

**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)

**MEMORIAL**

Case No. ARB/18/21

Steven M. Cowley  
[smcowley@duanemorris.com](mailto:smcowley@duanemorris.com)  
Bryan D. Harrison  
[bharrison@duanemorris.com](mailto:bharrison@duanemorris.com)  
DUANE MORRIS LLP  
100 High Street, Suite 2400  
Boston, MA 02110  
Telephone: 857.488.4200  
Legal Representative for Claimants

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<b>I.</b>	<b>OWNERSHIP HISTORY OF CLAIMANTS</b>	
1.	In order to begin operating in Rwanda’s private mining sector, German investors, Joachim Christopher Zarnack and Jens Christopher Zarnack (together, the “Zarnacks”), and a Rwandan national, Ben Benzinge, formed Natural Resources Development (Rwanda) Ltd (“NRD”) on or about July 10, 2006. <sup>1</sup>	
2.	By vote of the majority of shareholders on March 13, 2008, the Zarnacks transferred their individual shares in NRD to NRD Holding GmbH on March 13, 2008. NRD Holding	

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

GmbH is a wholly owned subsidiary of H.C. Starck GmbH (“Starck”).<sup>2</sup> On behalf of NRD Holding GmbH the Zarnacks continued to hold at least 85% of the shares of NRD.<sup>3</sup> The Zarnacks later pledged their shares to Starck, granting 100% ownership of NRD Holding GmbH, and an 85% ownership interest in NRD.<sup>4</sup>

3. Starck changed the name of NRD Holding GmbH to HC Starck Resources GmbH.<sup>5</sup>
4. The Spalena Company, LLC (“Spalena”) is a Delaware entity incorporated on June 9, 1998.<sup>6</sup> On December 23, 2010, Starck sold all of its interest in HC Starck Resources GmbH to Spalena for [REDACTED].<sup>7</sup>
5. Immediately following the sale of HC Starck Resources GmbH to Spalena, the name of HC Starck Resources GmbH was changed to Natural Resources Development GmbH.<sup>8</sup>
6. Spalena is an investment vehicle of Bay View Group, LLC (“BVG”), which is Delaware company incorporated on March 16, 2007.<sup>9</sup>
7. Roderick Marshall formed BVG to invest in Rwanda’s mining sector. Representatives of the Rwanda Development Board (“RDB”) enticed Marshall to invest in Rwanda in the mid-2000s. Rwanda was very keen to have United States investors in its mining sector. With certain assurances made by Rwanda, such as a guaranteed long term contract, Mr.

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<sup>2</sup> Letter from G. Roethe to V. Karega dated 30 October 2008, **C-003**.

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

<sup>4</sup> Minutes of the Shareholders’ Ordinary General Meeting, 29 October 2008, p. 1, **C-006**.

<sup>5</sup> *See, e.g.*, Declaration of Name Change, 23 December 2010, p. 3, **C-007**; Registry of Name Change, 13 August 2014, p. 1, **C-008**.

<sup>6</sup> Amended Arts. of Assoc., 1 May 2007, p. 1, **C-009**.

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

<sup>8</sup> Declaration of Name Change, 23 December 2010, **C-007**.

<sup>9</sup> Arts. of Assoc., 16 March 2007, **C-011**.

Marshall, as the lead investor in BVG, invested in Rwanda on behalf of BVG and obtained a mining contract from Rwanda. As a result, Marshall began investing substantially in Rwanda. Unfortunately, the Rwandan Government (“Rwanda”) took BVG’s Concession in 2012. Despite this, Mr. Marshall desired to continue investing and operating in Rwanda and transferred BVG’s investments in Rwanda to Spalena. As a result, BVG became an investor in Spalena. Through Spalena, Mr. Marshall, other investors, and BVG invested in NRD. BVG and Spalena are commonly owned affiliates.<sup>10</sup>

8. Mr. Marshall is the President of both BVG and Spalena. He is also the Managing Director of NRD. At all times that Mr. Marshall was communicating with Rwanda in his role as Managing Director of NRD, he was also speaking to them as NRD’s primary investor. Rwanda was always aware of Mr. Marshall’s dual role as Managing Director of NRD and as an investor.<sup>11</sup>
9. Claimants’ business was set up in the way described above because Rwanda required foreign investors to maintain an entity incorporated in Rwanda as its investment vehicle.
10. Spalena is the primary owner and investor in NRD<sup>12</sup> and Rwanda publicizes Spalena as such.<sup>13</sup>

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<sup>10</sup> Marshall WS, ¶¶ 6-8, 15. BVG held the Bisesero Concession, which was subsequently taken by Rwanda. BVG’s investment in the Biserero Concession is not at issue in this litigation.

<sup>11</sup> Marshall WS, ¶¶ 1, 15, fn. 3.

<sup>12</sup> Letter from R. Marshall to Registrar General, 23 March 2015, **C-013**. Although NRD wrote to the RDB to request that the register be updated to reflect the fact that the owner of NRD is Spalena, not NRD Holding GmbH, RDB never updated its register. However, the documentation establishes that Spalena is the owner of NRD, by virtue of its purchase of HC Starck Resources GmbH (formerly known as NRD Holding GmbH) from Starck.

<sup>13</sup> H. Kanzira, et al., *Republic of Rwanda Promotion of Extractive and Mineral Processing Industries in EAC Rwanda Status*, Rwanda Natural Resources Authority, Geology and Mines Department, April 2012, p. 30, **C-014**.

## II. NRD'S OPERATIONS IN RWANDA

11. Rwanda's mining history dates to Belgium's colonization of Rwanda following World War I. Mining activities began in full in the 1930s with the incorporation of MINETAIR and SOMUKI in 1934, followed by GEORWANDA and COREM in the mid-1940s. In 1973, Rwanda sought to take control of the mining industry by combining all existing mining operations and creating a private/public company, SOMIRWA, in which the Government held a 49% share. This company was ultimately a failure and, in 1989, REDEMI, a public company, took over all of SOMIRWA's mining concessions.<sup>14</sup>
12. Beginning in about 1997, and more fully in the mid-2000s, Rwanda sought to re-privatize its mining sector in order to increase mineral exports and increase employment in the sector. Much of the mining in Rwanda, even today, is done by small-scale ("artisanal") miners working with basic equipment, such as buckets and shovels and not on an industrial scale. It is estimated that there are over 20,000 artisanal miners working in Rwanda at thousands of locations. Much of the mining carried out by these artisanal miners causes environmental damage. A number of large mining companies, mostly from other countries, also sought to invest in the Rwandan mining industry as a result of the privatization of Rwanda's mining industry.<sup>15</sup>
13. As a result of Rwanda's effort to privatize its mining sector and encourage foreign investments, it issued a number of mining contracts to foreign investors. In particular,

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<sup>14</sup> Government of Rwanda Ministry of Forestry and Mines, *Mining Policy*, 13 January 2010, [http://www.minirena.gov.rw/fileadmin/Mining\\_Subsector/Laws\\_Policies\\_and\\_Programmes/Policies/Mining\\_policy\\_Update.pdf](http://www.minirena.gov.rw/fileadmin/Mining_Subsector/Laws_Policies_and_Programmes/Policies/Mining_policy_Update.pdf), (last accessed 25 February 2019), p. 5-6, C-015.

<sup>15</sup> *Mining Policy*, p. 6-7, C-015; Mbaya Witness Statement dated February 26, 2019, ¶ 5.

Rwanda awarded a “Contract For Acquiring Mining Concessions” (“Contract”) to Natural Resources Development Rwanda Ltd on November 24, 2006.<sup>16</sup>

14. In Article 1 of the Contract the Government of Rwanda authorized NRD “to explore and run mining operations within RUTSIRO, MARA, SEBEYA, GICIYE, and NEMBA Perimeters” for a period of four years.<sup>17</sup>

15. Article 2 obliged NRD to:

1. Make a geographical demarcation of the perimeters;
2. Provide the following documents as part of the contract:
  - a. The action plan.
  - b. The environmental protection plan.
  - c. The investment plan.
3. **Proceed immediately to the industrial exploitation in all given sites.**
4. Provide progress reports on research activities after two years.
5. Provide evaluation reports of reserves and the feasibility study after 4 years.<sup>18</sup>

16. Article 4 states that “[a]fter a positive evaluation of the submitted feasibility study Natural Resources Develop Rwanda Limited **will be** granted the mining concessions.”<sup>19</sup>

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<sup>16</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, **C-017**; *see also* Contract for Acquiring the Rutongo Mining Concession Between the Government of Rwanda and Umhlaba Investment Holding (Pty) Ltd dated 27 August 2008, **C-023**.

<sup>17</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 1, **C-017** (capitalization in original).

<sup>18</sup> *Id.* at Art. 2 (emphasis added).

<sup>19</sup> *Id.* at Art. 4 (emphasis added). There is no Article 3 in the Contract.

17. Following the receipt of the Contract, Rwanda issued five special permits, by means of ministerial decrees, one for each of the five concessions, specifically permitting NRD to access the concessions and begin to fulfill its contractual requirements.<sup>20</sup>
18. The decree states that NRD was granted a special small-scale mining exploration and operation permit. The decree states that NRD may mine for wolfram, coltan, and cassiterite in each of the five concessions and sets forth the perimeters for each concession.<sup>21</sup>
19. With these permits, NRD was permitted to immediately begin research and exploitation at the five concessions. Crucially, NRD was granted permission to exploit, not merely research and exploration.<sup>22</sup>

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<sup>20</sup> Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-018**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-019**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-020**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-021**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, **C-022**.

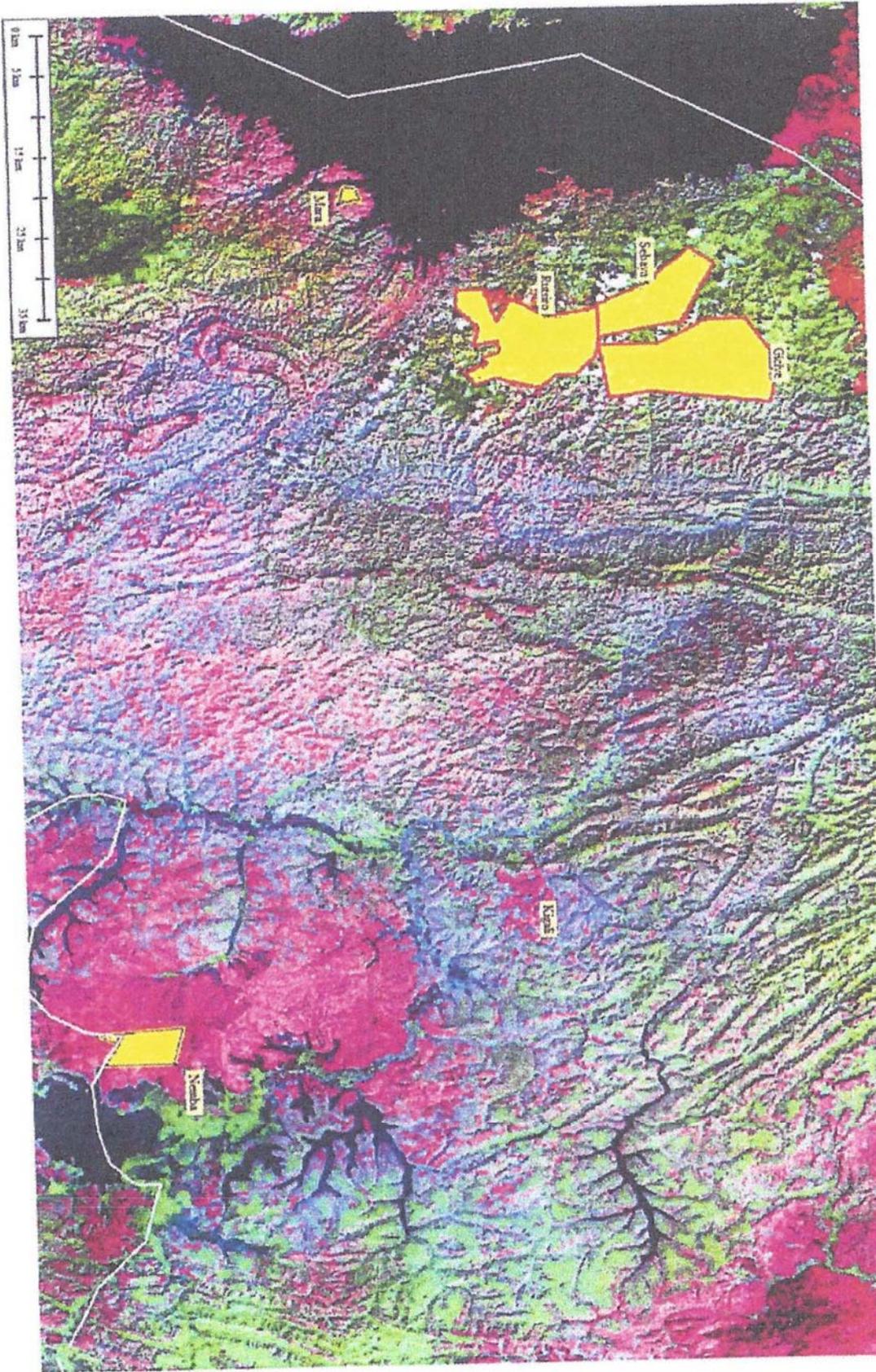
<sup>21</sup> Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-018**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-019**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-020**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-021**; Letter from M. Bikoro to B. Benzingé dated 29 January 2007, Introduction, Art. 2, **C-022**.

<sup>22</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Article 2, **C-017**. For example, Umhlaba Investment Holding (Pty) Ltd's (now Tinco) Contract for Acquiring the Rutongo Mining Concession did *not* permit Umhlaba to exploit, only to research, rehabilitate, and explore during the four-year term. *See* Contract for Acquiring the Rutongo Mining Concession Between the Government of Rwanda and Umhlaba Investment Holding (Pty) Ltd dated 27 August 2008, Art. 2, **C-023**.

20. The map below shows the relative location of each of NRD's Concessions within Rwanda, with each Concession demarcated in yellow with a red border.<sup>23</sup>

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<sup>23</sup> NRD Rwanda, *Status Report 2009*, p. 4, **C-067**.



21. In total, NRD's Concessions make up 32,274 ha of land. Most of NRD's Concessions (all but Nemba) are located in Rwanda's Western Province and are known as the Western Concessions. These Western Concessions are located very near Lake Kivu, which borders the Democratic Republic of Congo. Nemba is located in the Eastern Province and its southern border shares a border with Burundi.<sup>24</sup> The specific geographic boundaries of the Concessions are defined by statute.
22. Within each Concession are numerous mining sites that produce one of a number of minerals.<sup>25</sup> Pursuant to NRD's licenses, it is permitted to mine for wolfram (tungsten), coltan (tantalum), and cassiterite (tin).<sup>26</sup>
23. Rwanda contains reserves of cassiterite (tin), wolfram or wolframite (tungsten), and columbotantalite or coltan (tantalum).<sup>27</sup> Cassiterite is found throughout Rwanda and there are reserves of cassiterite in the Mara, Nemba, and Rutsiro Concessions, among others. The Rutsiro Concession contains a known reserve of wolfram and coltan.<sup>28</sup>
24. It is well known in the mining industry that NRD's Concessions are some of the most valuable and mineral-rich in Rwanda.<sup>29</sup>
25. NRD's Concessions were unique in Rwanda in that they were "greenfield," meaning that they had no or minimal pre-existing buildings or infrastructure from the era of Belgian

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<sup>24</sup> *Status Report 2009*, p. 2, **C-067**.

<sup>25</sup> *See e.g., Status Report 2009*, pp. 36-40, **C-067** (listing numerous mining sites with tantalum and tin reserves).

<sup>26</sup> *See, e.g., Letter from M. Bikoro to B. Benzinge dated 29 January 2007, Art. 2, C-018.*

<sup>27</sup> Kanzira, *Republic of Rwanda Promotion of Extractive and Mineral Processing Industries in EAC Rwanda Status*, p. 3, **C-014**.

<sup>28</sup> Kanzira, *Republic of Rwanda Promotion of Extractive and Mineral Processing Industries in EAC Rwanda Status*, p. 5, 7-8, **C-014**.

<sup>29</sup> Rwamasirabo WS ¶ 3; Kevin Buyskes Witness Statement dated 27 February 2019, ¶ 14; Fiala WS, ¶ 4.

mining. This lack of existing mining infrastructure created an added challenge for NRD's investors to develop operations at the Concessions.<sup>30</sup>

26. Initially, NRD's owners invested 3.2 Million Euros (USD \$4.7 Million) across the five Concessions to advance infrastructure, initiate production, and undertake additional geological studies. These early geological studies showed significant deposits of cassiterite, wolframite, and coltan in each of the five Concessions.<sup>31</sup> NRD hired Dr. Eckart Hilmer of Alsa Consulting to evaluate the wolframite deposits at the Rutsiro Concession, specifically. Dr. Hilmer found that the Concession contained a reserve of approximately 20,000 tons of wolframite and recommended that NRD begin by mining and processing scree found within the Concession.<sup>32</sup>
27. A major goal of NRD's investors in its early years was to establish a permanent presence at each of the Concessions. The purpose of this was to establish permanent offices for staff, experts, and geologists, and convert the Concessions from artisanal mining to industrial mining. Extensive investment and effort was made to improve road access to the Concessions and increase the amount of water and electricity at each of the locations. Improved road access permitted NRD to introduce heavy machinery to the Concessions, a necessity for more profitable mining. These improvements were necessary in order to

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<sup>30</sup> Barthelemy WS, ¶ 5; Mruskovicova WS ¶ 10.

<sup>31</sup> NRD Rwanda, *Status Report 2008*, pp. 5, 19-42, C-024. At present, Claimants are only in possession of the 2008 and 2009 Status Reports. The status reports from 2007 and 2010-2011 were stolen by Rwanda from NRD's offices in Kigali some time in 2015, during which Rwanda prevented NRD from accessing its corporate offices. Upon return to the offices in September 2015, NRD found that all of their computers had been wiped clean or destroyed, and that nearly all paper copies and records had been removed. Marshall WS, ¶ 67. Claimants expect that Rwanda will produce all of these stolen documents and material during discovery in this matter, including the missing Status Reports.

<sup>32</sup> E. Hilmer Consulting Report dated January 2008, pp. 2, 9, C-027.

bring the mining operations at the Concessions into the 21st Century, increase the capacity of the mining operations, and turn a profit.<sup>33</sup>

28. NRD also improved the topographic maps of each of the Concessions. Prior to NRD's arrival, the most up to date maps were from 1988 and incomplete. It was necessary to revise and update these maps to have an accurate view of the landscape in each of the Concessions so as to plan and explore new potential mining sites within each Concession. Similarly, NRD prepared detailed geological and tectonic maps for the Mara and Nemba Concessions which was a prerequisite to further understand the various mineralizations at those sites (such maps already existed for Rutsiro, Sebeya, and Giciye).<sup>34</sup>
29. By the end of 2007, NRD employed over 1,300 individuals, and by the 3rd quarter of 2008 it had produced over 90 metric tons of minerals. NRD expected these numbers to increase in the coming years as additional heavy machinery became available at the more remote areas in the Concessions (Rutsiro, Giciye, and Sebeya in particular). Such growth, however, was a two-step process because, in order to bring heavy machinery to the Concessions, substantial investment and efforts first had to be made to improve the roads to and from the sites.<sup>35</sup>
30. Rwanda was encouraged by NRD's 2007 and 2008 Status Reports.<sup>36</sup>

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<sup>33</sup> *Status Report 2008*, pp. 8-9, **C-024**.

<sup>34</sup> *Status Report 2008*, pp. 14-15, **C-024**.

<sup>35</sup> *Status Report 2008*, pp. 8-9, 46, **C-024**.

<sup>36</sup> Letter from V. Karega to G. Roethe dated 17 January 2009, **C-028**. As noted previously, Claimants are only in possession of the 2008 and 2009 Status Reports. All other status reports, which were submitted yearly, were stolen by Rwanda from NRD's offices in Kigali sometime in 2015. Claimants expect a return of these documents during the discovery phase of this arbitration.

31. In 2008, NRD's Concessions were leading producers of tantalum, wolframite, and cassiterite.<sup>37</sup>
32. In 2009, NRD's investors focused on improving the infrastructure at each of its five Concessions in order to expand ongoing and future exploration efforts and mining operations. Prior to this investment by NRD's owners, the infrastructure at the Concessions had long been neglected, with limited road access and limited facilities. Through its owners' investment, NRD erected numerous buildings and substantially improved road access in the Sebeya and Giciye Concessions.<sup>38</sup>
33. NRD's investors also built upon the foundation of technical imagery it created in 2008 to further map and explore the concessions. In particular, NRD acquired more detailed satellite images of its concessions. The satellite imagery, along with other data and maps further helped NRD identify potential mine site and mineralizations in the Concessions.<sup>39</sup>
34. These studies showed significant wolfram, coltan, and cassiterite deposits in the Rutsiro, Giciye and Sebeya Concessions with an especially high amount of wolfram in Rutsiro.<sup>40</sup> With respect to coltan reserves in these three Concessions, NRD obtained over 100 samples from various sites and found dozens of mining sites with potentially significant deposits.<sup>41</sup> At the Nemba Concession, NRD found substantial amounts of cassiterite as well as coltan, and at Mara, cassiterite.<sup>42</sup>

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<sup>37</sup> T. Yager, *USGS 2008 Minerals Yearbook, The Mineral Industry of Rwanda*, September 2010, <https://minerals.usgs.gov/minerals/pubs/country/2008/myb3-2008-rw.pdf> (last accessed 25 February 2019), C-029.

<sup>38</sup> *Status Report 2009*, p. 8, C-067.

<sup>39</sup> *Status Report 2009*, p. 11, C-067.

<sup>40</sup> *Status Report 2009*, pp. 20, 21, C-067.

<sup>41</sup> *Status Report 2009*, pp. 36-40, C-067.

<sup>42</sup> *Status Report 2009*, pp. 53, 64, C-067.

35. At the Nyatubindi mine in the Giciye Concession, NRD’s owners invested in building three sequential dams in order to minimize the buildup of sediment in the Sebeya River. In addition, NRD proactively stopped artisans from working a number of sites in order to minimize the environmental impact. This was most prevalent in the Giciye Concession where decades of unregulated hydraulic mining by the Belgians led to increased chances of sedimentation in the Sebeya river.<sup>43</sup>
36. In 2009 NRD’s Nemba concession produced 220 tons of cassiterite, a nearly 400% increase from 2007. NRD’s concessions continued to be leading producers of tantalum, coltan, wolframite, and cassiterite in 2009.<sup>44</sup>
37. Claimants also invested in the only functioning mineral processing plant in Rwanda and the only functioning mineral testing laboratory among concession holders.<sup>45</sup>

#### **A. Negotiation of Long Term Contracts**

38. It was well understood in the mining community that once a company obtained a contract for acquiring a concession the long term licenses were guaranteed.<sup>46</sup> Dr. Michael Biryabarema of the Rwanda Geology and Mines Authority (“OGMR”) (the OGMR later became the Geology and Mines Department (“GMD”)) indicated as such in a July 20, 2009 letter to the National Land Center/Office of the Registrar of Land Titles. In reference to NRD, he stated that they had a four year permit and that “[s]uch permits are expected to be converted into long term concessions.”<sup>47</sup> Consistent with Dr. Michael’s

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<sup>43</sup> *Status Report 2009*, pp. 45, 71, **C-067**.

<sup>44</sup> T. Yager, *USGS 2009 Minerals Yearbook, The Mineral Industry of Rwanda*, September 2011, <https://minerals.usgs.gov/minerals/pubs/country/2009/myb3-2009-rw.pdf> (last accessed 25 February 2019), **C-030**.

<sup>45</sup> Mruskovicova WS, ¶¶ 16-17.

<sup>46</sup> Marshall WS, ¶ 8; Buyskes WS, ¶ 7; Rwamasirabo WS, ¶ 6; Fiala WS, ¶ 5.

<sup>47</sup> Letter from B. Michael to Director of National Land Center dated 20 July 2009, **C-032**.

statement and the general rule in Rwanda, Rwanda represented directly to NRD that the long term contracts “will be negotiated” following the expiration of the Contract.<sup>48</sup> The Contract itself stated that NRD “**will be** granted the mining concessions.”<sup>49</sup>

39. In fact, Mr. Marshall was first enticed to invest in Rwanda and did so with the guarantee that he would receive a long term contract.<sup>50</sup>
40. It was equally well understood by Rwanda and mining investors alike that no investor would invest the money necessary to develop a mining company over a four-year period without a further guarantee of a long term contract that would enable it to see a return on that investment. The first years of operating a mine are costly and it is nearly impossible to turn a profit. NRD’s owners only invested in Rwanda in the first place on the understanding that NRD would obtain a long term contract in order that the immense upfront capital expenditure would be recovered and profits would be earned.<sup>51</sup>
41. Near the end of the term of the Contract and the special permits, the OGMR notified the Director of NRD that Rwanda was “satisfied with exploitation progress made in Rutsiro Mining site, specifically the construction of a washing plant which is still at the testing phase. We also acknowledge upgraded facilities at Nemba mine like the supply of water and the new equipment.”<sup>52</sup> OGMR further invited NRD to submit its application for the

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<sup>48</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033**.

<sup>49</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Article 4, **C-017** (emphasis added).

<sup>50</sup> Marshall WS, ¶ 8; *see also* Mruskovicova WS, ¶ 6.

<sup>51</sup> Marshall WS, ¶ 9; Buyskes WS, ¶¶ 7, 11. Rwanda also recognized the importance of maintaining investors. Minister Kamanzi, when he first granted NRD an extension of their contract, said “I understand the absolute necessity to conclude this agreement as soon as possible for strong investor confidence.” Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**.

<sup>52</sup> Letter from B. Christophe to Director General of NRD dated 20 October 2010, p. 1, **C-026**.

long term contracts, along with fuller reserve estimates and an environmental management plan.<sup>53</sup>

42. In accordance with OGMR's request and the terms of the Contract, NRD submitted an application for the long term contract ("Application") on November 29, 2010.<sup>54</sup> The Application contained detailed information regarding the geology of the Concessions, the production over the prior four years at each of the Concessions, further planned investments and production at each of the Concessions, reserve estimates and further plans to calculate reserves at each of the five Concessions.<sup>55</sup>
43. The Application also contained an Environmental Impact Assessment Report prepared by Dr. Fabien Twagiramungu, which included an environmental management plan as requested by OGMR. The plan noted some environmental damage that had occurred or predated NRD's operations and identified the many efforts that NRD had undertaken to remedy environmental damage.<sup>56</sup>
44. The Application fulfilled each of the specific requests of OGMR and each of NRD's requirements under the Contract to complete a feasibility study.<sup>57</sup> In particular, the Application contained an proposed action plan, an environmental protection plan, an

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<sup>53</sup> Letter from B. Christophe to Director General of NRD dated 20 October 2010, p. 1, **C-026**.

<sup>54</sup> See Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>55</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 2, 3, 5, **C-035**.

<sup>56</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, § VII, **C-035**; F. Twagiramungu Consulting Report dated September 2010, **C-036**.

<sup>57</sup> See Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 2, **C-017**; Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, p. 97, **C-035**; see generally *Status Report 2009*, **C-067**.

investment plan, and a feasibility study. Furthermore, Claimants had provided a Status Report in 2009, complying with Article 2, Section 4.<sup>58</sup>

45. In 2010, NRD produced approximately 12 tons of tantalum/coltan, 218 tons of cassiterite, and 33 tons of wolframite in 2010.<sup>59</sup>
46. Following NRD's submission of the requested Application and before a response was received from Rwanda, Spalena acquired NRD's parent company.<sup>60</sup>
47. On August 2, 2011, Stanislas Kamanzi, notified NRD, now run by Mr. Marshall that a long term contract would not be issued at that time because NRD had not yet fulfilled its obligations pursuant to Article II with respect to a "final report on reserves and mining feasibility studies."<sup>61</sup> It is unclear precisely what Mr. Kamanzi's concern was because the Application contained both a report on reserves and a feasibility study.<sup>62</sup>
48. Section 5 of the Application, Titled Resource and Reserve Estimations specifically details the Wolframite reserves at Rutsiro with detailed topographical maps showing the reserves.<sup>63</sup> The Application then goes on to detail reserves in the Nemba Concession in Section 5.3.<sup>64</sup> Finally, Section 6.3 details the planned reserve testing to be done at the Concessions.<sup>65</sup>

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<sup>58</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 5-8, **C-035**; *Status Report 2009*, **C-067**.

<sup>59</sup> T. Yager, *USGS 2010 Minerals Yearbook, The Mineral Industry of Rwanda*, August 2012, <https://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-rw.pdf> (last accessed 25 February 2019), **C-037**.

<sup>60</sup> *See supra* § I.

<sup>61</sup> Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>62</sup> *See generally* 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**.

<sup>63</sup> *Id.*, § 5, **C-035**.

<sup>64</sup> *Id.*, § 5.3, **C-035**.

<sup>65</sup> *Id.*, § 6.3, **C-035**.

49. Later in the negotiation process, it was established that Rwanda already knew and was well aware of the mineral reserves at each of NRD's Concessions, contrary to the purported concern about the report on reserves and mining feasibility. Specifically, Rwanda provided a draft long term contract to Mr. Marshall that contained reserve estimates and estimated monthly production amounts. These values, which Rwanda provided to NRD, established that Rwanda was well aware of the production potential of NRD's Concessions.<sup>66</sup>
50. With respect to Mr. Kamanzi's contention that NRD lacked a feasibility study, the Application undoubtedly fulfilled the request that a feasibility study be conducted. The Application details the geology of each of the five Concessions held by NRD, details the available minerals and the production from 2007 through 2010. It then goes on to describe the planned activity from 2011 through 2015. Without question, the Application constituted a "feasibility study" and established that the Concessions were viable and likely to produce wolfram, coltan, and cassiterite.<sup>67</sup> In fact, GMD informed Claimants that their feasibility was superior to any other submitted.<sup>68</sup> The annual status reports submitted to Rwanda further made clear that the Concessions were viable and contained sufficient reserves of minerals.<sup>69</sup> In addition, Rwanda itself suggested that NRD

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<sup>66</sup> Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, p. 5, **C-042**; Marshall WS, Art. 5.

<sup>67</sup> Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD, §§ 3, 5 **C-035**; *see also* Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, Article 5, **C-042**; Marshall WS, ¶ 32.

<sup>68</sup> Marshall WS, ¶ 32; *see also* Fiala WS, ¶ 8.

<sup>69</sup> *See, e.g., Status Report 2008*, § 3.1, **C-024**; *Status Report 2009*, § 5, **C-067**. At present, Claimants are only in possession of the 2008 and 2009 Status Reports. The status reports from 2007 and 2010-2011 were stolen by Rwanda from NRD's offices in Kigali some time in 2015, during which Rwanda prevented NRD from accessing its corporate offices. Upon return to the

complied with the provisions of the Contract when acknowledged that it was ready to negotiate long term contracts in January 2012.<sup>70</sup>

51. Additionally, in 2011, NRD mined between 96 and 168 tons of Cassiterite at the Nemba Concession and between 36 and 60 tons of Cassiterite at the Rutsiro Concession. This made Nemba the fourth most productive Cassiterite mine in Rwanda, and Rutsiro the fifth. Rutsiro also produced the third most tantalum and fourth most wolframite and coltan in Rwanda.<sup>71</sup>

52. Acknowledging NRD's compliance with the terms of the Contract, Minister Kamanzi granted NRD a six month extension of its existing licenses.<sup>72</sup> The purpose of this extension was to "negotiate the terms of the new contract."<sup>73</sup>

53. The six-month extension was the first of many extensions of the Contract throughout which representatives of Rwanda continually represented to Mr. Marshall that long term contracts were forth coming and guaranteed.<sup>74</sup> On February 20, 2012, Minister Kamanzi extended NRD's licenses until May 2, 2012. He stated that it had not been "possible to conclude the contract in the above time extension" and that he "understand[s] the absolute necessity to conclude this agreement as soon as possible for strong investor confidence." As a result, the Contract was extended an additional three months. Minister

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offices in September 2015, NRD found that all of their computers had been wiped clean or destroyed, and that nearly all paper copies and records had been removed. . Marshall WS, ¶ 67. Claimants expect that Rwanda will produce all of these stolen documents and material during discovery in this matter, including the missing Status Reports

<sup>70</sup> See Letter from R. Marshall to S. Kamanzi dated 30 January 2012, C-039.

<sup>71</sup> *USGS 2011 Minerals Yearbook, The Mineral Industry of Rwanda*, C-016.

<sup>72</sup> Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, C-034.

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., Letter from B. Michael to Director of National Land Center dated 20 July 2009, C-032 (OGMR stated that "[s]uch permits are expected to be converted into long term concessions"); Marshall WS, ¶ 32, 35.

Kamanzi concluded his letter by stating “I am certain that this is enough time for us to conclude a good contract for this partnership.”<sup>75</sup> Claimants continued to believe that the long term contract was forthcoming and imminent.<sup>76</sup>

54. Around January 2012 the RNRA and the RDB had already approved draft long term contracts for NRD’s five Concessions and appeared ready to begin negotiating the long term contracts with the Claimants, as investors in NRD.<sup>77</sup>
55. During this same time, Minister Kamanzi also raised some concerns about environmental damage in the Rutsiro Concession.<sup>78</sup> Mr. Marshall immediately responded to Minister Kamanzi’s concerns, informing him that he had not actually visited the Rutsiro Concession but the Nyatubindi site within the Giciye Concession. Mr. Marshall further clarified that it was not disposing of waste into the river and that there was sedimentation in the river from the Belgian’s 75 years of unregulated mining in the area.<sup>79</sup>
- Nevertheless, Claimants and NRD worked to address Minister Kamanzi’s concerns and they hired Dr. Twagiramungu to provide an updated environmental report on the Nyatubindi mining site.<sup>80</sup> NRD’s letter to the Mayor of the Rutsiro District, copying Minister Kamanzi, noted that NRD had planted over 10,000 trees in the last month to try

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<sup>75</sup> Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**.

<sup>76</sup> Marshall WS, ¶ 32, 35.

<sup>77</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2012, p. 1, **C-039**.

<sup>78</sup> Letter from S. Kamanzi to Chair of NRD dated 28 October 2011, **C-040**.

<sup>79</sup> Letter from R. Marshall to S. Kamanzi dated 31 October 2011, **C-041**. In fact, much of the environmental damage likely comes from illegal miners, a fact recognized by Rwanda. *Mining Policy*, p. 13, **C-015**.

<sup>80</sup> F. Twagiramungu Consulting Report dated September 2010, **C-036**.

to reduce sedimentation in the Sebeya river. NRD also reminded Rwanda that the damage at this site was due to 75 years of Belgian mining.<sup>81</sup>

56. NRD also unequivocally disputed the unsupported suggestion that it was involved in illegal mining.<sup>82</sup> If NRD was involved in illegal mining, ITRI would have issued an incident report. ITRI never issued an incident report to NRD and individuals who worked closely with NRD knew that they were not involved in illegal mining.<sup>83</sup>
57. In February 2012, the Operations Department of the Rwandan National Police illegally, and without notice, seized NRD's property. In particular, the police seized a Mercedes Actros dump truck and a Toyota Land Cruiser. The police attempted to get NRD to sign paperwork indicated that the police had provided notice to NRD of the forthcoming seizure. NRD refused to sign a clearly fraudulent document. One officer even threatened to close NRD's business within the month.<sup>84</sup>
58. The following month, NRD's mining activities in the Manihira Sector, located within NRD's Rutsiro Concession, were shut down by the Executive Secretary of the Manihira Sector.<sup>85</sup> Significantly, mines in the Manihira sector were specifically identified in NRD's 2009 Status Report as containing a potentially significant source of coltan.<sup>86</sup> Therefore, the miners that the local authorities permitted to mine at Manihira, while

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<sup>81</sup> F. Twagiramungu, *NRD Progress Mission Report*, November 2011, **C-043**; Letter from R. Marshall to Mayor of Ngororero District dated 22 November 2011, **C-044**.

<sup>82</sup> Letter from R. Marshall to S. Kamanzi dated 31 October 2011, p. 3, **C-041**; see Barthelemy WS, ¶ 9; Mbaya WS, ¶ 13.

<sup>83</sup> See *infra* § III.

<sup>84</sup> Letter from R. Marshall to Rwandan National Police dated 8 February 2012, p. 5, **C-046**.

<sup>85</sup> Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, p. 1, **C-047**.

<sup>86</sup> *Status Report 2009*, p. 43, **C-067**.

banning NRD, likely successfully mined large quantities of coltan that they were then able to sell.

59. NRD received notice in July from the Executive Secretary of the Rusebeya Sector that it's mining activities in the Rusebeya Sector, also in the Rutsiro Concession, were suspended. Despite these inexplicable shutdowns, purportedly due to environmental concerns, local authorities permitted mining to continue in both sectors in NRD's absence, but not by NRD personnel. In addition, NRD remedied the concerns of local officials by ensuring that all miners had protective equipment, there were functioning toilets, and that that all sites had safety kits.<sup>87</sup>
60. In September 2012, Mr. Kamanzi again extended NRD's licenses, this time until October 2012. He granted this extension because of "the ongoing work on reorganizing the mining section which will have a bearing on the new contracts that **will be negotiated** as has been communicated to all the existing concessions holders."<sup>88</sup> Although frustrated by the unjustified delays, Claimants continued rely upon representations like these from Rwanda that the long term contracts would be forthcoming to invest further money, time, and energy into developing NRD's Concessions.<sup>89</sup>
61. Although Kamanzi had extended NRD's licenses, NRD could not mine its Western Concessions (Rutsiro, Giciye, and Sebeya). The local authorities unilaterally decided to "close" NRD's Concessions. Despite the "closure", the Concessions were being mined by illegal miners. Upon a visit to the mines, the illegal miners informed NRD, who were

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<sup>87</sup> Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, p. 1-2, **C-047**.

<sup>88</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033** (emphasis added).

<sup>89</sup> Marshall WS, ¶ 35.

accompanied by an ITRI representative, that the local authorities told them to engage in mining activities.<sup>90</sup>

62. On September 17, 2012, Minister Kamanzi wrote to the Governor of the Western Province suspending all mining activities in the Western Province.
63. Although other mining companies operating within the Western Province were permitted to resume mining in October 2012, NRD was not. Rwanda falsely attributed the different treatment of Claimants' mining company by claiming to have a concern with "environmental damage." NRD reminded Rwanda that the damage, to the extent there was any, was caused by 75 years of Belgian mining. Much of the remediation work that NRD had previously implemented had been destroyed by miners during the time that NRD could not access its Concessions and local Rwandan officials permitted miners not affiliated with NRD to operate.<sup>91</sup> Additionally, Mr. Marshall visited other mines and it became clear that others had far worse environmental problems than NRD.
64. NRD also highlighted the fact that it was not being awarded any police protection at its mines, which it needed to protect its investments and curb the illegal mining.<sup>92</sup> NRD never had sufficient police or military protection at its mines, which further perpetuated the near constant illegal mining.<sup>93</sup> NRD had previously requested help from the Mayor of the Ngororero District to stop illegal mining but it was clear based upon the presence of illegal miners in September that the request went unanswered.<sup>94</sup> The Concessions Holders of Rutongo and Nyakabingo did receive substantial police protection. When

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<sup>90</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, p. 1, **C-049**.

<sup>91</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, **C-050**.

<sup>92</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, pp. 3-4, **C-050**.

<sup>93</sup> Marshall WS, ¶¶ 27, 46.

<sup>94</sup> Letter from R. Marshall to Mayor of Ngororero District dated 6 August 2012, **C-051**.

those Holders had trouble with theft of minerals and illegal and unauthorized mining, they received police and military protection from Rwanda. NRD was not afforded the same protection.<sup>95</sup>

65. In addition, between July and September of 2012, the Rwandan Military arrested 40 NRD staff within NRD's concessions and the local districts received payment of 50,000 RWF for each persons' release. No reason was given for their arrests.<sup>96</sup> During one arrest, the Military forced the Sebeya site manager to open the office and the Military seized all minerals currently being stored.<sup>97</sup>
66. NRD was ultimately permitted access to its mines in the Western Province in July 2013 and continued to mine pursuant to its Contract.<sup>98</sup>
67. Despite these setbacks and obstructionist tactics, in 2012, NRD was the second largest producer of cassiterite, producing 228 tons of Rwanda's cassiterite and 13% of all of Rwanda's tantalum.<sup>99</sup>
68. Mr. Marshall and Rwanda began to more substantially negotiate a long term contract for NRD's five concessions in 2012.
69. The terms of the draft contract were supplied primarily by Rwanda. The draft contract provided that NRD was to receive long term mining licenses for the Rutsiro, Sebeya, Giciye, Mara and Nemba concessions for a term of 30 years. The draft contract cited the

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<sup>95</sup> Marshall WS, ¶ 27.

<sup>96</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

<sup>97</sup> Letter from R. Marshall to District Police Commissioner of Ngororero District dated 3 September 2012, **C-052**.

<sup>98</sup> Marshall WS, ¶ 25.

<sup>99</sup> T. Yager, *USGS 2012 Minerals Yearbook, The Mineral Industry of Rwanda*, May 2015, <https://minerals.usgs.gov/minerals/pubs/country/2012/myb3-2012-rw.pdf> (last accessed 26 February 2019), p. 35.1, 35.4, **C-053**.

prior 2010 Application and attached business plan<sup>100</sup> as support for granting the long term licenses. Rwanda required, and Claimants agreed, to invest USD \$9,960,000 by and through NRD in the five-year period between 2013 and 2018. This investment was further broken down to specifically identify how much money would be allocated to specific sectors and specific concessions. In addition, Rwanda provided estimated production amounts for coltan, cassiterite, and wolframite for each of the five concessions. Rwanda also provided estimates for the amount of mineral reserves at each of the concessions. Rwanda estimated that the profit from all five of the concessions would be USD \$14,603,332.80 over a five-year period.<sup>101</sup>

70. As part of the negotiation process, Mr. Marshall provided Rwanda with an updated investment plan. The investment plan showed that Spalena was the owner of NRD, identified the production of cassiterite, wolfram, and coltan from 2007-2011, and highlighted the reserves at each of the concessions. Additionally, the investment report identified the nearly €16 million (USD \$21 million) that Claimants had already invested by and through NRD between 2007 and 2012.<sup>102</sup> The plan also set out proposed future investment of nearly USD \$10 million between 2013 and 2018, in addition to further research activity that it would undertake. Finally, between 2018 and 2043, when the long term contract would end, Claimants estimated investing USD \$30 million on mineral

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<sup>100</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**.

<sup>101</sup> Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, p. 5, **C-042**; Marshall WS, ¶ 36.

<sup>102</sup> In documents published by Rwanda, Rwanda has indicated that NRD's investment between 2007 and 2012 was closer to USD \$40 million. Kanzira, *Republic of Rwanda Promotion of Extractive and Mineral Processing Industries in EAC Rwanda Status*, p. 34, **C-014**; Ministry of Natural Resources of Rwanda, *Mining and Geological Status*, p. 5, **C-055**.

reserve calculations, feasibility studies, mining operations, underground mining works, drilling, and new processing plants.<sup>103</sup>

71. On February 18, 2013, Dr. Michael confirmed that NRD could continue its activities, which includes exploitation, at its Concessions. NRD was to continuing mining while “we proceed with negotiations on your request for new contracts for the concessions.”<sup>104</sup> This representation bolstered Claimants’ long standing belief that it would receive the long term contracts and that they should continue to invest money, time and effort into developing NRD’s mining operations while the negotiations continued.<sup>105</sup>
72. On April 2, 2013, Clare Akamanzi, the Chief Executive Officer of the Rwanda Development Board (“RDB”) sent a letter to NRD confirming that NRD had been “operating on short term extensions while both parties work toward concluding a comprehensive agreement.” Ms. Akamanzi further noted that Rwanda would be negotiating long term contracts separately for each concession and that they intended to begin with the Nemba Concession. The April 2, 2013 letter was sent to initiate this first negotiation.<sup>106</sup> NRD requested additional time to review the draft contracts that Ms. Akamanzi provided, and Ms. Akamanzi suggested a meeting on May 9, 2013 to negotiate the terms of the long term contract.<sup>107</sup>
73. Following the meeting with Ms. Akamanzi and the RDB, Mr. Marshall reached out directly to the Ministry of Natural Resources on June 7, 2013 to ease and simplify the

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<sup>103</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2013, p. 10, **C-054**.

<sup>104</sup> Letter from B. Michael to R. Marshall dated 10 February 2013, **C-056**; *see* Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, **C-017**.

<sup>105</sup> *See* Marshall WS, 35.

<sup>106</sup> Letter from C. Akamanzi to J. Zarnack dated 2 April 2013, **C-057**.

<sup>107</sup> Letter from C. Akamanzi to R. Marshall dated 10 April 2013, **C-058**.

process of negotiating the long term contracts. NRD presented a list of topics to the Ministry of Natural Resources to help with this process.<sup>108</sup>

74. On October 16, 2013, Evode Imena, the Minister of State in Charge of Mining, invited NRD to a meeting at the Ministry of Natural Resources to discuss, among other things, NRD's mining licenses.<sup>109</sup> At the meeting that followed, the parties discussed the long term contracts and Minister Imena continued to lead NRD to believe that it would receive the long term contracts.<sup>110</sup>
75. During the course of the 2013 calendar year, negotiations slowly proceeded. Despite the slow pace, Rwanda continued to make every indication that it was going to provide NRD with the long term mining licenses. Furthermore, the delays were not entirely unexpected in Rwanda and actually consistent with other foreign investors' experiences in the mining industry.<sup>111</sup> This furthered Claimant's belief that NRD would receive the long term mining license and that it was merely a matter of time before Rwanda provided it.<sup>112</sup>
76. In 2013, while these negotiations were going on, NRD mined 199 tons of tantalum, 212 tons of cassiterite, 1,057 tons of mixed cassiterite and coltan, and 549 tons of wolframite.<sup>113</sup>

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<sup>108</sup> Letter from R. Marshall to Honorable Minister of Ministry of Natural Resources dated 7 June 2013, pp. 2-4, **C-059**.

<sup>109</sup> Letter from E. Imena to R. Marshall dated 16 October 2013, **C-060**.

<sup>110</sup> Marshall WS, ¶ 38.

<sup>111</sup> Marshall WS, ¶ 40; Buyskes WS, ¶ 11.

<sup>112</sup> Marshall WS, ¶ 40.

<sup>113</sup> T. Yager, *USGS 2013 Minerals Yearbook, The Mineral Industry of Rwanda*, December 2016, <https://minerals.usgs.gov/minerals/pubs/country/2013/myb3-2013-rw.pdf> (last accessed 26 February 2019), pp. 36.1-2, 36.4, **C-061**. NRD is not identified in this report but districts in which it operates, Rutsiro and Ngororero, are listed. The values are the combined production from the Rutsiro and Ngororero districts.

77. On February 12, 2014, Rwanda issued a Presidential Order No. 63/02 “repealing” prior Presidential Orders granting concessions to various entities in 1971. Although Claimants’ concessions are listed in the order, NRD is not. Furthermore, none of the repealed Presidential Orders were the Orders granting NRD its concessions. To the extent that Presidential Order No. 63/02 did impact NRD, Article 3 states that “Concessions and mining titles issued before the publication of this Presidential Order shall remain valid until [sic] the demarcation of new mining perimeters [sic] and issuing of new mining titles.”<sup>114</sup> Therefore, NRD’s right to mine and exploit its five concessions remained intact despite the issuance of the Presidential Order.
78. In conjunction with this Presidential Order, Rwanda passed Law No. 13/2014 of 20/05/2014 on Mining and Quarry Operations.<sup>115</sup> The 2014 law repealed all prior laws on mining but maintained the validity of all mining contracts previously issued.<sup>116</sup> Therefore, NRD’s Contract and Special permit remained in full effect after the promulgation of the 2014 Law.<sup>117</sup>
79. On April 2, 2014, and purportedly pursuant to the new mining law, Minister Imena wrote to Mr. Marshall “to renegotiate new mining agreements, under the terms of the new regulations.”<sup>118</sup> Then, on August 16, 2014 Minister Imena, followed up on his letter of April 2 and formerly requested that Mr. Marshall “re-apply” for NRD’s licenses.

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<sup>114</sup> *Rwanda Presidential Order No. 63/02, Repealing Presidential Orders Establishing Mining Concession and Allocating Mining Exploitation Licenses*, 12 February 2014, Official Gazette No. Special of 6 March 2014, Arts. 1, 3, **CL-001**.

<sup>115</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, **CL-002**.

<sup>116</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Arts. 52, 54, **CL-002**.; Rwamasirabo WS, ¶ 4, 8.

<sup>117</sup> Rwamasirabo WS, ¶ 4, 8.

<sup>118</sup> Letter from E. Imena to R. Marshall dated 2 April 2014, **C-063**.

Minister Imena set a timeline of 30 days to submit the requested application materials.<sup>119</sup>

Mr. Marshall was assured by Minister of Natural Resources Vincent Biruta that the re-application process was a mere formality and that NRD would not, under any circumstances, lose its concessions. Minister Biruta promised Mr. Marshall that NRD would continue to be able to mine its five concessions and that it would obtain the long term concessions.<sup>120</sup>

80. Minister Evode Imena's request that Mr. Marshall and Claimants "re-apply" for its licenses is contrary to Rwanda law. NRD's licenses remained valid pursuant to the 2014 Law and, therefore, there was never a need to "re-apply." Claimants could not "re-apply" for a right that NRD already had.<sup>121</sup>
81. It seemed as though Minister Imena was treating NRD and its investors as new investors in the field. Ordinarily, existing investors, were required to submit some paperwork, but not a detailed application for a long term license. Claimants were, for unknown reasons, treated as new investors despite the fact that Rwanda knew who they were and had extensive information about their progress and Concessions.<sup>122</sup>
82. Other concession holders who were also negotiating the terms of their long term mining licenses were not similarly impacted by the 2014 Law. Neither RML or ETI was required to "re-apply." The 2014 Law did not significantly impact on either RML or ETI.<sup>123</sup>

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<sup>119</sup> Letter from E. Imena to NRD dated 18 April 2014, **C-064**.

<sup>120</sup> Marshall WS, ¶ 53.

<sup>121</sup> Rwamasirabo WS, ¶ 4.

<sup>122</sup> Fiala WS, ¶¶ 5-6.

<sup>123</sup> Buyskes WS, ¶ 10; *see also* Fiala WS, ¶ 6; Mruskovicova WS, ¶ 18.

83. Despite the lack of legal authority for of Minister Imena’s request, and with Minister Biruta’s reassurances, Claimants “re-applied” for the Concessions with an understanding that they already belonged to NRD and that this application process was a mere formality. Claimants submitted an application and a “Feasibility Study Update 2010-2014.”<sup>124</sup>
84. On October 28, 2014, Minister Imena sent a letter to Mr. Marshall confirming receipt of their application but nevertheless rejecting its application at that time. Minister Imena stated that “after evaluating the documents you submitted we noted that you did not submit all the requested documents and even those that were submitted were deemed unsatisfactory for granting mining licenses.” Minister Imena’s statement is contrary to Rwandan law and is inconsistent with the material submitted. In the first instance, NRD already had mining licenses so the idea that the renewed application could somehow grant them these licenses was fundamentally flawed.<sup>125</sup> Furthermore, Rwanda requires that the “[r]efusal of application for any license shall be accompanied by reasons for such decision...”<sup>126</sup> and that “[w]hen the application is rejected, the Minister shall explain to the applicant the reasons for rejection.”<sup>127</sup> Minister Imena’s letter plainly does not

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<sup>124</sup> Letter from R. Marshall to E. Imena dated 18 August 2014, **C-084**; NRD Rwanda, *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014*, **C-085**.

<sup>125</sup> Rwamasirabo WS, ¶ 8.

<sup>126</sup> *Rwanda Ministerial Order No. 005/Minifom, Determining the Procedures of Requesting Licenses, the Conditions, Classification of Mineral Substances and the Procedures for Licence Limits on Mining and Quarry Extraction*, 14 September 2010, Official Gazette No. 41, 11 October 2010, Art. 6, **CL-003**.

<sup>127</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 7, **CL-002**.

provide any of the necessary reasons for the denial and does not explain the Ministry's reasoning.<sup>128</sup>

85. Furthermore, Minister Imena's statement that the documents submitted were unsatisfactory or incomplete is entirely inconsistent with prior correspondence and a result of Rwanda's own doing. The document submitted to Minister Imena in 2014 was an updated version of the 2010 Application. In fact, approximately two years before the "re-application" process, Rwanda already had drafted and approved contracts for NRD's Concessions.<sup>129</sup>
86. In addition, Claimants could not fully comply with Minister Imena's requests because, as he knew, he barred Claimants from accessing their offices. If Rwanda had not temporarily prevented NRD from accessing its offices, NRD would have been able to meet the demands, no matter how unreasonable, of Minister Imena.<sup>130</sup>
87. NRD appealed Minister Imena's decision by way of letter dated November 1, 2014. In this appeal, NRD details the various ways in which NRD has been treated unfairly, and unlike similarly situated foreign investors in the mining sector in Rwanda. In particular, NRD was the only foreign investor that was required to provide additional information or "re-apply" for the Concessions.<sup>131</sup>
88. Following this appeal, Minister Imena backed off his initial denial and permitted Claimants to "submit the missing documents and provide additional information" and,

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<sup>128</sup> See Letter from R. Marshall to E. Imena dated 1 November 2014, **C-086**; Rwamasirabo WS, ¶ 13.

<sup>129</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2012, p. 1, **C-039**.

<sup>130</sup> Marshall WS, ¶ 58; Fiala WS, ¶ 7; *see also infra* Section VI.A.4.

<sup>131</sup> *E.g.*, Buyskes WS, ¶ 10; Fiala, WS, ¶ 6; Marshall WS, ¶ 64; Mruskovicova WS, ¶ 18.

for the first time, provided a list of the documents that were supposedly missing.<sup>132</sup> Claimants responded, providing documentation for each of the supposedly “missing” documents.<sup>133</sup> Ultimately, Claimants’ complete re-application package included the Updated Feasibility Study, letters from June 3, 2014 and September 5, 2014, NRD’s Corporate Social Responsibility Policy, Selected Financial Transaction of NRD’s Managing Director, a continual service improvement (“CSI”) plan, and an updated environmental impact study of the Rutsiro District.<sup>134</sup>

89. One of Minister Imena’s lingering concerns was that NRD was not owned by an entity represented by Roderick Marshall. To dispel with that thought, NRD timely sought proof of ownership from the RDB. The documentation provided by NRD established that NRD was owned, nearly entirely by Natural Resources Development GmbH, which in turn is owned entirely by Spalena.<sup>135</sup> Natural Resources Development GmbH is an inactive company and Mr. Marshall tried to update the register to reflect that Spalena was the proper owner.<sup>136</sup> Nevertheless, there is no question that, at this time, NRD was not owned by Benzinge in any amount more than 0.2%.<sup>137</sup>
90. Minister Imena again suggested that Claimants’ submission was insufficient on December 17, 2014 and gave NRD until January 16, 2015 to supplement its

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<sup>132</sup> Letter from E. Imena to R. Marshall dated 12 November 2014, **C-087**.

<sup>133</sup> Letter from R. Marshall to E. Imena dated 25 November 2014, **C-088**.

<sup>134</sup> Letter from Z. Mruskovicova to E. Imena dated 5 September 2014, **C-089**; *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014*, **C-085**; Letter from R. Marshall to E. Imena dated 13 June 2014, **C-090**; NRD Rwanda, *Corporate Social Responsibility Company Policy*, June 2014, **C-091**; Selected Financial Transactions, **C-092**; M. Duskova, et al., *Environmental Impact Study – Mining Area Kabera (Rutsiro District)*, Department of Development Studies at Palacky University, **C-093**; NRD, *CSI Plan*, **C-094**.

<sup>135</sup> Full Registration for Domestic Company of NRD Rwanda, **C-001**; *see supra*, Section I.

<sup>136</sup> Letter from R. Marshall to Registrar General, 23 March 2015, **C-013**.

<sup>137</sup> Full Registration for Domestic Company of NRD Rwanda, **C-001**; Rwamasirabo WS, ¶ 17.

application.<sup>138</sup> In accordance with Minister Imena’s request, Mr. Marshall sent a letter to Minister Imena on January 16, 2015, providing him with all of the information requested that was supposedly missing from the submission.<sup>139</sup>

91. In the first half of 2014, NRD produced 78 tons of tantalum, 900 tons of mixed cassiterite and coltan, and 230 tons of wolframite.<sup>140</sup>
92. During this “re application” process, NRD appealed to Minister Vincent Biruta, requesting help and relief from the arbitrary actions that Minister Imena was taking against NRD during in the “re-application process.” Minister Biruta informed NRD that Minister Imena was responsible for making decisions that affected NRD and requested that NRD submit documents as requested by Minister Imena.<sup>141</sup> Based upon Minister Biruta’s response, it became immediately clear that there was no one within the Rwandan Government to whom NRD could appeal to and that they would be stuck with any decision made by Minister Imena.<sup>142</sup>
93. In February 2015, Minister Biruta confirmed that Rwanda had received Claimants’ 2014 submissions and was evaluating them.<sup>143</sup> As Mr. Marshall understood it, there would be

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<sup>138</sup> Letter from E. Imena to R. Marshall dated 17 December 2014, **C-095**.

<sup>139</sup> Letter from R. Marshall to E. Imena dated 16 January 2015, **C-096**; Marshall WS, ¶¶ 58-59.

<sup>140</sup> T. Yager, *USGS 2014 Minerals Yearbook, The Mineral Industry of Rwanda*, December 2017, <https://minerals.usgs.gov/minerals/pubs/country/2014/myb3-2014-rw.pdf> (last accessed 27 February 2019), p. 34.2, 34.4, **C-097**. NRD is not identified in this report but one district in which it operates, Rutsiro, is listed.

<sup>141</sup> Letter from V. Biruta to R. Marshall dated 20 November 2014, **C-098**.

<sup>142</sup> Marshall WS, ¶ 56.

<sup>143</sup> Email from V. Biruta to R. Marshall, et al. dated 17 February 2015, **C-099**.

further discussions with Rwanda to negotiate the particular terms of the long term license, as had been the case with other Concession Holders, and which had begun in 2013.<sup>144</sup>

94. Between November 2014 and May 2015, the foreign investors in NRD, through Rod Marshall, initiated conversations with Rwanda regarding a violation of the BIT.<sup>145</sup> Claimants invoked the BIT in an effort to further negotiations with Rwanda regarding the long term concessions that NRD had been promised. NRD met with Daniel Nkubito of the RDB on March 23, 2015. Claimants reiterated that they invested in the Concessions with the promise that they would receive long term contracts.<sup>146</sup> Without such a guarantee, the four year term of the initial contracts simply made no economic sense for any investor.<sup>147</sup>
95. Claimants did not hear from Rwanda regarding the status of the application until May 19, 2015, at which time Rwanda informed Mr. Marshall that its submission did not meet the requirements for granting a mining license under 2014 Law.<sup>148</sup>
96. As a result of this notification, NRD began more substantial negotiations with Rwanda in an effort to avoid Rwanda's clear expropriation of NRD's Concessions and to continue operating mines at each of their five Concessions. In fact, NRD continued to operate the mines after the May 2015 letter and NRD staff operated the mines for a full year after the May 2015 letter.<sup>149</sup>

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<sup>144</sup> Marshall WS, ¶ 40; *see* Letter from R. Marshall to S. Kamanzi dated 30 January 2013, p. 1, **C-054**; Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, p. 5, **C-042**; Letter from C. Akamanzi to J. Zarnack dated 2 April 2013, **C-057**.

<sup>145</sup> Letter from R. Marshall to F. Gatare dated 23 March 2015, **C-100**.

<sup>146</sup> Meeting Minutes of Rwanda Development Board, 23 March 2015, p. 1, **C-101**.

<sup>147</sup> Marshall WS, ¶ 9; Buyskes WS, ¶ 11.

<sup>148</sup> Letter from E. Imena to R. Marshall dated 19 May 2015, **C-038**.

<sup>149</sup> Marshall WS, 71.

97. During that year, Claimants met with as many individuals within the government as possible in an effort to understand what was happening. Claimants asking for meetings regarding the long term agreement. Claimants received apologies from Rwandan officials, but no action.<sup>150</sup>
98. On September 22, 2015, NRD was permitted access to its main offices in Kigali for the first time in over a year and told to clear its belongings. Upon reentry, NRD learned that all significant records and files had been stolen, the computer hard drives had been erased and most equipment and machinery was missing.<sup>151</sup>
99. In January 2016, Rwanda made threats against Roderick Marshall and he understood these threats to mean that he must cease seeking the long term concessions on behalf of Claimants. Claimants nevertheless continued to believe that NRD was rightfully entitled to the long term licenses.<sup>152</sup>
100. Through February 2016, NRD continued to expect that it would remain in control of its Concessions because its staff continued to operate the Concessions and Rwanda had not clearly stated or taken any specific action that would expropriate NRD's Concessions and.<sup>153</sup>
101. In March 2016, Rwanda, for the first time, publically tendered NRD's Concessions and announced that the Concessions would be split into three lots.<sup>154</sup>

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<sup>150</sup> Marshall WS, ¶ 49, 65; Mruskovicova ¶ 9.

<sup>151</sup> Marshall WS, ¶ 67; Mruskovicova 24.

<sup>152</sup> Marshall WS, ¶ 69, 71; Mruskovicova ¶ 25; Barthelemy WS, ¶ 16.

<sup>153</sup> Barthelemy WS ¶ 18; Marshall WS, ¶ 71.

<sup>154</sup> F. Mukarubibi, *Call for Technical and Financial Proposals for the Development of Mining Perimeters Within the Former Sebeya, Giciye, Rutsiro, Mara and Nemba Mining Concessions*, The EastAfrican, 5 March 2016, **C-102**.

102. NRD’s investors, with the help of Mr. Barthelemy, tendered for the Concessions as a means of retaining NRD’s Concessions and assets.<sup>155</sup> Rwanda made it clear that it would not tolerate any additional lobby from NRD, its investors, or associated entities, and they were therefore forced to withdraw their tender and cease bidding.<sup>156</sup> Ultimately, Rwanda granted each of NRD’s five concessions to entities related to the Rwanda Ministry of Defense.<sup>157</sup>
103. NRD mining-scale dump trucks and other heavy machinery purchased with Claimants’ investment are currently being used by Cotraco, a company related to the government.<sup>158</sup>
104. Claimants have never been compensated for Rwanda’s expropriation of its investment.

### **III. THE ITRI/iTSCi TAGGING SYSTEM**

#### **A. Background**

105. During the early negotiations of the long term contract for NRD’s concessions in 2011, the method by which minerals were identified and authenticated changed drastically in Rwanda as a result of legislation in the United States known as Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>159</sup>
106. Dodd-Frank enacted sweeping changes to public companies registered with the Securities and Exchange Commission (“SEC”).<sup>160</sup> Section 1502 of Dodd-Frank, specially, concerns the selling and trade of conflict minerals originating in the Democratic Republic

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<sup>155</sup> Barthelemy WS, ¶ 19; F. Mukarubibi, *Call for Technical and Financial Proposals for the Development of Mining Perimeters Within the Former Sebeya, Giciye, Rutsiro, Mara and Nemba Mining Concessions*, *The EastAfrican*, 5 March 2016, **C-102**.

<sup>156</sup> Barthelemy WS, ¶ 20; Marshall WS, ¶ 70.

<sup>157</sup> Marshall WS, ¶ 70; Buyskes WS, ¶ 19; Barthelemy WS, ¶ 20; Mruskovicova ¶ 26-27.

<sup>158</sup> Mruskovicova WS, ¶ 21; Marshall WS, ¶ 72.

<sup>159</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), **CL-004**.

<sup>160</sup> *Id.*, **CL-004**.

of Congo (“DRC”). Congress included this particular provision in an effort to avoid financing “extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein.”<sup>161</sup> Section 1502 requires that companies registered with the SEC that buy minerals from the DRC or an adjoining country designate the origin of those minerals and certify that they are “DRC conflict free.”<sup>162</sup> Rwanda is an adjoining country and conflict minerals include coltan, cassiterite, wolframite or their derivatives.<sup>163</sup>

107. The companies based in the United States that have to comply with Dodd-Frank need a system to ensure that the minerals they purchase comply with the law. To address this need, the International Tin Association (“ITRI”) entered into an agreement with Rwanda to create a system, the International Tin Supply Chain Initiative (“iTSCi”), to create a process to certify that the minerals exported from the Rwanda originate from mining operations in Rwanda, and not the DRC. ITRI hired Pact, an international NGO, to create and implement the iTSCi traceability program so that a chain-of-custody could be documented for all Rwandan Minerals. Pact hired Joseph Mbaya, an experienced security expert, to develop and build the iTSCi system from scratch.<sup>164</sup>

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<sup>161</sup> § 1502(a), 124 Stat. at 2213, **CL-004**. The requirement to include a statement that minerals were “not DRC conflict free” in the original version of this statute was found to be unconstitutional. *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015), **CL-005**. However, this ruling has no impact on the underlying purpose of the law or the need for Rwandan mining entities to tag their minerals.

<sup>162</sup> § 1502(b), 124 Stat. at 2213, **CL-004**.

<sup>163</sup> § 1502(e), 124 Stat. at 2217, **CL-004**.

<sup>164</sup> Mbaya WS, ¶ 2; see also Intl. Tin Assoc., *ITRI and Rwandan Government to Co-operate on iTSCi Conflict Mineral Traceability Scheme*, <https://www.internationaltin.org/itri-and-rwandan-government-to-co-operate-on-itsci-conflict-mineral-traceability-scheme/> (last accessed 27 February 2019), **C-103**.

108. In order to that the minerals being exported from Rwanda are of Rwandan origin, ITRI provides tamper-proof seals (“tags”) to the Geology and Mines Department (“GMD”) (formerly the Rwandan Geology and Mines Authority or OGMR), an agency of the Rwandan Government. All tags are sequentially numbered. Mining companies or cooperatives request tags from GMD through the iTSCi procedures. The GMD then sends a “tag agent” or “tag manager” to the mines that request tags to verify the type of mineral to be tagged and the quantity. The tag manager is responsible for affixing a tag to the bag of minerals to be sold and recording the type of mineral and location where it originated in the occurrence book. Once tagged, the minerals may be sold, processed and exported out of the country.<sup>165</sup>
109. Because of the more than 20,000 artisanal miners in the country, the system does not work as intended. While some of the larger mining companies have a permanent tag manager, most tag managers go to a central location once or twice a week and miners bring their minerals to the tag manager. The system functions largely by blindly relying on the honor, truthfulness, and integrity of the miners and tag managers.<sup>166</sup>
110. In order to develop the iTSCi system, Mr. Mbaya studied the mining industry in Rwanda and visited many of the mining sites around Rwanda in order to obtain an estimate the amount of minerals that Rwanda produced or could produce at each location. With that information, Mr. Mbaya felt that he and his team could gauge whether a mine claimed to produce more minerals than seemingly possible. In the event that a mine requested tags for more minerals than it was believed that it could produce, ITRI would issue an incident

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<sup>165</sup> *Id.* at ¶ 3.

<sup>166</sup> *Id.* at ¶ 5.

report and Mr. Mbaya or one of his team members would go to the mine to investigate.

Frequently, when Mr. Mbaya or his team visited a mine that required investigation, there was no one mining. Nevertheless, the mine was being awarded tags by GMD.<sup>167</sup>

111. This meant that mines were seeking tags for minerals not mined in Rwanda and that the GMD was turning a blind eye to the fact that the minerals were not originating in Rwanda.<sup>168</sup>
112. When the managing director of a former large smelting and trading company in Rwanda asked ITRI to investigate what he thought was illegal smuggling, ITRI did not punish the miner or suspend them. It took ITRI one year to investigate and it ultimately decided that the managing director should either return the mineral to the miner or risk the purchase. It did not appear that there were any real consequences for violation of the ITRI/iTSCi rules. These miners continued to receive tags from the GMD.<sup>169</sup>
113. Mr. Mbaya tried to improve the iTSCi system in order to ensure that minerals were not smuggled into Rwanda and tagged as Rwandan. However, ITRI rejected Mr. Mbaya's proposal and instead relies only on the honor, truthfulness and integrity of the miners and tag managers.<sup>170</sup>

**B. Much of Rwanda's exported minerals originate in the DRC**

114. It is common knowledge in Rwanda and in the mining industry that many of the minerals tagged in and exported from Rwanda originated in the DRC.<sup>171</sup> Minerals from the DRC are smuggled into Rwanda either by truck or across Lake Kivu. Often, the minerals then

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<sup>167</sup> *Id.* at ¶¶ 6-8, 12.

<sup>168</sup> *Id.* at ¶ 8; *see also* Buyskes WS, ¶ 12.

<sup>169</sup> Barthelemy WS, ¶ 12.

<sup>170</sup> Mbaya WS, ¶ 9.

<sup>171</sup> Mbaya WS, ¶ 8; Barthelemy WS, ¶ 10; *see* Buyskes WS, ¶ 17.

go to “dummy mines” in the Northwest where no actual mining occurs but where minerals are nevertheless tagged and exported as having originated in Rwanda.<sup>172</sup>

115. Coltan from Rwanda is mostly black and only slightly radioactive. Coltan from the DRC is a white ash color and is highly radioactive. Miners typically mix white and black coltan in a 20/80 split in an effort to hide the coloration and radioactivity.<sup>173</sup>

Nevertheless, these minerals get tagged by GMD, largely without issue.<sup>174</sup>

116. It is believed that upwards of 50% of all minerals exported from Rwanda originate in the DRC and that upwards of 90% of the coltan exported from Rwanda originates in the DRC.<sup>175</sup>

117. Miners and traders have an incentive to smuggle minerals from the DRC to Rwanda. The DRC imposes a 10% royalty on mineral exports but Rwanda imposes only a 4% royalty. Therefore, there is an incentive to smuggle minerals to Rwanda, obtain tags, and export them at the lower royalty rate.<sup>176</sup> Additionally, by tagging minerals imported from the DRC as Rwandan allows Rwanda to improve their economic statistics with international institutions and thus attract investors.<sup>177</sup>

118. Rwanda has given no indication that it cares whether the minerals it tags originate in Rwanda, the DRC, or elsewhere. Instead, Rwanda turns a blind eye to smuggling and the GMD tag managers issued tags when requested, without asking questions.<sup>178</sup>

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<sup>172</sup> Fiala WS, ¶ 10.

<sup>173</sup> Barthelemy WS, ¶ 11.

<sup>174</sup> Barthelemy WS, ¶ 13; Buyskes WS, ¶ 17.

<sup>175</sup> Fiala WS, ¶ 9; Mruskovicova WS, ¶ 29.

<sup>176</sup> Fiala WS, ¶ 10.

<sup>177</sup> Barthelemy WS, ¶ 14.

<sup>178</sup> Mbaya WS, ¶ 8, 9; Barthelemy WS, ¶ 12, 13.

119. It is all but impossible to obtain an accurate assessment of the amount of mineral production in Rwanda because Rwanda does not release these numbers. Rwanda only releases the amount of minerals exported. In this way, Rwanda can hide behind the fact minerals not produced in Rwanda (i.e. smuggled from the DRC) are exported from Rwanda in order to boost its statistics. The production levels from historically large mines are relatively low which suggests that minerals are being smuggled into the country. It is not possible for Rwanda to have exported two and a half times more minerals in 2018 than it did in 2014 without exporting minerals that originated outside of Rwanda, and most likely in the DRC.<sup>179</sup>
120. Ultimately, the Rwanda's Ministry of Defense or related entities, like Ngali Mining, took control of NRD's Concessions.<sup>180</sup> With NRD's Concessions' proximity to the DRC, the Ministry of Defense and related entities could protect smugglers to and from the DRC. In addition, they could request tags from the GMD, a government agency, to further perpetuate the scheme. NRD was never willing to participate in this illegal scheme and, as a result, Rwanda unlawfully expropriated the Concessions.<sup>181</sup>
121. With Rwanda in control of NRD's concessions Rwanda can more completely control how much exported mineral is reported each year. This permits Rwanda to evade the iTSCi tagging system and designate minerals that originate from the DRC as being of Rwandan origin. The elimination of NRD from the Concessions ensures that there is no outsider to intervene in this process and permits Rwanda to seemingly comply with the requirement of Dodd-Frank.

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<sup>179</sup> Mbaya WS, ¶ 19; Buyskes WS, ¶ 18; Mruskovicova 28.

<sup>180</sup> Barthelemy WS, ¶ 20; Buyskes WS, ¶ 19.

<sup>181</sup> Mruskovicova WS, ¶ 27, 29; Marshall WS ¶ 79.

### C. Rwanda Barred NRD from Tagging its Minerals

122. OGMR requested NRD's cooperation with iTSCi in March 2011 so as to ensure that its mineral exports were appropriately tagged beginning March 31, 2011.<sup>182</sup>
123. NRD's participation in iTSCi was mandatory but also served to benefit NRD and Rwanda. Without the tags, NRD would be unable to sell the minerals that it mined.<sup>183</sup>
124. For years after the implementation of iTSCi, Rwanda provided NRD with tag managers and tags for the minerals mined from each of its five concessions. However, in the summer of 2014, Rwanda stopped providing tags and tag managers to NRD. As a result, NRD could not sell minerals mined at its concessions.<sup>184</sup>
125. It has never been clear precisely why NRD stopped receiving tags. ITRI never issued an incident report<sup>185</sup> and NRD always strictly complied with the ITRI/iTSCi rules.<sup>186</sup> It was incredibly strange that NRD was barred from participation in the tagging system even though it had not violated any ITRI/iTSCi rules.<sup>187</sup>
126. NRD's inability to obtain tags was strictly due to Minister Imena's anomalous decision to restrict NRD's access to the tags. Kay Nimmo, the head of ITRI at its England headquarters, did not have any objection to NRD receiving tags which meant that NRD was abiding by the rules.<sup>188</sup> Mr. Mbaya asked Minister Imena directly about the reason that NRD could not receive tags. Minister Imena told Mr. Mbaya that it was because he questioned the true ownership of NRD.<sup>189</sup> Minister Evode made similar claims to

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<sup>182</sup> Letter from B. Michael to Company Representative dated 15 March 2011, **C-104**.

<sup>183</sup> Marshall WS, 77.

<sup>184</sup> Marshall WS, ¶ 80; Mbaya WS, ¶ 11.

<sup>185</sup> Mbaya WS, ¶ 13.

<sup>186</sup> Barthelemy WS, ¶ 9.

<sup>187</sup> Mbaya WS, ¶ 13; Barthelemy WS, ¶ 9.

<sup>188</sup> Mbaya WS, ¶ 16.

<sup>189</sup> *Id.* at ¶ 17.

NRD.<sup>190</sup> However, he indicated to Mr. Mbaya that with proof of ownership, he would provide NRD with tags.<sup>191</sup>

127. On October 17, 2014, Mr. Marshall provided Minister Imena with proof of ownership in a further effort to appease Minister Imena's baseless suggestions that Claimants were not the rightful owner so that NRD could obtain ITRI tags.<sup>192</sup> Minister Imena still did not provide NRD with tags.
128. Mr. Marshall requested tags again after the High Court confirmed a judgment suspending Bailiff Jean Bosco's execution against NRD and because question of ownership, to the extent one still existed, had been definitively settled.<sup>193</sup> Minister Imena still did not provide the tags.
129. In essence, Minister Evode was using the iTSCi tagging system as a tool against NRD to address whatever personal issues he had with NRD's owners and for reasons that had nothing to do with whether minerals were validly mined in Rwanda. If Minister Evode truly believed that NRD's operations could be suspended due to an issue or dispute over its ownership, that issue would be strictly a matter for resolution in the civil courts or with the country's Registrar. Minister Evode was not using the normal administrative processes to suspend NRD's mining operations, instead he was misusing the iTSCi system to accomplish that result. This was the only time that the iTSCi tagging system rules and procedures were used to take a punitive action against a mining company that did not relate to the validity of its mining minerals in Rwanda.<sup>194</sup>

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<sup>190</sup> Letter from Z. Mruskovicova to E. Imena dated 27 October 2014, **C-105**.

<sup>191</sup> Mbaya WS, ¶ 17.

<sup>192</sup> Letter from Z. Mruskovicova to E. Imena dated 27 October 2014, **C-105**.

<sup>193</sup> Letter from R. Marshall to E. Imena dated 28 November 2014, **C-083**.

<sup>194</sup> Mbaya WS, ¶ 17.

130. Pursuant to Article 45 Law No. 13/204 of 20/05/2014 on Mining and Quarry Operations, those who hold a mining license are authorized to sell minerals.<sup>195</sup> NRD had five small-scale mining permits and therefore were permitted, under the 2014 Law, to sell minerals.<sup>196</sup> However, Rwanda effectively prevented NRD from selling minerals that it was legally permitted to sell by refusing to provide tags.
131. On numerous occasions NRD pleaded with Minister Imena and others in the Rwandan government to provide NRD with tags so that it could continue to mine. For example, along with NRD's "re-application" letter, they requested tags so that they could continue operating while Rwanda deliberated.<sup>197</sup> Without the tags, NRD was unable to sell the minerals that it was mining at its Concessions.<sup>198</sup>
132. On December 8, 2014, NRD again requested tags and a tag agent to supervise mining operations at its Concessions. NRD was the only company that was not granted tags during the negotiation period and, without the tags and a tag agent at the concessions, they were unable to mine.<sup>199</sup>
133. At a meeting with the RDB on March 23, 2015, NRD again raised the issue that Rwanda refused to grant NRD a "tag agent" that could tag minerals originating from its concessions. NRD explained that Minister Imena had failed to provide NRD with a

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<sup>195</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 45, **CL-002**.

<sup>196</sup> *See, e.g.*, Letter from M. Bikoro to B. Benzinge dated 29 January 2007, **C-018**.

<sup>197</sup> Letter from R. Marshall to E. Imena dated 18 August 2014, **C-084**.

<sup>198</sup> Marshall WS, ¶ 77; Mbaya WS, ¶ 11.

<sup>199</sup> Letter from R. Marshall to E. Imena dated 8 December 2014, **C-106**. Of course, the idea that NRD could not mine is directly contradicted by the text of the 2014 Law which expressly stated that all previously existing licenses remained valid. Rwamasirabo WS, ¶ 4. Therefore, NRD had, at all times, the right to mine the concessions granted to it in 2006 and that it had been mining continuously since.

straight answer as to why he was refusing to provide NRD with tags or a tag agent and changed his rationale no less than three times. Minister Imena’s final rationale made the least amount of sense. Minister Imena stated that because NRD did not have long term licenses, they could not have a tag agent.<sup>200</sup> This contradicts NRD’s history of having a tags and tag agents over the years<sup>201</sup> and the fact that all other Concession holders were permitted to tag their minerals, and therefore sell them, while they waiting to receive their long term contracts.<sup>202</sup>

#### **IV. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE**

134. BVG and Spalena are United States enterprises with protected investments in Rwanda. BVG, Spalena, and Rwanda have each consented to the arbitration of this dispute and all requirements under the BIT and the ICSID Convention for the submission of this dispute to arbitration have been fulfilled. This Tribunal is therefore competent to decide the present dispute.

##### **A. Claimants Constitute Investors of a Party Under the BIT**

135. Under the BIT, an “investor of a party” “means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party . . . .”

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<sup>200</sup> Meeting Minutes of Rwanda Development Board, 23 March 2015, **C-101**; Email from I. Niyonsaba to R. Marshall, et al. dated 31 March 2015, **C-107**.

<sup>201</sup> Letter from Z. Mruskovicova to M. Biryabarema dated 5 December 2013, **C-108** (requesting more tags for the Nemba site, indicating that NRD had tags at that site but that they were insufficient to meet the high amount of production); Letter from R. Marshall to D. Kayigire dated 24 June 2014, **C-109** (same but for Rutsiro).

<sup>202</sup> Meeting Minutes of Rwanda Development Board, 23 March 2015, **C-101**; Buyskes WS, ¶ 12, 13.

136. Spalena is a United States entity incorporated on June 9, 1998. Spalena is owned by the same United States investors who own BVG, which is also a United States company, incorporated on March 16, 2007.<sup>203</sup>
137. The U.S. investors who own BVG funded Spalena's acquisition of NRD's parent company, thereby acquiring ownership and control of NRD's assets, including the mining Concessions.<sup>204</sup>
138. BVG and Spalena then capitalized and funded NRD's liabilities and expenses in order to develop and operate the mining Concessions.<sup>205</sup>
139. BVG and Spalena constitute investors of a party to the BIT as each entity is an enterprise of the United States and, as such, BVG and Spalena are entitled to the protections afforded by the BIT.

**B. Claimants Have Made Qualifying Investments in Rwanda**

140. The BIT defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."<sup>206</sup> The investment may take the form of: an enterprise or, *inter alia*, turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.<sup>207</sup>

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<sup>203</sup> Amended Arts. of Assoc., 1 May 2007, **C-009**.

<sup>204</sup> Marshall WS, ¶ 15.

<sup>205</sup> *Id.*

<sup>206</sup> Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed 19 February 2008, Art. 1, **CL-006**.

<sup>207</sup> Rwanda-US BIT, Art. 1, **CL-006**.

141. Here, representatives of the Government of Rwanda expressly solicited the Claimants' principal investor, Roderick Marshall, to invest in Rwanda's mining industry.<sup>208</sup>
142. Based on that solicitation, Claimants invested in the acquisition of the NRD, and all of NRD's assets,<sup>209</sup> including the Rutsiro, Mara, Sebeya, Giciye, and Nemba Concessions.<sup>210</sup>
143. The Contract governing for these Concessions obligated NRD to undertake the development of commercial mining operations at those sites in order to retain the Concessions.<sup>211</sup> Claimants BVG and Spalena invested the money, equipment and other property necessary to finance NRD's performance of those Contract obligations.<sup>212</sup> NRD is the local operating company in Rwanda through which Claimants have made their investments of money, equipment and other assets in order to conduct mining activity in Rwanda. Accordingly, NRD is a "covered investment" under the terms of the BIT.<sup>213</sup>
144. The Contract between NRD and the Government of Rwanda constitutes an "investment agreement" as defined by the BIT and an "investment authorization" as it granted Claimants, through their ownership and control of NRD, authority to operate the mining Concessions under the protection of the BIT.<sup>214</sup> Until the time of Rwanda's

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<sup>208</sup> Marshall WS, ¶ 6.

<sup>209</sup> *Id.*, at ¶ 15; Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company, LLC, 23 December 2010, p. 6, **C-068**; Declaration of Name Change, 23 December 2010, **C-007**.

<sup>210</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 1, **C-017**.

<sup>211</sup> *Id.*

<sup>212</sup> Marshall WS, ¶ 15; Mruskovicova WS, ¶ 14.

<sup>213</sup> Rwanda-US BIT, Article 1.

<sup>214</sup> *See* Rwanda-US BIT, Art. 1, **CL-006**.

expropriation, Claimants were operating under express and implied extensions of the Contract, communicated to them by officials of the Government of Rwanda.

145. Additionally, and as contemplated in Article 1 of the BIT, Claimants' efforts to develop the Concessions fall under the BIT definition of "investment" because the broad definition of investment provides coverage for "every" investment whether controlled "directly or indirectly" that has the characteristics of an investment. Such characteristics include "commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." Claimants' various contributions in the form of capital, equipment and other property and resources, coupled with their expectancy relative to gain or profit and their acceptance of non-governmentally caused risk all support the conclusion that Claimants made an investment protected under the BIT.

**C. Claimants, as Investors of A Party, Qualify For Protection Under the BIT**

146. Article 2 of the BIT, provides the scope and coverage of the Treaty between Rwanda and the United States. Specifically, Article 2 provides that Claimants, as "investors of a party" and that had qualifying investments in Rwanda, fall within the scope of protection afforded by the BIT.<sup>215</sup> Claimants and their investments were intended to be and were, in fact, protected by the BIT entered into by and between Rwanda and the U.S. in February 2008.<sup>216</sup>
147. Because Claimants own significant investments in Rwanda that fall within the definition of "investment" under the BIT and because Claimants constitute investors of a party (the United States), Claimants are protected by the BIT.

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<sup>215</sup> See Rwanda-US BIT, Art. 2, **CL-006**.

<sup>216</sup> Rwanda-US BIT, p. 37, **CL-006**; the BIT did not go into effect until January 1, 2012.

**D. The Parties Have Consented to Arbitration of this Dispute and all Requirements Under the BIT and the ICSID Convention Have Been Fulfilled**

148. Both Parties unequivocally consented to resolve this dispute through international arbitration. By filing their request for arbitration, Claimants consented to the arbitration of this dispute in accordance with the procedures set out in the BIT. Moreover, Rwanda consented to international arbitration pursuant to the express terms of Article 25 of the BIT.
149. Pursuant to Article 24, Paragraph 3, over six months elapsed between the events giving rise to Claimants' claims and the submission of these claims to international arbitration.<sup>217</sup> Pursuant to Article 24, Paragraph 2, Claimants provided to Respondent a Notice of Intent and the parties held consultations during the six-month period following the submission of that Notice of Intent to submit their claims to arbitration.<sup>218</sup> Claimants have not alleged before any courts or administrative tribunals that Rwanda has breached any of its obligations under the BIT, and Claimants have waived their rights to do so pursuant to Article 26, Paragraph 29(b) of the BIT.<sup>219</sup>
150. Having satisfied these conditions precedent, on May 14, 2018, Claimants submitted their claims to arbitration pursuant to Article 24 of the BIT, which concern Rwanda's breaches of its obligations set forth in Articles 3-6 of Section A of the BIT and Claimants' substantial losses and damages arising out of those breaches.<sup>220</sup>

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<sup>217</sup> See *Bay View Group, et al. v. Government of Rwanda*, ICSID Case No. ARB/18/21, Amended Notice of Arbitration, 12 June 2018, pp. 5-6, **C-110**.

<sup>218</sup> *Id.* at p. 2.

<sup>219</sup> *Id.* at p. 3.

<sup>220</sup> *Bay View Group, et al. v. Government of Rwanda*, ICSID Case No. ARB/18/21, Notice of Arbitration, 14 May 2018, § 1, **C-111**.

151. As noted above, pursuant to Article 24, Paragraph 3, Rwanda has consented to arbitrate disputes under the BIT. Rwanda has further agreed to arbitrate such disputes under the ICSID Convention. Article 24, Paragraph 3 of the BIT grants a claimant the right to choose among different arbitral mechanisms and rules under which to submit its claims against the other Party.<sup>221</sup> In its Notice of Arbitration, Claimants elected to submit their claims against Rwanda – which they have not brought before any other forum – to arbitration under the ICSID Convention.<sup>222</sup>
152. Finally, the claims brought by Claimants meet the requirements for ICSID jurisdiction. This dispute is a legal dispute involving Rwanda’s violations of its obligations under the BIT. At all relevant times, Claimants directly or indirectly owned investments in Rwanda, within the meaning of the ICSID Convention and the BIT.<sup>223</sup> Both Rwanda and Claimants consented in writing to the jurisdiction of ICSID.<sup>224</sup> Accordingly, this dispute is validly submitted to arbitration under the ICSID Convention and pursuant to Article 24 of the BIT.

## V. THE BIT AND INTERNATIONAL LAW GOVERN THIS DISPUTE

153. Claims brought pursuant to the BIT are governed by the BIT provisions, as supplemented by international law. Article 30 of the BIT expressly provides that the BIT itself and international law govern this dispute:

[W]hen a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty [(i.e., the BIT)] and applicable rules of international law.

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<sup>221</sup> Rwanda-US BIT, Art. 24, ¶ 3, **CL-006**.

<sup>222</sup> Notice of Arbitration, p. 2, **C-111**.

<sup>223</sup> Amended Notice of Arbitration, p. 5, **C-110**.

<sup>224</sup> *Id.* at p. 2.

154. Article 30 makes no mention of the domestic laws of Rwanda and the United States. As is customary for investment treaty disputes, the domestic legal orders of Rwanda and the United States do not govern this dispute and are not binding on this Tribunal.
155. International jurisprudence is clear regarding the applicable law in investment treaty cases: tribunals apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.<sup>225</sup> Investment treaties grant foreign investors direct access to arbitration in order to allow investors to invoke the substantive protections afforded by the relevant treaty itself. Thus, the substantive standards of treatment and protections provided for in the BIT must primarily govern this case.
156. The Vienna Convention on the Law of Treaties (the “Vienna Convention”) provides that “treaties are governed by international law” and must be interpreted in light of “any relevant rules of international law.”<sup>226</sup> The Vienna Convention further consecrates the primacy of international law over domestic law in the area of State responsibility: “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>227</sup>
157. Moreover, the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (the “ILC Articles”) confirm that: “The characterization of an act of a State as internationally wrongful is governed by

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<sup>225</sup> *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, 30 I.L.M. 580, ¶ 54 (1991), **CL-007**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 85-87, **CL-008**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.2 – 8.2.5, **CL-009**.

<sup>226</sup> Vienna Convention on the Law of Treaties, 23 May 1969, Arts. 2(1)(a), 31(3)(c), **CL-010**.

<sup>227</sup> *Id.* at Art. 37.

international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”<sup>228</sup>

158. Therefore, the BIT, supplemented as necessary by international law, governs this dispute.

## **VI. RWANDA VIOLATED ITS OBLIGATIONS UNDER THE BIT AND INTERNATIONAL LAW**

### **A. Rwanda did not treat Claimant’s investments fairly and equitably**

159. Paragraph 1 of Article 5 of the BIT requires Rwanda to “accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Paragraph 2 states that “paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.” “Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>229</sup>

160. As set forth in the *Tecmed* Award, “the commitment of fair and equitable treatment included in [the treaty] is an expression and part of the *bona fide* principle recognized in international law.”<sup>230</sup> At the heart of what encompasses fair and equitable treatment is the principle of good faith.<sup>231</sup> Acting in good faith is a “basic obligation” of the fair and equitable treatment standard.<sup>232</sup>

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<sup>228</sup> Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, 28 January 2002, Art. 3, **CL-011**.

<sup>229</sup> Rwanda-US BIT, Art. 5, ¶¶ 1-3, **CL-006**.

<sup>230</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Rep. 134, ¶ 154, **CL-026**.

<sup>231</sup> *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 299, **CL-027**.

<sup>232</sup> *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 I.L.M. 967, ¶ 138, **CL-028**.

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

[Fair and equitable treatment] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>233</sup>

162. The *Bear Creek* Award, relying on the seminal *Tecmed* Award, confirmed that an investor's legitimate expectations "forms the dominant element of" the fair and equitable treatment standard. A "legitimate" expectation is one where a "host state has assumed a specific legal obligation for the future."<sup>234</sup>
163. Legitimate expectations arise when an investor receives an explicit or implicit promise or guarantee from a government related to its investment or the laws that apply to its

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<sup>233</sup> *Tecmed*, ¶ 154, CL-026.

<sup>234</sup> *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 522, CL-029.

investment.<sup>235</sup> Once legitimate expectations are found, any action that contradicts those expectations is a breach of the fair and equitable treatment standard.<sup>236</sup> Bad faith is not required.<sup>237</sup>

164. A series or combination of actions, even if one alone does not violate the fair and equitable treatment standard, can be a breach of the fair and equitable treatment standard.<sup>238</sup>
165. An investor's legitimate expectations may be based on an expectation that the host state will act in a particular way in a particular situation. In accordance with this understanding, the tribunal in the *Sakura* Partial Award stated that "the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that [Sakura], when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way."<sup>239</sup> Put differently, "[w]hile the host

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<sup>235</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, ¶ 331, **CL-030**; *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, 22 September 2014, ¶ 571, **CL-031**.

<sup>236</sup> See e.g. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264, **CL-032**.

<sup>237</sup> *Tecmed*, ¶ 153, **CL-026**.

<sup>238</sup> *Gold Reserve* Award, ¶ 566, **CL-031**; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 459, **CL-037** ("The fact that none of the measures analysed – that were not outside the Tribunal's jurisdiction or not excluded from consideration by the Tribunal because they did not result in any significant damage – were regarded, in isolation, as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina").

<sup>239</sup> *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 329, **CL-033**.

state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making."<sup>240</sup>

166. To that same end, although States are permitted to change policies and laws that impact an investment, a change that is politically motivated violates the fair and equitable treatment standard:

The practice that had been so consistently followed regarding the handling of relations with Claimant as holder of mining rights in Venezuela changed when the State's policy concerning mining activities changed. This fact does not excuse Respondent's conduct, rather it confirms that such conduct was in breach of the FET standard as it was driven by political reasons. This also explains Respondent's failure to accept that the Brisas Concession term had been extended by operation of law, just as it had for the El Pauji Concession at about the same time.<sup>241</sup>

167. "It cannot be disputed that State conduct violates the [fair and equitable treatment standard] if it eviscerates the arrangements in reliance upon which the foreign investor was induced to invest."<sup>242</sup>

168. In this matter, Rwanda's violations of the fair and equitable treatment standard ("FET") are numerous. Specifically, and in violation of the general maxims laid out above, Rwanda's treatment of NRD and its investors demonstrates a pattern of mistreatment over the course of many years prior to Rwanda's expropriation.

#### **1. Rwanda's conduct eviscerated Claimants' legitimate expectations**

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<sup>240</sup> *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 285, **CL-034**; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶¶ 207-208, **CL-035** (finding, generally, the host countries laws entice investors to invest and change their economic position as a result; the host country actively sought investment to obtain capital and technology which helped to attract investors).

<sup>241</sup> *Gold Reserve*, ¶ 607, **CL-031**.

<sup>242</sup> *Bear Creek*, ¶ 522, **CL-029**.

169. Claimants, based upon representations by Rwandan officials and the general understanding of the mining community regarding the Government’s treatment of Concessions Holders, had a legitimate expectation that after obtaining the Contract it would receive a long term license for its Concessions thereby permitting it to mine for a period of 30 years.
170. It was well understood in the mining community in Rwanda, and actively promoted by Government officials, that once an investor obtained a contract for acquiring mining licenses and a permit for mining, it would obtain a long term license from the Government.<sup>243</sup> Rwandan officials, on multiple occasions stated that the long term licenses were guaranteed.<sup>244</sup> And in reference to the long term licenses, the Contract itself stated that NRD “**will be** granted the mining concessions” following the expiration of the Contract.<sup>245</sup>
171. Under Rwandan law, once one party to a contract performs, that party is entitled to all benefits owed to that party under the contract.<sup>246</sup> With respect to NRD, the Contract obligated it to “[p]roceed immediately to the industrial exploitation” and to perform other research and planning activities.<sup>247</sup> Once NRD complied with these obligations, the Contract confirmed that NRD “will be granted the mining concessions.”<sup>248</sup> In essence, the Contract was an executory contract in which performance by NRD obligated Rwanda

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<sup>243</sup> Marshall WS, ¶ 8; Buyskes WS, ¶ 7; Rwamasirabo WS, ¶ 6; Fiala WS, ¶ 5.

<sup>244</sup> Letter from B. Michael to Director of National Land Center dated 20 July 2009, **C-032**; Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033**.

<sup>245</sup> Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, Art. 4, **C-017** (emphasis added).

<sup>246</sup> Rwamasirabo WS, ¶ 5.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

to grant to NRD the long-term concessions.<sup>249</sup> Claimants relied upon this fundamental understanding of the Contract and contract law in Rwanda in deciding to invest in Rwanda.<sup>250</sup>

172. It was this guarantee that attracted NRD and its investors to Rwanda in the first place. Rwanda reached out to Mr. Marshall directly in the hopes of getting him to invest in the mining industry. Rwanda told Mr. Marshall that if he invested in Rwanda, he would be guaranteed a long term contract, not merely a four-year license.<sup>251</sup> Without this guarantee, investors, including Claimants, would not invest in the mining industry in Rwanda. A four-year contract is insufficient in duration to start a mining company and it is the guarantee of a long term license following the four-year contract that attracted NRD's investors, and others, to Rwanda in the first place.<sup>252</sup>
173. Rwanda itself recognized the importance of the stability of long term contracts to its ability to attract and maintain investors. Minister Kamanzi, when he first granted NRD an extension of their contract, said "I understand the absolute necessity to conclude this agreement as soon as possible for strong investor confidence."<sup>253</sup> While this focus on investor-relations was a buoy to investment in Rwanda, the State dispensed with this pretense as soon as it found divesting Claimants of their investments and property more beneficial their Claimants' continued investment.
174. As made clear by the *Sakura* Partial Awards, such legitimate expectations need not be made explicit by the state. Rather, expectations based upon implicit understandings from

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<sup>249</sup> Rwamasirabo WS, ¶ 5.

<sup>250</sup> Marshall WS, ¶¶ 8-9.

<sup>251</sup> *Id.*

<sup>252</sup> Marshall WS ¶ 9; Buyskes WS, ¶¶ 7, 11.

<sup>253</sup> Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**.

a government are sufficient to create a protectable legitimate expectation.<sup>254</sup> In this instance, Rwanda continually suggested, through numerous extensions of the license, ongoing negotiations for the long term license, and ultimately through silence while NRD continued to operate its mines, that the long term licenses were forthcoming.<sup>255</sup> Claimants' belief and understanding was bolstered by the fact that foreign investors, in like circumstances, were ultimately awarded long term licenses after years of negotiation.<sup>256</sup> Therefore, Claimants had every right to believe that they too would receive long term contracts, as promised to them and other investors, and that they would remain in Rwanda, working and investing.

175. Rwanda eviscerated the arrangements upon which Claimants relied in investing in Rwanda in the first place. By not awarding NRD the long term licenses for its Concessions, to which Claimants had a legitimate expectation of receiving, Rwanda breached the fair and equitable treatment standard.<sup>257</sup>

**2. Rwanda failed to implement the 2014 Law uniformly in an effort to drive Claimants out of the country and in violation of the fair and equitable treatment standard.**

176. In 2014 Rwanda passed a new mining law.<sup>258</sup> Although Rwanda has the right to implement new legislation, it cannot pass laws or implement them in ways that are

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<sup>254</sup> *Saluka*, ¶ 329, **CL-033**.

<sup>255</sup> See Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**; Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**; Letter from S. Kamanzi to Managing Director of NRD, **C-066**; Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-045**; Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033**; Letter from C. Akamanzi to R. Marshall dated 10 April 2013, **C-058**.

<sup>256</sup> Marshall WS, ¶ 40; Buyskes WS, ¶ 8.

<sup>257</sup> *Bear Creek*, ¶ 522, **CL-029**; see *Lemire*, ¶ 264, **CL-032**.

<sup>258</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, **CL-002**.

politically motivated.<sup>259</sup> It also cannot pass or implement laws in such a way that are inconsistent or discriminatory.<sup>260</sup> Rwanda, and specifically Minister Imena, used the 2014 Law to treat Claimants differently than other investors and generally harass NRD.

177. Pursuant to the language of the 2014 Law, NRD's Contract remained in full effect because it was grandfathered-in.<sup>261</sup> Minister Imena's "re-application" request was only done to harass NRD. This request violated the law because NRD's licenses remained in full force following the passage of the 2014 Law and NRD could not "re-apply" for a right that it already had.<sup>262</sup>
178. Minister Imena violated Rwandan law when he requested NRD to "re-apply" for its Concessions in August 2014<sup>263</sup> after informing NRD, by letter dated 2 April 2014,<sup>264</sup> that direct negotiations of the "licenses" "shall start in April 2014", and then failing to hold such negotiations. Minister Imena's failure to hold such negotiations after giving notice to NRD, and then to ask NRD to "re-apply" for the Concessions without commencing negotiations in the interim are violations of NRD's rights of due process under Rwanda law.<sup>265</sup> Under Rwandan law, the failure to initiate negotiations following an invitation to negotiate is a violation of due process.<sup>266</sup> Tinco, for example, had ample opportunities to sit down with Rwanda to substantially negotiate the terms of their long term contract.

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<sup>259</sup> *Gold Reserve*, ¶ 607, **CL-031**.

<sup>260</sup> *Saluka*, ¶ 307, **CL-033**.

<sup>261</sup> *Rwamasirabo WS*, ¶ 4, 8; *Buyskes WS*, ¶ 9.

<sup>262</sup> *Rwamasirabo WS*, ¶ 4, 8.

<sup>263</sup> Letter from E. Imena to NRD dated 18 April 2014, **C-064**.

<sup>264</sup> Letter from E. Imena to R. Marshall dated 2 April 2014, **C-063**.

<sup>265</sup> *Rwamasirabo WS*, ¶ 9.

<sup>266</sup> *Id.* at ¶ 10.

Although Claimants were given some face time, no substantive discussions about the draft long terms contracts ever took place.<sup>267</sup>

179. Further, Minister Imena requested documents in the “re-application” process to which he knew NRD did not have access due to the fact that Rwanda had barred NRD from accessing its offices.<sup>268</sup> Such action by Minister Imena is another violation of NRD’s rights of due process under the law. Minister Imena violated Rwandan law when he requested that NRD “re-apply” for its Concessions and then to refused to meet or to have his staff meet or communicate with NRD. Such a refusal to meet with or communicate with NRD is a violation of due process under Rwanda law.<sup>269</sup>
180. Minister Imena’s arbitrary reapplication process was also sanctioned by Minister Biruta.<sup>270</sup> However, Claimants believed that the process was just a formality because of assurances received from Minister Biruta that Claimants’ would not lose their investment.<sup>271</sup>
181. Minister Imena further treated Claimants’ unfairly during the reapplication process because he required Claimants to submit documentation that he knew Claimants did not have access to. During this time period, Ben Benzinge had illegally taken control of NRD’s headquarters in Kigali and barred NRD’s access. Minister Imena permitted Benzinge to take these actions. Without access to the NRD offices, Claimants could not submit all the documentation that Mr. Imena requested.<sup>272</sup> It was patently unfair for

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<sup>267</sup> Mruskovicova WS, ¶¶ 9, 18; Marshall WS, ¶ 37.

<sup>268</sup> *Id.* at ¶ 11; Fiala WS, ¶ 7; Marshall WS, ¶ 64; *see* Letter from Z. Mruskovicova to B. Johnston dated 13 October 2014, **C-080**.

<sup>269</sup> Rwamasirabo WS, ¶¶ 11, 12.

<sup>270</sup> Letter from V. Biruta to R. Marshall dated 20 November 2014, **C-098**

<sup>271</sup> Marshall WS, ¶ 53.

<sup>272</sup> Marshall WS, ¶¶ 45, 64; Fiala WS, ¶ 7; *see also infra* Section VI.A.4.

Minister Imena to create an obstacle for Claimants and then claim that Claimants' failure to overcome the obstacle was a reason for denying them a long term license.

182. Separate and apart from the illegality of the request, Minister Imena's request that Claimants "re-apply" for its Concessions was entirely inconsistent with the way that Rwanda treated other foreign investors. No other foreign investor in the mining industry was required to "re-apply" for their Concessions. Instead, negotiations simply continued apace without the 2014 Law impacting the negotiation process.<sup>273</sup>

183. Minister Imena'

**3. Rwanda used the ITRI/iTSCi system to punish Claimants, in violation of the fair and equitable treatment standard.**

184. Rwanda breached its duty to treat Claimants fairly and equitably when it unilaterally barred NRD from participation in the iTSCi system in 2014.

185. The iTSCi system was designed to ensure that every kilo of mineral mined in Rwanda would be placed in a bag at the location where it was mined and would be immediately sealed with a tag by a tag manager.<sup>274</sup>

186. The reason NRD stopped receiving tags has never been clearly communicated. ITRI never issued an incident report<sup>275</sup> and NRD always strictly complied with the ITRI/iTSCi rules.<sup>276</sup> The fact that it had been barred from tagging minerals was incredibly strange precisely because it had not violated any ITRI/iTSCi rules.<sup>277</sup> As best as can be discerned, the decision not to award NRD tags was made unilaterally by Minister Imena

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<sup>273</sup> Buyskes WS, ¶ 10; Fiala WS, ¶ 7.

<sup>274</sup> Mbaya WS, ¶ 4.

<sup>275</sup> Mbaya WS, ¶ 13.

<sup>276</sup> Barthelemy WS, ¶ 9.

<sup>277</sup> Mbaya WS, ¶ 13; Barthelemy WS, ¶ 9.

as he was using the iTSCi tagging system as a tool against Claimants to address whatever personal issues he had with NRD's owners and for reasons that had nothing to do with whether minerals were validly mined in Rwanda.<sup>278</sup> Kay Nimmo, the head of ITRI at its England headquarters, did not have any objection to NRD receiving tags which meant that NRD was abiding by the rules.<sup>279</sup>

187. If Minister Imena truly believed that NRD's operations could be suspended due to an issue or dispute over its ownership, as he claimed, that issue would be strictly a matter for resolution in the civil courts or with the country's Registrar. Minister Imena was not using the normal administrative processes to suspend NRD's mining operations, instead he was misusing the iTSCi system to accomplish his own ends.

188. Minister Imena also suggested that he would provide tags to NRD if it could establish who the rightful owners were.<sup>280</sup> Claimants provided proof of ownership.<sup>281</sup> Nevertheless, Minister Imena still did not provide tags.

189. Minister Imena also claimed that NRD could not have tags because it did not yet have a long term agreement.<sup>282</sup> However, prior to Minister Imena's 2014 decision to bar NRD from the tagging program, it had been permitted to tag minerals and had been tagging minerals. Furthermore, NRD was the only concession holder that was barred access to ITRI tags during the negotiation process.<sup>283</sup>

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<sup>278</sup> Mbaya WS, ¶ 17.

<sup>279</sup> Mbaya WS, ¶ 16.

<sup>280</sup> Mbaya WS, ¶ 17.

<sup>281</sup> Letter from R. Marshall to E. Imena dated 28 November 2014, **C-083**.

<sup>282</sup> Meeting Minutes of Rwanda Development Board, 23 March 2015, **C-101**; Email from I. Niyonsaba to R. Marshall, et al. dated 31 March 2015, **C-107**

<sup>283</sup> Meeting Minutes of Rwanda Development Board, 23 March 2015, **C-101**; Buyskes WS, ¶ 12, 13.

190. This was the only time that the iTSCi tagging system rules and procedures were used to take a punitive action against a mining company that did not relate to the validity of its mining minerals in Rwanda.<sup>284</sup> No other mining company or foreign investor in Rwanda was treated this way.
191. The real reason that Minister Imena denied tags to NRD was to try to drive NRD and its investors out of Rwanda so that Rwanda could take over NRD's Concession to further its smuggling operation of minerals from the DRC to Rwanda. This practice, which results in increased revenue for the Rwanda government and increased export statistics, is harder to detect and redress if Claimants' Concessions are in the hands of the Rwandan Ministry of Defense or related entities and the output of the Concessions can remain undocumented.
192. Claimants' retention of the Concessions became inconvenient and possibly detrimental to the Government's economic interests, so it tried to force Claimants to walk away. When Claimants would not walk away, Rwanda had to physically take the Concessions from Claimants.

**4. Rwanda consistently permitted Rwandan nationals to use the police and court systems to harm Claimants' investment in violation of the fair and equitable treatment standard.**

193. For years before Rwanda ultimately expropriated NRD's Concessions, it consistently and systematically treated Claimants and their investment poorly and failed to act in good faith. These continuous bad acts against NRD represent a clear violation of Rwanda's obligation to treat Claimants fairly and equitably. Instead, most of Rwanda's actions

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<sup>284</sup> Mbaya WS, ¶ 17.

with respect to NRD and its investors appear arbitrary, capricious, and designed to harm Claimants at the benefit of Rwandan nationals.

194. These violative actions started in 2011 when NRD should have received long-term licenses for its Concessions but instead received a series of extensions. NRD submitted an application for long term licenses that complied with its Contractual requirements.<sup>285</sup> Minister Kamanzi then reported back approximately 6 months after NRD submitted the application that the NRD had not fulfilled its contractual obligations.<sup>286</sup> However, Claimants complied with its obligations under the contract. It was never made clear to Claimants why Minister Kamanzi only issued an extension.<sup>287</sup> Kamanzi's position that Claimants had not complied with the terms of the Contract is further contradicted by the fact that, in January 2012, Rwanda had prepared draft contracts for the long term concessions that it was prepared to share with Claimants.<sup>288</sup>
195. Thereafter, Claimants were treated unfairly and inequitably when it was barred, on two separate occasions in 2012, from accessing its western Concessions by local authorities who simultaneously permitted local miners to continue mining in NRD's absence.<sup>289</sup> This was in spite of the fact that Minister Kamanzi had extend NRD's mining license.<sup>290</sup>

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<sup>285</sup> See Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, **C-017**; 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**; F. Twagiramungu Consulting Report dated September 2010, **C-036**.

<sup>286</sup> Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, **C-062**.

<sup>287</sup> Marshall WS ¶ 32, **C-0025**; see Rwamasirabo WS, ¶ 5.

<sup>288</sup> Letter from R. Marshall to S. Kamanzi dated 30 January 2012, p. 1, **C-039**.

<sup>289</sup> Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, p. 1, **C-047**; Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

<sup>290</sup> Letter from S. Kamanzi to Managing Director of NRD dated 13 September 2012, **C-033** (emphasis added).

One of these instances involved mining in the Manihira Sector, in the Rutsiro Concession, which was a known source of Coltan.<sup>291</sup> In that case, the miners that the local authorities permitted to mine at Manihara, while banning NRD, likely successfully mined large quantities of coltan that they were then able to sell.

196. Despite the fact that NRD was not able to mine its Concessions for a large portion of 2012, it was still accused of causing environmental damage. However, environmental damage was actually a result of a long history of mining by the Belgians and illegal miners who were permitted to mine in NRD's absence.<sup>292</sup> It is disingenuous that Rwanda continually accused NRD of so much environmental damage when it publically recognized that illegal miners had long caused substantial damage.<sup>293</sup>
197. Then, in August 2012, NRD and its director, Roderick Marshall, were illegally barred from the offices for one week. Ben Benzinge, a Rwandan national, convinced the RDB that he was the managing director and, for reasons that were never understood, the RDB changed the corporate registration to reflect that Benzinge was the managing director. NRD's owners and investors never appointed Benzinge as the managing director and never submitted any documentation to the RDB that would have granted him that title. The RDB is supposed to update the identity of the managing director upon a submission of meeting minutes by the shareholders. No meeting minutes on this issue were ever submitted by Claimants. Instead of following its own rules and procedures, the RDB

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<sup>291</sup> *Status Report 2009*, p. 43, **C-067**.

<sup>292</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, **C-050**.

<sup>293</sup> *Mining Policy*, p. 6-7, **C-015**.

unilaterally determined that it would grant a Rwandan national without the right to be managing director, as managing director.<sup>294</sup>

198. The RDB suggested to Mr. Marshall that it did not have any corporate registration information for NRD and that if they did once have it, it had been lost. This made little sense as NRD was highly visible in Rwanda and its investors had made the largest US investment in the mining industry. It was highly unlikely that the information simply went missing.<sup>295</sup>
199. Mr. Marshall and NRD was not able to regain access to its Concessions for about 10 days. It was not until the United States Ambassador to Rwanda intervened on Claimants' behalf that the RDB corrected the corporate registry to show that Mr. Marshall was in fact the managing director.<sup>296</sup>
200. During the Benzinge, state-assisted control of Claimants' investment, he hired his own guards to take control of NRD's offices and he began contacting business partners and government agencies on behalf of NRD, he illegally fired employees, he stole minerals from the Concessions, and changed the locks on NRD's buildings and facilities. Benzinge also greatly undermined the confidence that NRD's employees had in NRD, which NRD worked hard to establish.<sup>297</sup>
201. Also during 2012, Rwandan police and military inexplicably arrested dozens of NRD's employees and demanded substantial payment from them in exchange for their release.

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<sup>294</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, C-048; Marshall WS, ¶¶ 19, 22; Rwamasirabo WS, ¶ 17.

<sup>295</sup> Marshall WS, ¶ 20.

<sup>296</sup> Marshall WS, ¶ 22.

<sup>297</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, C-048; Marshall WS, ¶ 22.

No reason was ever provided for these arrests. During at least one arrest, the military seized all minerals being stored at the Sebeya Concession.<sup>298</sup>

202. The extensive pattern of mistreatment against NRD continued in 2014.
203. Ben Benzinge, whose ownership interest in NRD was no more than 0.2% as of 2014, illegally used the Rwandan courts and police to terrorize and victimize NRD. He knowingly and intentionally misrepresented that he owned 100% of the shares of NRD.<sup>299</sup> This is plainly incorrect as evidenced by RDB's own documentation, which governs the issue.<sup>300</sup> The RDB registration shows that Benzinge owns 0.2% of shares and that Roderick Marshall is the managing director.<sup>301</sup> Benzinge, with the assistance of local police and bailiff<sup>302</sup> Nsengiyumva Jean Bosco, seized NRD's offices, buildings and assets, attempted to take control of the concessions and steal minerals, threatening business partners, and claiming that Benzinge is the managing director of NRD.<sup>303</sup> There is no corporate action making Benzinge managing director. The most recent corporate action by NRD or its parent entity states that Roderick Marshall is the managing director.<sup>304</sup>

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<sup>298</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**; Letter from R. Marshall to District Police Commissioner of Ngororero District dated 3 September 2012, **C-052**.

<sup>299</sup> Letter from R. Marshall to Minister of Internal Security of Rwanda dated 16 June 2014, **C-065**.

<sup>300</sup> Rwamasirabo WS, ¶ 17, **C-062**.

<sup>301</sup> Letter from R. Marshall to Minister of Internal Security of Rwanda dated 16 June 2014, **C-065**.

<sup>302</sup> In Rwanda, a bailiff is a private party, licensed by the government, to enforce money judgments from courts or to make an official notary record.

<sup>303</sup> Letter from R. Marshall to Minister of Internal Security of Rwanda dated 16 June 2014, **C-065**; Letter from R. Marshall to B. Michael dated 30 June 2014, **C-069**

<sup>304</sup> Resolution by Unanimous Written Consent of the Sole Director of NRD, GmbH dated 3 October 2011, p. 3, **C-070**.

204. Minister Imena permitted Benzinge to carry out this fraud. Minister Imena told Mr. Marshall that he, Minister Imena, had decided that Benzinge owed 100% of NRD.<sup>305</sup> Minister Imena plainly ignored Rwandan law and the RDB in an effort to further harm Claimants.
205. On or about July 11, 2014, Bosco attempted, albeit, unsuccessfully, to auction much of Claimants' property and assets. A Court had previously found that Bosco had attempted to fraudulently sell NRD's minerals at least once before.<sup>306</sup>
206. NRD reached out to Minister of Justice, Busingye Johnston, after notifying the CID of the illegal actions, in an effort to inform the Ministry of Justice of the illegal actions and to stop another planned auction scheduled for July 18, 2014.<sup>307</sup>
207. Minister Busingye wrote to Bosco on July 23, 2014, informing him that he must cease his actions and that he was suspended from working as a Bailiff.<sup>308</sup> Unfortunately, about one month later, Minister Busingye rescinded his prior letter, stating that the Attorney General cannot help NRD and that Bosco did have the right to continue to seize assets to settle NRD's debts.<sup>309</sup> Benzinge, a Rwandan national, was receiving assistance to the detriment of Claimants, foreign investors.
208. As of August 4, 2014, NRD had not been able to operate its business for about two months. With respect to the Nemba concessions, specifically, Benzinge held a "public shareholder's meeting" and unilaterally announced that the US investors in NRD have no

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<sup>305</sup> Marshall WS, ¶ 41.

<sup>306</sup> Letter from R. Marshall to B. Johnston dated 14 July 2014, p. 11, **C-071**.

<sup>307</sup> Letter from R. Marshall to B. Johnston dated 14 July 2014, pp. 1-2, **C-071**.

<sup>308</sup> Letter from B. Johnston to J. Nsengiyumva dated 23 July 2014, **C-072**.

<sup>309</sup> Letter from B. Johnston to Z. Mruskovicova, et al. dated August 2014, **C-073**.

ownership rights in NRD.<sup>310</sup> Of course, this is flatly incorrect as shown by RDB's records at the time.<sup>311</sup>

209. When NRD was finally granted access back to its concessions on August 19, 2014, it hired professional court bailiff Umurungi Jacquie to make an official notary record on her findings at the Nemba concession. She found that all of the doors had been padlocked and sealed with red tape and that these actions had been approved by the District Police Commander of the Bugesera District. NRD was forced to break the locks and seals in order to regain entry. Jacquie conducted interviews with the NRD site manager, a subcontractor, a Rwanda Defense Force Officer, and a local official to better understand property that was stolen. They reported that the following property was stolen during the two or so months that Benzinge illegally controlled the site: all security fencing and posts; metals roofs on all buildings; some railway lines and ties; steel water pipes that had been connected to the lake; other pipes; pieces of mine wagons; steel pipes for compressors; plastic hoses; steel equipment; and over 45 tons of tin as a result of illegal mining. Furthermore, the illegal miners severely damaged mining tunnels by removing support beams such that, tragically, one miner died during Benzinge's illegal control of Nemba.<sup>312</sup>

210. Although NRD regained control of its Concessions, they continued to have many problems. Bosco and Benzinge had substantially changed the management structure at

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<sup>310</sup> Letter from R. Marshall to B. Johnston dated 5 August 2014, **C-074**.

<sup>311</sup> Letter from R. Marshall to Minister of Internal Security of Rwanda dated 16 June 2014, **C-065**.

<sup>312</sup> U. Jacquie, *Report on NRD at Nemba Mining Site*, 22 August 2014, **C-075**.

the Nemba mine which undermined NRD's actual and rightful management. It appeared that Bosco and Benzinge's only intentions were to severely damage NRD's assets.<sup>313</sup>

211. Bosco ultimately stole nearly USD \$800,000 worth of Claimants' assets.<sup>314</sup>
212. Bailiffs were continuing to seize NRD's assets, purportedly to enforce court judgments, through at least February 2015. Bosco and these other bailiffs never had any documentation to support their "seizures" and always arrived on NRD's property with police and sometimes with military in tow.<sup>315</sup> NRD requested assistance from the Regional Police Commander of the Kigali Metropolitan Police in order to stop these illegal seizures.<sup>316</sup> NRD likewise appealed for help from the Rwanda Revenue Authority.<sup>317</sup> NRD never received any help and continually suffered at the hands armed bailiffs seizing its property allegedly to enforce court judgments.<sup>318</sup> Instead of helping Claimants, the policy and Rwandan government appeared to be helping bailiffs carry out illegal seizures of Claimants property.
213. As of October 13, 2014, NRD still did not have access to its main office in Kigali.<sup>319</sup> As a result, Claimants struggled to comply with Minister Imena's "re-application" demands.<sup>320</sup>

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<sup>313</sup> Letter from R. Marshall to B. Johnston dated 26 August 2014, **C-076**.

<sup>314</sup> Letter from NRD to DPC of Gasabo District dated 23 October 2014, **C-077**.

<sup>315</sup> Mruskovicova WS 19; Marshall WS, ¶ 51.

<sup>316</sup> Letter from R. Marshall to R. Rutikanga dated 13 February 2015, **C-078**.

<sup>317</sup> Letter from R. Marshall to D. Richard dated 2 April 2015, **C-079**.

<sup>318</sup> Marshall WS, ¶ 46, 49; Mruskovicova WS ¶ 19.

<sup>319</sup> Letter from Z. Mruskovicova to B. Johnston dated 13 October 2014, **C-080**.

<sup>320</sup> *See supra* Section VI.A.4.

214. On November 4, 2014, the Commercial Court suspended Bosco’s execution against NRD and the High Court confirmed that no appeal had been taken on November 27, 2014.<sup>321</sup> Accordingly, NRD immediately notified Minister Evode of the two court decisions to show that any question of ownership, to the extent one still existed, had been definitively resolved in favor of NRD.<sup>322</sup>
215. Throughout this entire process, Minister Imena was setting Claimants up for failure.<sup>323</sup>
216. The above illustrates Rwanda’s clear pattern of inconsistent application of the law to NRD and of individuals in Rwanda using local authorities to harm Claimants. Furthermore, despite numerous attempts, NRD was never able to obtain help from the police or military, in large part because they were taking part in the harm that befell NRD and its investors. Taken together, these actions establish a clear pattern of mistreatment that is sufficient to find that Rwanda breached its duty to treat Claimants fairly and equitably.<sup>324</sup>
217. The timing of these many events is crucially important. In April or May of 2014 Minister Imena unilaterally decided not to grant NRD any tags. In June of 2014, Minister Imena was complicit in the illegal takeover of Claimants’ investments by a Rwandan national, Benzinge. During Benzinge’s control, Minister Imena also demanded that Claimants “re-apply” for their concessions. These three acts evidence a pattern of mistreatment and clear plan to drive Claimants out of Rwanda. In doing so, a Rwandan national stood to

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<sup>321</sup> *Natural Resources Development v. Nsengiyumba Jean Bosco*, Commercial Court of Nyarugenge Case No. R COM 1237/14/TC/NYGE, Notice, 31 October 2014, **C-081**; *Natural Resources Development v. Nsengiyumba Jean Bosco*, Commercial High Court of Nyarugenge Case No. R COM 1237/14/TC/NYGE, Certificate, 28 November 2014, **C-082**.

<sup>322</sup> Letter from R. Marshall to E. Imena dated 28 November 2014, **C-083**.

<sup>323</sup> Marshall WS, ¶ 63; Fiala WS ¶ 7.

<sup>324</sup> See *Gold Reserve*, ¶ 566, **CL-031**; *El Paso Energy*, ¶ 459, **CL-037**.

benefit greatly from Claimants' losses. Mr. Imena knew that NRD could not sell minerals without tags. He also knew that with Benzinge in control of the Concessions, NRD could not mine. He also knew that with Benzinge in control of NRD's headquarters, Claimants would not be able to meet his "re-application" demands. Mr. Imena hoped that Claimants would simply roll over and walk away as a result of the repeated poor treated received at his hand, on behalf of Rwanda. However, because the Claimants would not, Rwanda was eventually forced to expropriate Claimants' investment.

**B. Rwanda failed to treat Claimants' investments transparently**

218. Related to an investor's legitimate expectation is the requirement that a host State treat investments transparently so as to comply with the fair and equitable treatment standard.<sup>325</sup> Treating investments with transparency requires the absence of any administrative ambiguity or opacity<sup>326</sup> and full candor in the administrative process.<sup>327</sup>

219. The obligation of transparency includes:

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

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<sup>325</sup> See e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 178, **CL-036** ("Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework").

<sup>326</sup> *Bear Creek*, ¶ 523, **CL-029**; Dugan, p. 519, **CL-012**.

<sup>327</sup> *Waste Mgmt.*, ¶ 98, **CL-028**.

with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.<sup>328</sup>

220. As has been detailed above, Rwanda did not act with transparency. To the extent that Rwanda believed that NRD did have to “re-apply” and was subject to the provisions of the 2014 Law, it had to provide the reason for rejecting the application.<sup>329</sup> However, Minister Imena’s letter of 2014 and 2015 did not provide the required specific reasons for the decision not to grant the licenses.<sup>330</sup> In addition, it is customary for the Minister to appoint an investigative or audit team to ascertain whether the deficiencies are genuine and true. Those procedures were not followed with regard to NRD.<sup>331</sup>
221. Minister Imena’s requirement that NRD submit documents that he knew it could not access because NRD was barred from its offices, is a clear violation of Rwanda’s obligation to act transparently. Rwanda was aware of this problem but nevertheless did not permit NRD timely access to remedy any supposed deficiencies in their “re-application.”<sup>332</sup>
222. Furthermore, as established above, Claimants had legitimate expectation of a long term agreement. Despite this, Claimants were strung along for years, with extensions of their licenses and further promises that the long term agreements for each of the Concessions were forthcoming. At each step, Rwanda never transparently explained to Claimants why they were merely granted extensions, and not the long term agreement. Claimants could not obtain a straight answer but went along with the process regardless.

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<sup>328</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76, **CL-038**.

<sup>329</sup> *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 7, **CL-002**.

<sup>330</sup> *Rwamasirabo WS*, ¶ 13, **C-062**.

<sup>331</sup> *Id.*

<sup>332</sup> *See Metalclad*, ¶ 76, **CL-038**.

**C. Rwanda Failed to Provide Full Protection and Security to Claimants' Investment**

223. Article 5 of the BIT requires Rwanda to “accord to covered investments treatment in accordance with customary international law, including...full protection and security.” It goes on to state that “‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”<sup>333</sup>
224. “The practice of arbitral tribunals seems to indicate, however, that the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”<sup>334</sup> “Traditionally, the cases applying full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments have failed to exercise due diligence in preventing the damage or punishing the perpetrators.”<sup>335</sup>
225. There is no question that Rwanda failed to provide full protection and security to Claimant’s investment because its investment was physically damaged by third parties as a result of Rwanda’s action and inaction. Furthermore, Rwanda failed to provide the necessary level of police protection to ensure the physical integrity of Claimants’ investment.
226. When NRD was barred from accessing its western Concessions for approximately a year between 2012 and 2013, much environmental damage was done. The damage was done, in part, by the illegal miners that the local authorities permitted to mine the Concessions

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<sup>333</sup> Rwanda-US BIT, Art. 5, **CL-006**.

<sup>334</sup> *Saluka*, ¶ 484, **CL-033**.

<sup>335</sup> *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, p. 63, **CL-039**.

in NRD's absence. Such environmental damage injured Claimants' physical assets and required them to expend time and money to remediate damage that they did not cause.<sup>336</sup>

227. During the time that NRD was barred from its western Concessions, the Rwandan Military arrested 40 NRD employees, without explanation, and demanded 50,000 RWF for the release of each person. Some employees were beaten. During at least one arrest, the Military forced the Sebeya site manager to open the office so that the Military could steal all minerals being stored at that time.<sup>337</sup>
228. Rwanda, on multiple occasions, permitted Benzinge and persons related to him to physical harm Claimants' investments. Through the RDB and Office of the Registrar General, Benzinge gained access to the Concessions for a period of one week in August 2012. Benzinge took control of the Nemba concession and stole Claimants' assets and minerals that were being stored on site. Benzinge even changed the locks on the buildings to further bar access by NRD. These actions, which took place with the assistance of Rwandan police and military, severely disrupted NRD's business.<sup>338</sup> The theft of assets and minerals, as well as the changing of the locks, injured Claimants' assets.
229. In 2014, Benzinge again wrested control of the Concessions from Claimants and caused physical injury to Claimants investment through the use of the courts, police, and military. In June 2014, with the tacit approval of Minister Imena, Benzinge claimed

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<sup>336</sup> Letter from R. Marshall to M. Biryabarema dated 14 December 2012, **C-050**.

<sup>337</sup> Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**; Letter from R. Marshall to District Police Commissioner of Ngororero District dated 3 September 2012, **C-052**.

<sup>338</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, **C-048**; Marshall WS, ¶ 16-22.

100% ownership of NRD and seized the Concessions.<sup>339</sup> He used the local police, military and bailiff Nsengiymva Jean Bosco to take possession of the Concessions.<sup>340</sup> The police, military, the Minister of Justice, and other Rwandan agencies did not intervene to assist Claimants, despite their requests.<sup>341</sup>

230. During Benzinge's occupation, and with the assistance of the police and military, he stole nearly USD \$800,000 worth of Claimants' assets.<sup>342</sup> The stolen property included all security fencing and posts; metal roofs on all buildings; railway lines and ties; steel water pipes that had been connected to the lake; other pipes; pieces of mine wagons; steel pipes for compressors; plastic hoses; steel equipment; and over 45 tons of tin as a result of illegal mining. Illegal miners also severely damaged a mining tunnel by removing support beams.<sup>343</sup> This, along with other activity undertaken by illegal miners, resulted in millions of dollars of damage to the mines, separate and apart from the other damage to Claimants' assets.<sup>344</sup> As a result of the illegal mining that took place in NRD's absence, and the harm caused by Rwanda through the actions of Benzinge, Claimants were harmed.

231. At the Nemba concession, Benzinge had also sealed the main office. When Claimants were finally permitted to reenter, they found that the doors were sealed with red tape that

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<sup>339</sup> Marshall WS, ¶ 41.

<sup>340</sup> Mruscovicova WS, ¶ 19.

<sup>341</sup> Letter from R. Marshall to R. Rutikanga dated 13 February 2015, **C-078**; Letter from R. Marshall to D. Richard dated 2 April 2015, **C-079**; Letter from B. Johnston to Z. Mruskovicova, et al. dated August 2014, **C-073**.

<sup>342</sup> Letter from NRD to DPC of Gasabo District dated 23 October 2014, **C-077**.

<sup>343</sup> U. Jacquie, *Report on NRD at Nemba Mining Site*, 22 August 2014, **C-075**.

<sup>344</sup> Marshall WS, ¶ 51.

showed that the District Police Commander of the Bugesera District had approved closure and locking of the office.<sup>345</sup>

232. During Benzinge's occupation of Claimants' property, he also sealed its main offices in Kigali. When Claimants were finally permitted to reenter, in September 2015, they found that substantially all of their papers had been stolen and their computers had been wiped clean.<sup>346</sup>
233. Consistently and routinely, instead of receiving help from the police to protect their assets, Claimants were subject to abuse by the police, military, and various agencies within the Rwandan government. The police and military assisted Benzinge to take control of Claimants assets and steal hundreds of thousands of dollars of material. Local authorities permitted illegal mining to take place in NRD's absence which caused substantial harm to the ground, including environmental damage that NRD was blamed for. Even the Ministry of Justice would not step in to assist.
234. Rwanda always failed to provide Claimants with full protection and security such that their assets suffered physical harm throughout the time period that they were investing in Rwanda. Instead of receiving any police or related assistance, the police worked against Claimants to permit third parties to harm their investments. These actions violate Rwanda's obligation to provide Claimants' investments full protection and security under the BIT.

**D. Rwanda Expropriated Claimants' Investments in Violation of Article 6 of the BIT**

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<sup>345</sup> See Jacquie, *Report on NRD at Nemba Mining Site*, 22 August 2014, C-075.

<sup>346</sup> Marshall WS ¶ 43, 67; Mruskovicova WS 24.

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

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

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

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5(1) through (3).<sup>347</sup>

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

238. As noted by experts on international jurisprudence, international law recognizes that an investment can be expropriated regardless of the vocabulary used to describe the expropriating government’s action no matter whether it be termed “seizure, confiscation, nationalization, sequestration, condemnation – and an even larger number of ways that property can be expropriated. Expropriation can be direct, indirect, regulatory, creeping, de facto, or a government act may be ‘tantamount to,’ ‘equivalent to,’ or ‘have similar effects as’ expropriation.”<sup>348</sup>

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<sup>347</sup> Rwanda-US BIT, Art. 6, **CL-006**.

<sup>348</sup> C. Dugan, et al., *Investor-State Arbitration* (2008), p. 450, **CL-012**.

239. Investment tribunals also recognize that concession rights are subject to expropriation.<sup>349</sup>

In the *Phillips Award*, the Iran-US Claims Tribunal dealt with rights arising from a concession agreement, which it held were subject to expropriation:

As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as contract rights involved in the present Case.<sup>350</sup>

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

241. Rwanda's expropriation of Claimants' covered investments were improper as Rwanda failed to act within the clear mandates of the BIT to which they were a signatory thereby entitling Claimants to recompense under the terms of the BIT and in accordance with international law.

**1. Rwanda did not expropriate Claimants' investments for a public purpose**

242. Annex B to the BIT provides the bases upon which Article 6, Paragraph 1, will be interpreted. Specifically, Article 6, Paragraph 1, reflects "customary international law concerning the obligation of States [(i.e., Rwanda)] with respect to expropriation."<sup>351</sup>

243. With respect to the necessity of a "public purpose," international law has long prohibited expropriation in the absence of a public purpose. In Professor Garcia Amador's words:

[T]he least that can be required of the State is that it should exercise [the] power [to expropriate] only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and

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<sup>349</sup> *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Trib. Case No. 39, Chamber 2, Award No. 425-39-2, 29 June 1989, ¶ 105, **CL-013**.

<sup>350</sup> *Id.* at ¶ 76.

<sup>351</sup> Rwanda-US BIT, Annex B, ¶ 1, **CL-006**.

give legal sanction to manifestly arbitrary acts of expropriation [...] [A]ll states should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is 'arbitrary' and therefore involves the international responsibility of the State.<sup>352</sup>

244. In *British Petroleum v. Libya* ("BP"), the tribunal expressly concluded that Libya's expropriation of British Petroleum's hydrocarbons concessions was unlawful because it had been adopted "for purely extraneous political reasons" and hence not for a public purpose.<sup>353</sup> Similarly, in *LETCO v. Liberia* ("LETCO"), an ICSID tribunal found that the revocation of a concession "was not for a *bona fide* public purpose" because "there was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good."<sup>354</sup>
245. Like the tribunals in BP and LETCO, the *ADC v. Hungary* tribunal also focused its attention on the lack of a public purpose for an expropriation. There, the tribunal required the expropriating State to demonstrate a genuine public interest:

[A] treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.<sup>355</sup>

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<sup>352</sup> F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119 (1959), II Y.B. Int'l. L. Comm'n. 1 (1960), ¶ 59, **CL-014**.

<sup>353</sup> *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, Award, 1 August 1974, 53 ILR 297, 329, **CL-015**.

<sup>354</sup> *Liberian Eastern Timber Corp. v. Government of The Republic of Liberia*, Award, 31 March 1986, 2 ICSID Reports 343, 366-367, **CL-016**.

<sup>355</sup> *ADC Affiliate Limited, et. al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 432, **CL-017**.

246. The *Siemens v. Argentina* tribunal, also focusing on the public purpose element, found that the fulfillment of the public interest requirement was questionable because Argentina’s abrogation of Siemens’ contractual rights “was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding.”<sup>356</sup>
247. Rwanda has never suggested that it expropriated Claimants’ investment for a public purpose.<sup>357</sup> In fact, and according to the Rwanda Constitution, Article 6, paragraph 1 of Rwanda’s Law No. 06/2015 of Investment Law of 28/03/2015 relating to Investment Promotion and Facilitation, it cannot claim it was for a public purpose as its own law states that private property “shall be inviolable.” Article 6, paragraph 2 states that “[n]o investment, interest in or right over any property forming part of such Investment shall be seized or confiscated except where provided under the relevant laws.” In violation of these provisions, Rwanda did not expropriate NRD’s Concessions for a public purpose “under relevant laws.”<sup>358</sup>
248. Furthermore, and although Rwanda’s law on expropriation does not apply to this matter, the “relevant” Rwandan law described above only permits expropriation for a public purpose, which, as explained herein, did not occur in these circumstances.<sup>359</sup>
249. A host of facts and Rwanda’s pattern of mistreatment towards Claimants further make clear that Rwanda did not expropriate for a public purpose.

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<sup>356</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 205, **CL-018**.

<sup>357</sup> Rwamasirabo WS, ¶ 14-16, **C-062**.

<sup>358</sup> *Id.* at ¶ 15.

<sup>359</sup> *Id.* at ¶ 16.

250. The “re-application” process, the culmination of which resulted in an expropriation, was specifically designed to cause Claimants to fail. First, Minister Imena prohibited NRD from tagging its minerals which meant that NRD had to limit its operations.<sup>360</sup> Then, Minister Imena permitted a Rwandan national, to illegally take control of Claimants’ investment. While this Rwandan individual had control of Claimants’ investments and headquarters, Mr. Imena requested that Claimants “re-apply” for NRD’s Concessions. Minister Imena set NRD and their investors up for failure in the hopes that they would simply give up and walk away from their investments.<sup>361</sup> When that did not happen, Rwanda expropriated the Claimants’ investment and assets so that they could take advantage of it. This is further evidenced by the fact that the current occupants of NRD’s concessions, Ngali mining, which is a company related to the government, is using NRD’s equipment, which was paid for by Claimants’ investment.<sup>362</sup>
251. Minister Imena seemingly had a personal problem with Claimants and acted on it by making life very difficult for them in Rwanda and eventually expropriating their investment.<sup>363</sup>
252. Currently, NRD’s Concessions are the possession of entities related to the Rwandan Ministry of Defense or other government contractors. It is not clear whether they are currently mining the Concessions.<sup>364</sup> However, upon a visit to the Concessions by Ms. Mruskovicova in 2017, she did not see any mining or any new mining sites. Given NRD’s western Concessions close proximity to Lake Kivu and the border with the DRC,

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<sup>360</sup> *See supra* Section III.C.

<sup>361</sup> *See supra* Section VI.A.4.

<sup>362</sup> Mruskovicova WS, ¶ 21, 27; Buyskes WS, ¶ 19.

<sup>363</sup> *See* Mbaya WS, ¶ 17.

<sup>364</sup> Buyskes WS, ¶ 19; Marshall WS ¶ 71; Mruskovicova WS, ¶ 27.

it is believed that Rwanda is using the western Concessions as a staging ground for minerals smuggled from the DRC.<sup>365</sup> With the Military or related entities in control, Rwanda can control the flow of smuggling, avoid scrutiny, and further increase their export numbers. Rwanda needs to control this flow in order to boost its mineral exports, which could not happen without minerals from the DRC, because Rwanda simply does not have the production capacity to match exports.<sup>366</sup>

253. Neither potential use, for mining or as a staging ground for smuggling, constitutes as public purpose. There was no country-wide policy to re-nationalize the mines or other law or policy that would have permitted Rwanda to expropriate without violation of the BIT. The fact that other foreign investors remain in Rwanda and are currently Concession Holders with long term licenses demonstrates that the taking of Claimants' investment and the NRD Concessions was not done for a public purpose.<sup>367</sup>
254. The specific and targeted expropriation of Claimants' investment was politically motivated and not done for a public purpose.

**2. Rwanda's expropriation was carried out in a discriminatory manner and in violation of due process of law and Article 5(1) through (3)**

255. As noted in further detail above in Section VI.A., Claimants were treated discriminatorily by Rwanda and in violation of due process of law and Article 5(1) through (3). Rwanda's actions, viewed objectively, show that its expropriation of Claimants covered investments was unlawful and in violation of the BIT.

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<sup>365</sup> Mruskovicova WS ¶ 29.

<sup>366</sup> *Id.*; Mbaya WS, ¶ 19; Barthelemy WS, ¶ 21; Buyskes WS, ¶¶ 17-18.

<sup>367</sup> *See e.g.* Buyskes WS, ¶¶ 8, 11.

256. Concerning discriminatory measures, the *Ulysseas v. Ecuador* tribunal noted that “for a measure to be discriminatory, it is sufficient that, objectively, two similar situations are treated differently.”<sup>368</sup> Discriminatory intent is not required.<sup>369</sup>
257. Rwanda plainly discriminated against Claimants.
258. Claimants were the only foreign investors that were required to go through the “re-application” process.<sup>370</sup> Claimants were the only foreign investors whose mining company was denied tags by Rwanda.<sup>371</sup> Claimants were the only foreign investors whose ownership stake in their investment vehicle was questioned, repeatedly, by Rwanda and the RDB and that was permitted to be controlled by a Rwandan national.<sup>372</sup>
259. Other investors were granted police and military protection to ensure there was no illegal mining occurring.<sup>373</sup> Instead of receiving similar treatment, the police and military actively worked to harm Claimants’ investment.<sup>374</sup>
260. Ultimately, Claimants were decimated against by not receiving the long term contracts, despite compliance with all requirements to receive one, when other foreign investors, who invested less money and did less work, did receive one.

### **3. Rwanda never made prompt, adequate, and effective compensation for its expropriation**

261. Rwanda expropriated Claimants’ covered investments but never compensated Claimants for the taking in direct violation of the BIT.

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<sup>368</sup> *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶ 293, **CL-019**.

<sup>369</sup> *See, e.g., Eastern Sugar B.V. v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 338, **CL-021**; *Siemens*, ¶ 321, **CL-018**.

<sup>370</sup> Buyskes WS, ¶ 10; Fiala WS, ¶ 7.

<sup>371</sup> *See Mbaya WS*, ¶ 17; Letter from R. Marshall to E. Imena dated 8 December 2014, **C-106**.

<sup>372</sup> *See supra*, Section VI.A.4.

<sup>373</sup> Marshall WS, ¶ 27.

<sup>374</sup> *See supra*, Section VI.A.4; Section VI.C.

262. The requirements regarding compensation required under the BIT reflect and expressly endorse the general international law principle that compensation must be prompt, adequate and effective, as articulated in 1938 by U.S. Secretary of State Cordell Hull: “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.”<sup>375</sup> The Hull formula, which is mirrored in the language of the BIT, has been widely regarded ever since its creation as an expression of the customary international law standard of compensation.<sup>376</sup>
263. Rwanda has not paid any form of compensation to Claimants, which is a fact not in dispute in this arbitration. This fact alone is sufficient to make Rwanda’s expropriation of Claimants’ covered investments an unlawful act under the BIT and international law.
264. Rwanda’s failure to compensate Claimants is also a violation of Rwanda’s Law No. 06/2015 of Investment Law of 28/03/2015 relating to Investment Promotion and Facilitation which, in Article 6, Paragraph 3, requires “[n]o action to expropriate an investor’s property in public interest shall be taken, unless the investor is given fair compensation in accordance with relevant laws.” In violation of this provision, Rwanda did not did not provide Claimants with any compensation for the expropriation of their investment.<sup>377</sup>

**E. Rwanda Violated Its National Treatment and Most-Favored-Nation Treatment Obligations**

265. Article 3 of the BIT (the “National Treatment” clause (“NT”)) requires that Rwanda “accord to investors of the other Party” and to “covered investments” “treatment no less

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<sup>375</sup> T. Levy, *NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the “Prompt, Adequate and Effective”*, 31 Stan. J. Int’l L. 423, 426, **CL-022**.

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

<sup>377</sup> Rwamasirabo WS, ¶ 15, **C-062**.

favorable than that it accords, in like circumstances,” to its own investors and to covered investments of its own investors, respectively, with regard to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>378</sup>

266. Similarly, Article 4 of the BIT (the “Most-Favored-Nation” clause (“MFN”)), requires that Rwanda treat investors of a party and their investments “no less favorabl[y]” than it treats investors of non-parties to the BIT and their investments “with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>379</sup>

267. The NT and MFN provisions found in the BIT are “near identical legal norms” guided by the respective treatment of a Party, *i.e.*, Rwanda, towards its own domestic investors and non-Party investors as compared to “other Party” investors, *i.e.*, Claimants in the present case.<sup>380</sup> Although the legal norms regarding NT and MFN clauses are nearly identical, international jurisprudence provides different methods for determining whether a party has violated such obligations.

268. Here, Rwanda has violated its obligations under the NT clause and the MFN clause.

#### **1. Rwanda violated its National Treatment obligation owed to Claimants**

269. International law recognizes two kinds of violations of the national treatment requirement: *de jure* and *de facto*.<sup>381</sup> In this case, Rwanda, through its 2014 Laws

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<sup>378</sup> Rwanda-US BIT, Art. 3, ¶ 1-2, **CL-006**.

<sup>379</sup> *Id.* at Art. 4, ¶¶ 1-2.

<sup>380</sup> A. King, *National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreement*, 49 *Geo. J. Int'l. L.* 929, 931, **CL-023**.

<sup>381</sup> *Pope & Talbot, Inc. v. Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001, ¶ 293, **CL-024**.

requiring “re-application” committed a *de facto* violation of its NT obligation through its own self-dealing.

270. Specifically, Rwanda violated its obligation to Claimants by expropriating Claimants’ covered investment, under the pretense of application issues, so it could turn around and provide those same covered investments to Ngali Mining, a Rwandan company organized under its own Ministry of Defense.<sup>382</sup>
271. Rwanda holds the position that Claimants could not mine, and therefore were not entitled to retaining their covered investments, because Claimants did not submit information sufficient to “meet the requirements for the grant of mining licenses” under Rwandan law.<sup>383</sup> The process to reach this decision spanned years and was due to Rwanda slowing the process, while Claimants’ records, assets, and other property was stolen and/or destroyed.
272. Unlike Claimants, Ngali Mining, an entity owned by Rwanda, had no such issues. Ngali Mining, which was formed in November 2015, was given title to Claimants’ covered investments only six (6) months after its creation under Rwandan law.<sup>384</sup>
273. Rwanda also violated the NT clause of the BIT by awarding, on two separate occasions, *de facto* ownership status to Ben Benzinge, a Rwandan national. Benzinge convinced the RDB that he was the managing director and, for reasons that were never understood, the RDB changed the corporate registration to reflect that Benzinge was the managing

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<sup>382</sup> See Buyskes WS, ¶ 19.

<sup>383</sup> Letter from R. Marshall to F. Gatare dated 23 March 2015, p. 7, C-112.

<sup>384</sup> NGALI Mining Ltd, *About Us*, <http://www.ngalimining.rw/#about> (last accessed 28 February 2018), C-113. (“NGALI Mining Ltd is a Private Limited Company registered in November 2015 under the Rwandan law, fully owned by NGALI Holdings and the latter being a public-owned enterprise.”); Marshall WS, ¶ 71; Mruskovicova WS, ¶ 27; Buyskes WS, ¶ 19.

director. NRD's owners and investors never appointed Benzinge as the managing director and never submitted any documentation to the RDB that would have granted him that title. The RDB is supposed to update the identity of the managing director upon a submission of meeting minutes by the shareholders. No meeting minutes on this issue were ever submitted by Claimants. Instead of following its own rules and procedures, the RDB unilaterally determined that it would grant a Rwandan national without the right to be managing director, as managing director.<sup>385</sup>

274. It was not until the US Embassy became involved that the RDB reversed course and “re-instated” Mr. Marshall as the managing director.<sup>386</sup>
275. Then, in 2014, and with the help of Minister Imena, Benzinge again took control of Claimants assets and the NRD Concessions. The Minister of Justice, Regional Police Commander of the Kigali Metropolitan Police, and Rwanda Revenue Authority all did not assist Claimants despite requests.<sup>387</sup> Government officials were permitting a Rwandan national to be treated more favorably than the Claimants, as foreign investors, by permitting Benzinge to perpetrate his fraud on Claimants.
276. Based on the plain language of the BIT, Rwanda violated the NT clause when it expropriated Claimants' covered investments, improperly denied them mining contracts, allowed mistreatment at the hands of a Rwandan national, and provided the covered investments to its own government entity without necessity of any protracted application process. The evidence shows that Rwanda stringing Claimants along was only a

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<sup>385</sup> Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, **C-048**; Marshall WS, ¶¶ 19, 22; Rwamasirabo WS, ¶ 17.

<sup>386</sup> Marshall WS, ¶ 22.

<sup>387</sup> Letter from R. Marshall to D. Richard dated 2 April 2015, **C-079**; Letter from B. Johnston to Z. Mruskovicova, et al. dated August 2014, **C-073**.

precursor to the unequal treatment and self-dealing that would follow. In all, Rwanda's behavior violated Article 3 of the BIT in all material respects.

**2. Rwanda violated its Most-Favored-Nation obligation owed to Claimants**

277. Additionally, and under the MFN clause, the measures instituted by Rwanda requiring “re-application,” *i.e.*, the 2014 Laws, violated the BIT and international law. The 2014 laws, while facially applicable to all miners or potential miners, were actually applied unequally and discriminatorily. Claimants and their covered investments were treated much differently under the governing law in comparison to other foreign investors and their investments that were in like circumstances.
278. An MFN clause, such as the one in the BIT, “is fundamentally a promise between the two states party to the treaty that neither state will give to investors from any third state more favorable treatment than that given to investors from the other state party to the treaty.”<sup>388</sup>
279. While many modern arguments relative to MFN clauses turn on whether a provision or procedural rule available to one investor should also be available to another investor, the plain meaning of the MFN clause demands equal treatment between investors of a Party and non-party investors in all respects.
280. In this case, Rwanda has treated non-party investors who were in like circumstances more favorably than it treated Claimants.
281. During the “re-application” process, Claimants were repeatedly told that their investments were safe and that the process amounted to a mere formality.<sup>389</sup> This was not true.

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<sup>388</sup> T. Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 Mich. J. Int'l Law. 537, 539, CL-025.

<sup>389</sup> Marshall WS, ¶ 53.

282. Similarly, two South Africa mining companies, Eurotrade International Ltd (“ETI”) and Rutongo Mines Ltd. (“RML”), were repeatedly told that their investments were safe.<sup>390</sup> This, however, was true. Rwanda did not subject ETI or RML to the “re-application” process even though Claimants were subjected to it when they should have been accorded “no less favorable” treatment by Rwanda as they were in “like circumstances.”
283. The effect of providing more favorable treatment to a non-party investor is an instantaneous and direct violation of the BIT:

Simply because an MFN clause entails an obligation not to provide more favorable treatment to a third party than is provided to the beneficiary of the MFN clause [*i.e.*, Claimants], the moment more favorable treatment is provided, the state providing the more favorable treatment is in breach of its treaty obligations.<sup>391</sup>

284. Here, Rwanda cannot dispute that it treated two South African, non-party, investors more favorably than Claimants in violation of Article 4 of the BIT.

## VII. MEASURE OF DAMAGES<sup>392</sup>

285. Article Six of the BIT provides, in part:

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:
  - (a) for a public purpose;
  - (b) in a non-discriminatory manner;
  - (c) on payment of prompt, adequate, and effective compensation; and
  - (d) in accordance with due process of law and Article 5(1) through (3).
2. The compensation referred to in paragraph 1(c) shall:
  - (a) be paid without delay;
  - (b) be equivalent to the fair market value of the

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<sup>390</sup> Buyskes WS, ¶ 10.

<sup>391</sup> Cole, p. 568-569, CL-025.

<sup>392</sup> At its hearing on December 3, 2018, the Tribunal bifurcated quantum from the merits. Accordingly, Claimants do not seek to establish the value of their damages but rather that they are entitled to damages and the measure of damages that is appropriate.

expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

286. The BIT only sets forth the method of compensation in the event of a lawful expropriation, i.e., one that is for a public purpose, in a non-discriminatory manner, and in accordance with due process of law and with Article 5(1) through 5(3).<sup>393</sup>
287. In the absence of specific rules regarding damages payable in the event of an unlawful expropriation, the compensation scheme of the BIT should not apply. The determination of compensation in the event of a lawful expropriation “cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation.”<sup>394</sup>
288. Customary international law for the assessment of damages in the event of an unlawful expropriation is to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>395</sup>
289. As further explained by the Tribunal in the *Chorzow Factory* case:
- compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated ; in the present case, such a limitation might result in placing

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<sup>393</sup> Rwanda-US BIT, Art. 6, **CL-006**.

<sup>394</sup> *ADC Affiliate Limited, et. al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 481, **CL-017**.

<sup>395</sup> *ADC*, ¶ 484, **CL-017**; *Case Concerning the Factory at Chorzow*, Judgment, 13 September 1928, 1928 P.C.I.J. (ser. A), No. 17, p. 124, **CL-040**.

Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.<sup>396</sup>

290. The standard first set forth in the *Chorzow Factory Case* continues in force today. In *ADC v. Hungary*, the Tribunal set out numerous recent decisions upholding the principal established by the *Chorzow Factor Case* in 1928 that claimants are entitled to be put in the same position as if the expropriation never occurred.<sup>397</sup>
291. There is one notable difference between the current arbitration and the *Chorzow Factor Case* and the cases that rely on it: the Concessions did not depreciate in value following the expropriation but instead increased in value. In these circumstances, the restitution available to Claimants is the fair market value on the date of the Award.<sup>398</sup>
292. The fair market value of the Concessions on the date of the Award is the appropriate compensation for Rwanda’s unlawful expropriation and is the amount that will “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>399</sup>

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<sup>396</sup> *Chorzow*, p. 124, **CL-040**.

<sup>397</sup> See e.g., *S.D. Myers, Inc. v. Canada*, UNICTRAL, Award, 13 November 2000, ¶ 311, **CL-041**; *Metalclad*, ¶ 122, **CL-038**; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 400, **CL-042**; *Petrobart Limited v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, ¶¶ 77, 78, **CL-043**.

<sup>398</sup> *ADC*, ¶¶ 496-499, **CL-017**.

<sup>399</sup> *Chorzow*, p. 124, **CL-040**.

293. Claimants will supplement their request for damages with specific details, as appropriate, in this bifurcated proceeding.

## VIII. REQUEST FOR RELIEF

294. For the reasons stated herein, Claimants request that the Tribunal find that Rwanda has breached its duties under the BIT and find in favor of Claimants on the issue liability.

Respectfully Submitted,

[signed]

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Steven M. Cowley  
[smcowley@duanemorris.com](mailto:smcowley@duanemorris.com)  
Bryan D. Harrison  
[bharrison@duanemorris.com](mailto:bharrison@duanemorris.com)  
DUANE MORRIS LLP  
100 High Street, Suite 2400  
Boston, MA 02110  
Telephone: 857.488.4200  
Legal Representative for Claimants

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