

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

BETWEEN:

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

(CLAIMANTS)

-AND-

GOVERNMENT OF RWANDA

(RESPONDENT)

**CLAIMANTS' POST-HEARING BRIEF**

Case No. ARB/18/21

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## INTRODUCTION

1. Claimants submit this post-hearing brief pursuant to Paragraph 47 of Procedural Order (“PO”) No. 7.
2. Claimants, Bay View Group, Inc. (“BVG”) and The Spalena Company, LLC (“Spalena”), are two US-based investors in Natural Resources Development Rwanda, Ltd. (“NRD”), a Rwandan mining company. Claimants goals, as investors in the mining industry, were to develop the Concessions to their investment vehicle, NRD, generate profits, and support the local economy. Respondent prevented Claimants from realizing their goals through a long term series of unfair, egregious, and arbitrary actions culminating in forcing Claimants out of the country expropriating Claimants’ investments in the mining Concession. Respondent’s actions violated the United States-Rwanda Bilateral Investment Treaty (“BIT”).
3. As set forth in Claimants’ pleadings and established during the course of eight days of oral testimony, Respondent breached the Minimum Standard of Treatment (Article 5), National Treatment (Article 3), and Most-Favored Nation Treatment (Article 4) requirements of the BIT, and Respondent expropriated Claimants’ investments in violation of Article 6.
4. The facts supporting Respondent’s breaches of articles three through five of the BIT largely overlap and constitute a creeping breach, because the full effect was not felt until, in some instances, years later, when Claimants finally and completely understood, that despite Respondent’s promises and guarantees, and multiple reversals of negative actions over the course of more than five years, Respondent would not, in fact, issue long term licenses for NRD’s Concessions.

5. Respondent's unfair treatment in violation of the BIT began with its decision to string Claimants along after NRD Submitted the 2010 Application. Respondent's position in this litigation is that the 2010 Application was insufficient and incomplete. But, as explained below, this is merely a litigation position contradicted by Respondent having treated the 2010 Application as satisfactory and sufficient to entitle Claimants to negotiate licenses for the continued operations of the Concessions after the expiration of the initial licenses that expired in 2010.
6. But Respondent strung those negotiations out and slowly backed away, then reversed course. NRD was singled out and treated differently than other licensees starting in mid-2014, starting with Respondent's refusal to continue issuing mineral tags so that the minerals from NRD's Concessions could be lawfully sold while negotiations continued and Respondent's demand that NRD re-apply for its licenses under the 2014 mining law. Other identically situated licensees continued to receive tags and earn revenue while their prolonged negotiations for extended licenses continued, and they were not required to re-apply for those licenses in 2014. Testimony during the hearings established that the distinctions Respondent put forward in its pre-hearings statements to justify the differential treatment Claimants received were false.
7. During this same mid-2014 time period, in what has proven to be impossible for Respondent to explain or justify, Respondent let a minority shareholder, Ben Benzinge, exercise complete control of NRD's mining operations, supposedly due to an arbitration award that in no way supports that outcome. Respondent purposefully ignored the conclusive resolution of the ownership question it claims was raised by Mr. Benzinge's arbitration award for two months, while Mr. Benzinge looted the company and destroyed

its records. Respondent then bafflingly acknowledged that long ignored resolution, brushed Mr. Benzinge aside and reverted to treating Claimants as the unquestioned owners of NRD, with no explanation for its baffling course of actions. The harm to Claimants' operations over those two months was severe and long lasting.

8. Ultimately, Respondent also expropriated Claimants' investments in full. The testimony was clear during the hearings that Claimants had office space, mining equipment, and a fully-built and operational mineral processing plant, all of which Respondent expropriated when forcing Claimants out of the Concessions and re-awarding them to new investors in 2016.
9. In addition to the factual defenses put forward by Respondent, Respondent also raises a number of Jurisdictional Objections. The objections did not have merit when Respondent first raised them and the hearing only further confirmed that they do not have any merit.
10. Respondent's objection *ratione temporis* fails because, as confirmed by Mr. Imena, Claimants case is not "out of time." Claimants' position has always been that they timely filed the Demand for Arbitration within the three year statute of limitations because Claimants could not have known of the violations of the BIT until May 19, 2015 at the earliest. Mr. Imena confirmed that NRD's licenses remained in effect at least until NRD received a final notice, which was not sent until May 19, 2015. There is no rational argument to support the position that Claimants should have known any time before May 19, 2015, while their re-application remained under review and they had active licenses, that Respondent had breached the BIT. The ultimate act of breaching the BIT is the failure to grant licenses and the earliest that decision could have been made was May 19, 2015.

11. But even that date was not the “final” date. There was a 60-day window, ending July 18, set out in the May 19, 2015 letter to conclude “the closure of your operations.” That day came and went and Claimants remained in control of the Concessions, preserving them and maintaining security forces to try to stave off illegal mining. The finality of Respondent’s breaches was not felt until Respondent tendered NRD’s former concessions, presumably with all of NRD equipment and the processing plant with it. It was at this time that Claimants understood that they would not obtain licenses for the continued operation of the Concessions.
12. Respondent’s objections *ratione materiae* and *ratione personae* are similarly without merit. Spalena and BVG invested in Rwanda, through NRD and these investments satisfy the standard under the BIT and ICSID convention. There is no question that Spalena purchased NRD from NRD’s parent, Starck, and thereby obtained all of NRD’s assets and liabilities. The actual purchase price is not determinative of whether or not the purchase is an investment because it is unquestioned that the purchase was an arms-length transaction and the price paid included [REDACTED] to Bay View, which was contributed for full resolution permitting Starck to exit its Rwanda investments with no ongoing liabilities. Furthermore, Spalena purchase all of NRD’s assets, which constitute Starck’s investments in Rwanda, giving Spalena standing to sue on behalf of investment made by Starck. Respondent objections also ignore the fact that Spalena continued to invest in Rwanda after the purchase, including through the maintenance and perseveration of the Concessions and the mines. BVG also unquestionably invested in NRD, through Spalena, first through contribution of its claim against Starck as part of the purchase, then through contribution of mining equipment

purchased outside the country and shipped into NRD's Concessions as needed.

Respondent's only argument is that the resolutions confirming the sale of BVG's assets to Spalena were fraudulent, but Mr. Marshall confirmed that that is simply not true.

13. Finally, with respect to the objection *ratione voluntatis*, the evidence at the hearing confirmed that Respondent knew that Mr. Marshall was the representative for BVG, Spalena and NRD at all material times. Any issue that pertained one, pertained to all, and was dealt with by Mr. Marshall. The hearings also confirmed that any harm suffered by BVG or Spalena as a result of Respondents arbitrary and egregious actions towards NRD were felt by both, equally, and Respondent knew this.

### ARGUMENT

- I. **The evidence and testimony adduced during the hearing demonstrates that Respondent accepted NRD's 2010 Application as sufficient to merit negotiations of licenses for the continued operation of the Concessions**
14. Respondent's position throughout this arbitration has been that the application that NRD submitted in November 2010 (the "2010 Application") was "superficial and incomplete and was not in substance compliant with the obligation under Article 2(5)"<sup>1</sup> of NRD's Contract for Acquiring Mining Concessions.<sup>2</sup> Respondent further argued that the 2010 Application "did not justify the granting of new licenses."<sup>3</sup> As borne out during the hearing, this litigation position is untrue and wholly inconsistent with Respondent's actual discussions with Claimants at the time.

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<sup>1</sup> Respondent's Counter-Memorial on Merits, ¶ 67.2.

<sup>2</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, C-017.

<sup>3</sup> Respondent's Counter-Memorial on Merits, ¶ 95.

15. In fact, contrary to the language of its letter, the evidence confirms that Respondent treated the 2010 Application to be sufficient and merited moving forward to the next step –negotiations in an effort to “conclude” contracts for four of the five concessions.
16. Respondent attributes great significance to the periodic letters of license “extensions” from the Minister of the Ministry of Natural Resources but only gives them narrow interpretation, inconsistent with the fact that such explicit extensions were unnecessary because the licenses extended automatically. In August 2011, Respondent sent a letter to NRD stating that the Contract was not fully executed because there is no “final report of reserves [or] mining feasibility studies” and simultaneously granting an extension of the licenses “to determine the future of these concessions.”<sup>4</sup> Mr. Imena testified that the August 2011 letter demonstrates that NRD’s work and 2010 Application “was not satisfactory.”<sup>5</sup>
17. On January 26, 2012, when Claimants already understood that a copy of its long term license had been submitted to the Rwanda Cabinet based upon negotiations with Dominique Bidega (see below), Respondent informed NRD that “the resources evaluation accomplished under your previous contract fell far short of the level expected.” Respondent nevertheless stated that it would be willing to proceed with contract negotiations for two concessions.<sup>6</sup> This letter makes no mention of a lack of a feasibility study, suggesting that any alleged failure to provide a feasibility study was not material Respondent’s considerations.<sup>7</sup>

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<sup>4</sup> Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>5</sup> Hearing on Jurisdiction and Merits Tr. (“Hearing Tr.”) Day 7, p. 43:2.

<sup>6</sup> Letter from S. Kamanzi to Managing Director of NRD dated 26 January 2012, **R-018**.

<sup>7</sup> Of course, the entire 2010 Application is, itself a feasibility study that satisfied any such requirement under the Contract. By way of comparison, Tinco submitted a feasibility study and called it as such. Feasibility study for 30 year mining licence in relation to Rutongo Mines (sections A and B), **R-042**. The substance of the 2010 Application and Tinco’s feasibility study largely overlap, demonstrating that they serve the same purpose. By

18. Claimants dispute the representation in this letter that any discussion with respect to granting two, instead of all five, licenses, ever took place. Mr. Marshall testified that he “was never made an offer of two out of five concessions. In fact, the discussion never went in that direction. There was no discussion like that.”<sup>8</sup> This is consistent with a contemporaneous letter sent on the topic.<sup>9</sup> In this same letter, Mr. Marshall also corrects Minister Kamanzi’s statement that Mr. Marshall had taken the position that he did not state that if NRD did not get all five concessions that NRD would not negotiate over two. Notably, having Mr. Marshall’s correction in hand by February 2012, Respondent was in a position to follow up and ask if NRD was willing to accept two concessions, if it had erroneously understood the opposite. But Respondent did not propose offer. And, despite the argument made by Respondent’s attorney during the hearings, Mr. Marshall never declined such a proposal.
19. The alleged failure to provide an estimate of reserves is not supported in the record. The May 2012 report by Mr. Imena, the authenticity of which will be discussed below, recognized that NRD did “some good preliminary exploratory work”<sup>10</sup> and this work was “significant.”<sup>11</sup> The May 2012 report, further states that “[d]etails on [significant preliminary exploration work] are provided in the assessment by the DDG RNRA/GMD,” which is a reference to Dr. Biryabarema, the Deputy Director General of

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comparison, Tinco did not submit an “application” but the lack of an “application” was not a hurdle to obtaining a long term license. *See* Imena IWS ¶ 58. In addition, in 2014 NRD submitted a document titled “Feasibility Study Update 2010-2014” which expressly stated it was an update of the 2010 Application, i.e. a feasibility study. **C-085**, § 1.1 In short, irrespective of the title ascribed to the document, the 2010 Application is a feasibility study.

<sup>8</sup> Hearing Tr. Day 2, p. 217:14-16.

<sup>9</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2012, **C-039**.

<sup>10</sup> Hearing Tr. Day 6, p. 167:18-19.

<sup>11</sup> *Id.* at p. 112:14-14; E. Imena, Evaluation of the Application for the Renewal of NRD’s Exploration/Mining Licenses dated 8 May 2012, **R-040**.

the Rwanda Natural Resource Authority/Geology and Mines Department.<sup>12</sup> However, this report was not exhibited by Respondent, not attached to Mr. Imena's witness statement, and not produced in discovery. The Tribunal should infer from Respondent's failure to produce or exhibit this report that it contains information contrary to Respondent's case-in-chief.

20. An adverse inference is further supported, and consistent with the evidence, because Mr. Imena failed to adequately report on the reserves and sampling as identified in the report, rendering the report materially misleading. The 2010 Application states that NRD collected 130 samples from just Rutsiro,<sup>13</sup> but Mr. Imena reported that NRD collected only 115 samples from three of the concessions.<sup>14</sup> The 2010 Application further provided that "detailed results are available upon request"<sup>15</sup> but neither Mr. Imena nor anyone at MINIRENA ever requested them.<sup>16</sup> Mr. Imena's 2012 Report was therefore wrong and misleading. The 2010 Application stated that NRD conducted more sampling than was indicated in the May 2012 Report and the results of those tests were available, but Respondent opted not to obtain them. Mr. Imena's decision to omit this information meant that his superiors received a skewed image of the work done by NRD. This skewed and unfavorable image carried forward as the report remained in NRD's file.

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<sup>12</sup> E. Imena, Evaluation of the Application for the Renewal of NRD's Exploration/Mining Licenses dated 8 May 2012, **R-040**; Hearing Tr. Day 6, p. 112:8-23.

<sup>13</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, **C-035**, § 5.2.

<sup>14</sup> E. Imena, Evaluation of the Application for the Renewal of NRD's Exploration/Mining Licenses dated 8 May 2012, **R-040**; Hearing Tr. Day 7, p. 6:25-7:1-5.

<sup>15</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, **C-035**, § 5.2.

<sup>16</sup> Hearing Tr. Day 7, p. 10:24-11:13. The offer to obtain these "detailed results" was made by Starck and these samples were sent back to Europe for testing. *Id.* at Day 3, p. 196:7-11. Respondent's failure to obtain them when offered is the only reason that they were not available for evidence here. Mr. Marshall has no access to Starck's documents.

21. In February 2012, Respondent further extended NRD’s licenses and states that “[i]t has not been possible to conclude the contract in the above time of extension”<sup>17</sup> and, consistent with the purpose of the letter – to inform NRD that it would conclude negotiations – raised no objects to the sufficiency of the 2010 Application. The stated goal of the February 2012 letter is to “conclude a good contract for this partnership.”<sup>18</sup> Although the February 2012 letter does not expressly say so, Respondent was inviting NRD to conclude contracts for Rutsiro and Nemba as soon as possible.<sup>19</sup>
22. The February 2012 letter confirms that Respondent was willing to “conclude” contracts for the Rutsiro and Nemba Concession despite any alleged infirmities in the 2010 Application such as the failure to specify the reserves at every site or the failure to provide an environmental impact assessment.<sup>20</sup> Respondent waived the very provisions it now tries to rely upon – that NRD allegedly failed to meet the terms of the Contract. Respondent never claimed to terminate the Contract pursuant to Article 5, which would have applied had NRD actually failed to honor the requirements Respondent now claims. Similarly, Respondent did not claim the license expired on its own term and NRD must vacate the Concessions. To the contrary, Respondent determined it would “conclude” a contract with NRD for continued operation of the Concessions as soon as possible.
23. Respondent sent a similar letter in September 2012 stating that due to the ongoing reorganization of 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

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<sup>17</sup> Letter from S. Kamanzi to Managing Director of NRD dated 25 February 2012, **C-034**.

<sup>18</sup> *Id.*

<sup>19</sup> Hearing Tr. Day 7, p. 64:16-23.

<sup>20</sup> *Id.* p. 59:2-14.

work to be completed.”<sup>21</sup> Again, the Minister raised no objections to the sufficiency of the 2010 Application confirming that any alleged impediments to the negotiation and conclusion of a long term license were not valid. The letter extended licenses for all five concessions, not just Rutsiro and Nemba.<sup>22</sup>

24. It was clear again, in January 2013 that, on the basis of the 2010 Application, Respondent was prepared to negotiate licenses. On January 21, 2013, Minister Kamanzi suggested that the RDB should continue negotiations with NRD in order to “conclude negotiations as soon as possible.”<sup>23</sup> According to this letter, the RDB was to begin with negotiations for Nemba, Giciye, and Mara because of alleged environmental issues at Rutsiro and Sebeya.<sup>24</sup> This confirms that Respondent was willing to negotiate with NRD for contracts for the continued operation of the Concessions based solely on the 2010 Application, because no other application had been submitted at this time.<sup>25</sup>

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<sup>21</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-045**.

<sup>22</sup> Hearing Tr. Day 7, p. 67:3-68:5

<sup>23</sup> Letter from S. Kamanzi to Acting CEO of RDB dated 21 January 2013, **C-160**.

<sup>24</sup> *Id.*; accord Hearing Tr. Day 7, p. 81:23-82:2. Although there is evidence in the record of some environmental damage at Sebeya, the extent of which and the responsible party remains in dispute, there is no evidence in the record of any environmental damage in Rutsiro and it is not now known what this alleged damage was. There were broad allegations of damage to the Western Concessions, as a group, but if that was the concern, then Respondent would have proceeded with negotiations only for Nemba. *See e.g.* Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, **C-047**; Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

<sup>25</sup> The Respondent relies upon the testimony of Anthony Ehlers, the former Managing Director of NRD to argue that the 2010 Application was in some way deficient. That reliance is misplaced. After being justifiably fired from his position as Managing Director, Mr. Ehlers retained his company laptop, which had confidential company information, and used that information to submit a competing application for the Nemba concession. Hearing Tr. Day 5, p. 154:8-11, Day 6, p. 11:9-19. Mr. Ehlers’ backwards reasoning for misappropriating trade secrets was that NRD owed him money, which has never been documented in any way, and therefore his misconduct was justified. *Id.* at p. 12:15-13:8. Putting this flawed logic aside, the sole basis for Mr. Ehlers’ application was NRD’s 2010 Application. Contradicting himself beyond any credibility, Mr. Ehlers first represented that Dr. Biryabarema informed him that the 2010 Application was deficient and he, in turn, shared that information with Starck. *Id.* at p. 16:5-8. There is no documentation that this communication ever took place, despite the fact that some of the communications occurred in writing. *Id.* at p. 16:9-17. Then Mr. Ehlers testified, even though he merely copied the NRD Application and had no new information to fixing any “deficiencies”, he expected he would receive a license for Nemba as a result of his competing application. *Id.* at p. 18:10-19:21. Either Mr. Ehlers fabricated the story about Dr. Biryabarema informing him of deficiencies in the 2010 Application or, like, Claimants, Mr. Ehlers understood that there were no material deficiencies that would prevent Respondent from issuing a license for the Nemba Concession. Either way, what is clear is that Mr. Ehlers, the principal author of the 2010 Application

25. Respondent's contemporaneous actions and its current legal position simply do not make sense. Even assuming that Respondent internally believed it made NRD aware that it was only willing to move forward with two Concessions, by continuing to recognize NRD's right to operate all five Concessions, necessarily led Claimants to believe that Respondent intended to negotiate the three other contracts as well. It was manifestly unfair for Respondent to lead NRD on with the prospect of obtaining licenses for all five Concession if, as it now wants the Tribunal to believe, it was willing to grant only two licenses.<sup>26</sup> Respondent failed to treat Claimants' investment with clarity and left Claimants continuing to invest in and manage all five Concessions with the understandable expectation that license negotiations would continue for all five.<sup>27</sup>

**A. The 2010 Application was an application for long term licenses**

26. The evidence, and inferences to be drawn therefrom, confirm that the 2010 Application was an application for a long term license, not merely an extension of the exploration licenses.

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believed that it was sufficient to earn the award of a license, otherwise he would not have plagiarized it with the expectation of obtaining that license for his competing company.

<sup>26</sup> See e.g. *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 I.L.M. 967, at ¶ 93, **CL-028** (defining the MST-FET standard to include "a complete lack of transparency and candour in an administrative process").

<sup>27</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76, **CL-038** (transparency requires that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party... become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 178, **CL-036**; *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 523, **CL-029**; C. Dugan, et al., *Investor-State Arbitration* (2008), p. 519, **CL-012**.

27. Respondent conducted analyses of Claimants' 2010 Application on August 12, 2014 and in March 2015.<sup>28</sup> Section 4 of both of these analyses are titled "Application for Long Term License" and go on to describe the 2010 Application.
28. The August 12, 2014 report is unsigned but it was authored by someone within the Ministry of Natural Resources or the RNRA who was reviewing NRD.<sup>29</sup> The report's author described the 2010 Application as an application for a long term license. Despite the plain language of the report, Mr. Imena would not even agree that such language was used in this document.<sup>30</sup> Displaying the same unreasonable and overly combative approach he inexplicably took with Claimants throughout their efforts to obtain Concession licenses, Mr. Imena refused to concede that the report referred to the 2010 Application as an application for a long-term licenses. It does. Undeniably, yet, Mr. Imena denies it.<sup>31</sup> This patently false testimony raises a larger question concerning Mr. Imena's agenda and credibility across all his testimony.
29. The March 2015 report is similarly unsigned but written by Mr. Biryabarema.<sup>32</sup> Mr. Biryabarema himself confirmed that he wrote the information set forth in the March 2015 report and it was not written by someone else.<sup>33</sup> Accordingly, he wrote and approved of, contemporaneously, the language describing the 2010 Application as an application for a long term license.<sup>34</sup> His statements to the contrary made for the purposes of the

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<sup>28</sup> Explanatory Note on NRD, **R-017**; NRD, Assessment of its Performance dated 12 August 2014, **R-118**. Critically, these analyses make no mention the January 2013 Application, discussed in more detail below, which expressly used the term "Long Term License."

<sup>29</sup> Hearing Tr. Day 6, p. 147:9-11.

<sup>30</sup> Hearing Tr. Day 6, p. 151:14-22; 152:15-19.

<sup>31</sup> Mr. Imena would, however, agree that there is no mention of the 2013 Application, which Respondent accepts was an application for a long term license. Hearing Tr. Day 6 at p. 152:2-14.

<sup>32</sup> Hearing Tr. Day 7, p. 157:10-16.

<sup>33</sup> *Id.* at p. 159:2-7.

<sup>34</sup> See Explanatory Note on NRD, **R-017**, § 4.

arbitration more than six-years later are unavailing. It is clear that, if Dr. Biryabarema, the Deputy Director General of RNRA-GMD, contemporaneously believed that the 2010 Application was an application for a long term license, contrary to the position that Respondent now takes in this arbitration. Further confirming this point is that the March 2015 Report makes no mention of the 2013 Application, which Respondent concedes was an application for a long term license.<sup>35</sup> If, as Respondent argues in the pleadings, the 2013 Application was truly NRD's first application for a long term license, the 2013 Application certainly would have at least received an honorable mention in the report. Instead, there is mention only of the 2010 Application because this was an application for a long term license.

**1. Respondent's interpretation of Article 4 of the Contract is untenable and contrary to the BIT**

30. The parties dispute how Article 4 of the Contract is to be interpreted. Article 4 provides, in full:

**Article 4: The rights**

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

31. Claimants position is that Article 4 means that it was NRD, not the government, who had to be satisfied with the feasibility study such that the results justified further investment by the investor. Mr. Buyskes, the general manager of Rutongo Mines, one of Tinco's investment vehicles, testified that "if the investor finds that he has got enough information, he is the man with the money, or he is the investor that is going to put money into this business, not the government. If he, as the investor, has sufficient

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<sup>35</sup> *E.g.*, Rejoinder on Merits and Jurisdiction, ¶ 182.

confidence with the information that he's garnered, to make that long-term commitment, surely the onus is on the investor. That's how it works in all mining companies."<sup>36</sup> He makes it clear that is not for the government to be satisfied, but rather the investor, as the one with the monetary interest in building out the mines. This is consistent with Mr. Marshall understanding of Article 4 as told to him by Respondent. He testified that Respondent told him that "once you [investor] approve it, once you decide you want to go ahead, you have the right to do so. They wanted to make sure that the company did the internal research to be able to make sure they wanted to put more money into the project. This was not intended to give the Government of Rwanda a way out after receiving so many tens of millions of dollars."<sup>37</sup>

32. By contrast, Respondent's interpretation is that the government had unfettered discretion to deny a license on the basis of Article 4. Mr. Mugisha testified that "whether there was a positive evaluation of the feasibility study was in the entire discretion of the minister" and that "no valid claim could be brought for breach of contract if the minister said, 'I'm not satisfied[.]'"<sup>38</sup>
33. Mr. Mugisha's interpretation of the contract cannot be the correct one for the reason identified by Mr. Marshall. If Mr. Mugisha were right, then an investor could come to Rwanda, spend millions of dollars (like Claimants did), conduct a feasibility study confirming for the investor that the money they had already spent was worthwhile and that it was worth continuing, only for the Minister to unilaterally decide the opposite. If this were truly the investment structure in Rwanda, Rwanda would be unable to attract a

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<sup>36</sup> Hearing Tr. Day 4, p. 137:9-16.

<sup>37</sup> *Id.* at Day 2, p. 42:3-9.

<sup>38</sup> Hearing Tr. Day 8, p. 25:13-21.

single dollar of foreign investment. That is simply too harsh a climate for any investor because it means that Respondent can, in effect, revoke an investment on a whim.

34. Such an interpretation is also contrary to the BIT. Under the BIT, Respondent is required to treat all US investors and their investments fairly and equally to other similarly situated investors. Unfettered discretion in the contract permits Respondent to treat US-based investors discriminatorily, without reason. Such an interpretation of the contract would not only prohibit NRD from pursuing a claim in Rwanda for breach of contract, but it would prohibit investors from bringing a claim under the BIT. This cannot be the correct interpretation of the Contract.
35. Moreover, Respondent has put forward the broad conclusion NRD failed to satisfy the terms of the Contract, thereby justifying Respondent's refusal to grant a further license, while others, like Tinco, met the contract requirements. However, Respondent wants, and in facts, needs, the Tribunal to accept that conclusion without any supporting evidence because Respondent has not provided any. It is not credible that Respondent's witnesses, including the former Minister of State in Charge of Mining cannot recall the names of other similarly situated applicants for long term licenses in 2010 except for Tinco and Musha.<sup>39</sup> However, Respondent has only provided some, not all, of the applications material from Tinco and none for Musha, or any other applicant despite the fact that these applicants existed and the application materials are, between the parties to this case, uniquely within the possession, custody, and control of Respondent. Respondent has cherry picked what it believes to be the most favorable documents (i.e. a portion of Tinco's application materials) while excluding all others. The Tribunal should not accept

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<sup>39</sup> Hearing Tr. Day 6, 98:17-25; 130:18-25

the conclusion that other similarly situated applicants did satisfy the terms of their contracts (accepting Respondent's analysis for the sake of argument) without assessing those applicants' submissions.

**2. Respondent has refused to produce numerous material documents underlying its purported justifications for the differential treatment afforded Claimants, precluding any meaningful review of those decisions in brazen disregard of the Treaty obligations**

36. Respondent, both implicitly and explicitly, relies on documents that it has not put forward in evidence but which it necessarily possesses. For example, as described in Section IV.C, below,, Mr. Imena testified that the Ministry determined Tinco passed an environmental audit and therefore did not have to comply with the requirement to submit an environmental assessment with its application. However, the results of that audit are not in evidence and were withheld in discovery.
37. As another example, and as described in in Section I.C, below, Respondent faults NRD's November 2010 Application for failing to adequately identify reserves as justifying the decision to demand a re-application in 2014 and ultimately a denial of a long term license. Respondent withheld from discovery and failed to produce in evidence the records of the favored applicants' identification of reserves and whether Respondent actually received different or more thorough analyses from those applicants who received long term licenses. Respondent would have the Tribunal believe that all other applicants from 2010 sufficiently identified reserves using methods or data that exceeded the reserves analyses in NRD's Application. But Respondent insists that the Tribunal blindly accept its professed comparative analysis and conclusion without being able to review for itself and judge whether Respondent, as required by the Treaty, applied a consistent and fair standard.

38. For instance, Mr. Imena testified:

Q: And these reports, you say followed your expectations [regarding reserve estimates]; correct?

A: They followed my expectations.<sup>40</sup>

Mr. Imena's *ipse dixit* is not a sufficient basis for this Tribunal to conclude that all successful applicants satisfied the requirements for identifying reserves, but NRD did not. Instead, Respondent has forced the Tribunal to play the limited role of rubber-stamping a hidden process and procedure, blessing it as fair and non-discriminatory sight unseen. This is no accident on Respondent's part, or failure to gather sufficient available evidence on Claimants' part. Claimant has no access to comparative documents allegedly reviewed by Respondent other than those selectively produced by Respondent in discovery while refusing to produce the rest. Meanwhile, Mr. Imena admitted that he has "many reports available to" him concerning reserve estimates from applicants.<sup>41</sup> He even stated that "if you are willing to get those reports, they can be shared with you."<sup>42</sup> Of course, Claimants requested just that, but Respondent refused to share those reports during discovery on the basis that that were not relevant.<sup>43</sup>

39. Claimants' case arises out of the fact that Respondent treated Claimants different than other similarly situated investors. Therefore, the sufficiency of those investors' application, including the identification of reserves in their applications – an element Respondent alleges it judged inadequate by comparison to other applications, is critical to the case. Respondent's pretense that the very documents in dispute are not relevant to the

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<sup>40</sup> Hearing Tr. Day 7, p. 16:17-19.

<sup>41</sup> Hearing on Jurisdiction and Merits Tr. Day 7, p. 16:16.

<sup>42</sup> *Id.* at p. 16:13-14.

<sup>43</sup> Claimants' requests for documents, Respondent's Objections, and Claimants' replies (6 December 2019),

dispute simply is not put forward in good faith. Mr. Imena confirmed that Respondent had the documents readily available the entire time and withheld them purposefully, “offering” to produce them for the first time during his testimony at the hearings. The Tribunal should not permit Respondent to subvert its role and the application of the Treaty obligations in this way. Instead, the Tribunal should hold Respondent to the choice it made and tactics it played by drawing the necessary adverse inference against Respondent’s professed negative comparisons of NRD’s Application where Respondent refused to produce the application documents purported judged superior.

40. Respondent heavily criticizes Claimants for failing to adequately industrialize NRD’s concessions. The Tribunal received a snapshot, through Mr. Gatare, that Rwanda’s mining industry remains largely un-industrialized.<sup>44</sup> However, absent from the record is any concrete evidence of the level of industrialization in the mining industry in Rwanda and, in particular, the level of industrialization of NRD’s peer companies. That information is squarely with Respondent’s control but they chose not to include it in the record. The necessary inference, of course, is that no other company was industrialized as NRD, which not only had built roads and bridges, had jackhammers and compressors, but also built the only functioning mineral processing plant in Rwanda, and Respondent’s criticism of NRD’s level of industrialization is entirely unfounded.
41. Moreover, Respondent could have, but refused, to produce mineral production amounts from the various mines and mining companies has a barometer for success or a barometer for industrialization and/or reserves. Mr. Gatare confirmed that Respondent does track production on a mine-by-mine basis.<sup>45</sup> This information, which Respondent vehemently

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<sup>44</sup> Gatare II WS, ¶ 20.

<sup>45</sup> Hearing Tr. Day 8, p. 23:2-8, p. 24:23-25:2.

refused to produce, but which would allegedly support its position, must not actually support their position. Either it shows that production was similar to NRD and Respondent's criticism are unfounded or it shows production levels that do not match exports and therefore confirm Claimants' claims that there is widespread smuggling from the DRC. More likely, it would show both. Respondent does not want this information made public so has taken the tactic of setting for the conclusion and asking the Tribunal to accept it as fact, without support. This should not be permitted, especially when the information is squarely within Respondent's control and Claimants have no access to the same information.

**B. NRD's Negotiations with Dominique Bidega, the Director of the Regulation and Supervision Unit of OGMR, further confirmed NRD's understanding that it would receive a long term license for the Concessions**

42. The negotiations between NRD and Respondent, through Mr. Bidega, map well onto the timeline of letters sent by Respondent in 2011 and 2012.
43. Minister Kamanzi sent the first extension letter in August 2011<sup>46</sup> and the second in February 2012.<sup>47</sup> In the interim, Mr. Marshall, on behalf of NRD, negotiated directly with Mr. Bidega,<sup>48</sup> the sometimes Acting director of OGMR/GMD and the head of the Licensing and Supervision Department within OGMR/GMD.<sup>49</sup> The negotiations involved back and forth communications and negotiations over the language of a long term license covering NRD's five concessions.<sup>50</sup> Both Mr. Marshall and Mr. Bidega provided edits and revisions.<sup>51</sup>

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<sup>46</sup> Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>47</sup> Letter from S. Kamanzi to Managing Director of NRD dated 25 February 2012, **C-034**.

<sup>48</sup> Email correspondence between R. Marshall and D. Bidega dated September– December 2011, **C-207**.

<sup>49</sup> Email chain between A. Ehlers, R. Marshall, P. Nkanika, et al. dated 14-16 January 2011, **C-156**.

<sup>50</sup> Email correspondence between R. Marshall and D. Bidega dated September– December 2011, **C-207**.

<sup>51</sup> *Id.*

44. After the negotiations with Mr. Bidega concluded, Mr. Marshall followed up with then-Minister Kamanzi about the status of those negotiations. On January 30, 2012, he wrote about various topics concerning the licenses and negotiations and also “request[ed] an explanation of what has changed since the draft extension contract for NRD was negotiated and approved by the RNRA Committee and the RDB.”<sup>52</sup> The reference to the RNRA Committee is a direct reference to Mr. Bidega and his department within the RNRA. NRD received no response to this inquiry. A silence that is wholly inconsistent with Respondent’s contention now that it was not aware of Claimants’ negotiations with Mr. Bidega. If the Ministry truly were not were of the negotiations when Mr. Marshall put the then-Minister on notice that a long term license had already been negotiated the only natural response would have been to respond by demanding to know those details and receive a copy of the license. Casual silence would be inconceivable. That silence was entirely consistent with the Ministry’s awareness of the negotiations as they occurred. Minister Kamanzi did not need to ask Mr. Marshall to explain what he was talking about, because he already knew. Minister Kamanzi’s silence reflects his inability to discuss the negotiated license, given what we now know was a reconsideration of its position and ultimate attempt to walk away from its promises.<sup>53</sup>

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<sup>52</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2012, **C-039**.

<sup>53</sup> Respondent’s counsel intimated that if Mr. Marshall did not send a letter to others at the Ministry of Natural Resources or the RNRA confirming his negotiations with Mr. Bidega, it must mean those negotiations did not actually take place or were a sham. Hearing on Jurisdiction and Merits Tr. Day 2, p. 201:7-8 (“If you had understood that, we would have seen that all over the correspondence, which we don’t”); *id.* Day 2 p. 225:19-21 (“But if you had really been told that [Minister Kamanzi and Dr. Biryabarema had approved a long term license and submitted it to the cabinet] you would have said so loud and clear, because you don’t hold back in your correspondence. Correct?”). Mr. Hill was either intentionally misleading Mr. Marshall in an effort to get him to agree, incorrectly, that no such correspondence was sent, or counsel was unaware of the letter at C-039. Mr. Marshall plainly did raise the issue and the letter Mr. Hill worried did not exist clearly does. Mr. Marshall again raised the issue by including an updated version of such 2011 draft long term agreement in his letter to Minister Kamanzi. Letter from R. Marshall to Honorable Minister of Natural Resources dated 30 January 2013 at **C-054**. (“We have further enclosed a draft long-term concession agreement in conformity with the template which your Ministry provided to us.”) Mr. Marshall also raised the issue in a June 7, 2013 to the RDB. Letter from R. Marshall

45. In fact, Minister Kamanzi's letter, dated February 20, 2012, implicitly confirmed the Ministry's awareness of the negotiations between Mr. Bidega and Mr. Marshall. That letter stated:

It has not been possible to conclude the contract in the above time of extension. 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 license for three months effective from 02/02/2012.<sup>54</sup>

46. Minister Kamanzi's use of the words "conclude" and "finalize" in the quoted text only makes sense if the Ministry were aware of the negotiations that began between Mr. Bidega and Mr. Marshall. Respondent has never identified any other communication between the parties that otherwise might have been the basis for those references. If, as Respondent would have the Tribunal believe, no negotiations had yet begun, Minister Kamanzi would have referred to the additional time being necessary to "begin" negotiations, or simply "to negotiate." The only negotiations that had taken place to date were those with Mr. Bidega and his team, which the Minister was aware of at the time and casually referred to, but Respondent now denies, because it cannot figure out how to explain negotiating a long term license for five concessions while maintaining its post-hoc litigation position – that it deemed the November 2010 Application is insufficient such that NRD was entitled to nothing. If the 2010 Application was rejected, there would not have been an negotiations of a license.

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to Honorable Minister of Natural Resources dated 7 June 2013, **C-059**, p. 3 ("Please note that in 2011, NRD began negotiating with RNRA using RNRA's standard long-term agreement...").

<sup>54</sup> Letter from S. Kamanzi to Managing Director of NRD dated 25 February 2012, **C-034**.

47. Until his testimony on June 25, Mr. Bidega's status as an employee of OGMR in the second half of 2011 had never been in question.<sup>55</sup> In fact, Respondent had never once suggested that he was not employed by the government. Besides his truly surprise testimony, there is no evidence to support the fact that he was not employed by Rwanda for all of 2011.
48. Prior to the hearings, Respondent challenged only the scope of Mr. Bidega's authority as an employee, not whether he was in fact an employee. Dr. Michael, who was Mr. Bidega's superior,<sup>56</sup> testified that "it was not within Mr. Bidega's remit to conduct negotiations, or to prepare draft contracts" and that Mr. Bidega was a "mid-ranking official at OGMR," meaning that he **was** an employee but suggesting that he was not responsible for considering negotiations such as the ones Claimants claim took place.<sup>57</sup>
49. As Mr. Bidega's superior, Dr. Michael was in the best position, on behalf of Respondent, to argue that when he sent the emails exhibited at C-207, Mr. Bidega was not an employee of OGMR. He did not make this argument because it was not true. Mr. Imena testified that that Mr. Bidega "retired at the end of 2011."<sup>58</sup> Given this history, it would be improper to allow Respondent to rely on Mr. Bidega's obviously inaccurate and presumably fearful testimony to ask this Tribunal to make a finding Respondent knows to be false.
50. Mr. Bidega's role, contrary to Dr. Michael's testimony, is confirmed by his own statements given in interviews that helped comprise a report titled "The EU Raw Materials Policy and Mining in Rwanda" (the "EU Policy") which was published in

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<sup>55</sup> See Hearing Tr. Day 5, p. 30.

<sup>56</sup> Supplemental Witness Statement of Dr. Michael Biryabarema ("Biryabarema WS II"), ¶ 9.4.

<sup>57</sup> *Id.* at ¶¶ 10.4 and 10.6.

<sup>58</sup> Hearing Tr. Day 6, p. 81:14-16.

February 2012 based on interviews conducted in November 2011.<sup>59</sup> Mr. Bidega is identified as the “head of regulation and inspection at the Geology and Mines Department.”<sup>60</sup> Furthermore, Mr. Bidega informed the author that there are only two people qualified to negotiate contracts: the Director of GMD and himself.<sup>61</sup>

51. As further evidence of the fact that Mr. Bidega was also acting within the scope of his employment when negotiating the terms of a license with NRD is that he quite transparently copied Clement Habiyambere, a lawyer working for RNRA who previously worked for OGMR on communications with Mr. Marshall negotiating the license.<sup>62</sup> Mr. Habiyambere did not intervene to suggest that the email in which Mr. Bidega provided edits to a draft contract was improper or inappropriate in any way.<sup>63</sup> Mr. Imena testified that he does not remember whether anyone reached out to Mr. Bidega to explain that Mr. Bidega was acting outside the scope of his employment or to NRD to explain that NRD should disregard the email.<sup>64</sup> The reason that Mr. Imena does not remember it is because there is no evidence to suggest it happened. Copying a lawyer for RNRA is no way for a low level employee acting beyond his authority to carry out clandestine discussions. If discussions revealed to the government’s lawyer were, in fact, unlawful and unauthorized, sitting passively and silently by with no corrective action of any kind is not a conceivable government response.

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<sup>59</sup> Jasper can Teffelen, *The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice* dated February 2012, **R-097**, p. 5.

<sup>60</sup> *Id.* p. 20.

<sup>61</sup> *Id.* p. 23.

<sup>62</sup> Hearing Tr. Day 6, p. 135:22-136:7. At the time of this email, December 13, 2011, OGMR was being reorganized as the Geology and Mines Department (“GMD”) of the RNRA, which continued to fall under the umbrella of the Ministry of Natural Resources.

<sup>63</sup> Email correspondence between R. Marshall and D. Bidega dated September– December 2011, **C-207**; Hearing Tr. Day 6, p. 135:1-4.

<sup>64</sup> Hearing Tr. Day 6, p. 137:25-138:15.

52. Furthermore, the documents submitted by the parties in briefing immediately following Mr. Bidega's testimony unequivocally confirms that he was an employee of OGMR at the time he sent the emails in C-207. Claimants submitted C-212, which is a letter from the Director General of RNRA, Dr. Emmanuel Nkurinziza to Mr. Bidega dated January 12, 2012 accepting Mr. Bidega's request for retirement, which was requested by letter dated December 12, 2011.<sup>65</sup> The letter confirms that Mr. Bidega's retirement will be effective as of January 1, 2012.<sup>66</sup> Therefore, Respondent recognized that Mr. Bidega was an RNRA employee throughout the course of negotiations with Claimants, and until December 31, 2011.
53. By way of rebuttal evidence, Respondent introduced the first page of Mr. Bidega's resignation letter.<sup>67</sup> Respondent's letter seeking to introduce the first page of his resignation letter suggests that Respondent located this letter on June 25, 2021 *before* Mr. Bidega was scheduled to testify. This is very concerning. Respondent had no reason to search for this document until *after* Claimants' submitted a pleading seeking to introduce **C-212**. Respondent could not have searched for the letter at that time intending to use the resignation letter during the cross examination of Mr. Bidega, because it was not

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<sup>65</sup> Letter from E. Nkurinziza to D. Bidega dated 12 January 2012, **C-212**.

<sup>66</sup> *Id.*

<sup>67</sup> Letter from D. Bidega to Director General of RNRA dated 12 December 2011, **R-247**. Respondent's letter seeking to introduce the first page of his resignation letter suggests that Respondent located this letter on June 25, 2021 *before* Mr. Bidega was scheduled to testify. This does not make sense. Respondent had no reason to search for this document (assuming that it should not have otherwise been produced in discovery) until *after* Claimants' submitted a pleading seeking to introduce **C-212**. Therefore, Respondent's pleading indicates that Respondent intended to use this letter during the cross examination of Mr. Bidega even though it was not previously an exhibit, let alone produced in discovery. Respondent's pleading further states that "despite extensive searches of its archives, the Respondent has only been able to locate the first page of the letter." It is not clear what "extensive searches" Respondent was doing, or why it was doing any searches, the morning of Mr. Bidega's testimony unless it intended to try to impeach Mr. Bidega with evidence not in the record. Finally, it is not credible that only the first page of this document is available. The Tribunal should infer from Respondent's failure to produce the entire letter that the additional pages, however many there are, would be adverse to its position on the matter of Mr. Bidega's employment status and job responsibilities.

previously submitted as an exhibit or even produced in discovery. Respondent's pleading further states that "despite extensive searches of its archives, the Respondent has only been able to locate the first page of the letter." It is not clear what "extensive searches" Respondent was doing, or why it was doing any searches, the morning of Mr. Bidega's testimony. The very fact that someone within Rwanda's government undertook a comprehensive search for Mr. Bidega's resignation letter *prior to* Mr. Bidega's otherwise extremely surprising testimony begs the very important question – why? What did that government employee know of Mr. Bidega's intended testimony in advance and how did he or she know it? Finally, it is not credible that only the first page of this document is available. The Tribunal should infer from Respondent's failure to produce the entire letter that the additional pages, however many there are, would be adverse to its position on the matter of Mr. Bidega's employment status and job responsibilities during his negotiations of a long term license with Claimants.

54. Rather than supporting Mr. Bidega's (incorrect) testimony that he was not an employee of OGMR in the second half of 2011, Mr. Bidega's contemporaneous resignation letter confirms his role at the time. The first page of the letter notes the numerous roles he has had over the years and concludes that, despite any change in title, "my job has remained the same."<sup>68</sup> The job that he is referring to is the Director of the Regulation and Supervision Unit where he reviewed the sufficiency and adequacy of the mining operations for all Mining Concession Holders, reviewed applications for long term licenses, and negotiated the terms of those licenses.<sup>69</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> Witness Statement of Dominique Bidega ("Bidega WS"), ¶¶ 2-4.

55. If Respondent truly believed that Mr. Bidega was acting outside of the scope of his employment, there would be evidence to this effect. Instead, it is a made-for-litigation position to avoid the reality that Mr. Bidega was authorized to negotiate a long term license with Claimants for all five Concessions, those negotiations were both known and authorized within the RNRA and the Ministry when they occurred, and Claimants reasonably relied on those negotiations with Mr. Bidega to justify their legitimate expectations of a long term license.

**C. Mr. Imena’s May 2012 analysis of NRD’s 2010 Application was intentionally vague and misleading**

56. Mr. Imena testified that he failed to adequately report on NRD’s 2010 Application and those failures carried over to his witness statements, rendering them entirely misleading.

57. Mr. Imena’s 2012 review of the 2010 Application, the authenticity of which the Claimants’ challenge, identifies a proposed budget of approximately \$39,000,000 and reported expenditures of \$12,000,000, roughly 30% of the budget.<sup>70</sup> He attributes this to a “lack of knowledge of the nature of the mining industry in Rwanda” and a “seriously flawed and inappropriate” plan.<sup>71</sup>

58. What is actually “seriously flawed and inappropriate” is the review conducted of the 2010 Application. NRD received licenses to five concession areas but the initial proposed budget of \$39 million envisioned that NRD would receive seven concession areas.<sup>72</sup> Rather than accounting for this discrepancy or reviewing the initial proposed budget for further clarity, Mr. Imena artificially decreased the ratio of investment made to

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<sup>70</sup> Feasibility Study for 30 Year Mining Licence in Relation to Rutongo Mines dated 1 May 2012, **R-042**, p. 2-3.

<sup>71</sup> *Id.* at p. 3.

<sup>72</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, **C-035**, p. 8.

investment budgeted, thereby misleading his superiors and setting NRD up failure.<sup>73</sup> At the hearings, Mr. Imena admitted that, upon preparing his report for others in the government to assess NRD, understanding “information would have been helpful.”<sup>74</sup>

59. Moreover, Mr. Imena could not recall any policy about a minimum amount of investment in 2006, the time the Contract was entered into.<sup>75</sup> Mr. Imena evaded the question as to whether he actually looked at any such policy or NRD’s original investment plan when analyzing the 2010 Application.<sup>76</sup> The necessary implication is that 1) there is no such policy,<sup>77</sup> and 2) he never reviewed NRD’s original investment plan. Respondent therefore cannot argue that NRD’s actual investment violated any policy, or even NRD’s own plan.
60. Furthermore, the alleged failure to comply with one’s own budget is not a violation of the Contract such that there could have been a basis to find that NRD did not perform its obligations under the Contract. Nevertheless, Respondent’s position is precisely that: NRD did not invest the full \$39 million so it failed to satisfy its requirement under the Contract. But the Contract requires only that NRD submit an investment plan.<sup>78</sup> It does not specify any amount or detail how the investment should be spent or when. In fact, the investment plan is not incorporated into the Contract and there is no basis for finding that NRD’s purported failure to meet its investment interests equates to a failure to satisfy the terms of the Contract.<sup>79</sup>

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<sup>73</sup> Hearing Tr. Day 6, p. 109:16-110:1.

<sup>74</sup> Hearing Tr. Day 6, p. 9-18.

<sup>75</sup> Hearing Tr. Day 6, p. 164:17-22.

<sup>76</sup> Hearing Tr. Day 6, p. 165-166.

<sup>77</sup> No such policy has been exhibited to the pleadings and none was produced in discovery.

<sup>78</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, C-017, Art. 2.2.

<sup>79</sup> Taken to its logical extreme, Respondent’s argument would mean that even if NRD had invested anything less than the proposed \$39,000,000, NRD would not be entitled to a long term license. This is an absurd outcome.

**D. NRD proceeded towards industrialization upon being granted the Contract**

61. Respondent's position is that NRD failed to "proceed immediately to the industrial exploitation in all given sites" and therefore breached the Contract.<sup>80</sup> To understand what is meant by the term "industrial exploitation" or "industrial mining" it is first necessary to understand the opposite, artisanal mining. Artisanal mining is "a way of doing things: the kind of tools [the miners] use, the practices that they use to extract the minerals, which tend to be using very simple rudimentary tools."<sup>81</sup> This is in contrast to industrial mining, which is the use of mechanized equipment to either extract the minerals, process the minerals, or both. Mr. Gatere testified that "Industrialization cannot be achieved overnight. It has to have what begins and what comes sequentially after another."<sup>82</sup>
62. Mr. Rupiya confirmed that NRD, in 2008, had purchased machines, including a bulldozer, crane, and crushers and that such machines constituted industrialization.<sup>83</sup> The process towards industrialization continued in 2009 as well.<sup>84</sup> NRD also proceeded towards industrialization by building roads, bridges and other necessary infrastructure in order to support fully industrialized mining.<sup>85</sup> Properly built roads and bridges are necessary to support fully industrialized mining so that equipment can be transported in and minerals can be transported out of the concessions from processing plants, like the one NRD built in Rutsiro.
63. Despite there being no dispute that NRD did, in fact, build an industrial-scale mineral processing plant in Rutsiro, Respondent wastes pages of its Rejoinder explaining why the

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<sup>80</sup> *E.g.* Rejoinder on Jurisdiction and Merits, ¶ 133.

<sup>81</sup> Hearing Tr. Day 8, p. 19-24.

<sup>82</sup> *Id.* at Day 8, p. 6:3-6.

<sup>83</sup> *Id.* at Day 5, p. 45:21-46:5.

<sup>84</sup> *Id.* at Day 5, p. 49:12-15.

<sup>85</sup> Hearing Tr. Day 5, p. 47:25-48:6; **C-147**.

Rutsiro plant was not operational and therefore did not qualify as “industrialization.” Mr. Rupiya succinctly put this argument to bed during the hearing: “The plant was correctly built. It could operate...”<sup>86</sup> Not only could it operate, but it **did** operate from the time construction was complete in 2010. Miners would use the shaking tables, jigs, and crushers to help processing the minerals that they mined.<sup>87</sup> In addition, and critical to the Rutsiro’s plants future use, was that it could process any kind of ore, including cassiterite, wolframite, and tantalum, all of which were present in Rutsiro and at NRD’s other concessions.<sup>88</sup> Not only did NRD invest in correctly build, operable, and operating, process plant, it did so that NRD could process any mineral. Indeed, artisan miners were at all relevant times regularly using components of the plant (crushers, jigs, washing tables) to process the material they had, whether wolfram, cassiterite or tantalum ore.<sup>89</sup> This was an investment in NRD’s future. As production increased and as additional investments were made, on the backs of the expected long term licenses, NRD planned to operate the Rutsiro plant from start to finish with regularity. That this did not happen does not mean that NRD did not industrialize the Rutsiro and it is illogical to proceed on the basis that because it was not operating from start to finish that NRD did not proceed towards industrialization.

64. Mr. Imena suggested, for the first time, that New Bugurama built two plants, which were better than NRD’s plant.<sup>90</sup> There is no evidence from Respondent about New Bugarama’s plants, how they function, or whether they are in use. This testimony is entirely Mr.

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<sup>86</sup> Hearing Tr. Day 5, p. 54:10.

<sup>87</sup> *Id.* at Day 2, p. 89:15-18; Day 4, p. 113:2-12.

<sup>88</sup> *Id.* at Day 5, p. 54:12-15.

<sup>89</sup> *Id.* at Day 2, p. 89:15-18; Day 4, p. 113:2-12.

<sup>90</sup> Hearing Tr. Day 7, p. 16:5-7.

Imena's say-so and completely unsupported in the record. There are, however, some photos comparing the Rutsiro plant to the plant built and New Bugarama in NRD's updated feasibility study.<sup>91</sup> Photos of the plant can be seen on pages 44-45. By comparison, photos of New Bugarama's plant are included on page 44 and a plant at Gifurwe is shown at page 43. The comparison is stark. NRD's plant is clearly new, built with metal supports, large, and has a proper retaining wall. The other plants, by contrast, appear to be built with wooden stilts and appear to be in states of disrepair.

65. By all accounts, NRD did proceed immediately to industrialization. Even if NRD had not, it would be entirely unfair to hold NRD to this "industrialized" standard when, as of at least May 2020, the majority of Rwanda's mining industry remained artisanal. As Mr. Gatare explained in his witness statement, "the Rwandan mining industry remains largely artisanal"<sup>92</sup> and fails to identify any examples of industrialization in the country. Mr. Gatare actually makes the case for why artisanal, and not industrial, mining benefits Rwanda and support Respondent's claim of an increase in mineral exports.<sup>93</sup> Mr. Gatare goes a step further and actually dismisses the benefits of "industrial mines," such as the ones that NRD was purportedly required to build, because of the "substantial sunk cost[s]" associated with running such large mines.<sup>94</sup>

66. All the while, Mr. Gatare simultaneously criticizes NRD because he says that NRD "was never able to show to our satisfaction that it was a serious, professional mining investor who would be capable of carrying out the transformation required from artisanal mining

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<sup>91</sup> NRD Rwanda, Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014, **C-085**.

<sup>92</sup> Gatare II WS, ¶ 20.

<sup>93</sup> Gatare II WS, ¶ 19.5, 20

<sup>94</sup> Gatare II, ¶ 20.

to modern industrialised mining.”<sup>95</sup> Firstly, that cannot be true because NRD built the only functioning mineral processing plant in Rwanda. Secondly, by making this assessment of NRD, Mr. Gatare is impermissibly holding NRD to a standard higher than he is the rest of the mining companies in Rwanda.

67. In fact, it is because the number of small-scale artisanal mining companies outnumber the large scale companies (industrialized or not) that Rwanda has been able to “realise quick production increases over a short period of time” and “respond[] to global market changes very quickly.”<sup>96</sup> In short, the precise reason that Rwanda has allegedly made so much money on mineral exports in recent years (use of artisanal miners) is the same reason that NRD has been criticized by Mr. Gatare. This does not make sense except insofar as a post-hoc excuse to justify the unfair and egregious treatment that NRD suffered at the hands of Respondent.

## **II. The January 2013 Application was a formality, requested by Respondent**

68. On January 30, 2013, NRD wrote a letter to Minister Kamanzi with the subject line “Application for a Long-Term License.”<sup>97</sup> This letter attached an application for a long term a long term license (the “2013 Application”). The evidence supports the fact that Mr. Marshall submitted the 2013 Application at the request of Respondent, despite believing that the 2010 Application was an application for a long term license.
69. Just nine days before NRD submitted the 2013 Application, the then-Minister of Natural Resources sent a letter dated January 21, 2013 to the CEO of the RDB stating that negotiations could proceed for long term licenses for three of NRD’s five concessions.<sup>98</sup>

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<sup>95</sup> Gatare I WS, ¶ 26.

<sup>96</sup> Hearing Tr. Day 8, p. 6:22-23, 7:3-4.

<sup>97</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2013, **C-054**.

<sup>98</sup> Letter from S. Kamanzi to Acting CEO of RDB dated 21 January 2013, **C-160**.

The Minister hoped “to conclude these negotiations as soon as possible.”<sup>99</sup> The Minister asked the RDB to lead these negotiations.<sup>100</sup>

70. Then, nine days later, NRD submitted the 2013 Application.<sup>101</sup> Although Mr. Marshall did not recall being presented with the information in the January 21, 2013 letter contemporaneously, he testified that, as a matter of corporate policy, NRD would respond to requests from the government within seven days.<sup>102</sup> Accordingly the information in the January 21, 2013 letter must have been transmitted to NRD by January 23 such that NRD understood that Respondent requested that it submit the 2013 Application.
71. Counsel for Respondent attempted to argue, through questioning, that the cover letter to NRD’s January 2013 was not in fact a response to a solicitation from Respondent to submit an application that expressly used the words “Long Term Mining License.”<sup>103</sup> Counsel intimated that because it lacked language like “Further to your request, here in an application,” NRD must have sent the letter unsolicited and that there was no connection between the Minister Kamanzi telling the RDB to “conclude” negotiations with NRD and NRD’s submission of the 2013 Application.<sup>104</sup>
72. Mr. Hill’s question was without any merit or basis because NRD would not have submitted the 2013 Application with a specific request from the government to do so. Claimants understood that the 2010 Application was an application for a long term license.<sup>105</sup> As such, in their mind, there was no need to submit the 2013 Application because NRD had already submitted the same application more than two years earlier.

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<sup>99</sup> *Id.*

<sup>100</sup> Hearing Tr. Day 7, p. 87:19-20.

<sup>101</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2013, **C-054**.

<sup>102</sup> Hearing Tr. Day 4, p. 125:11-126:16.

<sup>103</sup> Hearing Tr. Day 3, p. 47:18-22.

<sup>104</sup> *Id.*

<sup>105</sup> Hearing Tr. Day 2, p. 52:712.

73. Nevertheless, NRD was happy to comply with the request from Respondent because it demonstrated that negotiations for a long term license were moving forward again.<sup>106</sup>

**III. The Benzinge “sideshow” – as Respondent’s counsel labels it - cannot be explained at the time**

74. In Respondent’s opening statement, Mr. Hill described the Ben Benzinge story line as a “sideshow or smokescreen issue[.]” He went on to devote nearly 20 minutes of his opening talking about Mr. Benzinge. This is because Mr. Benzinge’s devastating interference in the operations of NRD is not a “sideshow” that Respondent passively observed, nor a “smokescreen” clouding a reasonable explanation for Respondent’s conduct. Instead, the destructive role played by Mr. Benzinge was both furthered and exploited by Respondent, who, in the end, has been unable to give a coherent position concerning its actions in reaction to Mr. Benzinge’s arbitration award.

75. The lack of reason or consistency in Respondent’s position with respect to Benzinge was on full display during the hearings, as Respondent’s counsel was unable to explain why Respondent was purporting to rely on a document that called into question whether Spalena had an investment in NRD, but not actually arguing that the Spalena is not the lawful investor in NRD as the basis for challenging the Claimants’ standing.<sup>107</sup> Twice Respondent’s counsel was asked to harmonize Respondent’s positions and twice Respondent’s counsel struggled greatly and in the end failed.<sup>108</sup> The reason for the lack of coherence is that Respondent wants this Tribunal to believe that the arbitration award raised questions that it did not actually raise (as explained in more detail below) and that

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<sup>106</sup> Hearing Tr. Day 4, p. 126:2-3 (“We were glad to have the negotiation”).

<sup>107</sup> Hearing Tr. Day 3, pp. 141:16-143:13; Day 8, 122:5-127:2.

<sup>108</sup> *Id.*

Mr. Imena acted neutrally and reasonably until those questions could be answered, when in fact he purposefully avoided the clear answer to any question raised by the arbitration award. In fact, he did so well beyond that answer being provided, while Mr. Benzinge wreaked absolute havoc on Claimants' operations. Then, Mr. Benzinge was simply brushed aside and the Claimants recognized as rightful owners again – a position that then remained consistent through to Respondent's recognition of Spalena as the lawful investor in NRD in this proceeding – based on the very answer that Mr. Imena and the Ministry purposefully refused to recognize more than two months. Compounding the confusion caused by that unexplained reversal, Respondent then presents and purports to rely upon expert testimony stating (albeit erroneously) that the Ministry's reliance on the answer provided by the RDB was contrary to law and that it was required to treat the Zarnacks, not Claimants, as controlling owners of NRD, apparently permanently and regardless of what the RDB's position on corporate ownership of NRD is. But Respondent did not actually act consistent with its expert's opinion and does not argue that the logical conclusion of that testimony is correct for the purposes of challenging Spalena's standing.<sup>109</sup> The end result is a twisted, self-contradictory series of changing positions which defy harmonization. All of this is the result of the Ministry's initial false position that it perceived a question whether Mr. Benzinge was in control of the Concessions that did not exist under the arbitration award, and its decision to ignore the administrative body responsible for making decisions concerning corporate ownership and management – all because the Ministry had its own agenda that Mr. Benzinge served perfectly.

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<sup>109</sup> *Id.*

76. There are three aspects to Respondent's unexplained and manipulative use of Mr. Benzinge's "sideshow," as Respondent's counsel calls it: 1) the ownership dispute between Mr. Benzinge and Mr. Marshall; 2) the Ministry's failure to grant tags to NRD; and 3) Bailiff John Bosco Nsengiyuma unrestrained and unlawful appropriation of Claimants' assets, even though he was required to back off from seizing and auctioning NRD's actual assets – the minerals mined at the Concessions.

**A. Respondent falsely claimed the ownership dispute justified Claimants' loss of NRD's Concessions and corporate office for a prolonged period**

77. It is not disputed that after Benzinge came forward with the Arbitration Award, a question was posed for the Ministry as to how to proceed with NRD's operation of the Concessions and Application for a long-term license. There was a clear path to a prompt answer to that question. Respondent has not and cannot explain any reasoned basis for refusing to take that clear path and, instead, to prolong and enable the destructive force Mr. Benzinge worked on Claimants' property and management of the Concessions.

78. The simple answer to the question posed by Mr. Benzinge's arbitration award was to ask the RDB who it determined to be the Representative of NRD and/or its majority shareholders in light of those rulings. Mr. Imena knew how the question was to be resolved; he testified that he was waiting for "the rightful owner of NRD as it is indicated by RDB" to be identified.<sup>110</sup> Mr. Imena's explanation for failing to present the issue to RDB and take its direction for a destructive two months is incoherent:

Q. Right. But you were familiar with the fact that the registrar was the ultimate authority on disputing parties' claims of ownership: the registrar would say who is right and who is wrong; correct?

A. Yes.

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<sup>110</sup> Hearing Tr. Day 7, p. 134:3-4.

Q. And you're saying that as Minister of Mines, you decided to ask the two disputing parties, and not the administrative body that's in charge of resolving their disputes?

A. I had no obligation to ask him.<sup>111</sup>

79. Mr. Imena's response is telling because it begs the question: why not ask for an immediate resolution of the question, even if you did not believe you were compelled to do so? What good faith Ministry agenda possibly could be served by leaving the question unresolved and pretending to believe that the combatants would work it out? And why would Mr. Imena contend that Mr. Benzinge should be involved in answering the question, given the suggestion in the award that the original owners, the Zarnacks, might be credited as the 85% controlling owners of the company? Why would a 15% minority shareholder ever be asked to speak for majority shareholders? Respondent has never offered any explanation for these obvious flaws in Mr. Imena's chosen course of action.
80. As a threshold matter, it is worth noting that Mr. Imena acknowledged that as Minister of State in Charge of Mining, he understood that RDB has controlling authority to decide any question regarding the ownership of NRD and intended to defer to that authority, which stands in direct conflict with the Respondent's legal expert's attempt to explain and justify Mr. Imena's actions. Mr. Mugisha testified that RDB records are only determinative of ownership at the time a company is registered and not at any later time.<sup>112</sup> Mr. Mugisha's attempted explanation of the law on corporate registrations is implausible and unworkable on its face. If, as Mr. Mugisha claims, RDB does not have authority to determine corporate ownership issues as shares are sold, or transferred

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<sup>111</sup> Hearing Tr. Day 7, p. 134:12-21.

<sup>112</sup> Hearing Tr. Day 8, p. 111-113.

through inheritance, or new shares issues, and given that Mr. Mugisha is unable to identify any other administrative body with the authority to resolve corporate ownership issues resulting from subsequent transactions, then Rwanda's corporate registration system works only for companies who experience no shareholder transactions after the initial registration, and for all others there is complete uncertainty. Importantly, however, Mr. Mugisha apparently wants the Tribunal to believe that Minister Imena was wrong in how he ultimately addressed ownership of NRD and control of the Concessions and the corporate office. But to what end? That remains unexplained. And, Mr. Mugisha purports to opine that Mr. Imena was correct in originally treating Mr. Benzinge as if he were the owner, for reasons that Mr. Imena does not agree with, if his Hearing testimony is to be believed.

81. Further calling into question the credibility of Mr. Mugisha's opinion on the conclusiveness of the RDB's determination of the ownership of NRD:
  - a. Mr. Mugisha testified that companies are required to notify the RDB of any changes to shareholding.<sup>113</sup> The only reason for this requirement would be for the RDB to update its records to reflect new shareholders and/or new shareholding percentages. In addition, RDB records reflect the most recent amendment of corporate governance documents, indicating that the RDB updates its files with changes to the information that companies are required to provide when initially registered.<sup>114</sup> Mr. Mugisha offers no explanation for the requirement that RDB be provided this ongoing information, if, as he contends, the RDB's files concerning post-registration shareholdings and governance have no legal effect.

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<sup>113</sup> *Id.* at 113:17-114:4.

<sup>114</sup> *See e.g.*, Full Registration for Domestic Company of NRD Rwanda dated 10 July 2006, C-001.

- b. Respondent's fact witnesses testified that, in fact, RDB's corporate records beyond initial registration are afforded a weight that Mr. Mugisha opines they do not have. For example, Mr. Imena testified that the RDB is the "ultimate authority" as to ownership.<sup>115</sup> Mr. Nsengiyuma similarly testified that "it is RDB's duty to say who is the shareholders of the company."<sup>116</sup> It could not be clearer that Respondent's witnesses rely on RDB records to establish ownership at times other than the date of registration. Mr. Mugisha never attempted to reconcile his opinion with the actual actions and practices of the Respondent.
- c. Mr. Mugisha's testimony also is inconsistent with other arguments in Respondent's pleadings. For example, in an effort to discredit Jerry Fiala, Respondent argues that "Mr. Fiala was only minority shareholder of Rwanda Rudniki – he is not 'the holder' as he seeks to present."<sup>117</sup> In support of this statement, Respondent cites to a letter submitted by his former company, Rwanda Rudniki, which in turn cites to and attaches RDB records of Rwanda Rudniki, **as amended** in 2014.<sup>118</sup> If Respondent truly believed that RDB records were not determinative of ownership at any time after registration, it would be entirely disingenuous to argue at the same time that RDB's records should be given just that determinative effect when attempting to discredit Mr. Fiala. Similarly, Respondent exhibited **amended** RDB records to its Rejoinder to argue that none of the companies that were awarded concessions in response to the public tender

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<sup>115</sup> Hearing Tr. Day 7, p. 134:12-16.

<sup>116</sup> Hearing Tr. Day 6, p. 76:3-5.

<sup>117</sup> Rejoinder, ¶ 337.

<sup>118</sup> Letter from B. Mbanza to RDB dated 17 October 2014, **R-185**.

of NRD's concessions in 2016 are owned by Rwanda.<sup>119</sup> While Claimants do not accept that the registrations produced prove that Rwanda is not the ultimate parent of these companies,<sup>120</sup> the fact that Respondent cites to post-registration corporate records in the RDB files as conclusive of ownership illustrates that Respondent does not, in fact, believe that its expert's opinion is accurate.

82. Acknowledging that the RDB records are determinative of corporate ownership questions is critical to understanding how baseless Mr. Imena's decision to permit Mr. Benzinge to take control of the NRD Concessions was. Although Mr. Imena testified that Mr. Marshall did come forward with RDB records showing that Claimants were the owners of NRD and the Ministry then went forward in its dealings with Claimants as rightful owners,<sup>121</sup> he failed to acknowledge or attempt to justify the long delay between the Ministry receiving that conclusive evidence and acting on it to end Mr. Benzinge's disastrous reign of control and destruction of NRD's operations.
83. Mr. Marshall provided RDB records showing that he was the owner by way of a letter dated June 13, 2014,<sup>122</sup> just two days after Mr. Benzinge took control of NRD.<sup>123</sup>

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<sup>119</sup> Rejoinder, ¶ 899; RDB Certificate of Domestic Company Registration for Fair Construction Ltd dated 3 January 2020, **R-140**; RDB Certificate of Domestic Company Registration for Kayenzi Mining Company (KAMICO) Ltd dated 3 January 2020, **R-141**; RDB Certificate of Domestic Company Registration for Rubavu Exploitation and Trading Company (RETC) Ltd dated 3 January 2020, **R-143**, RDB Certificate of Domestic Company Registration for Demikaru (Development Minier Kanama Rubavu) Ltd dated 3 January 2020, **R-144**; RDB Certificate of Domestic Company Registration for Better Generation Machinery Ltd dated 3 January 2020, **R-147**.

<sup>120</sup> For example, the Government of Rwanda is the ultimate shareholder of Ngali Mining (Witness Statement of Fabrice Kayihura ("Kayihura WS"), ¶ 1 but the corporate registry lists only its direct parent, Ngali Holdings. RDB Full Registration Information of Domestic Company for Ngali Mining Ltd dated 25 May 2018, **R-176**.

<sup>121</sup> Hearing Tr. Day 7, p. 134:5-6.

<sup>122</sup> Letter from R. Marshall to E. Imena dated 13 June 2014, **C-090**. As Lord Phillips correctly pointed out, there is also a document with an amendment of July 3, 2014, exhibited at **C-005**. Hearing Tr. Day 8, p. 121:12-16. However, the evidence confirms that Spalena was the owner a month before and that such evidence was presented to Mr. Imena.

<sup>123</sup> Hearing Tr. Day 3, p. 131:8-10.

84. Based upon Mr. Imena's testimony, the ownership dispute he claimed needed to be resolved in order to determine whether Mr. Benzinge should be permitted to take charge of the Concessions (a position Claimants dispute) was in fact resolved as of June 13, 2014, at the latest.<sup>124</sup> Nevertheless, the Ministry ignored the RDB's determination, which established that Mr. Benzinge had no lawful basis to exercise any authority over the operations of NRD's Concessions, and yet the Ministry permitted Mr. Benzinge to obtain the keys to NRD's office<sup>125</sup> and retain control the Concessions until August 19, 2014. Mr. Benzinge used that time and control with the Ministry's blessing – a position that has never been explained or justified and stands in direct conflict with Mr. Imena's Hearing testimony explaining his actions – to loot the Concessions and wreak havoc with the office and remove or destroy the company's records.
85. Throughout this process, Respondent and its expert have greatly exaggerated the arbitration award's effect on Mr. Benzinge's rights and status within, even before RDB issued its June 13, 2014 letter resolving the question of ownership of the company, which was ignored for two months. The arbitration award purported to nullify board of director actions implementing two transfers of the 85% majority shareholding position – from the Zarnacks to Stark and from Stark to Spalena – on the grounds that the directors' status at those meetings were not properly documented in the RDB records presented at an arbitration proceeding attended only by Benzinge – without any appearance or contribution by NRD. Nothing in that award purported to hold the actual sale transactions to be illegal or void, or otherwise incapable of being implemented by

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<sup>124</sup> Because Mr. Imena arbitrarily refused to inquire as to RDB's position directly, we do not know how much earlier in the story RDB's records would have resolved the question.

<sup>125</sup> Witness Statement of Jean Bosco Nsengiyuma ("Nsengiyuma I WS"), ¶ 27.

shareholder or director actions properly documented. Stated differently, honoring the arbitration award in no way results in the preclusion of Spalena having its acquisition of the 85% majority interest from Starck, and Starck's acquisition from the Zarnacks lawfully implemented by the company after the award issued. Mr. Mugisha's testimony creates the false impression that somehow the state of corporate records would have to be frozen in time as of the arbitration award and no future change could be permitted. There is nothing whatsoever on which to base such an assumption.

86. Second, pausing any communications with NRD until the ownership of the 85% majority position was straightened out in no way justifies authorizing Mr. Benzinge to play any role in resolving that question. His position as a 15% minority shareholder was not enhanced by the arbitration award in any way. It was not Mr. Benzinge's percentage interest, but instead the 85% position originally held by the Zarnacks that was in question. If the Ministry truly intended to pause in its dealings with NRD until it could address that question with the owners instead of with RDB, it required asking Starck and the Zarnacks, not Mr. Benzinge, as he could never speak for either. Mr. Mugisha's witness statement representations that those parties were not willing to take any action as to NRD was shown to be a gross misstatement. In fact, no one from the Respondent asked the Zarnacks or Starck.<sup>126</sup> Far from being obvious that those parties had no interest in taking action to correct or complete the RDB records and remove any possible question about the validity of their transactions, it seems fairly obvious that those parties who already made the decision to sell their 85% majority ownership position in NRD years before would not have any reason in 2014 to leave themselves at risk of having to

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<sup>126</sup> Hearing Tr. Day 8, p. 129:14-130:13.

give the purchase money back and re-take that ownership of NRD shares. In short, it seems clear how both the Zarnacks and Starck would answer if anyone asked: “what do we have to sign to reaffirm our sale of the controlling 85% shareholdings in NRD and keep our money?” But Respondent has offered no evidence that anyone at the Ministry asked that most basic question of the only parties who could speak to the question of how their prior 85% shareholdings should be treated following the award. There is no plausible or reasonable explanation for that failure other than the Ministry did not really care about the answer.

87. Although Respondent claims Mr. Imena acted reasonably to address the question raised by the arbitration award, in fact he pursued the most unreasonable path available, which was to let the minority owner with a conflict of interest speak as the only voice of the shareholders and, as a result, Mr. Benzinge was given the keys to the office by Bailiff Bosco and permitted to operate the mining Concessions as if he was controlling owner. It was always clear that was not the truth and that the arbitration award does not suggest otherwise, but it suited Mr. Imena to pretend to believe it might, because Mr. Benzinge proceeded to wreak complete havoc with NRD’s business records and leave Claimants in a state of disarray trying to maintain and operate the Concessions going forward. In this way, Mr. Imena opportunistically utilized Mr. Benzinge’s wild claims in an effort to get Claimants to give up and forfeit their Concessions. It did not work, the Ministry was forced to recognize Mr. Benzinge had no business operating the mining Concessions whatsoever, so it belatedly pushed him aside and re-engaged with Claimants as true owners of NRD as if Mr. Benzinge never existed and the “sideshow” as Respondent’s counsel labels it never happened. This behavior was baffling.

88. Third, the arbitration award left unquestioned two facts that Respondent and its expert fail to acknowledge, because they illustrate the unreasonableness of the Ministry's reaction to the award: (1) Mr. Benzinge was suspended as Managing Director of NRD by the RDB on August 6, 2012, and the arbitrator did not restore Mr. Benzinge to that position of authority or otherwise act on his request that she appoint a new Managing Director<sup>127</sup>; and (2) the RDB designated Mr. Marshall as "Representative" of NRD, which designation was neither challenged nor reversed, by the arbitrator.<sup>128</sup> Mr. Imena's professed position of not getting involved in the resolution of the dispute by treating Mr. Benzinge and Mr. Marshall as equal potential representatives of NRD until the ownership of 85% of the company's shares was worked out in fact belies his actual decision to weigh in heavily by disregarding those two key aspects of the arbitration award. To honor the award, Mr. Imena should have recognized, as both the RDB and the arbitrator acknowledged, that Mr. Marshall was NRD's corporate Representative and Mr. Benzinge was nothing more than a 15% minority shareholder. That made the Ministry's path clear and it should have addressed Mr. Marshall according to his unchallenged and unchanged status as Representative of NRD all along. But that did not fit with Mr. Imena's desire to hobble the Claimants' ability to retain their Concessions and their business, so he ignored those aspects of the award. For his part, Respondent's expert is unable to explain how the Ministry's actions were consistent with those aspects of the award, so he pretends they do not exist.
89. The reasons why Respondent seemingly put a stop to Mr. Benzinge's reign of terror and permitted Mr. Marshall to return after two months of ignoring the RDB letter remains

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<sup>127</sup> Arbitration Award, **R-013\_ENG** at pp. 2 (sixth par.), 4 (first par.) and 10-11.

<sup>128</sup> *Id.* at pp. 4 (first par.), 6 (second par.) and 10-11.

unclear because Respondent has been purposefully obtuse about these actions, but there are clues from the timeline of events surrounding Benzinge's departure<sup>129</sup> and Claimants' reinstatement.

90. Likely, the Respondent originally intended to go on ignoring the RDB letter and refusing to restore Mr. Marshall to a position of recognition as the owner's representative in charge of NRD, while leaving Mr. Benzinge in control until Claimants collapsed and abandoned their investment. But this plan backfired when Mr. Benzinge lost all control of the activities at the Concessions. During his takeover, Mr. Benzinge looted and destroyed many of the structures at the Nemba Concession.<sup>130</sup> In addition, during Mr. Benzinge's roughly 60-day tenure, 40 people were murdered<sup>131</sup> and their bodies dumped in the Nemba's Concessions Lake Rweru. The border between Rwanda and Burundi cuts through Lake Rweru and these 40 bodies were found by Burundian authorities. After these bodies were discovered, the Rwandan military called Mr. Marshall and said, "please come and take responsibility for your concessions."<sup>132</sup> Once Claimants regained control, security and order was restored and the killings stopped.<sup>133</sup>
91. Around this time in late August, a delegation of officials from Slovakia and the Czech Republic were planning to visit Rwanda to discuss a broad cooperation between the countries' militaries.<sup>134</sup> It is not a coincidence that Claimants regained access to NRD's

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<sup>129</sup> Absent from the record is any evidence as to what happened to Mr. Benzinge after August 19. There is no evidence as to where he went or why he decided to give up on his claims of ownership, despite having what he alleged was proof of ownership through the Arbitration Decision and to court rulings. His absence from the story only adds to the confusion and further supports Claimants position that he never had any legitimate claims of ownership. If he did, he would have remained in the picture and kept fighting Claimants.

<sup>130</sup> U. Jacquie, Report on NRD at Nemba Mining Site dated 22 August 2014, **C-075**; Hearing Tr. Day 5, p. 131:16-132:22.

<sup>131</sup> Hearing Tr. Day 3 p. 161:18-21.

<sup>132</sup> Hearing Tr. Day 3, p. 162:23-24.

<sup>133</sup> *Id.*

<sup>134</sup> Hearing Tr. Day 3, p. 162:23-25.

concessions around this time. Mr. Marshall had proved to be a valuable liaison between Rwanda and these countries based upon his prior work in the Czech Republic.

Respondent understood that Mr. Marshall would be unwilling to assist in this important meeting between Rwanda, Slovakia, and the Czech Republic that took place on August 25 and 26, 2014 regarding the sale, maintenance and training for various military equipment.<sup>135</sup> This relationship, and Mr. Marshall's role, was important as it led to a memorandum of understanding between the countries.<sup>136</sup>

92. Between Mr. Benzinge's utter failure to control NRD and the incoming Slovak delegation, Mr. Imena then wrote to NRD to invite NRD to re-apply for its concessions on August 18, 2014.<sup>137</sup> Although this letter is not directed to any particular person, only NRD as a company, it is clear that it was delivered to and received by Mr. Marshall on behalf of NRD, and not Mr. Benzinge, because it was Mr. Marshall that responded on September 18, 2014.<sup>138</sup> The necessary inference is that Respondent no longer considered Mr. Benzinge the owner/controller/operator or whatever term they wished to apply to him and intended to reinstate Claimants as the rightful owner of NRD.
93. When NRD received this letter, it did not even have access to its concessions yet and Mr. Benzinge was still in control. Before reentering the concessions, NRD hired a bailiff to assess and have a notarial record of the damage at Nemba, specifically, which is where Mr. Benzinge primarily looted.<sup>139</sup>

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<sup>135</sup> Minutes of Meeting between VOP Slovakia and Rwanda Armed Forces dated 27 August 2014, **C-137**.

<sup>136</sup> Email chain between R. Oswald and Z. Mruskovicova dated 22-23 March 2015, **C-135**.

<sup>137</sup> Letter from E. Imena to NRD dated 18 August 2014, **C-064**.

<sup>138</sup> Letter from R. Marshall to E. Imena dated 18 August 2014, **C-084**. Although dated, August 18, there is no dispute between the parties that this is a typo and that the letter was sent September 18, 2014. Hearing Tr. Day 3, p. 181:10-14.

<sup>139</sup> U. Jacquie, Report on NRD at Nemba Mining Site dated 22 August 2014, **C-075**.

94. As it would turn out, the invitation to reapply was an empty gesture. It was merely a farce to make it seem that Respondent was legitimately interested in granting the Concessions to NRD when, in reality, they were stringing Claimants along so they would maintain an incentive to assist in developing a positive working relationship with Slovakia and the Czech Republic. If Respondent had truly intended to be even handed and give NRD a fair shot, it would not have subjected them to the onerous requirements of the re-application process since NRD's licenses remained in place, NRD had already applied for long term licenses, twice, and had once fully negotiated the terms and conditions of a long term license.

**B. Respondent used the purported ownership dispute to deny mineral tags to NRD**

95. Allowing Mr. Benzinge to control the operations of NRD's Concessions under the guise of waiting for resolution of questions raised by the arbitration award – resolution of which stood ignored for approximately two months with no explanation – also was used by Mr. Imena as an excuse for refusing to issue mineral tags to NRD.<sup>140</sup> As detailed below in Section IV.A, Respondent's excuse for refusing to grant mineral tags to NRD – that it did not have an active license - was entirely baseless. But Respondent doubled down on refusing to grant tags to NRD by saying that the dispute over ownership with Benzinge was a secondary reason for denying tags to NRD.

96. But, there never was an ownership dispute. Mr. Benzinge did not and could not claim that the arbitration award resulted in his acquisition of a majority interest in NRD. He challenged the adequacy of documents supporting a vote to implement transfer of 85% of the shareholdings, but it was never open to dispute that Mr. Benzinge did not own those

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<sup>140</sup> Hearing Tr. Day 7, p. 131:14-132:6.

shares. In fact, Mr. Marshall promptly presented clear evidence from the RDB that Claimants established they were the rightful owners. Mr. Imena ignored that resolution for two months, and even when he accepted that result, Mr. Imena still refused to grant tags to NRD, demonstrating that the purpose all along was to financially strangle Claimants' ability to maintain their investment in NRD. Therefore, the ownership dispute was (and is) as sham excuse, not based on anything that can sustain inspection.

97. Respondent also has not provided any explanation for why an ownership dispute would prevent the company, as opposed to disputing shareholders, from receiving tags. Tags are not issued in Mr. Marshall's or Mr. Benzinge's (or Starck's or the Zarnack's) names, but rather to NRD in the company's name.<sup>141</sup> The company continued to exist in spite of any question of who owned 85% of its shares, and mining operations continued to be conducted by the artisanal miners on a daily basis, regardless of who owned what percentage of the company operating the Concessions.<sup>142</sup> The Respondent cannot credibly contend that it expected all the miners, who live locally,<sup>143</sup> to simply stop mining at the Concessions while the Ministry deprived NRD of tags necessary to sell their minerals lawfully. Instead, they continued mining and selling their minerals in order to survive. The elephant in the room that Respondent struggled mightily to pretend not to be able to see is: what happened to the minerals being mined every day at NRD's Concessions when no tags were issued to NRD? Were they sold on the black market? Tagged with another concession's tags?<sup>144</sup> The Ministry forced those mining activities to be carried out without accurate tagging and tracing records, and no justification for that

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<sup>141</sup> Hearing Tr. Day 8, p. 17:20-22.

<sup>142</sup> Hearing Tr. Day 7, p. 124:22-125:15; Day 8

<sup>143</sup> Hearing Tr. Day 7, p. 123:15

<sup>144</sup> *Id.* at Day 7, p. 125:9-7; 8, p. 14:15-19.

decision was offered – nor could one be for the Ministry to condone, indeed force, violation of its own laws.

98. According to Mr. Gatere, “when NRD was no longer operating their mining concessions, it was important for the government to quickly find alternative companies that could take up the concessions so they can provide employment to those who had lost their jobs.”<sup>145</sup> This is simply not an accurate description of events. Respondent left NRD as the operator of five mining Concessions for two years while simultaneously refusing to grant it tags to lawfully sell the minerals being mined by miners who no one believes left their homes or stopped mining, as if they had a choice how to earn a living. Throughout that long stretch, Claimants were forced to act as a preservationist, preserving their remaining investment as best they could, making it safe for artisanal miners as best they could, and trying to quell illegal mining without being able to make a single penny from the sale of minerals. A new operator was not put in place on any of NRD’s concessions until after the 2016 tender. Respondent purposefully did not act quickly to find alternatives. Instead it dragged out the process, letting the illegal sale of minerals continue for more than two years while NRD did not have tags.

**C. Mr. Benzinge enlisted the help of a court bailiff, working at the direction of the Ministry of Justice, to harm Claimants**

99. Mr. Benzinge also enlisted the services of a professional court bailiff, Mr. Nsengiyuma to further harm NRD financially and Mr. Nsengiyuma is unable to justify his actions, at all. His oral testimony differed from his written testimony and much of his testimony simply cannot be supported with any documentary evidence.

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<sup>145</sup> Hearing Tr. Day 8, p. 18:14-18.

100. At the outset of his testimony, Mr. Nsengiyuma confirmed some basic facts and rules that apply to bailiffs in Rwanda. Professional bailiffs are required to:
- a. “maintain an accounting of the value of recoveries received after seizure of property against debt being enforced;”
  - b. “maintain a log identifying all property seized or locked up for collection against a debt;”
  - c. “maintain the security of property seized or locked up before it could be safely disposed of and credited against the debt;”
  - d. “obtain independent appraisals of value for the property seized before selling it;”<sup>146</sup> and
  - e. “provide a written report to the judgment debtor [and creditor] as to the status of all credits and all receipts obtained from the seizure and sale of assets taken from that debtor.”<sup>147</sup>
101. The evidence and testimony of Mr. Nsengiyuma, who was enforcing judgment with the express consent of the Ministry of Justice,<sup>148</sup> did not comply with any of these requirements with respect to the enforcement of alleged judgments on behalf of Mr. Benzinge and others.
102. As a threshold matter, it is clear that Mr. Nsengiyuma is able to produce the underlying judgments when they actually exist. He exhibited the judgment entered on behalf of Pascal Rwakirenga.<sup>149</sup> This, however, is the only judgment attached to his witness

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<sup>146</sup> Hearing Tr. Day 6, p. 31:16-32:8.

<sup>147</sup> *Id.* at p. 34:3-8.

<sup>148</sup> *Id.* at p. 70:22-71:2

<sup>149</sup> *Pascal Rwakirenga v. Natural Resources Development Ltd*, Intermediate court of Gasabo sitting in Rusororo hearing cases related to labour Ruling of file RSOC 065/11/TGI/GSBO (29 September 2011) - **R-034**.

statement, while numerous seizures occurred in the names of other so-called creditors, all without documentation of a single additional judgment.

103. With respect to the alleged judgment on behalf of 26 or 28 (depending on the document) former employees, Mr. Nsengiyuma only attached a document he created, that made reference to a judgment.<sup>150</sup> Mr. Nsengiyuma says that this document references a judgment and that the judgment was “annexed” to the exhibit,<sup>151</sup> a common refrain. In fact, he testified that he provided a copy of a document that was 100 pages long with “everything I did, my work report” to his lawyers.<sup>152</sup> Either he is lying, and no such documents exists, or he is telling the truth and Respondent’s counsel intentionally chose not to exhibit them. If the former, then his testimony that these are legitimate debts should be discredited and it should be assumed that he, with the authority of the Ministry of Justice, was acting to specifically harm NRD for the benefit of Mr. Benzinge and others. If the latter, the Tribunal should make an adverse inference that the 100 pages of documents do not support the actions taken by Mr. Nsengiyuma and, similarly, it should be inferred that Mr. Nsengiyuma, with the authority of the Ministry of Justice, was acting to specifically harm NRD for the benefit of Mr. Benzinge and others.
104. The inference that he was acting with the authority of and at the direction of the Ministry of Justice is bolstered by his testimony that initially barred him from carrying out seizures, and then reinstated him. In particular, he testified extensively about the minerals he seized on behalf of Mr. Rwakirenga and again in June 2014 for the other alleged creditors.<sup>153</sup> Then, the Ministry of Justice got involved, first suspending Mr. Nsengiyuma

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<sup>150</sup> Hearing Tr. Day 6, p. 40:18-23.

<sup>151</sup> *Id.* at p. 41:17, 23-24.

<sup>152</sup> *Id.* at p. 49:25-50:11.

<sup>153</sup> *E.g. id.* at pp. 45:25-46:5; 59:24-60:1.

from carrying out judgment and later permitting him to carry out judgments.<sup>154</sup> However, after regaining the ability to seize NRD's assets, Mr. Nsengiyuma never again tried to seize assets located at the Concessions or the offices but he did go after Mr. Marshall's personal vehicle.<sup>155</sup> The fair inference that he did not have seize, or attempt to seize, NRD's Concessions or its office again is because the Ministry of Justice or others in the government did not want him seizing NRD's minerals. If he did, he would have interfered with the illegal mining ongoing at NRD's Concessions while Mr. Benzinge was in control and afterwards, because NRD never received tags again.

105. There is no record of Mr. Nsengiyuma ever giving any of the required notice, communications and information to NRD, as debtor, or of keeping a record of the property seized, the value of the property seized, and evidence that the auction process requirements were met. He failed to credit any asset sales against the alleged debts of these former employees, except for Mr. Rwakirenga. In R-051, Mr. Nsengiyuma appears to track the amount of the debt owed and credits to that debt based upon the auction of one of NRD's trucks. He made a similar statement for the seizure of minerals related to Mr. Rwakirenga's debt.<sup>156</sup> But again, absent from the exhibits to his witness statement, despite providing "100 pages" of documents and annexes, are any reports of or an accounting of any debt owed to the other debtors or any identification of the property seized or the auction process followed. The reason he was able to append documents related to Mr. Rwakirenga but not the other debtors is because the documents do not exist.

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<sup>154</sup> *Id.* at p. 76:13-17.

<sup>155</sup> *Id.* at p. 78:6-11.

<sup>156</sup> Statement of claim at Rweru police station and statement on seizure of minerals belonging to NRD Ltd at Nemba - Bugesera (11 April 2013), **R-071**.

106. Even if the documents do exist, he would not be able to justify the property he seized to account for the alleged debt owed to the former employees in the amount of FRW 94,729,166, or about USD \$137,000 under the then-current exchange rate.<sup>157</sup> He seized NRD's corporate office, which contained computers, tables, chairs, laboratory equipment, minerals and all of its files. Instead of seeking to sell any of this, which would have more than covered the alleged debts, he states that he simply handed the keys to Mr. Benzinge, and went off in search of *other* assets to seize.<sup>158</sup>
107. Mr. Nsengiyuma also claims to have provided a formal demand on NRD, through Mr. Benzinge, to pay debts owed to 25 former NRD employees, while separately serving notice on NRD that it had to Mr. Benzinge.<sup>159</sup> Although not explicit, he must have also served this notice on NRD to pay Mr. Benzinge, through Mr. Benzinge, which is illogical. He was playing fast and loose with the rules by putting a debtor of NRD in complete control of NRD, at the instruction of the Ministry of Justice, and then walking away despite the fact that, according to him, the debtor was also liable for NRD's debts.<sup>160</sup> And despite stating that Mr. Benzinge, as a shareholder, was liable for NRD's debts, he did not try to seize Mr. Benzinge's assets. Instead he continued to go after and harass Claimants by, for example, seizing Mr. Marshall's personal vehicle.<sup>161</sup>

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<sup>157</sup> Letter from the Professional Court Bailiff (J. B. Nsengiyuma) to NRD (R. Marshall, Z. Mruskovicova, B. Benzinge) Presentation of "Letter of attorney" to represent NRD Rwanda Ltd at the Auctioning of 11/07/2014 (9 July 2014), **R-074**. This letter also refers to a debt owed to the Rwanda Revenue Authority. Claimants vigorously dispute this debt. There is no evidence in the record that such a debt was owed or that the RRA hired Mr. Nsengiyuma to collect this debt. In fact, his testimony suggests that he was **not** collecting debt on behalf of the RRA because he ceded the RRA and stopped executing judgments when he "learned that the RRA were also enforcing debts against NRD." Nsengiyuma IWS ¶ 35.

<sup>158</sup> Nsengiyuma IWS ¶ 34-35.

<sup>159</sup> Nsengiyuma IWS, ¶ 20.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at ¶ 35; Note of public auction (20 February 2015), **R-077**.

**IV. The evidence adduced at trial confirms that Respondent treated Claimants differently than it treated Tinco, thereby violating the BIT**

**A. Claimants' Licenses remained active until at least May 19, 2015**

108. In order to first understand how Respondent arbitrarily and discriminatorily applied the 2014 law to NRD, it is necessary to first demonstrate that Respondent's excuse for applying the 2014 Law different with respect to NRD than it did to all others – that NRD did not have active licenses – is a position created from whole cloth for this litigation.
109. Respondent's position throughout this arbitration has been that NRD had to reapply for its concessions under the 2014 Law because NRD's licenses expired in October 2012, and that, without active licenses, it was subject to a reapplication process.<sup>162</sup> Mr. Imena's first Witness Statement provides that "[b]y the time the 2014 Law was enacted, NRD did not hold any licences, and were operating unlawfully, i.e. without a licence."<sup>163</sup>
110. By contrast, Claimants position has been that, because Rwanda expressly permitted NRD to operate, Rwanda implicitly extended NRD's licenses.<sup>164</sup> Mr. Imena's testimony confirms Claimants position and lays bare the fallacy and sheer illogicality of the position.
111. Mr. Imena confirmed that it is "illegal under Rwandan law for miners to just go mine minerals at a site, take them and sell them, without working under an approved operator of the mine, approved by the ministry."<sup>165</sup> He further testified that "you are only allowed to mine if you have the permit or license from the ministry. And you can continue to do

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<sup>162</sup> Counter-Memorial, ¶ 457.4; Imena I WS, ¶ 28.

<sup>163</sup> Imena I WS, ¶ 28; *accord* Counter-Memorial, ¶ 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 licenses...")

<sup>164</sup> Reply Memorial on the Merits, ¶ 206.

<sup>165</sup> Hearing Tr. Day 7, p. 65:24-66:3.

so until you get the final notice that you should vacate.”<sup>166</sup> Critically, express notice of license extensions, like the ones that NRD received in 2011 and 2012, were *not* required.<sup>167</sup> Instead, licenses were automatically extended until Respondent told a license-holder otherwise.<sup>168</sup> As Mr. Imena, the former Minister of State of Mining, clearly testified, “[a]s long as the ministry has not made a final decision on your application, you are allowed to continue operating.”

112. With respect to NRD, specifically, the Ministry did not explicitly extend NRD’s license beyond October 2012,<sup>169</sup> the Ministry did not need explicitly extend the licenses beyond October 2012 because the extensions were implicit and formal notice of an extension was not required,<sup>170</sup> and the Ministry did not inform NRD that its licenses were invalid and that it could no longer operate until 2015.<sup>171</sup> Therefore, NRD’s licenses remained in effect, meaning that they had the right to operate and mine, until at least May 19, 2015, the date that Mr. Imena sent a letter “finally” rejecting NRD’s application.<sup>172</sup>

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<sup>166</sup> *Id.* at p. 66:23-67:1.

<sup>167</sup> *Id.* at p. 84:7-12.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at p. 83:15-21.

<sup>170</sup> *Id.* at p. 84:7-12.

<sup>171</sup> *Id.* at p. 69:9-10.

<sup>172</sup> The word “finally” is in quotes for good reason. NRD’s experience was such that nothing is “final” in Rwanda until it is final. For example, Respondent sent the August 2011 letter seemingly rejected the 2010 Application and then negotiated the terms of a long term licenses and repeated informed NRD that negotiations would be “concluded” soon. Respondent regularly shut down NRD’s concessions without warning and then reopened them. Respondent temporarily took the concession from Claimants, gave them to Mr. Benzinge, only to return them to Claimants two months later. During the re-application process, Respondent allegedly rejected NRD’s application on multiple occasions but then also permitted NRD to submit more material. The absence of finality in Respondent’s decision making is further exemplified negotiations with Tinco over the shareholding agreement for Rutongo Mines Ltd. Respondent told Tinco on May 19, 2020 that it no longer wished to amend its shareholding agreement with Tinco, thereby leaving the Respondent holding a 90% majority ownership share. Email from C. Akamanzi to B. Menell dated May 19, 2020, **C-208**. Then, one year later, Respondent did an about face and amended the shareholding agreement giving Tinco the majority interest in Rutongo. Shareholders Agreement between the Government of Rwanda, Ngali Holdings, Ltd, Tinco Investments, Ltd, and Rutongo Mines, Ltd dated May 12, 2021, **C-209**.

113. Moreover, when asked point blank: “As of January 22nd 2013, is it your understanding that NRD was at that time currently operating on a short-term extension of its licenses for all five concessions?” Mr. Imena testified: “Yes, that is my understanding.”<sup>173</sup>
114. Mr. Imena’s testimony confirms Claimants’ argument that Respondent “implicitly extend[ed] the terms of the licenses. Rwanda never communicated to NRD at any time that the Licenses expired or that Rwanda deemed them to be expired.”<sup>174</sup> Mr. Imena’s testimony further confirms that Respondent’s position during the arbitration that the licenses expired in October 2012 is a made-for-arbitration, post-hoc, legal excuse to try to justify the Respondent’s egregiously unfair behavior towards Claimants.
115. Any other conclusion is illogical. It simply cannot be that NRD was permitted to operate the concessions in the absence of a license or permission from the government. To do so would be illegal.<sup>175</sup> Respondent’s characterization of NRD’s permission as indulgence<sup>176</sup> is nothing more than a recognition that it had legal permission to operate and mine at its concessions.

**B. Respondent’s arbitrary application of the 2014 Law patently demonstrates Respondent’s breach of the BIT**

116. In 2014, Respondent passed a new mining law (the “2014 Law”).<sup>177</sup> The 2014 Law, broadly speaking, created a new framework for the mining industry and replaced the

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<sup>173</sup> Hearing Tr. Day 7, p. 83:22-84:1; *accord id.* at p. 96:5-11 (confirming that NRD’s licenses remained in effect as of May 2013 because there was no instruction from the government to NRD to stop mining). Mr. Mugisha, Respondent’s legal expert, testified, instead, that at the end of an extension, if there was no explicit further extension, the concessions reverted back to Rwanda. Hearing Tr. Day 9, p. 103:4-21. But this simply does not comport with the practice on the ground. First, the then Minister of State of Mining, who is intimately familiar with the operation of mines and mining companies in Rwanda, did not understand this to be the case. And the reality was that NRD remained in control of the concessions and was permitted to operate at all relevant times. Mr. Mugisha’s testimony to the contrary is therefore not at all credible.

<sup>174</sup> Reply Memorial, ¶ 206.

<sup>175</sup> Hearing Tr. Day 7, p. 66:9-13.

<sup>176</sup> *E.g.*, Imena I WS, ¶ 49.

<sup>177</sup> Rwanda Law No. 13/2014 on Mining and Quarry Operations, 20 May 2014, Official Gazette No. 26 of 30 June 2014, **CL-002**.

“old” 2008 Law and the remnants of the 1971 law (applicable at the time NRD signed the Contract). Claimants recognize that a sovereign may pass new laws that impact its investment, but a sovereign may not pass new laws and then apply them in a discriminatory fashion.<sup>178</sup> Doing so is a violation of the FET.<sup>179</sup>

117. Respondent forced NRD to reapply for its concessions under this new law.<sup>180</sup> According to Respondent, Claimants had to reapply because 1) NRD’s application for a long term license post-dated the expiry of its licenses and 2) NRD did not have a valid license at the time of the 2014 law came into effect.<sup>181</sup> Respondent alleges that, by contrast, Tinco, the foreign investor in Rutongo Mines Ltd and Eurotrade International, had applied for a long term license while its licenses were active and still had active licenses when the 2014 law came into effect.<sup>182</sup>
118. Respondent’s argument fails because it is simply not true and made up for litigation.
119. First, NRD submitted an application for a long term license while it had active licenses.
  - a. As detailed above in Section 1.A, the 2010 Application was an application for a long term license. There is no dispute that NRD’s licenses remained in effect as of November 2010, the date of the 2010 Application, because they had not expired on their own terms yet (putting aside any argument with respect to explicit or implicit extensions).

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<sup>178</sup> Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, ¶ 305, **CL-033**.

<sup>179</sup> *Id.* at ¶ 307 (“A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any 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>180</sup> *E.g.*, Counter-Memorial, ¶ 457.4.

<sup>181</sup> Imena I WS, ¶ 57.

<sup>182</sup> *Id.*

b. Even if the Tribunal were to find that that 2010 Application was not an application for a long term license, NRD's licenses remained in effect when, on January 30, 2013, it submitted the 2013 Application, which Respondent concedes was for long term licenses. Mr. Imena's testimony on this issue could not have been clearer:

Q: As of January 22nd 2013, is it your understanding that NRD was at that time currently operating on a short-term extension of its licenses for all five concessions?

A: Yes, that is my understanding.

There can be no question, then, that when NRD submitted the 2013 Application, just eight days later, that its licenses remained in effect.

c. Under either analysis, it is clear that had active licenses to mine and operate when it applied for a long term license.

120. Second, NRD did have a valid license when the 2014 Law came into effect. Mr. Imena testified that, in order to dispossess a concession holder of its license was not a lack of explicit extensions, but rather an explicit statement that constitutes a "final notice that [a concession holder] should vacate."<sup>183</sup> Mr. Imena further testified that Respondent did not give NRD this final notice until 2015.<sup>184</sup> This was a reference to the May 19, 2015 letter purporting finally to deny NRD's re-application.<sup>185</sup> It goes without saying, then, that NRD's licenses remained in effect through all of 2014. Therefore, NRD had active licenses when the 2014 law came into effect.

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<sup>183</sup> Hearing Tr. Day 7, p. 66:24-67:1.

<sup>184</sup> *Id.* at p. 69:9-10.

<sup>185</sup> Letter from E. Imena to R. Marshall dated 19 May 2015, **C-038**.

121. The net result of the impact of the 2014 law on Claimants and on Tinco is clear: Claimants did not obtain a long term license and Tinco did obtain a long term license. Respondent used the 2014 Law as a further pretense to discriminate against Claimants, expropriate their investment, and force Claimants from the country.<sup>186</sup>

**C. Respondent did not equally apply contractual requirements**

122. Respondent has faulted NRD for allegedly failing to provide an adequate environmental report as a basis for not granting a long term license.<sup>187</sup> Putting aside the fact that Mr. Imena confirmed that Respondent was prepared to negotiate and conclude contracts despite an alleged lack of an environmental report,<sup>188</sup> Respondent did not apply this requirement equally to other similarly situated short term contract holders.<sup>189</sup>

123. Notably, NRD did include environmental studies in its 2010 Application and included an environmental impact assessment for the Rutsiro plant.<sup>190</sup> NRD also provided an update in November 2011.<sup>191</sup> Nevertheless, Tinco, which did receive a long term license for its two concessions, Rutongo and Nyakabingo, did not identify any environmental assessment in its application for a long term license.<sup>192</sup> In fact, the environmental reports,

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<sup>186</sup> The Tribunal should not ignore the fact that Tinco had a joint venture with Respondent in Rutongo. Respondent would not have wanted to subject Tinco to the reapplication process because doing so would harm its own investment.

<sup>187</sup> Hearing Tr. Day 7, p. 17.

<sup>188</sup> *Id.* at p. 59:2-14.

<sup>189</sup> It is not clear that this was a requirement in the first place. All that was required under the Contract was to provide an environmental protection plan upon signing the Contract. Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, **C-017**, Art. 2(2). Assuming an environmental plan was required at the end of the Contract, that requirement had to be applied equally to all similarly situated contract holders, all of whom held contract that were substantially the same. *See e.g.* Contract for Acquiring Mining Concessions Between Rwanda and Eurotrade, **C-012**. It was not.

<sup>190</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, **C-035**, p. 143; F. Twagiramungu Consulting Report, **C-036**; Hearing Tr. Day 7, p. 19:7-11.

<sup>191</sup> F. Twagiramungu, NRD Progress Mission Report, November 2011, **C-043**.

<sup>192</sup> Feasibility Study for 30 Year Mining Licence in Relation to Rutongo Mines dated 1 May 2012, **R-042**, p. 67.

which Tinco notes are “legal requirements for a mining concession,” would not be complete for another 12-18 months.<sup>193</sup> There is no evidence in the record that this allegedly legally required report was ever completed or submitted.<sup>194</sup> This timeline and lack of a report did not concern Mr. Imena.<sup>195</sup> It is clear that Respondent treated NRD and Tinco differently and treated NRD less favorably than Tinco, who was and still is Respondent’s joint venture partner.

124. During the hearings, Mr. Imena developed the excuse that Tinco did not need an environmental report because the Rwandan Environmental Management Authority (“REMA”) did an audit and Tinco passed the audit.<sup>196</sup> Tinco self-reported that “[t]he company passed the audit” and that “[n]o significant negative issues were noted.”<sup>197</sup>
125. The fallacy of this argument is that there is no evidence in the record as to what the audit entailed, whether it covered both concession areas, whether it covered only portions of either of the concessions, when it was conducted, or why it was conducted. The report was allegedly attached to Tinco’s application in Appendix 13 but it was not exhibited to Mr. Imena’s witness statements or otherwise exhibited to Respondent’s pleadings. Furthermore, nothing in the Contracts awarded to Tinco make any mention of an audit, or that an audit could replace an otherwise allegedly required environmental assessment.<sup>198</sup> There is no basis, therefore, for Respondent to argue that an audit can meet the legal requirements of an environmental study.

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<sup>193</sup> *Id.*

<sup>194</sup> See Hearing Tr. Day 7, p. 31:5-6.

<sup>195</sup> Hearing Tr. Day 7, p. 30:2-9.

<sup>196</sup> Hearing Tr. Day 7, p.

<sup>197</sup> Feasibility Study for 30 Year Mining Licence in Relation to Rutongo Mines dated 1 May 2012, **R-042**, p. 67.

<sup>198</sup> Contract for Acquiring Mining Concessions Between Rwanda and Eurotrade, **C-012**; Contract for Acquiring the Rutongo Mining Concession Between the Government of Rwanda and Umhlaba Investment Holding (Pty) Ltd dated 27 August 2008, **C-023**.

126. As demonstrated by the fact that Tinco received a long term license for its two concessions, Rutongo and Nyakabingo, Respondent disregarded Tinco's failure to conduct a timely (or any) and nevertheless awarded Tinco a long term license. Claimants were not afforded the same treatment.

**D. Respondent had no basis to deny tags to NRD**

127. It is undisputed that Mr. Imena barred NRD from receiving mineral tags by the summer of 2014.<sup>199</sup> It is further undisputed that primary reason that Mr. Imena barred NRD from receiving mineral tags was because NRD did not have licenses.<sup>200</sup> This is not a sustainable position in light of Mr. Imena's unequivocal testimony that NRD's licenses remained in effect until Respondent provided a final notice, which, in his view, was the letter sent on May 19, 2015.

128. NRD was therefore a "licensed mining operation[]" and entitled to tags.<sup>201</sup>

129. This failure to issue tags was detrimental to NRD and Claimants. Without tags, it could not legally sell minerals.<sup>202</sup> Suddenly, because Mr. Imena said so, NRD had no operating revenue and no cash flow.

130. To make matters worse, NRD was singled out. Mr. Imena confirmed that there were others in NRD's position, i.e. companies applying for long term licenses, and all such companies received tags.<sup>203</sup>

131. Even assuming, *arguendo*, that NRD did not have a license in the summer of 2014, it still should have received tags because all similarly situated companies received tags. Mr.

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<sup>199</sup> Hearing Tr. Day 7, p. 130: 4-12.

<sup>200</sup> *Id.* p. 131:20-22.

<sup>201</sup> Niyonsaba II WS, ¶ 16.

<sup>202</sup> Mbaya I WS, ¶ 11.

<sup>203</sup> Hearing Tr. Day 7, p. 130:21-131:2; *accord* Buyskes I WS, ¶ 12.

Imena testified, albeit inconsistently with his prior testimony, that all other companies who had applied for a long term license received tags and that these companies did not have an active license.<sup>204</sup> Assuming this alternative, then NRD was entitled to be treated like all other applicants and should have received tags so that it could operate and make money while Respondent decided its application.

132. There is absolutely no rational basis for Respondent to have treated NRD differently than all others in the same situation. The only reason that Respondent would have singled out NRD would be to permit illegal smuggling and illegal tagging of minerals from the DRC. With NRD out of the picture, at least insofar as an active operator is concerned, the miners, most of whom lived on the concessions, were free to keep mining and selling their minerals illegally. Separately, since NRD did not receive any tags, those tags could be applied to the smuggled minerals since those tags were not going to NRD.<sup>205</sup>

**V. Claimants invested in Rwanda, satisfying their obligations for standing under the BIT**

133. At this stage of the proceeding, Claimants task is to establish that both Spalena and BVG invested in NRD sufficient to satisfy the standing the requirements of the BIT. The amount need not be quantified at this time because liability and damages have been bifurcated. The record evidence confirms that both Spalena and BVG invested in NRD, and therefore in Rwanda, sufficient to overcome Respondent's *Ratione Personae* and *Ratione Materiae* objections.

**A. Claimants invested in NRD**

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<sup>204</sup> Hearing Tr. Day 7, p. 130:21-131:5.

<sup>205</sup> See e.g. Email from I. Niyonsaba to R. Marshall, C-107 (Mr. Niyonsaba acknowledging that minerals are being tagged at Nemba in March 2015).

134. There is no dispute that Claimants’ predecessors, the Zarnacks and Starck, invested in NRD and, by extension, in Rwanda.<sup>206</sup> Professor Prosper Nkanika Wa Rupiya confirmed this during the hearing, testifying consistent with his witness statement that:
- a. in 2008, NRD invested in fieldwork, geologic and tectonic mapping, sampling, rehabilitation of shafts and tunnels, environmental studies, the purchase of bulldozers, cranes and crushers in a step towards industrialization;<sup>207</sup>
  - b. in 2009, NRD built dams, explored existing shafts in an effort to make them bigger, repaired roads and bridges, continued with the semi-industrialization process, and bought compressors for use in mining shafts in Nemba;<sup>208</sup>
  - c. in 2010, NRD continued to build the Rutsiro plant and build dams;<sup>209</sup> and
  - d. in 2011, NRD commissioned an environmental report for Nyatubindi and engaged in other environmental projects.<sup>210</sup>
135. With respect to the Rutsiro plant, specifically, NRD spent approximately US \$1 million to construct the plant.<sup>211</sup> NRD built the plant as a long term investment in mining in Rwanda. Respondent has tried to argue that the Rutsiro plant was a failure.<sup>212</sup> However, this is simply not true. Mr. Rupiya, NRD’s then Chief Geologist,<sup>213</sup> confirmed that the

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<sup>206</sup> See *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), **RL-095**, ¶ 123 (“There is no case holding that the acquisition of a local corporation is not an investment”) (internal quotations marks omitted).

<sup>207</sup> Hearing Tr. Day 5, p. 44:17-46:5; *accord* Summary of Activities, Investment and Plans on all NRD’s Concessions, **C-147**.

<sup>208</sup> Hearing Tr. Day 5, p. 46:6-49:21; *accord* Summary of Activities, Investment and Plans on all NRD’s Concessions, **C-147**.

<sup>209</sup> Hearing Tr. Day 5, p. 50:5-51:8; *accord* Summary of Activities, Investment and Plans on all NRD’s Concessions, **C-147**.

<sup>210</sup> Hearing Tr. p. 51:9-22; *accord* Summary of Activities, Investment and Plans on all NRD’s Concessions, **C-147**.

<sup>211</sup> Hearing Tr. Day 5, p. 52:8-15.

<sup>212</sup> *E.g.*, Rejoinder, ¶¶ 97; 137; 138.

<sup>213</sup> Prosper Nkanika Wa Rupiya Witness Statement (“Rupiya WS”), ¶ 1.

“plant was correctly built” and “could operate.”<sup>214</sup> Consistent with the proper construction and operability of the plant, Mr. Marshall testified that parts of the Rutsiro plant, like the shaking tables or jigs, were used regularly.<sup>215</sup>

136. The plant was also capable of processing any kind of ore, whether it be wolframite, cassiterite, or tantalum.<sup>216</sup> Any suggestion that the plant was capable of processing wolframite only is therefore incorrect.<sup>217</sup> And all three ores are present in Rutsiro<sup>218</sup> meaning that the plant could and would process all three ores in the future, assuming that NRD received long term licenses and was subsequently able to attract further investment.
137. To ensure that the plant would continue to operate (which it did), NRD spent money on maintenance. That maintenance was confirmed by a third party, Jeffrey Lindhorst, who visited the plant in October 2015, and told Ms. Mruskovicova that it “looks good.”<sup>219</sup>
138. In addition, a potential investor, Rene van Wachem visited various concessions in either 2014 or 2015<sup>220</sup> with the goal of identifying a suitable concession with the “resource potential to build an industrial scale mine.”<sup>221</sup> Mr. van Wachem determined that no site in Rwanda justified building an industrial scale mine “with the exception of NRD’s area in Rutsiro.”<sup>222</sup>

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<sup>214</sup> Hearing Tr. Day 5, p. 54:10-11.

<sup>215</sup> Hearing Tr. Day 2, p. 89:15-18.

<sup>216</sup> Hearing Tr. Day 5, p. 54:12-15.

<sup>217</sup> *E.g.*, Rejoinder, ¶ 136.1, 136.2.

<sup>218</sup> Hearing Tr. Day 2, p. 55:23-24.

<sup>219</sup> Text messages from J. Lindhorst to Z. Mruskovicova dated 21 October 2015, **C-151**.

<sup>220</sup> Emails between R. Van Wachem and P. Martin Niyigena (16-29 July 2014) attaching ‘Rutsiro proposal: Proposed plan of approach for NRD concession #2 (July 2014), **R-119**; Email from R. van Wachem to R. Marshall dated 16 June 2015, **C-120**. The parties dispute whether Mr. van Wachem visited Rwanda in 2014 or 2015, or both. *See e.g.* Rejoinder on Jurisdiction and Merits, ¶ 246. This dispute is immaterial to the conclusions drawn by Mr. van Wachem during his visit.

<sup>221</sup> Emails between R. Van Wachem and P. Martin Niyigena dated 16-29 July 2014 attaching ‘Rutsiro Proposal: Proposed Plan of Approach for NRD Concession #2 dated July 2014, **R-119**, p. 4.

<sup>222</sup> *Id.*

139. This helps confirm, despite all of Respondent’s argument to the contrary, NRD’s decision to build an industrial scale plant in Rutsiro was a good and economically sound one. NRD built this plant not just to process the scree, but all other mineral located in Rutsiro including the substantial amounts of *primary* ore in Rutsiro that NRD had identified.<sup>223</sup> Just like Mr. van Wachem would have done, NRD built a plant in a location where the “resource potential” was sufficient to justify industrialization. This was a long term investment and one in which NRD intended to realize over the life of a long term license.
140. Claimants’ investment in NRD, and in Rwanda, extended beyond the “traditional” investment in mining operations, but included preservation of the mines both while NRD was actively mining and when it was not.
141. John Bosco Kagubare testified that he was the Director of Operations and Production for NRD and that he was in charge of the security forces hired by NRD.<sup>224</sup> When he joined in 2013 he helped to implement a 200-person security team to stop the illegal mining that had allegedly been going on at NRD’s concessions.<sup>225</sup> He provided his services, including oversight of security for which he was paid US \$2,000 per month, through the end of 2015.<sup>226</sup> Mr. Kagubare’s uncontested testimony confirms that Claimants were investing directly in the preservation of the mines. Claimants needed to ensure that there was not extensive illegal mining going on and that the physical assets (e.g. shafts, tunnels, fencing, housing, etc.) remained operable so that NRD could quickly restart full-scale mining operations once Respondent agreed to provide tags again. Although

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<sup>223</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, **C-035**, p. 101.

<sup>224</sup> Hearing Tr. Day 5, p. 115:4-9, 123:8-11.

<sup>225</sup> *Id.* at p. 123:20-124:3.

<sup>226</sup> *Id.* at p. 133:5-134:8.

Claimants assumed that they were preserving the mines for NRD, it turned out that they were investing in the preservation of the mines for the benefit of Rwanda, who would soon expropriate the Concessions and re-award them to investors who had preserved and secure sites on which to bid.

**1. Claimants purchased all investment made by Starck and the Zarnacks and are entitled to damages arising therefrom**

142. Presumably because Respondent recognizes that both the Zarnacks and Starck invested in Rwanda, through NRD, Respondent argues strenuously that Claimants cannot claim any investment made by the Zarnacks or Starck (i.e. before December 23, 2010) as their own. This argument is not supported on the facts of the sale, or on the applicable law.

143. Spalena purchased NRD, through an intermediary, via a Share Purchase Agreement (“SPA”).<sup>227</sup> Pursuant to that agreement, Spalena purchased [REDACTED]

[REDACTED].<sup>228</sup> In doing so, Spalena purchased [REDACTED]

Not only is this clear from the SPA but it is confirmed in the evidence because Claimants became liable for NRD’s pre-sale debts.<sup>229</sup> Claimants were also allegedly responsible for Starck’s pre-sale tax liabilities.<sup>230</sup> It makes no sense that Claimants would not inherit the benefit of Starck’s investment which they purchased, and acquire the standing to bring this matter against Respondent under the BIT that such investment affords, but at the same time inherit full liability for all of Starck’s outstanding obligations to Rwanda, to

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<sup>227</sup> Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company, LLC dated 23 December 2010, **C-068**.

<sup>228</sup> *Id.* at § 1(1).

<sup>229</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), **R-034**.

<sup>230</sup> Counter-Memorial on the Merits, ¶ 75; NRD tax filings for the period 2009 to 2011 and 2014 to 2018, **R-021**; accord Statement of seizure of a car belonging to NRD Rwanda Ltd plate number IT005RC currently undergoing roadworthiness test at Remera (3 July 2015) and Announcement by Rwanda Revenue Authority (20 February 2015) (statement from bailiff attached announcement that RRA is seeking seizure of NRD’s vehicles for alleged tax debts), **R-079**.

the extent that they exist. No rational company would invest in a company in Rwanda if this were true, because their investment could never appreciate and be sold, it would have to be operated in perpetuity or abandoned.

144. This is consistent with Mr. Gatare’s testimony that there are no restrictions on the sale of investors’ interests to another investor.<sup>231</sup> As he confirmed, if there were restrictions on such sales, it would deter investment in Rwanda.<sup>232</sup> Mr. Gatare is merely confirming what is logical: that investors are free to sell their interests and the buyers obtain the benefit of the seller’s investment, whatever that may be.
145. Furthermore, the decisions on which Respondent relies do not support its position. In *Phoenix v. Czech Republic*, the tribunal did not find that a “nominal” purchase price meant that there had been no investment. Instead it stated that a “nominal” purchase price, whatever that may be, necessitated further analysis by the tribunal.<sup>233</sup> The *Phoenix* tribunal did not establish a categorical bar and, in fact, stated that “[i]f there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment.”<sup>234</sup> In *Phoenix*, the tribunal ultimately found that here was no investment because the purchase was a sham designed to confer international jurisdiction over what should have been a domestic dispute.<sup>235</sup> The tribunal also found all other elements used to determine whether there is an investment (contribution of money or other assets, a certain duration, element of risk, operation made

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<sup>231</sup> Hearing Tr. Day 8, p. 31:20-32:1.

<sup>232</sup> *Id.* at p. 32:2-6.

<sup>233</sup> *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), **RL-095**, ¶ 119.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at ¶ 144 (concluding that the investment was not a *bonafide* investment because “they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism” but finding that the investment satisfied all other prongs of the analysis).

in order to develop an Economic activity in the host State, assets invested in accordance with laws of the host State) had been satisfied.<sup>236</sup> Its decision did not turn on the ultimate purchase price. Contrary to the findings of *Phoenix*, there is no evidence in the record that Spalena's purchase of NRD from Starck was a sham intended to confer jurisdiction for an international arbitration. Nor could there since, at the time of the sale, the BIT did not even exist yet.

146. Respondent's argument faces a further obstacle because a "nominal" purchase price, whatever that may be, can confer jurisdiction. The tribunal in *Societe General v. Dominican Republic* found, for the purposes of jurisdiction, a purchase price of merely USD \$2 was sufficient to grant the claimant standing because the price could account for "a discounted value and hence entail[ed] a form of compensation for the distressed state of a company."<sup>237</sup> The purchase price also considered the "potential market value of the shares purchased, contract rights related to the concession and other claims and rights to benefits having an economic value."<sup>238</sup> The tribunal continued that "the purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risk entailed in the business."<sup>239</sup> As a threshold matter, *Societe General* resound refutes Respondent's contention that a purchase price of US [REDACTED] is *de facto* insufficient. This is especially true in light of the other aspects of the transaction, which included a [REDACTED] and the risk inherent in operating a mining company in Rwanda. Some of those risks involve being associated with

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<sup>236</sup> *Id.* at ¶ 114, 118-134.

<sup>237</sup> *Société Générale v. The Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) **RL-161**, ¶ 36, 37.

<sup>238</sup> *Id.* at ¶ 36.

<sup>239</sup> *Id.*

smuggling, which Starck had no interest in doing. Starck is an international company and there was substantial reputational risk involved with mining in East Africa, especially after the passage of Dodd-Frank in the United States.<sup>240</sup> These risks, which informed the purchase price, were not without merit as there were credible allegations of illegal activity by Starck's own employees on the ground in Rwanda.<sup>241</sup> Furthermore, Respondent has not presented any evidence, including testimony from a Starck representative, as to what Starck understood the purchase price to include and the basis for the structure of the deal.

147. The other case on which Respondent relies, *Societe Civile v. Guinea*, is equally unavailing. The opinion is originally in French and Respondent has misleadingly only provided a translation for a select few paragraphs and the translation from Google Translate, rather than an official translator.<sup>242</sup> Even still, these paragraphs do not support Respondent because it has omitted the end of the quote, which materially alters the meaning of the text. The tribunal in *Societe Civile* stated, in full, that “it is necessary that the person availing himself of the protection granted by the Convention ICSID is indeed the author of the expenses incurred in connection with the operation in question, **or somehow has the effective charge.**”<sup>243</sup>

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<sup>240</sup> Hearing Tr. Day 4, p. 69:3-24.

<sup>241</sup> *Id.* at p. 68:2-22.

<sup>242</sup> Claimants' counsel confirmed this by translating the same sentence from the original text and receiving the exact translation. That the translation says “Convention ICSID,” the literal order of the words in French, rather than “ICSID Convention,” the other that would be used in English demonstrates that this is a copy and paste job that no translator reviewed for accuracy.

<sup>243</sup> *Societe Civile Immobiliere de Gaeta v Republic of Guinea*, ICSID Case No. ARB/12/36, Award (21 December 2015), **RL-150**, ¶ 231 (A cet égard, même si l'origine des fonds est sans importance, il est nécessaire que la personne se prévalant de la protection accordée par la Convention CIRDI soit bel et bien l'auteur des dépenses effectuées en lien avec l'opération visée ou en ait d'une façon ou une autre la charge effective”).

148. While the translation leaves much to be desired, the omission of the bolded text demonstrates that Respondent has materially misrepresented the case's holding. The alternatives for finding that a party made an investment are that the party made the investment itself or otherwise has control over the investment. With respect to any investment that the Zarnacks or Starck made before December 23, 2010, Claimants obtained control of those investments and therefore "has the effective charge" of those investments.

**B. BVG invested in NRD by acquiring shares of Spalena**

149. BVG became an owner of Spalena on March 27, 2012 by selling its assets to Spalena in exchange for membership in Spalena, a limited liability company.<sup>244</sup> Respondent's only basis for disputing the fact that BVG is an owner of Spalena is that corporate resolutions of BVG and Spalena authorizing the transfer of BVG's assets are fraudulent and were created for the purposes of conferring jurisdiction on BVG for this arbitration.<sup>245</sup>

150. Respondent contends that these are not authentic documents based solely on the fact that they are not attached to any email, or other correspondence and no draft, or corporate resolutions was submitted in evidence corresponding to the final documents. Mr. Marshall testified that there would be no need to send these via email to anyone because Mr. Marshall, who signed both resolutions, was the president and sole director of both BVG and Spalena.<sup>246</sup> Precisely who Respondent's counsel envisions as the supposed recipient of the resolutions cannot be imagined. It similarly escapes understanding why

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<sup>244</sup> Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, **C-123**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, **C-124**.

<sup>245</sup> See e.g. Hearing Tr. Day 1, p. 12-14.

<sup>246</sup> *Id.* Day 1, p. 12-19; Day 4, p. 82:22-83:6.

Mr. Marshall would ever deem it necessary to prepare a corporate resolution by which he authorized himself to prepare the transaction documents, instead of simply preparing the documents.

151. Respondent also attacked the authenticity of the resolutions because, if Claimants have copies of the resolutions, they should certainly also have a copy of a corresponding purchase and sale agreement for the assets.<sup>247</sup> Mr. Marshall testified that he may have created one and that he could not “imagine [he] would not have created” it, because it would have been a two sentence document, and that it was likely in NRD’s main office when looted by Mr. Benzinge.<sup>248</sup> He explained that the additional reason BVG assets were transferred to Spalena was because BVG was barred by the Respondent from continuing to do business and these assets would otherwise have no owner.<sup>249</sup> Mr. Marshall observed that there was no need for an extensive asset purchase agreement, with numerous representations and warranties, because it was not an arms-length negotiated agreement but rather an internal housekeeping matter.<sup>250</sup> The investors themselves have maintained a running balance of their respective ongoing contributions to and ownership interest in BVG/Spalena so there would be no need to notify them of the purchase and sale, or even of the resolutions, since the investors are the same.<sup>251</sup>
152. With respect to the assets themselves, some of the assets were on the ground in Rwanda while others were stored around the world, waiting to be shipped to Rwanda as Claimants expanded their mining operations.<sup>252</sup> A shipping invoice confirms a shipment of goods to

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<sup>247</sup> Hearing Tr. Day 1, p. 210: 4-12.

<sup>248</sup> *Id.* at 4:6-9, 14-15.

<sup>249</sup> *Id.* at Day 1, p. 183:8-15.

<sup>250</sup> *Id.* at Day 4, p. 83:13-84:1.

<sup>251</sup> *Id.* at Day 4, p. 78:1-5.

<sup>252</sup> *Id.* at Day 1, p. 212:10-17, 214:3-4.

BVG in Rwanda in October 2010 that included a Toyota car, a small trailer, a crusher, a compressor and hoses, two jackhammers, and other equipment.<sup>253</sup> The remainder of BVG's assets which were transferred to Spalena are exhibited in BVG's and Spalena's corporate resolutions.<sup>254</sup>

153. In light of Mr. Marshall's clear testimony and Respondent's baseless attack on the authenticity of the resolutions, there can be no question that BVG invested in Spalena and therefore has standing to bring this action.

**C. BVG invested in NRD through the Cooperation Agreement**

154. Prior to Spalena's purchase of NRD, BVG, which shares the same investors as Spalena, entered into a Cooperation Agreement with NRD. The Cooperation Agreement provided that NRD would manage the operations of the Bisesero Concession for BVG.<sup>255</sup> The Cooperation Agreement further stated that BVG would loan NRD [REDACTED] for the purchase of mining equipment to be used at BVG's Concession.<sup>256</sup> In return, [REDACTED] [REDACTED].<sup>257</sup>

155. Although Mr. Ehlers signed the Cooperation Agreement, he denied its authenticity because he said that the signature on the document did not match his signature.<sup>258</sup> He further stated that he did not see the Cooperation Agreement until preparing his Supplemental Witness Statement.<sup>259</sup> These positions turned out to be false and over-aggressive litigation tactics by the Respondent because, of course, the document was

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<sup>253</sup> Invoice dated 14 October 2010, C-125; *id.* at Day 4, p. 86:18-87:8.

<sup>254</sup> Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, C-123; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, C-124.

<sup>255</sup> Cooperation Agreement Between NRD and BVG dated 1 November 2010, C-122.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Rejoinder, ¶ 461.

<sup>259</sup> *Id.*

authentic and when confronted with his Mr. Ehlers relented and no longer disputes the authenticity of the Cooperation Agreement.

156. Mr. Ehlers testified that the [REDACTED] was intended for “site establishment” to allow NRD to take the equipment it was not actively using and set it up at Bisesero, BVG’s Concession.<sup>260</sup> He further confirmed that if BVG had not actually loaned the \$ [REDACTED] consistent with the Cooperation Agreement he would have demanded performance of that aspect of the Contract and that there are no documents making such a demand.<sup>261</sup>
157. And far from not being in a position to loan [REDACTED], Mr. Marshall testified that he did give Mr. Ehlers the [REDACTED] pursuant to the Cooperation Agreement, paid in installments.<sup>262</sup>

**D. The MSA Letter of Credit evidences Claimants continuing investment**

158. Respondent attempted to demonstrate that NRD had amassed a large amount of debt, both to Mineral Supply Africa.<sup>263</sup> Respondent suggested that evidenced NRD’s “worsening financial state.”<sup>264</sup> Despite these suggestions, and assuming the debt owed to MSA is real, which NRD strongly contests, the evidence demonstrates that NRD was actually paying off its debt to MSA.
159. On July 7, 2014, while Ben Benzinge was in control of NRD’s Concessions, MSA’s attorney delivered a letter to NRD, inexplicably via Mr. Benzinge, notifying NRD of a \$601,836.98 debt. Notably, there is no other document or testimony evidencing a debt of this size or what Mr. Benzinge did with such notice. Respondent has not identified any

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<sup>260</sup> Hearing Tr. Day 6, p. 28:11-16.

<sup>261</sup> Hearing Tr. Day 6, p. 27:8-16.

<sup>262</sup> *Id.* at Day 1, p. 198:4-18.

<sup>263</sup> *See e.g.* Hearing Tr. Day 2, p. 229-232.

<sup>264</sup> *Id.* at p. 232:23. Claimants vigorously dispute that NRD was in the financial situation represented by Respondent.

ledger or other financial document of NRD's recording this debt. Whether MSA strategically while MSA knew that Claimants did not have control of NRD and that Mr. Benzinge would willingly amass unsubstantiated debts for the company is unknown. However, the only credible testimony on the matter is that NRD had a line of credit with MSA, for which it provided security, and that it never exceeded this line of credit by more than \$20,000.<sup>265</sup>

160. Even accepting that NRD did owe over \$600,000 by July 2014, it had paid off down about \$100,000. Fabrice Kayihura, the Deputy Chief Executive of MSA from 2008 to 2016, testified that when he left at the end of 2016, NRD owed approximately \$500,000.<sup>266</sup> Therefore, even assuming that the debt is real, NRD successfully paid down \$100,000 despite being locked out of its mines for a period of time, despite being locked out of its office until September 2015, and despite not obtaining mineral tags and being able to lawfully sell minerals since April 2014.

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<sup>265</sup> *Id.* at p. 232:1-7.

<sup>266</sup> Kayihura WS, ¶¶ 6, 17.

Respectfully Submitted

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