Contract. Although the Claimants assert that in this letter Rwanda “invited NRD to submit its application for the long term contracts”, this is incorrect. The letter does not refer to any “long term” licences, in those terms or in any other terms. Instead, the primary topic of the correspondence is NRD’s failure to fully comply with the contract, and notification that any extensions to the existing licence will be in relation to only two concessions, as NRD has failed to perform in relation to others. Further, those possible extensions were plainly contingent on evaluation of a large number of requested documents.<sup>477</sup>
354. On 29 November 2010, NRD applied for extensions to its existing exploration and mining licences for the Four Concessions, effectively seeking a repeat of the same four year term as its existing licences, albeit with reduced geographical areas. NRD’s “*Application for the Renewal of Exploration Licences Nemba Rutsiro, Sebeya, Giciye and Mara, and Application for the Allocation of Mining Licences*”<sup>478</sup> is specifically time limited to renewal of the licences for a five year period. It provided a “*Proposed Activity Plan for the Period 29/01/2011 to 28/01/2015*”<sup>479</sup> and a “*Proposed Business Plan*” for the same period,<sup>480</sup> and on that basis made an application “*to retain the concessions*”.<sup>481</sup> On its face, the application is for short-term licences, similar to the four-year ones initially held, and not an application for “*long term licences*” or 35 year licences, as asserted in the Claimants’ Memorial. This is made plain through further correspondence both from Rwanda, stating later that NRD had applied “*for five year (5) licences for small mines within each of the five concessions*”,<sup>482</sup> and NRD itself, which recognised that its application of November 2010 was for “*a five year extension*”.<sup>483</sup> It did not provide the documents required for an application for a long term licence, in any event.

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Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), the Sebeya Concession (**Exhibit C-022**).

<sup>476</sup> Letter from the Ministry of Forestry and Mines (C. Bazivamo) to the Director General of NRD, *Subject: Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

<sup>477</sup> *Ibid*, (**Exhibit C-026**).

<sup>478</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD* (**Exhibit C-035**).

<sup>479</sup> *Ibid*, (**Exhibit C-035**), at pages 9-11.

<sup>480</sup> *Ibid*, (**Exhibit C-035**), at pages 11-12.

<sup>481</sup> *Ibid*, (**Exhibit C-035**), at pages 11-12.

<sup>482</sup> Letter from Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, Status of your mining and Exploration license (2 August 2011) (**Exhibit C-062**). Though note, the time period applied for was in fact from 29 January 2011 to 28 January 2015 which, while spanning five calendar years, is a time period of four years.

<sup>483</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of Natural Resources (S. Kamanzi), *NRD Response to Letter of Minister* (31 October 2011) (**Exhibit C-041**).



355. Accordingly, the Claimants have mischaracterised the position as at December 2010. At that time, at which Spalena made the decision to invest in NRD:

355.1. NRD held mining licences allowing it to exploit the Five Concessions until 29 January 2011, being approximately two further months; and

355.2. NRD had made an application for new five-year small scale mining licences;<sup>484</sup> but

355.3. NRD had not made an application for any long term licences; and

355.4. Rwanda had provided no indication that a long term licence was a real possibility, let alone that such licences would be granted;

355.5. NRD knew that it had not complied with its obligations under Article 2 of the Contract;<sup>485</sup> and

355.6. NRD knew it had not submitted a long-term feasibility study, as necessary for any grant of further licences under Articles 3 and 4 of the Contract.

356. Spalena must have been aware of the position of NRD at the time of purchase on the basis of any due diligence done at the time of purchase. Accordingly, from the outset, it cannot have had any expectation that a long term licence would be granted.

**v. *The Claimants cannot have had legitimate expectations to long term licences based on Rwanda's conduct following Spalena's purchase of NRD***

357. The Claimants have provided no evidence that any investment was made by the Claimants after the initial purchase of NRD, and indeed such evidence as there is suggest that Mr. Marshall was purloining NRD's mining proceeds and plundering its assets once he took over. However, as the Claimants may assert that further investments were made (of which, if permitted at all, they should be put to strict proof), it is material to observe that, where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.<sup>486</sup> On that basis, the Respondent also addresses the Claimant's further alleged bases for its expectation.

358. Following the expiry of the initial four year term for the licences, in order to provide both parties with time to negotiate further licences, and not on the basis of an obligation to

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<sup>484</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*.

<sup>485</sup> Witness Statement of Professor Prosper Nkaninka Wa Rupiya dated 21 May 2019, at paras. 14, 17.

<sup>486</sup> See C. Schreuer and U. Kriebaum, *At What Time Must Legitimate Expectations Exist?* in J. Werner and A. H. Ali (eds.), *A LIBER AMICORUM: THOMAS WÄLDE: LAW BEYOND CONVENTIONAL THOUGHT* 265-276 (2009). See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 557.

ultimately provide long-term licences, MINIRENA granted an extension of NRD operations in the Concessions for a six month period from August 2011 to February 2012. MINIRENA stated, in the letter granting that extension, that NRD had failed to fully execute the Contract, bringing to an end any entitlement to the extended long term licences under the Contract:

*“After considering the exploration report submitted, it was found out that the contract signed between the Government of Rwanda and your company on 24/11/2006 had not been fully executed, more especially in its article 2 as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years.*

*We notice that you applied for five year (5) licences for small mines within each of the five concessions. The new status of the concessions will have to be decided based on the work executed in the light of the signed contract (exploration work and other commitments) and on the provisions of the new mining law. We extend the operation of your licence for six (6) months from the day of receipt of this later (sic), to allow us time to determine the future of these concessions.”<sup>487</sup>*

359. From this letter, it is clear that Rwanda has consistently communicated to NRD that it has failed to fully comply with the Contract, and that any new or extended contracts would be granted in light of performance of the Contract, and the relevant Rwandan mining law. It has not promised to grant the 35 year long term licences. Nor has it indicated that the possibility of doing so remains under consideration, following NRD’s failure to provide the required documentation by way of application. Further, it was explicit that the extension was granted *“to allow us time to determine the future of these concessions”*.<sup>488</sup> There is no language in this letter that indicates any kind of guarantee or assurance of further extensions or ultimately of long term licencing. There is no basis for an expectation that NRD ever was, or remains, entitled to long term or 35 year licences.
360. Similarly, NRD recognised, at the time, that its submission dated 29 November 2010 sought *“an five year extension”* to its existing licences by way of the grant of new mining licences.<sup>489</sup> It stated that, in this it was *“like all concession-holders”*.<sup>490</sup> At that time, it made no reference to any belief that, rather than making an application for a five year extension, like all other concession-holders, that it was in any way entitled to a long term licence. Accordingly, NRD’s own conduct at the relevant time, as expressed in contemporaneous documentation, undermines any argument that it holds a legitimate

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<sup>487</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration license* (2 August 2011) (**Exhibit C-062**).

<sup>488</sup> *Ibid*, (**Exhibit C-062**).

<sup>489</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of Natural Resources (S. Kamanzi), *NRD Response to Letter of Minister* (31 October 2011) (**Exhibit C-041**).

<sup>490</sup> *Ibid*, (**Exhibit C-041**).

expectation that it was to be granted long term or 35 year licences on the basis of the Contract.

361. Rwanda acted in an even-handed, consistent and transparent manner.<sup>491</sup> It clearly and consistently communicated its position with NRD. Both parties understood that the November 2010 application was for five new mining licences, in relation to a reduced area within previously held concessions.
362. As the expiry of the extension approached, on 12 December 2011, NRD and the representatives of MINIRENA, and the Rwanda Natural Resources Authority and Geology and Mining Department met with an intent to agree on the nature of a new contract between the parties.<sup>492</sup> MINIRENA was clear that *“the resources evaluation accomplished under [NRD’s] previous contract fell far short of the level expected”* and accordingly that it *“would only be prepared to negotiate with [NRD] possible new licences on only two of the five concessions”*.<sup>493</sup>
363. It is clear that NRD did not consider that it was entitled to long term licences in relation to the concessions. MINIRENA repeated in correspondence dated 26 January 2012 its position that it had considered NRD’s capacity as demonstrated over the four year period of the initial Contract and found it deficient. Consequently, it stated that, if NRD would not accept its invitation to negotiate in relation to two concessions, MINIRENA would *“accept your option to relinquish all the five concessions”*.<sup>494</sup> Again, there is no basis in this correspondence for any expectation of a long term licence. And yet further, NRD itself did not assert any entitlement to long term licences at this time, despite being in regular contact with various Rwandan authorities, both in relation to the extensions to its licences and in relation to other topics.<sup>495</sup>
364. Accordingly, any assertion by the Claimants that they had a legitimate expectation that NRD would be granted long term licences to mine the concessions is unsupported, and indeed contradicted, by the contemporaneous evidence. The Claimants did not have and

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<sup>491</sup> See *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 499, where the tribunal notes that features that are inconsistent with legitimate expectations are conduct that *“lacked even-handedness, consistency and transparency”* and a government that *“refused adequate communication”*.

<sup>492</sup> Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD, Resolution to the issue of the former concessions held by NRD (26 January 2012) (**Exhibit R-018**).

<sup>493</sup> *Ibid* (**Exhibit R-018**).

<sup>494</sup> *Ibid* (**Exhibit R-018**).

<sup>495</sup> See, for example, Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (S. Kamanzi) (30 January 2012) (**Exhibit C-039**) referring to the *“draft extension contract for NRD”*; Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (S. Kamanzi) (14 September 2012) (**Exhibit C-049**) acknowledging receipt of the extension of NRD’s mining and exploration licences to October 2012; in relation to non-licencing issues see Letter from the Chairman of NRD (R. Marshall) to the Mayor/Ngororero District (22 November 2011) (**Exhibit C-044**), Letter from Chairman of NRD (R. Marshall) to the Commissioner for Operations, Rwandan National Police (8 February 2012) (**Exhibit C-046**), Letter from the Chairman of NRD (R. Marshall) to the District Police Commissioner, Ngororero District (3 September 2012) (**Exhibit C-052**), and Letter from the Chairman of NRD (R. Marshall) to the Deputy Director General of GMD (M. Biryabarema) (14 December 2012) (**Exhibit C-050**).

cannot have had any such expectation of NRD obtaining any mining licences, given its failure to provide Rwanda with the relevant documents that were requested and required in order for Rwanda to review its application, its past failure to develop the concessions to the required level, and its inability to demonstrate its capacity or intent to develop the concessions.

365. Rwanda continued to provide NRD with opportunities to succeed in its investment by negotiating in good faith in relation to the concessions. As discussed above, these opportunities were provided by way of indulgence, and not on the basis of any form of obligation, and were provided despite the fact that NRD continued to fail to provide the required environmental reports and continued to fail to perform to the required standards.
366. On 28 February 2011, MINIRENA extended NRD's extant 2007 licences for three months, backdated to 2 February 2011 and expiring on 2 May 2011, on the basis that "*it has not been possible to conclude the contract in the above time of extension*", understanding that it was necessary to conclude the investment as soon as possible in the interests of strong investor confidence and with the intention to conclude a good contract for this partnership.<sup>496</sup> This statement has been relied on by the Claimants as a basis for a legitimate expectation.<sup>497</sup> However, that was not sufficient to ground a legitimate expectation, particularly in the context of multiple clear statements that NRD has failed to comply with its obligations under the Contract that were necessary for the granting of a long term licence, and in circumstances where Rwanda had given no other indications that it intended to grant a long-term licence.
367. On 30 January 2013, NRD spontaneously provided an "*update of the amended application*" of NRD for a long term mining licence. This was purportedly an attempt to update the original request made over two years earlier, immediately following the expiry of the four year term of the initial contract in November 2010.<sup>498</sup> However, this document purported to be an application for a long term licence in which NRD tried to suggest that the November 2010 application was an application "*for a long term mining licence*",<sup>499</sup> which it plainly was not. In this January 2013 document, in contrast to the November 2010 application, the Investment Plan Report Summary was explicitly "*For the years 2013-2043 (30 years)*".<sup>500</sup> Additionally, and again in contradistinction to the November 2010 application, it included estimate investments for not only the five year period immediately following, but also for the 25 years after that.<sup>501</sup> However, this

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<sup>496</sup> Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (28 February 2012) (**Exhibit C-034**).

<sup>497</sup> Memorial, at para. 173.

<sup>498</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (S. Kamanzi), *Re: Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

<sup>499</sup> *Ibid* (**Exhibit C-054**).

<sup>500</sup> *Ibid* (**Exhibit C-054**), at page 1.

<sup>501</sup> *Ibid* (**Exhibit C-054**), at page 9.

purported application – which was the first application NRD had made for any 30 year concession – was lacking in any detail. If that was what NRD considered appropriate for an application for a 30 year mining concession it demonstrated a fundamental understanding of what was required.<sup>502</sup>

368. Following this application, over the course of 2013, NRD also continued to request and be allowed to continue to mine on the basis of short term extensions to its mining concessions.<sup>503</sup>

369. In April 2013, the RDB wrote to NRD, stating:

*“We understand that the Contract expired in 2011 and the Company has been operating on short term extensions while both parties work toward concluding a comprehensive agreement.*

*... we wish to initiate negotiations with the Company for the issuance of a small mine exploitation licence for the Nemba site”<sup>504</sup>*

370. NRD misunderstood the intent of the RDB’s letter, intentionally or otherwise, stating that it looked forward to the opportunity to discuss *“receiving the agreed upon ‘Long Term Licence”*<sup>505</sup> when what was offered was clearly negotiations relating solely to a small mine exploitation licence for the Nemba site, which had been identified as the most productive of NRD’s concessions (although this was largely due to the fact that NRD had benefitted from infrastructure left over from Belgian colonial days).<sup>506</sup>

371. From that point, NRD repeatedly (but wrongly) referred to the granting of long term licences as agreed upon and as an obligation of Rwanda.<sup>507</sup> This is not the case. In the context of the above, there was no basis for any legitimate expectation that NRD was entitled to long term licences to exploit the Five Concessions.

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<sup>502</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 23.

<sup>503</sup> Letter from the Deputy Director General RNRA (Dr. M. Biryabarema) to the Chairman of NRD (R. Marshall), *Re: Security Strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**); Letter from the CEO of RDB (C. Akamanzi) to the Chairman of NRD (J. C. Zarnack), *Re: Invitation to negotiate for a small mine exploitation licences between the Government of Rwanda and Natural Resources Development Rwanda Ltd* (2 April 2013) (**Exhibit C-057**); Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit (M. Isibo) (9 April 2013) (**Exhibit C-058**).

<sup>504</sup> Letter from the CEO of RDB (C. Akamanzi) to the Chairman of NRD (J. C. Zarnack), *Re: Invitation to negotiate for a small mine exploitation licences between the Government of Rwanda and Natural Resources Development Rwanda Ltd* (2 April 2013) (**Exhibit C-057**).

<sup>505</sup> Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit (M. Isibo) (9 April 2013) (**Exhibit C-058**).

<sup>506</sup> Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 11.

<sup>507</sup> See, for example, Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (7 June 2013) (**Exhibit C-059**), at page 3 (*“NRD would respectfully ask the Ministry of Natural Resources to ... Grant to NRD the long-term 30 year mining concession provided by Rwandan law and promised under the 2006 exploration and exploitation agreement, which has been repeatedly delayed and manipulated by RNRA”*); Letter from the Chairman of NRD (R. Marshall) to the Minister of State for Mining (E. Imena) (19 June 2014) (**Exhibit R-036**) (*“NRD retains its mining rights pending receipt of the ‘Long Term Licence”*).

372. In mid-2014, the 2014 Law was introduced, and changed the legal and regulatory landscape governing mining licences in Rwanda. NRD's position under the 2014 Law is as set out above. Additionally, it should be observed that on 12 November 2014, MINIRENA, in its letter declining to provide an extension to the licences, again explicitly stated that:

*"The terms of [the Contract] did not give NRD the rights to obtain an automatic and exclusive right for long term mining licences. However, as specified in Articles 4 and 5 of the [C]ontract; granting of mining licence is subject to a positive evaluation of the submitted feasibility study, and fulfilment of obligations under the article 2 of this [C]ontract."*<sup>508</sup>

373. The Claimants have alleged that state conduct is sufficient to create a protectable legitimate expectation,<sup>509</sup> and that may be so in certain circumstances. However, in so asserting, the Claimants state that Rwanda's conduct in "numerous extensions of the licence, ongoing negotiations for the long term licence, and ultimately through silence while NRD continued to operate its mines" was sufficient to ground a legitimate expectation that it would receive a long-term licence. However, what is plain on the face of the above is that Rwanda was not merely acting, but also communicating with NRD about their concessions, and in doing so, clearly apprising the Claimants of the fact that there was in no way any guarantee that the long-term licences would be granted to NRD. Further, while it did issue extensions of NRD's licences, the limited and interim nature of these was in the case of each extension clearly communicated, with Rwanda expressly noting the specific duration of each extension. Further, Rwanda was not ever silent while NRD operated its mines, but rather was in constant and ongoing communication with NRD in relation to its operations and licence applications.

374. It is plain that the Claimants did not have a legitimate expectation that NRD would receive long term licences. They specifically applied for a five year extension to their licences in 2010, not for a long term licence. While they may have, at most, hoped that Rwanda would grant NRD long term licences in 2014, Rwanda was certainly under no obligation to do so.

375. Expectations are protected if they are legitimate and reasonable in the circumstances.<sup>510</sup> NRD's behaviour establishes no basis for holding that the Claimants had a subjective expectation that NRD would be granted long-term licences, let alone an objectively legitimate expectation that such licences would be granted.

#### **B. Rwanda treated the Claimants' investments transparently**

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<sup>508</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**).

<sup>509</sup> Memorial, at para.175, citing *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**).

<sup>510</sup> *Ibid*, (**Exhibit CL-033**), at para. 304.

376. The second of the alleged breaches of Article 5 of the USA-Rwanda BIT is set out in Section VI.B of the Memorial, and alleges that Rwanda did not treat the Claimants' investments transparently so as to comply with the FET standard.<sup>511</sup>

377. The Claimants allege that the mistreatment arose in relation to the process whereby they were required to "re-apply" for licences in 2014.<sup>512</sup> As set out in the Preliminary Objections at Section V, it is denied that any of the alleged investments made by the Claimants were qualifying investments for the purpose of standing in this arbitration. In any event, they have not only failed to show there was any mistreatment by Rwanda, but have further failed to prove that Rwanda was even obliged to provide them with treatment of the kind they allege they were entitled to under the USA-Rwanda BIT.

**1. A duty to treat investments transparently is not provided for in the USA-Rwanda BIT and in any event is not part of the MST, so does not apply**

378. A duty to treat investments transparently is not explicitly provided for under Article 5 of the USA-Rwanda BIT (or otherwise) and therefore Rwanda can only have an obligation to treat investments transparently should it form part of the MST, as incorporated into the USA-Rwanda BIT.

379. There is no general duty of transparency in customary international law. The Tribunal in *Cargill v. Mexico* was clear that it:

*"has not [been] established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors".*<sup>513</sup>

380. Instead, a distinction is drawn between the decision in *Tecmed* and similar cases, which were determined on the basis of "*a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the 'basic expectations' of an investor*"<sup>514</sup> and cases such as this one which require only that treatment be consistent with customary international law.

381. In the recent case of *Mercer v. Canada*, the Tribunal was again clear that:

*As to transparency, it suffices to cite the Cargill Award ..., in which the tribunal decided that the customary international law standard had not yet been shown to embrace a claim to transparency. The Tribunal also notes that the tribunal in Merrill & Ring decided that transparency was not part of the customary international law standard.*"<sup>515</sup>

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<sup>511</sup> Memorial, at Section VI.B.

<sup>512</sup> Memorial, at para. 220.

<sup>513</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-008**), at para. 294, setting out the standard that operates under customary international law.

<sup>514</sup> *Ibid* (**Exhibit RL-008**), at para. 294.

<sup>515</sup> *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**Exhibit RL-043**), at para. 7.77, internal citations omitted.

382. Accordingly, there is not a stand-alone rule under customary international law requiring transparency.
383. The Claimants have failed to advance any evidence of state practice and *opinio juris* that could conceivably form the basis for, let alone prove, the existence of an obligation of transparency at customary international law. Additionally, they have failed to set out and establish what they contend that the obligation constitutes or contains.
384. Accordingly, while the Claimants allege a breach by the Respondent of the obligation to act transparently, they have failed to establish that any such obligation exists, let alone to establish the content of the obligation, or a breach of it in fact.

## **2. Rwanda treated Claimants' investments transparently**

385. In any event, if the Tribunal holds, contrary to the Respondent's submission, that the obligation to treat investments transparently does form part of customary international law, such that it is an obligation under Article 5 of the USA-Rwanda BIT, Rwanda did in fact treat the Claimants investments transparently such that there was no breach of Article 5.
386. If such a general obligation of transparency is found to exist in this case, the obligation to treat investments transparently would arise as a requirement not to treat investments in a manner that constitutes a complete denial of the Claimants' basic expectations of FET and of due process under the MST.<sup>516</sup>
387. In the Memorial, the Claimants allege that Rwanda failed in its alleged transparency obligation on the basis of a failure to provide reasons for requiring NRD to re-apply for licences in 2014.<sup>517</sup> However, it is clear from the Claimants' own documents, that MINIRENA wrote to the NRD on 18 August 2014, clearly setting out its reasons based on the newly enacted 2014 Law and stating:

*“Considering the fact that the negotiating process for the possible renewal of the mining licence for the above mentioned concessions [Nemba, Giciye, Rutsiro, Mara and Sebeya concessions] has stalled and did not yield any positive result since its initiation in 2012; considering that a new Law governing the mining sector, Law No13/2014, was published on June 30, 2014 and taking into account the Presidential Order No 63/02 of 12/02/2014 repealing Presidential Orders that established the mining concession boundaries of Nemba, Giciye, Rutsiro, Mara and Sebeya and others;*

*Because of the necessity to implement the new mining legal framework, I am requesting NRD to re-apply for the licenses of some or all of the former mining areas. A list of what is required in this application is attached to this*

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<sup>516</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Exhibit RL-008), at para. 294.

<sup>517</sup> Memorial, at para. 220.



*letter. Each concession is a separate entity and should be applied for individually ... Each application will be assessed on its own merit. It is key to note while applying that the government is looking for optimal investment in each of the mining areas mentioned above".*<sup>518</sup>

388. The reasons for requiring re-application are clear on the face of this correspondence:
- 388.1. failure to progress negotiations; and
  - 388.2. enactment of new legislation and executive orders requiring the re-application for the relevant licences.
389. Additionally, prior to being sent the above correspondence, Minister Imena met with Mr. Marshall and informed him that, in his view, NRD was unlikely to be granted a long term licence on the basis of any application that it would make, but that it may be able to satisfy the Ministry that it should be granted a short term licence for five years, during which it could prove itself in relation to any future long-term concession.<sup>519</sup>
390. Although NRD had been acting pursuant to authorisation to continue to operate, that was revocable at any time,<sup>520</sup> and it was consistent with Rwandan law to require NRD to apply for licences.<sup>521</sup> It was also consistent with the purpose of the 2014 Law to require mining operators to be licensed under the new law when it came into force.
391. Additionally, the Claimants allege that Rwanda failed to give NRD the opportunity to remedy any deficiencies in its application, after it had required NRD to provide documents that it was aware NRD could not access.<sup>522</sup> However, as already explained, it is clear that NRD could have sought those documents from alternative sources (if they indeed existed).<sup>523</sup>
392. Finally, the Claimants claim that Rwanda failed to treat their investments transparently on the basis that they provided repeated extensions to NRD's licences without explaining why NRD was being granted short-term licence extensions and not the long-term agreement it claimed to be expecting and entitled to. However, at each point, NRD was informed of the basis on which it was being granted a short-term extension to its licences, as set out above – namely to grant NRD the opportunity to enter into further discussions about new licences, which NRD was repeatedly told would be short-term rather than long. Any expectation that the short term, ad hoc extensions were stop gaps to the inevitable grant of long term licences was wholly unfounded, and in the circumstances

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<sup>518</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Re: Submission of the requirements for a license in line with the new legal framework* (16 August 2014) (**Exhibit C-064**).

<sup>519</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at paras. 30.

<sup>520</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 30.

<sup>521</sup> Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 32.

<sup>522</sup> Memorial, at para. 221.

<sup>523</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at paras. 41-42.

NRD can have had no genuine belief that this was the case. The reasons were expressed as they arose:

392.1. On 2 August 2011, following its decision not to grant the requested short-term licences for which NRD had applied in November 2010, MINIRENA stated:

*“After considering the exploration report submitted, it was found out that the contract signed between the Government of Rwanda and your company on 24/11/2006 had not been fully executed, more especially in its article 2 as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years.*

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

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392.2. On 28 February 2012, MINIRENA stated:

*“It has not been possible to conclude the contract in the time of the above extension [granted on 2 August 2011]. I understand the absolute necessity to conclude this agreement as soon as possible for strong investor confidence. However, because of the need for more time to finalize the process of contract negotiation, I extend your existing licence for three months effective from 02/02/2012. I am certain that this is enough time for us to conclude a good contract for this partnership”*

392.3. On 13 September 2012, MINIRENA stated:<sup>525</sup>

*“In view of the ongoing work on reorganizing the mining sector which will have a bearing on the new contracts that will be negotiated as has been communicated to all the existing concession holders, I have the pleasure to extend your license up to October 2012, to allow for the ongoing work to be completed.”*

393. Ultimately, as NRD was well aware, NRD was provided with short term, ad hoc extensions to its licence, following its failure to comply with the requirements under the Contract, and following its failure to provide an application sufficient to persuade the Government

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<sup>524</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration license* (2 August 2011) (**Exhibit C-062**).

<sup>525</sup> Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD *RE: Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

to grant it the new five year licences it had sought in November 2010, in order to allow mining operations, and negotiations relating to future licences, to continue at all.

**C. Rwanda provided full protection and security to the claimants' alleged investments**

394. The final of the alleged breaches of Article 5 of the USA-Rwanda BIT is set out in Section VI.C of the Memorial, and alleges that Rwanda failed to provide full protection and security (“FPS”) to the Claimants investments such that their assets suffered physical harm.<sup>526</sup> Those claims are wholly unsubstantiated and are denied.
395. The Claimants allege that Rwanda has failed in its obligation to provide FPS on two primary bases:
- 395.1. *First*, they allege that damage was caused by Ben Benzinge in 2012 and 2014 when he gained control of NRD and its assets, with the assistance of, variously, local police, the courts, the bailiff Jean Bosco Nsengiyuma and the Rwandan military; and
- 395.2. *Second*, they allege that damage was done to NRD’s mining concessions by illegal miners, causing harm to the ground and environmental damage.
396. However, the Claimants have, and have plainly, failed to establish their case in respect of either of the alleged forms of damage, which claims are denied. Not only have they have failed to provide any credible evidence of damage or loss, they have failed to establish any breach by the Respondent in relation to this alleged conduct sufficient to establish a breach of the FPS standard.

**1. Content of the FPS obligation at customary international law**

397. The USA-Rwanda BIT specifically requires at Article 5(1) that Rwanda “accord to [the Claimants’] covered investments treatment in accordance with customary international law, including ... full protection and security”.<sup>527</sup>
398. Additionally, it specifies that:

*“...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. The concepts of ... ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

*... (b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”<sup>528</sup>*

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<sup>526</sup> Memorial, at Section VI.C.

<sup>527</sup> USA-Rwanda BIT (Exhibit CL-006), at Article 5(1).

<sup>528</sup> USA-Rwanda BIT (Exhibit CL-006), at Article 5(2).

399. Under the MST, FPS includes “a duty to protect aliens and their investment against unlawful acts committed by some of its citizens ... If such acts are committed with the active assistance of state-organs a breach of international law occurs”.<sup>529</sup>
400. The FPS standard of treatment comprises the obligation of States to provide physical or police protection to foreign investments and investors from harm caused by the State itself or by third parties. As summarised by the Tribunal in *Saluka v. Czech Republic*, although addressing the autonomous standard under the relevant BIT, rather than the MST “the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force”.<sup>530</sup> At a minimum, it is clear that that “the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it”.<sup>531</sup>
401. Rather, the level of police protection required by customary international law is limited in scope.<sup>532</sup> Tribunals have held that it obliges the state to provide a certain level of protection to foreign investments from physical damage and not even all physical damage.<sup>533</sup> The obligation is one of due diligence, as is reasonable in the circumstances, and no more.<sup>534</sup> The key criterion is that the State knows of the unlawful act and takes no action to prevent or remedy it.<sup>535</sup> The duty does not oblige the Respondent to protect the Claimants from any possible loss of value caused by persons whose acts could not be attributed to the State.<sup>536</sup>

**2. The actions by Ben Benzinge did not breach the FPS standard and in any event are not attributable to Rwanda**

402. The Claimants allege that Ben Benzinge damaged their investment and that Rwanda ought to have prevented such damage from occurring. However, the Claimants have failed to provide any evidence that the Rwandan authorities encouraged, fostered, or

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<sup>529</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (20 November 1984) (**Exhibit RL-044**), at para. 172.

<sup>530</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 484.

<sup>531</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (**Exhibit CL-026**), at para. 177.

<sup>532</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (**Exhibit RL-045**), at para. 669.

<sup>533</sup> *Ibid* (**Exhibit RL-045**), at para. 663.

<sup>534</sup> *Ibid* (**Exhibit RL-045**), at para. 663; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997) (**Exhibit RL-046**); *Wena Hotels Ltd. v. Republic of Egypt*, ICSID Case. No. ARB/98/4, Award (8 December 2000) (**Exhibit RL-047**).

<sup>535</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (**Exhibit RL-045**), at para. 663.

<sup>536</sup> *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001) (**Exhibit RL-022**), at para. 308.

contributed their support to any illegal actions taken by Mr. Benzinge,<sup>537</sup> or that they were otherwise in breach of the FPS standard.

403. The reason Ben Benzinge was able to take control of NRD's premises and assets on two occasions, in 2012 and 2014, is because, as set out elsewhere and below, NRD was subject to ongoing ownership disputes between Mr. Benzinge and Mr. Marshall; and also because Mr. Benzinge had obtained an enforceable money judgment against NRD, and took the enforcement steps open to him under Rwandan law. This situation put the Respondent in a difficult position. Faced with two competing rights to ownership, the Respondent was forced to act based on the best information available to it at the time.
404. The relevant steps taken by Rwanda in response to the ownership and governance dispute between Mr. Marshall and Mr. Benzinge are set out above at para 182 - 191 and 194 -199.
405. It is not for the police, or other government actors, to determine the rightful owner of NRD, or independently to assess its ownership. Rather, its ownership is to be determined by the Rwandan courts, if disputed.
406. In *Ronald S. Lauder v. Czech Republic*, the Tribunal noted that:

*"the investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law..."*<sup>538</sup>

407. As in *Ronald S. Lauder v. Czech Republic*, there is no evidence that the Respondent ever violated this obligation.<sup>539</sup> Instead, the ownership dispute was, appropriately, decided by an arbitrator and the Courts, which found Mr. Benzinge to be the lawful owner of NRD. To the extent that Mr. Benzinge undertook any illegal actions in his capacity as the lawful owner of NRD, it is wholly unclear how such can, and there is no or no proper justifiable basis for them to be attributed to Rwanda, and no proper justifiable basis for these actions to form the basis of a breach of the FPS standard. NRD had declined of its own accord to participate in the arbitral proceedings, but was then able to avail itself of the Rwandan court system to try to challenge that award, albeit on the narrow procedural grounds on which an appeal could be based rather than substance. There can be no suggestion – and none is seriously advanced – that the decisions of the Rwandan High

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<sup>537</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (**Exhibit CL-026**), at para. 176.

<sup>538</sup> *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001) (**Exhibit RL-022**), at para. 314.

<sup>539</sup> *Ibid* (**Exhibit RL-022**), at para. 314.

Court and Supreme Court which refused to set aside the arbitral award for procedural irregularity were in any way improper.

408. Further, prior to these judgments in favour of Mr. Benzinge, the RDB had taken prompt steps to assist NRD when it alleged that Mr. Benzinge was seizing NRD's assets. This is evident in its swift response in 2012 to Mr. Marshall's allegations that Mr. Benzinge had transferred a significant amount of company assets and taken over company premises to the detriment of the company and its shareholders. As set out above, the RDB immediately wrote to Mr. Benzinge by letter dated 6 August 2012 advising him that the position of Managing Director had been suspended and that no person would hold position until complaints have been investigated to ensure that the interests of shareholders were secure.<sup>540</sup>
409. Similarly, in response to a complaint by NRD dated 14 July 2014 making allegations against Mr. Bosco,<sup>541</sup> on 23 July 2014, the Ministry of Justice wrote to the Mr. Bosco, instructing him to suspend his execution of judgments against NRD, so that the status of the issues in question could be examined.<sup>542</sup> Again, the Respondent was taking active steps to protect NRD against possible harm to NRD's assets. However, upon further investigation, and as set out in the witness statement of Mr. Bosco, it became clear that Mr. Nsengiyuma was simply seeking to enforce outstanding amounts owed, by order of the court, by NRD to its judgment creditors.<sup>543</sup> Upon realising this, the Ministry of Justice clarified its position and wrote to NRD noting that it would need to pay its legitimate judgment creditors, otherwise its seized assets would be liquidated.<sup>544</sup>
410. The Respondent's reliance on the best information available to it as to the legal position of NRD, and its reliance on the decision of its national courts, are entirely appropriate, and fully consistent with the obligation on the Respondent to conduct due diligence. These actions cannot, on any reasonable view, form the basis of any breach of the FPS standard. Indeed, the Respondent's actions in seeking to protect NRD clearly go well beyond the minimum standard contained in the FPS obligation as a matter of customary International Law.
411. Insofar as the alleged theft by the Rwandan military is concerned, the Claimants have provided no evidence to support this, and it is untrue. The Rwandan military were not

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<sup>540</sup> Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit R-029**).

<sup>541</sup> Letter from the Chairman of NRD (R. Marshall) to the Minister of Justice (J. Busingye), *Request for suspension of auction and work of bailiff* (**Exhibit C-071**).

<sup>542</sup> Letter from the Minister of Justice (J. Busingye) to Professional Court Bailiff (J. B. Nsengiyumva), *Re: Suspension from executing judgments against Natural Resources Development (Rwanda) Ltd* (23 July 2014) (**Exhibit C-072**).

<sup>543</sup> Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 30.

<sup>544</sup> Letter from the Minister of Justice (J. Busingye) to Z Mruskovicova, R. Marshall and B. Benzinge, *Re: Execution of judgments against NRD Rwanda Ltd* (August 2014) (**Exhibit C-073**).

present, and were not required as the seizure of NRD's assets was a straightforward task for Mr. Bosco.<sup>545</sup>

412. Similarly, the Claimants have provided no evidence to support their claim that, through the actions of the bailiff, Jean Bosco, the Respondent breached the FPS standard. Again, as set out in the witness statement of Mr. Bosco, he was authorised by Rwandan law to execute, on behalf of NRD's numerous debtors, including its employees, the judgments of the Rwandan courts which had held that NRD owed them outstanding sums. Further, in event there was a breach by Bosco, this cannot be attributed to Rwanda for the reasons set out at paragraphs 312 - 321 above.

**3. The actions taken by illegal miners do not breach the FPS standard and in any event are not attributable to Rwanda**

413. The Claimants have failed to furnish evidence to prove that the Rwandan authorities encouraged, fostered, or contributed their support to the illegal miners,<sup>546</sup> or were otherwise in breach of the FPS standard.

414. Instead, the evidence clearly establishes that the cause of any harm from illegal mining was not as a result of Rwanda's failure to provide FPS to NRD's assets, but due to NRD's inability to protect its own investment from illegal mining.

415. As set out in the witness statement of Mr. Kagubare, NRD:

415.1. Had large concessions that they could not manage. The company had almost 42,000 hectares but they were mining only about 100 hectares in total.<sup>547</sup>

415.2. Were completely unable and unequipped to effectively patrol and police this land.<sup>548</sup>

415.3. Contributed significantly to the problems by failing to pay its workers on time or, in some cases, at all.<sup>549</sup>

415.4. Was able materially to improve the problem when Mr. Kagubare was hired as Director of Operations and Production in the second half of 2013.<sup>550</sup> Mr. Kagubare immediately hired 200 security personnel to patrol the concessions, to patrol the mines and to put an end to the illegal .<sup>551</sup> This substantially reduced the extent of the illegal mining and significantly increased NRD's sales and income.<sup>552</sup>

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<sup>545</sup> Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 21.

<sup>546</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (**Exhibit CL-026**), at para. 176.

<sup>547</sup> Witness statement of Mr. John Kagubare dated 20 May 2019, at para. 12.

<sup>548</sup> Witness statement of Mr. John Kagubare dated 20 May 2019, at para. 12.

<sup>549</sup> Witness Statement of Mr. John Kagubare dated 20 May 2019, at para. 15. See also Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019 setting out the situation in late 2012 at para. 22-25.

<sup>550</sup> Witness statement of Mr. John Kagubare dated 20 May 2019, at para. 9.

<sup>551</sup> Witness statement of Mr. John Kagubare dated 20 May 2019, at para.14.

<sup>552</sup> Witness statement of Mr. John Kagubare dated 20 May 2019, at para. 14.

416. NRD's mismanagement and inability to protect its own investment cannot amount to a breach of the FPS obligation on the part of Rwanda. Further, this is not a case of threat to physical integrity of the investment through use of force;<sup>553</sup> NRD's concessions continued to be mined by illegal miners because it failed to protect them, not because of any unlawful use of force by the miners in gaining access or damaging the concessions.

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<sup>553</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 484; *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award (25 May 2018) (**Exhibit RL-048**), at para. 365.



**V. THE CLAIMANTS' EXPROPRIATION CLAIM UNDER ARTICLE 6 OF THE USA-RWANDA BIT IS UNJUSTIFIED AND WRONG**

417. In Section VI.D of its Memorial, the Claimants assert that the Respondent's conduct breached Article 6 of the USA-Rwanda BIT. Specifically, the Claimants assert that Rwanda expropriated the Claimants' investments, including "*tangible property and assets as well as intangible contractual rights*", outside the mandate of the USA-Rwanda BIT.<sup>554</sup> Those claims are unjustified and wrong.

418. Article 6(1) of the USA-Rwanda BIT provides the following:

*"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 (d) in accordance with due process of law and Article 5(1) through (3)."*<sup>555</sup>

419. Articles 6(2)-6(4) set out the requirements for compensation paid in accordance with Article 6(1)(c). Article 6 is required to be interpreted in accordance with Annexes A and B to the USA-Rwanda BIT. As indeed stated by the Claimants, in this instance, Article 6 should be interpreted in accordance with the customary international law concerning expropriation,<sup>556</sup> but there are numerous other provisions set out in Annex B that must also specifically be considered when interpreting Article 6. Annex B contains provisions reflecting the shared understanding of the Parties to the USA-Rwanda BIT in respect of Expropriation and, in full, reads as follows:

*"The Parties confirm their shared understanding that:*

- 1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.*
- 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*
- 3. Article 6(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*

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<sup>554</sup> Memorial, Section VI.D, para 240-241 in particular.

<sup>555</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 6.

<sup>556</sup> See Memorial, at para. 242, however the Claimants fail to mention other relevant provisions of these Annexes; USA-Rwanda BIT (**Exhibit CL-006**), at Annexes A and B.

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

(a) *The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:*

(i) *the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*

(ii) *the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*

(iii) *the character of the government action.*

(b) *Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”<sup>557</sup>*

420. The Claimants have failed to address the majority of these interpretation provisions, which cannot be ignored. The Claimants have not even attempted, and have therefore failed, to substantiate why and how there has been an expropriation such that a breach of Article 6, interpreted in accordance with Annex B, can be found. The Respondent relies in particular on the following (which are developed further below).

421. *First*, the Claimants have ignored the fact that Article 6 of USA-Rwanda BIT purely sets out the requirements for a lawful expropriation and these requirements only come into consideration if, and when, it has been concluded that there was some form of expropriation. The Claimants have not even attempted to establish that an expropriation took place such that Article 6 applies. Plainly, it did not.

422. *Second*, the Claimants will not be able to show how they have a plausible direct expropriation claim as there has been no direct transfer of ownership of any of the Claimants’ alleged investments to Rwanda, and in any event many of the Claimants’ alleged interests are not property capable of expropriation.

423. *Third*, the Claimants will not even be able to show how they have a plausible indirect expropriation claim when the only actions identified in relation to the “*re-application*” process do not, and could never, amount to an indirect expropriation.

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<sup>557</sup> USA-Rwanda BIT (Exhibit CL-006), at Annex B (emphasis added).

424. Given that the Claimants have failed to present a credible case for the existence of an expropriation at all, the Respondent has not in this Counter-Memorial, engaged in any detail with the Claimants' arguments on lawful expropriation under Article 6 of the USA-Rwanda BIT, although it is (without prejudice to the burden of proof) denied that they are accurate. The Respondent would seek to do so, and to respond to such arguments, and make any further necessary related arguments or raise any necessary defences, if and when the Claimants set out its case on what expropriation has occurred (although for the avoidance of doubt Rwanda will contend that not having advanced such arguments in their Memorial the Claimants should not now be permitted to advance such a case for the first time in reply).

**A. Article 6 of the USA-Rwanda BIT is only engaged if it is established that an expropriation occurred**

425. As is common with numerous BITs, Article 6 of the USA-Rwanda BIT simply sets out the requirements for an expropriation to be lawful and does not actually define what should be understood by expropriation. This was specifically addressed by the *Nations Energy v. Panama* tribunal who noted the following:

*“679. The BIT does not define what should be understood by expropriation within the meaning of Article IV. The Arbitral Tribunal considers that, in the context of the present litigation, the concept of expropriation within the meaning of Article IV of the BIT should be defined on the basis of a systematic interpretation, taking into account the object and purpose of the treaty.*

*680. In the first place, it is important not to confuse the definition of expropriation with the requirements of Article IV.1 in order to be lawful (in particular the existence of reasons of public utility or social interest and the non-discriminatory nature of the expropriatory measure) . These requirements only come into play if it has been concluded that there was an expropriation or a measure equivalent to an expropriation, but the absence of one or more of them does not in itself indicate an expropriation.”<sup>558</sup>*

426. It is paramount therefore that before even looking to the requirements for a lawful expropriation set out in the definition in Article 6 of the USA-Rwanda BIT, this Tribunal should first perform an assessment of whether there was actually an expropriation, because:

*“...the mere fact that the measures reproached to the State had not been adopted for reasons of public interest or had been discriminatory would not be enough to characterize an expropriation.”<sup>559</sup>*

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<sup>558</sup> *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Award (24 November 2010) (Exhibit RL-049), at paras. 679-680.

<sup>559</sup> *Ibid* (Exhibit RL-049), at paras. 681.

427. The Claimants have failed to even address, let alone establish so as to discharge the burden of proof which is on them, that an expropriation took place. They instead simply assert that certain actions (which are not even properly defined) that were allegedly taken by Rwanda were not in the public interest or were discriminatory.<sup>560</sup> Their attempt to characterise expropriation in this way is therefore incorrect, and means that even on their own case, their expropriation claim is wrong and must be rejected.
428. The correct approach in order to establish whether an expropriation has taken place, is to look to Annexes A and B to the USA-Rwanda BIT which are provided specifically to assist with interpretation of Article 6. These not only indicate that an assessment of expropriation should be done in accordance with the customary international law obligation of States in respect of expropriation, but further state that expropriation under Article 6(1) of the USA-Rwanda BIT addresses two situations, being direct and indirect expropriation.<sup>561</sup> The Respondent submits that the Claimants have not and cannot show that either of these occurred, and each of them is addressed further below.

**B. The Claimants cannot show that they had any interests in property capable of being expropriated**

429. The Claimants have failed to show any relevant interest in property that was capable of being expropriated, other than NRD which, on the Claimants' case, they still own. Tribunals have been clear that, since an expropriation claim is essentially a claim about interference with property, central to an expropriation claim is the ability to establish and "*be meticulous about*" the property rights held and allegedly expropriated.<sup>562</sup> Further, as noted by the Tribunal in *Ticaret v. Pakistan* :<sup>563</sup>

*"The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated."*

430. The Claimants do not make clear which of their alleged investments Rwanda is said to have expropriated. However, none of the acts that Rwanda has taken led to a transfer of ownership of any property belonging to the Claimants, including NRD or any licences to mine the Concessions (which are the investments that the Respondent understands the Claimants allege to have made) to the State:

- 430.1. On the Claimants' own case, the shares in NRD are still held by Spalena (and to the extent this is not correct, as is the Respondent's case, it is a result of a Supreme Court judgment determining the purported transfer of those shares to have been a nullity);

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<sup>560</sup> Memorial, at paras. 242-260.

<sup>561</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Annex B, Articles 3 and 4.

<sup>562</sup> *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, (16 September 2003) (**Exhibit RL-050**), at para. 6.2.

<sup>563</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 442.

- 430.2. the Claimants did not hold any, or any valid, proprietary interest in relation to the Concessions at the time of the alleged expropriation:
- 430.2.1. NRD did not hold a valid licence granting any proprietary interest to mine the Concessions, at least after its licence extension expired in October 2012; and
  - 430.2.2. an obligation to perform imposed under the Contract (even were that valid and still on foot at the material time, which it was not) is not a proprietary interest capable of expropriation.
431. The Respondent will seek to respond to any allegations by the Claimants (if permitted, which they should not be) made in relation to other property allegedly subject to expropriation in the event that the Claimants clarify the basis of their submission. The following summarises the position of the Respondent on the current assertions of expropriation of property by the Claimants.
432. First, in relation to NRD, it is plain on the face of the Claimants' Memorial that it cannot allege that NRD has been expropriated as, on the Claimants' case, ownership and control of the company has been retained.
433. Alternatively, as is the Respondent's case, the acquisition by Spalena of shares in NRD was a nullity / its purchase was *void ab initio* as determined in the arbitral award, which has been upheld by a decision of the Supreme Court of Rwanda, as set out in detail above.<sup>564</sup> As a matter of Rwandan law, Spalena is not considered to be a shareholder of NRD; this cannot be considered an expropriatory act.
434. Second, NRD was not in possession of a valid mining licence as at 2014, and had not been since October 2012. Although it continued to operate, it did so in the absence of a valid proprietary interest of any kind, let alone of a kind that could be subject to expropriation as its continued operation in the five former concession areas was an indulgence granted by Rwanda which it was free to revoke. As such, the Claimants have no basis whatsoever for asserting that their licences were expropriated: they simply expired in the ordinary course, following multiple extensions, and subsequently NRD had no enforceable right under Rwandan law to remain operating in the concession areas.
435. Third, in relation to the alleged contractual right to long-term licences, the law is clear that, in order to be capable of expropriation, an interest must be an interest in property – either tangible or intangible, or a proprietary right produced under a contract.<sup>565</sup> NRD did not have any right to mine in any of its concessions over the long-term. The rights granted pursuant to the Contract were expressly limited to four-years, with the option to apply for further mining concession licences being expressly conditional on certain

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<sup>564</sup> Expert Report of Richard Mugisha dated 24 May 2019, at para. 43.

<sup>565</sup> *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (**Exhibit RL-051**), at para. 169.

criteria being met and Rwanda positively evaluating NRD's submitted feasibility study. The Claimants never possessed a "right" to long term licences which could have been taken by the Respondent.<sup>566</sup>

436. Further, a purely contractual right is a personal right, and cannot be expropriated. As distinct from a proprietary right *in rem*, which is good against the world, a purely contractual right is a right to performance by a specific third party.<sup>567</sup> It is "*the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.*"<sup>568</sup>
437. Accordingly, although a proprietary right arising from a contract may lead to property that can be subject to an expropriation claim, a mere contractual interest in performance is not sufficient. As the Tribunal stated in *Waste Management v. Mexico*, "*the mere non-performance of a contractual obligation is not to be equated with the taking of property.*"<sup>569</sup> In that case, the Tribunal went on to say that:

*"It is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation."*<sup>570</sup>

438. Bearing in mind that (as has already been explained) the Respondent does not in any event accept that a contractual obligation to grant long term licences existed pursuant to the Contract, the alleged right arising under the Contract, if it existed at all, was a purely contractual right to performance, and not a proprietary right capable of expropriation.

### **C. The Claimants cannot show that there has been a direct expropriation**

439. In the event that (contrary to the Respondent's case) the Tribunal finds that the Claimants have identified rights or interests (which are yet to be properly explained or particularised for the purpose of the expropriation claim) that were capable of being expropriated, the Claimants would nonetheless be unable to support a claim for direct expropriation. As with the majority of its claims, the Claimants present a vague and confusing picture, never specifying whether they are alleging a direct or indirect expropriation.

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<sup>566</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 152.

<sup>567</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezeló v. Hungary*, ICSID Case No. ARB/12/3, Award (17 April 2015) (**Exhibit RL-052**), at para. 153-154.

<sup>568</sup> *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (**Exhibit RL-051**), at para. 169.

<sup>569</sup> *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 174.

<sup>570</sup> *Ibid* (**Exhibit CL-028**), at para. 175.

440. As is expressly set out in Article 3 of Annex B, any claim for direct expropriation must involve “*formal transfer of title or outright seizure*”.<sup>571</sup> This approach has been followed by numerous tribunals including the *El Paso v. Argentina* tribunal where the tribunal emphasised that a direct expropriation requires transfer of title:

*“Although the Claimant has complained about direct expropriation, it can be declared by the Tribunal from the outset, without extensive reasoning, that no such expropriation occurred. It is enough here to recall the definition given to direct expropriation by Professor Sacerdoti: ‘the coercive appropriation by the State of private property, usually by means of individual administrative measures.’ In direct expropriation, there is a formal transfer of the title of ownership from the foreign investor to the State engaged in the expropriation or to a national company of that State, and it has never been asserted that the shares of El Paso in the Argentinian companies have been transferred by the State to itself or to another public or private company.”<sup>572</sup>*

441. In the event that NRD held property capable of expropriation, licences to mine the concessions have not been transferred to the government, or to government-owned or related entities. The Claimants assert that Ngali Mining is now the owner of many of the NRD mines.<sup>573</sup> However, this is incorrect, as Ngali Mining does not have a licence to mine, have a concession over, or own any of the mines or mining sites previously operated by NRD.<sup>574</sup>

442. The evidence does not support a transfer of property or benefit directly to others, and in particular not to government-controlled actors. In fact, all of the former NRD concessions were put out for tender by the Government in early 2016.<sup>575</sup> Further, “none of the new licence holders are Government owned and none are connected with the Ministry of Defence”.<sup>576</sup> Yet further, in contrast to NRD which promised but failed to do so, each of the new licence-holders has been required to make a substantial investment commitment.<sup>577</sup> This is therefore not a properly to be characterised as an “expropriation” case at all.<sup>578</sup>

#### **D. The Claimants cannot show that there has been an indirect expropriation**

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<sup>571</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Annex B.

<sup>572</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-037**), at para. 265, Citing Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 Collected Courses, Hague Academy of International Law (1997) (**Exhibit RL-053**), at page 379 (emphasis added).

<sup>573</sup> Witness statement of Ms. Zuzana Mruskovicova dated February 28, 2019, at para. 27.

<sup>574</sup> Witness statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 10. Instead, all of the former NRD concessions were put out for tender by the Government in early 2016 and the successful bidders were approved by Cabinet in September 2016, see Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

<sup>575</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

<sup>576</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

<sup>577</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

<sup>578</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit CL-041**), at para. 288.

443. As set out at paragraphs 439 to 442 above, any direct expropriation claim should fail. The Claimants expropriation claim, if any (which is denied), must therefore be one for indirect expropriation. To the extent that the Claimants even have a claim for indirect expropriation, this also should fail, not least because they do not sufficiently identify what the “*action or series of actions*” are that were taken by Rwanda and how they have “*an effect equivalent to direct expropriation*” as set out in Annex B.

**1. The Claimants have failed to establish that the “re-application” process was equivalent to an indirect expropriation**

444. As set out in Annex B to the USA-Rwanda BIT, in order to determine whether an indirect expropriation has taken place, the Tribunal must perform a “*case-by-case, fact-based inquiry*” that takes into account certain factors.<sup>579</sup> At this stage, the Respondent, and in due course the Tribunal, cannot and will not be able to perform such assessment of the actions without knowing exactly what the “*action or series of actions*” are that were taken by Rwanda and how they have “*an effect equivalent to direct expropriation*”.

445. To the extent that the Claimants’ case is that the “*re-application*” process is the “*series of actions*” that are alleged to have “*an effect equivalent to direct expropriation*” – this simply cannot be the case.

446. First, although there was an economic cost associated with re-applying for the licences, as set out in Annex B of the USA-Rwanda BIT, an action or series of actions that has an economic effect on the value of an investment, standing alone, does not establish that indirect expropriation has occurred.

447. Second, even if the requirement for NRD to reapply for its licences interfered with the Claimants expectations, contrary to the Respondent’s case, as set out above, such expectations were, as there also explained, not reasonable. Third, the character of this government action, which does not involve any taking of property or anything akin to the taking of property, cannot and does not, on any objective view, constitute expropriation within the meaning of the USA-Rwanda BIT.

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<sup>579</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Annex B, Article 5



**VI. THE CLAIMANTS' HAVE FAILED TO ESTABLISH A VIOLATION OF ARTICLES 3 AND 4 OF THE USA-RWANDA BIT**

448. In Section VI.E of its Memorial, the Claimants assert that the Respondent's conduct breached Articles 3 and 4 of the USA-Rwanda BIT. Specifically, the Claimants assert that Rwanda (i) violated its National Treatment ("NT") obligation owed to Claimants,<sup>580</sup> and (ii) violated its Most-Favoured-Nation ("MFN") obligation owed to Claimants.<sup>581</sup>

**A. The Claimants' have failed to establish a violation of Article 3 of the USA-Rwanda BIT**

449. Article 3 of the USA-Rwanda BIT sets out the provisions in relation to NT and provides that:

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

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

*3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments."<sup>582</sup>*

450. In *Saluka v. Czech Republic*, the tribunal set out a test for when differential treatment of a foreign investor may be discriminatory and therefore in breach of the NT provision. It held that:

*"differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."<sup>583</sup>*

451. Similarly, in *AES Summit v. Hungary*, it was held that discrimination necessarily implies that the state has "benefited or harmed someone more in comparison with the generality."<sup>584</sup>

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<sup>580</sup> Memorial, at Section VI.E.1.

<sup>581</sup> Memorial, at Section VI.E.2.

<sup>582</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 3.

<sup>583</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic* (UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 307.

<sup>584</sup> *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010) (**Exhibit RL-016**), at para. 10.3.53.

452. Importantly, a mere showing of differential treatment is not sufficient to establish unlawful discrimination.<sup>585</sup> Rather, in order for treatment to be discriminatory, comparators must be materially similar; and there must be no reasonable justification for differential treatment.<sup>586</sup>
453. The Claimants allege that Rwanda violated Article 3 of the USA-Rwanda BIT through the implementation of the 2014 Law.<sup>587</sup> Specifically, the Claimants allege that Rwanda treated it or its investments differently to other investors such as Ngali Mining, in a way that amounted to a breach of the USA-Rwanda BIT. They also allege that it, in breach of the USA-Rwanda BIT, awarded de facto ownership of NRD to Ben Benzinge by modifying NRD's corporate registration in 2014.
454. However, the Claimants have failed to explain how these amount to a breach of Article 3 of the USA-Rwanda BIT, and there was no such breach.

**1. The Respondent did not expropriate the Claimants' Investment and therefore the Claimants cannot show a breach of Article 3 of the USA-Rwanda BIT**

455. As set out at Section V. above, the Respondent's actions in relation to the Claimants' purported investments could not, and did not, by any reasonable interpretation, qualify as expropriation. The mining concessions that NRD once held short-term licences for are not currently held by a Rwandan government entity; there has been no direct or indirect expropriation.
456. Further, as set out at paragraphs 142 – **Error! Reference source not found.** above, the Respondent was not granted the long term licenses it applied for in September 2014 because it failed to meet the requirements of the 2014 Law. Therefore, if, as a consequence of NRD's failure to meet the requirements of the 2014 Law, the long-term licences sought by the Claimants had ultimately been granted to a Rwandan (state-owned) company (which is not the case), this would still not establish an expropriation claim. The Claimants have failed to prove the requisite elements of expropriation and therefore that the expropriation amounted to a breach of Article 3 of the USA-Rwanda BIT.

**2. The delayed decision on NRD's long-term licence applications was due to its own failure to submit the required documentation and cannot amount to a breach of Article 3 of the USA-Rwanda BIT**

457. Further, no breach of Article 3 of the USA-Rwanda BIT can be imputed to Rwanda on the basis of the time taken to process NRD's application for long-term licences. The Claimants have alleged that Ngali Mining was treated more favourably than NRD as its long term licences were granted within six months. However, they were not; it took just

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<sup>585</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**Exhibit RL-024**), at para. 175.

<sup>586</sup> *Ibid* (**Exhibit RL-024**), at para. 175.

<sup>587</sup> Memorial, at para. 269.

over three years for Ngali Mining to be granted large scale mining licenses to explore for gold. Those licenses were issued in January 2019.<sup>588</sup> It received its first license in December 2016, thirteen months after the company was formed.<sup>589</sup> In any event, the reason that it took several years for NRD to be granted a decision is entirely attributable to faults by NRD:

- 457.1. Upon expiry of the four-year term in November 2010, NRD had failed to submit a satisfactory feasibility study and final report of reserves as required as a condition of the Contract to receive the long-term licences, subject to positive evaluation by Rwanda.<sup>590</sup> Although the Claimants refer to page 97 of their November 2010 Application<sup>591</sup> and their Status Report 2009<sup>592</sup> in support of their claim that they did submit the required feasibility study,<sup>593</sup> these documents – being in fact an application for a short licence extension accompanied by a superficial report demonstrating that NRD’s obligations had not been complied with – did not meet the requirements of a feasibility study for a long-term licence.
- 457.2. Although it had no contractual or legal obligation to do so, Rwanda then, out of good faith, granted NRD a series of short-term extensions, on 2 August 2011,<sup>594</sup> 20 February 2012,<sup>595</sup> and 13 September 2012<sup>596</sup> to its existing four-year mining licences which would otherwise have expired in January 2011.
- 457.3. NRD submitted what it purported to be an application for a 30 year concession (its first application expressly seeking a long-term concession) on 30 January 2013 which amounted to a mere nine pages of recycled information which could never have been taken seriously as an application for a 30 year concession.
- 457.4. In June 2014, the 2014 Law was implemented. NRD did not hold any valid licence at this time, because it had failed to make any application for new licences – despite having been invited to make applications for Rwanda’s review.<sup>597</sup> It had

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<sup>588</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para.7.

<sup>589</sup> Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 11.

<sup>590</sup> See Letter from the Ministry of Forestry and Mines (C. Bazivamo) to the Director General of NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

<sup>591</sup> *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD* (**Exhibit C-035**), at page 97.

<sup>592</sup> NRD, Status Report 2009 (**Exhibit C-067**).

<sup>593</sup> Paragraph 44 of Claimants’ Memorial.

<sup>594</sup> Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

<sup>595</sup> Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

<sup>596</sup> Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD *RE: Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

<sup>597</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 25.

failed to take the steps or make the investments that would have been persuasive to Rwanda to grant it a formal licence or licences. Unable to allow NRD to continue to operate without any proper legal basis to do so under Rwandan mining law, in August 2014 Rwanda requested that NRD re-apply for its mining licences in accordance with the new legal framework established by the 2014 Law.<sup>598</sup>

457.5. In 2014 and 2015, NRD made applications for long-term licences under the 2014 Law.<sup>599</sup> However, it failed to provide the relevant documents and studies, despite being provided with multiple opportunities to do so.<sup>600</sup> On that basis, it was informed that its application had been declined.<sup>601</sup>

458. This timeline of events highlights the cause of the delay as being NRD's failure, on multiple occasions, to provide the information required to have its application approved. NRD's application for a new five year licences made in November 2010 was declined in August 2011. It made no other application until August 2014 (its purported nine page application for a 30 year licence made on 30 January 2013 not being capable of being taken seriously). Additionally, NRD's application under the 2014 Law was initially declined in October 2014. The fact that Rwanda, as a courtesy measure, granted NRD short-term licence extensions until October 2012 and then allowed it to continue to operate without licences after that date, and gave it several opportunities to remedy the deficiencies in its 2014 application cannot form the basis of any breach of the National Treatment Standard or any obligation.

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<sup>598</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *RE: Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

<sup>599</sup> Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (18 August 2014) (**Exhibit C-084**); Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister E. Imena), *Delivery of a Re-Application letter* (1 November 2014) (**Exhibit R-019**); Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (E. Imena) *Requested Documents* (25 November 2014) (**Exhibit C-088**).

<sup>600</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**); Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**); Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re; Further response to your application letter concerning the mining license for Nemba, Rutsiro, Giciye, Sebeya and Mara concessions* (17 December 2014) (**Exhibit C-095**); Letter from the Minister of State in Charge of Mining (I. Evode) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licenses* (19 May 2015) (**Exhibit C-038**).

<sup>601</sup> Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**), Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re: Response to your letter* (12 November 2014) (**Exhibit C-087**), Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Re; Further response to your application letter concerning the mining license for Nemba, Rutsiro, Giciye, Sebeya and Mara concessions* (17 December 2014) (**Exhibit C-095**), Letter from the Minister of State in Charge of Mining (I. Evode) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licenses* (19 May 2015) (**Exhibit C-038**).

459. Any difference in time taken for Rwanda to approve Ngali Mining’s application compared with NRD’s thus did not reflect any unjustifiable or arbitrary distinctions by Rwanda,<sup>602</sup> or any preference for Ngali Mining’s investment over NRD’s.<sup>603</sup> Rather, NRD’s situation was not materially similar to that of Ngali Mining’s<sup>604</sup> as Ngali Mining had complied with the requirements of the 2014 Law whereas NRD had not. The Claimants have therefore failed to establish that the differential treatment between the two parties was discriminatory, or in any way in breach of the National Treatment Standard, and it was not.
460. What these facts actually show is a State that has demonstrated extreme patience and generosity when faced with an entity which, time after time, has failed to meet the requirements necessary to obtain the significant rights that are contained in long-term mining licences. Rather than being discriminatory, the facts highlight tolerance by Rwanda, in granting NRD the indulgence of having multiple opportunities to submit applications for licences that complied with its requirements. In fact, if there was any party that was being treated more favourably, it was NRD.<sup>605</sup>

### **3. Rwanda’s involvement in the ownership dispute between Roderick Marshall and Ben Benzinge does not amount to a breach of Article 3 of the USA-Rwanda BIT**

461. Rwanda’s responses to the ownership dispute between Mr. Marshall and Mr. Benzinge cannot, and do not, form the basis of a breach of Article 3 of the USA-Rwanda BIT. The Claimants allege that because Mr. Benzinge is a Rwandan national, Rwanda’s decision to modify NRD’s corporate registration to reflect the fact that Mr. Benzinge was Managing Director of NRD, and allowing him to control NRD’s assets and concessions in 2014, was in breach of the NT standard. However, as set out below, this narrative omits one highly material fact—one that wholly undermines the basis of the Claimants’ allegation: the decision to allow Mr. Benzinge access to NRD’s concessions, and the time taken to change NRD’s corporate registration, was based on a decision of an independent arbitrator ultimately upheld by the Supreme Court of Rwanda, and then in furtherance of Mr. Benzinge’s rights under Rwandan law to enforce a monetary judgement in his favour against NRD’s assets.<sup>606</sup>
462. The relevant facts are set out in detail para 182 - 191. In brief, the background to the arbitral award is a dispute, running from around August to October 2012, relating to the position of Managing Director of NRD. The RDB had registered Mr. Benzinge as Managing

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<sup>602</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602.

<sup>603</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 307.

<sup>604</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**Exhibit RL-010**), at para. 175.

<sup>605</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 45.

<sup>606</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Supreme Court, Kigali, RCOMA 0017/13/CS (2 May 2014) (**Exhibit R-015**).

Director of NRD, having been presented with documents appearing to support such registration, but suspended his position on the basis of a complaint by Mr. Marshall about that registration. It took some time until Mr. Marshall was re-instated due to proceedings, commenced by Mr. Benzinge, which are mentioned again below.

463. Mr. Benzinge commenced arbitral proceedings contesting RDB's suspension of his position. In a decision dated 17 May 2013, the arbitrator held that Roderick Marshall became Managing Director of NRD unlawfully.<sup>607</sup> The decision held that Ms. Zuzana Mruskovicova and Mr. Marshall be dismissed as members of the Board of Directors.<sup>608</sup> The decision further held that NRD Holding GmbH, from whom Spalena had supposedly purchased its shares, had become a shareholder of NRD illegally.<sup>609</sup> This decision of the arbitrator was then upheld by the Commercial High Court of Rwanda in a decision of 23 September 2013<sup>610</sup> and a decision of the Supreme Court of Rwanda dated 2 May 2014.<sup>611</sup>
464. Pursuant to that decision, the bailiff Jean Bosco validly seized assets of NRD.<sup>612</sup> Neither the Police nor the military were present.<sup>613</sup>
465. These facts highlight two critical features of Rwanda's actions which wholly undermine the Claimants' allegation that Rwanda breached the Article 3 of the USA-Rwanda BIT.
466. Firstly, the facts do not implicate any discriminatory behaviour on the part of Rwanda, or any partiality towards Mr. Benzinge over Mr. Marshall. Rather, they highlight that Rwanda took several actions in favour of Mr. Marshall's interests, including removing Ben Benzinge as Managing Director upon being advised by Mr. Marshall that there had been misconduct on the part of Mr. Benzinge, and facilitating the transfer of NRD's property to Mr. Marshall. Indeed, the facts demonstrate Rwanda took actions both favourable to, and unfavourable to, Mr. Benzinge and Mr. Marshall, at various times, depending on the respective positions of the parties as a matter of Rwandan law.
467. Secondly, even if there had been discriminatory treatment against NRD by Rwanda, which cannot be supported on the facts, such treatment was based on a rational policy that was not motivated by any preference for Mr. Benzinge over Mr. Marshall:<sup>614</sup> complying with a decision of the Supreme Court of Rwanda. As set out in the witness statement of Mr. Imena, Rwanda's actions at all times were based on the rational and legitimate objective of ensuring that NRD was operating in accordance with Rwandan law; at times this meant

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<sup>607</sup> *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal (17 May 2013) (**Exhibit R-013**), page 6.

<sup>608</sup> *Ibid* (**Exhibit R-013**), page 10.

<sup>609</sup> *Ibid* (**Exhibit R-013**), page 11.

<sup>610</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Commercial High Court, Kigali, RCOMA 0269/13/HCC (23 September 2013) (**Exhibit R-014**).

<sup>611</sup> *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Supreme Court, Kigali, RCOMA 0017/13/CS (2 May 2014) (**Exhibit R-015**).

<sup>612</sup> Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 19.

<sup>613</sup> Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 21.

<sup>614</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 307.

taking actions that were adverse to the interests of Mr. Benzinge (such as suspending Mr Bosco's enforcement action, and the RDB removing Mr. Benzinge as the registered Managing Director in favour of Mr. Marshall), and at times it meant taking steps that were adverse to the interests of Mr. Marshall and the Claimants.<sup>615</sup>

**B. The Claimants' have failed to establish a violation of Article 4 of the USA-Rwanda BIT**

468. Article 4 of the USA-Rwanda BIT sets out the provisions in relation to MFN and provides that:

*"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>616</sup>

469. There is extensive case law by arbitral tribunals considering the scope of MFN clauses, and the essential condition that is recognised in order to establish a violation is the existence of different treatment accorded to another foreign investor in a similar situation.<sup>617</sup> MFN clauses do not require identical treatment between different foreign investors in like circumstances, but must ensure overall equality of treatment between them,<sup>618</sup> so as to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT.<sup>619</sup>

470. The Claimants allege that their covered investments (which are denied as summarised above) were treated less favourably under the 2014 Law in comparison with other foreign investors and their investments in like circumstances, in breach of the MFN clause and international law. In particular, they allege that:

470.1. Eurotrade International Ltd ("**Eurotrade**") and Rutongo Mines Ltd ("**Rutongo**"), both investment vehicles of the Tinco Group, were not required to re-apply for long-term licences as NRD was. They allege that this is despite, like Eurotrade and Rutongo, the Claimants having performed their obligations under the

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<sup>615</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 49-56.

<sup>616</sup> USA-Rwanda BIT (**Exhibit CL-006**), at Article 4.

<sup>617</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (**Exhibit CL-030**), at para. 369, citing *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award (February 10, 1999) (**Exhibit RL-054**), at para. 121.

<sup>618</sup> *Daimler Financial Services AG vs. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) (**Exhibit RL-055**), at para. 242.

<sup>619</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction (3 March 2016) (**Exhibit RL-056**), at para. 162.

Contract (which is denied),<sup>620</sup> and Tinco having not made similar large value investments prior to receiving the long term licence agreement for Eurotrade and Rutongo.<sup>621</sup> However, as developed further below, Eurotrade and Rutongo, and Tinco, have made significantly larger investments in Rwanda; while the Claimants' investments have been non-existent or minimal at best, Eurotrade and Rutongo's applications were well-funded.<sup>622</sup>

- 470.2. Eurotrade and Rutongo were given an opportunity to negotiate the terms of the long term licences, whereas NRD was not.<sup>623</sup> That is false: NRD was given the opportunity to for both long term and short term licences, yet it failed to take the necessary steps that would have persuaded Rwanda that it merited any licences. By contrast, as Minister Imena explains, Rutongo, for example, established an excellent track record in exploring, exploiting and improving its concessions in the initial four-year period, and then submitted an impressive application for a long-term licence containing the information required.<sup>624</sup>
- 470.3. In 2014, Minister Imena blocked tag managers working with NRD, which thereby prevented NRD from selling its minerals, whereas no other concession holder was prohibited from having a tag manager.<sup>625</sup> However, as set out above, NRD was declined tags and a tag manager on the basis of the ownership dispute, and its failure to regularise its licencing status.<sup>626</sup>
- 470.4. Rwanda authorised the transfer of NRD offices and property to Ben Benzinge, who they allege to be only a 0.2% minority shareholder, whereas Rwanda did not interfere with the ownership of any other mining concession holder.<sup>627</sup> However, as set out above, Rwanda registered Mr. Benzinge as Managing Director of NRD only for a matter of days, and on the basis of a decision of the Supreme Court of Rwanda.<sup>628</sup>
- 470.5. Rwanda closed NRD's western concessions for environmental violations, but did not close Eurotrade and Rutongo's concessions, despite much worse environmental damage materialising at their sites from stilt.<sup>629</sup> That is not accepted, but in any event, it is clear that NRD's operations caused significant environmental damage, and constituted a valid ground for closure.

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<sup>620</sup> Witness statement of Ms. Zuzana Mruskovicova dated 28 February 2019, at para. 8.

<sup>621</sup> Witness statement of Ms. Zuzana Mruskovicova at para. 16.

<sup>622</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>623</sup> Witness statement of Ms. Zuzana Mruskovicova at paras. 9 and 18a.

<sup>624</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 58-59.

<sup>625</sup> Witness statement of Ms. Zuzana Mruskovicova at para. 18c.

<sup>626</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 53-55.

<sup>627</sup> Witness statement of Ms. Zuzana Mruskovicova at para. 18d.

<sup>628</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para.57.

<sup>629</sup> Witness statement of Ms. Zuzana Mruskovicova at para. 18e.



471. Accordingly, any differential treatment is explicable, and in no way in breach of the MFN clause contained in Article 4 of the USA-Rwanda BIT. The Claimants' allegations do not withstand scrutiny and are wrong.
472. The starting point for considering an alleged breach of the MFN clause is to assess the similarity of the situations to be compared.<sup>630</sup> When that is done, it becomes apparent that NRD was not a company in "like circumstances" to Rutongo and Eurotrade. In fact, Rutongo and Eurotrade were in a "completely different position to NRD".<sup>631</sup> Rather, unlike NRD, which had failed to submit the required application and feasibility study before its Contract terminated, Rutongo and Eurotrade had applied for long-term licences before their short-term concession agreements had expired.<sup>632</sup> As both companies submitted documents and evidence that met the requirements for the granting of a long-term licence, including the required feasibility studies, Rwanda granted these companies long-term licences. Importantly, this was prior to the new law coming into effect in June 2014.<sup>633</sup>
473. Accordingly, NRD was in a materially different position to Eurotrade and Rutongo as it did not have any long-term licence in place when the 2014 law came into effect.<sup>634</sup> Further, the level of investment made by NRD was not comparable to that made by Rutongo and Eurotrade, which had both made much higher levels of investment.<sup>635</sup> Rutongo and Eurotrade were large, well-run and well-funded, and as such they did not have the difficulties that NRD had in submitting a credible, acceptable application that met the requisite standard.<sup>636</sup> Additionally, Eurotrade and Rutongo had much higher levels of production than NRD, despite having significantly fewer concessions and less mining area available.<sup>637</sup>
474. Secondly, the reason NRD was denied tags for a short period was because of the ongoing ownership dispute between Mr. Marshall and Mr. Benzing. Mr. Marshall wanted production to go through him and so did Mr. Benzing.<sup>638</sup> The reason other foreign investors were not denied tags was thus not because they were being treated more advantageously, but because their companies were not subject to an ownership dispute. Similarly, Rwanda's transfer of NRD property to Mr. Benzing in accordance with the

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<sup>630</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 416.

<sup>631</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>632</sup> Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>633</sup> There is no general bar to a change in policy in regulatory practice that is made in good faith and in a non-arbitrary manner, see *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014) (**Exhibit RL-057**), at para. 8.7.5. This case considered the Most Favoured Nation clause contained in NAFTA, which is materially identical to the clause contained in the BIT.

<sup>634</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>635</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>636</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

<sup>637</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 59.

<sup>638</sup> Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

decision of the Supreme Court of Rwanda cannot possibly constitute a breach of the Most Favoured Nation Clause; no other foreign investors experienced this for the simple reason that none were undergoing ownership disputes as NRD was.

475. Thirdly, the Claimants have not provided any credible evidence of environmental breaches by Eurotrade or Rutongo. A vague and unparticularised statement by Ms Mruskovicova is insufficient to establish these breaches.<sup>639</sup> The evidence of NRD's environmental breaches, on the other hand, is extensive.
476. Accordingly, contrary to what the Claimants allege, these companies were not, for many material reasons, facing like circumstances. The necessary requirement of a breach, being the similarity of situations, is therefore not met.<sup>640</sup> Consequently, there can be no breach of the Most Favoured Nation Standard.<sup>641</sup>

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<sup>639</sup> Witness statement of Ms. Zuzana Mruskovicova, dated 28 February 2019, at para. 18e.

<sup>640</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 420.

<sup>641</sup> *Ibid* (**Exhibit RL-019**), at para. 420.

**VII. CLAIMANTS ARE NOT ENTITLED TO ANY REMEDY**

477. As recorded in Procedural Order No. 1, the “*the Tribunal decided at the First Session to bifurcate quantum from merits.*”<sup>642</sup> The Respondent therefore reserves all rights to address the Claimants’ submissions on their entitlement to damages at the quantum stage of proceedings, if any.<sup>643</sup>
478. In any event, the Claimants are not entitled to any compensation nor to reimbursement of costs and fees in this arbitration. In its Memorial on Preliminary Objections, the Respondent has shown that the Tribunal lacks jurisdiction over this dispute and in this Counter-Memorial has shown that the Claimants have in any event failed to establish any of the alleged violations of the USA-Rwanda BIT.

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<sup>642</sup> Procedural Order No. 1 (12 December 2018), at para. 14.1.

<sup>643</sup> Memorial, at Section VII.

**VIII. REQUEST FOR RELIEF**

479. For the foregoing reasons, Rwanda respectfully requests the Tribunal to:
- 479.1. Dismiss the Claimants' claims for lack of jurisdiction (as set out in the Respondent's Memorial on Preliminary Objections);
  - 479.2. Alternatively, dismiss the Claimants' claims on the merits;
  - 479.3. Order the Claimants' to pay to Rwanda the full costs of this arbitration, including, without limitation, arbitrators' fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with this arbitration;
  - 479.4. Order the Claimants to pay to Rwanda interest on the amounts awarded under paragraph 479.2 above until the date of full payment; and
  - 479.5. Grant any further relief to Rwanda as it may deem appropriate.

Respectfully submitted on 24 May 2019 by:

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Counsel for the Respondent, and duly authorised agent for the Respondent

## **APPENDIX I: Mining industry market conditions during NRD's operation**

480. The Claimants make unsubstantiated allegations about Rwanda's mineral production and exports,<sup>644</sup> but ignore the state of the global mining industry over the period of NRD's operation, and the contribution that and other factors this may have had on production. This Appendix 1 to the Respondent's Counter-Memorial provides the factual background to facilitate a more effective analysis of global market conditions for tin, tantalum and tungsten during the relevant period. This Appendix does not, at this stage, attempt to provide any detailed analysis but rather to provide an initial amount of data to allow more comprehensive analysis to take place at a later stage in the proceedings.

### **A. Tin (Cassiterite Ore)**

481. In Rwanda, as elsewhere, tin is primarily produced from cassiterite ore. It is used globally, particularly in the electronics production market, as its largest end-use is solder. In 2014, global prices for tin were detrimentally effected by an oversupply of tin in global markets, creating a supply glut due to "increased production in Myanmar and weakening demand for the metal from China".<sup>645</sup>
482. There was a slow-down in aggregate demand from China, which reduced by over 12% from 2014 to 2015.<sup>646</sup> A strong US dollar during the period has also been identified as a factor influencing tin prices, due to the primary location of purchase being the LME, where transactions are in dollars and a stronger dollar makes tin purchase more expensive for consumers from other countries.<sup>647</sup> Further, the emergence of Myanmar as a tin mining nation was unexpected and significantly impacted the industry. Mine production was estimated by ITRI at 45 kt tonnes of contained tin in 2015 from less than 1 kt in 2009.<sup>648</sup> Myanmar became the third largest producer of tin in 2014,<sup>649</sup> having previously been an insignificant player in the market.
483. As a consequence, the price of tin worldwide dropped, and remained suppressed in the following several years, recovering by around 2017.<sup>650</sup>

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<sup>644</sup> See, in particular, Witness Statement of Mr. Joseph Mbaya dated 26 February 2019, at para. 19, alleging "Rwanda reports exporting two and one-half times as many minerals today than ... in 2014. Based upon my knowledge of production amounts and capabilities of Rwanda's mining industry, it is not possible for Rwanda to produce two and one-half times as many minerals today as it did in 2014. I am not aware of any basis to justify the export figures put out by the Rwanda Government. Therefore, Rwanda must be exporting minerals that are not mined in that country".

<sup>645</sup> Mining Technology, *Global tin market: the slow road to recovery* (18 January 2016) (**Exhibit R-067**).

<sup>646</sup> *Ibid* (**Exhibit R-067**).

<sup>647</sup> *Ibid* (**Exhibit R-067**).

<sup>648</sup> International Tin Association, *2016 Report on Global Tin Resources & Reserves – Security of long-term tin supply* (2016) (**Exhibit R-068**).

<sup>649</sup> N. J. Gardiner, J. P. Sykes, A. Trench, L. J. Robb, *Tin mining in Myanmar: Production and potential* (5 October 2015) (**Exhibit R-069**).

<sup>650</sup> International Tin Association, *2016 Report on Global Tin Resources & Reserves – Security of long-term tin supply* (2016) (**Exhibit R-068**).

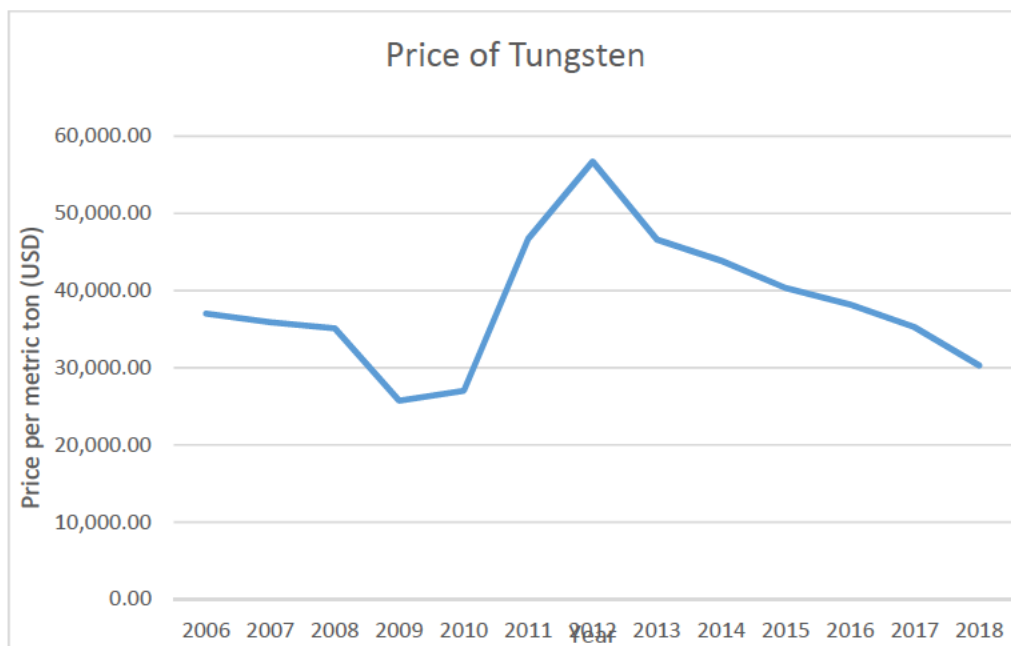
484. The below chart sets out the price of tin in the years that NRD was operating:<sup>651</sup>



**B. Tungsten (Wolframite ore)**

485. Tungsten is produced through processing wolframite ore. The global price of tungsten had a significant rise in the early-2010s, and peaked in 2012. The price has been falling since.

486. The below chart sets out the price of tungsten in the years that NRD was operating:<sup>652</sup>



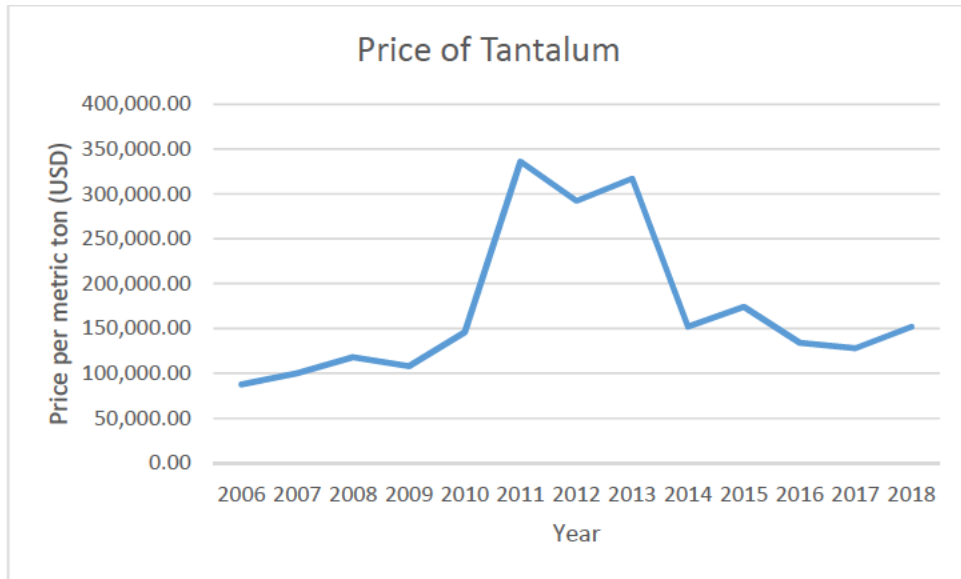
<sup>651</sup> Data source: <https://www.metalary.com/tin-price/>

<sup>652</sup> Data source: <https://www.metalary.com/tungsten-price/>

**C. Tantalum (Coltan Ore)**

487. Tantalum is produced through processing coltan ore. The price of tantalum began a significant increase in 2010, the year that Spalena allegedly purchased NRD, and was high for approximately three years. It returned to a more stable position, close to consistent with historical levels, following a significant decline in value in 2014.

488. The below chart sets out the price of tantalum in the years that NRD was operating:<sup>653</sup>



<sup>653</sup> Data source: <https://www.metalary.com/tantalum-price/>

## **ANNEX I: Abbreviations and Definitions**

<b>ABBREVIATION</b>	<b>DEFINITION</b>
1971 Law	Rwandan Law dated 27 April 1971 amending the law dated 30 January 1967 regarding the Mining Code
2008 Law	Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (Exhibit CL-020).
2014 Law	Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014), published in the Official Gazette No. 26 of 30 June 2014
2014 Presidential Order	Rwanda Presidential Order No. 63/02, <i>Repealing Presidential Orders Establishing Mining Concession and Allocating Mining Exploitation Licenses</i> (12 February 2014) published in the Official Gazette No. Special of 6 March 2014
3Ts	Tin, Tantalum and Tungsten
Arbitral Decision	The arbitral decision of Nelly Umugwaneza dated 17 May 2013 (Exhibit R-013)
Arbitrator	Nelly Umugwaneza
Anglovaal	Anglovaal Group
BIT	Bilateral Investment Treaty
BVG	Bay View Group LLC
Claimants	Bay View Group LLC and The Spalena Company LLC
COMRO	Chamber of Mines of South Africa Research Organisation
Contract	Contract for Acquiring Mining Concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (Exhibit C-017)
Contract Law	Rwanda Law No. 45/2011 of 25 November 2011, Governing Contracts (RM-001)
Cut-off Date	12 June 2015 (i.e. the date three years before the amended Request of Arbitration was registered by ICSID) or alternatively, 14 May 2015 (i.e. the date three years before the original Notice of Arbitration was submitted)
DRC	Democratic Republic of Congo
EIA	Environmental Impact Assessment
Eurotrade	Eurotrade International Ltd



<b>ABBREVIATION</b>	<b>DEFINITION</b>
Exploitation Licences	Large-scale mining licences granted to Ngali Mining to explore for gold in the Karongi district of Rwanda, at Miyove, Bweyeye and Birambo, in January 2019
FET	Fair and Equitable Treatment
First Session	The first session of the Tribunal held on 3 December 2018
Five Concession Areas	The Concessions at Rutsiro, Mara, Sebeya, Giciye and Nemba
FPS	Full Protection and Security
GMD	The Geology and Mines Department
HC Starck	HC Starck GmbH
High Court Decision	The decision of the High Court RCOMA 0269/13/HCC (23 September 2014) (Exhibit R-014)
HIPC	Heavily Indebted Poor Country
ICJ	International Court of Justice
IMF	International Monetary Fund
Initial RfA	Initial Request for Arbitration in May 2018
ITRI	International Tin Association
iTSCi	International Tin Supply Chain Initiative
Licenses	Special small-scale mining exploration and exploitation permits
MFN	Most-Favoured-Nation
MINECOFIN	The Rwandan Ministry of Finance and Economic Planning
MINIFOM	The Rwandan Ministry of Forestry and Mines
MINIJUST	The Rwandan Ministry of Justice
MINIRENA	The Rwandan Ministry of Natural Resources
MSA	Minerals Supply Africa
MST	The Customary International Law minimum standard of treatment
NAFTA	North American Free Trade Agreement (signed 17 December 1992)
Ngali Mining	Ngali Mining Ltd
NT	National Treatment

<b>ABBREVIATION</b>	<b>DEFINITION</b>
Notice	Natural Resources Development Rwanda Ltd. and Bay View Group, LLC Notice of Intent to Commence Arbitration Proceedings Against the Republic of Rwanda
November 2010 Application	Application made by NRD for the Renewal of Exploration Licences Nemba Rutsiro, Sebeya, Giciye and Mara, and Application for the Allocation of Mining Licences (Exhibit C-035)
NRD	Natural Resources Development Rwanda Ltd.
October 2014 Appeal	NRD's appeal in October 2014 of MINIRENA's decision not to grant mining licences
OGMR	Rwanda Geology and Mines Authority
PACT	PACT Inc.
Phoenix	Phoenix Metals Ltd
PO1	The Tribunal's Procedural Order No. 1 of 12 December 2018
PwC	Price Waterhouse Coopers
RDB	Rwanda Development Board
REDEMI	Regie d'Exploitation et de Developement des Mines in Rwanda
REMA	Rwanda Environment Management Authority
RIEPA	Rwanda Investment and Export Promotion Agency
RIPA	Rwanda Investment Promotion Agency
RMB	Rwanda Mines, Petroleum and Gas Board
RMR	Rwanad Mineral Resources Ltd
RNRA	Rwanda Natural Resource Authority
RRA	Rwanda Revenue Authority
Rutongo	Rutongo Mines Ltd
Rwanda	Republic of Rwanda
September 2014 Application	Application for licences to mine under the 2014 Law
Share Purchase Agreement	Share Purchase Agreement between Starck and Spalena (23 December 2010) (Exhibit C-068)
SOMIRWA	Société Minière de Rwanda
Spalena	The Spalena Company
Starck	H.C. Starck GmbH

<b>ABBREVIATION</b>	<b>DEFINITION</b>
Starck Resources	H.C. Stark Resources GmbH
Supreme Court Decision	The decision of the Supreme Court Case RCOMA 0017/13/CS dated 2 May 2014 (Exhibit R-015)
USA-Rwanda BIT	Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment signed on 19 February 2008 and entered into force on 1 January 2012
VCLT	Vienna Convention on the Law of Treaties
Zarnacks	Mr. Joachim and Jens Zarnack 2