

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)

**PROCEDURAL ORDER NO. 4
ON DOCUMENT PRODUCTION**

Members of the Tribunal

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

Secretary of the Tribunal

Mr. Alex B. Kaplan

December 20, 2019

I. INTRODUCTION

1. The Tribunal's directions are given on the basis that privileged documents need not be disclosed. Details of privileged documents should be set out in a Privilege Log in the form of Annex 1 to Respondent's Reply to Claimants' General Objections.
2. The Tribunal does not consider it appropriate to direct a party as to the manner in which a search for documents should be carried out. Where the Tribunal considers that documents may exist that have not come to light in the course of an initial search, it will direct a further search to be carried out in the expectation that this will be done thoroughly. In each case, the Parties should give a brief account of the nature of the search carried out.
3. The Parties are requested to cooperate in keeping the scope of this arbitration to manageable proportions. The issues appear to the Tribunal to be relatively clear cut and not to require a detailed investigation into the operation of the mining sector in Rwanda over a period of 6 years. As to this see Section III.A, paragraph 5 below.

II. CLAIMANTS' REQUESTS

- 1) **REQUEST REFUSED.** The Tribunal is unable at this stage to resolve the dispute as to whether Respondent removed this material. Plainly, if Respondent has in its possession any material that is the property of Claimants this should be returned. So far as discovery is concerned Claimants' request is far too wide.
- 2) **REQUEST GRANTED.**
- 3) **REQUEST GRANTED IN RELATION TO DOCUMENTS SENT TO ROD MARSHALL BUT NOT OTHERWISE.** It is reasonable for both Parties to search for and produce these documents, albeit that there is likely to be some duplication. The remaining documents are insufficiently relevant to justify the burden of searching for them.

- 4) **INSOFAR AS RESPONDENT HAS IN ITS POSSESSION DOCUMENTS FALLING WITHIN THIS CATEGORY, DOCUMENTS SUFFICIENT TO IDENTIFY THE DAMAGE IN QUESTIONS SHOULD BE PRODUCED.**
- 5) **REQUEST REFUSED.** Material sought of insufficient relevance to justify the request. Documents relating to quantum are not material at this stage.
- 6) **REQUEST REFUSED** for the same reason as Request 5.
- 7) **REQUEST GRANTED.** Respondent concedes this Request and should carry out reasonable searches to identify any additional documents in its possession.
- 8) **REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 9) **REQUEST GRANTED.** Respondent concedes this request.
- 10) **REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 11) **REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 12) **REQUEST GRANTED** in relation to the period between January 1, 2014 and May 19, 2015.
- 13) **REQUEST REFUSED.** In the light of the concession made by Respondent, the material sought is of insufficient relevance to justify the request.
- 14) **REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 15) **REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.

- 16) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 17) REQUEST GRANTED.** Respondent concedes this request.
- 18) REQUEST GRANTED.** A reasonable search should be carried out.
- 19) REQUEST REFUSED.** Material of insufficient relevance to justify the request.
Documents relating to quantum are not material at this stage.
- 20) REQUEST REFUSED.** Material of insufficient relevance to justify the Request.
- 21) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 22) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 23) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 24) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 25) REQUEST REFUSED.** What Claimants knew or understood about the normal hand-over regime may have relevance. Documents showing the actual hand-over regime in relation to another company are of insufficient relevance to justify the request.
- 26) REQUEST GRANTED.** Respondent concedes this request.
- 27) REQUEST GRANTED** subject to redaction of commercially sensitive material.
- 28) REQUEST GRANTED.**
- 29) REQUEST REFUSED.** Material of insufficient relevance to justify the request.
Documents relating to quantum are not material at this stage.

- 30) REQUEST REFUSED** for lack of relevance at this stage. If Claimants succeed on liability, the Tribunal will assume that some harm has been caused pending the resolution of issues of quantum.
- 31) REQUEST REFUSED** for the same reason as Request 30.
- 32) REQUEST REFUSED.** In the light of Respondent's answer, Claimants should seek these from their source.
- 33) REQUEST REFUSED.** In the light of Respondent's concession, production of these documents is not necessary.
- 34) REQUEST GRANTED** limited to the years 2014, 2015 and 2016. The material is relevant but must be restricted to reasonable proportions.
- 35) REQUEST GRANTED** but limited to evaluations of other applications for the years 2014, 2015 and 2016.
- 36) REQUEST REFUSED.** Production under Request 35 should suffice.
- 37) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 38) REQUEST GRANTED.** Claimants would not have requested this document if they already had it.
- 39) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 40) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 41) REQUEST GRANTED.** Identifiable and relevant documents and not an unreasonable burden.

- 42) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 43) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search
- 44) REQUEST REFUSED.** Not established that such documents exist.
- 45) REQUEST REFUSED.** (i) Request insufficiently specific. (ii) Communications that did not come to the attention of Claimants would seem of peripheral, if any, relevance.
- 46) REQUEST REFUSED.** Request insufficiently specific.
- 47) REQUEST REFUSED.** (i) Request insufficiently specific. (ii) Relevance peripheral.
- 48) REQUEST REFUSED.** Request insufficiently specific.
- 49) REQUEST GRANTED.** Respondent concedes this request. It would be convenient if Respondent were to provide a translation of this document but if Respondent is not prepared to do so, then Claimants must procure their own.
- 50) REQUEST REFUSED.** Claimants have not demonstrated that Respondent is likely to have this Report in its possession, custody or control.
- 51) REQUEST GRANTED** to the extent of requiring Respondent to produce documents sufficient to support the cited allegations from its Counter-Memorial.
- 52) REQUEST REFUSED.** Relevance of the material not established.
- 53) REQUEST GRANTED.** Respondent concedes this request. As for translation, see comments in respect of Request 49.
- 54) REQUEST GRANTED.** Identified and relevant documents.
- 55) REQUEST REFUSED.** Relevance not established.
- 56) REQUEST GRANTED.** Relevant documents now sufficiently identified.

- 57) REQUEST GRANTED** subject to Claimants producing a copy of the letter of October 31, 2014 or, if it is not in their possession, otherwise establishing its existence.
- 58) REQUEST REFUSED.** Existence and relevance of this material not established.
- 59) REQUEST REFUSED.** Existence and relevance of this material not established.
- 60) REQUEST REFUSED.** Request insufficiently specific and relevance of material not established.
- 61) REQUEST REFUSED.** Request insufficiently specific and relevance of material not established.
- 62) REQUEST REFUSED.** Request too wide and relevance of the material peripheral at best.
- 63) REQUEST GRANTED IN RESPECT OF TERMINATION LETTERS** but not otherwise because request too wide and relevance not established.
- 64) REQUEST GRANTED.** Respondent concedes this request.
- 65) REQUEST GRANTED** to the extent of requiring Respondent to carry out a further search.
- 66) REQUEST GRANTED.** Respondent concedes this request.
- 67) REQUEST GRANTED** to the extent of requiring Respondent to produce licences or other authorisations granted in respect of the Concessions.
- 68) REQUEST REFUSED.** Existence and relevance of material not established.
- 69) REQUEST REFUSED.** Existence and relevance of material not established.
- 70) REQUEST REFUSED.** Existence and relevance of material not established.
- 71) REQUEST GRANTED** in respect of the original version.

III. RESPONDENT'S REQUESTS

A. COMMENTS ON CLAIMANTS' GENERAL OBJECTIONS

4. As the Tribunal has indicated it is not at present in a position to resolve the dispute as to whether Respondent has or had in its possession any documents taken from NRD's headquarters in Kigali.
5. Where third parties are assisting Claimants by giving evidence in this arbitration, the Tribunal expects Claimants to use their best endeavours to persuade those third parties to produce any relevant documents that they have in their possession or control.
 - (i) The Tribunal does not understand Claimants' contention that the "Relevant Time Period" is that *before* the cut-off date (alleged to be May 19, 2015) and that, in consequence, there is no obligation to produce documents created or received *after* that date.
 - (ii) Claimants rightly observe: "The actions and failures to act by the Respondent that give rise to the Claimant's claims in this proceeding substantially occurred on or before May 19, 2015."
 - (iii) It is Respondent's case that claims in respect of these alleged actions and failures are time-barred. The issues appear to the Tribunal to be (a) whether Respondent only became aware *after* the cut-off date that these had constituted violations of the BIT; or (b) whether Respondent wrongfully expropriated, or refused to recognise, or discriminated against Claimants in respect of rights of Claimants that they retained *after* the cut-off date.
 - (iv) The Tribunal recognises that events before the cut-off date may have relevance when considering the knowledge of Claimants at the cut-off date or the conduct of Respondent after the cut-off date. The directions given in relation to documents reflect this. But, as the Tribunal indicated in its "Introduction", it is anxious that this arbitration should not become unbalanced by an excessive focus on the detail of events before the cut-off date.

- (v) In any event, so far as discovery is concerned, documents post-dating the cut-off date are plainly capable of being relevant and, where relevant, must be produced.
6. Correspondence with Government officials or Law Enforcement Authorities is not protected from disclosure by privilege. It may, however, be of insufficient relevance to justify an order for production.
7. It is common ground that legal professional privilege protects documents from production and where privilege is claimed production is directed subject to privilege.

B. REQUESTS

Note: Where Claimants have objected to a request but nonetheless agreed that, after a search, they will produce the requested documents if found, the Tribunal has directed production on the basis of that concession.

- 1) **REQUEST GRANTED.** Claimants concede this request.
- 2) **REQUEST GRANTED.** Claimants concede this request.
- 3) **REQUEST GRANTED.** Claimants concede this request.
- 4) **REQUEST GRANTED.** Claimants concede this request.
- 5) **REQUEST REFUSED.** The relevance of this wide class of documents is not established.
- 6) **REQUEST REFUSED.** The relevance of this wide class of documents is not established.
- 7) **REQUEST GRANTED.** Claimants concede this request.
- 8) **REQUEST REFUSED.** Documents requested are privileged.
- 9) **REQUEST REFUSED.** Documents requested are privileged.

- 10) **REQUEST GRANTED** to the extent conceded by Claimants. The Tribunal observes that the onus is on Claimants to produce all documents necessary to prove their pleaded case.
- 11) **REQUEST GRANTED** to the extent conceded by Claimants.
- 12) **REQUEST GRANTED.** Request conceded by Claimants.
- 13) **REQUEST GRANTED.** Request conceded by Claimants.
- 14) **REQUEST GRANTED** if and insofar as personal investments made by Mr. Marshall form any part of Claimants' case.
- 15) **REQUEST GRANTED.** Request conceded by Claimants.
- 16) **REQUEST GRANTED.** Request conceded by Claimants.
- 17) **REQUEST GRANTED.** Request conceded by Claimants.
- 18) **REQUEST GRANTED** to the extent conceded by Claimants.
- 19) **REQUEST GRANTED** to the extent conceded by Claimants.
- 20) **REQUEST GRANTED** to the extent conceded by Claimants.
- 21) **REQUEST GRANTED** to the extent conceded by Claimants.
- 22) **REQUEST GRANTED** to the extent conceded by Claimants.
- 23) **REQUEST GRANTED** to the extent conceded by Claimants.
- 24) **REQUEST GRANTED** to the extent conceded by Claimants.
- 25) **REQUEST GRANTED** to the extent conceded by Claimants.
- 26) **REQUEST REFUSED** subject to any appropriate entry in the Privilege Log. Claimants have satisfactorily responded to this request.

- 27) REQUEST GRANTED.** Claimants have conceded this request.
- 28) REQUEST REFUSED.** Relevance not demonstrated.
- 29) REQUEST GRANTED.** Claimants have conceded this request.
- 30) REQUEST GRANTED** to the extent conceded by Claimants.
- 31) REQUEST GRANTED.** Claimants have conceded this request.
- 32) REQUEST GRANTED** in respect of any non-duplicative documents.
- 33) REQUEST GRANTED.** Claimants have conceded this request.
- 34) REQUEST GRANTED.** Claimants have conceded this request.
- 35) REQUEST GRANTED.** Claimants have conceded this request.
- 36) REQUEST GRANTED.** Claimants have conceded this request.
- 37) REQUEST GRANTED.** Claimants have conceded this request.
- 38) REQUEST REFUSED.** Relevance not demonstrated.
- 39) REQUEST GRANTED.** Claimants have conceded this request.
- 40) REQUEST GRANTED.** Claimants have conceded this request.
- 41) REQUEST GRANTED.** Claimants have conceded this request.
- 42) REQUEST GRANTED.** Claimants have conceded this request.
- 43) REQUEST GRANTED.** Claimants have conceded this request.
- 44) REQUEST REFUSED.** The documents are privileged.
- 45) REQUEST GRANTED** to the extent that Claimants should use their best endeavours to obtain the documents.

- 46) REQUEST GRANTED** to the extent that Claimants should use their best endeavours to obtain the documents from Mr. Mboya.
- 47) REQUEST GRANTED.** Claimants have conceded this request.
- 48) REQUEST REFUSED.** Documents not demonstrated to be in the possession, power or control of Claimants and relevance not demonstrated.
- 49) REQUEST GRANTED.** Claimants have conceded this request.
- 50) REQUEST GRANTED.** Claimants have conceded this request.
- 51) REQUEST GRANTED.** Claimants have conceded this request.
- 52) REQUEST GRANTED.** Claimants have conceded this request.
- 53) REQUEST GRANTED.** Claimants have conceded this request.
- 54) REQUEST GRANTED.** The documents are relevant. If voluminous, sample documents to be produced that give a fair overall picture.
- 55) REQUEST GRANTED.** Claimants have conceded the request.
- 56) REQUEST GRANTED** in relation to documents that are not duplicative. The documents are relevant.
- 57) REQUEST GRANTED.** Claimants have conceded this request.
- 58) REQUEST GRANTED.** Claimants have conceded this request.
- 59) REQUEST REFUSED.** It has not been demonstrated that Claimants have such documents in their possession, power or control.
- 60) REQUEST GRANTED.** Claimants have conceded this request.
- 61) REQUEST GRANTED.** The material is relevant.
- 62) REQUEST GRANTED.** The material is relevant.

- 63) REQUEST GRANTED** to the extent that Claimants should use their best endeavours to produce the documents.
- 64) REQUEST GRANTED.** Claimants have conceded this request.
- 65) REQUEST REFUSED.** The request is insufficiently specific.
- 66) REQUEST REFUSED.** The request is insufficiently specific.
- 67) REQUEST GRANTED.** Claimants have conceded this request.
- 68) REQUEST GRANTED.** Claimants have conceded this request.
- 69) REQUEST GRANTED** to the extent conceded by Claimants.
- 70) REQUEST GRANTED.** Claimants have conceded this request.
- 71) REQUEST GRANTED.** Claimants have conceded this request.
- 72) REQUEST GRANTED.** Claimants have conceded this request.
- 73) REQUEST GRANTED.** Claimants have conceded this request.

On behalf of the Tribunal,

[signed]

Rt. Hon. Lord Phillips KG, PC
President of the Tribunal
Date: December 20, 2019