

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

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

(CLAIMANTS)

-AND-

GOVERNMENT OF RWANDA

(RESPONDENT)

**CLAIMANTS' COUNTER-MEMORIAL ON
PRELIMINARY OBJECTIONS**

Case No. ARB/18/21

Steven M. Cowley

smcowley@duanemorris.com

Bryan D. Harrison

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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1. Claimants submit this Counter-Memorial on Preliminary Objections (“Counter-Memorial”) pursuant to the revised procedural calendar proposed by the Parties and accepted by the Tribunal, as communicated to the Parties on July 25, 2019 through the ICSID case manager.¹
2. In Procedural Order No. 2, the Tribunal granted Respondent’s requests for bifurcation to consider its *ratione temporis* objection, *ratione personae* objection as to BVG, and *ratione voluntatis* objection as to Spalena in advance of the hearing on the merits. The Tribunal further stated that it would reconsider its decision to consider the *ratione temporis* objection preliminarily based upon the facts presented in this Counter-Memorial.²
3. This Counter-Memorial will therefore only address Respondent’s arguments with respect to the *ratione temporis* objection, *ratione personae* objection as to BVG, and the *ratione voluntatis* objection as to Spalena.
4. At this stage of the proceeding, the Tribunal’s task is not to decide the merits of Respondent’s arguments, but instead to determine whether the facts pleaded by Claimants “fall within the parameters of jurisdiction as defined by the enabling treaty.”³ “[T]he Tribunal is not required to consider whether the claims under the Treaty made by [Claimant] are correct. This is a matter for the merits. The Tribunal simply has to be

¹ Claimants presume familiarity with the abbreviations used in its Memorial, submitted March 1, 2019.

² Procedural Order No. 2 on Bifurcation dated June 28, 2019, ¶ 48.

³ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 45, **CL-051**. See also US-Rwanda BIT, Art. 28(4)(c), **CL-006** (the Tribunal “shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)”).

satisfied that, if the Claimants' allegations would be proven correct, then the Tribunal has jurisdiction to consider them."⁴

5. Furthermore, at the jurisdictional phase, the Tribunal should not foreclose Claimants' ability to ensure that the Tribunal considers all facts relevant to this dispute, including those before the Cut-off Date.⁵ Rather, the Tribunal must permit Claimant to present all relevant facts during the merits phase, which Respondent may dispute.
6. Given these considerations, the Tribunal must consider the facts as pled by Claimants and assume them to be true for the purposes of establishing jurisdiction. As detailed below, Claimants have established jurisdiction under the BIT.

I. INTRODUCTION

7. This dispute arises out of Respondent's expropriation and corresponding unfair treatment of Claimants' investment in Rwanda in violation of the US-Rwanda BIT. Beginning in 2011, and culminating in 2016, Respondent misled Claimants and systematically treated them unfairly and undermined the value of their investment in Rwanda at every opportunity. As outsiders who did not quietly go along with a large-scale mineral smuggling program that bolstered Respondent's revenue from the sale of minerals falsely tagged as originating in Rwanda, the Claimants were singled out for both obstruction by Government action and problematic inaction. Apparently, Respondent's hope was that Claimants would simply abandon their investment in their mining Concessions, leaving them for Respondent to control either through a state owned corporation or through the

⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 180, **CL-052**.

⁵ *See Griffin v. Republic of Poland*, High Court of Justice Business and Property Courts of England and Wales, Claim No. CL-2017-000174, Approved Judgment, 2 March 2018, ¶ 112, **CL-053**.

Military.⁶ When it became clear that Claimants would not quietly give up and walk away, Respondent expropriated Claimants' investment, thereby forcibly removing Claimants from the country.

8. As set forth in the Memorial and below, Respondent's ultimate goal was to gain possession of NRD's Concessions, thereby depriving Claimants of their investment, in order to avoid further scrutiny into Respondent's mineral exports by American investors who did not go along with an unlawful smuggling program. It is an open secret in Rwanda that at least half of all minerals exported from Rwanda originate in the DRC.⁷ NRD's presence in the country—operating productive mines close to the DRC—posed a threat to Respondent's ability to illegally export substantial amounts of minerals from the DRC and claim them as having originated in Rwanda. Government control of the Concessions with significant mineral reserves would allow for easier shielding of the true source of many of the minerals being sold into international commerce through Rwanda.

II. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS*

A. The Tribunal Has Jurisdiction Pursuant to Article 2 of the BIT

9. The Tribunal has Jurisdiction *ratione temporis* over the claims brought by Claimants because they took place *after* the BIT entered into force. Article 2 provides that “this Treaty does not bind either Party in relation to any act or fact that took place or any situations that ceased to exist before the date of entry into force of this treaty.”⁸ The treaty entered into force on January 1, 2012.

⁶ See Mruskovicova WS, ¶ 27; Buyskes WS, ¶ 19.

⁷ Fiala WS, ¶ 9; Mruskovicova WS, ¶ 29.

⁸ Rwanda-US BIT, Art. 2(3), **CL-006**.

10. Respondent's argument is premised on its assertion that the initial term of the licenses granted to Claimants expired before January 1, 2012.⁹ Respondent's contention ignores the fact that these licenses were extended on multiple occasions, through at least April 2013.¹⁰ In fact, in direct contradiction of this assertion, in its Counter-Memorial and Memorial on Preliminary Objections, Respondent actually recognizes that Claimants had been granted extensions of their licenses beyond January 1, 2012 and were permitted to continue operating the Concessions.¹¹
11. Therefore, the alleged violations of the BIT took place after the BIT entered into force and the Tribunal has jurisdiction to hear this case pursuant to Article 2 of the BIT.¹²

B. The Tribunal Has Jurisdiction Pursuant to Article 26 of the BIT

12. The BIT imposes a three-year statute of limitations for violations of the BIT.¹³ As stated in Procedural Order No. 2, the "Cut-off Date" for violation of the BIT is May 14, 2015, three years before the date on which Claimants submitted its Request for Arbitration.¹⁴ Respondent's expropriation of Claimants' investment took place after May 14, 2015. Although the date on which Respondent effectuated an expropriation is not well defined, given the tactics employed by Respondent, it could not have occurred any earlier than May 19, 2015, which is after the Cut-off Date. Only after the expropriation took place did

⁹ Memorial on Preliminary Objections, § III.A.

¹⁰ 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.

¹¹ See Memorial on Preliminary Objections, ¶ 156; Counter-Memorial, ¶ 131, 139.

¹² For the avoidance of doubt, Claimants do not accept that the licenses expired in 2012 or 2013. Claimants presented evidence in their Memorial to show that the violation of the BIT took place after the "Cut-Off Date" and present additional evidence in support of this below.

¹³ Rwanda-US BIT, Art. 26(1), CL-006.

¹⁴ Procedural Order No. 2 on Bifurcation dated June 28, 2019, ¶ 39.

Claimants fully understand and appreciate how they had been treated unfairly and differently than similarly situated investors in Rwanda. Accordingly, all violations of the BIT accrued after the Cut-off Date.

13. The differential and unjust treatment afforded Claimants that amount to the violations of the BIT at issue in this proceeding can be seen when reviewing the full set of circumstances and events of bad acts, and inactions, it is both before and after the Cut-off Date. All of the conduct that ultimately led to the expropriation of Claimants' investment is connected and needs to be viewed in its full context – as opposed to single actions in isolation – in order to address Claimants' claims, are part and parcel with the expropriation insofar as they provide context for why Respondent ultimately decided to expropriate Claimants' investment.

1. **Respondent's "creeping" violations of the BIT involved a series of actions and inactions over time and requires that the Tribunal look to the final act for the purpose of considering the applicable time limitation to assert a claim.**

14. The concept of a "creeping expropriation" is envisioned within the BIT's definition of expropriation. The BIT states that an "expropriation" can occur either "directly or indirectly through measures equivalent to expropriation or nationalization."¹⁵ A creeping expropriation is a kind of indirect expropriation in which "the negative effects of government measures on the investor's property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property."¹⁶ Generally, a creeping expropriation takes place when a State seeks "to achieve the same result [as an outright

¹⁵ Rwanda-US BIT, Art. 6, **CL-006**.

¹⁶ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 437, **CL-030**.

taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned.”¹⁷

15. In the case of a creeping expropriation “[d]iscrete acts, analyzed in isolation rather than in the context of the overall flow of event, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omission, which in the aggregate expropriated the foreign investor’s property rights.”¹⁸ It is the last step in the creeping expropriation that ultimately has a “perceptible effect.”¹⁹ As such, “the time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.”²⁰
16. The concept of a creeping expropriation has been applied to understand the nature in which violations of the fair and equitable treatment arose. In those situations, “[a] *creeping violation of the FET standard* could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.”²¹ In this way, much like the creeping expropriation, the time at which the violation occurs is the time at which the “last action or omission occurs.”²²

¹⁷ *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 101, **CL-054** (brackets in original).

¹⁸ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 231, **CL-018**, quoting M. Reisman, et al., *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BYIL (2003), pp. 123-124, **CL-058**.

¹⁹ *Siemens*, ¶ 263, **CL-018**.

²⁰ *Id.*, ¶ 265.

²¹ *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 518, **CL-037** (emphasis in original).

²² *Siemens*, ¶ 264, **CL-018**.

17. As set forth in more detail below, the “last action or omission” of the “composite act” that constitutes a creeping violation of the BIT was Respondent’s public tender of NRD’s Concessions on March 5, 2016. This final act by Respondent is the defining act that all prior actions by Respondent were leading towards. Only after the expropriation, and with the benefit of hindsight, did NRD come to realize that Respondent had violated the BIT.
18. For years leading up to that final act, Respondent slowly impaired Claimants’ rights and ability to enjoy the full economic benefit of their Concessions, but it was not until the ultimate full-fledged expropriation of the Concessions, without any compensation being negotiated or paid in accordance with Rwanda law and practice, that Respondent’s intent to deprive Claimants of their investment in violation of the BIT was known.
19. As explained below, Respondent’s actions may have started as a means to exert pressure on Claimants to quietly cooperate in the large scale abuse of international law by falsely labeling minerals sourced outside of Rwanda as originated within the country, but those pressure tactics evolved into a systematic effort to strip the Concessions from the Claimants and remove them from the country.
20. Claimants did not and could not have known of Respondent’s decision to pursue actions in violation of the BIT until after the Cut-off Date, because it was not until Respondent ultimately expropriated Claimants’ property that Claimants understood they would be treated differently than other investors in Rwanda and that their full investment would be misappropriated. Until the expropriation took place, Claimants always had reason to believe, based upon the actions and statements of Respondent, that they would receive long term contracts and that the difficulties they experienced in dealing with the Respondent were only setbacks that were part of a process that would ultimately lead to

long term contracts that would honor the Claimants' rights in the Concessions. Upon Respondent's final expropriation of Claimants' investment, Claimants finally learned that Respondent had determined not to honor the Claimants' investments and, instead, to violate the BIT by seizing the value of Claimants' concessions for Respondent's own exploitation without paying the required compensation.

2. Respondent's attempt to parse out each of its bad acts to be addressed in isolation is improper and ignores the well accepted approach to the interpretation of the BIT.

21. Respondent's attempt to have this Tribunal review each and every wrongful and unjust act perpetrated on the Claimants individually, and isolated from all prior and subsequent wrongful and unjust acts in constructing an argument that Claimants claims are "out-of-time" is improper. Rather, the series of Respondent's inequitable acts and inactions are connected and serve a common purpose that was not satisfied until the Respondent expropriated Claimants' Concessions and drove its U.S. investors out of the country after the Cut-off Date. Although the efforts to force Claimants out of Rwanda began before the Cut-off Date, their ultimate purpose was not achieved until after the Cut-off Date.
22. To adopt Respondent's logic and methodology would eviscerate the purpose of the BIT and render the BIT all but meaningless. For years, Claimants expected that they would receive the long term contract, as promised by government officials. It was not until Respondent ultimately expropriated Claimants' investment and refused to pay – or even negotiate – compensation for Claimants' lost investment that Claimants understood that they had been treated differently than other investors in Rwanda mining operations, in violation of the BIT.
23. Respondent's contention that Claimants were required to sue years earlier is premised on the erroneous view that the BIT requires foreign investors to commence an action under

the BIT following the first bad act by a government representative negatively impacting the investment, and then again following each subsequent bad act that may occur.

However, if Claimants had brought suit under the BIT at any time prior to the actual expropriation of their investment without any compensation, any prospect Claimants had to successfully pursue their investment in Rwanda would have been eviscerated.

24. Instead, Claimants did what any reasonable investor would have done in their situation; they remained committed to their investment based on promises made to them by Respondent that they would receive the long term licenses and earnestly sought to negotiate and resolve any concern raised by the Government. Claimants were committed to and did continue to invest in Rwanda, because they believed that they would obtain the long term licenses, that they were contributing positively to the Rwandan economy, and that they would eventually enjoy the economic benefits of successfully developing the mining Concessions at issue.
25. Respondent's argument might make sense if there never was an expropriation, but just a prolonged series of delays and disruptions leaving Claimants as continued owners of their investment, but unable to pursue the development necessary to profit from their investment. In that situation, Respondent's bad acts would not have culminated in one defining event, making each action or inaction that impaired the value of Claimants' investment subject to a decision whether a claim should be pursued. That is not the factual circumstances at issue here, because Respondent did ultimately expropriate Claimants' investment without compensation. The expropriation, which occurred after the Cut-off Date, is the defining event in this case that established for Claimants that all of the negative treatment that they endured at the hands of Respondent was part of a

determination by the Respondent to seize for itself the entire value of Claimants' investments.

3. Respondent carried out a systematic campaign to drive Claimants out of Rwanda and ultimately expropriated Claimants' investment after the Cut-off Date

26. Claimants suffered a series of unjust acts and unreasonable failures to act by Respondent, because Respondent sought to force Claimants in-line with quiet acceptance of a false mineral tagging program at the heart of a large-scale mineral smuggling program. Unable to control Claimants in that way, Respondent escalated its efforts seeking to force Claimants to abandon their investment and leave Rwanda, thereby permitting Respondent to retake control of the Concessions. In this way, Respondent would be able to more completely control mining production and reporting in Rwanda, inflate local production values beyond actual Rwandan mining operations and mask the fact that a large percentage of the minerals exported from Rwanda actually originates in the DRC.²³ Claimants were not willing to participate in the illegal smuggling of minerals²⁴ and Respondent therefore wanted to remove Claimants from Rwanda.
27. In order to successfully get Claimants to abandon their investments, Respondent first had to walk back its guarantee that, if Claimants invested in the mining industry, they would be guaranteed a long term license to mine the Concessions.²⁵ Those assurances were provided by the RDB and confirmed by State officials.²⁶ These guarantees were necessary to get Claimants to invest in Rwanda in the first place, because mining is an

²³ Fiala WS, ¶¶ 9, 10; Mruskovicova WS, ¶ 29.

²⁴ Marshall Supplemental WS, ¶ 20.

²⁵ Marshall WS, ¶ 8-9, 35, 40.

²⁶ Marshall WS, ¶ 7.

extraordinarily expensive undertaking and it would have been unreasonable for any investor to undertake such an operation without the assurance that it would be able to recoup that heavy investment over the long term operation of the mine.²⁷

28. With the understanding that they would receive long term licenses following the initial four-year license period, Claimants began investing in Rwanda through their investment vehicle, NRD. NRD, in turn, received a contract and licenses to mine five concessions for an initial term of four years.²⁸ At the end of the four-year term, NRD submitted an application²⁹ for long term licenses with the expectation and understanding, pursuant to conversations with the RDB and other State officials,³⁰ that they would receive the long promised term licenses.³¹ Based on the representations of its officials and the practices of the Government of Rwanda, there was an understanding within the Rwandan mining community that once an investor obtained a short term contract and license, it would be able to obtain the long term license by simply applying at the close of the four-year period.³² Instead, NRD received a letter from Minister Kamanzi stating Respondent would not, at that time, grant the long term licenses but instead would grant a six month extension, through February 2012.³³ The stated purpose of the extension was to negotiate the terms of the long term license.³⁴ But in light of Respondent's later conduct the

²⁷ Marshall WS, ¶ 9; Buyskes WS, ¶¶ 7, 11; Marshall Supplemental WS, ¶ 21.

²⁸ See Contract for Acquiring Mining Concessions Between the Government of Rwanda and Natural Resources Development Rwanda Ltd dated 24 November 2006, C-017; Letter from M. Bikoro to B. Benzinge dated 29 January 2007, C-018; Letter from M. Bikoro to B. Benzinge dated 29 January 2007, C-019; Letter from M. Bikoro to B. Benzinge dated 29 January 2007, C-020; Letter from M. Bikoro to B. Benzinge dated 29 January 2007, C-021; Letter from M. Bikoro to B. Benzinge dated 29 January 2007, C-022.

²⁹ Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licenses to NRD, p. 97, C-035.

³⁰ Marshall WS, ¶ 7.

³¹ Marshall Supplemental WS, ¶ 21.

³² Buyskes Supplemental WS, ¶ 5.

³³ See Letter from S. Kamanzi to Managing Director of NRD dated 2 August 2011, C-062.

³⁴ See Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, C-034.

unusual short term extension while continuing to dangle the promise of a long term license can be seen as a pressure tactic to squeeze Claimants into a more compliant position with regard to the false mineral tagging practices.

29. In accordance with the stated purpose of completing a long term license, Dominique Bidega of the OGMR (the precursor to the GMD) provided NRD with a draft long term license and NRD and Respondent began to negotiate the terms of the license.³⁵ NRD had the opportunity to negotiate the licenses in the first place because of the high quality and thoroughness of the application.³⁶ Following the negotiation of the license, Mr. Bidega submitted the draft agreement to his boss, Dr. Biryabarema, who approved it and sent it to the Minister of Natural Resources.³⁷ The Minister of Natural Resources also approved it and sent it to the Cabinet of the Government of Rwanda for final approval.³⁸
30. With the extension, negotiation and submission to the Cabinet, helped to confirm to Claimants that, as Respondent previously represented, NRD would receive the long term licenses.³⁹
31. The Cabinet usually acts on all matters submitted to it within one week. However, for reasons never made clear, the Cabinet neither acted to reject or accept the draft agreement.⁴⁰ In accordance with the Cabinet's inaction, Claimants received another extension of their license, this time though May 2, 2012.⁴¹ In granting this extension, Minister Kamanzi, on behalf of Respondent, stated that, "I am certain that this is enough

³⁵ Bidega WS, ¶ 4; Marshall WS, ¶ 29; Draft Contract between Government of Rwanda and NRD, September 2011, C-114.

³⁶ Bidega WS, ¶ 3.

³⁷ Bidega WS, ¶ 3, 5.

³⁸ Bidega WS, ¶ 3,5.

³⁹ Marshall WS, ¶ 29; Marshall Supplemental WS, ¶ 20.

⁴⁰ Bidega WS, ¶ 5.

⁴¹ See Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, C-034.

time for us to conclude a good contract for this partnership. Allow me to thank you for your continued commitment to invest in the Mineral Sector in Rwanda.”⁴² These assurances bolstered Claimants’ beliefs that the long term licenses would be executed and that Respondent was satisfied with the work Claimants had done thus far in the country, and it maintained Claimants as a willing investor continuing to develop the mining Concessions.⁴³

32. Although Respondent granted extensions of the Claimants’ licenses as part of its pressure tactics to rein in and control the Claimants, Respondent simultaneously interfered with their ability to conduct mining activities. In February 2012, the same month that Minister Kamanzi granted an additional extension, the Rwandan National Police illegally seized a Mercedes Actros dump truck and a Toyota Land Cruiser, both of which were the property of NRD.⁴⁴ In doing so, Respondent significantly restricted Claimants’ ability to operate the mines, move minerals and materials, and generally oversee the Concessions. Furthermore, by involving the National Police, Respondent foreshadowed its willingness to use force and ignore the rule of law should Claimants not fall in line with Respondent’s expectation of mining industry participants.
33. In March 2012, the Executive Secretary of the Manihira Sector, in the Rutsiro Concession, inexplicably shut down NRD’s mining operations but permitted illegal miners to continue their activities on the same Concession.⁴⁵ Then, on July 25, 2012, the Executive Secretary of the Rusebeya Sector, also in the Rutsiro Concession, suspended

⁴² *Id.*

⁴³ Marshall Supplemental WS, ¶ 21.

⁴⁴ See Letter from R. Marshall to Rwandan National Police dated 8 February 2012, **C-046**.

⁴⁵ See Letter from R. Marshall to Mayor of Rutsiro District dated 3 August 2012, **C-047**.

NRD's mining activities while also permitting illegal mining by others to take place.⁴⁶ Concurrently, and lasting through September of 2012, the Rwandan Military arrested 40 NRD staff within NRD's Concessions and forced NRD to pay 50,000 RwF to secure each person's release.⁴⁷ During one such arrest, the Military stole all the minerals stored in NRD's office.⁴⁸ No reason was ever given for these arrests, but Claimants now understand that they were a bullying tactic used to scare Claimants to cooperate, or leave the country, thereby abandoning their investment in NRD and the Concessions.

34. By permitting illegal mining to take place at NRD's Concessions while barring NRD staff, Respondent permitted the local government and unlicensed miners were permitted to benefit economically from Claimants' Concessions, while Claimants were being financially squeezed. Moreover, with NRD unable to access its mines, Respondent had a free hand to inflate production values and use the mines as a staging ground for the extensive smuggling of minerals from the DRC.⁴⁹ As a result, NRD temporarily lost the economic benefit of its Concessions. Although these actions were ostensibly taken at the hands of local officials, it is clear that the federal government had a role in the shut downs because Dr. Biryabarema of the GMD expressly permitted NRD to return and continue mining.⁵⁰ This display of control by Respondent was a high pressure tactic to both entice further investment by Claimants to develop their Concessions in the hope of long term reward, while displaying that all could be lost if Claimants did not stay on the

⁴⁶ *See id.*

⁴⁷ *See* Letter from R. Marshall to S. Kamanzi dated 14 September 2012, **C-049**.

⁴⁸ *See* Letter from R. Marshall to District Police Commissioner of Ngororero District dated 3 September 2012, **C-052**.

⁴⁹ Mruskovicova WS ¶ 29.

⁵⁰ *See* Letter from B. Michael to R. Marshall dated 10 February 2013, **C-056**.

right side Rwandan officials who wanted no challenge to false tagging practices necessary to the mineral smuggling program.

35. In addition to the illegal and unfair actions taking place at the mines themselves, NRD was also barred from accessing its headquarters in Kigali for a one-week period in August 2012. Ben Benzinge, who at most has a 0.2% stake in NRD,⁵¹ was inexplicably and falsely credited by the RDB as the managing director of NRD.⁵² During Benzinge's wrongful control of NRD's offices, with the RDB's backing, he hired guards to patrol the Concessions, fired employees, stole minerals, and changed the locks on NRD's buildings and facilities.⁵³ In essence, Respondent, by and through the RDB, used Benzinge as a pawn to make clear to Claimants that they could be stripped of their entire investment on a whim.
36. The RDB never provided a coherent explanation for its decision to change the corporate registry upon the say-so of a Rwandan national.⁵⁴ Despite this, Claimants remained committed to investing in Rwanda and obtaining the long term licenses.⁵⁵
37. Minister Kamanzi then sent another letter again extending NRD's licenses through October 2012, noting that "new contracts...will be negotiated as has been communicated to all the existing concession holders." Based on this letter and consistent with the assurances made to them prior to investing in Rwanda, Claimants continued to believe that they would receive long term licenses, so long as Respondent did not see them as a

⁵¹ Full Registration for Domestic Company of NRD Rwanda, C-001; Letter from L. Kanyonga to R. Marshall dated 27 October 2014, C-005.

⁵² 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.

⁵³ Letter from R. Marshall to Chief Executive Officer of Rwanda Development Board dated 10 August 2012, C-048; Marshall WS, ¶¶ 19, 22.

⁵⁴ Marshall WS, ¶ 20.

⁵⁵ Marshall Supplemental WS, ¶ 26.

threat to the mineral smuggling program. After receipt of this letter, NRD believed that the “shut-downs” in the Rutsiro concessions were anomalies that would not be repeated following the issuance of the long term licenses.⁵⁶

38. The dual tactics taken by Respondent, to simultaneously grant extensions and restrict Claimants from mining was designed to economically squeeze the Claimants, holding out the promise of long term recoupment of their investments, on the one hand, and the threat of total loss on the other, all to force quiet compliance with unlawful mineral sales. Despite setbacks, Claimants continued to operate the Concessions and invest in NRD and the Concessions under the understanding that Respondent would “conclude a good contract in the end.”⁵⁷
39. Claimants’ belief that NRD would obtain the long term licenses was bolstered again in January 2013 when GMD requested that NRD submit the previously agreed upon draft of the long term license agreement, together with an updated version of the NRD planning and application documents.⁵⁸ Claimants complied,⁵⁹ and were encouraged by this request because it suggested that negotiations of the long term licenses would continue and that NRD would soon receive the long term licenses.⁶⁰
40. Then, on February 10, 2013, Dr. Michael explicitly permitted NRD to resume mining its Western Concessions, the ones from which NRD had been inexplicably barred beginning in July 2012.⁶¹ Dr. Michael believed that NRD’s plan to employ demobilized soldiers as security forces at the Concessions in order to curb illegal mining had potential and

⁵⁶ Marshall Supplemental WS, ¶ 26, 27.

⁵⁷ Letter from S. Kamanzi to Managing Director of NRD dated 20 February 2012, **C-034**; Marshall Supplemental WS, ¶ 27.

⁵⁸ Marshall WS, ¶ 36.

⁵⁹ Amendment of Contract Between the Government of Rwanda and NRD dated February 2013, p. 5, **C-042**.

⁶⁰ Marshall Supplemental WS, ¶ 28.

⁶¹ Letter from B. Michael to R. Marshall dated 10 February 2013, **C-056**.

expressed that NRD should proceed with implementing this plan. Dr. Michael also informed NRD that Respondent would “proceed with negotiations on your request for new contracts for the concessions.”⁶² NRD understood the “new contracts” to refer to the long term licenses that they had been promised and that they had begun negotiating the year prior. NRD believed that the temporary shutdowns in the Western Concessions were unfortunate stumbling blocks but that the negotiation process was beginning again in earnest.⁶³

41. NRD then met with the RDB on May 9, 2013. The initial purpose of this meeting was to discuss the long term licenses but they instead discussed other issues concerning NRD’s Concessions. They agreed to have a second meeting at which they would discuss the long term licenses.⁶⁴ Claimants and NRD continued to believe that they would receive the long term licenses. However, the promised meeting never took place.⁶⁵
42. NRD then received a letter on October 16, 2013 from Minister Imena, who had recently been appointed to the newly created position of Minister of State for Mining.⁶⁶ The letter requested a meeting to discuss a number of topics, including the long term licenses.⁶⁷ The requested meeting took place on October 30, 2013 and Minister Imena assured NRD that the negotiations of the long term licenses would be picking back up shortly.⁶⁸ NRD and Claimants were encouraged by this meeting and the continued indications that

⁶² *Id.*

⁶³ Marshall Supplemental WS, ¶ 29.

⁶⁴ Marshall WS, ¶ 37.

⁶⁵ *Id.*

⁶⁶ Letter from E. Imena to R. Marshall dated 16 October 2013, C-060.

⁶⁷ *Id.*

⁶⁸ Marshall WS, ¶ 38.

Respondent intended to honor its representation to Claimants that they would receive the long term licenses.⁶⁹

43. Although more than three years had passed since NRD first applied for the long term licenses, Claimants knew from the outset that the process would be slow and involve a large amount of negotiation. Other investors in the mining industry, like Tinco, negotiated for nearly three years before receiving their long term licenses.⁷⁰ Given this, NRD, while frustrated by the delays, remained confident that the receipt of the long term licenses would be forthcoming.
44. NRD received another letter from Minister Imena on April 2, 2014, again inviting NRD to negotiate mining licenses.⁷¹
45. Continuing the irrational governmental behavior designed to keep Claimants on edge concerning their investments, Minister Imena then unilaterally, and in direct contradiction of RDB's records and NRD's internal documents, declared that Mr. Benzinge owned 100% of the shares of NRD despite the fact that the RDB's records show that Mr. Benzinge is only a 0.2% shareholder.⁷² In early June, Mr. Benzinge, armed with Minister Imena's declaration and with the assistance of the Rwandan Military and local police, took possession of NRD's corporate office in Kigali, as he had done once before in 2012, and sealed it.⁷³
46. Mr. Benzinge then took possession of NRD's Concessions, forcing the NRD staff out. NRD and Claimants complained to Minister Imena. Such complaints fell on deaf ears,

⁶⁹ Marshall Supplemental WS, ¶ 29.

⁷⁰ Marshall WS, ¶ 40; Buyskes WS, ¶ 11.

⁷¹ Letter from E. Imena to R. Marshall dated 2 April 2014, **C-063**.

⁷² Full Registration for Domestic Company of NRD Rwanda, **C-001**; Letter from L. Kanyonga to R. Marshall dated 27 October 2014, **C-005**.

⁷³ Marshall WS, ¶ 43.

because it was Minister Imena that had allowed Mr. Benzinge to take control of NRD's offices and concession in the first instance. Mr. Benzinge, during his government-sponsored control of the Concessions, also employed a court bailiff to auction off much of NRD's property.⁷⁴

47. Claimants refused to be bullied into leaving the country and successfully convinced Respondent to return the Concessions to their control on August 19, 2014.⁷⁵ Respondent's reversal of Mr. Imena's false declaration that Mr. Benzinge controlled NRD, continued the Respondent's see-saw tactics, indicating a willingness to honor its commitments and respect Claimants' investments in NRD and the Concessions, while not permitting Claimants to be settled in their position and consistently reminding Claimants they could lose it all at the whim of the Respondent. Because Claimants regained access and control of their Concessions, they expected and anticipated that the worst was behind them and that Respondent would continue with negotiations of the promised long term licenses. Claimants needed to look past Respondent's prior transgressions because they expected to receive the long term licenses and remained very interested in recouping their substantial investment in Rwanda. Refusing to press forward in developing their mining operations and negotiating license agreements with Respondent risked voluntarily abandoning their investments with no recourse against a government ostensibly willing to honor its commitments.

⁷⁴ Letter from R. Marshall to B. Johnston dated 14 July 2014, p. 1-2, 11, C-071.

⁷⁵ Marshall WS, ¶ 51. However, NRD still was unable to access its headquarters in Kigali and would remain locked out indefinitely. Claimants were permitted back to the NRD offices on September 22, 2015 only to retrieve files and documents. However, upon entry, they learned that the offices had been ransacked and that most of the documents and computers had been stolen. Marshall WS, ¶ 52. Therefore, NRD never truly "regained" access to the offices.

48. With Claimants unwilling to walk away from their investments, Respondent's divergent tactics continued. While Respondent continued to hold out that long term licenses were inevitable, Respondent simultaneously forced NRD to "re-apply" for its Concessions and barred NRD from receiving mineral tags.⁷⁶ Respondent's tactics were designed to force Claimants to jump through unnecessary hoops uniquely applied to Claimants and not other mining concession owners, while inflicting economic pressure, all in an effort to "persuade" Claimants to voluntarily abandon their investments or fall in line with the false tagging program.
49. Minister Imena sent a letter on August 18, 2014 asking that NRD "re-apply" for its licenses within 30 days, purportedly pursuant to a new 2014 mining law.⁷⁷ This request occurred even before NRD regained access to its Concessions following Mr. Benzinge's control.⁷⁸ However, although NRD had regained control of the Concessions, NRD did not also regain access to their main office in Kigali, where much of the information sought by Respondent was kept.⁷⁹ Respondent was aware that NRD could not access its headquarters, thereby setting NRD up for failure, knowing that NRD's ability to comply with the request to "re-apply" would be substantially impaired.
50. While Claimants and NRD did not believe that they needed to "re-apply" for licenses because they already had applied for the long term licenses, were grandfathered in from any sort of application process,⁸⁰ and that such licenses were guaranteed, they made the

⁷⁶ See Memorial, § III for background on the mineral tagging system through ITRI/iTSCi in Rwanda.

⁷⁷ *Rwanda Law No. 13/2014 on Mining and Quarry Operations*, 20 May 2014, Official Gazette No. 26 of 30 June 2014, Art. 7, **CL-002**; Letter from E. Imena to NRD dated 18 August 2014, **C-064**. The legality of this request is beyond the scope of this Counter-Memorial. Nevertheless, Claimants maintain, as set forth in their Memorial, that this request violated Rwandan law.

⁷⁸ Marshall WS, ¶ 51.

⁷⁹ Marshall WS, ¶ 52.

⁸⁰ Rwamasirabo WS, ¶¶ 4, 8; Buyskes WS, ¶ 9.

reasonable business decision that it was best to go along with the request as the best way to avoid Minister Imena perceiving a personal challenge and that it would be the fastest and easiest way to obtain their long term licenses. This belief was strengthened based upon a conversation with Minister Vincent Biruta, the newly appointed Minister of Natural Resources, who assured NRD on September 16, 2014 that “as long as I am Minister, you will not lose your Concessions.”⁸¹ Accordingly, NRD provided the information Minister Imena sought in the “re-application” request on September 18, 2014.⁸² With Minister Biruta’s assurances, Claimants and NRD expected the “re-application” process was a mere formality and that they were very close to obtaining the long term licenses.⁸³

51. Notably, Claimants were the only mine owners in Rwanda operating prior to the change in the mining law in 2014 that Respondent required to go through a “re-application” process. The “re-application” process was likely a ruse to drive Claimants from the country because Claimants Concessions totaled approximately 30,000 hectares, the largest in the country.⁸⁴ In this way, Respondent could control substantially more land from which to operate its smuggling operations. Furthermore, NRD’s Concessions were close to the DRC, making them a valuable staging ground for smuggling.⁸⁵

⁸¹ Marshall WS, ¶ 53.

⁸² Letter from R. Marshall to E. Imena dated 18 August 2014, **C-084** (the letter incorrectly states that it was sent on August 18, 2014. It was actually sent on September 18, 2014, as suggested by the date the letter was received by the RNRA and context from the letter); NRD Rwanda, *Rutsiro-Sebeya, Giciye, Mara and Nemba Mining Concessions Feasibility Study Update 2010-2014*, **C-085**.

⁸³ Marshall WS, ¶ 53.

⁸⁴ Buyskes Supplemental WS, ¶ 10.

⁸⁵ Mruskovicova WS ¶ 29

52. For example, Tinco Investment Limited, which owned Rutongo Mines Limited and Eurotrade International s.a.r.l., was granted long term licenses on September 3, 2014.⁸⁶ Tinco, like Claimants, had an operating mine prior to passage of the new mining law and did not have its long term licenses until after the new law went into effect, but Tinco was not required to go through a re-application process.⁸⁷ Respondent's inconsistent interpretation and selective enforcement of the new mining law kept Claimants dangling in an insecure position, but still with the expectation of a long term license.
53. Notably, Tinco only applied for its long term licenses after the expiration its four-year exploration contracts and Respondent still did not require that it "re-apply."⁸⁸ Tinco understood that if it, like any other four-year contract holder, wanted to pursue a long term license at the expiration of the four-year contract, all it had to do was apply and the long term license was allowed.⁸⁹
54. During the nearly three years between when Tinco applied for the long term licenses and received the licenses, they had multiple meetings with Respondent both in Kigali and at the mines.⁹⁰ Every three or four months, Tinco would meet with the RDB or Minister Evode, and was repeatedly told that the licenses would issue and to be patient.⁹¹ Observing the lengthy time that it took for Tinco to ultimately obtain its long term licenses and consistent assurances it received, Claimants reasonably anticipated that the

⁸⁶ Agreement for Large Scale Mining License dated 3 September 2014, **C-025**; Letter from E. Imena to Managing Director of RML dated 10 December 2014, **C-115**; Letter from E. Imena to Managing Director of Eurotrade International s.a.r.l. dated 10 December 2014, **C-116**; Letter from M. Kahanovitz to Rwanda Development Board dated 29 October 2014; **C-117**; Letter from M. Kahanovitz to S. Kamanzi dated 7 June 2011, **C-118**.

⁸⁷ Buyskes Supplemental WS ¶ 11.

⁸⁸ Buyskes WS, ¶ 10; Buyskes Supplemental WS ¶ 6.

⁸⁹ Buyskes Supplemental WS ¶ 5.

⁹⁰ Buyskes Supplemental WS ¶ 7.

⁹¹ Buyskes Supplemental WS ¶ 8.

similar assurances they received over the lengthy process waiting for long term licenses would have similar results.

55. Around the same time that Minister Imena requested that NRD “re-apply,” Minister Imena also prevented NRD from obtaining mineral tags.⁹² Without tags, NRD could not sell its minerals. If it could not sell minerals, it had no means to generate revenue. Minister Imena manipulated the mineral tagging process—the same process at the center of the mineral smuggling program—in an effort to pressure Claimants and push them to quietly go along with the scheme, or give up.
56. Minister Imena falsely claimed that he ordered that no tags would be provided to NRD because he questioned the true ownership of NRD,⁹³ despite the fact that Claimants already established the falsity of Mr. Benzinge’s claim of ownership and regained operational control of the Concessions.⁹⁴
57. Alternatively, Minister Imena purported to justify his blocking tags for NRD’s minerals on the ground that Claimants did not have a long term license.⁹⁵ This rationale was even more preposterous, as it defies the lengthy history of NRD receiving the required tags when obviously a long term license had yet been issued. Furthermore, all other mining companies negotiating for long term licenses continued to receive tags at all times prior to receiving those licenses.⁹⁶ Minister Imena’s inconsistent “interpretations” and enforcement of the mineral tagging procedures was applied against Claimants solely to

⁹² Marshall WS, ¶ 80; Mbaya WS, ¶ 11.

⁹³ Mbaya WS, ¶ 17.

⁹⁴ Letter from Z. Mruskovicova to E. Imena dated 27 October 2014, C-105.

⁹⁵ 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.

⁹⁶ Meeting Minutes of Rwanda Development Board, 23 March 2015, C-101; Buyskes WS, ¶¶ 12, 13.

ramp up the pressure Respondent sought to apply in order to obtain their release in the face of false tagging practices or abandonment of their Concessions.

58. Nevertheless, Claimants remained committed to obtaining their long term licenses in order to recoup their substantial investments in the Concessions, and Minister Biruta reassured them that NRD would not lose their licenses.
59. Contrary to Claimants' expectations, Minister Imena notified NRD that their "re-application" had been rejected.⁹⁷ Claimants timely appealed this decision on behalf of NRD⁹⁸ and was permitted to submit additional documents, which it did on November 24, 2014.⁹⁹ Claimants then supplemented their "re-application" a third time on January 16, 2015 at Minister Imena's request.¹⁰⁰ The following month, Minister Biruta confirmed that Respondent had received the submissions and was evaluating them.¹⁰¹
60. Claimants expected that there would be further negotiations of a long term license based upon Respondent's prior communications and established practices with Concession owners. But, Respondent would not engage in further negotiations and Respondent notified Claimants on May 19, 2015 that it had rejected NRD's "re-application."¹⁰²
61. Claimants did not expect this decision was final, based on Respondent's lengthy history of increasing its pressure tactics on Claimants, the reversing position and continuing discussions of a long term license.

⁹⁷ Letter from E. Imena to NRD dated 28 October 2014, **C-119**.

⁹⁸ Letter from R. Marshall to E. Imena dated 1 November 2014, **C-086**.

⁹⁹ Letter from E. Imena to R. Marshall dated 12 November 2014, **C-087**; Letter from R. Marshall to E. Imena dated 25 November 2014, **C-088**.

¹⁰⁰ Letter from E. Imena to R. Marshall dated 17 December 2014, **C-095**; Letter from R. Marshall to E. Imena dated 16 January 2015, **C-096**.

¹⁰¹ Email from V. Biruta to R. Marshall dated 1 February 2015, **C-127**; Marshall WS, ¶ 56.

¹⁰² Letter from E. Imena to R. Marshall dated 19 May 2015, **C-038**.

62. Consistent with Claimants' expectation that Respondent's position was not final, Minister Imena represented to third parties in June 2015 that NRD continued to own and operate mines and that NRD would be worth reaching out to for discussions about mining in Rwanda.¹⁰³
63. Importantly, Respondent did not follow up on Minister Imena's May 19, 2015 letter by pursuing a handover process that applies to terminations of Concessions. Under Rwandan law, Respondent was required to set up a detailed schedule of events to effectuate a handover of the Concessions by the Claimants, and Respondent was required to hire a valuation expert to determine a fair compensation price to be paid to the owners, taking into account the value of, among other things: (1) all assets remaining with the concession(s); (2) potential for future profitability; and (3) infrastructure built during the period of operation, including roads, water systems, dams, pumping systems, rail investment and other investments. Standard handover procedures also would have seen Respondent had set up meetings between Claimants and various Ministries in order to settle any outstanding debts, like tax obligations, and ensure that the Concessions were protected from theft and illegal mining.¹⁰⁴ At the end of the process, there would be a transfer of keys, or similar items, from the investor to the Government and the investor and Government would sign a Handover Protocol, formalizing and finalizing the handover.¹⁰⁵

¹⁰³ Email from R. van Wachem to R. Marshall dated 16 June 2015, C-120.

¹⁰⁴ Rwamasirabo Supplemental WS, ¶ 5-8.

¹⁰⁵ Rwamasirabo Supplemental WS, ¶ 10.

64. Respondent pursued none of these procedures. Not one meeting took place despite Claimants' repeated attempts to talk with anyone in the Government concerning Minister Imena's letter.¹⁰⁶
65. This was strange and NRD expected there to be a formal handover like there was for Gatumba. Gatumba voluntarily withdrew from Rwanda in 2014 and had a formal handover of its concessions. In advance of Gatumba's handover, Gatumba and Respondent met regularly to settle all outstanding debts and liabilities and ensure a smooth transition of possession. Gatumba provided a list of assets to the Government and the Government visited the Concessions to take inventory. Following a valuation, Gatumba settled all outstanding issues regarding compensation for their assets and investment. The GMD also held a public auction for the assets that Gatumba turned over during the handover process. At the end of the process, there was a formal handover during which Gatumba provided the Government with keys to their offices and they signed a Handover Protocol, formalizing and finalizing the handover.¹⁰⁷
66. Instead, Claimants remained in possession of the NRD Concessions for nearly a year following Minister Imena's letter and NRD staff continued to operate the Concessions in order to protect the Concessions from illegal mining and theft, and preserve the remaining value of Claimants' investment.¹⁰⁸
67. The letter appeared to be just another tactic designed to convince BVG and Spalena to abandon their investment in Rwanda.¹⁰⁹

¹⁰⁶ Mruskovicova Supplemental WS, ¶ 4; Marshall Supplemental WS, ¶ 31.

¹⁰⁷ Mruskovicova Supplemental WS, ¶ 7; Marshall Supplemental WS, ¶ 33.

¹⁰⁸ Mruskovicova Supplemental WS, ¶ 11.

¹⁰⁹ Marshall Supplemental WS, ¶ 35.

68. Based on negotiations with Respondent, as of August 12, 2015 Claimants expected that Respondent would either follow through on issuing long term licenses for NRD's operating of the Concessions, or would pay compensation for the return of the Concessions.¹¹⁰ If not Claimants expected Rwanda would proceed with an arbitration under the BIT to establish compensation.
69. Through February 2016, Claimants continued to expect that they would remain in control of the Concessions because NRD's staff continued to operate the Concessions and Respondent had still taken no action to effect an actual handover.¹¹¹
70. It was not until March 2016, when Respondent publically tendered NRD's Concessions, that Claimants knew and understood that Respondent expropriated their investment and intended to keep the full value for itself without paying Claimants any compensation for their loss.¹¹²

4. The underlying reason for the expropriation was Respondent's desire to better control the smuggling of minerals from the DRC.

71. As set forth in Claimants' Memorial, a significant percentage of the minerals exported from Rwanda does not originate in Rwanda, but instead is mined in and covertly imported from the DRC.¹¹³ The smuggling trade is controlled and run by a number of powerful Rwandan Oligarchs with close ties to the Government. If the Oligarchs want a private company's Concession, they work through their contacts in the Government to effect that taking.¹¹⁴

¹¹⁰ Email from R. Marshall to L. Johnson dated 12 August 2015, C-121.

¹¹¹ Barthelemy WS ¶ 18; Marshall WS, ¶ 71.

¹¹² 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.

¹¹³ Memorial, § III.B.

¹¹⁴ Marshall Supplemental WS, ¶ 17.

72. Usually, the Oligarchs will buy the minerals from miners in the DRC. Once purchased, the Oligarchs are able to apply Rwandan tags to the minerals either because they have a concession that receives tags, or they are able to purchase tags on the black market. Most Rwandan mining companies on paper are, in reality, just a handful of artisanal miners with very limited production capabilities, that create companies in order to receive tags. In this way, they are able to participate in and profit from the illegal smuggling by assisting the Oligarchs in tagging the illegally purchased minerals as Rwandan in origin.¹¹⁵
73. On a number of occasions NRD was approached by a Rwandan Oligarch to assist in these transactions. NRD always refused.¹¹⁶
74. Because Claimants refused to participate in the smuggling scheme, the Oligarch that approached Claimants put pressure on Respondent to force Claimants to cooperate or abandon their Concessions.¹¹⁷ In this way, Respondent saw fit to make sure that a company with American investors that was not willing to assist in the illegal smuggling of minerals from the DRC and the false tagging of their country of origin – a clear violation of U.S. import laws - would not stand in the way of a very profitable operation. The Government of Rwanda receives tax revenues on exports that would not take place without the smuggling of minerals from the DRC, so it was a very substantial incentive to cooperate in efforts to protect those activities from exposure.¹¹⁸

¹¹⁵ Marshall Supplemental WS, ¶ 18.

¹¹⁶ Marshall Supplemental WS, ¶ 19.

¹¹⁷ Marshall Supplemental WS, ¶ 20.

¹¹⁸ Fiala WS, ¶ 10.

75. The size of the mineral smuggling campaign becomes clear when one focuses on the fact that, despite claims to the contrary, Rwanda is not very mineral rich and cannot produce the quantity of minerals to match its claimed exports. Based on actual production values from the 10 largest mining operations in Rwanda, Rwanda could produce only \$20 million worth of minerals. Based on public claims that Rwanda *exports* more than \$350 million worth of minerals, it must fill the gap with minerals smuggled from the DRC and tagged in Rwanda.

5. The Tribunal cannot decide, as a matter of fact, that Claimants' Demand for Arbitration is "out-of-time" without entering into and prejudging the merits.

76. As set forth in the Observations on Request for Bifurcation, Respondent's request to bifurcate the *ratione temporis* objection necessarily requires the Tribunal to prejudge and enter into the Merits.

77. The Parties fundamentally disagree on when, or if, an expropriation took place. However, the Parties can agree that the relevant standard to determine timeliness is when the "claimant first acquired, or *should have first acquired*, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant...has incurred loss or damage."¹¹⁹ Under this standard, Claimants' knowledge is paramount. Claimants have alleged that they did not know that Respondent breached the BIT until the March 2016 tender. At this stage, the Tribunal has to accept this fact as true.¹²⁰ Likewise, the Tribunal has to accept as true Claimants' allegation that, until the expropriation took place, they were not aware of the other breaches of the BIT.

¹¹⁹ US-Rwanda BIT, Art. 26(1), **CL-006**.

¹²⁰ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 180, **CL-052** ("The Tribunal simply has to be satisfied that, if the Claimants' allegations would be proven correct, then the Tribunal has jurisdiction to consider them").

78. Respondent's arguments that the expropriation and other violations of the BIT took place prior to the Cut-off Date question Claimants' knowledge. To entertain Respondent's arguments at this stage would necessarily require the Tribunal to consider what Claimants' reasonably believed to be true, and the facts to support it, as well as what Respondent alleges was reasonable for Claimants' to believe, and the facts to support their position. Ultimately, the Parties would be arguing whether and when an expropriation took place, which is a question that should be left for the full hearing on the merits.
79. For example, Respondent cites to a letter that NRD sent Respondent before the Cut-off Date in which NRD invokes the language of the BIT.¹²¹ However, Claimants state that they invoked the language of the BIT in an effort to further negotiations with Respondent over the long term licenses.¹²² Given that Tinco ultimately had to write a letter to the a high-ranking government official in order to obtain its long term license, it was entirely reasonable for NRD to take a similar approach with respect to its negotiations.¹²³ The intent behind sending these letters is a question that directly impacts the merits of this case and cannot be used to determine jurisdiction.
80. Similarly, Claimants' decision to continue attempts to negotiate with Respondent following receipt of Minister Imena's May 19, 2015 letter¹²⁴, given Respondent's failure to proceed with any of the handover procedures in hope of re-engaging in discussions of a long term license or payment of compensation for return of the Concessions, was

¹²¹ See e.g., Memorial on Preliminary Objections, ¶40.

¹²² Memorial, ¶94.

¹²³ See Buyskes Supp. WS, ¶7.

¹²⁴ Mruskovicova Supplemental WS, ¶4.

entirely reasonable. Had Respondent gone forward with negotiation of compensation, as suggested in August 2015, Claimants may have made the reasonable business decision to accept payment of a fair value and end any further dispute with Respondent.

81. In fact, Respondent's decision not to offer fair compensation for return of the Concessions and instead to engage in an outright expropriation of the entire value of the Claimants' investments only occurred sometime after August 2015, when it suggested the opposite intention. Claimants reasonably chose to pursue voluntary payment of fair compensation before precipitously launching an action under the BIT, until they determined that there was no such option – in March 2016.
82. These fundamental disagreements of fact are only a few of many between the Parties that make an analysis of the *ratione temporis* objection improper at this time. Others include whether smuggling from the DRC influenced Respondent's decision to expropriate Claimants' investment, thereby expropriating for a non-public purpose, whether NRD was denied tags to perpetuate illegal mining and force Claimants to voluntarily abandon their Concessions, whether Claimants were forced to "re-apply" following the enactment of the 2014 law in an effort to keep the Claimants dangling while processing them to cooperate with the false tagging scheme, and many more.
83. Furthermore, where, as here, Claimants and Respondent disagree as to whether Respondent's individual actions should be considered cumulatively or separately, an analysis of the facts would require a review of the merits.¹²⁵

¹²⁵ *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. Arb/16/16, Procedural Order No. 2, Decision on Respondent's Request for Bifurcation, 14 December 2017, ¶ 95, **RL-134** (finding that a consideration of the *ratione temporis* objection would "inevitably require a consideration of the facts and context underlying the specific measures in question to decide whether the four measures should be considered cumulatively as argued by the Claimant or each separately as contended by the Respondent, which will then be revisited in a merits phase").

84. Based upon the facts pled by Claimants and the clear disagreement between the Parties on whether and when an expropriation took place, which subsequently led to other violations of the BIT, the Tribunal should reconsider its decision to bifurcate the *ratione temporis* objection from the merits and find that any ruling on this objection would necessarily prejudice and enter into the merits.

6. All of Claimants' claims under the BIT accrued at the time Respondent expropriated their investment.

85. In the alternative, the Tribunal should find that all of Respondent's violations of the BIT accrued after the Cut-off Date, thereby granting the Tribunal over Claimants' allegations.

86. Respondent formally expropriated Claimants' investment when it publically tendered the Concessions in March 2016 without offering any compensation to the Claimants for the taking of their investments in the Concessions. At the earliest, Respondent expropriated the investment on May 19, 2015, the date in which Respondent formally announced that it rejected NRD's "re-application." Using either date, the expropriation took place after the Cut-off date making the claim for expropriation timely. This final act, however, is not the only act that can be or should be considered by the Tribunal in determining whether an expropriation took place.

87. As noted above, Claimants suffered a creeping expropriation based on Respondent's extensive history of mistreatment of their investment. All of these prior acts should be considered in the aggregate for the purposes of determining whether there was an expropriation.¹²⁶ Furthermore, even if one such event in the chain of events could be

¹²⁶ *Griffin*, ¶ 124, CL-053.

considered, by itself, to be an expropriation, that does not preclude a finding of a creeping expropriation that culminates on a later date.¹²⁷ “[T]he time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.”¹²⁸ This is especially true given Respondent’s on-again, off-again posture concerning assurances of a long-term license and negotiations of potential compensation for the return of the Concessions.

88. At this stage of the proceeding, it would be inappropriate for the Tribunal to make any determination as to whether any intermediate event was an independent act of expropriation. To do so would necessarily involve an analysis of the merits.¹²⁹

Accordingly, the Tribunal must accept as true Claimants’ pleaded facts that they did not have reason to know, until May 19, 2015 at the earliest, that there had been an expropriation or deny the request to bifurcate this issue, as it is a question on the merits.

89. Therefore, the claim for expropriation is not “out-of-time.”

90. It was not until Respondent expropriated Claimants’ investment, in violation of Article 6 of the BIT, that Claimants knew or should have known that Respondent also violated Articles 3-5 of the BIT and did not treat Claimants’ investments fairly or transparently, did not provide full protection and security, and did not treat Claimants in accordance with the National Treatment and Most-Favored-Nation obligations.¹³⁰

91. At all times, Claimants, based on continued representations from Respondent as well as the treatment of similarly situated investors, expected to receive the long term licenses. As such, it was not until Respondent effectuated an expropriation, on or after May 19, 2015, that Claimants realized that all of the bad acts suffered at the hands of Respondent

¹²⁷ *Griffin*, ¶ 125, CL-053.

¹²⁸ *Siemens*, ¶ 265, CL-018.

¹²⁹ *Griffin*, ¶ 126, CL-053.

¹³⁰ *See El Paso Energy*, ¶ 518, CL-037.

were not merely steps towards getting the long term license but were, in fact, designed to harm and damage Claimants through damage to their investment.

92. If, despite its delays and improper pressure tactics, Respondent properly awarded Claimants the long-term licenses, they would not have been treated any differently than other investors. Alternatively, had Respondent followed through on its suggestion that fair compensation would be paid for the return of the Concessions, there would not have been an expropriation of Claimants' investment and the discriminatory treatment may not have resulted in any compensable loss. However, the uncompensated expropriation in March 2016 established that Claimants that were treated differently and suffered harm as a result. Accordingly, this claim accrued along with the expropriation.

III. THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* WITH RESPECT TO BVG

93. The Tribunal has jurisdiction *ratione personae* over BVG's claims under Article 24 of the BIT. In the event a particular investment dispute cannot be settled, Article 24 provides that a "claimant" may submit the dispute to ICSID asserting another party's breach of its obligations under the BIT.¹³¹ BVG has standing as a "claimant" under Article 1 of the BIT because it is "an investor of a Party that is a party to an investment dispute with the other party."¹³² The BIT defines "investor" as a "Party . . . or a national or an enterprise of a party, that . . . has made an *investment* in the territory of the other Party."¹³³ Accordingly, BVG must demonstrate only that it made a covered investment

¹³¹ Rwanda-US BIT, Art. 24(1)(a), **CL-006**.

¹³² Rwanda-US BIT, Art. 1, **CL-006**.

¹³³ Rwanda-US BIT, Art. 1, **CL-006** (emphasis added).

under the BIT in order to be considered an investor with the corresponding right to bring a claim before the Tribunal.¹³⁴

94. Under the BIT, a “covered investment” is, “with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.” The treaty broadly defines investment as “every asset that an investor owns or controls, *directly or indirectly*, that has the characteristics of an investment.”¹³⁵ Characteristics of an investment include “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”¹³⁶ Forms of investment recognized under the BIT include “shares, stock and other forms of equity participation in an enterprise.”¹³⁷ The term investment also includes “bonds, debentures, other debt instruments, and loans.”¹³⁸ “Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment.”¹³⁹

95. As set forth below, BVG has standing under the BIT as an investor based upon its direct investment in NRD, both prior to and in connection with the acquisition of NRD’s shares by Spalena. BVG also exercises ownership and control over NRD indirectly through its ownership interest in Spalena, an intermediary entity which owns NRD’s shares directly. The express terms of the BIT provide for indirect ownership of investments, and tribunals regularly exercise jurisdiction over claimants similarly situated. Further, BVG exercises

¹³⁴ Rwanda does not dispute that BVG is a national or enterprise of the United States in its objection to jurisdiction *ratione personae* and therefore does not address this topic. Memorial on Preliminary Objections, § IV. Nevertheless, BVG is a United States national and therefore has standing to bring a claim under the BIT. (Arts. of Assoc., 16 March 2007, C-011).

¹³⁵ Rwanda-US BIT, Art. 1, **CL-006** (emphasis added).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

actual managerial control over NRD, in order to protect and manage its investments, by and through the direct appointment of the NRD management team. Moreover, BVG made an additional covered investment when it loaned NRD the funds to purchase mining equipment, where the loan was part of Claimants' overall investment in Rwandan mining operations.

A. Relevant Factual Background

96. BVG's investment in Rwandan mining began when it was awarded a contract to carry out mining operations in the Bisesero Concession on or about March 23, 2007.¹⁴⁰ BVG's investment in Bisesero included the right to conduct research and carry out mining operations.¹⁴¹
97. In order to assist in the day-to-day operation of the Bisesero Concession, BVG entered into a Cooperation Agreement with NRD on November 1, 2010.¹⁴² At the time that BVG and NRD entered into the Cooperation Agreement, Starck owned NRD and NRD held, in its own name, rights to several other concessions in Rwanda.¹⁴³ The Cooperation Agreement provided that NRD would manage the operations of the Bisesero Concession for BVG.¹⁴⁴ The Cooperation Agreement further stated that BVG would loan NRD

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¹⁴⁰ Marshall WS, ¶ 13; *see* Contract for Acquiring Mining Concessions Between the Government of Rwanda and Bay View Group dated 23 March 2007, C-126.

¹⁴¹ *See* Contract for Acquiring Mining Concessions Between the Government of Rwanda and Bay View Group dated 23 March 2007, C-126.

¹⁴² Cooperation Agreement Between NRD and BVG dated 1 November 2010, C-122.

¹⁴³ *Id.* NRD was sold to Spalena on December 23, 2010. (Memorial, ¶ 4). This sale does not impact the cooperation agreement.

¹⁴⁴ Cooperation Agreement, ¶¶ 2-4, C-122.

¹⁴⁵ *Id.*, ¶ 2.

[REDACTED]

[REDACTED].¹⁴⁶

98. On December 23, 2010, NRD's then-parent company, Starck, sold NRD to Spalena.¹⁴⁷

[REDACTED]

[REDACTED].¹⁴⁸ The structure of the purchase was acceptable to BVG because BVG's investors and Spalena's investors are one and the same.¹⁴⁹

99. One of the motivating factors in Starck's sale of NRD was that Starck wanted to [REDACTED]

[REDACTED].¹⁵⁰ [REDACTED]

[REDACTED]

[REDACTED].¹⁵¹

As a result, BVG was able to significantly reduce the purchase price of NRD for Spalena, which purchased Starck's shares in NRD for [REDACTED]

[REDACTED]

[REDACTED]

100. By structuring the deal this way, the investors in BVG protected their investment in Bisesero without having to pursue a claim against Starck. Because the investors in BVG and Spalena are the same, the investors were comfortable with structure of this deal and understood that the sale of NRD to Spalena protected their investment in BVG.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company, LLC, 23 December 2010, p. 6, **C-068**.

¹⁴⁸ Marshall Supplemental WS, ¶ 3-7.

¹⁴⁹ Marshall Supplemental WS, ¶ 3-7.

¹⁵⁰ Marshall Supplemental WS, ¶ 3-7.

¹⁵¹ Marshall Supplemental WS, ¶ 3-7.

¹⁵² Marshall Supplemental WS, ¶ 3-7.

101. In November 2011, Respondent expropriated the Bisesero Concession from BVG.¹⁵³ So as not to lose the value of the assets that BVG invested to develop the Bisesero Concession, BVG sold all of its assets, totaling USD [REDACTED], to Spalena in exchange for an ownership stake in Spalena.¹⁵⁴ Pursuant to the Amended Articles of Incorporation and Memorandum of Operating Agreement for Spalena, BVG obtained an interest in Spalena “based on the amount of cash, property or other benefit that [BVG] contributed to” Spalena.¹⁵⁵ Prior to this sale, BVG was not an owner in Spalena. Through this transaction, BVG became a member of Spalena and an indirect investor in NRD.
102. Mr. Marshall, as the sole director of BVG, worked as NRD’s managing director on the ground in Rwanda, overseeing day-to-day operations in order to protect BVG’s investment in NRD held indirectly through Spalena. Tasked with managing NRD on behalf of BVG in order to protect BVG’s investment and ensure a return, Mr. Marshall did not take a salary from NRD. He relied on the value of his investment in BVG and Spalena as the basis for the compensation he would receive in managing NRD.¹⁵⁶

B. The Tribunal Has Jurisdiction Over BVG’s Claims On the Basis of BVG’s Indirect Ownership of NRD

103. As summarized above, BVG became an indirect owner in NRD through the March 27, 2012 sale of assets to Spalena. As a result, Respondent’s argument that BVG neither

¹⁵³ Letter from S. Kamanzi to R. Marshall dated 22 November 2011, C-126. Claimants make no claim for the taking of the Bisesero Concession in this arbitration. The information, however, is relevant to understand the relationship between the Claimants.

¹⁵⁴ Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012, C-123; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012, C-124. A complete accounting of all assets purchased by BVG and on behalf of BVG was kept in Claimants’ headquarters in Kigali. Those headquarters were looted by Respondent and the additional documentation is therefore currently in the possession of Respondent. Claimants expect that Respondent will turn over all such documents taken from the headquarters during discovery.

¹⁵⁵ Amended Arts. of Assoc., 1 May 2007, p. 1, C-009.

¹⁵⁶ Marshall Supplemental WS, ¶ 3-7.

owns nor controls NRD, and therefore has not made a covered investment under the BIT,¹⁵⁷ is incorrect.

104. BVG's indirect ownership of NRD is a covered investment under the express terms of the BIT. The BIT broadly defines investment as "every asset that an investor owns or controls, directly *or indirectly*, that has the characteristics of an investment."¹⁵⁸ The treaty specifically contemplates "shares, stock, and other forms of equity participation in an enterprise" as forms that a protected investment may take.¹⁵⁹
105. As described above, BVG sold its assets held in connection with the Bisesero Concession to purchase ownership in Spalena as a way of preserving its prior investment and establishing BVG's overall control over NRD. This structure was acceptable to the Spalena investors because BVG and Spalena were functionally one and the same. Mr. Marshall's position as the director of BVG and managing director of NRD further emphasized the continuity of ownership as well as BVG's intended "participation in" and control over the enterprise. Thus, BVG's investment in NRD by way of ownership exercised indirectly through Spalena falls squarely within the definition of investment set forth in the BIT.
106. It is well established that a tribunal may exercise jurisdiction over claims brought by an indirect investor where the operative BIT contains similarly broad language.¹⁶⁰ Under a similar set of facts, the tribunal in *Enron v. Argentina* held that investors had standing to

¹⁵⁷ Memorial on Preliminary Objections, ¶¶ 99.1, 99.2.

¹⁵⁸ Rwanda-US BIT, Art. 1, **CL-006** (emphasis added).

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **RL-124**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, **CL-052**; *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 199, **RL-084** ("[A]n investment might be made indirectly, for example, through an entity that serves to channel an investor's contribution to the host state. Special purpose vehicles have long facilitated cross-border investment.").

bring a claim under the U.S.-Argentina BIT based upon their indirect ownership of a qualifying investment. There, the claimants had invested in the Argentine gas industry through a similar structure to that of BVG's investment, utilizing several Argentine entities as intermediaries. The tribunal held that the claimants were "beyond any doubt the owners of the investment . . . [with] clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through [an Argentine intermediary] does not in any way alter this conclusion."¹⁶¹ The definition of investment under the operative BIT was substantially similar to the BIT in the present case. There, the BIT defined investment as "every kind of investment . . . controlled directly or indirectly . . . and includes without limitation a company or shares of stock or other interests in a company or interests in the assets thereof . . ."¹⁶²

107. Likewise, in *Siemens v. Argentina*, the tribunal held that claimants' indirect shareholding in an Argentine entity through an Austrian intermediary qualified as an investment under the Argentina-Austria BIT.¹⁶³ Similar to the U.S.-Rwanda BIT, the Argentina-Austria BIT defined investment as "any kind of asset invested or reinvested in any sector of the [sic] economic activity . . . in particular, though not exclusively . . . shares/any shareholding and any other form of participation in companies."¹⁶⁴ In addition to the terms of the operative treaty, the tribunal examined the development of the claimants' indirect ownership structure over the Argentine entity and found that the intermediary

¹⁶¹ *Enron*, ¶ 56, **RL-124**.

¹⁶² *Id.*, ¶ 42.

¹⁶³ *Siemens*, ¶ 177, **CL-052**.

¹⁶⁴ *Id.*

was established as “a holding company to hold the shares [in the Argentine investment].”¹⁶⁵

108. Here, the structure of BVG and Spalena’s ownership over NRD was analogous to that of the Claimants in *Siemens*. Though Spalena owned the shares in NRD directly, BVG funded Spalena’s purchase of Starck’s shares in NRD and wrote off its existing claim against NRD to leverage the deal.¹⁶⁶ Later, BVG’s sale of assets it held in connection with the Bisesero Concession in exchange for controlling ownership in Spalena cemented Spalena’s status as an intermediary holding company for the investor’s continued administration of and investment in NRD.¹⁶⁷
109. For the foregoing reasons, the Tribunal has jurisdiction *ratione personae* over BVG where BVG exercised indirect ownership and control over a covered investment throughout the relevant period.

C. The Tribunal Has Jurisdiction Over BVG’s Claims Based Upon Its Loan to NRD

110. The Tribunal has jurisdiction over BVG for the additional reason that BVG made a loan to NRD that confers standing to sue as a claimant under the BIT.
111. On or about November 1, 2010, BVG and NRD signed a Cooperation Agreement whereby NRD would assist BVG in managing the Bisesero Concession.¹⁶⁸ Pursuant to the Cooperation Agreement, BVG agreed to loan NRD \$ [REDACTED] to purchase equipment to develop the concession, and instructed NRD to [REDACTED]

¹⁶⁵ *Id.*, ¶ 180 (“Consequently, it is clear that the indirect shareholding in ENJASA was an investment of Claimants in Argentina.”).

¹⁶⁶ *SCB v. Tanzania*, ¶ 230, **RL-084** (“[A] claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.”).

¹⁶⁷ *Id.*

¹⁶⁸ Cooperation Agreement Between NRD and BVG dated 1 November 2010, **C-122**.

112. The loan by BVG to fund NRD’s purchase of equipment has the characteristics of an investment as: (1) a commitment of capital; (2) with an expectation of gain or profit; and (3) a concurrent assumption of risk. Indeed, the BIT expressly contemplates loans as “forms that an investment may take,” and notes that some forms of debt, in particular long-term notes, are more likely to have the characteristics of an investment.¹⁷¹
113. BVG’s loan to NRD is a long-term debt obligation from which BVG had an expectation of profit. In addition, BVG’s funding of NRD carried with it an assumption of risk, namely that the investment would fail to perform.
114. ICSID tribunals have found loans to be investments in several seminal decisions. In *Fedax*, the tribunal found that “loans and other credit facilities are within the jurisdiction of the Centre under both the terms of the Convention and the scope of the bilateral Agreement governing consent in this case.”¹⁷² There, the dispute involved promissory notes issued by Venezuela to a local mining company, which were subsequently endorsed to Fedax, an entity located in the Netherlands. The tribunal found the “transaction [met] the basic features of an investment.”¹⁷³
115. The *Fedax* decision also cited an earlier decision where the tribunal “found that the Centre had jurisdiction over loans having their origin in agreements separate from the

¹⁶⁹ *Id.*, ¶ 2.

¹⁷⁰ *Id.*, ¶ 5.

¹⁷¹ Rwanda-US BIT, Art. 1, CL-006.

¹⁷² *Fedax*, ¶ 37, CL-059.

¹⁷³ *Id.*, ¶ 43.

[overall] investment; although the respondent argued that these constituted different transactions, *the Tribunal emphasized ‘the general unity of an investment operation.’*¹⁷⁴

116. Similarly, BVG’s loan to NRD is part of the “general unity of an investment operation” in Rwandan mining undertaken by the Claimants beginning with the Bisesero Concession in 2007, and culminating in the purchase of NRD by Spalena and NRD’s subsequent development of the remaining Concessions.¹⁷⁵

117. The Decision of the Tribunal on Objections to Jurisdiction in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Case No. ARB/97/4 (May 24, 1999) is particularly applicable to the circumstances presented here. In *CSOB*, the claimant, a Czech bank, as part of a larger investment undertaking designed to privatize CSOB following the breakup of Czechoslovakia, entered into a consolidation agreement with the Slovak Republic. The consolidation agreement

provided, *inter alia*, for the assignment by CSOB of certain non-performing loan portfolio receivables to two so-called ‘Collection Companies,’ one to be established by the Czech Republic, the other by the Slovak Republic, in their respective national territories. The Consolidation Agreement also stipulated that each Collection Company was to pay CSOB for the assigned receivables. To enable them to do so, *each Collection Company was to receive the necessary funds from CSOB under the terms of separate loan agreements*, such loans to be paid down in accordance with a stipulated repayment schedule.¹⁷⁶

¹⁷⁴ *Id.*, ¶ 26 (emphasis added) (citations omitted). The concept of a particular investment qualifying as such as part of an “indivisible whole” is generally recognized. *See, e.g., Enron*, ¶ 70, **RL-124**; Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, British Yearbook of International Law, Vol. 51, 1980, p. 123, **CL-056**. In addition, other U.S. treaties explicitly incorporate this concept into their definition of investment. *See, e.g., North American Free Trade Agreement, Can.-Mex.-U.S.*, Dec. 17, 1992, 32 I.L.M. 289, 1993, Art. 1139, **CL-057** (defining investment, *inter alia*, as “a loan to an enterprise . . . where the enterprise is an affiliate of the investor”).

¹⁷⁵ Marshall WS, ¶ 15 (“BVG’s investors [acquired NRD via Spalena] in order to continue investing in Rwanda’s mining industry.”).

¹⁷⁶ *CSOB*, ¶ 2, **CL-060** (emphasis added).

Repayment of the loan to the Slovak collection company was guaranteed by the Slovak Republic. Following the Slovak Republic's breach of its obligations as guarantor, CSOB filed a request for arbitration under the operative BIT.

118. In its response, the Slovak Republic argued, *inter alia*, that the tribunal did not have jurisdiction over the dispute because CSOB's loan to the collection company could not be an investment under either Article 25 or the operative BIT.
119. The tribunal rejected the Slovak Republic's position, holding Article 25(1) of the Convention "is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan."¹⁷⁷ Examining the BIT, the tribunal also found that "terms as broad as 'assets' and 'monetary receivables or claims' clearly encompass loans extended to a Slovak entity."¹⁷⁸
120. The tribunal held that jurisdiction was proper due to the fact that the "contractual scheme embodied in the Consolidation Agreement shows . . . that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB."¹⁷⁹ The tribunal opined that an investment

is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.¹⁸⁰

¹⁷⁷ *Id.*, ¶ 76.

¹⁷⁸ *Id.*, ¶ 77.

¹⁷⁹ *Id.*, ¶ 80. For reasons not applicable here, the Tribunal ultimately found the loan from CSOB on its own was not an investment.

¹⁸⁰ *Id.*, ¶ 72.

121. The overall restructuring undertaking, involving “outlays of resources in the Slovak Republic in response to the need for the development of the Republic’s banking infrastructure . . . qualified CSOB as an investor and the entire process as an investment in the Slovak Republic with the meaning of the Convention.”¹⁸¹ Thus, the loan from CSOB to the Slovak collection company, as a part of the overall restructuring operation, met the requirements of an investment under the Convention.¹⁸²
122. Like the arrangement in *CSOB*, here the Cooperation Agreement evidences a transaction involving a loan from the investor (BVG) for purchase of assets by the local entity (NRD) as part of a larger investment operation (here, the development of various mining concessions in the country). The terms of the Cooperation Agreement requiring NRD to loan equipment to other sites at BVG’s command¹⁸³ is further evidence that BVG’s loan to NRD was interrelated with and cannot be disassociated from the Claimant’s overall investment in Rwandan mining operations.
123. Accordingly, BVG’s loan to NRD was a covered investment such that BVG is an investor with standing to bring claims under the BIT.

¹⁸¹ *Id.*, ¶ 88.

¹⁸² *Id.*, ¶ 82 (“The Slovak Republic’s undertaking and the CSOB loan form an integrated whole in the process defined in the Consolidation Agreement. Hence, individual transactions comprising it may still meet the requirements of an investment under the Convention, provided the overall operation for the consolidation of CSOB, to which it is closely connected, qualifies as an investment.”).

¹⁸³ Cooperation Agreement Between NRD and BVG dated 1 November 2010, ¶ 3, **C-122** (“NRD shall loan its bulldozer, wheel loader and tipper trucks to renovate/upgrade/create the Bigugu site, and at other sites in the Concession and for other purposes.”).

IV. THE TRIBUNAL HAS JURISDICTION *RATIONE VOLUNTATIS* WITH RESPECT TO SPALENA'S CLAIMS

124. The Tribunal has jurisdiction *ratione voluntatis* to hear Spalena's claims because at all material times Respondent knew that Spalena was a proper claimant and the owner of NRD.
125. Claimants' Notice of Intent, authored and signed by Mr. Marshall, fulfilled any notice obligation of Spalena under Article 24(2). Mr. Marshall is the lead investor and president of Spalena. He is also the president of BVG and serves as the Managing Director of NRD. As previously stated, Spalena and BVG share investors and BVG exercises ownership and *de facto* control over Spalena, which functions as BVG's intermediary. Thus, notice from Mr. Marshall sent on behalf of the Claimants was sufficient for purposes of Article 24 because Mr. Marshall represents Spalena and Spalena's and BVG's investment interests in NRD are identical.
126. The purpose of the 90-day notice and six-month "cooling off" period of Article 24(2) and (3) is to allow the parties time to resolve the dispute through consultation and negotiation.¹⁸⁴ Contrary to Respondent's assertions, Respondent did negotiate with Spalena and did have full opportunity to negotiate further, but unilaterally ceased such negotiations. Respondent's opportunity to negotiate with Spalena through Mr. Marshall was equivalent to its opportunity to negotiate with BVG during the same "cooling off" period because the sole negotiator for both was Mr. Marshall as representative of Spalena and BVG.
127. Claimants, through Mr. Marshall, made every effort to avoid pursuing claims and to resolve the dispute. Despite Claimants' best efforts, Respondent did absolutely nothing to

¹⁸⁴ Rwanda-US BIT, Art. 23, CL-006.

take advantage of the 90-day notice and cool-off periods with respect to BVG. Given Respondent's inaction following BVG's notice, it is blatantly misleading to suggest that Respondent lost any material opportunity to resolve Spalena's claim where the investors, money involved and issues were the same. Indeed, it is entirely disingenuous to argue that naming Spalena directly in Claimants' Notice of Intent would have resulted in a different outcome.

128. Elsewhere, Respondent suggests that Articles 23 and 24 of the BIT, which deal with a consultation and negotiation period and a 90-day cooling off period, respectively, are jurisdictional and that Claimants' failure to comply results in the Tribunal lacking jurisdiction *ratione voluntatis* over Spalena's claims. Respondent's objections are procedural rather than jurisdictional, conferring no basis upon which the Tribunal should decline to exercise jurisdiction. Moreover, to the extent the Tribunal finds Respondent has identified a jurisdictional issue, Spalena substantially complied with Articles 23 and 24 of the BIT and Respondent suffered no prejudice where Claimants' Notice of Intent set forth identical claims and issues to those asserted by Spalena individually.
129. Generally, tribunals "treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."¹⁸⁵ Tribunals also tend to treat a cooling off period as procedural and not jurisdictional.¹⁸⁶ Thus, the Tribunal should dismiss Respondent's objections to

¹⁸⁵ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 184, **CL-050**.

¹⁸⁶ *Lauder v. Czech Republic*, UNCITRAL, Ad Hoc Tribunal, Final Award, IIC 205, 3 September 2001, ¶ 187, **RL-022**, citing *Ethyl Corp. v. Canada*, UNCITRAL, 38 I.L.M. 708, 24 September 1998, ¶¶ 74-88, **CL-055**.

jurisdiction *ratione voluntatis* grounded in Articles 23 and 24 of the BIT on this basis alone.

130. Respondent attempts to avoid this outcome with a strained and ultimately incorrect interpretation of Article 23. Article 23, titled “Consultation and Negotiation” provides:

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

131. The Consultation and Negotiation clause is not mandatory and instead uses the word “should.”¹⁸⁷ The use of the “should,” rather than “shall,” makes the provision discretionary, not mandatory.

132. Respondent, relying on, *Kılıç İnşaat v. Turkmenistan*, argues otherwise.¹⁸⁸ The BIT in *Kılıç İnşaat v. Turkmenistan* had a similar consultation and negotiation provision with one major exception: it used the “shall” in place of the word “should.” Based on the specific language of the BIT, the tribunal determined that the failure to comply with a mandatory provision of the BIT was fatal to jurisdiction. The holding of *Kılıç İnşaat v. Turkmenistan* simply does not apply here where the BITs, despite having similar provisions, use a materially different word to direct the conduct of a potential claimant in advance of filing a demand for arbitration.

133. Respondent’s reliance on *Enron v. The Argentine Republic* is similarly misplaced.¹⁸⁹ In *Enron*, the tribunal held that failure to comply with language in the U.S.-Argentine BIT stating that parties “should” seek a resolution through consultation and negotiation prior

¹⁸⁷ Respondent cites to *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, ¶ 6.2.8, **RL-120** to argue that the use of the word “should” creates a mandate.

¹⁸⁸ Memorial on Preliminary Objections, ¶ 173.

¹⁸⁹ Memorial on Preliminary Objections, ¶ 174.

to submitting a dispute “would result in a determination of lack of jurisdiction.”¹⁹⁰

However, the operative BIT in *Enron* was an older version of the U.S. model treaty, which by its terms conditioned submitting a dispute to arbitration on initial negotiations.¹⁹¹ Here, the comparable language in the U.S.-Rwanda BIT is materially different, and further indicates the discretionary nature of the Consultation and Negotiation clause.¹⁹²

134. Claimants were well within their rights to determine at the outset that, based on the history of prior dealings, Respondent would not negotiate in good faith, and that submitting the dispute directly to arbitration offered Claimants their only meaningful recourse. Indeed, Respondent chose not to negotiate with Mr. Marshall based on the notice it received naming BVG. It is disingenuous of Respondent to suggest it would negotiate with Mr. Marshall concerning the same lost investment from the same U.S. investors in the same NRD Concessions based on the same actions by the Respondent identified in the notice it did receive, but did not because the notice did not also mention Spalena.

135. Respondent’s objection that Claimants failed to comply with Article 24 is similarly unpersuasive. As recognized by Respondent, Claimants sent a Notice of Intent to Respondent on April 12, 2017 naming NRD and notifying Rwanda of Claimants’ intent

¹⁹⁰ *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 88, **RL-124**.

¹⁹¹ See Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, Art. VII(2), **RL-123** (“*If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution . . .*”) (emphasis added).

¹⁹² US-Rwanda BIT, Art. 24(1), **CL-006** (“In the event that a disputing party *considers that an investment dispute cannot be settled* by consultation and negotiation . . .”) (emphasis added).

to commence arbitration proceedings.¹⁹³ After more than a year of silence, Claimants initiated this proceeding.

136. Article 24 requires Claimants to wait at least 90 days before filing an arbitration after sending a Notice of Intent.¹⁹⁴ The purpose of such a provision is to “grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration.”¹⁹⁵
137. Respondent did not take advantage of the 90-day period under Article 24 to initiate negotiations. In fact, Respondent did not engage in negotiations at any point in the more than one year between the filing of the Notice of Intent and the Demand for Arbitration.
138. Tribunals have found that when negotiations would be futile, there is no need comply with similar cooling-off periods.¹⁹⁶ Notification to the Respondent identifying Spalena as a Claimant would have been futile based upon the fact that notification related to BVG and NRD proved to be futile. Indeed, Respondent tellingly makes no argument that notice from Spalena, as opposed to BVG, would have somehow resulted in fruitful settlement discussions.
139. Moreover, the claims presented by Spalena in this matter are identical to those set forth in the Notice of Intent by BVG and NRD. As detailed above, Respondent had ample opportunity to consider those issues, and the Demand for Arbitration (at which time

¹⁹³ Memorial on Preliminary Objections, ¶¶ 179-80.

¹⁹⁴ US-Rwanda BIT, Art. 24(2), **CL-006**.

¹⁹⁵ *Burling Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶ 315, **RL-119** (emphasis in original); see also *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 2 September 2001, ¶ 188, **RL-022** (“the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration”)

¹⁹⁶ *Lauder*, ¶ 187, **RL-022**; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 87, **RL-124** (“If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve any new element, the observance of this requirement is evidently fulfilled.”).

Respondent alleges it first learned of Spalena) did not raise any new claims.¹⁹⁷ Thus, rather than learning of these claims for the first time at the time of the demand, Respondent knew of the instant claims from the day Claimants filed the Notice of Intent.

140. Assuming, *arguendo*, Claimants' Notice of Intent omitting Spalena created a jurisdictional issue, Respondent fails to demonstrate how it was prejudiced by Claimants' inadvertent omissions of Spalena. Indeed, Respondent cannot make a credible argument to this effect where the record is clear it was aware Spalena owned and/or exercised control over NRD and would therefore be associated with any claims concerning the same.¹⁹⁸
141. Respondent's argument in response, namely that its decision not to recognize Spalena's shareholding in NRD is a legitimate basis to obviate a claim by Spalena under the BIT,¹⁹⁹ is nonsensical. The GMD publicized Spalena as the parent company of NRD.²⁰⁰ The RDB in August 2012 recognized that Spalena owned NRD.²⁰¹ Respondent's decision not to recognize Spalena's ownership of NRD was based on documents produced by Spalena that Respondent claimed for self-serving reasons were insufficient. The fact that Spalena produced ownership documents for Respondent's consideration resulting in a dispute concerning Spalena's ownership of NRD contradicts Respondent's argument that it had

¹⁹⁷ See Enron, ¶¶ 87-88, **RL-124**.

¹⁹⁸ Respondent knew at all pertinent times that Spalena was the true owner of NRD. See, e.g., Letter from L. Kanyonga to R. Louis dated 7 August 2012, **C-129** (noting that the RDB "recently received legal and authenticated documentation that the holding company of NRD Ltd, NRD Holding GmbH, is wholly owned by Spalena Company LLC, an American Company"); Witness Statement of Roderick Marshall, ¶¶ 18, 22 (describing multiple attempts to change the name of the owner of NRD to Spalena and Spalena's submittal of the proper documentation to the RDB, including: Declaration of Name Change, 23 December 2010, p. 3, **C-007**; Registry of Name Change, 13 August 2014, p. 1, **C-008**; and Share Purchase Agreement Between HC Starck Resources GmbH and Spalena Company, LLC, 23 December 2010, p. 6, **C-068**). Accordingly, Claimants do not concede that the Notice of Intent was deficient in any way.

¹⁹⁹ Memorial on Preliminary Objections, ¶ 184 (referring to documents submitted to the RDB on March 23, 2015).

²⁰⁰ 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**.

²⁰¹ Letter from L. Kanyonga to R. Louis dated 7 August 2012, **C-129**.

“no basis for belief” Spalena considered itself the owner of NRD throughout the relevant period and that it would assert claims concerning Claimants’ investment in NRD.²⁰² In any event, Respondent’s argument elsewhere that Spalena did not make a protected investment²⁰³ undermines its contention with respect to jurisdiction *ratione voluntatis* that Spalena was obligated to provide notice as a Claimant²⁰⁴ under the BIT, and further demonstrates the internal inconsistencies in Respondent’s objections.

142. Moreover, it is disingenuous for Respondent to argue that it was unaware of Spalena's ownership of NRD's shares, since repeated efforts were made to get Respondent to correctly register that ownership.²⁰⁵ The fact that Respondent refused to document the acquisition of those shares by Spalena cannot be used to suggest that it was unaware of the facts. Instead, it merely indicated further refusal to consistently apply its laws and procedures to U.S. investors. Regardless of its procedural misconduct, Respondent was provided actual notice of Spalena's ownership of NRD's shares, so notice that the U.S. investors claimed expropriation of their investment in NRD gave Respondent actual knowledge that Spalena's reported interests were involved.
143. In addition, if Respondent’s argument were correct, nations could insulate themselves from enforcement of their obligations under bilateral investment treaties by the facile and easily manipulable trick of striking recognition of a party’s corporate investors from the host nation’s registry of corporations. Avoidance of treaty obligations in this manner is

²⁰² Memorial on Preliminary Objections, ¶ 183.

²⁰³ Memorial on Preliminary Objections, ¶¶ 117-162.

²⁰⁴ Defined as an investor of a party, which is an entity “that . . . has made an investment in the territory of the other Party” US-Rwanda BIT, Art. 1, **CL-006**.

²⁰⁵ Marshall WS, ¶¶ 18, 22.

antithetical to the object and purpose of international investment law generally, and of the U.S.-Rwanda BIT specifically, and should not be condoned.

144. Accordingly, Claimants fulfilled their obligations under Articles 23 and 24 of the BIT, and the Tribunal has jurisdiction to consider Spalena's claims on the merits.

V. Request for Relief

145. For the reasons stated herein, the Tribunal should, upon reconsideration, deny the request to bifurcate the *ratione temporis* objection. Furthermore, the Tribunal should rule against the Respondent on its *ratione temporis* and *ratione personae* objections as to BVG, and its *ratione voluntatis* objections as to Spalena.

Respectfully Submitted

Steven M. Cowley
smcowley@duanemorris.com
Bryan D. Harrison
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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