

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bay View Group, LLC, and The Spalena Company LLC

v.

Republic of Rwanda

ICSID Case No. ARB/18/21

RESPONDENT'S REJOINDER ON JURISDICTION AND MERITS

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1. This Respondent's Rejoinder on Jurisdiction and Merits (the "**Rejoinder**") is served pursuant to Rule 31 of the ICSID Arbitration Rules, the revised procedural calendar as approved by the Tribunal and communicated to the Parties on 8 October 2019, and to the revised deadline for filing as communicated to the Parties on 7 May 2020.
2. This Rejoinder adopts the abbreviations and definitions set out in Annex I to the Counter-Memorial and used in both the Counter-Memorial on the Merits ("**Counter-Memorial**") and Memorial on Preliminary Objections ("**MPO**"), and is served with the following supporting documents:
 - 2.1. the witness statements and expert reports listed in Annex I;
 - 2.2. the documentary evidence (exhibits) listed in Annex II; and
 - 2.3. the legal authorities listed in Annex III.
3. This Rejoinder responds to both the Claimants' Counter-Memorial on Preliminary Objections ("**CMPO**") and the Claimants' Reply Memorial on the Merits ("**Reply**").

I. INTRODUCTION AND SUMMARY

4. It was plain from the Claimants' Memorial and supporting evidence that their claims in this Arbitration were as contrived as they were hopeless, as explained in the Counter-Memorial. The evidence served since then, and the submissions set out in the CMPO and the Reply, reinforce that conclusion at every turn. The shameless dishonesty and baseless assertion of the Memorial is repeated in the Reply, in spades, with both fact and law presented in a misleading fashion.
5. As summarised below, the Claimants have introduced new factual and legal cases since the Memorial which betray the total lack of merit in their original claims, but which themselves are even more unconvincing than the flawed case originally advanced.

The Claimants' new Oligarch conspiracy claim
6. At the heart of the Claimants' factual case now appears to be a new, wholly incredible, and completely invented conspiracy theory, that NRD's alleged treatment by Rwanda was at the behest of, and in furtherance of, the illegal smuggling operations of "*a small number of powerful Oligarch's [sic] who had close ties to and likely control of the government*", one of whom (not identified) allegedly approached NRD (although the recipient of the approach is not identified, and nor is the time or place of the approach) to ask it to assist in illegal smuggling.¹
7. It is said to be as a result of NRD's refusal to assist this mysterious "Oligarch" in smuggling that the "Oligarch" "*put pressure on Respondent to force NRD and Claimants to abandon*

¹ Supplemental Witness Statement of Roderick Marshall dated 16 August 2019, at paras. 18 to 19.

their Concessions”.² Hence, it is asserted by Mr. Marshall that “*many, if not all, of the actions taken by Minister Imena were done at the request and direction of an Oligarch.*”³

8. This new case is a significant departure from the Claimants’ original – and equally meritless – case that Rwanda merely “*turned a blind eye*” to smuggling,⁴ its alleged motivation for doing so being that it resulted “*in increased revenue for the Rwanda government and increased export statistics*”⁵ given Rwanda’s alleged lack of natural mineral resources (which is also untrue). The new case therefore raises even more serious and scurrilous aspersions against Rwanda and the manner in which it is governed.
9. Followed to its natural conclusion, the Claimants’ new Oligarch conspiracy case asks the Tribunal to find that there was a coordinated, sophisticated, brazen and highly risky conspiracy between the alleged anonymous Oligarchs, different ministries of the Rwandan Government, the Rwandan military, and independent bodies such as ITRI (who would necessarily need to have been in on it), and a conspiracy of silence from those bodies such as the OECD involved in monitoring the mineral supply chain. And all of this would have to have been perpetrated under the noses of the international community and in flagrant breach of their attempts to stamp out the illegal trade in conflict minerals from the DRC. This is all complete fantasy, which has no support from any of the evidence in these proceedings.
10. In making such serious and improbable allegations it was incumbent upon the Claimants fully to particularise the allegations made, and to support them with cogent, compelling evidence. It has failed to do so, and relies solely on vague and ambiguous assertions, in many cases obviously misrepresented and untrue. The new Oligarch conspiracy case, like much of the rest of the Claimants’ claim, is risible.
11. It is therefore ever more clearly the case that the Claimants’ allegations in relation to smuggling, and Rwanda’s alleged attitude to, or alleged involvement in smuggling, have been made in significant part in order to try to embarrass Rwanda into settling these proceedings.
12. The Claimants have also been compelled to resort to the invention of these outlandish allegations because they seek to distract the Tribunal from the true narrative which is simply this: that NRD was not granted long-term licences, which are the focus of the Claimants’ claims in these proceedings, because it failed to demonstrate—based on NRD’s poor track record of managing the Five Concession Areas granted to them in 2006, and the inadequacy of the licence applications made in November 2010 and subsequently—that it had the necessary financial clout, mining expertise and commercial

² Supplemental Witness Statement of Roderick Marshall dated 16 August 2019, at para. 20.

³ Supplemental Witness Statement of Roderick Marshall dated 16 August 2019, at para. 17.

⁴ Claimants’ Memorial, at para. 118.

⁵ Claimants’ Memorial, at para. 191.

acumen to develop and operate successful industrialised mining operations over the long term.

13. Against that true background, which was set out in the Counter-Memorial and is augmented as necessary in this Rejoinder in response to the allegations made in the CMPO and Reply, it is painfully evident that the Claimants acquired NRD, a company which had performed poorly for almost 4 years, and whose Contract and Licences were about to expire, for next to nothing (therefore not even being able to satisfy this Tribunal that they made a qualifying investment), invested next to nothing, and produced disappointing volumes of minerals, but believed they could use political pressure and influence (*inter alia* from Mr. Marshall and Ms. Beatrice Gakuba) to obtain long-term licences for NRD that were not objectively merited. All the while the Claimants, or Mr. Marshall and Ms. Mruskovicova, at least, used NRD as their own personal piggy bank. Mr. Marshall's admission that his plan was to obtain long-term licences and then float NRD on the Alternative market to raise funds for investment is telling:⁶ the Claimants did not have the capability to make, and did not make, any significant investments of their own, and / or were unwilling to do so.
14. In believing that they could obtain long-term licences for NRD through pressure and influence rather than on merit, the Claimants badly misjudged the Respondent. When their misguided attempts failed, they cynically laid the groundwork for these proceedings, attempting to apply pressure by threatening a claim under the USA-Rwanda BIT prior to the date which, on their current case, they say they could not possibly have known they had such a claim (and hence demonstrating why, *inter alia*, their claims should in large part be dismissed on *ratione temporis* grounds, as explained at Section V.A below).
15. The reason why NRD was not granted long-term licences is abundantly clear and supported by all the contemporaneous documentation and the Respondent's evidence. There is no need to look any further than these facts to explain the Respondent's actions – and certainly no need to consider inherently improbable, vague and unsupported theories involving high-level conspiracies and Oligarchs such as those belatedly invented by the Claimants.

The Claimants' shifting legal case

16. In addition to this desperate and hopeless shift in the Claimants' factual case, the Claimants appear to have altered the framing of their legal case at the reply stage in an apparent acknowledgement of the force of certain of the Respondent's objections to this Tribunal and/or ICSID's jurisdiction.

⁶ See Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 24 (NB: it is assumed that the date of 13 March 2019 on the signature block of Mr. Marshall's second supplemental witness statement is an error and should in fact be 13 March 2020 given it was filed with the Claimants' Reply in March 2020 – the Respondent therefore refers to this statement as being dated 13 March 2020).

17. In particular, the Claimants now attempt to shift the focus to the Respondent's alleged treatment of NRD, in an apparent acknowledgement that they cannot bring claims in relation to the Respondent's decisions with respect to the Five Concession Areas. Further, they now characterise both the FET and expropriation claims as "creeping" violations – despite pleading neither of these in their Memorial – in an acknowledgement that they have no adequate answer to the objections raised by the Claimant in relation to jurisdiction *ratione temporis*. In any event, the Claimants' reframed claims still fail because this Tribunal and/or ICSID does not have jurisdiction *ratione temporis*, *ratione personae*, *ratione materiae* or *ratione voluntaris* to hear them (see further Section V below).

Failure of FET and expropriation claims on the merits in any event

18. For the reasons set out further in this Rejoinder, all of the Claimants' claims also fail on the merits. In particular:
19. The Claimants' FET Claim under Article 5 of the USA-Rwanda BIT cannot succeed because (see further Section VI below):
 - 19.1. Article 5 of the USA-Rwanda BIT expressly provides a minimum standard of treatment of foreign investors, reflective of the customary international law minimum standard. The Claimants are not entitled to import the FET standard from the Belgium-Rwanda BIT into the USA-Rwanda BIT through the MFN clause, as they attempt to do, because the MFN clause in the USA-Rwanda BIT applies only in the context of a comparative, fact-based analysis of investments or investors which are in factually similar situations. Article 5 of the USA-Rwanda BIT is clear that fair and equitable treatment pursuant to the USA-Rwanda BIT does not require treatment in addition to or beyond that which is required by the customary international law minimum standard, and does not create additional substantive rights. The Claimants' attempt to read a higher standard into the USA-Rwanda BIT, through the back door of the MFN provision, is inconsistent with the plain words and clear intention of the USA-Rwanda BIT and should be dismissed.
 - 19.2. The 2014 Law was enacted and implemented in a manner that was fair, not discriminatory, and was in the public interest. It was enacted to assist in the continued modernisation, industrialisation and development of Rwanda's mining industry. At the time that it was enacted, NRD was operating without licences and instead on the basis of a courtesy provided by the Government. For that reason, because it had failed to regularise its position prior to the entry into force of the 2014 Law it was required, pursuant to the 2014 Law, to re-apply for licences to mine in the concessions which it had previously held. In any event, Rwanda could properly have required it to do so because the Licences (even had they remained in force) had been granted under the 1971 and not 2008 Law and so were not contemplated by the grandfathering clause of the 2014 Law.

- 19.3. The Claimants allege that Rwanda arbitrarily ignored RDB records. However, it did no such thing. The Rwandan Government was faced with a dispute between competing shareholders, with Court judgments inconsistent with RDB records, which had resulted in two different individuals claiming to act for and on behalf of NRD in June 2014. The Respondent acted appropriately by not being drawn into the dispute, taking a neutral stance and not preferring one party over the other.
 - 19.4. Rwanda denied NRD tags due to the uncertainty relating to an ownership dispute between its purported investors, and due to its refusal to cooperate in the regularisation of its licensing status, which was reasonable.
 - 19.5. Rwanda acted consistently with the Claimants' due process rights at all material times. Allegations that it did not are entirely unsubstantiated and must be rejected. The Claimants have not established that the due process rights that they allege exist as a matter of Rwandan law, let alone that Rwanda breached them.
 - 19.6. The Claimants did not and cannot have had a legitimate expectation that NRD was entitled to long-term licences, either at the time that they made the investment in NRD, or later. The allegation that they had such an expectation is not credible based on the significant amount of documentary and testamentary evidence that demonstrates that NRD was never told that it was entitled to long term licences, or that such licences were guaranteed.
 - 19.7. In respect of each of the breaches alleged, the Claimants have failed to establish even a breach of domestic law, let alone of the USA-Rwanda BIT and/or of customary international law.
20. For the reasons set out further in Section VII below, the Claimants' expropriation claim under Article 6 of the USA-Rwanda BIT is unsubstantiated and wrong:
- 20.1. The claim is not properly pleaded or particularised. The burden is on the Claimants to establish the breaches which they allege, yet they have failed to properly explain what "*actions or series of actions*" are said to constitute the expropriation, or how they have had an "*effect equivalent to direct expropriation*" in accordance with Annex B of the USA-Rwanda BIT. Indeed, the Claimants have failed even to specify which investment they allege to have been expropriated. This is entirely unsatisfactory. The claim ought to be dismissed on this basis alone.
 - 20.2. Further, the Claimants have not established that the Respondent "*interfered with a tangible or intangible property right or property interest in an investment*". The Claimants have not specified which "*tangible property and assets*" they allege to have been expropriated, and it is cannot seriously be alleged that NRD itself has been expropriated as on their own case, it remains in their ownership.
 - 20.3. NRD did not have a contractual "*right*" to long-term licences that could have been expropriated because, at no material time, including on the date of the alleged

expropriation in March 2016, did it ever have such contractual entitlement: the only right it ever had was the conditional right under the Contract to be awarded long-term licences if its feasibility study submitted at the expiry of the Contract was positively evaluated, which it was not. Further, even if it did have a contractual right to long-term licences (which is denied), this right would only have been a right to performance, and not a proprietary right capable of expropriation. Nor have the Claimants established any other “right” to the long-term licences under the USA-Rwanda BIT, customary international law, or Rwandan law that could have been expropriated.

- 20.4. Moreover, the Claimants have failed to establish that in taking the steps that are alleged to constitute the “*creeping expropriation*”, Rwanda acted in the exercise of its sovereign powers (*puissance publique*) rather than as an ordinary contracting party as required to establish an expropriation under Article 6 of the USA-Rwanda BIT.
 - 20.5. The Claimants’ allegation of an indirect “*creeping expropriation*” is based on incorrect legal analysis and false facts. NRD’s former concessions were not nationalised, and the Five Concession Areas are now operated by private companies that were successful in the March 2016 public tender. Further, even if the claim was supported with credible evidence (which it is not), it would have fallen a long way short of satisfying the test for an indirect expropriation under Article 6 of the USA-Rwanda BIT.
21. For the avoidance of doubt, all claims, including those that are not expressly dealt with in this Rejoinder (to the extent the claims are still relied on by the Claimants), are denied and the Claimants are put to strict proof in relation to them all. No submission made in this Rejoinder in any way detracts from the burden of proof which lies squarely with the Claimants.
 22. For all of the reasons set out in the Counter-Memorial and in this Rejoinder, the Tribunal should dismiss the Claimants’ claims in their entirety.

II. STATEMENT OF FACTS

A. Mining in Rwanda

23. The history of mining in Rwanda, from its initial colonial stakeholders, through independence, to privatisation of the sector, was set out in the Respondent's Counter-Memorial at paragraphs 26 to 38. The Respondent does not intend to rehearse this history again in detail. It instead points out a number of pertinent issues, in response to matters raised by the Claimants in the Reply.
24. An important conceptual starting point in considering this history, and in turn, the key issues on which this Arbitration hinges, is that the mineral resources of a sovereign state belong to it. A country may choose to grant concessions to private entities that prove themselves to have the capacity to benefit the country through effective exploration and exploitation of those resources, but a 'concession' is precisely that: a concession, or a privilege.
25. The 1971 Law defined a significant number of concession areas.⁷ From 1971 until 2008, licences were granted pursuant to the 1971 Law and within those designated concession areas.
26. Privatisation of the mining sector was critical to Rwanda's development planning, and from around 1997, the sector started to refocus on development through progressive re-privatisation. One of the goals of this drive towards privatisation was to attain significant international private investment in the sector. Privatisation accelerated through the early 2000s and by around 2006 the Government was entering into four-year concession agreements with, and granting mineral licences to, a substantial number of investors. The purpose of these agreements was to allow investors the opportunity to assess the feasibility of mining concession areas on an industrial scale, and to demonstrate to the Government, through compliance with contractual obligations of development and industrialisation, for each investor to demonstrate that it was a serious and capable partner, with the financial and technical ability to continue to develop the concessions.⁸ The concession agreements issued during this period did not provide any guarantee or certainty that long-term agreements would be entered into, although it was the hope that investors would become long-term, stable partners of Rwanda.⁹
27. The material terms of the contracts issued during that period, including the Contract, included the requirement that the investors would proceed to industrialisation of the mining operations in their concession areas, and that a detailed feasibility study would be carried out at the end of the four-year contractual period.¹⁰

⁷ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 24.

⁸ Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 20.

⁹ Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 20.

¹⁰ Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 25.

28. In 2006, mining contracts and licences were still issued under the 1971 Law, but the Government was taking steps to modernise the legislative and regulatory framework. The reasons for taking these steps were acknowledged during a meeting between numerous Government officials on 17 December 2008 held in order to “*strategise on how the mining sector could be strengthened so as to contribute to the general development of the country*”.¹¹

1. The 2008 Law

29. A new mining law was enacted in 2008 (“**2008 Law**”),¹² with the intention of supporting the development of Rwanda’s burgeoning mining sector. The 2008 Law provided for four types of mining exploitation licences: prospecting licence, research licence, mining exploitation licence, and concession licence.¹³

30. The transitional provisions of the 2008 Law provide that all licences issued prior to the entry into force of the 2008 Law remain valid:

“Article 117: Transitional period

Licences that were issued for prospecting, research and mining exploitation shall remain valid.

*Holders of such licences shall have to conform to the new Law. They shall have a period of one (1) year within which to conform their works to this Law.”*¹⁴

31. Mine exploitation licences included a “*small mine exploitation licence*” which was expressly valid for a period of five years, pursuant to Article 45 of Chapter V of the 2008 Law:

“A small mine exploitation licence shall be valid for a period of five (5) years excluding the date it was granted. It may however, based on a new application and having furnished evidence of a good activity report, be extended, as many times deemed necessary, for another five (5) years.

An application for renewal of a mine exploitation licence must be submitted at least three (3) months before its expiration date.

*If a mine exploitation licence expires before a decision has been taken following a regularly submitted request for renewal, the licence shall remain in force until a decision is made.”*¹⁵

32. These small mine exploitation licences are in contrast to a “*vast mining concession*” which is provided for in Chapter IV, Articles 57-77 of the 2008 Law. The vast mining concession give its holder exclusive rights to research and exploit substances for which it has been issued in the full range of its area and indefinitely in depth, and is valid for a period of 30

¹¹ Meeting Minutes on the actions to strengthen the Mining sector (17 December 2008) (**Exhibit R-095**).

¹² Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**).

¹³ *Ibid.*, (**Exhibit CL-020**), at Article 44.

¹⁴ *Ibid.*, (**Exhibit CL-020**), at Article 117.

¹⁵ *Ibid.*, (**Exhibit CL-020**), at Article 45.

years renewable each time the licensee has maintained an activity considered to be in accordance with the work plan.¹⁶

33. The 2008 Law is clear that upon expiry of a licence, the concessions are to be returned to the State,¹⁷ and that when a licence to a concession expires without having been subject to an application for renewal, the concession is given back to the State on the day of the expiry of the licence.¹⁸ As set out by Mr. Mugisha, *“the 2008 Law simply provides for the reversion of the mine to the state if the concession is not renewed”*.¹⁹
34. If the holder of a small mine exploitation licence renounces it, a request letter is submitted, along with a *“state of environmental preservation and rehabilitation deemed satisfactory by the government”*, and a tax clearance certificate.²⁰ If a concession holder of a vast mining concession wishes to renounce it, it must provide a licence certificate, a clearance certificate by financial institutions, and a statement of environmental preservation.²¹ There is no formal process required to be performed by the Government in relation to renunciation or cancellation. Rather, there are obligations on the concessionaire to ensure that taxation and environmental obligations have been complied with.

2. Developments between 2010-2013

35. A new national mining policy was developed in 2010 (**“2010 National Mining Policy”**).²² The purpose of the policy was to *“to describe the strategy and the direction that the Government wanted to take to develop its mineral resources”*.²³ While the policy was intended to guide government decision-making, it was not published as an official policy, and was not intended to be (and was not) binding on the Government or on investors.²⁴ The national orientation, as set out by Mr. Gatare, was *“to encourage investors to mine in Rwanda, but based on the condition that they would undertake effective, professional exploration with a view to developing industrial mining opportunities”*.²⁵ While the policy orientation of the government is relevant to investors, what is relevant in terms of obligations is *“the laws and regulations enacted by the government with which NRD, along with all other investors, was required to comply in order to obtain the longterm licenses it was seeking”*.²⁶

¹⁶ *Ibid.*, (Exhibit CL-020), at Article 63.

¹⁷ *Ibid.*, (Exhibit CL-020), at Article 63.

¹⁸ *Ibid.*, (Exhibit CL-020), at Article 71.

¹⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 56.

²⁰ Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (Exhibit CL-020), at Article 52.

²¹ *Ibid.*, (Exhibit CL-020), at Article 70.

²² Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2010) (Exhibit C-015).

²³ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 7.

²⁴ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 7.

²⁵ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 9.

²⁶ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 8.

36. The Claimants allege that the lack of ministerial orders adverted to under the 2010 National Mining Policy should be read as a lack of good faith intention on the part of the Government.²⁷ However, at that time, law and policy were in flux. In 2010, as the four-year licences issued by Rwanda in 2006 were coming up for renewal, and it began receiving feasibility studies and other reports on development to date, Rwanda recognised that the majority of investors who had been granted four-year licences had not made sufficient progress towards exploration, exploitation or industrialisation. The 2010 National Mining Policy notes that *“limited proper exploration that has been undertaken”*, and that the four-year licence term was a factor in that.²⁸ It stated that a change needed to take place *“[g]iven that many of these 4 year licences are coming up for renewal in 2010”* and that there is now a *“need to ensure that the owners of the licences are making every effort to undertake effective exploration with a view to developing industrial mining opportunities”*.²⁹
37. Although there were no explicit ministerial orders setting out the requirements for obtaining new licences, the existing contracts were clear that any long-term licence must be applied for and, as set out by Mr. Gatare, *“the potential licensee must be able to prove to the government that they have met both the conditions of the original licence, and that they are appropriately positioned to be granted a long-term licence”*.³⁰ As explained by Dr. Michael Biryabarema in a letter to the RDB in January 2011 *“some companies’ performance during their four year licences has been below capacity”* and *“a way forward needs to be discussed”*.³¹ Plainly, if companies’ performance was not at the required level, the risk, as articulated by Mr. Gatare was that, *“it would undermine the Government’s attempts to professionalise and industrialise Rwanda’s mining sector”*.³² Rwanda was would only grant long-term licences to investors *“with the financial resources, experience, technical and management capabilities to develop and manage large-scale, long-term, professional mining operations”*.³³
38. Such an approach to the granting of long-term licences is plainly what any sensible Government would do. The contention at the heart of the Claimants’ case that the granting of 30-year long-term licenses to NRD was guaranteed regardless of its performance during its initial four-year license term and / or the quality of its application, is absurd: no sensible government would proceed on such basis, and no serious investor would expect it to.

²⁷ Claimants’ Reply, at para. 11.

²⁸ Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2010) (**Exhibit C-015**), at page 31.

²⁹ *Ibid.*, (**Exhibit C-015**), at page 31.

³⁰ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

³¹ Letter from OGMR (M. Biryabarema) to CEO of RDB, *Requesting a meeting on mining/exploration licenses renewals* (27 January 2011) (**Exhibit R-096**).

³² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

³³ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

39. Due to the lack of progress made, it was communicated to all concessionaires that if operators had not industrialised mining operations in their concession areas, as required pursuant to the short-term concession agreements and licences granted, and/or if they had not carried out sufficiently comprehensive resource evaluation activities, they would not be granted 30-year licences. This is recognised by the Claimants' own witness, Mr. Dominique Bidega, in a publicly available report in which he explains that *"the companies holding four-year permits simply had not done any exploration or reserve calculation"* and as such *"Rwanda is not looking to commit to long-term contracts. As a solution, Rwanda is therefore looking to negotiate another four-year contract to give the companies another chance to do a feasibility study."*³⁴
40. In 2013, Rwanda conducted a review of its economic development strategy ("**2013 Economic Development Strategy**").³⁵ The private sector was seen as key to Rwanda's economic transformation, but it remained small and nascent in 2013, with small and micro enterprises making up 99.5% of firms.³⁶ The mining sector was seen as critical to the private sector driven transformation of Rwanda and to reducing its economic reliance on small enterprises.³⁷
41. Mining was the first sector to be the subject of specific intervention, with an overhaul of regulations, systems, and an enhanced understanding of mining resources. The 2013 Economic Development Strategy:
- "prioritises the finalisation and implementation of the [sic] Rwanda's new Mining Law currently under development. One of the main transformations this new law will bring is an overhaul of the concessions strategy in the mining sector and the merging of the prospecting and exploration licenses."*³⁸
42. As explained below, the 2014 Law was subsequently introduced, with the goal of stimulating the development of a professional mining industry.

3. The 2014 Law

43. In 2014, further legislative change was introduced, to reflect the need to stimulate transformation in the mining industry as identified in the 2013 Economic Development Strategy. The key reason for this was that the concession areas demarcated under the earlier 1971 Law were outdated and based on old, very large, and unworkable colonial mining perimeters.³⁹ As explained by former Minister Imena, by reference to a Cabinet Paper that he prepared on 23 March 2013:

³⁴ Jasper van Teffelen, *The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice* (February 2012) (**Exhibit R-097**), at page 44.

³⁵ Republic of Rwanda (MINECOFIN), *Economic Development and Poverty Reduction Strategy II* (May 2013) (**Exhibit R-005**).

³⁶ *Ibid.*, (**Exhibit R-005**), at para. 1.39.

³⁷ *Ibid.*, (**Exhibit R-005**), at para. 2.39.

³⁸ *Ibid.*, (**Exhibit R-005**), at para. 2.39.

³⁹ See E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971* (23 March 2013) (**Exhibit C-143**), referred to in the Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31.

*“As a result of exploration works between 1970s and 2000s, we had a much better understanding of the areas in which we should focus development of mines and areas where there was no potential for mining. As a result, and to make the most of sustainable economic returns, the Government decided that the concessions needed to be adjusted.”*⁴⁰

44. The introduction of the 2014 Law and the 2014 Presidential Order set the foundations for that change which allowed *“more flexibility in the granting of mining licences”* and was *“part of the process of professionalising and industrialising mining operations in Rwanda with the help of external investment.”*⁴¹ This new legal framework and subsequent modernisation reforms have been successful, resulting in a substantial increase in production across the sector.
45. In the Reply, the Claimants seek to link the reasons for implementing the 2014 Law with an apparent concern by the Government that NRD controlled too much land, in an attempt to suggest that the implementation of the 2014 Law was aimed at NRD.⁴² This is incorrect: as clarified by former Minister Imena and explained above, *“[t]here was nothing untoward about this process, which was necessary as a result of the changing and developing economic landscape”* and *“it was not in any way aimed solely or directly at NRD”*⁴³ as the Claimants suggest. As it is evident from an internal summary of the performance of large mining and exploration companies,⁴⁴ there were other mining companies who were performing poorly and/or who had insufficient capacity to properly develop the concession areas they had been granted.⁴⁵ This is precisely why the new legal framework was developed and it had no more to do with NRD than it did with any other mining company operating in Rwanda at the time.
46. The mechanics of the 2014 Law is discussed in detail below, at section VI.B.2, and in the Respondent’s Counter-Memorial in Section II.G, but it is worth setting out at this stage the types of mineral licence available under the 2014 Law, their terms and the steps required on revocation, expiry or cancellation.
47. Pursuant to Article 4(4) of the 2014 Law, the following types of mineral licence are available to be granted to operators:

“mineral licences that may be granted under this law shall be the following:

- a. an exploration licence;*
- b. a small-scale mining licence;*
- c. a large-scale mining licence;*

⁴⁰ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31 referring to E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971* (23 March 2013) (**Exhibit C-143**).

⁴¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 32.

⁴² Claimants Reply, at paras. 20, 95, 214-215.

⁴³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31.

⁴⁴ *Summary on Performance of Large Mining and Exploration Companies* (**Exhibit C-141**).

⁴⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 33 referring to *Summary on Performance of Large Mining and Exploration Companies* (**Exhibit C-141**).

*d. an artisanal mining licence;*⁴⁶

48. Article 11 sets out the duration of these licences, and provides that:

“A small-scale mining licence shall be valid for an initial period not exceeding fifteen (15) years or the estimated life of the ore body proposed to be mined, whichever is shorter. Such a licence may be renewed for further periods each not exceeding ten (10) years.

*A large-scale mining licence shall be valid for an initial period not exceeding twenty-five (25) years or the estimated life of the mineral ore body proposed to be mined, whichever is shorter. Such a licence may be renewed for further periods each not exceeding fifteen (15) years.”*⁴⁷

49. Articles 25 to 27 set out the obligations of the Government and the concessionaire following suspension or cancellation of a mineral licence granted under the 2014 Law.⁴⁸ Pursuant to Article 25, the Minister is required to give thirty days’ notice of cancelling or suspending a licence, and in such notice shall require the holder to remedy any breach of the conditions of the mining licence or any violations of the mining law or other applicable laws. Pursuant to Articles 26 and 27, the holder of the mineral licence is required to provide the Minister with a full register of assets which the licence holder intends to remove or leave on the site, and notify the Minister of any hazards. It must also deliver to the Minister the records which it is required by the 2014 Law to maintain, including all results, interpretation, data and information pertaining to the exploration and mining of minerals under the licence. However, none of these provisions apply to the licenses granted to NRD because (a) they had already expired when the 2014 Law came into force; and (b) in any event these provisions of the 2014 Law only apply to mineral licences granted under that law.

B. Rwanda did not solicit Investments from the Claimants

50. In the Reply, the Claimants maintain that the Respondent solicited the *Claimants’* investment. That is incorrect. Further, the Respondent did not solicit *Mr. Marshall* to invest in Rwanda: on the contrary, it is clear from the documentary record that it was *Mr. Marshall* who approached Rwanda.⁴⁹ The true events, as evidenced by the documents, are set out below.

⁴⁶ Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014) published in the Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**), at Article 4(4).

⁴⁷ *Ibid.*, (**Exhibit CL-002**), at Article 11.

⁴⁸ *Ibid.*, (**Exhibit CL-002**), at Article 2(27) where a “mineral licence” is defined as “a document authorizing exploration, artisanal mining, small-scale mining and large-scale mining in accordance with this law”.

⁴⁹ See, for example, Letter from the Ministry of Finance and Economic Development (M. Twanirwa) to R. Marshall, *Investments plan and action plan* (29 August 2005) (**Exhibit C-138**), which states that Mr. Marshall had expressed interest in the mining industry and made a “proposition” to the Ministry of Finance and Economic Development.

1. Mr. Marshall's dealings with RIEPA/RDB

51. On 29 August 2005, the Ministry of Finance and Economic Development wrote to Mr. Marshall in response to a solicitation from him. In that letter, the Ministry thanked Mr. Marshall for expressing interest in the mining industry and said that the Government was looking for reliable partners to enter into a joint venture with REDEMI, the precursor to the OGMR, in order to develop the mining industry.⁵⁰
52. The Claimants rely on this letter in support of their claim that Rwanda solicited Mr. Marshall, including promising that if he formed a company and invested in Rwanda's mining sector, he would receive a long-term licence. However, the letter:⁵¹
- 52.1. does not solicit Mr. Marshall - to the contrary, it suggests that Mr. Marshall expressed interest in the mining industry having made a "*proposition*" to the Ministry;
 - 52.2. asks Mr. Marshall on the basis of his "*proposition*" to "*send the offer of [his] company*" setting out his "*identification (certified copies), [his] experience in the mining industry, [his] investment plan and [his] action plan*" so that it may be considered further; and
 - 52.3. refers to the potential of a joint venture with a Government partner, and does not state the duration of the agreement, let alone refer to long-term licences.
53. Documents disclosed by the Claimants indicate that Mr. Marshall made an unsolicited approach to Rwanda with an investment proposal and that the August 2005 letter from the Ministry of Finance and Economic Development was sent in response to his proposal. In particular, emails exchanged between Mr. Marshall, Ms. Mruskovicova and Mr. Lambert Mucyo of RIEPA in early August 2005, explain that Mr. Marshall had put together a joint venture proposal called 'Way Industry' which he planned to send to the Ministry of Commerce and RIEPA.⁵² By 24 August 2005 with Mr. Marshall discussions had moved on to how and to whom the proposal would be sent.⁵³ Mr. Marshall's proposal must have been sent shortly after this exchange given that Rwanda wrote to Mr. Marshall on 29 August 2005 requesting a formal proposal.
54. Emails from February 2006 also confirm that it was Mr. Marshall (along with Ms. Mruskovicova) who approached Rwanda – in particular, in an email to Mr. Alexis Ruzibukira (who was at the time the Director-General for Industry and SMEs at the Ministry of Trade and Industry), Ms. Mruskovicova states: "*in the case that our*

⁵⁰ *Ibid.*, (Exhibit C-138).

⁵¹ *Ibid.*, (Exhibit C-138).

⁵² See Email from R. Marshall to L. Mucyo and E. Mwiza, *Draft Joint Venture* (5 August 2005) (Exhibit R-098).

⁵³ Emails between Z. Mruskovicova, R. Marshall, L. Mucyo, *Addresses* (22 August 2005) (Exhibit R-099); Emails between L. Mucyo, Z. Mruskovicova, R. Marshall, *Addresses* (24 August 2005) (Exhibit R-100).

investment proposal is interesting to you I hope that we will receive your comments regarding both proposal soon ...”.⁵⁴

55. The Claimants also rely on an email from Mr. Mucyo in December 2006,⁵⁵ which they wrongly claim is evidence that Mr. Marshall expected to receive a long-term licence. They allege that Mr. Mucyo provided Mr. Marshall with a draft contract for the Bisesero concession, and that he indicated that Mr. Marshall would be guaranteed to receive a long-term licence if he invested and initially obtained a short-term licence. However, this correspondence is entirely misrepresented by the Claimants in their submissions, and the key contention that Rwanda told Mr. Marshall a long-term licence was guaranteed upon expiry of short-term licences is entirely unsupported in any of the documents relied upon by the Claimants. As to this:

55.1. Mr. Mucyo did not provide Mr. Marshall with a draft licence for Bisesero – he merely stated that he sent him an example of *“the type of contract other [sic] investors had signed”*. The Claimants have failed to provide the attachment to the email, so it is unclear whether any exemplar contract was in fact sent.

55.2. Mr. Mucyo’s statements amount to no more than an indication, following Mr. Marshall’s expression of interest, that the Bisesero concession was available. This is clear from wording that is underlined in the email: *“If you still interested to invest in mining”*.

55.3. Mr. Mucyo does not refer to the term of any licence that might be granted. There were no assurances that a long-term licence was guaranteed.

55.4. As explained in more detail at paragraph 320.1 below, the Claimants omit to mention that although Mr. Mucyo was an early business partner of Mr. Marshall with respect to BVG’s Bisesero concession, he resigned because he was not paid by Mr. Marshall, BVG was not fulfilling its contractual obligations, and Mr. Marshall had fabricated stories about him.⁵⁶

55.5. In any event, this correspondence relates to the Bisesero concession which is not at issue in this Arbitration.

56. Additionally, Mr. Gatara states that:

“... the four-year concession agreements entered into with investors in around 2006, including the Contract, did not provide any automatic guarantee or certainty that long-term agreements would be entered into. The national orientation was to encourage investors to mine in Rwanda but based on the condition that they would undertake effective, professional exploration with a view to developing

⁵⁴ Emails between Z. Mruskovicova and A. Ruzibukira, *What is new?* (28 February 2006) (**Exhibit R-101**).

⁵⁵ Claimants’ Reply, at para. 7; Second Supplemental Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 19; Email from L. Mucyo to R. Marshall, *Bisesero Mining Concession* (12 December 2006) (**Exhibit C-139**).

⁵⁶ Letter from Lambert Mucyo to the Police/CID, *False allegations by William Quam and Roderick Marshall* (23 June 2010) (**Exhibit R-102**).

industrial mining opportunities. These conditions were frequently, as was the case with NRD, captured in the four-year mining exploration agreements entered into in around 2006.

There has never been any legislation or regulation which guaranteed that automatically a long-term licence would be granted following a short-term licence. Any long term licence must be applied for, and the potential licensee must be able to prove to the government that they have met both the conditions of the original licence, and that they are appropriately positioned to be granted a long-term licence. It is not enough simply to demonstrate that the original four years have passed. If that were the only requirement then it would undermine the Government's attempts to professionalise and industrialise Rwanda's mining sector by only granting long-term licenses to investors with the financial resources, experience, technical and management capabilities to develop and manage large-scale, long-term, professional mining operations. In reality, as was understood in the sector, the four-year period was to allow licensors to prove that they should be granted a long-term licence."⁵⁷

57. Accordingly, it is clear that the allegation that a representation was made to Mr. Marshall that long-term licences were guaranteed has been invented for the purposes of this Arbitration. No such representation or promise was ever made.

2. Mr. Marshall's dealings with Ngali Mining and the Rwanda Military

58. The allegations at paragraph 4 of the Reply in relation to services purportedly rendered to Ngali Mining and the Rwandan Military, take the Claimants no further in relation to the allegation that Rwanda solicited the Claimants' investment via Mr. Marshall. Not only are the statements made irrelevant to the issues before this Tribunal, they also misrepresent the nature of the services that were allegedly provided.
59. In relation to the services allegedly provided for Ngali Mining,⁵⁸ the evidence of Mr. Emmanuel Muvara, company secretary and legal adviser to Ngali Holdings Ltd ("**Ngali Holdings**") since 2013 is that Mr. Marshall's involvement was minimal. In particular:
- 59.1. On or around 1 December 2014, Mr. Muvara was asked to review a draft cooperation agreement between Ngali Holdings (and not Ngali Mining as Mr. Marshall suggests) and Istrochem Explosives.⁵⁹ The draft was provided to Ngali Holdings by Mr. Marshall. As Mr. Muvara explains:

"I approved the draft, had it signed by the CEO of Ngali Holdings Ltd and sent it back to Mr. Marshall. That was the last I heard of it and I

⁵⁷ Supplemental Witness Statement of Mr. Francis Gatara dated 29 May 2020, at paras. 9-10.

⁵⁸ Claimants Reply, at para. 4; Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 15.

⁵⁹ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 6.2; Emails between R. Marshall, A. Nyamvumba and E. Muvara, *draft agreement* (November-December 2014) attaching *Cooperation Agreement* signed by Ngali Holdings (**Exhibit C-133**).

do not know if it was ever signed by Istrochem Explosives or if the agreement was ever put into practice.”⁶⁰

59.2. Mr. Muvara is not aware that Ngali Holdings was advised by Mr. Marshall in relation to *“the acquisition of helicopters, helicopter training equipment, a helicopter pilot training facility, contracts regarding such acquisitions, as well as a mobile hospital for its U.N. peacekeeping forces mission”*. As explained by Mr. Muvara:

“Ngali Holdings Ltd is a private limited liability company whose mission is not running UN peacekeeping missions and as such do not have any forces (as alleged by Mr. Marshall). If Ngali Holdings Ltd had obtained any of the advice Mr. Marshall alleges he provided, I would have known about it in my role as company secretary and legal adviser.”⁶¹

59.3. Mr. Marshall alleges that he was involved in setting up a special economic zone between Rwanda, Burundi and Uganda⁶² Mr. Muvara has never heard of a special economic zone between Rwanda, Burundi, the Democratic Republic of Congo and Uganda, and if it ever existed Ngali Holdings has never been party to it.⁶³ Similarly, Mr. Gatare is not aware of the special economic zone alleged.⁶⁴

60. Mr. Marshall also alleges that he provided substantial support to the Rwandan military, hosting delegations and organising meetings in Europe for Rwandan officials,⁶⁵ and pro bono work for RIEPA (now the RDB).⁶⁶ The Claimants submit **C-132** in support of the alleged pro bono relationship.⁶⁷ Mr. Gatare, who was the CEO of RIEPA at the relevant time, states that he is not aware of the alleged assistance provided by Mr. Marshall to the Government, or the alleged relationship between the Government and Mr. Marshall,⁶⁸ and that if Mr. Marshall was providing support to the government, he would have been aware of it.⁶⁹ Mr. Gatare states that he doubts the legitimacy of C-132, because:

60.1. He was not informed of the relationship by Mr. Nkurunziza, when he replaced him as head of RIEPA. If the relationship existed, Mr. Gatare would have been informed of it and involved in the ongoing execution of it.⁷⁰

⁶⁰ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 6.2 referring to Emails between R. Marshall, A. Nyamvumba and E. Muvara, *draft agreement* (November-December 2014) attaching *Cooperation Agreement* signed by Ngali Holdings (**Exhibit C-133**), at page 1.

⁶¹ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 6.3.

⁶² Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 15.

⁶³ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 6.1.

⁶⁴ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 33.

⁶⁵ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 15.

⁶⁶ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 14.

⁶⁷ Engagement Letter from Jillson and Marshall Associates (31 December 2004) (**Exhibit C-132**).

⁶⁸ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 33.

⁶⁹ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 34.

⁷⁰ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 34.1.

- 60.2. The document does not bear an official stamp, and it is highly unlikely that any official document produced in Rwanda in 2004 would not bear an official stamp.⁷¹
- 60.3. Mr. Marshall states that the document was signed on 12 January 2004, but RIEPA was not established until September 2004.⁷²
61. Additionally, Mr. Marshall alleges that he had been involved with the Government for some time, including assisting RIEPA in relation to dealings with investment banks and accounting firms in obtaining financing for energy generation facilities and food processing plants⁷³ and in negotiations between Rwandan-owned companies and Slovakian companies. Even if, which for the avoidance of doubt is disputed and as to which the Claimants are put to strict proof, these claims are true, any legal or other assistance provided by Mr. Marshall to Rwanda would plainly be unrelated to the privatisation of the mining industry in Rwanda, and is of no assistance to the Claimants in their claims.

3. NRD's dealings with OGMR

62. The OGMR's position has always been that the granting of long-term contracts would "*depend on the companies complying with the agreement signed*",⁷⁴ and that the possibility of obtaining long-term contracts was only "*theoretical*" absent such compliance.⁷⁵ Further, the process was never "*a mere formality*" as suggested by the Claimants.⁷⁶ As former Minister Imena explains: "*obtaining a licence of any kind has never been a mere formality either for new applicants or for companies applying to renew their licences.*"⁷⁷ There is nothing remotely surprising about that. Indeed, were the Claimants correct (which they plainly are not) that the granting of long-term licences was automatic regardless of the mining operator's performance over the four-year period of the initial licences, and/or regardless of evidence of its expertise and/or financial resources, and/or the quality of its studies and/or plans and/or applications, it would fundamentally undermine Rwanda's policy of professionalising and industrialising mining.
63. As explained in a publicly available report about the Rwandan Mining Sector published in February 2012 but prepared on the basis of interviews conducted with representatives of the Government including Mr. Dominique Bidega (witness for the Claimants) and Mr. Fidele Uwizeye (MINIRENA's Chief Policy Advisor at the time), during November 2011:

"Companies looking to get into mining in Rwanda must first apply for a mining permit. At the time of research, Rwanda has the policy of giving out four-year

⁷¹ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 34.2.

⁷² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 34.3.

⁷³ Engagement Letter from Jillson and Marshall Associates (31 December 2004) (**Exhibit C-132**).

⁷⁴ Minutes of the OGMR Board Meeting held on 22 April 2010 (**Exhibit R-103**).

⁷⁵ Decisions taken by the OGMR Board of Director's at meeting held on 22 April 2010 together with Minutes of the OGMR Board Meeting held on 31 December 2009 (**Exhibit R-104**).

⁷⁶ See Claimants' Reply, at para. 100; Supplemental Witness Statement of Mr. Kevin Buyskes dated 16 August 2019, at para. 5.

⁷⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 8.

*concession permits to companies looking to exploit a mining area. Fidele Uwizeye explains that with these permits companies can exploit their mines, but that they are also required to continue exploration, calculate reserves and carry out a feasibility check, before being eligible to apply for a long-term permit.*⁷⁸

64. This is consistent with the 2010 Mining Policy, which made clear that concessionaires would not be granted 30-year licences if they had not complied with the requirement to industrialise the mining operations and/or had not carried out a sufficiently comprehensive resource evaluation. The Claimants' assertions at paragraph 10 of the Reply that, "*the 2010 Policy informed investors and potential investors who read the Policy that there were two options for long term licences investors may receive*" and that it "*did not discuss a possibility that an investor could wind up with no ownership of a long term license*"⁷⁹ ignores the clear statement on the same page of the 2010 Policy which states:

*"Without such proof of effective exploration, 30 year licences will not be granted and without proof of the ongoing development of such resource statements companies will not be given extensions to their 4 year licences."*⁸⁰

65. The Claimants also allege at paragraph 9 of the Reply, that the OGMR "*routinely*" assured NRD that it was entitled to long-term licences. They refer to correspondence from the OGMR in July 2009 stating that NRD's Licences are "*expected*" to be converted into long-term licences.⁸¹ However, they fail, presumably deliberately, to mention that this expectation was expressly subject to the condition that economic deposits were confirmed. The 20 July 2009 letter from the OGMR, on which the Claimants' rely, states that four-year permits "*are expected to be converted into long term concessions of 30 years when there is success in defining economic deposits*".⁸² It is clear from this letter that four-year licences would only be converted to long-term licences if the concessionaire was able to provide evidence of the economic viability of the mineral deposits, following completion, and positive evaluation, of a feasibility study. In any event, and regardless of the omitted language, a statement of an expectation plainly does not constitute a guarantee and is consistent with the Respondent's position that receipt of long-term licences was contingent upon a positive evaluation of the feasibility study.

⁷⁸ Jasper van Teffelen, *The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice* (February 2012) (**Exhibit R-097**), at page 44.

⁷⁹ See the Claimant's Reply, at para. 10 referring to Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2010) (**Exhibit C-015**), at page 31.

⁸⁰ Government of Rwanda, Ministry of Forestry and Mines, *Mining Policy* (13 January 2010) (**Exhibit C-015**), at page 31.

⁸¹ See the Claimants' Reply, at para. 9, referring to Letter from M. Biryabarema to Director of National Land Center (20 July 2009) (**Exhibit C-032**).

⁸² Letter from OGMR (M. Biryabarema) to Director of National Land Center, *Application for a land lease by Natural Resources Development Rwanda LTD (NRD)* (20 July 2009) (**Exhibit C-032**).

The same can be said in relation to the letter from Minister Kamanzi dated 13 September 2012.⁸³

C. The ownership structure of the Claimants and NRD

1. The alleged Cooperation Agreement

66. NRD is alleged to have entered into a cooperation agreement with BVG for the management of the Bisesero concession on 1 November 2010 (the “**Cooperation Agreement**”), under which NRD would conduct due diligence and manage the operations of Bisesero for BVG, under its direction and instruction.⁸⁴ However, the Cooperation Agreement was allegedly entered into a mere seven weeks before NRD was acquired by Spalena, a company which has the same investor as BVG, Mr. Marshall. At that time, NRD was owned by HC Starck GmbH, through the vehicle of HC Starck Resources GmbH. Mr. Anthony Ehlers was the Managing Director at the time. He states that he was unaware of the Cooperation Agreement in 2010, and saw it for the first time in preparing his Supplemental Witness Statement.⁸⁵ He clarifies that although his name appears on the Cooperation Agreement, the signature is not his and he did not sign the document.⁸⁶ Mr. Sindayigaya, NRD’s accountant at the relevant time, also states that he had never seen the Cooperation Agreement before it was shown to him in the course of preparing his Supplemental Witness Statement and that he was never given any instructions as to its existence or implementation in 2010.⁸⁷
67. Accordingly, Rwanda does not accept that the Cooperation Agreement is a genuine contemporaneous document and puts the Claimants to proof in relation to the same. The Respondent’s submissions in relation to the Cooperation Agreement are made without prejudice to this.
68. Under the alleged Cooperation Agreement the Claimants allege that NRD was required to [REDACTED]
[REDACTED]⁸⁸ Explicitly, BVG would provide [REDACTED]
[REDACTED]⁸⁹ The Claimants allege that this provision of funds was a “loan”⁹⁰ from BVG to NRD but have provided no evidence of such an arrangement or provision of funds. Mr. Ehlers’ evidence is that no such payment was made.⁹¹ Further,

⁸³ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

⁸⁴ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**).

⁸⁵ *Explanatory Note on NRD* (**Exhibit R-017**).

⁸⁶ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 23.1, pointing to the fact that the Cooperation Agreement bears a very different signature to his usual signature.

⁸⁷ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 8.

⁸⁸ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**), at clause 2.

⁸⁹ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**), at clause 2.

⁹⁰ Claimants’ Reply, at para. 16.

⁹¹ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 23.1.

the Cooperation Agreement simply states [REDACTED].⁹² There is no stipulated requirement to repay, repayment terms, duration, default provisions or penalties, or provision for the payment of interest. The [REDACTED] could equally have been a loan as alleged, or a payment for services, an investment, or a gift. The nature of this transaction as a matter of law will be analysed in further detail below at Section V.B.4, paragraphs 481 to 496.

69. The Cooperation Agreement also provides that NRD would provide further equipment, and NRD would manage operations at the Bisesero concession.⁹³ The net profits of sale of minerals produced was agreed to be evenly split between the parties to the agreement.⁹⁴

2. The purchase of NRD by Spalena for an alleged [REDACTED]

70. On 23 December 2010, Spalena acquired 85% of the shares in NRD from HC Starck GmbH for a mere [REDACTED]. The Claimants allege – despite this not being reflected in any supporting evidence – that the consideration for the transaction included the [REDACTED]

Specifically, Mr. Marshall alleges that *“Prior to BVG’s purchase of NRD, NRD violated the terms of the cooperation agreement by stealing or not accounting for minerals stored on the Concession and using the Concession for smuggling from the DRC. This represented a significant liability of Starck/NRD of approximately [REDACTED]*

*[REDACTED]”*⁹⁵ The Claimants have produced no documentary evidence – contemporaneous or otherwise – in support of this claim.

71. Mr. Marshall fails to explain how the [REDACTED] could have arisen in relation to the approximately 7-week period between the signing of the Cooperation Agreement and 23 December 2010, the date the Share Purchase Agreement was signed. That suggestion is risible on its own terms, but is exposed as even less credible in the light of the evidence of Mr. Ehlers and Mr. Sindayigaya about the lack of mining activity at Bisesero at the time:

71.1. Mr. Ehlers recalls what he saw at Bisesero in late 2010:

*“From what I could see, there was no mining being conducted at the concession at all. Nor was there any investment visible – there were no operating vehicles, no processing facilities, and no infrastructure investments, such as road improvement, seemed to have been made.”*⁹⁶

⁹² Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**), at clause 2.

⁹³ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**), at clauses 1 and 3.

⁹⁴ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**), at clause 5.

⁹⁵ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 5.

⁹⁶ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 22.

- 71.2. Mr. Sindayigaya's evidence is also that no mining was taking place at Bisesero in 2010.⁹⁷
72. In any event, the terms of the Share Purchase Agreement conflict with and undermine the Claimants' assertion that NRD had a liability to BVG. In particular:
- 72.1. The agreement states at clause 2(1) that the purchase price of NRD is [REDACTED].⁹⁸ The alleged liability to BVG is not stated to be part of the purchase price at all.
- 72.2. The agreement states at clause 3(1)(m) that the seller warrants that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁹⁹
73. The assertion is contradicted by further contemporaneous records. Mr. Sindayigaya states that *"if BVG was owed any sum by NRD, especially the huge sum of [REDACTED] claimed, this would have been recorded in NRD's list of creditors – but it was not"*,¹⁰⁰ referring to a statement of NRD's creditors in 2010, audited by KPMG.¹⁰¹
74. Further, the statement that the liability was used as leverage and that BVG was happy to write off its claim against Starck and assign it to Spalena on the basis that this *"preserved the value of [BVG's] investment"* is nonsensical. Even if the allegations are true and the alleged liability existed (which is plainly not the case), there is no basis for considering that any funds received through misappropriation or theft would have been retained in the local vehicle, NRD, instead of being transferred through HC Starck's corporate chain. The fact that Mr. Marshall refers to the alternative to this alleged mechanism as *"a claim against Starck"*¹⁰² is telling. The suggestion that this alleged liability was [REDACTED]
[REDACTED] as alleged in the Reply at paragraph 17, is nonsensical. It is impossible to see how any equitable interest could have arisen.

3. BVG's alleged sale of its assets in exchange for an "ownership stake" in Spalena

75. The Claimants further claim that BVG *"sold all of its assets, totalling USD [REDACTED] to Spalena in exchange for an ownership stake in Spalena"*. They provide resolutions signed by Mr. Marshall as director of BVG and of Spalena, dated 27 March 2012, stating that the parties will take any and all necessary actions for the sale and purchase of the assets to Spalena, and for BVG to be deemed a party pursuant to Spalena's Amended Articles of

⁹⁷ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at paras. 9-10.

⁹⁸ Share Purchase Agreement between HC Starck and Spalena (23 December 2010) (**Exhibit C-068**), at page 6.

⁹⁹ *Ibid.*, (**Exhibit C-068**), at page 36.

¹⁰⁰ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 10.

¹⁰¹ NRD, List of creditors 2010 (13 February 2012) (**Exhibit R-235**).

¹⁰² Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 6.

Association and Memorandum of Operating Agreement.¹⁰³ Again, the Respondent does not accept that this document is genuine.

76. Mr. Ehlers states that the claim is not consistent with what he saw at BVG's Bisesero site when he visited it in late 2010:

*"I certainly do not recall ever seeing the assets set out in **exhibit C-123**. In fact, I recall my site manager at Mara, Mr. Salomon Ntahomvukiye, who had managed the State company that operated Bisesero prior to BVG, telling me that the concession had deteriorated significantly from when the State ran the mining operations."*¹⁰⁴

77. Similarly, Mr. Sindayigaya states:

*"The asset list in **C-123** appears to be fabricated. It certainly does not reflect the actual assets which I observed on Bisesero's sites. Despite several visits to Bisesero's two abandoned mining sites and overnight stays in BVG's transit houses in Nyamishaba and Kibuye town, I did not see any of the assets listed in **C-123**, other than two containers. These two containers were kept at BVG's Nyamishaba house, which was rented from the medical school, and I understood that the containers were used to store spare parts and small tools. I also saw one old LADA NIVA (a Russian 4x4 vehicle) parked at the premises. There were certainly none of the trucks that are listed, or any heavy mining equipment. Nor were the assets ever moved to NRD's concessions in 2012 as claimed."*¹⁰⁵

78. However, even if **C-123** is a genuine document (which is not accepted), satisfactory evidence of the consequences of this transaction on the ownership of Spalena has never been provided. The Claimants have not set out the nature of the ownership stake received and have not provided share transfer documents or any other records.
79. Additionally, how any liability at all could have arisen from the allegation that Starck via NRD was using Bisesero for smuggling from the DRC is wholly unexplained. The allegations are pure invention.

4. The Arbitral Decision

80. The Arbitral Decision of 17 May 2013 in the dispute between Mr. Ben Benzinge and NRD,¹⁰⁶ and the shareholder dispute that led to it, is discussed in detail in the Respondent's Counter-Memorial at 182 to 186 and below at section VI.B.3 and is not

¹⁰³ Resolution by Unanimous Written Consent of the Sole Director of BVG (27 March 2012) (**Exhibit C-123**); Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company (27 March 2012) (**Exhibit C-124**).

¹⁰⁴ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020 at para. 22.

¹⁰⁵ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 12.

¹⁰⁶ *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal (17 May 2013) (**Exhibit R-013**).

rehearsed here. For the reasons set out below, as a matter of Rwandan Law, the Arbitral Decision is binding as between the parties to those proceedings.

81. The Arbitral Decision held that NRD Holding GmbH and HC Starck GmbH became shareholders in NRD, and Mr. Marshall became Managing Director of NRD, unlawfully.¹⁰⁷ The Arbitrator also declared that Ms. Mruskovicova and Mr. Marshall be dismissed as members of the Board of Directors of NRD.¹⁰⁸ Further, the Arbitrator held that various decisions taken during the meetings of 11 October 2011, 28 October 2010, and 10 December 2008 were unlawful and must be annulled.¹⁰⁹
82. The effect of the Arbitral Decision was that:¹¹⁰
 - 82.1. The legal shareholders of NRD were Mr. Benzinge and Mr. Joachim Christopher Zarnack and Mr. Jens Christopher Zarnack (the “Zarnacks”).
 - 82.2. The appointments of Ms. Mruskovicova and Mr. Marshall to the Board of Directors of NRD, and Mr. Marshall as Managing Director, was void and accordingly they did not hold those positions. The effect of this decision, as no replacements were provided, is that the board reverts to the composition that it had before the appointment of Ms. Mruskovicova and Mr. Marshall.
 - 82.3. Mr. Benzinge had authority to act on behalf of NRD.
83. The Arbitral Decision was binding as between the parties. It did not constitute or involve any adjudication over the ownership of the shares themselves or purport *actually* to transfer the shares in the company as opposed to determining the parties’ rights and duties relating to the shares. Consequently, it was enforceable between the parties as to their ownership of the shares, but not enforceable *in rem*. Challenges to the Arbitral Decision, made on procedural grounds, were made and rejected before the High Court, and the Supreme Court of Rwanda.¹¹¹ The consequence of this is that the Arbitral Decision is binding as between the parties, and the Claimants’ complaints about the substance of the decision are irrelevant.¹¹²
84. The Claimants state that the Arbitral Decision is “*fundamentally flawed*”.¹¹³ However, as set out by Mr. Mugisha in his second Expert Report:

“NRD did not bring a challenge of the Arbitral Decision on those grounds at the time, when they had the opportunity to do so. The Arbitration Law limits the circumstances in which an award can be set aside and, having failed to have the

¹⁰⁷ *Ibid.*, (Exhibit R-013), at pages 6 and 11.

¹⁰⁸ *Ibid.*, (Exhibit R-013), at page 10.

¹⁰⁹ *Ibid.*, (Exhibit R-013), at page 11.

¹¹⁰ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 45-47.

¹¹¹ See *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Commercial High Court, Kigali, RCOMA 0269/13/HCC (23 September 2013) (Exhibit R-014) and *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Supreme Court, Kigali, RCOMA 0017/13/CS (2 May 2014) (Exhibit R-015).

¹¹² Expert Report of Richard Mugisha dated 24 May 2019, at para. 45.

¹¹³ Claimants’ Reply, at para. 24.

decision set aside, the Arbitral Award stands. Arbitral awards are binding unless they are challenged through the appropriate means provided for in the Law N° 005/2008 of 14 February 2008 on arbitration and conciliation in commercial matters (“Arbitration Law”).”¹¹⁴

85. The Claimants allege that a document titled “Summary of the Resolutions of NRD Cancelled by the Court” sets out the RDB’s position on the Arbitral Decision. Mr. Gatare has reviewed the document, and states:

“I have been shown a copy of a document headed “SUMMARY OF THE RESOLUTIONS OF NRD CANCELED BY THE COURT” which the Claimants’ allege was prepared by a lawyer at RDB.¹¹ The document is not on RDB paper; it is unsigned and the only link it has to RDB is a handwritten note at the top of the document which claims that it is the “Analysis of RDB State Attorney”.

I do not believe the document was written by Mr. Sangano or anyone else linked to the RDB. As such, I will not comment on the content of that note. As far as I can see, it was generated internally by NRD. There is no credibility to the assertion that it was drafted by the RDB. If it had been generated by the RDB, then consistent with RDB policy and procedure it would have been prepared on RDB headed paper and it would have been signed by the individual who prepared it.

I have been in contact with Mr. Sangano, who stated that he did not draft the document, and did not have any contact with NRD or Mr. Marshall in 2014, other than if they were received as normal clients in his office. He is unaware of the circumstances in which the document was prepared and does not know who added his name to the document. Mr. Sangano was not the RDB State Attorney in 2014; he did not attain that position until 2016.”¹¹⁵

86. Accordingly, the Arbitral Decision determined that the transfer of shares from the Zarnacks to H.C. Starck GmbH was improper and illegal, and the shareholding reverted to Mr. Benzinge. The Arbitral Decision did not effect the transfer of the shares, but was binding as against the parties and required them to effect that transfer.

D. The Claimants’ investments in Rwanda

87. The Claimants paint a misleading picture about their purported investments and throughout their pleadings, frequently attribute investments made by NRD, or prior investors in NRD, to themselves. In particular, the Claimants’ assertion in the heading at Section I.C of the Reply that “Claimants [i.e. BVG and Spalena] invested at least \$21 million in Rwanda” is demonstrably false and entirely misleading. What the Claimants actually mean, is that NRD, through its prior investors, invested USD \$21 million in Rwanda, at most (albeit that the Respondent does not accept this figure as being remotely accurate). As already explained in Section II.D of the Respondent’s MPO, “the

¹¹⁴ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 37.

¹¹⁵ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at paras. 29-31.

investments that the Claimants assert they made were all made by others prior to December 2010".¹¹⁶

88. The investments, or lack of, made by NRD, both before and after its acquisition by Spalena in December 2010 have been explained in the Respondent's Counter-Memorial. In particular:
- 88.1. during the Zarnack period (i.e. between the signing of the Contract and early 2008) little to none of the USD \$40 million investment pledged by the Zarnacks at the time the Contract was made;¹¹⁷
 - 88.2. during the Starck period (i.e. once Starck took control in March 2008 until late December) they made some modest investments at the Nemba site and some investments in a plant at the Rutsiro site, but due to the failure of the plant NRD nearly ended up bankrupt;¹¹⁸ and
 - 88.3. after the acquisition by Spalena (i.e. from December 2010 onwards) NRD was run as a "briefcase" company, predominantly from Mr. Marshall's home,¹¹⁹ with most transactions occurring in cash,¹²⁰ and with no investments whatsoever being made into it by Spalena (or anybody else for that matter).¹²¹
89. The documents submitted with the Reply support the Respondent's position as set out in paragraph 88 above. In particular, the Claimants' contention that *they* invested at least US\$21 million by January 2013 is purportedly supported by a table set out in **C-054** which is a summarised copy of the NRD expenditure for 2007-2010 as set out in the November 2010 Application,¹²² but with the addition of an estimated EUR €6,000,000 (or US\$7,928,880) for "*Foreign Consulting and Engineering [est.]*".¹²³ Given the November 2010 Application was prepared well before the Claimants had any involvement with NRD it is unclear how they claim this to be an amount *they* have invested. Further, they have given no explanation for the "*Foreign Consulting and Engineering*" figure or how this can be said to constitute an investment of the Claimants. As explained by former Minister Imena:

"I was not aware of NRD hiring any significant number of foreign consultants or engineers to justify that figure – I certainly never met such people and Mr. Marshall never mentioned them to me. I believe it is likely that this figure, in large part, represents an amount that Mr. Marshall decided to include as

¹¹⁶ Claimant's Memorial, at para. 110.

¹¹⁷ Respondent's Counter-Memorial, at paras. 70-72.

¹¹⁸ Respondent's Counter-Memorial, at paras. 73-76.

¹¹⁹ Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019, at para. 9.

¹²⁰ Respondent's Counter-Memorial, at paras. 108.

¹²¹ Respondent's Counter-Memorial, at paras. 77-95 and 101-116.

¹²² See Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at pages 99-101.

¹²³ Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

*representing the value of his services to NRD, presumably in order to try and persuade the Government that NRD had made a substantial investment.*¹²⁴

90. Similarly, Mr. Sindayigaya, NRD's Senior Accountant between 2010-2012, states:

"NRD's "total investment estimation for the five last years (2007-2012)" (estimate)¹²⁵ states that the estimated foreign consulting and engineering costs are "[4,848,000,000]" Rwf. This figure is grossly exaggerated. The only foreign consultant who worked for NRD for any decent period of time and who attracted a significant salary was Mr. Fink, a German engineer who built the plant at Rutsiro. He spent approximately two years at Rutsiro, leaving at the end of 2010. I recall that paying his living allowances was always a priority even though NRD was struggling financially. There were no other permanent foreign consultants employed at NRD during my years at the company, and I do not recall any other consultants being hired after 2010. Although Mr. Marshall did bring in some Slovakian staff in 2011, they worked for Bayview and their task was primarily to construct the clinic at Bisesero – they did almost no work for NRD".¹²⁶

91. These statements by former Minister Imena and Mr. Sindayigaya are consistent with the evidence of Mr. Ehlers.¹²⁷ Mr. Ehlers explains:

"[D]uring my time at NRD I do not recall that we ever employed any foreign consultants or engineers aside from the engineer who constructed the plant infrastructure at Rutsiro. Further, I was not aware of any foreign consultants or engineers being hired before my time apart from a geologist at Nemba and another who provided a provisional assessment of the ore body at Rutsiro."

92. The Claimants also rely on an internal "Summary of activities, investment and plans on all NRD's concessions" between 2007-2012.¹²⁸ This document states that they had invested USD \$17.2 million by 2011.¹²⁹ The evidence of NRD's employees from the relevant period confirms that the investment figures set out in this document are significantly exaggerated, and in some cases the items alleged to be spent were not incurred at all.

93. The evidence of Professor Prosper Nkanika Wa Rupiya, NRD's Chief Geologist between February 2008-February 2012, is that many of the activities listed as having taken place between 2008-2011 in this internal summary table did not occur – meaning that the expenses or "investment" claimed with respect to each activity could not have been incurred. In particular:

93.1. With respect to the investments alleged to have been incurred in 2008:

¹²⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 21.

¹²⁵ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

¹²⁶ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 6.2.4.

¹²⁷ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 14.1.

¹²⁸ Summary of activities, investment and plans on all NRD's concessions (**Exhibit C-147**).

¹²⁹ Summary of activities, investment and plans on all NRD's concessions (**Exhibit C-147**), at page 2.

- 93.1.1. The table lists “*environmental study Mara*” and “*Environmental activities*” but no environmental studies or activities were undertaken in 2008.¹³⁰
- 93.1.2. The table lists “*opening of new sites*” but no new sites were opened in 2008.¹³¹
- 93.1.3. The table lists “*building of houses and offices in all concessions*” but no new buildings were constructed in 2008.¹³²
- 93.1.4. The table lists “*donations*” but no donations were made in 2008.¹³³
- 93.2. With respect to the investments alleged to have been incurred in 2009:
- 93.2.1. The table lists “*construction of new shafts*” but no new shafts were opened in 2009.¹³⁴
- 93.2.2. The table lists “*Donations: Teams of doctors sent to Rwanda*” but no donations of this nature were made in 2009.
- 93.3. With respect to the investments alleged to have been incurred in 2011:
- 93.3.1. The table lists “*sampling at Uni of Comenius*” but no significant sampling was done in 2011.¹³⁵
94. Similarly, Mr. Ehlers describes the investment figures set out in exhibits **C-054** and **C-147** that are relied on by the Claimants as “*nonsensical*” and “*hugely exaggerated*” and states that in some cases the figures were never spent.¹³⁶ As he explains:

“I am unaware of a clinic having been constructed at any of NRD’s concessions in 2010 despite this being listed as an expense of 100,000 USD for 2010 in NRD’s internal summary document. Rather, Mr. Marshall had told me that he intended to build a clinic at Bisesero.

It is unclear to me what the processing and laboratory fees of €269,514 could have been for.

The social security fees and taxes are incorporated in the ‘salaries’ figure of €3,654,240, however my understanding was that NRD had not been paying its taxes and owed money to the Rwanda Revenue Authority.

Environmental activities are listed as being €188,725 however the only environmental activity I was aware of was the project to build diversion dams at Nyatubindi to stop the run-off into the Sebeya River.

¹³⁰ Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 11.1.

¹³¹ Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 11.2.

¹³² Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 11.3.

¹³³ Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 11.4.

¹³⁴ Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 12.1.

¹³⁵ Supplemental Witness Statement of Professor Prosper Nkankia Wa Ruipya dated 27 May 2020, at para. 14.1.

¹³⁶ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 14.

It is unclear to me what the treatment concentrate charges of €325, 668 could be for. We used to take our concentrate in bags to Phoenix Metals who would sample and buy it, paying us something in the range of \$10-12 USD per kilogram.

It is unclear to me what the rent expenditure of €220,799 could be for other than for the Kigali Main Office which is itemised separately.”¹³⁷

95. Further, as Mr. Ehlers notes, many of the items relied on such as hip replacements and payments to miners could not properly be considered “investment” in any event.¹³⁸ The only real investments made by NRD was the limited exploration work conducted, and the plant at Rutsiro, which turned out to be a failure.¹³⁹
96. Mr. Sindayigaya confirms that there was no clinic constructed at any of NRD’s concessions. Rather, *“a clinic was built at Bisesero as part of BVG’s promised corporate social responsibility initiative.”¹⁴⁰*
97. Further, Mr. Sindayigaya has explained that the investment figures relied on are entirely inconsistent with NRD’s audited financial accounts. As Mr. Sindayigaya sets out:

*“NRD was a company registered in Rwanda. This meant that it had obligations to maintain financial records in Rwanda. Historically, all investments were made by NRD’s initial owner H.C. Starck from 2007 to 2010 and all expenses incurred in Germany were charged to the local company, NRD. Consequently, all operational expenses were captured in NRD’s audited Profit & Loss statements,¹⁴¹ and all assets are recorded in its audited Property, Plant, and Equipment Report (**PPE Report**) and Balance Sheet for 2010.¹⁴² These financial statements were audited by KPMG Rwanda.*

It is clear from NRD’s audited financial statements for 2010 that the investment figures the Claimants rely on are pure fantasy – the sums are grossly overstated. For example:

The summary of activities, investment, and plans on all NRD’s concessions states that by end 2010, total investment was € 15,802,491 Euros.¹⁴³ However, NRD’s audited balance sheet for 2010 shows Shareholders Net Equity & Liabilities (being the sum of total equity and liabilities and retained earnings from the previous year) of only 4,294,463,575 Rwf. This equates to approximately € 5.5 million based on the exchange rate at the time.

¹³⁷ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 14.

¹³⁸ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 15.

¹³⁹ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 16.

¹⁴⁰ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para 6.2.3.

¹⁴¹ NRD Rwanda Ltd Profit & Loss Account for the Period Ended 31 December 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-232**).

¹⁴² NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-234**); Balance Sheet as at 31 December 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-233**).

¹⁴³ The Claimants allege that the total expenditure for the years 2007-2011 was EUR €17,201,777. They allege that EUR €1,399,286 of this was spent in 2011, bringing the total for the years 2007-2010 to EUR €15,802,491.

NRD's "total investment estimation for the five last years (2007-2012)" (estimate)¹⁴⁴ ascribes values for the cost of assets that differ from the corresponding figures in NRD's audited Property, Plant, and Equipment Report (**PPE Report**) for 2010. For example:

NRD's vehicles are valued at almost 699 million Rwf (€ 865,005 Euro) in NRD's internal estimation table for the period 2007-2012,¹⁴⁵ yet the total figures for trucks, motor vehicles and motorcycles in NRD's audited PPE Report for 2010 is only 375 million Rwf.¹⁴⁶ NRD did not acquire any further significant vehicles between 2011-2012 – rather by this stage we were selling vehicles to cover operating costs.

The Rutsiro plant is valued at 737,500,000 Rwf in NRD's internal estimation table for the period 2007-2012,¹⁴⁷ yet the corresponding figure in the audited report (construction in progress) is only 387,107,403 Rwf.

The investment figures relied on by the Claimants are not only inconsistent with NRD's audited accounts; they are also inconsistent with the reality of NRD's financial situation during the years I worked for it. Throughout this period, the company was in survival mode – the only outgoings were payments to miners, salaries, and basic operational expenses. There simply was no money available to be invested.

On several occasions, I recall Mr. Marshall telling me that if NRD was not granted licences, he would sue the government for \$ 15 million USD. I remember being surprised by this: it seemed a huge sum to be claiming given the company was an artisanal operation based on miners using traditional tools of their own (namely picks and shovels). The only substantive investment at the concessions were the Rutsiro plant (which was a commercial failure as I explained above) and a fleet of four trucks."¹⁴⁸

98. Further, the amounts the Claimants now claim that NRD invested are inconsistent with the observed development of the Five Concession Areas. As explained by former Minister Imena, "[s]taff from MINIRENA regularly visited the Concessions and reported to me that there was little investment made. With mining operations, it is not difficult to see if there has been investment made or not, because the investment shows itself in the machines and equipment you have on the ground, and improvements in infrastructure."¹⁴⁹
99. As well as regular visits and inspections at the Five Concession Areas, levels of investment were measured by submitted, monthly, quarterly and annual reports and audits

¹⁴⁴ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

¹⁴⁵ *Ibid.*, (**Exhibit C-054**), at page 5.

¹⁴⁶ NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-234**).

¹⁴⁷ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

¹⁴⁸ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at paras. 5-6.4.

¹⁴⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 20.

conducted by the RRA.¹⁵⁰ However, as former Minister Imena explains, “[t]he Claimants have not submitted any such documents to support the investment levels they say they made and, in any event, I do not recall the reports and audits for NRD bearing any reflection of the levels of investment the Claimants now claim.”¹⁵¹ Indeed, NRD’s financial accounts audited by KPMG Rwanda highlight this very disparity: the investment figures relied on by the Claimants, are in the words of Mr. Sindayigaya, “pure fantasy.”¹⁵²

100. It is also worth noting that at paragraph 36 of the Reply, the Claimants allege that Rwanda has admitted investment of USD \$3 million “at a minimum”. That is a misrepresentation of the submission made at paragraph 86 of the Counter-Memorial, which was that “the sums [the Claimants] claim to have invested are in fact the relatively modest amounts introduced as capital investment by Starck during the period 2008 to 2010 – likely no more than approximately USD \$3 million.”¹⁵³

E. NRD’s Contract and Licences

101. The Respondent, in section II.B.2 of the Counter-Memorial, has already set out in detail the nature of the Contract, the obligations under it and how it interacted with the Licences. A summary follows.

1. The Contract

102. In summary, on 24 November 2006, Rwanda entered into a contract for acquiring mining concessions with NRD (the “**Contract**”), under which Rwanda permitted NRD to occupy, explore and mine in the mining areas of Rutsiro, Mara, Sebeya, Giciye and Nemba (the “**Five Concession Areas**”).¹⁵⁴ In turn, NRD was obliged to proceed immediately to industrial exploitation of each of the Five Concession Areas which, in aggregate, covered an area of some 30,000 hectares.
103. The Contract was executed in both French and in English. Pursuant to Rwandan law, neither has precedence over the other.¹⁵⁵ The Contract provides under Article 1 that its purpose is that Rwanda authorises NRD to explore and run mining operations within the Five Concession Areas for a period of 4 years. Article 2 sets out NRD’s obligations under the Contract, including the obligation to proceed immediately to industrial exploitation in all given sites, provide progress reports, and provide evaluation reports of reserves and feasibility studies after four years.

¹⁵⁰ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 23.

¹⁵¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 23.

¹⁵² Supplemental Witness Statement of Jean Aime Sindayigaya dated 27 May 2020, at paras 6.2; NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-234**); NRD Rwanda Ltd Profit & Loss Account for the Period Ended 31 December 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-232**); Balance Sheet as at 31 December 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-233**).

¹⁵³ Respondent’s Counter-Memorial, at para. 86 (emphasis added).

¹⁵⁴ Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**).

¹⁵⁵ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 6.

104. Article 4 of the English version provides for Rwanda’s obligation to provide further mining concessions after the initial four-year period as follows: “*After positive evaluation of the submitted feasibility study Natural Resources Development Rwanda Limited will be granted the mining concessions.*”¹⁵⁶ The Contract is clear that there is no guarantee that a long-term licence will be granted, but rather that it is conditional on the compliance by NRD with its obligations under Article 2, and the positive evaluation by the Government of the feasibility study to be submitted by NRD at or before the end of the four-year term of the Contract.¹⁵⁷

2. The Licences

105. On 29 January 2007, pursuant to the obligations set out in Article 1 of the Contract for Rwanda to authorise NRD to begin mining operations in the Five Concession Areas for a period of four years, Rwanda issued five “*special small-scale mining exploration and exploitation permit[s]*” to NRD, one relating to each of the Five Concession Areas (together, the “**Licences**”).¹⁵⁸

106. The use of the special small-scale mining permits was “*specifically reserved for the holder or its authorized representative*”,¹⁵⁹ and was valid for a term of four years.¹⁶⁰ The Contract is governed exclusively by Rwandan contract law. The Licences, on the other hand, were subject to Rwandan mining law; and the granting of new or renewed licences was affected by the changing legislative framework around mining licences, set out above at paragraphs 23 to 49.

3. The remaining issues between the parties

107. There are a number of issues that remain in dispute between the parties as to the correct interpretation of the Contract:

¹⁵⁶ Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**), at Article 4 (English). There is no Article 3 in the English text, and no Article 4 in the French text, but Article 3 of the French text is broadly equivalent to Article 4 in the English, providing, in translation, “*After a positive review of the assessment and the feasibility study, Natural Resources Development Rwanda Ltd has priority for obtaining a mining title*”. The text in English differs from the French in two key ways: First, the French requires the submission of both the assessment and the feasibility study. Second, the French provides that NRD has priority for obtaining a mining title. However, contrary to the position adopted by the Claimants, both language versions of the Contract make it clear that there is no guarantee of the granting of a 30-year concession.

¹⁵⁷ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 10.2.

¹⁵⁸ Letters from the Minister of State for Water and Mines (B. Munyanganizi) to the Director of NRD (B. Benzinge) *Forwarding Ministerial Decree* (29 January 2007) for the Giciye Concession (**Exhibit C-018**), the Mara Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), and the Sebeya Concession (**Exhibit C-022**). The licences set out the legal framework in place at the time, including the law dated 27 April 1971 amending the law dated 30 January 1967 regarding the Mining Code (**Exhibit R-081**), in particular Article 64, and the Presidential Decree No. 8/07.2 dated 10 January 1974 regarding the organisation of small-scale mining exploration and exploitation (**Exhibit R-082**).

¹⁵⁹ *Ibid* (**Exhibit C-018**), (**Exhibit C-019**), (**Exhibit C-020**), (**Exhibit C-021**), and (**Exhibit C-022**), each at Article 4.

¹⁶⁰ *Ibid* (**Exhibit C-018**), (**Exhibit C-019**), (**Exhibit C-020**), (**Exhibit C-021**), and (**Exhibit C-022**), each at Article 5.

- 107.1. the meaning of the obligation under Article 2 of the Contract to “*proceed immediately to the industrial exploitation*” of all given sites;
- 107.2. whether Article 4 of the Contract granted NRD an automatic entitlement to long-term licences;
- 107.3. whether the Contract expired, and if so when;
- 107.4. whether the Licences expired, and if so when; and
- 107.5. the relationship between the Licences and the Contract.

i. NRD did not comply with the obligation under Article 2 to “proceed immediately to the industrial exploitation” of the Five Concession Areas

108. The Claimants contest the meaning of the requirement that they “*proceed immediately to the industrial exploitation*” of the Five Concessions Areas. The Claimants assert that that obligation is limited to “*working their Concessions in a professional manner to commercialize the mines beyond the historic personal, or artisan, mining carried on by individuals*”.¹⁶¹ Plainly, contrary to the Claimants’ submission, “*industrial exploitation*” requires more than commercialisation that merely moves the mining operations beyond artisanal / personal: the term must be given its ordinary common sense meaning, in the context of the mining industry in Rwanda in 2007. The Respondents’ witnesses are clear in their explanation of what the term industrial exploitation and industrialisation was understood to mean. NRD failed to comply with its Article 2 obligations in that (at least) it failed to proceed immediately (or at all or to any or any significant degree) to industrialise any of the Five Concession Areas once mining licences were granted in January 2007. Details of the Claimants’ failure to take any real steps towards industrialisation in any of the Five Concession Areas are set out in the Counter-Memorial at paragraph 80. In particular, at Rutsiro, although a processing plant was built it was never used as it was unable to become operational.¹⁶² Similarly, Nemba had not been industrialised,¹⁶³ and no development had taken place at Mara, Sebeya and Giciye.¹⁶⁴ These breaches would themselves have justified termination by the Respondent of the Contract under Article 5 prior to its expiry in any event.

ii. NRD did not have an automatic entitlement to long term licences under the Contract

109. In relation to the obligations under Article 4, the Claimants allege that NRD had an automatic entitlement to long-term licences, on the basis of the language of the Contract

¹⁶¹ Claimants’ Reply, at para. 50.

¹⁶² Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 27

¹⁶³ See Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 11; Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28.

¹⁶⁴ Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 29; Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 12; Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019 May 2019, at para. 11.

which states that NRD “*will be granted*” the mining concessions.¹⁶⁵ However, it is clear from the plain text of the Contract that NRD was not entitled to long-term licences, unless it submitted a feasibility study which was positively evaluated. Mr. Mugisha states that:

“... In my view, Article 4 makes it very clear that the mining concessions would only be granted ‘after positive evaluation [by Rwanda] of the submitted feasibility study’.

Notwithstanding the use of the words ‘will be’ in Article 4, the granting of ‘mining concessions’ under the Contract is not automatic, nor guaranteed to occur, because such granting depends on the prescribed conditions being satisfied, being compliance with the obligations of Article 2 and Rwanda’s positive evaluation of the submitted feasibility study.”¹⁶⁶

110. Additionally, the Claimants claim that Article 4 of the Contract only requires the Claimants to submit a feasibility study (even, it must follow on the Claimants’ argument, one of poor quality) which then triggers the right for NRD to be granted long-term licences. However, the Contract simply states that “*after positive evaluation of the submitted feasibility study [NRD] will be granted the mining concessions*” following the expiration of the contract. Any reliance on the words “**will be granted**” without paying attention to their context or indeed the very sentence in which the words appear is wrong and misleading. The Contract states that the granting of a licence is conditional on a “*positive evaluation of the submitted feasibility study*” or “*assessment and feasibility study*”. The specific legal obligation assumed by Rwanda under the Contract was to grant mining concessions **only** if a positive evaluation of NRD’s feasibility study and other reporting was made, and if NRD complied with its obligations under Article 2.

111. Mr. Gatere is clear that:

“... the four-year concession agreements entered into with investors in around 2006, including the Contract, did not provide any automatic guarantee or certainty that long-term agreements would be entered into. The national orientation was to encourage investors to mine in Rwanda but based on the condition that they would undertake effective, professional exploration with a view to developing industrial mining opportunities. These conditions were frequently, as was the case with NRD, captured in the four-year mining exploration agreements entered into in around 2006.

There has never been any legislation or regulation which guaranteed that automatically a long-term licence would be granted following a short-term licence. Any long term licence must be applied for, and the potential licensee must be able to prove to the government that they have met both the conditions of the original licence, and that they are appropriately positioned to be granted a long-term licence. It is not enough simply to demonstrate that the original four years have passed. If that were the only requirement then it would undermine the Government’s attempts to professionalise and industrialise Rwanda’s

¹⁶⁵ Claimants’ Reply, at para 9.

¹⁶⁶ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 14-15.

mining sector by only granting long-term licenses to investors with the financial resources, experience, technical and management capabilities to develop and manage large-scale, long-term, professional mining operations. In reality, as was understood in the sector, the four-year period was to allow licensors to prove that they should be granted a long-term licence.”¹⁶⁷

112. The Claimants assertion at paragraph 68 of the Reply, that regardless of whether the feasibility study was positively assessed, Rwanda was obligated to grant NRD long-term licences, is incorrect. It necessarily follows from the very notion of a “positive assessment” that anything other than a positive assessment would not oblige Rwanda to grant long-term licences; and it is equally clear, therefore, that qualitative evaluation of the submission by NRD would be made by Rwanda. Further or alternatively, it must also follow that a document labelled “feasibility study” which did not objectively conform to such a description, would not be a “feasibility study” for the purposes of compliance with NRD’s contractual obligation. Again, this amounted to a breach of the Contract for which the Respondent could have terminated under Article 5 had the Contract not expired.
113. Following the submission of the November 2010 Application, Rwanda assessed the application, including the purported feasibility study, and found it insufficient. As the precondition to the granting of long-term licences was not met, Rwanda had no obligation to grant long-term licences. The Contract did not require Rwanda to grant mining concessions to NRD on the basis of NRD’s performance alone (and had that been the case, it is clear from the evidence of Rwanda’s witnesses that the woeful performance of NRD (and, to the extent relevant, the performance of NRD’s investors when previously mining the Bisesero concession) would not have justified the granting of long-term (or any) licences.¹⁶⁸

iii. The Contract expired on its terms in November 2010

114. The Claimants allege that the Contract is still in force. That is incorrect. The Contract terminated in November 2010, on its own terms. As set out above, the Contract was for a four-year term, and would expire at the end of that term unless extended by Rwanda.¹⁶⁹ NRD was well aware that the Contract was to terminate at this time because in July 2009 it requested an extension for two years which was rejected by MINIRENA.¹⁷⁰
115. Rwanda did not extend the Contract. Therefore, on the terms of the Contract, the timing of when the obligations of all parties came to an end depended on Rwanda’s evaluation of NRD’s feasibility study under Article 4, as set out by Mr. Mugisha:

¹⁶⁷ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at paras. 9-10.

¹⁶⁸ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at paras. 6-8.

¹⁶⁹ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 10.

¹⁷⁰ See Letter from NRD (Dr. G. Roethe) to the Minister of State in Charge of Mining (Minister v. Karega), *Application for the extension of our Nemba, Rutsiro, Giciye, Sebeya and Mara concession for a further two year period* (15 July 2009) (**Exhibit R-105**); Letter from the Ministry of Natural Resources (Minister V. Karega) to NRD (G. Roethe), *Application for the extension of the exploration and mining current permit* (23 September 2009) (**Exhibit R-106**).

“If the feasibility study is positively evaluated, the obligations of both parties under the Contract would have been extinguished upon Rwanda’s granting of the “mining concessions”.

If the feasibility study is not deemed satisfactory, or if NRD does not submit a feasibility study on or before the end of the four-year term of the Contract, the obligations of both parties under the Contract would have extinguished upon Rwanda’s evaluation of the study as non-satisfactory (or unsubmitted).”¹⁷¹

116. The November 2010 Application was an application for new licences along with a feasibility study for the purposes of Article 2(5) and Article 4. The November 2010 Application was deemed unsatisfactory, that is, it was not positively evaluated, by Rwanda. Therefore, as set out by Mr. Mugisha, *“the obligations of both NRD and Rwanda under the Contract extinguished at the time of Rwanda’s negative evaluation of this study. As a matter of Rwandan law, neither party owed any obligations to the other under this Contract after this point”*.¹⁷²
117. The Claimants have advanced no evidence or any legal argument to support their claim that the Contract remained in place after the expiry of its four-year term on 24 November 2010, or that it remains in place.

iv. The Licences expired in October 2012, following various extensions

118. The Licences were issued in 2007, pursuant to the 1971 Law. They remained valid under the 2008 Law pursuant to the transitional provisions at Article 117 of the 2008 Law. In October 2010, NRD was informed that the Licences were close to the expiry of their four-year term.
119. In mid-2009, NRD was aware that its Licences (granted pursuant to the Contract) *“will expire on 28th January 2011”* and that it must submit the documents that it was required to submit under the Contract and to submit *“a report on why [it] can not [sic] meet the obligations in four years and show how far you have gone in meeting of the terms of the agreement”*.¹⁷³ Once NRD had done that and only if the reports were deemed satisfactory, MINIRENA would resolve the problem.¹⁷⁴
120. By way of the November 2010 Application, NRD applied for new licences (which were only five-year licences for small mines, and not long term licences, as the Claimants claim,¹⁷⁵) including submission of a purported feasibility study.¹⁷⁶ The November 2010

¹⁷¹ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 10.

¹⁷² Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 11.

¹⁷³ Letter from the Ministry of Natural Resources (Minister V. Karega) to NRD (G. Roethe), *Application for the extension of the exploration and mining current permit* (23 September 2009) (**Exhibit R-106**).

¹⁷⁴ *Ibid.*, (**Exhibit R-106**).

¹⁷⁵ See Claimants’ Memorial, at para. 42.

¹⁷⁶ *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD* (**Exhibit C-035**). The November 2010 Application is specifically time

Application fell far short of what would have been considered a satisfactory application.¹⁷⁷ The assessment of the November 2010 Application is addressed in detail in the Counter-Memorial at paragraphs 81 to 95.

121. As set out above, at paragraph 114, the Contract terminated, on its own terms, on 24 November 2010 (regardless of the fact that NRD was formally informed of the decision in August 2011).¹⁷⁸ Rwanda was not under any obligation to grant NRD long-term licences, and its obligation to grant a long-term licence if it positively evaluated a submitted feasibility study was extinguished following its negative evaluation of the submitted feasibility study. NRD had not sought, let alone (as NRD was fully aware)¹⁷⁹ fulfilled the requirements to justify being granted long-term licences.
122. The Claimants also allege that the Licences did not expire and instead remained valid until 2016. In fact, the Licences expired in October 2012; while they were due to expire in 2011, NRD was granted a series of short-term extensions, as set out below.
123. On 2 August 2011, Mr. Kamanzi wrote to NRD, granting a short-term extension of six months, in order to allow Rwanda time to determine the future of the Five Concession Areas.¹⁸⁰ For the avoidance of doubt, and as explained by former Minister Imena, this letter did not “*terminate*” the Licences as Mr. Marshall suggests at paragraph 20 of his Second Supplemental Witness Statement.¹⁸¹
124. Following Minister Kamanzi’s letter of 2 August 2011, further negotiations were held, but Rwanda was not satisfied with NRD’s resource evaluation under the Contract, and accordingly was only prepared to negotiate new licences in relation to two of the Five Concession Areas, considering that NRD lacked sufficient resources to develop all five simultaneously.¹⁸² As such, it was not possible to conclude a new contract during the period of the first six month extension. On 20 February 2012, the MINIRENA extended NRD’s special licence for three months, backdated to 2 February 2012 and expiring on 2

limited to renewal of the licences for a five-year period: a small mine exploitation licence under Article 45 of the 2008 Mining Law, which was under the new regime the equivalent to the licences for small-scale mining and exploration permits granted to NRD for the Five Concession Areas in 2007; See also Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

¹⁷⁷ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 9.3.

¹⁷⁸ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**). In noting that NRD had failed to comply with the obligations and conditions under Article 2 of the Contract, Rwanda indicated that it considered the Contract to have terminated.

¹⁷⁹ See Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 19-20; Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 19-21.

¹⁸⁰ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

¹⁸¹ See Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 11, referring to letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

¹⁸² Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Resolution to the issue of the former concessions held by NRD* (26 January 2012) (**Exhibit R-018**).

May 2012, on that basis.¹⁸³ No further progress was made in relation to licence renewal between the end of February 2012 and May 2012. However, on 13 September 2012, MINIRENA wrote to again extend NRD's licence. It noted that the previous licence had expired in May 2012, and the Minister of Natural Resources extended the licence up to October 2012.¹⁸⁴ After the extension until October 2012 expired, NRD was not granted further extensions, and accordingly the Licences expired (and were not renewed). From that point, NRD benefitted from an informal arrangement that they could continue to occupy the concessions which, as Mr. Mugisha explained,¹⁸⁵ was not unusual and was within the gift of the Government.

v. The relationship between the Contract and the Licences

125. The Claimants assert that the right to the Licences is premised upon the Contract, but that both the Contract and the Licences expressly grant NRD the right to mine and exploit the Five Concession Areas.¹⁸⁶ However, Mr. Mugisha's evidence is clear that:

"As NRD's feasibility study, submitted in November 2010, was not positively evaluated by Rwanda the obligations of both NRD and Rwanda under the Contract extinguished. On 2 August 2011, Minister Kamanzi notified NRD that its application for the licences applied for had not been approved, and consequently, notified NRD that the Contract had terminated.¹⁸⁷ However, in that letter Minister Kamanzi stated that the operation of the existing licences was extended 6 months from the day of receipt of the letter, and accordingly the Licences remained operative.

...

The right to mine derives from the Licences and not from the Contract. Mr Rwamasirabo is correct that the Licences grant the right to conduct mining operations at the Concessions...."¹⁸⁸

F. NRD did not comply with their obligations under the Contract

126. The Claimants make consistent reference to "*the Claimants*" taking various steps or complying with obligations under the Contract when presumably they mean NRD – the Claimants could not have "*submitted a progress report after two years*" (for example) because the Claimants had no involvement with NRD until after the Contract had expired

¹⁸³ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

¹⁸⁴ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**), the Respondent notes that the Claimants' **Exhibit C-045** and **Exhibit C-066** are identical or near identical copies of this letter.

¹⁸⁵ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 29.

¹⁸⁶ Claimants' Reply, at para 43.

¹⁸⁷ Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration Licence* (2 August 2011) (**Exhibit C-062**).

¹⁸⁸ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at paras. 12 and 14.

in late November 2010. As such the Respondent assumes that the Claimants mean NRD not the Claimants when discussing compliance with the Contract.¹⁸⁹

127. As already explained in the Respondent's Counter-Memorial, NRD plainly did not comply with its obligations under the Contract. In particular, as will be discussed in further detail again below:

127.1. NRD failed to comply with its obligations under Article 2 to proceed immediately to industrialise the Five Concession Areas;¹⁹⁰ and

127.2. NRD purported to provide a report of reserves and a feasibility study in November 2010 but *"it fell far short of what was required of a feasibility study"*,¹⁹¹ and accordingly Rwanda was unable to make a positive evaluation so as to warrant the grant of new licences to NRD.¹⁹²

128. Despite this, the Claimants seek to argue that NRD did comply, and indeed their whole case turns on the assertion that NRD did so – yet they have utterly failed to substantiate that allegation. In the words former Minister Imena: *"I find this statement difficult to comprehend given that NRD was repeatedly told that it was not compliant."*¹⁹³

1. Provision of progress reports

129. The Contract required the Claimants to *"provide progress reports on research activities after two years"* at Article 2(4). The Claimants point to the 2009 Status Report as being *"consistent with its obligations under the Contract"*,¹⁹⁴ and it is correct that the 2009 Status Report was consistent with the obligation under Article 2(4). It is notable that the 2009 Status Report was submitted prior to the sale of NRD to Spalena.¹⁹⁵ The Claimants state that status reports were also produced in 2007 and 2008, which were described as *"promising"*, which is correct.¹⁹⁶ However, no status reports were produced in 2010 or later, after Spalena purchased NRD.

130. The Claimants allege that NRD were able to take thousands of samples on each site due to the XRF technology that they had acquired. However, this is not reflected in the Status Reports and the Claimants pleading is itself contradictory. The Status Reports, and indeed the November 2010 Application discussed further below, showed that NRD had obtained

¹⁸⁹ This is most notable in the headings used by the Claimants in Section I.E of the Reply.

¹⁹⁰ Respondent's Counter-Memorial, at para. 67.1.

¹⁹¹ Respondent's Counter-Memorial, at para. 67.2, referring to the Witness statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 12.

¹⁹² Respondent's Counter-Memorial, at para. 67.3.

¹⁹³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 9.

¹⁹⁴ Claimants' Reply, at para. 45.

¹⁹⁵ NRD, *2009 Status Report (Exhibit C-067)* at page 4, states *"H.C. Starck is the major share holder with 85% of the shares of NRD Rwanda"*.

¹⁹⁶ Claimants' Reply, at para. 49, referring to letter from V. Karega to G. Roethe (17 January 2009) (**Exhibit C-028**).

“115 samples”¹⁹⁷ (or over 100 samples as alleged at paragraph 47 of the Reply). That same paragraph goes on to state that new XRF technology used by NRD enabled “NRD to take thousands of samples at each site”. These statements are at odds with each other. If NRD was taking thousands of samples, it would have been reflected in the Status Reports and in the November 2010 Application.¹⁹⁸

131. In any event, demonstrating compliance with Article 2(4) is not sufficient, in any way, to show compliance with its obligations under the Contract as a whole. NRD was also required to comply with Articles 2(1), 2(2) 2(3) and 2(5). It failed to perform Articles 2(3) and 2(5), as set out in detail below.

2. Failure to perform the Contract: NRD did not proceed to Industrial Exploitation

132. As explained at paragraphs 102 to 104 above, in order to comply with Article 2(3) of the Contract, NRD had to “*proceed immediately to the industrial exploitation in all given sites*”.¹⁹⁹ The Respondent has already explained in detail in its Counter-Memorial at paragraphs 70 to 95 why NRD failed to do this.

133. The Claimants argue that Rwanda has made a “*subtle, but important, modification of the Contract’s actual term*” in respect of industrialisation in that the contract stated “*proceed immediately to the industrial exploitation in all given sites*” yet the Respondent suggests that NRD had to “*industrialise the concessions*”.²⁰⁰ The Respondent rejects this and the allegation that it is attempting to “*re-write and reinterpret its contractual obligations in a way never understood or interpreted contemporaneously by the parties*”.²⁰¹ As is clear from the Respondent’s Counter-Memorial, in order to comply with the Contract NRD had to proceed immediately to industrialisation, but they failed to do so at all or to any significant degree.²⁰² Even if NRD’s only obligation was to “*perform by working their Concessions in a professional manner to commercialise the mines beyond the historic personal, or artisan, mining carried on by individuals*”²⁰³ (which is not accepted by the Respondent) it is quite clear that NRD did not even meet that more modest obligation.

134. First, as the Respondent’s witnesses have explained, by 2010, NRD’s Five Concession Areas were largely worked by artisanal miners²⁰⁴ and as such NRD had “*failed to take any or any significant steps to industrialise any of the concessions*” by the time it made the

¹⁹⁷ Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at page 36; NRD Rwanda, *Status Report 2009 (Exhibit C-067)*, at pages 36-40.

¹⁹⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 19; See also the Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 19.

¹⁹⁹ Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**), at Article 2(3).

²⁰⁰ Claimant’s Reply, at para. 50.

²⁰¹ Claimant’s Reply, at para. 50.

²⁰² See Respondent’s Counter-Memorial, at paras. 70-95.

²⁰³ Claimants’ Reply, at para. 50.

²⁰⁴ Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 14.

November 2010 Application.²⁰⁵ In particular, at Mara, Sebeya and Giciye no steps whatsoever were taken towards industrialisation and these concessions remained purely artisanal.²⁰⁶

135. *Second*, the Claimants suggest that the fact NRD built a plant to process wolframite at Rutsiro meant NRD proceeded to industrial exploitation.²⁰⁷ That is wrong. As explained in the Respondent's Counter-Memorial,²⁰⁸ and developed further below, the plant at Rutsiro was not operational until late 2010 and even then it was not able to produce any significant volume of minerals;²⁰⁹ and the establishment of the Rutsiro plant was not by itself sufficient to amount to the industrialisation of the Rutsiro concession on any interpretation.

136. As explained by former Minister Imena, the plant never passed out of the testing phase and it never became commercially operational. As such it *"did not contribute to the industrial exploitation of the Rutsiro concession"* and in essence *"ended up being a 'dummy'"*.²¹⁰ In particular:

136.1. *"The Rutsiro plant was designed first to process the scree deposits, before exploiting primary wolframite deposits after a few years of operation. Scree deposits in the context of Rutsiro is waste left by past exploitations prior to the arrival of NRD (i.e. from artisanal miners). We would expect a plant of industrial standard to process primary ore (ore extracted from the mine) as opposed to simply processing waste (scree)."*²¹¹

136.2. *The "Rutsiro plant was designed to produce wolframite concentrate of only 60% WO₃ purity. A standard wolframite processing plant should produce concentrate of a purity between 65% and 75% WO₃;²¹² as such the design of the Rutsiro plant was not fit for purpose and fell below globally accepted standards."*²¹³

²⁰⁵ Respondent's Counter-Memorial, at para. 80; See also the Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 5-12.

²⁰⁶ Respondent's Counter-Memorial, at para. 80.3, referring to the Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 29, the Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 12, and the Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019 May 2019, at para. 11; See also Supplemental Witness Statement of Mr. Anthony Ehlers dated May 2020, at paras. 11-12.

²⁰⁷ Claimants' Reply, at para. 51.

²⁰⁸ Respondent's Counter-Memorial, at para. 80.1, referring to the Witness statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 11 and the Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 27.

²⁰⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 17-18.

²¹⁰ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 18.

²¹¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 18.1, referring to the Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at page 8.

²¹² See Information from British Geological Survey, Tungsten, January 2011 (**Exhibit R-230**), at page 9.

²¹³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 18.2, referring to Information from British Geological Survey, Tungsten, January 2011 (**Exhibit R-230**), at page 9.

137. Former Minister Imena’s evidence is consistent with the evidence of Mr. Ehlers, Professor Nkanika Wa Rupiya, and Mr. Sindayigaya – all of whom were employees of NRD during the time in which the Claimants allege the plant was operational:

137.1. Professor Nkanika Wa Rupiya’s evidence is that the plant “*turned out to be a significant error for NRD*” as it “*made no sense to build a processing plant when there was no primary ore to process*”.²¹⁴

137.2. Mr. Sindayigaya’s evidence is that “[a]lthough we ran a few trial runs of the plant, it was never in use throughout my years at NRD.”²¹⁵

138. The Claimants rely on an email from Mr. Ehlers to Mr. Frederic Delforge and Mr. Joern Vogt of H.C. Starck on 20 September 2010 in which Mr. Ehlers stated that the “*Rutsiro plant is operating and we are in the process of fine tuning it.*”²¹⁶ This reliance is misplaced, as Mr. Ehlers explains in his supplemental witness statement:

“When I left NRD, the plant was “operational” in the sense that the machine was technically complete and its various components and conveyers worked, meaning that it could function if utilised in the right environment. However, there is a big difference between the plant being mechanically operational and actually producing ore. When I joined NRD, the construction of this plant had mostly been completed, having been commissioned by Dr. Roëte of H.C. Starck, the former Managing Director of NRD. However, I warned H.C. Starck that I had serious reservations about the plant as I could not see the Wolframite resources needed to feed the plant at Rutsiro. This problem had been brought to my attention by Dr. Schönherr, the consulting geologist working for H.C. Starck who had told me that he had serious doubts about the resources at Rutsiro.

In my email of 20 September 2010, I comment with reference to the plant that we were running a sample through our magnetic separator in Kigali and only after that would we have a feeling for possible production. It is clear from this email alone that we were in the very early stages of testing the plant. We had started with a dry commissioning – running the plant without ore to make sure the parts operated correctly, and we then tested the plant by running water and ore through it for approximately one week. Following this, we spent approximately one month processing small amounts of broken ore that had been left over by the artisanal miners and also built a tailings dam to collect the waste material. This is about the stage at which Mr. Marshall became involved.

However, the purpose of the plant was not to process leftover ore from the artisanal miners but rather to process primary ore. Tungsten (wolfram) is locked up in the rocks and the purpose of the plant was to crush the rocks finely to recover this mineral content, which the artisanal miners could not do.

As things turned out, Dr. Schönherr’s concerns proved well-founded and we were never able to use the plant in this industrial way using primary ore. The

²¹⁴ Supplemental Witness statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 13.1.

²¹⁵ Supplemental Witness statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 5.

²¹⁶ Email chain between A. Ehlers and F. Delforge (20-22 September 2010) (**Exhibit C-148**).

problem was ultimately that it is not enough to simply build a plant: you must be able to feed minerals into it. There is no purpose to building a processing plant unless there are sufficient volumes of minerals to process. In order to access more ore, NRD would have had to conduct far more exploration work, which would have required building roads up the mountains, as well as implementing an extensive sampling programme incorporating trenching, test pitting as well as drilling in prospective areas. We also needed facilities for blasting and an excavator in order to process fresh ore. However, H.C. Starck had not made these investments or carried out this exploration work and nor did Mr. Marshall after his company acquired NRD. As a result, the plant produced only minimal concentrates during my time at NRD, using old scree ore left over from the artisanal miners.

The plant was NRD's only attempt at industrialisation and it was very much a failure: like the rest of NRD's concessions, Rutsiro remained an artisanal operation based on hand panning. I believe that if a proper feasibility study had been conducted prior to commissioning the plant, it would not have been built by H.C. Starck in the first place, at least in that location. As I explained in my first statement, my understanding from contacts in Rwanda was that after I left, the plant remained unused and that NRD's concessions, including Rutsiro, were never industrialised.”²¹⁷

139. In addition, the production figures for wolframite support the Respondent's position that the plant was not operational. NRD's production figures for the period 2007 to 2013 were set out in the Counter-Memorial at paragraph 111.²¹⁸ As explained therein, the figures showed that production levels across all the minerals extracted by NRD significantly collapsed after 2009. This is supported by NRD's own documents. In particular, NRD's Investment Plan Report Summary prepared on 30 January 2013 and presented to MINIRENA on the same date, sets out production figures for the period 2007 to 2011.²¹⁹ For ease of reference the figures are reproduced in full below:

	Cassiterite	Wolfram	Coltan
2007	62,162.5	6,046	1872
2008	150,887	10,147	1,753
2009	217,895	32,936	10,623
2010	125,378	8,439	6,260
2011	168,054	6460	2542

²¹⁷ Supplemental Witness statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 5-11.

²¹⁸ The figures were taken from the *Explanatory Note on NRD (Exhibit R-017)*.

²¹⁹ Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at pages 4-5.

140. As can be seen when analysing the figures for the production of wolframite, despite the processing plant, which appears to have been completed by the end of 2010,²²⁰ production significantly decreased in 2010 and 2011 (after NRD was acquired by Spalena), returning to 2007 levels.²²¹ On this basis, it cannot seriously be suggested that the plant was operational, commercially productive and contributing to the industrialisation of the Five Concession Areas when production levels were dropping. It is also notable that the figures contained in the Investment Plan Report prepared in January 2013, do not include figures for 2012. It is submitted that the 2012 figures were not included because they show an even larger drop in production. This can be seen from the figures set out in the Respondent's Counter-Memorial which record wolframite production dropping down to only 605kg in 2013.²²² This was far below the estimated production levels set out in the Investment Plan Report Summary for years 2013 to 2018. In particular, this investment plan shows that NRD had planned to produce more wolframite *per year* than was ultimately produced during the entire period of 2007 to 2011.²²³ The reason for this disparity between anticipated and actual wolframite production is that, as explained above, the plant at Rutsiro never processed ore on any significant scale, and was a commercial failure.²²⁴
141. The Claimants rely on a letter from MINIFOM to NRD on 30 October 2010 to argue that OGMR had recognised the plant at Rutsiro and was "*satisfied with exploitation progress*".²²⁵ However, as this letter stated, at this stage the plant was "*still at the testing phase*" and it was only subsequently that it became apparent that although operational it was not commercially viable. Documents produced by the Claimants confirm that the plant was still in testing phase at this time²²⁶ and this accords with the evidence given by the Respondent's witnesses as explained paragraphs 135 to 137 above.²²⁷ Further, the Claimants fail to highlight that the letter goes on to explain, amongst other things, that no final report and feasibility studies for any of the Five Concession Areas had been submitted, production had decreased dramatically in 2010 and as such requested that NRD hand back some of its concession areas because the Contract was due to expire shortly and "*due to relatively low investment done in the large number of concessions you*

²²⁰ See, for example, Letter from B. Christophe to Director General of NRD (20 October 2010) (**Exhibit C-026**), at page 1.

²²¹ Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013 (**Exhibit C-054**), at pages 4-5.

²²² Respondent's Counter-Memorial, at para. 111.

²²³ Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013P (**Exhibit C-054**), at page 7.

²²⁴ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 5-11.

²²⁵ Letter from the Ministry of Forestry and Mines (C. Bazivamo) to Director General NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

²²⁶ Rutsiro Ore Dressing Plant Test Run Report (**Exhibit R-108**).

²²⁷ See Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 18; Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 5-11.

own”.²²⁸ The Claimants cannot seriously contend on the basis of this letter that they were in compliance with the Contract.

142. *Third*, at Nemba, NRD simply continued to use the small amount of infrastructure left over from the Belgian colonial mining times rather than constructing new tunnels. The Claimants allege that NRD had been working towards industrial exploitation, relying on the introduction of water supply to the site.²²⁹ However, this is a minimum requirement for work on a site, and cannot be relied upon as an indicator of industrialisation. As explained by Mr. Ehlers in relation to Nemba:

*“In the context of this mining site, which ... was located in the flat countryside, industrialisation would have meant carrying out proper exploration by way of drilling, and then building underground tunnels to exploit seams of tin underground identified from this exploratory drilling. However, this was not done. Instead, NRD had continued to use tunnels and infrastructure that had been set up in Belgian colonial times (although in fact a number of the tunnels had been closed on health and safety grounds under Starck’s ownership, and some re-timbering work had been carried out), and to allow artisanal mining on the surface.”*²³⁰

143. *Fourth*, Claimants have provided no credible evidence to support their statement that, in furtherance of the industrialisation requirement, “NRD’s investors substantially improved road access and constructed bridges and buildings to permit more advanced mining”.²³¹ Mr. Ehlers’ evidence is that this claim is incorrect. As he explains:

*“No work of this nature was undertaken during my time at NRD, including after it was acquired by Spalena. The only work of this nature that had been undertaken by NRD prior to my involvement was by H.C. Starck, and as far as I am aware that was limited to small improvements at Rutsiro and Giciye – Starck had improved road access by filling potholes, constructed small bridges of a primitive nature using logs laid longitudinally, and had built a small house at Rutsiro.”*²³²

144. *Fifth*, the Claimants’ assertion that BVG transferred to Spalena “heavy equipment, including all other operational assets” in March 2012 which shows that the Claimants proceeded to industrial exploitation is unsubstantiated and wrong. As Mr. Ehlers explains based on his visit to BVG’s Bisesero concession:

“From what I could see, there was no mining being conducted at the concession at all. Nor was there any investment visible – there were no operating vehicles, no processing facilities, and no infrastructure investments, such as road

²²⁸ Letter from the Ministry of Forestry and Mines (C. Bazivamo) to Director General NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

²²⁹ Claimants’ Reply at para. 53, referring to Letter from C. Barthelemy to Director General of NRD (20 October 2010) (**Exhibit C-026**), at page 1.

²³⁰ Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 30.

²³¹ Claimants’ Reply, at para. 52.

²³² Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 12.

improvement, seemed to have been made. I certainly do not recall ever seeing the assets set out in exhibit C-123."²³³

145. Mr. Sindayigaya's evidence is consistent with Mr. Ehlers' observations. Mr. Sindayigaya has explained that the asset list in **C-123** did not reflect the actual assets he observed on Bisesero's sites, and that the alleged assets were not ever moved to NRD's concessions in 2012 as the Claimants allege.²³⁴
146. The Claimants also argue, at paragraphs 56 and 57 of the Reply, that the Respondent's case as to the requirement to proceed to industrialisation is contradicted by its arguments that the Claimants held only short-term rights. That is not correct – the two go hand in hand. The Claimants (and many others) were granted short-term rights with the obligation to undertake certain steps in order to prove to the Government that they had the capacity to successfully commercialise the concession areas and therefore that they ought to be granted long-term licences. To this end, proceeding to industrialise was one of the conditions of the Contract and this could, and should, have been achieved in the period that NRD had the short-term rights. NRD itself acknowledged that it had "*to start industrial mining operations as soon as possible*" but that by July 2009 "*little progress was made*".²³⁵ As also acknowledged by NRD, the little progress made by this time was down to "*limited funds*" and "*lacking expertise in exploration and in mining*".²³⁶ With more funds and more expertise, NRD may have been able to proceed to industrialisation in accordance with the Contract, but it never did so. Not only did NRD take insufficient steps during this period, it subsequently failed to show the Government that it had the capacity to take the steps required for industrialisation. Of course, had it demonstrated this capacity, and had it had sufficient resources and expertise to complete a compliant feasibility and other studies, it would have ensured a positive evaluation.
147. At paragraphs 58 to 61 of the Reply, the Claimants attempt to explain why various steps taken by the Respondent between 2011 and 2014 should be blamed for NRD's failure to adequately industrialise. As explained at Sections II.G.2, II.G.3 and II.G.5 below, all the steps taken by the Respondent in relation to Mr. Marshall's ownership dispute with Mr. Benzing were legitimate and necessary, as were the steps taken to close certain of NRD's Five Concession Areas due to environmental violations and the decision in 2014 not to grant NRD tags. None of those steps would, in any event, ground the legal claims made by the Claimants in this Arbitration for the reasons explained in section VI below.
148. Further, contrary to what the Claimants suggest at paragraph 61 of the Reply, former Minister Imena's decision not to engage in any communication regarding the Dutch government's PSI grant in June 2014 was legitimate and not taken to stifle the Claimant's

²³³ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 22.

²³⁴ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 12.

²³⁵ Letter from NRD (Dr. G. Roethe) to the Minister of State in Charge of Mining (Minister v. Karega), *Application for the extension of our Nemba, Rutsiro, Giciye, Sebeya and Mara concession for a further two year period* (15 July 2009) (**Exhibit R-105**).

²³⁶ *Ibid.*, (**Exhibit R-105**).

progress with their Five Concession Areas. As explained by former Minister Imena in his supplemental witness statement:

“I declined to engage in discussions about this grant ‘unless [NRD’s] issues of ownership and management [were] sorted out’. I understand that the Claimants claim that my refusal was not made in good faith because these issues had been settled in 2012. That is incorrect. I explained at paragraph 53 of my first statement that Mr. Benzinge had come to see me in around May or June 2014 claiming to be the rightful owner of NRD and that on 13 June 2014 Mr. Marshall wrote to me explaining the ownership problems he was having with NRD. As far as I was concerned, by the time I sent the email referred to above the ownership issues remained unresolved.”²³⁷

149. Indeed, on the Claimants’ case the ownership issues are still unresolved, because it continues to take issue with the Arbitral Decision against it, despite its failure to overturn the decision through the Rwandan courts.
150. Therefore, Rwanda was by no means “*setting [NRD] up for failure*” as the Claimants suggest. The stark reality is that NRD had already failed, and at any point from January 2011 Rwanda could have evicted NRD from the concessions it was occupying and could have refused to discuss extending its licences or renewing them. Instead, Rwanda gave NRD numerous additional opportunities to demonstrate that, despite its failure to comply with the Contract, and the Contract’s consequent expiry in November 2010, it should nonetheless be granted the short-term licences for which it had applied in late 2010, very shortly after the expiry of the Contract. Despite the patience of the Respondent and the indulgences it granted to NRD, the company repeatedly failed to demonstrate to the satisfaction of Rwanda that it should be granted further licences.

3. The November 2010 Application: Failure to perform Article 2(5) of the Contract: NRD did not submit adequate reports of reserves and feasibility study

151. NRD also failed to provide adequate reports of reserves and feasibility study in the November 2010 Application. This failure was material: these requirements were “*the key aspect*” of the Contract granted to NRD and other concession holders alike.²³⁸
152. In his *Assessment of the Natural Resources Development Report on the Application for Renewal of the Exploration/Mining License*, prepared in 2011, Dr. Biryabarema found, with respect to NRD’s 2010 Application, that:²³⁹

²³⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 30.2, referring to email chain between R. Marshall and E. Imena, *PSI information meeting* (25-26 June 2014) (**Exhibit C-155**) and letter from NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena) (13 June 2014) (**Exhibit C-090**).

²³⁸ Letter from Ministry of Natural Resources (Minister S. Kamanzi) to the Minister of Justice, *Special Licenses (Exploration and Mining) Between Mining Companies and the Government of Rwanda in former Government Concessions which have either expired or not performing well* (8 August 2011) (**Exhibit R-109**).

²³⁹ *Assessment of the Natural Resources Development Report on the Application for Renewal of the Exploration / Mining Licence* (2011) (**Exhibit R-111**).

“Below are comments which provide an evaluation of the extent of the work done as measured against the expected work of mineral resource evaluation which was to be the basis of long-term contract negotiations;

1. The satellite and the ground penetrating Radar were intended, and indeed are capable of indicating surface and near surface features which should be targets for detailed exploration; as presented in the report these methods were intended to enhance certain exploration targets to help plan an exploration program;

2. Evaluation of five scree deposits by processing 130 samples of 100 kg each; although the sampling seems not to have been detailed enough the results helped take a decision to construct a 20 ton/hr gravity concentration plant;

3. “Detailed calculation” of primary wolfram deposit in Rutsiro is very highly theoretical and is not practical at all to provide any basis for objective planning. The same applies to estimation of Nyakabingo (Nemba) tin deposits;

4. Sampling’ in Rutsiro, Giciye and Sebeya to identify specific exploration targets for tantalum and tin in these areas was carried out in 2008 and 2009. A total of 115 samples were collected and analyzed. The study showed important areas of significant tantalum anomalies; these were supposed to be followed by more detailed exploration, which has not been done yet; the current results can only be taken to be qualitative;

*5. Most of the geologic work to date involved; acquisition of historical data and understanding the regional geology and metallogeny, remote sensing to identify exploration target areas, regional sampling to map target areas for more detailed exploration and very preliminary theoretical calculations of reserves in some locations”.*²⁴⁰

153. Dr. Biryabarema’s assessment report concluded that *“although some significant preliminary exploration work was done, it fell far short of the target in the agreement. This is very crucial in the light of the large area given to the company because of its expressed financial and technical capability.”*²⁴¹

154. The November 2010 Application contained a proposed activity plan which made it clear that NRD had failed to industrialise the Five Concession Areas, and had failed to carry out the detailed exploration work that would have enabled it to provide a proper feasibility report. Further, Dr. Biryabarema’s report observed that (i) the value of the planned exploration budget of EUR €382,000 was meagre; (ii) the production levels proposed

²⁴⁰ *Ibid.*, (Exhibit R-111), at page 2; Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 7.

²⁴¹ *Ibid.*, (Exhibit R-111), at page 3; Witness Statement of Dr. Michael Biryabarema dated 26 May 2020 at para. 7.5.

between 2012 and 2015 showed almost no change from year to year; and (iii) the initial investment to be injected by the investor was not visible.²⁴²

155. While NRD had prepared what purported to be a feasibility study, it is clear that NRD was aware at the time that it had not provided a feasibility study containing the detail necessary to satisfy the Government it should grant the Five Concession Areas to NRD on a long-term basis – and therefore that it had not provided a feasibility study within the meaning of that term in the Contract.²⁴³ As explained by former Minister Imena in his supplemental witness statement:

“the report NRD provided talks largely about gathering already existing information (a desktop study), giving an introduction to geology and mineralization, setting out achieved production and providing some information about remote sensing. This kind of information is simply a preliminary description of the concessions and a summary of what NRD produced in the previous 4 years. It is not a feasibility study for a professional, industrial mining project, as was required under the Contract.”²⁴⁴

156. Former Minister Imena goes on to explain:

“A feasibility study for an industrial mining project should be a comprehensive and detailed document that contains, among other things; the study of the geology, geophysical and geochemical studies, geological, geophysical and geochemical maps, the ore reserves as per standard definitions, the mineral reserves models, geotechnical studies, studies on environment, studies on infrastructure, studies on markets, the mine design based on the mineral reserves models, the mine sections and mine plans, the mining methods and extraction sequences, the ore handling processes, the results of metallurgical tests, the process plant design and flow sheet, the mine construction budget and schedule, the production schedule, the capital and operating costs estimate, cash flow study, the financial evaluation and risks analysis. NRD’s report did not include any of this and as such was not a compliant report.”²⁴⁵

157. To give some further examples of how the November 2010 Application was inadequate:

157.1. At page 116 of the November 2010 Application, NRD states that between 2011 and 2015 it was planning to do works of sampling, assaying, geophysical surveys, trenching, drilling, geological and geochemical mapping, interpretation of remote sensing imagery, evaluation and prioritisation of targets and deposits.²⁴⁶ As explained by former Minister Imena, “[t]hese proposed works are normally done at the very initial phases of a mining project (as scoping studies or pre-feasibility

²⁴² *Ibid.*, (Exhibit R-111), at page 3.

²⁴³ Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19 (internal citations omitted); Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 17-19.

²⁴⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 13.

²⁴⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 14.

²⁴⁶ Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035), at page 116.

study) and we would therefore have expected them to have been complete, or substantially progressed, by the time NRD submitted the November 2010 Application.”²⁴⁷

157.2. At page 120 of the November 2010 Application, NRD sets out a plan of proposed activities for reserves calculations to be done between 2011 and 2015.²⁴⁸ As explained by former Minister Imena, “[t]his is a further demonstration of how NRD had not complied with its contractual obligations: - under the Contract it was required to have completed reserves evaluations before 2011.”²⁴⁹

157.3. At page 36 of the November 2010 Application, NRD states that “a total of 115 samples were collected”.²⁵⁰ Mr. Marshall now claims that NRD was the only company doing sampling on a daily basis using new XRF spectrometers.²⁵¹ These statements are at odds with each other and as explained by former Minister Imena, simply “cannot be true”.²⁵² This is because, as former Minister Imena explains:

“First, if NRD was taking samples on a daily basis I believe this would have been recorded in their November 2010 Application – but it was not.”

“Second, NRD was not the only company using an XRF spectrometer and in fact they were commonly used in Rwanda.”²⁵³

158. With the above in mind, it is clear that, regardless of what was in fact submitted, the purported feasibility study submitted was entirely inadequate, and was not a feasibility study within the meaning of the term as used in the Contract. This was recognised by Rwanda at the time: Minister Kamanzi, who considered and declined the November 2010 Application stated that no feasibility study had been submitted.²⁵⁴ Compounding these problems, a site visit to NRD’s mines on 23 November 2010 concluded that there was substantial environmental damage occurring at all of NRD’s mines.²⁵⁵

²⁴⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 14.1.

²⁴⁸ Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at page 120.

²⁴⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 14.2.

²⁵⁰ Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at page 36.

²⁵¹ See Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 25.

²⁵² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 19; See also the Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 11.

²⁵³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 19.

²⁵⁴ Letter from Ministry of Natural Resources (Minister S. Kamanzi) to Managing Director of NRD (2 August 2011) (**Exhibit C-062**).

²⁵⁵ Inspection Report for Miners in Western Province (**Exhibit R-110**) (“In general, all mines of NRD experience environmental damage (such as entering Gishwati forest), there are thieves in some mines (It is operating at Musenyi and Giciye in Giciye Sector without a licence)”).

159. The Claimants assert that the OGMR's Strategic Plan for 2009-2012 lists NRD as having submitted a feasibility study,²⁵⁶ but in fact that document states that NRD's completion of a feasibility study would be an indicator of strengthening geological and mining research, and that that indicator is expected in 2012.²⁵⁷ The prospective language used shows that the authors of the report did not consider that what NRD had submitted alongside the November 2010 Application was a feasibility study at all, let alone that it was adequate. In his supplemental statement, former Minister Imena explains that although he had not seen this particular document before, "*it is similar to other planning documents produced by OGMR or MINIRENA as part of Rwanda's measures for planning, monitoring, evaluation and accountability (known as 'Imihigo')*."²⁵⁸ With this in mind he explains:

"The tables that appear on page 7 onwards set out OGMR's strategies, the outcomes it hopes to achieve, the activities through which it hopes to achieve them, any indicators that it might be achieving the outcomes and timeframes for completing them. For example, OGMR anticipated that through the Activities 'Evaluat[ing] prospection and research works conducted by the private sector' and 'Participat[ing] in evaluation of feasibility reports' it would help to achieve its strategy of 'Strengthen[ing] geological and mining research by both public and private sectors'. In relation to these activities, the OGMR set out certain indicators that it might be achieving its outcomes. The indication that NRD was one of the companies to have prepared exploration results and to have performed a feasibility study simply records OGMR's understanding that this material was being prepared. There is no indication in the Strategic Plan that these studies had actually been submitted to OGMR for assessment, let alone that they had been evaluated and deemed to be adequate so as to warrant the granting of a long-term licence."²⁵⁹

160. What also must be highlighted in respect of this document is the date that it was created: as explained by former Minister Imena: "*I also note that this strategic plan was for the years 2009 to 2012 and is dated 7 August 2010, several months before NRD submitted the November 2010 Application.*"²⁶⁰ With that in mind, former Minister Imena explains that, "*[a]ccordingly, I do not believe there can be any doubt that the document merely recorded the OGMR's understanding that NRD was preparing a feasibility study.*"²⁶¹

161. The Claimants also state that Rwanda's ongoing treatment of NRD was inconsistent with its position that NRD's application was insufficient or that NRD had not complied with the terms of the Contract.²⁶² However, the documents cited in support of that statement in fact are entirely consistent with the Respondent's position that the November 2010

²⁵⁶ Claimants' Reply, at paras. 65-66.

²⁵⁷ OGMR's Strategic Plan (2009-2012) (**Exhibit C-157**), at page 7.

²⁵⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 15.

²⁵⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 15 (emphasis added).

²⁶⁰ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 16.

²⁶¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 16.

²⁶² Claimants' Reply, at para. 66.

Application was inadequate, that the Contract expired, but nevertheless that the Respondent wanted to give NRD the opportunity to succeed, and gave it opportunities to continue developing the Five Concession Areas, and to apply for further licences in order to do so, provided it was able to demonstrate that the operations undertaken would be industrial, professional and effective:

- 161.1. On 20 February 2012, Minister Kamanzi wrote to NRD extending the special licence in order to “*negotiate the terms of the new contract*”,²⁶³ as the previous Contract had expired in November 2010.
 - 161.2. On 13 September 2012, Minister Kamanzi again wrote to NRD, again extending the short-term special licence granted in February 2012, in order to allow for “*the ongoing work to be completed*”.²⁶⁴
 - 161.3. On 10 February 2013, The Respondent allowed NRD to resume mining activities, despite the fact that it did not have a valid licence, as a courtesy, and explicitly “*in the short term*” pending the determination of the “*request for new contracts for the concessions*”.²⁶⁵
 - 161.4. Minutes of a meeting between NRD and the RDB and MINIRENA on 9 May 2013 show that NRD was in fact required separately to negotiate the new licences, despite NRD’s position that the Contract gave them an entitlement to long-term licences in relation to each of the Five Concession Areas.²⁶⁶
162. The Respondent’s position has been consistent throughout. It was prepared to negotiate new licences with NRD, if NRD was able to demonstrate that it could conduct its operations effectively; as explained by former Minister Imena “[t]he Government had no interest in seeing NRD fail”.²⁶⁷
163. The Claimants further allege that the sufficiency of the November 2010 Application is demonstrated by the submission of a draft long-term licence to Cabinet for approval by Mr. Bidega.²⁶⁸ However, as explained by numerous of the Respondent’s witnesses (and explained in more detail in Section II.G.1.i below) that was simply not the case:
- 163.1. As explained by former Minister Imena in his supplemental witness statement: “*OGMR did not determine that NRD had satisfied their obligations under the Contract and we certainly did not submit a draft licence agreement, or any*

²⁶³ Letter from Ministry of Natural Resources (Minister S. Kamanzi) to Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

²⁶⁴ Letter from Ministry of Natural Resources (Minister S. Kamanzi to Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-045**).

²⁶⁵ Letter from the Natural Resources Authority (Dr. M. Biryabarema) to NRD (R. Marshall), *Security Strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**).

²⁶⁶ Minutes of Meeting between NRD, RDB, and Ministry of Natural Resources (9 May 2013) (**Exhibit C-159**).

²⁶⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 32.

²⁶⁸ Claimants’ Reply, at para. 65.

agreement, in relation to any of NRD's concessions to Cabinet for approval.”²⁶⁹
This is because, as explained in his first witness statement, “*we never actually reached the point of discussing contractual terms with NRD because we never got to the point in their application process at which it was necessary to*”.²⁷⁰

163.2. Mr. Gatere is clear that this did not in fact take place, stating “*I have reviewed the Cabinet records relating to draft long-term mining licences for the relevant period, and can confirm that NRD's application was not submitted to, let alone considered by, Cabinet*”.²⁷¹

163.3. Dr. Biryabarema has also explained that Mr. Bidega did not ever provide him with a draft contract for NRD, that he never had any discussion with Mr. Bidega concerning draft contracts for NRD, and that he did not submit a draft contract to former Minister Imena and/or to Cabinet for approval.²⁷² As he explains, “*Although we had discussions regarding new licences with Mr. Marshall during 2011, we never came close to discussing the terms of a new agreement as NRD was never able to satisfy us that they had the technical or financial capacity to develop the concessions. A draft contract would not have been prepared unless and until we were satisfied that NRD's application met the requirements necessary to be granted a licence, and we never were satisfied.*”²⁷³

G. Rwanda did not undertake a campaign to drive the Claimants out of the country

164. The Claimants' new conspiracy theory is that all the actions Rwanda took after NRD submitted its November 2010 Application were taken in a bid to drive the Claimants from Rwanda because they were not willing to participate in illegal smuggling (although, tellingly, there is no clear allegation that NRD was ever asked to do so) in which the Rwandan state is alleged to have been colluding with anonymous “oligarchs” – which campaign apparently ended with the public tender of the Five Concession Areas in March 2016. This theory is vehemently denied by the Respondent, including the unfounded allegations relating to illegal smuggling which are dealt with separately below (Section II.H). The Respondent did not undertake a “campaign” of any kind – it acted legitimately in accordance with regulatory and legal norms at all times.

165. The Claimants bear the burden of proving the allegations made in support of their conspiracy theory. It is generally recognised that the more serious, dishonest or discreditable conduct that is alleged by a party, the stronger and more cogent evidence is required to prove its case. The following dictum of Andrew Smith J in the English High Court in *Fiona Trust v. Privalov* [2010] EWHC 3199 (Comm) helpfully encapsulates the

²⁶⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 10.

²⁷⁰ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 22.

²⁷¹ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at para. 12.

²⁷² Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at paras. 10-4-10.5

²⁷³ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.3.

approach of courts and tribunals in considering serious, inherently improbable allegations:

“It is well established that ‘cogent evidence is required to justify a finding of fraud or other discreditable conduct’: per Moore-Bick LJ in Jafari-Fini v. Skillglass Ltd., [2007] EWCA Civ 261 at para.73. This principle reflects the court’s conventional perception that it is generally not likely that people will engage in such conduct: ‘where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger’, per Rix LJ in Markel v Higgins, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungood-Thomas J put it in In re Dellow’s Will Trusts, [1964] 1 WLR 415, 455 (cited by Lord Nicholls in In re H, [1996] AC 563 at p.586H), ‘The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it’. Associated with the seriousness of the allegation is the seriousness of the consequences, or potential consequences, of the proof of the allegation because of the improbability that a person will risk such consequences: see R(N) v Mental Health Review Tribunal (Northern Region), [2005] EWCA 1605 para 62, cited in Re Doherty, [2008] UKHL 33 para 27 per Lord Carswell.”²⁷⁴

166. The reason for Rwanda not granting new licences to NRD was based on NRD’s inability to convince Rwanda that it merited them. That is clear from the evidence. There is absolutely no need to resort to the Claimants’ far-fetched, un-evidenced, and largely un-particularised, conspiracy theory involving alleged collusion in smuggling between shadowy unnamed “oligarchs”, various different organs of the Rwandan state, Mr. Benzinge, and (it is to be presumed) ITRI, in order to explain this fact.
167. The Claimants can come nowhere close to discharging the burden upon them of proving the serious and inherently improbably allegations they have made in advancing their conspiracy theory. As submitted in the Counter-Memorial, it is clear that those allegations have no foundation and have been advanced merely in a misguided attempt to try to embarrass Rwanda in these proceedings in order to try to obtain settlement. The allegations are improper and should never have been made.

1. Communications between NRD and the Respondent between 2010 and 2013

i. Draft licence agreement allegedly sent by Mr. Bidega in 2011

168. The Claimants begin their new conspiracy theory by suggesting that after NRD submitted its November 2010 Application, the OGMR began to negotiate the terms of a long-term

²⁷⁴ *Fiona Trust v. Privalov* [2010] EWHC 3199 (Comm) (**Exhibit RL-135**), at para. 1438, this dictum has also been recognised in an investor state context, see, for example, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (**Exhibit RL-045**), at para. 709, where the tribunal stated that “an allegation such as [a conspiracy] must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred”.

licence because NRD had complied with the Contract.²⁷⁵ That is not correct. The Claimants rely on the evidence of Mr. Bidega and a draft agreement allegedly sent by Mr. Bidega to NRD in October 2011.²⁷⁶ However this evidence and pleading is proved false by the documentary evidence relied on by the Claimants – raising very serious questions about the veracity of the evidence of Mr. Bidega and Mr. Marshall.

169. In his witness statement Mr. Bidega states that:

“In 2011 the OGMR Regulation and Supervision Division was responsible for negotiating a long term licence for the NRD and BVG Mining Concessions. As a result of the high quality application that NRD submitted, I provided NRD with a copy of the ‘then form’ of agreement that we were using for such Concession agreements between investors and the Government of Rwanda. I, along with my team at the Regulation and Supervision Unit, worked with NRD for several months to negotiate the terms of the agreement. In the draft agreement, the government provided the “Estimated capacity of production and scale of operation” figures in Article 5 based upon historical production values from NRD’s Concessions.”

170. In a footnote to this paragraph, Mr. Bidega cites “*Draft Contract Between Government of Rwanda and NRD, September 2011*”, exhibited at **C-114**. Mr. Bidega’s statement, as relied on and repeated by the Claimants, is false in more than one material respect.

171. The description by Mr. Bidega and the Claimants of the draft contract exhibited at **C-114** is misleading and wrong. For the reasons set out below, the draft contract is not for a long-term licence at all:

171.1. Article 2 of the draft contract expressly states that it is a “*small mine licence*”.²⁷⁷ Article 45 of the 2008 Law provides that “*A small mine exploitation licence shall be valid for a period of five (5) years excluding the date it was granted.*”;²⁷⁸

171.2. Article 2(2) states that the licence would run for a duration of five years until 2016: “*The right given by the small mine license are valid for all the duration of the license (2016) will be grant after signing this contract*”;²⁷⁹

171.3. Article 3(2) provides that NRD must “*proceed to continue exploration works immediately and improve the semi industrial mining within six (6) months from the date of entering into force of this Agreement*”;²⁸⁰

²⁷⁵ Claimants’ Reply, at para. 70.

²⁷⁶ See Witness Statement of Mr. Dominique Bidega dated 16 August 2019; Draft Contract between Government of Rwanda and NRD (September 2011) (**Exhibit C-114**).

²⁷⁷ Draft contract between the Government of Rwanda and NRD (September 2011) (**Exhibit C-114**), at page 2.

²⁷⁸ Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**).

²⁷⁹ Draft contract between the Government of Rwanda and NRD (September 2011) (**Exhibit C-114**), at page 2.

²⁸⁰ *Ibid.*, (**Exhibit C-114**), at page 2.

- 171.4. Article 3(3) provides that NRD must provide a “*progress report on research activities after two years*”;²⁸¹
- 171.5. Article 3(4) states that NRD must “*provide evaluation reports of reserves after two (2) years and feasibility study after five (5) years*”;²⁸²
- 171.6. Article 3(5) provides that within one year from the transfer of the concession, NRD must “*present to the Ministry in charge of mining all the activities plan for exploration and semi-industrial mining exploitation, agenda and relative different cost*”;²⁸³
- 171.7. Article 3(6) states that NRD must provide a “*final report on semi-industrial exploitation after 5 years*”;²⁸⁴ and
- 171.8. Article 4 sets out the investment required over the five-year period, stating that NRD plans to “*invest 9,960,000 USD in a period of 5 years.*”²⁸⁵
172. That the draft contract was only for a five-year small-mine licence is of course not surprising: as explained in the Respondent’s Counter-Memorial,²⁸⁶ at this stage NRD had not applied for a long-term licence, instead having only applied, by the November 2010 Application,²⁸⁷ for a renewal of its licences for a five-year period pursuant to Article 45 of the 2008 Law.²⁸⁸
173. It is not true that Mr. Bidega “*provided NRD with a copy of the ‘then form’ of agreement Rwanda was using for these Concession agreements*”. In a hopeless and ill-fated attempt to support this claim, the Claimants, presumably deliberately, failed to exhibit to the Reply, the covering email in which Mr. Bidega allegedly sent the draft agreement to NRD. On 29 April 2020, the Respondent wrote to the Claimants requesting that this covering email be exhibited on the basis it was referred to and relied on.²⁸⁹ This letter was ignored. On 18 May 2020, the Respondent requested that the Tribunal make an order for

²⁸¹ *Ibid.*, (Exhibit C-114), at page 2.

²⁸² *Ibid.*, (Exhibit C-114), at page 2.

²⁸³ *Ibid.*, (Exhibit C-114), at page 2.

²⁸⁴ *Ibid.*, (Exhibit C-114), at page 2.

²⁸⁵ *Ibid.*, (Exhibit C-114), at page 3.

²⁸⁶ Respondent’s Counter-Memorial, at para. 83.

²⁸⁷ *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (Exhibit C-035)*.

²⁸⁸ Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (Exhibit CL-020); As set out in the CMPO at para. 84, NRD’s application provided at pages 9-17 a “*Proposed Activity Plan for the Period 29/01/2011 to 28/01/2015*” and a “*Proposed Business Plan*” for the same period, and on that basis made an application “*to retain the concessions*”. NRD specifically states that it is “*determined to develop during the course of 2011 to 2015 the licences into sustainable mining operations*”. All of the planning, in relation to all of the Five Concession Areas, is limited to the period between the end of January 2011 and the end of January 2015.

²⁸⁹ Letter from Joseph Hage Aaronson LLP to Duane Morris LLP, Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21) (29 April 2020) (Exhibit R-178).

production.²⁹⁰ The Tribunal requested observations from counsel for the Claimants.²⁹¹ In response, on 20 May 2020, the Claimants provided a new exhibit **C-207**, which they rely on to substantiate their claim that Mr. Bidega sent NRD a copy of a draft long-term licence agreement.²⁹² However, the correspondence contained in this exhibit confirms that Mr. Bidega's statement, as repeated by Mr. Marshall and relied on in the Reply, is false. Mr. Bidega did not provide any draft licence agreement to Mr. Marshall – rather, Mr. Marshall repeatedly sent Mr. Bidega various versions of a contract that Mr. Marshall had drafted himself. Further, all of the iterations of this contract that Mr. Marshall drafted, as exhibited in **C-207** are expressly for small-scale, five-year agreements; contrary to the Claimants' assertions, none are for long-term licences and none are in fact the same as **C-114** (absent the accidental tracked change), as counsel for the Claimants have alleged.²⁹³ In particular:

- 173.1. By email dated 28 September 2011, Mr. Anthony Kibelinka, an employee of NRD and advisor to Mr. Marshall,²⁹⁴ emailed Mr. Bidega a draft five-year agreement, copying in Mr. Marshall. This draft agreement purports to be between NRD and the Government of Rwanda; however the agreement mentions New Bugarama Mining Company in Article 7, not NRD. There is no subject or text in the covering email.²⁹⁵
- 173.2. In their letter of 20 May 2020, the Claimants allege that *"In the process of determining the origin of the track change version of the document marked as C-114, Claimants did discover the first email from Mr. Bidega to Mr. Marshall*

²⁹⁰ Letter from Joseph Hage Aaronson LLP to the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (18 May 2020) (**Exhibit R-179**).

²⁹¹ Email from Alex Kaplan to Duane Morris LLP and Joseph Hage Aaronson LLP, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21) - Document Production (18 May 2020) (**Exhibit R-180**).

²⁹² Letter from Duane Morris LLP to the members of the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (20 May 2020) (**Exhibit R-173**).

²⁹³ *Ibid.*, (**Exhibit R-173**), at page 3 (*"...in the process of determining the origin of the track change version of the document marked as C-114, Claimants did discover the first email from Mr. Bidega to Mr. Marshall providing a draft long term license, which Respondent appears to have used for New Bugarama Mining Company Ltd long term license, and additional exchanges between the two regarding revisions to the draft. In response to Respondent's request for the communication relating to the erroneous version of the document, Claimants are only in a position to produce the email exchanges of the actual versions of the documents, and they are produced here as C-207."*)

²⁹⁴ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 26 (*"Mr. Kibelinka was an advisor to Mr. Marshall. He joined NRD mid-way through 2011 and assumed a much more active role in the company later in the year after Mr. Quam and Ms. Gakuba were dismissed. He was still employed by NRD when I left in September 2012."*); See also the Supplemental Witness Statement of Dr. Michael Biryabarema dated 27 May 2020, at para 10.4 (*"I can also confirm that Anthony Kibelinka, who sent some form of a draft small-scale mining contract to Mr. Bidega, copying in Mr. Marshall, on 28 September 2011, which Mr. Marshall appears to have used as basis for a draft small-mine licence he sent to Mr. Bidega several times later that year, was not an employee of the OGMR."*)

²⁹⁵ Email correspondence between R. Marshall and D. Bidega with attachments (September – December 2011) (**Exhibit C-207**), at page 1.

providing a draft long term license, which Respondent appears to have used for New Bugarama Mining Company Ltd long term license, and additional exchanges between the two regarding revisions to the draft.” This statement is false. We note:

- 173.2.1. *First*, as explained at paragraph 173.1 above, Anthony Kibelinka was an employee of NRD, not an employee of the OGMR or any other Government department, and nor do (or could) the Claimants assert that he was.²⁹⁶
- 173.2.2. *Second*, the long-term licence agreement between Rwanda and New Bugarama Mining Company was not executed until 29 January 2013 and therefore could not possibly have formed the basis for the agreements exchanged by Mr. Marshall and Mr. Kibelinka in 2011 and exhibited in **C-207**.²⁹⁷ New Bugarama Mining Company’s long-term licence agreement was executed following the signing of a transfer agreement between Mr. Serge Stinglhamber, who held 50-year concession rights in the relevant concession areas pursuant to Presidential Order No. 88/10 dated 11 May 1971, and who transferred them to New Bugarama Mining Company by agreement dated 12 December 2011.²⁹⁸ This transfer was approved by the Government and led to the signing of this long-term licence agreement between New Bugarama Mining Company and the Government dated 29 January 2013, granting New Bugarama the rights to exploit the concessions for the duration of the agreement, being until 11 May 2021 or until the Agreement was terminated in accordance with its terms.²⁹⁹
- 173.2.3. *Third*, the long-term licence agreement between Rwanda and New Bugarama Mining Company is completely different to the draft agreements exhibited at **C-114** and in **C-207**.³⁰⁰ Accordingly, the draft agreement sent by Mr. Kibelinka to Mr. Bidega, copying in Mr. Marshall, on 28 September 2011,³⁰¹ and the subsequent drafts prepared by Mr. Marshall which appear to have been prepared on the

²⁹⁶ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 26; Supplemental Witness Statement of Dr. Michael Biryabarema dated 27 May 2020, at para 10.4.

²⁹⁷ *Agreement for Transfer of Mining Concession by and Between The Government of the Republic of Rwanda and New Bugarama Mining Company* (29 January 2013) (**Exhibit R-181**).

²⁹⁸ *Ibid.*, (**Exhibit R-181**), at Annex C, pages 42-53.

²⁹⁹ *Ibid.*, (**Exhibit R-181**), at Article 3, page 9.

³⁰⁰ *Ibid.*, (**Exhibit R-181**).

³⁰¹ Email correspondence between R. Marshall and D. Bidega with attachments (September – December 2011) (**Exhibit C-207**), at page 1.

basis of that draft agreement, clearly did not originate from Rwanda.³⁰²

173.3. By email dated 14 October 2011, Mr. Marshall emailed Mr. Bidega stating *“I have attached a draft agreement for your review. Please have a look and tell me what you think.”*³⁰³ Mr. Bidega does not appear to have replied to this email.

173.4. By email dated 18 October 2011, Mr. Marshall again emailed Mr. Bidega with another copy of the agreement, stating:

“I have attached a new copy of the draft agreement between the Government of Rwanda and NRD. The previous copy had a typographical error on page three, which was totalling the next phase of investment.

Please let me know if there are any provisions which require further information. Or, please make your suggested changes and let’s discuss them.

*I have asked my driver to deliver to you a hard copy of the Internal Rules and Regulations of NRD, which will be with you in a few minutes.”*³⁰⁴

173.5. On 18 October 2011, Mr. Bidega replied, saying *“Thank you for your message, I received the NRD internal regulation document> For the point araised [sic] in your message, I will focus to it tomorrow..”*³⁰⁵

173.6. It appears that Mr. Bidega did not provide any substantive response to Mr. Marshall on 19 October 2011 as on 20 October 2011, Mr. Marshall again emailed him stating *“I have attached a copy of proposed agreement. Please note especially Article 3(B).”* Article 3B of that draft agreement prepared by Mr. Marshall set out what he wished to be the obligations of the Rwandan “Ministry in charge of mines”.³⁰⁶

173.7. The very next day, 21 October 2011, Mr. Marshall again emailed Mr. Bidega a copy of his draft small-scale licence agreement. Mr. Marshall’s covering email states *“I have attached a draft agreement – please excuse the date on the file but I could not change it after I began drafting the agreement. (I need better computer skills!)”*³⁰⁷

173.8. Later that day, on 21 October 2011, Mr. Bidega finally replied, stating *“According to our mining law, I made some change in your draft agreement. Look carefully*

³⁰² *Ibid.*, (Exhibit C-207), at pages 5-98.

³⁰³ *Ibid.*, (Exhibit C-207), at page 5.

³⁰⁴ *Ibid.*, (Exhibit C-207), at page 16.

³⁰⁵ *Ibid.*, (Exhibit C-207), at page 24.

³⁰⁶ *Ibid.*, (Exhibit C-207), at page 28.

³⁰⁷ *Ibid.*, (Exhibit C-207), at page 33.

to the text in red colour.”³⁰⁸ The email attached an amended version of the contract Mr. Marshall had sent in the previous email, but is not the contract exhibited at **C-114** as is clear from the different date (being October 2011 as opposed to September 2011) and the different wording of Article 3(B)(4) – the contract exhibited at **C-114** not providing any reference to long-term licences being granted following satisfactory calculation of the reserves and feasibility study being submitted. It is notable that:

173.9. Mr. Bidega’s edits were entirely consistent with the agreement being a draft agreement for a small-scale mining licence. His edits (highlighted here in bold) in Article 2 states that the draft is for “ **small mine licenses for five years**” and a further edit in article 2(3) (highlighted in bold) states that “*Nevertheless, if this extension for **small mine licences for five years** end without any request for renewal by NRD, the perimeters for the semi industrial mining concession licences immediately return back to the State without any lawsuit*”.³⁰⁹

173.10. Further, under Article 3(B)(4), Mr. Bidega made the following edits (again highlighted here in bold) – consistent with the Respondent’s position that long-term licences would only be granted upon satisfying the Government that such concession areas had satisfactory reserves and following conducting a satisfactory feasibility study:

*“As soon as NRD makes a calculation of **bankable** reserves and a **feasibility study**, NRD shall then be granted long term thirty year concession rights for the **concession studies; the remain concessions will continue with small mine license.**”*

173.11. Mr. Bidega did not say in this email that the agreement was being passed on to his superiors for approval, let alone that it had been provided to former Minister Imena or to Cabinet for approval.

173.12. The next day, 22 October 2011, Mr. Marshall emailed Mr. Bidega again saying “*I have attached a copy of draft agreement showing changes in red. Please let me know what you think.*”³¹⁰ The agreement attached a further draft agreement dated October 2011.

173.13. Less than one hour later, on 22 October 2011, Mr. Marshall emailed Mr. Bidega saying “*I have attached a proposed draft of the final agreement.*”³¹¹ His email attached a further draft agreement, dated October 2011, appearing to duplicate the one sent earlier that morning but without his changes being marked up in red.

³⁰⁸ *Ibid.*, (Exhibit C-207), at page 41.

³⁰⁹ *Ibid.*, (Exhibit C-207), at page 44.

³¹⁰ *Ibid.*, (Exhibit C-207), at page 49.

³¹¹ *Ibid.*, (Exhibit C-207), at page 57.

- 173.14. On 23 October 2011, Mr. Bidega replied, stating *“For me there is no problem, I add article 7 which will be common to all investors working in former REDEMI concessions; this article talk about the management of assets belong to the Government . But for NRD these assets are very limited. Thanks.”*³¹² Again Mr. Bidega did not state that he had submitted the agreement to his superiors, to former Minister Imena, or to Cabinet. The agreement he attached is not the same as the agreement exhibited at **C-114**.
- 173.15. Later that day, Mr. Marshall emailed Mr. Bidega again saying *“I have attached a copy of a draft agreement. Please let me know what you think.”*³¹³ Mr. Bidega did not appear to reply to that email.
- 173.16. On 13 December 2011, Mr. Marshall emailed Mr. Bidega again stating: *“Here attached is a revised version of the section on Investment Details in respect of exploration and feasibility study—amounts for each concession. Please let me know what you think of these.”*³¹⁴ The email attached a draft agreement dated December 2011. Later that day, Mr. Bidega replied stating *“For me it is fine, but I add some clarifications and corrections (see in red color).”*³¹⁵ Mr. Bidega followed up with a further email that day attaching a draft contract with edits.³¹⁶ These edits were to the figures listed for the required investment in exploration and feasibility study. The agreement, again, provided expressly in Article 2 that it was for a small mine licence for five-years. It was not the same as the agreement that Mr. Bidega claims to have submitted to Cabinet that is exhibited at **C-114**, as is evident from the date of the agreement (being December rather than September 2011) and the text of Article 3(B)(4). Again, Mr. Bidega did not state that he had sent the agreement to his superiors, former Minister Imena or to Cabinet.
174. Accordingly, it is clear that:
- 174.1. The draft agreement exhibited in **C-114** is expressly not a long-term licence agreement but rather a five-year, small-scale mining licence, consistent with what NRD had applied for at the time.
- 174.2. The draft agreements exhibited in **C-207** were expressly not for a long-term licence but rather for a five-year, small-scale mining licence, consistent with what NRD had applied for at the time.
- 174.3. The draft agreements exhibited at **C-207** were prepared by Mr. Anthony Kibelinka and Mr. Marshall and not by Mr. Bidega or anyone else within the

³¹² *Ibid.*, (Exhibit C-207), at page 65.

³¹³ *Ibid.*, (Exhibit C-207), at page 73.

³¹⁴ *Ibid.*, (Exhibit C-207), at page 81.

³¹⁵ *Ibid.*, (Exhibit C-207), at page 89.

³¹⁶ *Ibid.*, (Exhibit C-207), at page 90.

Government, as the Claimants have falsely claimed. Accordingly, they do not support the proposition that Mr. Bidega “provided” such agreement to NRD based on its supposedly high-quality application submitted – rather Mr. Marshall persistently emailed him copies of contracts that he asked Mr. Bidega to review.

- 174.4. Despite the Claimants’ assertion that the correspondence at **C-207** represented the covering email to the draft contract exhibited at **C-114**, this is not the case. The Claimants have therefore still not provided any evidence to support their claim that Mr. Bidega prepared the draft contract exhibited at **C-114**, let alone that he passed it on to his superiors, former Minister Imena, or to Cabinet.

ii. Cabinet Process

175. The Claimants are correct that Cabinet is required to consider high level policy, legal or regulatory proposals, and that before the proposals reach Cabinet, the vast majority of disagreements should have been resolved so that Cabinet can make a swift, informed decision.³¹⁷ As Mr. Mugisha states:

*“Cabinet decides on the issuing of mining licence. The nature of the Cabinet process is set out in the Rwandan Constitution, the Cabinet Manual, and the Presidential Order No 01/01 of 14/01/2013 Determining the Functioning, Composition and Procedure for Decision Making of the Cabinet (“**Presidential Order on the Decision Making of Cabinet**”).*

The Cabinet Manual is clear that:

‘The Cabinet is the ultimate policy decision-making institution in the country. In order to achieve its mission and make quality decisions, it is crucial that all documents presented to Cabinet are of high quality, and all issues to be decided upon have been thoroughly analyzed and well presented.

The role of Cabinet is to make high-level policy decisions, based on the evidence before it. It is the final stage in the decision-making process; by the time proposals reach Cabinet, the vast majority of issues and disagreements should have been resolved so that Cabinet can make a swift, well-informed decision.’

Further, in relation to proposals submitted by a Ministry:

‘Any proposal which a Ministry wishes Cabinet to consider must be submitted formally to the Prime Minister with a request to place it on the Cabinet agenda. The Minister who wishes to submit a proposal for Cabinet decision should prepare a detailed document presenting the issue he or she wants the Cabinet to consider and take decisions on, as well as a Cabinet paper summarizing the content of the detailed document and clearly stating the decisions he/she wants the cabinet to take. The

³¹⁷ Claimants’ Reply, at para. 70.

Minister should then write to the Prime Minister asking him to put the issue on the Cabinet agenda.

To ensure best use of Cabinet's time, proposals submitted for consideration by Cabinet must be complete and ready for Cabinet to make a decision. They should show their rationale, ensure all issues have been considered, all relevant information presented, and all consultations made. Ensuring proposals are as comprehensive as possible means that decisions can be taken swiftly, and are likely to achieve the best policy outcome. Detailed guidance on the content and format of Cabinet proposals can be found in chapter 6: Format and Drafting Requirements for Cabinet Papers.'

*As a consequence, issues are only submitted to Cabinet for decision once a Minister is convinced, on the basis of the evidence before him or her, that the paper is worthy of presenting to the Cabinet, and that it should be approved.*³¹⁸

176. However, the Claimants' assertions about the nature of the process for cabinet approval that was undertaken in relation to their draft long-term licence are pure fantasy, unsupported by any evidence and without any legal basis. No new long- or short-term licences or any new agreements were ever presented to the Cabinet in relation to NRD.
177. The Cabinet Manual states that "*Ministers should not make public statements on policy proposals which require Cabinet authorization in advance of Cabinet's consideration, as this may pre-empt Cabinet deliberations*".³¹⁹ This is inconsistent with the Claimants' allegation in the Reply at paragraph 65 that Mr. Bidega was aware, and informed them, that a draft long-term licence had been submitted to Cabinet for approval as part of a Cabinet process.³²⁰ Additionally, Mr. Mugisha is clear that the procedure provided for in the Cabinet Manual "*is inconsistent with the Claimants' allegation in their Reply at paragraph 71 that OGMR submitted the draft long-term licence to Cabinet, as the power to submit a proposal to Cabinet is limited to the Minister*".³²¹
178. Mr. Gatare is clear that the draft long-term licence was never submitted to Cabinet.³²² Further, as the Claimants recognise, by the time that a proposal reaches Cabinet, "*the vast majority of issues and disagreements should have been resolved*".³²³ For exactly that reason, the draft long-term licence would never have been submitted to Cabinet because, as Mr. Gatare sets out in his supplemental witness statement:

"Before any matter is put to Cabinet for decision, it must first have been approved or accepted by a Minister, who will then support it through the

³¹⁸ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at paras. 24-26, referring to Office of the Prime Minister Ministry of Cabinet Affairs, *Cabinet Manual*, Second Edition, January 2013 (**Exhibit RM-005**), at pages 29-30.

³¹⁹ Office of the Prime Minister Ministry of Cabinet Affairs, *Cabinet Manual*, Second Edition, January 2013 (**Exhibit RM-005**), at page 13.

³²⁰ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 29.

³²¹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 30.

³²² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 12.

³²³ Claimants' Reply, at para. 70.

Cabinet consideration process. NRD's application for long-term mining licenses was never accepted within the MINIRENA and could therefore not have been submitted to Cabinet for approval.

NRD were asked to apply for concessions and to provide exploration and production reports to support their application. Their application was very substandard, and although they were repeatedly given the opportunity to provide further documents and to bring their application up to the required standard, they failed to provide a viable application. As there was not a conclusive positive determination at ministerial level there would have been no basis for submitting any cabinet paper.”³²⁴

179. The Claimants had no reason to understand or expect that Cabinet was considering the draft long-term licence, let alone that they should expect a long-term licence to be issued.

iii. Licence extensions in 2012

180. As set out above at paragraphs 122 to 124, the Claimants' special licences were extended to allow more time for negotiations.³²⁵ Such extensions expired in October 2012. The Claimants rely on a letter from Minister Kamanzi dated 13 September 2012, as causing them to continue to expect that NRD was guaranteed long-term licences, however they misrepresent its contents.³²⁶ That letter stated:

“in view of the ongoing work on reorganising the mining sector which will have a bearing on the new contracts that will be negotiated as has been communicated to all the existing concession holders I have the pleasure to extend your licence up to October 2012”³²⁷

181. On any fair reading, this was in no way intended to communicate a guarantee to NRD that it was entitled to receive long-term licences, but rather to provide context to the extension of the short-term licence extension previously granted. The “*new contracts that will be negotiated*” in this case refers to the renegotiation of contracts held by all the existing concession-holders, following the reorganisation of the mining sector, and was not intended to refer only to NRD and its Five Concession Areas.

iv. NRD's licence application for long-term licences dated 30 January 2013

182. On 30 January 2013, several months after the expiry of its original Licences, NRD applied for a long-term licence for the first time.³²⁸ As explained at paragraphs 135 to 137 of the Counter-Memorial, this application was only nine pages long and was largely a

³²⁴ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at paras. 13-14.

³²⁵ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

³²⁶ Claimants' Reply, at para. 74.

³²⁷ Letter from Ministry of Natural Resources (Minister S. Kamanzi to Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-045**).

³²⁸ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

summarised re-hash of the contents of the November 2010 Application. The application was entirely inadequate, containing no proper analysis or supporting documentation, and lacked the detail that would have been required for even a five-year licence – yet NRD were seeking a long-term, 30-year licence on the basis of the application.³²⁹

183. It is also worth noting in relation to this application that it is clear from its contents that, just as NRD was not sampling “*thousands of minerals*”³³⁰ on site in 2010, it was not doing this in 2013 either. The 2013 application refers only to 130 samples of wolframite scree deposits and “*a total of 115 samples*” of tantalum being collected and while it states that a number of follow ups to the tantalum sampling occurred in 2011 and 2012, the application does not give any details.³³¹

184. The Claimants attached to this application a draft contract. They allege at paragraph 75 of the Reply, that they had been asked by the GMD in January 2013 to send them the previously agreed upon draft agreement together with updated NRD planning and application documents. The Claimants’ also allege at paragraph 75 of the Reply, that they had been asked by the GMD in January 2013 to send them this draft agreement together with its updated application. However, the Claimants have provided no evidence whatsoever that this request was made by GMD. Further, the Claimants assertions that the request was made are not credible for the reasons explained below:

184.1. *First*, rather than being in response to a request by GMD, it appears that NRD submitted the draft agreement together with an updated application from NRD on its own initiative. In its letter to Minister Kamanzi on 30 January 2013, NRD state that “[t]his letter is to provide you with an update of the amended application of Natural Resources Development Rwanda Ltd. (NRD) for a long-term mining concession licence.”³³²

184.2. *Second*, as with the draft agreement referred to above, this agreement did not originate from the Government. As explained by former Minister Imena:

“Although the two drafts are very similar in style and format, that style and format is very different to what the Government would use. Further, both drafts include information that we would not usually include in the body of the agreement, such as estimated investment levels and profitability estimates. I also note that both draft agreements, although purportedly prepared two years apart, contain exactly the same figures at Article 4 for ‘Capital Investment’, Article 5

³²⁹ Respondent’s Counter-Memorial, at paras. 135-137; Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 23; Witness statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 15.

³³⁰ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 25.

³³¹ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**) at page 4; See also the Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 19 and the Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 11.

³³² Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

for 'Estimated capacity of production and scale of operation' and Article 6 for 'Forecasted profit and loss statements'".³³³

v. Temporary permission to resume mining in NRD's western concessions while Rwanda considered NRD's licence application

185. On 10 February 2013, Dr. Biryabarema wrote to Mr. Marshall informing him that NRD could resume activities in its western concession areas in the short term as the Government proceeded with negotiations on NRD's request for new contracts.³³⁴ These concession areas had been closed by local government due to environmental damage and smuggling.³³⁵ However, Mr. Marshall had put forward a proposal as to the measures he intended to put in place to curb illegal mining which Dr. Biryabarema considered satisfactory, and as Mr. Marshall had submitted an application for long-term licences on 30 January 2013, discussed above, Dr. Biryabarema gave NRD permission to resume activities in its western concession areas in the short term while the Government considered its licence application.³³⁶

vi. 30 October 2013 Meeting

186. At paragraph 78 of the Reply, the Claimants allege that at a meeting on 30 October 2013, former Minister Imena assured NRD that negotiations for long-term licences would be picking up shortly but that no further negotiations took place. As former Minister Imena explains, in his supplemental statement, that is incorrect.

187. *First*, since making his first statement, former Minister Imena has located minutes of the meeting which accord with his recollection of the meeting as set out in paragraph 25 of his first statement, and do not reflect Mr. Marshall's version of the meeting as set out in his first witness statement at paragraph 38.³³⁷ As is evident from the minutes, it was agreed that the Government and NRD would set up a team that would meet at least once a week for the purpose of drawing up a plan for the mines, with new demarcations and recommendations and that negotiations for new licences would only start once that was done.³³⁸ At the meeting, the Government suggested that because NRD had failed to implement its planned activities and its production had decreased, it would be logical for NRD to focus on applying for licences for only two of the Five Concession Areas - being Nemba and Rutsiro.³³⁹

³³³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 24.2, referring to Draft Contract between Government of Rwanda and NRD (September 2011) (**Exhibit C-114**), at pages 3-4; Amendment of Contract Between the Government of Rwanda and NRD (February 2013) (**Exhibit C-042**), at pages 4-6.

³³⁴ Letter from the Natural Resources Authority (Dr. M. Biryabarema) to NRD (R. Marshall), *Security Strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**).

³³⁵ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 13.

³³⁶ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 14.

³³⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 27, referring to MINIRENA and NRD Meeting Minutes (30 October 2013) (**Exhibit R-112**).

³³⁸ *Ibid.*, (**Exhibit R-112**).

³³⁹ *Ibid.*, (**Exhibit R-112**); Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 15.3.

188. As former Minister Imena explained at the meeting, the “Ministry has no interest in stopping NRD Ltd for carrying out the mining activities however there is a need for both part to work in harmony.”³⁴⁰ As he explains, what former Minister Imena meant by this statement was that “[w]e wanted to find a way to help NRD because it was in our interest for NRD to get a licence if it was able to demonstrate that it would mine in a professional and effective manner – there was no benefit to us in seeing NRD fail to receive a licence if it would be able to mine successfully.”³⁴¹

189. Second, one further meeting was held with NRD after the 30 October 2013 meeting (although the minutes of the meeting record that the Government and NRD agreed to hold weekly meetings, in fact only one meeting was held). That meeting took place on 8 November 2013 with representatives of MINIRENA and NRD, including Mr. Marshall and Ms. Mruskovicova, in attendance.³⁴² As former Minister Imena explains in his supplemental witness statement, although he was not present at that meeting:

*“the minutes record that Joseph Butera, a mineral economist at MINIRENA who chaired the meeting and who was also present at the 30 October 2013 meeting, reminded NRD that the Government was willing to negotiate the Nemba and Rutsiro concessions with NRD. NRD refused to negotiate over only these two concessions and continued to press for licences for all 5 concessions as can be seen from the three options set out on the final page of the minutes. No further meetings ever took place because in light of NRD’s refusal to focus on only two concessions there did not seem to be any way forward.”*³⁴³

190. What is clear from the above is that negotiations did not continue because NRD refused to cooperate with the Government and not because the Respondent was conspiring to rid Rwanda of NRD as the Claimants suggest. Specifically, NRD refused to countenance focussing just on two of the Five Concession Areas: this was a sensible proposal by the Respondent who had well-founded concerns, based on NRD’s performance to date, that it did not have sufficient resources successfully to industrialise all Five Concession Areas.

2. Some concession areas were closed, and NRD was prevented from reopening for environmental reasons

191. Shortly before the expiry of its licences in October 2012 NRD was prevented from accessing its three western concession areas – Rutsiro, Sebeya and Giciye - in September 2012, when the local authorities in Rutsiro and Ngororero Districts called a halt to mining operations in those areas.³⁴⁴ Due to environmental concerns, NRD was not allowed to resume operations immediately.³⁴⁵ During the time that these concession areas were

³⁴⁰ *Ibid.*, (Exhibit R-112).

³⁴¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 28.

³⁴² MINIRENA and NRD Meeting Minutes (8 November 2013) (Exhibit R-113).

³⁴³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 29.

³⁴⁴ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister S. Kamanzi) (14 September 2012) (Exhibit C-049).

³⁴⁵ Letter from the Chairman of NRD (R. Marshall) to the Deputy Director General, GMD, RNRA (Dr. M. Biryabarema) (14 December 2012) (Exhibit C-050).

closed for environmental reasons, the Respondent was actively taking steps to protect NRD's mines and concessions.

192. In February 2013, NRD was permitted to return to the Five Concession Areas, on the basis that it would take steps to prevent and control illegal mining, which had been causing harm to the concession areas.³⁴⁶

3. NRD's disputes with Mr. Benzinge: Shareholder dispute and employment dispute

i. The Shareholder Dispute

193. NRD's initial shareholders were the Zarnacks and Mr. Benzinge. When the Zarnacks sold their shares in NRD to HC Starck, Mr. Benzinge had consistently asserted that his interest in NRD remained, and that the Zarnacks' transfer of ownership to HC Starck was inconsistent with the Memorandum and Articles of Incorporation of NRD and was therefore void.
194. A dispute as to the shareholding of NRD initially arose in August 2012, when Mr. Benzinge challenged Spalena's ownership, through NRD Holding GmbH, of NRD.
195. Spalena purchased HC Starck GmbH, as set out above, on 23 December 2010. On 2 August 2012, following information received from Mr. Benzinge, the RDB updated the corporate registration for NRD to record that Mr. Benzinge was its Managing Director.³⁴⁷ On 3 August 2012, Mr. Marshall wrote to the RDB stating that Mr. Benzinge's representations were wrong, that he had transferred a significant amount of company assets and taken over company premises to the detriment of the company and its shareholders and that Mr. Benzinge was not a shareholder of NRD. As such he asked the RDB to reverse their decision.³⁴⁸
196. On 6 August 2012, and in line with Mr. Marshall's request, the RDB informed Mr. Benzinge that the position of Managing Director had been suspended, until the complaints had been investigated to ensure that the interests of shareholders were secure. The RDB also updated the registration information to reflect Mr. Benzinge's removal and the suspension of the position.³⁴⁹
197. On 7 August 2012, the RDB wrote to the Mayor of Bugasera District, stating that it had recently received documents indicating that Mr. Marshall had been appointed as

³⁴⁶ Letter from the Natural Resources Authority (Dr. M. Biryabarema) to NRD (R. Marshall), *Security Strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**).

³⁴⁷ RDB Certificate of domestic company registration for NRD (2 August 2012) (**Exhibit R-026**).

³⁴⁸ Letter from NRD (R. Marshall) to the CEO of the RDB (C. Akamanzi) (3 August 2012) (**Exhibit R-231**).

³⁴⁹ RDB Full Registration information for Domestic Company for NRD (6 August 2012) (**Exhibit R-027**); RDB Certificate of Domestic Company Registration (6 August 2012) (**Exhibit R-028**); Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of NRD* (6 August 2012) (**Exhibit R-029**).

Managing Director of NRD, and that he was, in effect, the beneficial owner of NRD.³⁵⁰ As such, the RDB requested facilitation of the transfer of NRD's property to Mr. Marshall. Crucially, for the reasons set out at section VI.B.3.ii below, any control of NRD gained by Mr. Benzinge during this period was not done "with the RDB backing" as the Claimants suggest.³⁵¹ As explained in a letter from the RDB to Mr. Marshall at the time, Mr. Marshall had made "misrepresentations about RDB's role and/or intention in this matter" and he continues (wrongly) to do so now.³⁵²

198. On 8 August 2012, Mr. Benzinge lodged an appeal against the decision of RDB to suspend him as Managing Director of NRD.³⁵³ On 31 October 2012, Mr. Benzinge commenced arbitral proceedings against NRD in which he challenged the appointment of Mr. Marshall as Managing Director of NRD, the appointment of Ms. Mruskovicova and Mr. Marshall as board members, and the transfer of shares to NRD Holding GmbH and H.C. Starck GmbH. Although NRD was summoned, it did not attend the hearing, give a reason for its absence, or file any submissions.
199. On 17 May 2013, the Arbitrator held that NRD Holding GmbH and HC Starck GmbH had become shareholders in NRD, and Mr. Marshall Managing Director of NRD, unlawfully.³⁵⁴ The Arbitrator also declared that Ms. Mruskovicova and Mr. Marshall were to be dismissed as members of the Board of Directors of NRD.³⁵⁵ Further, the Arbitrator held that various decisions taken during the Board meetings of 11 October 2011, 28 October 2010, and 10 December 2008 were unlawful and should be annulled.³⁵⁶
200. NRD brought challenges to the Arbitrator's decision on procedural grounds, which were made and rejected before the High Court, and the Supreme Court of Rwanda, in September 2013 and May 2014 respectively.³⁵⁷ The consequence of this is that the Arbitral Decision remains and is binding as between the parties.³⁵⁸

³⁵⁰ Letter from the Registrar General of RDB (L. Kanyonga) to the Mayor of Bugesera District (L. Rwagaju), *Appointment of acting Managing Director of Natural Resources Development Ltd* (7 August 2012) (**Exhibit C-070**).

³⁵¹ Claimants Reply, at para. 86.

³⁵² Letter from the CEO of the RDB (C. Akamanzi) to NRD (R. Marshall), *Appointment of Managing Director of NRD* (7 August 2012) (**Exhibit R-114**).

³⁵³ Letter from Legal Counsel (I. M. Bizumuremyi) to the Minister of Trade and Industry, *Appeal by Mr. Ben Benzinge against the decision of Registrar General to suspend him from the position of Managing Director of Natural Resources Development (Rwanda) Ltd.* (8 August 2012) (**Exhibit R-012**).

³⁵⁴ *Ben Benzinge v. NRD Rwanda Ltd*, Decision of Arbitration Tribunal (17 May 2013) (**Exhibit R-013**), at pages 6 and 11.

³⁵⁵ *Ibid.*, (**Exhibit R-013**), at page 10.

³⁵⁶ *Ibid.*, (**Exhibit R-013**), at page 11.

³⁵⁷ See *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Commercial High Court, Kigali, RCOMA 0269/13/HCC (23 September 2013) (**Exhibit R-014**) and *Natural Resources Development Rwanda Ltd v. Ben Benzinge*, Decision of the Supreme Court, Kigali, RCOMA 0017/13/CS (2 May 2014) (**Exhibit R-015**).

³⁵⁸ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 45.

201. The effect of the Arbitral Decision, and the consequence of it being upheld on procedural grounds by the High Court and the Supreme Court, as set out above at paragraph 82, was that.³⁵⁹
- 201.1. As the transfer of the shares was not valid, the legal shareholders of NRD were Mr. Benzinge and the Zarnacks, whose names are found on the Articles of Association.
- 201.2. The appointment of Ms. Mruskovicova and Mr. Marshall to Board of Directors of NRD, and Mr. Marshall as Managing Director, was void and accordingly they do not hold those positions. As no replacements were provided, the board reverts to the composition that it had before the appointment of Ms. Mruskovicova and Mr. Marshall.
- 201.3. Consequently, as Managing Director, Mr. Benzinge had authority to act on behalf of NRD.
202. The Claimants portray the regard that Rwanda gave to the Arbitral Decision as Rwanda “*permitting*” Mr. Benzinge to “*wrest control of NRD’s operations from the Claimants*” and as a decision of former Minister Imena, “*unilaterally and in direct contradiction of RDB’s records and NRD’s internal documents*”.³⁶⁰ This misstates the position. The Arbitral Decision, which determined that the shares in NRD were properly the property of Mr. Benzinge, was a decision of the Arbitrator, and not of former Minister Imena. Although the RDB documents did not yet reflect the Arbitral Decision, the parties were required by the Arbitral Decision to recognise Mr. Benzinge’s ownership of the shares, and consequently to have the RDB records updated. The Arbitral Decision had not been challenged, and so remained binding.³⁶¹ It was appropriate for former Minister Imena to act consistently with the Arbitral Decision. In any event the decisions taken by the RDB were taken independently of former Minister Imena, and he did not “*declare that Mr. Benzinge owned 100% of the shares of NRD*”³⁶² as the Claimants allege. As former Minister Imena explains: “*I did not get involved in resolving the dispute regarding the ownership of NRD but told Mr. Benzinge that he should discuss the matter with RDB and that we would only deal with the person who the RDB records showed was the Managing Director and owner of the company.*”³⁶³

³⁵⁹ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at paras. 45-47.

³⁶⁰ Claimants’ Reply, at para. 88.

³⁶¹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 37 (“*NRD did not bring a challenge of the Arbitral Decision on those grounds at the time, when they had the opportunity to do so. The Arbitration Law limits the circumstances in which an award can be set aside and, NRD having failed to have the decision set aside, the Arbitral Award stands. Arbitral awards are binding unless they are challenged through the appropriate means provided for in the Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters (“Arbitration Law”)*”).

³⁶² Claimants’ Reply, at para. 88

³⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 40.

203. Following the confirmation of the Arbitral Decision by the Supreme Court of Rwanda, representatives of Mr. Benzinge wrote to the RDB requesting that it amend the company information, to indicate that, consistently with the Arbitral Decision, Mr. Benzinge is a shareholder and Managing Director of NRD.³⁶⁴ Mr. Marshall, on NRD letterhead and “on behalf of the shareholders” of NRD, also wrote to the RDB, stating that the Arbitral Decision was incomprehensible and requesting intervention.³⁶⁵
204. What the Claimants term “*Mr Benzinge’s wrongful seizure of NRD*”³⁶⁶ in which he was able to “*wrest control of NRD’s operations*”³⁶⁷ in fact simply reflects the operation of the Arbitral Decision, as upheld by the High Court and the Supreme Court. Mr. Benzinge was able to take control of NRD’s premises and assets in 2014 because, as set out above, NRD was subject to ongoing ownership disputes between Mr. Benzinge and Mr. Marshall; and also because Mr. Benzinge had obtained an enforceable money judgment against NRD, and took the enforcement steps open to him under Rwandan law.
205. The Claimants state that it was “*Minister Imena that had allowed Mr. Benzinge to take control of NRD’s offices and Concessions*”,³⁶⁸ but as explained by former Minister Imena:

*“Neither I nor the Ministry had authorised Mr. Benzinge to take control of NRD or its assets or had any knowledge about it until informed by Mr. Marshall. When I wrote to NRD on 18 August 2014 I did not know that NRD were barred from accessing the concessions or their office.”*³⁶⁹

ii. Enforcement of judgments against NRD

206. Concurrently, in early 2014, NRD was the subject of numerous court judgments declaring that it owed sums to various parties, including Mr. Benzinge and numerous employees. The Claimants allege that Mr. Nsengiyuma was hired “*to auction off much of NRD’s property purportedly to satisfy unspecified court judgments*”.³⁷⁰ This is not correct: the judgments were specified and were clearly set out in the Counter-Memorial at paragraph 195. They are:

206.1. Mr. Benzinge’s judgment against NRD in the arbitral proceedings discussed above, which he asked Mr. Nsengiyuma to enforce;³⁷¹ and

206.2. money judgments of 25 former employees of NRD in relation to unpaid wages.³⁷²

³⁶⁴ Letter from Lex Chambers Ltd (I. Bizumuremyi) to the Registrar General of the Rwanda Development Board (29 May 2014) (**Exhibit R-033**).

³⁶⁵ Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**).

³⁶⁶ Claimants’ Reply, at para. 90.

³⁶⁷ Claimants’ Reply, at para. 88.

³⁶⁸ Claimants’ Reply, at para. 88.

³⁶⁹ Supplemental Witness Statement of Evode Imena dated 28 May 2020, at para. 34.

³⁷⁰ Claimants’ Reply, at para. 88.

³⁷¹ Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 18.

³⁷² Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 18.

207. Around the same time, lawyers on behalf of Mineral Supply Africa Ltd wrote to NRD in relation to an outstanding balance of USD \$601,836.98, requesting payment of the outstanding funds and threatening legal proceedings if not repaid.³⁷³
208. The Claimants state that in July 2014, Mr. Nsengiyuma attempted to auction the Claimants' property and assets. That is correct. Yet far from being unlawful, or part of any conspiracy against NRD, Mr. Nsengiyuma's actions were undertaken to enforce the judgments of NRD's creditors and were in accordance with the law.³⁷⁴ The Claimants also allege that Mr. Nsengiyuma had attempted to fraudulently sell NRD's minerals previously.³⁷⁵ This is untrue, as Mr. Nsengiyuma has explained:
- "At paragraph 89 of the Reply Memorial, the Claimants allege that a court had previously found at I had attempted to fraudulently sell NRD's minerals once before. This is incorrect. As a bailiff, at all times, I act consistently with a valid court order. The Claimants attempt to rely on C-071 in order to make their allegation that I acted inconsistently with the law, but in fact that decision was related to a claim by third parties who claimed that the minerals I intended to auction did not belong to NRD. What is clear from the decision is that I started the proceedings seeking the court's permission to sell minerals belonging to NRD. The decision also shows for as long as the property sold belonged to NRD, such a sale would be lawful."*³⁷⁶
209. In fact, the Claimants were aware that Mr. Nsengiyuma intended to seize NRD's assets in the course of the lawful enforcement of the judgments listed at paragraph 206 above. On 9 June 2014, Mr. Nsengiyuma wrote to NRD with a formal demand of payment of the judgment debt owed to Mr. Benzinge and the 25 former employees. As the amounts due and demanded were not paid, Mr. Nsengiyuma seized all of the equipment in NRD's office in Kigali, and on the mine at Nemba, on 11 June 2014, as he was lawfully entitled to do, and informed NRD that he would sell the equipment on 11 July 2014 if the judgment debts had not been paid.
210. NRD reacted by accusing Mr. Nsengiyuma of unlawfully possessing NRD's property, requesting that the Minister of Justice suspend Mr. Nsengiyuma's action, which the Minister of Justice agreed to do, apparently on the strength of the claims made by NRD.³⁷⁷ However, following a review of the matter, the Minister of Justice confirmed that Mr. Nsengiyuma had acted appropriately, and informed NRD that it had legitimate judgment

³⁷³ Letter from R & Partners Law Firm (R. Rwihandagaza) to NRD, *Outstanding payment owed to MSA Ltd* (7 July 2014) (**Exhibit R-115**).

³⁷⁴ Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 8.

³⁷⁵ Claimants' Reply, at para. 89.

³⁷⁶ Supplemental Witness Statement of Mr. Jean Bosco Nsengiyuma dated 29 May 2020, at para. 7. See also Witness statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 8.

³⁷⁷ Letter from the Minister of Justice (J. Busingye) to Professional Court Bailiff (J. B. Nsengiyumva), *Suspension from executing judgments against Natural Resources Development (Rwanda) Ltd* (23 July 2014) (**Exhibit C-072**).

creditors who had won cases against the company and must be paid.³⁷⁸ The Claimants' description of Mr. Nsengiyuma's actions as "*illegal*"³⁷⁹ could not be further from the truth. Mr. Nsengiyuma's actions were taken in furtherance of the enforcement of legitimate judgments of the Rwandan courts, after due notice had been given to NRD.

211. Additionally, at paragraphs 91 and 278 of the Reply, the Claimants allege that Mr. Nsengiyuma tried to solicit a bribe from NRD's CFO, Ms. Mruskovicova. They allege that he wrongfully seized a magnetic separator and attempted to return it in exchange for fifty percent of its value. Mr. Nsengiyuma clarifies that:

*"The messages in C-149 were sent by me to the Managing Director of SPEDAG INTERFREIGHT ("SPEDAG"), a company operating freight and forwarding services. They were not sent to Ms Mruskovicova. SPEDAG had been mandated by NRD to take a magnetic separator to the Democratic Republic of Congo. It appeared to me that this transfer was, in part, in order to avoid execution of the judgment of the Court order in favour of Mr Benzinge and the other NRD employees discussed above over the asset. Accordingly, I seized the machine, in execution of the judgment, and requested the customs police to prevent its departure from Rwanda until either 50% of the price of the machine was paid to service the debt under the judgment, or the judgment had been fully executed from other sources. I was not attempting to solicit a bribe from Ms Mruskovicova, but rather seeking enforcement of the judgment against NRD, in accordance with my role as bailiff."*³⁸⁰

iii. Decision to withhold tags from NRD

212. In light of the failure of NRD to regularise its status under the 2014 Law, and its ongoing ownership dispute with Mr. Benzinge of which Rwanda had been made aware, Rwanda made the decision to bar iTSCi from issuing any further tags to NRD.
213. The Claimants allege that these reasons were not valid on the basis that "*disputes over ownership had been settled since 2012*",³⁸¹ and claim that as a result former Minister Imena "*manipulated the mineral tagging process*",³⁸² but plainly, as discussed above, the dispute between the Claimants and Mr. Benzinge was ongoing in mid-2014, remains in dispute on the Claimants' case (notwithstanding that its appeals to the Rwandan courts

³⁷⁸ Letter from the Minister of Justice (J. Busingye) to Z Mruskovicova, R. Marshall and B. Benzinge, *Execution of judgments against NRD Rwanda Ltd* (August 2014) (**Exhibit C-073**); Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para. 31.

³⁷⁹ Claimants' Reply, at para. 91.

³⁸⁰ Supplemental Witness Statement of Mr. Jean Bosco Nsengiyuma dated 29 May 2020 at para. 8.

³⁸¹ Claimants' Reply, at para. 240.

³⁸² See Claimants' Reply, at paras. 120, 224 and 239; Claimants' Counter-Memorial on Preliminary Objections, at paras. 55-57; Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 80; Witness Statement of Mr. Joseph Mbaya dated 26 February 2019, at paras. 11 and 17.

failed on procedural grounds) and NRD needed valid mining licences for the Five Concession Areas (which it did not have) to operate and receive tags.

214. Former Minister Imena addressed the reasons that NRD was denied tags in his First Witness Statement:

“I did so primarily because I wanted to put pressure on NRD to regularise its operations by applying for and obtaining licences for its concessions. By June 2014 NRD had not had a mining licence for any of its concessions since October 2012. However, with our indulgence it was continuing to operate its mines, through the artisanal miners, and was able to buy minerals from the artisanal miners on its sites and have them tagged following which it was able to sell them to traders in Kigali. It was able to do all of this without a licence and without making any investment into any of its mines.

*Although I had made clear to Mr. Marshall since I met him in October 2012 that NRD needed to re-apply for its licences, by mid-2014 NRD had not taken any steps to do so and I did not believe they had any intention of doing so – it seemed quite clear to me that NRD were quite happy to continue operating their mines without a licence so long as they were able to receive tags and that they had no real interest in pursuing their licence applications which would require a commitment to investment and development of the mines. I therefore instructed PACT not to issue any further tags to NRD in order to put pressure on NRD to regulate their position by applying for and obtaining licenses. It was not long after I instructed PACT not to issue any further tags to NRD that NRD submitted its September 2014 application for licences”.*³⁸³

215. The Claimants allege that this decision was improper. That is not so. Former Minister Imena’s decision was necessary to ensure that NRD regularise its status and apply for and obtain the licences which it required to operate lawfully. As explained by former Minister Imena in his supplemental witness statement:

*“NRD had been operating without a licence for too long and I wanted to put pressure on them to comply with the law by applying for a licence like everybody else had to. NRD could not be given any tags until it succeeded in its application for licences and became legally authorised to operate.”*³⁸⁴

216. The Respondent was under no obligation to allow mining in any form, or to grant tags, to a company which did not have a mining licence and its actions were in conformity with the law.³⁸⁵ It could have elected to prevent NRD from operating its mines altogether: it was under no obligation to continue to allow NRD to occupy and/or exploit the Five Concession Areas after the expiry of the Contract in November 2011, and the expiry of the Licences in January 2012. That it did so only demonstrates the good will extended

³⁸³ Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 49-50.

³⁸⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.1.

³⁸⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.1, referring to Internal Memo from Rossi Ditutu (8 December 2014) (**Exhibit R-116**).

towards NRD and the countless opportunities it was given, and spurned, to demonstrate that it should be granted further formal licences.

217. The Claimants state that *“without tags, NRD would be unable to legally sell minerals and unable to realize the value in its concessions”* in the Reply at paragraph 239. They state that this makes former Minister Imena’s decision inconsistent with *“common sense”*, but in fact the rationale for former Minister Imena’s decision is clear. In order to legally sell minerals, NRD needed tags. In order to receive tags it needed to have a valid mining licence. Former Minister Imena wanted to encourage NRD to regularise its status and obtain the appropriate licences in precisely this way, as he has explained in his evidence above.

218. As also explained by former Minister Imena in his First Witness Statement:

“The secondary reason I barred NRD from receiving tags in mid-2014 was the issue that arose regarding ownership of NRD. The ownership issue arose in around May or June 2014 when Mr. Ben Benzinge came to see me claiming to be the owner of NRD. He produced a copy of a decision of the Supreme Court which he said supported his claim and told me that I should not get involved with Mr. Marshall as he as the rightful owner of the company. He also visited the mining department and threatened to start proceedings against them if they continued to issue to tags to NRD while Mr Marshall was there.”³⁸⁶

219. There was plainly a dispute as to ownership at this time (which the Claimants continue to assert) which warranted the denial of tags. As explained by former Minister Imena: *“I was not willing to get involved in that dispute and I was not in a position to determine who was right and who was wrong. We had conflicting stories being presented to us and we could not just side with one party or the other. Ms. Mruskovicova’s 27 October 2014 letter was just one of the letters sent by NRD setting out their side of the story. Everything we received had to be considered and processed by us before any decisions could be made.”³⁸⁷*

220. In his Supplemental Witness Statement former Minister Imena addresses another reason why he understood there to be a continuing ownership dispute in 2014:

“On 10 December 2014, I held a meeting with Ms. Mruskovicova (at her request) at which a Mr. Yasin presented himself as a new shareholder of NRD and requested that I provide tags to NRD.³⁸⁸ This was the first we had heard of this and I told them that as far as we were concerned, he did not have authority to make requests on behalf of NRD. In response I was told by Ms. Mruskovicova that Mr. Marshall was being “sidelined” and that he would no longer be involved in the ongoing processes.³⁸⁹ I told NRD that tags could not be given to

³⁸⁶ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

³⁸⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.2 referring to Letter from NRD (Z. Mruskovicova) to the Minister of State in charge of Mining (Minister E. Imena) (27 October 2014) (**Exhibit C-105**).

³⁸⁸ MINIRENA, *Meeting Minutes with NRD Company Ltd* (10 December 2014) (**Exhibit R-117**).

³⁸⁹ *Ibid.*, (**Exhibit R-117**), at page 2.

anybody until the issue with NRD's licences had been resolved and the presentation of Mr. Yasin indicated to us, again, that NRD were not dedicated to resolving the problem. As acknowledged in the minutes: "we were all surprised to hear that NRD has sold 15% of its shares and changing its management when its applications are still under evaluation by the government".³⁹⁰ The fact Mr. Marshall had apparently been "sidelined" was also a surprise given he had been writing to me regarding the ownership dispute with Mr. Benzinge less than 2 weeks prior to this meeting."³⁹¹

221. As such it was entirely proper for former Minister Imena to ban NRD from receiving tags until these issues had been resolved.
222. In addition, the Claimants' assertion that by asking NRD to re-apply for the Five Concession Areas earlier in the year, former Minister Imena acknowledged that there was no ownership dispute³⁹² is incorrect:
- 222.1. *First*, former Minister Imena's first letter asking NRD to "re-apply" was sent at the start of April 2014,³⁹³ before any substantial issues surrounding ownership arose.³⁹⁴
- 222.2. *Second*, former Minister Imena's second letter, dated 18 August 2014, was not addressed "to Mr. Marshall as Chairman of NRD", as the Claimants suggest, but to "Natural Resources Development (NRD) Rwanda Ltd".³⁹⁵ As former Minister Imena explains, "I addressed it to NRD, without identifying Mr. Marshall or a specific person, due to the ownership dispute not having been resolved."³⁹⁶

4. Treatment of NRD and other companies after the entry into force of the 2014 Law

i. Treatment of NRD

223. The 2014 Law entered into force on 30 June 2014.³⁹⁷ The process that the Respondent undertook to engage with NRD ahead of the introduction of the 2014 Law is set out in the Counter-Memorial at paragraphs 153 to 155. The 2014 Law did not revoke any licences that remained in existence at the time that it entered into force.³⁹⁸ However, as set out at paragraphs 114 to 125 above, NRD did not have any valid licences or a valid contract when the 2014 Law came into force, and the 2014 Law did not entitle NRD to

³⁹⁰ *Ibid.*, (Exhibit R-117), at page 2.

³⁹¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.4 referring to MINIRENA, *Meeting Minutes with NRD Company Ltd* (10 December 2014) (Exhibit R-117).

³⁹² See Claimants' Reply, at para. 120.

³⁹³ Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Plans for NRD* (2 April 2014) (Exhibit C-063).

³⁹⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.3.1.

³⁹⁵ Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD, *Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (Exhibit C-064).

³⁹⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.3.2.

³⁹⁷ Rwanda Law No. 13/2014 on *Mining and Quarry Operations* of 20 May 2014, published in the Official Gazette No. 26 on 30 June 2014 (Exhibit CL-002). The 2014 Law entered into force on its publication in the Official Gazette of the Republic of Rwanda.

³⁹⁸ Claimants' Reply, at para. 95.

continue to mine. Further, as Mr. Mugisha explained at paragraph 31 of his first expert statement, the grandfathering clause of the 2014 Law did not apply to the Licences as they had been granted under the 1971 Law.

224. To the extent that concession-holders had existing licences and permits when the 2014 Law entered into force, those were transitioned or “grandfathered” by way of the transitional provision of the 2014 Law, which provided:

“Article 52: Transitional provision

Any mineral licence or quarry permit granted under Law n° 37/2008 of 11/08/2008 on mining and quarry exploitation shall remain into force until expiration of the period for which it was granted. No mineral or quarry licence granted prior to this law shall be extended or renewed. However, where the mineral or quarry licence granted prior to this law provided for a right to apply for a renewal or extension of the licence, the holder thereof may be granted, subject to this law, a similar type of licence on a priority basis if he/she meets the requirements.”³⁹⁹

225. Article 52 of the 2014 Law states that licences granted prior to the 2008 Law were not extended or renewed, but that licence-holders with rights to apply for extension or renewal in their existing licences were able to apply for a renewal or extension under the 2014 Law.
226. The 2014 Law does not apply to NRD’s Licences, because those Licences, following a number of short-term extensions given in good faith while NRD was given further opportunities to persuade Rwanda that new licences should be granted, expired in October 2012, well prior to the entry into force of the 2014 Law, as set out above at paragraphs 114 to 125. Accordingly, NRD had no valid licences capable of being “grandfathered” under the 2014 Law.
227. The position of NRD under the 2014 Law is reflected in the Assessment Report that is discussed by the Claimants in the Reply.⁴⁰⁰ The Assessment Report states that NRD was “allowed to apply for the renewal of the former license”. While inappositely stated, the Assessment Report does not recognise an existing right under Article 52 of the 2014 Law, but instead refers to the ability for NRD to apply for a licence to mine the Five Concession Areas which it had formerly held, and to hold those licences consistently with the 2014 Law. The Claimants incorrectly assert that the Assessment Report demonstrates that the assessment team “acknowledged that NRD’s Contract and Licences pre-dating the new law remained in effect and the Application was to be assessed under the still applicable Contract and Licences”.⁴⁰¹ In fact, the Assessment Report clearly demonstrates that the Claimants were allowed to apply, under the 2014 Law, for licences to mine in the Five

³⁹⁹ Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014) published in the Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**).

⁴⁰⁰ Claimants’ Reply, at para. 200.

⁴⁰¹ Claimants’ Reply, at para. 201.

Concession Areas, licences which they had previously held but which had expired in October 2012.

The invitation to re-apply for licences that NRD previously held

228. In accordance with the position under the 2014 Law, former Minister Imena requested that NRD “as a former holder of mining licences” over Nemba, Rutsiro, Mara, Giciye and Sebeya, “renegotiate new mining agreements, under the terms of the new regulations” on 2 April 2014.⁴⁰² NRD was required, pursuant to the 2014 Law, to apply for new licences over the Five Concession Areas, to the extent that it wished to continue to mine in those areas.
229. NRD’s performance was assessed internally within the Government. In a report dated 12 August 2014, NRD’s performance was assessed, and the report concluded that NRD had:
- “(i) clearly failed to fulfil its main contractual obligations (exploration and industrial production) and hasn’t demonstrated satisfactory managerial, financial and technical competence; (ii) had poor Environment management and failed in effective management of the concessions as shown by rampant illegal activities; (iii) had poor labour relations characterised by numerous disputes; (iv) displayed lack of cooperation in reasonable negotiations, the concessions should revert back to the Government.”⁴⁰³*
230. The report suggested that, accordingly, the Five Concession Areas should revert to the Government,⁴⁰⁴ and NRD should not continue to be allowed to mine without licences. Instead, it was suggested that it should, consistently with the requirements of the 2014 Law, make an application for those of the Five Concession Areas that it wished to continue to mine.⁴⁰⁵
231. On 18 August 2014 former Minister Imena wrote to Mr. Marshall inviting NRD to make an application for licences for some or all of its former mining areas.⁴⁰⁶ In that letter, former Minister Imena noted that NRD’s licences to mine in the Five Concession Areas had expired in October 2012, following extensions dated 16 June 2011, and 13 September 2012.⁴⁰⁷ A detailed list of what was required with the application was attached to the letter.⁴⁰⁸ Former Minister Imena explained the full context of this letter:

“By the time the 2014 Law was enacted, NRD did not hold any licences, and were operating unlawfully, i.e. without a licence. Although we were under no obligation to do so, we decided to give NRD a further opportunity to submit an application for long term licences which complied with the new legal

⁴⁰² Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Re: Plans for NRD* (2 April 2014) (**Exhibit C-063**).

⁴⁰³ Natural Resources Development; Assessment of its Performance (12 August 2012) (**Exhibit R-118**) at page 7.

⁴⁰⁴ *Ibid.*, (**Exhibit R-118**) at page 7.

⁴⁰⁵ *Ibid.*, (**Exhibit R-118**) at page 7.

⁴⁰⁶ Letter from the Minister of State in Charge of Mining (E. Imena) to NRD, *Re: Submission of the requirements for a license in line with the new legal framework* (18 August 2014) (**Exhibit C-064**).

⁴⁰⁷ *Ibid.*, (**Exhibit C-064**).

⁴⁰⁸ *Ibid.*, (**Exhibit C-064**).

*framework. I was determined that NRD should either make proper applications for licences under the new 2014 Law, or should cease operating as we could not allow the situation to continue whereby it was operating unlawfully”*⁴⁰⁹

232. The Claimants allege that former Minister Imena made this request that NRD apply for new licences to mine in the Five Concession Areas knowing that the Claimants were unable to access documents necessary to make the application at this time.⁴¹⁰ However, as explained by former Minister Imena: *“I find this claim extraordinary. Neither I nor the Ministry had authorised Mr. Benzinge to take control of NRD or its assets or had any knowledge about it until informed by Mr. Marshall. When I wrote to NRD on 18 August 2014 I did not know that NRD were barred from accessing the concessions or their office.”*⁴¹¹ In any event, as explained further in section II.J below, the suggestion that NRD had no access to copies of any of the relevant records is lacking in any credibility.
233. The Claimants further allege that the Respondent had *“a similar contemporaneous belief and expectation that Claimants’ Contract and Licence rights continued in force”*.⁴¹² This is fanciful. Former Minister Imena’s clear and repeated statements to NRD, set out above, were that NRD was the *“former holder”* of the Five Concession Areas, and that its licences had *“in effect expired”* in 2011 but were extended so that they ended up *“expiring in October 2012”*. The Respondent was rightly of the view that NRD’s Contract, and its Licences, had expired well before the entry into force of the 2014 Law and had communicated this to NRD. Although contested by NRD,⁴¹³ the relevant correspondence highlights that the Respondent was clear and unequivocal in communicating that neither the Contract nor the Licences remained on foot after November 2011 and October 2012, respectively. The Claimants’ assertions to the contrary are contradicted by the evidence and proper legal analysis.
234. The Claimants allege that they believed that NRD did not need to “re-apply” for licences. This assertion, which is based on a misinterpretation of the transitional provisions of the 2014 Law, does not withstand scrutiny. The Respondent clearly considered that NRD’s Contract and Licences had expired. Pursuant to the 2014 Law, licences which had expired were not able to be transitioned under 2014 Law.
235. The Claimants’ assertion that Minister Biruta informed them that they would not lose the Five Concession Areas, is – like many other “facts” set forth by the Claimants – is an invention. As explained by Mr. Gatara:

“Mr. Marshall alleges that Minister Biruta assured him that “As long as I am Minister, you will not lose your concessions”. I have discussed this allegation

⁴⁰⁹ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 28.

⁴¹⁰ Claimants’ Reply, at para. 99.

⁴¹¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 34.

⁴¹² Claimants’ Reply, at para. 99.

⁴¹³ Letter from NRD (R. Marshall) to Ministry of Natural Resources (Minister E. Imena) (18 August 2014), *NRD Ltd Mining Concessions (Exhibit C-084)* (NB: the letter is incorrectly dated 18 August 2014 and was in fact sent on 18 September 2014).

with Minister Biruta, who is currently the Minister of Foreign Affairs. Minister Biruta confirmed to me that he gave no such assurance or promise that on the contrary he had told Mr. Marshall that NRD should comply with the law, and that if it did so it would be treated fairly.

In any event, Minister Biruta did not have, and would have been aware that he did not have, the power to promise that NRD would not lose its concessions. All that he could do was review NRD's application under the applicable legal framework and, if he approved of it, submit it to Cabinet with a recommendation that it be approved. In fact, as discussed below, the application was substandard and no submission to Cabinet was made."⁴¹⁴

236. Further, former Minister Imena explains that:

"I did not believe Minister Biruta would have promised NRD that: "as long as I am Minister, you will not lose your Concessions". I am confident of this because of the good working relationship we had which enabled both of us to discuss any matters relating to our work and to take decisions based on a shared opinion. I know from my conversations with him that he shared my concerns about NRD, and therefore there would have been no basis for him to have given the assurance NRD claims to have received."⁴¹⁵

Assessment of the re-application for Long-Term Licences

237. In any event, NRD submitted a new application on 18 September 2014 ("**September 2014 Re-Application**") requesting that long-term licences be granted.⁴¹⁶ The September 2014 application was only partially complete. In its 18 August 2014 letter which accompanied the September 2014 application, NRD acknowledged the application was only partially complete, but claimed this was due to its inability to access its corporate files (which, as explained further at paragraph 599 below cannot have been true). It also stated that much of the information requested had previously been provided. In the 18 August 2014 letter, NRD also repeated the false claim previously made that it had invested funds in excess of USD \$20 million into "the project".

238. A Licence Evaluation Team from MINIRENA assessed NRD's September 2014 Re-Application. In a report dated 29 September 2014, the Licence Evaluation Team determined that NRD should not be issued new long-term licences in relation to the Five Concession Areas. It stated that:

"NRD may not be granted five (5) concessions namely: NEMBA, RUTSIRO, GICIYE, MARA AND SEBEYA. This is because NRD did not submit all the requirements requested and even those that were submitted are deemed not satisfactory according to request for the Minister of State in charge of Mining

⁴¹⁴ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at paras. 27-28.

⁴¹⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 50.

⁴¹⁶ Letter from NRD (R. Marshall) to Ministry of Natural Resources (Minister E. Imena) (18 August 2014), *NRD Ltd Mining Concessions (Exhibit C-084)* (NB: the letter is incorrectly dated 18 August 2014 and was in fact sent on 18 September 2014).

which requested NRD to re-apply for some or all former mining areas by NRD. The Evaluation technical team analysed documents submitted by NRD and the team found that in the motivation letter for the application of the licence, NRD Rwanda Ltd didn't not indicate what kind of Mining Concession NRD Rwanda Ltd was willing to operate in, the type of licence was also not mentioned according to the new law. And also the company did not indicate the licence period it wanted.”⁴¹⁷

239. On 28 October 2014, MINIRENA wrote to NRD informing it that, having assessed NRD's applications against the requirements of the 2014 Law, it had decided not to grant any of the mining licences that NRD applied for.⁴¹⁸ The letter advised that NRD had failed to submit a number of the documents that MINIRENA had requested, and those that were submitted were found to be unsatisfactory.⁴¹⁹ Further detail about the documents required and the failure of NRD to provide those is set out in the Counter-Memorial at paragraphs 155 and 160. MINIRENA requested NRD to proceed with closure of the Five Concession Areas within 60 days of receipt of the letter, and granted a seven-day period for NRD to lodge an appeal of the decision.⁴²⁰
240. NRD submitted a formal appeal of the decision, and also separately submitted a “re-application letter” (together, the “**October 2014 Appeal**”).⁴²¹ On 12 November 2014, MINIRENA clarified that its decision not to grant the licences was made on the basis of the 2014 Law, and regulations and practices in mining contract negotiations, as NRD had failed to submit the required documentation.⁴²² MINIRENA expressly stated that the terms of the Contract did not give NRD the rights to obtain long-term mining licences, but that the granting of a mining licence was subject to a positive evaluation of the purported feasibility study.⁴²³ Two further rounds of requests by MINIRENA for additional information, and provision of some limited information by NRD followed.⁴²⁴ MINIRENA and the OGMR assessed this information and found that it was still entirely unsatisfactory.⁴²⁵ It concluded that Rwanda had no basis to grant NRD a licence to any of

⁴¹⁷ Memorandum from the License Evaluation Team to the Honourable Minister of State in Charge of Mining, *Evaluation of NRD Re-Application for the 5 Concessions (Nemba, Rutsiro, Giciye, Mara and Sebeya)* (29 September 2014) (**Exhibit R-020**).

⁴¹⁸ Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**).

⁴¹⁹ Memorandum from the License Evaluation Team to the Honourable Minister of State in Charge of Mining, *Evaluation of NRD Re-Application for the 5 Concessions (Nemba, Rutsiro, Giciye, Mara and Sebeya)* (29 September 2014) (**Exhibit R-020**).

⁴²⁰ Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**).

⁴²¹ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (**Exhibit C-086**); Letter from Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Delivery of a Re-Application letter* (1 November 2014) (**Exhibit R-019**).

⁴²² Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter* (12 November 2014) (**Exhibit C-087**).

⁴²³ *Ibid.*, (**Exhibit C-087**).

⁴²⁴ See detail set out in Respondent's Counter-Memorial, at paras. 168 - 172.

⁴²⁵ Dr. M. Biryabarema, *Assessment report of additional documents submitted by NRD Rwanda Ltd* (February 2015) (**Exhibit R-024**).

the Five Concession Areas, as the company had not made appropriate applications in relation to each concession, had provided insufficient documentation, and had not shown financial or technical viability.⁴²⁶

241. Further, the Claimants allege that the January 2015 technical assessment of NRD's application and the February 2015 assessment by Dr. Biryabarema demonstrate Rwanda's acknowledgement that NRD's Contract and Licences remained valid.⁴²⁷ This is plainly wrong. The documents are assessments, designed to determine whether or not NRD could be granted new long-term licences as contemplated by the 2014 Law,⁴²⁸ and referred to the Contract as part of the background context, but without in any way recognising that it remained on foot. In relation to the Licences, the documents record NRD as explicitly recognising that its Licences are no longer valid.⁴²⁹
242. On 19 May 2015, MINIRENA again informed NRD that, despite the provision of additional information, which was again found insufficient, and despite the forbearance shown by the Ministry, NRD had failed to submit complete application files, let alone files that showed that it met the requirements of the 2014 Law for the granting of mining licences.⁴³⁰
243. The Claimants assert that the absence of written communications between Minister Biruta and former Minister Imena should lead to an adverse inference in relation to the nature of the 2014 application process for long-term licences.⁴³¹ However, as explained at Section IV.D below, there are no reasons to draw adverse inferences in light of former Minister Imena's explanation, and the totality of the contemporaneous evidence available, which supports the Respondent's case.
244. The Claimants also assert that they expected that there would be further negotiations of a long-term licence.⁴³² However, Rwanda reasonably declined to engage in further negotiations following four rounds of document submission procedures and detailed assessments of NRD's applications, within which NRD failed to satisfy it that it had the required financial or technical capability. Rwanda was under no obligation to continue with negotiations (and had been under no obligation since the expiry of the Contract and its decision not to positively evaluate NRD's applications or so-called feasibility studies). Rwanda showed patience and goodwill through the negotiation process. Ultimately, the

⁴²⁶ *Ibid.*, (Exhibit R-024).

⁴²⁷ See Claimants' Reply, at para. 97.

⁴²⁸ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 19.

⁴²⁹ Both Technical Team, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd* (20 January 2015) (Exhibit R-023) at page 2, and Dr. M. Biryabarema, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd* (February 2015) (Exhibit R-024) at page 4, record NRD's own statement that "it could not have any documents ... due to the fact that it has no mining license at present".

⁴³⁰ Letter from the Minister of State in charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (Exhibit C-038).

⁴³¹ Claimants' Reply, at para. 101.

⁴³² Claimants' Reply, at para. 104.

negotiations were brought to a halt because of NRD's failure to produce a meaningful or complete, let alone successful, application for long-term licences.

The alleged representations by former Minister Imena in 2015

245. At paragraph 104 of the Reply, the Claimants' allege that they did not understand the decision communicated to them by former Minister Imena on 19 May 2019 to be final because former Minister Imena represented to third parties in June 2015 that NRD continued to own and operate the mines. That is not correct. The Claimants rely on an email from Mr. Rene van Wachem to Mr. Marshall on 16 June 2015 in which Mr. van Wachem states that:

*"We visited a number of sites and met with many dignitaries, including minister Imena. During these meetings your company's name (NRD) came up. It is our understanding that you own several concessions in the Rutsiro region. We are keen to hear more about the current status of your project and your development plans."*⁴³³

246. It is a patent misrepresentation of this evidence to suggest that former Minister Imena "represented to third parties in June 2015 that NRD continued to own and operate mines" when it is not even clear the context in which NRD's name "came up", or indeed if it was even former Minister Imena who mentioned NRD. In any event, as explained by former Minister Imena in his supplemental witness statement, he did meet with Mr. van Wachem and his business partner, Mr. Keerseemaker, but that was in around **May or June 2014** and **not in June 2015**.⁴³⁴

247. As can be seen from the email exchange between Mr. van Wachem, former Minister Imena and his assistant, Peter Niyigena, on 16 July 2014, after their meeting in around May or June 2014, Mr. van Wachem and Mr. Keerseemaker made a proposal to MINIRENA for the Rutsiro concession on the basis that NRD's licences had expired.⁴³⁵ As explained by former Minister Imena, that proposal set far more impressive targets than anything NRD was proposing.⁴³⁶ There was, of course, no lawful impediment to Rwanda discussing granting licences to other parties in relation to the Five Concession Areas within which NRD formerly held licences given the expiry of the Contract in November 2011 and the Licences in October 2012.

The alleged handover process

248. The Claimants allege that the Respondent was required to "set up a detailed schedule of events to effectuate a hand-over of the Concessions".⁴³⁷ This is pure fiction of both law

⁴³³ Email from R. Van Wachem to R. Marshall, *Rwanda Mining* (16 June 2015) (**Exhibit C-120**).

⁴³⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 46, referring to Emails between R. Van Wachem and P. Martin Niyigena (16-29 July 2014) attaching 'Rutsiro proposal: Proposed plan of approach for NRD concession #2 (July 2014)' (**Exhibit R-119**), at page 4.

⁴³⁵ *Ibid.*, (**Exhibit R-119**), at pages 3-11.

⁴³⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 47.

⁴³⁷ Claimants' Reply, at para. 105.

and fact. There is no requirement of a formal handover process, and the Claimants have provided no evidence in support of the requirement for such a process. There are no “*standard handover procedures*”.

249. *First*, the 2014 Law did not apply to the Five Concession Areas in which NRD formerly held the Licences: the Licences were granted under the 1971 Law and the handover provisions of the 2014 Law did not apply to them⁴³⁸ because the Licences had already expired (in October 2012) when the 2014 Law came into force.
250. Further and in any event, even if the provisions of the 2014 Law were to be applicable, they could not have created the obligation on the Government which the Claimants’ suggest. Mr. Mugisha explains that the limits on cancellation, termination, or expiry of licences are that “*concession-holders are required to comply with all existing laws on closure of mining operations, but there is no “handover process”*”.⁴³⁹ The 2014 Law, on cessation of operations or cancellation of licences, requires concession holders to provide a register of assets to the Minister, notify the Minister of potential hazards on the site, and deliver to the Minister all records the concession holder was obliged to maintain.⁴⁴⁰ These obligations “*do not create a “handover process” that imposes any obligations on the state, but merely show the required information flow from the concession holder to the Minister on cancellation of the mineral licence*”.⁴⁴¹ Under each of the 1971, 2008 and 2014 Laws, on cancellation of a licence, the rights of the holder shall cease; there is no handover process, but the law provides for the reversion of the mine to the state if the licence to mine the concession is not renewed.⁴⁴²
251. In addition, it is not normal for any member of the Government or MINIRENA to visit a concession for a “formal” handover as Mr. Marshall suggests.⁴⁴³ There is no legislation, regulation or guidance that sets out any formal handover process.⁴⁴⁴ Any formal ceremonies only take place when companies are granted a licence and the Government attends to present the area to the company – as such Mr. Marshall must be confusing a formal handover with this process which often happens concurrently with a former investor leaving a concession.⁴⁴⁵
252. Further, it is incorrect that “[n]ot one meeting took place” after former Minister Imena’s letter of 19 May 2015.⁴⁴⁶ As explained by former Minister Imena, “*I met with Mr. Marshall and Ms. Mruskovicova on numerous occasions to explain why the long-term licence had not been granted. However, they were not willing to take note of the letter, or to listen to*

⁴³⁸ Expert Report of Mr. Richard Mugisha dated 20 May 2019, at para. 31.

⁴³⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 54.

⁴⁴⁰ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 56.

⁴⁴¹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 56.

⁴⁴² Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 56.

⁴⁴³ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 33.

⁴⁴⁴ Second Expert of Mr. Richard Mugisha dated 27 May 2020, at para. 55.

⁴⁴⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.7.

⁴⁴⁶ Claimants’ Reply, at para. 106.

what I had to say and instead they refused to close down their mining activities, clear their liabilities and vacate the concessions as they had been asked to.”⁴⁴⁷

253. On 12 June 2015, former Minister Imena wrote to NRD to request that they work with the Ministry’s technical evaluation team to check compliance with the mining and environmental laws and regulations in the Five Concession Areas.⁴⁴⁸ As explained by former Minister Imena: *“This evaluation process was a step in what might be described as a “hand-over process”*. The purpose was to evaluate the impact of NRD’s activities on the Five Concession Areas, which was why we wanted to conduct the exercise in the presence of NRD representatives.”⁴⁴⁹ However NRD did not respond and their contention that they did not receive the letter cannot be believed as discussed at paragraph 775 below.
254. In the months that followed former Minister Imena saw Ms. Mruskovicova at the Ministry and met her at least once or twice, during which he told her again that that the decision that NRD would not be granted licences was not going to be changed and that NRD must vacate the Five Concession Areas and clear their liabilities.⁴⁵⁰ However neither Ms. Mruskovicova nor Mr. Marshall were willing to do this: by this stage their only focus seems to have been on concocting the purported grounds for these proceedings, as evidenced by their references to the USA–Rwanda BIT in correspondence around this time.⁴⁵¹
255. Given there was no response to the 19 May 2015 letter, and since instructions given by former Minister Imena at meetings with Mr. Marshall and Ms. Mruskovicova were ignored, MINIRENA moved straight to the end of this evaluation process because NRD simply would not participate.⁴⁵² As former Minister Imena explains: *“The purpose of my 12 June 2015 letter was to try and ensure that NRD did not abandon the Concessions without a proper assessment of any damage that had been caused by their activities. This had to be done before any new investor came into the Concessions. That was the aim of*

⁴⁴⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.2.

⁴⁴⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.3 referring to letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Transmission of evaluation schedule for NRD mining perimeters and request for the representative(s) of the aforementioned company in the technical evaluation team* (12 June 2015) (**Exhibit R-025**).

⁴⁴⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.3.

⁴⁵⁰ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.4.

⁴⁵¹ See, for example, Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Appeal of Decision* (1 November 2014) (**Exhibit C-086**); Letter from NRD (R. Marshall) to the CEO of RDB, *Notice under the ‘Treaty between the Government of the USA and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment’* (23 March 2015) (**Exhibit C-100**); Email from R. Marshall to I. Niyonsaba, K. Nimmo and Z. Mruskovicova (30 March 2015) (**Exhibit C-107**); Letter from R. Marshall to the Ambassador of the United States Embassy (16 February 2016) (**Exhibit R-216**), at page 2, where Mr. Marshall stated that in March 2015, they had *“notified the Government of Rwanda of our intent to initiate proceeding under the BIT”*.

⁴⁵² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.5.

*the process I had initiated but which NRD refused to participate in. There was no other formal handover process that we were supposed to follow.”*⁴⁵³

256. On this basis there can have been no doubt following former Minister Imena’s letters of 19 May 2015 and 12 June 2015, that NRD no longer controlled or had possession of the Five Concession Areas.⁴⁵⁴ There was nothing further required by the law and Mr. Marshall knew this because he had been through the same process with BVG (which was the same process that any company leaving a concession went through) and which, in BVG’s case had led to their environmental deposit being only partially refunded when they left the Bisesero concession.⁴⁵⁵ Given there was no formal “handover” process undertaken when BVG left the Bisesero concession (and none is alleged), the Claimants, Mr. Marshall or Ms. Mruskovicova cannot have expected this with respect to NRD’s Five Concession Areas.⁴⁵⁶
257. In an attempt to substantiate their arguments, the Claimants attempt to compare the “hand-over” process for Gatumba with what happened for NRD.⁴⁵⁷ However as explained by former Minister Imena, they cannot be compared for the following reasons:

*“Gatumba was a joint venture between the Rwandan Government and South African investors, and when both shareholders decided to stop the company’s mining activities, they also had to terminate their business relationship which included winding-up the company and agreeing on how to proceed with the division of assets and liabilities. As such, there were numerous steps to be taken and the process was different from that which is followed when a company in which the Government is not a shareholder is denied a licence or voluntarily withdraws. In NRD’s case (and indeed that of any other company that does not have ties with the Rwandan Government), there were no requirements to be followed because it did not have a licence at this time. Even if they had had a licence which had to be cancelled, the only obligation the Government had was to act in accordance with Article 25 of the 2014 Law. As I have explained above, Article 25 did not require anyone from the Ministry to meet with NRD or to take the steps that Mr. Marshall and Ms. Mruskovicova allege should have been taken.”*⁴⁵⁸

258. The Claimants further allege that they remained in possession of the Five Concession Areas for nearly a year following former Minister Imena’s letter of 19 May 2020.⁴⁵⁹

⁴⁵³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.5.

⁴⁵⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.7.

⁴⁵⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.7 referring to letter from MINIRENA to BVG (R. Marshall), *Return of the Environmental Bond deposited in relation to Bisesero Concession* (5 November 2013) (**Exhibit R-120**); Letter from the Minister of State in Charge of Mining (Minister E. Imena) to R Marshall, *Your letter dated 9 May 2013* (17 May 2013) (**Exhibit R-121**).

⁴⁵⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 44.7.

⁴⁵⁷ Claimants’ Reply, at para. 107, referring to the Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 33; Supplemental Witness Statement of Ms. Zuzana Mruskovicova dated 16 August 2019, at paras. 4-7.

⁴⁵⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 45.

⁴⁵⁹ Claimants’ Reply, at para. 108.

However, this is contradicted by their own documentary evidence as discussed at paragraphs 826 to 828 below.

ii. Treatment of Rutongo and Eurotrade

259. The Claimants allege that, following the implementation of the 2014 Law, Tinco, a foreign investor in Rwanda, was treated more favourably than the Claimants. They allege that Tinco's investment vehicles, Rutongo and Eurotrade, were not required to re-apply for licences, and were granted long-term licences under the 2014 Law, while NRD was required to re-apply. This allegation of discrimination is misconceived. Rutongo and Eurotrade had already applied for long-term licences under the 2008 Law by the time the 2014 Law came into force.⁴⁶⁰ Additionally, they had met the requirements for the granting of a long-term licence by submitting comprehensive applications. This meant that they were in substantially different positions to the Claimants and NRD, and this created significantly different consequences for the implementation of the transitional provisions of the 2014 Law.
260. Tinco's investment vehicles, Rutongo and Eurotrade were granted four-year licences in 2007, pursuant to the 1971 Law. Those remained valid following the entry into force of the 2008 Law, pursuant to the transitional provisions which provided for their continued validity.⁴⁶¹
261. Rutongo and Eurotrade's licences, having been issued in 2007, were due to expire in 2011. They had submitted a request for renewal within the required time limits. Accordingly, Rutongo and Eurotrade had valid licences when the 2014 Law came into force. Pursuant to the transitional provisions of the 2014 Law, existing licences and permits were transitioned or "grandfathered" by way of the transitional provision of the 2014 Law.
262. Further, these companies had submitted applications, including the required feasibility studies, that met the requirements for the granting of a long-term licence.⁴⁶²
263. As explained by former Minister Imena:

"Rutongo's application, for example, was much more detailed than anything submitted by NRD. Not only this, but both Eurotrade and Rutongo had raised production levels in their concessions by considerable amount, invested far

⁴⁶⁰ Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57; Claimants' Counter-Memorial, at paras. 211-212.

⁴⁶¹ Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**), at Article 117.

⁴⁶² Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 57-60; Claimants' Counter-Memorial, at para. 214.

more into exploration, infrastructure and equipment, and carried out high quality exploration – the difference between them and NRD was staggering.”⁴⁶³

264. The Claimants also allege that the process of obtaining Rutongo and Eurotrade’s licences took nearly three years because of numerous delays by the Government.⁴⁶⁴ However, as explained by former Minister Imena, *“the delays were largely due to changes that had to be made to the structure of the company rather than the quality of their application, which was in fact approved by MINIRENA early on in the process. When Rutongo’s initial short-term mining licence was signed, Rutongo was majority-owned by the Government of Rwanda. When Rutongo applied for a renewal of its licence, discussions took place between the two shareholders, being TINCO and the Government of Rwanda, which resulted in changes to the share structure of the company. It was this process that took a long time and resulted in delays to Rutongo’s long-term licence being officially granted.”⁴⁶⁵* In addition:

“Both Rutongo and Eurotrade’s applications from MINIRENA’s perspective had been assessed and considered to be sufficient very early on in the process, and if it were not for the delays explained above, they both would have been granted long-term licences much more quickly. Although Eurotrade did not have the same shareholding structure as Rutongo (it was owned wholly by TINCO without the participation of the Government) because the companies had a common investor in TINCO and because the applications were made at the same time and considered at the same time, Eurotrade’s licence was granted at the same time as Rutongo’s.”⁴⁶⁶

iii. Treatment of other companies

265. The Claimants allege that the requirement that the Claimants apply for licences relating to the Five Concession Areas over which they had previously held licences was a ruse to drive the Claimants from Rwanda.⁴⁶⁷ That is untrue and flies in the face of all the contemporaneous evidence. It also relies, in order to explain Rwanda’s alleged motivation, on the Claimants’ far-fetched new conspiracy theory.

⁴⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.1 referring to the Feasibility study for 30 year mining licence in relation to Rutongo Mines (sections A and B) (**Exhibit R-042**), Contract for acquiring the Rutongo Mining Concession (**Exhibit C-023**), Environmental Assessment and Protection Plan for Rutongo Mines (27 August 2008) (**Exhibit R-043**), Investment Plan for Rutongo Mines (27 August 2008) (**Exhibit R-044**), Survey Report on the siting of the Rutongo concession beacons (22 August 2009) (**Exhibit R-045**), Rutongo Mines Exploration Programme (18 October 2010) (**Exhibit R-046**), 2nd Quarter exploration report, Rutongo Mines Ltd (23 October 2012) (**Exhibit R-047**), Historic Operating Results and investment summary, Rutongo Mines Ltd (**Exhibit R-048**), Report on the Nyramyumba blast samples (**Exhibit R-049**), Independent Review of Resource Estimation Methods for Rutongo Mines, Rwanda (May 2012) (**Exhibit R-050**).

⁴⁶⁴ Claimants’ Reply, at para. 115; Supplemental Witness Statement of Mr. Kevin Buyskes dated 16 August 2019, at para. 6.

⁴⁶⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.2.

⁴⁶⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.3.

⁴⁶⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 51; Claimants’ Reply, at paras. 95-116.

266. As explained by former Minister Imena, NRD was not the only company that was required to re-apply for licences under the 2014 Law.⁴⁶⁸ For example, Gatumba was required to go through the re-application process. On 2 April 2014 (the same day that former Minister Imena wrote to NRD to try and kick-start discussions with them ahead of the new 2014 Law coming into effect),⁴⁶⁹ former Minister Imena wrote to Gatumba and invited them to renegotiate mining agreements for their concessions under the new law.⁴⁷⁰ As former Minister Imena explains, “*Gatumba were treated in exactly the same way as NRD*”.⁴⁷¹
267. If anything, the act of asking NRD to “re-apply” was a sign of Rwanda’s good faith towards NRD because they did not have licences: we were not obliged to give them any further opportunity to prove they should be granted long-term licences.⁴⁷²
268. In addition, the Claimants make all manner of excuses as to why they continued to expect they would receive long-term licences even after former Minister Imena’s letter of 19 May 2015 in which they were told that their re-application had been unsuccessful.⁴⁷³ One of the many spurious reasons they advance is that they believed the letter “*was just another tactic designed to convince BVG and Spalena to abandon their investment*” because Rwanda did not “*effectuate a hand-over of the Concessions*”,⁴⁷⁴ and because the Claimants “*did not receive*” Rwanda’s follow up letter of 12 June 2015.⁴⁷⁵ As explained in more detail at paragraphs 816 to 834 below, these arguments are not credible and were only introduced for the first time in the Claimants’ CMPO, in an attempt to overcome the inevitable jurisdictional challenges they face in this Arbitration.
269. Numerous other companies had their licences terminated or lost their concessions when their contracts and/or short-term licences expired and were accordingly requested to close their operations. For example:
- 269.1. around the same time, various companies were notified that their applications for licenses were unsatisfactory, including Mirage Ltd⁴⁷⁶ and Gamico Ltd.⁴⁷⁷ In

⁴⁶⁸ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 61; Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 36.

⁴⁶⁹ See Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 29; Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**).

⁴⁷⁰ Letter from E. Imena to P. Boshoff (2 April 2014) (**Exhibit R-197**).

⁴⁷¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 37.

⁴⁷² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 36.

⁴⁷³ Letter from the Minister of State in charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (**Exhibit C-038**).

⁴⁷⁴ Claimants’ Reply, at paras. 110 and 105.

⁴⁷⁵ Claimants’ Reply, at para. 198, footnote 562.

⁴⁷⁶ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Mirage Ltd (A. Gahire), *Response to your application for license* (12 May 2015) (**Exhibit R-122**).

⁴⁷⁷ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Gamico Ltd (A. Nzabakenga Zaninka), *Response to your application for license* (12 May 2015) (**Exhibit R-123**).

relation to Gamico, it was explained that the mineral exploration report was “of poor quality”;⁴⁷⁸

269.2. the very next day after MINIRENA sent the 19 May 2015 letter to NRD, it notified Precious Mining Limited that it was having its license terminated because it had “failed to provide in due time the required documents to complete [the] application file”;⁴⁷⁹

269.3. at the beginning of 2016 at least six companies were told that their licenses had expired and as such they had to close their operations;⁴⁸⁰ and

269.4. in June 2016 at least 33 companies were also told that their licenses had expired and that they were requested to close down their operations.⁴⁸¹

270. The correspondence sent by Rwanda in all of these instances was materially identical to the 19 May 2015 letter sent to NRD and was sufficient to indicate to all of the companies above that they no longer had valid licenses and that they were to close down their operations on the concessions previously licensed to them. Each of these companies duly complied, apart from NRD.

5. NRD’s former concession areas are not controlled by the Rwandan Government

271. As explained at paragraphs 221 to 223 of the Counter-Memorial, NRD’s former concessions are not owned by entities associated with the Rwandan Military and/or Ngali Mining (as the Claimants alleged in their Memorial)⁴⁸² but were acquired by private companies following a public tender process in 2016. In their CMPO and Reply, the Claimants do not repeat these unsupported and false claims, but instead allege (having not done so in their Memorial) that they did not know the Respondent had expropriated their investment until this public tender process began in March 2016.⁴⁸³

272. Consistent with the goal of the 2014 Law (i.e. privatisation and the efficient commercial use of the mines) and on the basis that NRD had been told, many times, that its applications to renew its licences had failed, the Five Concession Areas were split into 20 smaller perimeters and put out for tender on 1 March 2016.⁴⁸⁴ The 20 perimeters were

⁴⁷⁸ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Gamico Ltd (A. Nzabakenga Zaninka), *Response to your application for license* (12 May 2015) (**Exhibit R-123**).

⁴⁷⁹ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Precious Mining Limited (S. R. Chandra), *Termination Notice* (20 May 2015) (**Exhibit R-124**).

⁴⁸⁰ See, for example, letters sent to Avolmi Ltd (22 January 2016) (**Exhibit R-125**), ECPE Ltd (22 January 2016) (**Exhibit R-126**), Nyamico Cooperative (22 January 2016) (**Exhibit R-127**), UMECO (22 January 2016) (**Exhibit R-128**), Robust Mining (27 January 2016) (**Exhibit R-129**), Sofama Minerals (27 January 2016) (**Exhibit R-130**).

⁴⁸¹ See letters sent on 3 June 2016 to various companies (**Exhibit R-131**).

⁴⁸² Claimants’ Memorial, at paras. 120, 250, 270 and 272; see also Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 71; Witness Statement of Ms. Zuzana Mruskovicova dated 28 February 2019, at paras. 26-27.

⁴⁸³ See Claimants’ Counter-Memorial on Preliminary Objections, at paras. 17, 70, 77, 86; Claimants’ Reply, at para. 113.

⁴⁸⁴ MINIRENA, *Call for Technical and Financial proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions* (1 March 2016) (**Exhibit R-132**).

split into Category I and Category II, the former being of (perceived) greater mineralisation potential than the latter.⁴⁸⁵

273. The process through which the Five Concession Areas were tendered was a standard competitive bidding process:

273.1. *First*, the invitation to tender was published on 1 March 2016⁴⁸⁶ and advertised through numerous newspapers, including The New Times,⁴⁸⁷ The East African and Rwanda Today,⁴⁸⁸ and Imvaho Nshya.⁴⁸⁹ These advertisements were arranged as early as 17 February 2016.⁴⁹⁰

273.2. *Second*, MINIRENA prepared comprehensive tender documents for both the Category I and Category II areas.⁴⁹¹ These documents set out detailed instructions to investors on the scope of the process, what investors had to do apply, when they had to apply by and how they bids would be assessed.⁴⁹² These tender documents also contained detailed evaluation criteria together with marks to be awarded for each criteria out of a total of 100.⁴⁹³ The documents also included a proposals submission form (at Annex 1) and details about how investors were to prove financial capacity (at Annex 2).⁴⁹⁴

273.3. *Third*, in response to its advertisement, MINIRENA received 27 bids which were opened in accordance with the tender documents, on 20 April 2016 at a meeting held for that purpose.⁴⁹⁵ The meeting was attended by representatives from each of the companies who presented a bid.⁴⁹⁶

273.4. *Fourth*, between 3 May 2016 and 23 May 2016, a team of five from MINIRENA evaluated the bids in accordance with the criteria set out in the tender

⁴⁸⁵ MINIRENA, *Evaluation Report* (24 May 2016) (**Exhibit R-133**).

⁴⁸⁶ MINIRENA, *Call for Technical and Financial proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions* (1 March 2016) (**Exhibit R-132**).

⁴⁸⁷ The New Times Invoice (17 February 2016) (**Exhibit R-134**).

⁴⁸⁸ The East African/Rwanda Today Invoice (17 February 2016) (**Exhibit R-135**); 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) (**Exhibit C-102**).

⁴⁸⁹ Imvaho Nshya Invoice (17 February 2016) (**Exhibit R-136**).

⁴⁹⁰ The New Times Invoice (17 February 2016) (**Exhibit R-134**); The East African/Rwanda Today Invoice (17 February 2016) (**Exhibit R-135**); Imvaho Nshya Invoice (17 February 2016) (**Exhibit R-136**).

⁴⁹¹ For Category I see: MINIRENA, *Call for Technical and Financial Proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions: Category I* (5 March 2016) (**Exhibit C-140**); for Category II see: MINIRENA, *Call for Technical and Financial Proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions: Category II* (5 March 2016) (**Exhibit R-137**).

⁴⁹² *Ibid.*, (**Exhibit C-140**), at Section 2, pages 5-16; (**Exhibit R-137**), at pages 5-17.

⁴⁹³ *Ibid.*, (**Exhibit C-140**), at pages 11-14; (**Exhibit R-137**), at pages 12-15.

⁴⁹⁴ *Ibid.*, (**Exhibit C-140**), at pages 17-21; (**Exhibit R-137**), at pages 18-22.

⁴⁹⁵ MINIRENA, *Former Mara, Nemba, Giciye, Rutsiro and Sebeya Mining Concessions: Bid Opening Report – Request for Proposal (RFP) Stage* (20 April 2016) (**Exhibit R-138**); MINIRENA, *Evaluation Report* (24 May 2016) (**Exhibit R-133**), at page 2.

⁴⁹⁶ MINIRENA, *Former Mara, Nemba, Giciye, Rutsiro and Sebeya Mining Concessions: Bid Opening Report – Request for Proposal (RFP) Stage* (20 April 2016) (**Exhibit R-138**), at pages 5-10.

documents.⁴⁹⁷ They presented their results in an Evaluation Report on 30 May 2016.⁴⁹⁸ In summary:

273.4.1. the Nemba perimeter received six bids. One bid was not evaluated because not all of the documents were submitted. Of the remaining bids evaluated, Fair Construction Ltd obtained the highest score and succeeded in its bid;⁴⁹⁹

273.4.2. Gahapfu and Manihira each received three bids. Tantalium Minerals Trading succeeded in relation to Gahpfu, and Rubavu Exploitation and Trading Company Ltd succeeded in relation to Manihira;⁵⁰⁰

273.4.3. Nyatubindi, Ntebeyondwe, Masengati, Runzenze, Rwoza and Tura each received two bids, the successful companies for each being, N.L. Mining Company Ltd, Tantalium Minerals Trading Ltd, DEMIKARU Ltd, Abahizi Cooperative, Better Generation Machinery Ltd and Abahizi Cooperative respectively;⁵⁰¹

273.4.4. Bisyo, Byimana and Murengeri received one bid each, with Kayenzi Mining Company Ltd, Rubavu Exploitation and Trading Company Ltd being successful in relation to Bisyo and Murengeri, but with the bid in relation to Byimana being unsuccessful;⁵⁰² and

273.4.5. Kabona, Kanengo, Karuhindura, Kore, Nyiratare, Mariba, Mucaca, Nyiratare and Shyembe received no bids.⁵⁰³

273.5. Finally, the successful companies were notified, and draft agreements negotiated. Following such negotiations, on 13 September 2016, MINIRENA requested that Cabinet approve the draft mining agreements between Rwanda and the successful investors.⁵⁰⁴ The licences awarded were all five-year licences apart from one, which was granted a 15-year licence.⁵⁰⁵

274. As such, not only was the 2016 tender process legitimate, fair and in line with the Government's objectives of privatisation and efficient commercial use of the mines, but the successful companies are not linked to the Rwandan Military or in any way connected

⁴⁹⁷ MINIRENA, *Evaluation Report for Mining Perimeters in Former Nemba, Rutsiro, Sebeya, Mara and Giciye Mining Concessions Request for Financial and Technical Proposal (RFP)* (30 March 2016) (**Exhibit R-139**), at page 5.

⁴⁹⁸ *Ibid.*, (**Exhibit R-139**).

⁴⁹⁹ *Ibid.*, (**Exhibit R-139**), at pages 17-18.

⁵⁰⁰ *Ibid.*, (**Exhibit R-139**), at pages 18.

⁵⁰¹ *Ibid.*, (**Exhibit R-139**), at pages 19-21.

⁵⁰² *Ibid.*, (**Exhibit R-139**), at pages 19-21.

⁵⁰³ *Ibid.*, (**Exhibit R-139**), at page 24; MINIRENA, *Evaluation Report* (24 May 2016) (**Exhibit R-133**), at page 2.

⁵⁰⁴ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Right Honourable Prime Minister, *Transmission of the Cabinet Paper on Successful Companies for the Development of former Government Mining Concessions* (19 September 2016) (**Exhibit R-035**).

⁵⁰⁵ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 46.

to the Government. This can be seen from the RDB records of each company which were disclosed by the Respondent during the document production phase of this Arbitration (but, perhaps not surprisingly, do not receive any mention in the Reply).⁵⁰⁶

275. What is also clear from the above is that certain other statements made by the Claimants in its Memorial in relation to the tender process are untrue.⁵⁰⁷ In particular, the Claimants state that “NRD’s investors, with the help of Mr. Barthelemy, tendered for the Concessions as a means of retaining NRD’s Concessions and assets.”⁵⁰⁸ In support of this, Mr. Marshall states:

“We made detailed plans with Christophe Barthelemy of Phoenix Metals Ltd. in an effort to regain the NRD Concessions and its fixed assets by tendering for the Concessions through another company. This ultimately failed when Mr. Barthelemy told me that highly placed people told him in late April or early May 2016 that we must drop such attempts because the Concessions were to be given to the military or people close to it.”⁵⁰⁹

276. Similarly, Mr. Barthelemy states:

“Through a third-party company that had the same investors as NRD, we tendered for NRD’s Concessions.”⁵¹⁰

277. These statements, even though vague and unsubstantiated, cannot be true. As explained above, 27 bids were received for the Five Concession Areas during March and April 2016, with the process closing on 20 April 2016. There was no bid placed by NRD, Phoenix Metals Ltd, Spalena or BVG, or any company related to Mr. Marshall, Mr. Barthelemy, Spalena or BVG (the name of the company that purportedly made the bid not being disclosed by Mr. Marshall or Mr. Barthelemy). Further, any bid would have had to be made before 20 April 2016, however Mr. Marshall states that it was not until late April or early May 2016 that they were purportedly told to “drop” their attempts. The timeline is not consistent with the timeline of the tender process described above. In addition, it is inconceivable that Mr. Marshall, through this unknown entity, would have submitted bids

⁵⁰⁶ RDB Certificate of Domestic Company Registration for Fair Construction Ltd (**Exhibit R-140**), Kayenzi Mining Company (KAMICO) Ltd (**Exhibit R-141**), Tantalium Minerals Trading (TMT) Ltd (**Exhibit R-142**), Rubavu Exploitation and Trading Company (RETC) Ltd (**Exhibit R-143**), Demikaru (Developpement Minier Kanama Rubavu) Ltd (**Exhibit R-144**), NL Mining Company Ltd (**Exhibit R-145**), ABAHIZI Cooperative (**Exhibit R-146**), Better Generation Machinery Ltd (**Exhibit R-147**), all produced pursuant to Claimants’ Requests for documents, see Claimants’ requests for documents, Respondent’s Objections, and Claimants’ replies (6 December 2019) (**Exhibit R-174**), at Request 28, page 42 (“The corporate registration(s) of the entity or entities that received Claimants’ Concessions following the March 2016 public tender held by the RDB.”).

⁵⁰⁷ See Claimants’ Memorial, at para. 102 (footnotes omitted), referring to the Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019, at paras. 19-20, and Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 70.

⁵⁰⁸ Claimants’ Memorial, at para. 102.

⁵⁰⁹ Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 70.

⁵¹⁰ Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019, at para. 19.

for each perimeter (there being 20 in total) – indeed, there was not a single company that did do so.⁵¹¹

H. Rwanda plays no part in illegal smuggling from the Democratic Republic of Congo

278. The Claimants’ hopeless conspiracy theory is based upon inadequately particularised allegations of a fantastical smuggling plot involving the Government, the Rwandan military, shadowy Rwandan oligarchs and others including ITRI, the independent International Tin organisation responsible for tagging and tracking minerals mined in Rwanda. That case is hopeless.
279. It must be said at the outset that Rwanda outright denies each and every allegation that it was or is involved in illegal smuggling, and the Claimants do not produce a single shred of evidence in support of their baseless allegations. Much, if not all of the Claimants’ allegations are based on speculation by its witnesses (whose testimony lacks any credibility in significant respects, as explained in Section III below). The Respondent believes that these unfounded allegations (which appear to have been raised for the first time in this Arbitration) are presented in an effort to distract the Tribunal from the real issues in this Arbitration and in order to obscure the reality which is that, as the contemporaneous record demonstrates, the reason that Rwanda was unwilling to grant NRD long-term licences was due to NRD’s, and its management’s, own comprehensive and repeated failings.
280. Nevertheless, because the Claimants have made these allegations Rwanda addresses them further here for completeness. However, there is categorically no link between illegal smuggling – which Rwanda plays no part in and in fact has taken drastic steps to prevent – and the treatment of NRD and the Claimants, and the Claimants cannot, and have not, shown one.
281. Contrary to the allegation made at paragraph 75 of the CMPO that Rwanda is mineral poor, it has substantial mineral reserves, and there is clear, well-documented evidence of these mineral deposits existing in Rwanda.⁵¹² Further, the minerals produced in Rwanda are consistent with the record. The Claimants’ allegations of smuggling from the DRC attempt to “*exploit the fact that geology is regional*”⁵¹³ by pointing to the similar mineral bases in the two countries. However, while it is difficult to stamp out smuggling completely, “*it is overwhelmingly the case that the minerals tagged as Rwandan and exported as Rwandan are produced in Rwanda*”.⁵¹⁴

⁵¹¹ The most bids made by a single company was Better Generation Machinery Ltd who bid for four perimeters out of the 20 and were successful on only one of them, see MINIRENA, *Evaluation Report for Mining Perimeters in Former Nemba, Rutsiro Sebeya, Mara and Giciye Mining Concessions Request for Financial and Technical Proposal (RFP)* (30 March 2016) (**Exhibit R-139**), at pages. 23-24.

⁵¹² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 16.1.

⁵¹³ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 16.1.

⁵¹⁴ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 16.1.

282. Rwanda's efforts to combat illegal smuggling including through the implementation of the iTSCi programme by the GMD and ITRI have been set out in detail at paragraphs 39 to 50 of the Counter-Memorial. As explained therein, "*Rwanda has been at the forefront of international efforts to promote international due diligence of the trade in the 3Ts to ensure that only minerals mined responsibly enter the international supply chain*".⁵¹⁵ It is clear from these efforts that there is no basis whatsoever for the allegations made by and on behalf of the Claimants. The Claimants' new argument that "*the underlying basis for Rwanda's mistreatment of NRD was Rwanda's participation in illegal smuggling*" simply ignores the evidence that the Respondent has produced regarding the efforts it has made to combat smuggling. Ultimately, the Claimants' arguments must fail both on the lack of evidence of smuggling, the plentiful evidence of the steps Rwanda takes to stamp out smuggling and as a matter of logic: it would make absolutely no sense for Rwanda to "*participate in illegal smuggling*" when it has taken exceptional and world-leading steps to prevent it. It is in Rwanda's interests to develop legitimate mining operations, which develop local economies, provide jobs, and assist the national economy.⁵¹⁶ Those are far more valuable to Rwanda than the revenues it could receive from the 4% levy on the export of minerals allegedly smuggled from DRC, which is the motivation alleged by the Claimants for the alleged conspiracy.⁵¹⁷
283. The allegation that the Rwandan state would fail to exploit its own mining sites in order to preserve them as dummy mines, with the consequent lack of economic development of its own resources; would risk the international opprobrium which would come with any such efforts to circumvent the Dodd Frank Act; and would successfully do so under the noses of the international community, is beyond improbable: it is obviously untrue. Only the strongest and most cogent evidence would suffice to prove such a case, but the Claimants rely on nothing but unsubstantiated assertions from witnesses with little to no credibility, as addressed below at Section III.A.2.

1. Rwanda's efforts to combat smuggling

284. Prior to the implementation of the iTSCi programme in 2011, Rwanda worked closely with the OECD to combat the illegal exploitation of minerals. Rwanda attended meetings hosted by the OECD, beginning with the International Conference on the Great Lakes Region Committee against the illegal exploitation of Natural Resources held in April 2010, following which Rwanda expressed interest in cooperating with the OECD and becoming a member of the OECD-hosted ad hoc working group in respect of due diligence in the Mining and minerals sector.⁵¹⁸

⁵¹⁵ Respondent's Counter-Memorial, at para. 38.

⁵¹⁶ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020 at para. 16.1.

⁵¹⁷ Claimants' Memorial, at para. 117; Claimants' Reply, at para. 129; Witness Statement of Mr. Jerry Fiala dated 27 February 2019, at para. 10.

⁵¹⁸ Letter from Ministry of Forestry and Mines (C Bazivamo) to OECD (M. Schekulin), *Cooperation with the OECD to strengthen due diligence in the mineral supply chain and combat the illegal exploitation of minerals in the Great Lakes Region* (24 May 2010) (**Exhibit R-148**).

285. Following its expression of interest, the OECD welcomed Rwanda's participation and Rwanda attended more meetings with the OECD and other key players in the 3Ts supply chain before implementing the iTSCi programme.⁵¹⁹ Rwanda also cooperated with other countries, such as Australia, on issues such as strengthening inspection in the mining industry.⁵²⁰
286. Even before the implementation of the iTSCi programme, Rwanda was working on a Certified Trading Chain project for the larger sites in the country.⁵²¹ This project evolved into the iTSCi tagging project and involved a significant amount of time, money, new staff and resources by numerous Government departments with the support of the World Bank, to get it off the ground.⁵²² As at April 2011 there were 43 members of staff working on the project with salaries totalling RwF 10,332,041 per month (approximately USD \$17,000, at the prevailing rate at the time).⁵²³ However this number was not sufficient to cover all of the mines⁵²⁴ and as such the number of staff increased to 83 in May 2011.⁵²⁵ The resources injected into this project speak to Rwanda's ongoing commitment to prevent illegal smuggling.
287. Once this traceability project was off the ground, Rwanda held consultative meetings and had regular contact with the mining companies operating in Rwanda and with the Rwanda Mining Association ("**RMA**") so as to discuss any issues with the project and its

⁵¹⁹ Letter from OECD Investment Committee (M. Schekulin) to the Minister of Forestry and Mines (C. Bazivamo) (5 July 2010) (**Exhibit R-149**).

⁵²⁰ OGMR, Scope for development cooperation in mining sector between the Government of Rwanda and Australia (8 June 2010) (**Exhibit R-150**); Letter from OGMR (Dr. M. Biryabarema) to the Minister of Forestry and Mines, *Scoping study on possible development cooperation in mining sector* (8 June 2010) (**Exhibit R-151**).

⁵²¹ Memo regarding Tagging Project (**Exhibit R-152**), at page 2.

⁵²² Memo regarding Tagging Project (**Exhibit R-152**); Letter from OGMR (Dr. M. Biryabarema) to the Ministry of Forestry and Mines (A. Ruvebana), *Recruiting people to help in mineral traceability* (25 February 2011) (**Exhibit R-153**); Letter from Secretary of Forestry and Mines (A. Ruvebana) to the Director General of OGMR, *Recruiting people to help in mineral traceability* (28 February 2011) (**Exhibit R-154**); Letter from OGMR (Dr. M. Biryabarema) to RDB, *Request for internees for traceability of minerals* (4 March 2011) (**Exhibit R-155**); Letter from OGMR (Dr. M. Biryabarema) to World Bank Country Representative, *Support for Mineral Traceability in Rwanda* (7 March 2011) (**Exhibit R-156**); Letter from RDB to OGMR, *Traceability of minerals* (8 March 2011) (**Exhibit R-157**); Letter from OGMR (Dr. M. Biryabarema) to CEDP (A. Kagaga), *World Bank support funds for Mineral Traceability in Rwanda* (18 March 2011) (**Exhibit R-158**).

⁵²³ OGMR Table of Salary of traceability project staff (April 2011) (**Exhibit R-159**); Letter from OGMR (Dr. M. Biryabarema) to CEDP, *Request for funds for mineral traceability project in Rwanda* (8 April 2011) (**Exhibit R-160**).

⁵²⁴ Letter from OGMR (Dr. M. Biryabarema) to RDB, *Request for internees for traceability of minerals* (10 April 2011) (**Exhibit R-161**).

⁵²⁵ Letter from OGMR (Dr. M. Biryabarema) to CEDP (A. Kagaga), *Requesting purchase order* (3 May 2011) (**Exhibit R-162**).

implementation.⁵²⁶ In February 2013, Rwanda agreed to an additional memorandum of understanding with ITRI in order to develop the iTSCi programme further.⁵²⁷

288. Rwanda is the only country in the region which is 100% compliant with the OECD and ICGRL mineral traceability and certificate[on schemes.⁵²⁸ Alongside this, Rwanda passed Ministerial Regulations No. 001/MINIFOM/2011 dated 10 March 2011 on fighting smuggling in mineral trading, which amongst other things, provides that anybody caught in the fraudulent mineral trade shall be liable for up to five years imprisonment or a fine of up to Rwf 5,000,000.⁵²⁹
289. In conjunction with these initiatives, Government officials work with the police and customs staff in capturing minerals that are travelling across Rwanda's borders illegally. An example of this can be seen in a report from November 2013 explaining how the Government worked with representatives of the DRC to hand over minerals that were captured travelling illegally across the Rwanda-DRC border.⁵³⁰ Rwanda's dedication to combating the illegal smuggling trade can also be seen in multiple recent news articles highlighting efforts by the Rwandan police to seize illegally traded minerals.⁵³¹
290. As set out by Mr. Niyonsaba, of iTSCi, there is increasing ability to determine the source of minerals that are seized or gathered in suspicious circumstances:

*"... in 2014-2015, iTSCi undertook a general sampling campaign, taking samples from most of the mining sites in Rwanda in order to map a unique mine database of reference samples of declared origin. From that large database, we are able to go some way to determining the mine or concession that is the source of a mineral sample taken from minerals seized by the police, gathered in the market in circumstances that are considered suspicious, or in checks at processor or exporter level, by considering characteristic geochemical features of the sample."*⁵³²

⁵²⁶ Report of consultative meeting with GMD and Managers of Mining Companies/Cooperatives in Rwanda (15 February 2013) (**Exhibit R-163**); Letter from the Chairman of Rwanda Mining Association (J-M. Kalima) to the Ministry of Trade and Industry, *Follow up on the need to address minerals theft and mines safety* (4 March 2013) (**Exhibit R-164**).

⁵²⁷ Supplementary Memorandum of Understanding between ITRI and MINIRENA (19 February 2013) (**Exhibit R-165**).

⁵²⁸ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at para. 16.2.

⁵²⁹ Ministerial Regulations No 001/MINIFOM/2011 dated on 10 March 2011 on fighting smuggling in mineral trading (**Exhibit R-166**); see also Rwanda Law No. 37/2008 on Mining and Quarry Exploitation (11 August 2008) published in the Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**).

⁵³⁰ Letter from Commissioner General RRA (B. Kagarama) to the Minister of Natural Resources, *Hand-over report of seized minerals to DRC* (27 November 2013) (**Exhibit R-167**); Memo from Rubavau Field trip report from 19th to 20th November 2013 (**Exhibit R-168**).

⁵³¹ See for example, IGIHE, *Police impounds 220 kg of illegally acquired minerals* (25 February 2020) (**Exhibit R-169**); The New Times, *Karongi- Vehicle Intercepted With Over 800kgs of Smuggled Minerals* (27 January 2020) (**Exhibit R-170**); The New Times, *Police Intercept Two Vehicles Carrying Smuggled Minerals* (30 August 2018) (**Exhibit R-171**).

⁵³² Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at para. 10.

291. As such, the Claimants' allegations that Rwanda is complicit in smuggling are simply wrong, and plainly made to distract from the real reason that NRD was not granted long-term licences, being its own failings. Mr. Marshall's allegations in paragraphs 9 to 20 of his supplemental statement are also plainly wrong, being that many if not all of the actions taken by former Minister Imena were done at the request and direction of an oligarch. This allegation is rejected by former Minister Imena and the grounds for Mr. Marshall's belief are unexplained in submission or evidence, are completely unsubstantiated and untrue and should never have been made.⁵³³

292. The Claimants rely on an email chain between Dr. Biryabarema and Martin Kahanovitz in February 2016 in support of their smuggling allegations. However, this email chain in no way substantiates their baseless claims but on the contrary highlights how seriously Rwanda is working to combat smuggling.⁵³⁴ As Dr. Biryabarema explained:

"The government was very concerned to put a stop to illegal mining and smuggling and far from ignoring complaints from TINCO and other companies we took active steps to try and curb illegal mining and trading. I believe this is clear from my email to Mr Kahanovitz on 13 April 2016 in which I said: "As an institution we have tried several methods to close loopholes of any collusion between different illegal actors. We frequently sensitise our workers and miners and exporters on the importance of transparency, we rotate the workers every three months, we are now working on reducing the number of middle men in mineral trade, we carry out immediate administrative sanctions on any of our workers of companies suspected to have miss-used the tags, we are planning to introduce data bases to help trace the location of tags from the point of issue to the export point etc. The system is evolving well despite some of these relatively few incidents that should be collectively blocked".⁵³⁵

293. Further, Mr. Gatare explains that, while there is some smuggling in Rwanda, it is not supported by the Government, which works actively to shut it down.⁵³⁶ Mr. Gatare is clear that the allegations by the Claimants are unfounded:

"Rwanda has no incentive, benefit or interest in ignoring, let alone promoting, smuggling in the region. We have every reason to fight against it, and we have taken strong steps to do so. Military, police and local administration all make sure that no illegal activity in minerals is tolerated, including illegal mining activities.

The allegations of any links between smuggling and the Government are entirely unsupported and are untrue. The mineral market, and mineral trading in Rwanda are very liberal and open. It is dominated by international mining and mineral trading companies. The government does not conduct any mining

⁵³³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 51-52.

⁵³⁴ Email chain between M. Kahanovitz, Dr. M. Biryabarema, et al. (22 February to 9 May 2016) (**Exhibit C-169**).

⁵³⁵ Supplemental Witness Statement of Dr. M. Biryabarema dated 26 May 2020, at para. 18; Email from Dr. M. Biryabarema to M. Kahanovitz (13 April 2016) (**Exhibit C-169**).

⁵³⁶ Supplemental Witness Statement of Mr. Francis Gatare dated 29 at para. 16.3.

*operations, or own the concessions, which were privatised some years ago. In such a liberal and open market environment, there is no place for government interference, and no role for state-sponsored “oligarchs”.*⁵³⁷

2. Export Figures

294. The Claimants assert that the increase in Rwanda’s mineral exports since 2017 could only be possible if Rwanda is smuggling minerals from the DRC, tagging them as Rwandan and exporting them to the world as Rwandan.⁵³⁸ This is not correct. In fact, the increase in exports can be attributed to a number of different factors, which are in large part consequent on Rwanda’s new, sound minerals policy.
295. Since 2017, Rwanda has embarked on reforms towards modernisation, professionalisation, diversification and value addition in its minerals industry.⁵³⁹ These reforms are in line with the National Strategy for Transformation. The policy statement in relation to mining states that the strategy in the minerals space is to *“Upscale mining by completing exploration of potential mineral areas to establish the extent of national resources and reserves, in terms of quantity and quality with the aim of exporting USD 800 million by 2020 and USD 1.5 billion annually by 2024 from USD 373 million in 2017”*.⁵⁴⁰
296. The industry is diversifying and increasing in its industrialisation and export scope, and accordingly a significant amount of the tin and gold mined in Rwanda is no longer exported in raw form, but is being smelted or refined prior to export and sold and exported at a higher price.⁵⁴¹ Additionally, due to the extensive mineral exploration projects that have been commissioned by Rwanda, in recent years new mineral commodities such as gemstones have been discovered and are now being mined.⁵⁴²
297. Further, as Mr. Niyonsaba explains: *“I believe that the increase in exports is due to the continued development of the mining sector and the fluctuating market.”*⁵⁴³
298. As Mr. Gatare states, the period 2017 to 2019 experienced a global price boom for the major mineral exports in Rwanda.⁵⁴⁴ Accordingly, the increased exports in 2017 are explained by a period of low growth from 2014 to 2017, in which the industry suffered poor international prices, and suspensions of mining companies, which together led to poor export figures.⁵⁴⁵ However, the context changed in around 2017, as set out by Mr. Niyonsaba:

“... there were two developments – international prices started to improve and a number of companies returned to the traceability system. In addition, prices

⁵³⁷ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020 at para. 16.3-16.4.

⁵³⁸ Claimants’ Reply, at para. 134.

⁵³⁹ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020 at para 19.1.

⁵⁴⁰ 7 Years Government Programme: National Strategy for Transformation (NST1) 2017–2024 (**Exhibit R-172**).

⁵⁴¹ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para 19.2.

⁵⁴² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para 19.4.

⁵⁴³ Supplemental Witness Statement of Ildephonse Niyonsaba dated 28 May 2020, at para. 13.

⁵⁴⁴ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para 19.3.

⁵⁴⁵ Supplemental Witness Statement of Ildephonse Niyonsaba dated 28 May 2020, at para. 14.

started to improve which led to an increase in exports. The improving prices led to an increase in artisanal mining production, as miners who had turned away from the industry when prices were low and worked in agriculture to make a living returned to mining. In addition, the mining companies increased production to meet demand. Mining activity in Rwanda is heavily impacted by the international market: - mines are closed if prices are low and therefore the investment in the mines is not being recovered, but can be reopened very quickly when prices recover; production can be increased quickly when prices are good, as those miners who were laid off during periods of low production simply return to work. Artisanal mining can also increase the rate of production very quickly, as it requires very limited investment compared to larger scale operations.”⁵⁴⁶

299. As explained by Mr. Gatare:

“Because a large amount of mining in Rwanda is still artisanal, when prices go down, production can substantially decrease, and similarly, when price and demand are high, production can surge as artisanal miners can rapidly move to and begin work in new areas and raise production quite rapidly.”⁵⁴⁷

300. In short, as, the mining industry in Rwanda remains largely artisanal, and while the goal of professionalisation means that this will change, for the time being, the market retains the “*substantial ability to be flexible to changing demand in the minerals market*”.⁵⁴⁸

301. Further, these baseless allegations relating to export figures are based on pure speculation by Mr. Marshall in his Second Supplemental Witness Statement.⁵⁴⁹ Mr. Marshall provides absolutely no credible documentary evidence in support of these allegations. Instead, he relies on a table setting out what he alleges to be Rwanda’s cassiterite production figures for the first six months of 2018. Mr. Marshall alleges that he received these figures from the GMD. He states: “*I received a copy of the cassiterite production for the first six months of 2018 from the GMD. A copy of that chart is set forth below. It lists the amount cassiterite mined, in kilograms in Rwanda.*”⁵⁵⁰

302. However, the chart to which Mr. Marshall refers and which he purports to reproduce, and the covering email in which he allegedly received the email from the GMD, were not produced or exhibited by the Claimants when they filed the Reply. In their 20 May 2020 letter to the Tribunal, the Claimants said – contrary to the plain words of Mr. Marshall’s statement, that he “*received*” the chart “*from the GMD*” – that “*Mr. Marshall did not state that the Rwanda’s Geology and Mines Department (“GMD”) sent him the chart, Mr. Marshall stated that the chart originated with the GMD*” and that it is a “*misreading (apparently intentional)*” to suggest that he said he received it from the GMD.⁵⁵¹ That is

⁵⁴⁶ Supplemental Witness Statement of Ildephonse Niyonsaba dated 28 May 2020, at para. 15.

⁵⁴⁷ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para 20.

⁵⁴⁸ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para 20.

⁵⁴⁹ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at paras. 4-13.

⁵⁵⁰ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 10.

⁵⁵¹ Letter from Duane Morris LLP to the members of the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (20 May 2020) (**Exhibit R-173**).

not a credible statement in light of the plain words of Mr. Marshall's statement. Further, the Claimants have failed to produce any covering email to support Mr. Marshall's claim that the chart does in fact originate from the GMD (which is denied).⁵⁵² In these circumstances, the screenshot that is used as the basis for Mr. Marshall's unfounded speculation about Rwanda's participation in mineral smuggling is plainly unreliable.

3. Rwanda Rudniki

303. The Claimants allege at paragraph 135 of the Reply that Rwanda "inflated export figures" in relation to various mining companies, citing Rwanda Rudniki Ltd as an example. Mr. Niyonsaba addresses these allegations directly:

"Mr. Fiala states that the spreadsheet (BVG001915, which is now exhibited at R-242) reports production of 231,663.6 kg of tantalum and 119,983.7 kg of tin by Rwanda Rudniki in 2012. Rwanda Rudniki was operating in the Muhanga district. iTSCi's official Rwanda Data Summary for Q2 2011 to Q4 2013 is not broken down by company but rather by district, and shows that the Muhanga district, produced 28,477kg of tantalum (Ta) and 120,138kg of tin (Sn) in 2012, as well as composite concentrates including 286,149 kg of Sn/Ta, 1,743 kg of Sn/W/Ta and 685 kg of Ta/W, where W is wolframite. The difference in these figures and the method of notation, including mixed ores, also indicates that the document is not an iTSCi document. I also note that in addition, Mr. Fiala claims that Rwanda Rudniki produced 8,217.3 kg of tantalum and 12,044.2 kg of tin in 2012. He states that that figures for 2013 show a similar discrepancy. This may be explained by the operation of other producers in Muhanga. Rwanda Rudniki initially had good investment and management, but later it suffered from bankruptcy and it was ultimately expelled from iTSCi in 2017, because it did not respect the terms and conditions of membership, such as sending annual due diligence reports, paying annual membership fees and sending other updates on the status of the company. I also understand that Mr. Fiala was removed as the company's managing director due to his financial mismanagement of the company. When Rwanda Rudniki was a full member of iTSCi, it was entitled to operate in both mineral production through mining, and in mineral trade and export."⁵⁵³

304. Similarly, Mr. Gatere says:

"In relation to the allegations relating to Rwanda Rudniki specifically, namely that the government of Rwanda "must be tagging smuggled minerals as originating from Rudniki" because the official production figures are higher than Rwanda Rudniki's internal production figures, that company is not a credible example of a mining company in Rwanda in any meaningful sense. It was poorly managed, and record-keeping was not consistent with standards. My understanding is that Mr. Jerry Fiala was fired by the managers of the company, as he had been involved in misusing funds and manipulation of the company's

⁵⁵² Screenshot summary of production figures (January-May 2018) (Exhibit C-206).

⁵⁵³ Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at paras. 11.2-11.3 (citations omitted).

financials. I have no reason to place any substantial weight on the figures produced by Mr Fiala.”⁵⁵⁴

305. The Claimants also raise, in this context, an email between Mr. Niyonsaba and Mr. Marshall, relating to illegal mining occurring at the Nemba site.⁵⁵⁵ The Claimants allege that, because of a lack of clarity around whether NRD tags were being used at that time, this communication led them to suspect that minerals were being tagged as originating at NRD’s Five Concession Areas although the company was not operative at that time.⁵⁵⁶ Mr. Niyonsaba provides context and responds as follows:

“... That email exchange began with an inquiry from me to Mr. Marshall on 19 March 2015 regarding mining activities at the Nemba site. I was aware that illegal mining activity was occurring at the concession and that minerals were being produced, so I asked Mr. Marshall to explain how the production was being tagged and sold. Mr. Marshall’s response on 19 March 2015 did not answer my question so I sent a further email the same day asking how the production at Nemba was being tagged and by whom.

Mr. Marshall finally responded to that email nearly 2 weeks later on 30 March 2015 stating that “As to who is tagging the minerals in the NRD concessions, we probably have less information than you do”. However he also said that he understood from the “Security Services”, which I understand to be private security contractors retained by NRD, that more than 20 tons of minerals were being produced by artisan miners in NRD’s western concessions each month and that NRD had been informed orally that the adjoining concession holders were tagging these minerals. He concluded by stating that NRD had not had any reports that any minerals had come into the NRD concessions from the DRC and that “there would be no economic incentive for such minerals to come from the DRC into our concessions”.

Mr. Marshall claims in paragraph 13 of his Second Supplemental Statement that I would not confirm or deny the use of NRD tags or the volume being exported from NRD’s concessions. That is incorrect. I told Mr. Marshall when I met with him following our March 2015 email exchange that I knew the minerals were not being tagged with NRD’s tags as those tags were all locked in a container together with the related logbooks. Eventually, those tags and the logbooks were returned to iTSCi. I cannot now recall when this material was returned but believe it was in late 2015 as the iTSCi incident report for January to June 2016 records the tags as having been returned to iTSCi and cancelled (i.e. removed) from the iTSCi database.”⁵⁵⁷

306. In addition, the suggestion that minerals smuggled from the DRC were being tagged as originating at NRD’s Five Concession Areas is surprising as it is in direct contradiction to Mr. Marshall’s position set out in the emails discussed above. As former Minister Imena

⁵⁵⁴ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at para 21.

⁵⁵⁵ Emails between I. Niyonsaba and R. Marshall, *Activities at Nemba site* (19-30 March 2015) (**Exhibit C-107**).

⁵⁵⁶ Claimants’ Reply, at para. 136.

⁵⁵⁷ Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at paras. 5-7.

explains: “What seems more plausible, is that tags were being used from adjoining concessions to tag the minerals being mined by artisanal miners which is what Mr. Marshall himself suggests was happening. I believe Mr. Marshall has invented the story about NRD tags being placed on minerals smuggled from the DRC for the purposes of this arbitration.”⁵⁵⁸

I. The document titled “explanatory note on NRD”

307. At paragraph 138 of the Reply, the Claimants’ state that “Rwanda cannot rely on the document it attached to its Counter Memorial titled ‘Explanatory Note on NRD’” because they assume that “someone had put the document together solely to prepare for this proceeding”.⁵⁵⁹ That is incorrect, and so are the four reasons the Claimants give in coming to this conclusion. Taking each of these in turn:

307.1. *First*, although the document is undated, Dr. Biryabarema explained in his first witness statement submitted with the Respondent’s Counter-Memorial, that it was created in March 2015.⁵⁶⁰ He also explained that he drafted the note on the basis of NRD’s further applications made in 2014, and that the purpose of the note was to “summarise[...] the background to NRD and explain[...] how in [his] view, NRD had not met the required standards in terms of exploration, production, investment, or environmental issues”.⁵⁶¹ The Claimants have chosen to ignore this explanation. Nevertheless, Dr. Biryabarema has further clarified in his supplemental statement that the document was prepared on 24 March 2015.⁵⁶²

307.2. *Second*, although the document is unsigned, Dr. Biryabarema explained in his first statement that he is the author of the document.⁵⁶³ Again, the Claimants have chosen to ignore this explanation.

307.3. *Third*, as Dr. Biryabarema explains in his supplemental witness statement, he drafted the document following Mr. Marshall’s 23 March 2015 letter to the RDB requesting consultation and negotiation under the USA-Rwanda BIT and requesting a review of NRD’s situation.⁵⁶⁴ The purpose of the note was to brief his superiors, being the Minister of State for Mining, the RDB and the Minister of Natural Resources, on the history of NRD and Mr. Marshall’s involvement with mining in Rwanda and was shared with them.⁵⁶⁵ The note was subsequently relied

⁵⁵⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 43 referring to emails between I. Niyonsaba and R. Marshall, *Activities at Nemba site (19-30 March 2015)* (**Exhibit C-107**), at page. 2.

⁵⁵⁹ See Claimants’ Reply, at para. 138 referring to *Explanatory Note on NRD* (**Exhibit R-017**).

⁵⁶⁰ Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 19.

⁵⁶¹ Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 19.

⁵⁶² Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 16.1.

⁵⁶³ Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 19.

⁵⁶⁴ Letter from NRD (R. Marshall) to the CEO of RDB, *Notice under the ‘Treaty between the Government of the USA and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment’* (23 March 2015) (**Exhibit C-100**); Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 16.1.

⁵⁶⁵ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at paras. 16-2-16.3.

on by former Minister Imena in confirming his earlier decision that NRD's application for long-term licences had been rejected.⁵⁶⁶

307.4. *Fourth*, it is correct that the document discusses BVG's Bisesero concession, but this does not mean the document was "*internally inconsistent*" as the Claimants' suggest. The comments in relation to Bisesero were made "*in relation to the refund of BVG's environmental deposit*"⁵⁶⁷ and were included in the same note because Mr. Marshall had operated the Bisesero concession through BVG prior to Spalena's purchase of NRD.⁵⁶⁸ Rwanda's past underwhelming experience of Mr. Marshall as a mine operator was plainly a relevant consideration when it came to evaluating NRD.

308. As such, the reasons for the preparation of the document, along with its author and date, are clear, and there no reason for the Respondent not to be able to rely on it in this Arbitration.

J. The Claimants' documentary evidence

309. In the Memorial, CMPO and Reply, the Claimants maintain that following Mr. Benzinge's occupation of their property, upon re-entering in September 2015 they discovered that "*substantially all of their papers had been stolen and their computers had been wiped clean*".⁵⁶⁹ During the document production phase of these proceedings, these claims were repeated:

309.1. The Claimants' first document request made during the document production phase was for: "*All documents, hard drives, and other material removed from Claimants' headquarters in Kigali between June 2014 and September 2015.*"⁵⁷⁰ In the Respondent's objection to the request, it made clear that any such documents were not in the possession of the Respondent⁵⁷¹ and upon consideration of this request it was refused by the Tribunal.⁵⁷²

309.2. In the Claimants' response to the Respondent's Document Requests, the Claimants objected to production of documents for the same reason:

"Claimants object to the extent that the document requests seek documents that were maintained in hard copy or electronic form at the headquarters of Natural Resources Development Rwanda, Ltd. ("NRD")

⁵⁶⁶ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 16.4; Supplemental Witness Statement of Mr Evode Imena dated 28 May 2020, at para. 35.

⁵⁶⁷ Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 20.

⁵⁶⁸ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 16.2.

⁵⁶⁹ Claimants' Memorial, at paras. 98, 232, 271 and footnotes 31, 36, 69; Claimants' Counter-Memorial on Preliminary Objections, at footnote 75; Claimants' Reply, at footnote 348; See also the witness statement of Zuzana Mruskovicova dated 28 February 2019. at para. 24.

⁵⁷⁰ Claimants' requests for documents, Respondent's Objections, and Claimants' replies (6 December 2019) (**Exhibit R-174**), at page 2.

⁵⁷¹ *Ibid.*, (**Exhibit R-174**), at page 2.

⁵⁷² Procedural Order No. 4 on document production (20 December 2019), at Section II(1).

in Kigali. Respondent prevented Claimants from accessing the headquarters beginning in June 2014 and did not regain access until September 22, 2015. Upon regaining access, Claimants found that, with limited exception for timesheets and employee attendance records, all hard copy documents had been removed from the headquarters and that all computer hard drives had been erased. Claimants expect that Respondent either destroyed all of the missing documents or retained copies for itself.”⁵⁷³

310. Despite maintaining this position, not only have the Claimants exhibited in excess of 200 documents in support of their claims, but during the document production phase the Claimants produced hundreds, if not thousands, more documents, including a large number of electronic files such as spreadsheets and unsigned letters, with the majority of them being from the period 2005 to 2014. Plainly, this would not have been possible if “[a]ll the computers had been wiped clean” or all NRD’s documents had been in NRD’s Kigali office and had been destroyed (neither of which is accepted by the Respondent).⁵⁷⁴ The Claimants’ false allegation regarding their retention of NRD’s records is of serious concern. Clearly, the Claimants have access to NRD’s records, and have had that access throughout these proceedings, including when they untruthfully claimed that they were unable to produce necessary documents due to the seizure of its Kigali offices.
311. Further, in support of the Claimants’ recent unsuccessful application to remove Mr. Mugisha as the Respondent’s expert witness, the Claimants produced documents found on a flash drive from 2008. Following a request by the Respondent for the Claimants to perform a search of this flash drive for documents responsive to its document requests,⁵⁷⁵ the Tribunal ordered that a search be undertaken⁵⁷⁶ and on 22 May 2020 the Claimants produced more than 150 further documents.
312. To the extent that the Claimants may seek to argue that their contentions are correct on the basis that NRD’s hard drives were wiped but were backed upon flash drives, that argument would not assist. Clearly, it would be highly misleading for the Claimants to assert that all records had been stolen or wiped whilst omitting to state that they were in fact retained on flash drives, and indeed if all of their records were maintained on flash drives, the alleged theft of their records would provide no basis whatsoever for resisting document production.

⁵⁷³ Respondent’s requests for documents, Claimant’s Objections and Respondent’s replies (6 December 2019) (**Exhibit R-175**), at page 1.

⁵⁷⁴ Witness statement of Zuzana Mruskovicova dated 28 February 2019 at para. 24.

⁵⁷⁵ Letter from Joseph Hage Aaronson LLP to the members of the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (24 April 2020) (**Exhibit R-090**).

⁵⁷⁶ Procedural Order No. 5 on the Claimants’ Request to exclude Expert Evidence (14 May 2020), at para. 14.

313. Additionally, Mr. Marshall used a Yahoo webmail service, to which he plainly still has access, and which presumably would have been used to liaise with relevant persons in the preparation of relevant documentation.⁵⁷⁷
314. In light of the above, the Claimants' allegation that "*substantially all of their papers had been stolen and their computers and been wiped clean*" is entirely implausible and merely highlights the Claimants' lack of veracity (as set out in more detail at Section III below). In any event, to the extent that the Claimants did lose any records during the alleged occupation of their property by Mr. Benzinge (which is not made out), plainly the Respondent could not be held responsible for any such loss.⁵⁷⁸

⁵⁷⁷ See Letter from Duane Morris LLP to the members of the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (20 May 2020) (**Exhibit R-173**), at page 3, in which counsel for the Claimants confirm that Mr. Marshall has access to his personal email, and they were able to produce documents extracted from that Yahoo webmail service as at 20 May 2020. See, for example, the emails included at **Exhibit C-207** which was provided along with the letter.

⁵⁷⁸ See the discussion as to why Mr. Benzinge's actions cannot be attributed to the Respondent, at paras. 644-660.

III. RELIABILITY OF WITNESSES

A. Reliability of the Claimants' Witnesses

315. The Claimants rely on numerous witnesses with significant credibility problems, and whose veracity must be doubted, for the reasons explained below.

1. **Roderick Marshall**

316. As is abundantly clear from the Claimants pleadings, the relationship between the Claimants and Rwanda is very much a relationship between Mr. Marshall and Rwanda. As explained above, Mr. Marshall is (and was at all material times) the President of and/or controlled BVG and Spalena. He was also appointed as Managing Director of H.C. Starck Resources GmbH, NRD's parent company (purporting at the time to hold 85% of the shares in NRD) on 23 December 2010, following the purchase of H.C. Starck Resources GmbH by Spalena. The Claimants' case rests heavily on documents and correspondence drafted and/or received by Mr. Marshall as well as the three witness statements made by him.

317. It is submitted that Mr. Marshall faces a very serious credibility problem. Large parts of his evidence is demonstrably untrue or, at best, misleading.

318. *First*, there are numerous contradictions, embellishments and plain mistruths in his evidence. Due to the large number of these, the Respondent does not refer to them all here; instead, the following key examples are highlighted:

318.1. In numerous letters written between 2011 and 2015 as discussed in further detail in relation to each claim, Mr. Marshall alleged that Rwanda had violated the USA-Rwanda BIT, including by "*taking*" and "*nationalising*" NRD's investment. The Claimants now allege that they simply "*invoked the language of the BIT in an effort to further negotiations with the Respondent over the long term licences*".⁵⁷⁹ This argument is not credible and is nothing more than a futile attempt to overcome the Claimants' time bar problem, as discussed in further detail at Section V.A below. Despite this, it is respectfully submitted that the contradiction between the position taken in the earlier correspondence prepared by Mr. Marshall and the position now adopted by the Claimants, whose source of knowledge was Mr. Marshall, reflects on Mr. Marshall's character and what appears to be a tendency to bend the truth as he sees fit.

318.2. Mr. Marshall states that he "*never received*" former Minister Imena's letter of 12 June 2015.⁵⁸⁰ This is implausible and cannot be accepted. As explained at paragraph 775 below, the letter was sent to exactly the same P.O. BOX number

⁵⁷⁹ Claimants' Counter-Memorial on Preliminary Objections, at para. 79; see also Claimants' Memorial, at para. 94.

⁵⁸⁰ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 22.

as every other letter sent from Rwanda to NRD, including former Minister Imena's letter of 19 May 2015 which the Claimants have acknowledged NRD received.

318.3. At paragraphs 17 and 18 of Mr. Marshall's second supplemental witness statement, Mr. Marshall alleges that NRD discussed entering a joint venture with Gabiro Mining Group to form an entity called "BlackOre". He attaches a draft Joint Venture Agreement between NRD, The Spalena Company, and Gabiro Mining Group.⁵⁸¹ The document states on page 1 that: "TSC [The Spalena Company] is the holder of substantially all of the shares of NRD, and has the share participation of David Bensusan who, among other services, shall provide for the expertise in the purchase of minerals".

318.4. The evidence of Mr. David Bensusan and Mr. Muvara (company secretary and legal advisor to Ngali Holdings), shows these statements by Mr. Marshall to be untrue. In particular:

318.4.1. Mr. Bensusan's evidence is that he has "*never heard of Gabiro Mining Group*"⁵⁸², that he has "*never heard of this proposed joint venture agreement or seen the draft joint venture agreement exhibited at C-170*"⁵⁸³ and that he "*never held any shares in Spalena or any other company operating in Rwanda aside from MSA.*"⁵⁸⁴

318.4.2. Mr. Muvara's evidence is also that he has never heard of Gabiro Mining Group, and that it is not a subsidiary of either Ngali Mining or Ngali Holdings.⁵⁸⁵

318.4.3. Mr. Muvara's evidence is that he has never heard of the proposed joint venture agreement and has never seen the draft joint venture agreement exhibited at **C-170**.⁵⁸⁶

318.4.4. Mr. Marshall alleges that Ngali Mining is associated with the Rwandan military.⁵⁸⁷ This is false, as Mr. Muvara confirms.⁵⁸⁸

318.4.5. Mr. Marshall alleges that he advised Ngali Holdings on the "*the acquisition of helicopters, helicopter training equipment, a helicopter pilot training facility, contracts regarding such acquisitions, as well as a*

⁵⁸¹ Draft Joint Venture Agreement between NRD, The Spalena Company, and Gabiro Mining Group (undated) (**Exhibit C-170**).

⁵⁸² Witness statement of Mr. David Bensusan dated 15 May 2020, at para. 13.1.

⁵⁸³ Witness Statement of Mr. David Bensusan dated 15 May 2020, at para. 13.2.

⁵⁸⁴ Witness Statement of Mr. David Bensusan dated 15 May 2020, at para. 13.3.

⁵⁸⁵ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 8.1.

⁵⁸⁶ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 8.2.

⁵⁸⁷ Second Supplemental Witness statement of Mr. Roderick Marshall dated 13 March 2020, at paras. 14-18; Draft Joint Venture Agreement between NRD, The Spalena Company, and Gabiro Mining Group (undated) (**Exhibit C-170**).

⁵⁸⁸ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 7.

mobile hospital for its U.N. peacekeeping forces mission".⁵⁸⁹ The Claimants have provided no credible documentary evidence to support this, and the evidence of Mr. Muvara is that he is not aware of any such advice having been given (and as legal adviser to Ngali Holdings he would have plainly known about any such advice).⁵⁹⁰

318.5. Former Minister Imena also was not aware of any negotiations Mr. Marshall may have had with Ngali Mining regarding a joint venture and there was no reference to the proposed joint venture in any of the documents NRD submitted to the Government in support of its licence application.⁵⁹¹ In any event, and as former Minister Imena explains:

*"so far as NRD's application was concerned, the proposed joint venture, if it even existed, was entirely irrelevant and would not have changed the decision of the Government regarding whether NRD were granted long-term licences."*⁵⁹²

318.6. Mr. Marshall suggests that he, with the help of Mr. Buyskes, tendered for NRD's concessions in 2016, which cannot be true for the reasons explained at paragraphs 275 to 277 above.⁵⁹³

318.7. At paragraph 23 of his second statement, Mr. Marshall makes misrepresentations concerning Mr. Bidega and the draft contract he allegedly prepared. He stated: *"I was confident that the Cabinet would approve the long term license when Dominique Bidega and his bosses, Dr. Biryabarema and Minister Kamanzi, submitted the long term license to the Cabinet of the Government of Rwanda for approval."* These events plainly never happened, as set out at paragraphs 163 and 168-174.4 above.

318.8. Mr. Marshall has made false claims concerning BVG's relationship with NRD in an attempt to overcome the insurmountable problem BVG has with establishing standing in this Arbitration. At paragraph 5 of his Supplemental Witness Statement dated 16 August 2019, Mr. Marshall states that *"Prior to BVG's purchase of NRD, NRD violated the terms of the cooperation agreement by [REDACTED] [REDACTED] [REDACTED] [REDACTED]."* Mr. Marshall and/or the Claimants have not provided a single document in support of this extraordinary claim, and the relevant financial documentation and Share Purchase Agreement between NRD and Spalena

⁵⁸⁹ Second Supplemental Witness statement of Mr. Roderick Marshall dated 13 March 2020, at para. 15.

⁵⁹⁰ Witness Statement of Mr. Emmanuel Muvara dated 25 May 2020, at para. 6.3.

⁵⁹¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 26.

⁵⁹² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 26.

⁵⁹³ Supplemental Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 70.

confirms that it is indeed false as discussed further at paragraphs 70 to 74 above and at paragraphs 457 to 468 below.

- 318.9. In various documents drafted by Mr. Marshall, including NRD's applications of 30 January 2013⁵⁹⁴ and 18 Sept 2014,⁵⁹⁵ Mr. Marshall grossly exaggerates the investment Spalena has made in NRD, including stating in the September 2014 application that he has invested funds in excess of USD \$20 million into NRD. These statements are false for the reasons set out at paragraphs 87 to 99 above and 510 to 515 below, and the supplemental witness statements of Mr. Jean Aime Sindayigaya,⁵⁹⁶ Professor Nkanika Wa Rupiya⁵⁹⁷ and Mr. Ehlers.⁵⁹⁸
319. *Second*, Mr. Marshall has made very serious allegations against others, including the Respondent's witnesses, which are false. In particular:
- 319.1. In letters written by Mr. Marshall that have been exhibited and/or exchanged by way of document production, Mr. Marshall makes very serious allegations against former Minister Imena. In a letter to the CID dated 30 October 2014, he writes at paragraph 2(g) that:

*"There are many instances where Minister Evode indirectly threatened NRD and its management and owners. Among these, on (or about) August 14th 2014, he told NRD business partner, David Bensusan, CEO of MSA, Ltd., that he "will nationalize NRD as a help to MSA" because, as Bensusan explained to us, then MSA will be given the NRD concessions so that MSA can get out of its financial and tax troubles. According to Bensusan, Minister Evode separately told him that he will "stop NRD from having income, bankrupt them and take the mining licenses". According to Bensusan, he was "shocked" that Minister Evode would treat the Rwanda mining industry "as if it was his own personal property". These and other similar statements by Minister Evode suggest that he was violating Rwandan 'good governance' practices for his own personal gain or personal interest."*⁵⁹⁹

- 319.2. In his witness statement Mr. Bensusan explains that these statements "*are false*".⁶⁰⁰ He explains:

⁵⁹⁴ Letter from the Chairman of NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

⁵⁹⁵ Letter from NRD (R. Marshall) to Ministry of Natural Resources (Minister E. Imena) (18 August 2014), *NRD Ltd Mining Concessions* (**Exhibit C-084**) (NB: the letter is incorrectly dated 18 August 2014 and was in fact sent on 18 September 2014).

⁵⁹⁶ Supplemental Witness Statements of Mr. Jean Aime Sindayigaya dated 27 May 2020, at paras. 5-6.4.

⁵⁹⁷ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at paras. 10-15.

⁵⁹⁸ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 13-16.

⁵⁹⁹ Letter from NRD (R. Marshall) to CID, Formal Complaint against apparent corruption (30 October 2014) (**Exhibit C-165**).

⁶⁰⁰ Witness Statement of Mr. David Bensusan dated 15 May 2020, at para. 9.

“Minister Imena did not ever make these comments to me, and I certainly never told Mr. Marshall that he did.”⁶⁰¹

319.3. Similarly, in an undated letter from Mr. Marshall to former Minister Imena, Mr. Marshall states that:

“According to our business partner, David Bensusan, CEO of MSA Ltd., you have stated to him in a public forum that you will “bankrupt NRD and take the mining licences” by supporting the claims of Ben Benzinge against NRD.”⁶⁰²

319.4. This statement is fabricated. Mr. Bensusan explains:

“This statement is also false. Minister Imena never made any such statements to me, either in a public forum or otherwise, and nor did I tell Mr. Marshall that he did. Further, as I have explained in paragraph 10 above, the suggestion that Minister Imena made such statements at all is implausible. Further, it is unclear to me what public forum Mr. Marshall might be referring to. The only public forums I can recall attending at which Minister Imena was also present were the quarterly mining forums. Minister Imena never made such statements about NRD at these forums – if he had, I don’t doubt that it would have been all over the news.”⁶⁰³

319.5. Mr. Marshall has made other serious allegations against former Minister Imena in correspondence sent on behalf of NRD. These allegations are also false.⁶⁰⁴

319.6. Mr. Marshall has also made very serious allegations against the Respondent’s expert witness, Mr. Mugisha, including stating that he had attended meetings with Mr. Mugisha, in an attempt to have him removed as the Respondent’s expert. These allegations are false. Mr. Mugisha’s evidence is that he had never met or advised Mr. Marshall (a point borne out by the fact that Norton Rose wished to appoint him as NRD’s independent expert in an investment treaty claim against the Rwandan Government) and the Claimants’ application to remove Mr. Mugisha was unsuccessful.⁶⁰⁵

319.7. The Claimants rely on statements written by Mr. Marshall as the basis for their very serious allegations made against the Respondents witnesses, Mr. Ehlers, Mr. Sindayigaya and Mr. Jean Bosco Nsengiyuma. As set out in the supplemental

⁶⁰¹ Witness Statement of Mr. David Bensusan dated 15 May 2020, at para. 9.

⁶⁰² Letter from R. Marshall to Minister. E. Imena (undated) (**Exhibit R-177**).

⁶⁰³ Witness Statement of David Bensusan dated 15 May 2020, at para. 12.

⁶⁰⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 54-55.

⁶⁰⁵ Procedural Order No. 5 on the Claimants’ request to exclude expert evidence (14 May 2020).

witness statements of these individuals, and at paragraphs 347 to 365 below almost all of these allegations are false.⁶⁰⁶

320. *Third*, there is documentary evidence available that further highlights Mr. Marshall's tendency to tell mistruths and to make false allegations against others:

320.1. In a letter written by Mr. Mucyo to the Police dated 23 June 2010, the Director of Criminal Investigation and others in June 2010, Mr. Mucyo explains how Mr. Marshall made "*unseemly, baseless, false and unfortunate allegations*" against him.⁶⁰⁷ The Claimants seek (wrongly) to rely on representations made by Mr. Mucyo when he worked for RIEPA (see paragraph 55 above), and Mr. Mucyo subsequently became the managing director of BVG's Bisesero Concession. In this letter, Mr. Mucyo responds to allegations that Mr. Marshall and Mr. William Quam appear to have made against him to the Section Police Commander and others, stating that:⁶⁰⁸

"Their correspondence truly shows how they are ready to use all maneuvers [sic]-including dishonest ones-so as to have their incapacity to perform blamed upon some people."

"The former Director of this Slovak company called Julius Mokos was deceitfully drawn By Roderick Marshall to be shareholder within the non performing BAY VIEW GROUP. Julius Mokos has now written an affidavit denouncing Roderick Marshall's dishonesty."

"And now because of the incapacity to fulfil the stipulations requested within the concession agreement they obtained from the Government back then in 2007, as well as safety standards legally required for the benefit of their employees, including the need for their insurance coverage in case of accident or death, Mr Roderrick Marshal [sic] and his country manager Mr. William Quam, have fabricated stories without head and tail according to which I am involved in the so called criminal gangs that deal in the illicit sale of mineral ores in conjunction with Bralirwa and Heineken and other false allegations. I hereby declare that all these allegations are false."

"I reiterate that such allegations are just a diversion aimed at justifying their failure to perform what they had pledged, and I instead bring to your attention the fact that these people tend to use such allegations to appease the questions of other investors who might have made a mistake of injecting their capital to the BAY VIEW GROUP company that has never been operational."

⁶⁰⁶ Supplemental Witness Statement of Anthony Ehlers dated 27 May 2020 at paras. 24-33; Supplemental Witness Statement of Jean Aime Sindayigaya dated 27 May 2020 at paras. 13-25; Supplemental Witness Statement of Jean Bosco dated 28 May 2020 at paras. 7-9.

⁶⁰⁷ Letter from Lambert Mucyo to the Police/CID, *False allegations by William Quam and Roderick Marshall* (23 June 2010) (**Exhibit R-102**), at page 3.

⁶⁰⁸ *Ibid.*, (**Exhibit R-102**).

320.2. The parallels with the present allegations Mr. Marshall and the Claimants have made against the Respondent with respect to NRD's Five Concession Areas are striking.

321. In *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico*, the tribunal made comments on one of the Claimants' witnesses that are pertinent with respect to Mr. Marshall.⁶⁰⁹ It held that "*The list of demonstrably unreliable representations made before the Arbitral Tribunal is unfortunately long*"⁶¹⁰ and that "[t]he credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with."⁶¹¹ The tribunal held that it "*obviously disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA.*"⁶¹²

322. It is respectfully submitted that the same is true of Mr. Marshall: he has made a long list of demonstrably untrue and/or unreliable representations, unsupported by documentary evidence, and in these circumstances little or no weight can be given to his evidence except where corroborated by contemporaneous documents. This is also true of the underlying documentary evidence relied on by the Claimants which comprises statements written and/or prepared by Mr. Marshall. This, in fact, renders the vast body of documentary evidence relied on by the Claimants in this Arbitration, primarily consisting of letters written by Mr. Marshall, highly unreliable: at best they are tactical and self-serving, and in relation to the period from late 2014 were crafted in order to assist the Claimants in these proceedings which it is clear were under contemplation at the time.⁶¹³

2. Dominique Bidega

323. The Claimants rely on a witness statement made by Mr. Bidega, the former Director of the Regulation and Supervision Unit of the OGMR and (subsequently) an employee of NRD.⁶¹⁴ In particular, the Claimants rely on Mr. Bidega's comments in relation to the purported high quality of NRD's research and negotiation of a draft long-term licence agreement. Mr. Bidega's witness statement, and the contentions that it is relied upon to support, are inconsistent both with the documentary evidence relied on by the Claimants, and with comments Mr. Bidega has made prior to this Arbitration, in publicly

⁶⁰⁹ *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award (1 November 1999) (**Exhibit RL-136**), at paras. 121-124.

⁶¹⁰ *Ibid.*, (**Exhibit RL-136**), at para. 122.

⁶¹¹ *Ibid.*, (**Exhibit RL-136**), at para. 123.

⁶¹² *Ibid.*, (**Exhibit RL-136**), at para. 124.

⁶¹³ See, for example, Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining, *Appeal of Decision* (1 November 2014) (**Exhibit C-086**).

⁶¹³ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter* (**Exhibit C-087**).

⁶¹⁴ Witness Statement of Mr. Dominique Bidega dated 16 August 2019.

available documents. His evidence has clearly in material respects been invented to assist the Claimants in these proceedings.

324. Mr. Bidega states at paragraph 4 of his witness statement that *“In 2011 the OGMR Regulation and Supervision Department was responsible for negotiating a long term licence for the NRD and BVG mining Concession. As a result of the high quality application that NRD submitted, I provided NRD with a copy of the then ‘form’ of agreement that we were using for such Concession agreements between investors and the Government of Rwanda”*. This statement is false. The email correspondence finally produced by the Claimants following a request for production made by the Respondent to the tribunal highlights that (i) the draft contract was expressly for five-year, small-scale licences and not for long-term licences, as explained above; and (ii) that the draft contract exchanged did not originate with the OGMR but rather appears to originate with Mr. Marshall.⁶¹⁵ These misrepresentations are extremely serious and raise significant concerns about Mr. Bidega’s veracity.
325. Moreover, in a publication titled *‘The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in practice’* dated February 2012,⁶¹⁶ Mr. Bidega, together with the then Chief Policy Advisor for Mining from MINIRENA, Mr. Fidele Uwizeye, makes the following statement about Rwandan mining policy:

“With the end of many of the bigger four-year permits coming into sight, the Government of Rwanda entered into negotiations with mining companies over new permits. These negotiations however prove problematic. Mr. Bidega explains that the companies holding four-year permits simply had not done any exploration or reserve calculation. Mr. Uwizeye finds that the companies only look to exploit, and do not adhere to the agreements made in the contracts. In spite of this, Mr. Bidega says that the companies are requesting 30-year exploitation contracts. With insufficient knowledge of the reserves under concession, Mr. Bidega says that Rwanda is not looking to commit to long-term contracts. As a solution, Rwanda is therefore looking to negotiate another four-year contract to give the companies another chance to do a feasibility study. Mr. Bidega says that the companies are far from keen on this and are holding on to their 30-year demand. At the time of writing, the final outcomes of these negotiations were still uncertain.”⁶¹⁷

326. It seems highly likely in the light of the evidence of Mr. Ehlers and Mr. Sindayigaya that NRD was one of the companies Mr. Bidega and Mr. Uwizeye were referring to because the comments contained in the report were made by them in November 2011⁶¹⁸ – i.e. at a time when Mr. Bidega purports to have been negotiating the NRD agreement.

⁶¹⁵ Email correspondence between R. Marshall and D. Bidega with attachments (September – December 2011) (**Exhibit C-207**).

⁶¹⁶ Jasper van Teffelen, *The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice* (February 2012) (**Exhibit R-097**).

⁶¹⁷ *Ibid.*, (**Exhibit R-097**), at section 5.3.2, page. 44

⁶¹⁸ *Ibid.*, (**Exhibit R-097**), at page 8.

327. His contemporaneous comments are consistent with the Respondent's case and are at odds with his witness statement.
328. Furthermore, Mr. Bidega states in his witness statement at paragraph 6 that prior to joining NRD in 2012 as Operations and Production Manager, he "*obtained the approval of Dr. Michael in order to dispel any thoughts or ideas that NRD bribed me in some capacity as a means to obtain the long term licences*".⁶¹⁹ Dr. Biryabarema has confirmed that this statement is false – Mr. Bidega did not obtain his approval before going to work for NRD.⁶²⁰ This further casts doubt on the reliability of his evidence.

3. Olivier Rwamasirabo

329. The Claimants rely on three witness statements made by Mr. Olivier Rwamasirabo in these proceedings: the first dated 26 February 2019 ("**Rwamasirabo 1**"), the second dated 16 August 2019 ("**Rwamasirabo 2**") and the third dated 13 March 2020 ("**Rwamasirabo 3**"). Despite being described as "witness statements" Mr. Rwamasirabo purports to opine on matters of Rwandan law. Confused as to the status of Mr. Rwamasirabo, on 6 April 2020, counsel for the Respondent wrote to counsel for the Claimants, seeking clarification that Mr. Rwamasirabo was being presented as a witness of fact and not as a legal expert.⁶²¹ As to this, the Respondent pointed out that:

329.1. each of Mr. Rwamasirabo's statements is described as a "witness statement" and not an expert report;⁶²²

329.2. none of the statements include an expert declaration confirming Mr. Rwamasirabo's independence from the parties, their legal advisors and the Tribunal, consistently with Article 5.2(c) of the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), in the form that would typically be expected (and indeed required) if he were being presented as an expert witness. In place of an expert declaration and inconsistently with what would be expected of an expert witness, Mr. Rwamasirabo has stated that all of his statements were drafted with the assistance of counsel: Rwamasirabo 1 at page 7, Rwamasirabo 2 at page 5, and Rwamasirabo 3 at page 21 state: "*I have prepared this witness statement with the assistance of counsel for the Claimants*";⁶²³ and

329.3. in Rwamasirabo 2 at paragraph 11, Mr. Rwamasirabo refers to discussions that he has had with Mr. Marshall, President of both Claimant companies, and Managing Director of NRD.⁶²⁴

⁶¹⁹ Witness Statement of Mr. Dominique Bidega dated 16 August 2019, at para. 6.

⁶²⁰ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.7.

⁶²¹ Letter from Joseph Hage Aaronson LLP to Duane Morris LLP, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21): Witness Statements of Olivier Rwamasirabo* (6 April 2020) (**Exhibit R-182**).

⁶²² *Ibid.*, (**Exhibit R-182**), at para. 3(a).

⁶²³ *Ibid.*, (**Exhibit R-182**), at para. 3(b).

⁶²⁴ *Ibid.*, (**Exhibit R-182**), at para. 3(c).

330. In response, Counsel for the Claimants appeared to recognise and confirm that Mr. Rwamasirabo is a witness of fact rather than a legal expert.⁶²⁵ Accordingly, on 14 April 2020, Counsel for the Respondent replied to Counsel for the Claimant stating *“Thank you for confirming that Mr. Rwamasirabo is being presented as a witness of fact.”*⁶²⁶ Counsel for the Claimants did not respond to that letter.
331. On 29 May 2020, within hours of the deadline for service of this Rejoinder, Counsel for the Claimants sent a letter to the Tribunal addressing Mr. Rwamasirabo’s position in this Arbitration.⁶²⁷ The letter confirmed that the Claimants maintain their view that submission of an expert declaration and CV was not required *“given the content and circumstances of Mr. Rwamasirabo’s testimony”*.⁶²⁸ The Respondent infers from this, although the position is not clearly stated by Counsel for the Claimants, that Mr. Rwamasirabo is, as presented, engaged as a witness of fact and not as a legal expert. However, the letter goes on to state that the Claimants do not have an objection to providing an expert declaration and copy of Mr. Rwamasirabo’s CV and attaches a declaration and CV by Mr. Rwamasirabo dated 18 May 2020 (the decision to delay service of such declaration for 11 days appearing to be a tactical decision so as to be received by the Respondent at the last possible moment in preparation of its Rejoinder).
332. In his declaration, Mr. Rwamasirabo states that *“With respect to my first two Witness Statements, which I believe are factual in nature and based on my experience as a lawyer in Rwanda, I was asked to review various Rwandan laws that govern mining, contracts, and investment in Rwanda including Law No. 37/2008 of 11/08/2008 on Mining and Quarry Exploitation, Law No. 13/2014 of 20/05/2014 on Mining and Quarry Operations, Rwandan law governing contract and performance thereof, Rwanda’s Law No. 06/2015 of Investment Law of 28/03/2015 relating to Investment Promotion and Facilitation, and Rwandan standards of practice for formal handovers.”*⁶²⁹
333. It is unclear how or on what basis Mr. Rwamasirabo considers that opinions on the nature and operation of Rwandan Law could be considered *“factual in nature.”* Further, with respect to Mr. Rwamasirabo’s declaration regarding his third witness statement, it is unclear how an engagement in which he was *“specifically asked to respond to Richard Mugisha’s Expert Report, which attacked statements I made in my prior Witness Statements”* could be considered as addressing matters of fact.⁶³⁰

⁶²⁵ Letter from Duane Morris LLP to Joseph Hage Aaronson LLP, *Re: Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (13 April 2020) [regarding Olivier Rwamasirabo] (**Exhibit R-183**).

⁶²⁶ Letter Joseph Hage Aaronson LLP to Duane Morris LLP, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)* (14 April 2020) [regarding Olivier Rwamasirabo] (**Exhibit R-184**).

⁶²⁷ Letter from Duane Morris LLP to the Tribunal *Re: Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (29 May 2020) attaching Declaration from Mr. Olivier Rwamasirabo (**Exhibit R-243**).

⁶²⁸ *Ibid.*, (**Exhibit R-243**).

⁶²⁹ *Ibid.*, (**Exhibit R-243**), at page 4.

⁶³⁰ *Ibid.*, (**Exhibit R-243**), at page 4.

334. Nevertheless, the Respondent accepts the Claimants' position that Mr. Rwamasirabo is engaged as a factual expert and not as a legal expert and confirms that it does not intend to treat any portion of his witness statements as expert opinion. Notwithstanding the Claimants' very late submission of a declaration on behalf of Mr. Rwamasirabo, given his evidence was prepared with the assistance of counsel for the Claimants, and following discussions with Mr. Marshall, it would be inappropriate to treat his evidence as that of an expert or indeed to give any weight as to his views on Rwandan Law. This remains the case notwithstanding his belated claim that his statements "*state they were prepared with the assistance of counsel only to reflect the fact that there was an exchange of information between Claimants' counsel and me with respect to the particulars of the case and a discussion of the pertinent legal issues*",⁶³¹ which the Respondent does not find convincing. Indeed, his evidence does not have the character of an expert report at all: it is replete with statements that one would not ordinarily find in an expert report and which could only be considered submission in relation to both fact and law.⁶³² This is of course unsurprising given that the statement was prepared with the assistance of counsel for the Claimants and following discussions with Mr. Marshall.⁶³³
335. Further, another aspect of Mr. Rwamasirabo's evidence raises concerns about his reliability and/or veracity. At paragraph 23 of Rwamasirabo 3, Mr. Rwamasirabo purports to make submissions as to why he considers NRD's due process rights to have been violated. One of the events he purports to rely on is that "*Dominique Bidega, Director of the Regulation and Supervision Unit of the OGMR (the precursor to the GMD) provided NRD with a draft long term licence and negotiated for several months in 2011 until agreement was reached on mutually acceptable language.*"⁶³⁴ This appears to be a reference to the draft contract exhibited at **C-114**, which as explained at in paragraphs 173 to 174 is not for a long-term licence at all but rather, expressly for a five-year small mine licence. It is respectfully submitted that Mr. Rwamasirabo's characterisation of this document as a "*draft long term licence*" suggests either that he has not read the document he is giving evidence in respect of, or that if he has read the document, he is misrepresenting its contents. In either case, this is cause for concern.
336. Additionally, there can be no doubt that Mr. Rwamasirabo has no direct knowledge of the events he purports to give evidence on in his capacity as a witness of fact. In these circumstances, it is unclear what relevance his evidence could possibly have. Mr. Rwamasirabo's evidence is therefore unreliable and irrelevant, and of no probative value in this Arbitration.

⁶³¹ *Ibid.*, (**Exhibit R-243**), at page 5.

⁶³² See, for example, Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at paras. 23-24.

⁶³³ Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at para. 21.

⁶³⁴ Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at para. 23(a) (emphasis added)

4. Jerry Fiala

337. The Claimants rely on two witness statements made by Mr. Jerry Fiala, who claims to be *“the holder of a small scale mining license on behalf of Rwanda Rudniki...”*.⁶³⁵ Neither the Claimants, nor Mr. Fiala, however, explain that as at October 2014, Mr. Fiala was only a minority shareholder of Rwanda Rudniki – he is not *“the holder”* as he seeks to present.⁶³⁶ Mr. Fiala also fails to mention that he has in the past made misrepresentations about his shareholding to the RDB and others. As is made clear in a letter sent by Mr. Mbanza Boniface, Chairman of the Board of Rwanda Rudniki and majority shareholder, to the RDB on 17 October 2014, Mr. Fiala had provided false information about his ownership interest to at least one bank and to the RDB, and action was being taken to prevent Mr. Fiala from jeopardising the company’s business operations and financial interests.⁶³⁷ He therefore has an established track record of making untrue statements.
338. Further, in January 2015, the Nyarugenge Commercial Court held that Mr. Fiala was not a Director of Rwanda Rudniki nor was he able to file a complaint as a representative of Rwanda Rudniki.⁶³⁸ Despite appealing this decision, it was upheld by the Supreme Court of Commerce, Kigali in July 2016.⁶³⁹ These facts are supported by the evidence of former Minister Imena at paragraph 69 of his first witness statement, where he explained that *“Mr. Fiala was removed as the company’s Managing Director”* and *“the Court found his removal to be valid”*. In addition, Mr. Niyonsaba states that he understands that *“Mr. Fiala was removed as the company’s managing director due to his financial mismanagement of the company”*⁶⁴⁰ and Mr. Gatere states that *“was fired by the managers of the company, as he had been involved in misusing funds and manipulation of the company’s financials”*.⁶⁴¹
339. It is surprising that even despite these court judgments, Mr. Fiala still holds himself out as General Director/Exploration Manager of Rwanda Rudniki,⁶⁴² and even more so that he holds himself out as *“the holder of a small scale mining license on behalf of Rwanda Rudniki”*⁶⁴³ when that is clearly incorrect.
340. Mr. Fiala also states in his witness statement that he had *“reviewed an excel sheet created by ITRI”*⁶⁴⁴ and uses this document as a basis for alleging that *“the Government of Rwanda must be tagging smuggled minerals a originating from Rudniki”*.⁶⁴⁵ However, Mr.

⁶³⁵ Witness Statement of Mr. Jerry Fiala dated 27 February 2019, at para. 1.

⁶³⁶ Letter from Rwanda Rudniki (B. Mbanza) to RDB, *Notification of misrepresentation of ownership by a minority shareholder* (17 October 2014) (**Exhibit R-185**).

⁶³⁷ *Ibid.*, (**Exhibit R-185**).

⁶³⁸ Decision of the Nyarugenge Commercial Court, RCom 1508/14/TC/Nyge (7 January 2015) (**Exhibit R-186**).

⁶³⁹ Decision of the Commercial Court, RCOMA 00146/2016/CHC/HCC (19 July 2016) (**Exhibit R-187**).

⁶⁴⁰ Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at para. 11.3.

⁶⁴¹ Supplemental Witness Statement of Mr. Francis Gatere dated 29 May 2020, at para. 21.

⁶⁴² LinkedIn profile of Jerry Fiala (**Exhibit R-188**).

⁶⁴³ Witness Statement of Mr. Jerry Fiala dated 27 February 2019, at para. 1.

⁶⁴⁴ Supplemental Witness statement of Mr Jerry Fiala dated 13 March 2020, at para. 5.

⁶⁴⁵ Supplemental Witness statement of Mr. Jerry Fiala dated 13 March 2020, at para. 7.

Niyonsaba is clear that the document referred to is not an iTSCi / ITRI document. He states:

“The excel sheet bearing bates number BVG001915 (and now exhibited at R-242) was not produced by iTSCi. It does not use the data references that iTSCi used at that time and includes features which iTSCi did not include, such as, for example, serial number, exporter representative and sheet number. Further, iTSCi tracks production by district, and does not publish information relating to individual companies, as it wants to avoid making public the confidential information of its members. iTSCi publishes data on the minerals trade in Rwanda annually and has done since July 2011. In order to record production, iTSCi relies on its field checks and tagged production recorded in iTSCi logbooks.”⁶⁴⁶

341. Given these misrepresentations, and his dishonest conduct in giving false information about his ownership interest, it is respectfully submitted that Mr. Fiala’s evidence cannot be trusted. Accordingly, little, if any, weight should be given to it.

5. Christophe Barthelemy

342. In his witness statement dated 1 March 2029, Mr. Barthelemy states that in 2016 he tendered for the Five Concession Areas through a third party:

“Through a third-party company that had the same investors as NRD, we tendered for NRD’s Concessions.”⁶⁴⁷

343. He goes on to state that:

“Later, we were told not to tender and we found out that that the NRD Concession areas were given to entities related to the Ministry of Defense.”⁶⁴⁸

344. Mr. Marshall’s (hearsay) evidence is that Mr. Barthelemy was told this in April or May 2016, though Mr. Barthelemy does not give any dates in his statement.

345. In any event, Mr. Barthelemy’s allegations cannot be true for the reasons explained at paragraphs 275 to 277 above. It is respectfully submitted that this casts doubt on the veracity of his evidence. Further, as his statement is largely based on speculation, it is respectfully submitted that it has no probative value.

6. Zuzanna Mruskovicova

346. Ms. Mruskovicova alleges that when she returned to NRD’s offices in 2015 “[a]ll the computers had been wiped clean”.⁶⁴⁹ This is either false, or in the least, misleading, for the reasons explained at paragraphs 309 to 314 above.

347. In addition, in email correspondence between Jeff Lindhorst and Ms. Mruskovicova dated 18 October 2015, Mr. Lindhorst asked to visit the Rutsiro plant, to which Ms.

⁶⁴⁶ Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at para 11.1.

⁶⁴⁷ Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019, at para. 19.

⁶⁴⁸ Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019, at para. 19.

⁶⁴⁹ Witness statement of Ms. Zuzana Mruskovicova dated 28 February 2019, at para. 24.

Mruskovicova replied that *“the property is in the hands of the government.”*⁶⁵⁰ She now alleges that *“Despite Minister Imena’s letter, NRD continued to possess and oversee the Concessions”* following former Minister Imena’s 19 May 2015 letter and while she does not give dates,⁶⁵¹ the Claimants’ position is that NRD remained in possession for nearly a year after 19 May 2015, i.e. until nearly May 2016.⁶⁵² Either her email of 18 October 2015, or her claims in her statement of 16 August 2019, are misleading and/or false.

B. Purported bias of the Respondent’s witnesses against NRD

348. In Section IV of the Reply, the Claimants make various allegations against certain of the Respondent’s witnesses and claim that they are biased against NRD. Almost all of the allegations advanced are untrue, and in any event, most are not remotely relevant to the matters in issue in this Arbitration. In fact, far from harming the credibility of the Respondent’s witnesses, the allegations advanced in the Reply and in the underlying documentation relied on highlight the tendency of the Claimants and/or Mr. Marshall to consistently make falsehoods about others. This, of course, goes to the veracity of the Claimants and/or Mr. Marshall, as opposed to that of the Respondent’s witnesses.

1. Former Minister Evode Imena

349. At paragraphs 255 to 259 of the Reply the Claimants intentionally paint an extremely misleading picture of former Minister Imena. For the reasons set out below, this should not be believed; there is absolutely no reason not to rely on former Minister Imena’s testimony as the Claimants suggest.

350. *First*, despite what the Claimants contend,⁶⁵³ former Minister Imena was not *“fired from his post”*. As he explains in his supplemental witness statement: *“I lost my position because of a restructuring within MINIRENA. I was not replaced by anybody – the position simply did not exist anymore, and this had no relationship whatsoever to my arrest in January 2017. Upon leaving my position I was provided with a 6-month allowance which I would not have received if I had been fired as the Claimants suggest.”*⁶⁵⁴

351. *Second*, the Claimants description of former Minister Imena’s arrest in January 2017 is incorrect and misleading. In particular, the Claimants fail to state that he was found not guilty of all the charges against him, and it is assumed that this failure is deliberate not least because the trial and the verdict were widely reported.⁶⁵⁵ Former Minister Imena sets out the true position in his Supplemental Witness Statement:

⁶⁵⁰ Email from Z. Mruskovicova to J. Lindhorst, *Visit to Rutsiro plant Wednesday 21 October* (18 October 2015) (**Exhibit R-189**) (emphasis added).

⁶⁵¹ Supplemental Witness Statement of Ms. Zuzanna Mruskovicova dated 16 August 2019, at paras. 9-10.

⁶⁵² Claimants’ Reply, at para. 108.

⁶⁵³ Claimants’ Reply, at para. 255.

⁶⁵⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.1.

⁶⁵⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 55.; *The New Times, Former State Minister Evode Imena gets bail* (21 February 2017) (**Exhibit R-190**).

- 351.1. *“After leaving the Ministry I went to work for SUTI Ltd as a consultant and project manager. It was during this time that I was arrested on 28 January 2017 and accused of: 1) making a decision based on favouritism; 2) issuing a document to someone who did not deserve it; and 3) issuing a false document.”*⁶⁵⁶
- 351.2. *“I was released after 23 days on 20 February 2017.”*⁶⁵⁷
- 351.3. *“On 7 December 2017, following a full trial, the court issued its final judgment declaring me not guilty on all the three charges.”*⁶⁵⁸
- 351.4. *“I therefore have no criminal record.”*⁶⁵⁹
352. Alleging that former Minister Imena committed fraud in an attempt to discredit his evidence, without also stating that he was found not guilty of all charges, is a misrepresentation by omission, and is a further example as to why nothing stated by or on behalf of the Claimants can be taken at face value, and underlines why the Tribunal should be astute not to accept the Claimants’ evidence without full corroboration.
353. *Third*, the charges had nothing whatsoever to do with NRD despite the Claimants’ attempt to link the two. The Claimants fail to mention that the letter sent by NRD to Minister Biruta in November 2014 purportedly seeking *“help for stopping Minister Imena’s malicious and bad acts”*⁶⁶⁰ was dealt with by Minister Biruta, who considered the complaint but dismissed all of the allegations made.⁶⁶¹ Minister Biruta told Mr. Marshall not to *“personalize issues but rather comply with the mining law requirements”* and stated that Mr. Marshall had *“gone beyond your boundaries to raise serious baseless allegations against the Minister of State and this is unacceptable”*.⁶⁶² If there were any truth to Mr. Marshall’s allegations, no doubt former Minister Imena would have been investigated and arrested – but he was not. Mr. Marshall appears to have a personal issue with former Minister Imena simply because he made decisions on behalf of MINIRENA that Mr. Marshall did not like.
354. In addition, former Minister Imena explains in relation to this letter:
- 354.1. *“I wholeheartedly disagree with everything that is said in the letter. I did not target NRD in any way and nor did I have any interest in doing so. Mr. Marshall’s 5 November 2014 letter was sent only one week after I had written to NRD on 28 October 2014 advising it that a decision had been made not to grant it any mining*

⁶⁵⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.2.

⁶⁵⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.3.

⁶⁵⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.4 referring to the decision of the Nyarugenge High Court, RP 00510/2017/TGI/NYGE (7 December 2017) (**Exhibit R-191**).

⁶⁵⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.5 referring to National Public Prosecution Authority Rwanda, Evode Imena Clean Criminal Record (18 July 2019) (**Exhibit R-192**).

⁶⁶⁰ Reply, at para. 258 referring to Letter from R. Marshall to V. Biruta (5 November 2014) (**Exhibit C-171**).

⁶⁶¹ Letter from MINIRENA (V. Biruta) to NRD (R. Marshall) (20 November 2014) (**Exhibit C-098**); Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 53.4.

⁶⁶² *Ibid.*, (**Exhibit C-098**).

*licences following which, as I explained in paragraph 36 of my first statement, on 1 November 2014, Mr. Marshall sent various letters to me complaining about that decision.”*⁶⁶³

354.2. *“I was made aware of the letter and I had a discussion with Minister Biruta about it at the time. This to me was part of Mr. Marshall’s tactics in a search to find a scapegoat for his company’s failures, to turn an issue between the Government (represented by the Ministry) and a company into a private problem between myself and his company and essentially to portray NRD as the victim, and to try to make so much trouble and threats that the Government would relent and grant NRD licences which could not be justified on any proper basis.”*⁶⁶⁴

2. Anthony Ehlers

355. The Claimants make very serious allegations against Mr. Ehlers, almost all of which are false. As Mr. Ehlers explains, in making these false allegations, the Claimants *“rely on internal NRD documents prepared by Mr Marshall and Tom Grey that are full of allegations uncorroborated by any independent source”*.⁶⁶⁵ Mr. Ehlers’ responses to these allegations are set out in detail in his supplemental witness statement at paragraphs 24 to 33.⁶⁶⁶ As the allegations made against Mr. Ehlers are not remotely relevant to the issues in dispute in this Arbitration, his responses are not repeated here.

356. It is clear from Mr. Ehlers’ responses that the allegations made against him are not made out. Rather, Mr. Ehlers’ responses highlight what appears to be a frequent pattern of the Claimants and/or Mr. Marshall in fabricating serious allegations against others in an attempt to shift the blame for NRD’s failure to run successful mining operations.

357. Accordingly, the Claimants have failed to establish that Mr. Ehlers is *“biased against NRD”* or the Claimants, or that his evidence is otherwise unreliable.

3. Jean Aime Sindayigaya

358. The Claimants have made very serious allegations against Mr. Sindayigaya, all of which are false. These claims are not substantiated by any reliable source and instead rely largely on a letter from Mr. Marshall (on behalf of NRD) to the Kigali Chief Police Officer dated 20 September 2012.⁶⁶⁷ Far from being involved in wrongful conduct himself, as the Claimants allege, Mr. Sindayigaya’s only involvement with the police was as a whistleblower, alerting Mr. Marshall and the Police to financial irregularities he had detected in his role as Senior Accountant at NRD. As Mr. Sindayigaya has stated with respect to the

⁶⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 53.1.

⁶⁶⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras 55.3.

⁶⁶⁵ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 24.

⁶⁶⁶ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 24-33.

⁶⁶⁷ Letter from NRD (R. Marshall) to the Kigali Chief Police Supervisor, *Criminal Investigation* (20 September 2012) (**Exhibit C-182**).

sale of the Actros truck at undervalue: *"I reported the irregularity to Mr. Marshall and am now shocked to see him trying to blame me for this."*⁶⁶⁸

359. Mr. Sindayigaya's responses to the unfounded allegations are set out in his supplemental witness statement at paragraphs 13 to 25 and are not rehearsed at length here.⁶⁶⁹ However, the Respondent observes that the lack of substance to the allegations made by the Claimants is evident from the strange and implausible nature of many of the allegations set out in the key letter relied on by the Claimants. This letter, which is incoherent, contains numerous allegations that are entirely unrelated to Mr. Sindayigaya's role as senior accountant.⁶⁷⁰
360. As such, the Claimants have failed to establish that Mr. Sindayigaya is biased against NRD or the Claimants. Indeed, far from establishing credible allegations against him, the Claimants and/or Mr. Marshall have simply cast further light on their own character and lack of veracity.

4. Jean Bosco Nsengiyuma

361. The Claimants allege that Mr. Nsengiyuma was hired by Mr. Benzinge to auction off NRD's property, and that he acted in concert with Mr. Benzinge pursuant to fraudulent court orders.⁶⁷¹ As set out by Mr. Nsengiyuma:

*"Both of these allegations are untrue. I explained paragraphs 17-18 of my first witness statement, I was hired by a group of 26 people, including Mr Benzinge, in early 2014 to assist then in enforcing judgments against NRD. The total amount owed to the group by NRD was RwF 85,761,624, of which RwF 16,300,000 was owed to Mr Benzinge. At paragraphs 20-34 of my first witness statement I explain the steps that I took to enforce the judgments. A stamped copy of the judgment in favour of Mr Benzinge is at **R-063**. All of those judgments had been delivered by the court and execution orders had been made. As a court bailiff it is impossible for me to act on a fraudulent judgment."*⁶⁷²

362. Additionally, the Claimants allege that Mr. Nsengiyuma had been previously found to have attempted to fraudulently sell NRD's minerals. That is also incorrect.⁶⁷³ While the Claimants attempt to rely on **C-71**, that decision *"was related to a claim by third parties who claimed that the minerals I intended to auction did not belong to NRD"*.⁶⁷⁴ It is clear from the decision that Mr. Nsengiyuma started proceedings seeking the court's

⁶⁶⁸ Supplemental Witness Statement of Jean Aime Sindayigaya dated 27 May 2020, at para. 23.12.

⁶⁶⁹ Supplemental Witness Statement of Jean Aime Sindayigaya dated 27 May 2020, at paras. 13-25.

⁶⁷⁰ Letter from NRD (R. Marshall) to the Kigali Chief Police Supervisor, *Criminal Investigation* (20 September 2012) (**Exhibit C-182**).

⁶⁷¹ Claimants' Reply, at paras. 88, 277.

⁶⁷² Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 6.

⁶⁷³ Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 7.

⁶⁷⁴ Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 7.

permission to sell minerals belonging to NRD. This decision shows that sale of NRD's minerals was lawful.⁶⁷⁵

363. The Claimants also allege that he attempted to solicit a bribe from NRD's CFO, Zuzanna Mruskovicova, relying on text messages allegedly between Ms. Mruskovicova and Mr. Nsengiyuma. Mr. Nsengiyuma is clear:

*"That is untrue. The messages in C-149 were sent by me to the Managing Director of SPEDAG INTERFREIGHT ("SPEDAG"), a company operating freight and forwarding services. They were not sent to Ms Mruskovicova. SPEDAG had been mandated by NRD to take a magnetic separator to the Democratic Republic of Congo. It appeared to me that this transfer was, in part, in order to avoid execution of the judgment of the Court order in favour of Mr Benzinge and the other NRD employees discussed above over the asset. Accordingly, I seized the machine, in execution of the judgment, and requested the customs police to prevent its departure from Rwanda until either 50% of the price of the machine was paid to service the debt under the judgment, or the judgment had been fully executed from other sources. I was not attempting to solicit a bribe from Ms Mruskovicova, but rather seeking enforcement of the judgment against NRD, in accordance with my role as bailiff."*⁶⁷⁶

364. Finally, the Claimants attempt to show a connection between Mr. Nsengiyuma and the police, relying on a text message allegedly from Mr. Emmanuel Rukangira. Mr. Nsengiyuma states that he does not know what issue that message is referring to, and that he never worked with Mr. Rukangira on the NRD file.⁶⁷⁷

5. Richard Mugisha

365. As set out at paragraph 319.6 above, the Claimants and Mr. Marshall made allegations against the Respondent's expert witness, Mr. Mugisha, which are false and the Claimants' application to remove Mr. Mugisha was unsuccessful.⁶⁷⁸ Accordingly, the Claimants have failed to establish that Mr. Mugisha is biased against NRD or the Claimants, or that his evidence is otherwise not reliable or authoritative: as explained by the Tribunal *"the Claimants have failed to make out a case of conflict of interest or other ground for taking the extreme step of disqualifying Mr. Mugisha"*.⁶⁷⁹

⁶⁷⁵ Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 7.

⁶⁷⁶ Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 8.

⁶⁷⁷ Supplemental Witness Statement of Jean Bosco Nsengiyuma dated 29 May 2020, at para. 9.

⁶⁷⁸ Procedural Order No. 5 on the Claimants' request to exclude expert evidence (14 May 2020).

⁶⁷⁹ Procedural Order No. 5 on the Claimants' request to exclude expert evidence (14 May 2020), at para. 12.

IV. THE CLAIMANTS' SUGGESTIONS THAT THE TRIBUNAL SHOULD DRAW ADVERSE INFERENCES AGAINST THE RESPONDENT ARE UNFOUNDED

366. On six occasions in the Reply, the Claimants seek to persuade the Tribunal to draw adverse inferences from the Respondent's purported failure to produce certain categories of documents during the document production phase of this Arbitration. In each case, the Claimants' requests are wildly inappropriate and are not made out.
367. At the outset, the Respondent highlights that the document production process as applicable to a sovereign state is a significant task involving searches of electronic records of a number of Government departments and its relevant employees spanning many years, as well as large volumes of hard copy files located in these various departments. This process was undertaken properly by the Respondent and included the Respondent's counsel personally reviewing hard copy files located in Government departments. To the extent documents were not located, it is because documents either do not exist or were not able to be located despite diligent searches.
368. The IBA Rules on the taking of evidence (the "IBA Rules") permit Arbitral Tribunals to draw adverse inferences, in particular to "*infer that such a document would be adverse to the interests of [the party who fails to produce it]*", in cases where the party has not provided a "*satisfactory explanation*" for a failure to produce the document sought.⁶⁸⁰ In particular, it may be appropriate for a tribunal to draw an inference in the following circumstances:
- 368.1. if it has been sufficiently shown that the Respondent held the documents which it refused to submit;⁶⁸¹
 - 368.2. if the content of the document has been established with relative certainty;⁶⁸²
 - 368.3. if the inference to be drawn is reasonable, consistent with the facts on the record and of a logical relation between the inference and the likely nature of the missing evidence;⁶⁸³ and
 - 368.4. if it is consistent with the evidential context because "*a party cannot possibly win its case on the basis of adverse inference alone*".⁶⁸⁴

⁶⁸⁰ The IBA Rules of the Taking of Evidence (**Exhibit CL-086**), at Article 9(5). As set out in para. 15.1 of Procedural Order No. 1 dated 12 December 2018, the production of documents in this Arbitration is to be guided by the IBA Rules.

⁶⁸¹ Vera Van Houtte - Van Poppel, *Chapter 5. Adverse Inferences in International Arbitration*, in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Volume 6 (**Exhibit RL-137**), at page 203, referring to the decision in *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 178.

⁶⁸² *Ibid.*, (**Exhibit RL-137**), at page 204.

⁶⁸³ *Ibid.*, (**Exhibit RL-137**), at page 207.

⁶⁸⁴ *Ibid.*, (**Exhibit RL-137**), at page 206.

369. For the reasons set out in more detail below, the inferences that the Claimants have invited the tribunal to draw are not appropriate because: (i) the Claimants have not shown that the documents sought even exist; (ii) there is no certainty as to the content of the documents; and (iii) the inferences the Claimants seek to have the Tribunal draw are unreasonable, uncertain, illogical and are not consistent with the facts on the record.

A. Paragraph 11

370. At paragraph 11 of the Reply, the Claimants state:

“Claimants specifically requested documents corresponding with the Ministerial Orders setting out criteria for evaluation of exploration efforts at Request 66 of their Requests of Documents. Rwanda produced no responsive documents. The Tribunal may therefore take an adverse inference against Rwanda that any Ministerial Orders or other documents setting out criteria for evaluation of exploration efforts have been withheld because they would be detrimental to Rwanda’s case. The only alternative explanation is that Rwanda never issued such Orders or other guidance for the objective and uniform review of Concession Holder submissions were ever created, raising material questions about Rwanda’s good faith intention to treat Concession Holders evenhandedly.”⁶⁸⁵

371. Contrary to the Claimant’s statement: (i) Request 66 was not a specific request for “documents corresponding with the Ministerial Orders setting out criteria for evaluation of exploration efforts”, it was a broader request for “Any guidelines applicable to Respondent’s evaluation of any application for long term licenses in concessions awarded by the Respondent”,⁶⁸⁶ and (ii) the Respondent produced at least three responsive documents.

372. The fact that responsive documents were produced is acknowledged by the Claimants’ who at footnote 21 of the Reply, note:

“Rwanda cannot rely on the public tender letter, which contained limited criteria on how Rwanda would review an application for a short term license, sent in 2016 to potential investors as if it bears any relevance to its review of Claimants’ Application. The Tender was sent March 5, 2016 and therefore cannot be guidance as to how Rwanda analyzed any application submitted prior to that date. Furthermore, the tender provides information regarding its review of a short term license, not a long term license, and is therefore inapplicable. See Republic of Rwanda Ministry of Natural Resources Call for Technical and Financial Proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions dated 5 March 2016, C-140.”

⁶⁸⁵ Claimants’ Reply, at para. 11 (citations omitted).

⁶⁸⁶ Claimants’ requests for documents, Respondent’s Objections, and Claimants’ replies (6 December 2019) (**Exhibit R-174**), at Request 66, pages 94-95.

373. As explained at paragraphs 36 to 38 above, the lack of ministerial orders adverted to under the 2010 National Mining Policy cannot be read as a lack of good faith intention on the part of the Government. At the time, law and policy were in flux. In 2010, as the four-year licences issued by Rwanda in 2006 were coming up for renewal, and it began receiving feasibility studies and other reports on development to date, Rwanda recognised that the majority of investors who had been granted four-year licences had not made sufficient progress towards exploration, exploitation or industrialisation.
374. Although there were no explicit ministerial orders setting out the requirements for obtaining new licences, the existing contracts were clear that any long-term licence must be applied for and as set out by Mr. Gatare, *“the potential licensee must be able to prove to the government that they have met both the conditions of the original licence, and that they are appropriately positioned to be granted a long-term licence”*.⁶⁸⁷ Plainly, if companies’ performance was not at the required level, the risk, as articulated by Mr. Gatare was that, *“it would undermine the Government’s attempts to professionalise and industrialise Rwanda’s mining sector”*.⁶⁸⁸ Rwanda was clear that it would only grant long-term licences to investors *“with the financial resources, experience, technical and management capabilities to develop and manage large-scale, long-term, professional mining operations”*.⁶⁸⁹
375. What is more is that the Claimants’ attempt, at footnote 21 of the Reply, to discredit the criteria set out in **Exhibit C-140** is completely undermined by their fundamental misunderstanding of the process. The Claimants state that *“the tender provides information regarding its review of a short term license, not a long term license, and is therefore inapplicable”* – however as already explained at paragraph 120 above, NRD’s November 2010 Application was only for a short, five-year licence, and not a long-term licence as they suggest.

B. Paragraph 83

376. At paragraph 83 of the Reply, the Claimants state:

“During discovery, Claimants specifically requested meeting minutes from this September 12 meeting and the Tribunal granted this request. However, Rwanda has failed to produce these meeting minutes. The Tribunal should therefore take an adverse inference against Rwanda that these minutes would reflect that the Military had no basis for arresting NRD staff and that the Ministry of Natural Resources was conspiring against NRD, and with local officials, to bar NRD from mining its Concessions so that illegal mining and smuggling could take place.”

377. For the reasons set out below, not only have the Claimants failed to show that the minutes exist and are in the Respondent’s possession, the adverse inference the

⁶⁸⁷ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

⁶⁸⁸ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

⁶⁸⁹ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at para. 10.

Claimants ask the Tribunal to draw is not reasonable and bears no correlation to the likely nature of the minutes (even if it could be shown they existed, which it has not).

378. *First*, the Claimants have not produced sufficient evidence to show that a meeting in fact took place on 12 September 2012 as they suggest. The Claimants rely only on a letter written by Mr. Marshall on NRD's behalf to Mr. Kamanzi on 14 September 2012,⁶⁹⁰ wherein Mr. Marshall says, "*we have been informed by the NRD staff ... that a meeting was held two days ago...*".⁶⁹¹ There is no direct evidence that this meeting took place.
379. *Second*, the Claimants have not shown that there were minutes taken at this meeting (if indeed it even took place). As Mr. Marshall himself explains, the meeting purportedly happened "*near the boundary between Rutsiro and Ngorerero*"⁶⁹² and not in a building or office. As such, the likelihood of any minutes being taken is remote.
380. *Third*, the Claimants have not provided any evidence that minutes of the meeting (even if they existed) would be in the possession of the Respondent. The Claimants have provided no evidence that anyone connected with MINIRENA or any other Government officials attended or that they would have the minutes (if they exist) in their possession.
381. *Fourth*, the Claimants have not provided sufficient evidence to establish what the minutes (even if they existed) would show. In the letter of 14 September 2012, Mr. Marshall admits that he and/or NRD "*have no information about what was decided or why*", yet he goes on to speculate as to what happened: "*it was reportedly decided by these State authorities to 'close' the NRD concessions*".⁶⁹³ Further, in support of the request for this document, the Claimants stated: "*Claimants believe that the parties at this meeting discussed the long term licenses and decided, without cause, to shutdown Claimants' Concessions.*"⁶⁹⁴
382. As such, the Claimants have plainly failed to substantiate what happened at the meeting and instead are simply speculating what happened based on unspecified information allegedly received from third parties. Further, the Claimants rely on this speculation that it was decided at the meeting to shut down some of the Five Concession Areas, to infer that MINIRENA was conspiring against NRD. This is far-fetched beyond belief, and in any event, has no link to the evidence relied on by the Claimants. Even if the Claimants' speculation that the meeting took place was to be accepted (as to which there are no proper grounds for such acceptance), it is by no means clear that the minutes would show anything other than that some of the Five Concession Areas were shut down – not that they were shut down for unjustifiable reasons. For the reasons set out above, the adverse inference sought are inappropriate and unsubstantiated and should not be drawn.

⁶⁹⁰ Letter from R. Marshall to S. Kamanzi (14 September 2012) (**Exhibit C-049**).

⁶⁹¹ *Ibid.*, (**Exhibit C-049**), at page 1.

⁶⁹² *Ibid.*, (**Exhibit C-049**), at page 1.

⁶⁹³ *Ibid.*, (**Exhibit C-049**), at page 1 (emphasis added).

⁶⁹⁴ See the Claimants' Requests for Documents, Respondent's Objections and Claimants' replies (6 December 2019) (**Exhibit R-174**), Request No. 16(4), page 26 (emphasis added).

C. Paragraph 84

383. At paragraph 84 of the Reply, the Claimants' state:

"Similarly, Rwanda failed to produce documents or communications concerning the shutdown of Claimants mines in the Manihira and Rusebeya sectors in 2012. The Tribunal ordered Rwanda to produce these documents. The Tribunal should therefore take an adverse inference against Rwanda that Rwanda ordered these shutdowns without any basis and the only purpose was to bar NRD from mining its Concessions so that illegal mining and smuggling could take place."

384. Contrary to the Claimants' statement, the Respondent did produce documents concerning the shutdowns in 2012 in response to document request 18. It is surprising that the Claimants apparently did not appreciate this given that they have exhibited one of the produced documents to the Reply.⁶⁹⁵ This document, a letter sent by Minister Kamanzi to the Governor of the Western Province on 17 September 2012, explains that shutdowns were ordered because of *"grave irregularities observed regarding non-compliance with relevant environment regulations"*.⁶⁹⁶ Further the Respondent produced a letter sent three months later to Minister Kamanzi by Ms. Mruskovicova on behalf of NRD which acknowledges that the shutdowns were due to environmental violations.⁶⁹⁷

385. As such, not only is it incorrect for the Claimants to state that the Respondent produced no documents falling in this category, it is also entirely inappropriate for them to suggest that an inference be drawn because the shutdowns had no basis, or that the basis *"was to bar NRD from mining its Concessions so that illegal mining and smuggling could take place"* – this is vehemently denied and the Claimants have produced no evidence that this is the case. The basis for the shutdowns is clear from the letters produced by the Respondent and referred to above and as such it is not appropriate for any inference to be drawn.

D. Paragraph 101

386. At paragraph 101 of the Reply, the Claimants' state:

"Claimants specifically requested that Rwanda produce all communications between Minister Evode and Minister Biruta in 2014 and 2015 concerning Claimants' Concessions and the "reapplication." The Tribunal ordered Rwanda to produce responsive documents. Rwanda has not produced any. It is not believe that there would be no such communications based upon the communications, however limited, received from Minister Imena and Minister Birtua [sic], separately. The Tribunal should take an adverse inference against Rwanda for its failure to produce responsive document and find that the withheld documents would show that the 2014 "re-application" was a sham and unilaterally imposed on Claimants by Rwanda in an effort to force them out of the country."

⁶⁹⁵ Letter from S. Kamanzi to Governor of Western Province (17 September 2012) (**Exhibit C-161**).

⁶⁹⁶ *Ibid.*, (**Exhibit C-161**).

⁶⁹⁷ Letter from NRD (Z. Mruskovicova) to MINIRENA (Minister S. Kamanzi) (17 December 2012) (**Exhibit R-193**).

387. Contrary to the Claimants' suggestion, and as explained by former Minister Imena at paragraph 49 of his supplemental statement, he and Minister Biruta did not communicate in writing. As explained by former Minister Imena, "*there is nothing sinister about this*" because "[t]he truth is that there were no such written communications between us".⁶⁹⁸ It was not necessary because he and Minister Biruta were part of the same Ministry, based in the same building, and so discussions were had orally.⁶⁹⁹
388. Notably, the Claimants have produced no evidence to suggest that any written correspondence exists or that the Respondent is withholding it. On this basis alone the Tribunal cannot draw the inference suggested by the Claimants.
389. Further, even if the Claimants had provided evidence to show that such documents exist and are in the Respondent's possession (which it has not), the Claimants have failed to establish how the inference they seek to draw is logical. It is unclear how correspondence between former Minister Imena and Minister Biruta "*would show that the 2014 "re-application" was a sham and unilaterally imposed on Claimants by Rwanda in an effort to force them out of the country*". That inference is quite obviously not reasonable, it is not consistent with the facts on the record and does not logically follow from the nature of the missing evidence. The Claimants have submitted no evidence to show that any correspondence between former Minister Imena and Minister Biruta would demonstrate this. To the contrary, all of the documentary evidence, as set out at paragraphs 223 to 270 above, suggests that the "re-application" process was entirely legitimate.

E. Paragraph 102

390. At paragraph 102 of the Reply, the Claimants' state:

"Rwanda's failure to produce any internal documents or communications concerning the May 19, 2015 letter from Minister Evode, after the Tribunal required Rwanda to produce such documents, evidences the fact that the entire "re-application" process and Minister Imena's made the decision to deny the long term licenses to Claimants unilaterally, and without input from other government officials. The Tribunal should take such an adverse inference against Rwanda."

391. Logic defies the conclusion the Claimants seek to draw in relation to this inference. Not only have the Claimants failed to establish that the documents they sought even exist (or exist with any reasonable certainty), the inference the Claimants seek to draw is not logical. This is because the 19 May 2015 letter sent by former Minister Imena was sent at the end of the "re-application" process and after NRD's applications had been properly evaluated by other Government officials.⁷⁰⁰ As explained in the Counter-Memorial at paragraphs 154 to 175, NRD's applications were properly evaluated by other Government officials between August 2014 and May 2015, in particular:

⁶⁹⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 49.

⁶⁹⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 49.

⁷⁰⁰ Letter from MINIRENA (Minister E. Imena) to NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (**Exhibit C-038**).

- 391.1. in September 2014, a Licence Evaluation Team from MINIRENA assessed NRD's application and concluded that NRD should not be re-issued the Five Concession Areas;⁷⁰¹
- 391.2. in January 2015, a technical team assessed NRD's application;⁷⁰² and
- 391.3. in February 2015, Dr. Biryabarema assessed NRD's application and concluded that MINIRENA had no basis to grant NRD a licence to mine at the Five Concession Areas.⁷⁰³
392. As explained at paragraph 307.3 above, Dr. Biryabarema also prepared an explanatory note in March 2015 which confirmed former Minister Imena's decision.
393. As such, the Claimants' allegation that "*Minister Imena [sic] made the decision to deny the long term licenses to Claimants unilaterally, and without input from other government officials*" is entirely unsubstantiated. The decision was plainly made with input from other Government officials and after a proper assessment of the application.

⁷⁰¹ Memorandum from License Evaluation Team to Minister of State in Charge of Mining, *Evaluation of NRD Re-application for the 5 Concessions (NEMBA, RUTSIRO, GICIYE, MARA and SEBEYA)* (29 September 2014) (**Exhibit R-020**).

⁷⁰² Technical Team Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd (20 January 2015) (**Exhibit R-023**).

⁷⁰³ Dr. M. Biryabarema, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd* (February 2015) (**Exhibit R-024**) (emphasis added).

V. THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE

394. As set out in detail in the Respondent's MPO, the Tribunal and/or ICSID does not and/or should not exercise jurisdiction over the Claimants' claims.⁷⁰⁴ The Claimants have attempted to substantially change their claims at the reply stage in order to circumvent these jurisdictional challenges. However, these attempts are futile: the Tribunal and/or ICSID still lack jurisdiction over their modified claims, for the reasons set out below.
395. *First*, the Tribunal and/or ICSID lack jurisdiction *ratione temporis* as all of the Claimants' claims are out of time pursuant to Article 26 of the USA-Rwanda BIT. The Claimants had actual, or in the alternative constructive, knowledge of all the breaches alleged and any associated loss prior to the Cut-off Date of 12 June 2015 and the alternative date of 14 May 2015. Further, certain of the breaches alleged took place prior to the USA-Rwanda BIT entering into force on 1 January 2012 and therefore the Tribunal and/or ICSID lack jurisdiction with respect to them for this additional reason (see further Section V.A below).
396. *Second*, the Tribunal and/or ICSID lack jurisdiction *ratione personae*, as the Claimants have failed to show that either party meets the definition of "claimant" under the USA-Rwanda BIT, which requires a claimant to be an "investor of a party" and to own or control a "covered investment". They have failed to show that BVG is an owner of, or controls, NRD. Further, they have failed to plead loss suffered by either Claimant, which is a prerequisite of jurisdiction (see further Section V.B below).
397. *Third*, although it appears now that the Claimants admit that the only investment that may be protected by the USA-Rwanda BIT and the ICSID Convention is NRD, this Tribunal still lacks jurisdiction *ratione materiae*. NRD does not in fact constitute an investment under the USA-Rwanda BIT and the ICSID Convention, and in any event the bad treatment alleged by the Claimants did not occur vis-à-vis NRD (see further Section V.C below).
398. *Fourth*, despite the Claimants' arguments to the contrary, Rwanda has not consented to arbitrate Spalena's claims as it failed to comply with the requirements of Article 23 and 24(2) of the USA-Rwanda BIT in that it neither notified Rwanda of any disputes it had, nor sought to settle any such disputes. Accordingly, the Tribunal and/or ICSID lack jurisdiction *ratione voluntatis* over Spalena's claims (see further Section V.D below).

⁷⁰⁴ Submissions in this Rejoinder that the Tribunal and/or ICSID lacks "jurisdiction", and to jurisdictional objections and the like, are to be taken, unless the contrary appears, to include and to encompass (if and to the extent necessary) the submission and objection that the claims or a claim are not admissible and/or that the Tribunal and/or ICSID should not exercise any jurisdiction that it may or might be held (contrary to the Respondent's case) to have. If, in relation to any plea, the distinction between lack of jurisdiction and inadmissibility becomes of real relevance it will be further developed by the Respondent in future argument. Further, references in the submissions in this Rejoinder to the Tribunal and/or ICSID lacking jurisdiction are also to be taken to include submissions of lack of "competence". If there is said to be a material distinction between the concepts, and that becomes a relevant matter, it will be further developed by the Respondent in future argument.

A. Lack of jurisdiction *ratione temporis*

1. The Tribunal lacks jurisdiction under Article 2 of the USA-Rwanda BIT in relation to the breaches alleged on the basis of Rwanda's failure to grant long-term licences

399. As already explained in Section III.A of the Respondent's MPO, this Tribunal and/or ICSID lack jurisdiction under Article 2 of the USA-Rwanda BIT with regards to all claims arising as a result of Rwanda's alleged failure to grant the Claimants long-term licences, which are characterised by the Claimants in the Reply as an FET breach under Article 5 and an expropriation claim under Article 6.

400. At paragraphs 20 to 28, 69, and 84 of the MPO, the Respondent explains why these claims relate to acts that took place prior to the USA-Rwanda BIT entering into force on 1 January 2012.

401. The Claimants have offered no response to this aside from stating at paragraph 10 of their CMPO that:

*"Respondent's contention ignores the fact that these licenses were extended on multiple occasions, through at least April 2013. 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."*⁷⁰⁵

402. However, it was not the extension of the Claimants' Licences (which were *short-term licences*) that forms the basis of their FET and expropriation claims: these extensions did not confer the right that was the subject of the Claimants' alleged legitimate expectations, and therefore allegedly breached in violation of Articles 5 and 6 or the USA-Rwanda BIT. Rather, these claims are premised on the Respondent's purported failure to grant *long-term licences* to which they claim to have been entitled pursuant to the Contract and the November 2010 Application, which would have conferred the right to operate and exploit the Five Concession Areas for 30 years.

403. Article 2(3) of the USA-Rwanda BIT states that "*this Treaty does not bind either Party in relation to any act or fact that took place... before the date of entry into force of this Treaty*".⁷⁰⁶ On the Claimants' own case, the Respondent violated the USA-Rwanda BIT when it failed to grant NRD long-term licences, allegedly pursuant to the Contract, prior to the expiry of the initial term of the Licences in January 2011. This was before the USA-Rwanda BIT came into force on 1 January 2012. The dates of the extensions to the Licences, which allowed NRD to continue to operate in the Five Concession Areas until October 2012, are therefore irrelevant to the question of when the alleged breaches

⁷⁰⁵ Claimants Memorial on Preliminary Objections, at para. 10 (footnotes omitted).

⁷⁰⁶ USA-Rwanda BIT (**Exhibit CL-006**), at Article 2(3).

based on the alleged failure of the Respondent to grant long-term licences, in breach of the Contract, took place.

404. The Respondent's arguments on this point therefore stand for the reasons explained in its MPO.

2. The Tribunal lacks jurisdiction under Article 26 of the USA-Rwanda BIT

i. The Cut-Off Date

405. In their CMPO, the Claimants allege that the Tribunal's Procedural Order No. 2 dated 28 June 2019 ("**PO2**") determined that the Cut-off Date for violation of the BIT is 14 May 2015.⁷⁰⁷ This is not correct. In PO2, the Tribunal held that "*the Claimants' Observations have not adequately challenged Rwanda's contention that they are time barred from bringing a claim in relation to breaches of which they had, or should have had, knowledge prior to May 14, 2015, which is the first "Cut-off Date".*"⁷⁰⁸

406. PO2 contained no finding as to whether the first Cut-off Date is the relevant Cut-off Date for the purposes of this objection. Nor did the Tribunal's Procedural Order No. 3 dated 28 August 2019 ("**PO3**"): PO3 simply found that the Claimants had pleaded a sufficient case that they may have a claim founded on matters arising after 14 May 2015, to be investigated during the merits phase. The Tribunal has not made a determination as to whether 14 May 2015 or 12 June 2015 is the correct Cut-off Date for the purposes of this analysis. The Claimants' statements to this effect are not an accurate reading of the relevant procedural orders.

407. It is not accepted that 14 May 2015 is the relevant Cut-off Date under Article 26 of the USA-Rwanda BIT. As set out in the Respondent's MPO, Article 26 provides that:

*"No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage."*⁷⁰⁹

408. Accordingly, the clause prescribes in plain terms that the time bar applies to a claim "*submitted to arbitration under this section.*"

409. The original Notice of Arbitration, which was rejected by ICSID, was filed on 14 May 2018. The claim filed in the original Notice of Arbitration is therefore not the claim that is the subject of this Arbitration and is accordingly not relevant under Article 26 of the USA-Rwanda BIT.

⁷⁰⁷ Claimant's Counter-Memorial on Preliminary Objections, at para. 12.

⁷⁰⁸ Procedural Order No. 2 on Bifurcation dated 28 June 2019, at para. 39 (emphasis added).

⁷⁰⁹ Respondent's Memorial on Preliminary Objections, at paras. 18.2 and 29. (emphasis added).

410. The claim that forms the basis of this Arbitration was “*submitted to arbitration*” on 12 June 2018, when the Claimants filed their Amended Notice of Arbitration. On a plain reading of Article 26, the Cut-Off Date is therefore 12 June 2015, being three years before 12 June 2018 (the “**Cut-off Date**”).
411. This interpretation is consistent with the ICSID Convention Arbitration rules. Rule 6(2) provides that “[a] proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request”. The Amended Request was registered on 22 June 2018, and this Arbitration instituted, on that date. It is therefore this request which saw this Arbitration being formally instituted, and it is therefore this request that forms the basis of this Arbitration, not the earlier rejected request.
412. This interpretation that the date of submission of the Amended Request for Arbitration, which forms the basis of this arbitration, is the relevant date for the purposes of Article 26 of the USA-Rwanda BIT is also consistent with the policy behind time bars. As explained in the Respondent’s MPO, the purpose behind time bars of this nature is to require diligent prosecution of known claims and to ensure claims will be resolved when evidence is reasonably available and fresh.⁷¹⁰ The diligent prosecution of claims requires that such claims be filed in a timely fashion and in registrable form. It would be entirely contrary to this policy to allow the Claimants to circumvent an express time bar provision by filing a claim which does not comply with the ICSID Convention and cannot be registered. If the date of the rejected Request for Arbitration of 14 May 2015 is adopted as the relevant Cut-off Date for the purposes of Article 26, the Claimants would be doing exactly that.
413. In any event, for the reasons submitted below, even if the earlier Cut-off Date of 14 May 2015 (the “**First Cut-off Date**”) is adopted, the Claimants’ claims are still out of time.

ii. The relevant legal test

414. In their Memorial, the Claimants made the following claims:
- 414.1. that the Respondent had failed to grant long-term licences on expiry of the Contract, contrary to the Claimants’ legitimate expectations, in breach of Article 5(1) of the BIT (FET) (Memorial Section VI.A.1);
- 414.2. that the Respondent had failed to implement the 2014 Law uniformly, in breach of Article 5(1) of the BIT (FET and MST) (Memorial Section VI.A.2);
- 414.3. that the Respondent used the ITRI/ITSCi system to “punish” the Claimants, in breach of Article 5 of the BIT (FET) (Memorial Section VI.A.3);

⁷¹⁰ Respondent’s Memorial on Preliminary Objections, at para. 30. referring to *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction (22 August 2008) (**Exhibit RL-070**), at para. 3.5.4, page 31.

- 414.4. that the Respondent permitted Rwandan nationals to use the police and court systems to harm the Claimants' alleged investment, in breach of Article 5 of the BIT (FET) (Memorial Section VI.A.4);
- 414.5. that the Respondent failed to treat the Claimants' investments transparently, in breach of Article 5 of the BIT (Memorial Section VI.A.5);
- 414.6. that the Respondent failed to provide full protection and security to the Claimants' alleged investment, in breach of Article 5 of the BIT (FPS) (Memorial Section VI.A.6);
- 414.7. that the Respondent expropriated the Claimant's alleged investment, in breach of Article 6 of the BIT (Memorial Section VI.A.7); and
- 414.8. that the Respondent treated the Claimant's alleged investments inconsistently under the 2014 Law, as compared to other foreign nationals, and favoured Mr. Benzinge, a Rwandan national, in breach of Articles 3 and 4 of the BIT (NT and MFN) (Memorial Section VI.A.8).
415. At paragraphs 29 to 90 of its MPO, the Respondent has shown how each of these claims is out of time (and significantly so). Each alleged wrongful act or omission and any associated loss took place, and is alleged to have taken place, and was known by the Claimants to have taken place, prior to both the Cut-Off Date of 12 June 2015, and the First Cut-off Date of 14 May 2015.
416. The Claimants have failed to sufficiently address the Respondent's analysis as to why the Claimants' FET claims, FPS claim, MFN claim, and NT claim, and the alleged failure to treat the Claimants' investments transparently, are out of time. As set out by the Respondent in its MPO, the plain terms of Article 26 of the USA-Rwanda BIT establishes a limitation period that is triggered as soon as the Claimants first acquired, or should have first acquired, knowledge of each relevant breach.⁷¹¹ The tribunal in *Rusoro Mining v. Venezuela*, in considering an alleged creeping expropriation case based on unconnected governmental measures, confirmed that, consistent with the approaches adopted by other investment tribunals, when considering the relationship between composite acts and time bars, the tribunal must break down each claim into individual breaches and apply the limitation period separately. It held that:

"...the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately. This approach is the one adopted by other investment tribunals and respects the wording of Art. XII.3 (d), which defines the starting date for the time bar period as the date when the investor acquired knowledge that a breach had occurred and a loss had been suffered."

⁷¹¹ Respondent's Memorial on Preliminary Objections, at para. 33.

The result is that breaches allegedly committed by Venezuela through the adoption of the 2009 Measures have become time barred, cannot result in enforceable claims and cannot be taken into consideration to decide whether a creeping expropriation has occurred (while claims relating to later breaches are not affected).⁷¹²

417. The Claimants have failed to engage with this jurisprudence, or to establish why the Tribunal should not follow the approach of the tribunal in *Rusoro Mining v. Venezuela* in circumstances where Article 26 of the US-Rwanda BIT is materially identical to the limitation clause at issue in that case.⁷¹³ Unsurprisingly, they have no answer to this insuperable objection to most of their claimed breaches.
418. The Claimants' pleadings – comprising the Memorial, CMPO, and Reply – together present an inconsistent and confused case. The CMPO and the Reply attempt to re-characterise the breaches pleaded in the Memorial as “creeping breaches” of Articles 5 and 6 of the USA-Rwanda BIT in an attempt to overcome their obvious jurisdictional problems under Article 26 of the USA-Rwanda BIT, and it remains unclear the extent to which the Claimants still stand by their claims as originally pleaded in their Memorial.
419. In any event, there can be no doubt that, contrary to what the Claimants now allege, the Claimants' FET claims, FPS claim, MFN claim, and NT claim, are distinct from the alleged expropriation claim. Therefore, the Tribunal must consider its jurisdiction over each individual claim. This is clear when one considers what would happen if the Tribunal was to reject the expropriation claim. This would not automatically result in a rejection of the Claimants' FET claims, FPS claim, MFN claim, and NT claim. Rather, because these claims are pleaded as distinct breaches in the Memorial,⁷¹⁴ unless all claims aside from the expropriation claim are formally abandoned, the Tribunal would still need to individually consider each separate claim, based on the evidence provided, regardless of its decision on the expropriation claim. The same must also be true, therefore, in relation to its *ratione temporis* jurisdiction: the Tribunal must consider whether it has jurisdiction in relation to each separate claim.

⁷¹² *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at paras. 231-232 (footnotes omitted). The Tribunal referred at footnote 158 to the decision in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 266 where “the Tribunal finds it possible and appropriate, as did the tribunals in *Feldman, Mondev and Grand River*, to separate a series of events into distinct components, some timebarred, some still eligible for consideration on the merits”.

⁷¹³ See *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 191. The relevant time bar provision is contained in Article XII.3 of the Canada-Venezuela BIT which provides that “An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) [ICSID Convention Arbitration or ICSID Additional Facility Rules Arbitration] only if... (d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage”.

⁷¹⁴ See the Claimants' Memorial, at pages 53-90.

420. Further, although the Claimants now assert that “[a]ll of the conduct that ultimately led to the expropriation of the Claimants’ investment is connected”,⁷¹⁵ they have not demonstrated any clear connection between all the various actions and omissions which are complained of. In any event, what matters under Article 26 is the Claimants’ *knowledge* of each breach, actual or constructive, and the Claimants have failed to demonstrate how it is the case that they did not know of specific breaches until subsequent unconnected breaches that allegedly took place.
421. Indeed, in any ICSID arbitration, there is always likely to be some factual nexus between different events which are alleged to form the basis of breaches of a BIT. This does not mean that the latest event in time which the Claimants allege constituted a breach was the date on which they acquired knowledge of all other breaches. If this approach was accepted, any claimant could avoid a time bar by simply claiming that a large number of distinct breaches of a BIT were part and parcel of the final alleged breach, all of which fell under a general “bad treatment” claim – which is effectively what the Claimants are now seeking to do. That approach would be entirely unprecedented, inconsistent with the large body of jurisprudence on time bars and the policy behind such provisions, and contrary to the plain wording of Article 26 of the USA-Rwanda BIT.
422. It does not appear to be seriously disputed, or at least the Claimants have not attempted to show otherwise, that if the Claimants’ claims are carefully and individually analysed (as is the correct approach, and the one adopted by other Tribunals dealing with similar time-bar objections),⁷¹⁶ then they are time-barred.
423. The only claim that is dealt with in any detail in the Claimants’ CMPO is the Claimants’ expropriation claim, which is re-characterised in this pleading and in the Reply as a “creeping” expropriation (this not having been alleged in the Memorial). The Claimants’ other claims are either not mentioned at all or are wrongly conflated with the expropriation claim. The Claimants now allege that:

*“All of the conduct that ultimately led to the expropriation of the Claimants’ investment is connected and needs to be viewed in its full context – as opposed to single actions in isolation – in order to address the Claimants’ claims, are part and parcel with the expropriation insofar as they provide context for why Respondent ultimately decided to expropriate Claimants’ investment.”*⁷¹⁷ [sic]

⁷¹⁵ Claimant’s Counter-Memorial on Preliminary Objections, at para. 13.

⁷¹⁶ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 231; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at paras. 266 and 281; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 63; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 83.

⁷¹⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 13.

“...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. Furthermore, even if one such event in the chain of events could be considered, by itself, to be an expropriation, that does not preclude a finding of a creeping expropriation that culminates on a later date.

“[T]he time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.”⁷¹⁸

“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 and did not treat the 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-Favoured-Nation obligations.”⁷¹⁹

424. These casual and sweeping legal assertions are made without any proper analysis or supporting authority or evidence and do not withstand scrutiny.

425. First, the Claimants’ assertions are premised upon a manifest error of law. The Claimants purport to rely upon the concept of a “*creeping expropriation*” and cite an alleged quote from the *Siemens v. Argentine Republic Award*:

“the time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.”⁷²⁰

426. In relation to breach of the FET standard, the Claimants state, again purporting to rely on the same quotation from the *Siemens AG v. Argentine Republic Award* that:

“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.”⁷²¹

427. Relying upon this quotation, the Claimants assert that:

“the “last action or omission” of the “composite act” that constitutes a creeping violation of the BIT was the Respondent’s public tender of NRD’s Concessions on 5 March 2016. This final act by Respondent is the defining act that all prior actions by Respondent were leaning towards. Only after the expropriation, and with the benefit of hindsight, did NRD come to realize that Respondent had violated the BIT.”⁷²²

428. The Claimants then go on to state that:

“It was not until March 2016, when Respondent publically [sic] tendered NRD’s Concessions, that Claimants knew and understood that Respondent expropriated

⁷¹⁸ Claimants’ Counter-Memorial on Preliminary Objections, at para. 87.

⁷¹⁹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 90.

⁷²⁰ Claimants’ Counter-Memorial on Preliminary Objections, at para. 15; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**).

⁷²¹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 16.

⁷²² Claimants’ Counter-Memorial on Preliminary Objections, at para. 17

*their investment and intended to keep the full value for itself without paying Claimants any compensation for their loss.”*⁷²³

429. The *Siemens v. Argentine Republic* Award is not a decision dealing with a time-bar issue, but in any event the Claimants’ quotation is inaccurate and misleading. Their reliance upon it is misplaced. The relevant quotation from the *Siemens v. Argentine* Award is in fact an extract from the commentary on the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”). The full quotation from the case is copied below:

“264. We are dealing here with a composite act in the terminology of the Draft Articles. Article 15 of the Draft Articles provides the following:

‘(1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act’.

265. As explained in the ILC’s Commentary on the Draft Articles:

*‘Paragraph 1 of Article 15 defines the time at which a composite act ‘occurs’ as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.’*⁷²⁴

430. The Claimants have, in their misquotation, omitted the underlined words above, and inserted a full stop, which materially changes the meaning of the quotation. As the full quotation from the commentary on the ILC Articles makes clear, even if one is prepared to accept that all the complained of actions form part of a single “composite act” (which is denied), the time at which a composite breach occurs is not the time at which the last act or omission in the series occurs. It is the time at which the last action or omission occurs which, taken with the other actions or omissions, is “*sufficient to constitute the wrongful act*”. Under the ILC Articles, the fact that there may be subsequent actions or omissions, still forming part of the same composite breach, does not postpone the time at which the breach occurs. Further commentary from Article 15 of the ILC Articles confirms this:

“Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the

⁷²³ Claimants’ Counter-Memorial on Preliminary Objections, at para. 72.

⁷²⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at paras. 264-265 (emphasis added).

*commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.”*⁷²⁵

431. In relation to this, the tribunal in *Rusoro v. Venezuela* explained:

*“The drafters of the Commentary reiterate that the purpose of Art. 15.1 is to set a criterion to determine the occurrence of a composite act (i.e., when the last action has occurred, which taken with the previous ones is sufficient for the breach to have occurred); while Art. 15.2 determines the relevant date of the breach (i.e., the date of the first of the acts in the series).”*⁷²⁶

432. *Second*, the Claimants have ignored the fact that Article 26 of the USA-Rwanda BIT provides that the critical time is when the Claimants “*first*” acquired, or ought to have acquired, knowledge of the breach. It is irrelevant whether the breach continues or whether further acts follow. As the Tribunal in *Resolute Forest v. Canada* correctly reasoned, in assessing whether an act is within the relevant time period:

*“According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. In terms of Article 14(2) of the Articles on State Responsibility, ‘[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.’ But the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation.”*⁷²⁷

433. Rather than applying the legal test set out in Article 26(1) of the USA-Rwanda BIT which is based on the date the Claimants would have *first* acquired knowledge, or should have first acquired knowledge of the breach, the Claimants have instead sought to rely on the *last possible* date of the alleged breach, being the date of the public tender of NRD’s former concession areas in March 2016. This is an untenable position. For reasons that will be explained in relation to each particular claim made by the Claimants below, it is inconceivable that the distinct breaches claimed that are based on acts beginning in 2011, and which largely took place between 2012 and 2014, and therefore prior to the First Cut-off Date, were not known for the first time until 2015 or 2016. To the contrary, there is extensive contemporaneous evidence of the Claimants’ knowledge of the alleged breaches and alleged resultant loss at the times at which the relevant acts that are said to constitute the breaches occurred.

⁷²⁵ International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at paragraph 10 to the commentary of Article 15 (emphasis added).

⁷²⁶ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 226.

⁷²⁷ *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) (**Exhibit RL-072**) (emphasis added).

434. Further, in all cases, these matters took place long before, are unconnected to, and made without any reference to, the public tender in 2016 (which is itself not even described or pleaded in the Memorial as being or constituting a wrongful act in breach of the USA-Rwanda BIT).⁷²⁸ It is not, and cannot sensibly be, suggested that alleged breaches (which are all denied), prior to the public March 2016 tender, that are complained of by the Respondent are by themselves insufficient to constitute a wrongful act. Indeed, they are pleaded as such: the Claimant's Memorial is replete with claims that prior actions or omissions by the Respondent were wrongful acts and breaches of the USA-Rwanda BIT.
435. In this regard, it is clear even on the Claimants' own case that they first knew of the first of the alleged breach(es) in 2011. In their Memorial, they state that:
- "These violative actions [of Rwanda's obligation to treat Claimants fairly and equitably] started in 2011 when NRD should have received long-term licences for its Concessions but instead received a series of extensions."*⁷²⁹
436. Further, at odds with their contention that the Claimants' did not have knowledge of breaches of the USA-Rwanda BIT until March 2016, the Claimants have acknowledged that most of the events at issue occurred prior to May 2015. We refer to the Claimants' reply to the Respondent's Document Requests, in which they state that:
- "The actions and failures to act by the Respondent that give rise to Claimant's claims in this proceeding substantially occurred on or before May 19, 2015 (the "Relevant Time Period"). Accordingly, unless otherwise specified in response to an individual request for production of documents below, Claimants object to each of Respondent's requests to the extent it may be read to request production of documents created or received after May 19, 2015, and each of Claimant's responses agreeing to produce documents will exclude any documents created or received after that date."*⁷³⁰
437. What is also notable from the above statement is the Claimants' attempts to exclude documents created or received after 19 May 2015 from production in this Arbitration – this is a stark contradiction to their case as now pleaded (i.e. that the Claimants' did not have knowledge of the breaches until March 2016) and is itself an acknowledgement that the acts or omissions that constituted breaches of the USA-Rwanda BIT, together with the corresponding knowledge, took place prior to this date. There is no other explanation.⁷³¹
438. *Third*, the Respondents have failed to counter, or to even engage with, the reasoned analysis of other investment tribunals which have rightly held that what is required in

⁷²⁸ The tender is mentioned only in relation to the background facts, as set out at paras. 101-102 of the Memorial.

⁷²⁹ Claimant's Memorial, at para. 195 (emphasis added).

⁷³⁰ Respondent's requests for documents, Claimant's Objections and Respondent's replies (6 December 2019) (**Exhibit R-175**), at para. 3, page 1 (emphasis added).

⁷³¹ The Tribunal were similarly surprised by the Claimants' contention when issuing Procedural Order No. 4 dated 20 December 2019: ("*The Tribunal does not understand Claimants' contention that the "Relevant Time Period" is that before the cut-off date (alleged to be May 19, 2015)*").

order for time to begin running under a limitation clause of this nature is simple knowledge that loss or damage has been caused, even if the extent and quantification are unclear.⁷³² As set out in the Respondent's MPO, the tribunal in *Berkowitz v. Costa Rica* explained clearly how this test works, commenting that:

*"the Article 10.18.1 requirement, inter alia, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking."*⁷³³

439. Were the Tribunal to accept that the Claimants' had no knowledge of any breaches before 5 March 2016, the Tribunal would indeed be doing exactly this: permitting the Claimants to wait and see the full extent of the loss or damage that will or may result. Moreover, it would be permitting the Claimants to wait to see the loss or damage that may result in relation to alleged breaches that are distinct and unconnected with the alleged breach taking place on 5 March 2016, being the alleged expropriation. To permit such an approach would not only be contrary to the plain words of Article 26 of the USA-Rwanda BIT, the decisions adopted by other tribunals in relation to materially identical limitation clauses,⁷³⁴ but also the policy behind such limitation periods in the first place. As the Tribunal explained in *Berkowitz v. Costa Rica*:

"While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit

⁷³² See the Respondent's Memorial on Preliminary Objections, at para. 35; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 217; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275

⁷³³ See the Respondent's Memorial on Preliminary Objections, at para. 35; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**Exhibit RL-076**), at para 213.

⁷³⁴ See the Respondent's Memorial on Preliminary Objections, at para. 35.

*the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.”*⁷³⁵

440. The Claimants suggest that it would not have been practicable to commence proceedings under the USA-Rwanda BIT as this might have undermined their prospects of receiving long-term mining licences.⁷³⁶ This claim does not withstand scrutiny. *First*, it was, or ought to have been, obvious to the Claimants that NRD had not fulfilled the criteria for the granting of long-term licences as early as 2 August 2011, when Minister Kamanzi advised NRD that long-term licences would not be issued at this time because NRD had not fulfilled its obligations under the Contract.⁷³⁷ *Secondly*, in any event, the relevant test for the purposes of the time bar – as expressly provided for in the plain terms of Article 26 of the USA-Rwanda BIT, and as confirmed by the decisions of other investment tribunals – is not when it would have been commercially desirable for the Claimants to commence proceedings.⁷³⁸ Rather, the test is when the Claimants first acquired simple knowledge of loss or damage. The legitimate policy behind limitation clauses of this nature, as elucidated by the tribunal in *Berkowitz v. Costa Rica*, would be wholly undermined if the Claimants could avoid compliance by simply citing commercial inconvenience.

441. The Claimants go on to argue in their CMPO that by August 2014 they “*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.”⁷³⁹ This is an express acknowledgment by the Claimants that, contrary to what they allege in this very same pleading, that they had actual knowledge prior to August 2014, and therefore prior to the First Cut-off Date, of the Respondent’s alleged “*prior transgressions*”, i.e. of the breaches they allege.

442. The Claimants further argue that:

*“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 US 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.”*⁷⁴⁰

443. Again, this analysis is misguided and wrong. It is irrelevant whether the allegedly “*connected*” wrongful actions served “*a common purpose*” (which is rejected) or when

⁷³⁵ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**Exhibit RL-076**), at para 208.

⁷³⁶ Claimants’ Counter-Memorial on Preliminary Objections, at para. 23.

⁷³⁷ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

⁷³⁸ See Respondent’s Memorial on Preliminary Objections, at para. 35.

⁷³⁹ Claimants’ Counter-Memorial on Preliminary Objections, at para 47 (Emphasis added).

⁷⁴⁰ Claimants’ Counter-Memorial on Preliminary Objections, at para. 21

the “*ultimate purpose*” was achieved. That analysis goes to Rwanda’s alleged state of mind, not the Claimants’. What is relevant on the plain terms of Article 26 of the USA-Rwanda BIT is the date on which the *Claimants* first acquired, or should have first acquired, knowledge of the alleged breaches. This was emphasised by the tribunal in *Berkowitz v. Costa Rica*, in which the tribunal rejected an argument that was similar to the one the Claimants now seek to advance in this Arbitration. In *Berkowitz v. Costa Rica*, the claimants had argued that the time bar should be overlooked because certain measures that were alleged to have been the “*last in the line of measures that contributed to the permanent and substantial deprivation of the Claimants’ property rights*”⁷⁴¹ took place only three months after the limitation period. The tribunal held that it could not accept this argument on the basis that:

“the relevant question is not whether the MINAET was the last line of measures affecting the Claimants’ property rights but rather when did the Claimants first acquire knowledge of the breach. The Claimants’ argument would turn the limitation clause on its head and the proposed approach cannot therefore be accepted”.⁷⁴²

444. The tribunal in *Berkowitz v. Costa Rica* concluded on this basis that giving effect to the limitation clause was simply what was required by way of the “*proper interpretation and application of the treaty*.”⁷⁴³ The need to interpret such limitation clauses strictly in order to give effect to the purpose and intention of the treaty was also emphasised in *Grand River v. United States*,⁷⁴⁴ in which the tribunal held, in relation to materially identical limitation clauses under the NAFTA Treaty,⁷⁴⁵ that the limitation clause provided a “*clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification*”.⁷⁴⁶
445. For all these reasons, the Claimants’ characterisation of the correct test under Article 26 of the USA-Rwanda BIT is wrong in law, inconsistent with their own pleadings and statements, and must be rejected.

⁷⁴¹ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**Exhibit RL-076**) at para. 297.

⁷⁴² *Ibid.*, (**Exhibit RL-076**) at para. 298.

⁷⁴³ *Ibid.*, (**Exhibit RL-076**) at para. 298.

⁷⁴⁴ *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**).

⁷⁴⁵ NAFTA Article 1116(2) provides that “*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*” NAFTA Article 1117(2) provides that “*An investor may not make a claim on behalf of an enterprise ... if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.*”

⁷⁴⁶ *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 29.

iii. Each of the Claimants' claims are out of time

446. There can be no doubt that when correctly analysed using the correct legal test, each of the Claimants' claims (as set out in the Memorial and /or as adapted and pleaded in the Reply) are out of time:
- 446.1. The claims based on Rwanda's allegedly discriminatory, unfair and arbitrary implementation of the 2014 Law, in alleged violation of the FET standard in Article 5 of the USA-Rwanda BIT, are out of time for the reasons explained at paragraphs 619 to 628 below and paragraphs 43 to 50 of the MPO.
- 446.2. The claims that the Respondent arbitrarily ignored RDB records, and/or that the Claimants permitted Rwandan nationals to use the police and court system to harm the Claimants' alleged investments, in alleged violation of the FET standard in Article 5 of the USA-Rwanda BIT, is out of time for the reasons set out at paragraphs 661 to 667 below and paragraphs 54 to 65 of the MPO.
- 446.3. The claim that former Minister Imena's decision not to grant tags to NRD in 2014, and/or that the Respondent used the ITRI/iTSCi system to punish the Claimants, in violation of the FET standard in Article 5 of the USA-Rwanda BIT, is out of time for the reasons explained at paragraphs 679 to 684 below and paragraphs 51 to 65 of the MPO.
- 446.4. The claims based on Rwanda's alleged violation of the Claimants' due process rights, in alleged violation of the FET standard in Article 5 of the USA-Rwanda BIT, is out of time for the reasons explained at paragraphs 698 to 703 below.
- 446.5. The claims based on Rwanda's alleged violation of the Claimants' legitimate expectations, in alleged breach of Article 5 of the USA-Rwanda BIT, is out of time for the reasons explained at paragraphs 803 to 835 below and paragraphs 38 to 42 of the MPO.
- 446.6. The claim that Rwanda expropriated the Claimants' investments in violation of Article 6 of the USA-Rwanda BIT is out of time for the reasons explained at paragraphs 909 to 914 below and paragraphs 81 to 87 of the MPO.
- 446.7. The claim that Rwanda failed to treat the Claimants' alleged investments transparently is out of time for the reason set out at paragraphs 66 to 70 of the MPO. The Claimants have not provided any further analysis of this claim beyond stating in their CMPO that they had no actual or constructive knowledge of the alleged breach until the date of the alleged expropriation.⁷⁴⁷
- 446.8. The claim that Rwanda failed to provide Full Protection and Security to Claimants' alleged investment is out of time for the reasons set out at paragraphs 71 to 80 of the MPO. The Claimants have not provided any further analysis of this claim

⁷⁴⁷ Claimants' Counter-Memorial on Preliminary Objections, at para. 90.

beyond stating in their CMPO that they had no actual or constructive knowledge of the alleged breach until the date of the alleged expropriation.⁷⁴⁸

446.9. The claim that Rwanda violated its NT and MFN obligations is out of time for the reasons set out at paragraphs 88 to 90 of the MPO. The Claimants have not provided any further analysis of this claim beyond stating in their CMPO that they had no actual or constructive knowledge of the alleged breach until the date of the alleged expropriation.⁷⁴⁹

⁷⁴⁸ Claimants' Counter-Memorial on Preliminary Objections, at para. 90.

⁷⁴⁹ Claimants' Counter-Memorial on Preliminary Objections, at para. 90.

B. Lack of jurisdiction *ratione personae*

447. As already set out in detail at section IV of the Respondent’s MPO, this Tribunal lacks jurisdiction to hear claims brought by BVG and Spalena, Neither party meets the definition of “*claimant*” under the USA-Rwanda BIT, which requires a claimant to be an “*investor of a party*” and to own or control a “*covered investment*”.
448. In relation to BVG, the Claimants have failed to demonstrate that BVG has standing. As explained at paragraphs 108 to 116 of the MPO, in order for BVG to be a proper claimant before this Tribunal and as such in order for this Tribunal to have jurisdiction *ratione personae* in relation to BVG, the Claimants must show that BVG owns or controls, directly or indirectly, an asset with the characteristics of an investment.⁷⁵⁰
449. In Section III of the CMPO, the Claimants argue that BVG is an “*investor of a party*” on the basis that:
- 449.1. BVG has an interest in Spalena, and so indirectly owns NRD; and / or
- 449.2. BVG loaned NRD [REDACTED] in order to pursue investment in the Bisesero concession.
450. However, as will be set out in detail below, it is the Respondent’s case that this takes the Claimants no further – it does not show that BVG owns or controls NRD (or indeed any of NRD’s assets) in a way sufficient to ground personal jurisdiction over the claims. In particular:
- 450.1. Despite asserting that BVG has an interest in Spalena, the Claimants have failed to provide evidence that BVG *owns* NRD, directly or indirectly;
- 450.2. Additionally, the Claimants have provided no evidence and accordingly plainly have failed to demonstrate that BVG *controls* NRD. All evidence provided to date fails to differentiate between the control of Mr. Marshall as a representative of Spalena and as a representative of BVG; and
- 450.3. BVG’s alleged transfer of [REDACTED] to NRD does not ground jurisdiction:
- 450.3.1. the transfer of [REDACTED] was not an investment; and, in any event,
- 450.3.2. the transfer was in respect of Bisesero and therefore is not part of the investment to which this dispute relates – being NRD.
451. Further, in relation to both BVG and Spalena, the Claimants have not addressed the Respondent’s arguments, set out in paragraphs 100 to 105 of its MPO, that the Claimants have failed to demonstrate that BVG or Spalena suffered any loss as a consequence of the alleged breaches of the USA-Rwanda BIT. This is a prerequisite for bringing a claim

⁷⁵⁰ As before, whether the allegations show that NRD is an asset with the characteristics of an investment will be discussed in detail below in relation to jurisdiction *ratione materiae*.

under Article 24 of the USA-Rwanda BIT, and the burden plainly lies with the Claimants to establish that this jurisdictional condition has been met.⁷⁵¹

452. Accordingly, and for the reasons developed further below, the Claimants do not have a credible claim to standing in this Arbitration.

1. It is for the Claimants to show that the Tribunal has jurisdiction over their claims

453. The Claimants are responsible for proving that the Tribunal has jurisdiction to hear their claims. A party bears the burden of proving the facts it asserts, and that extends to questions of jurisdiction in the same way that it applies to the merits of the claim.⁷⁵² Accordingly, it is for the Claimants to satisfy the burden of proof required at the jurisdictional phase.⁷⁵³ This proposition is so well established as to be considered by the Tribunal in *Ampal-American Israel Corporation v. Egypt* as “trite”.⁷⁵⁴

454. It is for the Claimants to allege and prove facts establishing the conditions for jurisdiction under the USA-Rwanda BIT.⁷⁵⁵ In particular, in relation to this Tribunal’s *ratione personae*, it is for the Claimants to show that they are investors as defined in the USA-Rwanda BIT,⁷⁵⁶ and in addition to their nationality the Claimants must show that they own or control an “investment”, as that term is defined, in the territory of Rwanda.

2. The Claimants have failed to show that BVG indirectly owns NRD

455. The Claimants have articulated the nature of the relationship between BVG and Spalena in a number of ways:

455.1. Prior to November 2011, the Claimants’ position appears to be that “*BVG’s investors and Spalena’s investors are one and the same*”⁷⁵⁷ but that BVG was “*not an owner in Spalena*”;⁷⁵⁸ the Claimants state that “*because the investors in BVG and Spalena are the same, the investors were comfortable with structure of this*

⁷⁵¹ As explained in the Respondent’s Memorial on Preliminary Objections, at para. 100, Article 24 of the USA-Rwanda BIT provides that a claimant may only submit a claim to arbitration if the respondent has breached an obligation under the USA-Rwanda BIT and the claimant “*has incurred loss or damage by reason of, or arising out of, that breach*”.

⁷⁵² *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**Exhibit RL-076**) at para. 239.

⁷⁵³ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) (**Exhibit RL-138**), at para. 48, citing *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**Exhibit RL-139**), at para. 79; *Saipem S.p.A v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) (**Exhibit RL-140**), at para. 83.

⁷⁵⁴ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) (**Exhibit RL-141**), at para. 216.

⁷⁵⁵ *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) (**Exhibit RL-142**), at para. 495.

⁷⁵⁶ *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010) (**Exhibit RL-143**), at para. 44.

⁷⁵⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 98.

⁷⁵⁸ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 7.

*deal [selling NRD to Spalena rather than BVG] and understood that the sale of NRD to Spalena protected their investment in BVG”;*⁷⁵⁹

455.2. As at November 2011, stating that BVG acquired an “ownership interest”⁷⁶⁰ or “an interest”⁷⁶¹ or an “ownership stake” in Spalena:⁷⁶²

“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. 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.”; and

455.3. The Claimants also state that BVG is “the controlling member of Spalena”.⁷⁶³

456. The Claimants have provided some limited documents regarding a transaction pursuant to which they claim that BVG acquired an ownership interest in Spalena.⁷⁶⁴ These merely give Mr. Marshall authority to effect the transfer, but there is no independent evidence that the transfer in fact occurred. Further, the Claimants have failed to produce any company records which demonstrate that BVG is currently an owner of Spalena – that claim appears to be based solely on the alleged asset sale. The failure to produce any evidence is particularly surprising given that pursuant to Spalena’s Amended Articles of Association and Memorandum of Operating Agreement, there is a requirement that Spalena “maintain a record of the respective percentage interest of each Party in the LLC”.⁷⁶⁵ The Claimants have failed to produce that record, or any other records (such as, for example, accounts or records of BVG recording its assets) which would evidence BVG’s alleged ownership of Spalena.

457. Further, the Claimants assert that BVG holds an equitable interest in NRD, on the basis of an agreement to write off of an alleged [REDACTED]

[REDACTED]

[REDACTED].⁷⁶⁶ The Claimants allege that this liability arose as a result of [REDACTED]

[REDACTED]

[REDACTED]:

“On December 23, 2010, Starck sold all of its interest in HC Starck Resources GmbH to Spalena for [REDACTED]

⁷⁵⁹ Claimants’ Counter-Memorial on Preliminary Objections at para. 100.

⁷⁶⁰ Claimants’ Counter-Memorial on Preliminary Objections, at para. 95.

⁷⁶¹ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para.7.

⁷⁶² Claimants’ Counter-Memorial on Preliminary Objections, at para. 101.

⁷⁶³ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 7.

⁷⁶⁴ Resolution by Unanimous Written Consent of the Sole Director of BVG (27 March 2012) (**Exhibit C-123**); Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company (27 March 2012) (**Exhibit C-124**).

⁷⁶⁵ Amended Articles of Association (1 May 2007) (**Exhibit C-009**), at para. 14.

⁷⁶⁶ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 5.

smuggling, I would have known about it. However, I had never heard of this allegation before until reviewing the Claimants' Reply and evidence in the course of preparing this statement."⁷⁷⁵

463. Similarly, Mr. Sindayigaya states:

*"it would have been literally impossible for NRD to have stolen [REDACTED] worth of minerals from BVG's Bisesero concession by December 2010. This is because absolutely nothing was being produced at Bisesero in 2010 - there were no miners, staff, or any exploitation happening at the concession whatsoever. Nor would there have been any minerals stored there - the concession was non-operational. I recall visiting the concession in March or April 2011 when we hired a site manager for the concession. Around this time, we also sent someone to Bisesero with a bobcat loader to try to get the mines open again as there had been landslides at the concession due to the lack of exploitation and maintenance."*⁷⁷⁶

464. Further, even if the Cooperation Agreement was a legitimate document, even on the Claimants own case it would only have been operative for approximately 7 weeks on the date of the Share Purchase Agreement. Without any supporting evidence, the Claimants appear to allege that, during the period from 1 November 2010 to 23 December 2010, NRD stole [REDACTED] worth of minerals. That is not a credible proposition.

465. Indeed, this particularly so when the amount of the alleged liability is compared with mineral prices at the time. As Mr. Sindayigaya has observed:

*"I note that based on mineral prices at the time, NRD would have had to of stolen between [REDACTED] in order to have accumulated a liability to BVG of [REDACTED]. However, during 2010, not even one tonne of minerals was being produced at Bisesero."*⁷⁷⁷

466. Mr. Sindayigaya's evidence is consistent with a note prepared by Dr. Biryabarema in March 2015 which addressed BVG's performance at its Bisesero concession.⁷⁷⁸ Dr. Biryabarema commented that "A concession of this size should at least produce 50 tons of concentrate (cassiterite+coltan+wolframite) a month. Looking at the data of the whole of 2011 average production was about one (1) tone per month."⁷⁷⁹ Given that Bisesero was not even producing 15-30 tonnes during 2011 after its mines re-opened, it is completely implausible that it was producing at this level in 2010 not least because the concession was not operating. Further, even if it was producing minerals in 2010 (which it was not), on the Claimants' case more than an entire year's worth of production would

⁷⁷⁵ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 23.2.

⁷⁷⁶ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 9.

⁷⁷⁷ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 10.

⁷⁷⁸ *Explanatory Note on NRD (Exhibit R-017)*.

⁷⁷⁹ *Ibid.*, (Exhibit R-017), at page 9.

have had to of been stolen by NRD in a mere seven-week period. That is simply not credible.

467. *Fourth*, the evidence of the Respondent's witness, Mr. Ehlers, who was the Managing Director of NRD when it was sold to Spalena and who was closely involved in the sale, was that no such liability existed or was part of the sale agreement.⁷⁸⁰
468. *Fifth*, the claim that the alleged liability was used as leverage and that BVG was happy to write off its claim against Starck and assign it to Spalena on the basis that this "*preserved the value of [BVG's] investment*" is nonsensical. Even if the allegations are true and the alleged liability existed, there is no basis for the belief that any funds received through misappropriation or theft would have been retained in the local vehicle, NRD, and not transferred through HC Starck's corporate chain. The fact that Mr. Marshall refers to the alternative to this alleged mechanism as "*a claim against Starck*"⁷⁸¹ is telling. The idea that this could be written off to "*create an equitable interest in favor of BVG in Spalena's investment in NRD*" as alleged in the Reply at paragraph 17 is legal nonsense. No equitable interest can exist.

3. The Claimants have failed to show that BVG controls NRD

469. In a bid to show that BVG controls NRD, the Claimants assert that "*BVG exercises actual managerial control over NRD, in order to protect and manage its investments, by and through the direct appointment of the NRD Management team.*"⁷⁸² However, the Claimants have failed to establish this, not least because their reliance on Mr. Marshall's role as NRD's managing director in this regard is misplaced. As explained below, Mr. Marshall's involvement with NRD pre-dates BVG's alleged involvement with NRD and so cannot demonstrate an exercise of BVG's managerial control.
470. At paragraph 102 of the MPO, the Claimants rely on Mr. Marshall's role as NRD's managing director as evidence of BVG's participation in and control over NRD. The Claimants allege that 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*".⁷⁸³ However, Mr. Marshall has been the Managing Director / Chairman of NRD since 2010, when Spalena became an investor in NRD.⁷⁸⁴ This is well prior to the point at which the Claimants allege

⁷⁸⁰ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at para. 23.3.

⁷⁸¹ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at page 6.

⁷⁸² Claimants' Counter-Memorial on Preliminary Objections, at para. 95.

⁷⁸³ Claimants' Counter-Memorial on Preliminary Objections, at para. 102.

⁷⁸⁴ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 1.

BVG became an owner of or began to control NRD, in November 2011.⁷⁸⁵ Mr. Marshall is the President of both BVG and Spalena.⁷⁸⁶

471. The Claimants further allege, as set out above, “*BVG’s investors and Spalena’s investors are one and the same*”. Accordingly, it goes nowhere to assert that Mr. Marshall acted as a representative of BVG in his role as Managing Director of NRD; he could be better characterised as a representative of Spalena, protecting Spalena’s interest directly, than acting “*in order to protect BVG’s investment in NRD held indirectly through Spalena*” which appears likely to be inaccurate and to be a significant overreach in characterisation. The Claimants have provided no evidence that the nature of that role changed following BVG’s alleged acquisition of NRD in November 2011. Certainly, the Claimants have provided no evidence that Mr. Marshall was acting on behalf of BVG as they assert.⁷⁸⁷ It is fanciful to state, as the Claimants do, that:

*“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.”*⁷⁸⁸

472. Whatever the nature of Mr. Marshall’s compensation arrangements in relation to NRD, that cannot be related to the relationship between BVG and NRD but rather to the relationship between Spalena and NRD, which predated the relationship between BVG and NRD substantially. As such, the fact of Mr. Marshall’s position within NRD cannot constitute sufficient evidence of BVG’s control of the company.

4. BVG’s alleged loan to NRD does not ground the Tribunal’s jurisdiction *ratione personae*

473. The Claimants, at paragraphs 110 to 123 of their CMPO, argue, in addition or in the alternative, that an alleged loan from BVG to NRD of USD [REDACTED] grounds the Tribunal’s jurisdiction *ratione personae*, stating that “*BVG made a loan to NRD that confers standing to sue as a claimant under the BIT*”.

474. This allegation is incorrect as both a matter of fact and of law.

i. As a matter of fact, the transfer of USD [REDACTED] pursuant to the Cooperation Agreement was not a loan

475. The Claimants refer to the Cooperation Agreement as evidencing the “*loan*”.⁷⁸⁹ However, the Cooperation Agreement is plainly not a loan agreement for the reasons set out below.

⁷⁸⁵ Claimants’ Counter-Memorial on Preliminary Objections, at para. 101 referring to Resolution by Unanimous Written Consent of the Sole Director of BVG (27 March 2012) (**Exhibit C-123**); Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company (27 March 2012) (**Exhibit C-124**).

⁷⁸⁶ Claimants’ Memorial, at para. 8.

⁷⁸⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 101.

⁷⁸⁸ Claimants’ Counter-Memorial on Preliminary Objections, at para. 102, relying on Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 8.

⁷⁸⁹ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**).

It is merely an agreement to “*cooperate in the management of the Bisesero Concession*”.⁷⁹⁰

476. *First*, the Cooperation Agreement does not include any information that is typically found in an agreement to provide a loan, in particular:

476.1. The duration of the loan;

476.2. the requirement to repay the loan;

476.3. any repayment terms;

476.4. default terms or penalties;

476.5. any provision for payment of interest; or, indeed

476.6. any clarity around whether the [REDACTED] was a pure contractual agreement, a payment for services, lending, funds invested, or funds gifted.

477. *Second*, in relation to the provision of funds, the Cooperation Agreement states that BVG “*will provide*” funds to NRD for a specified purpose.⁷⁹¹ Such funds (even if assuming they were provided, and Claimants have provided no evidence that they were) are described as “*BVG money*”.⁷⁹²

478. *Third*, at the relevant time, BVG was not in financial position to have made a loan of [REDACTED]. As its Managing Director Mr. Mucyo explained in his letter dated 23 June 2010 – less than five months before the Cooperation Agreement was signed – no investment had been made in the company, it was non-performing, and had “*never been operational*”.⁷⁹³

479. *Fourth*, in any event, the term “*loan*”, although used in other places in the Cooperation Agreement, is not used in relation to the provision of funds. For example, the Cooperation Agreement states:

479.1. NRD will “*loan its bulldozer, wheel loader and tipper trucks*”;⁷⁹⁴

479.2. NRD will “*loan its own equipment to the artisans in the Concessions*”;⁷⁹⁵

479.3. “*NRD will loan enough machinery and equipment for minerals to be processed on site in Bigugu and at other sites*”.⁷⁹⁶

⁷⁹⁰ *Ibid.*, (Exhibit C-122) at Clause 2.

⁷⁹¹ *Ibid.*, (Exhibit C-122), in the preamble.

⁷⁹² *Ibid.*, (Exhibit C-122) at Clause 2.

⁷⁹³ Letter from Lambert Mucyo to the Police/CID, *False allegations by William Quam and Roderick Marshall* (23 June 2010) (Exhibit R-102), at pages 2-3; Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 23.1-23.2.

⁷⁹⁴ Cooperation Agreement Between NRD and BVG (1 November 2010) (Exhibit C-122), at Clause 3.

⁷⁹⁵ *Ibid.*, (Exhibit C-122), at Clause 2.

⁷⁹⁶ *Ibid.*, (Exhibit C-122), at page 1, at Clause 3.

480. It is for the Claimants to prove that the transfer of [REDACTED] is a long-term debt obligation, as they claim. They have failed to do so.

ii. The present dispute does not arise directly out of the transfer of [REDACTED] pursuant to the Cooperation Agreement

481. In any event, if the transfer of the [REDACTED] is in fact a transfer of funds of a *type* sufficient to constitute an investment for the purposes of the USA-Rwanda BIT and so to found jurisdiction, it is still not sufficiently connected to the investment at issue in these proceedings in order to found jurisdiction *ratione materiae* in relation to BVG.

482. As already explained in the Respondents' MPO in relation to the Respondent's *ratione materiae* objection, and expanded on in Section V.C below, Article 25 of the ICSID Convention provides that ICSID's jurisdiction extends to "*any legal dispute arising directly out of an investment*" between a state and a national of another state. The Claimants fail to address the key question of whether the transfer of the [REDACTED], even if they are able to prove it happened, constitutes part of the investment out of which the present dispute arises; it is plain that the present dispute does not arise directly out of the transfer of the [REDACTED] itself, if that were to be categorised as the relevant investment for the purposes of this Arbitration.

483. Accordingly, the Claimants' position must rest first on the argument that the transfer of the [REDACTED] forms part of the investment which is the subject of the dispute, and second on the argument that BVG's connection to that singular part of the investment is sufficient to ground the jurisdiction of the Tribunal over BVG in relation to the dispute.

484. It is worth clarifying at the outset that the Claimants have not formally made a claim for the alleged taking of the Bisesero concession from BVG and nor would they have had any grounds for doing so.⁷⁹⁷ Further, it is telling that the alleged loan was not addressed in the Memorial. Rather, it represents, at most, an unrelated transaction, and is an ill-concealed attempt to shoehorn this into the Claimants' claim in an obvious effort to retain BVG as a Claimant, in the event that Spalena's claim is independently struck out for lack of jurisdiction *ratione voluntatis* or on any other basis.

485. The concept of unity of the investment does not mean that the Tribunal automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation. Instead, as the Tribunal stated in *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*:

"... 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

⁷⁹⁷ See para. 907 below; the Claimants' Memorial, at footnote 10; Claimants' Counter-Memorial on Preliminary Objections, at footnote 153.

the particular transaction forms an integral part of an overall operation that qualifies as an investment."⁷⁹⁸

486. The Claimants cite this case extensively, including the above quotation, but fail to understand its consequences for their case. They allege that the Cooperation Agreement evidences a transaction involving a loan from the investor for the purchase of assets by NRD as part of a larger investment operation. However, on the plain facts, this is not the case. The Cooperation Agreement is not at all related to BVG's investment in NRD and the Five Concession Areas, around which this dispute turns. The dispute centres around the Five Concession Areas to which NRD was granted licences in 2006. BVG's investment is expressly disaggregated from the dispute.⁷⁹⁹

487. In any event, even if the loan is linked to the investment in some way, as the tribunal in *Duke Energy v. Peru* explained:

*"the application of the concept of the unity of the investment (the "overall operation") did not mean that the Tribunal "automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation."*⁸⁰⁰

488. Rather, there is a requirement to *"look at the economic substance of the operation in question in a holistic manner"*.⁸⁰¹ A tribunal is required to consider *"the overall unity or inseparability of the relevant operation in order to exercise jurisdiction over other related contracts"*.⁸⁰²

489. As a factual matter, the case law has considered the following to be integral to the wider investment operation:

489.1. In *Niko Resources v. Bangladesh Petroleum Exploration and Production Company Ltd*, the Tribunal held that, in the context of an investment project consisting of the development of marginal and non-producing gas fields, which was the subject of a number of different agreements and other legal instruments, the sale of the gas produced by the gas fields was a necessary component of the investment, and

⁷⁹⁸ *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) (**Exhibit CL-060**), at para. 72 (Emphasis added).

⁷⁹⁹ See the Claimants' Memorial, at footnote 10; Claimants' Counter-Memorial on Preliminary Objections, at footnote 153.

⁸⁰⁰ *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006) (**Exhibit RL-144**), at para. 127.

⁸⁰¹ *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) (**Exhibit RL-145**), at para. 6.59, citing *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (**Exhibit RL-146**), at para. 428 and 435.

⁸⁰² *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (**Exhibit RL-147**), at para. 93.

accordingly that disputes arising out of the sale and purchase contract constituted disputes arising directly out of the investment.⁸⁰³

489.2. In *Koch Minerals v. Venezuela*, the Tribunal held that an offtake agreement, which was “*impossible to separate out*” as a separate stand-alone transaction wholly unrelated to the overall investment project, was part of the investment as a whole.⁸⁰⁴

489.3. The Tribunal in *Ambiente Ufficio v. Argentina* held that the “*process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind ‘aris[e] directly out of an investment’*”.⁸⁰⁵

490. Put differently, there is a requirement that each matter be an integrated part of the investment project.⁸⁰⁶

491. As is plain from the cases cited above, and despite the Claimants’ arguments to the contrary, the kind of connection necessary to generate the requirement that the transactions be considered to be part of one investment for the purposes of economic unity is significantly stronger than the connection between a purported transfer of ██████████ from BVG to NRD to purchase equipment for use on BVG’s Bisesero concession (which is explicitly not the subject of this claim) and the licences granted to NRD for the purpose of the development of mines in the Five Concession Areas. There is plainly no genuine relationship, for the purpose of the Claimants’ investment, between the transfer of ██████████ and the Claimants’ operations in relation to the Five Concession Areas, and it is wholly unreal for the Claimants to suggest that there is.

492. *First*, the Cooperation Agreement is an agreement “*to cooperate in the management of the Bisesero Concession*”.⁸⁰⁷ The agreement is expressly limited to the Bisesero concession and does not, on its own terms, apply to any other concessions. Yet this Arbitration does not concern BVG’s former concession at Bisesero. Accordingly, the agreement could not possibly confer standing on BVG in respect of claims arising out of the Five Concession Areas formerly held by NRD, which are the subject of this Arbitration.

⁸⁰³ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013) (**Exhibit RL-148**), at para. 372.

⁸⁰⁴ *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) (**Exhibit RL-145**), at para. 6.58.

⁸⁰⁵ *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (**Exhibit RL-146**), at para. 429.

⁸⁰⁶ *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (**Exhibit RL-147**), at para. 93.

⁸⁰⁷ Cooperation Agreement Between NRD and BVG (1 November 2010) (**Exhibit C-122**) (emphasis added).

493. *Second*, the Cooperation Agreement (signed on 1 November 2010) pre-dates BVG's purported acquisition of an interest in NRD through Spalena (in November 2011).
494. *Third*, on its face, the Cooperation Agreement terminated on 31 March 2011, and there is no reason to believe that it continued to be in force as at November 2011.⁸⁰⁸
495. *Fourth*, it is plainly not ancillary to the development of the Five Concession Areas when it relates to the Bisesero concession only, and as such cannot on any reading be part of an integrated, unitary operation that comprises an investment over which this Tribunal has jurisdiction.
496. As such, the dispute at issue before this Tribunal arises out of an investment in which BVG is not an investor, and BVG lacks standing as a claimant in this Arbitration.

5. The Claimants have not demonstrated that they suffered loss as a consequence of the breaches of the BIT alleged

497. As set out in the Respondent's MPO at Section IV.A, under Article 24 of the USA-Rwanda BIT, a claimant may only submit a claim to arbitration if the respondent has breached an obligation under the USA-Rwanda BIT and the claimant "*has incurred loss or damage by reason of, or arising out of, that breach*". Thus, standing to bring claims is expressly conditional on the Claimants incurring loss. The Claimants have failed to address the Respondent's arguments in this regard and have again failed to set out any basis for demonstrating that any loss or damage has been suffered by them consequent on the breaches of the USA-Rwanda BIT that they allege.
498. Accordingly, the Claimants have not discharged the onus that is on them to prove that this condition to jurisdiction has been satisfied. Nor can they. All of the loss allegedly suffered was loss by NRD and not by the Claimants. The Claimants have not pursued any claim on behalf of NRD (and in any event NRD is a Rwandan national and has no standing to bring a claim under the USA-Rwanda BIT).
499. Even if NRD had suffered the loss alleged (which is denied), any loss suffered by it as a company does not automatically result in a direct injury to Spalena as shareholder (and likewise with respect to BVG, though it is denied that BVG has any shareholding or other interest in NRD). Rather, a shareholder is generally not entitled to receive compensation for the loss suffered by a company, but instead simply a diminution in value of the shares that may result. Indeed, the Tribunal in the analogous case of *Gemplus v. Mexico* sets out the position clearly:

"The Claimants' claims for compensation derive only from their status as investors with investments in the form of their respective minority shareholdings in the Concessionaire, as distinct from any claim by the Concessionaire itself. Perhaps inevitably, the Parties' submissions occasionally

⁸⁰⁸ *Ibid.*, (Exhibit C-122), at clause 7 which states that it is effective for 5 months unless extended. The Claimants have provided no evidence that the agreement was extended.

*elided this important distinction, effectively treating the valuation of the Concessionaire's future profits (if any) as the relevant exercise for the assessment of compensation due to the Claimants. The exercise required of this Tribunal is, in contrast, the valuation of the Claimants' lost investments in the form of their shares in the Concessionaire and not, as such, the lost profits incurred by the Concessionaire under the Concession Agreement. The latter are not, of course, irrelevant; but they are not directly relevant as if the Claimants' claims were made by the Concessionaire itself."*⁸⁰⁹

500. Any loss suffered by NRD would only result in loss for Spalena or BVG (were BVG to be considered a shareholder) if Spalena or BVG had and were said to have had suffered a diminution in the value of their shares in NRD as a consequence, which has not been pleaded. The Claimants instead seek damages by way of compensation for an alleged expropriation of the Five Concession Areas and lost profits incurred by NRD, and not damages on the basis of diminution in the share value of NRD. The Claimants have not alleged, nor provided any evidence of, a diminution of value of Spalena's or BVG's shareholding in NRD. Indeed, they have not provided credible evidence of loss in any form, affecting Spalena or BVG, which could have resulted from the alleged breaches.
501. The Claimants appear to assert, in correspondence, that the Respondent's continued objection to the Tribunal's jurisdiction *ratione personae* over Spalena is "*surprising*".⁸¹⁰ However, what is surprising is that the Claimants have entirely failed to address the Respondent's arguments based on loss, instead only addressing the arguments relating to ownership or control. In making this material omission, the Claimants have failed to establish that this requirement for jurisdiction under Article 24 of the USA-Rwanda BIT has been met. As pleaded, the Claimants seek compensation based on the "*fair market value of the Concessions on the date of the Award*".⁸¹¹ This is not an asset to which the Claimants were ever entitled, and, if the Five Concession Areas were lost, their loss can only crystallise as a diminution of the value of NRD. The Claimants have not pleaded this loss, and so have not pleaded any loss sufficient to grant them standing under Article 24 of the USA-Rwanda BIT.

⁸⁰⁹ *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 (**Exhibit RL-149**), at para. 12-05 (emphasis added).

⁸¹⁰ Letter from Duane Morris LLP to Joseph Hage Aaronson LLP, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (13 April 2020) [regarding claimants' reply memorial] (**Exhibit R-194**).

⁸¹¹ Claimants' Memorial, at para. 292.

C. Lack of jurisdiction *ratione materiae*

502. At paragraphs 117 to 166 of the MPO, the Respondent argues that this Tribunal lacks jurisdiction *ratione materiae* over the Claimants' claims because the Claimants have failed to properly establish how their investment in NRD constitutes an investment under the USA-Rwanda BIT and/or the ICSID Convention. In its Reply, the Claimants do not address, expressly or at all, the Respondent's arguments in relation to this.
503. On 6 April 2020, the Respondent wrote to the Claimants to enquire as to whether the Claimants intended to address these and other arguments not yet addressed by the Claimants.⁸¹² In response on 13 April 2020 (the "**13 April 2020 Letter**"), the Claimants explained that they would not be addressing these arguments because in its Procedural Order No. 2 ("**PO2**") regarding bifurcation, the Tribunal "*confirmed Claimants did not need to brief this issue further because it would be covered in the merits portion of this arbitration*" and "*found that Claimants' Memorial and supporting evidence sufficiently countered Respondent's position*".⁸¹³ The Respondent is surprised by such a contention. All the Tribunal said in PO2 when declining to bifurcate this issue, was "[t]he Tribunal has determined that this preliminary objection turns on factual issues that will fall to be determined during the merits phase."⁸¹⁴ PO2 does not suggest that the Claimants did not need to brief this issue further or that the Claimants had already sufficiently countered the Respondent's objection, and in any event the Tribunal could not reasonably have said so given the Claimants had not provided any proper response to the objection.⁸¹⁵ The Claimants themselves admit that this issue "*would be covered in the merits portion of this arbitration*" and as such if they wished to put forward counterarguments to those advanced by the Respondent in its MPO, the Claimants ought to have done so in the Reply.
504. Despite (wrongly) arguing that the Tribunal "*confirmed Claimants did not need to brief this issue further*", the Claimants' letter goes on to argue that they have already, in their Memorial and Reply, "*set out facts showing the manner in which the Claimants invested in Rwanda through NRD and the money that Claimants invested in Rwanda through NRD,*

⁸¹² Letter Joseph Hage Aaronson LLP to Duane Morris LLP, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21): Claimants' Reply Memorial on the Merits* (6 April 2020) (**Exhibit R-195**).

⁸¹³ Letter Duane Morris LLP to Joseph Hage Aaronson LLP, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)* (13 April 2020) [regarding Claimants' reply memorial] (**Exhibit R-194**), at page 3, referring to Procedural Order No.2 on Bifurcation dated 28 June 2019, at paras. 30 and 46. NB: para. 30 is a reference to the summary of the Claimants' argument, not the Tribunal's analysis.

⁸¹⁴ Procedural Order No.2 on Bifurcation dated 28 June 2019, at para. 46.

⁸¹⁵ At this stage the Tribunal was purely assessing whether to bifurcate this issue from the Merits phase and had only considered the Claimants' position based on limited comments it had made in its Observations on the Respondent's request for bifurcation, which comments were aimed at arguing how this issue was so intertwined with the merits as opposed to substantive argument about the content of the issue: see the Claimants' Observations on Request for Bifurcation (21 June 2019), at paras. 25-35.

which in turn grant the Tribunal jurisdiction *ratione materiae* over the claims”.⁸¹⁶ The Claimants further allege that “there can be little doubt that there was an investment in Rwanda by Claimants” and postulate the question to be determined as “not whether an investment was made, which the Respondent’s own records concede, only the nature and scope of that investment”.⁸¹⁷ With respect, questions of the nature and scope of the Claimants’ investment go precisely to the question of whether this Tribunal has jurisdiction *ratione materiae*, and yet the Claimants have completely failed to address them.

505. Consequently, the Respondent does not repeat here the arguments it has already made in its MPO with regard to this Tribunal’s jurisdiction *ratione materiae* (in particular the legal arguments to which the Claimants have made no comment whatsoever), but instead only addresses any new points raised in the Claimants’ Observations on Request for Bifurcation (“**Observations**”), the Reply and the 13 April 2020 Letter to the extent they may impact the Respondent’s arguments.

506. As set out in Section V of the Respondent’s MPO, the Claimants’ case as to what investments it made in Rwanda that qualify for protection under the USA-Rwanda BIT and/or the ICSID Convention was not properly particularised, and was confused and unclear. Despite this, the Respondent summarised in its MPO what it understood to be the Claimant’s investments based on the Claimants’ Memorial⁸¹⁸ as (1) NRD, (2) the Five Concession Areas, and (3) the Contract. It went on to explain why each of these are not qualifying investments under the USA-Rwanda BIT/ICSID Convention. As explained at paragraphs 503 to 505 above, the Claimants have not addressed these arguments in the Reply and it can be established from the 13 April 2020 Letter that they do not intend to address them.⁸¹⁹ It is submitted that, should they seek to do so, the Claimants ought to be prohibited from introducing any new arguments or material on this issue at the hearing, having failed to properly respond in the Reply.

507. Despite this, and although not expressly set out in the Reply, what can be inferred from taking the Reply, the Observations and the 13 April 2020 Letter together, is that the only investment the Claimants actually allege is protected is NRD. This is because:

507.1. In its 13 April 2020 Letter, the Claimants assert that “*Claimants’ Memorial, Counter-Memorial on Preliminary Objections and the Reply set out facts showing the manner in which the Claimants invested in Rwanda through NRD and the*

⁸¹⁶ Letter Duane Morris LLP to Joseph Hage Aaronson LLP *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (13 April 2020) [regarding Claimants’ reply memorial] (**Exhibit R-194**), at page 3, referring to their Memorial, at paras. 4, 26-28, 32, 35, 37 and the Reply, at paras. 19, 35-36, 45, 48, 50-54.

⁸¹⁷ *Ibid.*, (**Exhibit R-194**), at page 3.

⁸¹⁸ See Claimants’ Memorial, at paras. 142-145.

⁸¹⁹ Letter Duane Morris LLP to Joseph Hage Aaronson LLP *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (13 April 2020) [regarding Claimants’ reply memorial] (**Exhibit R-194**).

*money that Claimants invested in Rwanda through NRD, which in turn grant the Tribunal jurisdiction *ratione materiae* over the claims”;*⁸²⁰

507.2. In its Observations, the Claimants state that “*NRD [...] is the covered investment that is afforded the protections of the BIT*”;⁸²¹ and

507.3. In the factual section of the Reply, the Claimants focus on explaining what the Claimants purportedly invested in NRD.⁸²²

508. This appears to be a change in position from that set out (albeit unclearly) in the Claimants’ Memorial. In any event, for the reasons set out below, the Claimants’ purported reliance on NRD as its investment to establish *jurisdiction ratione materiae* is misplaced and is insufficient to ground the Tribunal and/or ICSID jurisdiction to hear the Claimants’ claims.

1. The Claimants’ purported interest in NRD is not a protected investment under the USA-Rwanda BIT or the ICSID Convention

509. As explained at paragraphs 120 to 144 of the Respondent’s MPO, the Claimants’ investment in NRD is not protected because it does not “*have the characteristics of an investment*”⁸²³ in accordance with the USA-Rwanda BIT and does not satisfy the criteria for being an investment under Article 25(1) of the ICSID Convention because the Claimants (i) did not make a substantial contribution of money or assets, and (ii) did not contribute to the economic development of Rwanda. The Respondent maintains this position for the reasons set out in the MPO and in addition, for the reasons set out below.

510. In the heading to Section I.C of its Reply, the Claimants now allege that they “*invested at least \$21 million in Rwanda*”. In the paragraphs that follow, the Claimants purport to justify this by relying on the following:

510.1. A letter sent by Mr. Marshall to Minister Kamanzi on 30 January 2013 wherein it states “*NRD already has made the largest commitment in the Rwanda mining industry by investing approximately 15 million EURO in this project*” and which attaches an Investment Plan Report Summary for NRD which includes on page 5 a table setting out “*Total investment estimation for the five last years (2007-2012) (estimate)*” as being “*15, 832 173 EURO*”⁸²⁴ or approximately \$21 million USD as estimated by the Claimants;⁸²⁵

⁸²⁰ *Ibid.*, (Exhibit R-194), at page 3 (emphasis added).

⁸²¹ Claimants’ Observations on Request for Bifurcation (21 June 2019), at para. 33.

⁸²² See Claimants’ Reply, at paras. 35-36, 45, 48.

⁸²³ USA-Rwanda BIT (Exhibit CL-006), at Article 1.

⁸²⁴ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (Exhibit C-054), at page 1 and page 6.

⁸²⁵ See Claimants’ Reply, at para. 34.

- 510.2. An internal undated NRD document titled “*SUMMARY of activities, investment and plans on all NRD’s concessions*” which provides a total “*Budgeted (sic.) USD*” amount for exploration and exploitation as at 2011 of “17.201.777”;⁸²⁶
- 510.3. The purported transfer of BVG’s [REDACTED] investment and assets to Spalena for investment in NRD;⁸²⁷ and
- 510.4. The investments made by NRD’s prior investors which included “\$3 million dollars in NRD in the form of capital investment” and expenditure by HC Starck in constructing the plant and related infrastructure, which “*Claimants inherited*”.⁸²⁸
511. However not only have the Claimants once again failed to properly substantiate the amount of money or assets they claim to have contributed to NRD or to show how this was a “*substantial contribution*”, they have also failed to establish how the Claimants could properly “*inherit*” contributions purportedly made by NRD’s prior investors. Plainly, the burden is on them to do so.
512. *First*, the evidence that NRD invested “*at least*” USD \$21 million is based on *estimations* or *budgets* of contributions made by NRD in developing the Five Concession Areas as set out in NRD’s internal documents and does not reflect actual expenditure incurred, and moreover is unreliable.⁸²⁹ The Claimants have failed to provide evidence that these amounts were actually contributed (as opposed to simply being anticipated), and furthermore, that they were contributed by the Claimants in circumstances where Spalena only acquired NRD in December 2010, and where BVG did not ever acquire shares in NRD or contribute as a shareholder. In fact, what is clear from these documents is that nothing material – or sufficient to establish jurisdiction *ratione materiae* – was invested after December 2010 because:
- 512.1. The estimated total investment for 2007-2012 of EUR €15,832,173 (or \$20,921,900)⁸³⁰ set out in **C-054**, is simply a summarised copy of the NRD expenditure for 2007-2010 as set out in the November 2010 Application,⁸³¹ but

⁸²⁶ Summary of activities, investment and plans on all NRD’s concessions (**Exhibit C-147**), at page 3.

⁸²⁷ See Claimants’ Reply, at para 35 referring to Resolution by Unanimous Written Consent of the Sole Director of BVG (27 March 2012) (**Exhibit C-123**) and Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company (27 March 2012) (**Exhibit C-124**).

⁸²⁸ See Claimants’ Reply, at para. 36, relying on a supposed admission in the Respondent’s Memorial on Preliminary Objections, at para. 86 and the Witness Statement of Jean Aime Sindayigaya dated 21 May 2019, at para. 15.

⁸²⁹ See Summary of activities, investment and plans on all NRD’s concessions (**Exhibit C-147**); Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

⁸³⁰ All EURO figures have been converted from EURO to USD as at 31 January 2012 using: <https://www1.oanda.com/currency/converter/>

⁸³¹ See Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye, and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**), at pages 99-101.

with the addition of an estimated EUR €6,000,000 (or USD \$7,928,880) for “*Foreign Consulting and Engineering [est.]*”.⁸³² In relation to this:

512.1.1. Given that the November 2010 Application was filed *before* the Claimants purport to have acquired NRD, by way of purchase of its shares for ██████████, it is unclear how the alleged investment figures contained therein could be attributed to them;

512.1.2. It appears that there was little to no expenditure or investment made in the period from December 2010 to January 2013 which is consistent with former Minister Imena’s view based on what was to be seen on the ground at the Five Concession Areas,⁸³³

512.1.3. The item “*Foreign Consulting and Engineering [est.]*” includes an amount in square brackets which indicates it is not a certain or accurate estimate that may not have in fact not been intended to be included. In addition, the evidence of former Minister Imena,⁸³⁴ Mr. Ehlers,⁸³⁵ and Mr. Sindayigaya⁸³⁶ is that few foreign consultants were hired by NRD, suggesting the figure attributed to it was not in fact spent; and

512.1.4. No explanation has been provided for the inclusion of this amount in respect of which, according to former Minister Imena, it is likely that the figure “*in large part, represents an amount that Mr. Marshall decided to include as representing the value of his services to NRD, presumably in order to try and persuade the Government that NRD had made a substantial investment.*”⁸³⁷

512.2. Based on the budget set out in **C-147**, NRD had budgeted a spend of only USD \$1,399,286 in 2011⁸³⁸ (USD \$983,514 of that being for salaries and wages which as explained in the Respondent’s MPO were paid in cash in any event).⁸³⁹

512.3. Further, an amended version of **C-147** disclosed by the Claimants in document production confirms that nothing was expended after 2010.⁸⁴⁰ On its face, the summary in **R-240** is identical to that in **C-147**, but on closer inspection it is clear

⁸³² Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

⁸³³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 22.

⁸³⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 21.

⁸³⁵ Supplemental Witness Statement of Mr. Anthony Ehlers dated 28 May 2020, at para. 14.1.

⁸³⁶ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 28 May 2020, at para. 6.2.4.

⁸³⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 21.

⁸³⁸ Summary of activities, investment and plans on all NRD’s concessions (**Exhibit C-147**), at page 3.

⁸³⁹ Respondent’s Memorial on Preliminary Objections, at para. 136 referring to Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019, at para. 9.

⁸⁴⁰ Email from R. Marshall to Z. Mruskovicova, *updated Fidele’s report* (18 September 2014) attaching ‘Summary of activities, investment and plans on NRD’s concessions’ (**Exhibit R-240**).

that it has been amended to cover the period 2007 to 2013 (rather than just 2007 to 2011),⁸⁴¹ but the total investment figure of USD \$17,201,777 (which is now expressed as “*Exp. USD*” rather than “*Budgeted [sic] USD*”) is identical. In addition, this amended summary was apparently amended again in September 2014, yet does not record any investment having been made between 2013 and September 2014.

513. As such, not only do these documents show that the USD \$21 million figure asserted by the Claimants is an unreliable estimate of NRD’s investment, they also support the Respondent’s case that the total level of investment by NRD at the Five Concession Areas during the period 2008 to 2010 was likely no more than approximately USD \$3 million,⁸⁴² with the Claimants contributing little to nothing to it after Spalena acquired NRD in December 2010.

514. Further, as set out at paragraphs 89 to 100 above and in the supplemental witness statements of Mr. Sindayigaya,⁸⁴³ Professor Nkanika Wa Rupiya⁸⁴⁴ and Mr. Ehlers,⁸⁴⁵ it is clear that the sums that NRD alleges to have invested are grossly exaggerated and/or were never incurred. This is confirmed by NRD’s audited accounts for 2010, which highlight that:

514.1. NRD alleges to have invested EUR €15,802,491 by 2010.⁸⁴⁶ However, NRD’s audited balance sheet for 2010 shows Shareholders Net Equity & Liabilities (being the sum of total equity and liabilities and retained earnings from the previous year) of only Rwf 4,294,463,575.⁸⁴⁷ This equates to approximately EUR €5.5 million based on the exchange rate at the time.

514.2. NRD has valued its vehicles at almost Rwf 699 million (EUR €865,005),⁸⁴⁸ yet the total figures for trucks, motor vehicles and motor cycles in NRD’s audited PPE Report for 2010 is only Rwf 375 million.⁸⁴⁹

⁸⁴¹ See page 3 of the respective documents, Summary of activities, investment and plans on all NRD’s concessions (**Exhibit C-147**) and Email from R. Marshall to Z. Mruskovicova, *updated Fidele’s report* (18 September 2014) attaching ‘Summary of activities, investment and plans on NRD’s concessions’ (**Exhibit R-240**).

⁸⁴² See Respondent’s Counter-Memorial, at para. 87.

⁸⁴³ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at paras. 5-6.4

⁸⁴⁴ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at paras. 10-15.

⁸⁴⁵ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 13-16.

⁸⁴⁶ The Claimants allege that the total expenditure for the years 2007-2011 was €17,201,777. They allege that €1,399,286 of this was spent in 2011, bringing the total for the years 2007-2010 to €15,802,491.

⁸⁴⁷ Balance Sheet as at 31 December 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-233**).

⁸⁴⁸ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

⁸⁴⁹ NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-234**).

- 514.3. NRD has valued its Rutsiro plant at Rwf 737,500,000 in NRD's internal estimation table for the period 2007-2012,⁸⁵⁰ yet the corresponding figure in the audited PPE report is only Rwf 387,107,403.⁸⁵¹
515. It is clear that the Claimants' total estimated investment is a work of fiction based on internal documents that have been misrepresented by the Claimants.
516. *Second*, it is inappropriate to compare NRD's "budgeted" or "estimated" level of investment with the actual investments made by Tinco in Rutongo Mines as the Claimants appear to do at paragraph 34 of the Reply, because:
- 516.1. As set out above, the figures provided by the Claimants are "budgeted" or "estimated" amounts taken from internal documents that do not purport to be proper accounts (and in any event are not reliable);
- 516.2. The investment figure of [REDACTED] for Rutongo that is referred to by the Claimants is taken from the actual accounting records of Rutongo and sets out the actual investment by Tinco, Rutongo's investor;⁸⁵²
- 516.3. In any event, what others have invested is irrelevant for the purposes of establishing whether this Tribunal has jurisdiction over the Claimants' claims in this Arbitration.
517. *Third*, regardless of the amount invested by NRD, the Claimants have not shown that this was an amount that *they* invested. In fact, what the documents show is that any investment in NRD was made by NRD's prior investors and that aside from the purchase of shares in NRD for [REDACTED],⁸⁵³ the Claimants made little or no contribution whatsoever. The payment of [REDACTED] alone, is not sufficient to ground this Tribunal's jurisdiction: as the Tribunal in *Phoenix v. Czech Republic* put it, "*the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an 'investment'.*"⁸⁵⁴
518. Further, the Claimants do not even attempt to properly justify why they should be entitled to "*inherit*" an investment made by others, and the burden is plainly on them to do so. As set out in the Respondent's MPO, the primary consideration when it comes to establishing whether an investment satisfies the criteria of Article 25(1) of the ICSID Convention is that a substantial contribution has been made.⁸⁵⁵ It goes without saying,

⁸⁵⁰ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**), at page 5.

⁸⁵¹ NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012) (**Exhibit R-234**).

⁸⁵² See Historic Operating Results and Investment Summary, Rutongo Mines Ltd (**Exhibit R-048**), at page 4.

⁸⁵³ As explained in the Respondent's MPO, this transaction does not amount to an investment that is protected under the USA-Rwanda BIT or the ICSID Convention, see Respondent's Memorial on Preliminary Objections, at paras. 133 to 137.

⁸⁵⁴ *Phoenix Action, LTD v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**Exhibit RL-095**), at para. 119.

⁸⁵⁵ See Respondent's Memorial on Preliminary Objections, at paras. 120-128.

that such a contribution must have been made by the investor (i.e. the Claimants) and this does not include investments made by the prior investors in NRD. As stated by the Tribunal in *Societe Civile v. Guinae*: “it is necessary that the person availing himself of the protection granted by the ICSID Convention is indeed the author of the expenditures made in connection with the operation”.⁸⁵⁶

519. *Fourth*, there is no real or contemporaneous evidence of the purported transfer of BVG’s [REDACTED] investment and assets to Spalena for investment in NRD as the Claimants claim.⁸⁵⁷ In support of this, the Claimants rely only on written resolutions of BVG and Spalena which are both signed by Mr. Marshall on 27 March 2012 and which attach a schedule of “*purchased items*” totalling [REDACTED].⁸⁵⁸ No other documentation has been submitted, including any sale and purchase agreement or any records of NRD. If this had been a genuine transfer it would have been properly documented at the time. In particular:

519.1. As mentioned above, the Claimants claim that they invested at least USD \$21 million in NRD relies on a table setting out NRD’s total investment for 2007-2012 attached to a letter sent by NRD in January 2013.⁸⁵⁹ Although, as explained at paragraph 512.1 above, the table is in the most part replicated from the November 2010 Application, and it is included in a report prepared on 30 January 2013 and sent to Minister Kamanzi by NRD as an accurate representation of NRD’s investment.⁸⁶⁰ If the transfer of assets worth [REDACTED] had been made in March 2012 as the Claimants claim, it could and should have been accounted for in the investment summary.

519.2. The list of purchased items and the value accorded to them does not accord with what an ex-business partner of Mr. Marshall, and Managing Director of BVG’s Bisesero concession, Mr. Lambert Mucyo, says in respect of the assets BVG had at Bisesero. In particular, Mr. Mucyo states, “*no such investment was made*”, “*no sign of such equipment was ever received apart from two skid loaders tractors*” and “*the salaries of the company’s employees including myself were*

⁸⁵⁶ *Societe Civile Immobiliere de Gaeta v Republic of Guinea* ICSID Case No. ARB/12/36, Award (21 December 2015) (**Exhibit RL-150**), at para. 231 (quote translated from French original: *il est nécessaire que la personne se prévalant de la protection accordée par la Convention CIRDI soit bel et bien l’auteur des dépenses effectuées en lien avec l’opération*).

⁸⁵⁷ Claimants’ Reply, at para. 35.

⁸⁵⁸ Unanimous Written Consent of the Sole Director of BVG (27 March 2012) (**Exhibit C-123**) and Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company (27 March 2012) (**Exhibit C-124**).

⁸⁵⁹ See para. 510.1 above.

⁸⁶⁰ Letter from NRD (R. Marshall) to MINIRENA (Minister S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

never paid, neither the related taxes to the various institutions”.⁸⁶¹ Mr. Mucyo describes BVG’s Bisesero operation as “*non performing*”.⁸⁶²

- 519.3. The list of purchased items and the value accorded to them also does not accord with what Mr. Ehlers saw when he visited Bisesero with Mr. Marshall in late 2010. As set out at paragraph 144 above, Mr. Ehlers’ evidence is that there had been no meaningful investment in Bisesero and that he did not recall ever seeing the assets that allegedly belonged to BVG and which the Claimants allege were transferred to NRD – indeed there was no mining happening at Bisesero whatsoever.⁸⁶³ Mr. Sindayigaya, who visited Bisesero several times between 2011-2012, has confirmed the same. As he stated:

*“The asset list in C-123 appears to be fabricated. It certainly does not reflect the actual assets which I observed on Bisesero’s sites. Despite several visits to Bisesero’s two abandoned mining sites and overnight stays in BVG’s transit houses in Nyamishaba and Kibuye town, I did not see any of the assets listed in C-123, other than two containers. These two containers were kept at BVG’s Nyamishaba house, which was rented from the medical school, and I understood that the containers were used to store spare parts and small tools. I also saw one old LADA NIVA (a Russian 4x4 vehicle) parked at the premises. There were certainly none of the trucks that are listed, or any heavy mining equipment. Nor were the assets ever moved to NRD’s concessions in 2012 as claimed.”*⁸⁶⁴

- 519.4. Additionally, the Claimants have failed to exhibit financial records or bank records from BVG or Spalena to support the allegations of investment made after they acquired NRD, but they have notably failed to do so.

2. The conduct complained of occurred vis-à-vis the Five Concession Areas rather than NRD

520. Even if the Tribunal were to find that NRD was a covered investment under the USA-Rwanda BIT and Article 25(1) of the ICSID Convention, this Tribunal still lacks jurisdiction *ratione materiae* because the Claimants have failed to show that the conduct they complain of occurred vis-à-vis NRD rather than the Five Concession Areas.
521. As set out in Section V.B.1 of the Respondent’s MPO, the Claimants’ claims in this Arbitration revolve around an alleged expropriation, not of NRD, but of the Five Concession Areas allegedly owned by NRD. As such, the Claimants are expressly seeking damages measured by reference to the expropriation clause in the USA-Rwanda BIT for damages suffered by the Claimants as a result of the alleged expropriation of the Five

⁸⁶¹ Letter from Lambert Mucyo to the Police/CID, *False allegations by William Quam and Roderick Marshall* (23 June 2010) (**Exhibit R-102**).

⁸⁶² *Ibid.*, (**Exhibit R-102**).

⁸⁶³ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 21-22.

⁸⁶⁴ Supplemental Witness Statement of Mr. Jean Aime Sindayigaya dated 27 May 2020, at para. 12.

Concession Areas.⁸⁶⁵ However, the Claimants do not own (and have never owned) the Five Concession Areas and therefore could not have suffered any damage beyond a diminution in share value (which they do not even allege).

522. ICSID tribunals only have jurisdiction over claims that involve conduct which affects the rights of shareholders of a locally incorporated entity; they do not have jurisdiction over claims by shareholders in relation to measures that affect rights of the entity in which it holds shares (i.e. measures affecting contracts made by the company).⁸⁶⁶ As such the Claimants (to the extent they are shareholders of NRD) may only assert claims relating to the treatment of NRD that affects their shareholding, but they have not done so.
523. As will be further developed later in this Rejoinder, the Claimants in the Reply appear to have acknowledged that this Tribunal has no jurisdiction over claims relating to the Five Concession Areas, because there has been a significant shift of the focus of their claims onto NRD rather than the Five Concession Areas as pleaded in the Memorial. This shift is most stark in relation to the Claimants' FET claim for purported mistreatment of NRD which has now been transformed to capture all of the Claimants' claims that were originally directed at treatment of the Five Concession Areas. This complete shift in the Claimants' claims is a clear acknowledgement by them that the only investment they have which could, as a matter of law, be protected by the USA-Rwanda BIT and the ICSID Convention is NRD, and not the Five Concession Areas or anything else the Claimants may have suggested was a covered investment in their Memorial (although for the reasons already explained the Claimants' purported investment in NRD is not even sufficient on the facts).

⁸⁶⁵ See Claimants' Memorial, at Section VII.

⁸⁶⁶ See Gabriel Bottini, "Indirect Claims under the ICSID Convention", University of Pennsylvania Journal of International Law (**Exhibit RL-151**), at section 2.1, page 571.

D. The Tribunal lacks jurisdiction *ratione voluntatis* in relation to the claims of the Spalena Company LLC

524. Despite the Claimants' attempt to argue the contrary, it remains clear that Spalena failed to comply with the requirements contained in Articles 23 and 24 of the USA-Rwanda BIT and the Claimants' attempt to bundle Spalena's compliance in with that of BVG and/or NRD is wrong and should not be permitted.
525. The Claimants have put forward no viable explanation for Spalena's lack of compliance save for suggesting that its failure to provide adequate notice was an "*inadvertent omission*".⁸⁶⁷ This omission means that the Respondent did not consent to arbitrate Spalena's claims. This is fatal to its claims, and as a result the Tribunal lacks jurisdiction *ratione voluntatis* in relation to Spalena.

1. Spalena's failure to comply is more than a mere procedural error

526. At paragraphs 128 to 129 of the CMPO, the Claimants argue that clauses in BITs that deal with consultation and cooling off periods (i.e. Articles 23 and 24 of the USA-Rwanda BIT) are procedural rather than jurisdictional in nature and on that basis the Tribunal cannot decline jurisdiction due to non-compliance with those Articles. Not only do the Claimants' arguments completely miss the point, the interpretation of these Articles which the Claimants would have the Tribunal make, would mean there would be no legal consequences for the Claimants' non-compliance. This cannot be correct.
527. *Firstly*, the cases relied on by the Claimants in support of their arguments that clauses relating to consultation and cooling off periods are procedural rather than jurisdictional have been heavily criticised by other arbitral tribunals. In particular, the Claimants rely on the Decision on Jurisdiction in *SGS v. Pakistan*⁸⁶⁸ and the Final Award in *Lauder v. Czech Republic*,⁸⁶⁹ both of which have rightly received criticism for not properly considering the consequences of non-compliance. As the Tribunal in *Murphy Exploration v. Ecuador* explained:
- 527.1. In relation to the statement by the *SGS v. Pakistan* tribunal that "*...Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature*".⁸⁷⁰

"This Tribunal cannot agree with that statement which implies that, even though there is an explicit treaty requirement, the

⁸⁶⁷ Claimants' Counter-Memorial on Preliminary Issues, at para. 140.

⁸⁶⁸ Claimants' Counter-Memorial on Preliminary Issues, at para. 129; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction (6 August 2003) (**Exhibit CL-050**).

⁸⁶⁹ Claimants' Counter-Memorial on Preliminary Issues, at para. 129; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Case, Award (3 September 2001) (**Exhibit RL-022**).

⁸⁷⁰ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction (6 August 2003) (**Exhibit CL-050**), at para. 184.

*investor may decide whether or not to comply with it as it deems fit.”;*⁸⁷¹ and

527.2. In relation to the statement by the *Lauder v. Czech Republic* Tribunal that a six-month waiting period is a procedural rule rather than a jurisdictional provision:⁸⁷²

*“That Tribunal however, does not decide what happens if claimant does not comply with such obligation. It is contrary to the fundamental rules of interpretation to state that while it constitutes a “procedural rule that must be satisfied by the claimant”, non-compliance does not have any consequence whatsoever. Such a way of interpreting the obligation simply ignores the “object and the purpose” of the rule, which is contrary to Article 31(1) of the aforementioned Vienna Convention.”*⁸⁷³

528. Accordingly, it is improper to characterise these obligations as purely procedural. Rather, they *“constitute a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.”*⁸⁷⁴

529. As the Tribunal in *Murphy Exploration v. Ecuador* elucidated, the reasoning for this is clear: it does not make sense to have such obligations in BITs if there is no consequence for non-compliance. It is entirely orthodox for serious consequences to arise from non-compliance with obligations that may be procedural in nature: *“It is evident that in legal practice.... non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment, can have serious consequences for the defaulting party.”*⁸⁷⁵

530. The interpretation the Claimants seek is in flagrant disregard of the basic principles of treaty interpretation as set out in Article 31 of the VCLT:

*“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*⁸⁷⁶

531. In accordance with this fundamental provision, a party cannot ignore the existence of the norms contained in Articles 23 and 24 of the USA-Rwanda BIT, regarding the obligation of the parties to attempt negotiations in order to resolve their disputes and the impossibility of resorting to ICSID without delivering a notice of intent at least 90 before submitting the claim. The Claimants’ interpretation would wholly undermine the object

⁸⁷¹ *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010) (**Exhibit RL-152**), at para. 148.

⁸⁷² *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Case, Award (3 September 2001) (**Exhibit RL-022**), at para. 187.

⁸⁷³ *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010) (**Exhibit RL-152**), at para. 147.

⁸⁷⁴ *Ibid.*, (**Exhibit RL-152**), at para. 149.

⁸⁷⁵ *Ibid.*, (**Exhibit RL-152**), at para. 142.

⁸⁷⁶ Vienna Convention on the Law of Treaties (23 May 1969) (**Exhibit CL-010**), at Article 31.

and purpose of these mandatory provisions, and render them worthless, contrary to the VCLT. The correct interpretation, which is a good faith interpretation in accordance with Article 31 VCLT, is that in order to submit a claim to ICSID arbitration, the following conditions must be present:

531.1. A notice of intent that is compliant with Articles 24(2)(a) to 24(2)(d) must have been delivered by the Claimants to the Respondent at least 90 days beforehand; and

531.2. Six months must have elapsed since the events giving rise to the claim.

532. Although, in addition, the parties “*should*” seek to resolve disputes through consultation and negotiation, that requirement becomes irrelevant if the requirements set out at paragraphs 531.1 and 531.2 above have not been complied with. In this case, Spalena fundamentally did not deliver the appropriate notice of intent and therefore cannot now submit its claim to arbitration under the ICSID Convention. On this basis, the Claimants’ arguments that the use of the word “*should*” rather than “*shall*” in Article 23 of the USA-Rwanda BIT means that Consultation and Negotiation is “*discretionary*” becomes redundant.⁸⁷⁷

533. *Secondly*, the Claimants have failed to establish that it would have been futile to send an adequate notice properly identifying Spalena as a claimant. As explained by the Tribunal in *Louis Dreyfus v. India*:

*“the doctrine imposes a considerable burden of proof on a claimant wishing to invoke it to excuse non-compliance with preconditions to arbitrate. A mere showing that the steps a treaty requires to be taken prior to arbitration are unlikely to result in a satisfactory outcome for the investor would not satisfy a requirement of demonstrating that it was futile for the investor to even try. Futility connotes a manifest waste of effort towards a self-evident, even pre-ordained, lack of success, not simply that the effort faces significant hurdles or that the odds are against success.”*⁸⁷⁸

534. As explained below, the notice of intent sent by BVG and NRD set out claims that are fundamentally different to the claims advanced now by Spalena and NRD, including because the notice was sent by BVG in relation to the Bisesero concession which is not at issue in this Arbitration.

2. The Notices relied on by the Claimants are not compliant with Article 24

535. As set out at paragraphs 179 to 186 of the MPO, Spalena did not seek amicable settlement of the claims it has brought in this Arbitration. Rather, the notice the Claimants rely on seeks settlement of claims brought by different companies and that are of a different nature to those now being advanced. The Claimants argue that it did so

⁸⁷⁷ Claimants’ Counter-Memorial on Preliminary Issues, at paras. 131-133.

⁸⁷⁸ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 December 2015) (**Exhibit RL-153**), at para. 97.

because “the claims presented by Spalena in this matter are identical to those set forth in the Notice of Intent by BVG and NRD”.⁸⁷⁹ However, the Claimants have failed to explain how the claims are identical, not least when it appears now that the claims being advanced relate solely to the treatment of NRD rather than treatment of the Five Concession Areas as expressed in the Notice.

536. In fact, the Notice dated 12 April 2017, having identified BVG and NRD as claimants, goes on to set out claims arising out of conduct that resulted in an alleged expropriation of BVG’s concession (Bisesero) and NRD’s Five Concession Areas.⁸⁸⁰ Clearly, the claims with respect to NRD’s Five Concession Areas can only be brought by NRD, and the claims with respect to BVG’s Bisesero concession can only be brought by BVG. As such, the claims brought in this Arbitration by Spalena and BVG in their purported capacity as shareholders of NRD are of a completely different nature to those set out in the Notice. In essence, the Claimants have sent a Notice alleging one set of claims by NRD and BVG but instead commenced a different set of claims by different companies. It is improper for the Respondent to be appraised of one set of claims but instead to be faced with another set which, although derives from a similar set of facts, is different in nature and brought by different parties.
537. Regardless of whether Rwanda recognised Spalena as the shareholder of NRD, it is not for the Respondent to make guesses as to who will be bringing a claim against it. If Rwanda was going to be faced with a claim by Spalena rather than NRD, it should have been made aware of that and given proper notice in accordance with Articles 23 and 24 of the USA-Rwanda BIT.
538. It is for the Claimants to show that the notice they provided was adequate in accordance with Article 24 of the USA-Rwanda BIT and they have failed to do so. Accordingly, the Tribunal lacks jurisdiction *ratione voluntatis* in relation to Spalena’s claims

⁸⁷⁹ Claimants’ Counter-Memorial on Preliminary Issues, at para. 139.

⁸⁸⁰ Letter from Duane Morris LLP to Rwanda, *Natural Resources Development Rwanda Ltd. and Bay View Group, LLC Notice of Intent to Commence Arbitration Proceedings Against the Republic of Rwanda* (12 April 2017) (Exhibit R-196).

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

539. The Claimants have failed to establish a breach of Article 5 of the USA-Rwanda BIT. The reasons for this are explained in Section IV of the Respondent's Counter-Memorial. In particular, the Respondent explained how the Claimants had not established a breach of the FET or FPS standards by reference to the MST,⁸⁸¹ nor had the Claimants established a breach for failure to treat the Claimants' investments transparently.⁸⁸²

540. Instead of addressing the Respondent's arguments in relation to each allegation, in Section II of the Reply, the Claimants seek to re-characterise their claim as a breach of the FET standard by importing a higher standard of treatment from another BIT and by characterising the breach as a sweeping or "creeping" FET breach. For the reasons set out below, this re-characterised claim also fails.

541. To the extent the Claimants maintain the other breaches pleaded in the Memorial but not addressed in its Reply, the Respondent repeats its arguments set out in the Counter-Memorial in relation to each of them.

A. The Claimants are not entitled to import the FET standard from the Belgium-Rwanda BIT into the USA-Rwanda BIT through the MFN clause

542. In the Reply, the Claimants seek to import the FET protections from the BIT concluded between Rwanda and Belgium (the Belgo-Luxembourg Economic Union BIT ("**Belgium-Rwanda BIT**")), using the MFN clause of the USA-Rwanda BIT. However, as explained below, the FET protection contained in the Belgium-Rwanda BIT cannot be imported through the MFN clause in the USA-Rwanda BIT.

1. Article 5 of the USA-Rwanda BIT is clear that the MST protection applies

543. Article 5 of the USA-Rwanda BIT is exceptionally clear that the MST FET standard, as set out in Article 5, is the applicable FET standard. Article 5 states that the nature of the protection is "*the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*"⁸⁸³ The parties confirm, in Annex A of the US-Rwanda BIT, that customary international law standards result from a general and consistent practice of States that they follow from a sense of legal obligation. There is a very clear intention to include the MST standard in the USA-Rwanda BIT. That the Claimants now attempt to read a higher standard into the USA-Rwanda BIT, through the

⁸⁸¹ In relation to FET, see Respondent's Counter-Memorial, at paras. 232-366; in relation to FPS, see Respondent's Counter-Memorial, at paras. 394-416.

⁸⁸² See Respondent's Counter-Memorial, at paras. 367-393.

⁸⁸³ USA-Rwanda BIT (**Exhibit CL-006**), at Article 5(2).

back door of the MFN provision, is inconsistent with the plain words and clear intention of the USA-Rwanda BIT.

544. The Belgium-Rwanda BIT significantly pre-dates the USA-Rwanda BIT. Indeed, the only two other BITs that came into force between Rwanda and a third-party state prior to the USA-Rwanda BIT are the Belgium-Rwanda BIT and the Germany-Rwanda BIT. If the parties had intended to allow the importation of an autonomous FET protection, they would have done so. Instead, Article 5 explicitly states not only that the MST standard applies, but also that *“a determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article”*.⁸⁸⁴

2. The MFN clause cannot be used to import the FET protection from another BIT

545. The Claimants mischaracterise the relationship between the FET standard and the MFN clause contained in the USA-Rwanda BIT. Article 4 of the USA-Rwanda BIT cannot be used to import the alternative FET standard contained in the Belgium-Rwanda BIT.

546. The MFN clause reads:

“1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

*2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”*⁸⁸⁵

547. In support of this new argument that they may rely on substantive protection standards not specifically included in the USA-Rwanda BIT, the Claimants rely on the MFN treatment clause. This is a new argument raised for the first time in the Reply and is in conflict with the characterisation of the MFN clause in the Memorial. The MFN clause does not allow such importation, as the scope of the application of the clause is limited to *“like circumstances”*. As stated by the Claimants in the Memorial, the purpose of the MFN clause is to require *“that Rwanda treat investors of a party and their investments no less favourably than it treats investors of non-parties to the BIT and their investments”*.⁸⁸⁶ As the Claimants characterised the MFN clause in the Memorial, although they now appear to resile from that position, *“an MFN clause, such as the one in the BIT, is fundamentally a promise between the two states party to the treaty that neither state will give to investors from any third state more favourable treatment than that given to investors*

⁸⁸⁴ USA-Rwanda BIT (Exhibit CL-006), at Article 5(3).

⁸⁸⁵ USA-Rwanda BIT (Exhibit CL-006), at Article 4.

⁸⁸⁶ Claimants' Memorial, at para. 266 (citations omitted).

from the other state party to the treaty”.⁸⁸⁷ An issue will arise where a state “treated non-party investors who were in like circumstances more favourably than it treated the Claimants”.⁸⁸⁸ The Claimants have now apparently abandoned their original claim under the MFN clause, in favour of this new and strained interpretation of the clause.

548. Plainly, and as accepted by the Claimants in the Memorial, the determination of whether the investor is entitled to rely on the MFN clause requires a comparative, fact-based analysis of the investments or investors which are in factually similar situations. The reasons for this are explained below.
549. The standard application of the MFN protections for investors in like situations is to assess, first, as a matter of fact, the similarity of the situations being compared.⁸⁸⁹ That assessment is de facto and specific.
550. A similar MFN clause which explicitly protected investors in “similar situations” was analysed by the Tribunal in *Ickale Insaat v. Turkmenistan*.⁸⁹⁰ The Claimants in that case similarly argued that the MFN protection allowed the FET standard from a third party BIT to be incorporated into the agreement between the parties. The below passage is highly instructive and is accordingly set out at length:

“The ordinary meaning of the terms of the MFN clause, when read in their context and in light of the object and purpose of the Treaty, suggests that each State party to the Treaty agreed to treat investments made in its territory by investors of the other State party in a manner that is no less favorable than the treatment they accord in similar situations to investments by investors of any third State. Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State. However, this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in “a similar situation.” Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a “similar situation” to that of the investments of investors of third States; in such a situation, there is de facto no discrimination.

The terms “treatment accorded in similar situations” therefore suggest that the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less

⁸⁸⁷ Claimants’ Memorial, at para. 278 (citations omitted).

⁸⁸⁸ Claimants’ Memorial, at para. 280 (citations omitted).

⁸⁸⁹ See, for example, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 416; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (**Exhibit CL-030**), at para. 371.

⁸⁹⁰ *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) (**Exhibit RL-154**).

*favorable than that accorded to investments of the investors of any third State. It follows that, given the limitation of the scope of application of the MFN clause to “similar situations,” it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to “treatment accorded in similar situations,” without effectively denying any meaning to the terms “similar situations.” Investors cannot be said to be in a “similar situation” merely because they have invested in a particular State; indeed, if the terms “in similar situations” were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause “treatment no less favourable than that accorded in similar situations [...] to investments of investors of any third country” and “treatment no less favourable than that accorded [...] to investments of investors of any third country.” Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.”⁸⁹¹*

551. As in the BIT under consideration in *Ickale Insaat v. Turkmenistan*, the USA-Rwanda BIT explicitly provides that its MFN provision applies only to investors “*in like circumstances*”. This is a factual question, designed to prevent de facto discrimination. It is not intended to import the entire protections of other BITs to which Rwanda may be party. A comparison of the factual situation of the investments of the investors of the USA and third-party states is required in order to determine whether treatment of USA investors can be said to be less favourable in like circumstances. Investors are not in like circumstances merely because they are investors in Rwanda; as set out above by the Tribunal in *Ickale Insaat v. Turkmenistan*, “*it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to “treatment accorded in similar situations,” without effectively denying any meaning to the terms “similar situations”*”.⁸⁹² The same applies, *mutatis mutandis*, in relation to the term “*in like circumstances*”.
552. In contrast, the cases cited by the Claimants are not relevant to the present circumstances. In *Pauskok v. Mongolia*, the BIT at issue had no requirement that investors

⁸⁹¹ *Ibid.*, (Exhibit RL-154), at paras. 328-329.

⁸⁹² *Ibid.*, (Exhibit RL-154), at para. 329.

be in a similar situation or in like circumstances.⁸⁹³ This difference is quite clearly material. The Tribunals in *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*⁸⁹⁴ and *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan*⁸⁹⁵ imported a FET standard into a BIT which did not previously contain any FET standard but only an MFN standard.⁸⁹⁶ This was considered in the analysis by Dumberry in *'Shopping for a better deal: the use of MFN clauses to get 'better' fair and equitable treatment protection'* and relied on extensively by the Claimants, to be a different category of case.⁸⁹⁷

553. Dumberry differentiates between an MFN clause importing a FET clause into a BIT that did not include one, and one that includes an FET clause that provides limited protection. The article analyses “*whether an MFN clause contained in the basic treaty that does include an FET clause can be used by an investor to claim the benefit of better FET protection found in other BITs entered into by the host state*”.⁸⁹⁸ However, it is the Respondent’s position that the USA-Rwanda BIT is not a treaty with simplistic FET and MFN provisions, but rather a complex treaty which explicitly sets out FET provisions and its intentions in relation to the interaction between the MFN and FET provisions.
554. Dumberry argues that importing FET protections by way of the MFN standard is, conceptually, available, and undertakes an analysis of the Chile-Malaysia BIT and the Mongolia-Russia BIT. In each of those treaty provisions, there was a requirement under the MFN clause that the investments made by investors of either contracting party shall receive treatment which is fair and equitable and not less favourable than that accorded to investments made by investors of third states.⁸⁹⁹
555. While he concludes that the MFN provision can import an FET provision in certain cases, his arguments do not support the Claimants’ position on the facts of this case.⁹⁰⁰ He

⁸⁹³ *Paushok, et al. v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) (**Exhibit CL-064**). NB: this case is analysed in P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection*, 33 Arb. Int'l 1, 4 (2016) (**Exhibit CL-062**), at page 13.

⁸⁹⁴ *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010) (**Exhibit CL-067**).

⁸⁹⁵ *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**).

⁸⁹⁶ See *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010) (**Exhibit CL-067**); *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at para. 148.

⁸⁹⁷ P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection*, 33 Arb. Int'l 1, 4 (2016) (**Exhibit CL-062**).

⁸⁹⁸ *Ibid.*, (**Exhibit CL-062**), at page 2.

⁸⁹⁹ *Ibid.*, (**Exhibit CL-062**), at pages 13-14.

⁹⁰⁰ Similarly, it is notable that the Claimants state that it is well settled that a MFN clause may permit an investor to import more favourable language from an investment treaty between the host state and a third party state, citing *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017) (**Exhibit CL-029**). The Claimants refer to paragraph 517 of the award in support of their proposition that an MFN clause may permit an investor to import more favourable language from an investment treaty between the host state and a third-party state. However, para. 517 sets out the Claimant’s arguments in that case; the Tribunal’s

accepts that, if an MFN provision is used to import an FET provision “it is true that the concrete application of the MFN clause in the context of the FET standard means, in practical terms, that any potential difference between formulations of the fair and equitable treatment will likely be moot. Yet, the parties to BITs are free to limit the scope of application of an MFN clause in order precisely to prevent such a result.” Dumberry then suggests that, in order to do avoid depriving different formulations of the FET standard of any practical impact, the parties “should draft the MFN clause accordingly in order to explicitly prevent the importation of more generous FET clauses from other treaties”.⁹⁰¹ That is precisely what the USA-Rwanda BIT does. In fact, Dumberry goes on to demonstrate his point by citing the narrowed MFN clause found in the EU-Canada CETA at Article 8.1, which states, in language almost identical to the provision in issue under the USA-Rwanda BIT, that:

*“1. Each Party shall accord to an investor of the other Party and to a covered investment, **treatment no less favourable than the treatment it accords in like situations**, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory ...*

4. For greater certainty ... Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of this Article.”⁹⁰²

556. Similarly, Article 5 of the USA-Rwanda BIT explicitly states that the concept of FET does not go beyond that required by the MST standard, and states:

“The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by [the MST] standard, and do not create additional substantive rights.”⁹⁰³

557. Dumberry is clear, “Under this provision an investor cannot use the MFN clause contained in the CETA to claim the benefit of a better FET clause found in other treaties (both past and future)”.⁹⁰⁴ The same is also true of the USA-Rwanda BIT. The parties clearly intended for the FET standard in the USA-Rwanda BIT to be limited to the MST standard, and clearly expressed that through limitations imposed on both the MFN and MST standards. The Claimants’ proposed interpretation would wholly undermine that clear intent.

decision, set out at paragraph 533, is that there is no need to determine the issue. The Claimants have confused a summary of the parties’ decision with the ratio of the case.

⁹⁰¹ P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 4 (2016) (Exhibit CL-062), at page 15 (citations omitted).

⁹⁰² *Ibid.*, (Exhibit CL-062), at page 16.

⁹⁰³ USA-Rwanda BIT (Exhibit CL-006), at Article 5(2).

⁹⁰⁴ P. Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get ‘Better’ Fair and Equitable Treatment Protection*, 33 Arb. Int’l 1, 4 (2016) (Exhibit CL-062), at page 16.

558. Further, the intent of the parties to limit the MFN clause to investors in like circumstances is clear on the face of the text. There is no ambiguity requiring interpretation; a factual assessment of the similarity of circumstances is necessary.
559. It is notable that the Claimants have accepted that, on its plain terms, it was the parties' intention to include the MST-FET standard in the Rwanda-US BIT.⁹⁰⁵ As such, the Claimants clearly are not able to import the FET standard from the Belgium-Rwanda BIT into the USA-Rwanda BIT.

3. The content of the applicable MST-FET standard

560. The Claimants have contested the Respondent's analysis of the MST-FET standard. They argue that the kind of treatment referred to in *Neer* is not required to be reached,⁹⁰⁶ but rather that some kind of purportedly emerging norm under customary international law ought to be applied.⁹⁰⁷
561. However, the authorities cited by the Claimants, which all concern Article 1105 of the North American Free Trade Agreement ("**NAFTA**"), do not make a case for a new customary international law norm. They recognise that such a change in norms would require state practice and *opinio juris* and, while suggesting that some movement may be occurring, do not specify the boundaries of the MST-FET standard let alone create any new authoritative standard. All of the cases cited by the Claimants relate solely to the jurisprudence under Article 1105 of NAFTA, and as such even any emerging norm cannot necessarily be generalised beyond that article of NAFTA. Reliance on one set of treaty jurisprudence is not enough to demonstrate *opinio juris* sufficient to form a customary international law norm.
562. It is clear from a review of the cases cited by the Claimants that their reliance on these authorities is misplaced. Firstly, the analysis of the Tribunal in *ADF Group v. USA*, cited by the Claimants purportedly in support of their position, is in fact helpful to the Respondent's position. In that case, the Tribunal found that the investor had failed to prove "*the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments*", on the basis that neither "*concordant state practice nor judicial*

⁹⁰⁵ Claimants' Reply, at para. 153.

⁹⁰⁶ Claimants' Reply, at para. 170.

⁹⁰⁷ Claimants' Reply, at paras. 172-176; Although the requirement that the USA-Rwanda BIT be interpreted in the same way as NAFTA Article 1105 itself is not explicitly made by the Claimants, a review of the cases that it cites in support is clear. *Mondev, ADF, Pope & Talbot* and *Waste Management*, the cases referred to by the Claimant in support of its argument that *Neer* is no longer the controlling authority, are all disputes arising under NAFTA, and accordingly are determinative only as to the content of the FET obligation set out in Art 1105 of NAFTA. For example, *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 93 states (the paragraph cited by the Claimants): "*Both the Mondev and ADF tribunals rejected any suggestion that the standard of treatment of foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the Neer case*" (emphasis added).

or arbitral caselaw provides convincing substantiation” for the investor’s position.⁹⁰⁸ The tribunal observed that the decision in *Mondev v. USA*,⁹⁰⁹ also cited by the Claimants in support of their case, did not establish a new MST-FET standard, and that the *Mondev v. USA* tribunal held that “any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law”.⁹¹⁰ As stated by the tribunal in *ADF Group v. USA*, the investor has the burden of proving a breach of the standard.⁹¹¹ In relation to the MST-FET standard at customary international law, the Claimants argue that the *Neer* standard is not applicable, but do not provide an alternative standard by which the Respondent’s behaviour can be assessed, merely asserting that it has “evolved substantially since the *Neer* decision” but not stating what it has evolved into.⁹¹² The Claimants’ inability to identify the nature of the new standard they allege is symptomatic of that lack of evolution. As stated by the Respondent in its Counter-Memorial, it is for the Claimants to prove any evolution of the customary international law standard that they allege and to substantiate any new standard, yet they have plainly failed to do so.

563. As the Claimants submit at paragraph 174 of the Reply, with respect to the *Neer* standard, what is unfair or inequitable to the modern eye need not equate with the outrageous or egregious when assessed from a 1920s perspective. Indeed, that point was made by the Respondent in its Counter-Memorial at 239. Certainly, what behaviour is considered as shocking or outrageous has changed. But the essential element of the requirement, imposed by *Neer*, that, in order to breach the MST-FET standard *a state’s behaviour must be egregious*, has not changed. Ultimately, any modification to this general standard is for the Claimants to argue and to prove, and they have failed to do so.
564. Even if the Claimants had identified and proven the existence of customary international law rules protecting legitimate expectations and guaranteeing non-arbitrary treatment, the Claimants have not proven an FET violation under the MST. In the words of the tribunal in *Al Tamimi v. Oman*, the Respondent’s actions were in no way “egregious” or “flagrant.”⁹¹³ Far from *outrageous* or *shocking*, the Respondent’s actions were rational, non-discriminatory measures taken in response to NRD’s failure to perform under the Contract. There was nothing unfair or inequitable about the steps taken by the

⁹⁰⁸ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**Exhibit CL-073**), at para. 183.

⁹⁰⁹ *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**Exhibit CL-072**).

⁹¹⁰ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**Exhibit CL-073**), at para. 184.

⁹¹¹ *Ibid.*, (**Exhibit CL-073**), at para. 185.

⁹¹² Claimants’ Reply, at para. 177; Indeed, they fail to clearly state the standard as set out in the NAFTA jurisprudence.

⁹¹³ *Adel A Hamadi Al Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (27 October 2015) (**Exhibit RL-005**), at para. 390.

Respondent. Section VI.B below sets out an analysis of the specific alleged breaches of Article 5 of the USA-Rwanda BIT.

4. The “autonomous” FET standard

565. In the event that the Tribunal considers that the “autonomous” FET standard set out in the Belgium-Rwanda BIT is applicable in this case, the Respondent’s position on the nature of that standard is set out below. There can be no doubt that even if this alternative standard is applicable, which it clearly is not, the Respondent still has not breached it.

566. The Claimants rely heavily on the decision in *Tecmed v. USA* in the Reply at paragraph 160. However, the *Tecmed v. USA* decision is criticised as overly broad and representing not a standard but rather a “description of perfect public regulation in a perfect world, to which all States should aspire but which very few (if any) will attain”.⁹¹⁴ It has also been criticised as “questionable” and possibly leading a tribunal manifestly to exceed its powers.⁹¹⁵

567. The attempt in *Tecmed v. USA* to make legitimate expectations the crux of the FET standard has been repeatedly rejected. The Tribunal in *Rusoro Mining v. Venezuela* similarly set out a “threshold of propriety” to be met by a State, explaining that a tribunal is required to consider:

- “ - whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;
- whether the State had made specific representations to the investor, prior to the investment;
- whether the State’s actions or omissions can be labelled as arbitrary, discriminatory or inconsistent;
- whether the State has respected the principles of due process and transparency when adopting the offending measures;
- whether the State has failed to offer a stable and predictable legal framework, breaching the investor’s legitimate expectations.”⁹¹⁶

568. However, in that case as throughout, tribunals have tried to give meaning to the terms by circumscribing them with other terms such as ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’, ‘idiosyncratic’, ‘a manifest failure of natural justice in judicial proceedings’

⁹¹⁴ *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011) (**Exhibit RL-155**), at para. 10.3.6 citing Douglas, *Nothing if not Critical for Investment Treat Methanex: Occidental, Eureko and Methanex* (2006) 22 *Arbitration International* 27 at 28.

⁹¹⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007) (**Exhibit RL-156**), at para. 108; the opinion is positively referred to in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 600.

⁹¹⁶ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 524.

and a disregard of ‘procedural propriety’.⁹¹⁷ Although there is value in these efforts, they add little in terms of setting out the nature of acceptable and prohibited behaviour. Instead, they seek to refine or make more precise the abstract concepts of “fair” and “equitable” with yet more abstract concepts. However as correctly stated in *Lemire v. Ukraine* – “[t]he evaluation of the State’s action cannot be performed in the abstract”.⁹¹⁸

569. The Tribunal in *Rusoro Mining v. Venezuela* was clear in that case that “*In evaluating the State’s conduct, the Tribunal must balance the investor’s right to be protected against improper State conduct, with other legally relevant interests and countervailing factors*” including the principle that legislation and regulation are dynamic, that States enjoy a sovereign right to adopt and amend legislation, the fact that it is the investor’s duty to perform due diligence, and to show proper conduct before and after making the investment.⁹¹⁹ Additionally, recent tribunals have been clear that “*the commitment of the State to afford fair and equitable treatment to foreign investments does not entail relinquishing their regulatory powers in the public interest or the need to adapt their legislation to changes and emerging needs. ... there is a weighing of the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (in particular) its own citizens and residents.*”⁹²⁰
570. Regardless of the precise terms used, which differ across tribunals, all interpretations of the standard require a high threshold of impropriety.⁹²¹ It is clear that the state must have acted delinquently in some way, and it is not enough that a claimant should find itself in an unfortunate position, even if that is as a result of its dealings with a state.⁹²² The prohibition is generally linked to conduct that is arbitrary, idiosyncratic or discriminatory.⁹²³

5. “Creeping violation” of the FET standard

571. The Claimants initially, in the Memorial, alleged a suite of independent breaches of the FET standard, including denial of participation in iTSCi in 2014, misuse of police and court systems in May, June and September 2014, and unfair treatment during the reapplication

⁹¹⁷ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**Exhibit CL-069**), at para. 113; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at paras. 303-308; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 98.

⁹¹⁸ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (**Exhibit CL-032**), at para. 285.

⁹¹⁹ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 525.

⁹²⁰ *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (30 August 2018) (**Exhibit RL-157**), at para. 649 (citations omitted).

⁹²¹ *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (1 November 2013) (**Exhibit RL-038**), at para. 314.

⁹²² *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award (16 May 2014) (**Exhibit RL-158**), at para. 198.

⁹²³ *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award (19 December 2014) (**Exhibit RL-159**), at paras. 282-283.

process in 2014. However, having realised the limitation and time bar consequences of that pleading, rendering, as it did, almost all of their alleged breaches out of time, the Claimants now allege, in the Reply, that the Tribunal can, and should, find a “creeping violation” of the FET standard. They have made a 180 degree turn and now allege that “*it would be unfair and unjust to analyze each violation individually when the cumulative effect of every act results in a violation of the FET standard*” and insist, though without any clarity, that everything that they have set out in the Reply should be considered together, and that the final act in breach of the FET obligation was the public tender of the Five Concession Areas formerly held by NRD on 5 March 2016.⁹²⁴

572. The Respondent’s position is that, not only is this fundamental change to the Claimants’ case evidence of an uncertain and confused claim, but moreover that the concept of “creeping violation” on which they now rely does not apply in relation to the FET standard, as it is controversial and unsettled, and in any event completely inapposite.
573. The first tribunal to explicitly adopt the standard was the *El Paso v. Argentina* Tribunal in 2011, in a decision which stated:

*“The Tribunal considers that, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A creeping violation of the FET standard could thus be described as a process extending over time and 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.”*⁹²⁵

574. Although the Tribunal in *El Paso v. Argentina* found that while each of the government measures taken was consistent with the FET standard when considered individually, when all of those measures were considered together, their “*cumulative effect... completely altered the overall framework*” in which the investment was made, and amounted to a violation of the FET standard.⁹²⁶ However, for that reason, it stated that it was adopting a “creeping” violation of the FET standard, based on Article 15 of the ILC

⁹²⁴ Claimants’ Counter-Memorial on Preliminary Objections, at para. 17.

⁹²⁵ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-037**), at para. 518, note that the tribunal stated that its adoption of the creeping breach of the FET standard was “*not without precedent*” on the basis of a 2008 case. See *Société Générale v. The Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) (**Exhibit RL-161**), at para. 91, which stated that the concept was “*conceivable*”.

⁹²⁶ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-037**), at paras. 515, 519.

Articles.⁹²⁷ Subsequent tribunals have been clear that the tribunal in *El Paso* did not need to go so far, and that Article 15 was incorrectly applied.⁹²⁸

575. Similarly, commentators view the “creeping” breach analysis of the FET standard as “*misplaced, and premised on a misunderstanding of the term 'composite acts'*” set out in Article 15 of the ILC Articles.⁹²⁹ In order to explain the errors made in *El Paso v. Argentina*, the correct analysis of Article 15, which is set out in the *rationae temporis* discussion at paragraphs 429 to 430 above, is set out below.

576. Article 15 of the ILC Articles states:

“Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”⁹³⁰

577. The text of Article 15 of the ILC Articles is largely concerned with identifying the time at which a breach occurs. The operative language defines the concept of a composite act as “*a series of actions or omissions defined in the aggregate as wrongful*”. As the commentary to Article 15 explains, composite acts covered by Article 15 are those breaches of obligations which concern some series of acts or omissions defined in the aggregate as wrongful, such as obligations concerning genocide, apartheid, systemic discrimination or crimes against humanity.⁹³¹ That is, the term ‘composite act’ refers to obligations which can *only* be breached through a series of measures rather than through an individual act.⁹³² Although a composite act is an obligation that can only be breached through a series of measures, in some cases, each individual act may be wrongful (as in the case of the multiple unlawful killings that make up genocide). A composite act

⁹²⁷ Scott Vesel, *A ‘Creeping’ Violation of the Fair and Equitable Treatment Standard?* *Arbitration International*, Volume 30, Issue 3 (1 September 2014) (**Exhibit RL-160**), at pages 553–564 at 554, 556.

⁹²⁸ See, for example, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) (**Exhibit RL-162**), at para. 361, stating: “*In El Paso, the tribunal even defined the collection of acts which led to a forced sale of the investor’s Argentine shareholdings as a ‘composite breach’ in the sense of Article 15 of the ILC Articles. But for the purposes of that case it was not necessary to go so far. Article 15 only applies to a breach ‘through a series of acts or omissions defined in aggregate as wrongful’- for example, genocide*”.

⁹²⁹ Scott Vesel, *A ‘Creeping’ Violation of the Fair and Equitable Treatment Standard?* *Arbitration International*, Volume 30, Issue 3 (1 September 2014) (**Exhibit R-161**), at pages 553–564 at 554, 556.

⁹³⁰ International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at Article 15.

⁹³¹ *Ibid.*, (**Exhibit CL-084**), at paragraph 2 of the commentary to Article 15.

⁹³² Scott Vesel, *A ‘Creeping’ Violation of the Fair and Equitable Treatment Standard?* *Arbitration International*, Volume 30, Issue 3 (1 September 2014) (**Exhibit R-161**), at pages 553–564 at 556.

requires purpose or intention. As such, Article 15 cannot properly be considered to provide support for the concept of a creeping violation of FET set out in *El Paso v. Argentina*, and the Tribunal in that case adopted flawed reasoning in so using it.

578. At most, *El Paso v. Argentina* can properly stand for the proposition that a complete alteration of the legal framework which was designed to attract foreign investors, and subsequently became hostile to them, may be a breach of FET obligations even if a particular measure, independently, may not be a breach of those obligations.⁹³³
579. The attempt to adopt a “creeping” analysis of the alleged FET breaches, which does not genuinely exist as a matter of law, and is simply an erroneous turn of phrase and analysis from one case, *El Paso v. Argentina*, is plainly an attempt to subvert the limitation issues that arise for the Claimants. Indeed, the primary purpose of the attempt to adopt a creeping violation of FET is evident from the Claimants’ reliance on the analogy to creeping expropriation and the misquoted statement cited from *Siemens v. Argentina* that the time at which the breach occurs is the time of the last action or omission.⁹³⁴

B. The alleged breaches of Article 5 of the USA-Rwanda BIT

1. Summary of the alleged breaches

580. The Claimants, in the Reply, allege the following breaches of Article 5 of the USA-Rwanda BIT:
- 580.1. A general breach of the FET requirements in that:
- 580.1.1. The 2014 Law was implemented:
- 580.1.1.1. for an ulterior motive;⁹³⁵
- 580.1.1.2. in an unfair manner;⁹³⁶ and
- 580.1.1.3. in a discriminatory manner.⁹³⁷
- 580.1.2. The Respondent arbitrarily ignored RDB records.⁹³⁸
- 580.1.3. The Respondent denied tags to NRD.⁹³⁹

⁹³³ That interpretation of *El Paso* is supported by *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award (21 June 2019) (**Exhibit RL-163**), at para. 595; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) (**Exhibit RL-162**), at para. 362; *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (3 October 2006) (**Exhibit RL-164**), at para. 139, described this as “completely dismantling the very legal framework constructed to attract investors”.

⁹³⁴ Claimants’ Reply, at para. 169.

⁹³⁵ Claimants’ Reply, at paras. 212-216.

⁹³⁶ Claimants’ Reply, at paras. 208-211.

⁹³⁷ Claimants’ Reply, at paras. 198-207.

⁹³⁸ Claimants’ Reply, at paras. 221-236.

⁹³⁹ Claimants’ Reply, at paras. 237-242.

580.2. A breach of Article 5 because the Respondent violated the Claimants' due process rights.⁹⁴⁰

580.3. A breach of Article 5 by the Respondent by acting inconsistently with the Claimants' legitimate expectations and/or inconsistently with representations made by the Respondent that were relied on by the Claimants, that they would receive long-term licences.⁹⁴¹

581. The detail of these alleged breaches and the Respondent's responses to them is set out in detail below.

2. The allegations in relation to the 2014 Law

582. The Claimants allege that the 2014 Law was introduced with ulterior motive, and that it was implemented in an unfair and discriminatory manner. Specifically, they allege that the motive for the 2014 Law was to force the Claimants out of the Five Concession Areas,⁹⁴² the law was implemented unfairly in that the Respondent required the Claimants to re-apply when it knew that NRD did not have access to its corporate offices,⁹⁴³ and that it was implemented in a discriminatory way because Rwanda treated Tinco and the Claimants differently after the implementation of the 2014 Law.⁹⁴⁴ Each of these allegations will be addressed in turn.

583. The Claimants also allege in the Memorial that Respondent failed to negotiate new licences following former Minister Imena's letter of 2 April 2014.⁹⁴⁵ That claim is wrong for the reasons set out at paragraphs 285 to 293 of the = Counter-Memorial.

i. The 2014 Law was implemented in the public interest

584. The Claimants allege that the 2014 Law was implemented with the ulterior motive to force the Claimants out of the Five Concession Areas.⁹⁴⁶ This is untrue as a matter of fact; the 2014 Law was implemented in the public interest for the purpose of the modernisation and increased efficiency of the Rwandan mining sector. There was no intent to force the Claimants out of the Five Concession Areas. Additionally, the Respondent has an undeniable right to exercise its sovereign power to make and enforce laws.

585. As set out in the Respondent's Counter-Memorial, and not contested by the Claimants in the Reply, the requirement that a state treat a foreign investor in a fair and equitable manner must be read alongside the undeniable right of states to exercise their sovereign

⁹⁴⁰ Claimants' Reply, at paras. 217-219.

⁹⁴¹ Claimants' Reply, at paras. 178-197.

⁹⁴² Claimants' Reply, at para. 212.

⁹⁴³ Claimants' Reply, at para. 208.

⁹⁴⁴ Claimants' Reply, at para. 198.

⁹⁴⁵ Claimants' Memorial, at para 178.

⁹⁴⁶ Claimants' Reply, at para. 212.

legislative and executive power.⁹⁴⁷ While investors have a right to be protected against improper state conduct, that right must be balanced against other legally relevant interests and “*first among these factors is the principle that legislation and regulation are dynamic, and that States enjoy a sovereign right to amend legislation and to adopt new regulation in the furtherance of public interest*”.⁹⁴⁸ This does not authorise legislation to be targeted against a protected investor, but legislation can and should be designed to advance legitimate public policy.

586. The 2014 Law was enacted in the public interest and for the good governance of Rwanda. The Respondent has already, in its Counter-Memorial, stated the reasons for the enactment of the 2014 Law, and indicated that it was necessary to respond to the challenge faced by the mining industry in Rwanda.⁹⁴⁹ The Claimants have introduced no evidence to substantiate their rather extraordinary claims that the 2014 Law was designed to “*force the Claimants out of the Concessions*” as they claim.⁹⁵⁰ The reality was far less remarkable: Rwanda simply wished to improve the operation of its mining regime so as to better maximise productivity and returns.
587. As set out in the Respondent’s Counter-Memorial, the purpose of the 2014 Law was to introduce more flexibility into the licencing regime.⁹⁵¹ Additionally, it was clearly in the national interest to alter the existing structure of the mining industry to free up high mineral potential areas for appropriate exploitation and maximised production. As of March 2013, there were large inactive areas in many of the concession areas that had been granted to private investors under the 1971 Law because those concessions were too large to be optimally exploited.⁹⁵² Further, no mining company had been able to provide a comprehensive exploration report or upgrade mining over the entirety of its concession. In light of these factors it was plainly in Rwanda’s interest to sub-divide and redistribute those concession areas in order to maximise production and improve economic returns. The intent was not to target the Claimants or any other existing licensed concession holder but rather to maximise production from the concession areas by enabling larger areas to be rationally exploited through amending the allocation of concession areas.⁹⁵³ As set out in the Counter-Memorial at paragraph 260, the introduction of the 2014 Law meant that licences could have various time periods, which were not fixed, but which could be designed with terms appropriate for each application.

⁹⁴⁷ *Yuri Bogdanov and Yulia Bogdanov v. Republic of Moldova*, SCC Case No. V091/2012, Final Award (16 April 2013) (**Exhibit RL-011**), at para. 186.

⁹⁴⁸ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 525.

⁹⁴⁹ Respondent’s Counter-Memorial, at paras. 259-260.

⁹⁵⁰ Claimants’ Reply, at para. 212.

⁹⁵¹ Respondent’s Counter-Memorial, at paras. 259-260, citing Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 26.

⁹⁵² E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971* (23 March 2013) (**Exhibit C-143**); Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31.

⁹⁵³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31.

The term of the licence would vary depending on the evidence given by applicants as to their ability to successfully develop and operate the concession areas. This allowed Rwanda to tailor licences to meet the needs and capabilities of individual mining operators and so to better manage investment, environmental resource, and impacts on communities, in the public interest of Rwanda.

588. In support of their allegation that the 2014 Law was designed to force Claimants out of the Five Concession Areas, as a matter of fact, the Claimants point to Rwanda's alleged "*concern at the purchase*" of NRD by Spalena.⁹⁵⁴ While the Claimants appear to imply that Rwanda's concern at Spalena's purchase of NRD was in some way misplaced or improper, that is not the case. As explained by former Minister Imena, the Government had no interest in seeing NRD fail, as it would have benefited from NRD being successful.⁹⁵⁵ However, in light of NRD's failure to industrialise or develop the concessions in any meaningful sense since 2007, Rwanda was understandably concerned that NRD's financial and technical capacity was too small relative to the size of the Five Concession Areas.⁹⁵⁶ The basis for the concern is clearly articulated in the document in which it is expressed. Rwanda's concern was that BVG, under the control of Mr. Marshall, had failed to develop the concession area which it held at Bisesero: "*production has been very small: no credible facilities to improve production are on the ground*" and "*no exploration work has been done yet*". The document selectively quoted by the Claimants, if set out in full, provides the basis for the concern:

*"Note: the information we have is that this company has bought NRD, though its activity on [its] existing concession were very minimal. Observation: the reports presented are of no value at all; this company has shown no serious technical program to do exploration work. Yet now it might control a sizable part of our former concessions. The takeover on NRD needs to be investigated and if the company has to keep any stake, the size should be significantly reduced".*⁹⁵⁷

589. It is clear from this that Rwanda's concern related to BVG's failure to appropriately explore or develop the Bisesero concession that it had held prior to the acquisition of NRD. The concern is valid and appropriate. Rwanda's intention was to develop, professionalise and make more profitable its mining industry. The involvement of BVG, Spalena and Mr. Marshall in NRD, in circumstances where BVG, under the control of Mr. Marshall, had not come close to developing its concession area to an appropriate or acceptable standard, was of serious concern at a time when Rwanda was working towards revitalising its mining industry by increasing and improving exploration, development and production.

⁹⁵⁴ Claimants' Reply, at para. 213, referring to Summary on Performance of Large Mining and Exploration Companies (**Exhibit C-141**).

⁹⁵⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 32.

⁹⁵⁶ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 32.

⁹⁵⁷ Summary on Performance of Large Mining and Exploration Companies (**Exhibit C-141**).

590. Further, Rwanda intended to reduce the size of the large concession areas because that would allow investors to hold concession areas of a size that they could appropriately manage.⁹⁵⁸ As explained by former Minister Imena, the key reason for this was that the earlier 1971 Law was very outdated and based on old very large and unworkable colonial mining perimeters.⁹⁵⁹ The concern, as set out in the Cabinet Paper, was that *“no company was able to provide a comprehensive exploration report or upgrade mining in the whole concession given”* and that *“large parts of these concessions remained inactive ... [because] some of them are too big to exploit optimally by most of the companies who apply for them”*.⁹⁶⁰ Production was *“relatively very low compared to the expected production if reasonable parts of the whole concessions were rationally exploited”*.⁹⁶¹ That is, it was clear to the Respondent that the concession areas previously granted were under-exploited, because they were too large for investors to manage effectively.
591. In order to achieve suitable economic returns the Government decided that the concession areas needed to be broken up.⁹⁶² As set out in the Cabinet Paper, the purpose was *“increasing production, attracting more and capable investors and for efficient management of such Concessions in the mining sector”*. This is a common, and appropriate, government goal. It was not in any way inappropriate or designed to detrimentally impact the Claimants, or disproportionately affect them. To the extent that mining companies, including NRD, had failed to properly develop their concession areas and increase production, it was plainly appropriate for the Government to introduce policy and legislation in order to stimulate production and development. Any allegation of *“ulterior motive”* against the Respondent is unfounded. The changes were a result of the changing economic landscape and were not in any way directed toward NRD.⁹⁶³ However, Rwanda had legitimate and serious concerns rising out of the Claimants’ and NRD’s failure to develop the Five Concession Areas, and the concession area at Bisesero. Further, it is clear that there were many other companies which the Government considered had insufficient capacity to properly develop concession areas of the size that they had been granted.⁹⁶⁴
592. The Claimants allege that Rwanda’s concern about the amount of land controlled by the Claimants demonstrates that it sought to *“push the Claimants out of the country and reclaim their Concessions”*.⁹⁶⁵ Any concerns about the amount of land controlled by the Claimants demonstrates no such thing. It merely shows, as stated above, the combination of a general concern that investors in mining in Rwanda had been granted concession areas that were too large to be effectively mined, coupled with (and exemplified by) a

⁹⁵⁸ E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971* (23 March 2013) (**Exhibit C-143**).

⁹⁵⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 31.

⁹⁶⁰ E. Imena, *Cabinet Paper Repealing Presidential Orders of 1971* (23 March 2013) (**Exhibit C-143**).

⁹⁶¹ *Ibid.*, (**Exhibit C-143**).

⁹⁶² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31.

⁹⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 31-32.

⁹⁶⁴ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 33.

⁹⁶⁵ Claimants’ Reply, at para. 215.

specific concern that NRD and BVG, had to date failed to explore, exploit or generate production from the concession areas in which they were licensed to mine.

593. As is clear from the above, the enactment of the 2014 Law was not for an ulterior motive, or inconsistent with the fair and equitable treatment standard, regardless of the threshold adopted for that standard. The 2014 Law was adopted in the public interest, in order to increase mineral production and attract investors to Rwanda. It was not unfair, arbitrary, idiosyncratic or discriminatory, but appropriate legislation, which the sovereign Government was entitled to enact.

ii. The re-application requirement was not unfair

594. The Claimants also allege that the requirement under the 2014 Law that they re-apply for the Licences “*deliberately set Claimants up for failure*” because it was done at a time when NRD was barred from accessing its offices by Rwanda.⁹⁶⁶ That allegation is denied and assessed in more detail in the section that follows.

595. On 18 September 2014, NRD made a re-application for long-term licences to mine under the 2014 Law. It provided what it recognised was only a partially complete application, claiming that the gaps were due to its inability to access its corporate files, but that much of the information requested had previously been provided in any event.⁹⁶⁷ The Claimants now raise an issue of fairness, in relation to their inability to access its corporate files.⁹⁶⁸ The Claimants specifically allege that Rwanda’s requirement that the Claimants re-apply for licences was unfair because Rwanda knew that NRD did not have access to its corporate offices, and particularly that it was unfair because Rwanda had “*barred Claimants from accessing*” NRD’s corporate offices.

596. These claims are not correct. As stated by former Minister Imena:

“I find this claim extraordinary. Neither I nor the Ministry had authorised Mr. Benzing to take control of NRD or its assets or had any knowledge about it until informed by Mr. Marshall. When I wrote to NRD on 18 August 2014 I did not know that NRD were barred from accessing the concessions or their office.

Following my request, and as set out in detail at paragraphs 31 to 40 of my first statement, NRD did re-apply (albeit in a very piecemeal way) but after assessing the application NRD were told that they had not met the requirements for the granting of a long-term licence. Numerous evaluation reports and explanatory

⁹⁶⁶ Claimants’ Reply, at para. 208-211.

⁹⁶⁷ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (18 September 2014) (**Exhibit C-084**). The Respondent notes that this letter appears to be incorrectly dated 18 August 2014 when it was sent on 18 September 2014, see Letter from the Chairman of NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister E. Imena), *Delivery of a Re-application Letter* (1 November 2014) (**Exhibit R-019**).

⁹⁶⁸ Again, the Claimants state that “they” were forced to re-apply a day before “they” were purportedly granted access to the concessions, but the Respondent assumes the reference was intended to be to NRD and not to the Claimants.

notes were prepared by Dr. Michael Biryabarema which formed the basis of this decision, including evaluation reports from September 2014, January 2015, February 2015 and an explanatory note from March 2015. All evaluations concluded that NRD's application had failed to meet the requirements for the granting of a long-term licence.

At paragraph 61 of my first statement, I explained that NRD was not the only company that was required to "re-apply" for licences. I understand that the Claimants now suggest that the re-application process was likely to be a ruse to drive the Claimants from the country. That is completely untrue. A number of companies, including NRD, were required to re-apply because that is what the 2014 law required. If anything, the act of asking them to "re-apply" was a sign of our good faith towards NRD because they did not have licences: we were not obliged to give them any further opportunity to prove they should be granted long term licences."⁹⁶⁹

597. Mr. Mugisha sets out the nature of the re-application requirement under the 2014 Law and explains that the grandfathering provision that NRD seeks to rely on, namely Article 52 of the 2014 Law, does not apply to NRD:⁹⁷⁰

597.1. *Firstly*, this is because the 2014 Law provided that all mineral licences granted under the 2008 Law would remain in force until expiration of the period for which they were granted, but NRD had never had any licence granted to it under the 2008 Law (the Licences being granted under the 1971 Law); and

597.2. *Secondly*, it was because the Licences had already expired in October 2012, and the company was operating solely on the basis of the temporary authorisation granted by Dr. Biryabarema in February 2013 as a good faith indulgence.

598. Further, even if NRD had been able to bring itself within Article 52 of the 2014 Law, the requirement that NRD reapply for its licence was consistent with Article 52 of the 2014 Law, and did not breach any other laws. The 2014 Law prohibited the extension or renewal of any pre-existing licences, save for licences which provided for right to renewal or extension. Accordingly, companies holding licences that did not contain a right to renewal or extension would need to reapply for a new licence under the terms of the 2014 Law. None of the licences held by NRD included a right of renewal or extension, and therefore it is clear on the plain terms of the 2014 Law that NRD, together with any other company whose licence did not include a right of renewal, would need to re-apply.

599. Additionally, as set out in the Counter-Memorial at paragraph 157, although NRD alleged that it was unable to provide some documents, due to its inability to access its offices, the documents requested could have been sourced from other places. Tax clearance

⁹⁶⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at paras. 34-36 (citations omitted).

⁹⁷⁰ Second Expert Report of Richard Mugisha dated 27 May 2020, at paras. 32-34; Expert Report of Richard Mugisha dated 24 May 2019, at paras. 31-32.

certificates could have been obtained from the Rwanda Revenue Authority, a recommendation on the status of the environment at the Five Concession Areas could have been obtained from REMA, and evidence of funding capacity should in any event have been prepared, specifically in relation to the application, with the assistance of NRD's financial advisors.

600. Further, the requirement to re-apply was not unique to NRD. For example, Gatumba was invited to renegotiate the terms of the agreements for the concession areas that it held on the basis that the old law defining the concession areas in Rwanda had been repealed.⁹⁷¹ Gatumba was treated in exactly the same way as NRD.⁹⁷² Further, as set out above at paragraphs 265 to 270, many other companies including Mirage Ltd,⁹⁷³ Gamico Ltd⁹⁷⁴ and Precious Mining Ltd⁹⁷⁵ had their licences terminated or lost their concession areas when their contract expired and were accordingly requested to close their operations. In 2016, at least 39 companies were told that their licences had expired and as such they had to close their operations.⁹⁷⁶

601. It is clear from the above that the re-application requirement was not unfair, as it was consistent with the 2014 Law, and had the same effect on the Claimants as it had on others in the same as NRD. The re-application requirement was fair and appropriate.

iii. The re-application requirement was not discriminatory

602. The Claimants allege that the implementation of the re-application requirement was discriminatory, on the basis that they ought to have been treated in the same way as Tinco pursuant to the 2014 Law, but were not.⁹⁷⁷ The Claimants allege that they were in the same position as Tinco, but Tinco was treated more favourably as its investment vehicles, Rutongo and Eurotrade, were not required to re-apply for licences, and were granted long-term licences under the 2014 Law. They allege that this treatment "*fits neatly within the definition of discriminatory State conduct*" in breach of Article 5 of the USA-Rwanda BIT.⁹⁷⁸ In their Memorial, the Claimants advanced this allegation in relation to the MFN clause and alleged a breach of that clause on the basis of differential

⁹⁷¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 37, Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Director of Metmar (P. Boshoff), *Plans for Gatumba Mining Concessions* (2 April 2014) (**Exhibit R-197**).

⁹⁷² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 37.

⁹⁷³ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Mirage Ltd (A. Gahire), *Response to your application for license* (12 May 2015) (**Exhibit R-122**).

⁹⁷⁴ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Gamico Ltd (A. Nzabakenga Zaninka), *Response to your application for license* (12 May 2015) (**Exhibit R-123**).

⁹⁷⁵ Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Precious Mining Limited (S. R. Chandra), *Termination Notice* (20 May 2015) (**Exhibit R-124**).

⁹⁷⁶ See, for example, letters sent to Avolmi Ltd (22 January 2016) (**Exhibit R-125**), ECPE Ltd (22 January 2016) (**Exhibit R-126**), Nyamico Cooperative (22 January 2016) (**Exhibit R-127**), UMECO (22 January 2016) (**Exhibit R-128**), Robust Mining (27 January 2016) (**Exhibit R-129**), Sofama Minerals (27 January 2016) (**Exhibit R-130**) and letters sent on 3 June 2016 to companies (**Exhibit R-131**).

⁹⁷⁷ Claimants' Reply, at paras. 198-207.

⁹⁷⁸ Claimants' Reply, at para. 204.

treatment between the Claimants and Tinco. They now advance a claim of discriminatory treatment in violation of the FET standard, though based on the same facts.

603. Regardless of how the claim is characterised, in fact, the treatment does not approach discriminatory state conduct. Discrimination arises only when different treatment occurs in like circumstances; a mere showing of differential treatment is not sufficient to establish unlawful discrimination.⁹⁷⁹ Rather, in order for treatment to be discriminatory, comparators must be materially similar; and there must be no reasonable justification for differential treatment.⁹⁸⁰
604. The alleged discrimination in relation to the treatment of Tinco in comparison with NRD, through its investment vehicles Eurotrade and Rutongo was dealt with in detail in the Counter-Memorial at paragraph 470. However, the Claimants have now changed their position, as they have done with other aspects of its case. The Claimants previously alleged that NRD was unfairly required to re-apply for its licences although it was not required to do so by the 2014 Law (as is stated in its Memorial).⁹⁸¹ They now accept that it may be the case that NRD was rightly required to re-apply (as is stated in the Reply),⁹⁸² but allege that in this case Tinco also should have been required to re-apply. In addition the Claimants allege that the re-application requirement was procedurally unfair because the Respondent knew that the Claimants did not have access to their offices,⁹⁸³ an allegation which is denied, and addressed at section VI.B.1.ii above. The Claimants now state that, on the basis of reviewing the documents, Tinco should have been required to re-apply subject to the 2014 Law.
605. In any case, the Respondent is and has consistently been clear as to its position: NRD was rightly required to re-apply for licences to mine the Five Concession Areas (whether that was all five or a smaller number) that it wished to continue to mine after the entry into force of the 2014 Law. This is reflected in the Assessment Report that is discussed by the Claimants in the Reply,⁹⁸⁴ which states that NRD was “*allowed to apply*” for licences to mine the Five Concession Areas which it had previously held, in order to comply with the 2014 Law, which prevented the extension or renewal of a licence granted prior on its plain contractual terms. The Claimants incorrectly assert that the Assessment Report to demonstrate that the assessment team “*acknowledged that NRD’s Contract and Licences pre-dating the new law remained in effect and the Application was to be assessed under*

⁹⁷⁹ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**Exhibit RL-024**), at para. 175.

⁹⁸⁰ *Ibid.*, (**Exhibit RL-024**), at para. 175.

⁹⁸¹ Claimants’ Memorial, at para. 177 (“*Minister Imena’s “re-application” request was only done to harass NRD. This request violated the law because NRD’s licenses remained in full force following the passage of the 2014 Law and NRD could not “re-apply” for a right that it already had.*”)

⁹⁸² Claimants’ Reply, at para. 203 (“*It is clear that both Tinco and Claimants had to re-apply but Rwanda did not require Tinco to do so*”).

⁹⁸³ Claimants’ Reply, at para. 208.

⁹⁸⁴ Claimants’ Reply, at para. 200.

the still applicable Contract and Licences".⁹⁸⁵ In fact, the Assessment Report clearly demonstrates that the Claimants were allowed to apply, under the 2014 Law, for renewal of their licences.

606. The 2014 Law was applied consistently. Tinco and the Claimants were in different positions and were properly treated differently on the basis of those different positions.

607. The background to the 2014 Law and the basis for the reapplication requirement was set out in the 2014 Law and explained in the Counter-Memorial at paragraphs 143 to 155 and above at paragraphs 43 to 45 and is not repeated here in detail. In summary, the 2014 Law set out the general principles of the new licencing framework, as well as specific rules concerning acquisition of a mineral licence, and the rights and obligations that attach to licences once granted. It also included transitional provisions, relating to licence-holders who held licences at the time of enactment of the 2014 Law.⁹⁸⁶ The key issue in this proceeding is the application of the transitional provisions.

608. The transitional provisions provided:

"Article 52: Transitional provision

*Any mineral licence or quarry permit granted under Law n° 37/2008 of 11/08/2008 on mining and quarry exploitation shall remain into force until expiration of the period for which it was granted. No mineral or quarry licence granted prior to this law shall be extended or renewed. However, where the mineral or quarry licence granted prior to this law provided for a right to apply for a renewal or extension of the licence, the holder thereof may be granted, subject to this law, a similar type of licence on a priority basis if he/she meets the requirements."*⁹⁸⁷

609. This is exactly what was cited in the section of the *"Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd"* referred to by the Claimants in the Reply at paragraph 200.⁹⁸⁸

610. It is clear from Article 52 of the 2014 Law that the licences granted prior to the 2008 Law would not be extended or renewed, but that any licence holders whose licence included a right to apply for extension or renewal were able to apply for a renewal or extension under the 2014 Law.

611. NRD was not able to apply for the extension or renewal of its licences because, as explained at paragraphs 114 above, NRD's Contract expired on its own terms in November 2010 and, following the negative review of the purported feasibility study

⁹⁸⁵ Claimants' Reply, at para. 201.

⁹⁸⁶ Rwanda Law No. 13/2014 on Mining and Quarry Operations (20 May 2014), published in the Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**), at Article 52.

⁹⁸⁷ *Ibid.*, (**Exhibit CL-002**), at Article 52.

⁹⁸⁸ Dr. M. Biryabarema, *Assessment Report of Additional Documents Submitted by NRD Rwanda Ltd* (February 2015) (**Exhibit R-024**).

which did not justify the granting of further licences, the Licences expired, following a number of short extensions, in October 2012.

612. The Claimants state that the assessment report acknowledges that NRD's licences remained in force.⁹⁸⁹ That is not so. The report clearly states that NRD was "*allowed to apply for renewal of the former licence*", which explicitly recognises that the licence was "former" and not current. It "considered" the Contract but did not in any way acknowledge that it remained on foot. As Dr. Biryabarema explains:

*"I understand that the Claimants assert that this Assessment suggests that NRD's Contract and Licences remained in effect. That is not correct. The assessment states that "NRD Rwanda LTD' was allowed to apply for the renewal of the former license". As this statement indicates, we allowed NRD to re-apply for the Concessions notwithstanding that the Contract and former licences had expired several years previously."*⁹⁹⁰

613. A technical team was set up to assess NRD's application, which was required because neither the Contract nor the Licences remained active. The application was assessed carefully and diligently, and the Assessment Report sets out why NRD's applications were rejected.⁹⁹¹
614. By contrast, in its application, Rutongo submitted documents and evidence that met the requirements for the granting of a long-term licence, including the required feasibility studies, which was detailed and had been independently assessed. As explained by former Minister Imena: "*Rutongo's application, for example, was much more detailed than anything submitted by NRD. Not only this, but both Eurotrade and Rutongo had raised production levels in their concessions by considerable amount, invested far more into exploration, infrastructure and equipment, and carried out high quality exploration – the difference between them and NRD was staggering.*"⁹⁹²
615. Indeed, in a letter to the Rwanda Revenue Authority dated 31 July 2013, Mr. Marshall himself acknowledges the vast difference between Rutongo and NRD, stating that both

⁹⁸⁹ Claimants' Reply, at para. 19.

⁹⁹⁰ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 15.2.

⁹⁹¹ Witness Statement of Dr. Michael Biryabarema dated 24 May 2019, at para. 18.

⁹⁹² Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 58-59; Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.1, referring to Feasibility study for 30 year mining licence in relation to Rutongo Mines (sections A and B) (**Exhibit R-042**), Contract for acquiring the Rutongo Mining Concession (**Exhibit C-023**), Environmental Assessment and Protection Plan for Rutongo Mines (27 August 2008) (**Exhibit R-043**), Investment Plan for Rutongo Mines (27 August 2008) (**Exhibit R-044**), Survey Report on the siting of the Rutongo concession beacons (22 August 2009) (**Exhibit R-045**), Rutongo Mines Exploration Programme (18 October 2010) (**Exhibit R-046**), 2nd Quarter exploration report, Rutongo Mines Ltd (23 October 2012) (**Exhibit R-047**), Historic Operating Results and investment summary, Rutongo Mines Ltd (**Exhibit R-048**), Report on the Nyramyumba blast samples (**Exhibit R-049**), Independent Review of Resource Estimation Methods for Rutongo Mines, Rwanda (May 2012) (**Exhibit R-050**).

Rutongo and Gatumba have “*nearly twenty times our level of production and turnover.*”⁹⁹³

616. While the Claimants allege discriminatory treatment when compared with Tinco, Tinco’s two investment vehicles Eurotrade and Rutongo were in vastly different circumstances to NRD, which explains their different treatment. First, they had applied for long-term licences of 30 years while their existing licences were still in place. Accordingly, their applications were treated as a renewal and not as a new application.⁹⁹⁴ NRD had no licences when the 2014 Law came into effect and therefore its application had to be treated as a new application.⁹⁹⁵
617. Discrimination occurs when treatment is “*based on unjustifiable distinctions*”⁹⁹⁶ or if the treatment that occurs is “*differential treatment of a foreign investor ... based on unreasonable distinctions and demands*”.⁹⁹⁷ In this case, it is clear that the differential treatment was based on a very rational basis, namely different circumstances. Accordingly, the re-application requirement was not discriminatory. The treatment of NRD was different to that of Rutongo and Eurotrade, but only because the circumstances were different. Each was treated pursuant to the plain terms of the 2014 Law.
618. The Claimants have therefore failed to make out any breach of Article 5 of the USA-Rwanda BIT.

iv. In any event, the claims based on Rwanda’s allegedly discriminatory, unfair and arbitrary implementation of the 2014 law, in alleged violation of the FET standard, are out of time

619. The Respondent has explained at paragraphs 43 to 50 of their MPO why this claim is out of time. As explained, the loss arising from any alleged unfair, discriminatory or arbitrary introduction or implementation of the 2014 Law clearly would have been, or at least should have been, first known to the Claimants at the time of the implementation of the 2014 Law, or very shortly thereafter, even if the full extent and quantification of the alleged loss and damage was unclear. In fact—remarkably—the CMPO makes no mention of this particular claim and provides no evidence to establish that the claim is not time barred.
620. Instead, the Claimants simply state, without analysing the proposition in relation to this particular claim, that “*all of Claimants’ claims under the BIT accrued at the time Respondent expropriated their investment*”,⁹⁹⁸ alleging that this occurred either in March

⁹⁹³ Letter from NRD (R. Marshall) to Rwanda Revenue Authority (B. Kagarama), *NRD RIN 101390940* (31 July 2013) (**Exhibit R-107**), at page 5 (emphasis in original).

⁹⁹⁴ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

⁹⁹⁵ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

⁹⁹⁶ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 309.

⁹⁹⁷ *Ibid.*, (**Exhibit CL-033**), at para. 307.

⁹⁹⁸ Claimants’ Counter-Memorial on Preliminary Objections, at page 35.

2016, at the time of the public tender of the Five Concession Areas formerly held by NRD, or alternatively on 19 May 2015, the date of receiving former Minister Imena's letter confirming its earlier decision to reject NRD's licence application.⁹⁹⁹

621. The significance of the public tender in 2016 to these claims of unfair, discriminatory or arbitrary introduction or implementation of the 2014 Law is unexplained. The Claimants have failed to explain how this alleged breach, based on their alleged treatment by the Respondent in 2014, could not have crystallised until March 2016, when the Five Concession Areas were publicly tendered, or alternatively, when long-term licences were not granted on 19 May 2015. This is because there is no reasonable case that it did.
622. In relation to any ulterior motive to the introduction of the 2014 Law, this alleged breach plainly, on its face and as pleaded, occurred prior to and on introduction of the 2014 Law. The Claimants cannot plausibly claim that they were unaware of the introduction of the most significant legislative reform in their sector in years.
623. In relation to the alleged unfairness of the re-application requirement, this alleged breach (which, like all the breaches, is denied) obviously occurred prior to the Cut-Off Date, and NRD (and through it the Claimants) would have had actual knowledge, or at the very least, constructive knowledge, of the alleged breach and any associated loss when the negotiations allegedly failed to materialise following former Minister Imena's letter of 2 April 2014.¹⁰⁰⁰
624. In relation to the alleged discrimination, to the extent to which there was any inconsistent treatment, which is denied, the Claimants would have been aware of it when it occurred, or in any event well prior to either Cut-Off Dates. Indeed, the Claimants' case is that, "*The effect of providing more favorable treatment to a non-party investor is an instantaneous and direct violation of the BIT*".¹⁰⁰¹ It is difficult to reconcile this statement with the Claimants' claim that they ought not to have known of this breach until March 2016, or alternatively, until May 2015. Indeed, the Claimants' knowledge is plain in correspondence from NRD to Minister Biruta dated 5 November 2014, which alleges unfair and discriminatory treatment against NRD, stating that a foreign licence-holder was granted two years to re-apply, and that the Claimants considered that to be prejudicial against NRD.¹⁰⁰²
625. In their CMPO and the Reply, the Claimants introduce the concept of a "creeping" breach of the FET standard. Due to the confused nature of the Claimants' pleadings, it remains unclear as to the extent to which the Claimants are alleging that the Respondent's alleged

⁹⁹⁹ Claimants' Counter-Memorial on Preliminary Objections, at para. 86.

¹⁰⁰⁰ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**).

¹⁰⁰¹ Claimants' Memorial, at para. 283 (emphasis added).

¹⁰⁰² Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 3.

failure to implement the 2014 Law uniformly was a breach *in itself* of the FET standard or part of the alleged creeping breach.

626. In any event, as with the claims based on Rwanda’s failure to grant long-term licences, recharacterising their claims as a “*creeping breach of the FET standard*” and a “*creeping*” expropriation does not assist the Claimants. Even if all the events could be characterised as a single “*creeping*” breach of the FET standard or “*composite act*”, then it is one which was constituted, and known of, long before the First Cut-Off date. At a minimum, the actions or omissions sufficient, and alleged in the Memorial to be sufficient,¹⁰⁰³ to constitute the composite act that is alleged to be in breach of the FET standard took place, and were known of, long before the First Cut-Off date, as per the *Siemens* test. In particular, as set out in the Respondent’s MPO:

626.1. The Respondent’s allegedly unfair treatment of NRD compared with other investors was known to NRD (and through it the Claimants) in 2014, as evidenced by a letter from NRD to former Minister Imena dated 1 November 2014,¹⁰⁰⁴ and a letter from NRD to Minister Biruta dated 5 November 2014,¹⁰⁰⁵ in which NRD expressly alleged this unfair treatment compared with other investors.

626.2. Any associated loss took place, and the Claimants were aware of the supposed loss and damage to a sufficient degree, prior to the Cut-off Date.

626.3. The Respondent’s alleged failure to negotiate (to the extent this claim is still advanced) would have been known to NRD in 2014 and through it the Claimants, who would have had actual knowledge, or at the very least, constructive knowledge, of the alleged breach and any associated loss when the negotiations allegedly failed to materialise following Minister Imena’s letter of 2 April 2014.

627. The Claimants have failed to explain why they needed to know of any further alleged breaches in order for them to have had actual or constructive knowledge of the alleged creeping breach of the FET standard (which is denied). Plainly, they did not.

628. Accordingly, the Claimants first knew of this alleged breach falling under this claim in 2014 at the latest, well before the First Cut Off Date on 14 May 2015. The claims in relation to the introduction and the implementation of the 2014 Law are therefore out of time, and the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* in relation to them.

¹⁰⁰³ Claimants’ Memorial, at paras. 176-182.

¹⁰⁰⁴ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Appeal of Decision* (1 November 2014) (**Exhibit C-086**), at page 2.

¹⁰⁰⁵ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 3.

3. The allegation that the Respondent arbitrarily ignored RDB records

i. The Respondent did not ignore RDB records for any improper purpose

629. The Claimants allege that RDB records are determinative of ownership of a company in Rwanda, and that the Respondent “*arbitrarily ignored*” the RDB records and allowed Mr. Benzinge to control NRD in 2012 and between June and August 2014, in breach of Article 5 of the US-Rwanda BIT.
630. The crux of this claim is that, in the Claimants’ view, in June to August 2014, Rwanda ought to have preferred the RDB records of ownership over the Arbitral Decision and subsequent Supreme Court decision. Their concern is that these two sources provided conflicting evidence as to the ownership of NRD, and that on the basis of the Arbitral Decision, they were deprived, for a time, of the ability to manage NRD. The Claimants allege that Rwanda, improperly, allowed Mr. Benzinge the ability to control NRD at various times during NRD’s operation in Rwanda.
631. The background to the dispute around NRD’s ownership is set out in detail in the Counter-Memorial at paragraphs 182 to 191 and above at paragraphs 193-205 and is not repeated here. In brief, RDB records were initially changed following an approach by Mr. Benzinge, and in 2014 following the Arbitral Decision and a decision of the Supreme Court of Rwanda.
632. In 2012, the RDB changed NRD’s corporate information to reflect ownership and shareholding by Mr. Benzinge, on the basis of information provided by Mr. Benzinge at the time.¹⁰⁰⁶ After complaint from Mr. Marshall, investigation by the RDB, and presentation of records by Mr. Marshall that he was the beneficial owner of NRD, the records were changed back.¹⁰⁰⁷ The Claimants allege that Rwanda “*never provided a coherent explanation*”¹⁰⁰⁸ for the decision, but in fact it is consistent with standard practice, as set out by Mr. Mugisha:

*“In practice, the RDB’s register of shareholdings relating to each Rwandan company is updated following filing annual returns, or at other times as and when the company, through its directors or shareholders, amends and updates the records and informs the RDB.”*¹⁰⁰⁹

633. At the later time in issue, in mid-2014, Rwanda was faced with two competing interests, one expressed in the RDB records and the other expressed in a decision of the Supreme Court of Rwanda, with both Mr. Benzinge and Mr. Marshall claiming to act for and on

¹⁰⁰⁶ RDB Certificate of domestic company registration for NRD (2 August 2012) (**Exhibit R-026**).

¹⁰⁰⁷ Letter from NRD (R. Marshall) to the CEO of the RDB (C. Akamanzi) (3 August 2012) (**Exhibit R-231**); RDB Full Registration information for Domestic Company for NRD (6 August 2012) (**Exhibit R-027**); RDB Certificate of Domestic Company Registration (6 August 2012) (**Exhibit R-028**); Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of NRD* (6 August 2012) (**Exhibit R-29**).

¹⁰⁰⁸ Claimants’ Reply, at para. 222.

¹⁰⁰⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 52.

behalf of NRD in June 2014.¹⁰¹⁰ Faced with two competing claims to ownership, the Respondent was forced to act based on the best information available to it at the time. It elected to favour the decision of the Arbitral Tribunal, as upheld by the Supreme Court of Rwanda. That decision was not arbitrary or improper.

634. *Firstly*, in contrast to the Arbitral Decision and the Supreme Court Decision, RDB records are not determinative of ownership. Mr. Rwamasirabo, the Claimants' witness who comments on Rwandan law despite not being presented as an expert, states that a certificate of incorporation from the RDB is conclusive evidence of and determinative that ownership of the company.¹⁰¹¹ That is incorrect. As Mr. Mugisha makes clear:

“Mr Rwamasirabo cites no support for this assertion, and indeed misunderstands Article 22 of the Companies Law, which states:

A certificate of incorporation is a conclusive evidence that all the requirements of this law in respect of incorporation have been complied with; and that the company has been duly incorporated under this law on the date of incorporation stated in the certificate.

On the plain words of Article 22, a certificate of incorporation is conclusive evidence that:

- 1. All the requirements of the Company Law in respect of incorporation have been complied with; and*
- 2. the company has been duly incorporated under the Companies Law on the date of incorporation stated in the certificate.*

That is, a certificate of incorporation is conclusive only as to the fact of incorporation and the date of incorporation. However, Mr Rwamasirabo is not correct that it is conclusive as to the ownership of the company as at incorporation, let alone the owners as at any date after incorporation. The most that could be said is that the certificate of incorporation and the documents submitted with that certificate to the RDB will constitute prima facie evidence as to ownership, but there is no basis for suggesting that that evidence would be conclusive or irrebuttable.

*Nowhere in the Companies Law is it provided that any records held by the Registrar General are conclusive evidence as to ownership of the company at any stage.”*¹⁰¹²

635. The Claimants state that *“The RDB never provided a coherent explanation for its decision to change the corporate registry upon the say-so of one Rwandan national”*.¹⁰¹³ In fact,

¹⁰¹⁰ See Letter from Lex Chambers Ltd (I. Bizumuremyi) to Rwanda Development Board (The Registrar General) (29 May 2014) (**Exhibit R-033**) claiming that Mr Benzinge is a shareholder and Managing Director of NRD and Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**) from Mr Marshall, claiming to be on behalf of the shareholders of NRD and requesting *“urgent intervention to tell us ... if we are still owners of NRD”*.

¹⁰¹¹ Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at para. 33.

¹⁰¹² Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at paras. 49-50.

¹⁰¹³ Claimants' Reply, at para. 222.

the decision is consistent with the duties of the Registrar General to update the corporate registry when informed of a change in shareholding or directorship. As Mr. Mugisha states, the RDB's register is regularly updated:

*"In practice, the RDB's register of shareholdings relating to each Rwandan company is updated following filing annual returns, or at other times as and when the company, through its directors or shareholders, amends and updates the records and informs the RDB."*¹⁰¹⁴

636. Secondly, in contrast, the decision of the Arbitral Tribunal and the Supreme Court was binding, as the Arbitral Decision was not challenged through the appropriate means during the available period for challenge.¹⁰¹⁵ The Claimants *"cannot now rely on vague allegations of impropriety in order to have the Arbitral Decision ignored"*.¹⁰¹⁶

637. As stated by Mr. Mugisha, the Respondent's expert on Rwandan law, and as cited in the Counter-Memorial:

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

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

*As a consequence of the Arbitration award as upheld by the Supreme Court, in circumstances where the Zarnacks no longer wish to exercise authority over the company, and the dispute is between Mr. Marshall and Mr. Benzinge, it is Mr. Benzinge who would have authority to act on behalf of the Company."*¹⁰¹⁷

638. The Respondent's decision was made in accordance with the decision of the Supreme Court of Rwanda, which had determined that, consistently with the arbitrator's decision, Mr. Benzinge was a shareholder and the Managing Director of NRD. Acting consistently with the Supreme Court of Rwanda is not and cannot possibly be considered to be an arbitrary decision. The Claimants allege that former Minister Imena *"permitted Mr*

¹⁰¹⁴ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 52.

¹⁰¹⁵ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 37.

¹⁰¹⁶ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 40.

¹⁰¹⁷ Expert Report of Richard Mugisha dated 24 May 2019, at paras. 45-47.

Benzinge to retake control of NRD” and that he acted “*unilaterally*”¹⁰¹⁸ but in fact, it is clear that he was acting consistently with the decision of the Supreme Court of Rwanda. Mr. Mugisha is clear:

*“The Arbitral Decision is a decision of the arbitrator that was upheld in the High Court and the Supreme Court. That the Claimants now consider it to be flawed, or that they now try to assert that, is irrelevant to the legal force of the Arbitral Decision. Now, years after the decision was made, it cannot be challenged on any grounds.”*¹⁰¹⁹

639. Further, the Claimants attempt to show that former Minister Imena was involved in an improper way in this ownership dispute. They assert, providing no evidence, that former Minister Imena “*unilaterally declared that Mr Benzinge owned 100% of the shares of NRD*”.¹⁰²⁰ He did no such thing.¹⁰²¹ As former Minister Imena explained, he “*did not get involved in the dispute between Mr. Benzinge and Mr Marshall over the ownership and control of NRD which [he] left to the RDB and the Ministry of Justice to resolve*”.¹⁰²² It is true the ownership dispute placed former Minister Imena in a difficult position in relation to issuing tags (which was within his role and which will be discussed in detail below),¹⁰²³ but it is improper for the Claimants to imply, without any evidential basis, that former Minister Imena was involved in the ownership dispute, which is simply untrue.
640. Accordingly, the Respondent did not decide to “*ignore*” RDB records, and nor was the decision arbitrary. The Government was required to weigh two competing interests, one expressed in the RDB records and the other expressed in a decision of the Supreme Court of Rwanda, with both Mr. Marshall and Mr. Benzinge claiming to act for and on behalf of NRD in June 2014.¹⁰²⁴ The Respondent was forced to act based on the best information available to it at the time.
641. The Claimants allege that document exhibited at **C-164** sets out the RDB’s position on the dispute at the time. However, Mr. Gatere is clear that that is not an RDB document:

“I have been shown a copy of a document headed “SUMMARY OF THE RESOLUTIONS OF NRD CANCELED BY THE COURT” which the Claimants’ allege was prepared by a lawyer at RDB. The document is not on RDB paper; it is unsigned and the only link it has to RDB is a handwritten note at the top of the document which claims that it is the “Analysis of RDB State Attorney”.

¹⁰¹⁸ Claimants’ Reply, at para. 223.

¹⁰¹⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 45.

¹⁰²⁰ Claimants’ Reply, at para. 223.

¹⁰²¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 40.

¹⁰²² Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 56.

¹⁰²³ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 55; Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 40.

¹⁰²⁴ See Letter from Lex Chambers Ltd (I. Bizumuremyi) to Rwanda Development Board (The Registrar General) (29 May 2014) (**Exhibit R-033**) claiming that Mr. Benzinge is a shareholder and Managing Director of NRD and Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**) from Mr. Marshall, claiming to be on behalf of the shareholders of NRD and requesting “*urgent intervention to tell us ... if we are still owners of NRD*”.

I do not believe the document was written by Mr. Sangano or anyone else linked to RDB. As such, I will not comment on the content of that note. As far as I can see, it was generated internally by NRD. There is no credibility to the assertion that it was drafted by the RDB. If it had been generated by RDB, then consistent with RDB policy and procedure it would have been prepared on RDB headed paper and it would have been signed by the individual who prepared it.

I have been in contact with Mr. Sangano, who stated that he did not draft it, and did not have any contact with NRD or Mr. Marshall in 2014, other than if they were received as normal clients in his office. He is unaware of the circumstances in which it was prepared, and does not know who added his name to the document. I note also that he was not, in 2014, the RDB State Attorney; he did not attain that position until 2016.”¹⁰²⁵

642. Further, the Claimants allege that, in 2014, former Minister Imena “unilaterally declared that Mr. Benzinge owned 100% of the shares of NRD”¹⁰²⁶ and that the position is “astonishing and contradictory”.¹⁰²⁷ However, as a matter of fact, as set out by former Minister Imena:

“... the Claimants allege that I unilaterally declared that Mr. Benzinge owned 100% of NRD. That is incorrect. As I made clear in paragraph 54 of my first statement, I did not get involved in resolving the dispute regarding the ownership of NRD but told Mr. Benzinge that he should discuss the matter with RDB and that we would only deal with the person who the RDB records showed was the Managing Director and owner of the company.”¹⁰²⁸

643. In the Memorial, the Claimants alleged this to be a failure of the FPS obligation; having failed to succeed on that basis, they now attempt to shoehorn this argument into the FET standard. It is inapposite in either regard. The Rwandan executive is entitled to act consistently with the decisions of the Supreme Court of Rwanda, and it would be (to say the least) odd for it not to do so. Such decisions derive from judicial authority and acting in accordance with them cannot be considered to be arbitrary, egregious or otherwise inconsistent with Article 5 of the USA-Rwanda BIT.

ii. The Claimants cannot show that the actions of Mr. Benzinge are attributable to Rwanda

644. In its Counter-Memorial at paragraphs 308 to 315, the Respondent explained why actions taken by Mr. Benzinge could not be attributable to Rwanda in the context of the Claimants’ FET claim, and at paragraphs 402 to 412 in the context of the Claimants’ FPS claim. The Respondent also explained why actions taken by the bailiff Mr. Nsengiyuma and by illegal miners were not attributable to Rwanda in the context of both the

¹⁰²⁵ Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020, at paras. 29-31.

¹⁰²⁶ Claimants’ Reply, at para. 223.

¹⁰²⁷ Claimants’ Reply, at para. 224.

¹⁰²⁸ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 40.

Claimants' FET and FPS claims.¹⁰²⁹ As explained above, the Claimants now appear to recharacterise their FPS claim as an FET claim at this late stage. Further, they have not responded to the Respondent's analysis with respect to the actions taken by the bailiff Mr. Nsengiyuma and by illegal miners and as such the Respondent does not address them any further here.

645. As part of its newly formulated FET claim, the Claimants maintain at paragraphs 226 to 236 of the Reply, that Mr. Benzinge's actions are attributable to Rwanda because "*he either was acting at the instruction of Rwanda, or he was empowered to act by Rwanda, given that he could not have acted as he did had Rwanda merely enforced its law evenhandedly, without purposefully turning a blind eye to his misconduct.*" The Claimants then set out (for the first time) the legal principles determining whether States can be held liable for the actions of private parties. The existence of these principles is not disputed, and the Respondent explains as much in its Counter-Memorial.¹⁰³⁰ However, the Claimants have misconstrued the principles on which they purport to rely and as such they cannot show that Mr. Benzinge's actions in (1) taking control of the Five Concession Areas in 2012 "*as a result of the decision of the RDB*", and (2) taking control of the Five Concession Areas in 2014 "*at direction of Minister Imena*",¹⁰³¹ are attributable to Rwanda.

Article 5 of the ILC Articles

646. The meaning of Article 5 of the ILC Articles is clear – in full, including the title, it reads as follows:

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."¹⁰³²

647. As is plain from the title, Article 5 of the ILC Articles applies to "*persons or entities exercising elements of governmental authority*". The Commentary of the International Law Commission in its *Draft Articles on Responsibility of State for Internationally Wrongful Acts* ("ILC Commentary") elucidates the purpose and scope of this Article:

"(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take

¹⁰²⁹ In relation to Jean Bosco, see Counter-Memorial, at paras. 316 to 319 and 409 to 410; In relation to illegal miners, see Counter-Memorial, at paras. 320 to 321 and 413 to 416.

¹⁰³⁰ See Counter-Memorial, at paras. 313 to 315, where the Respondent explains why the actions of Mr. Benzinge cannot be attributed to Rwanda.

¹⁰³¹ Claimants' Reply, at paras. 234-236.

¹⁰³² International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at Article 5.

account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

...

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority ... It is accordingly a narrow category.¹⁰³³

648. The passages from the decision in *EDF v. Romania* cited by the Claimants at paragraphs 229 and 230 of the Reply are in accord with this explanation.¹⁰³⁴ The Tribunal in that case explained that “*in order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority.*”¹⁰³⁵ However, in quoting this passage from the case, the Claimants have omitted an important sentence from the quotation: “*As stated by the ILC Commentary to Article 5, ‘It is accordingly a narrow category.’*”¹⁰³⁶

649. As further explained by the *EDF v. Romania* tribunal:

“Therefore, in order for an act to be attributed to the State under ILC Article 5, two cumulative conditions must be fulfilled:

- first, the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority;

- second, the act in question must be performed by the entity in the exercise of the delegated governmental authority.”¹⁰³⁷

650. On the basis of this two-pronged test, in order for actions of Mr. Benzinge to be attributed to the Respondent under Article 5 of the ILC Articles the Claimants must show not only that Mr. Benzinge was empowered by internal law to exercise elements of governmental authority, but also that his actions were taken in the exercise of the delegated governmental authority. On the facts of this case it is clear that neither requirement has been, or could be, met.

651. In fact, this Article is irrelevant: its ambit does not extend to the actions of an individual who has no connection whatsoever to the State and who has no “*governmental authority*” that could be attributed to Rwanda. Article 5 is a “*narrow category*” which is limited to “*entities which are empowered by internal law to exercise governmental authority*” and is intended to capture “*parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State*

¹⁰³³ *Ibid.*, (Exhibit CL-084), at paras. 1 and 7 of the Commentary to Article 5 (emphasis added).

¹⁰³⁴ *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (Exhibit CL-078), at para. 193.

¹⁰³⁵ *Ibid.*, (Exhibit CL-078), at para. 193.

¹⁰³⁶ *Ibid.*, (Exhibit CL-078), at para. 193.

¹⁰³⁷ *Ibid.*, (Exhibit CL-078), at para. 191.

*corporations have been privatized but retain certain public or regulatory functions.*¹⁰³⁸ This is simply not the case here on the case advanced by the Claimants (and nor could it be so). The Claimants' use of the word "empowered" in an attempt to extend Article 5 to the actions of somebody who quite plainly falls outside of this category is not credible and shows a fundamental misunderstanding of the operation of this provision. These claims must fail.

Article 8 of the ILC Articles

652. The Claimants' reliance on Article 8 of the ILC Articles is similarly misguided. Article 8 in full, including the title, reads:

Article 8. Conduct directed or controlled by a State

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*¹⁰³⁹

653. As is plain from the title, Article 8 applies with respect to "Conduct directed or controlled by a State." The ILC Commentary to Article 8 provides further context:

"(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control. Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery."¹⁰⁴⁰

654. As the Claimants recognise, there are thus two strands to Article 8: (1) private persons *acting on the instructions* of the State, and (2) private persons *acting under the State's direction or control*. The Claimants cannot show that Mr. Benzinge falls within either strand:

654.1. In relation to the first strand, the Claimants partially cite paragraph 2 of the ILC Commentary on Article 8.¹⁰⁴¹ The full text is instructive:

¹⁰³⁸ International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at Commentary to Article 5, paragraph 1 (emphasis added).

¹⁰³⁹ *Ibid.*, (**Exhibit CL-084**), at Article 8.

¹⁰⁴⁰ *Ibid.*, (**Exhibit CL-084**), at Commentary to Article 8, paragraph 1 (emphasis added).

¹⁰⁴¹ The Claimants' reference at paragraph 233 to the Tribunal in *Electrabel S.A. v. Republic of Hungary* splitting Article 8 into two parts is misleading (and indeed the Claimants do not even provide a reference to it) – as the Claimants go on to state, the clarification simply comes from the text of the Commentary to Article 8 of the ILC Articles; see footnote 1040 above.

“(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves “governmental activity”. Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighbouring countries, or who are instructed to carry out particular missions abroad.”¹⁰⁴²

As such the Claimants’ must show that Mr. Benzinge was “acting on the instructions of the State”, or was “recruit[ed] or instigat[ed]” or “employed as [an] auxiliar[y] or ... sent as [a] ‘volunteer’”. They have failed in each respect.

654.2. In relation to the second strand, the Claimants cite paragraph 3 of ILC Commentary on paragraph 8, which in full reads:

“(3) More complex issues arise in determining whether conduct was carried out “under the direction or control” of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.”¹⁰⁴³

The Claimants must therefore show that Mr. Benzinge’s “specific” actions were “directed or controlled” by Rwanda.

654.3. Even though the degree of control in Article 8 of the ILC Articles “may, however, vary according to the factual circumstances” as the Claimants recognise by reference to the decision in *Prosecutor v. Tadic*,¹⁰⁴⁴ the Claimants fail to draw attention to the following paragraph of this decision which states:

“One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent.”

¹⁰⁴² International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at Commentary to Article 8, paragraph 2 (emphasis added).

¹⁰⁴³ *Ibid.*, (**Exhibit CL-084**), at Commentary to Article 8, paragraph 3 (emphasis added).

¹⁰⁴⁴ See Claimants’ Reply, at para. 232, referring to the case of *Prosecutor v. Dusko Tadić*, UN Case No. IT-94-1-A, Appeals Chamber, Judgement (15 July 1999) (**Exhibit CL-080**), at para. 117.

Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it ex post facto publicly endorsed those acts."¹⁰⁴⁵

655. As such, the Claimants have failed to establish that Mr. Benzinge's actions in 2012 are attributable to Rwanda under Article 8 of the ILC Articles. In order for Article 8 to apply, the Claimant's must show that either (1) Mr. Benzinge was "acting on the instructions of the State" or (2) that the specific actions of Mr. Benzinge were "directed or controlled" by Rwanda. However, they cannot show either. They do not even attempt to argue that Mr. Benzinge was acting on the instructions of the Respondent, and in relation to the second strand, simply state that "he acted pursuant to the direction and instructions of the RDB".

656. The Claimants simply state that Mr. Benzinge "managed to convince the RDB that he was the managing director of NRD, contrary to the corporate registration information" and that "as a result of the decision of the RDB ... he was able to harm NRD".¹⁰⁴⁶ They provide no evidence that he so acted. Additionally, it is entirely unclear what direction or instruction the Claimants rely on in support of their claims:

656.1. If the alleged direction or instruction complained of is changing the corporate records, that is quite clearly not a direction or instruction to Mr. Benzinge to take control of the Five Concession Areas. As explained above at paragraph 632, the standard practice of the RDB is to update company registers when provided with information from directors and shareholders.¹⁰⁴⁷ This was explained to Mr. Marshall at the time in a letter of 7 August 2012: "the RDB is a facilitator of shareholders' wishes and cannot appoint or remove a Managing Director as that is within the remit of shareholders."¹⁰⁴⁸ This act, in and of itself, was quite clearly not a direction or instruction to Mr. Benzinge, and in particular was not one which gave Mr. Benzinge power to take control of the Five Concession Areas. Any actions taken by Mr. Benzinge following the change of corporate registration were not done at the direction or instruction of the RDB.

¹⁰⁴⁵ *Prosecutor v. Dusko Tadić*, UN Case No. IT-94-1-A, Appeals Chamber, Judgement (15 July 1999) (**Exhibit CL-080**), at para. 118.

¹⁰⁴⁶ Claimants' Reply, at para. 234.

¹⁰⁴⁷ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 52.

¹⁰⁴⁸ Letter from the CEO of the RDB (C. Akamanzi) to NRD (R. Marshall), *Appointment of Managing Director of NRD* (7 August 2012) (**Exhibit R-114**).

- 656.2. The Claimants appear to rely on a letter from the RDB to Mr. Benzinge on 6 August 2012 which states that *“the position of Managing Director has been suspended and no person shall hold this position in the company until we have further investigated these complaints to ensure that the interests of all the shareholders in NRD Rwanda are secure.”*¹⁰⁴⁹ This decision that there shall be no Managing Director of NRD until the complaints are investigated simply cannot be considered an instruction or direction from the Respondent to Mr. Benzinge to harm NRD. This was a decision taken by the RDB to protect the interests of NRD, not to harm it. Further, it was not a decision which gave Mr. Benzinge power to take control of the Five Concession Areas either expressly or impliedly – it in fact stopped Mr. Benzinge from taking control of NRD whilst the situation was being investigated.
657. Mr. Marshall himself also acknowledged that Mr. Benzinge’s acts were not connected to a direction or instruction of the RDB when he wrote to the RDB saying *“It is clear to me and our investors that the RDB staff was completely misled by the threats and illegal actions of this man, Ben Benzinge”* and that *“the crimes were committed against both RDB and NRD”*.¹⁰⁵⁰
658. Accordingly, at most Mr. Benzinge’s actions were *“incidental”* or *“peripheral”* to any decisions made by the RDB, and as such cannot be attributed to Rwanda under Article 8. Importantly, the Claimants have produced no evidence that that shows Rwanda *“issued specific instructions”* to Mr. Benzinge or that it *“ex post facto publicly endorsed”* his actions. It is not enough that actions taken by Rwanda had consequences that NRD did not like.
659. The Claimants have also failed to establish that Mr. Benzinge’s actions in 2014 are attributable to Rwanda under Article 8 of the ILC Articles: they have not shown that he was *“acting on the instructions of the State”* or that his specific actions were *“directed or controlled”* by Rwanda. Although the Claimants allege that Mr. Benzinge’s action in taking control of the Five Concession Areas in 2014 was *“at the direction of Minister Imena”*, they have provided no evidence that was the case. In fact:
- 659.1. The true version of events, as explained at section VI.B.3.i above, is that in mid-2014, Rwanda was faced with two competing claims in relation to who was the rightful owner and controller of NRD: one expressed in the RDB records and the other expressed in a decision of the Supreme Court of Rwanda in the proceedings between NRD and Mr. Benzinge. As a result, both Mr. Benzinge and Mr. Marshall claimed to act for and on behalf of NRD in June 2014, and each had some support

¹⁰⁴⁹ Letter from the Registrar General RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit C-146**) (emphasis added).

¹⁰⁵⁰ Letter from NRD (R. Marshall) to CEO of RDB, *Natural Resources Development Rwanda Ltd. as victim by acts of Ben Benzinge and others* (10 August 2012 (**Exhibit C-048**)).

for that contention.¹⁰⁵¹ Faced with two competing rights to ownership, the Respondent was in a difficult position and had to act based on the best information available to it at the time. After properly considering both sides of the story, it decided it could not side with one party or the other. That decision was not arbitrary or improper and was not explicitly about not picking sides or favouring a Rwandan national over NRD's investors, as the Claimants allege.¹⁰⁵²

659.2. In any event, had there been any decision to favour the Arbitral Decision over the RDB records that could in no way have been a "*specific instruction*" by former Minister Imena to Mr. Benzinge to take control of Five Concession Areas as the Claimants' allege.

659.3. Nor did former Minister Imena "*publicly endorse*" Mr. Benzinge's actions and the Claimants have not provided any evidence that he did. For the avoidance of doubt, the Claimants' assertions that "*Rwanda both allowed these bad acts to occur and failed to stop them*" are not only wrong, and denied, but could not in any event constitute a "*public endorsement*" of Mr. Benzinge's actions. To the contrary, former Minister Imena did his best to remain neutral.

659.4. It is wrong for the Claimants to now suggest that the actions of Mr. Benzinge be attributed to Rwanda for the purpose of this Arbitration when it is clear that at the time Mr. Marshall, and NRD, acknowledged a distinction between the two. For example, in a "Concept Note" produced by Mr. Marshall on 1 July 2014 and sent to Minister Busingye, the US Ambassador and Professor Nshuti the following day, and to Mr. Nkuruzinza on 11 July 2014, Mr. Marshall states that "*It is a credit to the Rwanda state institutions that Benzinge's false and malicious allegations did not result in them completely shutting down NRD*".¹⁰⁵³ This is a clear acknowledgment from Mr. Marshall, at the time of the relevant events, that Mr. Benzinge was not acting on the direction of the Rwandan state institutions, and that Mr. Marshall did not at the time consider that Rwanda was taking steps to advance, or to favour, Mr. Benzinge..

659.5. In addition, it was made clear to NRD in 2012 that Rwanda did not support Mr. Benzinge's actions. For example, in an email from Mr. Fidele Uwzeze (MINIRENA's Chief Policy Advisor) to Ms. Mruskovicova, Mr. Uwzeze states "*it is not a*

¹⁰⁵¹ See Letter from Lex Chambers Ltd (I. Bizumuremyi) to Rwanda Development Board (The Registrar General) (29 May 2014) (**Exhibit R-033**) claiming that Mr. Benzinge is a shareholder and Managing Director of NRD and Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**) from Mr Marshall, claiming to be on behalf of the shareholders of NRD and requesting "*urgent intervention to tell us ... if we are still owners of NRD*".

¹⁰⁵² Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.2.

¹⁰⁵³ Concept Note by Dr Roderick Marshall, *Crimes committed against NRD by Ben Benzinge* (1 July 2014), sent by email to Minister Busingye, the US Ambassador and Professor Nshuti on 2 July 2014 and to Mr Nkuruzinza on 11 July 2014 (**Exhibit R-198**).

nationalisation because Benzinge words can not be covered by any government support".¹⁰⁵⁴ This sentiment remained the Government's position throughout.

660. Accordingly, the Claimants' proposition that Mr. Benzinge's actions can be attributable to Rwanda is futile and must be rejected.

iii. The claim that the Respondent arbitrarily ignored RDB records is out of time

661. In any event, this claim is out of time.

662. The allegation that in 2012 the RDB "*changed NRD's corporate information to show that Mr Benzinge was the Managing Director*" took place prior to the First Cut-off Date. The event, and any associated loss (which is denied) was also known to the Claimants at this time. This is evident from the following correspondence:

662.1. A letter from Mr. Marshall to the CEO of the RDB dated 4 August 2012 in which he complains of this action and characterises the alleged breach as "*simple theft of US investment property in Rwanda*" (albeit that the allegation was that Mr. Benzinge was the alleged thief, and not Rwanda);¹⁰⁵⁵

662.2. A letter from Mr. Marshall on behalf of NRD to the CEO of the RDB dated 10 August 2012 in which he complains of this action and expressly lists the "*significant costs*" of this alleged breach to NRD;¹⁰⁵⁶

662.3. A letter from Louise Kanyonga, Registrar General of the RDB to Mr. Benzinge, copying Mr. Marshall, dated 6 August 2012 in which she suspends him as Managing Director of NRD on the basis of a written complaint from Mr. Marshall that alleged that Mr. Benzinge had transferred a significant amount of company assets and taken over company premises to the detriment of NRD and its shareholders;¹⁰⁵⁷ and

662.4. A letter from Ms. Kanyonga to Rwagaju Louis, Mayor of the Bugesera District, copying Mr. Marshall, dated 7 August 2012 in which she requests that he facilitate the transfer of company property including keys to the premises of the company to Mr. Marshall.¹⁰⁵⁸

663. The same is true of the events in 2014 which the Claimants allege to be in breach of the FET standard. The specific allegation, as set out in the Claimants' Reply, is that Rwanda "*through the actions of Minister Imena, permitted Mr. Benzinge to retake control of NRD*

¹⁰⁵⁴ Email from F. Uwzeye to Z. Mruskovicova, NRD (7 August 2012) (**Exhibit R-199**).

¹⁰⁵⁵ Letter from NRD (R. Marshall) to CEO of RDB (C. Akamanzi) (4 August 2012) (**Exhibit R-200**). NB: this letter was disclosed by the Claimants' during document production and was disclosed incomplete.

¹⁰⁵⁶ Letter from NRD (R. Marshall) to the CEO of the RDB, NRD as victim by acts of Ben Benzinge and others (10 August 2012) (**Exhibit C-048**), at page 8.

¹⁰⁵⁷ Letter from the Registrar General RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit C-146**); see also Respondent's Memorial on Preliminary Objections, at para. 77.

¹⁰⁵⁸ Letter from Registrar General RDB (L. Kanyonga) to the Mayor of Bugesera District (R. Louis), *Appointment of acting Managing Director of NRD* (7 August 2012) (**Exhibit C-070**).

from June 2014 through August 2014”¹⁰⁵⁹ and that “The net result of Rwanda’s inaction and decision to ignore RDB’s records was to allow a Rwandan national to take control of NRD for approximately 10 weeks and substantially harm Claimants.”¹⁰⁶⁰ These events took place before the First Cut-off Date. The Claimants had knowledge of that alleged breach and any associated loss to a sufficient degree when it occurred, as is evident from the correspondence at the time. We refer to the correspondence highlighted at paragraphs 60 to 60.3 of the Respondent’s MPO, wherein NRD expressly complains of the actions alleged:

663.1. A letter from Mr. Marshall to the RDB dated 2 June 2014 in which he complains of Mr. Benzingé’s alleged seizure of the Five Concession Areas and mineral supplies. The letter states that “the costs to NRD and its shareholders were very large” and alleges failures on the part of the Rwandan state;¹⁰⁶¹

663.2. A report dated 2 August 2014 prepared on the request of NRD that records the alleged damage at the Nemba mining site resulting from the alleged takeover by Mr. Benzingé and claiming significant losses as a result of stolen and damaged tools, material and equipment;¹⁰⁶² and

663.3. A letter from NRD to Minister Busingye dated 26 August 2014 setting out the alleged loss incurred by NRD as a result of the alleged actions by Mr. Benzingé.¹⁰⁶³

664. In addition:

664.1. In a “concept note” sent by Mr. Marshall to Minister Busingye, the US Ambassador, and Professor Nshuti on 2 July 2014, and to Mr. Nkuruzinza on 11 July 2014, and referred to at paragraph 659.4 above, NRD complains of the alleged actions concerning Mr. Benzingé and states that the “company lost to theft more than one and a one-half million USD in equipment and small parts”;¹⁰⁶⁴

664.2. In an email from Mr. Marshall to Minister Busingye dated 3 July 2014, Mr. Marshall complains of Mr. Benzingé’s actions. Minister Busingye replies the same day recommending that Mr. Marshall’s company lawyers file a civil claim and that he files any criminal complaints with the relevant agencies;¹⁰⁶⁵

¹⁰⁵⁹ Claimants’ Reply, at para. 223.

¹⁰⁶⁰ Claimants’ Reply, at para. 225.

¹⁰⁶¹ Letter from the Chairman of NRD (R. Marshall) to the Rwanda Development Board (2 June 2014) (**Exhibit R-032**).

¹⁰⁶² *Report on Natural Resources Development Rwanda Ltd. (“NRD”) at Nemba Mining Site* by Court Bailiff (U. Jacque) (2 August 2014) (**Exhibit C-075**).

¹⁰⁶³ Letter from the Chairman of NRD (R. Marshall) to the Minister of Justice (B. Johnston), *Return of Nemba mining business and NRD losses* (26 August 2014) (**Exhibit C-076**).

¹⁰⁶⁴ Concept Note by Dr Roderick Marshall, *Crimes committed against NRD by Ben Benzingé* (1 July 2014), sent by email to Minister Busingye, the US Ambassador and Professor Nshuti on 2 July 2014 and to Mr Nkuruzinza on 11 July 2014 (**Exhibit R-198**).

¹⁰⁶⁵ Email correspondence between Mr. Marshall and Minister Busingye, *Re: Benzingé’s claim against the wrong defendant* (3 July 2014) (**Exhibit R-201**).

- 664.3. In an email from Mr. Marshall to Minister Gatare dated 26 July 2014, Mr. Marshall requests that the RDB “*correct the NRD Registration Certificate and remove Benzinge’s name from the list of shareholders of the company;*”¹⁰⁶⁶
- 664.4. In a letter from Mr. Marshall to Minister Busingye dated 30 July 2014, Mr. Marshall requests that “*possession of NRD be returned to the US investors who are recognized by RDB (in the NRD Registration Certificate) as owners of NRD;*”¹⁰⁶⁷
- 664.5. NRD’s account of its meeting with former Minister Imena dated 16 September 2014 states that “*NRD also provided the Minister with NRD’s bailiff’s findings in Nemba showing the extent of damage caused by Benzinge;*”¹⁰⁶⁸ and
- 664.6. In a letter to the Criminal Investigations Department in Kigali (“CID”) dated 30 October 2014, Mr. Marshall states that “*Minister of State Evode has actively promoted the interests of Ben Benzinge, a British-Rwandan national who has committed crimes against NRD including apparently extorting money from the company.*”¹⁰⁶⁹ He then goes on to list specific ways in which he alleges that former Minister Imena has made an “*effort to promote Benzinge*”, including the allegation that “*Minister Evode has refused to recognize the decision of the RDB Companies Registrar that the US investors are the majority (or indeed, sole) shareholders in NRD.*”¹⁰⁷⁰
665. There can be no doubt, based on the above correspondence, that the Claimants had actual knowledge (or in the alternative, constructive knowledge) of the alleged breaches and loss long before the First Cut-off Date. The suggestion that they could not have known of these alleged breaches until unconnected later events, being the public tender in March 2016 or alternatively, the receipt of former Minister Imena’s letter in May 2015, is not credible.
666. Further, even if the concept of a “creeping” breach of the FET standard was apposite on the current facts (which it plainly is not), if this alleged breach is said to be part of the supposed creeping breach by the Respondent (which again, is unclear due to the failure of the Claimants to properly plead their claim), it is still out of time. That is, even if all the events could be characterised as a single “creeping” breach of the FET standard or “composite act”, then it is one which was constituted, and known of, long before the First Cut-Off date. At a minimum, the acts and omissions sufficient, and alleged in the

¹⁰⁶⁶ Letter from NRD (R. Marshall) to the RDB (Minister F. Gatare), *Notice of correction of Registration Certificate for NRD* (26 July 2014) (**Exhibit C-010**).

¹⁰⁶⁷ Letter from NRD (R. Marshall) to the Minister of Justice (Minister J. Busingye), *Request for return of NRD company and offices/mines to RDB-confirmed* (30 July 2014) (**Exhibit R-202**).

¹⁰⁶⁸ *Minutes from the meeting between Minister of State in Charge of Mining and NRD* (16 September 2014) (**Exhibit R-203**), at page 1.

¹⁰⁶⁹ Complaint from NRD (R. Marshall) to CID, *Formal complaint against apparent corruption* (30 October 2014) (**Exhibit C-165**).

¹⁰⁷⁰ *Ibid.*, (**Exhibit C-165**).

Memorial to be sufficient,¹⁰⁷¹ to constitute the composite act that is alleged to be in violation of the FET standard, took place, and were known of by the Claimants prior to the First Cut-off Date as the above correspondence indicates.

667. Accordingly, the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over the claim that the Respondent arbitrarily ignored RDB records, in violation of the FET standard.

4. The Allegation that the Respondent unfairly denied tags to NRD

i. Former Minister Imena's decision not to grant tags to NRD in 2014 was justified and was not a breach of the FET standard

668. The Claimants allege that Rwanda's decision to refuse to issue mineral tags to NRD was illogical, arbitrary and unfair.¹⁰⁷² It was none of those things. In 2014, in light of the failure of NRD to regularise its status under the 2014 Law, and its ongoing ownership dispute with Mr. Benzingé of which Rwanda had become aware, Rwanda made the decision to bar ITSCI from issuing any further tags to NRD. The decision was justified and fair, and treated NRD in a manner than was more favourable than the treatment to which it was entitled.

669. The Claimants also allege that the reasons were not valid on the basis that "*disputes over ownership had been settled since 2012*",¹⁰⁷³ but plainly, as discussed above, the dispute between the Claimants and Mr. Benzingé was ongoing in 2014, and indeed although it was determined in Mr. Benzingé's favour by the Arbitral Tribunal, High Court and Supreme Court after 2012 the Claimants continue to dispute the correctness of the decision. Additionally, the Claimants allege that "*Rwanda plainly believed that NRD's Contract and Licences did remain in effect*", but as discussed at paragraphs 114 to 124 above, it is clear that NRD's Contract expired on its terms in November 2010, and the Licences expired, following several short extensions, in October 2012. The Claimants raise the comparison with Tinco again but as discussed above at 259 to 264, Tinco, and its subsidiaries Rutongo and Eurotrade, were in a vastly different position to the Claimants and NRD.

670. In his First Witness Statement former Minister Imena addressed the reasons why NRD was denied tags, as set out in the Respondent's Counter-Memorial at paragraph 205:

"I did so primarily because I wanted to put pressure on NRD to regularise its operations by applying for and obtaining licences for its concessions. By June 2014 NRD had not had a mining licence for any of its concessions since October 2012. However, with our indulgence it was continuing to operate its mines, through the artisanal miners, and was able to buy minerals from the artisanal miners on its sites and have them tagged following which it was able to sell them

¹⁰⁷¹ Claimants' Memorial, at paras. 184-192.

¹⁰⁷² Claimants' Reply, at paras. 237-242.

¹⁰⁷³ Claimants' Reply, at para. 240.

to traders in Kigali. It was able to do all of this without a licence and without making any investment into any of its mines.

Although I had made clear to Mr. Marshall since I met him in October 2013 that NRD needed to re-apply for its licences, by mid-2014 NRD had not taken any steps to do so and I did not believe they had any intention of doing so – it seemed quite clear to me that NRD were quite happy to continue operating their mines without a licence so long as they were able to receive tags and that they had no real interest in pursuing their licence applications which would require a commitment to investment and development of the mines. I therefore instructed PACT not to issue any further tags to NRD in order to put pressure on NRD to regulate their position by applying for and obtaining licenses. It was not long after I instructed PACT not to issue any further tags to NRD that NRD submitted its September 2014 application for licences”.¹⁰⁷⁴

671. The Claimants allege that this decision was not based on any proper purpose, and was therefore illogical, unfair, or discriminatory. However, at that time, NRD was only operating its mines, without a valid licence, and without any right to demand a licence of any type, due to an indulgence from the Respondent. As further explained by former Minister Imena in his Supplemental Witness Statement:

“I barred NRD from receiving tags primarily because NRD had been operating without a licence for too long and I wanted to put pressure on them to comply with the law by applying for a licence like everybody else had to. NRD could not be given any tags until it succeeded in its application for licences and became legally authorised to operate.”¹⁰⁷⁵

672. Following complaints from Mr. Marshall about the decision to bar iTSCi from issuing any further tags to NRD, former Minister Imena sought legal advice from Ditutu Rossi, a lawyer at the GMD. This advice confirmed his decision, finding that *“NRD is neither legally authorised to carrying out mining operations on the Nemba site nor on any other mining concessions until a favourable response is issued with regard to its re-application. Thus, NRD cannot, at present, be granted ITRI tags.”¹⁰⁷⁶*

673. The Respondent was under no obligation to allow mining in any form, or to allow tags to be issued, to a company which did not have a mining licence. Indeed, Mr. Niyonsaba is clear that tags are only issued to licensed mining operations.¹⁰⁷⁷ Accordingly, the Respondent could have elected simply to prevent NRD from operating its mines altogether. However, it decided to prevent NRD from obtaining any further tags, in an effort to encourage NRD to regulate its position.

674. Former Minister Imena’s decision was necessary in order to ensure that NRD would regularise its status and apply for and obtain the licences it required in order to operate

¹⁰⁷⁴ Witness Statement of Mr. Evode Imena dated 24 May 2019, at paras. 49-50.

¹⁰⁷⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.1.

¹⁰⁷⁶ Internal Memo from Rossi Ditutu (8 December 2014) (**Exhibit R-116**); Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.1.

¹⁰⁷⁷ Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at para. 16.

lawfully. The lawful, efficient operation of the mines, and their industrialisation, was in both parties' best interests. The Claimants state that "*without tags, NRD would be unable to legally sell minerals and unable to realize the value in its concessions*" in the Reply at paragraph 239. They state that that makes former Minister Imena's decision inconsistent with "common sense", but in fact the common sense is evident. In order to legally sell minerals, NRD needed tags. In order to receive tags it needed to have a valid mining licence. Former Minister Imena intended to encourage NRD to regularise its status and obtain the appropriate licences in precisely this way, as he has explained in his evidence.

675. As also explained by former Minister Imena in his First Witness Statement:

*"The secondary reason I barred NRD from receiving tags in mid-2014 was the issue that arose regarding ownership of NRD. The ownership issue arose in around May or June 2014 when Mr. Ben Benzinge came to see me claiming to be the owner of NRD. He produced a copy of a decision of the Supreme Court which he said supported his claim and told me that I should not get involved with Mr. Marshall as he as the rightful owner of the company. He also visited the mining department and threatened to start proceedings against them if they continued to issue to tags to NRD while Mr Marshall was there."*¹⁰⁷⁸

676. As this statement from former Minister Imena makes clear, there was plainly also a dispute as to ownership at this time which warranted the denial of tags. As explained by former Minister Imena: "*I was not willing to get involved in that dispute and I was not in a position to determine who was right and who was wrong. We had conflicting stories being presented to us and we could not just side with one party or the other. Ms. Mruskovicova's 27 October 2014 letter was just one of the letters sent by NRD setting out their side of the story. Everything we received had to be considered and processed by us before any decisions could be made.*"¹⁰⁷⁹

677. In addition, in his Supplemental Witness Statement, former Minister Imena explains a further reason why he understood there to be a continuing ownership dispute in 2014:

"On 10 December 2014, I held a meeting with Ms. Mruskovicova (at her request) at which a Mr. Yasin presented himself as a new shareholder of NRD and requested that I provide tags to NRD.¹⁰⁸⁰ This was the first we had heard of this and I told them that as far as we were concerned, he did not have authority to make requests on behalf of NRD. In response I was told by Ms. Mruskovicova that Mr. Marshall was being "sidelined" and that he would no longer be involved in the ongoing processes.¹⁰⁸¹ I told NRD that tags could not be given to anybody until the issue with NRD's licences had been resolved and the

¹⁰⁷⁸ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 53.

¹⁰⁷⁹ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 39.2 referring to Letter from NRD (Z. Mruskovicova) to the Minister of State in charge of Mining (Minister E. Imena) (27 October 2014) (**Exhibit C-105**).

¹⁰⁸⁰ MINIRENA, *Meeting Minutes with NRD Company Ltd* (10 December 2014) (**Exhibit R-117**).

¹⁰⁸¹ *Ibid.*, (**Exhibit R-117**), at page 2.

presentation of Mr. Yasin indicated to us, again, that NRD were not dedicated to resolving the problem. As acknowledged in the minutes: “we were all surprised to hear that NRD has sold 15% of its shares and changing its management when its applications are still under evaluation by the government”.¹⁰⁸² The fact Mr. Marshall had apparently been “sidelined” was also a surprise given he had been writing to me regarding the ownership dispute with Mr. Benzinge less than 2 weeks prior to this meeting.”¹⁰⁸³

678. Against this background, it was entirely proper for former Minister Imena to ban NRD from receiving tags until these issues had been resolved. His actions were not inconsistent with Article 5 of the USA-Rwanda BIT. They did not meet the threshold of impropriety required. In fact, NRD was treated far better than it could or should have expected given that typically unlicensed mines do not receive tags.¹⁰⁸⁴ That NRD had been allowed to operate, receiving tags and without a licence, for so long shows Rwanda’s continued support for, and good faith treatment of, NRD.

ii. The claim based on former Minister Imena’s decision not to grant tags to NRD in 2014 is out of time

679. In any event, this claim is out of time.

680. At paragraphs 51 to 53 of the CMPO, the Respondent explains why this claim is out of time. The conduct which is alleged to form the basis of the breach (and which was in fact justified for the reasons set out above) took place in 2014, when former Minister Imena denied tags to NRD. The Claimant had clear knowledge of this breach and any associated loss at the relevant time, which was prior to the First Cut-off date. This knowledge is highlighted by the following correspondence:

680.1. In a letter from NRD to former Minister Imena dated 18 September 2014, Mr. Marshall on behalf of NRD writes that *“In connection with the claims of Mr. Benzinge against us as investors in NRD, we continue to be refused ITRI “tags” which confirm the origin of the mined NRD minerals. I take this opportunity to respectfully ask you again to permit NRD to have “tags” so that we can fulfil our faction as ‘administrators’ for NRD until the Benzinge dispute over our ownership is resolved.”*¹⁰⁸⁵

680.2. In NRD’s account of its meeting with former Minister Imena dated 16 September 2014, it states that *“NRD in its letter (as attached) asked the Minister to provide*

¹⁰⁸² *Ibid.*, (Exhibit R-117), at page 2.

¹⁰⁸³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 39.4 referring to MINIRENA, *Meeting Minutes with NRD Company Ltd* (10 December 2014) (Exhibit R-117).

¹⁰⁸⁴ Supplemental Witness Statement of Mr. Ildephonse Niyonsaba dated 28 May 2020, at para. 16.

¹⁰⁸⁵ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), NRD Mining Concessions (18 September 2014) (Exhibit C-084), at page 1, NB: the letter is incorrectly dated 18 August 2014.

*tags for the NRD concessions. Minister said that he will not approve to provide the tags if NRD doesn't have [sic] licence;*¹⁰⁸⁶

- 680.3. In an email dated 9 October 2014 from Ms. Mruskovicova on behalf of NRD to Minister Biruta, Ms. Mruskovicova complains about not being given tags, stating that *"without ITRI tags we cannot transport or sell the minerals"*, and asserts that Mr. Benzinge does not have any entitlement to tags;¹⁰⁸⁷
- 680.4. In a letter from Mr. Marshall to the President of Rwanda dated 31 October 2014, NRD alleges that various crimes were *"actively assisted/promoted by Minister of State for Mining Evode Imena and others who illegally refuse us ITRI minerals "control tags" and so closed our business."*¹⁰⁸⁸
- 680.5. In a letter from Mr. Marshall on behalf of NRD to Minister Biruta dated 5 November 2014, he complains that former Minister Imena has *"refused to permit NRD to have any ITRI "control tags" and thereby shut down production at the NRD mines;"*¹⁰⁸⁹
- 680.6. In a letter from Mr. Marshall on behalf of NRD to former Minister Imena dated 28 November 2014, Mr. Marshall requests that *"you provide us with ITRI tags..."*¹⁰⁹⁰
- 680.7. In an email from Ms. Mruskovicova on behalf of NRD to Marie Louise of the Rwandan Mining Association dated 19 January 2015, Ms. Mruskovicova states that *"we are not getting a tag agent for 8 months, so we are out of business"* and that *"Ministry is refusing to give us a tag agent"*,¹⁰⁹¹ and
- 680.8. In an email from Mr. Marshall to Mr. Niyonsaba dated 30 March 2015, Mr. Marshall complains that former Minister Imena is not granting NRD a *"tag manager"* on the basis that it does not have a long-term licence, and states that *"we have begun legal procedures to claim against the Rwandan Government for expropriation damages under the Rwanda – US bilateral investment treaty."*¹⁰⁹²
681. It is inconceivable, in light of this correspondence evidencing actual knowledge of loss and damage in 2014, that the Claimants only acquired knowledge of loss or damage of this particular alleged breach and any associated alleged loss on the date that the Five

¹⁰⁸⁶ *Minutes from the meeting between Minister of State in Charge of Mining and NRD* (16 September 2014) (**Exhibit R-203**), at page 1.

¹⁰⁸⁷ Email from Z. Mruskovicova to Minister Biruta (9 October 2014) (**Exhibit R-204**).

¹⁰⁸⁸ Letter from NRD (R. Marshall) to His Excellency, the President of Rwanda, *Request for Help* (31 October 2014) (**Exhibit R-205**).

¹⁰⁸⁹ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 1.

¹⁰⁹⁰ Letter from NRD (R. Marshall) to the Minister of State for Mining (Minister E. Imena) (28 November 2014) (**Exhibit C-083**).

¹⁰⁹¹ Emails between Z. Mruskovicova and representatives of the Rwanda Mining Association, Meeting (19-20 January 2015) (**Exhibit R-206**).

¹⁰⁹² Email from R. Marshall to I. Niyonsaba, *Activities at Nemba site* (30 March 2015) (**Exhibit C-107**).

Concession Areas were publicly tendered in March 2016, or alternatively, in May 2015 when the final application by NRD for long-term licences was rejected.

682. Even if it is true that “*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*”¹⁰⁹³ – which is rejected – the date of the alleged expropriation cannot possibly be the relevant date for this particular claim which is not based on the Respondent’s alleged failure to grant long-term licences but on an alleged breach (which is denied) that took place in 2014.
683. Further, as with the other claims discussed above, even if the concept of a creeping breach of the FET standard was applicable (which it is not), if this alleged breach is said to be part of the alleged creeping breach by the Respondent (which again, is unclear due to the failure of the Claimants to properly plead their claim), it is still out of time. Even if all the events could be characterised as a single “creeping” breach of the FET standard or “composite act”, then it is one which was constituted, and known of, well before the First Cut-Off date. At a minimum, the alleged omission was sufficient to constitute the composite act that is alleged to be in breach of the FET standard, and alleged in the Memorial to be sufficient to violate the FET standard,¹⁰⁹⁴ being Rwanda’s decision not to grant tags to NRD, took place, and was known of by the Claimants in 2014. This was, of course, prior to the First Cut-off Date.
684. The claim is therefore out of time, and the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* in relation to it.

5. The allegation that the Respondent violated the Claimants’ due process rights

i. The Respondent did not violate the Claimants’ due process rights

685. The Claimants allege at paragraphs 217 to 220 of the Reply that Rwanda violated NRD’s due process rights, allegedly in breach of the FET standard, by (i) failing to positively evaluate the purported feasibility study NRD submitted as part of the November 2010 Application (which was for 5-year licences), and (ii) failing to grant NRD long-term licences in response to the November 2010 Application (which again was for 5-year licences). The Claimants rely on the second supplemental witness statement of Mr. Rwamasirabo at paragraphs 11 to 24 in support of this allegation.
686. These allegations are completely unsubstantiated both factually and legally and should be rejected. The Claimants have not established that such due process rights exist as a matter of Rwandan law, let alone that Rwanda breached them. Further, they have materially failed to analyse or explain how a breach of Rwandan law due process rights, if any, could constitute a breach of the USA-Rwanda BIT and/or customary international law by breaching FET norms.

¹⁰⁹³ Claimants’ Counter-Memorial on Preliminary Objections, at para. 20.

¹⁰⁹⁴ Claimants’ Memorial, at para. 184.

687. The Claimants allege that due process required, at a minimum, that Rwanda not use a review of the purported feasibility study as an excuse to avoid its obligations under the Contract, or as an excuse to deprive NRD of the benefits of the Contract, including the granting of long-term licences.¹⁰⁹⁵
688. The Claimants allege that the Contract required Rwanda to evaluate the purported feasibility study “upon receipt”. This is incorrect. There is no explicit obligation in the Contract to review the purported feasibility study; the Contract states only that NRD is required to submit the feasibility study, and that if a positive evaluation of the submitted feasibility study is made, NRD will be granted the mining concessions. Further, the Claimants have not identified (because they cannot) any procedural or substantive obligations arising from a source other than the Contract, to review the purported feasibility study in a particular way, or at a particular time.
689. In any event, the Respondent submits that no weight can be attributed to the evidence of Mr. Rwamasirabo with respect to the Rwandan law of due process. As explained at paragraphs 329 to 336 above, Mr. Rwamasirabo has acknowledged in his declaration dated 18 May 2020 that he is engaged as a witness of fact and not as a legal expert, and therefore no weight can or should be attributed to his views on Rwandan Law.¹⁰⁹⁶ In any event, his views on due process rights under Rwandan law are incorrect. As Mr. Mugisha states:

“... there is no codified law on due process in Rwanda. Failure to provide reasons does not invalidate a decision, and Mr Rwamasirabo has been unable to provide any authority for the proposition that it does. The only way in which an administrative decision can be challenged is through the procedure set out in the Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure (“Civil Procedure Code”). It sets out the relevant procedure, which requires that, if dissatisfied with the decision of an administrative authority, an appeal must be brought to the immediate superior of the decision-maker. If you remain dissatisfied you apply to the court to set aside the decision. There is no legislation or court decision that provides for the kind of due process that is being alleged here, in terms of an obligation to give reasons for a decision, or a right to engage in negotiations. Judicial review, in the form that it takes in the common law, does not exist in Rwandan law, and there is no concept of general administrative due process.”¹⁰⁹⁷

690. On the basis of this allegedly implied (but unsubstantiated and unexplained) obligation to review the purported feasibility study, the Claimants allege a failure of due process, arguing that Rwanda failed to evaluate the purported feasibility study, inconsistently with

¹⁰⁹⁵ Claimants’ Reply, at para. 219.

¹⁰⁹⁶ Letter from Duane Morris LLP to the Tribunal *Re: Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda* (ICSID Case No. ARB/18/21) (29 May 2020) attaching Declaration from Mr. Olivier Rwamasirabo (**Exhibit R-243**).

¹⁰⁹⁷ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 13; see also Expert Report of Mr. Richard Mugisha dated 24 May 2020, at para. 56 (“*There is no codified law of due process in Rwanda*”).

NRD's due process rights. Mr. Rwamasirabo alleges that due process required the Respondent to "inform NRD of deficiencies in the feasibility study and accord the Claimants with the opportunity to correct those deficiencies".¹⁰⁹⁸

691. However, as stated by Mr. Mugisha, the assessment of the purported feasibility study was within the absolute discretion of the Minister, and:

"... The government has absolute discretion in assessing the financial and technical capacity of an applicant, and determining whether that is sufficient such that any licence applied for should be granted.

*... there is no obligation to provide reasons for a decision, or allow an applicant an opportunity to remedy any aspect of an application that is not satisfactory."*¹⁰⁹⁹

692. As a matter of fact, while NRD did purport to provide a feasibility study in November 2010 as part of the November 2010 Application, that study was superficial and incomplete and was not in substance compliant with the obligation under Article 2(5) of the Contract. NRD was aware at the time that the purported feasibility study submitted was superficial and fell far short of what was required.¹¹⁰⁰

693. In October 2010, MINIFOM wrote to NRD expressing its dissatisfaction at the progress made by NRD.¹¹⁰¹ It stated that there had been "relatively low investment", and requested that it "give some [Concessions] back to the Government" on the basis of failure to appropriately invest or exploit the Five Concession Areas.¹¹⁰² Following this correspondence, NRD was conscious that the Contract would expire in November 2010 and its Licences were due to expire in January 2011, and aware of its obligation to provide a feasibility report pursuant to Article 4 of the Contract. Accordingly, it prepared an application for new licences and what purported to be a feasibility study.¹¹⁰³ The application was specifically time limited to the renewal of licences for a five-year period,¹¹⁰⁴ which reflected NRD's realistic acceptance at the time that it could not expect to be granted long-term licences based on its performance to date.¹¹⁰⁵

¹⁰⁹⁸ Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at para. 21.

¹⁰⁹⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at paras. 17-18.

¹¹⁰⁰ See Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 19-20; Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 19-21.

¹¹⁰¹ Letter from the Ministry of Forestry and Mines (C. Bazivamo) to the Director General of NRD, *Mining and Mineral exploration progress report* (20 October 2010) (**Exhibit C-026**).

¹¹⁰² *Ibid.*, (**Exhibit C-026**).

¹¹⁰³ Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 19; Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 19.

¹¹⁰⁴ *Application for the renewal of exploration licenses Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD* (**Exhibit C-035**); Rwanda Law No. 37/2008 on Mining and Quarry Exploitation, 11 August 2008, Official Gazette No. 14 of 6 April 2009 (**Exhibit CL-020**); NRD sought a small mine exploitation licence under Article 45 of the 2008 Mining Law, which is explicitly limited to five years.

¹¹⁰⁵ Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras. 17-19. Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 19-21.

694. The purported feasibility study demonstrated that NRD's performance was woefully inadequate to justify the grant of both short 5-year licences, let alone long-term licences to which it now claims it was entitled. NRD had failed to industrialise any of the Five Concession Areas and had failed to carry out the detailed exploration work that would have enabled it to prepare a proper feasibility report. The exploratory work undertaken fell far short of what would have been expected, or what was necessary, in order properly to develop professional, modern, industrial mining operations.¹¹⁰⁶ MINIRENA stated that it had considered NRD's November 2010 Application, and that:

*"After considering the exploration report submitted, it was found out that the contract signed between the Government of Rwanda and your company on 24/11/2006 had not been fully executed, more especially in its article 2 as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years."*¹¹⁰⁷

695. In communicating in due course that NRD had failed to comply with its obligations under Article 2 of the Contract, Rwanda indicated that it considered the Contract to have terminated. Given the superficial and incomplete nature of the November 2010 Application, the Government was unable to make a positive evaluation, and therefore did not grant new mining concessions and was under no obligation, contractually or otherwise, to do so either at that time, or at any time subsequently.

696. The Claimants further allege that their due process rights were violated on the basis of the Respondent allegedly "*stringing NRD along for years, letting it continue to perform under the Contract, operate and build up the mining Concessions, increasing their value, believing that it would obtain the long term licenses applied for in 2010*".¹¹⁰⁸ The Claimants have failed to provide proper particulars with respect to this part of the claim, and have not pleaded the basis for their allegation that Respondent allegedly strung the Claimants along; or led them to believe that they would obtain long-term licences; or that NRD increased the value of the Five Concession Areas. The onus, of course, is on the Claimants to properly plead the breaches of the USA-Rwanda BIT that they allege. However, in footnote 392 of paragraph 217 of the Reply, which cites paragraph 23 of Mr. Rwamasirabo's supplemental witness statement in which he lists various steps that he alleges "*violated NRD's due process rights*", it is inferred that the Claimants intend to rely on these alleged steps as part of this claim. The Respondent therefore relies on its analysis at paragraphs 163-163.3, 168-184.2, and 186-190 above, and at paragraphs 735-751, 756, and 759-763 below as to why none of the events relied on could have given the Claimants a reasonable expectation to long-term licences.

¹¹⁰⁶ *Explanatory Note on NRD (Exhibit R-017)*, at page 4.

¹¹⁰⁷ Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

¹¹⁰⁸ Claimants' Reply, at para. 219.

697. Further, even if a breach of Rwandan due process law could be established (which is denied), a simple breach of domestic due process obligations does not constitute a breach of the international standard. It is clear that, in contrast to a mere breach of the domestic law, “*in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action*”.¹¹⁰⁹ The essential question is “*whether the specific procedural protections claimed by the Claimants in this case are required by customary international law, particularly whether those protections are part of the customary international law minimum standard of treatment of aliens*”,¹¹¹⁰ and a “*high threshold of severity and gravity*”¹¹¹¹ must be shown in order for a Tribunal to conclude that the FET standard has been breached. The Claimants have failed to argue, let alone demonstrate, a breach of Article 5.

ii. The claims based on Rwanda’s alleged violation of the Claimants’ due process rights, in violation of the FET standard, are out of time

698. In any event, the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over this claim under Articles 2 and 26 of the USA-Rwanda BIT.

699. With respect to the claim based on the Respondent’s alleged failure to evaluate NRD’s purported feasibility study, the Claimants state that this breach concerns “*the Application submitted in November 2010*” and expressly allege that the breach took place at this time: “*Upon receipt, Rwanda was required to evaluate the feasibility study, which it did not do.*”¹¹¹² The alleged omission relied on thus took place:

699.1. before the entry into force of the USA-Rwanda BIT on 1 January 2012, and therefore the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* pursuant to Article 2 of the USA-Rwanda BIT; and

699.2. before the first Cut-off Date on 14 May 2015, and therefore the Tribunal lacks jurisdiction *ratione temporis* under Article 26 of the USA-Rwanda BIT.

700. Insofar as the Claimants rely on the Respondent allegedly “*stringing NRD along for years, letting it continue to perform under the Contract, operate and build up the mining Concessions, increasing their value, believing that it would obtain the long term licenses applied for in 2010*”, this claim is also out of time.¹¹¹³ As set out above, the Claimants have failed to provide proper particulars with respect to this part of the claim, and have not pleaded the basis for their allegation that Respondent allegedly strung the Claimants along or led them to believe that they would obtain long-term licences. The only events

¹¹⁰⁹ See, for example, *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) (**Exhibit RL-165**), at para. 371.

¹¹¹⁰ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014) (**Exhibit RL-057**), at para. 9.27.

¹¹¹¹ *Ibid.*, (**Exhibit RL-057**), at para. 9.47.

¹¹¹² Claimants’ Reply, at para. 218.

¹¹¹³ Claimants’ Reply, at para. 219.

rereferred to and therefore that can be properly relied on by the Claimants with respect to this breach are those listed at paragraph 23 of Mr. Rwamasirabo's supplemental witness statement which he alleges "*violated NRD's due process rights*". Every single action cited here by Mr. Rwamasirabo took place prior to the First Cut-off Date and the Claimants had knowledge of these alleged actions and any associated loss prior to the First Cut-off Date.¹¹¹⁴

701. The Claimants have failed to explain how it could possibly be the case that they did not know of these alleged breaches until the public tender in March 2016, nearly five years after the date on which, on their own case, the Respondent was in breach by allegedly failing positively to review NRD's purported feasibility study (the decision in respect of which was communicated on 2 August 2011¹¹¹⁵), and long after all of the events that are alleged at paragraph 23 of Mr. Rwamasirabo's supplemental witness statement to constitute breaches of the FET standard. Clearly, the claim is untenable when the essence of this claim is *procedural* in nature: it does not pertain to the outcome of NRD's licence applications but rather to the process undertaken with respect to it. It is unclear how this alleged procedural breach could not have been known until the alleged "taking" of the Five Concession Areas as a result of the March 2016 public tender or alternatively, with the final rejection letter given by former Minister Imena on 19 May 2015, which relates to the *substantive* outcome of NRD's attempt to receive long-term licences.
702. Further, as with the other claims discussed above, even if the concept of a creeping breach of the FET standard was apposite on the current facts (which it is not), if this alleged breach of the Claimants' due process rights is said to be part of this alleged creeping breach by the Respondent (which again, is unclear due to the failure of the Claimants to properly plead their claim), it is still out of time. That is, even if all the events could be characterised as a single "creeping" breach of the FET standard or "composite act", then it is one which was constituted, and known of, well before first Cut-Off date. At a minimum, the acts and omissions sufficient to constitute the composite act which is said to violate the FET standard were known of long before the First Cut-Off date.
703. Plainly, the claim is out of time and the Tribunal and/or ICSID has lacks jurisdiction *ratione temporis* to hear this claim.

¹¹¹⁴ Specifically, in the Supplemental Witness Statement of Mr. Rwamasirabo dated 13 March 2020, at para. 23 Mr. Rwamasirabo refers to correspondence dated: 14-16 January 2011 (**Exhibit C-156**); 20 February 2012 (**Exhibit C-034**); 13 September 2012 (**Exhibit C-045**); 10 February 2013 (**Exhibit C-056**); 9 April 2013 (**Exhibit C-158**); 16 October 2013; and alleged in person meetings on 9 May 2013 and 30 October 2013. All of these actions occurred well prior to both Cut-off Dates in May and June 2015.

¹¹¹⁵ Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

6. The allegation that the Respondent acted inconsistently with the Claimants' expectation that its investments be treated transparently

704. In the Memorial at section VI.B, the Claimants alleged that the Respondent acted inconsistently with the Claimants' right to full protection and security. This was addressed in the Counter-Memorial at paragraphs 379 to 393. In the Reply at paragraphs 163 to 165, the Claimants assert that a transparency requirement is part of the FET standard.
705. However, the Claimants have not independently advanced the claim of breach of the FET standard by virtue of an alleged failure to treat the Claimants' investments transparently in the Reply. For the avoidance of doubt, the Respondent maintains its response to that allegation as set out in the Counter-Memorial.

7. The allegation that the Respondent acted inconsistently with the Claimants' right to full protection and security

706. In the Memorial at section VI.C, the Claimants alleged that the Respondent acted inconsistently with the Claimants' right to full protection and security. This was addressed in the Counter-Memorial at paragraphs 394 to 416. The Claimants have not addressed this claim in the Reply but, for the avoidance of doubt, the Respondent maintains its response set out in the Counter-Memorial.

8. The allegation that the Respondent acted inconsistently with the Claimants' legitimate expectations, in breach of Article 5

i. Introduction to legitimate expectations

707. In their CMPO and Reply, the Claimants rely on certain events which they suggest led them to reasonably believe, until the date that the Five Concession Areas were tendered in March 2016, that long-term licences would be granted. These allegations are baseless. Not a single one of the bases alleged to have led to this expectation contains a guarantee of a long-term licence, and could not have given the Claimants a reasonable expectation that NRD would be granted long-term licences.
708. Further, the argument that NRD were automatically entitled to long-term licences is conceptually absurd. Long-term mining licences confer the most valuable and significant rights that a mineral-rich country could grant to an investor: an entitlement to exploit the state's lucrative mineral resources for multiple decades. Rwanda's mineral resources are among its most valuable public assets and are a significant export earner and source of development, from community level upwards. In granting rights so extensive in both nature and duration to private investors, as opposed to simply exploiting the concession areas through state-owned companies, a state like Rwanda makes a calculated decision that the benefits of having an investor run the operation more efficiently will outweigh the loss of control and associated loss of profit, due to increased productivity and thus

greater royalties through taxation.¹¹¹⁶ The idea that a country would be willing to simply hand these very significant rights away to a company without that company proving itself and its ability - financial, technical and commercial - to develop the concession areas into highly productive, successful operations – that such rights would be conferred automatically - is untenable as a matter of basic commerciality and economic reality.

709. The below sets out the legal framework around legitimate expectations and assesses the facts that the Claimants claim led them to have expectations that NRD would be granted long-term licences.

ii. Protection of expectations under the MST only arises to the extent that failure to comply with them constitutes a breach of the MST standard

710. As the Claimants state at paragraph 278 of the Reply, the MST standard may be breached by a failure to comply with representations, made by a state and reasonably relied on by an investor. It is also the case that the representation relied upon must have been made at the time that the investor made their investment, in order to induce them to make the investment. That is well established and uncontroversial. However, the MST standard is only breached if the failure to comply with those representations reaches the threshold elucidated by the Tribunal in *Waste Management v. Mexico*. The Tribunal in that case held that the MST is infringed by conduct that is “*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*”. In that context, and in applying that standard, it will be relevant that “*the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*”.¹¹¹⁷

711. The Claimants have not sought to argue otherwise.¹¹¹⁸

iii. In the event that the Tribunal determines that the autonomous FET standard applies, only legitimate expectations held at the time that the investment was made are protected

712. In the event that the Tribunal considers that the autonomous FET standard applies, as set out in the Respondent’s Counter-Memorial, not all categories of expectations are protected by the law of legitimate expectations. Even the FET standard only protects expectations that are reasonable and legitimate in light of the circumstances and on which the investor relied when it made its investment, not the investor’s subjective

¹¹¹⁶ See Witness Statement of Mr. Francis Gatere dated 24 May 2019, at para. 25 (“...achieving industrialisation was the very rationale for privatisation of the mining industry in 2006: the Government wanted to increase productivity by professionalising the mining industry. Increasing productivity was and is vital because it facilitates Rwanda’s economic development through mineral royalties.”)

¹¹¹⁷ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Exhibit CL-028), at para. 98.

¹¹¹⁸ See Claimants’ Reply, at para. 178.

motivations and considerations.¹¹¹⁹ The determination of reasonableness and legitimacy of the investor's expectations requires a balancing of the various interests at stake, taking into account all circumstances.

713. The overall framework is helpfully set out in *Invesmart v. Czech Republic*:

“First, although an investor's expectation is subjective, i.e., what the investor believed to be the import of its dealings with government officials on which it claims to have relied, for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim.

Secondly, a source of contemporaneous evidence of the investor's expectation can be the contractual documents by which it acquired its investment or otherwise dealt with the seller of the investment where it purchased an existing investment.

Thirdly, there is a temporal dimension to evaluating a claimed expectation. To the extent that the expectation is based upon the investor's reliance upon the acts and/or statements of the responsible government officials, it must be based on how the officials actually dealt with the investor at the time.

For example, in the Tribunal's view; it is not appropriate to base a claimed expectation upon the content of internal governmental discussions to which the investor was not privy at the time. If the contents of a particular governmental discussion or deliberative process to which the investor was not a party were nevertheless disclosed to it, they can contribute to the investor's expectation. However, if it was not privy to a discussion nor informed of its results, the investor cannot use documents disclosed in a subsequent arbitration as proof of its expectation at the time. Such documents can confirm a claimed expectation, but they cannot be used to establish a particular factual element of a claimed expectation if such element was unknown to the investor at the time.

Fourthly, the due diligence performed when the investor made its investment plays an important role in evaluating its expectation. A putative investor, especially one making an investment in a highly regulated sector such as financial services, as in the instant case, has the burden of performing its own

¹¹¹⁹ See Respondent's Counter-Memorial, at para. 327, citing e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602 (“Protection of legitimate expectations: the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.” (emphasis added)); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008) (**Exhibit RL-027**), at para. 186 (“Tribunals have considered that fair and equitable treatment was denied when the protection of the investor's expectations had not been warranted, provided that these were reasonable and legitimate.” (emphasis added)).

due diligence in vetting the investment within the context of the operative legal regime.

Fifthly, and related to the fourth point, an investor's expectations must be based on the legal regulatory regime in place in the host state. Although there has been a suggestion in some cases that the investor's subjective expectations are to be given substantial weight, they are not to be the definitive source of the host state's obligations...

Sixthly, it is important to distinguish between the various entities of the state. While the acts of governmental entities are attributable to the state for the purposes of international responsibility, the fact of attribution cannot be used to obscure the allocation of different competencies between different entities of the state when the issue of breach is determined. The investor deals with the state in its various emanations. Barring some kind of agency relationship, one entity of the state not vested with actual decision-making authority cannot be taken to bind the entity which by law possesses the actual authority.”¹¹²⁰

714. As such, the law of legitimate expectations only protects expectations on which the investor *actually relied* when it made its investment.¹¹²¹ A foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment. It is the investor's reliance on a promise which may prompt, or contribute to, its decision to invest and proceed with that investment, and which makes in turn the expectation worthy of legal protection.¹¹²² As such, the representation must have existed, and have been relied on, at the time that the investment was made. Expectations that arose *after* the time that the investment was made cannot be covered by the notion of legitimate expectations as it operates within the FET standard. Such beliefs in the likely success of an investor's investment do not attract the protection of international investment law. Further expectations must be reasonable when assessed against the background of the information that a claimant knew or ought to have known at the time that it invested.¹¹²³
715. The reasonableness or legitimacy of an investor's expectation is assessed in all the circumstances, including the conditions prevailing in the host state at the time:

“To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances,

¹¹²⁰ *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, (26 June 2009) (**Exhibit RL-039**), at paras. 250-256.

¹¹²¹ See, e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602 (“*Protection of legitimate expectations: the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.*” (emphasis added)).

¹¹²² *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 557.

¹¹²³ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (**Exhibit RL-024**), at para. 7.78.

*including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”*¹¹²⁴

716. The Claimants claim that they had a legitimate expectation that, after obtaining the Contract, NRD would receive a long-term licence for the Five Concession Areas, permitting it to mine for a period of 30 years.¹¹²⁵ However, such an expectation would not be protected even under the autonomous FET standard.
717. The law of legitimate expectations can only protect expectations on which the investor actually relied when it made its investment.¹¹²⁶ Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment.¹¹²⁷ A foreign investor must make its decisions and shape its expectation on the basis of the law and the factual situation as it stands at the time of the investment. It is the investor’s reliance on a promise which may prompt, or contribute to, its decision to invest, and which in turn makes an expectation worthy of international legal protection.
718. In any event, none of the statements or acts on which the Claimants now seek to rely are explicit statements by Rwanda that NRD was automatically entitled to receive long-term licences following the expiry of their four-year licences. Although informal representations can be relied on in some circumstances, tribunals increasingly recognise that *“informal representations can present difficulties, which is why tribunals have increasingly insisted on clarity and the appropriate authority to give undertakings binding*

¹¹²⁴ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**Exhibit RL-017**), at para. 340 (emphasis added). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-019**), at paras. 192-193 (relying on “*all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State*” and concluding “*In the present case, the Tribunal is of the view that the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract.*”). *National Grid plc v. Argentina*, UNCITRAL, Award, 3 November 2008, (**Exhibit RL-030**), at para. 173, (“[FET] protects the reasonable expectations of the investor at the time it made the investment”); *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, (**Exhibit RL-0019**), at para. 190-191; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, (**Exhibit CL-032**), at para. 264.

¹¹²⁵ Claimants’ Memorial, at para. 169.

¹¹²⁶ See, e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit RL-009**), at para. 602 (“*Protection of legitimate expectations: the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.*” (Emphasis added)).

¹¹²⁷ *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (**Exhibit RL-031**), at paras. 82, 83; *Saluka Investment BV v. The Czech Republic*, IIC 210 (2006), Partial Award (17 March 2006) (**Exhibit CL-033**), at para. 329; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**Exhibit RL-032**), at para. 372; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008) (**Exhibit RL-027**).

on a state".¹¹²⁸ In any event, even if informal representations are able to be relied upon, no such representations were made in this case. At no point did Rwanda represent to the Claimants, either formally or informally, that NRD would receive long-term licences.

719. Further, the investor's subjective beliefs do not suffice to show that a legitimate expectation exists. The scope of the USA-Rwanda BIT does not protect all subjective investor expectations genuinely held. Expectations must be based on more than mere subjective belief.¹¹²⁹

720. Accordingly, in order for an expectation held by the Claimants in this case to be protected by the autonomous FET standard, if that standard applies which is denied, it must have been objectively reasonable, not merely subjectively held, and must have existed at the time that the investment was made. It must be assessed in light of the Claimants' knowledge of the legal and factual situation at the time of its investment. Expectations that arose in a different manner are not covered by the notion of legitimate expectations that are worthy of protection in the context of the FET standard.

iv. The Claimants cannot have had a legitimate expectation that NRD was entitled to long-term licences when Spalena purchased NRD

721. As set out above at paragraphs 712 to 720, the only representations that are relevant in assessing legitimate expectation are those that are relied upon at the time that the investor made its investment.

722. Of the alleged statements, actions and inferences on which the Claimants seek to rely, the following took place prior to Spalena's purchase of NRD:

722.1. Alleged "*understanding of the mining community*", which is not a representation of the Respondent, and for which it cannot be held responsible under the US-Rwanda BIT (and which is not made out in any event);

722.2. Alleged communications with RIEPA, which are misrepresented by the Claimants;

722.3. Alleged expectations based on the language of the Contract, which is misinterpreted and which in any event is not sufficient grounds for a claim under the US-Rwanda BIT;

722.4. Alleged communications with OGMR, which are misrepresented;

722.5. Draft contracts, the origins, and terms of which are misrepresented by the Claimants; and

722.6. An alleged assurance from Minister Biruta, which is denied.

¹¹²⁸ *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) (**Exhibit RL-162**), at para. 371.

¹¹²⁹ *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, (26 June 2009) (**Exhibit RL-039**), at para. 250.

723. These will be discussed in detail below at paragraphs 724 to 751, but neither alone nor together are they sufficient to establish that the Claimants had a legitimate expectation that NRD was entitled to long-term licences when Spalena purchased NRD.

The alleged expectation based on the “general understanding of the mining community”

724. In relation to the alleged “general understanding of the mining community”¹¹³⁰ the Claimants have provided no evidence of that understanding. It is plainly not sufficient to build an investment upon any such “general understanding”; any reliance on it would not be reasonable, and it was not a representation made by the Respondent for which it should be considered to be accountable. Indeed, the Claimants have failed to provide a single authority in support of this extraordinary proposition. Relying on an alleged general understanding is clearly not a legitimate basis for an expectation that significant and valuable licences to conduct substantial mining operations for an extended period would be granted. Even reliance on the specific legal regime existing at the time, without “some promise” or statement from the state, is not sufficient to ground a legitimate expectation,¹¹³¹ let alone reliance on the supposed views of the so-called “mining community” as to what the likely outcome of any future application would be.

725. As explained by former Minister Imena, there is never any guarantee that a long-term licence will follow from a short-term licence.¹¹³² Further:

“...it was always clear that the evaluation based on the submitted documents had to be positive, and the other relevant conditions set out in a contract had to be complied with, before a long-term licence would be issued. This was reinforced by the mining policy introduced in 2010 and the new mining law implemented in 2014, both of which were implemented in order to better regulate the mining sector and the issuance of licences. What was clear at all times was that the law only allowed the issuance of licences to those companies who complied with the Government’s regulatory and performance requirements which had been brought in to try to professionalise and industrialise mining in Rwanda.”¹¹³³

726. As such any understanding that a licence was automatic or guaranteed did not come from any representation made by the Government. It was clear throughout that licences were only granted to companies that complied with regulatory requirements and that a positive evaluation of the licence application was always required before a licence would be issued. That was made clear in the Contract and was a matter of commercial common sense.

¹¹³⁰ Claimants’ Reply, at para. 179.

¹¹³¹ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (**Exhibit RL-036**), at para. 117.

¹¹³² Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 7.

¹¹³³ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 7.

727. That the granting of long-term licences is not automatic is reinforced by the evidence of Mr. Ehlers, who explains:

“Based on my experience of Rwanda it is not true that long-term licences are automatically granted by Rwanda after four years. That is just not how it works and everyone in the mining community in Rwanda is aware of this. Rather, it is the common understanding that many conditions have to be met in order for long-term licences to be granted – indeed, this is true of every country I have worked in. Shortly after I joined NRD in mid-2010 I met with Dr. Michael Biryabarema of the OGMR to discuss the process of obtaining long-term licences upon expiry of NRD’s four year licences, and he advised me that more work still had to be done, in particular in carrying out exploration and proving ore resources, before they would be granted. I informed H.C. Starck of this. Subsequently, Dr. Biryabarema reiterated the same point to me several times about the work that would need to be done before long-term licences could be granted.

As I explained at paragraph 19 of my first witness statement, I clearly explained these requirements for the granting of long-term licences to Mr. Marshall before Spalena acquired the company in December 2010. In particular, I explained to him that NRD could not expect to be granted any long-term licences upon expiry of the initial four-year licenses as it had not sufficiently carried out the exploration and was unable to provide an acceptable feasibility study as required under the Contract.”¹¹³⁴

728. Further, obtaining long-term licences could not and should not have been considered to be a “mere formality” as suggested by Mr. Buyskes.¹¹³⁵ As explained by former Minister Imena, “obtaining a licence of any kind has never been a mere formality either for new applicants or for companies applying to renew their licences.”¹¹³⁶

729. Further, Mr. Buyskes’ evidence on this issue is at odds with his experience and appears to have been fabricated. As former Minister Imena explains:

“Mr. Buyskes is himself well aware, based on his own experience with Rutongo and Eurotrade that the granting of licences is not a mere formality – if it were merely a formality Rutongo and Eurotrade would have obtained their new licences immediately given they had been among the best performers. Instead as Mr. Buyskes himself explains, it actually took them 3 years to obtain renewal of their licences.”¹¹³⁷

The alleged expectations based on communications with RIEPA

730. The Claimants allege that, in the course of communications with RIEPA, a promise was made by a RIEPA employee to the Claimants in 2006 that long-term licences were

¹¹³⁴ Supplemental Witness Statement of Mr. Anthony Ehlers dated 27 May 2020, at paras. 18-19.

¹¹³⁵ Supplemental Statement of Mr. Kevin Buyskes dated 16 August 2019, at para. 5.

¹¹³⁶ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 8

¹¹³⁷ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 8, referring to the Supplemental Witness Statement of Mr. Kevin Buyskes dated 16 August 2019, at para. 5.

guaranteed.¹¹³⁸ However, the only documentary evidence advanced in support of the allegation is an email from Mr. Lambert Mucyo to Mr. Marshall personally, not to the Claimants, concerning the Bisesero concession, which is not at issue in this Arbitration.¹¹³⁹ Further, the Claimants' investment through NRD did not begin until December 2010 when Spalena purchased NRD.¹¹⁴⁰

731. As set out at paragraphs 51 to 55 above, that this email from Mr. Mucyo is the best (and indeed the only) evidence the Claimants are able to present in support of this allegation demonstrates that the Claimants' case is truly wanting. The email does not indicate any guarantee of long-term licences, but merely informs Mr. Marshall that, if he is interested in investing in mining, he must write a letter to the Minister of State in Charge of Water and Mines expressing his interest. Further, the email refers to the requirement of submitting an "*action plan and Investment plan*", as well as "*environmental protection plan*".¹¹⁴¹ The email does not contain a single representation as to the nature or length of any licence that may be granted.¹¹⁴² Accordingly, any representation to Mr. Marshall in 2006 cannot be considered to be a representation to the Claimants that they would receive long-term licences for the Five Concession Areas.

The alleged expectations based on the language of the Contract

732. The Claimants have alleged that the language of the Contract itself gave rise to legitimate expectations.¹¹⁴³ The Respondent has already explained why this could not be so, at paragraphs 333 to 336 of its Counter-Memorial. In summary, it is clear that the English language version of the Contract states that "*after positive evaluation of the submitted feasibility study*" NRD will be granted mining concessions following the expiration of the contract. Any reliance on the words "*will be granted*" without paying attention to their context or indeed the very sentence in which the words appear is, first, not credible, and second, if true, misguided and a failure of due diligence for which the Respondence could not possibly be responsible. The French language version is even clearer as to the conditionality of the Contract. The Claimants have failed to advance any response to this position, instead simply repeating in the Reply the same implausible argument advanced in their Memorial.¹¹⁴⁴

733. As set out by Mr. Gatare, there cannot have been any expectation of an automatic entitlement to long-term licences based on the Contract:

¹¹³⁸ Claimants' Reply, at para. 180.

¹¹³⁹ Email from Lambert Mucyo to Roderick Marshall, *Bisesero Mining Concession* (12 December 2006) (**Exhibit C-139**).

¹¹⁴⁰ Claimants' Reply, at para. 17.

¹¹⁴¹ Email from Lambert Mucyo to Roderick Marshall, *Bisesero Mining Concession* (12 December 2006) (**Exhibit C-139**).

¹¹⁴² *Ibid.*, (**Exhibit C-139**).

¹¹⁴³ Claimants' Reply, at para. 180.

¹¹⁴⁴ Claimants' Reply, at para. 9.

“... that the four-year concession agreements entered into with investors in around 2006, including the Contract, did not provide any automatic guarantee or certainty that long-term agreements would be entered into. The national orientation was to encourage investors to mine in Rwanda but based on the condition that they would undertake effective, professional exploration with a view to developing industrial mining opportunities. These conditions were frequently, as was the case with NRD, captured in the four-year mining exploration agreements entered into in around 2006.

There has never been any legislation or regulation which guaranteed that automatically a long-term licence would be granted following a short-term licence. Any long term licence must be applied for, and the potential licensee must be able to prove to the government that they have met both the conditions of the original licence, and that they are appropriately positioned to be granted a long-term licence. It is not enough simply to demonstrate that the original four years have passed. If that were the only requirement then it would undermine the Government’s attempts to professionalise and industrialise Rwanda’s mining sector by only granting long-term licenses to investors with the financial resources, experience, technical and management capabilities to develop and manage large-scale, long-term, professional mining operations. In reality, as was understood in the sector, the four-year period was to allow licensors to prove that they should be granted a long-term licence.”¹¹⁴⁵

The alleged expectations based on communications with OGMR

734. Similarly misconstruing the language of a document by ignoring caveats or conditions, the Claimants allege that in July 2009, the OGMR informed them that the licences were “expected to be converted into long term concessions of 30 years”.¹¹⁴⁶ However, they fail to cite the remainder of the sentence, which states that this will occur “when there is success in defining economic deposits”.¹¹⁴⁷ The letter - which, in any event, is an internal Government communication, and not a letter to NRD as the Claimants suggest, and accordingly cannot have provided the base for any legitimate expectation – is clear that the conversion of licences into long-term licences is conditional on “defining economic deposits” or, as described by Dr. Biryabarema, who wrote the letter:

“In that letter I referred to the fact that permits, such as the four-year licences granted to NRD under the Contract, are expected to be converted into long term concessions of 30 years “when there is success in defining the economic deposits”. That was correct, but was always subject to the operator, in this case NRD, demonstrating their credentials and complying with its obligations to develop the concession areas.

These obligations included investing appropriately, carrying out sufficiently detailed exploratory activity, and submitting a satisfactory study assessing the

¹¹⁴⁵ Supplemental Witness Statement of Mr. Francis Gatare dated 29 at paras. 9-10.

¹¹⁴⁶ Claimants’ Reply, at para. 180.

¹¹⁴⁷ Letter from the Director of OGMR (Dr. M. Biryabarema) to the Director of the National Land Center/Office of the Registrar of Land Titles, *Application for a land lease by Natural Resources Development Rwanda Ltd (NRD)* (20 July 2009) (**Exhibit C-032**).

feasibility of mining in the area over a 30-year period. We would not be prepared to grant long-term concession areas to operators who had not demonstrated their professionalism and ability to develop the concessions into high-performing, industrial mining operations.”¹¹⁴⁸

The alleged expectations based on the purported draft long-term licence agreements

735. The Claimants allege in their CMPO that *“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”*.¹¹⁴⁹ The Claimants rely on the witness statements of Mr. Bidega at paragraph 4 and the first witness statement of Mr. Marshall at paragraph 29, as well as the *“Draft Contract between Government of Rwanda and NRD, September 2011”*¹¹⁵⁰ in support of this claim. They go on to claim in the Reply (without exhibiting any documentary evidence in support) that the *“Claimants were not deterred by Minister Kamanzi’s letter [of 2 August 2011] that purported to terminate the Contract because Mr. Bidega of the OGMR told Claimants to ignore that letter and Minister Kamanzi, jointly with the Prime Minister, sent a favorable transmittal letter with the approved long term license agreement, signed by NRD, to the Cabinet.”*¹¹⁵¹ The Claimants further allege that *“With the extension, negotiation and submission [of the draft agreement] to Cabinet, helped to confirm to Claimants that, as Respondent previously represented, NRD would receive the long term licenses.”*¹¹⁵² [sic]
736. These allegations are wholly unsupported by – and indeed, contradicted by – the documentary evidence. The fact that the Claimants and their witnesses, Mr. Bidega, Mr. Marshall, and Mr. Rwamasirabo, have, presumably deliberately, misrepresented the nature of the draft contract exhibited raises questions about their veracity and the extent to which any of their evidence can be relied on, as discussed in Section III.A above.
737. *First*, as explained at paragraphs 173 to 174, the draft contracts exhibited at **C-114** and **C-207** are not for long-term, 30-year licences but rather are expressly for five-year, small-scale licences. This is consistent with the fact that NRD had not yet applied for long-term licences and did not do so until January 2013. It is highly misleading for Mr. Marshall,¹¹⁵³ Mr. Bidega,¹¹⁵⁴ and Mr. Rwamasirabo¹¹⁵⁵ to suggest that the draft exhibited at **C-114** is a *“long term licence agreement”* when it plainly is not.
738. *Second*, the draft agreement was not prepared or produced by the Government. This is confirmed by the Claimants’ own evidence, which demonstrates that the draft contract

¹¹⁴⁸ Witness Statement of Dr. Michael Biryabarema dated May 2019, at paras. 9-10.

¹¹⁴⁹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 29.

¹¹⁵⁰ Draft contract between the Government of Rwanda and NRD (September 2011) (**Exhibit C-114**).

¹¹⁵¹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 180.

¹¹⁵² Claimants’ Counter-Memorial on Preliminary Objections, at para. 30, see also para. 29.

¹¹⁵³ Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 29..

¹¹⁵⁴ Witness Statement of Mr. Dominique Bidega dated 16 August 2019, at para. 4.

¹¹⁵⁵ Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020 at para. 23(a).

(and its various iterations) that are relied on were prepared by Mr. Marshall and Anthony Kibelinka, Mr. Marshalls advisor, and sent to Mr. Bidega.¹¹⁵⁶ Mr. Bidega misleadingly suggests otherwise: the clear impression given by the statement “*I provided NRD with a copy of the then ‘form’ of agreement that we were using for such Concession agreements between investors and the Government of Rwanda*” is that the document originated with the OGMR when it in fact originated from Mr. Marshall.¹¹⁵⁷ This is further evident from the fact that the style and format is different to what the Government would use.¹¹⁵⁸ As former Minister Imena explains, with respect to both this and a further version submitted by Mr. Marshall to the Government in February 2013:

*“Although the two drafts [contained in C-042 and C-114] are very similar in style and format, that style and format is very different to what the Government would use. Further, both drafts include information that we would not usually include in the body of the agreement, such as estimated investment levels and profitability estimates. I also note that both draft agreements, although purportedly prepared two years apart, contain exactly the same figures at Article 4 for “Capital Investment”, Article 5 for “Estimated capacity of production and scale of operation” and Article 6 for “Forecasted profit and loss statements”.*¹¹⁵⁹

739. Indeed, the stark difference in style and format between the draft agreements exhibited by the Claimants and the agreements used by the Government becomes readily apparent when the draft agreements are compared with standard long-term licence agreements such as those entered into with New Bugarama and Rutongo.¹¹⁶⁰ These long-term licence agreements are not remotely similar to the draft agreements relied on by the Claimants.
740. *Third*, in drafting the agreement that he sent to Mr. Bidega, Mr. Marshall appears to have used a draft agreement that New Bugarama Mining Company was preparing internally.¹¹⁶¹ However, Mr. Marshall expressly changed the duration of the licence from 2021 (being the expiry date for the concession New Bugarama Mining Company appears to have been seeking to acquire at the time) to 2016 and 2017 in the versions he prepared – a clear acknowledgment that, contrary to what they now allege, Mr. Marshall, and

¹¹⁵⁶ Email correspondence between Mr Marshall and Mr Bidega with attachments (September – December 2011) (**Exhibit C-207**).

¹¹⁵⁷ *Ibid.*, (**Exhibit C-207**).

¹¹⁵⁸ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 24.2.

¹¹⁵⁹ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 24.2 referring to Draft Contract between Government of Rwanda and NRD (September 2011) (**Exhibit C-114**), at pages 3-4; Amendment of Contract Between the Government of Rwanda and NRD (February 2013) (**Exhibit C-042**), at pages 4-6.

¹¹⁶⁰ See *Agreement for Transfer of Mining Concession by and Between The Government of the Republic of Rwanda and New Bugarama Mining Company* (29 January 2013) (**Exhibit R-181**) and *Agreement for Large Scale Mining License by and between the Government of the Republic of Rwanda and Rutongo Mines Limited* (3 September 2014) (**Exhibit C-025**), which is in substantially the same format as the large scale mining licences granted on NRD’s former concessions in 2016, see for example the *Agreement for large-scale mining license between the Government of Rwanda and Fair Construction Ltd* (28 November 2016) (**Exhibit R-208**).

¹¹⁶¹ Email correspondence between Mr Marshall and Mr Bidega with attachments (September – December 2011) (**Exhibit C-207**), at page 1.

through him the Claimants, did not have an expectation to a long-term licence at the time.¹¹⁶²

741. *Fourth*, the Claimants rely solely on purported actions by Mr. Bidega with respect to the draft contract, but Mr. Bidega did not have authority to make decision on whether to grant licences.¹¹⁶³ As Dr. Biryabarema, former Director General of the OGMR, explains, Mr. Bidega was only a mid-ranking official at the OGMR and “*it was not within Mr. Bidega’s remit to conduct negotiations, or to prepare draft contracts*”.¹¹⁶⁴ Further, Mr. Bidega’s lack of authority to make a decision as to whether to grant NRD a licence would have been known to NRD at the time, as these decisions had always been communicated from the relevant Minister, as evident from Minister Kamanzi’s letter of 2 August 2011 which was communicated to the Claimants prior to the correspondence between Mr. Marshall and Mr. Bidega later that year which the Claimants now seek to rely on.¹¹⁶⁵

742. *Fifth*, the allegations that the draft long-term licence agreement was submitted to Cabinet for approval is false:

742.1. Dr. Biryabarema did not approve the draft contract and sent it to the Minister of Natural Resources. Dr. Biryabarema has explained that he never had any discussions with Mr. Bidega regarding a draft contract for NRD, has never seen the draft contracts exhibited at **C-114**, **C-042** and **C-207** before, and that if he had submitted a draft contract to the Minister, he would have had a review meeting with him before it was submitted to the Cabinet office.¹¹⁶⁶ However, “[n]o such meeting ever took place.”¹¹⁶⁷ Further, contrary to Mr. Bidega’s claim, if Cabinet had had any questions regarding a contract with NRD those questions would have been discussed with former Minister Imena rather than the OGMR.¹¹⁶⁸ However, in this case, “*no such questions arose or could have arisen as no contract with NRD was ever submitted to Cabinet.*”¹¹⁶⁹

742.2. It is not true that former Minister Imena approved the draft contract and submitted it to Cabinet for approval. As former Minister Imena explains, “*Given that I have never seen the draft contracts at exhibits C-114 or C-207 before, it is*

¹¹⁶² See *Ibid.*, (**Exhibit C-207**). The draft contract sent by Mr. Marshall’s advisor, Mr. Kibelinka (containing the reference at Article 7 to New Bugarama Mining Company) states at Article 2(2) on page 3 that the licence will expire in 2021, whereas the amended versions of this draft contract that Mr Marshall sent to Mr Bidega that are included in the same exhibit (for example, at page 7), state that the duration is until 2017, and in the Draft Contract between Government of Rwanda and NRD (September 2011) (**Exhibit C-114**) the duration is stated at Article 2(2) on page 2 as being until 2016.

¹¹⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 24.1.

¹¹⁶⁴ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.4.

¹¹⁶⁵ Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration license* (2 August 2011) (**Exhibit C-062**).

¹¹⁶⁶ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at paras. 10.4- 10.5.

¹¹⁶⁷ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.5.

¹¹⁶⁸ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.6.

¹¹⁶⁹ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para. 10.6.

*impossible that I could have approved them or sent them anybody else for approval as Mr. Bidega claims”.*¹¹⁷⁰

742.3. It is also not true that the Prime Minister sent a favourable transmittal letter with the approved long-term licence agreement to Cabinet.¹¹⁷¹ It was not the Prime Minister who approved licence decisions at this time.¹¹⁷²

743. *Sixth*, the evidence of Professor Nkanika Wa Rupiya, who during his employment with NRD was NRD’s main contact person with the OGMR, is that long-term licences were not remotely in the picture in 2011. He explains:

*“NRD had only completed superficial exploratory work by late 2010, and the four-year licences were due to expire the following month. It was in these circumstances that we put together the November 2010 Application. The idea was that, if we successfully developed the five concessions during this period, we might be granted a long-term (30-year) licence to exploit the concessions. It was not the expectation or belief of anyone at that time that NRD would be granted a 30-year licence at this stage – that was not realistic based on the limited exploration that had been undertaken. This is reflected in my email to Mr. Marshall and Mr. Ehlers dated 14 January 2011, in which I described the November 2010 Application as the “NRD renewal application”.*¹¹⁷³

744. At paragraph 65 of the Reply , the Claimants cite, and misrepresent, an email chain between Professor Nkanika Wa Rupiya, Mr. Marshall, and Mr. Ehlers dated 14 January 2011 as supporting their allegation that Mr. Bidega had submitted a draft long-term licence to Cabinet.¹¹⁷⁴ In fact, Professor Nkanika Wa Rupiya merely states in this email that *“this morning I met Mr. Bidega Dominique, acting Director in OGMR, in order to get information about NRD renewal application. he said that it is still in examination because OGMR is very busy with starting the CTC implementation. OGMR has to meet ROB next week and he hopes the response will be given at the end of the end of January.”* [sic] The email does not state that Rwanda had determined that NRD had complied with the terms of the Contract, and nor does it mention a draft long-term licence agreement being submitted to Cabinet for approval (indeed, the email was exchanged many months before the draft agreement was allegedly sent to Cabinet).

745. Rather, the evidence of Professor Nkanika Wa Rupiya is that:

745.1. At no point did Mr. Bidega or anyone else at the OGMR ever discuss long-term licences with him.

¹¹⁷⁰ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 24.3.

¹¹⁷¹ Claimants’ Reply, at para. 80.

¹¹⁷² Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 25.

¹¹⁷³ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 7.

¹¹⁷⁴ Emails between A. Ehlers, R. Marshall and P. Nkanika, *NRD renewal application* (24-23 January 2011) (**Exhibit C-156**).

- 745.2. At no point did Mr. Bidega or anyone else at the OGMR ever tell him that they had agreed to grant the five-year renewal sought, or any other kind of licence for NRD.¹¹⁷⁵
- 745.3. Neither Mr. Bidega nor anyone else at the OGMR ever sent him a draft long-term licence agreement. Professor Nkanika Wa Rupiya has never seen the draft contracts between NRD and Rwanda dated September-December 2011 that are exhibited by the Claimants at **C-114 and C-207**.¹¹⁷⁶
746. Professor Nkanika Wa Rupiya further explained that if the OGMR had been willing to grant any kind of licences to NRD, *“it would have been communicated to me by Dr. Biryabarema.”*¹¹⁷⁷ As he puts it:
- “I did not ever understand that Mr. Bidega was in a position to negotiate or make any agreements about licences on behalf of OGMR, he had never been NRD’s primary contact at the OGMR, and we had not to my knowledge discussed or negotiated the terms of any existing licence renewal or granting of long-term licences with him.”*¹¹⁷⁸
747. *Seventh*, we note that Mr. Bidega, who by this point was employed with NRD, emailed Mr. Marshall on 5 June 2012 stating:
- “The government is working on the NRD license; at the level of PS through Fidele want the annual salaries for 2009, 2010 and 2011; for the same period she needs the tax payment to the government. At the level of agencies, we are in touch with Isah, the lawyer for Geology, Evode who is a geologist and Mine Department and Shires, the RDB lawyer adviser; all people we meet has positive attitude”* [sic]¹¹⁷⁹
748. This statement is at odds with the submission (which itself is incorrect) that Dr. Biryabarema and former Minister Imena had already approved (nine months earlier) long-term licences for NRD and submitted the proposal to Cabinet. It also begs the question as to why, if the Claimants were able to produce this email from Mr. Bidega (provided pursuant to document production), along with the email correspondence between Mr. Marshall and Mr. Bidega exhibited at **C-207**, they were not able to produce a single piece of correspondence between Mr. Marshall and/or Ms. Mruskovicova with Mr. Bidega (despite each of these individuals being witnesses) supporting the allegations that Mr. Bidega had told NRD to ignore Minister Kamanzi’s letter of 2 August 2011 and that Dr. Biryabarema, former Minister Imena, and even the Prime Minister had approved long-term licences for NRD and submitted the agreement to Cabinet for approval (despite NRD not having applied for such licences by this point in time).¹¹⁸⁰ The appropriate

¹¹⁷⁵ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 8.2.

¹¹⁷⁶ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 8.4.

¹¹⁷⁷ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 8.5.

¹¹⁷⁸ Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya dated 27 May 2020, at para. 8.5.

¹¹⁷⁹ Email D. Bidega to R. Marshall, *Flash report* (5 June 2012) (**Exhibit R-207**).

¹¹⁸⁰ Claimants’ Reply, at para 80; Witness Statement of Mr. Dominique Bidega dated 16 August 2019, at paras. 3-5.

inference to be drawn is that these allegations – like so many of the others made by the Claimants – are untrue. Although the Claimants allege that the Respondent has not complied with its document production obligations because it did not produce any correspondence between Mr. Bidega and Mr. Marshall,¹¹⁸¹ throughout his time at the OGMR as well as following his move to NRD, Mr. Bidega was communicating with Mr. Marshall and/or NRD using his own Yahoo address: bidegad@yahoo.fr.¹¹⁸² The Respondent clearly does not have access to Mr. Bidega’s Yahoo account, but Mr. Bidega evidently does, as the selective disclosure of the Claimants demonstrates.

749. This failure of the Claimants to produce any documentary evidence supporting their claims as to the representations made by Mr. Bidega, despite clearly having access to relevant email correspondence between Mr. Bidega and Mr. Marshall and/or Ms. Mruskovicova, from their own email accounts, is telling. The Claimants’ case as to the alleged guarantees by the Respondent as to their entitlement to long-term licences – which is entirely at odds with all of the documentary evidence and the evidence of the Respondent’s witnesses – rests largely on these alleged assurances by Mr. Bidega. Yet they have provided no evidence to support their contention that he gave such assurances aside from the draft contract which is expressly not for long-term licences, and which was prepared by Mr. Marshall as evidenced by the email exchanges exhibited at **C-207**. It is submitted that in these circumstances Mr. Bidega’s evidence that he made such statements to NRD and/or the Claimants should be rejected.
750. Accordingly, the Claimants could not have had any entitlement to long-term licences based on the misrepresented draft contract exhibited at **C-114** or the draft contracts prepared by Mr. Marshall that are exhibited at **C-207**.
751. The Claimants allege that their *“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”*.¹¹⁸³ The particulars as to this alleged submission are entirely lacking: Mr. Marshall fails to specify in his witness statement exactly who at GMD allegedly made this request.¹¹⁸⁴ The Claimants also rely on the *“Amendment of Contract Between the Government of Rwanda and NRD dated February 2013”*, which they say they submitted with their application of 30 January 2013.¹¹⁸⁵ The allegation that Rwanda requested that NRD submit this draft licence is not correct. Former Minister Imena explained at paragraphs 22 and 23 of his first witness statement

¹¹⁸¹ Letter from Duane Morris LLP to the members of the Tribunal, *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)* (20 May 2020) (**Exhibit R-173**), at page 3.

¹¹⁸² See Email correspondence between Mr Marshall and Mr Bidega with attachments (September – December 2011) (**Exhibit C-207**); Email D. Bidega to R. Marshall, *Flash report* (5 June 2012) (**Exhibit R-207**).

¹¹⁸³ Claimants’ Counter-Memorial on Preliminary Objections, at para. 39; Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

¹¹⁸⁴ Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 36.

¹¹⁸⁵ Draft amendment of contract between Government of Rwanda and NRD (February 2013) (**Exhibit C-042**).

that Rwanda “never actually reached the point of discussing contractual terms with NRD because we never got to the point in their application process at which it was necessary to do so.” He further explained that although Mr. Marshall stated in his covering letter that the agreement was “in conformity with the template which your Ministry provided to us”, any template did not originate from Rwanda as it was not in the style or format that would be used for a long-term agreement, as already explained above in relation to the draft contract exhibited at **C-114**.¹¹⁸⁶ Similarly, Dr. Biryabarema has stated that he has never seen the draft contract exhibited at **C-042** before.¹¹⁸⁷ It appears that this contract is simply NRD’s own modification of the small-scale mining agreements that Mr. Marshall had prepared dated September, October, and December 2011, which were never approved or agreed to by the Respondent.¹¹⁸⁸

v. The Claimants cannot have had legitimate expectations to long-term licences based on Rwanda’s conduct following Spalena’s purchase of NRD

752. The Claimants also rely on a substantial number of alleged representations that took place after Spalena purchased NRD, stating that their expectations were “bolstered”,¹¹⁸⁹ or “encouraged”,¹¹⁹⁰ by those statements or actions of Rwanda. The Claimants have provided no evidence that any investment was made by the Claimants after the initial purchase of NRD. However, as the Claimants may assert that further investments were made (of which, if permitted at all, they should be put to strict proof), it is material to observe that, where investments are made through several steps and spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.¹¹⁹¹ On that basis, the Respondent also addresses the Claimants’ further and later-in-time alleged bases for its expectation.
753. The Respondent’s positive case, which sets out the reasons that any expectation that long-term licences would be granted was not legitimate, reasonable or objective, is set out in its Counter-Memorial at paragraphs 358 to 374. The following sets out further context, and addresses issues raised in the Reply, directly assessing each of the interactions that the Claimants allege led to their expectation being upheld, encouraged or prolonged by Rwanda in the period following the purchase of NRD by Spalena.

¹¹⁸⁶ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 24.2.

¹¹⁸⁷ Draft amendment of contract between Government of Rwanda and NRD (February 2013) (**Exhibit C-042**).

¹¹⁸⁸ Draft contract between the Government of Rwanda and NRD (September 2011) (**Exhibit C-114**); Email correspondence between Mr Marshall and Mr Bidega with attachments (September – December 2011) (**Exhibit C-207**).

¹¹⁸⁹ Claimants’ Counter-Memorial on Preliminary Objections, at paras. 31 and 39.

¹¹⁹⁰ See Claimants’ Reply, at para. 182; Claimants’ Counter-Memorial on Preliminary Objections, at para. 42.

¹¹⁹¹ See C. Schreuer and U. Kriebaum, *At What Time Must Legitimate Expectations Exist?* in J. Werner and A. H. Ali (eds.), *A LIBER AMICORUM: THOMAS WÄLDE: LAW BEYOND CONVENTIONAL THOUGHT* 265-276 (2009). See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 557.

The alleged expectations based on correspondence with Government agents

754. As explained at paragraph 123 above, following the expiry of the initial four-year term for the licences, in August 2011 MINIRENA granted an extension of NRD operations in the Five Concession Areas for a six month period to February 2012 in order to provide both parties with time to negotiate further licences, and not on the basis of an obligation to ultimately provide long-term licences. MINIRENA stated, in its letter granting that extension, that NRD had failed to fully execute the Contract, bringing to an end any entitlement to extended long-term licences under the Contract:

“After considering the exploration report submitted, it was found out that the contract signed between the Government of Rwanda and your company on 24/11/2006 had not been fully executed, more especially in its article 2 as regards the presentation of the final report of reserves and mining feasibility studies at the end of four years. We notice that you applied for five year (5) licences for small mines within each of the five concessions. The new status of the concessions will have to be decided based on the work executed in the light of the signed contract (exploration work and other commitments) and on the provisions of the new mining law. We extend the operation of your licence for six (6) months from the day of receipt of this later [sic], to allow us time to determine the future of these concessions.”¹¹⁹²

755. From this letter, it is clear that Rwanda communicated to NRD that it had failed to fully comply with the Contract, and that any new or extended contracts would be granted in light of performance of the Contract and the relevant Rwandan mining law. It did not promise to grant long-term licences. Nor did it indicate that the possibility of doing so remained under consideration, following NRD’s failure to provide the required documentation by way of application. Further, Rwanda was explicit that the extension was granted “to allow us time to determine the future of these concessions.”¹¹⁹³ There is no language in MINIRENA’s letter that indicates any kind of guarantee or assurance of further extensions or ultimately of long-term (or even short-term) licences. There is no basis for an expectation that NRD ever was, or remains, entitled to long-term (or indeed any) licences or indulgence.

756. The Claimants appear to accept that, but submit that “*Claimants were not deterred by Minister Kamanzi’s letter [of 2 August 2011] that purported to terminate the Contract because Mr. Bidega of the OGMR told Claimants to ignore that letter...*”¹¹⁹⁴ However:

756.1. The Claimants have not provided any documentary evidence to support their contention that Mr. Bidega made this statement;

¹¹⁹² Letter from the Ministry of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration license* (2 August 2011) (**Exhibit C-062**).

¹¹⁹³ *Ibid.*, (**Exhibit C-062**).

¹¹⁹⁴ Claimants’ Reply, at para. 18.

- 756.2. Mr. Bidega is a witness for the Claimants, yet has not said in his evidence that he made any such statement to any representatives of the Claimants; and
- 756.3. Mr. Marshall's evidence is oddly opaque as to the details of this alleged representation. In his second supplemental statement at paragraph 20, he simply states that: *"Dominique Bidega, Director of the Regulation and Supervision Unit of the OGMR, who had been responsible for negotiating the license agreement submitted to the Cabinet of Rwanda, told Claimants to ignore Minister Kamanzi's letter..."*. This statement is entirely inadequate: it fails to specify to whom Mr. Bidega allegedly made this statement (it being unclear whether the statement was allegedly made to him or someone else representing the Claimants); on what date Mr. Bidega allegedly told the unspecified person(s) to ignore the letter; and by what means (whether by email, phone, in person or otherwise) the unspecified person was told to ignore the letter. It is submitted that no weight can be given to this vague and unparticularised statement. Ultimately, it is just not tenable that in the face of the clear letter from Minister Kamanzi, who was far more senior than Mr. Bidega, stating that the licences would not be granted, that the Claimants could have reasonably expected otherwise.
757. As the expiry of the extension approached, on 12 December 2011, NRD and the representatives of MINIRENA, and the Rwanda Natural Resources Authority and Geology and Mining Department met to discuss the potential way forward.¹¹⁹⁵ MINIRENA was clear that *"the resources evaluation accomplished under [NRD's] previous contract fell far short of the level expected"* and accordingly that it *"would only be prepared to negotiate with [NRD] possible new licences on only two of the five concessions"*.¹¹⁹⁶
758. The Claimants fail to address any of this correspondence, which clearly provides no basis for any expectation of long-term licences. And yet further, NRD itself did not assert any entitlement to long-term licences at this time, despite being in regular contact with various Rwandan authorities, both in relation to the extensions to its licences and in relation to other topics.¹¹⁹⁷ The Claimants did not have and cannot have had any such expectation of NRD obtaining any mining licences, of whatever term, given its failure to

¹¹⁹⁵ Letter from the Minister of Natural Resources (S. Kamanzi) to the Managing Director of NRD, *Resolution to the issue of the former concessions held by NRD* (26 January 2012) (**Exhibit R-018**).

¹¹⁹⁶ *Ibid.*, (**Exhibit R-018**).

¹¹⁹⁷ See, for example, Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (S. Kamanzi) (30 January 2012) (**Exhibit C-039**) referring to the *"draft extension contract for NRD"*; Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (S. Kamanzi) (14 September 2012) (**Exhibit C-049**) acknowledging receipt of the extension of NRD's mining and exploration licences to October 2012; in relation to non-licencing issues see: Letter from the Chairman of NRD (R. Marshall) to the Mayor/Ngororero District (22 November 2011) (**Exhibit C-044**), Letter from Chairman of NRD (R. Marshall) to the Commissioner for Operations, Rwandan National Police (8 February 2012) (**Exhibit C-046**), Letter from the Chairman of NRD (R. Marshall) to the District Police Commissioner, Ngororero District (3 September 2012) (**Exhibit C-052**), and Letter from the Chairman of NRD (R. Marshall) to the Deputy Director General of GMD (M. Biryabarema) (14 December 2012) (**Exhibit C-050**).

provide Rwanda with the relevant documents that were requested and required in order for Rwanda to review its application, its past failure to develop the Five Concession Areas to the required level, and its inability to demonstrate its capacity or intent to develop the Five Concession Areas.

759. The Claimants allege that Minister Kamanzi's letter of 20 February 2012 extending the licences through to May 2012 "*bolstered Claimants' beliefs that the long term licenses would be executed...*".¹¹⁹⁸ This letter stated that "*I am certain that this is enough 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.*"¹¹⁹⁹ They also rely on Minister Kamanzi's letter of 13 September 2012 extending the licences until October 2012 and in particular the statement that "*new contracts.... will be negotiated as has been communicated to all existing concession holders*".¹²⁰⁰
760. Contrary to the Claimants' submissions, these statements do not suggest that *any* licences were guaranteed. In any event, as NRD had not applied for any long-term licences by this point, and had only applied for a five-year renewal of its licences as explained above, the statements made are irrelevant to the question of the Claimants' expectations as to long-term licences and any alleged breach by the Respondent in failing to grant them. If the Claimants genuinely believed these letters amounted to representations that long-term licences were guaranteed (which is not credible and is denied), then that is an inexplicable misunderstanding on their part. The letters provided no basis for a reasonable expectation of receipt of long-term licences.
761. The Claimants further rely on Dr. Biryabarema's letter dated 10 February 2013 in which he allowed NRD to temporarily resume mining activities on the basis of NRD's plan to deploy demobilised soldiers to provide security at the Five Concession Areas.¹²⁰¹ The Claimants rely on the fact that Dr. Biryabarema stated that "*NRD will be permitted to resume activities in the short term as we proceed with negotiations on your request for new contracts for the concessions.*" Again, this letter contained no guarantee that NRD would receive long-term (or any) licences and could not form the basis of a reasonable expectation to long-term (or any) licences.¹²⁰²

¹¹⁹⁸ Claimants' Counter-Memorial on Preliminary Objections, at para 31; Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

¹¹⁹⁹ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

¹²⁰⁰ Claimants' Counter-Memorial on Preliminary Objections, at para 37.

¹²⁰¹ Letter from Deputy Director General, RNRA (Dr. M. Biryabarema) to NRD (R. Marshall), *Security strategy in NRD concessions in Western Rwanda* (10 February 2013) (**Exhibit C-056**), referred to in Claimants' Counter-Memorial on Preliminary Objections, at para. 40.

¹²⁰² See also the Witness Statement of Dr. Michael Biryabarema dated 23 May 2019, at para. 16 ("*This was a short-term interim measure, and did not involve the granting of any new licences (which could only be done by way of ministerial order).*")

762. In April 2013, the RDB wrote to NRD, stating:

“We understand that the Contract expired in 2011 and the Company has been operating on short term extensions while both parties work toward concluding a comprehensive agreement.

... we wish to initiate negotiations with the Company for the issuance of a small mine exploitation licence for the Nemba site”¹²⁰³

763. NRD misunderstood the intent of the RDB’s letter, intentionally or otherwise, stating that it looked forward to the opportunity to discuss *“receiving the agreed upon ‘Long Term Licence’”¹²⁰⁴* when what was offered was clearly negotiations relating solely to a five-year small-mine exploitation licence for the Nemba site.

764. The Claimants allege that they were invited to continue negotiating long-term licences in May 2013, and that former Minister Imena assured NRD at a meeting on 30 October 2013 that *“negotiations of the long term licences would be picking back up shortly”* and that they were *“encouraged by this meeting”*.¹²⁰⁵ That cannot be the case. Since making his first witness statement, former Minister Imena has located the minutes of this meeting which were prepared by his adviser at the time, Peter Martin Niyigena.¹²⁰⁶ The minutes of the meeting accord with former Minister Imena’s recollection of the meeting as set out in his First Witness Statement in that they set out how he explained that NRD’s Licences had expired, that NRD would need to get new licences and that they should focus on only two mining sites because NRD had failed to implement any of the activities it had planned.¹²⁰⁷ As explained by former Minister Imena:

“The minutes do not reflect Mr. Marshall’s version of the meeting as set out in his first witness statement at paragraph 38. Nowhere do they state that I “assured” NRD that “negotiations on the language of the agreement would be continuing shortly”. What was agreed, as reflected in the minutes, was the Government and NRD would set up a team that would meet at least once a week for the purpose of drawing up a plan for the mines, with new demarcations and recommendations. Negotiations regarding new licences would only start after that plan was drawn up. As I explained at the meeting, the “Ministry has no interest in stopping NRD Ltd for carrying out the mining activities however there is a need for both part to work in harmony.” We wanted to find a way to help NRD because it was in our interest for NRD to get a licence if it was able to demonstrate that it would mine in a professional and effective

¹²⁰³ Letter from the CEO of RDB (C. Akamanzi) to the Chairman of NRD (J. C. Zarnack), *Re: Invitation to negotiate for a small mine exploitation licences between the Government of Rwanda and Natural Resources Development Rwanda Ltd* (2 April 2013) (**Exhibit C-057**), NB: In fact it was the Licences rather than the Contract which had originally expired in January 2011, the Contract’s 4-year term having come to an end on 24 November 2010.

¹²⁰⁴ Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit (M. Isibo) (9 April 2013) (**Exhibit C-058**).

¹²⁰⁵ See Claimants’ Reply, at para. 182 and Claimants’ Counter-Memorial on Preliminary Objections, at para. 42.

¹²⁰⁶ MINIRENA and NRD Meeting Minutes (30 October 2013) (**Exhibit R-112**); Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 27.

¹²⁰⁷ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 27.

manner – there was no benefit to us in seeing NRD fail to receive a licence if it would be able to mine successfully.”¹²⁰⁸

765. As recorded in the minutes of this meeting, it was agreed between the Government and NRD that weekly meetings would be held in order to find a way to move forward¹²⁰⁹ – however only one more meeting was held.¹²¹⁰ At that meeting, and as set out in the minutes of that meeting, NRD were reminded that the Government was willing to negotiate the Nemba and Rutsiro concessions. However as former Minister Imena explains, “*NRD refused to negotiate over only these two concessions and continued to press for licences for all 5 concessions as can be seen from the three options set out on the final page of the minutes. No further meetings ever took place because in light of NRD’s refusal to focus on only two concessions there did not seem to be any way forward.*”¹²¹¹
766. From that point, NRD repeatedly (but wrongly, and presumably tactically) referred to the granting of long-term licences as agreed upon and as an obligation of Rwanda.¹²¹² This is not the case. In the context of the above, there was no basis for any legitimate expectation that NRD was entitled to long-term licences to exploit the Five Concession Areas.
767. The Claimants also rely on the letter from former Minister Imena to NRD dated 2 April 2014.¹²¹³ This letter makes no guarantees as to Claimants’ entitlement to their licences whatsoever, and in fact refers to NRD as a “*former holder of mining licences*” and invites NRD to “*renegotiate new mining agreements, under the terms of the new regulations*”.¹²¹⁴
768. The Claimants allege that they expected that Rwanda would “*continue with negotiations*” for long-term licences in 2014, after they say they regained access and control of the Five Concession Areas.¹²¹⁵ They allege, despite the clear terms of the 2014 Law and the express requests from the government to re-apply for long-term licences, that they did

¹²⁰⁸ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 28.

¹²⁰⁹ MINIRENA and NRD Meeting Minutes (30 October 2013) (**Exhibit R-112**).

¹²¹⁰ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 29 referring to MINIRENA and NRD Meeting Minutes (8 November 2013) (**Exhibit R-113**).

¹²¹¹ *Ibid.*, (**Exhibit R-113**).

¹²¹² See, for example, Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (7 June 2013) (**Exhibit C-059**), at page 3 (“*NRD would respectfully ask the Ministry of Natural Resources to ... Grant to NRD the long-term 30 year mining concession provided by Rwandan law and promised under the 2006 exploration and exploitation agreement, which has been repeatedly delayed and manipulated by RNRA*”); Letter from the Chairman of NRD (R. Marshall) to the Minister of State for Mining (E. Imena) (19 June 2014) (**Exhibit R-036**) (“*NRD retains its mining rights pending receipt of the ‘Long Term Licence’*”).

¹²¹³ Claimants’ Counter-Memorial on Preliminary Objections, at para. 44; Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**).

¹²¹⁴ Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**) (emphasis added).

¹²¹⁵ Claimants’ Reply, at para. 183.

not believe that they were required to apply but that they nevertheless decided to do so.¹²¹⁶

769. However, the Claimants could not have had a reasonable expectation of an automatic entitlement to long-term given the Claimants were expressly told they had to re-apply.

770. The Claimants allege that they had ongoing expectations of receiving long-term licences, and / or that they did not have a good reason to believe the Respondent to be in breach of the USA-Rwanda BIT because during a meeting on 16 September 2014, Minister Biruta stated that *“as long as I am Minister, you will not lose your Concessions”*.¹²¹⁷ This is inherently improbable in all the circumstances, and as the Respondent’s evidence shows it is untrue. As set out in the evidence of Mr. Gatara:

“I have discussed this allegation with Minister Biruta, who is currently the Minister of Foreign Affairs. Minister Biruta confirmed to me that he gave no such assurance or promise that on the contrary he had told Mr. Marshall that NRD should comply with the law, and that if it did so it would be treated fairly.

*In any event, Minister Biruta did not have, and would have been aware that he did not have, the power to promise that NRD would not lose its concessions. All that he could do was review NRD’s application under the applicable legal framework and, if he approved of it, submit it to Cabinet with a recommendation that it be approved. In fact, as discussed below, the application was substandard and no submission to Cabinet was made.”*¹²¹⁸

771. Further, former Minister Imena has also explained why it would have been highly unlikely that Minister Biruta would have made such comments:

*“I am confident of this because of the good working relationship we had which enabled both of us to discuss any matters relating to our work and to take decisions based on a shared opinion. I know from my conversations with him that he shared my concerns about NRD, and therefore there would have been no basis for him to have given the assurance NRD claims to have received.”*¹²¹⁹

772. On 12 November 2014, MINIRENA, in its letter declining to provide an extension to the licences, again explicitly stated that:

*“The terms of [the Contract] did not give NRD the rights to obtain an automatic and exclusive right for long term mining licences. However, as specified in Articles 4 and 5 of the [C]ontract; granting of mining licence is subject to a positive evaluation of the submitted feasibility study, and fulfilment of obligations under the article 2 of this [C]ontract.”*¹²²⁰

¹²¹⁶ Claimants’ Reply, at para. 184.

¹²¹⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 50; Witness Statement of Mr. Roderick Marshall dated 1 March 2019, at para. 53.

¹²¹⁸ Supplemental Witness Statement of Mr. Francis Gatara dated 29 May 2020, at paras. 27-28.

¹²¹⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 50; Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 32.

¹²²⁰ *Letter from the Minister of State in Charge of Mining (E. Imena) to the Chairman of NRD (R. Marshall)*, Re: Response to your letter (12 November 2014) (**Exhibit C-087**).

773. The Claimants also claim in their CMPO that after re-submitting their application on 16 January 2015, the following month “Minister Biruta confirmed that Respondent had received the submissions and was evaluating them”, referring to the email from Minister Biruta to Mr. Marshall dated 1 February 2015.¹²²¹ Minister Biruta’s statement in this email made no representations that the Claimants would receive long-term licences and merely stated that “Your application is being evaluated and we will inform you officially the final decision”. Accordingly, this email could not have provided any reasonable basis for a legitimate expectation that long-term licences would be granted.
774. The Claimants go on to claim that they did not consider that the rejection of NRD’s re-application as conveyed in the Respondent’s letter of 19 May 2015 was final on the basis of “Respondent’s lengthy history of increasing its pressure tactics on Claimants, the reversing position and continuing discussions of a long term licence”.¹²²² These allegations are entirely unsubstantiated and baseless. Rwanda did not adopt pressure tactics (and the Claimants have provided no evidence that it did), and nor did it “reverse” its position (and the Claimants have provided no evidence that they did). Further, the Respondent’s discussions with NRD (which far from being a breach of the USA-Rwanda BIT, were an indulgence) in no way amounted to guarantees that NRD would be granted long-term licences (and nor have the Claimants produced any evidence that they were). Ultimately, the Respondent cannot be blamed for NRD’s failure to submit a satisfactory application for long-term licences or otherwise satisfy Rwanda that it should be entrusted with valuable long-term licences.
775. Further, the Claimants’ claim that they did not consider the decision conveyed in former Minister Imena’s letter of 19 May 2015 to be final is inconceivable in light of the clear terms of the letter which expressly stated that NRD must hand over the mining perimeters and close operations within 60 days.¹²²³ Further, on 12 June 2015 former Minister Imena sent a further letter to NRD which addressed closure issues, referred to his letter of 19 May 2015 and requested that NRD cooperate with MINIRENA in assessing the compliance with the mining and environmental laws and regulations at NRD’s sites.¹²²⁴ Although the Claimants’ assert that they did not receive this letter,¹²²⁵ this is not credible given that it was addressed to exactly the same P.O. BOX number as every other letter sent from Rwanda to NRD, including former Minister Imena’s letter of 19 May 2015 which the Claimants have acknowledged they received. Further, in any event, it would have been obvious to NRD well before this date, based on all of the correspondence

¹²²¹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 59; Email from Minister Biruta to Roderick Marshall, *Meeting Schedule* (1 February 2015) (**Exhibit C-127**).

¹²²² Claimants’ Counter-Memorial on Preliminary Objections, at para 43.

¹²²³ Letter from Minister of State in charge of mining (Minister E. Imena) to NRD (R. Marshall), *Notification letter for not granting mining licences* (19 May 2015) (**Exhibit C-038**).

¹²²⁴ Letter from the Chairman of NRD (R. Marshall) to the CEO of RDB (F. Gatere) *Notification Letter from Minister of State for Mining* (25 May 2015) (**Exhibit C-112**).

¹²²⁵ Claimants’ Reply, at para. 198, footnote 562; Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 22.

highlighted at paragraphs 754 to 773 above, that Rwanda’s position was that the Claimants had no automatic entitlement to long-term licences and that long-term licences would only be granted if NRD’s application met the requirements of the relevant law. Indeed, NRD’s application under the 2014 Law had already been rejected by letter dated 28 October 2014.¹²²⁶

776. The Claimants claim that they maintained their expectation that long-term licences would be received throughout 2015, on the basis that former 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*” during that period.¹²²⁷ As explained at paragraphs 245 to 247 above, not only have the Claimants misrepresented the email on which they rely, but former Minister Imena has confirmed that any discussions he had with Mr. van Wachem and his business partner, Mr. Keersema, were in around May or June 2014 (and not June 2015) and that such discussions were held on the basis that NRD’s Licences had expired.¹²²⁸
777. As such, it is clear that the Respondent did not regard NRD as having any licences (or any entitlement to licences) in June 2015, as their application for long-term licences had already been rejected. For example, a Mining and Petroleum Unit Flash Weekly Report prepared by the Respondent in December 2015 refers twice to the “*former NRD concessions*” in a discussion of data collection for the future management of the Five Concession Areas.¹²²⁹ Similarly, an email exhibited by the Claimants to the Reply dated 4 November 2015 from Mr. Jeff Lindhorst to former Minister Imena refers to the “*Ex-NRD assets*”.¹²³⁰
778. The Claimants have alleged that Rwanda’s conduct in granting extensions to the Licences, ongoing negotiations, and allowing NRD to continue to operate its mines was sufficient to ground a legitimate expectation that it would receive long-term licences to mine in the Five Concession Areas. However, what is plain on the face of the above is that Rwanda consistently and repeatedly made clear to NRD that there was no guarantee it would be granted long-term licences.
779. Further, while the Respondent did extend NRD’s licences up to October 2012, the limited and interim nature of these extensions was clearly communicated in each case. Further, Rwanda was in constant communication with NRD in relation to its operations and licence applications. It is plain that the Claimants could not and did not have a legitimate expectation that NRD would receive long-term licences, based on their communications

¹²²⁶ Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit R-022**).

¹²²⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para 62; Email from Rene van Wachem to Roderick Marshall, *Rwanda Mining* (16 June 2015) (**Exhibit C-120**).

¹²²⁸ Supplemental Witness Statement of Mr. Evode Imena dated 27 May 2020, at para. 46.

¹²²⁹ Mining and Petroleum Unit Flash Weekly Report (1-4 December 2015) (**Exhibit R-209**).

¹²³⁰ Email from Jeff Lindhorst to Minister Imena, et al., *Rutsiro Processing Plant* (4 November 2015) (**Exhibit C-150**).

with the Government. NRD specifically applied for five-year short-term licences in 2010, and not for long-term licences. While they may have, at most, hoped that Rwanda would grant NRD long-term licences in 2014, they cannot reasonably have believed or understood that Rwanda was under any obligation to do so.

The alleged expectations based on Rutongo and Eurotrade's receipt of long-term licences

780. Further, the Claimants could not have had legitimate expectations, worthy of protection under the USA-Rwanda BIT that NRD were entitled to long-term licences on the basis that Rutongo and Eurotrade received long-term licences. The Claimants allege that their expectation that NRD would receive long-term licences was re-enforced by the fact that Tinco's investment vehicles, Rutongo and EuroTrade, each received a long-term licence,¹²³¹ and that "*NRD, while frustrated by the delays, remained confident that the receipt of the long term licences would be forthcoming*" on the basis that "*other investors in the mining industry, like Tinco, negotiated for nearly three years before receiving their long term licences.*"¹²³²

781. However, this is not sufficient grounds for legitimate expectations.

782. *Firstly*, as a matter of fact, Rutongo and Eurotrade were in completely different positions to the Claimants and NRD. The Claimants cannot have had a legitimate expectation that they would have been treated in the same way as Rutongo and Eurotrade, for the following reasons, discussed in greater detail in the Respondent's Counter-Memorial at paragraph 470 and set out in summary here:

782.1. Eurotrade and Rutongo were not required to re-apply for long-term licences; their situation was different from that of NRD both factually and legally - see paragraphs 259 to 264 above. In summary, when the 2014 Law came into force, Rutongo and Eurotrade had already applied for long-term licences and so their applications were treated as renewal, and not re-application.

782.2. Tinco, through Eurotrade and Rutongo, made significantly larger investments in Rwanda; while the Claimants' investments have been non-existent or minimal at best, Eurotrade and Rutongo's applications were well-funded.¹²³³

782.3. Rutongo established an excellent track record in exploring, exploiting and improving its concession areas in the initial four-year period, and submitted an impressive application for a long-term licence containing the information required.¹²³⁴ As explained by former Minister Imena:

"Rutongo's application, for example, was much more detailed than anything submitted by NRD. Not only this, but both Eurotrade and Rutongo had raised production levels in their concessions by

¹²³¹ Claimants' Reply, at para. 186.

¹²³² Claimants' Counter-Memorial on Preliminary Objections, at para. 43.

¹²³³ Witness statement of Mr. Evode Imena dated 24 May 2019, at para. 57.

¹²³⁴ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 58-59.

*considerable amount, invested far more into exploration, infrastructure and equipment, and carried out high quality exploration – the difference between them and NRD was staggering.*¹²³⁵

- 782.4. Rutongo and Eurotrade both have strong environmental records for compliance with Rwandan environmental law; both have strong records and have received certificates of recognition for their efforts,¹²³⁶ while NRD’s operations caused significant environmental damage.
783. Given their vastly different circumstances and propositions, there could be no possible reason for believing that NRD would be treated the same way as Rutongo and Eurotrade and therefore that NRD could expect to be granted long-term licences on the basis that Rutongo and Eurotrade had received long-term licences. As Mr. Ehlers explains, with respect to Rutongo, the comparison is *“inappropriate as NRD and Rutongo had very different types of operation”* – NRD’s *“essentially artisanal operations”* could not be compared to Rutongo’s concession areas, which had been *“industrial-scale operations with high levels of investment for many years.”*¹²³⁷ Mr. Marshall was entirely aware of this difference too, expressly acknowledging that Rutongo was producing *“twenty times”* as much as NRD in 2013 as discussed at paragraph 615 above.¹²³⁸ Rutongo’s experience therefore could not have given him any legitimate expectation to receipt of long-term licences.
784. Further, the Claimants claim in their Memorial that Tinco’s subsidiaries, Rutongo and EuroTrade were treated differently to NRD and that this constituted a separate breach, of the MFN Clause of the USA-Rwanda BIT.¹²³⁹ They claim that *“Tinco, for example, had ample opportunities to sit down with Rwanda and substantially negotiate the terms of their long term contract”* and that *“Rwanda did not subject ETI or RML [Tinco’s investment vehicles] to the “re-application” process even though Claimants were subjected to it”*.¹²⁴⁰ This is denied, for the reasons set out in paragraphs 211 to 216 of the Counter-Memorial and paragraphs 57 to 60 of the Witness Statement of former Minister Imena. Effectively,

¹²³⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.1 referring to Feasibility study for 30 year mining licence in relation to Rutongo Mines (sections A and B) (**Exhibit R-042**), Contract for acquiring the Rutongo Mining Concession (**Exhibit C-023**), Environmental Assessment and Protection Plan for Rutongo Mines (27 August 2008) (**Exhibit R-043**), Investment Plan for Rutongo Mines (27 August 2008) (**Exhibit R-044**), Survey Report on the siting of the Rutongo concession beacons (22 August 2009) (**Exhibit R-045**), Rutongo Mines Exploration Programme (18 October 2010) (**Exhibit R-046**), 2nd Quarter exploration report, Rutongo Mines Ltd (23 October 2012) (**Exhibit R-047**), Historic Operating Results and investment summary, Rutongo Mines Ltd (**Exhibit R-048**), Report on the Nyramyumba blast samples (**Exhibit R-049**), Independent Review of Resource Estimation Methods for Rutongo Mines, Rwanda (May 2012) (**Exhibit R-050**).

¹²³⁶ Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 62.

¹²³⁷ Supplemental Witness of Mr. Anthony Ehlers dated 27 May 2020, at para. 20.

¹²³⁸ Letter from NRD (R. Marshall) to Rwanda Revenue Authority (B. Kagarama), *NRD RIN 101390940* (31 July 2013) (**Exhibit R-107**), at page 5.

¹²³⁹ Claimants’ Memorial, at paras. 178 and 282.

¹²⁴⁰ Claimants’ Memorial, at paras. 178 and 282; see also Claimants’ Counter-Memorial on Preliminary Objections, at para. 52.

the Claimants are claiming that Rutongo and Eurotrade were treated more favourably, in violation of the USA-Rwanda BIT; whilst at the same time, seeking to rely on Rutongo and Eurotrade's treatment as a basis for their legitimate expectations. These two claims are inconsistent, for the reasons set out below.

785. Ms. Mruskovicova states that:

*"Claimants believed that they had successfully negotiated a long term license agreement by 2012, at which time the GMD told them had [sic] been submitted to the Government Cabinet for approval. Later, beginning in 2013, they were occasionally asked to continue negotiating terms but in fact were not given the opportunity to meet or to communicate with Government officials concerning the terms of the agreement. Contrary to Claimants' experience, Tinco was provided a true and meaningful opportunity to negotiate the terms of long term license agreements with Rwanda. Rwanda officials engaged in substantial discussions with Tinco representatives concerning the detailed terms of the ETI and RML agreements. Those officials did not engage in similar discussions with Claimants."*¹²⁴¹

786. Rutongo's long-term mining licence agreement was signed with Rwanda on 3 September 2014.¹²⁴² Eurotrade's was signed the same day.¹²⁴³ The Claimants allege that these companies' negotiations with the Government lasted three years.¹²⁴⁴ Accordingly, even if the Claimants had knowledge of how Rutongo and Eurotrade were treated prior to Ms. Mruskovicova allegedly commencing her role with the Tinco Group in 2015, the negotiation period for the licences held by Rutongo and Eurotrade clearly overlapped with the period in which NRD sought to obtain long-term licences.¹²⁴⁵ Indeed, the Claimants have stated that *"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"*.¹²⁴⁶ Given the Claimants allege that they were *"not given the opportunity to meet or to communicate with Government officials concerning the terms of the agreement"*,¹²⁴⁷ on their own case the alleged difference between how Rwanda treated the licence applications by Rutongo and Eurotrade compared with NRD's application (which is incorrect and denied) would have been apparent to the Claimants at the time. Accordingly, even on the Claimants' own case, there could be no possible reason for believing that NRD would be treated the same as

¹²⁴¹ Witness statement of Ms. Zuzanna Mruskovicova dated 28 February 2019, at para. 9.

¹²⁴² Agreement for Large Scale Mining License between the Government of Rwanda and Rutongo (3 September 2014) (**Exhibit C-025**); Claimants' Counter-Memorial on Preliminary Objections, at para. 52.

¹²⁴³ The licence was then granted on 29 January 2015; See Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Managing Director of Eurotrade (M. Kahanovitz), *Sending a Ministerial Order granting a mining licence* (29 January 2015) (**Exhibit R-210**).

¹²⁴⁴ Claimants' Counter-Memorial on Preliminary Objections, at para. 43.

¹²⁴⁵ Witness statement of Ms. Zuzanna Mruskovicova dated 28 February 2019, at para. 9 (emphasis added).

¹²⁴⁶ Claimants' Counter-Memorial on Preliminary Objections, at para. 54.

¹²⁴⁷ Witness statement of Ms. Zuzanna Mruskovicova dated 28 February 2019, at para. 9.

Rutongo and Eurotrade and therefore that NRD could expect to be granted long-term licences on the basis that these companies had been.

The alleged expectation based on a purported lack of formal handover process

787. The Claimants allege that they maintained a legitimate expectation that NRD was entitled to long-term licences until the date of the public tender in March 2016 on the basis that a handover process had not taken place, contrary to Rwandan law.¹²⁴⁸ This allegation is baseless. As set out in the evidence of Mr. Mugisha, no such handover process was required under Rwandan law:

“Concession-holders are required to comply with all existing laws on closure of mining operations, but there is no “handover process”: as I explain further below, the 2014 Law confers obligations upon the exiting concession-holder: it does not create any obligations with which the state has to comply in relation to “handover”. The so-called formal handover process alleged by Mr Rwamasirabo in Rwamasirabo 2 at paragraphs 5-6 and 8-10, and without which “a concession owner would continue to hold the concession rights” (at paragraph 7), does not exist.

There is no legislation, regulation, or guidance that sets out any formal handover process, let alone the detailed process set out by Mr Rwamasirabo at paragraph 6. Mr Rwamasirabo has cited no authority in support of the alleged handover process, because there is none. Consequently, there is no legal consequence for failure to complete the process set out at paragraph 6, let alone the significant consequence alleged.”¹²⁴⁹

788. Further, the only requirements in the 2014 Law relating to cancellation of licences or cessation of operations impose no obligations on Rwanda other than a notification period if it wishes to cancel a licence. Mr. Mugisha is clear that:

“... Articles 26 and 27 of the 2014 Law do not in fact grant rights to exiting concession holders, but rather impose obligations, on exiting concession holders. These obligations do not create a “handover process” that imposes any obligations on the state, but merely show the required information flow from the concession holder to the Minister on cancellation of the mineral licence.”¹²⁵⁰

789. The evidence of former Minister Imena is in accord:

“Although Articles 25 to 27 of the 2014 Law impose some obligations on concession-holders following the suspension or cancellation of a mineral licence, there are no formal “handover” procedures when a concession holder leaves a concession.”¹²⁵¹

¹²⁴⁸ Claimants’ Counter-Memorial on Preliminary Objections, at para. 63; Supplemental Witness Statement of Mr. Oliver Rwamasirabo dated 16 August 2020, at paras. 3-12.

¹²⁴⁹ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at paras. 54-55.

¹²⁵⁰ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 56.

¹²⁵¹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 38.1 (footnotes omitted).

790. Indeed, the evidence of Mr. Rwamasirabo, who, as explained above at section III.A.3, is engaged as a witness of fact and not as a legal expert and therefore whose opinion cannot be treated as that of an expert, is embarrassing for lack of specificity as to the legal basis for the assertions made in relation to the handover process. He references various “*Rwandan regulations and standard practice*”¹²⁵² but fails to particularise what these regulations are, aside from a reference to a regulation requiring NRD to provide a register of assets and records to the Minister (which, if not complied with, would suggest a breach by the NRD, not the Respondent);¹²⁵³ and another regulation which is irrelevant to these facts. That latter regulation provides that “*No investment, interest in or right over any property forming part of such investment shall be seized or confiscated except where provided under relevant laws*”.¹²⁵⁴ No such seizure or confiscation took place and the Claimants’ reliance on this regulation is therefore entirely misplaced.
791. Further, as set out by Mr. Mugisha, “*While Mr Rwamasirabo is correct that Article 6 prevents expropriation without fair compensation, in the case at hand the existence of a domestic investment protection regime is relevant neither to the alleged handover process, nor to the Respondent’s obligations at international law. Law No. 06/2015 Relating to Investment Promotion and Facilitation does not apply, because it relates to rights following expropriation, not rights following expiry or cancellation of a concession*”.¹²⁵⁵ On no reasonable construction does the statement support the propositions made by Mr. Rwamasirabo that the “*Respondent is responsible for coordinating efforts by police and security services to ensure the entity’s and its owners’ concessions and property are protected from theft and illegal mining during the handover process*”¹²⁵⁶ and that “*in the event of a legal taking, Respondent would be required to prepare a professional valuation report in order to determine a fair compensation price to be paid to the owners*”.¹²⁵⁷
792. In any event, what Rwandan law does or does not require by way of handover is irrelevant to the Claimants’ legitimate expectations as to receipt of long-term licences. In this respect the Claimants’ pleading and evidence are again entirely lacking: although Ms. Mruskovicova and Mr. Marshall allege that they expected a handover process to take place with respect to the Five Concession Areas formerly held by NRD, they fail to give any particulars as to the basis of this understanding as to the anticipated handover process.¹²⁵⁸ Further, although Ms. Mruskovicova and Mr. Marshall speculate as to the

¹²⁵² Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 16 August 2019, at para. 5.

¹²⁵³ Rwanda Law No. 13/2014 on Mining and Quarry Operations, 20 May 2014, Official Gazette No. 26 of 30 June 2014 (**Exhibit CL-002**), at Articles 26 and 27.

¹²⁵⁴ Rwanda Law No. 06/2015 Relating to Investment Promotion and Facilitation, 28 March 2015, Official Gazette No. Special of 27 May 2015 (**Exhibit CL-045**), at Article 6.

¹²⁵⁵ Second Expert Report of Mr. Richard Mugisha dated 27 May 2020, at para. 57.

¹²⁵⁶ Supplemental Witness Statement of Mr. Oliver Rwamasirabo dated 16 August 2019, at para. 8.

¹²⁵⁷ Supplemental Witness Statement of Mr. Oliver Rwamasirabo dated 16 August 2019, at para. 9.

¹²⁵⁸ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at paras. 30-35; Supplemental Witness Statement of Ms. Zuzanna Mruskovicova dated 16 August 2019, at paras. 6-11.

handover that took place with respect to Gatumba, as explained by former Minister Imena, the process undertaken in relation to Gatumba cannot be compared to any process that should or should not have happened in relation to NRD:

“Gatumba was a joint venture between the Rwandan Government and South African investors, and when both shareholders decided to stop the company’s mining activities, they also had to terminate their business relationship which included winding-up the company and agreeing on how to proceed with the division of assets and liabilities. As such, there were numerous steps to be taken and the process was different from that which is followed when a company in which the Government is not a shareholder is denied a licence or voluntarily withdraws. In NRD’s case (and indeed that of any other company that does not have ties with the Rwandan Government), there were no requirements to be followed because it did not have a licence at this time. Even if they had had a licence which had to be cancelled, the only obligation the Government had was to act in accordance with Article 25 of the 2014 Law.”¹²⁵⁹

793. What is more is that, Mr. Marshall and Ms. Mruskovicova’s evidence on the handover point is conveniently vague as to the details on which they rely. For example, Mr. Marshall states in his supplementary witness statement that *“Despite numerous efforts, I was unable to set up any meeting with the RDB, the revenue authority, the labor department, the tax department, or any other governmental agency in order to address a “handover” of the NRD Concession.”¹²⁶⁰* Yet he fails to provide a shred of supporting evidence demonstrating his attempts to contact Rwandan authorities to speak about a handover process. Similarly, Ms. Mruskovicova claims with respect to the allegedly anticipated handover process that *“There was no one for NRD to meet with to accomplish these steps. I had paperwork and keys in my possession that I expected to give to the government and there was no one to give them to.”¹²⁶¹* It is unclear what is meant by this statement. For example, Ms. Mruskovicova says nothing about the efforts, if any, she made to hand over the keys and paperwork, which of course she could have done by visiting MINIRENA and handing them over or by simply sending them to the Ministry. Similarly, in their CMPO the Claimants state that *“Not one meeting took place despite Claimants’ repeated attempts to talk with anyone in the Government concerning Minister Imena’s letter”* but fail to particularise or provide any evidence of such attempts.¹²⁶² Those assertions should therefore be dismissed on these grounds alone.
794. As explained by former Minister Imena, these statements are in any event incorrect because after informing NRD that they had not obtained long-term licences on 19 May 2015, he *“met with Mr. Marshall and Ms. Mruskovicova on numerous occasions to explain why the long-term licence had not been granted. However, they were not willing to take note of the letter, or to listen to what I had to say and instead they refused to close down*

¹²⁵⁹ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 46.

¹²⁶⁰ Supplemental Witness Statement of Mr. Roderick Marshall dated 16 August 2019, at para. 31.

¹²⁶¹ Supplemental Witness Statement of Ms. Zuzanna Mruskovicova dated 16 August 2019, at para. 8.

¹²⁶² Claimants’ Counter-Memorial on Preliminary Objections, at para 106.

*their mining activities, clear their liabilities and vacate the concessions as they had been asked to.*¹²⁶³

795. This lack of specificity is obviously highly material: the Claimants' rely on these alleged facts not only as the basis for their legitimate expectations but also to prove that they ought not to have known, prior to March 2016, of **any** of the alleged breaches by the Respondent of the USA-Rwanda BIT, including the alleged breach based on Rwanda's failure to grant long-term licences. As explained in more detail at section VI.B.9 below, the Claimants have also provided no contemporaneous documentary evidence from prior to the First Cut-off Date to suggest that they believed there to be a handover process, or (contrary to what they have now alleged) any attempts to initiate this. In the absence of such evidence, the Claimants' assertion that they legitimately expected to receive long-term licences until March 2016 on the basis of their alleged understanding of the handover process must be rejected.
796. Further, the Claimants' reliance on their alleged understanding of what happened with the Gatumba concession areas (despite failing to give evidence as to when and how they acquired such alleged knowledge or to provide any supporting documentary evidence) is also unconvincing given that Mr. Marshall and Ms. Mruskovicova had direct experience with the closure of a concession area in relation to their Bisesero concession. On 22 November 2011, MINIRENA wrote to Mr. Marshall as a representative of BVG, with a subject line "*Handover of Bisesero Concession.*"¹²⁶⁴ That letter advised that BVG's special licence for research and exploration had expired on 16 June 2011 and stated that "*You have to close all mining activities with immediate effect, after receiving this letter and to contact directly the Rwanda Natural Resources Authority to prepare for handover within sixty (60) days.*" This letter was materially similar to the letter sent to NRD on 19 May 2015, which stated that "*...You are hereby requested to hand over the mining perimeters of Nemba, Giciye, Rutsiro, Mara, and Sebeya, and proceed with the closure of your operations, in accordance with the mining, environmental and labour laws; and settle all outstanding taxes and statutory charges. This process should be concluded within a period of sixty (60) days from the signature date of this letter.*"¹²⁶⁵ Further, as explained at paragraphs 269 to 270 above, this letter was also materially identical to letters sent to various other companies whose licences had expired or been cancelled.¹²⁶⁶ The Claimants have not suggested that the alleged "*handover process*" was undertaken in relation to

¹²⁶³ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 45.2.

¹²⁶⁴ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to BVG (R. Marshall), *Handover of Bisesero Concession* (22 November 2011) (**Exhibit R-211**).

¹²⁶⁵ Letter from Minister of State in charge of Mining (Minister E. Imena) to NRD (R. Marshall), *Notification letter for not granting mining licenses* (19 May 2015) (**Exhibit C-038**).

¹²⁶⁶ See, for example, letters sent to Mirage Ltd (12 May 2015) (**Exhibit R-122**); Gamico Ltd (12 May 2015) (**Exhibit R-123**); Precious Mining Limited (20 May 2015) (**Exhibit R-124**); Avolmi Ltd (22 January 2016) (**Exhibit R-125**), ECPE Ltd (22 January 2016) (**Exhibit R-126**), Nyamico Cooperative (22 January 2016) (**Exhibit R-127**), UMECO (22 January 2016) (**Exhibit R-128**), Robust Mining (27 January 2016) (**Exhibit R-129**), Sofama Minerals (27 January 2016) (**Exhibit R-130**); numerous companies (3 June 2016) (**Exhibit R-131**).

the Bisesero concession, nor could they. As former Minister Imena has explained in his supplemental statement, there was no such handover process with respect to BVG's Bisesero concession, as no such process was required.¹²⁶⁷ The Claimants therefore could not have had any reasonable expectation of this process with respect to the Five Concession Areas, or any reason to believe that former Minister Imena's letter of 19 May 2015 did not mean anything other than what it said: that they needed to hand over the Five Concession Areas in accordance with the relevant laws of Rwanda within 60 days of the letter.

797. Indeed, it is significant that the Memorial makes no mention whatsoever of the Claimants' expectation that there be a handover process. It appears that the emergence of this argument in the Claimants' CMPO and Reply is nothing more than a belated and ill-thought-out attempt to overcome the Claimants' glaring time bar problem. It is untenable, unsupported by Rwandan law, unsupported by any evidence, inconsistent with the Claimants' own pleadings and inconsistent with BVG's experience with its Bisesero concession, and ought to be rejected.

The allegations relating to expectations arising from assistance provided to the Government

798. Mr. Marshall also alleges that he provided substantial support to many Rwandan state and military agencies, and alleges that he provided this support on the basis that he believed that NRD "*would get the Licences in a more timely fashion*" on the basis of his assistance provided to the Rwandan military,¹²⁶⁸ and that the Rwandan military would not "*continue to solicit [his] help if Rwanda did not intend to grant the long term licences*".¹²⁶⁹

799. Mr. Gatara responds to these allegations:

"I am not aware of any of this assistance allegedly provided. I am not aware of any relationship between our institutions of Government and Mr. Marshall, or of any support that he claims to have provided to the military or RIEPA. Further I am not aware of any special economic zone between Rwanda, Burundi and Uganda. I was at RIEPA when the Kigali Economic Zone was started, and we could not have worked concurrently on a regional special economic zone while developing one locally.

Additionally, if Mr. Marshall were engaged in providing such support, I would have been aware of it. I believe that this did not happen. I have seen the alleged "Engagement Letter" from Jillson and Marshall associates,¹⁷ however, I doubt its legitimacy for a number of reasons:

- 1. First, Mr. Nkurunziza, who allegedly signed the document, was my predecessor as the head of RIEPA. I replaced him in 2005. As his successor,*

¹²⁶⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 45.7.

¹²⁶⁸ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 16.

¹²⁶⁹ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 16.

if such a relationship existed between RIEPA and Mr. Marshall, I would have been informed of it. Further, I would have been provided with the document, and involved in the ongoing execution of the relationship. However, I was not provided with the letter and was not aware of any relationship. I doubt that any such relationship existed.

2. *Second, the document does not bear any official stamp. At that time in Rwanda, when official business was typically conducted by letter, it is highly unlikely that any official document would not bear an official stamp.*
3. *Third, the date on the document is unclear. Mr. Marshall states, relying on the document, that “On January 12, 2004, I ... signed an engagement letter with ... RIEPA”. This cannot be true. RIEPA was not established until September 2004.*

*Accordingly, I doubt the authenticity of **Exhibit C-132**.*

Mr. Marshall has also claimed that he provided this support because he believed that NRD “would get the Licences in a more timely fashion” on the basis of his assistance provided to the Rwandan military,¹²⁷⁰ and that the Rwandan military would not “continue to solicit [his] help if Rwanda did not intend to grant the long term licences”¹²⁷¹. I do not believe that anyone within the Rwandan Government would have given Mr. Marshall that impression. The Rwandan administrative process is not influenced in this way.

It is true that Rwanda relies upon the goodwill of investors and others. Particularly following the genocide, many people reached out to support Rwanda and its initiatives, including by facilitating connections or informal promotion of Rwanda as a place of doing business. In the years following the genocide, many institutions and individuals offered to provide support and assistance to Rwanda. However, this informal assistance does not constitute official or formal support of, or any form of partnership with, the institutions of Government. When formal support occurs, it is always governed by a formal legal instrument. In any case, even if Mr. Marshall had provided formal support to Rwanda, he would not have been guaranteed mining licences in exchange for that support, and neither would any application have been processed more quickly: it would have been made clear to him that any application would have to succeed on its own merits.”¹²⁷²

800. Hence, even if Mr. Marshall did provide the assistance he claims (which is not accepted), it could not ground any legitimate expectation in relation to the granting of licences, or the treatment of NRD or the Claimants in any other way. The Claimants’ reliance on this ground betrays their fundamental misunderstanding of what was necessary in order to persuade Rwanda to grant licences to NRD: it was not currying favour with the Rwandan authorities in order to compel a favour in return that was important, but demonstrating

¹²⁷⁰ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 16.

¹²⁷¹ Second Supplemental Witness Statement of Mr. Roderick Marshall dated 13 March 2020, at para. 16.

¹²⁷² Supplemental Witness Statement of Mr. Francis Gatare dated 29 May 2020 at paras. 33-37.

on properly evidenced grounds that NRD was a professional, effective and competent mining operator that deserved to be granted licences on its own merits.

vi. Summary of alleged expectation of entitlement to long-term licences

801. As is clear from the analysis at paragraphs 721 to 751 above, the Claimants have failed to provide a single document to suggest that the Respondent ever provided an assurance of a long-term licences. Instead, the Claimants and their witnesses, in particular Mr. Marshall, have misrepresented documentary evidence, discussions, the licence application processes of third parties, and even the terms of the Contract itself in an effort to suggest that there may have been some basis for a representation such as that alleged. At no point did any Government official or body provide any basis for the Claimants to believe that that they or NRD were entitled to long-term licences on the expiry of the Contract in November 2010, or that they would subsequently be granted them.
802. Further, in relation to the MST specifically, as there was no statement made by the Government that the Claimants were entitled automatically to receive long-term licences, it is plain that there was no failure to comply with representations, made by a state and reasonably relied on by an investor. In the event that some of the conduct or one of the statements relied on by the Claimants constitutes a relevant representation, which is denied, it is absolutely clear that there was no infringement of the MST standard by conduct inconsistent with a representation made by the state which is “*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*”.¹²⁷³

9. The Claimants’ legitimate expectation claims are out of time

803. In any event, even if the Claimants could establish the existence of a legitimate expectation to long-term licences, the claim is out of time.
804. As set out at paragraphs 405 to 445 above, the correct legal approach to the limitation period prescribed in Article 26 of the USA-Rwanda BIT is to break down each claim into individual breaches and apply the limitation period separately in relation to each claim. The clock for time bar purposes starts running on the date at which the Claimants first acquired actual or constructive knowledge of each alleged breach and loss in principle.
805. The Respondent has already explained in its MPO why the claim that the Respondent failed to provide long-term licences, contrary to the Claimants’ alleged legitimate expectations, is out of time.¹²⁷⁴ The Claimants’ pleaded case is that they were automatically entitled to long-term licences pursuant to the terms of the Contract, and

¹²⁷³ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Exhibit CL-028), at para. 98.

¹²⁷⁴ Claimants’ Counter-Memorial on Preliminary Objections, at paras. 38-42 and 81-87.

that the US-Rwanda BIT was breached by the Respondent in failing to grant those licences. The documentary evidence leaves no doubt that Claimants had actual knowledge of such alleged breach by the Respondent long before the Cut-off date of 12 June 2015 or the First Cut-Off date of 14 May 2015, and indeed that the Claimants had alleged that the failure to grant the licences was in breach of the BIT long before both Cut-off Dates.

806. In their CMPO and Reply, the Claimants seek to rely on certain events which they contend led them to believe, until the date that the Five Concession Areas were allegedly tendered on 5 March 2016, that long-term licences would be granted. These allegations are all baseless, for the reasons explained in section VI.B.8 above. As set out in these paragraphs, the events relied on could not have given the Claimants any reasonable expectation that they would receive long-term licences.
807. As discussed at paragraphs 17, 418 and 571 above, because all of the Claimants' claims are time barred, including this claim, the Claimants now attempt to circumvent the time bar contained in Article 26, and the policy underpinning it, by alleging that the breach of their legitimate expectation to long-term licence, alongside other alleged actions undertaken by Rwanda, constituted a "*creeping violation of the FET standard.*"¹²⁷⁵ They ambitiously and unrealistically allege that they had no actual and constructive knowledge of any breaches, including the breach based on the failure to grant long-term licences, until the date of the alleged expropriation in March 2016. In the Reply, the Claimants state that:

*"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."*¹²⁷⁶

808. This statement is completely implausible, for the reasons set out below.

i. The Claimants' case as to the operation of the time bar is inconsistent with their case on the merits

809. The Claimants have alleged that the Respondent failed to fulfil the Claimants' legitimate expectation that they would receive long-term licences following the expiry of their four-year licences. In their CMPO and Reply, the Claimants have confirmed that their alleged

¹²⁷⁵ Claimants' Counter-Memorial on Preliminary Objections, at para. 16.

¹²⁷⁶ Claimants' Reply, at para. 254.

expectation was that they would receive long-term licences at the end of the four-year term of the Contract. In the CMPO, they state that:

*“With the understanding that they would receive long term licences following the initial four-year license period, Claimants began investing in Rwanda through their investment vehicle, NRD. NRD, in turn, received a contract and licences to mine five concessions for an initial term of four years. At the end of the four-year term, NRD submitted an application for long term licences with the expectation and understanding, pursuant to conversations with the RDB and other State officials, that they would receive the long-promised term licences. 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 that once an investor obtained a short term contract and license, it would be able to obtain term licensee by simply applying at the close of the four-year period.”*¹²⁷⁷

810. The Claimants’ case was and remains that they legitimately expected, pursuant to Article 4 of the Contract, to receive long-term licences on expiry of the term of the Contract on 24 November 2010.¹²⁷⁸ The Claimants allege that NRD submitted an application for a long-term contract on 29 November 2010¹²⁷⁹ – on their case, this was a mere formality – which (they say) complied with the requirements under the Contract,¹²⁸⁰ and that their expectation was that that it would be granted.¹²⁸¹ That application was refused on 2 August 2011.¹²⁸² If the Claimants did have a legitimate expectation of a long-term licence on expiry of the Contract on 24 November 2010, then the alleged breach took place, and / or the Claimants first acquired knowledge of the breach, on the Respondent’s refusal of NRD’s application on 2 August 2011 at the very latest. The Claimants do not attempt to explain how it could be the case that they first acquired knowledge of the alleged breach in March 2016, as they allege.
811. This argument on the merits has consequences for the time bar analysis. If NRD was entitled to long-term licences pursuant to their application of 29 November 2010, then the first breach of Article 6 must have taken place on the refusal of that application on 2 August 2011. Indeed, this is precisely the Claimants’ pleaded case.
812. Ultimately, it is inconceivable that, despite claiming to have an automatic entitlement to the Licences from January 2011, the Claimants *first acquired* actual or knowledge of this breach over five years later, in March 2016, or alternatively, over four years later, in May 2015. Plainly, the Claimants’ case on the merits as to their entitlement to a long-term

¹²⁷⁷ Claimants’ Counter-Memorial on Preliminary Objections, at para. 28 (emphasis added).

¹²⁷⁸ Claimants’ Memorial, at paras. 38-39, 42 and 170-171; See also Letter from NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister. E. Imena), *Re-application letter* (1 November 2014) (**Exhibit R-212**) which refers to the “*terms of the contract for automatic right to the grant of the long term licence being satisfied.*”

¹²⁷⁹ Claimants’ Memorial, at para. 42.

¹²⁸⁰ Claimants’ Memorial, at para. 44.

¹²⁸¹ Claimants’ Memorial, at paras. 47-52.

¹²⁸² Claimants’ Memorial, at para. 47; Letter from the Ministry of Natural Resources (Minister. S Kamanzi) to the Managing Director of NRD, Status of your Mining and Exploration license (2 August 2011) (**Exhibit C-062**).

licence flies in the face of their assertion that the claim is not time-barred. They simply cannot say that NRD was automatically entitled to long-term licences in January 2011, and that they had a legitimate expectation of receiving them, whilst also claiming that they did not have in the least, simple knowledge that loss or damage had occurred as a result of NRD not being granted the licences at that time.¹²⁸³ This is not a case where a breach took place but the Claimants were not in a position to detect the breach until years later.

813. The fact that the Claimants' short-term licences were extended (initially for three months from 2 February 2012,¹²⁸⁴ and subsequently to October 2012)¹²⁸⁵ is irrelevant. A mere short-term licence, limited in time, to continue operating in the Five Concession Areas is distinct from long-term licences to which the Claimants allege they were entitled; the extensions did not confer the right that was the subject of the Claimants' alleged legitimate expectations, being the entitlement to operate and exploit the Five Concession Areas for 30-years. In any event, any breach associated with these extensions (which is denied) would be out of time as those extensions expired in October 2012.
814. The fact that the Claimants' appeal against the decision of 28 October 2014 (informing them that their application for a long-term licence was denied)¹²⁸⁶ was rejected on 19 May 2015, was not and cannot be considered to be the Claimants' *first* knowledge of the alleged breach of the Claimants' alleged legitimate expectations particularly in light of the Claimants' position that "... *there was never a need to 're-apply.'* Claimants could not '*re-apply*' for a right that NRD already had."¹²⁸⁷ Accordingly, the 19 May 2015 letter does not affect the operation of the time bar, as the Claimants had knowledge of the alleged breach of their legitimate expectations long before they received this letter and well before the First Cut-off Date. Further, to the extent that the Claimants allege that they had legitimate expectations to receipt of a long-term licence based on the Respondent's alleged conduct after 2011 (which is denied), the claim is still out of time. The Claimants did not first acquire knowledge of this alleged breach on the date of receiving the 19 May 2015 letter – rather, that letter simply confirmed a decision which had been taken and notified to the Claimants on 28 October 2014, and therefore of which the Claimants had knowledge, prior to the First Cut-off Date. Indeed, the Claimants expressly acknowledge in their CMPO that the rejection of their application by letter dated 28 October 2014 was

¹²⁸³ See *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para 217.

¹²⁸⁴ Letter from Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya (20 February 2012) (**Exhibit C-034**).

¹²⁸⁵ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

¹²⁸⁶ Letter from NRD (R. Marshall) to the Ministry of Natural Resources (Minister E. Imena), NRD Mining Concessions (18 August 2014) (**Exhibit C-084**) (NB: the letter is incorrectly dated 18 August 2014 and was in fact sent on 18 September 2014).

¹²⁸⁷ Claimants' Memorial, at para. 80.

in breach of their legitimate expectations, highlighting actual knowledge of the breach on this date. They refer to former Minister Imena's letter dated 28 October 2014 and state that:

*"Contrary to Claimants' expectations, Minister Imena notified NRD that their "reapplication" had been rejected".*¹²⁸⁸

815. Similarly, in relation to the public tender in March 2016, even if a public tender could be regarded as a breach of the Claimants' legitimate expectations (which is not made out), it was part of and conditional upon the alleged prior breach, i.e. the Respondent allegedly failing to grant the Claimants long-term licences. The Memorial does not allege that the public tender of the Five Concession Areas in March 2016 was in breach of the FET standard or that it formed part of such breach, or that it was an act of expropriation, or formed part of an act of expropriation, or was otherwise a breach of the USA-Rwanda BIT. The tender is mentioned just once,¹²⁸⁹ as part of the background, and not mentioned in any of the sections alleging Respondent's breaches (including the sections on the alleged FET and expropriation breaches). In any event, if, as is the Claimants' case, the Respondent had breached the Claimants' legitimate expectations, in violation of the FET standard, then that had long since occurred, and was known of, well before either of the Cut-Off Dates.

ii. The Claimants' arguments regarding the time bar are inconsistent with the documentary evidence

816. It is obvious from the correspondence set out in the Respondent's MPO that by 2 August 2011 at the very latest, the Claimants had, and regarded themselves as having had, knowledge of Rwanda's alleged breach in relation to failure to grant long-term licences. This is how the Claimants' claim is pleaded,¹²⁹⁰ and how it was explicitly described by, and therefore known by, the Claimants prior to the First Cut-off Date of 14 May 2015.

817. As set out in the Claimants' Memorial, Rwanda clearly communicated to NRD that it would not be automatically granted long-term licences as far back as 2 August 2011, when Minister Kamanzi communicated to NRD that the short-term licences NRD had applied for in November 2010 (which were not even long-term licences) would not be granted, and asserted that NRD was itself in breach of the Contract. Any breach and loss would have been apparent to the Claimants then, even if the full extent and quantification of the alleged loss was unclear. As set out in the Respondent's MPO, the Respondent continued to assert that the Claimants had no entitlement to the licences

¹²⁸⁸ Claimants' Counter-Memorial on Preliminary Objections, at para. 59; Letter from Minister of State in charge of mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit C-119**).

¹²⁸⁹ Claimants' Memorial, at paras. 101-102.

¹²⁹⁰ See the Claimants' Memorial, at paras. 95 and 96 ("*Claimants did not hear from Rwanda regarding the status of the application until May 19, 2015, at which time Rwanda informed Mr. Marshall that its submission did not meet the requirements for granting a mining license under 2014 Law. As a result of this notification, NRD began more substantial negotiations with Rwanda in an effort to avoid Rwanda's clear expropriation of NRD's Concessions and to continue operating mines at each of their five Concessions.*").

based on the Contract and that their application for long-term licences of 30 January 2013 had been rejected. We refer in particular to the letter from former Minister Imena dated 2 April 2014 which is relied on by the Claimants in support of the alleged violation of their legitimate expectations.¹²⁹¹ This letter was received by the Claimants more than a year in advance of the First Cut-off Date.

818. To the extent the Claimants had any legitimate expectation to long-term licences based on the 2006 Contract (which is denied), there can be no doubt that they considered Rwanda to be in breach by failing to provide them, long before both Cut-off Dates. This is evident from the following documents authored by NRD (the contents of which are not accepted as being true or accurate), which indicate actual knowledge that Rwanda would not be providing long-term licences:

818.1. In an email from Mr. Marshall to Matthew Robinson dated 18 November 2012, Mr. Marshall stated that *“about ten days ago I was promised the long term licence (30 years) within the next eight weeks”*;¹²⁹²

818.2. In a letter from NRD to a legal analyst at the Strategic Investments Unit at the RDB dated 9 April 2013, NRD states that the original contract has passed *“without NRD receiving the agreed upon Long Term License”*;¹²⁹³

818.3. In a letter from NRD to MINIRENA dated 7 June 2013, it asked the Ministry to *“grant to NRD the long-term 30-year mining concession provided by Rwandan law and promised under the 2006 exploration and exploitation Agreement”*.¹²⁹⁴ The letter complains of the *“systemic harassment, oppression, and efforts to shut down the business of NRD.”*¹²⁹⁵ and

818.4. In a letter dated 18 September 2014 (incorrectly dated 18 August 2014) from NRD to MINIRENA, NRD states that it has met its obligations under its Contract and that it is now *“incumbent now on the part of the government of Rwanda to grant the necessary mining rights for a period of 35 years renewable to NRD”*.¹²⁹⁶

819. The Claimants do not deny that they knew of these alleged breaches and any associated loss at the time, nor could they. For the Claimants to claim that they had anything less than actual knowledge of the alleged breaches and any associated loss at this time flies

¹²⁹¹ Claimants’ Memorial, at para. 178.

¹²⁹² Email from Roderick Marshall to Matthew Robinson, *AW: 2011 CCA accounts* (18 November 2012) (**Exhibit R-213**).

¹²⁹³ Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit (M. Isibo) (9 April 2013) (**Exhibit C-058**).

¹²⁹⁴ Letter from NRD (R. Marshall) to the Ministry of Natural Resources attaching a note titled *‘Issues for discussion with the Honourable Minister of the Ministry of Natural Resources’* (7 June 2013) (**Exhibit C-059**), at page 3.

¹²⁹⁵ *Ibid.*, (**Exhibit C-059**), at page 3.

¹²⁹⁶ Letter from NRD (R. Marshall) to Ministry of Natural Resources (Minister E. Imena) (18 August 2014), *NRD Ltd Mining Concessions* (**Exhibit C-084**) (NB: the letter is incorrectly dated 18 August 2014 and was in fact sent on 18 September 2014).

directly in the face of this correspondence and is not tenable. Their contention that they *ought* not to have known of this alleged breach is even less tenable.

820. Indeed, the Claimants expressly alleged prior to the First Cut-off Date that Rwanda was in breach of the USA-Rwanda BIT by failing to grant long-term licences. This is significant: it highlights in the clearest of terms their knowledge of the alleged breach at this time. In this regard, Rwanda relies on a letter from NRD to former Minister Imena dated 1 November 2014, in which Mr. Marshall expressly claims that Rwanda's failure to grant a long-term licence pursuant to the Contract is "*in violation of the Bilateral Investment Treaty between Rwanda and the U.S.*"¹²⁹⁷

821. Further, on 23 March 2015, NRD sent Mr. Francis Gatere of the RDB a "*Notice under the 'Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment.*"¹²⁹⁸ In that notice, NRD refer to the actions which are alleged to constitute creeping breaches of the FET, and seek redress:

*"We... request that the appropriate Rwanda agency review the current situation facing NRD, including the frequent theft of NRD properties and other difficulties which led to the formal closure of our business more than 10 months ago.... We know that you are largely aware of the "collusion" and other crimes that have been committed against NRD... NRD needs to be treated like the other mining companies in Rwanda (and in compliance with Rwanda law) and requests that it receive equivalent courtesies. NRD specifically requests that we receive police protection equal to that of other doing business in Rwanda, to stop the theft and the "shakedowns" by those inside and outside the country who want NRD's property... we also respectfully request that we are provided with a Ministry-appointed "tagging manager so that the NRD concessions are permitted to 'tag' the mineral production in accordance with ITRI requirements."*¹²⁹⁹

822. The letter states that the damages incurred by NRD as a result of Rwanda's alleged conduct is "*significant and increasing each day*".

823. The Claimants have offered very little analysis as to how they did not know, or ought not to have known, about the alleged breach of their legitimate expectations and any associated loss (which is denied) when they sent these letters despite the express allegations contained therein. Plainly, their contention that they *first acquired* knowledge of these alleged breaches in March 2016 or alternatively, in May 2015, is not credible on their own evidence.

¹²⁹⁷ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Appeal of Decision* (1 November 2014) (**Exhibit C-086**).

¹²⁹⁸ Letter from NRD (R. Marshall) to the CEO of RDB, *Notice under the 'Treaty between the Government of the USA and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment'* (23 March 2015) (**Exhibit C-100**).

¹²⁹⁹ *Ibid.*, (**Exhibit C-100**) (emphasis added).

824. Recharacterising the claim as a “*creeping breach of the FET standard*” does not assist the Claimants. Even accepting, for present purposes, the Claimants’ submission that all of the complained of events can or should be characterised as a single “*creeping*” breach of the FET standard or “*composite act*” (which is absurd and denied as explained at paragraphs 571 to 579 above) it was one which was constituted, and known of, well before the First Cut-Off date. At a minimum, the actions or omissions sufficient, and alleged in the Memorial to be sufficient,¹³⁰⁰ to constitute the composite act that is alleged to be in breach of the Claimants’ legitimate expectations in violation of Article 5 of the USA-Rwanda BIT, took place, and were known of, well before the First Cut-Off date, as per the ILC Articles and the *Siemens* test discussed at paragraphs 429 to 430 above.¹³⁰¹ The Tribunal is referred to the following examples of correspondence, in which the Claimants expressly and unequivocally state that they have been refused long-term licences and allegedly suffered loss prior to both of the Cut-off Dates and long before March 2016:

824.1. A letter from Mr. Marshall to Minister Kamanzi dated 31 October 2011, in which Mr. Marshall writes that “... *our investor group must conclude that the intent to nationalize the Giciye mining concession.*”¹³⁰²

824.2. In a letter from NRD to the CID dated 30 October 2014 (in response to a letter from MINIRENA dated 28 October 2014 advising NRD that it had not been granted any mining licences, and that the Ministry had terminated all working relations with NRD, and requesting that NRD proceed with closing its mining operations),¹³⁰³ NRD alleged various ways in which it has “*suffered millions of USD of losses*” as a result of alleged actions by the Respondent.¹³⁰⁴ In particular, NRD referred to the alleged breach based on the failure to grant long-term licences, characterising it as a state “*taking*” and “*nationalization*” of NRD:

“We have lost our mining business through what appears to be a State ‘taking’ or nationalization of our company’s assets, including mining licenses (see the analysis in the following paragraphs) which was announced by Minister Evode on 28 October 2014”

“It appears that Minister Evode is confusing the fraudulent claims of Ben Benzinge with his own actions, as Minister of State in Charge of Mining, in ‘taking’ the NRD business.”

¹³⁰⁰ Memorial, at paras. 169-175.

¹³⁰¹ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at paras. 264-265; International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at page 63.

¹³⁰² Letter from NRD (R. Marshall) to the Minister of Natural Resources (Minister S. Kamanzi), *NRD Response to Letter of Minister* (31 October 2011) (**Exhibit C-041**), at page 6.

¹³⁰³ Letter from Minister of State in charge of mining (Minister E. Imena) to NRD, *Notification Letter* (28 October 2014) (**Exhibit C-119**).

¹³⁰⁴ Complaint from NRD (R. Marshall) to CID, *Formal complaint against apparent corruption* (30 October 2014) (**Exhibit C-165**).

“it appears that because Minister Evode's letter cancels ‘all’ relationships, he is ‘taking’ or nationalizing the NRD business”

“It appears that Minister Evode has nationalized NRD in contradiction to the spirit and the letter of the Bilateral Investment Treaty.”¹³⁰⁵

The letter also complains of various actions which are materially identical to the Claimants’ claimed breaches in this Arbitration.

824.3. In a letter to the President of Rwanda dated 31 October 2014, NRD alleges cancellation of its licences, which it describes as a *“simple nationalization of our company.”*¹³⁰⁶

824.4. In a letter from NRD to President Biruta dated 5 November 2014, NRD complained that this termination had resulted in the Respondent *“taking”* its property:

“On 28 October 2014, we received notice from Minister of State for Mining Evode Imena that ‘all relationships’ between NRD and that the Government of Rwanda have been terminated and the mining licenses cancelled. This termination is a breach of those agreements, and resulting in a State “taking” of our property. We ask for your help because Minister of State for Mining Evode has maliciously targeted NRD, creating losses which are now in the millions of USD in stolen assets and lost income.”¹³⁰⁷

824.5. In a letter from NRD to the President of Rwanda dated 14 November 2014, NRD outlines its losses and makes allegations against former Minister Imena, referring to the termination of their licences as a state *“taking”* of their property.¹³⁰⁸ The letter goes on to state that *“ordinarily we would seek to begin negotiations with the Government of Rwanda under the provisions of the US-Rwanda Bilateral Investment Treaty”*.

824.6. In another letter from NRD to the President of Rwanda dated 5 February 2015, NRD states that the termination of its licences is a *“breach of those agreements, and resulting in a nationalization of our property”*.¹³⁰⁹ The letter also complains of various other actions which now form the basis for the Claimants’ claims, claiming that NRD’s losses are *“in the millions of USD”*.

824.7. In an email to Mr. Niyonsaba and Ms. Kay Nimmo dated 30 March 2015, Mr. Marshall stated that:

¹³⁰⁵ *Ibid.*, (Exhibit C-165) (emphasis added).

¹³⁰⁶ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for Help* (31 October 2014) (Exhibit R-205).

¹³⁰⁷ Letter from NRD (R. Marshall) to the Minister of Natural Resources (Minister V. Biruta), *Request for help* (5 November 2014) (Exhibit C-171) (emphasis added).

¹³⁰⁸ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for help* (14 November 2014) (Exhibit R-214), at page 1.

¹³⁰⁹ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for help* (5 February 2015) (Exhibit R-215), page 2.

“We have begun legal procedures to claim against the Rwandan government for expropriation damages under the Rwanda – US bilateral investment treaty.”¹³¹⁰

825. These express allegations of expropriation and “taking” of NRD’s property based on the Respondent’s decision not to grant long-term licences leave no doubt that the Claimants had *actual knowledge* of the alleged breach of its legitimate expectations prior to the First Cut-off Date of 14 May 2015. The suggestion that they did not is clearly untenable in the face of these documents.

826. Further, the claim that the Claimants had no knowledge of Rwanda’s alleged breach until the public tender in March 2016 is even less plausible. This is clear from the following documents which highlight the Claimants’ actual knowledge of the alleged breaches and associated loss prior to March 2016:

826.1. In a letter from NRD dated 25 May 2015 to Mr. Gatere, NRD repeatedly complained that the Five Concession Areas had been “*effectively closed*” by the Respondent more than 18 months previously, and “*formally expropriated*” more than one year previously, i.e. prior to May 2014: in this letter, reference is made to a former Minister Imena’s letter dated 19 May 2015 entitled: “*Notification letter for not granting mining licences*”. NRD states that:

“This Notification Letter appears to make little sense given that more than one year ago the Minister expropriated the same mining concessions... It was due to this expropriation and the Minister’s unwillingness to discuss this matter that, two months ago, we requested settlement negotiations under Article 23 of [the BIT] ... As you are aware the NRD mining concessions were effectively closed by the Minister’s actions more than 18 months ago, and formally expropriated by action of the Minister more than one year ago when the mines and the NRD offices were seized and, shortly thereafter, the Minister ordered that NRD could no longer sell any minerals. The Notification Letter suggests that NRD is in possession of the referenced mining concessions and the NRD corporate offices. This is obviously untrue; they are not in our possession.”¹³¹¹

¹³¹⁰ Email from R. Marshall to I. Niyonsaba, K. Nimmo and Z. Mruskovicova (30 March 2015) (**Exhibit C-107**) (emphasis added); See also Letter from R. Marshall to the Ambassador of the United States Embassy (16 February 2016) (**Exhibit R-216**), at page 2, where Mr. Marshall stated that in March 2015, they had “*notified the Government of Rwanda of our intent to initiate proceeding under the BIT*”.

¹³¹¹ Letter from NRD (R. Marshall) to the CEO of the RDB, *Notice under the ‘Treaty between the Government of the USA and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment’* (23 March 2015) (**Exhibit C-100**), at pages 1-2 (emphasis added).

826.2. On 18 August 2015, NRD sent a further letter to Mr. Gatare setting out the treatment of NRD's assets "*following the alleged expropriation of the NRD business by the government of Rwanda*".¹³¹²

826.3. In email correspondence between Jeff Lindhorst and Ms. Mruskovicova dated 18 October 2015, Mr. Lindhorst asked to visit the Rutsiro plant, to which Ms. Mruskovicova replied that "*the property is in the hands of the government*."¹³¹³

826.4. In a letter from Mr. Marshall to the United States Embassy in Kigali dated 16 February 2016, Mr. Marshall states that "*The NRD and Bay View Group Mining Concessions are now reportedly being "awarded" by the Minister of Mines to other investors. See, e.g. the New Times article last week regarding the Bisesero Mining Concession.*"¹³¹⁴ The letter goes on to highlight the Claimants' knowledge of the alleged breaches, including of a "creeping" breach:

*"The NRD and Bay View Group investors are alleging that their business, including the investment of over \$20 million, is now lost. They allege that the lack of police protection, the lack of access to justice or due process under Rwandan law, the lack of exclusivity in the mining concessions, the failure of the Rwanda Government to treat the US investors equally with the foreign and domestic investors, individually and collectively constitute a taking of the US investments without due compensation in violation of the BIT."*¹³¹⁵

827. Further, the documents highlighted at paragraph 825 above wholly undermine the Claimants' assertions, in their CMPO, that the Five Concession Areas remained in their possession until nearly May 2016 and that for this reason they did not believe there to be any breaches of the USA-Rwanda BIT. In the CMPO, the Claimants state that:

"Claimants remained in possession of the NRD Concessions for nearly a year following Minister Imena's letter [of 19 May 2015] 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.

...

"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."

¹³¹² Letter from NRD (R. Marshall) to the CEO of the RDB (F. Gatare), *Treatment of assets of NRD following expropriation of the NRD business by the Government of Rwanda* (18 August 2015) (**Exhibit C-100**), at pages 26-28 (emphasis added).

¹³¹³ Email from Z. Mruskovicova to J. Lindhorst, *Visit to Rutsiro plant Wednesday 21 October* (18 October 2015) (**Exhibit R-189**) (emphasis added).

¹³¹⁴ Letter from Roderick Marshall to the Ambassador of the United States Embassy (16 February 2016) (**Exhibit R-216**), at page 2.

¹³¹⁵ *Ibid.*, (**Exhibit R-216**), at page 2 (emphasis added).

*“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 that they would be treated differently than other investors in Rwanda and that their full investment would be misappropriated.”*¹³¹⁶

828. The Claimants’ allegations that they “remained in possession of the NRD Concessions for nearly a year following Minister Imena’s letter [of 19 May 2015]” are irreconcilable with their claims in October 2015 that “the property is in the hands of the government” and their claim in 25 May 2015 that “more than one year ago the Minister expropriated the same mining concessions”. Either the facts alleged in their pleadings, or the facts alleged in the evidence they rely upon, are false.

829. It is also apparent from the Claimants Application to Remove the Respondent’s Expert Witness (the “**Application**”) served on 24 March 2020 that the Claimants had engaged lawyers before their proposed Cut-off Date of March 2016. At paragraph 18 of the Application, the Claimants state that:

*“On October 8, 2015, Mr Mugisha met with Claimants’ prior counsel to discuss the possibility of engaging Mr Mugisha as an expert witness on Rwandan law, as Claimants began to consider potential claims under the US-Rwanda BIT.”*¹³¹⁷

830. In the same paragraph of the Application, the Claimants state that the topics with which their lawyers were engaged included “*contractual interpretation of mining licenses and long-term concession rights*”.

831. The suggestion that the Claimants had no actual or constructive knowledge of the alleged breaches associated with Rwanda’s decision not to grant long-term licences, whilst actively engaging lawyers to commence arbitration proceedings based on these very breaches, is extraordinary.

832. The Claimants allege, in an attempt to overcome their glaring time bar problem, that “[t]hey invoked the language of the BIT in an effort to further negotiations with the Respondent over the long term licences”.¹³¹⁸ The Claimants also allege that Tinco had taken a similar approach.¹³¹⁹ The Claimants’ position appears to be that they did not genuinely believe the Respondent to be in breach of the USA-Rwanda BIT on the various dates that they accused Respondent of precisely this, but falsely asserted that they believed this to be the case in an attempt to gain leverage with Rwanda so that they could be granted long-term licences. This begs the question as to why, if the Claimants did not believe there to be any breach of the USA-Rwanda BIT prior to March 2016, they assert in their Memorial that such actions prior to this date were indeed in breach of the USA-

¹³¹⁶ Claimants’ Counter-Memorial on Preliminary Objections, at paras. 66, 69 and 70.

¹³¹⁷ Claimants’ Application to Remove Respondent’s Expert Witness, at para. 18 (footnotes omitted).

¹³¹⁸ Claimants’ Counter-Memorial on Preliminary Objections, at para. 79; see also Claimants’ Memorial, at para. 94.

¹³¹⁹ Claimants’ Counter-Memorial on Preliminary Objections, at para. 79.

Rwanda BIT. The Claimants face an unavoidable and embarrassing contradiction between their pleadings on the merits and their response to the Respondent's jurisdictional objections.

833. Ultimately, it is inconceivable, in the face of the documents highlighted at paragraphs 818 to 830 above, that the Claimants had no actual or constructive knowledge until either March 2016 or May 2015 that the Respondent had breached their legitimate expectations by failing to grant long-term licences. NRD sent letter after letter expressly alleging a violation of the USA-Rwanda BIT based on the failure to grant long-term licences prior to these dates, and indeed prior to the First Cut-off Date of 14 May 2015. In light of this evidence, the only conclusion that can be drawn is that the claims are time-barred under the terms of Article 26. As the Tribunal commented in *Resolute Forest v. Canada*:

"There is an almost metaphysical question whether a claimant which actually asserts that it has already suffered loss or damage can subsequently, in effect, argue that it was mistaken and that the loss or damage were only incurred at a later date. Is it possible to have actual knowledge of something that is not the case? But as not infrequently happens in the law, the metaphysical question does not really arise. Articles 1116(2) and 1117(2) are concerned to set time limits on NAFTA claims once the claimant has notice of what it considers breach and consequential loss. A claimant which unequivocally asserts both elements, then waits more than 3 years to commence proceedings, can hardly be heard to say that its original assertion was premature."¹³²⁰

834. The Claimants further allege that they did not have actual or constructive knowledge of any breaches until March 2016 because *"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"*.¹³²¹ They further claim that the Respondent had an *"on-again, off-again posture concerning assurances of a long-term licence and negotiations of potential compensation for the return of the Concessions"*.¹³²² These claims are entirely unsupported, do not withstand scrutiny, and must be rejected. Indeed, it is submitted in the alternative that if the Claimants did not have actual knowledge of the alleged breach (which is plain from the evidence) prior to either Cut-off Date, then they ought to have known; any belief to the contrary would not have been reasonable.

835. For all of these reasons, the claim that Rwanda was in breach of Article 5 – whether characterised as a creeping or individual violation – by failing to grant the Claimants long-term licences, to which they had legitimate expectations, is out of time pursuant to Article

¹³²⁰ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) (**Exhibit RL-072**), at para. 167 (emphasis added).

¹³²¹ Claimants' Counter-Memorial on Preliminary Objections, at para. 68.

¹³²² Claimants' Counter-Memorial on Preliminary Objections, at para. 87.

26 of the USA-Rwanda BIT. The Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over the claim.

VII. THE CLAIMANTS' EXPROPRIATION CLAIM UNDER ARTICLE 6 OF THE USA-RWANDA BIT IS UNJUSTIFIED AND WRONG

836. As explained in the Counter-Memorial, the Respondent has not expropriated the Claimants' investment (to the extent there was one at all, which is denied for the reasons set out at Section V.C above). The Claimants' expropriation case is unjustified and wrong in both law and fact. In their Memorial, the Claimants argue that the Respondent's purported expropriation was unlawful. However, the Claimants materially failed to establish that there had even been an expropriation. As explained at paragraph 419 of the Counter-Memorial, this requires consideration of the factors specified at Annexes A and B of the USA-Rwanda BIT.
837. Annex A clarifies that the customary international law standard generally and as specifically referenced in Annex B results from "*a general and consistent practice of States that they follow from a sense of legal obligation.*"¹³²³
838. Annex B sets out the overall framework for determining whether a violation of Article 6 has been constituted. We copy in full the terms of this Annex below:

"The Parties confirm their shared understanding that:

1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

¹³²³ See the USA-Rwanda BIT (**Exhibit CL-006**), at Annex A, which read in full: "*The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.*"

- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”¹³²⁴

839. When the actions relied on by the Claimants are analysed against the framework established by Annex A and B of the USA-Rwanda BIT and the relevant case law, it is clear that the Claimants’ expropriation case cannot succeed.

A. The Claimants’ expropriation case has substantially changed and is not properly pleaded or particularised

840. In the Memorial, the Claimants failed to plead a proper case as to expropriation under Article 6 of the USA-Rwanda BIT. The Memorial is entirely unclear as to what property the Claimants were alleging was expropriated and moreover, when such expropriation was alleged to have taken place. This lack of clarity was highlighted by the Tribunal in Procedural Order No 2 (“**PO2**”) dated 28 June 2019, in which the Tribunal stated that:

*“While the Demand for Arbitration alleges breaches after the Cut-off date, the allegations in the Memorial almost all relate to acts and omissions by Rwanda **before** the Cut-off Date. These are repeatedly described as a “pattern of mistreatment” “culminating” in expropriation. The Tribunal has failed to find any reference to precisely when this expropriation occurred or what constituted the expropriation. The Claimants allege:*

Rwanda holds the position that Claimants could not mine, and therefore were not entitled to retaining (sic) their covered investments, because Claimants did not submit information sufficient to “meet the requirements for the grant of mining licenses” under Rwandan law. The process to reach this decision spanned years.

Yet, the Memorial does not specify when the decision in question was reached.”¹³²⁵

841. In their CMPO and Reply, the Claimants purport to give more clarity as to their expropriation case. However, it is respectfully submitted that the Claimants have again failed to properly plead and particularise which of the Respondent’s actions are alleged to constitute the expropriation.

842. In their CMPO, the Claimants attempt to characterise for the first time when and how the alleged expropriation occurred. They attempt to make a case that the Respondent committed an indirect expropriation, in violation of Article 6 of the USA-Rwanda BIT,

¹³²⁴ The USA-Rwanda BIT (**Exhibit CL-006**), at Annex B.

¹³²⁵ Procedural Order No. 2 on Bifurcation (28 June 2019), at para. 41 (footnotes omitted).

based on the concept of a “*creeping expropriation*”.¹³²⁶ These allegations are repeated in the Reply.¹³²⁷

843. At paragraph 12 of their CMPO, the Claimants state that “*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.*”

844. The Claimants go on to state at paragraph 13 of the Reply that “*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.*” [sic]

845. The Claimants state at paragraphs 86 to 87 of their CMPO that:

“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.

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.”

846. However, the CMPO fails to particularise what actions aside from the rejection of NRD’s long-term licence application, and the public tender, are alleged to constitute this creeping expropriation claim (as opposed to other claims advanced by the Claimants). It is plainly inadequate to simply cite an “*extensive history of mistreatment of their investment*” and to refer to “*all prior acts*” without explaining what these alleged actions and mistreatment were, or how they are said to have had “*effect equivalent to direct expropriation*” as set out in Annex B of the USA-Rwanda BIT. It is also unclear from the CMPO whether “*[a]ll of the conduct that ultimately led to the expropriation of Claimants’ investment*” (whatever that is intending to refer to) is merely “*context for why Respondent ultimately decided to expropriate Claimants’ investment*” as stated at paragraph 13 of the CMPO, or whether it is an element of the expropriation claim itself,

¹³²⁶ Claimants’ Counter-Memorial on Preliminary Objections, at para. 14.

¹³²⁷ Claimants’ Reply, at para. 249.

as suggested at paragraph 87 of the CMPO (“*all of these prior acts should be considered in the aggregate for the purposes of determining whether there was an expropriation*”).

847. In the Reply, the Claimants attempt to set out for the first time the other steps they consider to constitute the alleged expropriation:

“The first step in Rwanda’s expropriatory actions was to fail to act on the draft long term license that OGMR had submitted for approval after determining that Claimants had satisfied their obligations under the contract. Thereafter, Rwanda systematically led Claimants to reasonably expect that they would receive the long term licenses. The long term licenses were guaranteed yet Rwanda ultimately refused to issue them to Claimants after years of stringing Claimants along and resorting to various tactics designed to force Claimants to walk away on their own. In the process, Rwanda “governmental officials of the highest level” interfered with Claimants’ operation of the Concessions by allowing a Rwandan National to wrongfully seize control and damage NRD on two separate occasions, indiscriminately ceasing Claimants’ mining operations, and wrongfully denying Claimants’ mineral tags.”¹³²⁸

848. This explanation still does not sufficiently particularise the “*action or series of actions*” that were allegedly taken by Rwanda that amount to expropriation as required by Annex B. It is insufficient to refer to “*years of stringing Claimants along and resorting to various tactics designed to force Claimants to walk away on their own*”¹³²⁹ without specifying precisely what steps or actions the Claimants are referring to or relying on. Further, the Claimants have again failed to explain how it is that such unparticularised actions are said to have had “*effect equivalent to direct expropriation*” as set out in Annex B of the USA-Rwanda BIT.

849. The Claimants’ pleadings are also defective in failing to specify precisely which assets or investments were allegedly expropriated. At paragraph 248 of the Reply, the Claimants state, without providing any of the required particulars, that Rwanda “*expropriated Claimants’ tangible property and assets as well as intangible contractual rights to which Claimants were entitled.*”¹³³⁰ The Respondent infers that the contractual rights referred to are NRD’s alleged entitlement to long-term licences pursuant to the Contract (although this remains unclear as it is not properly pleaded, and in any event, it is denied that the Claimants had any such contractual rights). However, it remains entirely unclear what “*tangible property and assets*” the Respondent allegedly expropriated. It is submitted that the Claimants are unable to specify which tangible property and assets were allegedly expropriated because no such property or assets were expropriated.

850. It is also unclear whether the Claimants are alleging that the act of failing to grant long-term licences was in itself expropriatory, whether it was part of a “*creeping expropriation*”, or whether the Claimants are intending – despite giving no clear

¹³²⁸ Claimants’ Reply, at para. 253.

¹³²⁹ Claimants’ Reply, at para. 253.

¹³³⁰ The same allegation is made in the Claimants’ Memorial, at para. 240.

indication – to plead the claims in the alternative. The same is true of all the other (unparticularised) actions that are somehow said to be part of the “creeping expropriation” claim.

851. At paragraph 444 of the Counter-Memorial, the Respondent explained that:

“As set out in Annex B to the USA-Rwanda BIT, in order to determine whether an indirect expropriation has taken place, the Tribunal must perform a “case-by-case, fact-based inquiry” that takes into account certain factors. At this stage, the Respondent, and in due course the Tribunal, cannot and will not be able to perform such assessment of the actions without knowing exactly what the “action or series of actions” are that were taken by Rwanda and how they have “an effect equivalent to direct expropriation”.

852. Despite the Claimant filing two more pleadings since the Counter-Memorial was filed, this statement still has not been engaged with by the Claimants. There can be no dispute that the burden is on the Claimants to make out the breaches they allege against the Respondent, including their expropriation claim. The Claimants’ claim under Article 6 of the USA-Rwanda BIT must therefore be dismissed for failure to make out the claim.

B. The Claimants have not established that the Respondent “interfered with a tangible or intangible property right or property interest in an investment”

853. The essence of an expropriation claim is a taking of property without compensation.¹³³¹ As explained at paragraph 838 above, Annex B of the USA-Rwanda BIT expressly states: *“An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.”*¹³³²

854. At paragraphs 429 to 442 of the Respondent’s Counter-Memorial, the Respondent explained why the Claimants could not show that they had any interests in property capable of expropriating. As explained therein, central to an expropriation claim is the ability to *“be meticulous about”* the property rights allegedly held and expropriated.¹³³³ This is, of course, elementary: a claimant cannot accuse a state taking of its property without first establishing precisely what property was taken, and its rights over that property.

855. Yet, despite the Tribunal’s comments alerting the Claimants to the defective nature of their expropriation pleading in PO2, as explained at paragraph 849 above, the Claimants have failed to correct the situation by specifying or explaining in their subsequent

¹³³¹ *Link-Trading Joint Stock Company v. Republic of Moldova*, UNCITRAL, Final Award (18 April 2002) (**Exhibit RL-166**), at para. 87 (“the essence of any claim of expropriation is that there has been a taking of property without prompt and adequate compensation”).

¹³³² USA-Rwanda BIT (**Exhibit CL-006**), at Annex B (emphasis added).

¹³³³ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, (16 September 2003) (**Exhibit RL-050**), at para. 6.2.

pleadings exactly which “*tangible property and assets*”¹³³⁴ they allege to have been expropriated.

856. As explained by the Respondent at paragraph 430 of its Counter-Memorial, none of the actions that Rwanda is alleged to have taken led to a transfer of any ownership of any property belonging to the Claimants, including NRD or any licences to mine at the Five Concession Areas. Nor have the Claimants provided any evidence to the contrary. The Respondent did not expropriate, nationalise or otherwise take any of NRD’s property and assets. As explained by former Minister Imena: “*Rwanda did not take the Claimants’ investments, including NRD itself. In this regard. I understand that NRD is still owned by the Claimants. If by investments, the Claimants are referring to NRD’s former concessions, then they also were not taken by Rwanda.*”¹³³⁵
857. Further, as explained at paragraph 432 of the Counter-Memorial, it cannot seriously be alleged that NRD itself has been expropriated (for example, through a transfer of some or all of the shares in the company to Rwanda). On the Claimants’ own case, ownership in NRD has been retained.
858. In this respect, the case of *Feldman v. Mexico*, relied on by the Claimants for their creeping expropriation claim, is instructive. In this case the Tribunal found that Mexico had not committed a “creeping expropriation” of the Claimant’s investment under Article 1110 NAFTA. That clause is materially identical to the expropriation clause contained in Article 6 of the USA-Rwanda BIT.¹³³⁶ The claim was rejected despite the Tribunal’s finding that the Claimant, “*through the Respondent’s actions, is no longer able to engage in his business of purchasing Mexican cigarettes and exporting them, and has thus been deprived completely and permanently of any potential economic benefits from that particular activity.*”¹³³⁷ One of the reasons for rejecting the creeping expropriation claim was that “*the Claimant’s ‘investment,’ the exporting business known as CEMSA, as far as this Tribunal can determine, remains under the complete control of the Claimant...*”¹³³⁸
859. The same of course is true with respect to Spalena’s ownership of shares in NRD. For the avoidance of doubt, and as explained at sections V.B.2 to V.B.4 above, the Respondent does not accept that BVG has any ownership of, or interest in, NRD.

¹³³⁴ Claimants’ Reply, at para. 248.

¹³³⁵ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para. 49.

¹³³⁶ The material part of Article 1110 of NAFTA states: “*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*”

¹³³⁷ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 109.

¹³³⁸ *Ibid.*, (**Exhibit RL-034**), at para. 111.

860. Likewise, the Claimants have failed to prove that the Respondent “*expropriated Claimants’ ... intangible contractual rights to which Claimants were entitled.*”¹³³⁹ The Claimants allege that the expropriation “*could not have occurred any earlier than May 19, 2015.*”¹³⁴⁰ Yet NRD did not hold any “right” to mine at this time, contractual or otherwise.¹³⁴¹

1. NRD did not hold a contractual right to operate the Five Concession Areas on the alleged date of expropriation of 19 May 2015 or March 2016

861. In May 2015, and March 2016, being the alternative dates of the alleged expropriation, NRD was not in possession of a valid mining licence providing the right to operate the Five Concession Areas even in the short term. As the Respondent has explained in its Counter-Memorial, NRD’s Licences expired in January 2011 and the final extension of these licences expired in October 2012.¹³⁴² If NRD was still operating in May 2015 or March 2016, it was doing so in absence of any proprietary interest of any kind, let alone of a kind that could be subject to expropriation. Indeed, if NRD was operating at this time it was only doing so as a result of an indulgence from the Respondent which it was entitled to revoke at any point. The enjoyment of an indulgence is plainly not something that can be expropriated.

862. Further, the Claimants never possessed a “right” to long-term licences which could have been taken by the Respondent.¹³⁴³ NRD did not, at any time, have any long-term right to mine in any of the Five Concession Areas. The rights granted pursuant to the Contract were expressly limited to four years, as confirmed by the licences themselves,¹³⁴⁴ and the option to acquire long-term licences was expressly conditional on certain criteria being met, including Rwanda positively evaluating a feasibility study submitted by NRD. These conditions were never met and therefore the Contract no longer existed as a source of rights or obligations on either party once Rwanda had decided that the November 2010 Application and purported feasibility study did not justify granting the short-term licences for which NRD had applied; as was the case in *Azinian v. Mexico*, which concerned a

¹³³⁹ Claimants’ Reply, at para. 248; see also the Respondent’s Counter-Memorial, at paras. 430.2-438.

¹³⁴⁰ Claimants’ Counter-Memorial on Preliminary Objections, at para. 12.

¹³⁴¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 152.

¹³⁴² Claimants’ Counter-Memorial on the Merits, at para. 434.

¹³⁴³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 152.

¹³⁴⁴ Letters from the Minister of State for Water and Mines (B. Munyanganizi) to the Director of NRD (B. Benzinge) Forwarding Ministerial Decree (29 January 2007) regarding the Giciye Concession (**Exhibit C-018**), the Mara Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), and the Sebeya Concession (**Exhibit C-022**).

contract that had been declared invalid, the Contract “*had no further existence as a source of rights*”.¹³⁴⁵ As such, there was “*by definition no contract to be expropriated*”.¹³⁴⁶

863. Accordingly, the Claimants’ allegation that Rwanda expropriated Claimants’ intangible contractual rights must be rejected. As the Tribunal held in *Generation Ukraine v. Ukraine*, “*there cannot be an expropriation of something to which the Claimant never had a legitimate claim*”.¹³⁴⁷

2. Even if NRD did have a contractual right to be granted long-term licences (which is denied), this is not something that was capable of being expropriated

864. Even if the Claimants did have a right under the Contract to long-term licences (which is not credible as a matter of basic contractual interpretation principles and is denied), this right would only have been a right to performance, and not a proprietary right capable of expropriation.¹³⁴⁸ This is clear from the Claimants’ own authorities. The Tribunal in *Crystallex v. Venezuela* explained that “*as a matter of substance, it is clear that a breach of a contract by a State does not normally amount to a violation of international law*”.¹³⁴⁹ Similarly, the Tribunal in *Siemens v. Argentina* clarified that expropriation is “*not a matter of being disappointed in the performance of the State in the execution of a contract*”.¹³⁵⁰

865. In *Waste Management v. Mexico*, the Tribunal considered, in the context of a waste management services concession, what circumstances, if any, a breach of contract could amount to expropriation under Article 1110 of NAFTA. That clause is materially identical to the expropriation clause contained in Article 6 of the USA-Rwanda BIT.¹³⁵¹ The Tribunal considered the decision in *Azinian v. Mexico*, which concerned whether the non-performance of a Concession Contract could be considered to be an act of expropriation in violation of Article 1110 of NAFTA.

¹³⁴⁵ See *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 164, in summarising the decision in *Azinian v Mexico*. The Tribunal in *Waste Management* noted that “*the repudiation by the council in that case took the form of the actual rescission of the contract for cause, which cause was upheld by the Mexican courts in proceedings not alleged to involve a denial of justice*”.

¹³⁴⁶ *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (**Exhibit RL-136**), at para. 100.

¹³⁴⁷ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, (16 September 2003) (**Exhibit RL-050**), at para. 22.1.

¹³⁴⁸ See the Respondent’s Counter-Memorial, at paras. 436-438.

¹³⁴⁹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 689.

¹³⁵⁰ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at para. 253.

¹³⁵¹ The material part of Article 1110 of NAFTA states: “*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*”

866. In *Azinian v. Mexico*, the Tribunal had “emphasised that proof of a breach of contract did not equate to a breach of NAFTA Chapter 11”.¹³⁵² It observed that “Labelling is... no substitute for analysis. The words ‘confiscatory,’ ‘destroy contractual rights as an asset,’ or ‘repudiation’ may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder—and that is not satisfactory for present purpose.”¹³⁵³

867. After considering *Azinian v. Mexico* and other relevant jurisprudence, the Tribunal in *Waste Management v. Mexico* went on to hold that “simply to assert that ‘property rights are created under and by virtue of a contract’ is not sufficient.”¹³⁵⁴ As it explained:

“It is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.”¹³⁵⁵

868. The tribunal further explained:

“... the present Tribunal does not regard the conduct of Mexico in the present case as tantamount to expropriation of the enterprise as such, within the meaning attributed to that term in *Metalclad*. *Acaverde* at all times had the control and use of its property. It was able to service its customers and earn collection fees from them. It is true that the City failed to make available the promised land for the disposal site—but a failure by a State to provide its own land to an enterprise for some purpose is not converted into an expropriation of the enterprise just because the failure involves a breach of contract. It is also true that the City’s breaches (not remedied by *Guerrero* and remedied only to a limited extent by *Banobras*) had the effect of depriving *Acaverde* of “the reasonably-to-be-expected economic benefit” of the project so far as the monthly fees due from the City were concerned. But that will be true of any serious breach of contract: the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one.”¹³⁵⁶

869. The Tribunal went on to conclude that:

“...it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and

¹³⁵² *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 164, citing *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (**Exhibit RL-136**), at para. 90.

¹³⁵³ *Ibid.*, (**Exhibit RL-136**), at para. 90.

¹³⁵⁴ *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit CL-028**), at para. 174.

¹³⁵⁵ *Ibid.*, (**Exhibit CL-028**), at para. 175.

¹³⁵⁶ *Ibid.*, (**Exhibit CL-028**), at para. 159.

dependent for its success on unsustainable assumptions about customer uptake and contractual performance. A failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled.
...¹³⁵⁷

870. The Claimants rely on the decision of the Tribunal in *Phillips v. Iran* to support the proposition that concession rights can be expropriated.¹³⁵⁸ However, this 1989 decision of the Iran-United States Claims Tribunal is not at all authoritative or relevant to the question of whether a breach of contract can constitute expropriation under the Rwanda USA-BIT. Indeed, the Tribunal in *Waste Management* expressly acknowledged the decisions of the Iran-United States Claims Tribunal but still concluded that non-compliance by a government with contractual obligations was not expropriation.¹³⁵⁹ Further, as noted in *Siemens v. Argentina*,¹³⁶⁰ the applicability of the jurisprudence of the Iran-US Claims Tribunal has been rejected in various investor-state cases including *Pope & Talbot, Inc. v. Canada*,¹³⁶¹ and *S.D. Myers, Inc. v. The Government of Canada*.¹³⁶² In any event, the facts in question in *Phillips v. Iran*, in which the claimants (unlike NRD or the Claimants in this case) actually held a contractual right to exploitation, is not analogous, and nor have the Claimants explained how it possibly could be.

3. NRD did not have a “right” under the USA-Rwanda BIT, Rwandan law, or under customary international law to operate the mines

871. Just as NRD did not have a “right” under any contract to be granted long-term licences that could have been expropriated, it did not have a “right” to operate mines that derived from any other source. In particular:

871.1. The Claimants did not have a right to operate the concessions under the USA-Rwanda BIT or customary international law (and the Claimants have not pleaded

¹³⁵⁷ *Ibid.*, (Exhibit CL-028), at para. 177.

¹³⁵⁸ See Claimants’ Reply, at para. 246, referring to *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Trib. Case No. 39, Chamber 2, Award No. 425-39-2, 29 June 1989 (Exhibit CL-013), at para. 105.

¹³⁵⁹ *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Exhibit CL-028), at para. 172.

¹³⁶⁰ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (Exhibit CL-018), at para. 222.

¹³⁶¹ *Pope & Talbot, Inc. v. Canada*, Interim Award (26 June 2000), AL RA No. 50 (Exhibit RL-167) at para. 104 (“The Tribunal is unable to accept the Investor’s reading of Article 1110. “Tantamount” means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more. No authority cited by the Investor supports a contrary conclusion. References to the decisions of the Iran-U.S. Claims Tribunal ignore the fact that that tribunal’s mandate expressly extends beyond expropriation to include “other measures affecting property rights.”)

¹³⁶² *S.D. Myers, Inc. v. The Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Exhibit CL-041) at para. 286 (“The Tribunal agrees with the conclusion in the Interim Award of the Pope & Talbot Arbitral Tribunal that something that is “equivalent” to something else cannot logically encompass more. In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word “tantamount” to embrace the concept of so-called “creeping expropriation”, rather than to expand the internationally accepted scope of the term expropriation.”)

that they did). This point was highlighted by the Tribunal in *Feldman v. Mexico*, in dismissing the expropriation claim under Article 1110 of NAFTA. It held that:

“NAFTA and principles of customary international law do not, in the view of the Tribunal, require a state to permit cigarette exports by unauthorized resellers (gray market exports)”.¹³⁶³

871.2. The Claimants did not have a right to operate any mines under Rwandan law. The Respondent repeats paragraphs 228-234 above and paragraphs 153 to 180 of the Counter-Memorial. In this respect, the decision of the tribunal in *Feldman v. Mexico* is again relevant. In this case, the tribunal found that the absence of a relevant legal “right” was a further reason for its finding that there was no creeping expropriation. The tribunal observed that:

“at no relevant time has the IEPS law, as written, afforded Mexican cigarette resellers such as CEMSA a “right” to export cigarettes (due primarily to technical/legal requirements for invoices stating tax amounts separately and to their status as non-taxpayers)”.¹³⁶⁴

4. Even if NRD did have a contractual right that was capable of being expropriated, interference by a sovereign act is required to establish an expropriation

872. Even if NRD did have a right that was capable of being expropriated (which is not the case), in order to establish an expropriation, the Claimants would need to prove that their right was violated through a sovereign act. The Claimants have not addressed this requirement and have thus failed to discharge the burden that was on them to make out this element.

873. The Claimants seek to rely heavily on the decision of the Tribunal in *Crystallex v. Venezuela*.¹³⁶⁵ In this case, the Tribunal explained the requirement that any rescission of a contract must take the form of a sovereign act in order to constitute an expropriation. It stated that:

“In the Tribunal’s view, the pivotal question is whether the Respondent, in terminating the contract, acted in the exercise of its sovereign powers (puissance publique) rather than as an ordinary contracting party. The presence of this element allows distinguishing between mere breaches of contracts (which would normally not give rise to international responsibility) and acts which, while expressed as contractual, are in reality sovereign acts which may implicate state responsibility. Differently put, the Tribunal must objectively determine whether the purported exercise of a contractual act is evidencing the

¹³⁶³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 115.

¹³⁶⁴ *Ibid.*, (**Exhibit RL-034**), at para. 111.

¹³⁶⁵ See Claimants’ Reply, at paras. 251-253, referring to *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at paras. 673-678.

characteristics of the exercise of sovereign power and is thus to be characterized as a sovereign act."¹³⁶⁶

874. Similarly, in *Impregilo v. Pakistan*, the tribunal observed that:

"...a Host State acting as a contracting party does not "interfere" with a contract; it "performs" it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority.

....only measures taken by Pakistan in the exercise of its sovereign power ('puissance publique'), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation."¹³⁶⁷

875. The Claimants have not explained how it is that any of the alleged acts and omissions that are said to constitute the "creeping expropriation" meet this requirement. It is clear that they did not: Rwanda did not ever pass a legislative decree, exercise a public law prerogative, or perform any other action that could be considered an exercise of sovereign authority with respect to NRD. Rather, the Claimants' case is effectively that Rwanda performed the Contract "badly", and this is insufficient in law to establish an expropriation.¹³⁶⁸

C. The Claimants have not established a direct expropriation by the Respondent

876. The Respondent has already explained at paragraphs 439 to 442 of its Counter-Memorial that the Claimants could not possibly have established that a direct expropriation took place as there was no direct transfer of ownership of any of the Claimants' alleged investments to Rwanda. The Claimants appear to have accepted that proposition as they do not make any allegation of a direct expropriation in the Reply.

¹³⁶⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 692.

¹³⁶⁷ *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**Exhibit RL-139**), at paras. 278, 281 (footnotes omitted); See also the other authorities cited in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at footnote 968 of para. 696: *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) (**Exhibit CL-039**), at para. 153 ("In investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between *acta iure imperii* and *acta iure gestionis*, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty"); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**Exhibit RL-032**), at para. 315 ("contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract.")

¹³⁶⁸ *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**Exhibit RL-139**), at para. 278.

D. The Claimants have not established an indirect expropriation by the Respondent

1. The Claimants' allegation of a "creeping expropriation" is based on incorrect legal analysis

877. The Claimants have failed to establish an indirect expropriation by the Respondent. As well as being improperly pleaded and insufficiently particularised, the Claimants' case premised on a "creeping expropriation" is based on an incorrect legal analysis and is entirely unsupported by the facts.
878. At paragraph 249 of the Reply, the Claimants allege that the Respondent committed a creeping expropriation. They allege that this "*does not involve a transfer of property but a deprivation of the enjoyment of the property*".¹³⁶⁹ The Claimants state, referring to the decision in *Feldman v. Mexico*, that "*a creeping expropriation takes place when a State seeks 'to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned.'*"¹³⁷⁰ The Claimants go on to cite the decision in *Siemens v. Argentina* in support of the propositions that "*It is the last step in the creeping expropriation that ultimately has a 'perceptible effect'*" and that "*the time at which a composite act 'occurs' [is] the time at which the last action or omission occurs.*"¹³⁷¹
879. As with the Claimants' strained attempt to allege a "creeping" violation of the FET standard, the Claimants' reliance on the concept of a creeping expropriation is inapposite. Further, the particular construction of a creeping expropriation which they espouse is grounded in an error of law.
880. *Firstly*, it is not alleged that this case concerns measures of taxation imposed by the Respondent. Nor does this case involve "*regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned.*"¹³⁷² To the extent that the Claimants' seek to rely on the implementation of the 2014 Law as an expropriatory measure, as already explained at paragraphs 584 to 594 above, the 2014 Law was implemented in the public interest for the purpose of the modernisation and increased efficiency of the Rwandan mining sector – a legitimate objective by a sovereign state. The 2014 Law was certainly not designed to make NRD "*uneconomical so that it is abandoned*", and the Claimants have provided no evidence to the contrary. The Claimants' self-important and spurious explanation for the 2014 Law, that it was part of a "*campaign to drive Claimants out of Rwanda and to force them to abandon their*

¹³⁶⁹ Claimants' Reply, at para. 249, citing *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, (11 September 2007) (**Exhibit CL-030**), at para. 437.

¹³⁷⁰ Claimants' Reply, at para. 249, citing *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 101, citing the Restatement, Section 712, Reporter's Note 7.

¹³⁷¹ Claimants' Reply, at para. 250, citing *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at para. 231.

¹³⁷² Claimants' Reply, at para. 249, citing *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 101.

investment” is not supported by any evidence. The creeping expropriation theory on which the Claimants rely thus does not arise on the facts.

881. *Secondly*, the concept of a creeping expropriation invoked by the Claimants is based on the same error of law by the Claimants that is evident in their analysis in their CMPO of the time bar contained in Article 26 of the USA-Rwanda BIT. As explained at paragraphs 423 to 430 above, the relevant statement from *Siemens v. Argentina*, which reproduces the ILC Articles, has been misquoted by the Claimants so as to materially change its meaning. Contrary to the Claimants’ misrepresentation, *Siemens v. Argentina* does not support the proposition that “*the time at which a composite act ‘occurs’ [is] the time at which the last action or omission occurs.*” As explained, the full quotation clarifies that “*Paragraph 1 of Article 15 defines the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.*”¹³⁷³

882. Likewise, *Siemens v. Argentina* does not support the proposition that “*It is the last step in the creeping expropriation that ultimately has a ‘perceptible effect’*” as the Claimants suggest. The full quotation reads:

*“The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.”*¹³⁷⁴

883. It is respectfully submitted that the Claimants do themselves no favours by deliberately misquoting, and misrepresenting, the legal authorities on which they rely. It is clear that the Claimants’ attempt to characterise their case as one of a “*creeping expropriation*” that did not crystallise until the public tender in March 2016, or alternatively until May 2015, has no legal basis. The Respondent repeats its analysis on the Tribunal’s jurisdiction *ratione temporis* at paragraphs 405 to 445 above.

2. The Claimants’ allegation of a creeping expropriation is unsupported by the facts

884. The Claimants’ creeping expropriation case is also unsustainable on the facts.

885. As explained at paragraphs 846 to 847 above, the Claimants have failed to properly particularise precisely which actions are said to constitute the creeping expropriation, and to explain how these actions could have had the “*effect equivalent to direct expropriation*” as set out in Annex B of the USA-Rwanda BIT. They simply state, without elaborating any further, that:

“The first step in Rwanda’s expropriatory actions was to fail to act on the draft long term license that OGMR had submitted for approval after determining that

¹³⁷³ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at para. 265, referring to International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts* (2001) (**Exhibit CL-084**), at paragraph 8 of the commentary to Article 15.

¹³⁷⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-018**), at para. 263 (emphasis added).

Claimants had satisfied their obligations under the contract. Thereafter, Rwanda systematically led Claimants to reasonably expect that they would receive the long term licenses. The long term licenses were guaranteed yet Rwanda ultimately refused to issue them to Claimants after years of stringing Claimants along and resorting to various tactics designed to force Claimants to walk away on their own. In the process, Rwanda “governmental officials of the highest level” interfered with Claimants’ operation of the Concessions by allowing a Rwandan National to wrongfully seize control and damage NRD on two separate occasions, indiscriminately ceasing Claimants’ mining operations, and wrongfully denying Claimants’ mineral tags.”¹³⁷⁵

886. The suggestion that these actions constituted a creeping expropriation is unsubstantiated and wrong. In particular:

886.1. The first step alleged to be expropriatory is pure fiction. The Respondent did not “fail to act on the draft long-term licence that OGMR had submitted for approval after determining that Claimants had satisfied their obligations under the Contract.”¹³⁷⁶ As discussed above, the draft contract relied on and exhibited by the Claimants is expressly not for a long-term licence, was prepared by Mr. Marshall and not by Rwanda, and was never “submitted for approval”. The Claimants have provided no credible evidence otherwise. The unequivocal evidence of former Minister Imena¹³⁷⁷ and Dr. Biryabarema¹³⁷⁸ is that they had never even seen a draft contract, including the ones now relied on by the Claimants. Indeed, NRD had not even applied for a long-term licence by this point, it did not do so until January 2013. The Respondent repeats its analysis at paragraphs 151 to 185 above.

886.2. The claims that the Respondent “systematically led Claimants to reasonably expect that they would receive the long term licences” is not properly particularised, and in any event, wrong.¹³⁷⁹ The Claimants have failed to provide any credible evidence to support this claim, and it is entirely inconsistent with the large volume of documentary evidence exhibited in this Arbitration. To the extent that the Claimants seek to rely on the same events relied on for the Claimants’ legitimate expectations claim (and it is submitted that it is no longer open for them to do so as it has not formed any part of their pleaded case to date), the Respondent repeats its analysis at paragraphs 708 to 802 above.

886.3. The claim that the “long term licences were guaranteed” is untrue. As addressed in detail herein and in the Counter-Memorial, the Claimants have failed to provide any credible legal or factual arguments that this is the case, and the

¹³⁷⁵ Claimants’ Reply, at para. 253.

¹³⁷⁶ Claimants’ Reply, at para. 253.

¹³⁷⁷ Supplemental Witness Statement of Mr. Evode Imena dated 28 May 2020, at para 25.3.

¹³⁷⁸ Supplemental Witness Statement of Dr. Michael Biryabarema dated 26 May 2020, at para 10.4.

¹³⁷⁹ Claimants’ Reply, at para. 253.

allegation is contradicted by the plain terms of the Contract, the policy objectives of the Respondent in signing the Contract with NRD in the first place, and all of the relevant documentary evidence filed in this Arbitration. The Respondent repeats its analysis at paragraphs 102 to 104 above.

- 886.4. The claim that Rwanda “ultimately refused to issue [long-term licences] to Claimants after years of stringing Claimants along and resorting to various tactics designed to force Claimants to walk away on their own” is not properly explained or particularised. It is thus unclear what acts allegedly constituted “stringing Claimants along” and what the “various tactics” referred to are. The onus of course is on the Claimants to make out their case, and they have failed to do so. In any event, the claim is false and the Claimants have failed to provide any credible evidence in support of the allegation. To the extent that the Claimants seek to rely on the same events relied on for the Claimants’ legitimate expectations claim (and it is submitted that such course is no longer open to them), the Respondent repeats its analysis at paragraphs 708 to 802 above.
- 886.5. The claim that Rwandan “governmental officials of the highest level” interfered with Claimants’ operation of the Concessions by allowing a Rwandan National to wrongfully seize control and damage NRD on two separate occasions” is untrue. The Respondent cannot reasonably be held responsible for the ownership dispute between Mr. Marshall and Mr. Benzinge, or for any actions taken by Mr. Benzinge in respect of this dispute, for the reasons explained at paragraphs 644 to 659.4 above. Further, it is entirely unclear how this action could amount to an indirect expropriation within the meaning of the USA-Rwanda BIT. In this respect, the Claimants’ own altered expropriation case, as it has emerged in the Reply, appears entirely inconsistent with the Claimants’ documentary evidence filed with the Reply. The Respondent relies in particular on the Complaint from NRD to the CID dated 30 October 2014 in which, in the context of false allegations Mr. Marshall makes against former Minister Imena, Mr. Marshall states that:

“It appears that Minister Evode is confusing the fraudulent claims of Ben Benzinge with his own actions, as Minister of State in Charge of Mining, in “taking” the NRD business. This is particularly confusing as Minister Evode has never identified for us a connection between Ben Bezinqe’s [sic] fraud and any nationalization of the company.”¹³⁸⁰

The connection between the alleged expropriation or nationalisation of NRD and the events concerning Mr. Benzinge remain as unclear to the Respondent as it evidently is to the Claimants.

¹³⁸⁰ Complaint from NRD (R. Marshall) to CID, *Formal complaint against apparent corruption* (30 October 2014) (**Exhibit C-165**), at page 2 (emphasis added).

- 886.6. The claim that the Respondent interfered with the Claimants' operation of the Five Concession Areas by "*indiscriminately ceasing Claimants' mining operations*" is again not properly explained or particularised. Due to the deficiency in this pleading, it is not clear what the alleged acts by the Respondent are that the Claimants are referring to.
- 886.6.1. To the extent that the Claimants seek to rely on the closure of the Rutsiro and Ngororero Districts in 2012 (and they should be prohibited from doing so as they have not pleaded as such), this step was taken due to the ongoing environmental problems, as explained at paragraph 117 to 121 of the Claimants' Counter-Memorial and at paragraphs 191 to 192 above.
- 886.6.2. To the extent that the Claimants seek to rely on their claims based on the alleged actions of the illegal miners while its concessions were closed in 2012 due to environmental violations (and they should be prohibited from doing so as they have not pleaded as such), the Respondent repeats its analysis at paragraphs 413 to 416 of its Counter-Memorial.
- 886.7. The claim that the Respondent "*interfered with Claimants' operation of the Concessions*" by "*wrongfully denying Claimants' mineral tags*" is false. Although the Respondent instructed PACT not to grant tags to NRD in summer 2014, this action was not wrongful and it certainly was not expropriatory. It was taken because NRD had no licences, was refusing to cooperate in regularising their position, and further was embroiled in an ownership dispute leaving uncertainty as to who was properly to be considered in control of NRD and therefore to whom the tags should be issued. The Respondent repeats its analysis at section VI.B.4 above and paragraphs 204 to 206 of its Counter-Memorial, together with the Witness Statement of former Minister Imena, at paragraphs 49 and 50.
887. Further, even if the acts and omissions that the events claimed to constitute the alleged "creeping expropriation" did take place (which is denied), the Claimants have failed to discharge the burden that is on them to prove how these actions could, whether individually or collectively, have had an effect equivalent to a taking or nationalisation of property so as to constitute an expropriation under Article 6 and Annex B of the USA-Rwanda BIT.
888. Plainly, the actions that are alleged to have taken place (and which are denied) could not have had the effect equivalent to expropriation. Annex B of the USA-Rwanda BIT confirms that only in rare circumstances will non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives constitute an indirect expropriation. The relevant case law on expropriation reiterates this. The

Restatement of the Law of Foreign Relations of the United States, discussed in *Feldman v. Mexico*, observes that:

*“A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory....”*¹³⁸¹

889. Rwanda’s dealings with NRD were not discriminatory and were at all times in accordance with its laws and regulations. Its mining laws and regulations were designed to encourage the productive operation of its mining sector whilst also protecting the environment and communities.¹³⁸² These were legitimate public welfare objectives and Rwanda was entitled as a sovereign state to enact such laws and regulations, and to act in accordance with them. The Claimants have failed to establish otherwise.
890. Further, Annex B of the USA-Rwanda BIT clarifies that the determination as to whether an action or series of actions constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers the economic impact of a government’s action, but the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment standing alone, does not establish that an indirect expropriation has occurred.
891. Annex B also considers, in determining whether an expropriation has taken place, the extent to which the government action interferes with distinct, reasonable, investment-backed expectations. As already explained, none of the Respondent’s actions interfered with any reasonable expectations that the Claimants could have had.

3. The decisions relied on by the Claimants in support of their creeping expropriation claim are not analogous

892. The Claimants seek to rely on the decision of the tribunal in *Crystallex v. Venezuela*. Any reliance on this case is misplaced.¹³⁸³ The facts of *Crystallex v. Venezuela* are very far removed from the present case, and it is plainly not enough that both cases concern the mining sector.
893. In *Crystallex v. Venezuela*, the Tribunal held that the combination of the actions surrounding the denial of the permit contrary to promises made, the express statements

¹³⁸¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 105.

¹³⁸² See Witness Statement of Mr. Francis Gatere dated 24 May 2019, at para. 25-26 (“...achieving industrialisation was the very rationale for privatisation of the mining industry in 2006: the Government wanted to increase productivity by professionalising the mining industry. Increasing productivity was and is vital because it facilitates Rwanda’s economic development through mineral royalties” and “even today, the goal of increasing and incentivising productivity remains a key driving force behind our mining policy and all of the legal reforms we have implemented since 2006; we continually strive to achieve greater productivity across the entire sector whilst ensuring that the investors are respecting the environment, workers, and local communities”).

¹³⁸³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 674.

by Venezuela's President Hugo Chávez to the effect that the country would "take back" the claimants' mining concession, combined with the repudiation of the Mining Operation Contract (MOC), amounted to a creeping expropriation.¹³⁸⁴ These elements are not present in this case.

894. *Firstly*, with respect to the actions and circumstances surrounding the denial of the permit: in *Crystallex v. Venezuela* the claimant had submitted a feasibility study that had been approved by the government,¹³⁸⁵ and the claimant possessed a long-term (20-year) mining contract (the MOC), prior to their permits being denied.¹³⁸⁶ This long-term contract was subsequently rescinded by the Venezuelan government.¹³⁸⁷ In the present case, the purported feasibility study submitted by NRD was found to be insufficient by the Respondent, and NRD was never granted a long-term mining licence because it had not met the requirements of the Contract.
895. *Secondly*, in *Crystallex v. Venezuela* the Venezuelan government had expressly promised to "hand over" the permit less than a year before it declined to issue it.¹³⁸⁸ No such promise or representation was ever made by the Respondent in the present case.
896. *Thirdly*, the Venezuelan government made clear and repeated statements in public shortly after denying the claimant the permit that it intended to nationalise and "take back" the claimants' concessions. This included a statement from Venezuela's President Hugo Chávez in a public address that the government would take back "big mines" in Guayana, including "one of the biggest in the world",¹³⁸⁹ which the Tribunal held to be an express reference to the claimants' mine; an official press release from the Ministry of Mines two months later that announced the plan to seize the mine in order "to boost Venezuela's international reserves";¹³⁹⁰ and a statement by President Chávez on national TV that the government would be nationalizing the concession.¹³⁹¹ The Tribunal found that the Venezuelan government had "brought those political announcements to their conclusion and effected, through the termination of the MOC".¹³⁹²
897. These rather extraordinary statements by the Venezuelan government, which were found to be a key element of the creeping expropriation,¹³⁹³ highlight just how starkly different *Crystallex v. Venezuela* is to the present case. The Respondent has not made any statements of any remotely comparable nature and has not nationalised the Five Concession Areas. To the contrary, rather than seeking nationalisation of the Five

¹³⁸⁴ *Ibid.*, (Exhibit RL-033), at paras. 674-685.

¹³⁸⁵ *Ibid.*, (Exhibit RL-033), at para. 32.

¹³⁸⁶ *Ibid.*, (Exhibit RL-033), at para. 20.

¹³⁸⁷ *Ibid.*, (Exhibit RL-033), at para. 59.

¹³⁸⁸ *Ibid.*, (Exhibit RL-033), at para. 597.

¹³⁸⁹ *Ibid.*, (Exhibit RL-033), at para. 676.

¹³⁹⁰ *Ibid.*, (Exhibit RL-033), at para. 678.

¹³⁹¹ *Ibid.*, (Exhibit RL-033), at para. 681.

¹³⁹² *Ibid.*, (Exhibit RL-033), at para. 684.

¹³⁹³ *Ibid.*, (Exhibit RL-033), at para. 708.

Concession Areas, the policy behind the mining sector in Rwanda has been one of privatisation since 2006. As Mr. Gatare explained in his first witness statement:

“...I find NRD’s claims of expropriation quite extraordinary: improving Rwanda’s economic growth by granting concessions to companies with the requisite skills to industrialise operations was the reason we decided to privatise all the country’s mining concessions – one of our country’s most valuable resources – in 2006. Even today, the goal of increasing and incentivising productivity remains a key driving force behind our mining policy and all of the legal reforms we have implemented since 2006; we continually strive to achieve greater productivity across the entire sector whilst ensuring that the investors are respecting the environment, workers, and local communities.”¹³⁹⁴

898. Indeed, the Claimants have not provided a single piece of documentary evidence to support their claim that the Five Concession Areas formerly held by NRD are now operated by the Rwandan Government. They state in their Memorial that *“Ultimately, the Rwanda’s Ministry of Defence or related entities, like Ngali Mining, took control of NRD’s Concessions”¹³⁹⁵* but have provided no credible evidence to support this statement beyond the vague assertions and speculation contained in the witness statements of Mr. Barthelemy, Mr. Buyskes, and Ms. Mruskovicova.¹³⁹⁶ The Respondent’s evidence leaves no doubt that this claim is false. As former Minister Imena explained:

“Mr. Marshall asserts that the NRD concessions were transferred by the Government to a construction company connected to the Ministry of Defence in April 2016. That is not correct – all of the former NRD concessions were put out for tender by the Government in early 2016 and the successful bidders were approved by Cabinet in September 2016. None of the new licence holders are Government owned and none are connected with the Ministry of Defence – they are all independent companies.”¹³⁹⁷

899. Former Minister Imena’s statements are corroborated by the evidence of Mr. Fabrice Kayihura, Managing Director of Ngali Mining, who has confirmed that Ngali Mining does not have any licence or concession over any of the Five Concession Areas.¹³⁹⁸ A letter from former Minister Imena to the Prime Minister of Rwanda dated 19 September 2016 provides the details of the companies that now hold the Five Concession Areas formerly held by NRD and confirms that none of them are Government-owned.¹³⁹⁹ The fact none of them are owned by the Government is supported by documents produced by the

¹³⁹⁴ Witness Statement of Mr. Francis Gatare dated 24 May 2019, at para. 26.

¹³⁹⁵ Claimants’ Memorial, at para. 121.

¹³⁹⁶ Claimants rely on the Witness Statement of Mr. Christophe Barthelemy dated 26 February 2019, at para. 20, the Witness Statement of Mr. Kevin Buyskes dated 27 February 2019, at para. 19 and the Witness Statement of Ms. Zuzanna Mruskovicova dated 28 February 2019, at para. 27.

¹³⁹⁷ See Witness Statement of Mr. Evode Imena dated 24 May 2019, at para. 46 (footnotes omitted), see also Respondent’s Counter-Memorial, at para. 223, and 441-442.

¹³⁹⁸ Witness statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 10.

¹³⁹⁹ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Right Honourable Prime Minister, *Transmission of the Cabinet Paper on Successful Companies for the Development of former Government Mining Concessions* (19 September 2016) (**Exhibit R-035**).

Respondent during the document production phase, including the registration certificates of these entities.¹⁴⁰⁰

900. Further, as can be seen from the explanation of the tender process at paragraphs 271 to 277 above, the process undertaken in relation to the Five Concession Areas was legitimate, commercial, and in accordance with the goal of the 2014 Law which was privatisation and the efficient commercial use of the mines.
901. The Claimants do not repeat their false and unsustainable claims that the Five Concession Areas formerly held by NRD are held by entities associated with the Rwandan Military and/or Ngali Mining when they attempt to set out their expropriation case for the first time in the Reply, and it remains unclear the extent to which they still rely on this false allegation. If they no longer rely on the false allegation, it is difficult to see how they can possibly allege that Article 6 of the USA-Rwanda BIT is even engaged.
902. *Fourthly*, in *Crystallex* the Tribunal found that the “*true nature of the rescission was an exercise of sovereign authority, and not an exercise of a contractual right to unilaterally terminate the contract.*”¹⁴⁰¹ In making this determination, the Tribunal emphasised that it was “*convinced that the evidence on the record clearly shows that the MOC was terminated to give effect to the superior policy decisions dictated by the higher governmental spheres.*”¹⁴⁰² Alongside the statements from high governmental officials which highlighted the real reason for the termination of the MOC,¹⁴⁰³ the Tribunal noted that the MOC was terminated through the use of a public law prerogative, and “*effected through a “Resolution”, a formal administrative act under Venezuelan law.*”¹⁴⁰⁴ No such factors apply in the present case, as explained at paragraphs 872 to 875 above, and it is clear that none of the actions alleged to constitute the creeping expropriation involved the exercise of sovereign authority.
903. In fact, far from helping the Claimants, the decision in *Crystallex v. Venezuela*, in highlighting the flagrancy of the breaches that amount to an expropriation in an investor-state context, highlights just how implausible the Claimants’ expropriation case really is.

¹⁴⁰⁰ See RDB Certificate of Domestic Company Registration for Fair Construction Ltd (**Exhibit R-140**), Kayenzi Mining Company (KAMICO) Ltd (**Exhibit R-141**), Tantalium Minerals Trading (TMT) Ltd (**Exhibit R-142**), Rubavu Exploitation and Trading Company (RETC) Ltd (**Exhibit R-143**), Demikaru (Developpement Minier Kanama Rubavu) Ltd (**Exhibit R-144**), NL Mining Company Ltd (**Exhibit R-145**), ABAHIZI Cooperative (**Exhibit R-146**), Better Generation Machinery Ltd (**Exhibit R-147**), all produced pursuant to Claimants’ Requests for documents, Respondent’s Objections, and Claimants’ replies (6 December 2019) (**Exhibit R-174**), at Request 28, page 42 (“*The corporate registration(s) of the entity or entities that received Claimants’ Concessions following the March 2016 public tender held by the RDB.*”)

¹⁴⁰¹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**Exhibit RL-033**), at para. 707.

¹⁴⁰² *Ibid.*, (**Exhibit RL-033**), at para. 701.

¹⁴⁰³ *Ibid.*, (**Exhibit RL-033**), at para. 705.

¹⁴⁰⁴ *Ibid.*, (**Exhibit RL-033**), at para. 706.

904. Similarly, the Claimants' reliance on *Metalclad v. Mexico* is misconceived.¹⁴⁰⁵ Like *Crystallex*, the facts of that case are very far removed from the present case. We note in particular that:

904.1. In *Metalclad*, the Tribunal found that the Mexican federal government had made "*representations...on which Metalclad relied*" in constructing the landfill at issue.¹⁴⁰⁶ In the present case, no such representations were made. The Respondent repeats its analysis at paragraphs 721 to 802 above,¹⁴⁰⁷

904.2. The Tribunal also found that there was an "*absence of a timely, orderly, or substantive basis for the denial by the Municipality of the local construction permit*",¹⁴⁰⁸ which was issued "*well after construction was virtually complete.*"¹⁴⁰⁹ In this case, the Respondent's decision not to grant long-term licences was based on NRD's non-compliance with the Contract and its subsequent failure to meet the requirements of the 2014 Law. The Respondent repeats its analysis at paragraphs 53 to 179 of its Counter-Memorial, and paragraphs 126 to 163 and 223 to 258 above; and

904.3. The Tribunal found that Mexico had acted "*outside its authority*".¹⁴¹⁰ There is no such allegation in the present case.

905. The Claimants also seek to rely on *Tecmed v. Mexico*.¹⁴¹¹ It is not accepted that this decision, which was been widely criticised and rejected as discussed at paragraph 566 above,¹⁴¹² is authoritative or good law. In any event, nor is it relevant – and the Claimants have not explained how it possibly could be. In that case, the Tribunal did not accept that

¹⁴⁰⁵ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (**Exhibit CL-038**).

¹⁴⁰⁶ *Ibid.*, (**Exhibit CL-038**), at para. 107.

¹⁴⁰⁷ In *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), the tribunal rejected the claimants' attempt to rely on the *Metalclad v. Mexico* award, commenting at paras. 148-149 that: "*The facts, and the reasonableness of the Claimant's reliance in Metalclad, are thus quite different from the instant case. The assurances received by the investor from the Mexican government in Metalclad were definitive, unambiguous and repeated, in stating that the federal government had the authority to authorize construction and operation of hazardous waste landfills, and that Metalclad had obtained all necessary federal and other permits for the facility... in the present case the assurances allegedly relied on by the Claimant (which assurances are disputed by Mexico) were at best ambiguous and largely informal.*"

¹⁴⁰⁸ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (**Exhibit CL-038**), at para. 107.

¹⁴⁰⁹ *Ibid.*, (**Exhibit CL-038**), at para. 90.

¹⁴¹⁰ *Ibid.*, (**Exhibit CL-038**), at para. 106.

¹⁴¹¹ See Claimants' Reply, at para. 247, footnote 420, referring to *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) 10 ICSID Rep. (**Exhibit CL-026**), at para. 117.

¹⁴¹² See for example, *MTD Equity Sdn Bhd & MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) (**Exhibit RL- 156**) in which the tribunal observed at para. 67 that: "*The TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations, investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.*"

there were legitimate environmental and other public interest grounds which justified the Environmental Protection Agency's decision not to grant the environmental permit for the claimant's landfill in Mexico.¹⁴¹³ No such criticism can reasonably be made against the Respondent in this case.

4. Not every business problem is an expropriation

906. In *Feldman v. Mexico*, the Tribunal rejected the Claimants' "creeping expropriation" claim under Article 1110 of NAFTA,¹⁴¹⁴ which as explained above is materially identical to the expropriation clause contained in Article 6 of the USA-Rwanda BIT. In doing so, the Tribunal clarified that "*many business problems are not expropriations*",¹⁴¹⁵ explaining the very high threshold that must be met to prove an expropriation:

*"First, the Tribunal is aware that not every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110, or a denial of due process or fair and equitable treatment under Article 1110(1)(c). As the Azinian tribunal observed, "It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities... It may be safely assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction..." (Robert Azinian and Others v. The United Mexican States, Award, November 1, 1999, para. 83, 14 ICSID Review. FILJ 2, 1999.) To paraphrase Azinian, not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."*¹⁴¹⁶

907. These comments are instructive. Plainly, even if the vague claims that are alleged by the Claimants to constitute an expropriation were based on fact and substantiated with credible evidence (which they are not), they would have fallen a long way short of satisfying the test for expropriation under the USA-Rwanda BIT. Indeed, the Claimants' multiple references to BVG's Bisesero concession being "expropriated" shows just how loosely the Claimants' use of the term "expropriation" really is, and just how much they misunderstand the nature of what this very serious allegation entails.¹⁴¹⁷ BVG's Bisesero

¹⁴¹³ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) 10 ICSID Rep. (**Exhibit CL-026**), at para. 124.

¹⁴¹⁴ *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**Exhibit RL-034**), at para. 153.

¹⁴¹⁵ *Ibid.*, (**Exhibit RL-034**), at section H.3.1.

¹⁴¹⁶ *Ibid.*, (**Exhibit RL-034**), at para. 112.

¹⁴¹⁷ See Claimant's Memorial, at para. 7 ("*Unfortunately, the Rwandan Government ("Rwanda") took BVG's Concession in 2012.*"); Claimant's Counter-Memorial on Preliminary Objections, at para. 101 ("*In November 2011, Respondent expropriated the Bisesero Concession from BVG*"); Claimant's Reply, at para. 19 ("*Respondent announced that it expropriated the Bisesero Concession from BVG*"), at para. 35 ("*after Rwanda expropriated the*

concession was not renewed because BVG had failed to meet its obligations under the contract, as Dr. Biryabarema explained in his March 2015 Explanatory Note,¹⁴¹⁸ and as set out very clearly in a letter from Lambert Mucyo, former Managing Director of BVG's Bisesero concession,¹⁴¹⁹ and no claim under the USA-Rwanda BIT was ever brought in respect of it (and rightly so).

908. Accordingly, the Claimants' expropriation claim under 6 of the USA-Rwanda BIT is unjustified and wrong. It should be dismissed.

5. The Claimants' expropriation claim is out of time

909. In any event, the Claimants' expropriation claim is out of time.

910. Every specific act that is particularised in the Reply as constituting the creeping expropriation took place prior to the First Cut-off Date. In particular:

910.1. The Claimants allege that "*The first step in Rwanda's expropriatory actions was to fail to act on the draft long term license that OGMR had submitted for approval after determining that Claimants had satisfied their obligations under the contract.*"¹⁴²⁰ On the Claimants' own facts, this occurred between September 2011 and 20 February 2012, after the alleged "*draft long term license*" dated September 2011 was allegedly submitted to Cabinet but not acted on.¹⁴²¹ The Claimants state that "*Cabinet's inaction*" became obvious to them upon receipt of the letter from Minister Kamanzi to Mr. Marshall dated 20 February 2012 that temporarily extended NRD's licences.¹⁴²² Accordingly, even if this event could be considered expropriatory (which it plainly could not be), the Claimants knew of this breach and any associated loss long before the first Cut-off Date.

910.2. The Claimants allege that the Respondent "*systematically led Claimants to reasonably expect that they would receive the long term licences*" and that "*the*

Bisesero Concession"), at para. 138 ("*Rwanda had expropriated the Bisesero Concession before BVG invested in NRD*").

¹⁴¹⁸ See Explanatory Note on NRD (**Exhibit R-017**) at pages 8-11; Witness Statement of Mr. Francis Gatere dated 24 May 2019, at para. 29; Supplemental Witness Statement of Anthony Ehlers dated 27 May 2020 at paras. 23.1-21-23.3.

¹⁴¹⁹ Letter from Lambert Mucyo to the Police/CID, *False allegations by William Quam and Roderick Marshall* (23 June 2010) (**Exhibit R-102**).

¹⁴²⁰ Counter-Memorial on Preliminary Objections, at paras. 17, 70; Reply, at para. 253.

¹⁴²¹ Counter-Memorial on Preliminary Objections, at paras. 29-31; Draft contract between the Government of Rwanda and NRD (September 2011) (**Exhibit C-114**). See also the Supplemental Witness Statement of Mr. Olivier Rwamasirabo dated 13 March 2020, at para. 23a ("*Dominique Bidega, Director of the Regulation and Supervision Unit of the OGMR (the precursor to the GMD) provided NRD with a draft long term licence and negotiated for several months in 2011 until agreement was reached on mutually acceptable language. Although this draft was provided by Rwanda and submitted to the Cabinet for approval, along with the OGMR's basis for submitting the draft long term licence for approval, as required by law, the Cabinet never took any action on it, but NRD was not informed that the Cabinet would take no action on the draft long term licence. The failure to act on the submitted draft was a violation of due process.*")

¹⁴²² Counter-Memorial on Preliminary Objections, at para. 31; Letter from the Minister of Natural Resources (Minister S. Kamanzi) to Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

long term licences were guaranteed yet Rwanda ultimately refused to issue them to Claimants after years of stringing Claimants along and resorting to various tactics designed to force Claimants away on their own".¹⁴²³ As stated at paragraphs 886.2 to 886.4 above, these vague actions that are said to be part of the creeping expropriation are not properly particularised (and in any event denied). The Claimants should not be permitted to rely on events that are not pleaded as constituting the alleged breach. Further, to the extent that the Claimants seek to rely on the same events relied on for the Claimants' legitimate expectations claim (and it is submitted that they should be prohibited from doing so as they have not pleaded as such), it is clear that the Claimants had knowledge of these alleged breaches prior to the Cut-off Date, as explained at paragraphs 803 to 835 above.

910.3. The Claimants allege that the Respondent interfered with the Claimants' operation of the Five Concession Areas by allowing Mr. Benzinge to wrongfully seize control and damage NRD on two separate occasions.¹⁴²⁴ The claim is not properly particularised but it is inferred that the Claimants are referring to the events in 2012 and 2014 that form the basis of the Claimants' claim that the Respondent arbitrarily ignored RDB records, in violation of the FET standard. The Claimants first acquired knowledge of these alleged breaches and any associated loss prior to the Cut-off Date, as explained at paragraphs 661 to 667 above.

910.4. The Claimants allege that the Respondent interfered with the Claimants' operation of the Five Concession Areas by "*indiscriminately ceasing Claimants' mining operations*". As stated at paragraph 886.6 above, this allegation is not properly explained or particularised. It is thus not clear what alleged acts by the Respondent the Claimants are referring to and the Claimants cannot rely on actions that are not particularised as constituting the breach. Further:

910.4.1. To the extent that the Claimants seek to rely on the closure of the Rutsiro and Ngororero Districts in 2012 due to environmental violations (and they should be prohibited from doing so as they have not pleaded as such), any claim based on this event is plainly out of time.

910.4.2. To the extent that the Claimants seek to rely on their claims based on the alleged actions of the illegal miners during the times that its concessions were closed in 2012 due to environmental violations (and they should be prohibited from doing so as they have not pleaded as such), the claim based on this event is out of time.

910.4.3. The Respondent repeats its analysis at paragraphs 71 to 80 of its MPO as to why any breaches based on these alleged actions of the

¹⁴²³ Claimants' Reply, at para. 253.

¹⁴²⁴ Claimants' Reply, at para. 253.

Respondent in respect of the closure of its concessions in the Rutsiro and Ngororero districts in 2012 are out of time.

- 910.5. The Claimants allege that the Respondent wrongfully denied the Claimants mineral tags to NRD.¹⁴²⁵ This claim is based on events that took place in 2014.¹⁴²⁶ The Claimants first acquired knowledge of this alleged breach and any associated loss long before the first Cut-off Date, as explained at paragraphs 679 to 684 above.
911. Further, as stated at paragraph 853 above, the essence of an expropriation claim is a taking of property without compensation.¹⁴²⁷ The documentary evidence leaves no doubt that the Claimants had knowledge of this alleged breach long before the First Cut-off date. Indeed, the Claimants had expressly alleged in writing, on numerous occasions, a “taking” of their property prior to either of the Cut-off Dates.
912. For this reason, re-characterising their claims as a single “creeping” expropriation does not assist the Claimants. Even accepting, for present purposes, the Claimant’s submission that all of the complained of events can or should be characterised as a single “creeping” expropriation or “composite act” (which is denied), then it is one which was constituted, and known of, well before First Cut-Off date. At a minimum, the actions or omissions sufficient, and alleged in the Memorial to be sufficient,¹⁴²⁸ to constitute the composite act that is said to be in violation of Article 6 of the USA-Rwanda BIT took place, and were known of by the Claimants, well before the First Cut-Off date. The Respondent repeats and relies on the evidence highlighted in paragraphs 803 to 835 above in full, and refers the Tribunal to the following correspondence in particular, in which the Claimants expressly and unequivocally state that they have already had their investments expropriated and suffered loss as a result:
- 912.1. A letter from Mr. Marshall to Minister Kamanzi dated 31 October 2011, in which Mr. Marshall writes that “... *our investor group must conclude that the intent to nationalize the Giciye mining concession*”;¹⁴²⁹
- 912.2. A letter from NRD to MINIRENA dated 7 June 2013 in which it asked the Ministry to “*grant to NRD the long-term 30-year mining concession provided by Rwandan law and promised under the 2006 exploration and exploitation Agreement*”;¹⁴³⁰

¹⁴²⁵ Claimants’ Reply, at para. 253.

¹⁴²⁶ Claimants’ Reply, at para. 253.

¹⁴²⁷ *Link-Trading Joint Stock Company v. Republic of Moldova*, UNCITRAL, Final Award (18 April 2002) (**Exhibit RL-166**), at para. 87 (“*the essence of any claim of expropriation is that there has been a taking of property without prompt and adequate compensation*”).

¹⁴²⁸ Memorial, at para. 235-264.

¹⁴²⁹ Letter from NRD (R. Marshall) to the Minister of Natural Resources (Minister S. Kamanzi), *NRD Response to Letter of Minister* (31 October 2011) (**Exhibit C-041**), at page 6.

¹⁴³⁰ Letter from NRD (R. Marshall) to the Ministry of Natural Resources attaching a note titled ‘*Issues for discussion with the Honourable Minister of the Ministry of Natural Resources*’ (7 June 2013) (**Exhibit C-059**), at page 3.

The letter complains of the “systemic harassment, oppression, and efforts to shut down the business of NRD.”¹⁴³¹ It also refers to other complaints now wrongly conflated with the expropriation claim, including the closure of certain of the Five Concession Areas for environmental violations;¹⁴³²

- 912.3. A letter from NRD to the CID dated 30 October 2014 that states that NRD has “suffered millions of USD of losses” as a result of alleged actions by the Respondent, including the state “taking” of its assets:

“We have lost our mining business through what appears to be a State ‘taking’ or nationalization of our company’s assets, including mining licenses (see the analysis in the following paragraphs) which was announced by Minister Evode on 28 October 2014”

“It appears that Minister Evode is confusing the fraudulent claims of Ben Benzinge with his own actions, as Minister of State in Charge of Mining, in ‘taking’ the NRD business.”

“it appears that because Minister Evode’s letter cancels ‘all’ relationships, he is ‘taking’ or nationalizing the NRD business”

“It appears that Minister Evode has nationalized NRD in contradiction to the spirit and the letter of the Bilateral Investment Treaty.”¹⁴³³

The letter also complains of various actions which are materially identical to the Claimants’ claimed breaches in this Arbitration and which are now said to somehow form part of the creeping expropriation, including the alleged favouring of Mr. Benzinge;

- 912.4. A letter from NRD to the President of Rwanda dated 31 October 2014, in which NRD alleges that its licences have been cancelled and that this amounts to a “simple nationalization of our company”;¹⁴³⁴

- 912.5. A letter from NRD to President Birtua dated 5 November 2014, in which NRD states that the alleged termination of its licences has resulted in the Respondent “taking” its property:

“On 28 October 2014, we received notice from Minister of State for Mining Evode Imena that ‘all relationships’ between NRD and that the Government of Rwanda have been terminated and the mining licenses cancelled. This termination is a breach of those agreements, and resulting in a State “taking” of our property. We ask for your help because Minister of State for Mining Evode has maliciously targeted

¹⁴³¹ *Ibid.*, (Exhibit C-059), at page 3.

¹⁴³² *Ibid.*, (Exhibit C-059), at page 3.

¹⁴³³ Complaint from NRD (R. Marshall) to CID, *Formal complaint against apparent corruption* (30 October 2014) (Exhibit C-165) (emphasis added).

¹⁴³⁴ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for Help* (31 October 2014) (Exhibit R-205).

NRD, creating losses which are now in the millions of USD in stolen assets and lost income."¹⁴³⁵

NRD then goes on to list nine specific complaints, including the alleged favouring of Mr. Benzinge and the decision not to grant NRD tags, which are now said to form part of the creeping expropriation;

912.6. A letter from NRD to the President of Rwanda dated 14 November 2014, in which NRD outlines its losses and makes allegations against former Minister Imena, referring to the termination of their licences as a state "taking" of their property.¹⁴³⁶ The letter states that "ordinarily we would seek to begin negotiations with the Government of Rwanda under the provisions of the US-Rwanda Bilateral Investment Treaty";

912.7. A letter from NRD to the President of Rwanda dated 5 February 2015, in which NRD states that the termination of its licences is a "breach of those agreements, and resulting in a nationalization of our property".¹⁴³⁷ The letter states that that NRD's losses are "in the millions of USD"; and

912.8. An email from Mr. Marshall to Mr. Niyonsaba and Ms. Nimmo dated 30 March 2015, in which he states that:

*"We have begun legal procedures to claim against the Rwandan government for expropriation damages under the Rwanda – US bilateral investment treaty."*¹⁴³⁸

913. It is simply not plausible, in the face of these documents, that the Claimants first acquired knowledge of the alleged expropriation on the date of the public tender in March 2016, as they contend. Indeed, the Claimants themselves allege in the Reply, inconsistently with their CMPO and other parts of the Reply,¹⁴³⁹ that an expropriation took place prior to the March 2016 tender. We refer to paragraph 51 of the Claimants' Reply, in which the Claimants expressly allege that the purported expropriation had taken place prior to March 2016:

*"After Rwanda expropriated Claimants' Concessions, Jeffrey Lindhorst sought to buy or lease the Rutsiro plant and sent a text to Mr. Mruskovicova, on October 21, 2015 stating that 'we are here at the plant. Looks good.'"*¹⁴⁴⁰

¹⁴³⁵ Letter from NRD (R. Marshall) to the Minister of Natural Resources (Minister V. Biruta), *Request for help* (5 November 2014) (**Exhibit C-171**) (emphasis added).

¹⁴³⁶ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for help* (14 November 2014) (**Exhibit R-214**), at page 1.

¹⁴³⁷ Letter from NRD (R. Marshall) to the President of Rwanda, *Request for help* (5 February 2015) (**Exhibit R-215**), page 2.

¹⁴³⁸ Email from R. Marshall to I. Niyonsaba, K. Nimmo and Z. Mruskovicova (30 March 2015) (**Exhibit C-107**) (emphasis added); See also Letter from Roderick Marshall to the Ambassador of the United States Embassy (16 February 2016) (**Exhibit R-216**), at page 2, where Mr. Marshall stated that in March 2015, they had "notified the Government of Rwanda of our intent to initiate proceeding under the BIT".

¹⁴³⁹ See the Counter-Memorial on Preliminary Objections, at paras. 17, 70 and the Reply, at para. 113.

¹⁴⁴⁰ Claimants' Reply, at para. 51 (emphasis added).

914. Rather, it is clear from the contemporaneous correspondence highlighted above that the Claimants first acquired knowledge of this alleged breach and any associated loss (which is denied) long before the First Cut-off Date, and expressly alleged as such, with reference to the USA-Rwanda BIT, at the time. Accordingly, there can be no doubt that the Claimants' expropriation claim is out of time and that the tribunal and/or ICSID has no jurisdiction over it.

VIII. THE CLAIMANTS HAVE FAILED TO ESTABLISH A VIOLATION OF ARTICLES 3 AND 4 OF THE USA-RWANDA BIT

915. At Section VI.E of its Memorial, the Claimants set out alleged violations of Articles 3 and 4 of the USA-Rwanda BIT which the Respondent countered in detail at Section VI of its Counter-Memorial. In the Reply, however, the Claimants do not address any of the Respondent's arguments in this regard, and instead, as explained in section VI.A above, seemingly seek to transform its alleged breaches of Articles 3 and 4 into a sweeping or "creeping" breach of the FET standard under Article 5. As such, and to the extent that the Claimants maintain these claims, the Respondent does not address them further here but refers to its arguments set out in its Counter-Memorial.
916. Further, and in any event, as explained in the Respondent's MPO at paragraphs 88 to 90, the Claimants' claims for breach of Articles 3 and 4 of the USA-Rwanda BIT are out of time. This fact is not changed by the Claimants attempts to recharacterise these claims as part of a sweeping or "creeping" breach of the FET standard under Article 5.

IX. REQUEST FOR RELIEF

917. For the reasons set forth above, the Respondent respectfully requests that the Tribunal grant the following relief:

- 917.1. Dismiss the Claimants' claims for lack of jurisdiction;
- 917.2. Alternatively, dismiss the Claimants' claims on the merits;
- 917.3. Order the Claimants' to pay to Rwanda the full costs of this Arbitration, including, without limitation, arbitrators' fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with this Arbitration;
- 917.4. Order the Claimants to pay to Rwanda interest on the amounts awarded under paragraph 917.3 above until the date of full payment; and
- 917.5. Grant any further relief to Rwanda as it may deem appropriate.

Respectfully submitted on 29 May 2020 by:

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ANNEX I: Witness Statements and Expert Reports

DOCUMENT	DATE
WITNESS STATEMENTS	
Supplemental Witness Statement of Mr. Evode Imena	28 May 2020
Supplemental Witness Statement of Mr. Francis Gatare	29 May 2020
Supplemental Witness Statement of Mr. Anthony Ehlers	27 May 2020
Supplemental Witness Statement of Mr. Ildephonse Niyonsaba	28 May 2020
Supplemental Witness Statement of Mr. Jean Aime Sindayigaya	27 May 2020
Supplemental Witness Statement of Mr. Jean Bosco Nsengiyuma	28 May 2020
Supplemental Witness Statement of Dr. Michael Biryabarema	26 May 2020
Supplemental Witness Statement of Professor Prosper Nkanika Wa Rupiya	27 May 2020
Witness Statement of Mr. David Bensusan	15 May 2020
Witness Statement of Mr. Emmanuel Muvara	25 May 2020
EXPERT REPORTS	
Second Expert Report of Mr. Richard Mugisha on Rwandan Law	27 May 2020

ANNEX II: Factual Exhibits

NO.	DOCUMENT
R-095	Meeting Minutes on the actions to strengthen the Mining sector (17 December 2008)
R-096	Letter from OGMR (M. Biryabarema) to CEO of RDB, <i>Requesting a meeting on mining/exploration licenses renewals</i> (27 January 2011)
R-097	Jasper van Teffelen, <i>The EU Raw Materials Policy and Mining in Rwanda: Policy Coherence for Development in Practice</i> (February 2012)
R-098	Email from R. Marshall to L. Mucyo and E. Mwiza, <i>Draft Joint Venture</i> (5 August 2005)
R-099	Emails between Z. Mruskovicova, R. Marshall, L. Mucyo, <i>Addresses</i> (22 August 2005)
R-100	Emails between L. Mucyo, Z. Mruskovicova, R. Marshall, <i>Addresses</i> (24 August 2005)
R-101	Emails between Z. Mruskovicova and A. Ruzibukira, <i>What is new?</i> (28 February 2006)
R-102	Letter from Lambert Mucyo to the Police/CID, <i>False allegations by William Quam and Roderick Marshall</i> (23 June 2010)
R-103	Minutes of the OGMR Board Meeting held on 22 April 2010
R-104	Decisions taken by the OGMR Board of Director's at meeting held on 22 April 2010 together with Minutes of the OGMR Board Meeting held on 31 December 2009
R-105	Letter from NRD (Dr. G. Roethe) to the Minister of State in Charge of Mining (Minister v. Karega), <i>Application for the extension of our Nemba, Rutsiro, Giciye, Sebeya and Mara concession for a further two year period</i> (15 July 2009)
R-106	Letter from the Ministry of Natural Resources (Minister V. Karega) to NRD (G. Roethe), <i>Application for the extension of the exploration and mining current permit</i> (23 September 2009)
R-107	Letter from NRD (R. Marshall) to Rwanda Revenue Authority (B. Kagarama), <i>NRD RIN 101390940</i> (31 July 2013)

NO.	DOCUMENT
R-108	Rutsiro Ore Dressing Plant Test Run Report (undated)
R-109	Letter from Ministry of Natural Resources (Minister S. Kamanzi) to the Minister of Justice, <i>Special Licenses (Exploration and Mining) Between Mining Companies and the Government of Rwanda in former Government Concessions which have either expired or not performing well</i> (8 August 2011)
R-110	Inspection Report for Miners in Western Province (together with English translation)
R-111	Assessment of the Natural Resources Development Report on the Application for Renewal of the Exploration/Mining License (2011)
R-112	NRD Meeting Minutes (30 October 2013)
R-113	MINIRENA and NRD Meeting Minutes (8 November 2013)
R-114	Letter from the CEO of the RDB (C. Akamanzi) to NRD (R. Marshall), Appointment of Managing Director of NRD (7 August 2012)
R-115	Letter from R & Partners Law Firm (R. Rwihandagaza) to NRD, Outstanding payment owed to MSA Ltd (7 July 2014)
R-116	Internal Memo from Rossi Ditutu (8 December 2014)
R-117	MINIRENA, <i>Meeting Minutes with NRD Company Ltd</i> (10 December 2014)
R-118	Natural Resources Development; Assessment of its Performance (12 August 2012)
R-119	Emails between R. Van Wachem and P. Martin Niyigena (16-29 July 2014) attaching ' <i>Rutsiro proposal: Proposed plan of approach for NRD concession #2</i> ' (July 2014)
R-120	Letter from MINIRENA to BVG (R. Marshall), <i>Return of the Environmental Bond deposited in relation to Biseseo Concession</i> (5 November 2013)
R-121	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to R Marshall, <i>Your letter dated 9 May 2013</i> (17 May 2013)
R-122	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Mirage Ltd (A. Gahire), <i>Response to your application for license</i> (12 May 2015)

NO.	DOCUMENT
R-123	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Gamico Ltd (A. Nzabakenga Zaninka), <i>Response to your application for license</i> (12 May 2015)
R-124	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Precious Mining Limited (S. R. Chandra), <i>Termination Notice</i> (20 May 2015)
R-125	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Avolmi Ltd (Gasana Ugirumwami Aloys), <i>Notification of License Expiry</i> (22 January 2016)
R-126	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to ECPE Ltd (Murwanashyaka Jean Damascene), <i>Notification of License Expiry</i> (22 January 2016)
R-127	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Nyamico Cooperative (Gasasira Uzziel), <i>Notification of License Expiry</i> (22 January 2016)
R-128	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to UMECO Ltd, <i>Notification of License Expiry</i> (22 January 2016)
R-129	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Robust Mining Ltd (Kanyagisaka Justin), <i>Notification of License Expiry</i> (27 January 2016)
R-130	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to Sofama Minerals Company Ltd (Mayogi Olivier), <i>Notification of License Expiry</i> (27 January 2016)
R-131	Letters from the Minister of State in Charge of Mining (Minister E. Imena) to various companies, <i>Notification of Mineral/ Quarry License Expiry</i> (3 June 2016)
R-132	MINIRENA, <i>Call for Technical and Financial proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions</i> (1 March 2016)
R-133	MINIRENA, <i>Evaluation Report</i> (24 May 2016)
R-134	The New Times Invoice (17 February 2016)
R-135	The East African/Rwanda Today Invoice (17 February 2016)
R-136	Imvaho Nshya Invoice (17 February 2016)

NO.	DOCUMENT
R-137	MINIRENA, <i>Call for Technical and Financial Proposals for the Development of Mining Perimeters of the Former Sebeya, Giciye, Rutsiro, Nemba and Mara Mining Concessions: Category II</i> (5 March 2016)
R-138	MINIRENA, <i>Former Mara, Nemba, Giciye, Rutsiro and Sebeya Mining Concessions: Bid Opening Report – Request for Proposal (RFP) Stage</i> (20 April 2016)
R-139	MINIRENA, <i>Evaluation Report for Mining Perimeters in Former Nemba, Rutsiro, Sebeya, Mara and Giciye Mining Concessions Request for Financial and Technical Proposal (RFP)</i> (30 March 2016)
R-140	RDB Certificate of Domestic Company Registration for Fair Construction Ltd (3 January 2020)
R-141	RDB Certificate of Domestic Company Registration for Kayenzi Mining Company (KAMICO) Ltd (3 January 2020)
R-142	RDB Certificate of Domestic Company Registration for Tantalium Minerals Trading (TMT) Ltd (3 January 2020)
R-143	RDB Certificate of Domestic Company Registration for Rubavu Exploitation and Trading Company (RETC) Ltd (3 January 2020)
R-144	RDB Certificate of Domestic Company Registration for Demikaru (Developpement Minier Kanama Rubavu) Ltd (3 January 2020)
R-145	RDB Certificate of Domestic Company Registration for NL Mining Company Ltd (3 January 2020)
R-146	Registration Certificate of ABAHIZI Cooperative (25 April 2011)
R-147	RDB Certificate of Domestic Company Registration for Better Generation Machinery Ltd (3 January 2020)
R-148	Letter from Ministry of Forestry and Mines (C Bazivamo) to OECD (M. Schekulin), <i>Cooperation with the OECD to strengthen due diligence in the mineral supply chain and combat the illegal exploitation of minerals in the Great Lakes Region</i> (24 May 2010)
R-149	Letter from OECD Investment Committee (M. Schekulin) to the Minister of Forestry and Mines (C. Bazivamo) (5 July 2010)

NO.	DOCUMENT
R-150	OGMR, Scope for development cooperation in mining sector between the Government of Rwanda and Australia (8 June 2010)
R-151	Letter from OGMR (Dr. M. Biryabarema) to the Minister of Forestry and Mines, <i>Scoping study on possible development cooperation in mining sector</i> (8 June 2010)
R-152	Memo regarding Tagging Project
R-153	Letter from OGMR (Dr. M. Biryabarema) to the Ministry of Forestry and Mines (A. Ruvebana), <i>Recruiting people to help in mineral traceability</i> (25 February 2011)
R-154	Letter from Secretary of Forestry and Mines (A. Ruvebana) to the Director General of OGMR, <i>Recruiting people to help in mineral traceability</i> (28 February 2011)
R-155	Letter from OGMR (Dr. M. Biryabarema) to RDB, <i>Request for internees for traceability of minerals</i> (4 March 2011)
R-156	Letter from OGMR (Dr. M. Biryabarema) to World Bank Country Representative, <i>Support for Mineral Traceability in Rwanda</i> (7 March 2011)
R-157	Letter from RDB to OGMR, <i>Traceability of minerals</i> (8 March 2011)
R-158	Letter from OGMR (Dr. M. Biryabarema) to CEDP (A. Kagaga), <i>World Bank support funds for Mineral Traceability in Rwanda</i> (18 March 2011)
R-159	OGMR Table of Salary of traceability project staff (April 2011)
R-160	Letter from OGMR (Dr. M. Biryabarema) to CEDP, <i>Request for funds for mineral traceability project in Rwanda</i> (8 April 2011)
R-161	Letter from OGMR (Dr. M. Biryabarema) to RDB, <i>Request for internees for traceability of minerals</i> (10 April 2011)
R-162	Letter from OGMR (Dr. M. Biryabarema) to CEDP (A. Kagaga), <i>Requesting purchase order</i> (3 May 2011)
R-163	Report of consultative meeting with GMD and Managers of Mining Companies/Cooperatives in Rwanda (15 February 2013)

NO.	DOCUMENT
R-164	Letter from the Chairman of Rwanda Mining Association (J-M. Kalima) to the Ministry of Trade and Industry, <i>Follow up on the need to address minerals theft and mines safety</i> (4 March 2013)
R-165	Supplementary Memorandum of Understanding between ITRI and MINIRENA (19 February 2013)
R-166	Ministerial Regulations No 001/MINIFOM/2011 dated on 10 March 2011 on fighting smuggling in mineral trading
R-167	Letter from Commissioner General RRA (B. Kagarama) to the Minister of Natural Resources, <i>Hand-over report of seized minerals to DRC</i> (27 November 2013)
R-168	Memo from Rubavau Field trip report from 19 th to 20 th November 2013
R-169	IGIHE, <i>Police impounds 220 kg of illegal acquired minerals</i> (25 February 2020)
R-170	The New Times, <i>Karongi- Vehicle Intercepted with over 800kgs of smuggled minerals</i> (27 January 2020)
R-171	The New Times, <i>Police intercept two vehicles carrying smuggled minerals</i> (30 August 2018)
R-172	7 Years Government Programme: National Strategy for Transformation (NST1) 2017–2024
R-173	Letter from Duane Morris LLP to the members of the Tribunal, <i>Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (20 May 2020)
R-174	Claimants’ requests for documents, Respondent’s Objections, and Claimants’ replies (6 December 2019)
R-175	Respondent’s requests for documents, Claimant’s Objections and Respondent’s replies (6 December 2019)
R-176	RDB Full Registration Information of Domestic Company for Ngali Mining Ltd (25 May 2018)
R-177	Letter from R. Marshall to Minister. E. Imena (undated)
R-178	Letter from Joseph Hage Aaronson LLP to Duane Morris LLP, <i>Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (29 April 2020)

NO.	DOCUMENT
R-179	Letter from Joseph Hage Aaronson LLP to the Tribunal, <i>Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (18 May 2020)
R-180	Email from Alex Kaplan to Duane Morris and Joseph Hage Aaronson LLP (18 May 2020)
R-181	<i>Agreement for Transfer of Mining Concession by and Between The Government of the Republic of Rwanda and New Bugarama Mining Company</i> (29 January 2013)
R-182	Letter from Joseph Hage Aaronson LLP to Duane Morris LLP, <i>Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21): Witness Statements of Olivier Rwamasirabo</i> (6 April 2020)
R-183	Letter from Duane Morris LLP to Joseph Hage Aaronson LLP, <i>Re: Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (13 April 2020) [regarding Olivier Rwamasirabo]
R-184	Letter Joseph Hage Aaronson LLP to Duane Morris LLP, <i>Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (14 April 2020) [regarding Olivier Rwamasirabo]
R-185	Letter from Rwanda Rudniki (B. Mbanza) to RDB, <i>Notification of misrepresentation of ownership by a minority shareholder</i> (17 October 2014)
R-186	Decision of the Nyarugenge Commercial Court, RCom 1508/14/TC/Nyge (7 January 2015) (together with English translation)
R-187	Decision of the Commercial Court, RCOMA 00146/2016/CHC/HCC (19 July 2016) (together with English translation)
R-188	LinkedIn profile of Jerry Fiala
R-189	Email from Z. Mruskovicova to Jeff Lindhorst, <i>Visit to Rutsiro plant Wednesday 21 October</i> (18 October 2015)
R-190	The New Times, <i>Former State Minister Evode Imena gets bail</i> (21 February 2017)
R-191	Decision of the Nyarugenge High Court, RP 00510/2017/TGI/NYGE (7 December 2017) (together with English translation)
R-192	National Public Prosecution Authority Rwanda, <i>Evode Imena Clean Criminal Record</i> (18 July 2019)

NO.	DOCUMENT
R-193	Letter from NRD (Z. Mruskovicova) to MINIRENA (S. Kamanzi) (17 December 2012)
R-194	Letter from Duane Morris LLP to Joseph Hage Aaronson LLP, <i>Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (13 April 2020) [regarding claimants' reply memorial]
R-195	Letter Joseph Hage Aaronson LLP to Duane Morris LLP, <i>Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21): Claimants' Reply Memorial on the Merits</i> (6 April 2020)
R-196	Letter from Duane Morris LLP to Rwanda, <i>Natural Resources Development Rwanda Ltd. and Bay View Group, LLC Notice of Intent to Commence Arbitration Proceedings Against the Republic of Rwanda</i> (12 April 2017)
R-197	Letter from the Minister of State in Charge of Mining (Minister E. Imena) to the Director of Metmar (P. Boshoff), <i>Plans for Gatumba Mining Concessions</i> (2 April 2014)
R-198	Concept Note by Dr R. Marshall, <i>Crimes committed against NRD by Ben Benzinge</i> (1 July 2014), sent by email to Minister Busingye, the US Ambassador and Professor Nshuti on 2 July 2014 and to Mr Nkuruzinza on 11 July 2014
R-199	Email from F. Uwzeye to Z. Mruskovicova, <i>NRD</i> (7 August 2012)
R-200	Letter from NRD (R. Marshall) to CEO of RDB (C. Akamanzi) (4 August 2012)
R-201	Email correspondence between R. Marshall and Minister Busingye, <i>Re: Benzinge's claim against the wrong defendant</i> (3 July 2014)
R-202	Letter from NRD (R. Marshall) to the Minister of Justice (Minister J. Busingye), <i>Request for return of NRD company and offices/mines to RDB-confirmed</i> (30 July 2014)
R-203	<i>Minutes from the meeting between Minister of State in Charge of Mining and NRD</i> (16 September 2014)
R-204	Email from Zuzana Mruskovicova to Minister Biruta (9 October 2014)
R-205	Letter from NRD (R. Marshall) to His Excellency, the President of Rwanda, <i>Request for Help</i> (31 October 2014)

NO.	DOCUMENT
R-206	Emails between Z. Mruskovicova and representatives of the Rwanda Mining Association, Meeting (19-20 January 2015)
R-207	Email from D. Bidega to R. Marshall, <i>Flash report</i> (5 June 2012)
R-208	Agreement for large-scale mining license between the Government of Rwanda and Fair Construction Ltd (28 November 2016)
R-209	Mining and Petroleum Unit Flash Weekly Report (1-4 December 2015)
R-210	Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Managing Director of Eurotrade (M. Kahanovitz), <i>Sending a Ministerial Order granting a mining licence</i> (29 January 2015)
R-211	Letter from the Minister of Natural Resources (Minister S. Kamanzi) to BVG (R. Marshall), <i>Handover of Bisesero Concession</i> (22 November 2011)
R-212	Letter from NRD (R. Marshall) to the Minister of State in Charge of Mining (Minister. E. Imena), <i>Re-application letter</i> (1 November 2014)
R-213	Email from R. Marshall to M. Robinson, <i>AW: 2011 CCA accounts</i> (18 November 2012)
R-214	Letter from NRD (R. Marshall) to the President of Rwanda, <i>Request for help</i> (14 November 2014)
R-215	Letter from NRD (R. Marshall) to the President of Rwanda, <i>Request for help</i> (5 February 2015)
R-216	Letter from R. Marshall to the Ambassador of the United States Embassy (16 February 2016)
R-217	iTSCi Incident Summary Rwanda: January to June 2011
R-218	iTSCi Incident Summary Rwanda: July to December 2011
R-219	iTSCi Incident Summary Rwanda: January to June 2012
R-220	iTSCi Incident Summary Rwanda: July to December 2012
R-221	iTSCi Incident Summary Rwanda: January to June 2013
R-222	iTSCi Incident Summary Rwanda: July to December 2013

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R-223	iTSCi Incident Summary Rwanda: January to June 2014
R-224	iTSCi Incident Summary Rwanda: July to December 2014
R-225	iTSCi Incident Summary Rwanda: January to June 2015
R-226	iTSCi Incident Summary Rwanda: July to December 2015
R-227	iTSCi Incident Summary Rwanda: January to June 2016
R-228	iTSCi Rwanda Data Summary Q2 2011 to Q4 2013
R-229	iTSCi Data On The Minerals Trade Within The iTSCi Programme Q2 2011 To Q4 2012, Rwanda
R-230	Information from British Geological Survey, Tungsten, January 2011
R-231	Letter from NRD (R. Marshall) to the CEO of the RDB (C. Akamanzi) (3 August 2012)
R-232	NRD Rwanda Ltd Profit & Loss Account for the Period Ended 31 December 2010 (KPMG Rwanda, 13 February 2012)
R-233	NRD Balance Sheet as at 31 December 2010 (KPMG Rwanda, 13 February 2012)
R-234	NRD Property, Plant, and Equipment List for 2010 (KPMG Rwanda, 13 February 2012)
R-235	NRD, List of creditors 2010 (13 February 2012)
R-236	Email from J. A. Sindayigaya to R. Marshall, <i>financial irregularities</i> (4 May 2011) attaching Report on <i>Financial irregularities observed during the last 6 months of year 2010 & begin 2011</i>
R-237	Email from J. A. Sindayigaya to R. Marshall, <i>financial regularities</i> (6 October 2011) attaching <i>Summary of major financial irregularities in the last 5 months</i>
R-238	Email from J. A. Sindayigaya to A. Van Mierlo, <i>NRD Invoice Accounting 2011</i> (18 May 2011)
R-239	Email from W. Quam to J. A. Sindayigaya et al., <i>Request for the binders</i> (5 July 2011)

NO.	DOCUMENT
R-240	Email from R. Marshall to Z. Mruskovicova, <i>updated Fidele's report</i> (18 September 2014) attaching 'Summary of activities, investment and plans on NRD's concessions
R-241	Metalry, <i>Metal Prices</i> for Tungsten Tin and Tantalum (available at: www.metalary.com/tungsten-price ; www.metalary.com/tantalum-price and www.metalary.com/tin-price)
R-242	Production figures for Rwanda Rudniki 2007 to 2013 (disclosed by the Claimants as BVG001915)
R-243	Letter from Duane Morris LLP to the members of the Tribunal, <i>Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda (ICSID Case No. ARB/18/21)</i> (29 May 2020) attaching Declaration of Olivier Rwamasirabo

ANNEX III: Legal Authorities

NO.	DOCUMENT
RL-135	<i>Fiona Trust v. Privalov</i> [2010] EWHC 3199 (Comm)
RL-136	<i>Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, Award (1 November 1999)
RL-137	Vera Van Houtte - Van Poppel, <i>Chapter 5. Adverse Inferences in International Arbitration</i> , in Teresa Giovannini and Alexis Mourre (eds), <i>Written Evidence and Discovery in International Arbitration: New Issues and Tendencies</i> , Dossiers of the ICC Institute of World Business Law, Volume 6
RL-138	<i>Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey</i> , ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013)
RL-139	<i>Impregilo S.p.A. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005)
RL-140	<i>Saipem S.p.A v. People's Republic of Bangladesh</i> , ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007)
RL-141	<i>Ampal-American Israel Corporation and others v. Arab Republic of Egypt</i> , ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016)
RL-142	<i>Philip Morris Asia Limited v. Commonwealth of Australia</i> , PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015)
RL-143	<i>Alasdair Ross Anderson et al v. Republic of Costa Rica</i> , ICSID Case No. ARB(AF)/07/3, Award (19 May 2010)
RL-144	<i>Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru</i> , ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006)
RL-145	<i>Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/19, Award (30 October 2017)
RL-146	<i>Ambiente Ufficio S.p.A. and others v. Argentine Republic</i> , ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013)
RL-147	<i>Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine</i> , ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010)

NO.	DOCUMENT
RL-148	<i>Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited and Bangladesh Oil Gas and Mineral Corporation</i> , ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013)
RL-149	<i>Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States</i> , ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (16 June 2010)
RL-150	<i>Societe Civile Immobiliere de Gaeta v Republic of Guinea</i> , ICSID Case No. ARB/12/36, Award (21 December 2015)
RL-151	Gabriel Bottini, "Indirect Claims under the ICSID Convention", University of Pennsylvania Journal of International Law
RL-152	<i>Murphy Exploration and Production Company International v. Republic of Ecuador I</i> , ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010)
RL-153	<i>Louis Dreyfus Armateurs SAS v. Republic of India</i> , PCA Case No. 2014-26, Decision on Jurisdiction (22 December 2015)
RL-154	<i>Ickale Insaat Limited Sirketi v. Turkmenistan</i> , ICSID Case No. ARB/10/24, Award (8 March 2016)
RL-155	<i>White Industries Australia Limited v. Republic of India</i> , UNCITRAL, Final Award (30 November 2011)
RL-156	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007)
RL-157	<i>South American Silver Limited v. Plurinational State of Bolivia</i> , PCA Case No. 2013-15, Award (30 August 2018)
RL-158	<i>David Minnotte and Robert Lewis v. Republic of Poland</i> , ICSID Case No. ARB(AF)/10/1, Award (16 May 2014)
RL-159	<i>British Caribbean Bank Ltd. v. Government of Belize</i> , PCA Case No. 2010-18/BCB-BZ, Award (19 December 2014)
RL-160	Scott Vesel, A 'Creeping' Violation of the Fair and Equitable Treatment Standard? <i>Arbitration International</i> , Volume 30, Issue 3 (1 September 2014)
RL-161	<i>Société Générale v. The Dominican Republic</i> , LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction (19 September 2008)

NO.	DOCUMENT
RL-162	<i>Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic</i> , ICSID Case No. ARB/14/3, Award (27 December 2016)
RL-163	<i>United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia</i> , ICSID Case No. ARB/14/24, Award (21 June 2019)
RL-164	<i>LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic</i> (ICSID Case No. ARB/02/1), Decision on Liability of (3 October 2006)
RL-165	<i>Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia</i> , ICSID Case No. ARB/99/2, Award (25 June 2001)
RL-166	<i>Link-Trading Joint Stock Company v. Republic of Moldova</i> , UNCITRAL, Final Award (18 April 2002)
RL-167	<i>Pope & Talbot, Inc. v. Canada</i> , Interim Award (26 June 2000), AL RA No. 50