

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bay View Group LLC and The Spalena Company LLC

Claimants.

- v. -

Republic of Rwanda

Respondent.

(ICSID Case No. ARB/18/21)

MEMORIAL ON PRELIMINARY OBJECTIONS

24 May 2019

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1. This Memorial on Preliminary Objections is served by the Republic of Rwanda ("**Rwanda**" or "**Respondent**") pursuant to Article 14 and Annex C of the Tribunal's Procedural Order No. 1 dated 12 December 2018.
2. This Memorial on Preliminary Objections adopts the abbreviations and definitions as set out in Annex I to the Counter-Memorial on the Merits (although, for convenience, the definitions are also given in the text). It relies in relevant part on the supporting witness statements, expert reports, documentary evidence and legal exhibits listed in Annexures II-IV of the Counter-Memorial on the Merits, together with the additional legal authorities listed in Annex I.

I. INTRODUCTION AND SUMMARY

3. Bay View Group, LLC ("**BVG**") and The Spalena Company ("**Spalena**", together the "**Claimants**") seek an award of unspecified damages for the alleged mistreatment of, and interference with, its alleged investments in five mining concessions in Rwanda.
4. Essentially, the Claimants now seek to shift responsibility for their own failures and breaches of contract to Rwanda, arguing, amongst other things, that in breach of Rwanda's obligations under the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment (the "**USA-Rwanda BIT**"), Rwanda mistreated and/or expropriated the Claimants' alleged investments.
5. As summarised in the Respondent's Counter-Memorial on the Merits, Rwanda did not breach its obligations under the USA-Rwanda BIT, and each of the Claimants' claims in this arbitration are factually and legally meritless; for the avoidance of doubt, nothing in this Memorial is in any way to be taken as qualifying or detracting from that, and Rwanda reserves all of its rights in this regard. However, the Tribunal and ICSID also lack jurisdiction¹ to determine these claims, and that is the subject matter of this Memorial. Essentially what the Claimants are attempting to do is to bring a plainly hopeless decade-old, Rwandan domestic law breach of contract claim, in relation to licences allegedly held or expected by a third party Rwandan domestic company, within the jurisdictional scope of an International law ICSID arbitration. As developed further below, that cannot and should not be permitted by this Tribunal: neither the Tribunal nor ICSID have jurisdiction under the USA-Rwanda BIT and/or the ICSID Convention, and

¹ Submissions in this Memorial that the Tribunal and/or ICSID lacks "jurisdiction", and to jurisdictional objections and the like, are to be taken, unless the contrary appears, to include and to encompass (if and to the extent necessary) the submission and objection that the claims or a claim are not admissible and/or that the Tribunal and/or ICSID should not exercise any jurisdiction that it may or might be held (contrary to the Respondent's case) to have. If, in relation to any plea, the distinction between lack of jurisdiction and inadmissibility becomes of real relevance it will be further developed by the Respondent in future argument. Further, references in the submissions in this Memorial to the Tribunal and/or ICSID lacking jurisdiction are also to be taken to include submissions of lack of "competence". If there is said to be a material distinction between the concepts, and that becomes a relevant matter, it will be further developed by the Respondent in future argument.

if they did (contrary to the Respondent's case) have such jurisdiction, that jurisdiction should not be exercised.

6. As elaborated further in this Memorial (and in, and underpinning, the Request for Bifurcation), the Tribunal does not need to proceed to assess the merits of the Claimants' claims. The Claimants have failed, and can now be seen to have failed, to establish that the Tribunal and/or ICSID has and/or should exercise jurisdiction over the Claimants' claims. The Respondent's jurisdictional objections should be heard at the outset and the claims dismissed so that time, resources and effort are not expended unnecessarily.
7. The Respondent's jurisdictional objections are, in broad summary, as follows, and are developed further below:
8. *First*, the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over the Claimants' claims arising out of the alleged failure to grant long-term licences to NRD. The alleged acts and the facts upon which these claims are based took place prior to the entry into force of the USA-Rwanda BIT. Further, or alternatively, the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* as all of the Claimants' claims are time barred: the acts on which they are supposedly based, and the requisite knowledge of the supposed breach and supposed subsequent loss or damage were acquired outside of the limitation period set out in Article 26(1) of the USA-Rwanda BIT (See further Section III below).
9. *Second*, the Claimants do not have standing to bring these claims because they do not meet the definition of "claimant" under the USA-Rwanda BIT: (i) BVG does not, and is not alleged to, own NRD; (ii) the Claimants have not provided any evidence, or even alleged, to control NRD, and (iii) the Claimants have not provided any evidence that either BVG or Spalena have suffered any loss, and thus the Tribunal and/or ICSID lacks jurisdiction *ratione personae* (See further Section IV below).
10. *Third*, although it is not entirely clear exactly what investments the Claimants allege were protected under the USA-Rwanda BIT, it does not appear that the Claimants have any such protected investments. Neither NRD nor NRD's licences to undertake mining operations constitute investments under the USA-Rwanda BIT or the ICSID Convention, and thus the Tribunal and/or ICSID lacks jurisdiction *ratione materiae* (See further Section V below).
11. *Fourth*, Rwanda has not consented to arbitrate Spalena's claims as it failed to comply with the requirements of Article 23 and 24(2) of the USA-Rwanda BIT in that it neither notified Rwanda of any disputes it had, nor sought to settle any such disputes, therefore

the Tribunal and/or ICSID lacks jurisdiction² *ratione voluntatis* over Spalena's claims (See further Section VI below).

² Particular reference is here made to footnote 1 above. This objection includes the submission that the Tribunal should not exercise any jurisdiction it may (contrary to the Respondent's case) have.

II. THE TRIBUNAL'S POWER TO HEAR THESE PRELIMINARY OBJECTIONS

12. The ICSID Convention, the ICSID Arbitration Rules and the USA-Rwanda BIT, all provide that this Tribunal has the power to consider and to decide the Respondent's preliminary objections, and to do so as a preliminary question:

12.1. Article 41 of the ICSID Convention provides:

"(1) The Tribunal shall be the judge of its own competence.

*(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."*³

12.2. Article 41(1) of the ICSID Arbitration Rules provides:

*"Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time."*⁴

12.3. Article 28(4) of the USA-Rwanda BIT provides:

*"Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34."*⁵

12.4. Article 28(5) of the USA-Rwanda BIT provides:

*"In the event that the respondent so requests [...] the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence."*⁶

³ See ICSID Convention, at Article 41, the term "competence" is (see footnote 1 above) used interchangeably with the term "jurisdiction" see commentary on Article 41, C. H. Schreuer et al., *THE ICSID CONVENTION: A COMMENTARY* (2nd Ed, 2009) (**Exhibit RL-058**), at para. 57, page 532 ("...when Article 41(1) says that the tribunal shall be the judge of its own competence, it is clear that the tribunal must also judge whether the Centre has jurisdiction in the case before it.").

⁴ ICSID Arbitration Rules, at Rule 41(1).

⁵ USA-Rwanda BIT (**Exhibit CL-006**), at Article 28(4) [emphasis added]. The Respondent relies on this Article to show only that the Tribunal has the power to address objections as preliminary questions, and is not, to be taken as, in any way suggesting that its preliminary objections are based on whether the claims submitted by the Claimants are those for which an award may be made under Article 34, which this Article expressly provides for.

⁶ USA-Rwanda BIT (**Exhibit CL-006**), at Article 28(5).

13. The object and purpose of these provisions, taken together, is therefore to provide an efficient mechanism for disposing of claims at an early stage if they do not fall within the jurisdiction of the tribunal. With that in mind, at the first session held on 3 December 2018 (the “**First Session**”), following notification from the Respondent that it wished to make preliminary objections relating to this Tribunal’s jurisdiction to hear the claims brought by the Claimants in this arbitration, a timetable for the Respondent to make such objections was set forth in Annex C to the Tribunal’s Procedural Order No. 1 of 12 December 2018 (“**PO1**”).⁷
14. It has been said that, when considering preliminary objections and at jurisdictional stages of proceedings, “... *it is commonly accepted that [...] the facts as alleged by the claimant have to be accepted, when, if proven, they would constitute a breach of the relevant treaty.*”⁸ Further, Article 28(4)(c) of the USA-Rwanda BIT provides that “*the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)*” and that they “*may also consider any relevant facts not in dispute*”.⁹
15. The foregoing does not mean however that the Tribunal must accept all of the Claimants’ factual allegations at face value. Not only does a party asserting a fact have to prove that fact (and thus for the Claimants facts to be accepted they must to begin with be supported by evidence),¹⁰ but as the *Pac Rim Cayman v. El Salvador* tribunal observed in respect of an identically worded article set out in the Dominican Republic-Central America-United States Free Trade Agreement, “*factual allegations*” do not include “*a legal allegation clothed as a factual allegation,*” nor do they include “*a mere conclusion unsupported by any relevant factual allegation.*”¹¹ As that tribunal further noted, “*substance must clearly prevail over form under this procedure.*”¹² Further, as the tribunal in *Trans-Global v. Jordan* observed with respect to a preliminary objection under the ICSID Arbitration Rules, “*as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate*

⁷ The timings set out in Article 28(5), and to the extent relevant Article 28(4), of the USA-Rwanda BIT have therefore been superseded by agreement of the parties and the Tribunal.

⁸ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (**Exhibit RL-059**), at para. 29.

⁹ USA-Rwanda BIT (**Exhibit CL-006**), at Article 28(4)(c).

¹⁰ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (**Exhibit RL-059**), at para. 29, together with the cases cited therein.

¹¹ *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) (**Exhibit RL-060**), at para. 91.

¹² *Ibid* (**Exhibit RL-060**), at para. 91.

or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation.”¹³

16. Further, as regards facts which are material to the establishment of jurisdiction (and can be determined separately from the merits of the claims),¹⁴ the Claimant should be required to establish such facts at the preliminary stage, so that any decision made by the Tribunal to accept or deny jurisdiction disposes of the issues, so far as possible, once and for all, including in the interests of efficiency, fairness and saving of costs.¹⁵
17. With the above in mind, the Tribunal should suspend the proceedings on the merits under Article 41(3) of the ICSID Arbitration Rules and proceed to hear the Respondent’s preliminary objections set out herein as a preliminary stage.¹⁶

¹³ *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008) (**Exhibit RL-061**), at para. 105.

¹⁴ For the avoidance of doubt, the Respondent’s position is that the facts that must be proven by the Claimants at the preliminary stage, in relation to whether this Tribunal and/or ICSID have jurisdiction to determine the claims, are those not sufficiently linked to the merits to warrant the need for these preliminary objections to be heard in conjunction with the merits, but instead, due to their (i) serious and substantial nature, (ii) ability to be examined without prejudicing the merits, and (iii) ability to dispose of all or an essential part of the claims (as set out more fully in the Respondent’s Request for Bifurcation) they can and should be heard in a separate preliminary phase.

¹⁵ See *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. the Republic of Peru*, ICSID Case No. ARB/03/4, Dissenting Opinion of Sir Franklin Berman (5 September 2007) (**Exhibit RL-062**), at para. 17; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) (**Exhibit RL-063**), at paras. 4.9-4.11; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) (**Exhibit RL-064**), at paras. 53-58.

¹⁶ The Tribunal’s power to suspend the proceedings on the merits is further and more fully addressed in the Respondent’s Request for Bifurcation which is served alongside these Preliminary Objections.

III. LACK OF JURISDICTION RATIONE TEMPORIS

18. The USA-Rwanda BIT contains the following conditions and limitations relevant to whether the Tribunal and/or ICSID has jurisdiction *ratione temporis*:

18.1. At Article 2(3) it provides: “For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.”;¹⁷ and

18.2. At Article 26(1) it provides: “No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant [...] has incurred loss or damage.”¹⁸

19. These restrictions mean that for there to be jurisdiction the Claimants’ claims must arise from facts or acts that took place after the USA-Rwanda BIT entered into force and must be claims that fall within the limitation period, being three years from when the Claimants first knew, or should have known of the breach and loss. For the reasons set out further below, the Claimants’ claims do not meet these jurisdictional tests, and the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over them.

A. The Claimants’ claims based on Rwanda’s alleged failure to grant the long-term licences relate to acts that took place prior to the USA-Rwanda BIT entering into force

20. The USA-Rwanda BIT was signed on 19 February 2008 but did not enter into force until 1 January 2012.¹⁹ As referred to at paragraph 18.1 above, Article 2(3) of the USA-Rwanda BIT states that it “does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.”²⁰

21. Clauses of this nature are standard in Bilateral Investment Treaties (“**BIT(s)**”). They reflect the basic rule of non-retroactivity of treaties which is embodied in Article 28 of the 1969 Vienna Convention on the Law of Treaties (“**VCLT**”), which provides that:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which

¹⁷ USA-Rwanda BIT (**Exhibit CL-006**), at Article 2(3).

¹⁸ USA-Rwanda BIT (**Exhibit CL-006**), at Article 26(1).

¹⁹ USA-Rwanda BIT (**Exhibit CL-006**), at Article 22(1). Rwanda joined the ICSID Convention on 14 November 1979 and the ICSID Convention was made effective in its territory by way of Décret No. 20/79 du 16 juillet 1979.

²⁰ USA-Rwanda BIT (**Exhibit CL-006**), at Article 2(3).

took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party."²¹

22. It is well-established that the fundamental provisions of a BIT will only apply if they are in full force and effect at the moment when the relevant violations take place²² and that "[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force".²³
23. Long before the USA-Rwanda BIT entered into force on 1 January 2012, on 24 November 2006, NRD entered into a contract with the Government of Rwanda for licences to occupy a number of mining concessions (the "**Contract**").²⁴ It was executed in both French and English versions, which unfortunately differ in some aspects, in particular in relation to Articles 3 / 4. Article 1 of the Contract authorised NRD to explore and run the mining operations within Rutsiro, Mara, Sebeya, Giciye and Nemba for four years (the "**Five Concessions**")²⁵, and in January 2007 Rwanda duly granted four-year mining licences to NRD.²⁶ Articles 2, and 3 / 4 set out the rights and obligations under the Contract. Article 2 places various obligations on NRD, in particular the requirement immediately to proceed to industrial exploitation in all given sites, and the requirement to provide both evaluation reports of reserves and a feasibility study four years after the date of the Contract. Article 3 (in the French) and Article 4 (in the English) contain the rights of NRD; in particular, following, and dependant on, a positive evaluation of the required study that NRD was obliged to submit, it would be granted (or, in the French, to have the priority to be granted) mining concessions. In French, Article 3 provides (in translation) that "[a]fter a positive review of the assessment and the feasibility study, Natural

²¹ Vienna Convention on the Law of Treaties (concluded on 23 May 1969) (**Exhibit CL-10**), at Article 28.

²² See, for example, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award I (8 May 2008) (**Exhibit RL-065**), at paras. 428-446; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility (29 July 2008) (**Exhibit RL-066**), at para. 116; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (3 March 2010) (**Exhibit RL-067**), at para. 241; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. The government of Belgium*, ICSID Case No. ARB/12/29, Award (30 April 2015) (**Exhibit RL-068**), at para. 172.

²³ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) (**Exhibit RL-069**), at para. 93; see also *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) (**Exhibit RL-125**), at para. 2.105-2.106.

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

²⁵ *Ibid* (**Exhibit C-017**).

²⁶ Letters from the Minister of State for Water and Mines (B. Munyanganizi) to the Director of NRD (B. Benzinge), *Forwarding Ministerial Decree* (29 January 2007) regarding the Giciye Concession (**Exhibit C-018**), the Mara Concession (**Exhibit C-019**), the Nemba Concession (**Exhibit C-020**), the Rutsiro Concession (**Exhibit C-021**), and the Sebeya Concession (**Exhibit C-022**).

*Resources Development Rwanda Ltd has priority for obtaining a mining title.*²⁷ The equivalent provision in the English version of the Contract, Article 4, provides that “[a]fter positive evaluation of the submitted feasibility study Natural Resources Development Rwanda Limited will be granted the mining concessions”.²⁸ For convenience and without prejudice to any submissions the Respondent may wish to make about the inconsistency between the French and the English clauses in due course, references below to Article 4 are reference to the English version.

24. The crux of the Claimants’ case as presented, insofar as it concerns Rwanda’s alleged failure to grant long-term mining concessions, is essentially that Rwanda was in breach of the Contract in failing to grant the long-term mining licences to which they claim they were ‘automatically’ entitled pursuant to Article 4 after NRD submitted an application for further licences (although in fact it was for short-term licences) in November 2010 prior to expiry of the licences granted from January 2007 to January 2011. This claim is framed variously as a breach of Articles 3-6 of the USA-Rwanda BIT, and the Respondent wholly rejects the Claimants’ claims on the merits. As set out in more detail in the Respondent’s Counter-memorial, the Claimants have failed to provide any evidence that NRD actually met the requirements for the granting of the long-term mining concession licences: it did not, and was in breach of its obligations under the Contract, which then expired because of NRD’s breaches and the failure to meet necessary conditions, and/or Rwanda’s inability to evaluate the merits of the application made. Accordingly, Rwanda was clearly never under any obligation to grant NRD long-term licences under the Contract and did not breach the USA-Rwanda BIT.
25. In any event, the breaches alleged are, however, supposed to have occurred when, after NRD submitted what the Claimants assert to be (but which on its face was plainly not) its application for long-term licences on 29 November 2010, Rwanda did not grant it.²⁹ Specifically, the Claimants allege that the Respondent was in breach of its contractual obligation by failing to grant the long-term licences at this time in response to NRD’s application. In particular, the Claimants state in their Memorial that NRD was notified on 2 August 2011 by Minister Stanislas Kamanzi of the Ministry of Natural Resources (“**MINIRENA**”) that a long term contract would not be issued at that time because NRD

²⁷ Translation of the French language version of the Contract (**Exhibit R-011**), at Article 3, the French language version being “Après examen positif des travaux d’évaluation et l’étude de faisabilité la Société Natural Resources Development Rwanda Ltd a la priorité pour l’obtention de titre minier.” In its Counter-Memorial, the Respondent contends that the translation provided in the original English version of the Contract (**Exhibit C-017**) is not reflective of the proper interpretation of the French version and has provided an alternative translation (**Exhibit R-011**).

²⁸ Contract for acquiring mining concessions between the Government of Rwanda and Natural Resources Development Rwanda Ltd (24 November 2006) (**Exhibit C-017**).

²⁹ The Claimants rely on Application for the Renewal of Exploration Licences Nemba, Rutsiro, Sebeya, Giciye and Mara and Application for the Allocation of Mining Licences to NRD (**Exhibit C-035**); F. Twagiramungu Consulting Report (September 2010) (**Exhibit C-036**).

had not fulfilled its obligations under the Contract with respect to a “*final report of reserves and mining feasibility studies*” as required at the end of NRD’s four-year contractual term,³⁰ and argue that the Respondent acted wrongfully in not granting the licences, as NRD claims that it had submitted the documents required to be granted the long-term licences under the Contract.³¹ As is apparent from the letter of 2 August 2011, as of this date Rwanda treated the Contract as at an end, and considered NRD to be in breach.³²

26. The timing of these events is critical. The date on which the events in question took place constitutes the determining factor for jurisdiction *ratione temporis*.³³ The Claimants rely on their application of 29 November 2010 and the Respondent’s letter of 2 August 2011 in support of their claim that Rwanda was in breach by not granting long-term licences at this time, and thus this forms the basis of their claim for breach of the USA-Rwanda BIT. Importantly, these events occurred prior to the USA-Rwanda BIT coming into force on 1 January 2012, and as such no breach of obligations under that treaty could have occurred as a result of those events. Further, as the alleged violation took place prior to the USA-Rwanda BIT entering into force, the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* over the Claimants’ claim (which is denied) that Rwanda did not act consistently with the Minimum Standard of Treatment required by Article 5 of the USA-Rwanda BIT.
27. Further, the Claimants’ claim that Rwanda expropriated its investment is also based on the alleged failure to grant long-term mining licences and as such, for the same reasons, this Tribunal and/or ICSID has no jurisdiction to hear the claim: the relevant events and the alleged breach of Article 6 of the USA-Rwanda BIT (which is denied) took place prior to the USA-Rwanda BIT entering into force.
28. Further, and due to the vague nature in which some of the Claimants claims are pleaded, for the avoidance of doubt, the Respondent submits in general that this Tribunal and/or ICSID lacks jurisdiction over any other of the Claimants’ claims that arise out of the alleged failure to grant a long-term mining licence and/or out of Rwanda’s decision to grant a short term extension of the licence (as opposed to a long-term licence) on 2 August 2011, as these actions, and therefore the alleged breaches (which are denied), occurred prior to the USA-Rwanda BIT entering into force.³⁴

³⁰ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration License* (2 August 2011) (**Exhibit C-062**).

³¹ Claimants’ Memorial, at paras. 47-52.

³² Mr. Richard Mugisha, the Respondent’s Expert on Rwandan Law, agrees with this analysis, see Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 8.2.

³³ *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility (29 July 2008) (**Exhibit RL-066**), at para. 116.

³⁴ At para. 194 of the Claimants’ Memorial, the Claimants rely on Rwanda’s decision to grant a series of short term extensions of the Contract as evidence of its claim that Rwanda permitted Rwandan nationals to use the

B. Lack of jurisdiction as the Claimants' claims are out of time

29. The Tribunal and/or ICSID also lacks jurisdiction *ratione temporis* for a further reason. All of the Claimants' claims are out of time. As referred to at paragraph 18.1 above, Article 26 of the USA-Rwanda BIT prescribes the time period in which claims must be filed. It states that:

"Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage."³⁵

30. Similar limitation clauses are commonplace in BITs. They reflect the important policy objective of requiring diligent prosecution of known claims and ensuring claims will be resolved when evidence is reasonably available and fresh.³⁶
31. The relevant date for the purposes of calculating the limitation period is three years before the Claimant filed its Request for Arbitration.³⁷ Article 26 thus requires that no more than three years have elapsed between (i) the date when the Claimants for the first time obtained actual or constructive knowledge of a breach of the USA-Rwanda BIT, and of loss or damage caused by such breach, and (ii) the date of submission to arbitration of the dispute which involves claims for that breach of the USA-Rwanda BIT, pursuant to Article 24 of the USA-Rwanda BIT.³⁸
32. The Claimants initially attempted to file a Request for Arbitration on 14 May 2018 (the "**Original RfA**"). However, the Original RfA was rejected by ICSID and it declined to register it.³⁹ The Claimants then filed an amended Request for Arbitration on 12 June

police and court system to harm the Claimants' alleged investments. The Respondent is unclear how this is related to this breach and/or is different from its claim that Rwanda eviscerated its legitimate expectations in relation to the granting of the long-term licence (at Section VI.A.1), but addresses it separately in any event.

³⁵ USA-Rwanda BIT (**Exhibit CL-006**), at Article 26.

³⁶ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction (22 August 2008) (**Exhibit RL-070**), at para. 3.5.4, page 31.

³⁷ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 192.

³⁸ *Ibid* (**Exhibit RL-012**), at para. 204, Article 26 of the USA-Rwanda BIT being materially identical to the time-bar provision contained in Art. XII.3(d) of the Canada-Venezuela BIT, and as set out in para. 191, which was at issue here ("*not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage*").

³⁹ Letter from the ICSID Secretariat Duane Morris LLP, *Request for Arbitration of Bay View Group LLC, The Spalena Company LLC, and Natural Resources Development Rwanda, Ltd.* (24 May 2018) ("*...we invite the Requesting*

2018 (the “**Amended RfA**”), which was registered by ICSID. Thus, pursuant to Article 26 of the USA-Rwanda BIT, the Tribunal has no jurisdiction to hear claims based on alleged breaches and loss and damage, of which the Claimants first acquired, or should have first acquired, knowledge⁴⁰ prior to 12 June 2015 (the date three years before the Amended RfA was submitted) or alternatively 14 May 2015 (the date three years before the Original RfA was submitted) (the “**Cut-off Date**”).

33. In considering the application of the limitation period to the claims at issue, the Tribunal must break down each claim into individual breaches and loss/damage and apply the limitation period separately.⁴¹ As observed by the Tribunal in *Rusoro Mining v. Venezuela*, this is consistent with the approach adopted by other investment tribunals.⁴² It is also consistent with the wording of Article 26 of the USA-Rwanda BIT, which defines the starting date for the limitation period as the date when the investor acquired knowledge that a breach had occurred and a loss had been suffered.⁴³
34. Further, each breach is deemed to occur when the governmental conduct complained of occurs.⁴⁴ Article 26 of the USA-Rwanda BIT adopts a wide interpretation of knowledge in that incorporates the concepts of both actual and constructive knowledge. The question of whether a claimant had actual knowledge is primarily a question of fact.⁴⁵ Constructive knowledge, on the other hand, is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact.⁴⁶
35. As to the extent of the knowledge that is required to start time running, there is well-established arbitral jurisprudence considering the limitation clause contained in the North America Free Trade Agreement (“**NAFTA**”). That limitation clause is materially identical to the one contained in the USA-Rwanda BIT.⁴⁷ Various tribunals have rightly held that what is required in order for time to begin running under a limitation clause of

Parties to clarify whether NDR is a requesting party... in this matter. Please note that if NDR is not, the Secretary-General would not be in a position to register the Request in its current version.” [sic].

⁴⁰ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 209.

⁴¹ *Ibid* (**Exhibit RL-012**), at para. 231.

⁴² *Ibid* (**Exhibit RL-012**), at para. 231.

⁴³ *Ibid* (**Exhibit RL-012**), at para. 231, where the tribunal was considering a limitation clause that was materially identical to that contained in Article 26 of the USA-Rwanda BIT, see wording of Article 26 of the USA-Rwanda BIT (**Exhibit CL-006**), at para. 29 above.

⁴⁴ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) (**Exhibit RL-072**), at para. 154.

⁴⁵ *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 54.

⁴⁶ *Ibid* (**Exhibit RL-073**), at para. 59.

⁴⁷ North American Free Trade Agreement (signed 17 December 1992) (**Exhibit RL-074**), at Article 1116(2) (“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”)

this nature is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear.⁴⁸ As the tribunal observed in *Berkowitz v. Costa Rica*:

“On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in Mondev, Grand River, Clayton and Corona Materials that the limitation clause does not require full or precise knowledge of the loss or damage. Indeed, in the Tribunal’s view, the Article 10.18.1 requirement, inter alia, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.”⁴⁹

36. Each of the claims asserted by the Claimants have become time-barred under the USA-Rwanda BIT as the Claimants had actual, or at least constructive, knowledge of the alleged breaches (and any associated loss) prior to the Cut-off Date, and the Tribunal and/or ICSID has no jurisdiction over them.⁵⁰ The Respondent addresses each alleged breach in turn below. In light of the overwhelming evidence of actual knowledge, the Respondent does not here develop further or in great detail the allegation of constructive knowledge, but asserts (for the avoidance of doubt) that the Claimants had constructive knowledge of the alleged treaty breaches (and any associated loss) before the Cut-off Date.
37. Actual and/or constructive knowledge of BVG and Spalena is reasonably and rightly to be imputed to them through knowledge held by Mr. Marshall.⁵¹ Mr. Marshall is (and was at material times) the President of and/or controlled BVG and Spalena. He was also appointed as Managing Director of H.C. Starck Resources GmbH, NRD’s parent company

⁴⁸ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit RL-012**), at para. 217; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

⁴⁹ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**Exhibit RL-076**), at para. 213.

⁵⁰ *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award (3 March 2010) (**Exhibit RL-071**), at para. 258; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (3 March 2010) (**Exhibit RL-067**), at para. 258.

⁵¹ See *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**Exhibit RL-043**), at para. 6.9.

(holding 85% of the shares in NRD) on 23 December 2010, following the purchase of H.C. Starck Resources GmbH by The Spalena Company LLC. As Mr. Marshall controlled NRD as well as BVG and Spalena, any knowledge held by NRD can, through Mr. Marshall, be reasonably imputed to the Claimants. To say otherwise would make no sense in circumstances where the link between the Claimants and NRD is Mr. Marshall; everything NRD knew, BVG and Spalena thereby also knew. Indeed, as will be apparent from the evidence discussed below, and the volume of correspondence between NRD and Rwanda that has been served by the Claimants, each piece of material correspondence exchanged between NRD and Rwanda went through Mr. Marshall.

1. The Claim that Rwanda’s conduct in failing to grant the long-term licences breached legitimate expectations protected by Article 5 is out of time

38. In Section VI.A.1 of the Memorial, the Claimants allege that they had a legitimate expectation that after obtaining the Contract they would receive long-term licences, and that by not granting them the long-term licence Rwanda breached the fair and equitable treatment (“FET”) element of the minimum standard of treatment (“MST”) standard in Article 5 of the USA-Rwanda BIT.
39. Such breach and associated supposed loss are denied, but any breach and associated loss (if indeed this breach would have resulted in any loss or damage) in relation to Rwanda’s decision not to grant NRD long-term licences would have been, or at least *should* have been, known to the Claimants when the long-term licences were not granted by (at the latest) 2 August 2011 when Minister Kamanzi communicated to NRD that the licences NRD had applied for in November 2010 would not be granted, and asserted that NRD was itself in breach of the Concessions Contract, even if the full extent and quantification of the alleged loss was unclear.⁵² Further, in relation to NRD’s application of 30 January 2013,⁵³ which was expressly for a long-term (30-year) concession, it was reasonably and sufficiently clear by at least 2 April 2013, when Rwanda proposed that NRD apply for a new short term licences at only one concession site,⁵⁴ that its application had been rejected, and that (had Rwanda had any obligation to grant long term concessions on all five sites, which it did not) Rwanda was in breach of contract.

⁵² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

⁵³ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister. S. Kamanzi), *Application for Long-Term Mining License* (30 January 2013) (**Exhibit C-054**).

⁵⁴ Letter from the CEO of Rwanda Development Board (C. Akamanzi) to the Chairman of NRD (J. C. Zarnack), *Invitation to negotiate for a small mine exploration licence between the Government of Rwanda and Natural Resources Development Rwanda Ltd.* (2 April 2013) (**Exhibit C-057**).

40. Indeed, it is plain that NRD and/or Mr. Marshall (and, as summarised above, through NRD and/or Mr. Marshall, the Claimants) were aware of both the supposed breach of the USA-Rwanda BIT, and NRD expressed its own intention to bring such a claim under that BIT, prior to the Cut-off Date. This is evidenced by a letter from NRD to Minister Evode Imena, the Minister of State in Charge of Mining, dated 1 November 2014, which specifically claims that Rwanda's failure to grant a long-term licence pursuant to the Contract is "*in violation of the Bilateral Investment Treaty between Rwanda and the U.S.*"⁵⁵ This letter plainly contains an express allegation by NRD, prior to the Cut-off Date, that Rwanda was in breach of the USA-Rwanda BIT by not granting the long-term licences, and can only have been made on the basis of actual knowledge of the alleged breach and alleged consequent loss. Further correspondence between NRD and Rwanda indicates actual knowledge by NRD of Rwanda's decision not to grant the long-term licences, and therefore of the alleged breach and any associated loss prior to the Cut-off Date. The Respondent relies in particular but without limitation on the following documents:

- 40.1. A letter from NRD to a legal analyst at the Strategic Investments Unit at the Rwanda Development Board ("**RDB**") dated 9 April 2013 which clearly sets out NRD's view that Rwanda was in breach of the USA-Rwanda BIT by not granting the long-term licences. The letter states that the original contract has passed "*without NRD receiving the agreed upon Long Term License*".⁵⁶
- 40.2. A letter from MINRENA to NRD dated 2 April 2014 which clearly sets out Rwanda's position that NRD has no entitlement to a long-term licence. The letter refers to Presidential Order No. 63/02 of 12/02/2014 and informs NRD that as a consequence it will need to renegotiate the mining agreements under the terms of the new legal framework.⁵⁷
- 40.3. A letter dated 18 August 2014 from MINRENA confirming its position that NRD must reapply for the licences on the basis of the new legal framework.⁵⁸
- 40.4. A letter dated 12 November 2014 from MINIRENA to NRD which again sets out in very clear terms that the Contract did not give NRD rights to an automatic right to

⁵⁵ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Appeal of Decision* (1 November 2014) (**Exhibit C-086**), at page 3.

⁵⁶ Letter from the Chairman of NRD (R. Marshall) to the Legal Analyst – Strategic Investments Unit (M. Isibo) (9 April 2013) (**Exhibit C-058**).

⁵⁷ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**).

⁵⁸ Letter from the Minister of State in charge of Mining (Minister E. Imena) to NRD, *Submission of the requirements for a license in line with the new legal framework* (**Exhibit C-064**).

long-term mining licences and requesting that NRD submit the documents that it had failed to submit as part of its most recent application.⁵⁹

41. In light of this correspondence with Rwanda, and in all the circumstances, it is inconceivable that the Claimants did not know of the alleged breach now claimed in relation to Rwanda's decision not to automatically grant long-term licences to NRD. It is also inconceivable that the Claimants did not know of any alleged loss (if indeed this alleged breach resulted in any loss or damage) that would flow from these alleged breaches, even if the full extent and quantification of such alleged loss was not entirely clear.
42. The Claimants' claim that Rwanda breached the FET element of the MST standard in Article 5 of the USA-Rwanda BIT by failing to grant NRD long-term licences is therefore out of time. The Tribunal and/or ICSID lacks jurisdiction *ratione temporis* in relation to it.

2. The Claim that Rwanda failed to implement the 2014 Law uniformly in violation of the MST standard is out of time

43. At Section VI.A.2 of the Memorial, the Claimants allege that the implementation of Rwanda Law No. 13/2014 on Mining and Quarry Operations ("**2014 Law**") was a breach of the FET element of the MST standard because it "*used the 2014 Law to treat the Claimants differently than other investors and generally harass NRD*"⁶⁰ in breach of Article 5 of the USA-Rwanda BIT.
44. The Claimants rely, in support of this claim, on several actions allegedly taken by Rwanda. However, any alleged breach and associated loss (if indeed this alleged breach would have resulted in any loss or damage) arising from them would have been, or at least should have been, first known to the Claimants at the time of the implementation of the 2014 Law, or very shortly after, even if the full extent and quantification of the alleged loss and damage was unclear.
45. The Claimants allege that "*Minister Imena violated Rwandan law when he requested NRD to 're-apply' for its Concessions in August 2014 after informing NRD, by letter dated 2 April 2014, that direct negotiations of the 'licenses' 'shall start in April 2014', and then failing to hold such negotiations.*"⁶¹ The Claimants allege that Rwanda's conduct insofar as the reapplication process was managed was a breach of NRD's rights of due process.⁶²

⁵⁹ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Response to your letter* (12 November 2014) (**Exhibit C-087**).

⁶⁰ Memorial, at para. 176.

⁶¹ Memorial, at para. 178 (footnotes omitted).

⁶² Memorial, at para. 178-179.

46. This alleged breach (which like all the breaches is denied) obviously occurred prior to the Cut-off Date, and was known to the Claimants when the facts occurred in 2014. In particular, NRD (and through it the Claimants) would have had actual knowledge, or at the very least, constructive knowledge, of the alleged breach and any associated loss when the negotiations allegedly failed to materialise following Minister Imena's letter of 2 April 2014.⁶³
47. Further, the Claimants allege that Minister Imena breached the USA-Rwanda BIT by allowing Ben Benzinge illegally to take control of NRD's headquarters in Kigali.⁶⁴ Documentation provided by the Claimants indicates that Mr. Benzinge allegedly took control of NRD's headquarters in June 2014. In particular, in a letter from Mr. Marshall to the Minister of Internal Security dated 16 June 2014, Mr. Marshall asserts that Mr. Benzinge had persuaded police to seize NRD's offices, assets and records,⁶⁵ and in a letter from NRD to Minister Vincent Biruta of MINIRENA dated 5 November 2014, NRD claims that, more than five months earlier, Minister Imena permitted Court Bailiffs to close all NRD operations, including its corporate offices.⁶⁶ Thus on the Claimants' own documents it is clear that the alleged breach (which is denied) and any associated loss took place, and that the Claimants were aware of that alleged breach and supposed loss and damage to a sufficient degree, prior to the Cut-off Date.
48. Further, the Claimants allege unequal treatment insofar as the re-application process was concerned, with NRD being supposedly treated unfavourably in comparison to other foreign investors.⁶⁷ The underlying facts upon which the Claimants rely in support of this alleged breach (which is denied) were known or should have been known to the Claimants in 2014. This is evident from the following documents in which NRD alleges unfair treatment compared with other foreign investors, albeit in terms contradicting what is now claimed (that no other foreign investor was required to reapply for licences):
- 48.1. a letter from NRD to Minister Imena dated 1 November 2014, in which NRD expressly alleges unequal treatment of NRD by Rwanda in comparison with another (unnamed) mining company.⁶⁸ The letter states that the other company was given two years for the preparation of its licence application.⁶⁹

⁶³ Letter from the Minister of State in charge of Mining (Minister E. Imena) to the Chairman of NRD (R. Marshall), *Plans for NRD* (2 April 2014) (**Exhibit C-063**).

⁶⁴ Memorial, at para. 181.

⁶⁵ Letter from the Acting Chairman of NRD (R. Marshall) to the Minister of Internal Security (16 June 2014) (**Exhibit C-065**).

⁶⁶ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 1.

⁶⁷ Memorial, at para. 182.

⁶⁸ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Appeal of Decision* (1 November 2014) (**Exhibit C-086**), at page 2.

⁶⁹ *Ibid* (**Exhibit C-086**), at page 2.

- 48.2. a letter from NRD to Minister Biruta of MINIRENA dated 5 November 2014, which again alleges unfair treatment of NRD. NRD claims that another foreign large concession holder was given more than 2 years to re-apply for its mining licence, which NRD claims is evidence of Minister Imena's "*prejudice against NRD and U.S. investors.*"⁷⁰
49. Further, any associated loss took place, and the Claimants were aware of the supposed loss and damage to a sufficient degree, prior to the Cut-off Date.
50. In the circumstances, the Claimants' claim that Rwanda breached the FET standard in Article 5 of the USA-Rwanda BIT by failing to implement the 2014 Law uniformly is therefore out of time, and the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* in relation to it.

3. The Claim that Rwanda used the ITRI/iTSCi system to punish Claimants in violation of the FET element of the MST standard is out of time

51. At Section IV.A.3 of the Memorial, the Claimants allege that Rwanda used the International Tin Supply Chain Initiative ("*iTSCi*") system implemented by the International Tin Association ("*ITRI*") and Rwanda, to punish the Claimants in breach of Article 5 of the USA-Rwanda BIT.
52. As alleged in the Claimants' Memorial, the ITRI/iTSCi system was designed to ensure every kilo of mineral mined in Rwanda would be placed in a bag at the location where it was mined and sealed with a tag by a tag manager.⁷¹ The basis of the Claimants' allegations relating to use of the ITRI/iTSCi system appears to be that in April or May of 2014 Minister Imena decided not to continue to grant NRD any tags.⁷² Any alleged breach said to arise out of Minister Imena's decision (which is denied) is therefore clearly out of time. As set out in the Respondent's Counter-memorial, Rwanda's position is that the decision not to issue tags was justified in circumstances where NRD had no licence to operate, and where there was a shareholder dispute as a result of which there were competing claims as to who was properly to be considered to be in control of NRD. However, if the decision were to be (contrary to the Respondent's case) found to be in breach of the USA-Rwanda BIT, any claims arising out of this alleged breach are clearly out of time. The Respondent relies, in particular in this respect, on a letter from NRD to the Minister Imena of 18 September 2014, in which NRD claims that it has continued to

⁷⁰ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 3.

⁷¹ Memorial, at para. 185.

⁷² Memorial, at para. 217.

be refused ITRI tags which were necessary to confirm the origin of mined NRD minerals.⁷³ As this letter makes clear, NRD was aware of the alleged breach and any associated loss by this date, which is prior to the Cut-off Date.

53. The Claimants' claim that Rwanda breached Article 5 of the USA-Rwanda BIT by using the ITR/iTSCi system to punish the Claimants is therefore out of time, and the Tribunal and/or ICSID lacks jurisdiction *ratione temporis* in relation to it.

4. The Claim that Rwanda consistently permitted Rwandan nationals to use the police and court systems to harm Claimants' alleged investment in violation of the FET standard is out of time

54. At Section IV.A.4 of the Memorial, the Claimants allege that Rwanda permitted Rwandan nationals to use the police and court systems to harm the Claimants' alleged investment, in breach of the FET standard. As a basis for this the Claimants rely on a number of alleged actions and omissions by Rwanda. In particular, they cite various actions purportedly undertaken by the Respondent which took place prior to the Cut-off Date, and which go to establish that this claim is time-barred for the reasons set out below.
55. For reasons that are unclear, the Claimants allege under this heading rather than elsewhere that, beginning in 2011, NRD received a series of short-term licence extensions when they claim that it should have instead received long-term licences.⁷⁴ That claim is without any foundation at all in circumstances where the first time NRD had applied for the grant of a long term licence was 30 January 2013, after the expiry of the short-term licence extensions in October 2012.
56. In any event, the licence extensions about which the Claimants complain were granted on 2 August 2011,⁷⁵ 2 February 2012⁷⁶ and 13 September 2012,⁷⁷ and were communicated to NRD by letter on these dates. NRD therefore had actual knowledge of any breaches and loss associated with these decisions by Rwanda to grant only short-term extensions (as opposed to the long-term licences it claimed Rwanda was obliged to grant) at the time at which they were granted, all of which were prior to the Cut-off Date.

⁷³ Letter from the Chairman of NRD (R. Marshall) to the Minister of State in charge of Mining (Minister E. Imena), *Natural Resources Development (Rwanda) Ltd. Mining Concessions* (18 August 2014) (**Exhibit C-084**), at page 1.

⁷⁴ Memorial, at para. 194.

⁷⁵ Letter from the Ministry of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration Licence* (2 August 2011) (**Exhibit C-062**).

⁷⁶ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (20 February 2012) (**Exhibit C-034**).

⁷⁷ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

Further, the Respondent repeats the submissions made at paragraphs 20-42 above in relation to the Claimants' specific claim based on Rwanda's failure to grant long-term licences.⁷⁸

57. Further, the Claimants allege that they were "*barred, on two separate occasions in 2012, from accessing its western Concessions by local authorities who simultaneously permitted local miners to continue mining in NRD's absence.*"⁷⁹ They further allege that in August 2012, NRD and its director, Mr. Marshall, were illegally barred from the offices for one week.⁸⁰ They claim that Mr. Marshall and NRD were not able to regain access to NRD's Concessions for about 10 days.⁸¹
58. It is implicit in the nature of these alleged actions, in which the Claimants say there were prevented from accessing their premises, that they would have been aware of the action and any associated loss and damage in principle when it occurred. This is verified by a letter dated 3 August 2012 from Mr. Marshall to the Mayor of the Rutsiro District, in which Mr. Marshall complains of these alleged actions and the harm that he claims to have resulted.⁸²
59. Further, the Claimants allege (which is denied) that in June 2014, Mr. Benzinge was given control of the NRD's assets, and that he "*hired his own guards to take control of NRD's offices and he began contacting business partners and government agencies on behalf of NRD, he illegally fired employees, he stole minerals from the Concessions, and changed the locks on NRD's buildings and facilities.*"⁸³ The Claimants allege that Rwanda, and Minister Imena in particular, permitted Mr. Benzinge to carry out these actions and was therefore complicit in it.⁸⁴
60. It is clear that the Claimants had actual (or, at the very least, constructive) knowledge of the alleged breaches (which are denied) and any resulting loss and damage (to a sufficient degree) at the time that these alleged acts occurred, or, in any event, well in advance of the Cut-off Date. The Respondent relies in particular on the following documents:

⁷⁸ It is unclear to the Respondent how these actions are deemed to be part of the Claimants' claim that Rwanda permitted Rwandan nationals to use the police and court systems to harm the Claimants' alleged investments in breach of the FET standard but addresses it in any event. Further should these facts be used to support this claim (that is different to the Claimants claim that Rwanda eviscerated its legitimate expectations by not granting a long-term mining licence) it is in any event time barred.

⁷⁹ Memorial, at para. 195.

⁸⁰ Memorial, at para. 197.

⁸¹ Memorial, at para. 199.

⁸² Letter from the Managing Director of NRD (R. Marshall) to the Mayor of Rutsiro District, *Closure of NRD mines in the Sectors of Manihira and Rusebeya* (3 August 2012) (**Exhibit C-047**).

⁸³ Memorial, at para. 200.

⁸⁴ Memorial, at paras. 200 and 217.

- 60.1. a letter from Mr. Marshall to the Rwanda Mineral Board on 2 June 2014 which alleges that Mr. Benzinge has seized NRD's concession, including their mineral supplies, and states that "*the costs to NRD and its shareholders were very large*".⁸⁵ The letter further alleges failures on the part of Rwanda, stating that "*although these were criminal acts, Ben Benzinge has never been arrested or prosecuted*"⁸⁶ and contends that the Rwandan police and military had been used by Mr. Benzinge to assist with the seizure of NRD assets.⁸⁷
- 60.2. a report dated 2 August 2014 prepared on request of Ms. Zuzana Mruskovicova and Mr. Marshall which records the alleged damage that resulted at the Nemba mining site during the alleged takeover, claiming that the company suffered significant losses due to stolen and damaged tools, material and equipment.⁸⁸
- 60.3. a letter from NRD to the Rwandan Minister of Justice Busingye Johnston on 26 August 2014 which claims that the losses resulting from the alleged actions are "*significant*" and even goes as far as to claim "*hidden, related costs*" relating to a claimed negative effect on the morale and organisational discipline of the company.⁸⁹
61. Further, the Claimants allege (which is denied) that during 2012, Rwandan police and military arrested NRD employees and demanded payment from them in exchange for their release.⁹⁰ The Claimants allege that during at least one arrest, the military seized all minerals being stored at the Sebeya Concession,⁹¹ and claim that this "*pattern of mistreatment against NRD*" continued in 2014.⁹²
62. A letter from Roderick Marshall to the District Police Commissioner dated 3 September 2012, demonstrates actual knowledge by NRD of these alleged breaches at this date, characterising the actions alleged to be undertaken by Rwanda to be contrary to Rwandan law and international law.⁹³ A further letter from NRD to MINRENA dated 7 June 2013 refers to "*the systematic harassment, oppression and efforts to shut down the*

⁸⁵ Letter from the Chairman of NRD (R. Marshall) to the Minister of RDB (2 June 2014) (**Exhibit R-032**), at page 1.

⁸⁶ *Ibid* (**Exhibit R-032**), at page 2.

⁸⁷ *Ibid* (**Exhibit R-032**), at page 4.

⁸⁸ *Report on Natural Resources Development Rwanda Ltd. ("NRD") at Nemba Mining Site* by Court Bailiff (U. Jacquie) (2 August 2014) (**Exhibit C-075**).

⁸⁹ Letter from the Chairman of NRD (R. Marshall) to the Minister of Justice (B. Johnston), *Return of Nemba mining business and NRD losses* (26 August 2014) (**Exhibit C-076**), at page 2.

⁹⁰ Memorial, at para. 201.

⁹¹ Memorial, at para. 201.

⁹² Memorial, at para. 202.

⁹³ See Letter from the Chairman of NRD (R. Marshall) to the Police Commissioner of Ngorerero, *Military arrests and seizure of minerals* (3 September 2012) (**Exhibit C-052**).

business of NRD'.⁹⁴ Here again, the Claimants knew (or should have known) of any resulting loss and damage at this time, even if the full extent and quantification was unclear.⁹⁵

63. Further, the Claimants allege (which is denied) that Minister Busingye, the Minister of Justice, permitted the bailiff, Mr. Jean Bosco Nsengiyuma, to attempt to auction the Claimants' property and assets.⁹⁶ The Claimants allege that as of August 4, 2014, NRD had not been able to operate its business for about two months,⁹⁷ and that as of 13 October 2014, NRD still did not have access to its main office in Kigali.⁹⁸ The Claimants further allege that the Rwandan government appeared to help the bailiffs carry out illegal seizures of Claimants property, which involved the alleged theft of nearly US\$800,000, and that these seizures occurred until February 2015.⁹⁹
64. A letter dated 13 February 2015 from NRD to the Regional Police Commander, Rogers Rutikanga not only demonstrates NRD's actual knowledge of these alleged actions, but goes as far as to particularise the supposed loss. The letter invites Mr. Rutikanga to "*stop the unlawful seizures of NRD property by Bailiff Sunday Andrew and Bailiff Janvier Uwitje*" and claims that the bailiffs have seized NRD property with a value of more than US\$1 million USD, despite the amount owing on judgments being under US\$180,000.¹⁰⁰
65. In the circumstances, the Tribunal and/or ICSID has no jurisdiction over the Claimants' claim that by permitting Rwandan nationals to use the police and court system to harm Claimants' investment Rwanda breached Article 5 of the USA-Rwanda BIT. The alleged breaches took place prior to the Cut-off Date, and the Claimants had actual or constructive knowledge of the alleged breaches and associated losses incurred at that time.

5. The Claim that Rwanda failed to treat Claimants' alleged investments transparently is out of time

⁹⁴ Letter from the Chairman of NRD (R. Marshall) to the Ministry of Natural Resources (7 June 2013) (**Exhibit C-059**).

⁹⁵ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

⁹⁶ Memorial, at para. 207.

⁹⁷ Memorial, at para. 208.

⁹⁸ Memorial, at para. 213.

⁹⁹ Memorial, at para. 212.

¹⁰⁰ Letter from the Chairman of NRD (R. Marshall) to the Regional Police Commander of Kigali Metropolitan Police (R. Rutikanga), *Unlawful seizures of NRD Property by Bailiffs* (13 February 2015) (**Exhibit C-078**).

66. At Section IV.B of the Memorial, the Claimants claim that Rwanda failed to act with transparency such that it was in breach of the FET Standard set out in Article 5 of the USA-Rwanda BIT. In particular the Claimants allege that Rwanda:
- 66.1. did not provide a reason for rejecting NRD's application for a long-term licence;¹⁰¹
 - 66.2. did not appoint an investigative or audit team to ascertain whether the deficiencies cited in relation to the rejection of NRD's application were correct;¹⁰² and
 - 66.3. did not explain to NRD why it was only granted extensions and not long-term licences when promises that the long-term agreements were forthcoming were made.¹⁰³
67. The Claimants had actual or constructive knowledge of these alleged breaches and any associated loss and damage (if indeed any losses arise from this alleged breach) prior to the Cut-off Date, and as such the Tribunal and/or ICSID does not have jurisdiction to hear this claim. The Respondent relies in particular on the following facts and matters.
68. By letter to NRD dated 28 October 2014, Rwanda advised NRD that it had decided not to grant any of the long-term licences that NRD had applied for on 18 September 2014. The Claimants would therefore have had actual knowledge of any alleged breach based on Rwanda's alleged failure to provide reasons for its declinature at this point in time, which is prior to the Cut-off Date. It is submitted that the Claimants were aware (or, should have been aware) of any alleged associated loss or damage at this point in time, even if the full extent and quantification of such loss were unclear.¹⁰⁴ Similarly, any breach and associated loss or damage in relation to Rwanda's alleged failure to appoint auditors to review its decision to decline NRD's application, and any associated loss, were or should have been apparent to NRD (and therefore the Claimants) shortly after the Respondent communicated its declinature, and in any event prior to the Cut-off Date which was several months later.

¹⁰¹ Memorial, at para. 220.

¹⁰² Memorial, at para. 220.

¹⁰³ Memorial, at para. 222.

¹⁰⁴ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

69. Further, as set out at paragraph 56 above, the short term licence extensions were granted on 2 August 2011,¹⁰⁵ 20 February 2012¹⁰⁶ and 13 September 2012,¹⁰⁷ and were communicated to NRD by letter on these dates.¹⁰⁸ NRD therefore had actual knowledge of any breach associated with Rwanda's alleged failure to give reasons why it was granting short-term licence extensions rather than long-term licences on 2 August 2011. The Claimants were aware (or, in the alternative, should have been aware) of any alleged associated loss and damage at this point in time, even if the full extent and quantification of such loss were unclear.¹⁰⁹ Additionally, the alleged breach based on Rwanda's failure to give reasons for granting an extension rather than a long-term licence on 2 August 2011 occurred prior to the USA-Rwanda BIT entering into force, and for the reasons set out at paragraphs 18-28 above, the Tribunal and/or ICSID further lacks jurisdiction for this reason.
70. In the circumstances, the Tribunal and/or ICSID has no jurisdiction over the Claimants' claim that Rwanda failed to treat the Claimants' alleged investments transparently in breach of Article 5 of the USA-Rwanda BIT. The acts on which the claim is based took place prior to the Cut-off Date and the Claimants had knowledge of the alleged breach and losses as a consequence, at that time.

6. The Claim that Rwanda Failed to Provide Full Protection and Security to Claimants' alleged investment is out of time

71. At Section VI.C of the Memorial, the Claimants allege that Rwanda failed to provide full protection and security ("**FPS**") "*such that their assets suffered physical harm throughout the time period that they were investing in Rwanda.*"¹¹⁰ In support of this claim, the Claimants rely on several alleged acts and omissions by the Rwandan government, all of which allegedly took place prior to the Cut-off Date and all of which would have resulted in actual knowledge of the alleged breach (and any associated loss

¹⁰⁵ Letter from the Ministry of Natural Resource (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your Mining and Exploration license (Exhibit C-062)*.

¹⁰⁶ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Status of your mining and exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya (20 February 2012) (Exhibit C-034)*.

¹⁰⁷ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Extension of the NRD Mining and Exploration license in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya (13 September 2012) (Exhibit C-033)*.

¹⁰⁸ *Ibid* (Exhibit C-033).

¹⁰⁹ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (Exhibit RL-004), at para. 87; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (Exhibit RL-077), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (Exhibit RL-073), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (Exhibit RL-075), at para. 275.

¹¹⁰ Memorial, at para. 234.

to a sufficient degree) prior to the Cut-off Date. The Respondent relies in particular on the following facts and matters.

72. The Claimants allege (which is denied) that considerable environmental damage resulted in 2012 and 2013 when local authorities permitted illegal miners to mine in NRD's absence.¹¹¹ The Claimants allege that such environmental damage injured Claimants' physical assets and required them to expend time and money to remediate damage that they did not cause.¹¹²
73. Letters sent from NRD demonstrate actual knowledge of the environmental damage alleged to have been caused by illegal miners in 2012. In particular, by letter to the Mayor of the Ngororero District dated 6 August 2012, NRD requested help to stop the illegal mining.¹¹³ A further letter from NRD to MINIRENA dated 14 December 2012 complained of environmental damage alleged to have been caused by illegal miners.¹¹⁴ The letter stated that there are "*thousands of illegal miners working in the NRD concession areas, using poor mining practices, and falsely claiming that they are supervised by the local authorities.*"¹¹⁵ The Claimants were aware, or in any event should have been aware, of any loss or damage resulting from this alleged breach, even if the full extent and quantification is unclear.¹¹⁶ Furthermore, NRD employed an Operations and Production Director, Mr. John Bosco Kagubare, who gives evidence on behalf of Rwanda that he was hired in 2013 specifically to try to address the problems NRD was experiencing with miners on the concessions.¹¹⁷
74. Further, the Claimants allege (which is denied) that during the time that NRD was "*barred from its western Concessions, the Rwandan Military arrested 40 NRD employees, without explanation, and demanded 50,000 RWF for the release of each person. Some employees were beaten. During at least one arrest, the Military forced the Sebeya site manager to open the office so that the Military could steal all minerals being stored at that time.*"¹¹⁸

¹¹¹ Memorial, at para. 226.

¹¹² Memorial, at para. 226.

¹¹³ Letter from the Managing Director of NRD (R. Marshall) to the Mayor of Ngororero, *Environment Management Report* (6 August 2012) (**Exhibit C-051**).

¹¹⁴ Letter from the Chairman of NRD (R. Marshall) to the Deputy Director General of the Geology and Mining Department, Ministry of Natural Resources (M. Biryabarema) (14 December 2012) (**Exhibit C-050**).

¹¹⁵ *Ibid* (**Exhibit C-050**), at page 2.

¹¹⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

¹¹⁷ Witness Statement of Mr. John Bosco Kagubare dated 20 March 2019, at paras. 6-7.

¹¹⁸ Memorial, at para. 227.

75. As mentioned at paragraph 62 above, a letter from Mr. Marshall to the District Police Commissioner dated 3 September 2012, demonstrates actual knowledge by NRD of these alleged breaches at this date, characterising the actions alleged to be undertaken by Rwanda to be contrary to Rwandan law and international law.¹¹⁹ A further letter from NRD to MINIRENA dated 7 June 2013 refers to “*the systematic harassment, oppression and efforts to shut down the business of NRD*”.¹²⁰ The Claimants knew (or should have known) of any resulting loss and damage at this time, even if the full extent and quantification was unclear.¹²¹
76. Further, the Claimants claim that through RDB and the Office of the Registrar General, Mr. Benzinge gained access to the Concessions for a period of one week in August 2012. They allege that he stole assets and minerals and changed the locks of NRD’s buildings and facilities, and that this injured the NRD’s assets.
77. On 6 August 2012, Louise Kanyonga, Registrar General of RDB wrote to Mr. Benzinge suspending him as Managing Director of NRD on the basis of a written complaint from Mr. Marshall claiming that as Managing Director, Mr. Benzinge transferred a significant amount of company assets and took over company premises to the detriment of NRD and its shareholders.¹²² This further shows that the Claimants had actual (or in the alternative, constructive) knowledge of the alleged breach and loss and damage at the time, namely in 2012, long before the Cut-off Date.
78. Further, the Claimants allege that Mr. Benzinge caused further harm to the Claimants in 2014, when he took control of the Concessions. The Claimants allege that Mr. Benzinge stole nearly US\$800,000 worth of assets and that millions of dollars of damage to the mines also resulted.¹²³ They allege that the police, military, the Minister of Justice, and other Rwandan agencies did not intervene to assist Claimants, despite their requests.¹²⁴

¹¹⁹ See Letter from the Chairman of NRD (R. Marshall) to the District Police Commissioner of Ngorerero District, *Military arrests and seizure of minerals* (3 September 2012) (**Exhibit C-052**).

¹²⁰ Letter from the Chairman of NRD (R. Marshall) to the Minister of Natural Resources (7 June 2013) (**Exhibit C-059**).

¹²¹ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

¹²² Letter from the Registrar General of RDB (L. Kanyonga) to NRD (B. Benzinge), *Suspension of position of Managing Director of Natural Resources Development* (6 August 2012) (**Exhibit R-029**).

¹²³ Memorial, at para. 230.

¹²⁴ Memorial, at para. 229.

79. As set out at paragraph 60 above, the Claimants had knowledge of these acts and the alleged omissions by the Rwandan authorities, and the estimated resulting loss, at the time that they occurred in 2014.
80. In the circumstances, the Tribunal and/or ICSID has no jurisdiction to hear the Claimants' claim that Rwanda failed to provide FPS to the Claimant's investment in breach of Article 5 of the USA-Rwanda BIT. The acts on which the claim is based took place prior to the Cut-off Date, and the Claimants' had knowledge of the alleged breach and any resulting losses and damage at that time.

7. The Expropriation Claim is out of time

81. In Section VI.D, the Claimants allege (which is denied) that the Respondent expropriated the Claimants' alleged investments in Rwanda in breach of Article 6 of the USA-Rwanda BIT. Although it is far from clear from the Claimants' pleading precisely which supposed qualifying investments are said to have been expropriated, the expropriation claim appears to be based on Rwanda's decision not to grant NRD the long-term licences and the Claimants' assertion, which the Respondent denies, that a Rwandan government agency is now operating the mines previously managed by NRD.
82. A breach of Article 6 of the USA-Rwanda BIT occurs when the alleged expropriation (as defined therein) takes place.¹²⁵
83. As mentioned above, it is not clear from the Claimants' pleading as to precisely what alleged investment was allegedly expropriated. However, it appears from the face of the pleadings that the alleged unlawful "taking" of property, constituting the alleged expropriation, is Rwanda's failure to grant long term licences to which the Claimants assert that NRD was entitled.
84. As set out at paragraph 25 above, the Respondent's decision not to grant long-term licences to NRD was clearly known to NRD by 2 August 2011, when it was granted a short-term extension to its four year licences, rather than a long term licence (which, relevantly, it had not in fact applied for, as is addressed in detail in the Respondent's Counter-Memorial). As set out above, any loss allegedly flowing from this decision was or should have been apparent to the Claimants at the time, even if the full extent and quantification of such alleged loss was not then clear.¹²⁶ Accordingly, this is the point at which any

¹²⁵ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) (**Exhibit RL-072**), at para. 161.

¹²⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit RL-004**), at para. 87; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-077**), at para. 29; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**Exhibit RL-073**), at para. 78; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-075**), at para. 275.

expropriation claim in relation to the licences became ripe such that this breach occurred prior to the USA-Rwanda BIT entering into force.

85. In the alternative, the latest possible date that the claim became ripe was when NRD was informed, following its application for a long term licence in September 2014, that that application had not been granted. This is evident from correspondence from NRD prior to the Cut-off Date which expressly alleges expropriation, highlighting clear knowledge of the alleged breach and loss. For example, a letter from NRD to Minister Biruta of MINIRENA dated 5 November 2014 claimed that Minister Evode had handled NRD's reapplication process "*as a tool to nationalise the NRD mining concessions.*"¹²⁷
86. Further, given the express time-bar contained in the USA-Rwanda BIT, the Claimants cannot seek to circumvent the USA-Rwanda BIT by relying on international law in relation to any of their claims, as this would render the time bar provided for in Article 26 of the USA-Rwanda BIT redundant. In any event, it is well-established that international tribunals may apply equitable prescription principles to dismiss untimely claims.¹²⁸ For example, in *Nauru v. Australia*, the International Court of Justice noted that "*even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.*"¹²⁹
87. Accordingly, the Tribunal and/or ICSID lacks jurisdiction to hear the Claimants' expropriation claim under Article 6 of the USA-Rwanda BIT, as the acts on which the claim is based took place prior to the Cut-off Date and the Claimants' had knowledge of the alleged breach and any resulting losses and damage at that time.

8. The Claim that Rwanda violated its National Treatment and Most-Favoured-Nation obligations are out of time

88. The Claimants allege that Rwanda violated both its National Treatment ("**NT**") and Most-Favoured-Nation ("**MFN**") obligations under Articles 3 and 4 respectively of the USA-Rwanda BIT, through the implementation of the 2014 Law and in requiring the Claimants to "re-apply" for mining licences.¹³⁰
89. These claims relate to matters set out and addressed above, namely the:

¹²⁷ Letter from the Chairman of NRD (R. Marshall) to the Minister of Natural Resources (Minister V. Biruta), *Request for Help* (5 November 2014) (**Exhibit R-070**), at page 3.

¹²⁸ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) (**Exhibit RL-078**), at para. 420.

¹²⁹ *Case concerning certain phosphate lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, 240 (**Exhibit RL-079**), at page. 253, para. 32.

¹³⁰ See Section VI.E.1 (NT) and Section VI.E.2 (MFN).

- 89.1. alleged inconsistent treatment under the 2014 Law, as compared with Rwandan nationals and foreign nationals, addressed at paragraphs 43 to 50 above; and
 - 89.2. alleged favouring of Ben Benzinge, a Rwandan national, addressed at paragraphs 59 to 60 above.
90. As described in above, the Claimants first acquired, or should be held to have acquired, knowledge of the alleged breaches and any potential associated losses and damage well in advance of the Cut-off Date. Accordingly the Tribunal and/or ICSID lacks jurisdiction over the Claimants NT and MFN claims under Articles 3 and 4 of the USA-Rwanda BIT.

IV. LACK OF JURISDICTION RATIONE PERSONAE

91. The Tribunal and/or ICSID lacks jurisdiction over the claims brought by the Claimants (BVG or Spalena), because they do not meet the definition of “claimant” under the US-Rwanda BIT, which not only requires a claimant to be an “investor of a party”, but also requires them to own or control a “covered investment”.¹³¹ This section summarises the reasons that the Tribunal and/or ICSID lacks jurisdiction over claims brought by the Claimants.

92. The basis for the Tribunal’s jurisdiction *ratione personae* is set out in Article 24 of the USA-Rwanda BIT, which provides the basis for submission of a claim to arbitration:

“Submission of a claim to arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

a. the claimant, on its own behalf, may submit to arbitration under this Section a claim:

i. that the respondent has breached:

- A. an obligation under Articles 3 through 10,*
- B. an investment authorization, or*
- C. an investment agreement;*

and

ii. that the claimant has incurred loss or damage by reason of, or arising out of, that breach ...

b. the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

i. that the respondent has breached

- A. an obligation under Articles 3 through 10,*
- B. an investment authorization, or*
- C. an investment agreement; and*

ii. that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

[...]

¹³¹ See definitions of “claimant”, “investor of a party” and “investment” in the USA-Rwanda BIT (**Exhibit CL-006**), at Article 1, replicated at paragraphs 92-94 below.

3. *Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:*
 - a. *Under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention.*¹³²
93. In order to submit a claim to arbitration under Article 24 of the USA-Rwanda BIT, a person must first qualify as “a claimant”. The term “claimant” is defined for the purposes of the US-Rwanda BIT in its Article 1 as [including] “an investor of a Party that is a party to an investment dispute with the other Party.”¹³³
94. “Investor of a party” is also a term defined in Article 1 as:
- “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”*¹³⁴
95. Additionally, the USA-Rwanda BIT defines “investment” in Article 1 as:
- “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. [...]”*¹³⁵
96. Accordingly, in order to be valid claimants before this tribunal, and as such in order for this tribunal and/or ICSID to have jurisdiction *ratione personae*, the Claimants must show that they own or control, directly or indirectly, an asset with the characteristics of an investment, and that they suffered loss as a consequence of any alleged harm caused to that investment. Whether the allegations by the Claimants show that any investments the Claimants claim to have made (which the Respondent understands, but it is not made entirely clear by the Claimants, is NRD and certain assets that it is said NRD owns or controls) are an asset of the Claimants with the characteristics of an investment will be discussed in detail at Section V below in relation to jurisdiction *ratione materiae*. This section addresses whether the Claimants have suffered loss as a consequence of the alleged breaches, or have ownership or control over NRD sufficient to ground personal jurisdiction over the claim, on the basis of an assumption that NRD, or assets that it owns or controls, is the relevant investment. Claimants have not made a claim “on behalf of” NRD pursuant to Article 24(1)(b). Any such claim would also be

¹³² USA-Rwanda BIT (Exhibit CL-006), at Article 24.

¹³³ USA-Rwanda BIT (Exhibit CL-006), at Article 1.

¹³⁴ USA-Rwanda BIT (Exhibit CL-006), at Article 1.

¹³⁵ USA-Rwanda BIT (Exhibit CL-006), at Article 1 (emphasis added).

misconceived. The Respondent may seek to supplement this part of the argument in the event that the Claimants more clearly articulate exactly what investments they claim to have made and rely on.

97. The Claimants' case seems to be that both Claimants, i.e. BVG and Spalena, are investors of a Party, and have a covered investment on the basis of their United States nationality, and on the basis of their relationship with NRD. Specifically, they claim under the heading "*Claimants Constitute Investors of a Party Under the BIT*" that:

"137. The U.S. investors who own BVG funded Spalena's acquisition of NRD's parent company, thereby acquiring ownership and control of NRD's assets, including the mining Concessions.

*138. BVG and Spalena then capitalized and funded NRD's liabilities and expenses in order to develop and operate the mining Concessions."*¹³⁶

98. Accordingly, it appears that the basis for the claim that the Claimants are "*investors of a party*" is that:

98.1. in relation to Spalena: Spalena acquired NRD's parent company, HC Starck Resources GmbH (subsequently called Natural Resources Development GmbH), and accordingly owns NRD and controls NRD's assets; and

98.2. in relation to BVG: BVG's owners funded Spalena's acquisition of NRD, and BVG capitalised and funded NRD's liabilities and expenses.

99. As set out in more detail below, neither of the Claimants have any credible or justifiable claim to standing in this arbitration.

99.1. In relation to both BVG and Spalena, the Claimants have not demonstrated that either BVG or Spalena suffered any loss as a consequence of the alleged breaches of the USA-Rwanda BIT.

99.2. Further, in relation to BVG:

99.2.1. on the Claimants' own case, BVG does not own NRD; and

99.2.2. the Claimants have provided no evidence, and plainly failed to establish, that BVG controls NRD.

¹³⁶ Memorial, at paras. 137-138 [citations omitted].

A. The Claimants have not demonstrated that either BVG or Spalena have suffered any loss as a result of the alleged breaches

100. Under Article 24 of the USA-Rwanda BIT, a claimant may only submit a claim to arbitration if the respondent has breached an obligation under the USA-Rwanda BIT and the claimant “has incurred loss or damage by reason of, or arising out of, that breach”.¹³⁷ Thus standing to bring claims is expressly conditional on the Claimants incurring loss. If the Claimants have not incurred any loss as a result of the alleged breaches by Rwanda, then they have no standing to bring the claims that it seeks to bring in this arbitration.
101. Despite this, the Claimants have failed to set out any basis for demonstrating that any loss or damage has been suffered by them consequent on the breaches of the US-Rwanda BIT that they allege. All loss alleged is loss suffered by NRD and not by the Claimants. The Claimants have not pursued any claim on behalf of NRD (and in any event NRD is a Rwandan national and has no standing to bring a claim under the USA-Rwanda BIT).
102. It is a normal, indeed elementary principle of company law in at least most domestic law systems, and is “*default position*” as considered by international tribunals, that a shareholder is a separate legal entity to the company in which it owns shares.¹³⁸ A company is an independent legal entity, granted rights over its own assets, which it alone is capable of protecting.¹³⁹ Accordingly, any loss suffered by a company does not automatically result in a direct injury to shareholders. Rather, a shareholder is generally not entitled to receive compensation for the loss suffered by a company, but instead simply a diminution of value of the shares that may result.
103. Accordingly, any loss suffered by NRD would only result in loss for Spalena if Spalena had and was said to have had suffered a diminution in the value of its shares in NRD as a consequence, which has not been alleged. The Claimants instead seek damages by way of compensation for an alleged expropriation of the Concessions, and not damages on the basis of diminution of the share value of NRD. The Claimants have not alleged, nor provided any evidence of, a diminution of value of Spalena’s shareholding in NRD. Indeed, they have not provided credible evidence of loss in any form, affecting Spalena or BVG, which has resulted from the alleged breaches.
104. Furthermore, as submitted below, BVG is not a shareholder of NRD, and cannot as a matter of fact have suffered any diminution of the share value of NRD.

¹³⁷ USA-Rwanda BIT (**Exhibit CL-006**), at Article 24(1).

¹³⁸ *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award (23 May 2011) (**Exhibit RL-089**), at para. 147.

¹³⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J., Preliminary Objections, Judgment (24 May 2007), I.C.J. Reports 2007, 582 (**Exhibit RL-090**), at page 605, para. 61.

105. The Claimants have therefore failed to prove that either Spalena or BVG have suffered loss as required to have standing to bring a claim under Article 24 of the USA-Rwanda BIT.

B. BVG does not own NRD

106. On the Claimants' own case, BVG does not own NRD. It is not, and is not alleged to be, a shareholder or an ultimate beneficial owner. The Claimants have asserted that BVG's owners funded Spalena's acquisition of NRD, and that it capitalised and funded NRD's liabilities and expenses, but not that it has any rights of ownership in relation to Spalena or to NRD.

107. Accordingly, BVG has no standing on the basis of ownership in relation to any of the claims it has submitted to arbitration under the USA-Rwanda BIT.

C. Claimants have not alleged or proved that BVG controls NRD

108. Further, or alternatively, the Claimants have not provided any evidence to suggest that BVG controls NRD, and have not even alleged BVG controls NRD at any relevant time (or at all).

109. In order to have standing, the Claimants must demonstrate that BVG owns NRD, or it must "*control, [NRD] directly or indirectly*". The term "*control*" contains elements of both legal control, that is, rights arising as a result of ownership, and de facto control, being the actual exercise of rights and powers in relation to the controlled party.¹⁴⁰ Generally, de facto control is not sufficient without legal control also being present, although the opposite may be true. In this case, all that appears to have been alleged is commonality of a director, and no actual exercise of control over NRD by BVG, which is insufficient to establish standing under the USA-Rwanda BIT.

110. Where legal control is absent, if *de facto* control is permitted at all (which is not accepted), there is a very high burden of proof to demonstrate de facto control. For example, the Tribunal in *Thunderbird Gaming v. Mexico* was reluctant to allow standing in the absence of a clear demonstration of legal control, but ultimately concluded that a showing of de facto or effective control was sufficient, but only if it was established to a very high standard of proof, i.e. beyond any reasonable doubt:

"a showing of effective or "de facto" control is, in the Tribunal's view, sufficient for the purposes of [the relevant treaty]. In the absence of legal

¹⁴⁰ *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) (**Exhibit RL-081**), at para. 227.

control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt."¹⁴¹

111. In so doing, it established a very high bar for the demonstration of the existence of de facto control in the absence of corroborating legal control. Adopting this approach, the Tribunal in *Perenco v. Ecuador* considered de facto control to be sufficient only on the basis that the control by the claimant was "*so substantial, so compelling and uncontradicted*"¹⁴² that the circumstances required it to give weight to that control.
112. In this case, in the absence of *any* allegation or factual evidence that demonstrates actual exercise of control over NRD, and in the absence of *any* powers of control that arise on the basis of ownership, there is no basis to conclude that NRD was controlled, directly or indirectly, by BVG for the purposes of the tribunal's *ratione personae* analysis.¹⁴³
113. In fact, there is no indication whatsoever of BVG's control, direct or indirect, in the Claimants' Memorial or evidence. In particular:
 - 113.1. The Claimants have not alleged and have provided no evidence to show that BVG had any shareholding or voting rights in NRD, or that it exercised any such rights.
 - 113.2. The Claimants have not alleged and have provided no evidence to show that BVG controlled NRD or its investments in an active and direct manner.¹⁴⁴
 - 113.3. The Claimants have not alleged and have provided no evidence to show that BVG had management responsibility of NRD.
 - 113.4. The Claimants have not alleged and have provided no evidence to show that BVG had the power to appoint a majority of NRD's directors or otherwise direct NRD's actions.
 - 113.5. The Claimants have not alleged and have provided no evidence to show Mr. Marshall was, at any time, controlling NRD in any capacity related to BVG, as opposed to in his asserted role of Managing Director of NRD, or as opposed to

¹⁴¹ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006) (**Exhibit RL-006**), at para. 106.

¹⁴² *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability (12 September 2014) (**Exhibit RL-082**), at para. 529.

¹⁴³ *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award (22 September 2015) (**Exhibit RL-083**), at para. 136.

¹⁴⁴ *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award (2 November 2012) (**Exhibit RL-084**), at paras.257-266.

as his role in relation to NRD's primary shareholder, Spalena. Such a claim would be untenable in light of the vast volume of documentary evidence highlighting that Mr. Marshall was acting in his claimed capacity as Managing Director of NRD.

114. For the avoidance of doubt, it should be noted that the fact that BVG was, through Mr. Marshall, in a position of knowledge as to the alleged acts which form the basis of its claims, as discussed at paragraph 37 above, this does not in any way establish that BVG was in a position of control over NRD. *Knowledge* for the purpose of a time bar is conceptually distinct from *control* as a matter of standing. Here, it could not be said that BVG, notwithstanding that it was owned and/or managed by Mr. Marshall, was in a position of control of NRD in circumstances where there was no other relevant nexus between BVG and NRD including any legal right to exercise control. However BVG is to be and should be attributed with knowledge where Mr. Marshall knew of relevant acts giving rise to a claim.
115. Ultimately, there can be no doubt that the burden of proof to establish the facts supporting its claims to standing lies with the Claimants.¹⁴⁵ Thus, the onus was on the Claimants to provide the necessary information and evidence concerning the circumstances of ownership and control of NRD by BVG, directly or indirectly, at all relevant times.¹⁴⁶ They have failed to discharge this burden. Any alleged control by BVG appears to be by way of commonality of director, which is insufficient; the Claimants have not alleged, and have provided no evidence of any legal or *de facto* control by BVG.
116. Accordingly, the Tribunal has no basis to conclude that NRD was controlled, directly or indirectly, by BVG for the purposes of the tribunal's *rationae personae* analysis, and therefore the Tribunal and/or ICSID cannot or should not exercise jurisdiction over BVG's claims.¹⁴⁷

¹⁴⁵ See *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011) (**Exhibit RL-085**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) (**Exhibit RL-086**); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014) (**Exhibit RL-087**).

¹⁴⁶ *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award (1 January 2003) (**Exhibit RL-088**).

¹⁴⁷ See *Guardian Fiduciary Trust Ltd f/k/a Capital Conservator Savings & Loan Ltd v Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31 (22 September 2015) (**Exhibit RL-083**), where the tribunal held that in absence of any factual evidence that demonstrates actual exercise of control over the claimant, there is no basis to conclude that the claimant was controlled, directly or indirectly, by the purported investor for the purposes of the tribunal's *rationae personae* analysis.

V. LACK OF JURISDICTION RATIONE MATERIAE

117. At Section IV.B of the Memorial, the Claimants assert that they have made investments in Rwanda such that they qualify for protection under the USA-Rwanda BIT.¹⁴⁸ Deficiencies in the Claimants' pleadings mean that it is not entirely clear exactly what the alleged investments are. Specifically, they state that their "*covered investments*" are NRD,¹⁴⁹ and the "*Claimants' efforts to develop the Concessions*".¹⁵⁰ It appears that the Claimants' covered investments allegedly comprised (i) NRD, specifically through "*the acquisition of NRD, and all of NRD's assets*"¹⁵¹ and (ii) the rights held by the Claimants in relation to "*the Rutsiro, Mara, Sebeya, Giciye and Nemba Concessions*".¹⁵²
118. Neither of these alleged covered investments qualify as investments within the meaning of Article 1 of the USA-Rwanda BIT or Article 25(1) of the ICSID Convention for the following reasons, as developed further below:
- 118.1. *First*, in relation to NRD: The Claimants simply assert that their alleged investment in NRD is a "covered investment" under Article 1 of the USA-Rwanda BIT, but fail to explain why and how NRD is to be treated as a "covered investment" for the purposes of the USA-Rwanda BIT or the ICSID Convention. Without prejudice to the burden of proof, which is on the Claimants, the Respondent submits below that the Claimants' alleged investment in NRD is not an investment under Article 1 of the USA-Rwanda BIT or within the meaning of "investment" under Article 25(1) of the ICSID Convention, because it does not have "characteristics of an investment", such as making a substantial contribution of funds, and a contribution to the receiving nation's economy. The Claimants have not shown, much less proven, that this alleged investment satisfies these requirements.
- 118.2. *Second*, in relation to the Concessions: the nature of the alleged investment is not clearly pleaded by the Claimants. However, NRD's licences to undertake mining operations in the Concessions, being the interest in the Concessions in fact held at certain points by NRD, cannot be investments subject to the protection of Article 1 of the USA-Rwanda BIT because: (i) as a matter of law, the Claimants have no entitlement to the Concessions which is enforceable before this Tribunal, as the licences to the Concessions were held by NRD and so are enforceable only by NRD, before the Rwandan courts – while the Claimants could conceivably and without any concession by the Respondent) have made a

¹⁴⁸ Memorial, at section IV.B.

¹⁴⁹ Memorial, at para. 143.

¹⁵⁰ Memorial, at para. 145.

¹⁵¹ Memorial, at para. 142.

¹⁵² Memorial, at para. 142.

claim before this Tribunal for a consequent diminution of the share value of NRD (if they had otherwise been entitled to do so, which they are not), they have not even attempted to do so; and (ii) as a matter of fact, the licences to the Concessions expired in October 2012, and since that time, NRD was operating the concessions on the basis of an indulgence, not a legal entitlement or right.¹⁵³ Further, in the event that the Tribunal finds that the licences are capable of being investments subject to protection by the BIT, the Claimants' alleged "efforts"¹⁵⁴ to develop the Concessions, if seen through that lens, equally do not have the "characteristics of an investment".

118.3. *Third*, the Claimants assert that the Contract constitutes an "investment agreement" and an "investment authorisation" under Article 1 of the USA-Rwanda BIT because it "granted Claimants, through their ownership and control of NRD, authority to operate the mining concessions under the protection of the BIT".¹⁵⁵ Regardless of whether correct, this classification of the Contract excludes it from protection under the articles of the USA-Rwanda BIT that are alleged to have been breached, which protects "covered investments", and not "investment agreements" or "investment authorisations".

119. All of the Claimants' claims appear to rely on the alleged mistreatment or expropriation of NRD's licences to the Concessions, and all of their claims for remedies pivot off the allegation of "an unlawful expropriation" and damages sought on that basis. Accordingly, the status of the Concessions will be considered first.

A. The Claimants' alleged interest in NRD is not a protected investment within the meaning of Article 1 of the USA-Rwanda BIT or within the meaning of "investment" under the ICSID Convention

120. The Claimants do not adequately explain why or how their investment in NRD is protected under the USA-Rwanda BIT, and instead simply assert that "NRD is a 'covered investment'" because "NRD is the local operating company in Rwanda through which Claimants have made their investments of money, equipment and other assets".¹⁵⁶ Similarly, they do not show how their alleged "efforts to develop the concessions"¹⁵⁷ are investments protected by the USA-Rwanda BIT.

121. The USA-Rwanda BIT provides that in order to be protected under it, an investment must meet two definitions, *i.e.* it must fall within the definition of "investment" but also

¹⁵³ Expert Report of Mr. Richard Mugisha dated 24 May 2019, at para. 27-29.

¹⁵⁴ Memorial, at para. 145.

¹⁵⁵ Memorial, at para. 144.

¹⁵⁶ Memorial, at para. 143.

¹⁵⁷ Memorial, at para. 145.

“covered investment”.¹⁵⁸ The Claimants have not even attempted to identify what the investments of money, equipment and other assets that they claim to have made, let alone how those investments are sufficient that NRD is an “investment”, or how this alleged “investment” is a “covered investment”. The burden is plainly on them to do so.¹⁵⁹

122. The Claimants have failed to show that NRD (or any of its rights or assets) is a covered investment. As is expressly stated in the definition of “investment” in Article 1 of the USA-Rwanda BIT as set out at paragraph 95 above, an asset is only an investment if it “has the characteristics of an investment”.¹⁶⁰ An asset without the characteristics of an investment is simply an asset and, plainly, not any asset has the characteristics of an investment, as such an interpretation would lead to manifestly absurd and unreasonable results. In the words of Professor Douglas:

*“If in order to qualify for investment treaty protection, it were sufficient for the claimant to have secured a legal right to claim money, then one must inevitably determine that a winning lottery ticket bought in the host state is an investment.”*¹⁶¹

123. In order to prevent such absurdity, the USA-Rwanda BIT explicitly refines the definition in the way it does, resulting in the Claimants’ alleged interests not being qualifying investments. Indeed, in entering into BITs globally, US negotiators have consistently “wished to make clear that an asset would be covered by the definition only if it had the character of an investment.”¹⁶²

124. With that in mind, the USA-Rwanda BIT provides examples of what characteristics are relevant in classifying an asset as an investment; “including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.¹⁶³ The indicative categories of assets that follow are simply a “non-

¹⁵⁸ The breaches the Claimants allege fall under Articles that afford protection only to “covered investments” or “investors”, see the USA-Rwanda BIT, at Article 3 (“accord to investors [and] covered investments treatment no less favourable...”); Article 4 (“accord to investors [and] covered investments treatment no less favourable...”); Article 5 (“accord to covered investments treatment in accordance with customary international law...”); Article 6 (“Neither Party may expropriate or nationalize a covered investment...”).

¹⁵⁹ The onus of establishing jurisdiction under the BIT and indeed the ICSID Convention, which includes proof of the facts on which jurisdiction depends, is on the Claimants, see *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award (22 December 2017) (**Exhibit RL-097**), at para. 148; *Caratube International Oil Company LLP and Devinvcci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) (**Exhibit RL-078**), at para. 309.

¹⁶⁰ USA-Rwanda BIT (**Exhibit CL-006**), at Article 1.

¹⁶¹ Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009) (**Exhibit RL-098**), at pages. 184-185.

¹⁶² See *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) (**Exhibit RL-099**), at para. 356, citing K. J. Vandevelde, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* (2009), at pages 114–115 and 121–122.

¹⁶³ USA-Rwanda BIT (**Exhibit CL-006**), at Article 1.

exhaustive list [of assets that] may exhibit these hallmarks [of an investment]".¹⁶⁴ An asset without the characteristics of an investment is still simply an asset and "*the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'.*"¹⁶⁵

125. In addition, the Tribunal's jurisdiction depends not only on the existence of an investment within the meaning of the USA-Rwanda BIT but also on the existence of an investment under the ICSID Convention.¹⁶⁶ The term "*investment*" in Article 25(1) of the ICSID Convention has an objective meaning,¹⁶⁷ which grounds ICSID Tribunals' jurisdiction and cannot be extended or derogated from by agreement of the parties in the form of a BIT.¹⁶⁸
126. Accordingly, in order to determine whether the Claimants' alleged investment is a protected investment, and in order to find that it has jurisdiction, the Tribunal must determine that it has jurisdiction not only under the USA-Rwanda BIT but also International Law and the ICSID Convention. As the tribunal in *Phoenix v. Czech Republic* explained, an ICSID tribunal's jurisdiction *ratione materiae* "*rests on the intersection of the two definitions.*"¹⁶⁹ There is thus a dual-test (also referred to as "*jurisdictional keyhole*"¹⁷⁰ or a "*double barrelled*"¹⁷¹ approach) that must be applied by Tribunals when determining whether the requirements for an "*investment*" have been met. This is especially so in this Arbitration given the wording of the USA-Rwanda BIT and the explicit mention to an investment having "*characteristics of an investment*".¹⁷²

¹⁶⁴ *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, UNCITRAL (PCA Case No. AA280), Award (26 November 2009) (**Exhibit RL-100**), at para. 207.

¹⁶⁵ *Ibid* (**Exhibit RL-100**), at para. 207.

¹⁶⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) (**Exhibit RL-101**), at para. 44. *See also, e.g., Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 December 2010) (**Exhibit RL-102**), at para. 43; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment (1 November 2006) (**Exhibit RL-103**), at para. 25.

¹⁶⁷ *See, e.g., Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**Exhibit RL-104**), at para. 50; *Victor Pey Casado et Fondation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (**Exhibit RL-065**), at para. 232; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment (1 November 2006) (**Exhibit RL-103**), at para. 25; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) (**Exhibit RL-106**), at para. 116.

¹⁶⁸ *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**Exhibit RL-095**), at para. 96 [emphases added]. *See also OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 March 2015) (**Exhibit RL-107**), at para. 216; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**Exhibit RL-104**), at paras. 49-50; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008) (**Exhibit RL-108**), at para. 134.

¹⁶⁹ *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**Exhibit RL-095**), at para. 74.

¹⁷⁰ *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005) (**Exhibit RL-081**), at para. 278

¹⁷¹ *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award (17 May 2007) (**Exhibit RL-109**), at para. 55

¹⁷² *Hassan Awdj, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) (**Exhibit RL-110**), at para. 199.

127. ICSID tribunals have developed a set of cumulative criteria to determine whether an investment was made for purposes of Article 25(1) of the ICSID Convention. There must be: (i) a substantial contribution in money or other assets, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the economic development of the host State.¹⁷³ In order for this Tribunal and ICSID to have jurisdiction to determine the Claimants' claims, each of these criteria must be met. Tribunals have found there to be no investment when any one of the criteria was not present.¹⁷⁴

128. The Claimants have failed to address how their alleged investment in NRD constitutes an investment under either the USA-Rwanda BIT or the ICSID Convention, and thus this Tribunal should conclude that it does not have jurisdiction to decide their claims. In any event, and without prejudice to the burden of proof (which is on the Claimants), the Claimants investment in NRD does not meet the requisite criteria, particularly the requirements for (i) substantial contributions in money or other assets, and (ii) contribution to the economic development of the host State. These are discussed further below.

1. The Claimants' alleged investments did not equate to a substantial contribution of money or other assets

129. The requirement that there must be have been a substantial contribution for there to be a qualifying investment has been consistently considered by Tribunals, including those considering cases based on mining activities.¹⁷⁵ Further, and as further developed below, the requirement of a substantial contribution is distinct from the requirement that a contribution be made to the development of the host state. The Claimants' alleged investment meets neither of these criteria.

130. It is well established that contribution or commitment should not only be looked at in financial terms but also in terms of know-how, equipment, personnel and services.¹⁷⁶

¹⁷³ See, e.g., *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) (**Exhibit RL-101**), at para. 52; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**Exhibit RL-104**), at para. 53; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on the Objection to Jurisdiction (17 October 2006) (**Exhibit RL-111**), at para. 77; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment (1 November 2006) (**Exhibit RL-103**), at para. 27.

¹⁷⁴ See, e.g., *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006) (**Exhibit RL-103**), at paras. 23-48; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award (17 May 2007) (**Exhibit RL-109**), at paras. 44, 48-148.

¹⁷⁵ See, for example, *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB.74/3, Decision on Jurisdiction and Competence (6 July 1985) (**Exhibit RL-112**), at para. 17;

¹⁷⁶ *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction (16 July 2001) (**Exhibit RL-113**), at para. 61; *Consortium Groupement L.E.S.I.-DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Award (10 January 2005) (**Exhibit RL-114**), at para. 14(i); *Bayindir Insaat*

However in this case, in relation to NRD itself, any substantial contributions whether monetary or otherwise were made by the previous shareholders of NRD, before Spalena acquired the shares in NRD. The Claimants themselves did not make any substantial contribution to NRD whatsoever, either by way of financial investment, or know-how, personnel or technical resources, and accordingly their purchase of shares in NRD alone cannot be seen a qualifying investment for the purposes of satisfying the ICSID Convention and the BIT in this arbitration.

131. Further, the Claimants did not make any, or any substantial, investment in the Concessions. As set out in the Respondent's Counter-Memorial on the Merits, Spalena acquired 85% of the shares in NRD's parent company, HC Starck Resources GmbH, from HC Starck GmbH on 23 December 2010 for merely [REDACTED]. Prior to the alleged acquisition of NRD by Spalena, the previous shareholders of NRD, HC Stark, had allegedly made some investment in NRD and in the Concessions, although it appears that that was limited.¹⁷⁷
132. By the time that Spalena acquired NRD, the level of investment and the efforts to meet the obligations and requirements on it under the Contract (which had expired by this time) were not to the satisfaction or expectation of Rwanda.
133. In any event, the Claimants have failed to address how the investments that were made prior to Spalena's acquisition of NRD, were made by them or are at least attributable to them in some way. They were made by HC Starck Resources GmbH before the Claimants allegedly acquired shares in NRD, and were not developed or expanded on by the Claimants in any way. Aside from the purchase of shares in NRD by Spalena for [REDACTED], the Claimants do not explain what investments they have made, let alone how they come to be protected by the USA-Rwanda BIT. There is no evidence that the Claimants made any investment in NRD.¹⁷⁸
134. An investment "*in an economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale*" which is merely an exchange of values.¹⁷⁹ ICSID tribunals will not have jurisdiction over disputes arising out of a simple sale.¹⁸⁰ A

Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (**Exhibit RL-115**), at para. 131; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006) (**Exhibit RL-116**), at para. 73(i); *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007) (**Exhibit RL-109**), at para. 109.

¹⁷⁷ Witness statement of Prof. Prosper Nkanika Wa Rupiya dated 21 May 2019, at paras 8-13.

¹⁷⁸ Witness Statement of Prof. Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 10; Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 29; Witness Statement of Mr. Jean Aime Sindayigaya dated 21 May 2019, at para. 11, 23.

¹⁷⁹ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (**Exhibit RL-091**), at para. 361.

¹⁸⁰ The Secretary General of ICSID refused to register a request for arbitration dealing with a dispute arising out of a simple sale, see *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No.

contribution requires not only an initial purchase of shares but also, by way of example: use of know-how, provision of necessary equipment and qualified personnel for the accomplishment of works, and obtaining loans.¹⁸¹

135. In this case, Spalena's purchase of NRD was merely a purchase of a shareholding, and nothing more. The Claimants did not engage with the performance of the Contract or with the undertaking the obligations pursuant to the mining licences. In respect of the Concessions, the Claimants had a completely passive role and did not actively control them in any way. "[S]imple passive ownership" is not sufficient to establish that the Spalena had a protected investment.¹⁸² Accordingly, there is a lack of the requisite connection between the share purchase and any value creation such as to found a protected investment.
136. NRD was run as a "briefcase company".¹⁸³ It was a cash only business, all transactions including payments to the miners, fuel, salaries and uniforms were conducted in cash.¹⁸⁴ No genuine attempts were being made to industrialise NRD's operations.¹⁸⁵ On the basis of evidence from its accountant at the time, NRD made no financial investment in the Five Concession Areas after acquiring them.¹⁸⁶ Indeed, NRD's previous owners had made only very limited investment in Nemba, Sebeya, Giciye and Mara. The only relatively substantial funds that they had invested were at Rutsiro, and those were invested into a plant that was incapable of becoming operational.¹⁸⁷ NRD remained at all material times dependent on artisanal miners and artisanal mining practices (in breach of its obligation under the Contract immediately to industrialise mining operations in all of the concession areas).¹⁸⁸ Production figures were extremely low, and all of NRD's concessions were working below capacity.¹⁸⁹

ARB/00/4, Decision on Jurisdiction (23 July 2001) (**Exhibit RL-101**), at para. 52, citing I.F.I. Shihata and A.R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes: ICSID Review*, Foreign Investment Law Journal, vol. 14, No. 2, 1999 (**Exhibit RL-117**), at page 308.

¹⁸¹ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) (**Exhibit RL-101**), at para. 53. See also, for example, a contribution including "know how, equipment and personnel and in financial terms" in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (**Exhibit RL-115**), at para. 131.

¹⁸² *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit RL-084**), at para. 222-225; see also, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019) (**Exhibit RL-118**), at para. 200 where the Tribunal considered that the case in hand should be distinguished from *Standard Chartered Bank v. Tanzania* as there was more than "passive" ownership. It is submitted by the Respondent that in this case, the Claimants cannot show more than "passive" ownership unlike the *Anglo American v. Venezuela* tribunal.

¹⁸³ Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019, at para. 8.

¹⁸⁴ Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019, at para. 9.

¹⁸⁵ Explanatory Note on NRD (**Exhibit R-017**), at page 4.

¹⁸⁶ Witness Statement of Mr. Jean Aime Sindayigaya dated 20 May 2019, at para. 21.

¹⁸⁷ Witness Statement of Mr. Jean Amie Sindayigaya dated 20 May 2019, at para. 15-16.

¹⁸⁸ Witness Statement of Mr. Anthony Ehlers dated 20 May 2019, at paras. 23-27.

¹⁸⁹ Explanatory Note on NRD (**Exhibit R-017**), at page 4.

137. In effect, in this case, and on the basis of the evidence produced to date, Spalena bought a [REDACTED] “lottery ticket”, using the analogy of Professor Douglas at paragraph 122 above, in December 2010. It did not make a substantial contribution of funds. The payment was a one-off, made to acquire NRD. Once Spalena held a majority ownership in NRD, it took no steps to develop or invest in the Concessions issued to NRD, or to grow NRD itself. The Claimants injected no further funds. Insofar as they now seek to recover from the Respondent on the basis that that alleged “investment” did not bear fruit, and that it was protected by the USA-Rwanda BIT, they plainly should not be allowed to do so.

2. The Claimants’ alleged investments did not result in a contribution to Rwanda’s development

138. Contribution of an investment to the host state’s economy, *i.e.* an operation made in order to develop economic activity in the host state, is necessary for an investment to benefit from protection under the ICSID Convention and an investment treaty. Investment treaty tribunals have applied this requirement either as a separate element of the objective definition of investment¹⁹⁰ or as an element inherent in the other three elements of the *Salini* test.¹⁹¹

139. Indeed, the investor’s contribution to the host State’s economy is a quid pro quo to have a right to resort to international arbitration:

“The notion of a quid pro quo between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration. In exchange for contributing to the flow of capital into the economy of the host contracting state, the nationals of the other contracting state (or states in the case of a multilateral investment treaty) are given the right to bring international arbitration proceedings against the host contracting state and to invoke the international minimum standards of treatment contained in the applicable investment treaty. The conferral of this right reduces the sovereign risk attaching to the investment in the host state and hence investment treaties in this way can positively influence the decision making process for investments.

This contribution must be clearly ascertained by the tribunal if its existence is challenged by the host state; for otherwise the procedural privilege conferred

¹⁹⁰ See, *e.g.*, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) (**Exhibit RL-101**), at para. 52; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**Exhibit RL-104**), at para. 53; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment (1 November 2006) (**Exhibit RL-103**), at paras. 28-29.

¹⁹¹ See, *e.g.*, *Victor Pey Casado et Fondation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (**Exhibit RL-065**), at para. 232; *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**Exhibit RL-095**), at paras. 85 and 114; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (**Exhibit RL-115**), at para. 137.

by the investment treaty might be utilized by a claimant who has not fulfilled its side of the bargain.”¹⁹²

140. As reflected in their preambles, the USA-Rwanda BIT and the ICSID Convention were concluded to encourage and protect international investments that contribute to the economy of the host state.¹⁹³ Investment treaty tribunals have emphasised this *quid pro quo*, and disqualified from protection, under the ICSID Convention and investment treaties, investments that do not involve a contribution to the economy of the host State.
141. The *Nations Energy v. Panama* tribunal noted that “*there can hardly be a protected investment without the investor having made contributions that have some economic value for the country*”.¹⁹⁴ Contributions to development may be made in a number of ways beyond the financial, such as paying tax, environmental protection, community engagement, health and safety measures, investing in developing local expertise and contributing to employment.
142. It is material here that NRD failed to pay any taxation for the majority of years that it was operating in Rwanda,¹⁹⁵ and had large amounts of unpaid taxes¹⁹⁶ in respect of which enforcement action was ultimately taken.¹⁹⁷ Additionally, it did not comply with local laws, and it did not treat its staff and contractors well,¹⁹⁸ including failing to pay them.¹⁹⁹ NRD also caused severe environmental degradation through its mining practices and acted in consistent disregard of environmental standards.²⁰⁰
143. NRD’s approach to development in Rwanda can be contrasted with that of other companies operating in the mining sector in Rwanda, which were extremely careful to prevent river pollution,²⁰¹ and which have meaningful corporate social responsibility planning and engagement with communities.²⁰²
144. In conclusion, the Claimants’ alleged investments did not involve a flow of funds to Rwanda and did not contribute to an economic venture in or to the economic development of Rwanda. Indeed, the opposite is the case. The shares allegedly held in

¹⁹² Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009) (**Exhibit RL-098**), at pages 161-162 [emphasis added].

¹⁹³ USA-Rwanda BIT (**Exhibit CL-006**), Preamble; ICSID Convention, Preamble (“*Considering the need for international cooperation for economic development, and the role of private international investment therein*”).

¹⁹⁴ *Nations Energy Inc., Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award (24 November 2010) (**Exhibit RL-049**), at para. 429.

¹⁹⁵ NRD tax filings for the period 2009 to 2011 and 2014 to 2018 (**Exhibit R-021**).

¹⁹⁶ Witness Statement of Mr. Jean Aime Sindayigaya dated 20 May 2019, at para.18

¹⁹⁷ Witness Statement of Mr. Jean Bosco Nsengiyuma dated 24 May 2019, at para.34

¹⁹⁸ Witness Statement of Mr. John Bosco Kagubare dated 20 May 2019, at para. 14.

¹⁹⁹ Witness Statement of Prof. Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 22.

²⁰⁰ Explanatory Note on NRD (**Exhibit R-017**), at page 5, Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Chairman of NRD, *Serious issues arising from mining activities in Rutsiro Concession* (**Exhibit C-040**), F. Twagiramungu, *NRD Progress Mission Report* (November 2011) (**Exhibit C-043**), at page 2.

²⁰¹ Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 11.

²⁰² Witness Statement of Mr. Fabrice Kayihura dated 21 May 2019, at para. 12.

NRD are therefore not investments protected under Article 25(1) of the ICSID Convention and Article 1(1) of the USA-Rwanda BIT.

B. The Claimants' alleged interests in the Concessions are not protected by Article 1 of the USA-Rwanda BIT

1. The Claimants' alleged interests in the Concessions are not investments of the Claimants capable of protection by the USA-Rwanda BIT

145. NRD's licences (more accurately, alleged contractual rights to licences) to undertake mining operations in the Concessions are not investments of the Claimants capable of protection under Article 1 of the USA-Rwanda BIT. Although it is not set out explicitly, the Claimants appear to allege that they made indirect investments in the licences to mine the Concessions through NRD, and that such investment is protected under the Article 1 of the USA-Rwanda BIT as assets comprising concession rights, licences and tangible physical assets with an economic value.
146. Indeed, it appears that the full suite of the Claimants' claims arise from this supposed indirect investment. As reflected in the remedies apparently sought, the claim is considered by the Claimants to be a claim relating to Rwanda's alleged expropriation – not of NRD, but of the Concessions, or contractual rights thereto. No claim for damages is made for diminution of the value of Spalena's shareholding in NRD but rather compensation for the allegedly unlawful expropriation of the Concessions. However, the Claimants have no legal right to the assets of NRD, including the Concessions, and accordingly those rights are not protected by the USA-Rwanda BIT and this claim cannot be brought before this Tribunal or ICSID.
147. Further, the Claimants have provided no material to support their contention that a shareholder in the position of Spalena has standing to assert claims for an alleged impairment of the assets of a company (i.e. NRD) in which it holds shares. The Claimants have failed to establish that the USA-Rwanda BIT enables the Claimants to submit claims for any alleged rights or claims that NRD might have against Rwanda. Rather, case law supports the opposite proposition, confirming that shareholders do not have claims arising from or rights in the assets of the companies in which they hold shares.
148. The “*default position*” in international law is that a company is legally distinct from its shareholders,²⁰³ which implies that, as an independent legal entity a company has rights over its own assets, which it alone is capable of protecting.²⁰⁴ The Claimants have not

²⁰³ *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award (23 May 2011) (**Exhibit RL-089**), at para. 147.

²⁰⁴ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (**Exhibit RL-091**), at para. 230.

advanced a position that moves away from this default distinction, either as a matter of Rwandan law or of International law. They have failed to show that the Claimants have any legal rights to the Concessions held by NRD that would allow them to bring a claim against Rwanda on the basis of an alleged impairment or expropriation of such property.

149. Further, tribunals have consistently held that “*an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares.*”²⁰⁵ Although it is correct that a claimant’s interest in a local company may entitle it to assert claims based on the host state’s treatment of that local company, that is only “*to the extent that those claims are related to the effects that the measures taken against the company’s assets have on the value of the claimant’s shares in such company*”.²⁰⁶
150. In *El Paso v. Argentina*, the question before the tribunal was whether the rights protected by the US-Argentina BIT were limited to those pertaining to the shares held by the claimant in various Argentinian companies, or whether they included other items such as legal and contractual rights belonging to said companies.²⁰⁷ In other words, the tribunal had to examine whether certain assets of the companies in which the claimant had a shareholding qualified as protected investments under the treaty. The tribunal held that while the shares held by the claimant in the Argentinian companies were a protected investment under the US-Argentina BIT, the licences and other contracts granted to the Argentinian companies were not protected investments.²⁰⁸ In summarising its conclusion regarding the definition of the protected investment for the purpose of the tribunal’s jurisdiction, the *El Paso v. Argentina* tribunal stated that “*what is protected are ‘the shares, all the shares, but only the shares.’*”²⁰⁹
151. Tribunals have consistently held that, where the investor is not a party to a contract or licence, it cannot directly assert any claim thereunder, and accordingly the BIT will not allow the investor to bring claims before the tribunal derived from the licence on behalf of the domestic company.²¹⁰
152. Claimants may be able to bring claims relating to damage suffered to licences and concessions held by companies in which they are shareholders, as long as the claims are

²⁰⁵ *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL (PCA Case No. 2011-06), Award on Jurisdiction (18 July 2013) (**Exhibit RL-092**), at para. 278.

²⁰⁶ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (**Exhibit RL-091**), at para. 232.

²⁰⁷ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-037**), at para. 144 and 148.

²⁰⁸ *Ibid* (**Exhibit CL-037**), at para. 177-214.

²⁰⁹ *Ibid* (**Exhibit CL-037**), at para. 214.

²¹⁰ *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award (24 December 2007) (**Exhibit RL-093**), at para. 214.

limited to the protection of rights arising from the shares.²¹¹ For example in *ST-AD v. Bulgaria* the tribunal said that “an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets”.²¹² The *ST-AD v. Bulgaria* tribunal also clarified that “such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares.”²¹³

153. Ultimately, it is plain that:

*“a shareholder of a company incorporated in the host State may assert claims based on measures taken against such company’s assets that impair the value of the claimant’s shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets.”*²¹⁴

154. In the present case, the Claimants have not relied on their shareholding in NRD as the basis of their claim; indeed, BVG is not even a shareholder in NRD. Instead, the Claimants have claimed in respect of the Concessions or contractual rights thereto held by NRD. However, the Claimants have failed to show they have any right to the assets of NRD that qualifies for the protection of the USA-Rwanda BIT. It is submitted that, as past tribunals have held, they have no such rights. The Tribunal and/or ICSID has no jurisdiction over the Claimants’ claims.

155. Further, even in the event that the Tribunal considers that NRD’s licences to mine the Concessions to be investments of the Claimants subject to the protection of the USA-Rwanda BIT, the Claimants must demonstrate, but have failed to demonstrate, that NRD owned the Concessions at the time the alleged violations of the USA-Rwanda BIT occurred. The Claimants bear the burden of proof to establish that NRD owned the concessions at issue at the time of the alleged treaty violations. In the words of the *Emmis v. Hungary* tribunal, demonstrating an extant interest in a protected investment is “essential to establish jurisdiction”.²¹⁵ Investment treaty tribunals have therefore denied

²¹¹ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (**Exhibit RL-094**), at para. 66-68.

²¹² *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL (PCA Case No. 2011-06), Award on Jurisdiction (18 July 2013) (**Exhibit RL-092**), at para. 282.

²¹³ *Ibid* (**Exhibit RL-092**), at para. 282.

²¹⁴ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (**Exhibit RL-091**), at para. 245.

²¹⁵ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., et. al., v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (**Exhibit RL-051**), at para. 174.

jurisdiction where claimants failed to meet their burden of establishing that they had a proprietary interest in the investment at the time of the alleged treaty violations.²¹⁶

156. As already explained, the Claimants have not shown that either of them owned the Concessions at the time of the alleged treaty violations. Indeed, as a matter of fact, NRD's licences expired in October 2012,²¹⁷ following multiple extensions, and NRD has been operating since that date on the basis of indulgences granted by the Rwandan government. NRD does not currently, and has not at any point since October 2012, held any licences capable of grounding a claim.

2. The Claimants' alleged interest in the Concessions is not a protected investment within the meaning of Article 1 of the USA-Rwanda BIT or within the meaning of "investment" under the ICSID Convention

157. Further, in the event that, contrary to the Respondent's submissions, the Tribunal finds that the Claimants' interests in the Concessions are interests capable of protection by the USA-Rwanda BIT, those interests were not investments sufficient to engage the protection of the USA-Rwanda BIT, as above in relation to NRD. In fact, all of the alleged investment in NRD is the same as the alleged investment in relation to the Concessions. The Claimants do not allege that any independent investment was made into NRD other than in relation to its licences to mine and operate mining activities in the Concessions. The framing of the investments, as investments in NRD or in the Concessions, does not change the fact that the alleged investments do not pass the tests of sufficiency of contribution or contribution to the development of Rwanda.

158. Accordingly, as above in relation to NRD at paragraphs 129 to 144, those steps are not a sufficient contribution, and did not contribute to the development of Rwanda, sufficiently to be afforded the protection of the USA-Rwanda BIT.

159. In relation to the Concessions:

159.1. At Rutsiro, although a processing plant was built, it was never used, because it was unable to become operational because NRD had failed to undertake the required exploration at Rutsiro prior to constructing the plant, and its use was not commercially viable".²¹⁸

²¹⁶ See, e.g., *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**Exhibit RL-095**), at paras. 68, 70; *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) (**Exhibit RL-086**), at para. 536; *European Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) (**Exhibit RL-096**), at paras. 139-145.

²¹⁷ Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Managing Director of NRD, *Re: Extension of the NRD Mining and Exploration License in the five concessions of Nemba, Giciye, Rutsiro, Mara and Sebeya* (13 September 2012) (**Exhibit C-033**).

²¹⁸ Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 27.

- 159.2. At Nemba, the Claimants continued to use the small amount of infrastructure left over from the Belgian colonial mining times, rather than constructing new buildings, mines and tunnels.²¹⁹
- 159.3. At Giciye, Mara and Sebeya, no investment was made at all, other than giving workers some protective clothing and hand tools.²²⁰
160. Additionally, production figures were extremely low, and all of NRD's concessions were working below capacity.²²¹ Further, as set out above, NRD's operation of the Concessions also caused severe environmental degradation through its mining practices and acted in consistent disregard of environmental standards.²²²
161. The very purpose of concession licences under Rwanda's minerals framework and policy was to encourage industrialisation of the mining industry, to allow the operations in the country to move away from an artisanal mining model based on the use of very basic tools towards the industrial model, in the interests of Rwandan development.²²³ However, the Concessions continued to rely almost exclusively on artisanal mining.²²⁴
162. This failure of the Claimants to invest capital, time or energy, and failure to develop the concessions, or to make any investments that assisted in the development of Rwanda means that the Claimants' interests in the Concessions do not qualify for the protection of the USA-Rwanda BIT.

C. The Claimants' classification of the Contract excludes it from protection under the USA-Rwanda BIT

163. Further, the Claimants assert that the Contract is both an "*investment agreement*" and an "*investment authorization*" "*as it granted Claimants, through their ownership and control of NRD, authority to operate the mining Concessions under the protection of the BIT*".²²⁵

²¹⁹ Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 28.

²²⁰ Witness Statement of Prof. Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 112; Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 29, Witness Statement of Mr. Jean Aime Sindayigaya dated 20 May 2019, at para. 11.

²²¹ Explanatory Note on NRD (**Exhibit R-017**), at page 4.

²²² Explanatory Note on NRD (**Exhibit R-017**), at page 5, Letter from the Minister of Natural Resources (Minister S. Kamanzi) to the Chairman of NRD, *Serious issues arising from mining activities in Rutsiro Concession* (**Exhibit C-040**), F. Twagiramungu, *NRD Progress Mission Report* (November 2011) (**Exhibit C-043**), at page 2.

²²³ Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 23.

²²⁴ Witness Statement Prof. Prosper Nkanika Wa Rupiya dated 21 May 2019, at para. 14; Witness statement of Mr. Anthony Ehlers dated 20 May 2019, at para. 27.

²²⁵ Memorial, at para. 144.

164. In addition to the definition of “investment” and “covered investment”, Article 1 of the USA-Rwanda BIT provides:

“‘investment agreement’ means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;*
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or*
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.”²²⁶*

And,

“‘investment authorization’ means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.”²²⁷

165. Although the Claimants’ assert that the Contract is an “investment agreement” and “investment authorization” as covered by the above definitions,²²⁸ it is not clear why they attempt to classify them as such given the breaches of the USA-Rwanda BIT that they allege only afford protection to “covered investments” or “investors” and not to an “investment agreement” or “investment authorization”. While Article 24(1)(a)(i)(C) of the USA-Rwanda BIT might in theory (and which is not accepted, and which would be subject to other objections) have allowed the Claimants to make a claim for breach of an investment authorisation or investment agreement, the Claimants have not done so, and in any event such a claim would clearly be out of time, as set out above at paragraphs 18 to 90. Claimants instead attempt impermissibly to fit their claims within the framework of the USA-Rwanda BIT.

166. The scope and coverage of the USA-Rwanda BIT is limited to: “measures adopted or maintained by a Party relating to: (a) Investors of the other Party; (b) Covered

²²⁶ USA-Rwanda BIT (Exhibit CL-006), at Article 1.

²²⁷ USA-Rwanda BIT (Exhibit CL-006), at Article 1.

²²⁸ Since the Respondent contends that the existence of an “investment agreement” or an “investment authorization” is irrelevant for determining jurisdiction of the Claimants claims in this arbitration, the Respondent reserves its rights to argue that the Contract is in any event not even an “investment agreement” or an “investment authorization” should it be necessary.

*investments; [...]*²²⁹ Thus on Claimants own case the Contract as an “*investment agreement*” and “*investment authorization*” is not a protected investment.²³⁰

²²⁹ USA-Rwanda BIT (**Exhibit CL-006**), at Article 2(1), all investments in the territory of the Party are covered with respect to Articles 8, 12 and 13 only and the Claimants do not allege that the Respondent has breached any of these Articles.

²³⁰ The Respondent would seek to respond to any attempted argument made in response that the Contract is in fact a “*covered investment*” such that it is afforded protection under the USA-Rwanda BIT.

VI. THE TRIBUNAL LACKS JURISDICTION *RATIONE VOLUNTATIS* IN RELATION TO THE CLAIMS OF THE SPALENA COMPANY LLC

167. The Claimant's Memorial alleges that Rwanda has violated numerous articles of the USA-Rwanda BIT in its treatment of the Claimants' alleged investments; that is the supposed investments of both BVG and Spalena, although, as set out in the Respondent's other objections to this Tribunal's jurisdiction above, it has failed to show that either actually are an investor or hold any covered investments in Rwanda. Further, Spalena, as the alleged "*primary owner and investor in NRD*",²³¹ neither notified Rwanda of any disputes it had, nor did it seek to settle any such disputes. Spalena therefore failed to comply with the requirements contained in Article 23 of the USA-Rwanda BIT to seek initially to resolve the dispute through consultation and negotiation, and Article 24(2) of the USA-Rwanda BIT to deliver written notice of its intention to submit a claim to arbitration. Accordingly, this Tribunal lacks jurisdiction *ratione voluntatis* to hear any claims brought by Spalena.

A. The amicable settlement requirement in Articles 23 and 24 of the USA-Rwanda BIT qualifies Rwanda's consent to ICSID arbitration

168. Article 23 of the USA-Rwanda BIT provides:

*"In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures."*²³²

169. Article 24 of the USA-Rwanda BIT provides in relevant part:

"1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Articles 3 through 10,

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

²³¹ Memorial, at para. 10.

²³² USA-Rwanda BIT (**Exhibit CL-006**), at Article 23.

*(d) the relief sought and the approximate amount of damages claimed.”*²³³

170. Under Articles 23 and 24 of the USA-Rwanda BIT, no claim may be submitted to arbitration unless, (i) there has been a period of consultation and negotiation between the Claimant and the Respondent, and (ii) the requisite notice of intent has been provided by the Claimant to the Respondent. Unless these conditions are satisfied, the Tribunal lacks jurisdiction *ratione voluntatis*. The Claimants effectively acknowledge as much in their Memorial where they wrongly allege that they met the requirements of undertaking consultation with Rwanda and providing a Notice of Intent.²³⁴
171. The Respondent only consented to arbitrate disputes that comply with the provisions of the USA-Rwanda BIT. Consent of the parties is the cornerstone of any investment treaty arbitration, including ICSID arbitration.²³⁵ An investor may only accept a Contracting Party’s offer to arbitrate in the manner in which that offer is made in the applicable investment treaty, including any limitations attached to the offer. As the tribunal in *Kiliç v. Turkmenistan* explained:

“It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer as made. It follows that an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor’s acceptance of a host state’s standing offer as made (i.e., under its terms and conditions). The Tribunal agrees with Professor Schreuer’s view that the investor may accept or not accept the offer as it stands in the BIT, but it cannot alter it unilaterally:

*‘where ICSID’s jurisdiction is based on an offer made by one party, subsequently accepted by the other, the party’s consent is only to the extent that offer and acceptance coincide. ... It is evident that the investor’s acceptance may not validly go beyond the limits of the host State’s offer. Therefore, any limitation contained in the legislation or treaty would apply irrespective of the terms of the investor’s acceptance. If the terms of acceptance do not correspond with the terms of the offer there is no perfected consent.’ (Tribunal’s emphasis)”*²³⁶

²³³ USA-Rwanda BIT (**Exhibit CL-006**), at Article 24.

²³⁴ Memorial, at para. 149.

²³⁵ International Centre for Settlement of Investment Disputes, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, International Bank for Reconstruction and Development (18 March 1965), at para. 23 (“Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1))”).

²³⁶ *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**Exhibit RL-120**), at paras. 6.2.1.-6.2.2 [italics in the original, internal citation omitted].

172. The jurisprudence of the International Court of Justice likewise confirms that any conditions attaching to a State's consent to international adjudication, including amicable settlement requirements, demonstrate limits on that consent.²³⁷
173. Pursuant to Articles 23 and 24 of the USA-Rwanda BIT, the Claimant and the Respondent “*should initially seek to resolve the dispute through consultation and negotiation*” and only if the investment dispute “*cannot be settled by consultation and negotiation*” “*may [the claimant] submit to arbitration [...] a claim (i) that the respondent has breached (A) an obligation under Articles 3 through 10 the dispute*” to ICSID arbitration after “*deliver[ing] to the respondent a written notice of its intention to submit the claim to arbitration*”.²³⁸ As the *Kiliç v. Turkmenistan* tribunal held, the ordinary meaning of these and similarly worded provisions is that the exercise of the investor's right to resort to international arbitration is “*conditional upon certain requirements having been met,*”²³⁹ and failure to comply with the requirements “*has the consequence that there exists no jurisdiction to be exercised.*”²⁴⁰
174. Other ICSID tribunals are in accord. The Respondent draws attention to the fact that the requirement that resolution through consultation and negotiation “*should*” occur is frequently found in BITs to which the USA is party, and is seen as a mandatory requirement. In *Enron v. Argentina*, the tribunal held that the requirement in Article VII of the US-Argentina BIT that “*the parties to the dispute should initially seek a resolution through consultation and negotiation*”²⁴¹ was “*very much a jurisdictional one*” and that a “*failure to comply with that requirement would result in a determination of lack of jurisdiction.*”²⁴²
175. In *Burlington v. Ecuador* too, the tribunal held that non-compliance with the requirements in Article VI of the US-Ecuador BIT that “*the parties to the dispute should initially seek a resolution through consultation and negotiation*” and that the investor could only submit the dispute to arbitration once “*six months had elapsed from the date*

²³⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment (3 February 2006), I.C.J. Reports 2006, page 6 (**Exhibit RL-121**), at para. 15; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, page 70 (1 April 2011) (**Exhibit RL-122**), at para. 131.

²³⁸ USA-Rwanda BIT (**Exhibit CL-006**), at Articles 23 and 24.

²³⁹ *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**Exhibit RL-120**), at para. 6.2.8.

²⁴⁰ *Ibid* (**Exhibit RL-120**), at para. 6.2.9.

²⁴¹ Treaty Between United States of America and the Argentine Republic Concerning The Reciprocal Encouragement and Protection of Investment (14 November 1991) (**Exhibit RL-123**), at Article VII(2) (“*In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution. [...]*”).

²⁴² *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) (**Exhibit RL-124**), at para. 88.

on which the dispute arose,”²⁴³ and that failure to comply defeated jurisdiction. The tribunal explained the purpose of the limitation as follows:

*“[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.”*²⁴⁴

176. The amicable settlement requirement set out in Article 23 and 24 of the USA-Rwanda BIT therefore constitutes a jurisdictional requirement that the Claimants must comply with before it may submit a dispute with Rwanda to arbitration. In informing Rwanda of its claims only in the Original RfA of 18 May 2018 (which was only registered by ICSID following amendment as the Amended RfA of 12 June 2018 on 22 June 2018), Spalena has failed to comply with this requirement. Even if the requirement leaves an element of discretion with the Tribunal, that should be exercised against the Claimants. There was no good or sufficient reason for the Claimants’ failure, and Rwanda has been prejudiced by nor having the required opportunity to resolve the matter.

177. As the *Burlington v. Ecuador* tribunal has confirmed, the Request for Arbitration – and a fortiori the Memorial – is too late a time to apprise the respondent State of a dispute:

*“[T]he Request for Arbitration is too late a time to apprise Respondent of a dispute. The six-month waiting period requirement of Article VI is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration. Claimant has only informed Respondent of this dispute with the submission of the dispute to ICSID arbitration, thereby depriving Respondent of the opportunity, accorded by the Treaty, to redress the dispute before it is submitted to arbitration.”*²⁴⁵

²⁴³ Treaty Between the United States of America and the Republic Of Ecuador Concerning The Encouragement and Reciprocal Protection of Investment, With Protocol and a Related Exchange of Letters (27 August 1993) (**Exhibit RL-080**), at Article VI(2) and (3).

²⁴⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**Exhibit RL-119**), at para. 315 [emphasis added, italics in the original].

²⁴⁵ *Ibid* (**Exhibit RL-119**), at para. 312 [emphases added]. See also *The Channel Tunnel Group Limited, France-Manche S.A. v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland, Le ministre de l’équipement, des transports, de l’aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, PCA, Partial Award (30 January 2007) (**Exhibit RL-105**), at paras. 142-143 (“It is established that a party to international proceedings cannot create a dispute by its request for arbitration, even if such a dispute would have been within jurisdiction had it existed and could therefore, potentially, be the subject of a new request following further exchanges between the parties. [...] There appears to have been no communication on this subject between the Concessionaires and the United Kingdom prior to the Request, no attempt to bring the matter formally before the IGC and no prior indication by any means or in any forum of what the United Kingdom might have neglected to do in relation to the SeaFrance subsidies.

178. In conclusion, for the Tribunal to have jurisdiction over Spalena's claims, Spalena was required to comply with the amicable settlement requirement in Articles 23 and 24 of the USA-Rwanda BIT. As summarised below, Spalena has failed to comply with this requirement. This Tribunal therefore lacks jurisdiction *ratione voluntatis* over Spalena's claims.

B. Spalena did not seek amicable settlement of its claims

179. Although the Claimants allege in their Memorial that sufficient notice and consultations took place in order to satisfy consent to, and the requirements for and under the USA-Rwanda BIT and the ICSID Convention, this is not the case. The notice of intent relied upon by the Claimants as fulfilling the necessary requirements under the USA-Rwanda BIT and the ICSID Convention for consenting to arbitration is dated 12 April 2017 (the "**Notice**") and is titled:

*"Natural Resources Development Rwanda Ltd. and Bay View Group, LLC Notice of Intent to Commence Arbitration Proceedings Against the Republic of Rwanda."*²⁴⁶

180. Duane Morris LLP, the author of the Notice, only identifies "*Natural Resources Development Rwanda Ltd. ('NRD') and Bay View Group, LLC ('BVG' and collectively with NRD, the 'Companies')*" as their clients and as the companies whose intention it is to submit claims under the USA-Rwanda BIT against Rwanda. In addition the Notice makes vague reference to the owners of these identified companies (BVG and NRD) as being "*American Investors whose interests are represented by Mr. Marshall*", but it goes no further than this. Indeed, the Notice specifically states that the "*each of the American investors is an individual who has United States of America Citizenship, or is a US trust or estate, all of whose beneficiaries are individuals who have United States of America citizenship*"²⁴⁷. Nowhere does the Notice state that any corporate person, let alone a US-incorporated LLP, is a shareholder in NRD. Nowhere in the Notice is there mention of Spalena being one of these "*American investors*".

181. Shortly following the filing of the Original RfA, and during their review of it, Mr. Paul-Jean Le Cannu, on behalf of the Secretary-General of ICSID, wrote to the Claimants requesting certain information and documentation. The second request on 24 May 2018, requested that the Claimants provide evidence that they had complied with Article 24(2) of the USA-Rwanda BIT.²⁴⁸

There was in the Tribunal's view no dispute between the Concessionaires and the United Kingdom as concerns the SeaFrance claim at the time the Request was served, and that aspect of the claim is accordingly outside its jurisdiction." [emphasis added]).

²⁴⁶ Letter from Duane Morris LLP to Rwanda (12 April 2017).

²⁴⁷ Letter from Duane Morris LLP to Rwanda (12 April 2017), at page 2.

²⁴⁸ Letter from ICSID to Duane Morris (24 May 2018), at para. 3.

182. In response to this request, the Claimants provided the Notice along with the following explanation regarding it:

“A copy of the April 12, 2017, notice of intent is attached as Exhibit E. At all relevant times, Rwanda has known Natural Resources Development Rwanda Ltd (“NRD”) was wholly-owned by The Spalena Company LLC (“Spalena”) and that Spalena in turn was an affiliate of Bay View Group LLC. NRD provided documentation to Rwanda reflecting the fact that it is owned by Spalena. See Exhibit F. Accordingly, the April 12, 2017, notice of intent to arbitrate the BIT claims arising out of Rwanda’s mistreatment of the US investors’ investment in NRD necessarily constituted notice of intent to arbitrate the claims arising out of Spalena’s investment.”²⁴⁹

183. This explanation as to why Spalena should be allowed to ignore the amicable settlement and notice requirements set out in the USA-Rwanda BIT cannot be accepted. As set out above, the Notice does not provide any basis for belief that any United States corporation, let alone Spalena in particular, had a claim on the basis that it was an investor in NRD.

184. Further, as the Claimants are well aware, the documents submitted as Exhibit F to Duane Morris LLP’s letter dated 12 April 2017 were submitted to the RDB on 23 March 2015, but were not accepted as sufficient proof of Spalena’s ownership of NRD by the RDB or consequently by the Rwandan government. Now to assert that Rwanda *“has known [NRD] was wholly-owned by [Spalena]”* is plainly incorrect. Rwanda had specifically declined to recognise Spalena’s shareholding in NRD.

185. As a consequence, following receipt of the Notice, Rwanda had been notified merely that claims against it were being brought by BVG and NRD. In the event, the Claimants have now effectively withdrawn BVG’s claim on its own account, stating that *“BVG’s investment in the Bisiero Concession is not at issue in this litigation”*.²⁵⁰ Similarly, counsel for the Claimants have *“confirm[ed] that [NRD] is withdrawn as a named Claimant as stated in the Demand for Arbitration filed on May 14, 2018”*,²⁵¹ presumably on the basis of a recognition that the Tribunal would lack jurisdiction to hear a claim brought by NRD. Accordingly, neither of the claimants named in the Notice are now bringing the claims as set out in the Notice. Instead, Spalena has been substituted for NRD, and BVG is advancing a claim relating to its alleged losses through NRD, rather than on its own account.

186. In sum, the claims now brought are of a different character, and brought by different parties, to those notified to Rwanda in 2017. Spalena itself did not notify Rwanda of,

²⁴⁹ Letter from Duane Morris LLP to ICSID (31 May 2018), at para. 3.

²⁵⁰ Memorial, at para. 7, fn 10.

²⁵¹ Email from Steven M. Cowley to Paul-Jean Le Cannu (8 June 2018) at 3:35 PM.

nor seek amicably to settle, any of its disputes before submitting the Original RfA. In neglecting to do so, Spalena failed to comply with the amicable settlement requirement in Articles 23 and 24 of the USA-Rwanda BIT. The Tribunal therefore lacks jurisdiction *ratione voluntatis* over Spalena's claims.

VII. REQUEST FOR RELIEF

187. For the reasons set forth above, the Respondent respectfully requests that the Tribunal grant the following relief:
- 187.1. Dismiss the Claimants' claims in their entirety for lack of jurisdiction on the basis of these Preliminary Objections;
 - 187.2. Declare that it does not have jurisdiction to hear the Claimants' claims;
 - 187.3. Order the Claimant to pay to Rwanda the full costs of determination of the Preliminary Objections, including, without limitation, arbitrator's fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with the Preliminary Objections;
 - 187.4. Order the Claimant to pay Rwanda interest on the amounts awarded under 187.3 above until the date of full payment; and
 - 187.5. Grant any such further or other relief as the Tribunal sees fit.

Respectfully submitted on 24 May 2019 by:

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