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 POST-HEARING BRIEF

I. INTRODUCTION AND SUMMARY

1. In accordance with the Tribunal's request,[1] this Post-Hearing Brief focuses on the evidence given at the hearing. It does not repeat the Respondent's case in full. The Respondent maintains its case as set out in the Memorial on Preliminary Objections ("**MPO**"), Counter-Memorial on the Merits ("**Counter-Memorial**"), Rejoinder ("**Rejoinder**"), and supporting evidence.

2. The hearing demonstrated the absence of merit in the Claimants' case. Whilst the lack of substance in the claim was visible in the pleadings and the written evidence previously submitted, the evidence given at the hearing put matters beyond doubt. It is a case entirely unsupported by the facts, and which fails both on jurisdiction and on the merits.

3. The Claimants' case is one premised on a misreading (to put it as neutrally as possible) of the documentary record, including the contract between NRD and the Respondent, the key contemporaneous correspondence between the Respondent and NRD, the contemporaneous record as a whole, and even the BIT itself. Their case was inconsistent with those documents, and the hearing confirmed that there was no basis at all to go behind the plain and obvious reading of them.

4. The testimony of Mr Marshall exemplified the weakness of the Claimants' case. He was an untruthful witness, whose uncorroborated statements were wholly undermined by the documentary record. Mr Marshall contrived to make new allegations against Rwanda and the witnesses giving evidence on its behalf, and he put forward implausible and shifting explanations when faced with the documents which undermined the Claimants' claims. Strikingly, and tellingly, many of the serious allegations which he had made in his witness statements and then embellished and augmented in his oral testimony, were not put by the Claimants' counsel to the Respondent's witnesses. Further, if documents were unhelpful to Mr Marshall's case, he frequently asserted that they were fabricated; and the absence of documents corroborating his claims was due to apparent theft by Rwanda. This was a convenient theory, but one entirely lacking in any credibility.

5. As it had during the written stage of the proceedings, the Claimants' case continued to shift during the hearing. Key parts of their case, including the false allegations regarding smuggling, were quietly abandoned by the Claimants' counsel, who evidently considered (rightly) that there was no proper basis upon which they could be put to the Respondent's

[1] Day 7, p164/11-17 (President's Closing Remarks).

witnesses. Many of the Claimants' other witnesses resiled from their written testimony, including Mr Bidega, whose alleged actions form the central basis for the Claimants' claims. As a result of Mr Bidega's confirmation that he was not acting as representative of Rwanda at the material times (a point explained further by Mr Imena in his oral evidence),[2] the Claimants' case alleging breach of the Fair and Equitable Treatment ("**FET**") obligation and expropriation is unsustainable.

6. Much of the cross-examination of the Respondent's witnesses was on peripheral and irrelevant issues. Nor were the Respondent's witnesses properly challenged in cross-examination in respect of important parts of their written evidence (including three of them not being challenged whatsoever).

7. The testimonies given at the hearing confirmed that the Claimants had no basis for their alleged grievances with respect to NRD's claim to long-term licences. In 2010, the Claimants had acquired NRD—a company which was in breach of its contract with Rwanda having failed to carry out the extensive mineral exploration or to proceed to industrialisation as required, and whose contract and licences were about to expire—for next to nothing. Contrary to the Claimants' arguments, NRD manifestly had no guarantee of any further licences, whether short- or long-term. It was also clear that Mr Marshall was aware of NRD's position at the time of the acquisition, including as to the serious deficiencies with the performance of the contract and its application for renewal of the licences. Following the acquisition, the Claimants made no material capital investment into NRD, and instead mismanaged the concessions despite NRD being given repeated opportunities to prove itself worthy of being granted further formal licences.

8. The testimony of the Respondent's witnesses bore out that Rwanda's conduct was at all times entirely fair and reasonable. Between 2011 and 2015, NRD made successive applications for new licences and Rwanda gave it repeated chances to demonstrate its ability to invest in and manage professional industrial mining operations. NRD's applications were grossly inadequate. Each application was evaluated fairly and transparently. However, NRD repeatedly failed to address the requirements of a successful application and to remedy the deficiencies in their previous attempts which Rwanda had clearly communicated to them. After several years of indulgence, in 2015, Rwanda ultimately notified NRD that it would not be granted further licences and the concessions would be put out to tender.

[2] Day 6, p81/9 – p82/6 (Imena).

9. Even despite the Claimants' shifting legal case, they have wholly failed to establish any breaches of the BIT. There was no expropriation. There was no breach of the Most Favoured Nation ("**MFN**") and National Treatment ("**NT**") standards. Nor were the Claimants discriminated against, or otherwise treated contrary to the FET standard.

10. The Claimants have also failed to overcome the Respondent's jurisdictional objections. It is clear from the documentary record that the Claimants' claims are out of time, that the Claimants did not make any investment within the meaning of the BIT and the ICSID Convention, that BVG did not own or control NRD, and that Spalena failed to comply with the BIT's mandatory jurisdictional preconditions to arbitration. The Tribunal and/or ICSID accordingly lack jurisdiction over the Claimants' claims.

II. FACTUAL SUMMARY

A. The Contract

11. On 24 November 2006, NRD and Rwanda entered into the contract for acquiring mining concessions (the "**Contract**").[3] The Claimants' case is premised on an untenable construction of this simple agreement.

12. Article 2 of the Contract sets out various obligations on NRD. It was required to proceed immediately to industrial exploitation, and to provide evaluation reports of reserves and a feasibility study after four years.

13. The Contract was entered into at a time when the Zarnacks owned and controlled NRD. During the hearing, Mr Marshall accepted that, since he had not been involved in the negotiation of the Contract, he could not give direct evidence about it.[4] He conceded that he could not give any evidence on the actual understandings of any parties to the Contract at the time, including whether there was any guarantee of NRD being granted long-term licences.[5] Ms Mruskovicova also confirmed that she was not involved in the contractual negotiations between NRD and Rwanda nor those with the Tinco Group which she had sought to rely on.[6] Further, Mr Marshall accepted that the Claimants had not called any witnesses who could give such evidence.[7] Mr Marshall stated that he had reviewed the Contract when he was contemplating acquiring NRD,[8] and he accepted that he knew that Article 2 set out its obligations under the Contract and that if NRD was in breach of the Contract it was capable of being terminated.[9]

14. The Contract did not include any guarantee to NRD of long-term licences. As is plain from the express terms of the Contract (and as was accepted by Mr Rwamasirabo in cross-examination,[10] the contract being governed by Rwandan law)[11] Rwanda's obligations in respect of the grant of mining licences were—amongst other things—conditional on NRD

[3] Contract for acquiring mining concessions between the Rwanda and NRD (24 November 2006) (**C-017**).

[4] Day 1, p224/18, p225/2 (Marshall).

[5] Day 1, p225/3-10 (Marshall).

[6] Day 4, p150/7-22 (Mruskovicova).

[7] Day 1, p225/11-13 (Marshall).

[8] Day 1, p224/14-17 (Marshall).

[9] Day 1, p231/17-23 (Marshall).

[10] Day 8, p38/3 – p41/3 (Rwamasirabo).

[11] Mugisha 2, at para. 21.

performing its obligations under Article 2. Mr Marshall and Mr Buyskes agreed that the mining community would accept that any party's rights would depend upon the terms of its contract and upon that party fulfilling its side of the contractual bargain.[12] Mr Marshall agreed that NRD had to abide by the obligations under Article 2,[13] including to proceed with industrial exploitation and to submit a feasibility study.[14] The contrary would be unarguable.

15. Mr Marshall accepted on the first day of the hearing that—contrary to the Claimants' case[15]—the Contract contained no guarantee, and that the grant of long-term licences in Rwanda was not a "*mere formality*".[16] He subsequently sought to resile from this on the second day of the hearing by claiming, implausibly, that he had possibly misspoken and that there were assurances in other documents which he could not identify.[17] Plainly, no such assurances were ever given. The incoherence of the Claimants' case was further underscored by Ms Mruskovicova's suggestion that Rwanda had informed NRD in the 2008 mining law that it would become a long-term concession holder.[18]

16. The conditionality of Rwanda's obligations under the Contract is clearly stated. Whilst Rwanda's obligations pursuant to Article 3 (French) / 4 (English) of the Contract were different, under both versions, and as Mr Rwamasirabo also accepted, a feasibility study had to be submitted and positively evaluated after four years under Article 2(5) before Rwanda's obligations became due.[19]

17. Contrary to the assertion made by Mr Marshall for the first time in cross-examination[20] (which contradicted the written evidence of Mr Rwamasirabo),[21] the evaluation of the feasibility study was a matter for Rwanda (and not NRD). Mr Rwamasirabo rightly agreed in his oral testimony that it was for Rwanda to deem the feasibility study as satisfactory.[22] Mr

[12] Day 1, p231/1-7 (Marshall); Day 4, p134/11 – p136/23 (Buyskes).

[13] Day 2, p26/11-13, p44/18-23 (Marshall).

[14] Day 2, p27/ 5-11, p40/3-8 (Marshall).

[15] Memorial, at paras. 79, 83, 180, 281; Reply, at para. 100.

[16] Day 1, p229/19-25, p234/1-2 (Marshall).

[17] Day 2, p21/10 – p26/1 (Marshall).

[18] Day 4, p150/7-16 (Mruskovicova), referring to Law No. 37/2008 on Mining and Quarry Exploitation (**CL-020**) which contains no such information or guarantee.

[19] Day 8, p42/2-5 (Rwamasirabo); Day 7, p153/6-9 (Biryabarema).

[20] Day 1, p228/11-12; Day 2, p40/18-21, p42/10-13 (Marshall).

[21] Rwamasirabo 3, at para. 19.

[22] Day 8, p41/19-21 (Rwamasirabo).

Marshall's assertion otherwise was inconsistent with the express requirement to submit a feasibility study to Rwanda under Article 2(5) of the Contract, and represented a contrived, last-minute, attempt in cross-examination to avoid the effect of what had been agreed in the Contract.

18. Given the policy imperatives at play from Rwanda's point of view, it is nonsensical to suggest that it would not be for Rwanda to evaluate the feasibility study in line with its objectives in granting the four-year licences. As Mr Gatare explained in his first witness statement, the main purposes of the four-year licence agreements granted in around 2006, such as the Contract, were two-fold. First, the agreements would give the investor an opportunity to assess the feasibility of mining the concession area on an industrial level. Secondly, the agreements would give investors an opportunity to demonstrate to Rwanda, through complying with their obligations, that they were serious partners to whom a long-term licence should be granted.[23] Mr Gatare's evidence in this respect was not challenged by the Claimants in cross-examination.

19. The Claimants' case on the existence of a guarantee is also inconsistent with the policy behind the grant of the four-year licences and Rwanda's rationale for privatising the mining sector. Mr Gatare explained that the purpose of the agreements was to "*transform the whole of the mining sector in Rwanda.*"[24] To achieve this, the potential licensee needed to prove to Rwanda that they had met both the conditions of the original licence, and that they sufficiently demonstrated their credentials to justify being granted a long-term licence. If instead there was a guarantee of a long-term licence regardless of performance, it would undermine Rwanda's attempts to professionalise and industrialise its mining sector.[25] Again, Mr Gatare was not challenged on this.

20. The Contract must also be interpreted in accordance with Rwandan law. Pursuant to Article 77 of the 2011 Rwandan contract law,[26] the requirement for a positive evaluation of the feasibility study under Article 3/4 of the Contract was a suspensive condition, being an event which had to occur before Rwanda's obligations fell due.[27] Mr Rwamasirabo tried to argue that Article 77 did not apply on the basis that the parties had not agreed that it was a suspensive

[23] Gatare 1, at para. 20.

[24] Gatare 1, at para. 25.

[25] Gatare 2, at paras. 9-10; Gatare 1, at para. 25.

[26] Rwandan Law No. 45/2011 of 25 November 2011, Governing Contracts (**RM-001**), at page 50.

[27] Day 8, p91/3-17 (Mugisha).

condition and Article 3/4 was not expressly labelled as such.[28] That was not a credible argument: as Mr Rwamasirabo had to concede, the parties had agreed to the terms of Article 3/4, and there is no requirement under Article 77 for a contractual term to be expressly labelled as a suspensive condition.[29]

21. Accordingly, as both Mr Mugisha and Mr Rwamasirabo agreed, the effect of the positive evaluation of the feasibility study being a suspensive condition was that, pursuant to Article 78 of the 2011 Rwandan contract law, Rwanda's obligations under Article 3/4 were extinguished when the submitted feasibility study was not positively evaluated.[30] That negative evaluation of NRD's feasibility study was made by Rwanda in 2011, and "*as a matter of Rwandan law, neither party owed any obligations to the other under this Contract after this point*".[31]

B. NRD's failure to comply with its obligations under the Contract

1. Failure to perform Article 2(3) of the Contract: NRD did not proceed immediately to industrialisation

22. NRD failed to perform the Contract.[32]

23. Article 2(3) of the Contract required NRD to proceed immediately to industrial exploitation in "*all given sites*."[33] NRD failed to industrialise even one site, with all five of its concessions (being Rutsiro, Mara, Sebeya, Giciye and Nemba, together the "**Concessions**") maintaining artisanal operations.[34] Mr Ehlers and Mr Kagubare explained that none of NRD's sites were successfully industrialised.[35] Their evidence as to the lack of industrialisation at the Concessions was not challenged during cross-examination.[36]

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[28] Day 8, p45/1-13 (Rwamasirabo).

[29] Day 8, p45/14-19, p46/7-14 (Rwamasirabo).

[30] Day 8, p46/19 – p47/2 (Rwamasirabo); Day 8, p91/19-21 (Mugisha).

[31] Mugisha 1, at para. 11.

[32] Day 7, p15/19-20 (Imena); Day 6, p166/15-20 (Imena).

[33] Contract for acquiring mining concessions between Rwanda and NRD (24 November 2006) (**C-017**), at Article 2(3).

[34] Counter-Memorial, at paras. 70-95; Rejoinder, at paras. 132-150.

[35] Ehlers 1, at paras. 29-30; Kagubare 1, at paras. 17-19.

[36] Instead, the Claimants' counsel simply put to Mr Imena that the requirement to industrialise the Concessions was "*unfair*": an odd line of challenge in circumstances where, as Mr Imena put it, "*that is what NRD signed in its contract*": see Day 6, p159/16 – p161/14.

24. Mr Ehlers, a mining engineer and former Managing Director of NRD, explained in his first witness statement that to industrialise a concession means to "*move away from an artisanal mining model towards the more productive and professional industrial model*".[37] Mr Ehlers explained that this process involved, amongst other things, "*significant investment in exploration and resource evaluation, and then in more sophisticated mining equipment and infrastructure*."[38] The Claimants did not challenge Mr Ehlers on this definition of industrialisation and have not put forward any tenable alternative.

25. Mr Marshall did try, however. During his oral testimony, he claimed for the first time that "*all support for our artisans, any additional support that is beyond a hammer and a chisel, is considered industrialisation*".[39] He further claimed that the mere use of jackhammers, compressors and generators amounts to industrialisation in the Rwandan mining industry.[40] These were not credible propositions, and the Claimants had not advanced this proposed definition of "*industrialisation*" in their pleaded case. Indeed, Mr Marshall's written evidence was to the contrary: that industrialisation means "*to move beyond artisanal mining*".[41] Mr Marshall had explained in his second supplemental witness statement that his "*goal*" was to achieve industrialisation, which was a costly endeavour that would have been attainable had NRD been listed on the London Stock Exchange (which did not happen).[42] Mr Marshall had thereby already accepted in his written evidence that NRD had not achieved industrialisation of the Concessions.

26. In his oral testimony, Mr Imena further explained what "*industrialisation*" required. Consistent with Mr Ehlers' explanation, NRD was expected to "*bring in machinery, plants, structure and organisation*" that would "*transform this artisanal way of working into a modern way of business*."[43] However, as Mr Imena explained, it transpired that

[37] Ehlers 1, at para. 26.

[38] Ehlers 1, at para. 26.

[39] Day 2, p34/3-5 (Marshall). Mr Marshall went on to claim that "*every time you bring in additional heavy equipment in the context of jackhammers and generators and compressors to run the jackhammers, that's – in Rwandan parlance that's industrialisation*": Day 2, p34/9-12 (Marshall). He also claimed that "*Any artisan support they deem industrialisation. Anything that can move away from simple buckets and shovels and hammers is, in their mind, industrialisation*": Day 2, p84/24 – p85/3 (Marshall).

[40] Day 2, p27/ 17 – p28/14 (Marshall).

[41] Marshall 3, at para. 23.

[42] Marshall 3, at para. 23.

[43] Day 7, p142/11 – p143/14 (Imena).

NRD did not have the capacity to industrialise the Concessions during the term of the Contract, and the steps that it took were wholly insufficient.[44]

27. NRD itself conceded this failure. In a July 2009 letter to Minister Karega, the then Minister of State in charge of Environment and Mines, NRD explained that although the Contract required NRD to "*start industrial mining operations as soon as possible*", limited progress had been made due to the Zarnacks having "*limited funds*" and "*lacking expertise in exploration and in mining*".[45] But as explained further below, no further meaningful progress was made towards industrialisation following Spalena's acquisition of NRD in late 2010.

28. The lack of industrialisation is also reflected in NRD's failure to invest the $39.5 million promised in its business plan for the successful industrialisation of the Concessions.[46] The shortfall was substantial: the Claimants' figures (even if accepted at face value) show that no more than a third (a maximum of $13 million) had been invested by the time NRD applied for a renewal of its five-year licences in November 2010.[47] Further, this investment was not made by the Claimants, as they wrongly assert in their Pre-Hearing Brief ("**PHB**"),[48] but rather by the Zarnacks and HC Starck in the period prior to the acquisition by Spalena in December 2010.[49]

29. In their PHB and opening submissions, the Claimants suggested for the first time that NRD had invested the entire $39.5 million promised.[50] This was obviously wrong, and inconsistent with the Claimants' own evidence.[51] Although the Claimants seek to rely on a GMD promotional document from April 2012 in this regard, it is clear that the document does not assist them.[52] This publication lists the companies that had been granted mining

[44] Day 7, p143/14-16 (Imena).

[45] Letter from NRD to Minister Karega (15 July 2009) (**R-105**).

[46] Rejoinder, at paras. 88-100; Counter-Memorial, at paras. 56-57, and 72.

[47] NRD November 2010 Application (**C-035**), at page 101.

[48] PHB, at para. 35 (emphasis added). The figure referred to by the Claimants is erroneously given in € rather than $. The total expenditure was only €9,393,164 which was equivalent to approximately $13 million.

[49] Day 1, p166/5-23 (Respondent's Opening).

[50] PHB, at para. 35 ("*Rwanda was publicly reporting that NRD had invested close to USD$40 million as of April 2012*."); Day 1, p47/1-15 (Claimants' Opening).

[51] November 2010 Application (**C-035**), at page 101.

[52] RNRA, GMD, Promotion and Development of extractive minerals (April 2012) (**C-014)**, at page 34; Claimants' Pre-Hearing Brief, at para. 35.

licences, and NRD is included alongside an "*Investment*" figure of "[$]*39,501,500*".[53] Rather than a record of the amount that NRD had invested, it is clear from the document that this is a reference to the original projected investment promised by the Zarnacks.[54] In any event, Mr Marshall conceded during cross-examination that when Spalena purchased NRD he knew that significantly less than this had been invested[55] (despite having said earlier in his testimony that he did not even know the amount that was promised).[56]

i. There was no transfer of heavy equipment from BVG to Spalena

30. The Claimants asserted that the transfer of heavy equipment from BVG to Spalena in the sum of $2,252,502.00[57] was evidence of NRD's industrialisation of the Concessions.[58] There is no evidence that such a transfer was made, and such credible evidence as exists is to the contrary. As explained in the Rejoinder, the only documents relied on in support of this claim, being the resolutions of BVG and Spalena at **C-123** and **C-124**, are not genuine contemporaneous documents.[59] Further, as Mr Ehlers and Mr Sindayigaya explained in their written evidence, which was not challenged during cross-examination, the list of assets at **C-123** did not reflect what was actually on site at Bisesero. It is hard to see how the Claimants can persist in the allegation that there was a transfer of assets to NRD, having chosen not to challenge this evidence from Mr Ehlers and Mr Sindayigaya.[60]

31. Mr Marshall's testimony as to the alleged transfer of equipment was confused and incoherent. On the one hand, he tried to suggest that the absence of contemporaneous documentation supporting the transfer of the equipment was due to actions of the Respondent. His explanation for why there were no emails or drafts of **C-123** or **C-124** from 2012 was because "*we had lost Bisesero; the police had come and taken it*";[61] and

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[53] *Ibid*., (**C-014)**, at page 34.

[54] Day 1, p104/4-22 (Respondent's Opening).

[55] Day 2, p112/22 – p113/8 (Marshall).

[56] Day 2, p38/20 – p39/21, p78/16 – p80/11 (Marshall).

[57] CMPO, at para. 101; Resolution by Unanimous Written Consent of the Sole Director of BVG dated 27 March 2012 (**C-123)**; Resolution by Unanimous Written Consent of the Sole Director of the Spalena Company dated 27 March 2012 (**C-124)**.

[58] Reply, at para. 54

[59] Rejoinder, at paras. 75-78 and 519.

[60] Ehlers 2, at para. 22; Sindayigaya 2, at para. 12.

[61] Day 1, p207/7 – p208/23 (Marshall).

the reason he gave as to why the Claimants were unable to produce any actual sale agreement between NRD and BVG in relation to the transfer of equipment was because Rwanda "*took all our documents*".[62] However, when it was put to him that there would have been contemporaneous emails in his email account in relation to the documents had they existed, Mr Marshall suggested that there were no emails or documents because they were not "*necessary*".[63]

32. Although Mr Marshall stated that the resolutions at **C-123** and **C-124** were retained because they were kept "*in a different place*" to the other allegedly missing documents,[64] when asked by the President where exactly this different place was, Mr Marshall floundered, and could only say that he "*would often take documents home*".[65]

33. Contrary to the Claimants' pleaded position, Mr Marshall went on to say that only "*some*" of the assets listed in **C-123** were at Bisesero but was unable to say which items were there and which were not.[66] Plainly, no such transfer was made.

ii. The plant at Rutsiro was a commercial failure

34. NRD's only attempt at industrialisation (save for some very limited but inadequate steps taken at Nemba) was its failed plant at Rutsiro.[67] The documentary evidence highlights that the plant was never commercially operational, and this has been addressed extensively by the Respondent in its pleadings and evidence.[68] Although the Claimants insisted (without any evidence) that the plant was fully operational,[69] they appeared to have abandoned this case during the hearing. Instead, their case shifted from the plant being "*the best industrialisation example in the country at the time*"[70] to a plant used not for the purpose intended, but with some parts of it being used by the odd artisanal miner to wash rocks.[71] When it was put to Mr Marshall during cross-examination that the plant

[62] Day 1, p209/22 – p210/9 (Marshall).

[63] Day 1, p208/24 – p209/21 (Marshall).

[64] Day 1, p210/6-9 (Marshall).

[65] Day 1, p210/25 – p211/7 (Marshall).

[66] Day 1, p212/22 – p214/4 (Marshall).

[67] Ehlers 1, at paras. 30-39; Ehlers 2, at para. 11; Rejoinder, at paras. 132-150.

[68] Rejoinder, at paras. 135-141; Counter-Memorial, at para. 80.1; Biryabarema 1, at para. 11; Ehlers 1, at para. 27; Imena 1, at paras. 17-18.

[69] PHB, at para. 37.

[70] Day 1, p56/8-10 (Claimants' Opening).

[71] See Day 5, p99/21 – p101/23 (Sindayigaya).

was not processing, he asserted that "*pieces of it were*"[72] and went on to say in re-direct that artisanal miners would use parts of the plant.[73]

35. Mr Sindayigaya said that there was never any mineral production from the plant during his years at NRD.[74] Professor Nkanika Wa Rupiya's testimony confirmed this.[75] As Mr Imena explained, NRD had failed to conduct appropriate studies assessing the appropriateness of the plant in that location.[76] This led to NRD essentially installing a "*dummy plant*" that was a major disappointment for Rwanda.[77]

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

36. NRD did not meet its obligations under Article 2(5) of the Contract to provide adequate reports of reserves and the feasibility study.[78] As Mr Gatare explained, exploration was a major requirement of the privatisation exercise and a precondition to obtaining long-term licences.[79]

37. Mr Imena explained what was required to satisfy the obligation to provide an evaluation report of reserves: "*you conduct extensive geological, geophysical, geochemical work. You conduct sampling, you conduct drilling, you conduct the geotechnical studies, you conduct financial studies. It's a whole bunch of studies that will lead you to reserves calculations and feasibility study…*"[80]

38. NRD's failings in this regard were significant. Its application for renewal of its five-year licences in November 2010 (the "**November 2010 Application**"), discussed further in section II.D below, stated that only 115 samples had been collected.[81] As Mr Imena explained, this fell well short of the extensive sampling that was required.[82] The limited

[72] Day 2, p89/11 – p89/19 (Marshall).

[73] Day 4, p113/2-4 (Marshall).

[74] Day 5, p98/22 – p99/10; p99/21 – p101/22 (Sindayigaya).

[75] Day 5, p53/7 – p54/16 (Nkanika Wa Rupiya).

[76] Day 7, p7/9-11, p7/22-25 (Imena).

[77] Day 7, p7/24 – p8/15 (Imena).

[78] See Rejoinder, at paras. 151-163.

[79] Day 8, p5/18-23 (Gatare).

[80] Day 7, p4/13-20 (Imena).

[81] NRD Application for the Renewal of Exploration Licences (**C-035**), at page 36.

[82] Day 7, p3/2-6 (Imena); see also Imena 1, at para. 12.

number of samples taken was particularly deficient in light of the very large size of the Concessions, which comprised more than 30,000 hectares.[83] Further, no drilling had been conducted.[84]

39. As with NRD's later licence applications, there was an objective evaluation of the November 2010 Application by a senior geologist and staff member, Dr Michael Biryabarema.[85] In line with what NRD expected when they made that application, Dr Biryabarema's review determined that the November 2010 Application was deficient, particularly in respect of the exploration works and the resource evaluation.[86] 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.*"[87] Dr Biryabarema's findings in this assessment were not challenged by the Claimants in cross-examination.

40. Mr Imena conducted a further evaluation of NRD's performance in May 2012.[88] It found that NRD had completed less than 50% of the required exploration and mine development works.[89] As Mr Imena explained in more detail in his testimony, NRD's exploration work was "*very preliminary*"[90] and "*superficial*", and failed to meet the standards expected of a serious mining operator.[91] Indeed, the fact that NRD expected that a detailed resources evaluation report would "*just be made by 15 pages of unclear images*" highlights its lack of understanding as to what was required, in turn reflecting its lack of experience and competence as an operator.[92]

[83] Day 7, p3/2-6 (Imena); see also Imena 1, at para. 12.

[84] Imena 1, at para. 12.

[85] NRD Assessment Report (2011) (**R-111**).

[86] *Ibid*., (**R-111**).

[87] *Ibid*., (**R-111**); Biryabarema 1, at para. 7.5.

[88] Minister Imena's Evaluation of NRD Application (8 May 2012) (**R-040**).

[89] *Ibid*., (**R-040**), at page 3.

[90] Day 7, p9/8 (Imena), referring to his 8 May 2012 evaluation of NRD's November 2010 Application (**R-040**), at page 3.

[91] Day 7, p9/8-15 (Imena).

[92] Day 7, p13/2-13 (Imena), referring to NRD's November 2010 Application (**C-035**), at pages 101-115.

41. NRD's November 2010 Application stated that the company would conduct an estimation of reserves at all of the Concessions between 2011 and 2015.[93] As Mr Imena pointed out, it was implicitly accepted in this plan that an adequate evaluation of reserves had not been previously conducted as required by the Contract.[94]

42. While NRD had prepared what purported to be a feasibility study, it is clear that they were aware at the time that such study did not remotely contain the detail that was to be expected, and which might provide a realistic prospect of satisfying Rwanda that it should grant long-term licences—and therefore that it had not provided a feasibility study as contemplated by the Contract. Further, as Mr Marshall conceded, the required environmental impact assessments had not been carried out except in two very limited respects.[95]

43. Mr Imena explained that what NRD provided was *"not a feasibility study for a professional, industrial mining project, as was required under the Contract."*[96] Minister Kamanzi was of the same view when relaying to NRD that no feasibility study had been submitted when he declined NRD's November 2010 Application.[97]

C. Mr Marshall's initial dealings in Rwanda and the Bisesero concession

44. The Claimants have not advanced any evidence to support their assertion that Rwanda solicited Mr Marshall to invest in Rwanda.

45. In their PHB and during the hearing via Mr Marshall's oral testimony, the Claimants alleged, for the first time, that Mr Marshall's historic relationship with Rwanda was predominantly with the Directorate of Military Intelligence, the Ministry of Defence and the Rwandan military.[98] In their PHB, the Claimants named, for the first time, General Jack Nziza and General James Kabarebe, as individuals to whom Mr Marshall allegedly provided services.[99] The PHB made numerous new allegations regarding the treatment of NRD and/or Mr Marshall by the military. For example, that:

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[93] NRD's November 2010 Application (**C-035**), at pages 115-117.

[94] Day 7, p13/7-13 (Imena); Rejoinder, at para. 154.

[95] Day 2, p156/2 – p157/25 (Marshall); Day 7, p17/1 – p27/25 (Imena).

[96] Imena 2, at para. 13.

[97] Letter from Minister Kamanzi to NRD (2 August 2011) (**C-062**). See also Day 7, p40/11 – p41/1 (Imena).

[98] PHB, at paras. 5-6; Day 1, p15/20-22 (Claimants' Opening).

[99] PHB, at para. 5.

45.1. "*Mr. Marshall* […] *was a trusted advisor to Rwanda and to its military*";

45.2. NRD received "*assurances from the Rwandan Military*";

45.3. "*NRD was requested and did provide regular representation and advisory services for the Rwanda government, and especially for the Rwanda military and intelligence services*";

45.4. "*Respondent's military continued to encourage Claimants*";

45.5. "*Claimants' contacts in the Rwandan Military continued to support Claimants"*";

45.6. "*the Rwandan Military and its business arm continued to rely on Claimants' principals*".[100]

46. Mr Marshall made similar assertions when giving evidence and went further in suggesting that there was a parallel process being undertaken in respect of the obtaining of licences. For example, Mr Marshall stated:

46.1. "*we were having regular, several times a week meeting with senior grade officers from the military who repeatedly assured us just to be patient*."[101]

46.2. "*we had a parallel line of negotiation with the government through the Rwanda military and they were telling us that we had fully performed and there was a corruption problem that their internal security was working on*."[102]

46.3. "*we continued to rely on the advice of the military people who encouraged us to wait for the internal investigations to play out*."[103]

47. These belated allegations had no support in the contemporaneous record. But in any event, even if allegations of this kind had been true (which they plainly are not), they hinder rather than advance the Claimants' case: the Claimants appear to be suggesting that NRD should have received special treatment that other investors did not get, as a result of the personal relationship that Mr Marshall claims to have had with the military.[104]

48. Further, these statements go well beyond, and are completely inconsistent with, the evidence given by Mr Marshall in his witness statements. The discrepancies are striking: in Mr

[100] PHB, at paras. 5-6, 10, 31, 51, and 57.

[101] Day 3, p63/9-12 (Marshall).

[102] Day 3, p91/22 – p92/1 (Marshall).

[103] Day 3, p212/24 – p213/2 (Marshall).

[104] Day 1, p100/3-10 (Respondent's Opening).

Marshall's first witness statement, the only mention of the Rwandan military is in relation to acts he suggests were performed by them and/or the police (for which he has no evidence) that sought to harm NRD and/or the Claimants.[105] In particular, Mr Marshall alleges that "*the Rwandan police and military frequently worked against NRD and made its life more difficult in Rwanda*".[106] This testimony cannot be reconciled with his new claims that the military was in fact helping him, giving him assurances as to NRD's entitlement to long-term licences and running a parallel line of negotiations.[107]

49. As explained by the Claimants' counsel during their opening submissions, Mr Marshall was in fact "*not a commercial miner*" but "*an international transactional attorney, practising in Eastern Europe*".[108] For Rwanda (whether through its military or otherwise) to solicit Mr Marshall in the way that the Claimants contend, given his background, is highly improbable. In fact, what the documents show is that Mr Marshall was pitching to Rwanda and not the other way around.[109]

50. The emails between Mr Marshall and Mr Lambert Mucyo in December 2006 on which the Claimants rely do not assist.[110] As explained in the Rejoinder, these emails relate to the Bisesero concession and Mr Mucyo was merely responding to an expression of interest from Mr Marshall. Although Mr Mucyo was a RIEPA employee at the time, he became an early business partner of Mr Marshall in the Bisesero concession.[111] In what was to become a theme with Mr Marshall's business partners and staff in Rwanda, Mr Mucyo resigned because Mr. Marshall had fabricated stories about him, and he was not paid.[112]

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[105] Marshall 1, at paras. 21, 26, 27, 45, 70 and 72.

[106] Marshall 1, at para. 27 (emphasis added).

[107] Marshall 3, at paras. 14-16 is the first time any mention of a relationship with the military is made and it is limited to explaining the work Mr Marshall says he did for them.

[108] Day 1, p13/18 – p14/3 (Claimants' Opening).

[109] Day 1, p217/20 – p224/8 (Marshall), by reference to emails between Mr Mucyo and Mr Marshall (24 August 2005) (**R-100**) and letter from Ministry of Finance and Economic Development to Mr Marshall (29 August 2005) (**R-138**).

[110] Day 1, p17/19 – p20/5 (Claimants' Opening); Day 4, p43/7 – p50/15 (Marshall) by reference to an email to him from Mr Mucyo (12 December 2006) (**C-139**).

[111] Rejoinder, at paras. 51-57.

[112] Letter from Mr Mucyo to the Police/CID (23 June 2010) (**R-102**).

51. The Bisesero concession ultimately failed because Mr Marshall mismanaged the concession and BVG materially failed to comply with its obligations regarding exploitation, research and investment.[113]

52. The Respondent's evidence at the hearing supports this. Mr Ehlers explained that "*there was never any work done at Bisesero that* [he] *remember*[s]".[114] Mr Sindayigaya's evidence was to the same effect: "*there was no activity in Bisesero because* [the Slovak team were] *only busy with* [building] *the clinic*",[115] and "*if there was minerals and miners, it would have been part of the things we could have found on site in March 2011, and we found absolutely nothing. We found only closed mines.*" [116]

53. As admitted by the Claimants, "[t]*hings did not work out at Bisesero*"[117] and the concession was not renewed due to BVG's failure to perform and poor environmental record.[118] The Claimants' suggestion that the concession failed due to "*bad relationships and – bad performance of relationships and who they relied on, and disputes about what happened*",[119] does not reflect what happened.

D. The November 2010 Application

54. Prior to Spalena acquiring NRD in December 2010, and shortly before the expiry of the four-year licence, NRD made its November 2010 Application. In their PHB, the Claimants accepted (as they had to) that the application was "*styled as a five-year extension*."[120] Although the Claimants have asserted elsewhere that the November 2010

[113] *Ibid*., (**R-102**), where Mr Mucyo explains upon his resignation that (1) although BVG had extensive obligations to, amongst other things, "*proceed immediately to the Industrial exploration*", "*progress reports on research activities*" and "*provide evaluation reports of reserves and feasibility study*" (in the same manner as NRD was obliged to do), and (2) Mr Marshall pledged "*to invest an amount of more than $5,000,000 and promised equipment availability in less than three months*", "[t]*o this date no such investment was made, no exploration or research has ever been conducted, no sign of such equipment was ever received apart from two skid loaders tractors which Roderick managed to manoeuvre* [sic] *from another Slovak company*".

[114] Day 6, p28/6-7 (Ehlers); see also Ehlers 2, at paras. 21-22.

[115] Day 5, p102/19-25 (Sindayigaya).

[116] Day 5, p103/8-10, and more generally p103-105 (Sindayigaya); Sindayigaya 2, at paras. 8-12.

[117] Day 1, p21/11 (Claimants' Opening).

[118] Rejoinder, para. 907.

[119] Day 1, p21/17-19 (Claimants' Opening).

[120] PHB, at para. 18.

Application was for long-term licences, [121] it manifestly was not,[122] as the Claimants' PHB acknowledges.

55. The November 2010 Application was indeed for a five-year extension. In this context:

55.1. There is nothing in the 2010 Application to support the suggestion that this was an application for vast mining licences under Article 57 of the 2008 Law,[123] which it necessarily would have to have been had the application been for long-term licences.

55.2. During cross-examination, Mr Marshall accepted that there was an inconsistency in the Claimants' contention to this effect in that if the November 2010 Application was for a vast mining concession, NRD would have been entitled under the 2008 Law to explore and research within the Concessions. Accordingly, NRD would not have needed to apply for the renewal of exploration licences as well as the mining licence.[124]

55.3. That the November 2010 Application was expressly for a renewal of the five-year licences is clear on the face of the document.[125] The application itself cites the fact that applications for renewals must be submitted three months prior to the expiry date, consistent with Article 45 of the 2008 Law which governs small mining licences; this is in contrast to the provision governing vast mining concessions which provides for a six-month period.[126] The application further explains that when HC Starck acquired the majority of NRD in 2008, the focus of its activities and investments was on "*supporting small scale artisanal mining in multiple*

[121] See Day 1, p27/14-19 (Claimants' Opening).

[122] Day 7, p156/10-15 (Biryabarema); Day 7, p158/8 – p159/1 (Biryabarema).

[123] Law No. 37/2008 on Mining and Quarry Exploitation (**CL-020**), at Article 57, page 49.

[124] Day 2, p52/15-22 (Marshall).

[125] NRD's November 2010 Application (**C-035**), on the title page and page 13, which expressly seek renewals of the exploration licences, albeit with a reduced size in respect of four of the five concession areas. Renewals are provided for under Article 45 of the 2008 Law (**CL-020**), at page 43.

[126] NRD's November 2010 Application (**C-035**), at page 25, which states that "*An application for renewal of a mine exploitation licence must be submitted at least three (3) months before its expiration date*." Contrast this with Article 60 in relation to vast mining licences, which provides that if the holder of a small mine exploitation licence wants to convert it to a vast mining concession the deadline is six months from the date of expiry of the licences (**CL-020**), at page 43; Day 2, p62/14 – p63/8 (Marshall).

places",[127] and there is nothing in the document that goes beyond a five-year window.[128]

55.4. Mr Marshall himself had acknowledged contemporaneously that the November 2010 Application was for a short-term licence. By letter to Minister Kamanzi dated 31 October 2011, Mr Marshall stated that NRD had "*submitted a five year extension agreement for review*".[129] Mr Marshall's suggestion in cross-examination that the letter was referring to the fact that NRD had separately applied for five-year licences, in addition to long-term licences, was a hopeless attempt to avoid accepting what he had said at the time.[130]

56. Dr Biryabarema, who reviewed the November 2010 Application on behalf of Rwanda, confirmed that, like Mr Marshall and NRD at the time, he too understood the application to be for five-year licences.[131]

E. <u>The acquisition of NRD and ownership structure of the Claimants</u>

1. The acquisition of NRD

57. Shortly after the November 2010 Application was made, on 23 December 2010, Spalena acquired 85% of the shares in NRD from HC Starck for a mere [redacted]. Although the Claimants and Mr Marshall alleged for the first time during the hearing that BVG had not been permitted under Rwandan law to take over NRD, the Claimants' counsel was unable to point to any Rwandan law evidence corroborating this account when asked to do so by the President.[132] The allegation was also at odds with the Claimants' pleaded case and the written evidence of Mr Marshall, which alleged that HC Starck had refused to sell NRD to BVG.[133]

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[127] *Ibid*., (**C-035**), at page 9.

[128] *Ibid*., (**C-035**), at page 17 states that "*NRD is determined to develop during the course of **2011 to 2015** the licences into sustainable mining operations, while continuously taking into consideration environmental, social and community aspects*" (emphasis added).

[129] Letter from NRD to Minister Kamanzi (31 October 2011) (**C-041**), at page 4.

[130] Day 2, p63/9 – p66/13 (Marshall).

[131] Day 7, p156/10-15 (Biryabarema); Day 7, p158/8 – p159/1 (Biryabarema).

[132] See Day 1, p22/2 – p25/6 (Claimants' Opening); Day 1, p207/16 – p208/5 (Marshall).

[133] See CMPO, at para. 93; Marshall 2, at para. 5.

58. Prior to Spalena acquiring NRD, Mr Marshall conducted due diligence on NRD, and he was aware (as explained below, and as reflected in the [redacted] purchase price), of the serious deficiencies in NRD's application. During the hearing, Mr Marshall confirmed that he had reviewed the terms of the Contract[134] and also read the November 2010 Application[135] and other company documentation.[136] He said he knew that nothing but artisanal mining had been conducted at three of the concessions (contrary to what was required under Article 2 of the Contract) and that evaluation reports of reserves and a feasibility study needed to be provided.[137] Mr Marshall also initially accepted, as had been recorded in the Share Purchase Agreement ("**SPA**"),[138] that he was required to acknowledge in the agreement that there were issues associated with the renewal of the licences.[139] He subsequently sought to resile from this admission notwithstanding the clear terms of the SPA.[140]

59. Contrary to his implausible denials, having accepted that he had read the November 2010 Application, Mr Marshall would have seen from its terms that it was an application for five-year licences, and the limits of the exploration work which had been performed by NRD.[141] It would also have been obvious that a meaningful feasibility study had not been submitted. As stated above, Mr Marshall accepted that he knew, as recorded in the November 2010 Application, that the $39.5 million of investment promised by NRD had not been made and that there had been a change of approach by previous management.[142]

60. Mr Marshall also confirmed that he worked closely with Mr Ehlers in relation to the due diligence of NRD.[143] Mr Marshall was specifically told by Mr Ehlers: (a) about the limitations with the application, (b) that any licence would be on a short-term rather than a long-term basis, and (c) that NRD had not sufficiently carried out the exploration it had agreed to do and had therefore not been able to provide a feasibility study which would

[134] Day 1, p224/17-24 (Marshall).

[135] Day 2, p31/13-20 (Marshall).

[136] Day 2, p95/19-25 (Marshall).

[137] Day 2, p32/3-13, p40/3-8 (Marshall).

[138] Share Purchase Agreement between HC Starck and Spalena (23 December 2010) (**C-068**), at page 15.

[139] Day 2, p45/22 – p46/19 (Marshall).

[140] Day 2, p47/11 – p48/12 (Marshall).

[141] Day 2, p51/23 – p59/13 (Marshall).

[142] Day 2, p80/4-20 (Marshall).

[143] Day 2, p74/9-16 (Marshall).

satisfy Rwanda.[144] Mr Ehlers also told him that investment had not been made to the extent initially envisaged, therefore only superficial exploratory activities had been conducted and no real steps had been taken towards industrialisation.[145] Mr Ehlers also explained the state of the Concessions to Mr Marshall, and together they went on site visits to them.[146] Mr Ehlers' evidence is that he had explained the requirements for the grant of licences to Mr Marshall and it was clear to Mr Marshall that NRD could not expect to be granted any further extensions to the four-year licences.[147] Mr Ehlers' evidence on these points was not challenged in cross-examination.

2. The shareholding structure of Spalena

61. The shareholding structure of Spalena remains opaque and the Claimants have failed to establish that BVG has at any time had a shareholding in Spalena. During cross-examination, Mr Marshall was evasive when asked about the relationship between BVG and Spalena, and eventually tried to suggest that BVG has a direct shareholding in Spalena.[148] This is despite there being no documentary evidence of this alleged interest, and Mr Marshall having made no mention of it in his first witness statement when describing the relationship between BVG and Spalena.[149] Indeed, Mr Marshall was unable to provide clear and direct answers in response to the President's questions as to who owns the shares in Spalena, when the other alleged US investors acquired their shares, and what proportion of the shares in Spalena were allegedly transferred to them.[150]

62. Mr Marshall was also unable to explain why a letter from the Rwanda Development Board ("**RDB**") to the Mayor of the Bugesera District dated 7 August 2012, refers to the RDB having received from Mr Marshall "*legal and authenticated documentation showing that the holding company of NRD Ltd, NRD Holding Gmbh, is wholly owned by Spalena Company LLC, an American Company, incorporated in Delaware that is in turn wholly owned by Mr Roderick Marshall.*"[151] Mr Marshall denies that he had told the RDB that

[144] Ehlers 1, at para. 19.

[145] Ehlers 1, at pars. 20-21.

[146] Ehlers 1, at paras. 28-31.

[147] Ehlers 1, at para. 22, Ehlers 2, at para. 19.

[148] Day 1, p180/20 – p184/8 (Marshall).

[149] See Marshall 1, at para. 15.

[150] Day 4, p76/8 – p78/5 (Marshall).

[151] Letter from RDB to the Mayor of the Bugesera District (7 August 2012) (**C-070**); Day 1, p216/3 – p217/8 (Marshall).

he is the sole owner of Spalena, but his explanation that the "*letter is wrong*" is not credible.[152]

3. BVG did not advance a loan to Spalena

63. The Claimants' position that BVG acquired an ownership interest in NRD on the basis of a [redacted] loan advanced to NRD pursuant to a Cooperation Agreement[153] was plainly an invention made in response to the Respondent's jurisdictional objections.

64. Mr Marshall could not explain why the Claimants' Memorial ("**Memorial**") and his first witness statement made no mention of the Cooperation Agreement whatsoever, or the alleged loan of [redacted] from BVG to NRD.[154] Nor could Mr Marshall answer when asked how the loan was advanced and by what means.[155] The inability of Mr Marshall to provide even basic facts about the loan was telling.

65. Further, the Claimants failed to exhibit any evidence in support of the alleged loan and were unable to point to any during the hearing. Indeed, during cross-examination Mr Marshall could not explain the absence of evidence documenting the alleged advance of the loan, in circumstances where NRD was obliged under the Cooperation Agreement to keep proper financial records of the transactions.[156] Mr Marshall's (default) explanation—that the lack of evidence was because of the alleged loss of company records from NRD's Kigali office—is not credible given that, for example, bank statements could have been obtained from BVG's bank.[157]

4. NRD did not have any [redacted] and smuggling

66. The Claimants also failed to establish that minerals were stolen from BVG's Bisesero concession, and that NRD had used the concession for smuggling minerals from the DRC.[158] The Claimants have asserted these facts to manufacture a contrived claim that

[152] Day 1, p216/5 (Marshall).

[153] CMPO, paras. 97, 111.

[154] Day 1, p190/10 – p191/8 (Marshall)

[155] Day 1, p196/20-22 (Marshall).

[156] Day 1, p196/13 – p199/10 (Marshall).

[157] Day 1, p197/10 – p198/25 (Marshall).

[158] See CMPO at para. 99; Marshall 2 at para. 5; Day 4, p68/12-18 (Marshall).

BVG holds an equitable interest in NRD on the basis of an agreement to [redacted].[159]

67. These liabilities never existed and were again concocted to deal with the Respondent's jurisdictional objections. There is not a single document that supports the existence of these allegations and the claimed liability, and unsurprisingly, Mr Marshall was unable to point to any when asked during cross-examination.[160] Mr Marshall also could not explain why the claims made in his supplemental witness statement, filed in response to the Respondent's preliminary objections, that BVG acquired an interest in Spalena through the alleged [redacted] and through the transfer of equipment to NRD, did not feature in his first witness statement which described the relationship between BVG and NRD.[161]

68. Mr Sindayigaya's evidence highlights the implausible nature of this claim, and during cross-examination, he gave a reliable and detailed account of the nature of BVG's operations at Bisesero in 2010. He explained that there was no activity at the concession during this time aside from the construction of a clinic: there were no minerals, no staff, and no operational mines, which were instead full of mud slides.[162] Mr Sindayigaya explained that even in March 2011, when he visited Bisesero, there was still "*absolutely nothing*" going on and that "*we found only closed mines*".[163] If there were no minerals being produced, there were plainly none to be stolen.

69. Neither the SPA, nor the Certificate of NRD's liabilities annexed to it, refer to [redacted].[164] When the Certificate was put to him during cross-examination, Mr Marshall's explanation was that the document was a "*misrepresentation*".[165] Mr Marshall's suggestion that HC Starck, a professional and reputable mining company, would have entered into an agreement containing a significant misrepresentation of this nature is not credible. When cross-examined as to why Mr Marshall himself would have knowingly signed the agreement if

[159] Marshall 2, at para. 5; Reply, at para. 17.

[160] Day 1, p199/11 – p200/14 (Marshall).

[161] Day 1, p184/9 – p191/16 (Marshall).

[162] Day 5, p102/14-21 (Sindayigaya).

[163] Day 5, p103/8-11 (Sindayigaya).

[164] Share Purchase Agreement between HC Starck and Spalena (23 December 2010) (**C-068**), at page 9.

[165] Day 1, p204, p206/20 (Marshall).

he thought the certificate misrepresented NRD's liabilities, Mr Marshall avoided the question.[166]

70. Mr Marshall was asked extensive questions about the alleged liability, and he consistently failed to provide coherent responses. In particular:

70.1. Mr Marshall was unable to answer convincingly questions from the President in relation to this alleged liability, including how the alleged theft of minerals by Mr Ehlers could result in a liability for NRD, and how any alleged reputational damage for HC Starck would fit into a [redacted] that was used to leverage the transaction.[167]

70.2. Mr Marshall accused Mr Ehlers of having stolen these minerals (another new allegation, not pleaded by the Claimants) but accepted that he was unable to prove it at the time and could still not prove it. He further accepted that Mr Ehlers was not acting on behalf of NRD in allegedly stealing the minerals.[168] Mr Marshall's uncorroborated allegations against Mr Sindayigaya were equally baseless.[169] None of these allegations were put to Mr Ehlers or Mr Sindayigaya.

70.3. When asked by the President what he meant in stating in his supplemental witness statement that BVG "*assigned*" its claim to Spalena[170] and whether there were any documents recording these transactions, Mr Marshall confirmed that no such documents exist.[171] He was also unable to explain coherently the nature of the alleged assignment to Spalena.[172]

70.4. When asked by Ms Dohmann QC to explain BVG's contribution, Mr Marshall had difficulty responding, and could only say that it was "*the fact that we would not bring a claim against them if we bought the company, although not said in so many words.*"[173] The suggestion that a company such as HC Starck, and Mr Marshall, a

[166] Day 1, p205/1 – p206/2 (Marshall).

[167] Day 4, p68/24 – p70/9 (Marshall).

[168] Day 4, p70/10 – p71/20 (Marshall).

[169] Day 1, p201/9-12 (Marshall).

[170] Marshall 2, at para. 6.

[171] Day 4, p73/7-10 (Marshall).

[172] Day 4, p73/11-24 (Marshall).

[173] Day 4, p73/25 – p74/24 (Marshall).

highly experienced transactional lawyer, would have made such an arrangement that was not recorded anywhere in writing is not credible.

F. The Claimants' investments in and management of the Concessions

71. Spalena's takeover of NRD was a failure. Following its acquisition of NRD in late 2010, no material further investment was made, either in industrialising the mining on the Concessions or in exploratory work and evaluating the reserves. Rather, NRD continued artisanal mining operations at each of the Concessions by purchasing minerals from individual artisanal miners.[174]

72. Despite NRD's desperate financial plight, and as addressed in detail in relation to the Tribunal's jurisdiction *ratione materiae* at section IV.C below, there is no evidence that the Claimants (or indeed anybody else) made any external investment in NRD once it was acquired by Spalena, despite the Claimants' assertions in this arbitration. The uncorroborated claim by Mr Marshall that "*we were expending far more money than anybody else*" is not made out on facts.[175] Rather, all of the evidence suggests the opposite: that the only investment had been made prior to Spalena's acquisition, and the financial condition of NRD worsened under Spalena's management, with debts owed to trading partners, to employees, and the Rwandan Revenue Authority ("**RRA**").[176]

73. The evidence of Professor Nkanika Wa Rupiya and Mr Sindayigaya as to the state of chaos that NRD was in under Mr Marshall's management was not challenged during their cross-examination.[177] Mr Marshall and his partner, Ms Mruskovicova, were running NRD as a "*briefcase company*",[178] borrowing from traders and draining the company's working capital.[179] Production dropped, and problems with illegal mining and environmental damage at the Concessions worsened, leading to the closure of NRD's western concessions in late 2012.[180] As Mr Sindayigaya put it, by the time he left NRD in late

[174] Day 6, p163/4-6 (Imena).

[175] Day 2, p121/21-22 (Marshall).

[176] Tax filings of NRD (**R-021**).

[177] Nkanika Wa Rupiya 1, at paras. 23-24; Sindayigaya 1, at para. 23; See also SA, at paras. 24-25.

[178] Kagubare 1, at para. 9.

[179] Counter-Memorial, at para. 108; Kagubare 1, at paras. 9-10.

[180] Biryabarema 2, at para. 13; Letter from NRD to Minister Kamanzi (14 September 2012) (**C-049**). During his cross-examination, Mr Marshall accepted that there was environmental damage at NRD's concessions: see Day 2, p202/19-20 (Marshall).

2012, NRD was "*like a jungle*".[181] In his oral testimony, Mr Sindayigaya spoke cogently about the deterioration of the company that he witnessed under Spalena and Mr Marshall's management.[182]

74. Mr Kagubare recalls a similar state of disarray upon joining NRD in 2013, with the company failing to keep track of its operations, losing minerals, and having numerous cases in court.[183] Upon investigation, Mr Kagubare "*realised the miners were taking advantage of the weak management system and the security system. In fact, there was no security, they weren't monitoring who mines what and who delivers what, and that's why all the minerals were missing*."[184] In response, Mr Kagubare employed security personnel to try and curb illegal mining and mineral theft.[185] Mr Kagubare's strategy paid off for a brief period, however the systemic management failings of the company, alongside Spalena's failure to inject any, or any adequate, funds into the company, meant that NRD essentially became non-operational by 2015.[186] Mr Marshall's explanation for Mr Kagubare's evidence, that it was "*fabricated*" and "*untrue*"[187] is unsustainable, and Mr Kagubare's account is well supported by corroborating evidence, including the unchallenged evidence of Professor Nkanika Wa Rupiya and Mr Sindayigaya.

G. Assessment of the November 2010 Application, the alleged draft licences and submission to Cabinet

75. The November 2010 Application made prior to Spalena's takeover of NRD was thin and unsatisfactory. The lack of progress made by NRD in the four-year period, and the paucity of the exploration and sampling work and the evaluation of the mineral reserves that were required, was obvious on the face of the application.[188] As discussed in section II.B above, the material in the November 2010 Application did not amount to a feasibility study, or indeed an evaluation of reserves as required by the Contract.[189]

[181] Day 5, p78/9 (Sindayigaya).

[182] Day 5, p80/5-16 (Sindayigaya).

[183] Day 5, p127/6-10 (Kagubare).

[184] Day 5, p127/11-17 (Kagubare).

[185] Day 5, p127/18-25 (Kagubare); Kagubare 1, at paras. 13-14.

[186] Kagubare 1, at paras. 13-20.

[187] See Day 3, p93/22 – p101/7 (Marshall).

[188] See section II.B above; Day 7, p3/2-13 (Imena).

[189] See Day 7, p13/2-13 (Imena).

76. NRD's November 2010 Application was assessed against Rwanda's 2010 Mining Policy.[190] That policy stressed the need to assess critically and to evaluate applications to make sure that in the four-year contractual periods, effective exploration work had been undertaken, and the concessionaires were not simply conducting artisanal mining on the concessions.[191]

77. As Professor Nkanika Wa Rupiya explained, NRD knew when it made the November 2010 Application that it had not complied with its obligations under the Contract to carry out exploration or reserve estimation, to industrialise the Concessions, and to produce a sufficiently detailed feasibility report.[192] NRD accordingly knew that it had no prospect of being granted long-term licences as a result of the November 2010 Application, and was not even confident that its performance would lead Rwanda to grant it the short-term licences for which it had applied. As Mr Marshall accepted, Professor Nkanika Wa Rupiya was with NRD when the November 2010 Application was submitted to Rwanda, whereas he was not.[193]

78. NRD was informed by Rwanda that its November 2010 Application was unsatisfactory in August 2011 by a letter from Minister Kamanzi.[194] It is plain from the terms of the letter that Rwanda understood the November 2010 Application to be for an extension of five-year licences for small mines within each of the Concessions. When this was put to Mr Marshall in cross-examination, Mr Marshall suggested, unconvincingly, that the five-year extension referred to in the letter was a "*mistake*" or a "*misrepresentation*".[195] Contrary to what the Claimants assert in their PHB,[196] there is nothing in this letter that supports any interpretation that NRD had applied for long-term licences or that the extension granted was for the purposes of negotiating long-term licences.

79. The Claimants have asserted that the November 2010 Application was sufficient and that this was "*confirmed by numerous letters and communications between Claimants and*

[190] Rwanda, MINIFOM, *Mining Policy* (13 January 2010) (**C-015**).

[191] See also SA, at para. 19.

[192] Nkanika Wa Rupiya 1, at paras. 18-21.

[193] Day 2, p70/11 – p74/3 (Marshall).

[194] Letter from Minister Kamanzi to NRD (2 August 2011) (**C-062**).

[195] Day 2, p67/6-13 (Marshall).

[196] PHB, at para. 18.

Respondent".[197] This is not so. During cross-examination, Mr Marshall could not identify any documents in which Rwanda confirmed the sufficiency of the November 2010 Application.[198]

80. The Claimants also assert that Rwanda prepared a draft contract for long-term licences on the basis of the November 2010 Application. This is not correct. The 2011 draft contract that Mr Marshall himself prepared and sent to Mr Bidega is quite clearly a draft contract for five-year small mine licences, consistent with Article 45 of the 2008 Law, and not for long-term licences.[199] Although the Claimants have asserted that this draft contract was approved by Mr Imena and submitted to Cabinet, there is no evidence that supports this claim. Indeed, Mr Marshall's claim (advanced for the first-time during cross-examination) that by November 2011 Rwanda had "*reached agreement on the languages of both the BVG long-term licence and the NRD long-term licence*"[200] is entirely untenable on the face of the evidence. It is clear that the five-year extension NRD had applied for had been denied three months earlier, and that in November 2011 Rwanda wrote to BVG in relation to the expiry of its licence at Bisesero and advising that it had to close all mining activities with immediate effect.[201]

81. In any event, Mr Bidega's exchanges with Mr Marshall regarding the draft licences do not assist their case. Mr Bidega explained during evidence-in-chief that, contrary to the Claimants' earlier submission,[202] the correspondence regarding the draft licences at **C-207** began after he had, in practice, finished working for the Rwanda Geology and Mines Authority ("**OGMR**").[203] Accordingly, there can be no doubt that Mr Bidega considered himself to be, and was, assisting the Claimants in a personal capacity, after being demoted from his role at the OGMR, a matter which he was dissatisfied about, shortly before commencing employment with NRD.[204] He was not dealing with NRD in his capacity as

[197] Reply, at para. 65.

[198] Day 2, p158/1 – p159/20 (Marshall).

[199] Rejoinder, at paras. 173-174 and 335.

[200] Day 2, p186/15-21 (Marshall).

[201] Letter from Minister Kamanzi to BVG (22 November 2011) (**R-211**).

[202] Day 1, p40/23 – p41/20 (Claimants' Opening).

[203] Day 5, p31/19 – p32/3 (Bidega).

[204] See the letter from Mr Bidega to the Director General of RNRA (12 December 2011) (**R-247**), in which Mr Bidega explains his dissatisfaction with having been demoted from 8 September 2011 from his position as the Coordinator of the Regulation and Inspection Unit of the OGMR; See also Day 6, p81/12 – p82/6 (Imena), in

a representative of Rwanda. This is fatal to the Claimants' case in this regard. Further, Mr Bidega's oral testimony entirely undermined his written witness statement, including his assertion that the contract had been submitted to Cabinet, all of which was predicated on the version of events given earlier in his statement which he had disavowed in his oral testimony.

82. In October 2011, Minister Kamanzi wrote to NRD advising it of "*very serious shortcomings regarding the contractual obligations of NRD*" at Rutsiro, including "*severe environmental degradation and security issues.*"[205] The letter highlighted NRD's failure to comply with its business plan that formed the basis of the Contract, Rwandan law, and international mining standards. The letter gave NRD two months to rectify the violations, failing which all the mines at Rutsiro would be closed and the licence governing the concession terminated.[206]

83. In December 2011, Dr Biryabarema told NRD that they should apply for short-term licences for only two of the Concessions.[207] The view was repeated internally within the Geology and Mines Department ("**GMD**") (by Mr Imena who was then a geologist but who later became Minister) who concluded in May 2012 after a review of NRD's operations that NRD had "*failed in its contractual obligations and hasn't demonstrated enough managerial, financial and technical competence*" but that "*we should allow them to select one or two areas within the five and request them to prepare the relevant Financial and Technical plans that would be evaluated for eventual conditional licences*."[208]

84. NRD continued to insist—without having made any further applications and without any reasonable justification—on licences for all five Concessions.[209] At the same time, NRD began threatening, again without any reasonable basis but with clear implications for the

which Mr Imena explained that Mr Bidega was unhappy with his demotion, the new role involving a reduced salary and significant fieldwork which Mr Bidega was unable to perform due to his health condition.

[205] Letter from Minister Kamanzi to NRD (28 October 2011) (**C-040**).

[206] *Ibid*., (**C-040**).

[207] Letter from MINIRENA to NRD (26 January 2012) (**R-018**).

[208] Minister Imena's Evaluation of NRD Application (8 May 2012) (**R-040**).

[209] Letter from NRD to MINIRENA (30 January 2012) (**C-039**).

Tribunal's jurisdiction *ratione temporis* (as addressed in detail at section IV.A below), to commence an action against Rwanda under the BIT.[210]

H. The extension and expiry of the licences

85. NRD was notified by Minister Kamanzi in August 2011 that it had not complied with its obligations under the Contract.[211] Following that, there were no extant rights of any kind in respect of long-term licences arising from the Contract.[212]

86. NRD's licences expired in January 2011.[213] They were extended consensually until October 2012 to allow for further negotiations between NRD and Rwanda.[214] Those licence extensions did not extend the Contract, the rights and obligations under which had extinguished following Rwanda's negative evaluation of NRD's feasibility study.[215]

87. After October 2012, there were no further licence extensions; although Rwanda did, as a matter of indulgence, make temporary allowances for NRD to remain on the Concessions while they applied for new licences.[216] After its licences expired, NRD had no formal right to be present at, or to exploit, the Concessions.[217]

88. None of these extensions or allowances ever confirmed any right or expectation to long-term licences or involved any assurances.[218] The Claimants' contention otherwise—that Rwanda "*granted an extension of NRD licenses in order to negotiate the terms of the long term license*"—is not tenable on the face of the plain words of Minister Kamanzi's August 2011 letter.[219] Mr Marshall's only explanation appeared to be that he was receiving assurances from his contacts in the Rwandan military that licences would be granted. As addressed above at paragraphs 45-48, there was no evidence corroborating these new

[210] *Ibid*., (**C-039**).

[211] As set out at para. 78 above; Letter from MINIRENA to NRD (2 August 2011) (**C-062**).

[212] Mugisha 1, at para. 11.

[213] Letters from the Minister of State for Water and Mines to NRD (29 January 2007) regarding Giciye (**C-018**), Mara (**C-019**), Nemba (**C-020**), Rutsiro (**C-021**), and Sebeya (**C-022**).

[214] Counter-Memorial, at paras. 122-132; Rejoinder, at paras. 118-124.

[215] Mugisha 1, at para. 18; Mugisha 2, at paras. 8-11.

[216] Counter-Memorial, at para. 266; Rejoinder, at para. 124.

[217] Mugisha 2, at para. 15.

[218] Rejoinder, at paras. 180-181,754-755, 759-760, and 778.

[219] PHB, at para. 18, citing Letter from Minister Kamanzi to NRD (2 August 2011) (**C-062**).

assertions, and in any event even were that the case it harms rather than helps the Claimants' case.

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

89. On 30 January 2013, NRD made its first purported application for long-term licences (the "**2013 Application**").[220] The 2013 Application was a perfunctory document which fell a long way short of what was required, and NRD could not have had any reasonable expectation of being granted long-term licences based on this application.

90. Mr Imena's evidence—which was not challenged by the Claimants during cross-examination—is that the 2013 Application "*contained very little detail and much of it appeared to have been copied and pasted from the November 2010 Report. There was no proper analysis or supporting documentation with it at all.*"[221] Similarly, Dr Biryabarema's evidence—which again, was not challenged—was that the application "*was entirely inadequate*" and that it "*contained none of the detail that would have been required even for short term licences, let alone the 30 year licences now being requested.*"[222]

91. When it was put to Mr Marshall during cross-examination that the 2013 Application failed to identify any new material investment or exploration since the November 2010 Application, Mr Marshall avoided the question.[223] He also could not explain why the application omitted production figures for 2012—the obvious inference being that it was a deliberate decision based on the low values that year, which would have highlighted NRD's failure to industrialise the Concessions.[224]

92. Mr Marshall also invented a new claim that the content of the 2013 Application was dictated by Rwanda. He stated that he met with the OGMR who requested that NRD prepare a "*high level … summary of a number of items, and send it to us now*".[225] Further, Mr Marshall suggested that NRD's submitted plans for reserve calculations for 2013 to

[220] Letter from NRD to MINIRENA (30 January 2013) (**C-054**); Counter-Memorial, at para. 135; Imena 1, at para. 23.

[221] Imena 1, at para. 23.

[222] Counter-Memorial, at para. 136; SA, at para. 33; Biryabarema 1, at para. 15.

[223] Day 3, p52/17 – p53/3 (Marshall).

[224] Day 3, p58/14-20 (Marshall); Rejoinder, at para. 140.

[225] Day 3, p48/14 – p49/25 (Marshall); See also Day 3, p53/16-23 (Marshall).

2018 were provided by MINIRENA.[226] These claims are baseless: they are not pleaded, were not made in any of Mr Marshall's witness statements, and there is no evidence whatsoever to suggest they are true.

93. Mr Marshall has alleged that the draft contract attached to the 2013 Application had been agreed with Rwanda.[227] As Mr Imena explained, this is not correct.[228] The draft was not prepared by Rwanda, and in fact Rwanda never reached the point of discussing contractual terms with NRD.[229] Mr Marshall's claim that Mr Imena's statement was "*entirely made up for the purposes of this Arbitration*" is not credible.[230] Nor can it be true, as Mr Marshall alleges, that NRD "*negotiated in good faith with Dominique Bidega and his staff*"[231] as Mr Bidega's testimony was that he considered he was no longer working for the OGMR at the time of his discussions with Mr Marshall.[232] Further, Mr Marshall's account of the chronology is illogical: had Minister Kamanzi already approved the contract and submitted it to Cabinet with a positive recommendation, as he alleges, there would have been no point in NRD submitting the 2013 Application at all.[233]

94. In April 2013, Rwanda invited NRD to apply for a small-scale licence for Nemba, the only site at which NRD had achieved any significant production.[234] Mr Marshall suggested that NRD "*took it* [the letter] *as an invitation to come and negotiate a long-term concession licence*".[235] That is not a reasonable interpretation of the letter, and is yet another example of the Claimants ignoring the plain words of documents (and premising their case on an untenable reading). NRD declined Rwanda's invitation, and continued to

[226] Day 3, p54/3 – p56/23 (Marshall).

[227] Marshall 1, at para. 36; Letter from NRD to Minister Kamanzi (30 January 2013) (**C-054**); Draft Amendment of Contract between the Government of Rwanda and NRD (**C-042**).

[228] Imena 1, at para. 22.

[229] Imena 1, at para. 22.

[230] Day 3, p64/17-18 (Marshall).

[231] Day 3, p64/18 – p65/2 (Marshall).

[232] See paras. 80-81 above, and the references cited therein.

[233] See Day 3, p64/17 – p67/9 (Marshall).

[234] Counter-Memorial, at para. 139; SA, at para. 34; Letter from the RDB to NRD (2 April 2013) (**C-057**).

[235] Day 3, p77/24 – p78/21 (Marshall).

insist, without any proper basis, on receiving long-term licences in respect of all five Concessions.[236]

95. In October 2013, Mr Imena met with Mr Marshall and explained that to have any chance of obtaining new licences, NRD had to make proper applications, as NRD's continued occupation of the Concessions without extant licences could not continue.[237] Again, Mr Marshall was advised that NRD should focus resources on two concessions: Nemba and Rutsiro.[238] A further meeting between NRD and MINIRENA took place on 8 November 2013, at which MINIRENA again communicated that Rwanda was willing to negotiate licences for Nemba and Rutsiro with NRD.[239] It is clear from the minutes of these meetings that Mr Marshall's claim that Rwanda never suggested NRD only apply for two of the concessions is simply untrue.[240]

96. NRD ignored Rwanda's advice and made no new applications until September 2014, as discussed below.

J. The invitation to re-apply for licences under the 2014 Law and assessment of NRD's re-application in 2014

97. On 30 June 2014, Rwandan Law No. 13/2014 on Mining and Quarry Operations came into force (the "**2014 Law**").[241]

98. Article 52 of the 2014 Law contained transitional provisions. These provisions did not apply in respect of NRD's licences. The first paragraph of Article 52 stated that any mineral licence or quarry permit granted under the 2008 Law shall remain in force until expiration of the period for which it was granted. It is common ground that NRD's licences were granted under the 1971 mining law[242] and Mr Rwamasirabo agreed that this

[236] Letter from NRD to the Legal Analyst – Strategic Investments Unit (9 April 2013) (**C-058**); Counter-Memorial, at para. 370.

[237] Imena 1, at para. 25.

[238] MINIRENA and NRD Meeting Minutes (30 October 2013) (**R-112**); Day 7, p63/23 – p64/5 (Imena); SA, at para. 35; Counter-Memorial, at paras. 141-142; Rejoinder, at para. 764; Imena 1, at para. 25; Imena 2, at paras. 27-28.

[239] Minutes of the Meeting between MINIRENA and NRD (8 November 2013) (**R-113**); Imena 2, at para. 29; Rejoinder, at para. 765.

[240] Day 3, p110/23 – p113/3 (Marshall).

[241] Rwanda Law No. 13/2014 on Mining and Quarry Operations (**CL-002**), at article 55.

[242] Day 8, p68/1-16 (Rwamasirabo); Rwandan Law of 27 April 1971 (**R-082**).

provision was therefore not applicable to NRD's licences.[243] Further, the provision was irrelevant to NRD as it no longer held any licences as at June 2014, these having expired in October 2012.

99. The second paragraph of Article 52 provided that no mineral or quarry licence granted prior to the 2014 Law shall be extended or renewed. This was subject to the proviso that where the licence provided for a right to apply for a renewal or extension of the licence, the holder may be granted, subject to the 2014 Law, a similar type of licence on a priority basis if it met the requirements. NRD's licences did not contain any rights of renewal or extension, [244] and accordingly the proviso in the second paragraph of Article 52 did not apply in respect of NRD's licences either. Mr Rwamasirabo rightly accepted this in cross-examination,[245] consistently with the evidence of Mr Mugisha.[246] Accordingly, even if (contrary to the Respondent's case) NRD could establish that it had been operating pursuant to existing licences at the time that the 2014 Law came into effect, it would still have had to re-apply under the new regime.

100. NRD was advised of its requirement to apply for new licences under the 2014 Law, and invited to do so, by letter from Mr Imena in April 2014.[247] Mr Marshall agreed that the letter did not specify that these applications would be for long-term licences.[248]

101. NRD ignored Rwanda's request. In August 2014, Mr Imena sent a follow-up letter asking NRD to make a new application for licences under the 2014 Law and gave NRD a deadline of 30 days to do so.[249] Mr Imena explained that the application would need to be made on a concession-by-concession basis. The letter attached a detailed list specifically identifying what NRD needed to supply with its application. Mr Marshall agreed that NRD was being asked to make an application under the new law, and that the annex to the letter set out what was required in respect of the application[250] (although he

[243] Day 8, p68/17 – p69/13 (Rwamasirabo).

[244] 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 (**C-018**), the Mara Concession (**C-019**), the Nemba Concession (**C-020**), the Rutsiro Concession (**C-021**), and the Sebeya Concession (**C-022**).

[245] Day 8, p69/7-23 (Rwamasirabo).

[246] Day 8, p93/8 – p94/9 (Mugisha).

[247] Letter from Minister Imena to NRD (2 April 2014) (**C-063**).

[248] Day 3, p115/15-22 (Marshall).

[249] Letter from Minister Imena to NRD (18 August 2014) (**C-064**).

[250] Day 3, p165/3 – p166/8 (Marshall).

subsequently suggested, implausibly and for the first time, that NRD had been told by Mr Imena's office that the requirements did not apply to NRD since its application was a "*formality*").[251]

102. On 18 September 2014, following Mr Imena's request, NRD made an application for long-term licences under the 2014 Law ("**September 2014 Re-Application**").[252] NRD wrongly claimed that it was entitled to long-term licences on the basis of the Contract and that it had invested $20 million in the Concessions. NRD ignored the request to apply on a concession-by-concession basis, with Mr Marshall again wrongly claiming in his oral testimony that Mr Imena's request to do so did not apply to NRD.[253]

103. The September 2014 Re-Application was merely another reworking of the November 2010 Application. NRD declined to provide much of the material that had been specifically requested by Rwanda. The application was accompanied by a 90-page feasibility study from which it was clear that no material investment in infrastructure or additional exploratory work had been carried out since the November 2010 Application, which NRD knew (and had already been told) was inadequate even for the five-year extension then being sought.[254] Mr Marshall was not able to dispute this credibly when put to him during the hearing.[255] In respect of NRD's financial resources, the application only included a list of transactions which Mr Marshall's law firm had advised on, which Mr Marshall rightly accepted did not assist with establishing NRD's financial capability.[256]

104. Rwanda acted fairly and reasonably in its assessment of the September 2014 Re-Application. The application was evaluated objectively by the Licence Evaluation Team at MINIRENA which gave a sensible and rational recommendation to Mr Imena, with reasons why the application should be rejected.[257] Mr Marshall questioned whether the evaluation had been fabricated, despite this having never been previously suggested by

[251] Day 3, p168/11 – p169/23 (Marshall).

[252] Letter from NRD to Minister Imena (18 September 2014) (**C-084**).

[253] Day 3, p186/3-20 (Marshall).

[254] NRD Rwanda Feasibility Study Update 2010-2014 (**C-085**).

[255] Day 3, p187/6 – p188/22; p189/1 – p191/24 (Marshall).

[256] Selected Financial Transactions (**C-092**); Day 3, p198/21 – p199/11 (Marshall).

[257] License Evaluation Team Memorandum, NRD Re-Application (29 September 2014) (**R-020**).

the Claimants.[258] This allegation was not put to Mr Imena (or any of the Respondent's other witnesses), and there is manifestly no basis for it.

105. The Licence Evaluation Team found numerous deficiencies with the September 2014 Re-Application.[259] These included the fact that (a) NRD had failed to provide evidence of a recommendation from the Rwanda Environmental Management Authority ("**REMA**") and a tax clearance certificate (and nor could it have done, because NRD had had not been properly paying its taxes and owed significant unpaid debts to the RRA);[260] (b) the feasibility study had not satisfied the requirements for minimum investment commitments in relation to each concession; (c) information had not been submitted regarding minimum work commitments and (d) NRD had not satisfactorily shown its financial capability.[261]

106. As Mr Imena explained, the critical deficiencies in the application had nothing to do with whether certain documents could be obtained from NRD's offices, as the Claimants alleged had handicapped the application.[262] Rather, the key information required could readily have been acquired from third parties such as the RRA and REMA.[263] Mr Imena explained Rwanda's concern that NRD's claim that the required documents could not be obtained was little more than a ruse to delay the application process so that NRD could be given further time to obtain the information needed for its application, even though Rwanda was under no obligation to do so.[264] Mr Marshall again made up a new explanation suggesting that the authorities from which the relevant information could have been acquired refused to deal with NRD.[265] In reality, the critical deficiencies in NRD's application were entirely its own doing: its operations were so inadequate that it was not in a position to provide compliant material.

107. NRD was informed by letter dated 28 October 2014 that a decision had been made not to grant it mining licences and that it had seven days to file an appeal (despite there being

[258] Day 3, p203/9-16 (Marshall).

[259] License Evaluation Team Memorandum, NRD Re-Application (29 September 2014) (**R-020**), at pages 3-6.

[260] *Ibid*., (**R-020**), at page 3.

[261] *Ibid*., (**R-020**), at page 5; Day 3, p202/3 – p208/8 (Marshall).

[262] Day 7, p112/4-24 (Imena).

[263] Day 7, p112/4-24 (Imena).

[264] Day 7, p112/22 – p113/12 (Imena).

[265] Day 3, p209/4-25 (Marshall).

no requirement for NRD to be given a right to appeal).[266] NRD's appeal was filed on 1 November 2014, in which it repeated its unsupported and incorrect claims that it had invested $20 million and that it was entitled to long-term licences under the Contract.[267]

108. On 12 November 2014, Mr Imena replied advising that NRD's reliance on the Contract was misplaced.[268] Mr Imena provided NRD with a list of outstanding documentation, thereby allowing NRD a further opportunity to improve its application (as Mr Marshall accepted).[269]

109. However, in its response NRD yet again failed to provide all the required information.[270] Its application was accordingly rejected as inadequate for failing to provide documents proving NRD's capability to develop the Concessions and in materially omitting detailed plans for the periods of the licences being applied for. NRD was advised of this outcome by Mr Imena by letter dated 17 December 2014.[271] Mr Imena again provided NRD with a list of outstanding information to be submitted by no later than 16 January 2015. This was again a transparent and fair approach which identified gaps in the material provided by NRD, and which generously gave it a third opportunity to remedy the deficiencies in its application.

110. On 16 January 2015, NRD replied providing a small amount of further information. It asserted—without any documentary corroboration or particularisation—that it was able to raise $2 million including from the Dutch government and had firm financial commitments from internationally recognised entities.[272] It also claimed that it was not able to obtain tax clearance until it had been granted mining licences.

111. Rwanda assessed NRD's updated application shortly afterwards. Both the Licence Evaluation Team and Dr Biryabarema found that NRD's application remained inadequate.[273] Mr Marshall was not able to dispute in cross-examination their conclusions

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[266] Letter from Minister Imena to NRD (28 October 2014) (**R-022**).

[267] Letter from NRD to Minister Imena (1 November 2014) (**C-086**).

[268] Letter from Minister Imena to NRD (12 November 2014) (**C-087**).

[269] *Ibid*., (**C-087**); Day 3, p251/1-16 (Marshall).

[270] Letter from NRD to Minister Imena (25 November 2014) (**C-088**).

[271] Letter from Minister Imena to NRD (17 December 2014) (**C-095**).

[272] Letter from NRD to Minister Imena (16 January 2015) (**C-096**).

[273] Technical Team NRD Assessment Report (20 January 2015) (**R-023**); Dr Biryabarema, NRD Assessment report (February 2015) (**R-024**).

that NRD had failed to meet the requirements, including in relation to providing further material regarding NRD's financial viability and its failure to submit detailed work and business plans for each of the Concessions as requested.[274]

112. It is clear from each of the evaluations that NRD's applications were reviewed fairly and transparently as part of a robust process. Mr Marshall's suggestion that Rwanda had retained British counsel to assist with the fabrication of Dr Biryabarema's report[275] speaks only to the desperate nature of the Claimants' case, which fails on any reasonable reading of the documentary record. This allegation, like other fantastical claims made by Mr Marshall, was not put to Dr Biryabarema (or any of the Respondent's witnesses). In fact, as with Dr Biryabarema's evaluations of NRD's earlier applications, Dr Biryabarema was not challenged at all on the conclusions of his 2015 evaluation of NRD's application.

113. Mr Imena confirmed in his letter to NRD dated 19 May 2015 that NRD's application did not meet the requirements of the 2014 Law and had been rejected. The letter observed that NRD had now been given three opportunities to provide a complete application, and that Rwanda was now notifying NRD that it would not be granted mining licences for any of the Concessions.[276]

K. The alleged handover process

114. Once NRD's licence applications had been declined, it was entirely right that NRD should leave the Concessions given that they had no contractual or other right to occupy or exploit them. It was also entirely appropriate at this point for the Concessions to be put out to tender by Rwanda.

115. The Claimants wrongly assert that a formal handover process was required under Rwandan law. The Claimants rely on the evidence of Mr Rwamasirabo in this respect, who claims that this is a mandatory process that should have taken up to a year.[277] Mr Rwamasirabo alleged that this process should have included detailed negotiations concerning investment compensation, taxes, employee severance, and the sale of mining equipment; and that institutions such as the RDB and the Ministries of Social Security, Labour, Tax, and the Environment were required to contact NRD to discuss the timetable for the pending handover and to settle any outstanding issues. Mr Rwamasirabo claimed

[274] Day 3, p264/10 – p272/11 (Marshall).

[275] Day 3, p271/18 – p272/11 (Marshall).

[276] Letter from Minister Imena to NRD (19 May 2015) (**C-038**).

[277] Rwamasirabo 2, at para. 5.

that a handover of the Concessions would not have taken place under Rwandan law unless Rwanda had performed the alleged process.[278]

116. Mr Rwamasirabo's theory was wrong. Mr Rwamasirabo cited only two provisions of the 2014 Law in support of his assertions as to the handover process, but they do not assist.[279] The provisions do not mandate any handover process, and as he rightly accepted in cross-examination, do not impose any obligations on Rwanda at all.[280] Rwanda clearly cannot breach obligations that do not exist. Mr Rwamasirabo's reliance on Article 6 of the Rwandan 2015 law on investment protection was equally misplaced: as he conceded in cross-examination, this Article does contain any provision relating to the handover of a mining concession.[281]

117. Ultimately, Mr Rwamasirabo accepted, consistently with the evidence of Mr Mugisha[282] and Mr Gatare,[283] that the handover process which he set out in his second witness statement does not exist under Rwandan law.[284] As Mr Gatare explained, there is no formal event that concludes the relationship with a concession holder.[285]

118. Accordingly, on 19 May 2015, Mr Imena wrote to NRD requesting it to hand over the Concessions and to proceed to close the operations and settle all outstanding charges and taxes within 60 days.[286] Nothing further was required under Rwandan law. Mr Imena's evidence[287] that he met with Mr Marshall and Ms Mruskovicova on numerous occasions to explain why the long-term licences had not been granted and that they refused to close down mining activities at the Concessions was not squarely challenged.[288]

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[278] Rwamasirabo 2, at paras. 5-8.

[279] Rwanda Law No. 13/2014 on Mining and Quarry Operations (**CL-002**), at Articles 26 and 27; Rwamasirabo 2, at paras. 3-12.

[280] Day 8, p81/19-21 (Rwamasirabo).

[281] Day 8, p81/22 – p82/6 (Rwamasirabo).

[282] Day 8, p95/25 – p96/15 (Mugisha); Mugisha 2, at para. 54.

[283] Day 8, p28/6-22 (Gatare).

[284] Day 8, p82/20-25 (Rwamasirabo), by reference to Rwanda Law No. 06/2015 Relating to Investment Promotion and Facilitation (**CL-045**).

[285] Day 8, p27/8-15, p28/6-22, p29/3-7 (Gatare).

[286] Letter from Minister Imena to NRD (19 May 2015) (**C-038**).

[287] Imena 2, at para. 44.2.

[288] It was only put to Mr Imena that he stopped communicating with NRD in 2015 after informing NRD that its application had been denied: Day 7, p128/14-25 (Imena).

119. Further, on 12 June 2015, Mr 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 governing the Concessions.[289] Mr Imena explained that NRD did not comply with that process.[290] Mr Marshall claims that NRD did not receive this letter and received no subsequent communications from Rwanda, and accordingly that NRD thought they could remain in occupation of the Concessions on the basis that no handover process had taken place.[291] This is not credible: the letter was sent to the same address as every other letter sent from Rwanda to NRD, including Mr Imena's 19 May 2015 letter which the Claimants acknowledged they have received.[292] The Claimants' suggestion (for the first time in their PHB) that they received a call from Rwanda when Mr Imena's 19 May 2015 letter was sent to check that it was received, but that they did not receive such a call in relation to the 12 June 2015 letter, is unsubstantiated and should be dismissed.[293]

120. In her first witness statement, Ms Mruskovicova makes far-fetched and unsupported statements about what allegedly happened following Mr Imena's 19 May 2015 letter, including the implausible claim that she met with 20 different offices and organisations to seek assistance. She also alleged that she had met various times with the Deputy Commander of the Police Criminal Investigations Division ("**CID**") and that at one of the meetings she was given a warning that Mr Marshall had angered some dangerous people and his life was in danger.[294] This uncorroborated allegation was enlarged and distorted in the PHB which alleged that Rwanda made threats against Mr Marshall's life.[295] This is false. Indeed, Ms Mruskovicova's account in her oral testimony did not suggest that Mr Marshall's life had been threatened, and was further inconsistent with the story given by Mr Marshall[296] (who had relied on what he had been told by Ms Mruskovicova).[297] In any

[289] Letter from Minister Imena to NRD (12 June 2015) (**R-025**).

[290] *Ibid*., (**R-025**); Day 7, p128/14-25 (Imena).

[291] Day 4, p27/14-25 (Marshall).

[292] Rejoinder, at para. 775; see also explanation by Mr Imena on Day 7, p129/4-15 (Imena).

[293] PHB, at para. 30. The suggestion made by Claimants' counsel to Mr Imena that NRD would not have received the letter because they were not operating the Concessions at the time is also nonsensical. As Mr Imena explained, and as is clear from the letter itself, it was sent to NRD's P.O. Box (where all other correspondence had been sent) and not to the Concessions themselves: see the letter from Minister Imena to NRD (12 June 2015) (**R-025**) and Day 7, p129/1-15 (Imena).

[294] Day 4, p177/13 – p178/23 (Mruskovicova); Marshall 1, at para. 69; Mruskovicova 1, at para. 25.

[295] PHB, at paras. 11, 44.

[296] Day 4, p30/15-22 (Marshall).

[297] Day 4, p176/8-25 (Mruskovicova).

event, this inappropriate allegation is not relied on as a breach of the BIT or even a pleaded fact, and is therefore irrelevant and should never have been made. These alleged threats are also hard to reconcile with Ms Mruskovicova's decision to remain working in Rwanda after this time.[298]

L. The tender and status of the Concessions

121. In 2016, the Concessions were put to tender, and the winning tenders chosen following a public process. The documentary evidence clearly evidences the tender process, which was conducted by Rwanda, and that the Concessions are now in the hands of private operators.[299] The Claimants' assertion that the tender process was conducted inappropriately, or as a means to transfer the Concessions to government-owned entities, is entirely unfounded.[300] Similarly, Ms Mruskovicova's denial of the public tender process is wholly contradicted by the documentary evidence.[301]

122. The Claimants rely on the witness statement of Mr Barthelemy to suggest impropriety on the part of Rwanda in relation to the tender process.[302] These allegations are unsustainable. During his cross-examination, Mr Barthelemy accepted that there was a public tender process, with criteria set out in the bidding documents, and that these were evaluated by an evaluation committee which selected the winning bids.[303] He also accepted (contrary to the claims in his and Mr Marshall's witness statements)[304] that there was no tender from any company represented by him or Mr Marshall.[305]

123. The Claimants had alleged that the winning tenderer of NRD's former concessions was Ngali Mining ("**Ngali**"), being a company organised under the Ministry of Defence. That is false. In cross-examination, Mr Buyskes resiled from his understanding set out in his first witness statement that the Concessions had been given to Ngali,[306] and said that in

[298] Mruskovicova 1, at para. 2; Day 4, p147/1-25 (Mruskovicova).

[299] See, e.g., Letter from Minister Imena to the Prime Minister (19 September 2016) (**R-035**) and MINIRENA, Evaluation Report (24 May 2016) (**R-133**). The full documentary evidence in relation to the tender process is set out in the Rejoinder, at paras. 271-277. See also Imena 1, at para. 46.

[300] Memorial, at paras. 120, 250, 270 and 272; Marshall 1, at para. 71; Mruskovicova 1, at paras. 26-27.

[301] Day 4, p171/23 – p173/25 (Mruskovicova).

[302] Barthelemy 1, at paras. 15-20.

[303] Day 5, p21/11 – p24/3 (Barthelemy).

[304] Barthelemy 1, at para. 19; Marshall 1, at para. 70.

[305] Day 5, p22/3-12 (Barthelemy).

[306] Buyskes 1, at para. 19.

fact he had no idea who now held the Concessions.[307] Ms Mruskovicova also admitted in cross-examination that, contrary to her witness statement,[308] she had not investigated whether Ngali held any of the Concessions.[309]

124. Mr Kayihura, who had given evidence that the assertions that Ngali operated NRD's former Concessions were untrue, was not cross-examined by the Claimants' counsel.[310] Mr Imena was not challenged about his evidence in relation to the tender process, nor his evidence that the new licence holders were not government-owned and that none have a connection with the Ministry of Defence.[311]

125. In their PHB, the Claimants made a new allegation that the Concessions were "*transferred to a Rwandan investor with close ties to the government*".[312] This allegation was not pleaded, and it is not supported by any evidence. No particulars have been given, nor any explanation as to how this relates to the public tender process that took place. This allegation was again not put to any of the Respondent's witnesses and seems to be a transparent attempt by the Claimants to resile from their earlier, patently wrong, position.

M. Alleged violation of due process rights

126. The Claimants made various allegations, based on the evidence of Mr Rwamasirabo, that Rwanda violated NRD's due process rights under Rwandan law. These included allegedly: (a) failing to evaluate the feasibility study submitted in 2010, (b) failing to hold negotiations with NRD, (c) requesting NRD to submit documents and technical information which were not available, and (d) failing to meet or communicate with NRD.[313]

127. However, in what was a recurrent theme of his evidence, Mr Rwamasirabo failed to cite any provisions of Rwandan law in any of his three witness statements in support of his assertions in respect of due process.[314] Mr Mugisha's evidence[315] (which was

[307] Day 4, p131/14 – p132/13 (Buyskes).

[308] Mruskovicova 1, at para. 27.

[309] Day 4, p173/23 – p175/1 (Mruskovicova).

[310] Kayihura 1, at paras. 7, 9 and 10.

[311] Imena 1, at para. 46.

[312] PHB, at paras. 11 and 43.

[313] Rwamasirabo 1, at paras. 9-12; Rwamasirabo 3, at paras. 21-24.

[314] Day 8, p55/19-22, p56/25 – p57/3 (Rwamasirabo).

[315] Mugisha 1, at paras. 53-56; Day 8, p92/18 – p93/6 (Mugisha).

unchallenged by Mr Rwamasirabo in his second and third witness statements or by the Claimants' counsel during cross-examination)[316] was that the alleged rights do not exist as a matter of Rwandan law.

128. Accordingly, the Claimants failed to establish that the due process rights that they alleged even existed as a matter of Rwandan law, let alone that Rwanda had breached them. Further, the allegations were based on the factual assertions of Mr Rwamasirabo, who accepted that he had no direct knowledge of the facts of the case, and who had based his conclusions on an incomplete review of the available evidence that omitted key documents.[317]

N. NRD's disputes with Mr Benzinge

129. On around 2 August 2012, Mr Benzinge persuaded staff at the RDB, which administers public company registration, that he should be registered as NRD's Managing Director, rather than Mr Marshall or Ms Mruskovicova.[318] On 3 August 2012, Mr Marshall complained to the RDB that Mr Benzinge had misinformed the RDB and he requested that the company information be changed back.[319] In his oral testimony, Mr Marshall initially claimed—for the first time—that Mr Benzinge had physically threatened staff at the RDB. When he was told that these allegations did not feature in his contemporaneous correspondence, he appeared to resile from that version of events.[320]

130. The matter was taken up by the RDB, who dealt with it promptly and professionally. Within three days, on 6 August 2012, Mr Benzinge had been suspended from acting as director while the RDB investigated Mr Marshall's complaints.[321] The RDB also updated the registration information to reflect Mr Benzinge's removal and the suspension of the position.[322] On 7 August 2012, the RDB wrote again to NRD stating that the existing

[316] Day 8, p55/23 – p58/22 (Rwamasirabo).

[317] For example, Mr Rwamasirabo's assertions in Rwamasirabo 3, at paras. 21-24 did not refer to the 2011 NRD Assessment Report (**R-111)**, the letter from Minister Kamanzi to NRD (26 January 2012) (**R-018)**, or the letter from RDB to NRD (2 April 2013) (**C-057)**, which were highly material to the conclusions asserted by him. Day 8, p64/6 – p66/9 (Rwamasirabo).

[318] RDB Certificate of domestic company registration for NRD (2 August 2012) (**R-026**).

[319] Letter from NRD to RDB (3 August 2012) (**R-231**); Day 2, p253/20 – p254/7 (Marshall).

[320] Day 2, p253/2 – p256/26; Day 3, p12/13 – p15/13 (Marshall).

[321] Letter from RDB to NRD (6 August 2012) (**C-146**).

[322] RDB Full Registration information for NRD (6 August 2012) (**R-027**).

issues would be resolved,[323] and sent a further letter on the same date to the Mayor of the Bugesera District confirming that Mr Marshall was the Managing Director and requesting that the company's property be transferred to him.[324]

131. During cross-examination, Mr Marshall agreed that within five days of his initial complaint, the RDB had responded to his representations and, that they had taken steps to ensure company property and access was returned to him (save that Mr Marshall claimed that there was some further delay in respect of accessing the company's bank accounts).[325] The evidence plainly shows that the RDB acted honestly, impartially and fairly, and Mr Marshall appeared to accept in cross-examination that they had acted fairly and reasonably.[326]

132. At the time these events took place, Mr Marshall accepted that the RDB personnel who were initially persuaded by Mr Benzinge to change the registered information had been misled and were not in any way collusive or acting in bad faith.[327] However, when it was put to him in cross-examination that he had made no complaint about the way that the RDB had handled the situation contemporaneously, Mr Marshall's evidence shifted. Contrary to the position adopted in the Claimants' Counter-Memorial on Preliminary Objections ("**CMPO**") (where no such allegation was made),[328] Mr Marshall suggested for the first time that Mr Benzinge was acting in collusion with the RDB.[329] This was another example of Mr Marshall making things up in cross-examination when faced with contradictions between the documentary evidence and the Claimants' pleaded case.

133. Mr Benzinge subsequently brought arbitration proceedings against NRD. Mr Benzinge's claims were determined in his favour following a hearing on the merits. The arbitrator found that the appointment of Ms Mruskovicova and Mr Marshall was unlawful and that they were not the lawful directors, and that the transfer of the shares to NRD Holding and HC Starck was illegal and null and void.[330] Mr Rwamasirabo and Mr Mugisha agreed that

[323] Letter from RDB to NRD (7 August 2012) (**R-114**).

[324] Letter from RDB to the Mayor of Bugesera District (7 August 2012) (**C-070**).

[325] Day 3, p20/22 – p21/5 (Marshall).

[326] Day 3, p17/7-10, p18/18 – p20/2 (Marshall).

[327] Letter from NRD to RDB (10 August 2012) (**C-048**).

[328] CMPO, at para. 35.

[329] Day 3, p21/14 – p24/12 (Marshall).

[330] *Ben Benzinge v NRD*, Decision of Arbitration Tribunal (17 May 2013) (**R-013**); Day 8, p71/9-16 (Rwamasirabo).

the consequences of the arbitral award were that the legal shareholders of NRD reverted to being Mr Benzinge and the Zarnacks, and that the board reverted to the composition it had prior to the appointment of Ms Mruskovicova and Mr Marshall (in which Mr Benzinge was a director of NRD).[331]

134. NRD appealed against the arbitral decision, but those appeals were rejected by the High Court and the Supreme Court. In the High Court, NRD sought the annulment of the decision on the (baseless) grounds that NRD had not been notified of the hearing.[332] This appeal was dismissed, and it was clear from the findings that NRD was involved in the arbitration at an early stage, including in various court hearings dealing with the constitution of a tribunal. The High Court found that NRD had been duly notified of the arbitration hearing, but chose not to attend.[333] Mr Marshall agreed that NRD had been aware of the arbitration from the outset and had participated in court proceedings relating to the constitution of the Tribunal, but had not attended the arbitration hearing.[334] The High Court held that "*... the company did not start any procedures opposing her appointment as provided for in the [arbitration] law*."[335]

135. NRD appealed to the Supreme Court. It alleged that the procedure and the articles of association of the company had not been complied with, and only one arbitrator had been appointed instead of three.[336] The Supreme Court rejected NRD's appeal.

136. In his evidence, Mr Rwamasirabo raised another alleged challenge to the award on the basis that the arbitrator had been subject to a conflict of interest and had failed to disclose her relationship with Mr Benzinge.[337] However, there was an established procedure for making such a challenge under the Rwandan arbitration law.[338] NRD never pursued the point or made any challenge at the time, and no allegations of bias were included in their

[331] Day 8, p71/17-23 (Rwamasirabo); Day 8, p94/11 – p95/23 (Mugisha).

[332] *NRD v Ben Benzinge*, Decision of the Commercial High Court (23 September 2013) (**R-014**), at para. 10.

[333] *Ibid*., (**R-014**).

[334] Day 3, p117/15 – p118/11 (Marshall).

[335] *NRD v Ben Benzinge*, Decision of the Commercial High Court (23 September 2013) (**R-014**), at para. 17.

[336] *NRD v Ben Benzinge*, Decision of the Supreme Court (2 May 2014) (**R-015**), at para. 14.

[337] Rwamasirabo 3, at para. 42.

[338] Law No. 005/2008 on Arbitration and Conciliation in Commercial Matters (**RM-002**), at page 20.

appeals. Mr Marshall was not able to suggest otherwise, and he accepted that the courts had affirmed the award.[339]

137. In any event, the actions of Mr Benzinge were as a private individual (and not of or attributable in any way to the RDB or any other state body) and the Claimants have not adduced any evidence to the contrary.[340] Accordingly, the actions of Mr Benzinge cannot conceivably ground a claim in this arbitration.

O. Enforcement of judgments against NRD

138. Mr Nsengiyuma was involved in executing several judgments against NRD. As he confirmed in his testimony, these initially included an unfair dismissal claim on behalf of Mr Pascal Rwakirenga, Mr Benzinge's judgment, and judgments arising from claims against NRD brought by up to 28 employees.[341] Mr Marshall accepted that Mr Nsengiyuma had been initially instructed to enforce a judgment debt for a salary claim on the part of a former employee, and then subsequently in respect of the further employee claims.[342] Ms Mruskovicova also accepted in her testimony that Mr Nsengiyuma was "*probably*" enforcing judgment debts from employees.[343]

139. Mr Nsengiyuma was an experienced professional bailiff. At all material times, he executed his duties lawfully and in good faith, and acted entirely within his authority as a professional bailiff. This is clear from the July 2014 auction he proposed to conduct to satisfy the claims of the NRD employees and a claim from the RRA, of which he properly gave notice to Mr Marshall, Mr Mruskovicova and Mr Benzinge.[344] Mr Marshall's response when questioned about this was his default: he made new (unfounded) allegations that the document was fabricated for the purposes of this arbitration[345] and that NRD had never received any notice of the judgments.[346] Ms Mruskovicova accepted

[339] Day 3, p124/7-25, p126/2-17 (Marshall).

[340] Counter-Memorial, at paras. 310-315.

[341] Day 6, p35/20 – p36/2, p38/6-8, p50/23, p51/23, p53/4-5 (Nsengiyuma).

[342] Day 3, p145/13-17, p149/22 – p150/13 (Marshall).

[343] Day 4, p157/4-6 (Mruskovicova).

[344] Letter from Mr Nsengiyuma to NRD (9 July 2014) (**R-074**).

[345] Day 3, p151/14 – p152/24 (Marshall).

[346] Day 3, p162/7-15; p231/9-11 (Marshall).

that NRD knew there were multiple judgments but claimed, unconvincingly, that Mr Nsengiyuma had shown NRD only one of them.[347]

140. Mr Nsengiyuma confirmed that he had provided copies of the judgments to NRD, which were annexed to letters he had delivered to NRD's office. These were handed to Barbara, NRD's secretary.[348] Mr Nsengiyuma explained that he was lawfully executing the judgments and that Mr Marshall had taken him to court at least ten times and never won.[349] Further, Mr Nsengiyuma had conducted the auction of minerals in execution of the judgment debts and provided a report to NRD, after which he had been summoned numerous times to the police station to justify his actions as a result of Mr Marshall's complaints.[350] Mr Nsengiyuma also explained he had seized minerals and equipment at NRD's offices, and secured the offices, in June 2014 because judgment debts had not been paid.[351]

141. In August 2014, following Mr Marshall's complaints[352] and having initially suspended Mr Nsengiyuma's activities,[353] the Ministry of Justice investigated the situation. It found that NRD had legitimate judgment creditors who needed to be paid, and that Mr Nsengiyuma was entitled to execute on their judgments.[354]

142. In any event, Mr Nsengiyuma's actions cannot be attributed to the Respondent.[355] As Mr Nsengiyuma explained, a bailiff in Rwanda is independent: they are not acting upon an order of the Rwandan court but rather are instructed by, contract with, and report to the judgment creditor.[356] So, as with the allegations about Mr Benzinge, the complaints made about Mr Nsengiyuma would go nowhere even were they to have any substance (which they do not).

[347] Day 4, p158/13-16 (Mruskovicova).

[348] Day 6, p30/17-25; p40/25 – p44/19; p59/3-7; p79/17 – p80/5 (Nsengiyuma).

[349] Day 6, p44/20 – p45/3 (Nsengiyuma).

[350] Day 6, p46/11 – p48/12 (Nsengiyuma).

[351] Day 6, p59/10-23; p61/3-7 (Nsengiyuma).

[352] Letter from NRD to the Minister of Justice (14 July 2014) (**C-071**).

[353] Letter from the Minister of Justice to Mr Nsengiyuma (23 July 2014) (**C-072**); Day 6, p35/11-19 (Nsengiyuma).

[354] Letter from the Minister of Justice to Ms Mruskovicova, Mr Marshall and Mr Benzinge (August 2014) (**C-073**).

[355] Counter-Memorial, at para. 317.

[356] Day 6, p32/14-23, p33/4-24, p45/12-24 (Nsengiyuma).

P. The decision to withhold tags

143. Rwanda was entirely justified in refusing to issue tags to NRD in the summer of 2014. As Mr Imena explained, the first reason why NRD was barred from accessing tags was that it had no valid licences and had ignored Mr Imena's repeated requests to apply for them. In the circumstances, Rwanda's primary concern was to ensure that NRD regularised its status by applying for licences, and in fact NRD did do so following the decision to withhold tags.[357] Mr Niyonsaba, the manager of the International Tin Supply Chain Initiative ("**iTSCi**") in Rwanda, had given evidence that tags were only to be issued to licensed mining operators.[358] The Claimants did not cross-examine Mr Niyonsaba, and Mr Marshall accepted that NRD did not have a mining licence as their licences had expired.[359]

144. The second reason why NRD was denied tags was the ownership dispute. As Mr Imena explained, he was faced with competing claims from Mr Benzinge and from Mr Marshall as to their entitlement to represent NRD and receive tags.[360] Mr Benzinge was threatening proceedings if tags were issued to Mr Marshall, and had the benefit of the arbitration award and the judgments of the High Court and Supreme Court which supported his position; as discussed above, the effect of those decisions was that legal shareholders of NRD reverted to being Mr Benzinge and the Zarnacks, and the board reverted to the composition it had before the appointment of Ms Mruskovicova and Mr Marshall. On the other hand, Mr Marshall had presented a copy of the register from the RDB to say that he was the rightful owner.[361] This put the Ministry in a difficult position.[362]

145. Mr Imena explained that he had to take the ruling from the Supreme Court very seriously.[363] Mr Imena said that he advised Mr Benzinge that he was not going to get involved in the dispute and would grant tags to the rightful owner once NRD's shareholder dispute and licencing issues had been resolved.[364]

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[357] Day 7, p131/14-22, p136/23 – p138/25 (Imena).

[358] Niyonsaba 2, at para. 16.

[359] Day 3, p171/23 – p172/1 (Marshall).

[360] Day 7, p132/2-14 (Imena).

[361] Day 7, p134/2-7 (Imena).

[362] Imena 1, at para. 55.

[363] Day 7, p132/2-14 (Imena).

[364] Day 7, p132/2-14 (Imena); Day 7, p135/8-13 (Imena).

146. Although the Claimants allege Mr Imena's conduct was improper on the basis that the RDB records are determinative of shareholder ownership, this is not correct. The Claimants rely on Mr Rwamasirabo's witness evidence in this respect, but his conclusions are unsubstantiated as a matter of Rwandan law. Mr Rwamasirabo had relied solely on Article 22 of the Rwandan Companies Law,[365] but plainly on its face this provision does not support the proposition that the RDB's records are determinative.[366] Rather, as Mr Mugisha explained, Article 22 deals only with requirements in relation to company incorporation and does not address the question of what amounts to proof of ownership of the shares of the company.[367]

147. In the circumstances of NRD's refusal to apply for licences and the ongoing shareholder dispute, Mr Imena's decision to bar PACT from issuing tags was entirely reasonable. Mr Imena acted in good faith in the face of regulatory non-compliance and conflicting positions as to ownership, and he proceeded in a fair, careful and appropriate manner.

Q. <u>The allegations of Rwanda's involvement in smuggling</u>

148. The Claimants advanced a variety of assertions regarding Rwanda's alleged involvement or acceptance of smuggling. These were advanced in differing incoherent and conflicting formulations, which evolved during their written case. These allegations were baseless, irrelevant to the matters in issue, and wholly unsupported by evidence. Although similar allegations featured in the PHB,[368] the allegations were not put to any of the Respondent's witnesses,[369] and, accordingly, it appears that the Claimants belatedly (and rightly) abandoned them during the hearing. The Respondent should never have been burdened with these unnecessary and ill-founded allegations. They appear to have been advanced in the Claimants' written submissions as part of a misguided attempt to pressure the Respondent into settlement.

149. As Mr Gatare's unchallenged evidence confirms, Rwanda has, in fact, well observed and thorough processes in place for preventing smuggling. His oral testimony was that Rwanda had started to operate the iTSCi traceability programme in 2011 and had

[365] Day 8, p76/11 – p77/23 (Rwamasirabo).

[366] Day 8, p77/24 – p79/9 (Rwamasirabo).

[367] Mugisha 2, at paras. 47-50; Day 8, p111/8-11 and 17-20 (Mugisha).

[368] PHB, at paras. 12-13.

[369] Nor did the Claimants' witnesses testify to the "*widespread smuggling*" allegedly taking place in Rwanda as the PHB suggested they would: PHB, at para. 12.

established a very accurate network of data collection where each volume of minerals that is produced at mining sites is bagged and tagged with a unique tag.[370] Mr Gatare also explained that Rwanda had confidence in its monitoring processes with respect to export and import statistics, and its system that traces from the mine upwards to the point of export.[371]

150. Mr Gatare's evidence is that Rwanda has no incentive to participate in smuggling. Rather, it is in Rwanda's interest to develop legitimate mining operations, which develop local economies, provide jobs, and assist the national economy: indeed, Rwanda receives far more substantial revenues by doing so.[372] Again, Mr Gatare was not challenged on this evidence.

151. Mr Niyonsaba had made two witness statements which, amongst other things, detail the operation of the iTSCi programme, Rwanda's support for the programme and the measures taken to enforce it. Mr Niyonsaba was not called for cross-examination and challenged on this evidence which should therefore be accepted. As Mr Mbaya accepted, the staff who had been on the ground in Rwanda since he left in 2014 are in a good position to know how the tagging system was now working.[373] Mr Marshall was not able to dispute Mr Niyonsaba's evidence regarding the iTSCi programme and remarkably refused to accept that Mr Niyonsaba was better placed than he was to give evidence as to the iTSCi programme and Rwanda's production and export statistics. As he had failed to do in his witness statements, Mr Marshall provided no substance for his allegations in relation to smuggling.[374]

152. The Claimants also relied on Mr Barthelemy's unsubstantiated evidence in which he sought to speculate that illegal traders were not punished for importing coltan from the DRC.[375] In cross-examination, he conceded that he had in fact no knowledge regarding the suspension of traders for the mixing of coltan under the iTSCi programme, and was only concerned with his company's compliance with the traceability rules.[376]

[370] Day 8, p21/19-25 (Gatare).

[371] Day 8, p25/13-16 (Gatare).

[372] Gatare 2, at para. 16.1.

[373] Day 5, p9/7-11.

[374] Day 4, p36/10 – p38/19 (Marshall); Marshall 3, at paras. 4-13.

[375] Barthelemy 1, at para. 12.

[376] Day 5, p17/22 – p18/2 (Barthelemy).

153. The Claimants had principally sought to rely on piecemeal data which the Claimants suggest show that more minerals are exported from Rwanda than are produced. In particular, they had relied on Mr Fiala's evidence that he had reviewed an Excel spreadsheet created by ITRI/iTSCi and that these figures suggested that the Rwandan government was participating in smuggling.[377] The document is plainly not reliable or instructive. Mr Fiala's explanation that he found the document online and that the document was called "*ITRI audit*", and it was signed by "*ITRI people*" was not consistent with the document attached to his witness statement.[378] Mr Niyonsaba has given unchallenged evidence that this was not an iTSCi document.[379]

154. In any event, as set out in Mr Niyonsaba's evidence, the Claimants have misinterpreted or drawn incorrect inferences from the data. Mr Niyonsaba explained Rwanda's production figures and how they related to exports. In particular, the increased exports from 2017 reflected improvements in the international market and responses of the mining industry (particularly the artisanal sector) to the growing demand.[380]Again, this went unchallenged.

[377] Fiala 1, at paras. 5, 7.

[378] Day 4, p186/5-17 (Fiala).

[379] Niyonsaba 2, at para. 11.1.

[380] Niyonsaba 2, at paras. 11-15.

III. THE WITNESSES AND THE EVIDENTIAL RECORD

A. The Claimants' witnesses

156. The Respondent has already given a detailed account of the significant credibility problems the Claimants' witnesses have.[381] These problems were exacerbated during the hearing as set out below.

1. Mr Marshall

157. Mr Marshall was an untruthful witness, and his testimony was unreliable and should be rejected save where consistent with the Respondent's evidence or the contemporaneous record.[382] He consistently refused to accept basic propositions, including those which were irrefutable on the documents, and instead put forward answers in line with what he thought would advance the Claimants' case theory. His answers frequently changed during his testimony, in particular when he realised his previous answer was unhelpful to the Claimants' case.

158. Mr Marshall failed to give credible responses, when challenged, regarding the lack of evidence supporting the Claimants' case. He made excuses for being unable to substantiate statements he was making or when faced with a document or evidence which contradicted his position, by saying that the documents or statements were "*untrue*",[383] a "*misrepresentation*"[384] or "*fabricated*".[385]

159. At other times, Mr Marshall sought to claim that relevant documents were not available since, he alleged, NRD's documents were taken from its office by Rwanda and that instead Rwanda had such documents in its possession.[386] Such assertions were difficult to reconcile with the hundreds of exhibits produced by the Claimants, and the thousands of documents it produced during the document production phase.[387] Nor have the Claimants produced any evidence showing that documents were taken by Rwanda. The furthest their case goes was that it was

[381] Rejoinder, at section III.A.

[382] See also the Respondent's submissions on the credibility of Mr Marshall in the Rejoinder, at paras. 316-322.

[383] Day 1, p198/23, p218/6; Day 2, p18/23, p53/2, p81/12; Day 3, p96/16, p100/25, p166/25, p181/8, p195/24; Day 4, p28/5 (Marshall).

[384] Day 2, p54/22, p67/13; Day 3, p97/15, p99/15, p101/5, p172/13 and 22, p180/14 (Marshall).

[385] Day 3, p96/16 (Marshall).

[386] Day 1, p209/6-9, p211/2-21, p222/32-25, Day 2, p23/25 – p24/10, p160/15-17, p172/15-16, p195/11-14, p201/16-19; Day 4, p32/4 – p33/17 (Marshall).

[387] See also the submissions in the Rejoinder, at paras. 309-314.

Mr Benzinge who allegedly took them.[388] This allegation cannot be reconciled with the wide variety of documents that have been produced by the Claimants; but in any event (and as explained above) his actions are not attributable to Rwanda.[389]

160. Mr Marshall's propensity to use this answer as an excuse when faced with tricky questions repeatedly found him giving conflicting or incoherent evidence. For example, when questioned on why he believed NRD had been given assurances as to the long-term licences when there is nothing in the documents that suggests this, Mr Marshall first answered that: "*I don't know that it's evident from all the documents*".[390] He later claimed that there were other documents that had "*been taken by the government out of our offices*".[391]

161. Mr Marshall also consistently gave evidence that was replete with new allegations that (a) were entirely unsubstantiated with evidence, and (b) were so lacking in credibility that the Claimants' counsel did not put the allegations to the Respondent's witnesses, evidently concluding that there was no sufficient basis properly to do so. These included new and wholly unsupported claims that:

    161.1. Dr Biryabarema was under criminal investigation during most of the period that Mr Marshall was in Rwanda, and that Mr Marshall had many meetings discussing Dr Biryabarema's corruption with internal and external intelligence.[392]

    161.2. Mr Marshall and Dr Biryabarema had "*a very bad relationship*" and therefore Mr Marshall "*could not pay him bribes*" because he "*was in a difficult position with him*" and "[h]*e expected to be the owner of NRD*."[393]

    161.3. NRD had "*visited every other concession. We viewed every other concession application*"[394] and were told that their application "*was far superior to any other application*".[395]

[388] Rejoinder, at para. 309 (and see the references to the Claimants' pleadings cited therein).

[389] Counter-Memorial, at paras. 310-315.

[390] Day 1, p221/1 (Marshall).

[391] Day 2, p222/6 – p224/8 (Marshall).

[392] Day 3, p59/13 – p60/20 (Marshall).

[393] Day 2, p218/14-18 (Marshall).

[394] Day 3, p63/12-13 (Marshall).

[395] Day 3, p61/17-21 (Marshall); see also Day 2, p37/6-10 (Marshall).

161.4. There was a parallel line of negotiation through the Rwandan military who told Mr Marshall: "*Please do not pay attention to Dr Michael or to Minister Evode. It's a problem of corruption*"[396] and that NRD "*had fully performed*".[397]

161.5. Dr Michael and Mr Ehlers were bribing one another.[398]

161.6. Professor Nkanika Wa Rupiya had no knowledge of what exploratory work had been conducted by NRD because he was working for the Directorate of Military Intelligence ("**DMI**") and would rarely "*go into the field*".[399]

161.7. As with Professor Nkanika Wa Rupiya, Mr Kagubare was also working for the DMI and acting as a liaison between NRD and the military when he started working for NRD.[400] Mr Kagubare confirmed during his testimony that this was untrue.[401]

161.8. During the period that NRD did not have tags, the Rwandan military "*came and bombarded us with requests for memos and assistance in meeting companies in Slovakia*."[402]

161.9. [redacted] (as discussed above at paragraphs 66-70).[403]

161.10. NRD "*respond*[ed] *to all communications within seven days as a matter of internal corporate policy*."[404]

162. Mr Marshall claimed that the reason some of these new statements came out during the hearing rather than being in his written evidence was because of death threats he is allegedly receiving from Rwanda.[405] The suggestion that there had been threats of this

[396] Day 2, p134/15-17 (Marshall).

[397] Day 3, p91/22-25 (Marshall).

[398] Day 2, p134/11-13, p135/5-7; Day 3, p59/23-25 (Marshall).

[399] Day 2, p109/1-7 (Marshall). Mr Marshall subsequently accepted that on page 57 of NRD's November 2010 Application (**C-035**), Professor Nkanika Wa Rupiya was indeed photographed out in the field: see Day 2, p110/22 – p111/2 (Marshall).

[400] Day 3, p93/18-23 (Marshall).

[401] Day 5, p117/117 – p118/21 (Kagubare).

[402] Day 1, p176/1-4 (Marshall).

[403] Day 4, p70/10 – p71/20 (Marshall).

[404] Day 4, p126/12-16 (Marshall).

[405] Day 2, p135/12-14 (Marshall).

kind was a serious and false allegation which should never have been made (see paragraph 120 above). The proposition that these alleged threats explained the emergence of the new versions of events in Mr Marshall's oral testimony was also far-fetched:

162.1. It is not clear how (on his version of events) Mr Marshall distinguished between allegations which were put in his written evidence and those allegations which were not, in circumstances when he makes serious allegations against Rwanda in his witness statements including allegations of smuggling, and the involvement of oligarchs.[406] For Mr Marshall to have included these very serious allegations against the Respondent whilst claiming to have omitted others because of alleged death threats makes no sense. It also makes no make sense for Mr Marshall to exclude certain matters from his witness statements which are not public for fear of repercussions, but to instead raise them for the first time at the public hearing.

162.2. Mr Marshall's account of the alleged death threats has also shifted. In his first witness statement, he explained that Ms Mruskovicova had attended a meeting in 2016, where the Deputy Commander of the CID "*said that* [his] *life was threatened by very dangerous people and* [he] *should not return to Rwanda*."[407] In the PHB, this developed into the "*Respondent threatened to kill Mr. Marshall if he returned to Rwanda*"[408] and "*Mr. Marshall received a death threat from the police*".[409] His account evolved further during the hearing as he suggested that such threats were ongoing. These allegations were further inventions by Mr Marshall.

163. As well as introducing new, unconvincing evidence, Mr Marshall often changed his evidence. By way of example:

163.1. Mr Marshall changed his initial answer conceding that the Contract contained no guarantee.[410]

163.2. Mr Marshall conceded that when Spalena purchased NRD he knew that significantly less than the $39.5 million promised by the Zarnacks had been

[406] Marshall 1, at paras. 73-80; Marshall 2, at paras. 9-20.

[407] Marshall 1, at para. 69; Mruskovicova 1, at para. 25.

[408] PHB, at para. 11.

[409] PHB, at para. 44

[410] See para. 15 above.

invested, despite suggesting earlier that he did not even know the amount that had been promised.[411]

163.3. Mr Marshall initially accepted that he was required to acknowledge in the SPA that there were issues with the renewal of the licences but then sought to resile from it.[412]

163.4. Mr Marshall agreed that NRD was asked to make an application under the 2014 Law in accordance with the requirements as set out in Mr Imena's August 2014 letter. However, he subsequently suggested that NRD had been told by Mr Imena's office that the requirements did not apply to NRD since its application was a formality.[413]

163.5. Mr Marshall initially claimed that Mr Benzinge had physically threatened staff at the RDB but changed his version of events when presented with the inconsistency of his account with the contemporaneous documentation.[414]

164. The Claimants' case depends fundamentally on the credibility of Mr Marshall's evidence. For all the reasons set out above, he has shown himself to have none.

2. Mr Bidega

165. Mr Bidega's witness statement cannot be relied on. During examination-in-chief, Mr Bidega stated that he had ceased being employed by the OGMR in 2011, and that when he had conversations with Mr Marshall about draft contracts for mining concessions he was no longer employed.[415] This confirmed the essence of the Respondent's case: that Mr Bidega was acting for or assisting NRD and was not representing Rwanda in any official capacity when he was discussing draft contracts with Mr Marshall. (In this context, as explained in the Respondent's letter to the Tribunal of 28 June 2021, a letter sent by Mr Bidega to the RNRA on 12 December 2011 highlighted that from September 2011 Mr Bidega had been demoted to a role where there was no possibility that he could have been formally involved in approving any licence application or draft agreement, and had decided to leave the OGMR

[411] See para. 29 above.

[412] See para. 58 above.

[413] See para. 101 above.

[414] See para. 129 above.

[415] Day 5, p30/21 – p32/3 (Bidega).

completely.[416]) Mr Bidega's testimony was contrary to his witness statement and wholly undermined the Claimants' reliance on his evidence.[417]

166. During the hearing, the President asked the Claimants' counsel what the relevance of Mr Bidega's evidence was to the Respondent's preliminary objections—his statement having been filed alongside the CMPO.[418] The Claimants' counsel was unable to answer[419] and failed to provide the Tribunal with an answer subsequently.

167. Mr Bidega's statement had introduced new facts regarding the alleged draft contract that were not pleaded in the Memorial (Mr Bidega having not been mentioned in the Memorial). Accordingly, it is clear that the introduction of his evidence was little more than a belated, and ultimately ill-fated, attempt by the Claimants to change their case in response to the Respondent's *ratione temporis* objections.

3. Ms Mruskovicova

168. Ms Mruskovicova, who is Mr Marshall's partner, was an unreliable witness.[420] Ms Mruskovicova was not even aware that NRD was not a Claimant in these proceedings which led to inherent confusion in the evidence that she gave.[421]

169. The unreliable nature of Ms Mruskovicova's evidence was further highlighted by her response to the President's question wherein she maintained that she had met with over 20 different offices and organisations (including the President's Office, the Office of the Supreme Court, the EU Commission, and the Parliament) after the refusal of NRD's licence applications. Despite having suggested in her witness statement that "*none* [of these 20 different offices] *tried to help* [NRD]",[422] she admitted that she had not actually asked them to do anything.[423] It is also difficult to reconcile her claim that she was able to meet with all of these entities with her assertion that she waited outside Mr Gatare's offices every day for

[416] See letter from JHA to the Tribunal (28 June 2011), at paras. 4 and 6; Letter from Mr Bidega to the Director General of the RNRA (12 December 2011) **(R-247)**; See also Day 6, p81/12 – p82/6 (Imena).

[417] Bidega 1, at paras. 2-5.

[418] Day 5, p1/17-24 (Bidega).

[419] Day 5, p1/25 – p2/4 (Bidega).

[420] See also the Respondent's submissions on the credibility of Ms Mruskovicova in the Rejoinder, at paras. 346-347.

[421] Day 4, p149/18 – p150/6 (Mruskovicova).

[422] Mruskovicova 1, at para. 23.

[423] Mruskovicova 1, at para. 23; Day 4, p177/13 – p178/23 (Mruskovicova).

two weeks but that she was unable to meet him.[424] Mr Gatare's unchallenged evidence is that Ms Mruskovicova never tried to set up a meeting with him.[425]

170. Ms Mruskovicova also sought to further the Claimants' case theory regarding the alleged guarantee of long-term licences but her evidence in relation to the Contract was of no assistance. Ms Mruskovicova acknowledged that she was not involved in the negotiations, and she claimed without any basis for doing so that the alleged guarantee was in the 2008 Law.[426] She also made implausible allegations that there was no public retendering of the Concessions despite the documentary evidence to the contrary,[427] and gave confused evidence as to who obtained the Concessions after the tender process. Having initially claimed, in accordance with her witness statement, that some of the Concessions were now owned by Ngali,[428] Ms Mruskovicova immediately resiled from that by admitting that she had not investigated the position.[429] Overall, Ms Mruskovicova was obviously a witness seeking to give evidence that she thought might assist the Claimants. Her evidence should not be treated as reliable except where supported by contemporaneous documents, or consistent with the Respondent's case.

4. Mr Rwamasirabo

171. Mr Rwamasirabo made three witness statements in these proceedings which purport to give evidence both as to the facts and matters of law.[430] Mr Rwamasirabo accepted that he had no first-hand knowledge of the facts,[431] and that his witness statements were based solely on the information he had been provided, and what he had been told by the Claimants' counsel and Mr Marshall.[432] His assertions in relation to the facts omitted reference to key documents[433] and he rightly accepted in cross-examination that the Tribunal could form its own view based

[424] Day 4, p170/21 – p171/1 (Mruskovicova).

[425] Gatare 2, at para. 39.

[426] Day 4, p150/7-16 (Mruskovicova).

[427] Day 4, p173/3-19 (Mruskovicova).

[428] Mruskovicova 1, at para. 27; Day 4, p174/17-22 (Mruskovicova).

[429] Day 4, p173/23 – p175/1 (Mruskovicova).

[430] See also the Respondent's submissions on the credibility of Mr Rwamasirabo in the Rejoinder, at paras. 329-336.

[431] Day 8, p64/7-20 (Rwamasirabo).

[432] Day 8, p64/21 – p65/3 (Rwamasirabo).

[433] See, e.g. his assertion that Rwanda had not objected to NRD's performance under the 2006 Contract: Day 8, p47/3 – p51/17 (Rwamasirabo).

on the evidence and having seen the witnesses' testimony.[434] Plainly, no weight should be given to Mr Rwamasirabo's assertions in relation to the facts.

172. In relation to matters of Rwandan law, Mr Rwamasirabo stated that he had not been instructed as an independent expert in these proceedings.[435] Accordingly, he had not initially given any declarations as an expert when making his witness statements. Mr Rwamasirabo belatedly provided a declaration after the submission of his evidence in which he averred that he had complied with Article 5.2 of the IBA Rules (which included a declaration as to his independence from the parties and their legal advisors).[436]

173. It emerged during the hearing that Mr Rwamasirabo had been initially instructed by Mr Marshall as his client to advise in relation to potential claims in Rwanda[437] and that (at least according to the Claimants' counsel)[438] he had been involved in the preparation of Mr Bidega's evidence,[439] although these matters were not set out in his declaration. There was also uncertainty as to the role of the Claimants' counsel in the preparation of his statements.[440] It is submitted that Mr Rwamasirabo was not an independent expert and the weight to be given to his evidence should be treated accordingly.

174. Further, Mr Rwamasirabo has limited experience practising as an attorney, having qualified only around 18 months prior to making his first statement.[441] His assertions in relation to Rwandan law were mostly unsubstantiated and (remarkably) often did not refer to any relevant provisions of law.[442] Indeed, even where he had cited provisions of law they did not support the propositions being made.[443] Accordingly, it is submitted that his testimony in relation to matters of Rwandan law should also be given no weight.

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[434] Day 8, p66/3-10 (Rwamasirabo).

[435] Day 8, p61/1-4 (Rwamasirabo).

[436] Letter from Duane Morris LLP to the Tribunal (29 May 2020) (**R-243**), at page 3.

[437] Day 8, p64/24 – p65/3, p66/20-23 (Rwamasirabo); Day 6, p5/11-20.

[438] Mr Rwamasirabo denied this in cross-examination: Day 8, p66/11 – p67/18 (Rwamasirabo).

[439] Day 5, p33 (Bidega).

[440] Day 8, p86/11 – p88/24 (question from Ms Dohmann).

[441] Day 8, p60/7 – p61/18 (Rwamasirabo).

[442] Day 8, p47/20-22; p52/5-18; p55/18 – p57/2; p59/2-9; p76/1-16 (Rwamasirabo).

[443] Day 8, p77/9 – p79/8; p80/22 – p82/24 (Rwamasirabo).

5. Mr Fiala

175. In the event, Mr Fiala was unable to give any credible evidence of significance to these proceedings. It is worth noting, however, that Mr Fiala has a history of dishonest conduct in giving false information, and was not a credible witness.[444] He had been dismissed as a director of Rwanda Rudniki because the company considered that he had misused funds and had misrepresented financial information.[445] Mr Fiala accepted that he had been dismissed as a director and that he was only a minority shareholder in Rwanda Rudniki, and not the holder of a mining licence in Rwanda as he had suggested in his witness statement.[446]

176. Mr Fiala also could not recall the details of the Contract (including wrongly stating when it was entered into) and had no credible evidence to give with respect to NRD's licences, or levels of production in Rwandan mining.[447] His testimony is accordingly of no relevance.

6. Mr Barthelemy

177. Mr Barthelemy accepted that the contents of his witness statement were inaccurate in material respects, and accordingly his evidence should not be treated as reliable.[448] Mr Barthelemy conceded that his witness statement had wrongly claimed that his business had closed as a result of a dispute with Rwanda, and that Mr Gatare's account as to the reasons for its closure was a fair summary of what had actually happened.[449] He also accepted (again contrary to his witness statement)[450] that there was no tender for NRD's former Concessions from any company represented by him or Mr Marshall.[451] Further, he said that he had in fact no knowledge regarding the suspension of traders for the mixing of coltan, and he was only concerned with his company's compliance with the traceability rules.[452] Whilst he had given evidence on the extent of NRD's investment, he also conceded that Mr Imena was better

[444] Rejoinder, at paras. 337-341.

[445] Letter from Rwanda Rudniki to RDB (17 October 2014) (**R-185**).

[446] Day 4, p181/22 – p185/17 (Fiala).

[447] Day 4, p187/4 – p193/6 (Fiala).

[448] See also the Respondent's submissions on the credibility of Mr Barthelemy in the Rejoinder, at paras. 342-345.

[449] Day 5, p13/22 – p14/24 (Barthelemy); Barthelemy 1, at para. 3.

[450] Barthelemy 1, at para. 19.

[451] Day 5, p22/3-12 (Barthelemy).

[452] Day 5, p17/22 – p18/2 (Barthelemy); Barthelemy 1, para. 12.

placed to give evidence as to the levels of capital investment made by different mining companies in Rwanda.[453]

7. Mr Buyskes

178. Mr Buyskes confirmed that there were material issues with his evidence. He conceded that he had not been aware of the public tender of NRD's former Concessions. He admitted that his understanding set out in his first witness statement that some of the Concessions were now held by Ngali was wrong and he did not in fact know who held them.[454] He also accepted that his evidence with respect to the negotiations of the contracts with Rutongo was undermined because he was not personally involved.[455] Further, he accepted that each company had its own contract with its rights depending on its terms, and was not able to comment on other mining companies' performance of their obligations as he was not involved.[456] Mr Buyskes' evidence in relation to contractual obligations under mining contracts was also confused: being focused on what he considered to be fair rather than performance of the obligations which had actually been agreed.[457]

8. Mr Mbaya

179. Mr Mbaya's evidence was extremely limited, and he rightly accepted those limitations in that he had left Rwanda in 2014. He accepted that there were employees currently in Rwanda (such as the Respondent's witnesses) who were in a better position to describe how the tagging system in Rwanda worked and how the enforcement of the programme operated, and who were also better placed to understand and comment on increases in export levels.[458]

B. <u>The Respondent's witnesses</u>

180. The various allegations of bias made against the Respondent's witnesses are entirely lacking in substance; the majority of them were not even put to the witnesses during the hearing.[459] Rather, the Respondent's witnesses have demonstrated that they are honest, reliable, and credible.

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[453] Day 5, p15/1-18 (Barthelemy); Barthelemy 1, paras. 5-7.

[454] Day 4, p131/14 – p132/13 (Buyskes); Buyskes 1, para. 19.

[455] Day 4, p133/6 – p134/3 (Buyskes).

[456] Day 4, p134/11 –16, p140/5-11 (Buyskes).

[457] Day 4, p134/21 – p140/11 (Buyskes).

[458] Day 5, p9/2 – p10/18 (Mbaya).

[459] See also Rejoinder, at section III.B.

1. Mr Imena

181. Mr Imena was an honest witness. If he did not know an answer, he fairly acknowledged this, and would not speculate.[460]

182. It was clear from his testimony that Mr Imena was extremely knowledgeable about the mining sector. He spoke clearly and with detail as to what was required by the Contract,[461] and why NRD's performance was unsatisfactory.[462] He was well-acquainted with the work undertaken by other mining companies, and how that compared with NRD.[463] His considered explanations for the decisions taken by Rwanda were at odds with what the Claimants had sought to portray in their pleadings, as someone who acted arbitrarily out of a personal grudge against the Claimants.[464]

183. The cross-examination of Mr Imena was largely focused on the content and authenticity of one document (for which more than sufficient evidence had already been given proving its authenticity),[465] whether Mr Imena complied with document production,[466] his views about documents he did not prepare,[467] his views on correspondence as to which he was not shown the complete picture,[468] and what actions Rwanda took to prevent illegal mining at the former NRD Concessions.[469]

184. Key aspects of his evidence were not challenged, including Mr Imena's detailed criticisms of the November 2010 Application and NRD's inadequate investment in the Concessions,[470] and the implausibility of the Claimants' illegal smuggling claims.[471] Nor were the extensive

[460] See for example, Day 6, p87/19-20, p88/10, p91/6, p142/24, p143/12; Day 7, p58/2-5, p70/8-10, p86/2 (Imena).

[461] Day 7, p142/11 – p143/14 (Imena); Day 7, p4/13-20 (Imena).

[462] Day 7, p15/19-20 (Imena); Day 6, p166/15-20 (Imena); Day 7, p3/2-6 (Imena); Day 7, p143/14-16 (Imena).

[463] Day 7, p16/2-8 (Imena); Day 7, p28/14-22 (Imena).

[464] Reply, at paras. 255-259; Rejoinder, at paras. 349-352.

[465] See para. 202.2202.2 below; Day 6, p84/15 – p124/16 (Imena).

[466] Day 6, p124/17 – p134/2 (Imena).

[467] Day 6, p145/16 – p168/19 (Imena).

[468] Day 7, p40/15 – p50/18 (Imena).

[469] Day 119/16 – p129/15 (Imena).

[470] Imena 2, at paras. 9-23.

[471] Imena 2, at paras. 41, 51-52.

criticisms of Mr Imena made in the Claimants' Reply Memorial on the Merits ("**Reply**"), and addressed by Mr Imena in his supplemental witness statement, put to him.[472]

185. Further, during their opening submissions, the Claimants' counsel made comments about the criminal prosecution of Mr Imena.[473] The President rightly identified that Mr Imena was acquitted of all charges,[474] and this was not put to Mr Imena indicating that the Claimants had rightly abandoned any suggestion otherwise. This was another allegation (in this instance by insinuation) which should never have been made.

2. Mr Gatare

186. Mr Gatare was an impressive witness. In his testimony, he demonstrated his extensive knowledge of Rwanda's mining sector and the policy framework underpinning it, including the relevance of community expectations and the environment.[475] He also gave an informative overview of Rwanda's ongoing traceability efforts as implemented through the iTSCi traceability programme.[476]

187. Mr Gatare's cross-examination was brief. Some of the questioning of Mr Gatare was curious, including as to the proximity of where miners lived to the mines, and Rwanda's knowledge of what miners would have done when tags were not issued at the Concessions.[477] Mr Gatare was not challenged on the contents of most of his two witness statements, including his evidence on the Contract and the policy behind it,[478] and on mineral tracing and the smuggling allegations.[479]

3. Mr Ehlers

188. Mr Ehlers was largely cross-examined on irrelevant and peripheral issues which he dealt with in a straightforward manner, including matters allegedly going to his credit,[480] whether he

[472] Imena 2, at paras. 53-55.

[473] Day 1, p77/17 – p78/9 (Claimants' Opening).

[474] Day 1, p78/10 – p79/5 (Claimants' Opening), by reference to **R-191** of which the Respondent has provided a complete translation. Imena 2, at para. 55; Decision of the Nyarugenge High Court, RP 00510/2017/TGI/NYGE (7 December 2017) (**R-191**); Mr Imena Clean Criminal Record (18 July 2019) (**R-192**).

[475] Day 8, p3/7 – p18/25 (Gatare).

[476] Day 8, p13/1 – p15/22 (Gatare).

[477] Day 8, p19/1 – p25/17 (Gatare).

[478] Gatare 1, paras. 18-30.

[479] Gatare 1, paras. 31-32; Gatare 2, paras. 15-21.

[480] Day 5, p153/13 – p159/16 (Ehlers).

considered Mr Marshall to be a liar,[481] and the false allegations that he had conspired with Dr Biryabarema to seek to obtain one of the Concessions.[482] Almost all of Mr Ehlers' written evidence was unchallenged, including in particular his evidence on the sale of NRD to Spalena and what he told Mr Marshall during his due diligence,[483] on the state of the Concessions and NRD's failed attempts at industrialisation,[484] on NRD's lack of investment,[485] and on iTSCi's traceability programme.[486] Mr Marshall's claims that Mr Ehlers and Dr Biryabarema were bribing each other were not put to him.[487]

4. Mr Sindayigaya

189. Mr Sindayigaya was a reliable witness who demonstrated detailed knowledge of the state of operations at NRD and BVG's concessions during his time as an employee of NRD.

190. Much of the cross-examination of Mr Sindayigaya focussed on his job title, the timing of his promotion and the scope of his responsibilities as an accountant and in particular whether he was a "*low level bookkeeper*", apparently in order to suggest that he had inflated his own importance.[488] This line of attack was wrong and unfair—as became clear in re-examination when Mr Sindayigaya was taken to contemporaneous email correspondence with Mr Marshall in which his signature title was "*Senior Accountant*".[489] It was clear that he had not exaggerated his role, and was on any view in a position to know the matters about which he gave evidence.

191. Significant parts of Mr Sindayigaya's evidence went unchallenged including, for example, his evidence on the lack of industrialisation and investment by NRD in the concessions (save in relation to the operation of the Rutsiro plant).[490] Nor were the serious allegations made by the Claimants against Mr Sindayigaya put to him including in relation

[481] Day 6, p24/2-6; p25/10-14 (Ehlers).

[482] Day 6, p20/5-21 (Ehlers).

[483] Ehlers 1, at paras. 9-22; Ehlers 2, at paras. 17-20.

[484] Ehlers 1, at paras. 27-31; Ehlers 2, at paras. 5-12.

[485] Ehlers 1, at para. 34; Ehlers 2, at paras. 13-16.

[486] Ehlers 1, at paras. 36-41.

[487] Day 2, p134/11-13, p135/5-7; Day 3, p59/23-25 (Marshall).

[488] Day 5, p56/22 – p76/4 (Sindayigaya).

[489] Day 5, p111/6-24 (Sindayigaya).

[490] Sindayigaya 1, at paras. 9-14; Sindayigaya 2, at para. 6.

to the theft of minerals, alteration of accounting records, alleged complaints to the police about him and the rental of a bulldozer.[491]

5. Mr Nsengiyuma

192. Mr Nsengiyuma was a credible witness. He articulated clearly the nature of his role and obligations as a professional bailiff, and how he had sought lawfully to execute judgments against NRD. Much of his cross-examination focused on why his witness statement had not exhibited the judgments which he executed on NRD. This was a fruitless line of cross-examination as it was plain on the face of the documents that the judgments had been annexed to the notices given to NRD.[492] It was also put to him that the car he seized was Mr Marshall's personal car rather than one owned by NRD.[493] This was another invention of the Claimants which first appeared in their PHB,[494] but which was obviously wrong, as Mr Nsengiyuma confirmed.[495]

193. Serious allegations made against Mr Nsengiyuma were not put to him. These included that he acted in concert with Mr Benzinge pursuant to fraudulent court orders; that he had attempted to sell NRD's minerals fraudulently; and that he had attempted to solicit a bribe from Ms Mruskovicova.[496] The allegations are plainly without merit.

6. Professor Nkanika Wa Rupiya

194. The cross-examination of Professor Nkanika Wa Rupiya was limited to a few paragraphs of his second witness statement.[497] The remainder of his evidence was unchallenged, including his evidence that NRD knew that Rwanda would have been disappointed with the lack of development of the Concessions and that NRD was aware that they would not be granted long-term licences; that he was the main point of contact between NRD and OGMR but long-

[491] Sindayigaya 2, at paras. 14-25. During cross-examination Mr Marshall admitted, contrary to the Claimants' case at para. 270 of the Reply and consistently with Mr Sindayigaya's evidence, that he did not know if the letter to the Kigali Police exhibited at **C-182** was ever sent: Day 3, p32/23 – p33/5.

[492] Day 6, p79/17 – p80/5 (Nsengiyuma); Order prior to seizure and auctioning (9 April 2013) (**R-051**).

[493] Day 6, p77/21-24 (Nsengiyuma).

[494] PHB, at para. 24

[495] Nsengiyuma 1, at para. 32.

[496] Nsengiyuma 2, at paras. 6-9.

[497] Day 5, p43/6 – p54/16 (Nkanika Wa Rupiya); Nkanika Wa Rupiya 2, at paras 11-13.

term licences were never discussed; and that Mr Marshall was not interested in developing the Concessions let alone investing in them.[498]

195. Further, the new allegations made by Mr Marshall against Professor Nkanika Wa Rupiya, including that he had no knowledge of what exploratory work had been conducted by NRD because he was working for the DMI, that he refused to do any work, and that he was "*fired for plagiarism*",[499] were not put to him during cross-examination.

7. Mr Kagubare

196. Mr Kagubare was an honest and impartial witness. The cross-examination of Mr Kagubare had a misconceived focus on irrelevant issues, such as whether he currently worked in military intelligence (which he confirmed he did not),[500] and Mr Marshall's attempts to intermediate on the sale of military equipment.[501] Mr Kagubare was not challenged on the contents of his witness statement. In particular, he was not challenged on his evidence as to the operation and mismanagement of NRD as a cash-only business and its problems with illegal mining,[502] the lack of industrialisation at the Concessions, NRD's lack of capital investment, and its focus on artisanal mining.[503]

8. Dr Biryabarema

197. Dr Biryabarema is a highly knowledgeable and well-regarded mining expert. The cross-examination of Dr Biryabarema was perfunctory and brief. Dr Biryabarema was asked irrelevant questions: for example, notwithstanding that he had been retired for a number of years, he was asked to speculate on the largest concessions areas and producers in Rwanda and to recall all other short term exploratory licence holders who had applied for extensions.[504] This was at the expense of any challenge to the evidence given in his witness statements, which included, materially, his evidence on the assessment of NRD's licence

[498] Nkanika Wa Rupiya 1, at paras. 17, 19 and 23; Nkanika Wa Rupiya 2, at para. 8.

[499] Day 2, p69/14-18, p109/1-7 (Marshall).

[500] Day 5, p117/20 – p118/6 (Kagubare).

[501] Day 5, p119/5 – p121/15 (Kagubare).

[502] Kagubare, at paras. 9-15.

[503] Kagubare, at paras. 16-19.

[504] Day 7, p153/24 – p155/17, p159/9 – p160/14 (Biryabarema).

applications,[505] on the alleged 2011 draft contract,[506] his response to the allegations regarding smuggling,[507] and his explanation of the closure of the Western Concessions in 2012.[508]

198. The serious new allegations made by Mr Marshall against Dr Biryabarema, including that he was subject to criminal investigation, was corrupt and that he was involved in bribery with Mr Ehlers,[509] were not put to him. The allegations are, of course, untenable. Similarly, Dr Biryabarema was not challenged about the reliability of his March 2015 "*Explanatory Note on NRD*", which the Claimants had disputed in their Reply,[510] but which, as explained at paragraph 202.1 below, it appears they may no longer challenge.

9. Mr Kayihura, Mr Muvara and Mr Niyonsaba

199. The Claimants' counsel elected not to cross-examine Mr Kayihura, Mr Muvara and Mr Niyonsaba, and thereby failed to challenge at all their written evidence.[511] This included Mr Niyonsaba's evidence on the iTSCi programme in Rwanda[512] and his explanation of the Rwandan export data.[513] The Claimants' decision not to cross-examine Mr Niyonsaba signalled their effective abandonment of the misconceived allegations regarding Rwanda's attitude to smuggling, which should never have been made.[514] The Claimants also made no challenge to Mr Kayihura's evidence regarding the concessions operated by Ngali (which did not include the former NRD concessions).[515]

10. Mr Mugisha

200. Mr Mugisha is a very experienced and well-qualified Rwandan lawyer. He provided two expert reports in this arbitration which, in contrast to Mr Rwamasirabo's evidence, were corroborated by supporting provisions of Rwandan law. To the extent that there is any conflict

[505] Biryabarema 1, at paras. 8-21; Biryabarema 2, at paras. 6-8.

[506] Biryabarema 2, at paras. 9-10.

[507] Biryabarema 2, at paras. 12-14.

[508] Biryabarema 2, at paras. 17-19.

[509] Day 2, p134/11-13, p135/5-7; Day 3, p59/23-25 (Marshall).

[510] Explanatory Note on NRD (**R-017**); Reply, at para. 138.

[511] Day 5, p2/18 – p3/1. The Claimants' election not to cross-examine Mr Niyonsaba and Mr Kayihura does not appear to have been recorded on the transcript.

[512] Niyonsaba 1, at paras. 9-14.

[513] Niyonsaba 2, at paras 11-18.

[514] The decision also highlighted the Claimants' departure from the allegations advanced by Mr Marshall in his testimony, who had described Mr Niyonsaba's statement as being "*wholly fallacious*": Day 4, p37/21 (Marshall).

[515] Kayihura, at paras. 7-11.

in this evidence, it is respectfully submitted that Mr Mugisha's evidence on Rwandan law is to be preferred to that of Mr Rwamasirabo. Mr Mugisha's key conclusions in his expert reports as summarised in his opening presentation, including his evidence as to applicable provisions of Rwandan contract, company and arbitration law, were not properly challenged in cross-examination by the Claimants' counsel.

C. Allegedly fabricated documents

201. During the hearing, the Claimants, and their witnesses, in particular Mr Marshall, repeatedly alleged that numerous documents were fabricated.[516] When requested by the Tribunal to clarify which documents each party alleges are fabricated,[517] the Claimants' counsel provided a list of the following documents:[518]

Exhibit	Document
R-020	NRD Evaluation Memorandum by the License Evaluation Team (29 September 2014)
R-024	NRD Assessment Report by Dr Biryabarema (February 2015)
R-040	NRD Evaluation Memorandum by Mr Imena (8 May 2012)
R-111	Assessment of NRD Application (2011)
R-112	MINIRENA and NRD Meeting Minutes (30 October 2013)
R-118	NRD Assessment of performance (12 August 2012)
R-119	Emails between Mr Van Wachem and Mr Niyigena (July 2014)

[516] See, the following examples of where documents are alleged to have been fabricated for the first time: Day 2, p150/8-18 (Marshall): **C-015** is a "*fabricated document*"; Day 2, p167 (Marshall): **R-111** is a "*fraudulent document*"; Day 2, p204/11-13 (Marshall): **R-110** is a "*fabricated document*"; Day 3, p152/5-13 (Marshall): **R-074** "*was prepared in preparation for this hearing*"; Day 3, p108/2-4 (Marshall): **R-112** is a "*fraudulent document*"; Day 3, p271/20 – p272/4 (Marshall): **R-024** is "*not* [the Ministry's] *own work*" and that they "*retained British counsel to come up with* [it]"; Day 4, p173/6-8 (Mruskovicova): the public tender documents are not genuine.

[517] Day 2, p257/11 – p258/8 (Question from the President); Email Mr Kaplan to the parties, 24 June 2021 at 19:18PM BST.

[518] Email Mr Harrison to Mr Kaplan, 28 June 2021 at 12:34PM BST.

202. There is no basis whatsoever for the allegation that any of these documents were fabricated; nor have the Claimants have ever identified any basis. Throughout this arbitration the Claimants' have adopted a scatter-gun and inconsistent approach to making serious allegations of this kind. None of the allegations variously advanced have any substance. In this context:

202.1. The list does not include Dr Biryabarema's March 2015 '*Explanatory Note on NRD*' (**R-017**) which the Claimants had previously alleged was fabricated.[519] The Respondent infers that this is because the Claimants are now satisfied that the document is genuine following the Respondent's production of the document in its native format.

202.2. The list includes Mr Imena's NRD Evaluation Memo of 8 May 2012 (**R-040**). The allegation that the document was fabricated is unsustainable in light of Mr Imena's clear recollection as to the circumstances and date of its creation.[520] Further, the Claimants' counsel had no basis for refusing to accept the date on which the document was created after having received the metadata for this document showing that it was created when Mr Imena says it was. [521]

202.3. The Claimants have failed to identify, in accordance with the President's directions,[522] which documents from this list were alleged to have been fabricated for the first time during the hearing. For the Tribunal's benefit:

202.3.1. Dr Biryabarema's NRD Assessment Report of February 2015 (**R-024**), the 2011 Assessment of NRD's November 2010 Application (**R-111**) and the MINIRENA and NRD Meeting Minutes of 30 October 2013 (**R-112**) were alleged to be fabricated for the first time by Mr Marshall during the hearing.[523]

202.3.2. As for the Assessment of NRD's performance of 12 August 2012 (**R-118**) and the emails between Mr Van Wachem and Mr Niyigena of July 2014 (**R-119**), their inclusion on the Claimants' list to the Tribunal was the first

[519] Reply, at para. 138; Rejoinder, at paras. 307-308.

[520] Day 6, p99/15 – p124/16 (Imena).

[521] Day 6, p123/13 – p124/5.

[522] Day 2, p258/7-8 (Question from the President).

[523] Day 2, p164, p167 (Marshall): **R-111**; Day 3, p108/2-4 (Marshall): **R-112**; Day 3, p271/20 – p272/4 (Marshall): **R-024**.

time any allegation was made as to their authenticity, and they were not challenged during the hearing (or indeed in any earlier written pleadings). Rather, the Claimants' counsel spent a substantial amount of time going through **R-118** with Mr Imena, including using it to put various parts of the Claimants' case to him regarding the meaning of terms of the Contract.[524] The Claimants' counsel also put it to Mr Gatare to question its content in relation to production figures,[525] but at no point did they suggest the document was fabricated. **R-119** was not put to any of the Respondent's witnesses. Their inclusion on the list is puzzling.

202.4. The list does not include other documents that Mr Marshall and Ms Mruskovicova alleged were fabricated during the hearing.[526] The Respondent infers that the Claimants are now content that the documents are genuine and have already resiled from Mr Marshall's and Ms Mruskovicova's allegations in respect of these documents. Indeed, although Mr Marshall alleged on Day 2 that Rwanda's 2010 Mining Policy (**C-015**), for example, was "*fabricated*" and "*prepared for this proceeding*",[527] the document was produced by the Claimants and is relied on extensively in their pleadings.[528] Similarly, the public tender documents that Ms Mruskovicova alleged were not genuine on Day 4,[529] are publicly available documents.[530] These absurd claims by Mr Marshall and Ms Mruskovicova further confirm the unreliable nature of their testimony.

203. For clarity, the Respondent sets out below which of the Claimants' documents it maintains are fabricated:

[524] Day 6, p139-168.

[525] Day 8, p20-25.

[526] Day 2, p150-153 (Marshall): **C-015**; Day 2, p204/11-13 (Marshall): **R-110**; Day 3, p152/5-13 (Marshall): **R-074**; Day 4, p173/6-8 (Mruskovicova): Public tender documents.

[527] Day 2, p150-153 (Marshall).

[528] See, for example, Memorial, at paras. 11-12, 55 and 196; Reply, at paras. 10-11, 59, 180.

[529] Day 4, p173/6-8 (Mruskovicova).

[530] Ms Mruskovicova did not identify which tender documents she alleged to be fabricated, but the tender documents are set out in the Rejoinder, at paras. 271-277.

Exhibit	Document	Pleading/Transcript Reference
C-123	Written Resolution of the Sole Director of BVG (27 March 2012)	Rejoinder, paras. 78 and 519 // Day 1, p208/l12-16
C-124	Written Resolution of the Sole Director of Spalena (27 March 2012)	Rejoinder, paras. 78 and 519 // Day 1, p208/l12-16
C-132	Engagement Letter from Jillson and Marshall Associates (31 December 2004)	Rejoinder, para. 799 // Gatare 2, paras. 33-37 // Day 8, p32/13 – p34/6

204. At paragraph 67 of its Rejoinder, the Respondent stated in relation to the Cooperation Agreement at **C-122**, that "*Rwanda does not accept that the Cooperation Agreement is a genuine contemporaneous document*". Prior to the start of the hearing, the Claimants provided an earlier version of the Cooperation Agreement, together with its metadata, exhibited at **C-210**. Whilst the Respondent does not maintain that the documents at **C-122** or **C-210** are fabricated, it does maintain that neither version of the document represents a genuine agreement in that there was never any meeting of the minds between NRD and BVG as to the agreement in November 2010 or at any other time, and the agreement was never executed.[531] Indeed, Mr Marshall himself accepted that the two versions of the Cooperation Agreement in evidence are not the same,[532] and that he did not know which version was binding.[533]

[531] See paras. 63-65 above.

[532] Day 2, p8/13 – p16/10 (Marshall).

[533] Day 2, p16/20-25 (Marshall).

IV. THE TRIBUNAL AND/OR ICSID LACK JURISDICTION

205. It is respectfully submitted that the Tribunal does not need to assess the merits of this claim as it has no jurisdiction over the dispute. The Tribunal's lack of jurisdiction *ratione temporis, ratione personae, ratione materiae and ratione voluntatis* is addressed by the Respondent in its pleadings and is supported by the evidence given during the hearing.[534]

A. Lack of jurisdiction *ratione temporis*

1. Lack of jurisdiction under Article 2 of the BIT

206. The Tribunal and/or ICSID lack jurisdiction *ratione temporis* under Article 2 of the BIT in relation to all claims arising pursuant to Rwanda's failure to grant NRD long-term licences.[535] This is because the claims are based on acts that took place prior to the BIT entering into force on 1 January 2012.

207. The Respondent's submissions are set out at paragraphs 20-28 of the MPO, paragraphs 399-404 of the Rejoinder and paragraphs 51-52 of the Respondent's Skeleton Argument ("**SA**").

2. Lack of jurisdiction under Article 26 of the BIT

208. The Tribunal and/or ICSID also lack jurisdiction *ratione temporis* under Article 26 of the BIT because all of the Claimants' claims are out of time:[536] the Respondent's submissions are set out at paragraphs 29-37 of the MPO, paragraphs 405-445 of the Rejoinder and paragraphs 53-59 of the SA.

209. The Claimants' case as to precisely when they acquired knowledge of each breach alleged has become even more unclear during the hearing. In their Reply and CMPO, the Claimants allege that they first acquired knowledge of the alleged breaches on the date of the public tender in March 2016, or alternatively in May 2015.[537] However, in their opening submissions, the Claimants stated that "*at least one of the claims only triggers in 2016 and the other claims trigger after 2015*", without explaining what their new case is and precisely which claims they are said to have acquired knowledge of, and when.[538] Compounding this

[534] MPO; Rejoinder, at section V; SA, at section III; Day 1, p163/14 – p168/16 (Respondent's Opening).

[535] See also the US Non-Disputing Party Submission ("**US NDP**"), at paras. 5-6.

[536] MPO, at paras. 29-37; Rejoinder, at paras. 405-445; SA, at paras. 53-59.

[537] Reply, at para. 113; CMPO, at paras. 70; 86.

[538] Day 1, p86/19-21 (Claimants' Opening). The Claimants also claim for the first time at para. 44 of their PHB that "*It was not until Mr. Marshall received a death threat from the police and the Concessions were tendered that Claimants understood that NRD would not receive the long term licenses. It was also at this point that*

confusion, during cross-examination Mr Marshall suggested that the expropriation took place in June 2014.[539] The Claimants rely on the date of the alleged expropriation as being the date on which they acquired knowledge of all other breaches alleged.[540]

210. In their PHB, the Claimants make new arguments concerning alleged negotiations for a shareholding agreement entered into between Rwanda and Tinco in 2021,[541] and have also introduced new documentation in this regard.[542] The Claimants' reliance on this new material in relation to the Tribunal's jurisdiction *ratione temporis* is wholly misplaced: it concerns negotiations that are alleged to have taken place many years after the events which are the subject of this arbitration, and which concern completely different entities. Plainly, any events concerning Tinco's negotiations with Rwanda between 2020-2021, which are not pleaded breaches, are irrelevant to the question of when the Claimants first acquired knowledge of the breaches alleged in relation to NRD.

211. Regardless of what the Claimants' case is in response to the Respondent's objections, the contemporaneous documentation, which includes letters beginning in January 2012[543] alleging Rwanda to be in breach of the BIT, leaves no doubt that the Claimants had actual (or alternatively, constructive) knowledge of each breach alleged, and the alleged resultant loss, prior to the Cut-off Date of 12 June 2015.

212. When questioned on this correspondence, Mr Marshall was unable to explain how he could not have had knowledge of the breaches alleged at the time of the letters. His answers were

Respondent's expropriation of the right to the licenses was concrete". It is unclear how this alleged death threat (which is unsubstantiated and denied) could be at all relevant to when the Claimants acquired knowledge under Article 26 in relation to any of the pleaded breaches. Further, this threat is alleged to have been communicated on 22 January 2016 (see Mruskovicova 1, at para. 25 and Marshall 1, at para. 69) but it is unclear how it adds anything to the Claimants' position as to when they first acquired knowledge of the breaches alleged, as the PHB still relies on the (later) March 2016 tender of NRD's concessions in this respect.

[539] Day 3, p130/8-12 (Marshall), when questioned about his letter to Mr Imena dated 13 June 2014 (**C-090**). Mr Marshall stated that *"it's important we are not rushed through this section because this is the point when the company gets taken from us, expropriated from us, whether you can say it's by Benzinge or the RDB or the Minister, this is where it's taken*."

[540] CMPO, at para. 77.

[541] PHB, at paras. 58-60.

[542] See Email from Ms Akamanzi to a representative of the Tinco Group (19 May 2020) (**C-208**); Tinco Shareholders Agreement (12 May 2021) (**C-209**).

[543] Letter from NRD to MINIRENA (30 January 2012) (**C-039**); See also the correspondence referred to in the Rejoinder, at fn 451.

that the correspondence was "*highly rhetorical*"[544] and written to "*encourage them to behave properly*",[545] and that the Claimants were "*trying to get some form of communication*"[546] and to "*provoke a response*".[547] These statements fail to overcome the inescapable conclusion that the Claimants had knowledge of each alleged breach and any resultant loss (which is denied) at the time of the correspondence, and therefore long before the Cut-off Date.

B. The Tribunal and/or ICSID lack jurisdiction *ratione personae*

213. The Tribunal and/or ICSID lack jurisdiction *ratione personae*:[548] the Respondent's submissions are set out at paragraphs 91-116 of the MPO, paragraphs 447-523 of the Rejoinder and paragraphs 60-66 of the SA. For the avoidance of doubt, the Respondent does not challenge the Tribunal and/or ICSID's jurisdiction *ratione personae* in relation to Spalena on the basis of the arbitral award and the associated court decisions.[549]

214. During the hearing, the Claimants were unable to elicit any reliable evidence establishing that BVG owns or controls, directly or indirectly, an asset with the characteristics of an investment in order to have standing pursuant to Articles 1 and 24 of the BIT. Rather, Mr Marshall's evidence as to the transactions allegedly giving rise to BVG's standing was wholly lacking in credibility and confirmed that these aspects of the Claimants' case had been invented. The Claimants also failed to establish, in relation to BVG and Spalena, that the Claimants have suffered loss, as necessary to establish standing pursuant to Article 24 of the BIT.

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[544] Day 4, p17/15 – p18/9 (Marshall), when cross-examined on his letter to Mr Gatare dated 25 May 2015 (**C-112**), in which he invokes the USA-Rwanda BIT and states that NRD's concessions were "*formally expropriated by action of the Minister more than one year ago*".

[545] Day 3, p244/5 – p245/6 (Marshall), when cross-examined on his letter on behalf of NRD to Mr Imena dated 1 November 2014 (**C-086**), in which he states that "*your termination, of course, is a breach of those agreements in violation of the Bilateral Investment Treaty between Rwanda and the U.S.*".

[546] Day 4, p8/12 – p9/6 (Marshall), when cross-examined on his letter to Mr Gatare dated 23 March 2015 (**C-100**), giving notice under the USA-Rwanda BIT and requesting consultation and negotiation. Mr Marshall went on to state that as of this date, NRD had been trying to "*use any tool we could, as I had been doing for three years, trying to provoke any sort of attention to the problem*".

[547] Day 4, p9/7 – p12/25 (Marshall), when cross-examined on his email to Mr Niyonsaba dated 30 March 2015 (**C-107**), in which Mr Marshall states that "*we have begun legal procedures to claim against the Rwandan government for expropriation damages under the Rwanda – US bilateral investment treaty*". Mr Marshall's full answer when asked whether he was telling Mr Niyonsaba that he had begun legal procedures to claim against the Rwandan government for expropriation, was that "*what I was trying to do was provoke a response from Ildephonse on the same basis that he addressed the problem*" (Day 3, p217/5 – p218/6 (Marshall)).

[548] MPO, at paras. 91-116; Rejoinder, at paras. 447-523; SA, at paras. 60-66.

[549] See Day 1, p113/20-24; Day 3, p141/18 – p143/15.

1. BVG does not own NRD

215. The Claimants have failed to establish that BVG has any ownership interest in NRD:

215.1. It is common ground that BVG has no shareholding in NRD.

215.2. BVG has no shareholding in Spalena.[550]

215.3. BVG has no equitable interest in NRD as a result of a [redacted] and smuggling.[551]

215.4. No loan was advanced from BVG to NRD.[552]

215.5. There was no transfer of assets from BVG's Bisesero concession to NRD.[553]

2. BVG does not control NRD

216. The Claimants have failed to establish that BVG controls NRD.[554] The Claimants have not provided any evidence that Mr Marshall was, at any material time, controlling NRD in any capacity related to BVG, and have not elicited any such evidence during the hearing. Indeed, in their PHB, the Claimants state that "*Respondent was always aware of Mr. Marshall's dual role as NRD's Managing Director and as the President and lead investor of Spalena and NRD.*"[555] This is entirely consistent with the Respondent's position: that Mr Marshall was at all material times acting in his asserted role of Managing Director of NRD, and as the representative of Spalena, and not as a representative of BVG.

3. The Claimants have not established any loss

217. In relation to both BVG and Spalena, the Claimants have not established that they have suffered any loss as a consequence of the breaches alleged, as required by Article 24 of the BIT, which, in any event, could only crystallise as a diminution of the value of Spalena's shareholding in NRD.[556] No loss was pleaded, and no evidence of any loss was advanced in written evidence or during the hearing.

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[550] See paras. 61-62 above.

[551] See paras. 66-70 above.

[552] See paras. 63-65 above.

[553] See paras. 30-33 above.

[554] MPO, at paras. 108-116; Rejoinder, at paras. 469-472; SA, at para. 64.

[555] PHB, at para. 3.

[556] MPO, at paras. 100-105; Rejoinder, at section V.B; SA, at para. 66. See also US NDP, at paras. 15-21.

C. The Tribunal and/or ICSID lack jurisdiction *ratione materiae*

218. The Tribunal and/or ICSID lack jurisdiction *ratione materiae*: the Respondent's submissions are set out at paragraphs 117-119 of the MPO, section V.C of the Rejoinder and paragraphs 67-72 of the SA. The Claimants have failed to respond adequately to these objections, and in their PHB, they confuse the Respondent's *ratione personae* and *ratione materiae* arguments.[557]

219. Firstly, the Claimants continued insistence that the level of investment made by the Claimants is only relevant to the bifurcated quantum phase of these proceedings demonstrates their misunderstanding of the basic jurisdictional requirements of an ICSID arbitration.[558] As the Respondent has submitted repeatedly, the Claimants must produce sufficient evidence to establish that they made a qualifying investment under the ICSID Convention and the BIT.[559] This requires them to establish that they have satisfied a cumulative set of criteria, including that the investment involved a substantial contribution in money or assets.[560] The Claimants have failed to do so.

220. Further, the Claimants' attempt to explain away the Respondent's objection by reference to the level of Tinco's investment as set out in **R-048** does not assist.[561] The question of whether Tinco invested sufficiently to satisfy Rwanda that it deserved long-term licences is a different question to whether the Claimants' investments amount to an "*investment*" under the ICSID Convention and the BIT. The investments of other entities are irrelevant: the burden is squarely on the Claimants to establish that all jurisdictional requirements have been met.

221. In any event, the Claimants have still failed to explain what investments they rely on in respect of each of their BIT claims, who made them (i.e. which of BVG or Spalena) and how they qualify as an "*investment*" under the ICSID Convention and the BIT.[562] The Claimants' assertion that the "*Respondent's attempts to distinguish between investment in NRD before and after the sale of NRD to Spalena are entirely without merit*" is wrong.[563] Distinguishing the two is paramount when what matters for establishing jurisdiction is what the Claimants

[557] PHB, at paras. 64-67.

[558] Day 1, p27/3-7, p86/25 – p87/13 (Claimants' Opening); Day 2, p126 – p129, p226/23 – p227/1 (Marshall).

[559] MPO, at paras. 120-128; SA, at paras. 68-71.

[560] MPO, at paras. 126-128 and the cases cited at fn 173.

[561] PHB, at para. 65.

[562] SA, at paras. 68-71.

[563] PHB, at para. 61.

have invested and not what anybody else at some other point in time may have invested. The Claimants' statement in its PHB that "*Contemporaneous documents demonstrate that Claimants invested at least €13 million by the end of 2010*" is demonstrably wrong, and is simply an attempt to inherit investment they have not themselves made, without explaining why this should be so.[564]

222. It is clear that any investments made by the Claimants themselves were minimal, and could not equate to a "*protected investment*" under the ICSID Convention and the BIT:

222.1. The Claimants acknowledge in their PHB that most of NRD's investment came from retained earnings, and that the Claimants' "*intention was to invest more heavily in the Concessions after the receipt of the long term licenses*".[565] This appears to be an implicit acknowledgment that Spalena's investment in the Concessions was indeed negligible.

222.2. In their opening submissions, the Claimants' counsel stated: "*that investment is going to be, you know, one of the next steps after getting those long-term licences for the concessions…*"[566] Mr Marshall's evidence was in accord: "*If we had the licence we would have expended huge additional amounts*".[567]

222.3. When questioned about the estimated investment figures in the November 2010 Application and the January 2013 Application, Mr Marshall could not explain why they were materially identical and resorted to querying their accuracy despite being the Claimants' own documents.[568] Mr Marshall also could not explain why any investment allegedly made after the acquisition of NRD by Spalena was not reflected in the January 2013 Application.[569] Plainly, any investment made by the Claimants would have been identified in the 2013 Application in order to demonstrate their capacity and commitment. Further, Mr Marshall's explanation as to the single material difference between the investment figures in the two applications (being the estimated fees of €6 million

[564] PHB, at para. 35; SA, at para.70.1.

[565] PHB, at para. 9.

[566] Day 1, p45/8-10 (Claimants' Opening).

[567] Day 2, p134/3-4 (Marshall).

[568] See Day 2, p110 – p122 (Marshall) and in particular Day 2, p117/23-24 (Marshall), referring to NRD's November 2010 Application (**C-035**), at pages 99-101 and Letter from NRD to Minister Kamanzi (30 January 2013) (**C-054**), at page 5. See also Rejoinder, at para. 512.1.

[569] Day 2, p121 (Marshall).

for "*Foreign Consulting and Engineering*") was contradicted by the evidence given by the Respondent's witnesses.[570] It was also uncorroborated by any other documents such as invoices, receipts, or testimony from any of the persons who provided these services. This figure is a fiction, inserted to make it look as though the Claimants had made a meaningful investment in NRD when they had not. Ultimately, the Claimants failed to provide any evidence that this estimated sum for consulting and engineering was actually incurred.

222.4. The summary investment plan relied on by NRD was, as admitted by Mr Marshall, only a budget,[571] and contains figures that are different from those in the November 2010 Application and January 2013 Application.[572] Mr Marshall could not explain the difference and refused to comment as he "*thought this was going to be part of the bifurcated process*".[573] Mr Marshall's plea of ignorance as to the relevance of the Claimants' alleged investments is hardly credible when the Respondent raised these very points in its Rejoinder.

222.5. Mr Marshall also failed to explain why the figures in this investment plan were the same as those in an updated version from 2014.[574] He attempted to avoid the question by suggesting that Ms Mruskovicova be asked instead on the basis that "[he] *wasn't involved in the preparation of the*[m]".[575] This cannot be true: the updated version from 2014 was in fact sent by him to Ms Mruskovicova.[576]

222.6. Mr Marshall explained that no additional investment figures featured in the September 2014 Application because "*our financial resources was* [sic] *the investment we'd already made*" [577] and that he understood that the application would be satisfied by the historic investment.[578] Given the estimated investment

[570] Day 2, p118/19 – p120/2, p124/13 – p126/1 (Marshall); Imena 2, at paras. 21-22; Ehlers 2, at para.14.1; Sindayigaya 2, at para. 6.2.4.

[571] Day 2, p122/21 (Marshall); Summary of activities, investment and plans on all NRD's concessions (**C-147**).

[572] Day 2, p122/10 – p124/12, p126/4-18 (Marshall).

[573] Day 2, p126/15-17 (Marshall).

[574] Day 2, p126/19 – p128/12 (Marshall), comparing the summary of activities, investment and plans on all NRD's concessions (**C-147**) with the version attached to the email from Mr Marshall to Ms Mruskovicova (18 September 2014) (**R-240**).

[575] Day 2, p127/12 (Marshall).

[576] Email from Mr Marshall to Ms Mruskovicova (18 September 2014) (**R-240**), at page 1.

[577] Day 3, p197/1-2 (Marshall).

[578] Day 3, p199/14-18 (Marshall).

figures in the November 2010 Application and the January 2013 Application were largely the same, any historic investment must have been that made prior to Spalena's acquisition of NRD.

223. Accordingly, the Claimants have failed to establish that their (at best) minimal investments have the requisite characteristics of a qualifying investment within the meaning of the ICSID Convention and/or the BIT.[579]

D. The Tribunal and/or ICSID lack jurisdiction *ratione voluntatis* in relation to Spalena

224. The Claimants have failed to adduce any evidence that Spalena notified Rwanda of its claims or sought to settle them as required by Articles 23 and 24 of the BIT. These provisions together constitute mandatory jurisdictional preconditions to arbitration, and failure to comply deprives a claimant of jurisdiction.[580]

225. The Respondent's submissions are set out in full at paragraphs 167-186 of the MPO, paragraphs 524-538 of the Rejoinder and paragraphs 73-77 of the SA.

226. The Claimants' contention that they complied with these provisions since the allegations set out in the Notice filed by BVG and NRD dated 12 April 2017 ("**Notice**") are "*identical to the allegations, breaches, and wrongful acts alleged by Spalena in the present proceeding*", is wrong.[581] As explained in the Rejoinder, that Notice set out claims concerning the alleged expropriation of BVG's Bisesero concession, and claims that could only have been brought by NRD.[582] The Claimants' contention that Articles 23 and 24 were satisfied on the basis that Mr Marshall represented both companies[583] is hopeless in circumstances where the claims set out in the Notice concern different claims brought by a different group of companies.[584] None of the evidence given during the hearing changes this.

[579] SA, at paras. 69-72; MPO, at paras. 117-119; Rejoinder, at section V.C.

[580] SA, at paras. 74-75.

[581] PHB, at para. 68.

[582] Rejoinder, at para. 536.

[583] PHB, at paras. 68 and 70; Day 1, p88/9 – p89/13.

[584] Rejoinder, at para. 536; Day 1, p167/25 – p168/16.

V. THE CLAIMANTS HAVE NOT ESTABLISHED ANY VIOLATIONS OF THE BIT

227. As the Respondent explained in its Counter-Memorial,[585] Rejoinder,[586] and SA,[587] and as is clear from the evidence given at the hearing, the Claimants have manifestly failed to establish any breaches of the BIT.

A. There has been no violation of Article 5 of the BIT

228. The Claimants' allegations that the Respondent breached Article 5 of the BIT are devoid of merit for the reasons set out at section IV of the Counter-Memorial, section VI of the Rejoinder, and paragraphs 79-85 of the SA. As highlighted in the SA, the Respondent understood the Claimants' Reply to have transformed the Full Protection and Security ("**FPS**") claim, and the claim that Rwanda failed to treat the Claimants' alleged investments transparently, into a single "*creeping*" breach of the FET standard.[588] The Claimants' silence in their PHB and opening submissions as to the FPS claim, and the claim that Rwanda failed to treat the Claimants' investments transparently, appears to confirm this.

229. The evidence given at the hearing reinforces the Respondent's position. For the reasons outlined in section II above, the Claimants have failed to establish any of the facts relied on in respect of their FET claim:

229.1. Rwanda did not implement the 2014 Law in a discriminatory manner.[589]

229.2. Rwanda did not arbitrarily ignore RDB records.[590]

229.3. Rwanda was entirely justified in denying NRD tags.[591]

229.4. Rwanda did not act inconsistently with the Claimants' due process rights.[592]

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[585] Counter-Memorial, at sections IV (Article 5), V (Article 6) and VI (Articles 3 and 4).

[586] Rejoinder, at sections VI (Article 5), VII (Article 6) and VIII (Articles 3 and 4).

[587] SA, at paras. 78-94.

[588] SA, at para. 79. To the extent that the Claimants maintain that Rwanda breached the FPS standard and/or failed to treat their investment transparently, the Respondent refers to paras. 367-416 of its Counter-Memorial as to why these claims are not made out. See also Rejoinder, at paras. 704-706.

[589] See paras. 97-113 above. In their opening submissions, the Claimants' counsel confusingly stated that the FET discrimination case was in relation to the 2008 Law: see Day 1, p 81/3-10. However, the Claimants' pleaded case is only in relation to the 2014 Law: see the Reply, at paras. 114-116.

[590] See paras. 129-132 above.

[591] See paras. 143-147 above.

[592] See paras. 126-128 above.

229.5. Rwanda did not act contrary to the Claimants' alleged legitimate expectations with respect to the receipt of long-term licences.[593]

230. Article 5 of the BIT is exceptionally clear that the Minimum Standard of Treatment ("**MST**") applies.[594] There can be no doubt that, taken in its entirety, the evidence does not come remotely close to suggesting that Rwanda's conduct was "*arbitrary, grossly unfair, unjust or idiosyncratic*", or that it was "*discriminatory*", prejudicial or offensive to judicial propriety, as required to breach this exacting standard.[595] Nor is any breach of the higher autonomous FET standard contained in the Belgium-Rwanda BIT made out on the facts (were such standard to apply, which is denied).[596] Rather, Rwanda's actions were at all times rational, non-discriminatory measures taken in response to NRD's failure to perform under the Contract, its inability to submit satisfactory licence applications, and its private disputes as to the company's ownership. As Mr Marshall admitted with respect to NRD's licence applications, on which the Claimants' FET case is premised, they were grateful to have a second chance and "*not just be told to go home*".[597]

231. Although the Claimants contend that Tinco's investment vehicles, Eurotrade and Rutongo, were in "*nearly identical positions in Rwanda*" relative to NRD[598] and that NRD was accordingly discriminated against in breach of the FET standard,[599] this is wrong. Tinco and NRD were not, for many material reasons set out in the Respondent's pleadings and evidence, in like circumstances.[600] During his testimony, Dr Biryabarema explained that during the years of 2010-2012, Rutongo was "*producing more than most of the other concessions*".[601] Mr Imena's evidence was in accord: he explained the high quality of Rutongo's application relative to NRD's, which included sampling so extensive that 4,000 samples were collected in one tunnel alone.[602] Further, Mr Imena pointed out that Tinco

[593] See Sections IIA- II.D and II.H-II.L above.

[594] Rejoinder, at para. 543.

[595] *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**CL-028**), at para. 98; Counter-Memorial, at para. 242.

[596] Rejoinder, at paras. 565-570; SA, at para. 83.

[597] Day 4, p125/2-8 (Marshall).

[598] PHB, at para. 35.

[599] PHB, at paras. 33- 36.

[600] Counter-Memorial, at paras. 468-476; Rejoinder, at paras. 259-264, 516, 602- 618, 669, and 782-783; Imena 1 at paras. 57-60; Imena 2 at para. 38.

[601] Day 7, p155/2-11 (Biryabarema).

[602] Day 7, p16/2-8 (Imena).

passed REMA's environmental impact audit, which is more difficult to satisfy than the environmental impact assessment. As Mr Imena highlighted, this confirmed what he said in his statement: that "*Rutongo did much better than NRD*."[603]

232. During cross-examination, the Claimants' witnesses conceded that Tinco and NRD were not in like circumstances:

232.1. Ms Mruskovicova, who worked for Tinco,[604] stated that comparing NRD and Tinco would be like "*comparing apples and oranges"* because the companies were "*completely different animals*", with Rutongo being "*a very rich mine*" with "*the biggest deposit in Rwanda*".[605]

232.2. Mr Marshall did not dispute his statement from 2013 that Rutongo's production was "*more than twenty times*"[606] that of NRD's.[607]

232.3. Mr Marshall also said in relation to Nemba that "*you can't compare it to Rutongo in terms of its production*".[608] This was a significant concession given that Nemba was the only mine of NRD's that had achieved any significant production.

232.4. Mr Marshall stressed multiple times that Rutongo's application was "*superior*" to NRD's[609] and that Rutongo was a more efficient and professional operation.[610] This is consistent with the evidence of Mr Imena.[611]

233. Further, although the Claimants alleged in their PHB that Mr Buyskes would testify that "*Tinco's mining operations are, at most, semi-industrialized"*,[612] Mr Buyskes gave no such testimony. The discrimination claim is wholly unsustainable.

234. The evidence given at the hearing further reinforced the unmeritorious nature of the Claimants' legitimate expectations claim. This claim had relied heavily on the evidence

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[603] Day 7, p28/14-22 (Imena), referring to the Feasibility study for 30-year mining licence in relation to Rutongo Mines (sections A and B) (**R-042**), at page 67.

[604] Mruskovicova 1, at para. 2.

[605] Day 4, p154/11-25 (Mruskovicova).

[606] Letter from NRD to RRA (31 July 2013) (**R-107**), at page 5; Rejoinder, at para. 783.

[607] Day 4, p35/6-20 (Marshall).

[608] Day 4, p35/21 – p36/6 (Marshall).

[609] Day 3, p63/13-19, p193/3-6, p194/10-14 (Marshall).

[610] Day 2, p249/2-4; Day 3, p63/14-20; p194/12-13; Day 4, p35/23 – p36/6 (Marshall).

[611] Imena 2, at para. 38; Imena 1, at para. 57.

[612] PHB, at para. 39.

of Mr Bidega, who had allegedly determined that NRD had satisfied their obligations under the Contract, advised that a draft contract for long-term licenses had been sent to Cabinet for approval, and told the Claimants to ignore Minister Kamanzi's letter of 2 August 2011.[613] However, as discussed above, it was clear from Mr Bidega's testimony that he did not regard himself as acting as an employee or representative of Rwanda at this time.[614] The oral evidence-in-chief fairly given by Mr Bidega rendered the Claimants' flimsy case as to the "*evisceration*" of their legitimate expectations even more untenable.

235. The Claimants' PHB also introduced new facts concerning Mr Marshall's alleged relationship with the Rwandan military that the Claimants suggest supports their FET claim.[615] The matters alleged do no such thing. The claims that the military gave NRD assurances as to the receipt of long-term licences are not pleaded as part of the Claimants' case, and no reliable evidence has been given in support. Mr Marshall's uncorroborated statements in his oral testimony—that tellingly do not feature in any of his witness statements—should be rejected.

236. In any event, the Claimants' new claims regarding assurances from the military are irrelevant. Even if the autonomous FET standard was to apply, this only protects expectations that are reasonable and legitimate in light of the circumstances and on which the investor relied when it made its investment.[616] Yet, even on the Claimants' account, these assurances from the military were not given at the time the Claimants made their investment, but rather were provided subsequently. Further, to the extent that the Claimants are suggesting that they were entitled to some higher standard of treatment based on Mr Marshall's alleged relationship with the military, there is plainly no basis for this in the BIT and/or in customary international law.[617]

B. <u>There has been no violation of Article 6 of the BIT</u>

237. The Claimants' expropriation claim is devoid of any merit.

238. The Respondent's submissions at paragraphs 417-447 of its Counter-Memorial and section VII of its Rejoinder explain why the Claimants' claim that Rwanda expropriated its right to licences is baseless. The evidence given at the hearing reinforced the position:

[613] Reply, at paras. 65 and 180.

[614] See paras. at 80-81, 93 and 165-167.

[615] See paras. 45-49 above; PHB, at paras. 10, 31 and 57.

[616] Counter-Memorial, at para. 327 and the cases cited therein; SA, at para. 84.

[617] Day 1, p100/3-10 (Respondent's Opening).

the Claimants never had any "*right to the long term licences*" that could have been expropriated.[618]

239. The testimony also put paid to the Claimants' contention that Rwanda effected a creeping expropriation of the Claimants' right to long-term licenses (even if such right existed, which is denied) through "*repeated and ongoing bad acts.*"[619] These was no basis at all for these allegations. The Claimants' case had been 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*".[620] This was contradicted by the unchallenged evidence of Mr Imena and Dr Biryabarema: they cogently and unequivocally explained that NRD's applications were found to be unsatisfactory.[621] Compounding these insuperable issues, Mr Bidega's confirmation as to the capacity in which he was communicating with Mr Marshall reinforced that the claim is entirely unsustainable.

240. Although the Claimants seek to rely on the implementation of the 2014 Law as an expropriatory measure,[622] the Claimants have failed to engage with Annex B of the BIT. Annex B expressly confirms that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives rarely constitute an indirect expropriation.[623] The evidence of Mr Gatare[624] and Mr Imena[625] as to the public policy behind the 2014 Law—which was designed to incentivise and increase productivity and to introduce more flexibility into the country's mining regime—was not challenged.

241. The Claimants had also alleged that Rwanda expropriated its tangible assets, and in their PHB they attempt to explain, for the first time, precisely what tangible assets they consider have

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[618] PHB, at paras. 41 and 42.

[619] PHB, at para. 42. The Claimants' counsel appeared to confirm in response to a question from the President that the acts relied on "*are part of the sustained losses that went into a prolonged expropriation*" and are therefore being brought as part of the creeping expropriation claim, but "*are not being sued upon independently*": see Day 1, p83/6 – p86/8 (Claimants' Opening).

[620] Reply, at para. 253.

[621] Day 7, p2/23 – p20/24 (Imena); Imena 1, at paras. 7-48; Imena 2, at paras. 9-37; Biryabarema 1, at paras. 8-21; Biryabarema 2, at paras. 6-8.

[622] See Day 1, p83/20 – p84/5 (Claimants' Opening), in which the Claimants' counsel describes the expropriation as being a "*very long, slow process*" in which Rwanda "*put in place first a law that would so-called 'justify' saying no* [to the long-term licences]."

[623] See the BIT (**CL-006**), at Annex B; Rejoinder, at para. 838.

[624] Gatare 1, at para. 26.

[625] Imena 1, at para. 26.

been expropriated. They state that when Rwanda tendered the Concessions, it took "*a processing plant, roads, bridges, reservoirs, piping networks, a testing laboratory and other buildings on the Concessions*" and "*vehicles, equipment, and other tools used for mining*".[626] However, they have materially failed to provide any evidence of (i) their property interests in these items, and (ii) any taking of these items by Rwanda.

242. The Claimants' expropriation case fails on jurisdiction as well as on the merits. At the hearing, and as set out at paragraph 209 above, Mr Marshall gave evidence that conflicted with the Claimants' case on expropriation and confirmed that it is time-barred (on which see section IV.A above). In particular, when questioned about the letter he wrote to Mr Imena on 13 June 2014,[627] Mr Marshall explained that "*it's important we are not rushed through this section because this is the point when the company gets taken from us, expropriated from us, whether you can say it's by Benzinge or the RDB or the Minister, this is where it's taken*."[628]

243. Accordingly, on Mr Marshall's account, the alleged expropriation took place prior to the Cut-off Date of 12 June 2015.

C. The Claimants have failed to establish a violation of Articles 3 and 4 of the BIT

244. As explained in the Rejoinder at paragraphs 915-916 and the SA at paragraph 94, the Respondent had understood the Claimants to have transformed its allegations of breaches of the NT obligation contained in Article 3 of the BIT, and the MFN obligation in Article 4, into creeping breaches of the FET standard under Article 5. However, in their PHB, the Claimants attempt to resuscitate their Article 3 and 4 claims.[629] The claims are not made out on the evidence, and are also out of time.[630]

245. As explained in the Counter-Memorial, a mere showing of differential treatment is not sufficient to establish unlawful discrimination in violation of the NT standard.[631] The

[626] PHB, at para. 45.

[627] Letter from Mr Marshall to Minister Imena (13 June 2014) (**C-090**).

[628] Day 3, p130/10-14 (Marshall).

[629] PHB, at paras. 46-50; Day 1, p79/14 – p81/10 (Claimants' Opening). The suggestion by the Claimants' counsel that Article 4 is "*a clause that just inexplicably is not really dealt with by Respondent*" is manifestly wrong (Day 1, p80/21-23 (Claimants' Opening)): the claim is addressed in the Counter-Memorial at paras. 468-476 and the Rejoinder at paras. 545-559.

[630] Counter-Memorial. at section VI.E; MPO, at paras. 88-90; US NDP, at paras. 30-35.

[631] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**RL-024**), at para. 175.

comparators must also be materially similar, and there must be no reasonable justification for the differential treatment.[632]

246. The Claimants allege that Rwanda's conduct in relation to Mr Benzinge was in breach of the NT standard. This is wrong: as explained above, Mr Imena acted entirely fairly and reasonably in navigating the dispute between Mr Marshall and Mr Benzinge, and there was no discrimination.[633] Further, the decisions made by Rwanda in relation to Mr Marshall's dispute with Mr Benzinge were at all times based on a rational policy of ensuring that Rwanda was dealing with the correct owner. The Claimants have not come close to establishing that there was any discriminatory conduct motivated by a preference for Mr Benzinge over Mr Marshall. The NT claim lacks all merit.[634]

247. The Claimants also allege that Ngali was afforded more favourable treatment than NRD.[635] However, Ngali (which received a licence to mine gold) was not in a materially similar situation to NRD.[636] The Claimants have proffered no evidence in support of their claim that Ngali received more favourable treatment in relation to the negotiation process, which appears to be based on conjecture. Indeed, the Claimants have acknowledged that they have no knowledge of what investments Ngali made or what else it did to satisfy Rwanda that it was entitled to long-term licences.[637] Nor is it correct to say, as the Claimants do, as an apparent comparator to Ngali, that NRD "*could not get any meaningful negotiation* [with Rwanda] *in more than four years*".[638]

248. In their PHB, the Claimants allege for the first time that "*it appears that Ngali Mining was not required to carry out the same level of exploitation*".[639] Again, this is speculation and uncorroborated by any evidence. In any event, it is entirely unclear how a gold mining licence issued under a later law could be relevant to a claim requiring the parties to be in "*like circumstances*." No breach of Article 3 is made out on the facts.

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[632] *Ibid.* (**RL-024**), at para. 175; Article 3 of the BIT expressly requires that the parties be in "*like circumstances*".

[633] See paras. 129-137 above.

[634] Counter-Memorial, at paras. 461-467.

[635] PHB, at paras. 47-49.

[636] Counter-Memorial, at paras. 457-459.

[637] PHB, at para. 47

[638] PHB, at para. 47.

[639] PHB, at para. 48.

249. The Claimants' allegations regarding Tinco are also without merit.[640] For the reasons set out at paragraphs 231-233 above, NRD and Tinco were in a materially different position and no breach of the MFN clause is made out on the facts.

* * *

250. For the reasons set out above, the Claimants' claims should be dismissed in their entirety.

[640] PHB, at para. 50.