

In the matter of an arbitration  
under the Rules of Arbitration of  
the International Centre for  
Settlement of Investment Disputes

Case No. ARB/18/21

Video conference  
via Zoom

Monday, 21st June 2021

Hearing on Jurisdiction and the Merits

Before:

RT HON LORD PHILLIPS KG PC  
MR J TRUMAN BIDWELL JR  
MS BARBARA DOHMANN QC

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BAY VIEW GROUP LLC  
and  
THE SPALENA COMPANY LLC

Claimants

-v-

GOVERNMENT OF RWANDA

Respondent

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Secretary to the Tribunal: ALEX B KAPLAN

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Transcript produced by Anne-Marie Stallard  
and Georgina Vaughn on behalf of Trevor McGowan

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| <p>12:01 1 Monday, 21st June 2021<br/>2 (Transcript times are British Summer Time)<br/>3 (12.01 pm)<br/>4 THE PRESIDENT: Welcome, everybody, to Day 1 of this merits<br/>5 hearing, by Zoom, of the ICSID arbitration between<br/>6 Bay View Group and The Spalena Company v the Government<br/>7 of Rwanda.<br/>8 We have 15 minutes allowed for preliminary matters.<br/>9 First of all, I understand that Mr Hill will be speaking<br/>10 for the Respondent and Mr Cowley for the Claimants in<br/>11 these proceedings. Is that correct?<br/>12 MR COWLEY: Yes. When you say "these proceedings", with<br/>13 regard to the --<br/>14 THE PRESIDENT: Today, in the openings.<br/>15 MR HILL: Yes, that's correct.<br/>16 THE PRESIDENT: Good.<br/>17 Now, according to Procedural Order No. 7, witnesses<br/>18 should not be listening to submissions. I just wanted<br/>19 to raise the question of whether the Respondent wishes<br/>20 this to be applied in the case of Mr Marshall, who will<br/>21 be giving evidence immediately after the opening<br/>22 statements, or whether they prefer to have Mr Marshall<br/>23 listening to what they say in their opening.<br/>24 MR HILL: No, from our perspective we're happy that the<br/>25 regime stays as it is and Mr Marshall is excluded.</p> <p style="text-align: center;">Page 1</p>  | <p>12:04 1 screening of these proceedings will take place after the<br/>2 hearing has been concluded, and before the proceedings<br/>3 are screened publicly, they will be shown to each side,<br/>4 so that each side will have the opportunity to draw<br/>5 attention to any matters which are confidential and<br/>6 should not be put into the public arena.<br/>7 Is that arrangement satisfactory?<br/>8 MR COWLEY: Claimants agree.<br/>9 MR HILL: Yes, and the Respondent also.<br/>10 THE PRESIDENT: Good.<br/>11 Now, the third matter to be resolved relates to the<br/>12 Claimants' application to adduce additional evidence.<br/>13 The Tribunal has discussed this application in the light<br/>14 of the Respondent's response to it. We don't wish to<br/>15 invite further argument about it, but there are just one<br/>16 or two matters we would like assistance on.<br/>17 First of all, Mr Cowley, could you explain why it is<br/>18 that this application has been made only one working day<br/>19 before the start of the hearing?<br/>20 MR COWLEY: It was the deadline that was agreed to some time<br/>21 ago, when we scheduled all the proceedings. The request<br/>22 for submission of new evidence was set as the deadline<br/>23 of Thursday. We simply followed the order.<br/>24 THE PRESIDENT: I'm not aware of any order that applications<br/>25 should not be made before a deadline. There is</p> <p style="text-align: center;">Page 3</p> |
| <p>12:03 1 THE PRESIDENT: Very well. So be it.<br/>2 Now, there are one or two matters that we left open<br/>3 to resolve in this initial stage. The first was the<br/>4 position of Mr Rwamasirabo, who is going to give<br/>5 evidence but there is an issue as to the capacity in<br/>6 which he gives it. I'm not quite sure procedurally what<br/>7 turns on this. Is it whether he gives a 15-minute<br/>8 introduction or makes a presentation?<br/>9 MR HILL: Just on that, I think from our perspective nothing<br/>10 turns on it for the purposes of the procedure. We are<br/>11 not going to object to him giving a 15-minute<br/>12 presentation. In terms of the positioning in the<br/>13 timetable, he comes at the end. We will be making<br/>14 submissions in due course about the weight to be<br/>15 attached. But in terms of the procedure I don't think<br/>16 there's any problem that arises.<br/>17 THE PRESIDENT: Well, in that case, there wouldn't seem to<br/>18 be any issue to resolve at this stage; is that right?<br/>19 MR COWLEY: Agreed.<br/>20 THE PRESIDENT: Right.<br/>21 The next matter, and it's a small matter: these<br/>22 proceedings will in due course be screened for the<br/>23 public, but because the proceedings are being conducted<br/>24 remotely, the normal course that ICSID follows will not<br/>25 be followed. What is proposed is that the public</p> <p style="text-align: center;">Page 2</p> | <p>12:06 1 a practice, which is not one that I'm enthusiastic<br/>2 about, of always waiting for the deadline before doing<br/>3 anything. But if one is dealing with an application to<br/>4 adduce additional evidence, the sooner it is made the<br/>5 better, surely.<br/>6 MR COWLEY: Well, our apologies. We did not propose<br/>7 anything that we were holding that was our own. There<br/>8 are two in particular that -- these are Respondent's<br/>9 documents, especially with regard to Mr Ehlers's<br/>10 communication; he's had them the whole time. The<br/>11 only -- we would raise the question, if we were still in<br/>12 an earlier phase, as to why it wasn't produced, you<br/>13 know, in response to our request.<br/>14 THE PRESIDENT: Well, the only question -- I was not<br/>15 inviting argument about whether it should come in;<br/>16 I just wanted to know why it was that the application<br/>17 was made so late.<br/>18 Could I turn to the three particular items of<br/>19 evidence. The first is documents relating to Tinco's<br/>20 agreement with the Respondent.<br/>21 Mr Hill, the primary objection that's been made to<br/>22 this is on the grounds of relevance. Relevance is<br/>23 something that we wouldn't wish to predetermine at this<br/>24 stage. Is there any other reason why the Respondent<br/>25 can't deal with this evidence?</p> <p style="text-align: center;">Page 4</p>  |

12:07 1 MR HILL: Well, it comes so late -- we don't actually have  
 2 the evidence; we haven't, obviously, looked at it. So  
 3 we are, at this very short notice, prejudiced by seeking  
 4 to deal with it at all. As I say, we don't understand  
 5 the relevance, and there has been no submission made or  
 6 explanation given as to why it's so late. It's been  
 7 around for over a year. Trying to explain the degree of  
 8 prejudice is inherently difficult because we haven't  
 9 seen the material. But at the last day, we're certainly  
 10 not in a position to deal with it today and we don't  
 11 know if we'll be in a position to deal with it at any  
 12 stage during this week.  
 13 THE PRESIDENT: Do you not have the document? It's  
 14 a document that evidences what is alleged to be dealings  
 15 of the Respondent.  
 16 MR HILL: Well, I'm not in a position to answer that, I'm  
 17 afraid. But we certainly would be prejudiced in  
 18 addressing -- even on the assumption we have the  
 19 document, we would certainly be prejudiced in seeking to  
 20 deal with it, to discuss it with our witnesses, in the  
 21 short time available. And in the circumstances where  
 22 there is a lot in this case and it's immaterial, we do  
 23 say it shouldn't be admitted.  
 24 THE PRESIDENT: Will it be open to the Claimants to  
 25 cross-examine on what has occurred since disclosure of

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12:09 1 documents? Because if so, this is going to be put to  
 2 your witnesses.  
 3 MR HILL: Well, if there's a witness that they think it's  
 4 relevant to cross-examine on, they can attempt to do so.  
 5 I would suggest that would be an unuseful expenditure of  
 6 their time in cross-examination because it's  
 7 an immaterial issue.  
 8 THE PRESIDENT: Yes. Can we just go into a private session  
 9 for a moment, please.  
 10 (12.10 pm)  
 11 (The members of the Tribunal withdraw)  
 12 (12.11 pm)  
 13 THE PRESIDENT: Mr Cowley, can you hear me? Is it your  
 14 intention that this evidence should be put in  
 15 cross-examination to any of the Respondent's witnesses?  
 16 MR COWLEY: Yes, it was our expectation, it was our  
 17 understanding of paragraph 22 of Procedural Order 7 that  
 18 we were only afforded an opportunity to ask for the  
 19 submission of new evidence for cross-examination.  
 20 This is something that only became available in the  
 21 last month to anyone, and not us. We had to obtain this  
 22 through --  
 23 THE PRESIDENT: Yes, can you state which witness or  
 24 witnesses you're going to ask about this?  
 25 MR COWLEY: Well, I believe it's at least directly relevant

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12:11 1 to Mr Evode Imena, but I would not want to say right now  
 2 that we have mapped out our cross-examination so tightly  
 3 that we know every topic we are going to cover and all  
 4 the issues in the documents. So I would say that I know  
 5 it's relevant to at least one.  
 6 THE PRESIDENT: Well, our direction is that by start of  
 7 business tomorrow you shall have decided which witnesses  
 8 you are going to put this evidence to, give notice of  
 9 those witnesses. When you come to cross-examine them,  
 10 at that point, if an objection is taken, we will deal  
 11 with it then.  
 12 MR COWLEY: In the meantime, your Honour, just so  
 13 I understand, what are we to do with the documents?  
 14 Respondent's counsel suggests he doesn't have them,  
 15 although they're actually Respondent's documents. We're  
 16 happy to provide them to them.  
 17 THE PRESIDENT: You should certainly provide them to the  
 18 Respondent without further delay.  
 19 MR COWLEY: I just wanted to know what our next step was.  
 20 THE PRESIDENT: Yes.  
 21 MR COWLEY: And we will advise tomorrow who we intend to  
 22 examine on the topic that's addressed in the document.  
 23 THE PRESIDENT: Moving to the second category, which are  
 24 human rights reports, we decided that these are not  
 25 going to be admitted at this very late stage. They

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12:13 1 cover very wide ground, they are hearsay documents; some  
 2 of them have been available for a very long time. They  
 3 are of questionable relevance and impact, and we do not  
 4 consider that the circumstances justify their admission  
 5 at this late stage.  
 6 The third category, in relation to the cooperation  
 7 agreement, we've decided shall be admitted. They are  
 8 plainly documents of relevance to the case being  
 9 advanced by the Claimants, and we don't consider that  
 10 prejudice will be caused to the Respondent because  
 11 although the application is made at a very late stage,  
 12 there are still going to be, I think, four or five days  
 13 elapsing before any use is made of those particular  
 14 documents. But we would invite, please, Mr Ehlers to  
 15 produce a short written statement in relation to this  
 16 material.  
 17 MR COWLEY: I'm sorry, Mr who?  
 18 THE PRESIDENT: Mr Ehlers.  
 19 MR COWLEY: Your Honour, again, just so that I know --  
 20 THE PRESIDENT: This is a matter for the Respondent.  
 21 MR COWLEY: I apologise.  
 22 THE PRESIDENT: Mr Hill?  
 23 MR HILL: Yes, we've understood that, Mr President. We  
 24 will --  
 25 THE PRESIDENT: Yes, how long would you like for that?

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12:15 1 MR HILL: Well, Mr Ehlers is obviously a mere witness of  
 2 ours.  
 3 THE PRESIDENT: Yes.  
 4 MR HILL: I would ask for three days.  
 5 THE PRESIDENT: Very well.  
 6 MR HILL: Thank you.  
 7 THE PRESIDENT: 15 minutes. Any other matters of  
 8 housekeeping?  
 9 MR COWLEY: Your Honour, just as clarification, again, what  
 10 do we do with the documents? Are we to submit them to  
 11 the Tribunal now as additional Claimants' exhibits?  
 12 I take it that the --  
 13 THE PRESIDENT: Yes.  
 14 MR COWLEY: -- Respondent has copies already. So we'll get  
 15 them to the Tribunal by tomorrow; is that acceptable?  
 16 THE PRESIDENT: That's acceptable.  
 17 MR HILL: Just to clarify, we don't have copies. Mr Ehlers  
 18 does not have this email and we haven't seen it, so we  
 19 will need to be provided with it.  
 20 MR COWLEY: We will get that out today, as best we can after  
 21 the hearing is over. We'll get them out as soon as we  
 22 can. We just need to mark them as the next exhibits.  
 23 So it's just a step away.  
 24 Lastly, I hate to be so particular but I don't want  
 25 to fail to deliver something that's expected: when we

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12:17 1 ask the Tribunal's assistance with.  
 2 THE PRESIDENT: Yes.  
 3 MR COWLEY: There is a document in Respondent's production  
 4 that is not translated in full from Kinyarwanda to  
 5 English, as required by Procedural Order No. 1. It is  
 6 only selectively translated, for two paragraphs. It's  
 7 Respondent's document R-191. And we would like to ask  
 8 that the Tribunal direct Respondent to provide the full  
 9 translation of the entire document.  
 10 THE PRESIDENT: How long is it?  
 11 MR COWLEY: 11 pages, I believe. 11-15 pages, something  
 12 like that.  
 13 THE PRESIDENT: Can you tell us what the document is?  
 14 MR COWLEY: It appears to be a judgment of some sort against  
 15 Evode Imena, Mr Imena. He cites it for the two  
 16 paragraphs, but there are at least ten pages of  
 17 additional written something in the order that we cannot  
 18 read and translate -- we could hire a translator, but we  
 19 can't be assured that we have agreement with the other  
 20 side. And I don't think it makes any sense for us to  
 21 question Mr Imena line by line to get a reading of the  
 22 other paragraphs and try to get agreement as to what  
 23 they say, as opposed to have in writing the translation  
 24 that we know Respondent agrees to because it has  
 25 provided it.

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12:16 1 send out the documents to the Tribunal relating to  
 2 number 3, the email and its attachment, do we also send  
 3 the Tribunal the two different agreements with Tinco  
 4 that are covered by item 1, along with the --  
 5 THE PRESIDENT: Yes, please.  
 6 MR COWLEY: Okay, thank you.  
 7 MR HILL: Could I just raise one more point on that timing?  
 8 THE PRESIDENT: Yes.  
 9 MR HILL: We would be keen to have the email and the  
 10 cooperation agreement immediately. So while  
 11 I understand the idea about marking up exhibits and that  
 12 can be done later, just as between the parties, if the  
 13 provision of that document could be provided  
 14 immediately, that would -- because we've only got three  
 15 days in order for Mr Ehlers to comment on it.  
 16 THE PRESIDENT: That's a reasonable request. Mr Cowley,  
 17 could you put in train arrangements so that the  
 18 documents are transmitted immediately?  
 19 MR COWLEY: We will. When you say "immediately", we don't  
 20 have any staff in the office, and you're looking at the  
 21 entire team, the litigation team, sitting here with you.  
 22 So immediately means as soon as we can today, when  
 23 someone --  
 24 THE PRESIDENT: As soon as possible. Very well.  
 25 MR COWLEY: We do have one other item that we would like to

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12:19 1 THE PRESIDENT: Yes. Mr Hill, can that be done?  
 2 MR HILL: Yes, I've just had some brief instructions.  
 3 I understand it is quite a lengthy document and relevant  
 4 only in part.  
 5 Just on the original point from Mr Cowley, we were  
 6 only required to provide excerpts. Obviously, in light  
 7 of what the President said, I will find out how easily  
 8 it can be done and revert if there is a difficulty.  
 9 THE PRESIDENT: Alright. Thank you very much.  
 10 So, Mr Cowley, over to you.  
 11 (12.20 pm)  
 12 Opening statement on behalf of the Claimants  
 13 MR COWLEY: We are bringing up a PowerPoint presentation.  
 14 It will take just a couple of seconds because we need to  
 15 share our screen. This was submitted earlier this  
 16 morning to Mr Kaplan. (Pause)  
 17 So if it hopefully makes more sense of my opening,  
 18 we prepared a timeline to direct chronologically what we  
 19 believe we presented, and obviously will be explored  
 20 further, in much greater detail, by testimony and the  
 21 points in context, both by Claimants' witnesses and  
 22 Respondent's witnesses.  
 23 I do not intend to provide the level of detail and  
 24 quotes, but for a brief few indications of portions of  
 25 documents and portions of testimony. I leave out,

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12:21 1 obviously, much detail, and I say that upfront. I'm not  
 2 suggesting that this opening is a comprehensive analysis  
 3 of all the documents on these topics or all the contents  
 4 of the documents we point to. We are trying to provide  
 5 an overview and direction of the case as we see it and  
 6 we believe we presented it, and will obviously defend it  
 7 over the course of the next two weeks in these hearings.  
 8 The Claimants here, and the acts and issues that  
 9 give rise to the claims by the Claimants, all centre  
 10 unquestionably around Mr Marshall's activities in  
 11 becoming an investor in Rwanda, in the mining industry  
 12 specifically in Rwanda, and he brought with him other US  
 13 investors.  
 14 How it came to be that Mr Marshall was in a position  
 15 to identify an opportunity to invest in this industry  
 16 starts actually with who Mr Marshall is and what his  
 17 relationship with Rwanda was prior to making this  
 18 investment. He was not a commercial miner that was  
 19 looking around the world for various opportunities and  
 20 simply, at arm's length, passed in an application for  
 21 concessions. Mr Marshall first developed  
 22 a relationship, a trusted relationship, where he acted  
 23 as both legal advisor and general consultant on business  
 24 to important institutions and individuals within the  
 25 Rwandan Government.

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12:23 1 This relationship goes all the way back to  
 2 December 2004. Mr Marshall, at the time in his career,  
 3 he was an international transactional attorney,  
 4 practising in Eastern Europe. He started in the  
 5 United States and moved to Eastern Europe and was  
 6 practising: he was providing advice to international  
 7 companies and to nation states, sovereign entities. And  
 8 he developed a speciality and had relationships with  
 9 a number of governments, countries, agencies within  
 10 governments and companies doing business with him.  
 11 That's how he became introduced to and started  
 12 a relationship with Rwanda.  
 13 (Slide 2) In December 2004 Mr Marshall and his  
 14 partner at the time providing these legal services and  
 15 other transactional advice and consulting signed  
 16 an agreement to provide such services to the Rwandan  
 17 Investment and Export Promotion Agency. And it's a very  
 18 high-level agreement because it's not specific as to  
 19 projects, but agrees and sets the basis for what turned  
 20 out to be a very long-term relationship.  
 21 (Slide 3) And as you can see from -- as we bring up  
 22 some documents, the specific document numbers that are  
 23 referenced on the documents correspond with the document  
 24 in the hearing bundle. I will try to remember them and  
 25 point them out, but the PowerPoint presentation has been

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12:25 1 provided, so all of these documents or snippets from  
 2 documents can be traced back or found based on the  
 3 individual slides: they have the document numbers on  
 4 them.  
 5 So Claimants' Exhibit [132] will show that it's  
 6 a very high-level document, and what Mr Marshall and his  
 7 partner did -- and over time it became primarily  
 8 Mr Marshall who developed this relationship and  
 9 continued working on it -- they provided these services  
 10 on a pro bono basis. Given the nature of Rwanda's early  
 11 stages of privatisation and getting involved in  
 12 international transactions, it was not in a position to  
 13 pay for some of the types of legal services and other  
 14 needs that it had, that other nation states did, and  
 15 Mr Marshall began working with them with that knowledge  
 16 and understanding.  
 17 It became over time a very close relationship. And  
 18 when I say it's long term, this relationship, the role  
 19 of trusted legal and business advisor to elements within  
 20 the Rwandan Government, other institutions -- over time  
 21 it became far more centred on the military and its  
 22 transactional arm -- lasted until 2016, until the events  
 23 that really ended Mr Marshall's investment in Rwanda.  
 24 He worked for them in this role throughout all the  
 25 events we see here, all the events we're going to deal

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12:26 1 with here, as an investor. And it's important -- and we  
 2 point this out now at the beginning, in this opening,  
 3 because keeping in mind the way Mr Marshall's claims,  
 4 even the basic representations about things that were  
 5 provided to him in writing, the accusations back about  
 6 fraud, manipulation, lying, distortion, trying to get  
 7 something from the government, the way he has been  
 8 handled -- not as a good faith dispute or disagreement  
 9 about a contract or its rights, disagreements about what  
 10 happened on the ground, that could happen between  
 11 anybody, but accusing him of actively manipulating and  
 12 lying throughout -- is coming from a government that was  
 13 using Mr Marshall this entire time as a spokesperson, as  
 14 a representative, as a liaison to other governments; as  
 15 someone who would handle not only specific transactions  
 16 but big-picture developing relationships that Rwanda  
 17 felt were important in Eastern Europe for them. They  
 18 relied on him in that role until 2016.  
 19 So hearing now the approach they take and the  
 20 accusations levelled at Mr Marshall, it should always be  
 21 remembered, at the time and in context: how did they  
 22 actually view Mr Marshall, how did they actually treat  
 23 him? Like a liar and someone not to be trusted? Or  
 24 like someone who they trusted so much they could use as  
 25 their voice and their representative with others?

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12:28 1 Through this relationship and Mr Marshall's work in  
 2 understanding about the different types of transactions  
 3 that Rwanda was looking to get involved in, and his own  
 4 speciality in working on similar transactions in other  
 5 countries, specifically in Eastern Europe, Mr Marshall  
 6 was introduced to and learned about the privatisation  
 7 efforts. And at one point it focused on the mines, on  
 8 the mining concessions. Rwanda was interested in  
 9 getting foreign investment; specifically, through  
 10 Mr Marshall, they hoped, US investment, interested in  
 11 getting in early and helping privatise, build out,  
 12 Rwandan mines in the mining industry.  
 13 (Slide 4) Mr Marshall was introduced to this early  
 14 in his relationship, and by December 12th 2006 there was  
 15 discussion about what it would look like if he was  
 16 interested -- he had expressed interest in trying to put  
 17 together an investment group to get involved -- what the  
 18 steps would be.  
 19 And December 12th 2006, one of the communications  
 20 from RIEPA (C-139) -- I want to point out here because,  
 21 again, I do this because, in terms of the  
 22 communications, not by any stretch was this the only  
 23 one; by no stretch are we saying this email is the  
 24 agreement on something. There's numerous discussions  
 25 and conversations. But we point this out because we

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12:30 1 think it is indicative of the way business was actually  
 2 done, how things were actually handled.  
 3 Again, we think it's completely out of context and  
 4 completely distorted once it gets into the legal realm  
 5 that we have now, and we have lawyer positions and legal  
 6 analysis and reasoning about what documents should mean  
 7 and what things must have been intended or not because  
 8 of the language. What I'm trying to draw the court's  
 9 attention to with this email is: how was business  
 10 actually done when Mr Marshall was trying to get  
 11 involved, and later did get involved, and he was dealing  
 12 with representatives of Rwanda and the ministry that was  
 13 handling the privatisation of mines? How were they  
 14 actually handling their own written policies and  
 15 procedures?  
 16 Well, we see right here, on December 12th 2006,  
 17 Mr Marshall was told quite explicitly, "You do not have  
 18 to go through RIEPA" or the privatisation scheme that  
 19 was in place, early as it was, loose as it was, in terms  
 20 of the written programmes. "Don't worry about that",  
 21 they say, "just write a letter explaining your interest,  
 22 and we're working with you". And that informality, that  
 23 "Trust us, this is how we're going to do it; don't worry  
 24 too much about what things say, let's get involved,  
 25 let's get you going and get to an agreement about how

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12:31 1 we're going to do it", working together cooperatively  
 2 was how things were handled from the very beginning.  
 3 So to suggest now, all these years later, when  
 4 things did not turn out right and Mr Marshall asserts  
 5 a claim, that it was completely unreasonable to expect  
 6 that what he was told meant anything, given what was in  
 7 writing; it wasn't. It wasn't unreasonable because he  
 8 was always assured and he knew from his experience how  
 9 things were done, business was actually done, through  
 10 the personal relationships and working cooperatively.  
 11 From the get-go, they assured him, "That's how we do  
 12 things".  
 13 To draw your attention -- I'm sorry, this turns out  
 14 to be a lot smaller on my screen and I'm hunching over;  
 15 I don't mean to do that, but I don't know how to enlarge  
 16 it. When I say the "cooperative" nature of the  
 17 relationship, I just want to draw the Tribunal's  
 18 attention to the last line. In submitting plans and  
 19 submitting proposals and analysis of what he's going to  
 20 do, it was made quite clear to them the Rwandan  
 21 Government was going to be working with him to come up  
 22 with satisfactory documentation and proposals. They  
 23 were going to assist in his presentations because they  
 24 wanted to be successful.  
 25 It was not handled the way we're now hearing it and

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12:33 1 presented, where "You submit something, we'll judge it",  
 2 and that's all. Instead, it was always a matter of "You  
 3 help me by telling me what you need; we'll see if we can  
 4 do it and how we can do it". And that was true from the  
 5 very beginning.  
 6 (Slide 6) NRD received its contract for mining  
 7 concessions on November 24th 2006.  
 8 (Slide 7) That NRD initial award, the initial  
 9 licence, is at Claimants' Exhibit C-017. The only thing  
 10 I'd like to point out and remind the Tribunal at this  
 11 point is: the initial agreement from its initial  
 12 investment, NRD -- well, NRD's then owners and investors  
 13 in NRD acquired the rights to five mines: Rutsiro, Mara,  
 14 Sebeya and Giciye, four of the mining concessions, were  
 15 in the Western Province; one, Nemba, was not.  
 16 The reason I just point that out is, in putting in  
 17 context as the hearings go on, you'll hear about the way  
 18 things were done, sometimes only focusing on the  
 19 Western Provinces and only things that affected those  
 20 mining concessions. So I just wanted to point out that  
 21 four of NRD's five mining concessions were located  
 22 there.  
 23 (Slide 9) In November 2010 Mr Marshall, who was not  
 24 with NRD previously, was not one of the initial  
 25 investors in NRD, became involved, became an investor.

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12:35 1 If I could just take a step back, up until this  
 2 point, or prior to the investment by BVG in NRD,  
 3 Mr Marshall's initial investment, when he did move  
 4 forward with RIEPA conversations and ultimately applied  
 5 for a concession, it was for a mining concession called  
 6 Bisesero. That is not a concession that's at issue in  
 7 this case, in the sense that there's no claims asserted  
 8 about the fact that Mr Marshall's companies do not have  
 9 long-term concessions there, but it's admitted that they  
 10 don't.  
 11 Things did not work out at Bisesero. And  
 12 Mr Marshall's company, his investment company, through  
 13 which he and other American investors put their initial  
 14 roots, if you will, into the investment that later  
 15 became the groundwork for the investment in NRD going  
 16 forward, they initially put that into Bisesero and they  
 17 were, over time, unable, based on essentially bad  
 18 relationships and -- bad performance of relationships  
 19 and who they relied on, disputes about what happened  
 20 left them in quite a hole, quite a bind there. And when  
 21 Bisesero was taken from them, Mr Marshall, already  
 22 facing problems with that investment, made the decision  
 23 not to fight about Bisesero, not to argue about whether  
 24 he had rights to continue, but to walk away and to  
 25 reinvest in other concessions that he knew became

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12:37 1 available.  
 2 The NRD owner originally when the concessions were  
 3 awarded, Starck company, a German company, wanted out,  
 4 wanted out of Rwanda. Mr Marshall and others became  
 5 aware of their interest in transferring their  
 6 investment, transferring NRD. And Mr Marshall acquired  
 7 that Starck interest, in a private transaction he  
 8 acquired -- they acquired the Starck investment in NRD  
 9 through Spalena, an investment vehicle that was set up  
 10 simply to address the fact that Bay View Group was no  
 11 longer recognised and listed in Rwanda as a company  
 12 registered to do business there. So acquiring NRD in  
 13 Bay View Group's name was not in compliance with Rwandan  
 14 law, and Bay View put its money through a new investment  
 15 vehicle that Mr Marshall and his other investors formed,  
 16 an affiliate that they controlled.  
 17 THE PRESIDENT: Could I just intervene. Is there any  
 18 evidence in relation to the fact that Bay View was not  
 19 permitted, under Rwandan law, to take over the business?  
 20 MR COWLEY: To make the acquisition of the shares --  
 21 THE PRESIDENT: I understood the Claimants' case to be that  
 22 Mr Marshall had no idea why this was.  
 23 MR COWLEY: He had no idea why Rwanda stood its ground and  
 24 insisted that Bay View Group could not renew its  
 25 registration when -- and it's in Mr Marshall's

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12:39 1 testimony, and I don't recall -- it's a very fair  
 2 question, and I have to say I don't specifically recall  
 3 if it was also addressed by Olivier Rwamasirabo, because  
 4 I don't recall it and I can't say that he specifically  
 5 addressed it. But there was a period of time when  
 6 Rwanda undertook to acquire the foreign corporations  
 7 doing business there all to renew their registration,  
 8 and he was told not for Bay View Group. That he doesn't  
 9 understand.  
 10 Why Bay View Group needed to put its money into  
 11 another affiliated entity with a different name to then  
 12 buy ownership and control of NRD's parent from Starck he  
 13 does understand, because it simply needed to be  
 14 a vehicle, a company, that was on the books in Rwanda.  
 15 So it was an affiliate with no distinction between the  
 16 investors, the managers or the money. The money was the  
 17 same money that BVG -- first of all, much of the  
 18 investment that was already put into Bisesero was  
 19 transferred, the assets were transferred; and the  
 20 monetary commitment that was going in directly from BVG  
 21 then became a monetary commitment and investment going  
 22 from BVG through its affiliated controlled company,  
 23 Spalena, into the parent company of NRD and then  
 24 directly to NRD, once it owned the shares.  
 25 So he understands why he put the money in the way he

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12:41 1 did. He has never been given an explanation for why it  
 2 mattered. Because there is no question -- none has been  
 3 raised, and there certainly is no question based on  
 4 Mr Marshall's presentation -- that this was not done  
 5 behind the backs of anybody in Rwanda. Mr Marshall was  
 6 not blocked, his investors that he had behind him were  
 7 not blocked. This was not a group of individuals who  
 8 knew Rwanda did not permit them to invest in the  
 9 country, invest in the mining business themselves,  
 10 directly or more specifically. They weren't getting  
 11 around anything there. They were getting around  
 12 a roadblock of the name that they had to put the money  
 13 in. They did that by opening up an empty shell, so to  
 14 speak, additional company, and putting their money in  
 15 through that.  
 16 But the entire time, Mr Marshall was always the  
 17 representative, Mr Marshall was always the controlling  
 18 investor, Mr Marshall was always the managing director  
 19 of BVG, Spalena; and then, when they acquired ownership  
 20 of NRD, took over as the director of NRD and was always  
 21 dealing directly with the representatives of Rwanda.  
 22 So it was certainly nothing to get around people in  
 23 Rwanda, decision-makers in Rwanda, the Mining Minister  
 24 specifically in Rwanda, knowing that Mr Marshall and his  
 25 investors were continuing and reinvesting in a new set

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12:43 1 of concessions.  
 2 I hope that answers the question. Because what they  
 3 do know and what they don't know in terms of the  
 4 decision is frustrating even to this day on our side.  
 5 We simply do not know why Rwanda wanted to leave it in  
 6 that state. But they did, and the parties went forward.  
 7 (Slide 10) So the way that this is handled is BVG  
 8 had put some money into Bisesero, and that money was  
 9 used to buy equipment; that money was used to pay miners  
 10 and pay other operational costs. It was now switched so  
 11 that what could be moved and reinvested as hard assets,  
 12 it committed to transferring to NRD, again through  
 13 transferring it to Spalena and then, through the  
 14 acquisition of the owner, the parent company of NRD,  
 15 putting it into NRD directly and then going and working  
 16 to build it out with miners and operate.  
 17 BVG put in hard equipment and put in \$100,000 loaned  
 18 to NRD for use to operate its mining concessions, the  
 19 same way he understood that the operational costs,  
 20 maintenance of equipment, use of equipment, employees,  
 21 et cetera, all required investment to continue to  
 22 develop, as profitability was a ways off. So the  
 23 investment was not to get an asset that was throwing  
 24 money out; the investment was to get an asset that was  
 25 requiring additional money just to keep moving towards

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12:45 1 the day when profitability would be available. So BVG  
 2 made \$100,000 of immediate cash available for that  
 3 purpose and transferred assets.  
 4 This cooperation agreement (C-122) was heavily  
 5 attacked, we think completely inappropriately, and we  
 6 intend that this will be now the subject of discussion  
 7 with Mr Ehlers as to why he denied that this was a real  
 8 document. But the fact of the matter is, not only is  
 9 the document real, but this happened. BVG put this  
 10 money in. Starck was out.  
 11 There is no dispute between the parties, despite all  
 12 the shadow that is cast over the lack of records that  
 13 exist from the headquarters or the operating offices of  
 14 NRD, when all is said and done, to take back the years  
 15 of records of payroll and other expenses, the  
 16 day-to-day, week-to-week expenses -- we don't have them,  
 17 and such shadow is cast over that as to how it couldn't  
 18 possibly have been.  
 19 But nobody has ever come forward from Rwanda and  
 20 disputed there were miners there. There were miners  
 21 there working, they were being paid; there was security  
 22 there the whole time; there was equipment the miners  
 23 were using, it had to be maintained. The money was not  
 24 coming from Starck. The money was not coming from  
 25 profits earned by NRD. The money was coming -- which

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12:46 1 started with \$100,000 invested into NRD in cash from the  
 2 beginning, and it kept coming, and it included things  
 3 like payment of tax responsibilities, et cetera. The  
 4 money grew in size, all of which we understand -- and  
 5 we're not going to cross the line in terms of the  
 6 bifurcation; we are not to get into how much money was  
 7 lost and how much damages exist as a result.  
 8 But the idea that money was put in is attacked by  
 9 saying the document is false, so therefore nothing was  
 10 put in. But then nobody explains how years of  
 11 operations, maintenance, security, et cetera, were paid  
 12 for, if it wasn't BVG putting money, through Spalena,  
 13 into NRD. This was the beginning.  
 14 (Slide 11) In November 2010 NRD applied for the  
 15 long-term licences, as its initial licences were coming  
 16 to a close. The long-term licences at this time -- and  
 17 I'll repeat it in a moment -- were 30-year licences,  
 18 that's what it was looking for. And I'll explain that  
 19 in a moment.  
 20 (Slide 12) Rwanda now has a theory that: well, NRD  
 21 actually, what you bought into -- what they were  
 22 actually seeking was only a five-year licence. And they  
 23 point to language in this long document and long  
 24 submission that NRD made. Admittedly, this was before  
 25 the full ownership of NRD was acquired from Starck, but

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12:48 1 BVG was already investing in NRD because that was the  
 2 transaction it was contemplating working on, heading  
 3 toward, and it needed to keep NRD moving, keep it  
 4 operational. So it had already made its investment  
 5 direct and made the acquisition shortly; and in between,  
 6 before the initial licences expired, NRD submitted this  
 7 application.  
 8 Like the initial licences discussed, it needed to  
 9 have certain information about each investment, its  
 10 feasibility study, a projection of how that investment  
 11 was going to be used to build out the mining operations  
 12 of the concessions, in a way, because environmental  
 13 analyses were also required, and alleviation was also  
 14 a focus of what was required to be submitted as well.  
 15 How it was going to be built out, not only in a way to  
 16 get the investor to profits, but in a way that would not  
 17 harm Rwanda's long-term environmental and other  
 18 interests, all this needed to be explained at the time  
 19 of the application.  
 20 And because the feasibility aspects, all of which --  
 21 all of those aspects of the required submission are  
 22 intertwined in this document and -- I'm sorry, I don't  
 23 see the ...  
 24 This is Claimants' Exhibit 35. I apologise for not  
 25 noticing before that it's not on the face of this

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12:50 1 document. But C-035, a very lengthy document.  
 2 When the Tribunal focuses on it, you'll see that the  
 3 required elements of the application for long-term  
 4 licences -- it required a feasibility study, analysis of  
 5 the investment that was intended to be made over the  
 6 life of the investment, over the 30 years, what money  
 7 was going to be coming in, who is going to back it up  
 8 financially, what environmental studies and analyses  
 9 were presented to show how this was going to be done  
 10 safely -- all of this is intertwined and repeated, in  
 11 terms of breaking out and intertwining, concession by  
 12 concession. In other words, there's not one --  
 13 THE PRESIDENT: Mr Cowley, could we look at the top of  
 14 page 13 of this document?  
 15 MR COWLEY: Could you bring up C-035 from the bundle.  
 16 It's not in the PowerPoint, so we have to toggle  
 17 over to the bundle to do that.  
 18 THE PRESIDENT: Well, I'll read it slowly:  
 19 "It is herewith applied to retain the concessions of  
 20 Rutsiro, Giciye and Sebeya as Exploration Licences,  
 21 albeit with a reduced areal extent ..."  
 22 Can you show us which part of this document applies  
 23 to 30-year concessions?  
 24 MR COWLEY: Yes, and I started with the cover because I know  
 25 that Rwanda pointed to that: the "Application for the

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12:51 1 Renewal of Exploration Licences ... and Application for  
 2 the Allocation of Mining Licences". It's both, it's two  
 3 things; they're applying for both.  
 4 And the reason for that language, the reason for  
 5 that focus, as we understand it -- now, obviously  
 6 Mr Marshall did not himself submit this document, but he  
 7 is aware not only of this document but he is aware of  
 8 the submissions relating to others -- is everyone did  
 9 a five-year projection and feasibility study. No one  
 10 could, in the mining industry -- no one they worked with  
 11 as consultants, no one they worked with as geologists,  
 12 other experts -- no one was prepared to do a 30-year  
 13 analysis and study of feasibility long term in that  
 14 period of time.  
 15 So it was referred to, in terms of the exploration,  
 16 as: that was the feasibility aspect of the submission  
 17 that was required by the initial exploration licences,  
 18 and that was only for five years. I believe in the  
 19 comparators that we're aware of, one was for six years;  
 20 everyone else that we're aware of is five years only.  
 21 And according to our submissions, our understanding, all  
 22 the experts, all the people that were working on this in  
 23 the mining industry would only speak in terms of five or  
 24 six years and nothing else.  
 25 So you're right that that language is there, but

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12:53 1 that language is not the only application. It's not  
 2 only asking them to approve feasibility for only  
 3 five years, because that's all they were prepared to  
 4 submit and provide information about, but they're asking  
 5 for the allocation of mining licences. And thirty years  
 6 is not mentioned in the document by NRD because it would  
 7 have been irrelevant. It would have been unusual to  
 8 think in terms of having to name how long the licence  
 9 was at the time this was submitted.  
 10 It's only an issue now because we're looking at this  
 11 and arguing about this through the prism of Rwanda  
 12 deciding to change the law. And they changed the law  
 13 during the course of the process of the negotiations of  
 14 the contract that was being drafted as a result of this  
 15 application. They changed the law, and the 2014 law  
 16 talks about applications for shorter periods and longer  
 17 periods, and what would be required of each. But not  
 18 then.  
 19 If you go to the next slide (13), what in fact that  
 20 application for mining licences was governed by, what  
 21 anybody who would submit it would be referring to, [is]  
 22 the law that was in existence since 2008. This is  
 23 marked Claimants' Exhibit 20; again, it's a longer  
 24 document.  
 25 But if you go forward (slide 14), there's various

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12:54 1 articles about the mining application after the initial  
 2 exploration period and a mining licence for a large  
 3 concession. And not only were all of NRD's concessions  
 4 large; to Claimants' knowledge, these are the largest.  
 5 If not the five largest, they're within -- all of  
 6 them -- the top ten group of largest mining concessions  
 7 in the country.  
 8 So they're clearly applying in each instance for  
 9 large mining concessions. "... shall be for a period of  
 10 thirty (30) years", period. That's it. So no one  
 11 submitting an application for a mining licence for  
 12 a large concession in 2010 would deign to say, "We want  
 13 it for 30 years".  
 14 They did want approval and sign-off on a feasibility  
 15 study of only five years because that, they felt, would  
 16 be all that was -- and Mr Marshall will be addressing  
 17 this, and I'm sure he has addressed it somewhat in his  
 18 papers already -- that was all that anyone in the  
 19 industry was ever willing to take on. So they did want  
 20 to get Rwanda to agree to accept the feasibility study  
 21 and the projection out for only five years, as opposed  
 22 to thirty; but the licences it wanted were for  
 23 thirty years. That was the only licence to be given  
 24 under the law.  
 25 THE PRESIDENT: Yes.

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12:56 1 MR COWLEY: (Slide 15) Later that year the discussions with  
 2 Starck culminated. And because of Mr Marshall's  
 3 difficulties getting an explanation for how to address  
 4 BVG going forward with Rwanda's ministry regarding the  
 5 corporations registration, they founded Spalena and  
 6 acquired the ownership interest of NRD and inherited its  
 7 investment, including its application for a long-term  
 8 licence.  
 9 (Slide 16) That document is the Claimants'  
 10 Exhibit 68.  
 11 One moment, sorry.  
 12 MS DOHMANN: Mr Cowley, there is reference, as we see in  
 13 Chapter IV of the Mining Law of 2008 -- it's Law 37 --  
 14 Article 57 refers to a "vast mining concession", and you  
 15 have helpfully included that in your presentation  
 16 (slide 14). Can you explain to us what the "vast mining  
 17 concession" is about, and whether there was  
 18 an application that Mr Marshall relies on in relation to  
 19 a vast mining concession?  
 20 MR COWLEY: Well, a very good question, and I do not mean to  
 21 be unprepared to answer it, but I don't think I've  
 22 actually posed and gotten an answer directly the way  
 23 you've posed it.  
 24 I can say from my understanding and work with the  
 25 Claimants in this case throughout, my expectation and

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12:58 1 understanding of the answer to a question like that from  
 2 Mr Marshall, and the other Claimants' witnesses that  
 3 were involved in the mining industry and their own  
 4 specific mining concessions that they applied for  
 5 licences, refers to the large concessions as different  
 6 from small mines, where artisanal mining was the  
 7 long-term projected only economic use.  
 8 I haven't asked them to distinguish and identify in  
 9 writing whether what they refer to as "large"  
 10 concessions were all the ones designated as "vast".  
 11 I can't say, therefore, that there was a written  
 12 document between the owners of mining concessions and  
 13 the licences in Rwanda that specified by name the  
 14 so-called "vast concessions", as used in the law of  
 15 2008.  
 16 What I can say is the Claimants' witnesses who I've  
 17 spoken to that are involved in investment in mining  
 18 concessions talk about and acknowledge an understanding  
 19 within the industry that there was a divide between  
 20 large concessions and small concessions, and I have  
 21 always taken and understood what they reference as the  
 22 large concessions is the vast concessions as referenced  
 23 in the law. And someone investing in one of those  
 24 concessions was being asked to invest in developing,  
 25 industrialising, making significant long-term inroads to

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13:00 1 fully exploit a large quantity of valuable minerals, but  
 2 it would take a lot of investment over a long period of  
 3 time to extract them.  
 4 Someone had to come in with expertise and plan how  
 5 to do it; not only how to do it profitably, but how to  
 6 do it safely for Rwandans and the environment,  
 7 et cetera. They needed to be professionals, those with  
 8 real experience in the industry that would be paid to  
 9 come in and get it right. And that's why they asked for  
 10 these expert -- that's why they understood, at least,  
 11 they were being asked for these expert analyses,  
 12 feasibility studies, et cetera, to explain how someone  
 13 comes in and develops out a large-scale mine.  
 14 On the other side of the divide are mines that  
 15 no one was contemplating someone would find profitable  
 16 enough to do something like that, and that it was far  
 17 more opportunistic mining. Artisanal mining -- the  
 18 industry uses "artisanal mining" as, seemingly, a term  
 19 of art that everyone understands. But apparently, as  
 20 I've come to understand it, it could capture under that  
 21 umbrella individuals with a bucket, a pail and a shovel;  
 22 and it could include a more professionalised group of  
 23 workers tapping a vein and running with it.  
 24 But it wasn't such a rich vein, it wasn't so deeply  
 25 varied that significant equipment and other measures for

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13:02 1 safety and significant entry to the vein and extraction,  
 2 et cetera, was required; individuals could do it with  
 3 manual labour, working together, and some equipment.  
 4 And industrialisation imposed as -- not just the vast  
 5 equipment, but power tools, you know, air compressors,  
 6 jackhammers, that sort of thing, where it would require  
 7 some capital, some business investment and oversight and  
 8 management, and a number of employees.  
 9 And those different groups -- and I'm sure those are  
 10 just a couple of permutations in the whole range -- all  
 11 fit under the umbrella, as I've come to understand it,  
 12 of what's referred to in the mining industry as  
 13 "artisanal mining".  
 14 As I have had explained to me, the divide in the  
 15 2008 law between the vast and the non-vast, or the small  
 16 mines, was the concept that non-vast mines would be  
 17 long-term artisanal mining, and the idea was to  
 18 opportunistically -- again, safely and environmentally  
 19 soundly, but opportunistically -- someone to come in,  
 20 exploit it and leave, and there was much less concern  
 21 about long-term damage and other things, because that  
 22 was never going to be put in the ground.  
 23 The vast mines include all of these concessions for  
 24 NRD. All of these concessions are, if not the largest  
 25 in their category for the minerals that are identified,

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13:03 1 they're within the top couple for the categories for the  
 2 minerals that are primarily expected to be extracted  
 3 from there.  
 4 Frankly, that became a bit of a sticking point as  
 5 time went on. Significant pressure was put on to break  
 6 it up: okay, Starck got five, Starck got five of the  
 7 biggest; maybe they should be broken up. Maybe give up  
 8 something and you'll be allowed to proceed. And the  
 9 reason, we say, that lingered behind that was because of  
 10 the size, because of the long-term value of these  
 11 concessions.  
 12 So they were clearly all on the vast side by  
 13 definition; that's our understanding. And that will be  
 14 far better explained by witnesses such as -- well, first  
 15 of all Mr Marshall, but he has other witnesses in the  
 16 mining industry that could talk about the distinctions  
 17 between the mines, and the size, and what constituted  
 18 the vast, and how they differed long term in terms of  
 19 projections and what was expected of them. I hope that  
 20 answers the question.  
 21 (Slide 17) So from that period of time, now  
 22 Mr Marshall is NRD. He's in charge, he's the director  
 23 on the ground. His equipment is coming over, working  
 24 with the miners who are operating it, putting their  
 25 money in to NRD. And he takes over the negotiation,

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13:05 1 from the submission that has already been on file, the  
 2 application, he takes over those discussions about  
 3 moving it forward as they anticipated.  
 4 Again, his understanding of the process was not new.  
 5 Through acquiring through investment the NRD interest,  
 6 Mr Marshall knew about the process, had the whole  
 7 understanding of how it worked, who to work with,  
 8 et cetera, for years, because he was involved with  
 9 Bissero and he did understand from his own experience  
 10 exactly what he was doing.  
 11 He gave up Bissero, in the sense that he was  
 12 willing to allow it to be taken back without arguing  
 13 about it, there's no question. But he was never really  
 14 gone from the mining industry. He focused on investing  
 15 in NRD, Starck's interest in taking it over.  
 16 So Mr Marshall was involved in the mining industry  
 17 throughout. He understood it. Taking over -- he was  
 18 working people he already worked with, people he already  
 19 knew; he was working with a process he already knew. So  
 20 this was all very familiar to him, he understood it, and  
 21 he had ongoing discussions for quite a long time.  
 22 Those discussions moved beyond the application.  
 23 What was submitted, was it correct, did it have all the  
 24 information, was the necessary first step, because the  
 25 initial NRD exploration licences expired in 2010. Their

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13:07 1 application to go forward and get the long-term licences  
 2 needed to comply with what they were required to submit.  
 3 That had to be reviewed.  
 4 (Slide 18) It did progress beyond that in the  
 5 discussions, and there's a witness statement, and you'll  
 6 hear from the witness -- I apologise, I forgot  
 7 Mr Bidega's [first] name, and I apologise to Mr Bidega  
 8 in his absence. Dominique Bidega and Mr Marshall on  
 9 behalf of NRD undertook, as 2011 went on, to be  
 10 discussing cooperatively -- just like from the  
 11 beginning, there's cooperation on "Let us tell you what  
 12 we're looking for, let us tell you what we're expecting  
 13 in the contracts, let's look at others".  
 14 This was nothing new to Mr Marshall and Mr Bidega.  
 15 We saw from the early 2006 emails it was the way things  
 16 were done. Everybody on the mining industry side wanted  
 17 the investors to come in and succeed. All the investors  
 18 came in and wanted to succeed. They worked together to  
 19 help build this out. It was a new, young industry, in  
 20 terms of privatisation, on both sides.  
 21 The cooperative working together was not nefarious.  
 22 The cooperative working together was not clandestine and  
 23 hidden. I say that, I feel I have to point that out,  
 24 because that's exactly how it's treated in Rwanda's  
 25 papers.

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13:08 1 Mr Bidega worked closely with Mr Marshall or NRD's  
 2 proposed contract because that's what was expected of  
 3 them. They wanted the contract to be acceptable to the  
 4 ministry, and ultimately the cabinet, with the  
 5 ministry's support. They didn't want it to fail.  
 6 So Rwanda now points out that somehow something  
 7 nefarious must be going on because Yahoo accounts of  
 8 Mr Bidega were used in these negotiations. That was  
 9 just true of the time. Having a rwanda.gov email  
 10 account was relatively new, and how it rolled out for  
 11 what employees at what time, we can't say. But they had  
 12 conducted business with their own personal accounts,  
 13 government business, for years.  
 14 And the lingering use of both, when they existed, is  
 15 true not just for -- and as the course of the hearings  
 16 go on, we will point out where others, including  
 17 Rwanda's witnesses, continued to use personal accounts  
 18 with absolutely no question or concern that that was  
 19 somehow inappropriate, at the same time as they had  
 20 government accounts, because it was such a long-standing  
 21 necessity to use those individual accounts for so many  
 22 years in the country. It continued.  
 23 Mr Bidega at this time will explain why he signed  
 24 this email (C-207) as director. His official title as  
 25 assistant is something that was also a mix, because, you

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| <p>13:10 1 know, Dr Michael, the official director, was both on<br/>2 leave for studies abroad and on sick leave at different<br/>3 periods, and therefore Mr Bidega had to assume the<br/>4 responsibilities of director in his absence.<br/>5 So Mr Bidega, officially the assistant director --<br/>6 one of, perhaps -- but for the Rwanda Geology and Mines<br/>7 Authority was working with Mr Marshall. And Mr Marshall<br/>8 understood, as I understand from Mr Bidega -- true of<br/>9 other applicants -- he was working with them on<br/>10 contracts.<br/>11 We're at a stage in 2011 where the administrative<br/>12 agency that's responsible for working with the minister<br/>13 of the mining industry that's ultimately to approve the<br/>14 licences, he's working on behalf of the government, is<br/>15 working on a contract for the long-term licences. That<br/>16 means the application was not rejected, it was not<br/>17 looked at as insufficient, it wasn't looked at as a step<br/>18 that hadn't been met yet. You don't get to talk about<br/>19 a contract until you're talking about finalising what<br/>20 was expected to be approval.<br/>21 Now, we argue the expectations, and that's obviously<br/>22 an issue that the Tribunal's going to decide. But what<br/>23 I'm suggesting here is the expectation that that's the<br/>24 goal, the expectation that having in a provable<br/>25 contract, one that will first and foremost be put</p> <p style="text-align: center;">Page 41</p>   | <p>13:14 1 test, and apparently one that he wasn't supposed to<br/>2 endure and come out the other side of. Giving up seems<br/>3 to be the -- having NRD, Mr Marshall and his investors<br/>4 give up seems to have become the intent somewhere in<br/>5 this period.<br/>6 But at the time he did not know that. At the time<br/>7 when we say his expectations were that the contract was<br/>8 about to be approved, it's because of the discussions<br/>9 that led to it and preceded it, and the purpose always<br/>10 was: he should be successful. The Rwandan offices that<br/>11 he was dealing with, the minister ultimately wanted<br/>12 investors to be successful; Mr Marshall had no reason to<br/>13 think otherwise. So the investments by BVG continued.<br/>14 (Slide 20) March 2012, BVG invests more money in<br/>15 acquiring -- over time, it wasn't all at one fell swoop;<br/>16 I'm just suggesting this is the date of the<br/>17 documentation as to the transfer of ownership -- but<br/>18 equipment, heavy, small, et cetera, acquired by BVG,<br/>19 starting with its original investment in Bisesero.<br/>20 Going on and considering building out, developing,<br/>21 meeting the feasibility analysis and expectations that<br/>22 were submitted for the NRD concessions, all required<br/>23 investment in physical equipment.<br/>24 (Slides 21 to 25) Purchases were being made around<br/>25 the world. Significant amounts of equipment were</p> <p style="text-align: center;">Page 43</p> |
| <p>13:12 1 forward and supported by the GMA -- or, excuse me, the<br/>2 office is referred to repeatedly in documents as "OGMR",<br/>3 Mr Bidega's office -- was only a step if the application<br/>4 was something that was excepted to be acted on.<br/>5 So when I say that there were expectations of<br/>6 progressing towards a long-term licence, it's supported,<br/>7 it's coming back to Mr Marshall that this is progressing<br/>8 as normal, as always expected. The licences are to be<br/>9 issued; the question is what are the terms, what will be<br/>10 acceptable to the minister, et cetera. And those<br/>11 discussions were well under way in 2011.<br/>12 (Slide 19) In 2012 things hit a bump and they go<br/>13 sideways, and the report back out as to "Is the contract<br/>14 approved?" lingers. And Mr Marshall has spent a lot of<br/>15 time and others of Claimants' witnesses have spent a lot<br/>16 of time in their witness statements -- and I'm sure<br/>17 you'll hear a lot of testimony and questions presented<br/>18 to them about that during these hearings -- there's<br/>19 a lot that went into; things started to go wrong.<br/>20 In hindsight, in retrospect, what you can see -- it<br/>21 seems apparent on its face -- is a string of things<br/>22 going wrong in terms of Mr Marshall's expectation that<br/>23 the contract negotiations would be completed,<br/>24 face-to-face negotiations, terms documented, finalised,<br/>25 never quite getting there. It was a long endurance</p> <p style="text-align: center;">Page 42</p> | <p>13:16 1 purchased by BVG's investors. These were all<br/>2 transferred to Spalena. So that BVG, the investors,<br/>3 treated the BVG interest as now part and parcel of<br/>4 ownership of Spalena, which owns the parent company, all<br/>5 of which is funnelling the money from the outside<br/>6 investors to NRD in the country to operate/run the<br/>7 mines, and all the equipment that is being acquired and<br/>8 purchased with that long-term development of the mining<br/>9 concessions is transferred for that very purpose, for<br/>10 NRD's benefit and long-term use.<br/>11 Because again, at this time Mr Marshall and his<br/>12 investors' expectation was things were going as they<br/>13 should be going. Keeping in mind that the investment<br/>14 that they had made to date, the investment that they're<br/>15 making in acquiring this large inventory of equipment,<br/>16 this is not sufficient to meet the long-term goals in<br/>17 build-out of five mining concessions owned by NRD.<br/>18 The successful progress forward, including the award<br/>19 of the licences, is necessary to fund raise much more<br/>20 significant investment outside. Primarily, again,<br/>21 Mr Marshall was identified again as the person with the<br/>22 contacts in the US for investment. The idea was<br/>23 investors would come in on those contracts with<br/>24 a 30-year period of investment to realise the profits<br/>25 from their investment.</p> <p style="text-align: center;">Page 44</p> |

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| <p>13:18 1 So BVG wanted their ownership of Spalena to be<br/>2 clear, and this is how this transaction is documented,<br/>3 so that BVG is clearly a major shareholder in Spalena,<br/>4 and anybody putting money into BVG would be acquiring<br/>5 an interest in the company that owned the parent of NRD.<br/>6 So this internal transaction, and lining it up for<br/>7 future investment, again consistent with the idea that<br/>8 it all matters, that investment is going to be, you<br/>9 know, one of the next steps after getting those<br/>10 long-term licences for the concessions, was to raise<br/>11 more money and more investors. They are lining it up so<br/>12 that that investment vehicle makes sense, Bay View takes<br/>13 a major shareholding in Spalena and it's all uniform:<br/>14 a clean set of investment books for someone to come in<br/>15 from the outside and add more to.<br/>16 So this list we point to as some of the in-kind, the<br/>17 assets, hard investments that BVG made in NRD,<br/>18 through -- transferred to Spalena.<br/>19 (Slide 26) But as 2012 goes on, those discussions<br/>20 that Mr Marshall was expecting face-to-face with the<br/>21 minister or otherwise, who the minister sought to work<br/>22 with, finalising the contract just weren't scheduled,<br/>23 didn't happen, and operational questions, operational<br/>24 blocks for NRD started to pop up. The Rutsiro mining<br/>25 operations, the minister's office shut them down in</p> <p style="text-align: center;">Page 45</p> | <p>13:22 1 (Slide 29) So in C-014 you'll see a promotional<br/>2 manual put together by the Respondent, (slide 30) and<br/>3 you'll see NRD identified as one of the investors.<br/>4 Spalena is the owner, they acknowledged that.<br/>5 (Slide 31) They go on to quantify a \$39 million<br/>6 investment. So in promoting the idea, soliciting other<br/>7 interests in investment in the mining industry, they're<br/>8 identifying the investors in NRD as already putting in<br/>9 \$39.5 million for their concessions.<br/>10 Now we see and hear from Rwanda a very different<br/>11 perspective: that somehow there's all sorts of<br/>12 questions, and Mr Marshall can't document and back up<br/>13 his investment. There was no question at the time.<br/>14 They were so confident of it, they were telling other<br/>15 investors to rely on their information.<br/>16 (Slide 32) In August 2012 Mr Benzinge, one of the<br/>17 early investors with the predecessor to Starck in NRD,<br/>18 starts agitating that somehow he has a greater interest,<br/>19 but he far overstates his interest. And the dispute of<br/>20 that covers a number of topics that you're going to be<br/>21 presented with in the course of the witness testimony,<br/>22 because advising the co-investors at the time as to how<br/>23 to deal with Mr Benzinge's interest and get all that<br/>24 right and move forward so that their interest as a group<br/>25 could be sold to Starck as sole owner, Rwanda's witness</p> <p style="text-align: center;">Page 47</p> |
| <p>13:20 1 March.<br/>2 (Slide 27) C-047 documents Mr Marshall on behalf of<br/>3 NRD's complaint about the fact that this order of<br/>4 shutdown comes and he doesn't understand it. There's no<br/>5 explanation. Why is this happening? Discussions about<br/>6 this getting back on track start taking over. And as<br/>7 we'll see, and as you've already seen in the witness<br/>8 statements, they become what -- all the energy becomes<br/>9 burned up. What all the activity and energy is about is<br/>10 just getting back to the minister treating them as<br/>11 operational and moving forward, and that continues<br/>12 throughout 2012.<br/>13 (Slide 28) I point out that while this was going on,<br/>14 while there seems to have been a gradual -- there<br/>15 certainly was a pause in the discussions of the contract<br/>16 to be signed for the 30-year licences. There seems to<br/>17 be agitation about how the minister feels about<br/>18 Mr Marshall or his investors, NRD as a whole. Perhaps<br/>19 the concessions is the focus, but there seems to be some<br/>20 agitation inside about how to deal with them.<br/>21 Nevertheless, there was no question at that time,<br/>22 contemporaneous, that Rwanda understood there was<br/>23 significant investment in NRD for these five<br/>24 concessions, stand-out investment compared to the other<br/>25 mining concessions at the time.</p> <p style="text-align: center;">Page 46</p>   | <p>13:24 1 advised on that, his firm advised on that and helped<br/>2 approve. Now it's all called into question, not only by<br/>3 Rwanda but by the same individual.<br/>4 (Slide 33) But Mr Benzinge's calling it into<br/>5 question was promptly resolved by the office in Rwanda<br/>6 responsible for maintaining the records of corporate<br/>7 ownership, registering who the correct owners were. The<br/>8 agency with the final say resolved this concern. [It<br/>9 was a] very disruptive concern for a week, but it was<br/>10 resolved by August 8th. So between August 2nd and<br/>11 August 8th, Mr Benzinge was able to agitate and cause<br/>12 a great deal of stress and problems for Mr Marshall.<br/>13 Now, keeping in mind none of Mr Benzinge's<br/>14 complaints about how he was handled and what was done<br/>15 with his interest involved Mr Marshall. That's not his<br/>16 investment. He bought it from someone who bought what<br/>17 they understood to be all the shares in the company, and<br/>18 the former shareholders, Mr Benzinge included, and the<br/>19 Zarnacks, being paid by Starck, all of that was handled<br/>20 before Mr Marshall, through Spalena, made their<br/>21 acquisition from Starck.<br/>22 But a great deal of agitation and disruption to<br/>23 Mr Marshall's on-the-ground directorship and management<br/>24 of NRD through his investor group's ownership was quite<br/>25 a problem that Mr Benzinge forced him to deal with. And</p> <p style="text-align: center;">Page 48</p>                 |

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| <p>13:26 1 RDB did deal with it, got it straight, and Mr Benzinge<br/>2 was put back out. And the RDB, in analysing the<br/>3 situation, agreed as to who owned controlling shares of<br/>4 the company, who was the majority owner, who had the<br/>5 right to appoint the director.<br/>6 Mr Marshall was restored to that recognised spot,<br/>7 and at that time he thought it was over. It was very<br/>8 disruptive. He was concerned that anyone within the<br/>9 government would let someone like Mr Benzinge do this<br/>10 all these years later, and based on his allegations. He<br/>11 was complaining about it at the time. But it was<br/>12 resolved by those people charged with the responsibility<br/>13 to look into it; at least that's what Mr Marshall<br/>14 believed.<br/>15 (Slide 35) In September 2012, as the period for the<br/>16 discussion about the contract finalisation of its terms<br/>17 in signing the contracts for the long-term licences<br/>18 continued to drag out, to Mr Marshall's frustration at<br/>19 the time, nevertheless the Respondent identified that<br/>20 they were remaining licensee at the concessions while<br/>21 that application was being considered.<br/>22 (Slide 36) I point this out not because, again, it's<br/>23 the only communication about this; as Mr Marshall's<br/>24 statements have made clear, there were numerous<br/>25 conversations, in person and otherwise, about "Where are</p> <p style="text-align: center;">Page 49</p> | <p>13:30 1 it was the prior year that a draft contract was -- it<br/>2 was in 2011. We saw a December communication. But in<br/>3 2011 there were communications about, "Beyond the<br/>4 application, let's start drafting a contract. What are<br/>5 you looking for? What is acceptable?"<br/>6 In September 2012 Mr Marshall is again being told,<br/>7 his investor group is being told, "new contracts ...<br/>8 will be negotiated". You're only in the phase of<br/>9 negotiating a new contract with the original exploration<br/>10 licence holders if their application was timely<br/>11 submitted and considered appropriately, fully submitted<br/>12 at the end of the exploration licences for the long-term<br/>13 licences. That's all that exists under the law at the<br/>14 time, the law that Mr Marshall thought was applying to<br/>15 him and the other concession holders thought was<br/>16 applying to them.<br/>17 So when being told that, "We will negotiate<br/>18 contracts with you", there is no question on the table<br/>19 that, "We're considering your application and aren't<br/>20 sure that you timely submitted one, we're not sure you<br/>21 qualify". None of that happens at the time. That's not<br/>22 contemporaneously what they say. [There's] only later<br/>23 an explanation of, "Well, in fact you didn't and it<br/>24 wasn't good enough; you must do something different".<br/>25 But at the time, when Mr Marshall is saying, "That's not</p> <p style="text-align: center;">Page 51</p> |
| <p>13:28 1 we on getting to these meetings and discussions and<br/>2 finalisation?" But the reason for pointing out C-045 is<br/>3 the spin that's put on it in an extremely legalistic<br/>4 analysis of "What can we call something?"<br/>5 Rwanda's position now is they want to decide as if<br/>6 they're somehow gifted: they're permitted to remain, but<br/>7 with no rights to be there after expiration of the<br/>8 exploration licences, past the application period for<br/>9 the long-term licences. NRD, they say, was not really<br/>10 a licensee anymore. That's what reportedly they say to<br/>11 them and to the general concession holders in<br/>12 September 2012, a written acknowledgment that as these<br/>13 discussions were continuing with the concession holders,<br/>14 the existing concession holders -- I actually just<br/>15 quoted from the part that's not highlighted, in between<br/>16 the two highlightings:<br/>17 "... as has been communicated to all the existing<br/>18 concession holders ..."<br/>19 That's how they're talking about NRD, Mr Marshall<br/>20 and his investment group at the time: they're "existing<br/>21 concession holders". Because "new contracts that will<br/>22 be negotiated". They're being told, "We will be talking<br/>23 to you about the contracts".<br/>24 Again, I pause here. This is September 2012, months<br/>25 after the application was filed, months in -- you know,</p> <p style="text-align: center;">Page 50</p>       | <p>13:31 1 our expectation, that's not our understanding, that's<br/>2 not what we were being told", and he's being accused of<br/>3 lying when he's saying it, he points to Respondent's own<br/>4 language, Respondent's own letters, and he says, "No,<br/>5 what I'm saying I expected is what you're telling me to<br/>6 expect: you will negotiate the contract with us. It's<br/>7 just taking longer".<br/>8 (Slide 37) But the disruptions to the actual<br/>9 operations continue.<br/>10 (Slide 38) In September, an example of a letter<br/>11 complaining about, summarising some of those disruptions<br/>12 that are going on with government officials' backing,<br/>13 support, is C-049. Arrests and disruptions of the<br/>14 miners and activities at the concession make it appear<br/>15 that somehow there's a question whether the ownership,<br/>16 the management, can maintain the security. But<br/>17 Mr Marshall complains they're being singled out for such<br/>18 bad treatment, they're being put upon, and the miners<br/>19 are calling into question what is happening when no<br/>20 question should exist.<br/>21 (Slides 40 and 41) Then in September again, just to<br/>22 stop operations.<br/>23 (Slide 42) October, operations were allowed to<br/>24 continue. After the stop in the western regions for<br/>25 everyone, October becomes, "Well, operations may</p> <p style="text-align: center;">Page 52</p>  |

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| <p>13:33 1 continue, but not NRD".<br/>                 2 (Slide 43) C-050, a December 14th 2012 letter from<br/>                 3 Mr Marshall, points that out, complains about this.<br/>                 4 Again, why are they being singled out? Why are the<br/>                 5 other concession holders being treated as if this<br/>                 6 problem, this concern that's supposed to shut everybody<br/>                 7 down, their operations can continue, they can continue<br/>                 8 building out, they can continue trying to make the<br/>                 9 revenue flow for their miners, et cetera, during this<br/>                 10 time period; we can't? You know, why are we being<br/>                 11 singled out? This becomes the constant theme of the<br/>                 12 concerns that are going back and forth. Mr Marshall is<br/>                 13 saying, "But you're treating NRD differently".<br/>                 14 (Slide 44) It wasn't until February 2013 that<br/>                 15 finally NRD can resume the mining activities.<br/>                 16 (Slide 45) "... as we proceed with negotiations on<br/>                 17 your request for new contracts ..." (C-056)<br/>                 18 So the disruptions, the problems, the<br/>                 19 head-scratching lack of answers to what's happening, the<br/>                 20 ominous signals that he's not liked, or his company is<br/>                 21 not liked, his other investors aren't liked, the fact<br/>                 22 that he has these five big concessions isn't liked;<br/>                 23 something is off somewhere, it seems, to cause these<br/>                 24 constant problems. But again, repeated, despite the<br/>                 25 problems, you're seeing one thing, you're experiencing</p> <p style="text-align: center;">Page 53</p> | <p>13:37 1 table, it's going to happen, it's going to be discussed:<br/>                 2 "Let's sit down and talk about the mining licences".<br/>                 3 (Slide 49) But look, it's April to October, it's<br/>                 4 still being left as "Let's schedule a time, let's have<br/>                 5 the conversations". The ability to get the contracts,<br/>                 6 supposedly just some negotiations and discussions away,<br/>                 7 but that dangled negotiation didn't happen.<br/>                 8 Meanwhile, the entire time, the investment<br/>                 9 continues. There's no abandonment of the concessions.<br/>                 10 There's no stop of work, to the extent it could be done,<br/>                 11 there's no stop of security, there's no lack of<br/>                 12 maintenance. The concessions are being invested in just<br/>                 13 to be maintained.<br/>                 14 It is not the case that the investment, like a light<br/>                 15 switch, goes on and off as you generate minerals from<br/>                 16 a mine. To have roads to bring in the equipment to<br/>                 17 bring out the minerals, to do things long term that meet<br/>                 18 the feasibility study, work has to be done, preparations<br/>                 19 have to be made, money has to be put in the ground. And<br/>                 20 what is there and what is being done, and what people<br/>                 21 are making the smaller revenues from artisanal mining<br/>                 22 that's occurring has to be, again, maintained.<br/>                 23 Employees have to be there, they have to be housed.<br/>                 24 Money is going in. Not the kind of money that will<br/>                 25 flow to build out the full-scale mines after the</p> <p style="text-align: center;">Page 55</p>                                       |
| <p>13:35 1 one thing, "But hey, we're going to negotiate that<br/>                 2 contract".<br/>                 3 Again, we recite back. There's no question what<br/>                 4 that means to anybody who's familiar with the 2008 law;<br/>                 5 they've been operating under it. Contract for your<br/>                 6 side's concessions: 30 years. That's what we're going<br/>                 7 to negotiate with you. (Pause)<br/>                 8 (Slide 46) In April Mr Marshall, on behalf of NRD,<br/>                 9 is invited to continue to negotiate for those licences.<br/>                 10 (Slide 47) He thanks them for that opportunity,<br/>                 11 again confirming what he said his expectations were.<br/>                 12 This is the communication that's going on on one level,<br/>                 13 this is the discussion. He's expecting the negotiation<br/>                 14 of a contract means terms will be set down and the<br/>                 15 licence will issue, and he's being told to expect it<br/>                 16 repeatedly, being invited to participate, and it doesn't<br/>                 17 happen anyway. Not -- as you've heard from Mr Marshall<br/>                 18 in his witness statements, and you'll hear if there's<br/>                 19 any questions to him asked about it -- not because of<br/>                 20 lack of effort by Mr Marshall, Ms Zuzana -- I apologise<br/>                 21 for not being very good at saying her last name,<br/>                 22 especially with a dry mouth. You've seen their reports:<br/>                 23 efforts were continuous and they were tireless to make<br/>                 24 it happen, but they're not happening.<br/>                 25 (Slide 48) By October 2013, still it's out on the</p> <p style="text-align: center;">Page 54</p>   | <p>13:39 1 concessions, but that's doesn't mean nothing. And<br/>                 2 that's how it's being treated here: as if somehow<br/>                 3 there's some mystery that Mr Marshall must prove,<br/>                 4 because records, you know, accounts, payroll, the rental<br/>                 5 payments, the purchases for the equipment coming in and<br/>                 6 building roads, because we can't put them on the table,<br/>                 7 can't be. The roads were there, the people were there,<br/>                 8 the housing was there. The plant that was, you know,<br/>                 9 the best industrialisation example in the country at the<br/>                 10 time, the plant had to be maintained. Whether it was<br/>                 11 processing tonnes of minerals a day or not, it had to be<br/>                 12 maintained; it couldn't just sit.<br/>                 13 So whilst this is not happening in terms of the<br/>                 14 30-year licence and more money is not pouring in to<br/>                 15 ratchet up everything, money is still going in.<br/>                 16 (Slide 50) Then things change. Now suddenly it's<br/>                 17 the prism of: well, start over. And that's because the<br/>                 18 2014 law passed. And in hindsight, the long-awaited,<br/>                 19 long-dangled but somehow couldn't get held conversations<br/>                 20 and discussions on the terms of those contracts that are<br/>                 21 going to issue to you seems to be a stall tactic. It<br/>                 22 seems to have been a wait-and-see, "This is what we want<br/>                 23 before we have another meaningful conversation with<br/>                 24 you". Because there was no explanation ever given why<br/>                 25 a meeting couldn't be held about the contract. It was</p> <p style="text-align: center;">Page 56</p> |

13:40 1 well underway in 2011. We're now in 2014, and suddenly  
 2 the world is supposed to change for NRD, because of the  
 3 enactment of the 2014 law.  
 4 (Slide 51) The position takes a 180 about-face.  
 5 We're negotiating new mining negotiations, but under the  
 6 new regulations. And as Mr Marshall has testified, and  
 7 as other witnesses have testified, there is an aspect of  
 8 the claim that is: well, again, NRD is singled out on  
 9 this. Again, NRD is being treated differently than  
 10 others on this point that were in the same situation:  
 11 original exploration licences, applications for  
 12 long-term licences. And other examples, not even as  
 13 good a state of current investment and development as  
 14 NRD, they're not reapplying and starting anew. That's  
 15 one aspect of it.  
 16 But the purpose of the selection of these items of  
 17 communication, to be very blunt about it, is to say: you  
 18 don't even have to look outside of NRD itself to see  
 19 a complete and utter change in position, that it does  
 20 not fit. This is not preceded by any reasonable  
 21 expectation that an investor prior to this date would  
 22 have as to what Rwanda's intention was with regard to  
 23 long-term licences for the five concessions, without  
 24 even asking: well, what are you doing with the other  
 25 concession holders?

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13:42 1 (Slide 52) July 14th, Mr Benzinge comes back and  
 2 says that he obtained an arbitration award,  
 3 an arbitration that NRD didn't attend, in which he  
 4 disputes a transaction that Mr Marshall and his  
 5 investors weren't involved in, and he says that the  
 6 result of that arbitration and what he says the  
 7 arbitrator said his real shareholding should be, that he  
 8 was deprived of, should allow him to take over NRD as it  
 9 currently existed.  
 10 Now, there's an awful lot to be said -- and there  
 11 has been some discussion by Mr Marshall at least, and  
 12 Zuzana as well, I believe -- about how challenging this  
 13 presentation was of Mr Benzinge in terms of going  
 14 forward with an arbitration where they had identified  
 15 a conflict of interest with the arbitrator and  
 16 Mr Benzinge and were expecting that conflict to be  
 17 addressed, and meanwhile the next thing they hear is  
 18 an award issued.  
 19 But more importantly, the logic of an idea that  
 20 someone who went from less than 1% interest holding to  
 21 a full 15% interest holding because of a shareholding  
 22 agreement with two owners removed, those owners who  
 23 treated him as a less than 1% interest holder in going  
 24 forward with a transaction, and were paid and left with  
 25 the money, Mr Benzinge said his award established they

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13:44 1 didn't treat him correctly. But to come to interest  
 2 holders later and say, "I want your company", as opposed  
 3 to going over the Zarnacks, who got the money and,  
 4 according to your maths, got your share very wrong,  
 5 "They're fine, I'll leave them alone; I want the  
 6 company". For a 15% interest holding, he wants the  
 7 whole company. And the Respondent gave it to him.  
 8 (Slide 53) Showed up with the bailiffs, took  
 9 possession, waving around an arbitration provision  
 10 calling him the 15% holder, 15% interest holding not  
 11 recognised. And Mr Marshall was put out, Zuzana was put  
 12 out. Now suddenly they're told, "You're not really the  
 13 owners/managers/directors; we'll deal with Mr Benzinge".  
 14 That's first by the bailiff, and then the minister  
 15 says, "Well, this is a big concern to us", which is, at  
 16 a whole other level, extremely frustrating to the  
 17 investors in NRD. Why is the Minister of Mines, the  
 18 mining industry, getting involved in what a shareholder  
 19 agreement on a transaction long ago occurred, [that] may  
 20 have been honoured or not honoured, and what it may mean  
 21 in terms of what Mr Benzinge is owed, why is the  
 22 Minister of Mines getting involved in that, if that  
 23 interest holder wants more money for a 15% share and was  
 24 treated as less than 1% owner?  
 25 NRD still exists. NRD has been handling the

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13:46 1 concessions. NRD has been investing, the entity in its  
 2 original licences, application for new licences,  
 3 contract proposal for the terms of those new licences,  
 4 all on the table. And to say, "Well, we can't deal with  
 5 you any more because Mr Benzinge says he owns 15%, so  
 6 nobody is getting anything, nothing's happening. And  
 7 you know what? You can't even sell your minerals".  
 8 There are miners. There's money being put in to  
 9 both secure, protect the concessions and the miners.  
 10 There's work being done, people are housed, things --  
 11 weekly, monthly, et cetera, money is going in to make  
 12 this happen, all relying on the revenues that can be --  
 13 expecting some revenues to be generated while this  
 14 continues from that mining. And now suddenly it's all:  
 15 can't move, can't do anything with it. You can mine;  
 16 you can't generate a sale. We're just going to prevent  
 17 you from tagging.  
 18 And the background of this so-called "tagging"  
 19 requirement, all put in place to deal with the US import  
 20 regulations and statutes that prohibited importing  
 21 minerals or products made from minerals from so-called  
 22 "conflict countries", requiring assurances, requiring  
 23 averments about the lack of any such minerals coming  
 24 into the country from those importing. All this is  
 25 a huge concern. How are you going to deal with it when,

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| <p>13:48 1 for the long history -- as you've heard from some of the<br/>                 2 Claimants' witnesses -- minerals were coming from Congo,<br/>                 3 a conflict country, conflict minerals had been in<br/>                 4 Rwanda? How are we going to assure that they are not<br/>                 5 what is being exported from Rwanda?<br/>                 6 (Slide 55) There's the tagging process. There's<br/>                 7 going to be an independent body in place as to<br/>                 8 assurances. And the tags are everything, because if<br/>                 9 it's not tagged, well then it's not assured that it's<br/>                 10 not a conflict mineral, you can't import it into the US.<br/>                 11 So you can't really sell it in the open market if the US<br/>                 12 imports are excluded.<br/>                 13 (Slide 56) This is the lifeblood of the ongoing<br/>                 14 industry in artisanal, as it may be at the time, smaller<br/>                 15 scale, as it may be at the time. The ongoing mining and<br/>                 16 selling of minerals in Rwanda from its mines requires<br/>                 17 the application of these tags. Rwanda is in control of<br/>                 18 it, working with iTSCI. And the Minister of Mines says<br/>                 19 no more, no more to NRD.<br/>                 20 If Mr Benzinge is a 1% interest holder or a 15%<br/>                 21 interest holder, those minerals came from where they<br/>                 22 came from. Those miners who put in the labour put it in<br/>                 23 and need to be compensated. NRD needs its share of the<br/>                 24 revenues to keep paying for the things that allow that<br/>                 25 to happen and not have it fall apart. There's no</p> <p style="text-align: center;">Page 61</p> | <p>13:52 1 Mr Imena's office. Got to reapply, got start over.<br/>                 2 Somehow now, after the law of 2014 was passed, despite<br/>                 3 what was treated and the reasons that have come forward<br/>                 4 and nobody has got an explanation for -- "Okay, others<br/>                 5 don't have to do it for all these reasons" -- we've got<br/>                 6 to start over, as if the application was not timely and<br/>                 7 fully filed. They're treating the 2010 application for<br/>                 8 30-year licences as non-existent. Got to start over.<br/>                 9 But as we've seen consistently prior to the law of<br/>                 10 2014 passing, when apparently they knew what they were<br/>                 11 looking for in the law and they were working to have it<br/>                 12 accomplished, but it didn't exist, they were referring<br/>                 13 to the contract negotiation stage. We're past the<br/>                 14 application stage. And then it all becomes focused on,<br/>                 15 "Well, your new application has got to be submitted".<br/>                 16 There was a push for that again in August 2014.<br/>                 17 (Slide 61) In October 2014, C-119, "Sorry to inform<br/>                 18 you, the ministry has decided not to grant you mining<br/>                 19 licences based on your new application".<br/>                 20 So according to Rwanda's current position, of<br/>                 21 course, when something like that is said, that's<br/>                 22 definitely final, right? If they tell you "no", no<br/>                 23 means no and you're done. That's not how it works.<br/>                 24 That's not how it worked in Rwanda. They say<br/>                 25 Mr Marshall is completely unreasonable to suggest he</p> <p style="text-align: center;">Page 63</p> |
| <p>13:50 1 question what stopping the tagging means. And the stark<br/>                 2 disconnect between tagging minerals as validly mined on<br/>                 3 site in Rwanda and Mr Benzinge saying, "I want what<br/>                 4 Mr Marshall has, because other people years ago did<br/>                 5 something that I don't like and that I think is wrong",<br/>                 6 is astounding.<br/>                 7 Nevertheless, in justifying this, Mr Evode Imena,<br/>                 8 the minister at the time who made this decision -- it<br/>                 9 was a personal decision -- he specifically, looking at<br/>                 10 NRD, chose not to let them participate in a supposedly<br/>                 11 neutral, as to be applied to everyone equally, law. And<br/>                 12 he felt perfectly comfortable. So comfortable he's come<br/>                 13 to you and said, "Yes, I did that, that's what I did,<br/>                 14 the decision to specifically say no to NRD, because<br/>                 15 I want to put pressure on them to regularise their<br/>                 16 operations".<br/>                 17 Operations, regularising operations -- operations<br/>                 18 are being managed by Mr Marshall and his investment<br/>                 19 group. So Mr Imena, looking at Mr Marshall and the<br/>                 20 investors, said, "I want to send them a message about<br/>                 21 what I want to see happening, so I'm going to stop<br/>                 22 giving them the benefit of the law". That, we say, we<br/>                 23 start this proceeding with a concession of a violation<br/>                 24 of a treaty.<br/>                 25 (Slide 57) The pressure then continues from</p> <p style="text-align: center;">Page 62</p>  | <p>13:54 1 ever had an expectation that a yes could result after<br/>                 2 a no, and yet after a "No, sorry, you're done", next<br/>                 3 communication, at least the next communication I'm going<br/>                 4 to highlight -- as I pointed out, I do not represent<br/>                 5 that there are no communications in between; as a matter<br/>                 6 of fact, I was going to refer to one.<br/>                 7 (Slide 63) C-087 shows that -- I'm sorry, the date<br/>                 8 is blocked -- oh, I'm sorry, it's at the top:<br/>                 9 November 12th 2014. Because you pushed back to the no,<br/>                 10 we say, "Submit new things": we are back and considering<br/>                 11 a new application note. So no becomes yes -- well, no,<br/>                 12 excuse me, I completely misstated that. I did not<br/>                 13 intend to say it that way. No becomes "Maybe, let's<br/>                 14 keep talking, keep trying". That's what he's in as<br/>                 15 of November. That's what the investors are in as<br/>                 16 of November.<br/>                 17 Try again but start over. They of course say: we<br/>                 18 did successfully start the application process, we're in<br/>                 19 the contract negotiation phase, but they're trying to<br/>                 20 comply. They're trying to appease Minister Imena.<br/>                 21 Next slide. Oh, I'm sorry, this goes onto a little<br/>                 22 bit of a different topic. So we have -- it's been<br/>                 23 pointed out to me that we have five minutes to a break.<br/>                 24 Before I jumble back and forth, I ask the Tribunal:<br/>                 25 would you like us to break now? I will try to summarise</p> <p style="text-align: center;">Page 64</p>                                      |

13:55 1 this thing quickly and finish --  
 2 THE PRESIDENT: Yes, I think we'll break now, but we will  
 3 come back in 20 minutes.  
 4 MR COWLEY: Thank you, your Honour.  
 5 THE PRESIDENT: Break now and come back in 20 minutes.  
 6 (1.56 pm)  
 7 (A short break)  
 8 (2.22 pm)  
 9 MR COWLEY: Your Honour, may we start again? I'll wait for  
 10 your word. (Pause)  
 11 THE PRESIDENT: Can everybody hear me now?  
 12 MR COWLEY: Yes, sir.  
 13 MR WATKINS: Yes, we can.  
 14 THE PRESIDENT: Good.  
 15 I was apologising for the length of the break, which  
 16 was caused by the fact that the Tribunal had been thrown  
 17 into confusion by the hearing agenda, which is  
 18 defective, in that it suggests that in London we are now  
 19 going to sit until 5.00 pm -- that is for two and  
 20 three quarter hours -- when it should be 4.00 pm. So we  
 21 are going to sit, as I understand it, for one and  
 22 three quarter hours now.  
 23 At the end of the day I want to discuss tomorrow's  
 24 timing because the current timetable is not  
 25 satisfactory. The Tribunal needs a break of half

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14:24 1 an hour at the end of the first session of one and  
 2 three quarter or two hours, so that we can eat  
 3 a sandwich. And when people are present from Kigali,  
 4 they'll also probably want to have a bite to eat at that  
 5 stage of the proceedings, rather than waiting until it's  
 6 almost time for dinner before we have our lunchtime  
 7 sandwich.  
 8 Anyway, we'll sort that out at the end of today.  
 9 Meanwhile, let's go ahead until 4 o'clock our time.  
 10 MR COWLEY: Yes, sir, and my apologies for the error in the  
 11 hearing schedule.  
 12 THE PRESIDENT: One other point, please. The Respondent has  
 13 vanished from the screen. The Tribunal would be  
 14 grateful if the parties always have somebody on screen,  
 15 as it were, throughout the hearing.  
 16 MR COWLEY: Thank you, sir. May I begin?  
 17 THE PRESIDENT: Yes.  
 18 MR COWLEY: So in our timeline -- and as I mentioned before,  
 19 as a reminder, I am not suggesting that this is the next  
 20 event. Mr Marshall, Ms Muskovicova -- I apologise for  
 21 mispronouncing her name again -- provided services to  
 22 Rwandan entities and agencies, but I highlight a couple  
 23 here, just for example purposes, and I'll go through  
 24 them really quickly. The substance is not something I'm  
 25 going to dwell on.

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14:26 1 (Slide 65) But in December 2014, in their other  
 2 capacity, Mr Marshall and Zuzana were working with  
 3 Ngali, which is an entity owned by the Rwandan  
 4 Government, at least in part. They were working with  
 5 them on a transactional manner, in a consulting and  
 6 advising role. (Slide 66) Exhibit C-133.  
 7 (Slides 67 and 68) December 2014, another request,  
 8 somewhat critical (C-095). They're asking again for  
 9 documentation that they want them to -- everything at  
 10 this time is from the perspective of "You must reapply".  
 11 They're citing the new application guidelines,  
 12 requirements; "new" being the 2014 law.  
 13 As you know, the parties' positions differ on this,  
 14 they have a split of views, and this was consistent at  
 15 the time. NRD/Mr Marshall believed that the application  
 16 was timely and correct, and accepted under the 2008 law,  
 17 and this was just not a point that the minister was  
 18 giving on. And Mr Marshall did the best he could to  
 19 maintain his position and yet try to comply by  
 20 resubmitting a renewed application.  
 21 (Slide 70) Work continues in their other capacity:  
 22 in this case, on behalf of the Rwandan Government.  
 23 Ngali, the entity that's owned by the Rwandan  
 24 Government, at least in part, in a United States  
 25 transaction, purchased helicopters. Again, I apologise

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14:28 1 for going quickly here, but I'm not getting into the  
 2 substance of the work being done here as important to  
 3 this presentation. I will explain shortly the reason;  
 4 I'm just laying out the context.  
 5 (Slide 72) In February 2015 Minister Biruta confirms  
 6 on behalf of the Respondent that the renewed application  
 7 is under review. (Slide 73) Again, referring to it as  
 8 the "long-term license" application. And still work is  
 9 going on.  
 10 (Slide 74) The other capacity that Mr Marshall and  
 11 Ms Mruskovicova were in the country from the earliest of  
 12 days, working with Rwanda in their advisory and  
 13 consulting capacity, handling another -- helping to  
 14 facilitate. So this is the role of sort of a face,  
 15 a representative for Rwanda in making a relationship  
 16 connection, so that a transaction could be discussed  
 17 between the representatives of Rwanda and the  
 18 Slovak Republic.  
 19 Again, I stress this as just the context of: this is  
 20 a very trusted capacity. Rwanda is relying on  
 21 Mr Marshall as a face, as a voice for it in dealing with  
 22 very serious, presumably very valuable transactions and  
 23 other matters for the country, while this is happening.  
 24 (Slide 76) In March, NRD meets with the RDB to  
 25 discuss ongoing issues and concerns relating to the

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14:31 1 operations of NRD, ongoing concerns about how they're  
 2 being treated and dealt with. They're not in  
 3 a satisfactory position yet as to how they're being  
 4 treated on this application, on this side, with regard  
 5 to the mining investment, at the same time that these  
 6 other transactions and other relationships with  
 7 Mr Marshall and Ms Mruskovicova are continuing.  
 8 (Slide 78) Then we get to May. After a few months  
 9 of considering it, Mr Imena informs NRD -- Mr Marshall,  
 10 on behalf of NRD -- that the renewed application is  
 11 denied.  
 12 (Slide 79) Similar: "I ... regret to inform you that  
 13 you will not get them" (C-038). Similar "no" as in  
 14 2014.  
 15 (Slide 80) But it goes on. In order to finalise  
 16 this -- we're saying no, recognising that they're there,  
 17 they're operating, they're maintaining, they are  
 18 running, to the extent they can, the mining concessions.  
 19 No one else is. You're going to have to hand them over.  
 20 The government is saying no; the government is going to  
 21 go forward and take over. And all five concessions are  
 22 expected to be handed over, because those perimeters,  
 23 those areas, the security for those areas is being  
 24 provided by the investors' money, NRD's owners' money.  
 25 The maintenance, the extent anybody is acting

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14:32 1 responsibly to maintain them and continue them, all  
 2 through this time has just been the investors in NRD.  
 3 So that's going to be turned over now because of the no.  
 4 (Slide 81) That doesn't happen. And just like in  
 5 2014, where we were told no, Mr Marshall has provided  
 6 a witness statement saying, "I didn't expect we were  
 7 done. I expected the process to continue. We continued  
 8 to make efforts to negotiate and find what the issue was  
 9 that was holding up the willingness to issue the 30-year  
 10 long-term licences, negotiate an agreement on how to  
 11 resolve it and go forward". He believed sticking with  
 12 that process was the only way to get what they invested  
 13 in and have a potentially favourable outcome, as opposed  
 14 to being done, calling it quits and suing.  
 15 Rwanda's position is, "It's completely unreasonable;  
 16 you never would have expected it". But that's exactly  
 17 what happened in 2014. Months go by; the no wasn't  
 18 really "no", the no was "maybe". Further  
 19 considerations, further discussions held out as  
 20 possible, four long-term licences, as they said, despite  
 21 the no. And it's not just no: it's no and "We're taking  
 22 them over". Well, when are you taking them over? Then  
 23 we're done.  
 24 They don't take them over. They do not take any  
 25 steps to actually implement the no. And yet Rwanda's

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14:34 1 position is: NRD's investors must have known it was  
 2 over. They had to leave. There was no possible  
 3 reasonable expectation of a yes from here.  
 4 Well, if they left, they would have been abandoning  
 5 the site. The government wasn't taking them over, not  
 6 from them, and not really ending their control and  
 7 possession of the concessions; not for quite a long  
 8 time.  
 9 (Slide 82) It's not just Mr Marshall who says in  
 10 this interim period, "I did not believe we were done.  
 11 I did not think it was over and declared that Rwanda was  
 12 not going to issue the concessions, not leave us with  
 13 the concessions, and instead take them back". We see in  
 14 the record Mr Marshall has presented -- the Claimants  
 15 have presented other interactions with the government  
 16 where confusion is expressed as to, "Well, who actually  
 17 owns it now?" The government is not saying externally  
 18 or internally to others any clear answer that suggests  
 19 the Claimants aren't the owners, through NRD, of those  
 20 concessions and in charge of them.  
 21 In this particular June 16th 2015 communication  
 22 (C-120), there's reference by a potential outside  
 23 investor, who is in the country to look at potential  
 24 investments, being shown the NRD concessions and having  
 25 it referenced to him. Now, this is not Mr Marshall

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14:36 1 doing this and inviting them in; this is the government.  
 2 They refer to Mr Marshall as the owner, and he's  
 3 reaching out for some information about their  
 4 concessions and their operations. That's based on  
 5 information they're getting from the government and  
 6 whoever they're working with to talk about a potential  
 7 investment. That is not Mr Marshall causing the  
 8 confusion: he's just receiving this and recognising  
 9 they're still being referred to as the owners of the  
 10 concession. It's June 2015.  
 11 (Slide 83) There's an iTSCi transaction report  
 12 (R-226). As we've mentioned earlier, we've heard a lot  
 13 and you've seen a lot of detailed information about the  
 14 tagging of the minerals and the import, and who is  
 15 running it is iTSCi. There's an occurrence report that  
 16 iTSCi prepares, and this is reporting to the government,  
 17 and this is an agency that's working with the government  
 18 to implement its laws, its process of tagging and  
 19 monitoring the mines for the government.  
 20 There was a death at one of the concessions in  
 21 September 2015. The government's arm, the body it  
 22 worked with to set up and to help it implement its rules  
 23 and its laws regarding mines, is reporting on its  
 24 incident report in September 2015: this is an incident  
 25 at NRD's concession.

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14:37 1 Now, the Respondent is saying here: Mr Marshall is  
 2 not telling the truth when he says that after May, he  
 3 considered himself still at the concessions, with  
 4 potential ongoing interest in them and ownership, and  
 5 that everything was going to turn out with, you know,  
 6 right for what they understood all along was eventually  
 7 a negotiation of a mutually acceptable term for 30-year  
 8 licences. That's completely unreasonable, he's making  
 9 that up, couldn't possibly.  
 10 Internally, so to speak, within the government's  
 11 dealings with iTSCi, it's not reporting to iTSCi, "Those  
 12 are our concessions now, so this is an incident where  
 13 the government is in charge of the area where this death  
 14 occurred". That doesn't happen until, if you see --  
 15 because this is obviously a system that is interactive  
 16 and ongoing, because if you see in the green at the top,  
 17 "Rwanda: July to December 2015 (status as [of the]  
 18 end" -- excuse me, "July to December 2015", and this  
 19 status, this report, was printed at the end of 2016.  
 20 So information is being added over time. The  
 21 initial start date is shown as a September date in 2015;  
 22 the end date, the last entry, is a date in 2016. That  
 23 end date entry in 2016 is that the site is to be  
 24 publicly tendered.  
 25 The GMD was contacted about the question of NRD and

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14:39 1 the site is to be publicly tendered. That's reported to  
 2 iTSCi as to who's in charge, who it should be dealing  
 3 with to try to remediate/address incidents like a death.  
 4 The government finally tells it in 2016, "Well, that's  
 5 us. You're not dealing with NRD anymore; you're dealing  
 6 with us". And as the Claimants have explained, it's  
 7 2016 when they really knew they were done, they really  
 8 knew they were out.  
 9 (Slide 84) In September 2015 they were told to take  
 10 all their belongings and get out of the offices. So it  
 11 wasn't even until September 2015 that the government  
 12 took any action to prevent NRD's investors, the  
 13 Claimants, from operating the main offices. They had  
 14 them take their materials out, closed off their office  
 15 to them in October 2015.  
 16 (Slide 85) C-163 is the text messages in which they  
 17 were informed that was happening at the moment. No  
 18 advance notice, just: this is happening now, they're  
 19 going to close up your offices and you've got to be out,  
 20 you're not going back in.  
 21 (Slide 86) In January 2016 Mr Marshall, in response  
 22 to discussions that he was having -- and I'm going to  
 23 cover that backwards in a moment -- but despite the  
 24 discussions that were happening up until then, where he  
 25 was encouraged that things may not turn out as badly as

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14:41 1 the May letter suggested, "Stay with the process, don't  
 2 do anything precipitous" -- I'll come back to that in  
 3 a moment -- in January 2016 he was told it changed, and  
 4 now that's no longer a possibility. "Rod, it's not safe  
 5 for you to come back to the country, it's not safe for  
 6 you here, it's over".  
 7 That was January 2016. Between 2014, 2015, through  
 8 January 2016 and in fact longer, the Claimants were  
 9 spending the money on security. The Claimants were  
 10 spending money on maintenance for the equipment and the  
 11 plant that was on the ground, to keep it ready to be  
 12 pushed forward and operated for mining. They were  
 13 paying for all that; the government wasn't. They  
 14 continued to pay for it even after January 2016, but  
 15 they were trying to cooperate. And certainly with  
 16 Zuzana remaining in the country, they weren't going to  
 17 do anything that made anybody react in a way that  
 18 Mr Marshall was warned he would be treated if he came  
 19 back to the country.  
 20 So from January 2016 on, they tried to appease and  
 21 just turn over quietly control, and they continued to  
 22 pay out of their pocket for certain expenses. But he  
 23 knew then, and for the first time, the concessions were  
 24 not possibly going to be the Claimants'.  
 25 The reason I highlighted but didn't spend any time

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14:43 1 on the substance of the representational capacity in  
 2 which Rwanda was relying on, utilising, working,  
 3 cooperating with and trusting the principals of the  
 4 Claimants throughout 2014/2015 is when Mr Marshall in  
 5 his witness statement says that he was being encouraged  
 6 to stay with the process, "Don't do anything  
 7 precipitous", he firmly believed -- had every reason to  
 8 believe -- that the people who wanted him there, who  
 9 wanted him to succeed in his investment, to be  
 10 a successful investor in Rwanda with the concessions,  
 11 and continue to be there and work in the capacity as  
 12 representative of Rwanda, he had every reason to believe  
 13 they were just as powerful, just as influential; that  
 14 ultimately their view of what should happen may prevail,  
 15 and not Minister Imena's.  
 16 The suggestion by Rwanda that once Mr Imena spoke,  
 17 the only assumption the Claimants could draw is that he  
 18 spoke and it's done simply does not align with the  
 19 reality that it's a very fluid situation, and others who  
 20 have as much ability to potentially influence and  
 21 dictate the outcome of this were on the other side, and  
 22 did not want Rod and the Claimants to leave, did not  
 23 want them to do anything themselves to end the  
 24 investment in the concession, and it was entirely  
 25 reasonable to believe that they may have the ultimate

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| <p>14:44 1 say. Knowing how closely they worked internally in the<br/>2 Rwandan Government, the Claimants knew the outcome was<br/>3 not determined until it was determined. And that<br/>4 message as to how it was determined was delivered in<br/>5 January 2016.<br/>6 (Slide 87) It wasn't until March 2016 that<br/>7 Respondent actually tendered the concessions and<br/>8 nationalised them, took -- you know, obtained new money,<br/>9 profited from taking back the concessions that were<br/>10 originally awarded to NRD's investors and re-awarding<br/>11 them.<br/>12 (Slide 88) So the violation of expropriation really<br/>13 occurs ultimately in March 2016. There were many steps<br/>14 along the way that impaired the value, but the value was<br/>15 nationalised and taken back and capitalised on in<br/>16 March 2016.<br/>17 (Slide 89) In January 2017 former minister<br/>18 Evode Imena was arrested.<br/>19 (Slide 90) Allegations against him included he was<br/>20 charged with favouritism in how he was awarding licences<br/>21 (C-190):<br/>22 "Prosecution alleges that [Mr Imena and his<br/>23 co-conspirators] registered a company which was<br/>24 fraudulently awarded a license to conduct mining [in one<br/>25 of the concessions]."</p> <p style="text-align: center;">Page 77</p>   | <p>14:48 1 import of those two paragraphs, we would like to know<br/>2 the entire context in which they were rendered.<br/>3 We do know that the co-conspirators were found<br/>4 guilty, which wasn't reported by Mr Imena. So the idea<br/>5 that there was nothing to this is greatly exaggerated.<br/>6 (Slide 91) The sum total, in terms of summing up our<br/>7 presentation -- I apologise for going so quickly at the<br/>8 end and slowly up until now, trying to hold to our time.<br/>9 There's four articles of the investment treaty that we<br/>10 say have been breached, have been violated. They are<br/>11 obviously -- as in many cases is true -- overlapping in<br/>12 terms of the conduct and actions that relate to one and<br/>13 relate to the others.<br/>14 (Slide 92) In terms of national treatment, clearly<br/>15 the American investors were not given -- and we've<br/>16 established and we've put forward some of those early<br/>17 exploration licence holders who were in no better<br/>18 position, in submitting applications for long-term<br/>19 licences, to get them, in terms of the very issues that<br/>20 are held out as the reasons for rejecting Claimants in<br/>21 the end.<br/>22 The amount of industrialisation: well, Claimants had<br/>23 more. The status of the investment. Just like the<br/>24 Claimants, the real investment in developing was held<br/>25 out by Tinco as: after the licences are issued, that's</p> <p style="text-align: center;">Page 79</p>                        |
| <p>14:46 1 And that these events happened in 2013/2014. Again,<br/>2 raised with the context in terms of whether Mr Imena's<br/>3 position within the government, what he was doing and<br/>4 how people viewed him and what they wanted to see as<br/>5 an outcome, was clearly going to dictate -- Mr Marshall<br/>6 points to this and says the reason why some people felt<br/>7 he was very vulnerable and would not have the final say,<br/>8 and ultimately be around, were reasonable to believe,<br/>9 could very well have turned out to be true, and --<br/>10 THE PRESIDENT: Is it correct that he was acquitted of these<br/>11 charges?<br/>12 MR COWLEY: The document that you ordered be given to us in<br/>13 full translation will tell us the full content of what<br/>14 was said in one judgment. We're not sure if it's all.<br/>15 We do know that in the document that they point to,<br/>16 there was a private party that was looking for<br/>17 compensation. We know that from the two paragraphs that<br/>18 were translated.<br/>19 I don't have any ability to say, on the face of<br/>20 those two paragraphs and these articles, how those two<br/>21 align. Why a private party would be seeking<br/>22 compensation in a court proceeding, and that be the<br/>23 court proceeding in which criminal liability is<br/>24 determined, I don't know. The primary reason we ask for<br/>25 the full translation is: before we fully comment on the</p> <p style="text-align: center;">Page 78</p> | <p>14:50 1 when our outside investors will come in and the real<br/>2 money will be put in. Everybody understands why.<br/>3 Everybody gets the nature of big business and what<br/>4 they're looking for in terms of a secure investment. It<br/>5 was accepted as reasonable for Tinco; wasn't accepted as<br/>6 reasonable, or put forward as a ground of, "No, we're<br/>7 not willing to accept it from you, Claimants".<br/>8 (Slide 93) Well, the issue for the treaty is Tinco's<br/>9 joint venture, at the time of the award, with<br/>10 a state-owned mining company, about 90% of that company.<br/>11 So the award, the benefit of the award, the benefit of<br/>12 their interpretation of how these requirements should<br/>13 apply to Tinco was for the benefit of a Rwandan<br/>14 investment, the state itself, and one of its commercial<br/>15 arms, primarily. That only changed very recently in<br/>16 terms of giving Tinco the majority control, and that was<br/>17 another issue in terms of the documents that we talked<br/>18 about this morning. So for the entire period that was<br/>19 applicable to these applications, this different<br/>20 treatment was for Rwandan benefit, primarily.<br/>21 (Slide 94) Most favoured nation treatment, a clause<br/>22 that just inexplicably is not really dealt with by<br/>23 Respondent or the United States, but clearly any<br/>24 investor would look at this.<br/>25 (Slide 95) If they're an American investor, they</p> <p style="text-align: center;">Page 80</p> |

14:51 1 can't be treated worse than anybody else. Nobody else  
 2 is going to get favoured deals or favoured treatment.  
 3 Again, for the reasons we just stated, that's not  
 4 true. You know, the Rwandan, and dealing with the  
 5 South African joint venture, was clearly given better  
 6 interpretation. A different application to the  
 7 application of 2008 law, not 2014. A different view of  
 8 what meets the standards, even though the standards  
 9 overlap to a large degree. And it can't be said that  
 10 the same rules were applied to both sets of investors.  
 11 (Slides 96 and 97) Minimum standard of treatment.  
 12 At the end of the day they can't be grossly unfair. And  
 13 what we put up regarding some of the conduct in 2012 and  
 14 the details, you have far more events and conduct. The  
 15 number of events that impaired the ability of the US  
 16 investors just to maintain what they had and wait out  
 17 the award of the licences until more fundraising would  
 18 come in was constantly being jeopardised and impeded,  
 19 seemingly as a way to just exhaust them and make them  
 20 leave. If they give up, then they have no claim under  
 21 the treaty or claim under the original licences.  
 22 (Slide 98) The bad acts in terms of unexplained  
 23 shutdowns, reopenings with the exclusion of the  
 24 Claimants' concessions, without differentiation or  
 25 explanation.

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14:53 1 The failure to tag, so that in Mr Imena's mind the  
 2 operations of NRD and the people operating it,  
 3 presumably is what he meant, could be regularised. What  
 4 does "regularised" mean? What he wants to say. So make  
 5 him happy, the tags will happen. Without the tags, no  
 6 money is flowing. What will happen other than, at some  
 7 point, you exhaust the people holding the concessions  
 8 and make them leave?  
 9 That, we say, is all knowing violation of just basic  
 10 minimum standards of treating an investor like someone  
 11 who has an interest in the country that you're going to  
 12 recognise and treat fairly.  
 13 (Slides 99 and 100) And obviously, expropriation.  
 14 There was expropriation of certain aspects of the value  
 15 of the investment: the flow of revenues from tagging,  
 16 minerals that can't be sold. Now those minerals  
 17 disappear, they go somewhere else. The tagging problem  
 18 and the mis-tagging of problems associated with smuggled  
 19 minerals from Rwanda was always one of the problems, and  
 20 I'll get back to that in a moment.  
 21 So the minerals are all somehow getting to market,  
 22 but not tagged in a way that the Claimants' concessions  
 23 share in any of that revenue for a prolonged period of  
 24 time. Well, you could call that an expropriation.  
 25 There were events like that that expropriated certain

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14:54 1 aspects of the profits or revenues that would flow from  
 2 the concessions while they were being held. But the  
 3 real expropriation in terms of the value of the right  
 4 occurred in March 2016, when the concessions themselves  
 5 were resold by the Respondent.  
 6 THE PRESIDENT: Could I ask for a little clarification on  
 7 this point. I have no difficulty in understanding what  
 8 you talk about, the real expropriation: your claim, you  
 9 say, that you didn't appreciate until March 2016 that  
 10 you were not going to get the 30-year long-term  
 11 concessions that you contend your clients were entitled  
 12 to. That I follow.  
 13 But during the year 2012, there are a number of  
 14 incidents that occurred, of which you complain, which  
 15 would have resulted in loss to NRD, individual losses,  
 16 such as losses when they were unable to tag minerals for  
 17 sale. Are you making independent claims for those  
 18 losses, or is your claim limited to a claim for the  
 19 deprivation of the 30-year concession?  
 20 MR COWLEY: I'm going to answer that it's the latter, but  
 21 the explanation is it's not as clean-cut as one or the  
 22 other, in this sense: in the loss -- the expropriation  
 23 of the 30-year licences, the right that they bought into  
 24 to have the 30-year licences awarded under the 2008 act,  
 25 the expropriation was a very long, slow process,

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14:56 1 dangling the whole time, "We're going to negotiate that  
 2 with you". But it was very prolonged, and ultimately,  
 3 in the end, intended not to issue the licence but to put  
 4 in place first a law that would so-called "justify"  
 5 saying no.  
 6 That treatment, the expropriation by staying, not  
 7 processing, then putting in place something and pointing  
 8 to it and saying, "Well, now we get to take it back",  
 9 winds up including the -- throughout that time, if we  
 10 weren't going to give up, if we were going to be able to  
 11 maintain the concessions, the Claimants had to continue  
 12 to put a lot of money into maintaining operations,  
 13 securing, et cetera.  
 14 So expropriation isn't just: (inaudible) you lost,  
 15 let's quantify, have someone come in and say what's the  
 16 value of those concessions on that day; it's bleeding  
 17 them of all the money over time. No question that the  
 18 amount of money they have to put in goes up based on the  
 19 events that caused cost, caused losses, but the  
 20 expropriation was not a one-time event. If our claim is  
 21 upheld, that means they had the right to those licences  
 22 in 2012, and they were bled for quite a long time until  
 23 the entire situation could be repostured and then  
 24 supposedly justified in saying, "You know what? You're  
 25 not going to get them at all anymore". And we say that

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14:58 1 significant losses were sustained as part of the  
 2 expropriation over the period of time.  
 3 I hope that answers the question. I would say it  
 4 this way, I think it's a clear answer this way: in 2015  
 5 the powers that be that were encouraging Rod to stay the  
 6 course, do not walk away, continue to press for the  
 7 concessions and this all may turn around, did turn  
 8 around: Minister Imena was replaced at the time, in my  
 9 hypothetical; concessions were awarded.  
 10 Do I believe that under the treaty a claim could be  
 11 made that, despite owning the concessions for the  
 12 long-term value, being able to work, money was lost  
 13 based on actions by the Respondent that caused some  
 14 seizure of property, some blocking of being able to  
 15 profit and earn revenue from minerals and seizing of  
 16 other property which wound up in losses with the conduct  
 17 of their agent, the person they worked through,  
 18 Mr Benzinge, or the person they allowed to act in such  
 19 a malicious way, taking materials? I believe a claim  
 20 could be made, even with the concessions, that that  
 21 constitutes expropriation of some value of the  
 22 concessions, some property that was invested, and they  
 23 would have to decide just to sue for that or not, and  
 24 they haven't, they didn't.  
 25 So as a standalone event, the seizure of the

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15:00 1 property and then return of the property, and now  
 2 equipment is missing, now things are gone, the loss of  
 3 profits over the period of time that there was no  
 4 tagging, are not being sued upon independently. They  
 5 are part of the sustained losses that went into  
 6 a prolonged expropriation, through which time the  
 7 Claimants were losing money the whole time, waiting it  
 8 out.  
 9 THE PRESIDENT: Thank you very much.  
 10 Does that conclude your opening submissions? If you  
 11 need ten more minutes, you're entitled to them, because  
 12 we ate into the time --  
 13 MR COWLEY: (Slide 101) This is the last slide, and I will  
 14 be brief. I think my intention all along was never to  
 15 take the full time, and I didn't do a good job. That's  
 16 my fault. I will just try to briefly summarise.  
 17 The statute of limitations element is one of the  
 18 defences put forward that says: well, regardless of the  
 19 merits, regardless of how the dispute comes out as to  
 20 who did what to whom when, sued too late. The Claimants  
 21 did not sue too late. At least one of the claims only  
 22 triggers in 2016 and the other claims trigger after  
 23 2015. At some point a decision was made not to issue  
 24 the licences. But until then, the Claimants were in,  
 25 actually vying for licences that could issue, and well

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15:01 1 within the statutory period.  
 2 In terms of personal jurisdiction as to BVG, BVG  
 3 made an investment in NRD before it completed the  
 4 transaction with Starck, selling the owner of NRD to the  
 5 Spalena entity created to take the shares of the holding  
 6 company. It already invested and started to plan for  
 7 pursuing its mining interests through NRD. That's  
 8 sufficient to trigger personal jurisdiction from BVG.  
 9 Arguments about how much to quantify it, nit-picking  
 10 about whether somebody saw every aspect on a list of  
 11 properties that were invested in addition to cash, all  
 12 of which goes to the second stage. Not only were we not  
 13 required to quantify it in detail, we were told we  
 14 couldn't. We're not here to present how big a loss all  
 15 this was.  
 16 So all we've done is show that BVG is a qualified  
 17 investor. Spalena acquired the shares. BVG's money was  
 18 put into it to make it happen, and it became a co-owner  
 19 of Spalena. But even before, when Spalena first  
 20 acquired the shares in the holding company, BVG was  
 21 already directly an investor.  
 22 In terms of subject matter jurisdiction, clearly  
 23 that's a different way of spinning a legal argument on  
 24 the same argument that the investment is not the right  
 25 type of investment. Of course it is.

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15:03 1 I don't understand how any US investor, but through  
 2 vehicles such as this, would invest in NRD, but for  
 3 loaning it money to buy operations and pay for  
 4 operations on the ground, putting in more capital so  
 5 that big equipment could be purchased, et cetera. The  
 6 same course would have followed when millions more were  
 7 raised in future investment, as planned, with the  
 8 long-term licences, but it would have been the same  
 9 vehicle and the same transaction. That's the only way  
 10 to invest in these mines for the US investors.  
 11 In terms of consent to arbitrate, it's entirely  
 12 superficial and it is entirely created for the purposes  
 13 of this argument that anybody from the Respondent ever  
 14 asked for a distinction as to which hat Mr Marshall was  
 15 wearing, Spalena or BVG or NRD director; now put on  
 16 a different hat and talk about your managing investor  
 17 role for BVG or Spalena. It's all artificial. Of  
 18 course, as the lead investor, as given control by his  
 19 other investors of both investment vehicles, and as the  
 20 director in charge of all operations of NRD, in which  
 21 their investment was being managed, Mr Marshall was the  
 22 only point of contact.  
 23 So the idea that, in response to BVG's notice,  
 24 Rwanda, who decided it had no intention to talk to him  
 25 about resolving his claims at all and let that pass,

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15:05 1 should have been told -- and Spalena too, to the extent  
 2 that the transaction that closed the purchase to acquire  
 3 the shares of the holding companies in Spalena's name --  
 4 wearing that hat, Mr Marshall also invites you to  
 5 resolve the loss of his investment based on these  
 6 claims, then they would have discussed it with him in  
 7 that hat, is completely artificial, is an attempt to  
 8 say: we can do everything wrong, but until you tick  
 9 every box on which capacity you might be talking to us,  
 10 we are not knowing and [will] not talk to you, but we're  
 11 saying you're waiving your rights, silently.  
 12 This is clearly a challenge with no meaning  
 13 whatsoever in terms of the purpose of the requirement  
 14 for notice and the parties to try to resolve things  
 15 without bringing it to this level.  
 16 I apologise for going a little over what the stated  
 17 time was, and I appreciate your patience throughout this  
 18 argument.  
 19 THE PRESIDENT: Thank you very much.  
 20 Mr Hill, we'll go on until 4.07 our time, so that  
 21 you make up the fact that you're starting a little bit  
 22 late, and we'll shorten the next break by seven minutes.  
 23 MR HILL: Thank you, Mr President.  
 24 (3.06 pm)  
 25

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15:07 1 allegations regarding NRD's alleged entitlement to  
 2 long-term licences over the five concessions. As you  
 3 know, the gist of the Claimants' case -- and you've  
 4 heard it again today -- is that there was an assurance  
 5 and a guarantee of long-term licences, on the strength  
 6 of which investments were made, and that that guarantee  
 7 is to be found in the 2006 contract and also in various  
 8 other assurances they say have been made.  
 9 The Claimants then say that NRD made an application  
 10 for long-term licences in November 2010, and they say  
 11 that while the licences were not immediately awarded,  
 12 the assurance of long-term licences was reinforced by  
 13 various extensions that Rwanda gave, or indulgences  
 14 allowing NRD to stay on in the concessions.  
 15 The Claimants say that when NRD was not ultimately  
 16 awarded licences, and in 2015 was told to vacate the  
 17 concessions, that this amounted to an expropriation and  
 18 breached the Claimants' rights as investors in Rwanda,  
 19 through NRD, under the bilateral investment treaty or  
 20 under customary international law. By the time of the  
 21 Reply, this case has been, in fact, fleshed out by way  
 22 of a somewhat absurd, we suggest, conspiracy theory,  
 23 which does keep growing, and I'll come back to that.  
 24 Now, none of that case has any substance. We would  
 25 highlight eleven points at the outset.

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15:06 1 Opening statement on behalf of the Respondent  
 2 MR HILL: We would submit that this is an unmeritorious  
 3 claim that fails on its merits, and also fails because  
 4 of the preliminary objections to it that we have.  
 5 I propose to deal with our points in that order,  
 6 spending most of my time today on the merits of the  
 7 substantive case, so I can give what I hope is a helpful  
 8 guide to the evidential material you're going to see  
 9 this week, and then say a little about some of our  
 10 preliminary objections, which we suggest are also fatal.  
 11 So beginning with the merits, as we sought to  
 12 explain in our skeleton, at its heart this is quite  
 13 a straightforward case, and one where the merits are  
 14 wholly one way, and against the Claimants; and all that  
 15 one needs to do is go through the history of events,  
 16 sorting the wood from the trees, to see that. That's  
 17 what I hope to assist you with today, and also in the  
 18 cross-examination you will see, in particular of  
 19 Mr Marshall.  
 20 We would suggest that a lot of the picture from  
 21 Mr Cowley that you saw painted today did go some way  
 22 beyond what the evidence in this case actually shows.  
 23 There's one key aspect of the Claimants' claims and  
 24 then a number of sideshow or subsidiary points.  
 25 The key aspect of the case relates to the Claimants'

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15:09 1 First, there was quite obviously no guarantee of  
 2 long-term licences in the 2006 contract. NRD was given  
 3 a right to four-year licences and, as you would expect,  
 4 any expectation that this would then lead to long-term  
 5 licences depended on NRD fulfilling its obligations in  
 6 the four years and then delivering a satisfactory  
 7 feasibility study to prove to the government's  
 8 satisfaction that it was deserving thereafter of  
 9 long-term licences.  
 10 Secondly, there were no assurances outside the  
 11 contract that NRD was automatically entitled to  
 12 long-term licences or anything like that. We will go  
 13 through some of the sources for these assurances that  
 14 have been identified by the Claimants in their memorials  
 15 and identified by Mr Marshall, and there is nothing in  
 16 any of them. Much of it consists of what we would  
 17 suggest is a grotesque misreading of many of the  
 18 documents in the case.  
 19 It's worth remembering that Mr Marshall was not on  
 20 the scene at all vis-à-vis NRD when the NRD contractual  
 21 relationship started with the government in 2006. He  
 22 didn't arrive, as regards NRD, until late 2010. There's  
 23 no evidence whatsoever of any assurance before his  
 24 arrival, and all the evidence is to the contrary.  
 25 Now, Mr Marshall, I would say, did have previous

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15:10 1 form in running -- unsuccessfully -- a concession at  
 2 Bisesero, which had been granted to Bay View Group. The  
 3 licence to that concession was not renewed, as a result  
 4 of BVG's underperformance, and no complaint has ever  
 5 been pursued that that was unlawful. So Mr Marshall  
 6 cannot seriously suggest he received any assurance in  
 7 that capacity either, even were that relevant.  
 8 Thirdly, when Mr Marshall's company Spalena  
 9 purchased NRD for just [REDACTED] at the end of 2010, he  
 10 knew that there was no assurance of a long-term licence,  
 11 and indeed he was specifically told that NRD was  
 12 unlikely to obtain long-term licences. What he was  
 13 told -- correctly -- was that the level of exploration,  
 14 resource estimation and industrialisation done by NRD  
 15 had fallen far short of what was expected of any  
 16 operator looking for a long-term licence, and the most  
 17 that NRD could hope for would be a renewal of five-year  
 18 exploration licences to give them a chance of doing what  
 19 they should have done in the first four years, but even  
 20 that was uncertain.  
 21 Fourthly, when NRD applied for a renewal of its  
 22 licences shortly before the expiry of the four-year  
 23 terms, they didn't even apply for long-term licences.  
 24 Because of the limited exploration and industrialisation  
 25 work that had been done, NRD knew that long-term

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15:12 1 licences were out of the question, and they applied for  
 2 a renewal of five-year licences.  
 3 It's worth looking at paragraph 18 of the Claimants'  
 4 pre-hearing brief on this, if that could be pulled up.  
 5 MR BRODSKY: Yes, I can pull that up. Can you help me:  
 6 that's in the pleadings?  
 7 MR HILL: I don't know, I'm afraid, is the answer to that.  
 8 They were filed on Thursday, last Thursday. I don't  
 9 know where ... It is, I'm afraid, worth taking a moment,  
 10 because I've got one or two other references to this  
 11 document. So it would be helpful if that could be  
 12 located.  
 13 MR BRODSKY: I will look for that amongst the files that  
 14 I have access to.  
 15 MR KAPLAN: I don't believe it is with FTI, given it was  
 16 just filed, but I can get it to FTI. It will take a few  
 17 moments.  
 18 THE PRESIDENT: Ms Dohmann has got a hard copy. I've got  
 19 a hard copy which I will share. So we can proceed  
 20 straightaway.  
 21 MR HILL: I'm very grateful.  
 22 In paragraph 18, what's said in the second sentence  
 23 is:  
 24 "The contemporaneous evidence demonstrates that  
 25 Respondent represented to Claimants that it intended

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15:13 1 [to] negotiate the terms of the long term licences with  
 2 Claimants, based on the application submitted.  
 3 Respondent's after-the-fact characterization of the  
 4 parties' discussions cannot change the fact that the  
 5 understanding at the time was that Claimants'  
 6 application, styled as a five-year extension, was for a  
 7 long term licence of the concessions."  
 8 It's difficult to know what's meant here. There is  
 9 no contemporaneous evidence at all demonstrating that  
 10 the Respondent represented that it intended to negotiate  
 11 long-term licences, and it's right to say the  
 12 application was styled as a five-year extension, and  
 13 that is because it was indeed an application for  
 14 a five-year extension.  
 15 What is more, Mr Marshall knew that a five-year  
 16 extension was all that had been pitched for when he  
 17 arrived on the scene to acquire NRD at the end of 2010.  
 18 All of that of itself shows that the case here that  
 19 there was an expectation of long-term licences is, in my  
 20 submission, hopeless.  
 21 Just pausing here, it's worth just staying with  
 22 paragraph 18 to get something of a flavour of the way  
 23 the Claimants' submissions operate. The next sentence  
 24 says:  
 25 "Claimants' principal, Mr Marshall, was told by

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15:15 1 Respondent that the application would be considered for  
 2 that purpose."  
 3 There is no evidential basis anywhere for that  
 4 assertion, not to be found in any witness statement.  
 5 I don't know if we're going to see something coming in  
 6 by way of evidence-in-chief; we'll have to see.  
 7 The next sentence:  
 8 "This is confirmed by the fact that Respondent  
 9 granted an extension of NRD licenses in order to  
 10 negotiate the terms of the long term license and then  
 11 NRD did in fact begin negotiating the long term license  
 12 with Dominique Bidega, the then Acting Director of  
 13 OMGR."  
 14 There's nothing in the extension letters, any of  
 15 them, which suggests that the Respondent granted an  
 16 extension to negotiate long-term licences. That is just  
 17 an invention. And we'll be looking at the extension  
 18 letter that's referred to, and indeed other extension  
 19 letters, in due course.  
 20 The reference to Mr Bidega is something different.  
 21 That relates to a curious episode which happened in late  
 22 2011, which we'll be referring to later. The Claimants  
 23 refer to it a lot. All I would say at this point is  
 24 that that episode of Mr Bidega does not assist the  
 25 Claimants at all.

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15:16 1 My fifth point is that the November 2010 application  
 2 for renewal of the five-year licences was itself thin  
 3 and unsatisfactory. The lack of progress made by NRD in  
 4 the four-year period, and the paucity of the exploration  
 5 and sampling work and the evaluation of the mineral  
 6 reserves that were required, was obvious on the face of  
 7 the application. NRD knew at the time -- and  
 8 Mr Marshall was told when he bought in -- that this  
 9 application was inadequate even to justify the five-year  
 10 licences being sought, and very, very far short of what  
 11 was required to justify long-term licences.  
 12 Sixthly, NRD was notified in August 2011 that it had  
 13 not complied with its contractual obligations and,  
 14 following that, there were no extant rights of any kind  
 15 in respect of long-term licences arising from the  
 16 contract.  
 17 Seventhly, the licences themselves expired in  
 18 January 2011. They were extended consensually until  
 19 October 2012 to allow for further negotiations between  
 20 NRD and the government, and after that, there were no  
 21 further extensions; although the government did, as  
 22 a matter of indulgence, make temporary allowances for  
 23 NRD to remain on the concessions while they applied for  
 24 new licences.  
 25 The point here is, again, that none of these

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15:17 1 extensions or allowances ever confirmed any right or  
 2 expectation to long-term licences or involved any  
 3 assurances or anything of that kind. The repeated  
 4 refrain that they did is, in our submission, untenable  
 5 and derives from, at best, a misreading of the  
 6 documents.  
 7 Related to that, we would say on our side that the  
 8 fact that the government did keep making allowances so  
 9 as to give NRD a chance to make an adequate application  
 10 for a licence is in fact inconsistent with the  
 11 Claimants' case theory, and in particular their  
 12 extravagant case theory about there being a conspiracy  
 13 to oust NRD from the concessions. If there was such  
 14 a conspiracy, the government would never have been as  
 15 indulgent and as generous as it was. What you will see  
 16 in the evidence is that instead of being harsh on NRD,  
 17 the government in fact gave NRD chance after chance  
 18 after chance.  
 19 While we are on assurances, we have an enhanced  
 20 story developed by the Claimants in their skeleton at  
 21 page 10 of that document, and you heard more of it  
 22 today. This is about personal assurances being given to  
 23 Mr Marshall by people in the military with whom he says  
 24 he worked.  
 25 Well, it's worth noting that what's said at

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15:19 1 paragraph 10 about assurances from the director of the  
 2 military, he says at the end of this paragraph:  
 3 "... while simultaneously reaffirming its guarantees  
 4 and continuing negotiations towards the promised  
 5 long term licenses, which included assurances from the  
 6 Rwandan military, who valued Mr Marshall's services,  
 7 that so long as he remained patient ... NRD would obtain  
 8 the long term licenses."  
 9 Well, that is not in Mr Marshall's witness statement  
 10 and goes well beyond what is in Mr Marshall's witness  
 11 statement. And it's hard, in any event, to understand  
 12 the relevance of some conversation that Mr Marshall now  
 13 says he had with someone in the military to his  
 14 application to the Ministry of Natural Resources for new  
 15 licences. Those applications, and any application made,  
 16 obviously need to be considered on its merits, and it  
 17 would be odd if it wasn't.  
 18 One gets a similar point at paragraph 31 of  
 19 Mr Cowley's pre-hearing brief, where he again makes  
 20 a new evidential point, not in the evidence, about  
 21 assurances from the military.  
 22 We heard more of it in the oral submissions today,  
 23 at the outset of the Claimants' submissions, some of the  
 24 first points that were made today, referring to  
 25 Mr Marshall as acting as a "voice" for the military.

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15:21 1 Again, that's a new point, not in evidence and, we  
 2 suggest, irrelevant.  
 3 It seemed from part of that submission that the  
 4 Claimants' case didn't seem to be that the Claimants  
 5 should have received fair and equal treatment; they  
 6 appeared to be suggesting the Claimants should have  
 7 received some special treatment that other investors  
 8 didn't get, as a result of some personal relationship  
 9 that Mr Marshall had with the military. Not the proper  
 10 subject of a claim of this kind.  
 11 My eighth point is that throughout the period of the  
 12 voluntary extension to the licences and the ad hoc  
 13 indulgences thereafter -- that's after October 2012 --  
 14 NRD had every opportunity to put in a compliant and  
 15 adequate application for long-term licences if it was  
 16 able to. But it was unable to, and its attempts were  
 17 weak and unprofessional.  
 18 Specifically on those points, what you will see in  
 19 the evidence is that after the inadequate November 2010  
 20 application for a renewed licence, there was  
 21 an extremely feeble application for long-term licences  
 22 in January 2013. That had no real substance at all, and  
 23 NRD could never have expected it to have any real chance  
 24 of being adequate, and it was interesting to see that  
 25 that wasn't even mentioned today in the submissions.

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15:22 1        Thereafter, given that the licences had expired in  
 2        October 2012, NRD had to be, in fact, chased by the  
 3        government repeatedly to apply for new licences. Again,  
 4        that all gives the lie to the conspiracy theory of the  
 5        government trying to get them out.  
 6        Mr Imena specifically chased NRD repeatedly in late  
 7        2013 and then repeatedly in 2014, and eventually in late  
 8        2014 the NRD did apply for licences. They did, at that  
 9        point, apply for long-term licences, but the  
 10       applications were again palpably deficient, and in  
 11       particular there was nothing of substance that was  
 12       additional to the applications that were themselves weak  
 13       when they were made in 2010.  
 14       My ninth point is that it was unsurprising that the  
 15       licence applications after 2010 were unforthcoming, and  
 16       that when they did come, they were deficient and didn't  
 17       add materially to the original November 2010  
 18       application. The reason for that is that after  
 19       Mr Marshall and Spalena arrived at the end of 2010,  
 20       paying ██████, they made no material further investment  
 21       into NRD, either in industrialising the mining on the  
 22       concessions or in exploratory work and evaluating the  
 23       reserves. What they did do instead was to allow  
 24       artisanal mining to carry on in the NRD concessions and  
 25       make money out of buying the minerals dug out by

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15:24 1        individual artisanal miners.  
 2        As a result of all that, NRD, post-2010, was never  
 3        going to be in a position to make a more impressive  
 4        application than it had made in 2010, because it simply  
 5        wasn't putting in any work or investment to improve the  
 6        position it was in by carrying out further proper  
 7        exploration or taking further steps to industrialise.  
 8        Relating to that, what we actually see on the  
 9        evidence is that, if anything, matters deteriorated  
 10       under Mr Marshall's watch, rather than improved. The  
 11       financial condition of the company worsened, with debts  
 12       owed to trading partners, to employees, and the Revenue.  
 13       For example, NRD could never have secured long-term  
 14       licences without a Revenue clearance certificate. But  
 15       it was in fact running up debts to the Revenue which  
 16       were unpaid, and indeed subject to enforcement. And  
 17       given its debt to the Revenue, it could never have  
 18       obtained the relevant tax clearance that was a necessary  
 19       part of any licence application.  
 20       It's not just the finances of the company, although  
 21       that is important. NRD, under Mr Marshall's watch, also  
 22       permitted illegal mining, or at the very least was  
 23       unable to prevent it because of management failings and  
 24       failure to invest in sufficient security. The  
 25       combination of illegal mining and NRD's own activities

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15:25 1        also meant that there was continual environmental  
 2        damage.  
 3        It's also worth keeping in mind here that  
 4        Mr Marshall's whole scheme was evidently to try to  
 5        secure long-term licences mainly by applying political  
 6        pressure or bullying, as we'll see in the  
 7        correspondence, without actually investing in order to  
 8        obtain them.  
 9        What he wanted to do -- and he's actually quite  
 10       candid about this in one of his witness statements -- is  
 11       obtain financing after, and on the back of, the  
 12       long-term licences. But the problem with that is that  
 13       the 2006 contract and the scheme of the government's  
 14       Mining Policy, published in early 2010, simply don't  
 15       work that way.  
 16       Mr Marshall should have known -- and must have  
 17       known, we would say -- the purpose of the initial  
 18       short-term licences was for the concession holder to  
 19       commence industrialisation and undertake proper  
 20       exploration work. That requires investment, and that  
 21       was necessary in order to justify the long-term licence.  
 22       So you had to invest upfront.  
 23       That's why the Zarnacks' original business plan,  
 24       right back at the beginning of the NRD contract,  
 25       envisages as much as \$39 million of investment. In

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15:26 1        fact, it would be generous to think that even a third of  
 2        that was spent, even on NRD's own figures as contained  
 3        in its 2010 November application.  
 4        So Mr Marshall's business strategy of securing  
 5        long-term licences without spending or sourcing  
 6        investment to do so could never have worked.  
 7        Just as an aside, in relation to that \$39 million  
 8        figure, this morning Mr Cowley referred to C-014, which  
 9        is a document that he said suggested a \$39 million  
 10       investment. The impression given in this morning's  
 11       submissions was that somehow that investment might have  
 12       been made in NRD. If that suggestion was meant, it was  
 13       unfortunate.  
 14       That reference to \$39 million in C-014 is quite  
 15       obviously a reference to the original projected  
 16       investment put forward by the Zarnacks in the business  
 17       plan under which the 2006 contract was granted. I had  
 18       thought it was common ground -- and all the evidence  
 19       shows it -- that only around a maximum of \$13 million,  
 20       even taking the Claimants' figures at face value, was in  
 21       fact invested during the Zarnack and Starck era. The  
 22       Claimants have never suggested previously that  
 23       \$39 million was invested, and it's inconsistent with  
 24       what they have suggested. So I hope that wasn't the  
 25       submission that was really being advanced.

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15:28 1 My tenth point is that the government behaved both  
2 fairly and indeed generously to NRD in dealing with the  
3 licence applications when they were made. When the 2014  
4 applications were made, they were evaluated objectively  
5 by a team of people who gave a sensible and rational  
6 recommendation to the minister, with reasons for why the  
7 application should be rejected.

8 Moreover, NRD was specifically told in late 2014 and  
9 2015 what was deficient or missing in the 2014  
10 applications, and was given three opportunities to  
11 submit additional documentation. Those opportunities  
12 were met with a feeble response from NRD. And as I've  
13 stated, NRD's own deficiencies meant that it could never  
14 have put in an adequately compliant licence application,  
15 although it's fair to say its efforts to address the  
16 problems were meagre.

17 Eleventh point. When the government finally  
18 declined the licence applications in mid-2015, and  
19 thereafter put the concessions out to tender, it was  
20 fully justified in doing so. This wasn't  
21 an expropriation of any kind at all.

22 The licences themselves had in fact expired a very  
23 long time previously, in October 2012. NRD was at that  
24 point only continuing to occupy at all on a temporary  
25 indulgence, to give it the opportunity to make

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15:31 1 expropriation, and even corruption and criminality on  
2 the part of ministers and others. In my submission, the  
3 Tribunal will have to assess for itself what Mr Marshall  
4 was up to in some of this extraordinary correspondence.  
5 It is truly littered with distortions of reality.

6 You will also see that the letters are copied to  
7 a number of people in each case, including various other  
8 ministers and usually the US ambassador.

9 We would submit that, on any view, Mr Marshall was  
10 seeking to lay a paper trail by his misleading account  
11 of things, and in particular for a future arbitration of  
12 this kind; but he was also, it appears, seeking to bully  
13 and pressurise ministers with the tenor of his  
14 correspondence. And we do say that the overall effect  
15 is something that it is remarkable to see in a business  
16 and commercial context. It's a long, long way from the  
17 behaviour you would expect from any serious,  
18 professional applicant for a mining licence.

19 So that's the main area of the case. There are also  
20 a number of sideshow or smokescreen issues, and they are  
21 issues thrown up by the Claimants, it looks like in the  
22 hope of muddying the waters, and I'll just run through  
23 the main ones briefly.

24 The first is a long and complicated episode  
25 involving Mr Benzinge. He was one of the original

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15:29 1 an adequate application. It was unable to do so. And  
2 once the licence applications were determined against  
3 NRD, it was entirely right that they should leave the  
4 concessions, as unlicensed operators with no contractual  
5 or other right to occupy or exploit the concessions, and  
6 of course entirely right that the concessions should be  
7 put out to tender.

8 So we would submit that those are the essential  
9 points on the key area of the case that you will see  
10 from the evidence as it emerges this week. Once the  
11 facts are seen and understood, they speak for  
12 themselves, and there isn't, in our submission, a shred  
13 of a case here.

14 One thing that that summary I've just given doesn't  
15 get across is the flavour of the communications by which  
16 NRD and Mr Marshall carried on their business. What you  
17 will see time and time again is the individuals in the  
18 ministries on the Rwandan side doing their job, writing  
19 straightforward, sensible, professional letters to NRD;  
20 but as they did so, if there was anything that smacked  
21 of criticism of NRD or even thwarted Mr Marshall's plans  
22 in any way, what one sees is the most extraordinary  
23 response from Mr Marshall.

24 There is letter after letter in which Mr Marshall,  
25 on the flimsiest pretext, launches into allegations of

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15:32 1 shareholders of NRD. He founded the company along with  
2 the Zarnacks. He took issue with the sale of the shares  
3 by the Zarnacks to Starck, HC Starck, and in  
4 consequence, as a result, took issue with the on-sale to  
5 Spalena.

6 Mr Benzinge challenged the legitimacy of the  
7 appointment of Mr Marshall and Ms Mruskovicova, which  
8 resulted from their acquisition of shares, and there are  
9 two episodes that the Tribunal will see involving  
10 Mr Benzinge in this case. None of them actually adds  
11 anything to this case or could conceivably give rise to  
12 a realistic claim.

13 The first one was something that happened over  
14 a very short period of a few days in August 2012.  
15 Mr Benzinge managed to persuade staff at the RDB, the  
16 Rwanda Development Board, which deals with public  
17 company registration, he managed to persuade them that  
18 the correct position was that he should be registered as  
19 director on the records, rather than Mr Marshall or  
20 Ms Mruskovicova.

21 Within a very short time, a day or so, Mr Marshall  
22 complained to the RDB. The matter was then taken up by  
23 the RDB, who dealt with it promptly and professionally.  
24 Within three days, Mr Benzinge had been suspended from  
25 acting as director while RDB investigated; and within

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15:34 1 a further one day, the RDB directed the return of  
2 company property to Mr Marshall.  
3 So it was a problem that lasted a few days, and  
4 where the evidence plainly shows the RDB acted honestly,  
5 impartially and fairly.  
6 The Claimants complain about the actions of  
7 Mr Benzinge and things that he did in that short period,  
8 but those of course are the actions of Mr Benzinge as  
9 a private individual and cannot conceivably ground  
10 a claim in an arbitration of this nature.  
11 Just to give, again, a flavour of the way the  
12 Claimants are trying to present this case in this  
13 arbitration, it's worth taking up the pre-hearing brief  
14 again at paragraph 19. They say in relation to this  
15 August 2012 episode:  
16 "... Mr Benzinge had no role in the company.  
17 Claimants could not have known it at the time, but this  
18 was one of the first bad acts in a long line of bad acts  
19 perpetrated by Respondent in an effort to force  
20 Claimants to abandon their investment."  
21 Now, two points about that.  
22 First, Mr Marshall accepted at the time that the RDB  
23 personnel who were initially persuaded by Mr Benzinge to  
24 change the registered information were not in any way  
25 collusive or acting in bad faith. They were just

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15:37 1 an arbitration in which an individual challenges  
2 a company as to who is the correct chief executive of  
3 the company. It seems to have its origin in a court  
4 order, and I find it difficult to identify any  
5 comparable civil proceedings in this country. One would  
6 have thought it would be some kind of proceeding under  
7 a Companies Act. But we've got very tenuous evidence  
8 about this, both from the Claimants and the Respondent.  
9 MR HILL: Well, we have some evidence on it from Mr Mugisha.  
10 Rather than shooting from the hip, I might make sure  
11 I characterise it accurately and come back to you on  
12 that, just so that I make sure I'm making the correct  
13 submission.  
14 THE PRESIDENT: Thank you.  
15 MR HILL: What I think I can say, because I'm sure my  
16 recollection on this is accurate, is that both parties,  
17 both the NRD side -- or the Claimants' side, I should  
18 say -- and Mr Benzinge, were consensual about there  
19 being an arbitration. I think there was  
20 a falling-out -- and this is the subject of the court  
21 hearings -- about how the tribunal should be  
22 constituted.  
23 The Claimants' side wanted a three-man tribunal;  
24 Mr Benzinge wanted a one-man tribunal. Initially the  
25 Claimants were successful and then Mr Benzinge was

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15:35 1 persuaded by the information given by Mr Benzinge that  
2 this was the correct thing to do on behalf of the  
3 company.  
4 Secondly, once this difficulty was escalated,  
5 because there was a dispute between the shareholders  
6 about it, there was a very prompt investigation, and  
7 obvious neutrality and professionalism shown by the RDB.  
8 I would submit that this sentence about it being  
9 a "first bad act[]" in a long line of bad acts" is  
10 an untenable characterisation of events, and it does  
11 demonstrate the kind of way in which the Claimants are  
12 putting this case that we will all have to wade through.  
13 Now, back to Mr Benzinge. He felt aggrieved at  
14 losing that first round, and he pursued his arguments  
15 later in 2012, and he did so by launching an arbitration  
16 involving him and NRD, which was subject to various  
17 inter partes court rulings at the early stages of  
18 identifying the arbitrator and the like.  
19 So just to flesh out that point, it's not as if this  
20 was some private arbitration that the NRD or the  
21 Claimants never knew about; they were actually involved  
22 in the arbitration at an early stage, in various court  
23 hearings dealing with the constitution of a tribunal.  
24 THE PRESIDENT: Could I just intervene, because I have been  
25 very puzzled by this particular proceeding:

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15:38 1 successful, in various rounds of court hearing. But as  
2 far as I recall, there was no problem from either party  
3 about this being dealt with by an arbitration rather  
4 than by some court proceeding.  
5 So that resulted in an arbitration held in  
6 April 2013. It's clear -- and it's clear from the  
7 subsequent appeal judgment -- that NRD were duly  
8 notified of the arbitration hearing, but they chose not  
9 to turn up to it. And they chose not to turn up to it  
10 by writing a letter on the day before the first of the  
11 arbitration hearings objecting to the arbitrator, but  
12 not taking any other steps, other than writing one  
13 letter to the chairman of the arbitration centre, which,  
14 in our submission, falls far short of the steps that  
15 should have been taken if that was a challenge they  
16 wanted to pursue.  
17 In the event, there was an arbitration hearing, and  
18 that was a substantive hearing -- it wasn't a default  
19 hearing or anything like that; it was the hearing on the  
20 merits -- and Mr Benzinge's claims were determined in  
21 his favour. And Mr Mugisha deals with the consequences  
22 of that, which is that the shareholdings reverted to the  
23 position they were before the transfer by the Zarnacks,  
24 and that meant that Mr Benzinge could pursue his claim  
25 that the shareholdings should revert back to the

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15:40 1 original position. He would still, obviously, only be  
 2 a minority shareholder, but the shareholdings would  
 3 revert, and the subsequent resolutions consequent on the  
 4 transfer of shares were invalidated.  
 5 Now, NRD appealed that, and their appeals were  
 6 rejected at two levels of appeal, the final Supreme  
 7 Court decision being given in May 2014.  
 8 It's important to note in relation to those appeals  
 9 that the Claimants' submission in this case -- and it  
 10 was a point flagged up in that letter I mentioned -- is  
 11 that the arbitrator was in some way conflicted or  
 12 biased. If that were the case, then NRD would indeed  
 13 have had a valid ground of objection to the arbitration  
 14 award. But that is not a ground of objection they in  
 15 fact pursued on appeal, at either level of appeal. It's  
 16 something they've brought up in these proceedings, and  
 17 it wasn't a point they took at the time or pursued at  
 18 the time.  
 19 Now, on the back of that award --  
 20 THE PRESIDENT: Sorry. If that award was correct, wouldn't  
 21 it follow that Spalena has no locus standi of any kind  
 22 in this arbitration?  
 23 MR HILL: Well, it certainly could follow. That's the  
 24 implications of Mr Mugisha's evidence. And we say --  
 25 THE PRESIDENT: That's a far more fundamental point than any

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15:41 1 that's been taken.  
 2 MR HILL: Well, if you look at our pre-hearing brief, we've  
 3 certainly not accepted that they are proper  
 4 shareholders, for that reason.  
 5 Now, on the back of that award, confirmed by the  
 6 Supreme Court ruling, Mr Benzinge made various attempts  
 7 to enforce his award. The Claimants complain this  
 8 resulted in NRD being shut out of their Kigali office  
 9 and parts of their concessions at the time. And none of  
 10 those points take Claimants anywhere.  
 11 Mr Benzinge had the rights that he had under his  
 12 award and the Supreme Court judgment, and the bailiff he  
 13 instructed also had his professional rights and  
 14 obligations to enforce the judgments. The Claimants  
 15 haven't, in our submission, advanced any coherent case  
 16 that the bailiff, Mr Bosco, who is going to be  
 17 a witness, exceeded his rights and duties in any way.  
 18 But even if he had, none of that involved actions of the  
 19 state, or participated in by the state in any way.  
 20 The Claimants do suggest that this episode is  
 21 relevant on a different area because Mr Imena, the  
 22 State Minister in Charge of Mining, was unwilling to  
 23 issue tags for minerals to NRD in part on the basis of  
 24 Mr Benzinge's claims, and we heard more about that this  
 25 morning. Two points on that.

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15:43 1 First, the reason why Mr Imena refused to issue tags  
 2 for minerals was, in fact, twofold. One of the reasons  
 3 why tags were not issued by him to Mr Marshall was that  
 4 tags were only supposed to be given to licensed mining  
 5 operators, and we have other evidence on that. NRD did  
 6 not have a mining licence, and despite repeated requests  
 7 from Mr Imena to apply for one, they hadn't done so at  
 8 that stage.  
 9 So it was quite right for Mr Imena to say, "You are  
 10 an unlicensed operator. I've been trying to get you to  
 11 apply for licences repeatedly. You must now apply for  
 12 licences, and I'm not going to allow you to keep  
 13 receiving tags as an unlicensed operator, and benefiting  
 14 from them, without making the application you should  
 15 make, and which you're required to make under the  
 16 scheme".  
 17 THE PRESIDENT: My understanding is that NRD were given  
 18 informal permission to act as if they had a licence. Is  
 19 that correct?  
 20 MR HILL: They were given informal permission to remain on  
 21 the concessions, but subject to the fact that from  
 22 October 2013, and repeatedly in 2014, they were being  
 23 pressed to apply for licences and were declining to do  
 24 so.  
 25 So in our submission, it was entirely fair for the

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15:44 1 person issuing tags to say, "I'm not going to give you  
 2 the indulgence of keeping on treating you as licenced  
 3 pro tem while you make an application when you're not in  
 4 fact making this application".  
 5 THE PRESIDENT: Yes. I would be grateful at some stage for  
 6 a bit of further assistance with the status that they  
 7 had under these informal permissions that were granted.  
 8 MR HILL: Yes.  
 9 THE PRESIDENT: But you needn't deal with that at this  
 10 point.  
 11 MR HILL: I'm grateful.  
 12 I can just foreshadow what will be said, which is:  
 13 these were not, by any means, formal licences; they were  
 14 indulgences. To take tagging as an example, they should  
 15 have had proper licences, which they were being asked to  
 16 apply for, and it went beyond the scheme of the policy  
 17 to be granting them tags when they were not licensed.  
 18 That was very much an indulgence. And entirely proper  
 19 and right to say, "You must now get a licence, and I'm  
 20 going to stop giving you these tags until you do".  
 21 So that was the first reason from Mr Imena. And  
 22 a second reason was that he was faced with competing  
 23 claims from Mr Benzinge and from Mr Marshall for being  
 24 the people who were entitled to represent NRD and  
 25 receive these tags, and in fact he was being threatened

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15:45 1 with being sued by Mr Benzinge.  
 2 So in those circumstances also, fair enough not to  
 3 issue tags and not to take sides. And we don't accept  
 4 the suggestion from the Claimants that Mr Imena was  
 5 siding with Benzinge. He wasn't: he was standing in the  
 6 middle.  
 7 Now, just on all those points, we do say that you  
 8 will notice in the contemporaneous approach by  
 9 Mr Marshall, and also in the Claimants' case, that they  
 10 repeatedly underplay the fact that Mr Benzinge had the  
 11 benefit of this arbitration award, backed by the appeal  
 12 judgments, and which supported his claims in respect of  
 13 the management and ownership of the company.  
 14 So, for instance, going back to the pre-hearing  
 15 brief, if one goes to paragraph 26, they say:  
 16 "Mr Imena's argument that there was a dispute over  
 17 NRD's ownership is unfounded and outrageous. Mr Imena  
 18 casually admits that, upon threats from Mr Benzinge to  
 19 sue MINIRENA, he decided to prevent NRD from receiving  
 20 mineral tags. This is an astonishing admission. He  
 21 blocked Claimants' ability to operate their investment  
 22 upon the mere threat of litigation by a Rwandan  
 23 national."  
 24 It wasn't a "mere threat of litigation by a Rwandan  
 25 national". Mr Benzinge had the arbitration award and

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15:47 1 a Supreme Court judgment which supported his position,  
 2 although you might not have appreciated that from this  
 3 paragraph.  
 4 The Claimants then go on:  
 5 "Any issue over ownership had already been resolved  
 6 in Spalena's and Mr Marshall's favour when Mr Benzinge  
 7 tried a similar trick. In 2012 the RDB expressly  
 8 recognised Spalena's ownership of NRD and that  
 9 Mr Marshall was the Managing Director. Mr Marshall  
 10 provided Mr Imena RDB's registration information and  
 11 informed him that Mr Benzinge, working with a court  
 12 bailiff, blocked Claimants from NRD's offices and  
 13 confiscated NRD's property, on June 13, 2014.  
 14 Mr Imena's contention that he was unaware of such  
 15 activity is false."  
 16 Now, there's a bit of unfortunate sleight of hand  
 17 here. Whatever the RDB decided in 2012, that's referred  
 18 to there, was of course before the 2013 arbitration  
 19 award and before the 2014 Supreme Court judgment. So  
 20 whatever the RDB thought in 2012, Mr Imena was entirely  
 21 reasonable to see the position as disputed, and one in  
 22 which he needed to see a resolution and to consider it  
 23 would be inappropriate for him to take sides.  
 24 Then in paragraph 28 of this pre-hearing brief, the  
 25 Claimants say:

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15:48 1 "By Mr Imena's own admission, he was using the  
 2 tagging system as a political tool to harm a foreign  
 3 investor."  
 4 That is a quite unfair spin. Mr Imena was acting  
 5 for these two reasons that I've suggested, and the  
 6 Claimants haven't even dealt fairly at all with the  
 7 first reason, which is that tags are for licensed  
 8 operators and that NRD had declined to apply. And we do  
 9 say that Mr Imena was entirely justified in the approach  
 10 he took to tagging.  
 11 We will also say -- and it will be apparent from  
 12 some of the correspondence we'll go to -- that at the  
 13 time Mr Marshall very significantly ignored or  
 14 underplayed the fact that Mr Benzinge had this  
 15 arbitration award from an arbitration that NRD had  
 16 chosen not to attend, and had it backed by Appeal Court  
 17 judgments.  
 18 So that's the Benzinge episode. The next episode,  
 19 or set of episodes, relates to Mr Bosco Nsengiyuma, and  
 20 he is the professional bailiff.  
 21 Now, Mr Bosco is a highly experienced bailiff.  
 22 During the period with which this arbitration is  
 23 concerned, he was involved in executing a number of  
 24 judgments against NRD. There was first an unfair  
 25 dismissal claim; then there was Mr Benzinge's judgment;

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15:50 1 and there were also judgments from employee claims  
 2 against NRD from some 25 employees.  
 3 The ins and outs of the various enforcement  
 4 processes from Mr Bosco are lengthy. We would suggest  
 5 they are immaterial to this case. Mr Bosco Nsengiyuma  
 6 has put in two witness statements which explain his  
 7 actions in detail. And we will suggest that he's  
 8 clearly an experienced professional bailiff, clearly  
 9 doing his best to comply with his duties faithfully and  
 10 executing on lawful judgments.  
 11 This is another area of the case where we suggest  
 12 the Claimants simply don't like what was happening and  
 13 leap to theories of conspiracy or corruption, where the  
 14 short point is that there were judgment debts, because  
 15 NRD was in default and had not paid its debts, and there  
 16 was a bailiff who was entitled to execute on those debts  
 17 and who was doing so.  
 18 As I say, there are a lot of ins and outs. For  
 19 an active account of the detail, I would commend to the  
 20 Tribunal the detailed explanation that Mr Bosco gives in  
 21 his two witness statements. We would also reiterate the  
 22 point that, in any event, his actions cannot be  
 23 attributed to the Rwandan Government.  
 24 That brings me to the third sideshow point, which  
 25 relates to the conspiracy theory advanced by the

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15:51 1 Claimants, involving smuggling minerals from the DRC and  
 2 selling them as Rwandan minerals. It is difficult, in  
 3 our submission, to even understand the theory. It was  
 4 set out somewhat vaguely in the Claimants' Memorial. It  
 5 grew in the telling by the time of the Reply, and now  
 6 involves an unnamed oligarch who, at an unspecified time  
 7 and in an unspecified way, may have wanted NRD to assist  
 8 in smuggling, which Mr Marshall says they did not do;  
 9 and in some other unspecified way, it's then said that  
 10 the expropriation that Mr Marshall says has occurred is  
 11 in some way at the behest of this unspecified oligarch.  
 12 Now, there is a total -- and I mean total -- absence  
 13 of evidence to support this case. There is also a total  
 14 absence of sufficient detail even to understand it. But  
 15 even if those points weren't themselves fatal to this  
 16 conspiracy theory, the case is evidently nonsensical.  
 17 First, and most importantly, we can actually see  
 18 from all the evidence what in fact happened to NRD's  
 19 applications for long-term licences. We can see who was  
 20 involved and we can see what they decided and why they  
 21 decided what they did. This was a contemporaneously  
 22 documented, transparent process. It involved teams  
 23 analysing the applications, explaining why the  
 24 applications were deficient, and such that it should  
 25 never have been any surprise that NRD didn't make the

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15:53 1 grade. Mr Marshall had, of course, been told of the  
 2 problems in 2010 when he bought into the company, and  
 3 hadn't improved on the position in the years that  
 4 followed.  
 5 Secondly, on this conspiracy theory, to the extent  
 6 one needs to even think about it, one can see that the  
 7 underlying premise is untenable. Rwanda has, in fact,  
 8 well observed and thorough processes in place for  
 9 preventing smuggling, and is a main proponent in the  
 10 region of measures to prevent smuggling. So, while no  
 11 systems can be foolproof, there is no conceivable basis  
 12 for any suggestion that Rwanda is promoting or even  
 13 condoning smuggling: it does the opposite, extensively,  
 14 and as observed by third-party partners, such as the  
 15 representatives of the Tin Council initiative, and it  
 16 could never be in Rwanda's interest to condone  
 17 smuggling, and it does the very opposite.  
 18 Thirdly, the only material that the Claimants seek  
 19 to rely on -- and they do so inferentially to support  
 20 their theory -- is various bits of data or statistics  
 21 which the Claimants suggest show that more minerals are  
 22 exported than are produced. Well, the data doesn't in  
 23 fact show that. They've misinterpreted it or drawn  
 24 incorrect inferences from the data, and this is  
 25 a misguided exercise, and that is dealt with by our

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15:54 1 witnesses.  
 2 So if you turn to the Claimants' pre-hearing brief  
 3 again and look at, for instance, paragraph 13, one can  
 4 see sentences like:  
 5 "Claimants did not, and would not, participate in  
 6 smuggling, and therefore NRD was singled out and treated  
 7 differently, in violation of the [bilateral investment  
 8 treaty]."  
 9 This is, in our submission, simply an allegation not  
 10 anchored in reality and with no evidence.  
 11 The next sideshow issue relates to the fact that  
 12 from time to time, NRD was made subject to requirements  
 13 to cease mining in parts of their concessions because of  
 14 local issues arising from illegal mining and  
 15 environmental problems.  
 16 The short point here is that there were indeed  
 17 problems from both illegal mining and environmental  
 18 issues on NRD's concessions. These problems got worse  
 19 over the period in which Mr Marshall and Spalena was in  
 20 control. One sees in Mr Marshall's protestations at the  
 21 time -- and this is repeated by the Claimants -- the  
 22 allegations that NRD was not being fairly treated, but  
 23 that is unfair again on the Claimants' part.  
 24 On illegal mining, what they say is that Rwanda  
 25 should have prevented illegal mining on NRD's

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15:55 1 concessions. That's a bad point and it's not how it  
 2 works. The duty to prevent illegal mining on the  
 3 concessions was the concession holder's, NRD's. And if  
 4 they couldn't do it, if NRD couldn't do it, that was  
 5 a function of them having areas of concessions that were  
 6 too large for what they could cope with, that they  
 7 simply weren't working themselves, they were leaving  
 8 unprotected, and simply too large for the scale of  
 9 operation and investment that they were engaged in.  
 10 Indeed, NRD recognised that it was their  
 11 responsibility at the time, because eventually they  
 12 promised to do something about it by hiring demobilised  
 13 soldiers to help police the concessions. And when they  
 14 did so, when they promised to do so, they were permitted  
 15 to work again on the concessions. So no unfairness  
 16 there.  
 17 On environmental issues, the Claimants repeatedly  
 18 said and say that the environmental damage in the  
 19 concessions was not NRD's fault because it was the fault  
 20 of the illegal miners or an environmental hangover from  
 21 colonial mining practices by the Belgians. But neither  
 22 of these points in fact wash.  
 23 The illegal miners should themselves have been  
 24 prevented by NRD, as I've just mentioned. And the point  
 25 about colonial practices is an exaggeration, because

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| <p>15:57 1 what was in fact discovered was that NRD's work, and its<br/>2 failure to control illegal mining, was exacerbating the<br/>3 environmental issues. Even though I'm sure it's fair to<br/>4 say there were some original hangover from the colonial<br/>5 period, the problem was that whatever damage was done in<br/>6 the colonial period was being exacerbated in the way in<br/>7 which the mines were still being exploited during the<br/>8 period of NRD's control.<br/>9 Now, the last sideshow issue relates to the<br/>10 allegations that other operators, and in particular<br/>11 Tinco and Rutongo Mining, were in some way treated more<br/>12 favourably because they didn't end up with long-term<br/>13 licences. There is nothing in this either.<br/>14 Quite simply, they were justifiably regarded as<br/>15 having made strong applications because they were some<br/>16 of the best-performing mining operators, unlike NRD.<br/>17 The documents show at the time that Mr Marshall regarded<br/>18 them as having 20 times NRD's productivity on much<br/>19 smaller concessions. These companies had made properly<br/>20 substantiated, timely applications for mining licences,<br/>21 unlike NRD. So there's no surprising or unfair<br/>22 differentiation and treatment.<br/>23 Relatedly, there's another allegation about<br/>24 a company called Ngali Mining you might have come<br/>25 across, and that's again focused on by the company now.</p> <p style="text-align: center;">Page 125</p> | <p>16:00 1 (4.00 pm)<br/>2 (Adjourned until 4.40 pm)<br/>3 (4.42 pm)<br/>4 THE PRESIDENT: Hello, Mr Hill, we are ready for you.<br/>5 MR HILL: I'm grateful. I'm sorry, I didn't hear you,<br/>6 Mr President.<br/>7 THE PRESIDENT: We are now ready.<br/>8 MR HILL: I'm grateful.<br/>9 Just before I resume, could I just mention that, as<br/>10 far as I'm aware, we haven't had the email of Mr Ehlers<br/>11 and the cooperation agreement email. Apologies if it's<br/>12 in the ether as I speak, but we really must have it, and<br/>13 I wonder if Mr Cowley could tell us if it is in fact<br/>14 coming.<br/>15 MR COWLEY: It's coming. It's what we've been working on --<br/>16 I'm not going to take any credit for working on it.<br/>17 It's what Mr Harrison has been working on during the<br/>18 break, while trying to also eat something. So, yes,<br/>19 it's on its way.<br/>20 THE PRESIDENT: On its way.<br/>21 MR HILL: Thank you.<br/>22 I was going to do a more chronological cross-section<br/>23 now, taking the period of the case in a series of<br/>24 blocks.<br/>25 The first block or era would be what one might call</p> <p style="text-align: center;">Page 127</p>  |
| <p>15:58 1 But again, the Claimants don't begin to establish that<br/>2 Ngali Mining is in a materially similar situation to NRD<br/>3 so you've got the starting point for some differential<br/>4 treatment by reference to the national treatment<br/>5 standard.<br/>6 Ngali Mining was in fact a gold miner. It had been<br/>7 granted licences to mine a different mineral -- gold --<br/>8 to that which NRD mined, using different techniques,<br/>9 against a totally different contractual background, and<br/>10 indeed in a different period, several years later, under<br/>11 a new 2018 Mining Law. So there's just no relevant<br/>12 comparison in order to conduct any useful exercise.<br/>13 So those are really the issues in the case that we<br/>14 will be covering, and I've given you a cross-section of<br/>15 them by reference to the issues. What I was proposing<br/>16 to do -- and perhaps now would be a good time to<br/>17 break -- is give you a cross-section of the case in<br/>18 a different way, which is chronologically, just trying<br/>19 to divide the period into blocks of time, and just to<br/>20 tell the Tribunal what particular milestones or points<br/>21 that are likely to be covered in the evidence are to be<br/>22 looked out for in each block of time, which I hope will<br/>23 be helpful.<br/>24 THE PRESIDENT: Thank you. We will break now, but we will<br/>25 break for 40 minutes, not 45 minutes. Thank you.</p> <p style="text-align: center;">Page 126</p>           | <p>16:43 1 the Zarnack era. And that covers the period from 2006,<br/>2 when the Zarnacks and Mr Benzinge incorporated NRD,<br/>3 through to 2008, when the Zarnacks sold to HC Starck,<br/>4 a mining company.<br/>5 Now, in that first period there was obviously the<br/>6 contract, which was issued in November 2006, and the<br/>7 four-year licences, which were subsequently issued.<br/>8 It's just worth pulling up the contract briefly. It's<br/>9 at C-017. And I would submit it's quite telling that<br/>10 this morning Mr Cowley didn't spend any time on the<br/>11 contract, even though it's said to be where there's<br/>12 a guarantee of rights to a long-term licence.<br/>13 If we look at page 1, we can see from Article 1 that<br/>14 there is a four-year period, four-year term of the<br/>15 contract. In fact, I'm not sure -- thank you, FTI --<br/>16 I'm not sure it needs to be blown up, unless anyone<br/>17 particularly wants it. I think one can see from the<br/>18 full screen. So it's an authorisation for four years.<br/>19 There are then a series of obligations, starting in<br/>20 Article 2, which are obligations on NRD. These<br/>21 obligations amounted to conditions of obtaining<br/>22 a long-term licence later, as Mr Mugisha explains. And<br/>23 just in that context, it's worth noting that Article 5<br/>24 always provides for the ability to terminate for breach<br/>25 of the obligations.</p> <p style="text-align: center;">Page 128</p> |

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|--|---|
| <p>16:44 1 Mr Gatere, in his witness statement, has explained<br/>                 2 that a number of these licences were issued as part of<br/>                 3 the privatisation of mining, the goal being to improve<br/>                 4 production and move away from artisanal mining, which<br/>                 5 can be as simple as individuals with picks and shovels,<br/>                 6 towards a more industrial model. The idea of the<br/>                 7 four-year licence was for the private investors to prove<br/>                 8 themselves as serious operators.<br/>                 9 So they were to commence industrialisation and,<br/>                 10 importantly, conduct exploratory work and evaluate the<br/>                 11 mineral reserves, so that at the end of the four-year<br/>                 12 period they could produce a feasibility study. And the<br/>                 13 government needed to be satisfied about the adequacy of<br/>                 14 the information and the proposals in the feasibility<br/>                 15 study, including the resource estimates and the<br/>                 16 exploratory work done, before it would grant a long-term<br/>                 17 licence.<br/>                 18 You can see this reflected in the contract. So<br/>                 19 Article 2.2 provides for the provision of an investment<br/>                 20 plan, as well as an environmental protection plan. And<br/>                 21 in the case of the Zarnacks, that was the one that<br/>                 22 resulted in a \$39 million proposed investment over the<br/>                 23 four years.<br/>                 24 Article 2.3 then provides for the concessionaire to<br/>                 25 move to industrial exploitation immediately; in other</p> <p style="text-align: center;">Page 129</p>                                       | <p>16:47 1 reserves as required by the contract.<br/>                 2 So we'll come back in a moment to the contract, but<br/>                 3 if FTI could pull up Mr Imena's supplemental witness<br/>                 4 statement, I would be grateful. It's paragraphs 13 and<br/>                 5 14, where he says he explains further why the<br/>                 6 November 2010 application -- that's fine. So:<br/>                 7 "13. First, the report NRD provided talks largely<br/>                 8 about gathering already existing information (a desktop<br/>                 9 study) giving an introduction to geology and<br/>                 10 mineralization, setting out achieved production and<br/>                 11 providing some information about remote sensing. This<br/>                 12 kind of information is simply a preliminary description<br/>                 13 of the concessions and a summary of what NRD produced in<br/>                 14 the previous 4 years. It is not a feasibility study for<br/>                 15 a professional, industrial mining project, as was<br/>                 16 required under the contract.<br/>                 17 "14. A feasibility study for an industrial mining<br/>                 18 project should be a comprehensive and detailed document<br/>                 19 that contains, among other things; the study of the<br/>                 20 geology, geophysical and geochemical studies,<br/>                 21 geological, geophysical and geochemical maps, the ore<br/>                 22 reserves as per standard definitions, the mineral<br/>                 23 reserves models, geotechnical studies, studies on<br/>                 24 environment, studies on infrastructure, studies on<br/>                 25 markets, the mine design based on the mineral reserves</p> <p style="text-align: center;">Page 131</p>             |
| <p>16:46 1 words, as per the government's strategy, don't just<br/>                 2 continue with artisanal mining. And that is,<br/>                 3 unfortunately, what NRD very largely did, because --<br/>                 4 just jumping ahead -- in three out of its five<br/>                 5 concessions, on any view there was no industrialisation<br/>                 6 of any kind at all. In two of them, there was very<br/>                 7 limited infrastructure work, which I will come back to.<br/>                 8 Article 2.5 provides for evaluation reports of the<br/>                 9 reserves. So that would require substantial<br/>                 10 exploration, drilling and sampling and the like to<br/>                 11 evaluate reserves. And what's also required is<br/>                 12 a feasibility study after four years.<br/>                 13 Now, we've seen this reference to a feasibility<br/>                 14 study. It's worth understanding what a feasibility<br/>                 15 study is. And this arises because we fully accept that<br/>                 16 there was some accompanying material with NRD's<br/>                 17 November 2010 application, and indeed its 2014<br/>                 18 application, and the Claimants say that this amounted to<br/>                 19 a feasibility study as required by the contract.<br/>                 20 We would suggest it's worth looking to see what<br/>                 21 Mr Imena says about that. He is a geologist. He became<br/>                 22 the State Minister of Mining. And in his supplemental<br/>                 23 statement, he explains at paragraphs 13 and 14 why the<br/>                 24 material in the November 2010 application did not amount<br/>                 25 to a feasibility study, or indeed an evaluation of</p> <p style="text-align: center;">Page 130</p> | <p>16:48 1 models, the mine sections and mine plans, the mining<br/>                 2 methods and extraction sequences, the ore handling<br/>                 3 processes, the results of the metallurgical tests, the<br/>                 4 process plant design and flow sheet, the mine<br/>                 5 construction budget and schedule, the production<br/>                 6 schedule, the capital and operating costs estimate cash<br/>                 7 flow study, the financial evaluation and risks analysis.<br/>                 8 NRD's report did not include any of [that] ..."<br/>                 9 I'm not going to go into NRD's report at this stage,<br/>                 10 but I will be doing that in due course. But that gives<br/>                 11 you a picture of what one would be expecting to see in<br/>                 12 a serious application for a long-term mining contract,<br/>                 13 and NRD never came close to producing a study of this<br/>                 14 kind. And as I say, Mr Marshall was warned when he<br/>                 15 bought into this project by NRD, the existing people at<br/>                 16 NRD, that the work just hadn't been done to meet the<br/>                 17 requirements of the contract. And once he arrived on<br/>                 18 the scene, he never invested so as to procure that the<br/>                 19 work was done.<br/>                 20 FTI, if I could go back to Article 4 of the contract<br/>                 21 (C-017), please, that we were on just now. Thank you.<br/>                 22 So the provision of a feasibility study is<br/>                 23 an obligation under Article 2. Then Article 4 provides:<br/>                 24 "After positive evaluation of the submitted<br/>                 25 feasibility study [NRD] will be granted the mining</p> <p style="text-align: center;">Page 132</p> |

16:50 1 concessions."  
 2 That's in the English. There is an issue about  
 3 French and English translations that doesn't matter for  
 4 this purpose. But what's clear is that not only is  
 5 there an obligation to provide the feasibility study, if  
 6 the concessionaire is to be provided with a long-term  
 7 licence, this requires positive evaluation. So in other  
 8 words, the government needs to be satisfied with the  
 9 feasibility study before it will grant a long-term  
 10 licence.  
 11 Just pausing there, one can see immediately that the  
 12 Claimants' case is untenable that there was a guarantee  
 13 of a long-term contract, because you can see that that  
 14 doesn't work on the face of the contract. The purpose  
 15 of the contract was for the concession holder to prove  
 16 itself; and unless it did, it wouldn't be granted  
 17 a long-term contract. So it needed to comply with  
 18 Article 2 and it also needed to have the feasibility  
 19 study positively evaluated.  
 20 So I'm coming to the end of the Zarnack era. That  
 21 ended in 2008, by which point very little had been done  
 22 on the concessions at all, and very little invested.  
 23 That's explained when you see Professor Rupiya's  
 24 evidence. He was a geologist at NRD. He explains that  
 25 very little had been done by the end of 2008.

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16:51 1 The next period is between 2008 and 2010. In this  
 2 period NRD was substantially owned by HC Starck, which  
 3 is a mining company.  
 4 Now, this was the only period in which any material  
 5 degree of proper investment was done. They did  
 6 undertake some infrastructure investment and they also  
 7 undertook some exploratory work, but even that  
 8 investment was, in fact, quite limited. It fell very  
 9 far short of the kind of money envisaged in the  
 10 Zarnacks' \$39 million investment plan. It seems at most  
 11 to have been about \$13 million, about a third of the  
 12 proposed level of investment.  
 13 In fact, what one sees in the evidence is that there  
 14 was a very heavy emphasis and focus by Starck on one  
 15 single piece of infrastructure, which was a wolframite  
 16 or tungsten processing plant on the Rutsiro concession.  
 17 And unfortunately that turned out to be a white  
 18 elephant, and I'll come back to why in a moment.  
 19 Mr Ehlers, one of our witnesses, is a mining  
 20 engineer, and he was the MD of NRD during the Starck era  
 21 and in the early part of the period after Mr Marshall  
 22 took over. In his witness statement he explains the  
 23 state of play in late 2010, when the four-year period  
 24 was up and when NRD was applying for a renewed licence,  
 25 and his evidence coincides and chimes very well with

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16:52 1 Professor Rupiya's, who was also there on the scene as  
 2 the geologist.  
 3 There were five concessions. Starck had focused  
 4 their investments in one of them, Rutsiro, and  
 5 specifically on this processing plant, which was  
 6 expensive, and it was a plant which did end up being  
 7 a white elephant and it never went into production,  
 8 although it did have some testing.  
 9 As a result of NRD's failure to carry out proper  
 10 exploratory work in advance of building this plant, the  
 11 plant could never be commercial. And the main problem  
 12 was that the premise for the build was that it could be  
 13 used to process rocks which were in the local scree,  
 14 which were a result of previous colonial mining, the  
 15 premise being that that scree was itself rich in  
 16 tungsten, following which at some point they would be  
 17 delving into the primary ore, which it was thought was  
 18 also sufficiently rich in tungsten.  
 19 All those premises turned out to be wrong, and as  
 20 a result there was never the ability to produce  
 21 a commercially viable amount of ore of the right grade  
 22 to make the plant worth operating, and as a result the  
 23 plant never worked at all. When I say "never worked at  
 24 all", I'm not suggesting that at the testing phase it  
 25 wasn't operable, but it was never commercially viable

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16:54 1 and never actually processed any ore.  
 2 So Mr Cowley said this morning that whether or not  
 3 it was processing minerals, the plant had to be  
 4 maintained. That's actually not correct and not borne  
 5 out by the evidence. The evidence is that not only did  
 6 it not work because it was not commercially viable, it  
 7 actually wasn't maintained and couldn't even have been  
 8 made to work, or at least not without some further  
 9 rehabilitation. So that's Rutsiro.  
 10 There's then Nembra, which was a tin mine, and the  
 11 one that already had the most infrastructure as a result  
 12 of mining from the colonial era. Starck, on that  
 13 concession, had made also some limited further  
 14 investment, but in neither of those two concessions was  
 15 there any significant level of industrialisation.  
 16 For the other three concessions, which are Giciye,  
 17 Mara and Sebeya, there was no industrialisation at all;  
 18 there was just a continuation of artisanal mining.  
 19 So that's industrialisation, which didn't comply  
 20 with the obligations under Article 2. And it wasn't  
 21 just the industrialisation that was limited; it was also  
 22 the exploration work and the reserve estimates, which  
 23 are particularly important when you come to consider the  
 24 ability to produce a feasibility study.  
 25 Professor Rupiya gives evidence about that, and his

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16:55 1 point is that NRD had only done superficial exploratory  
 2 work and only approximate estimates of reserves, which,  
 3 as he says, were more guesswork than anything else  
 4 because of the superficial level of sampling that had  
 5 been carried out. That's dealt with, just for your  
 6 note, in the witness statement at paragraphs 18-21.  
 7 Because of all that, the only hope in the 2010  
 8 application was not to get a long-term contract, but to  
 9 be given a five-year licence to essentially have another  
 10 go, the hope being that NRD might do a better job on the  
 11 concession areas in the next five years, and they might  
 12 at that point have a shot at a thirty-year licence.  
 13 That is why, of course, the 2010 application is  
 14 indeed only aimed at a five-year licence. Both NRD and  
 15 the government understood that it was an application for  
 16 a five-year licence, and Mr Marshall understood that  
 17 too, and we will be going to some of the evidence on  
 18 that with him in cross-examination.  
 19 There is nothing in the 2010 application to support  
 20 the suggestion that this was an application for a vast  
 21 mining licence under Article 57 of the Mining Law. All  
 22 the documents point to this being an application for  
 23 a five-year licence under Article 45 and a small mines  
 24 exportation licence, and there's nothing in the document  
 25 that goes beyond a five-year window.

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16:57 1 Mr Cowley suggested this morning that it's normal in  
 2 the industry not to go beyond a five-year window, but no  
 3 evidence for that proposition either. And it's  
 4 inconsistent with NRD's own later application, which  
 5 does indeed produce figures going beyond the five-year  
 6 window and out to the thirty years that was sought.  
 7 Professor Rupiyya was there, and his understanding  
 8 was that NRD was applying for a small mining licence for  
 9 five years under Article 45.  
 10 Now, part of, as I understood, Mr Cowley's  
 11 submission this morning was that any application for  
 12 a mining licence must have been for a long-term vast  
 13 concession licence. That's simply not right, because  
 14 there's a mining licence under Article 45, which is  
 15 a small mining licence, which is indeed what NRD were  
 16 after. It's quite clear, we suggest, that Mr Marshall  
 17 understood this at the time, and we'll come to that.  
 18 Now, that's the second block of time. The next  
 19 block of time is really the period from the end of 2010,  
 20 after Mr Marshall's arrival and Spalena's acquisition of  
 21 NRD, until about the beginning of 2012.  
 22 Dealing with the acquisition by Spalena, what's  
 23 important to note is that Mr Marshall conducted due  
 24 diligence and spent some time with Mr Ehlers and was  
 25 specifically told about the limitations in the work that

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16:58 1 had been done in the previous eras, and specifically  
 2 told about the limitations in the application.  
 3 He was also specifically told that because of the  
 4 limited work done, NRD thought that if any further  
 5 licences were granted, these would be on a short-term  
 6 basis. So he went in with his eyes open, he paid  
 7 a desultory price of [REDACTED] for the company, and the  
 8 idea that he thought that there were long-term licences  
 9 guaranteed and assured is, in my submission, absurd; not  
 10 only at odds with the contract in fact in place, but  
 11 also at odds with what he was told by NRD at the time  
 12 and at odds with the application that had already gone  
 13 in.  
 14 That application needed to be assessed and was  
 15 assessed against Rwanda's 2010 Mining Policy, and that  
 16 stressed the need to critically assess and evaluate  
 17 applications to make sure that in these four-year  
 18 periods, effective exploration work was being done, and  
 19 the concessionaires weren't simply conducting artisanal  
 20 mining on the concessions.  
 21 We've set out quite a long quote at paragraph 19 of  
 22 our skeleton. What the policy is effectively doing is  
 23 warning against exactly the kind of practices that NRD  
 24 was guilty of across its extremely large concessions, in  
 25 three of which NRD wasn't even pretending to do anything

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17:00 1 other than purely artisanal mining.  
 2 While I'm dealing with this shift from artisanal to  
 3 industrial mining that Rwanda was seeking to push, can  
 4 I just pick up on one point in paragraph 38 of the  
 5 Claimants' pre-hearing brief. If I could start in the  
 6 middle of the paragraph, the Claimants say:  
 7 "Astoundingly, Mr Gatare, in his second witness  
 8 statement, states that 'the Rwandan mining industry  
 9 remains largely artisanal.'"  
 10 There's nothing astounding at all about anything  
 11 Mr Gatare says in his second witness statement, and at  
 12 some point -- we could go to it now, but I'll just note  
 13 it now -- paragraph 20 of Mr Gatare's second witness  
 14 statement is entirely clear.  
 15 What he's saying is the aim and the policy of Rwanda  
 16 is to industrialise from artisanal mining, and  
 17 concessions are awarded on that basis. But the process  
 18 of industrialisation is of course a gradual one, and the  
 19 point that he's dealing with in this paragraph is that  
 20 for so long as the industry has a largely artisanal  
 21 component, you will see fluctuations in production  
 22 volumes, because miners and productivity can wax and  
 23 wane, depending on things like the price of minerals and  
 24 whether mining at an artisanal level is sufficiently  
 25 economical for the individual miners as compared with

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17:01 1 other activities.  
 2 So when you get to a sentence lower down in  
 3 paragraph 38, the Claimants say:  
 4 "Mr Gatare goes a step further and actually  
 5 dismisses the benefits of 'industrial mines,' such as  
 6 the ones that NRD was purportedly required to build,  
 7 because of the 'substantial sunk cost[s]' associated  
 8 with running such large mines."  
 9 Now, this is a regrettable part of the paragraph.  
 10 It simply doesn't characterise what Mr Gatare says in  
 11 his witness statement. He doesn't dismiss the benefits  
 12 of industrial mining at all in paragraph 20 of his  
 13 supplemental witness statement, and no fair reader of  
 14 that statement could have thought he was. He in fact,  
 15 in that paragraph, explicitly extols the benefit of  
 16 industrial mining. But he does say that so long as  
 17 there are still significant levels of artisanal mining,  
 18 you will have this side effect of fluctuating levels of  
 19 productivity.  
 20 Again, I do say it's unfortunate. I've had to spend  
 21 time -- and we've all had to spend time -- unpicking  
 22 points like this because they are simply inaccurate.  
 23 Coming back to the acquisition by Spalena of NRD,  
 24 you will have seen that there is a dispute about whether  
 25 there were other components or bits of consideration in

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17:04 1 was inherent in the purchase.  
 2 Now, the evidence is that Mr Marshall and his  
 3 partner Ms Mruskovicova ran NRD as a briefcase company:  
 4 they borrowed from traders, they ran up debt, they  
 5 drained the company's working capital. And this meant  
 6 that the situation worsened under Mr Marshall's watch:  
 7 no investment, drop in production levels from the start  
 8 times, and less ability to control the concessions in  
 9 terms of illegal mining and environmental damage.  
 10 The November 2010 application was evaluated by  
 11 Rwanda in 2011. As with the later licence applications,  
 12 there was an objective evaluation by a senior geologist  
 13 and staff member, Dr Michael Biryabarema, who is  
 14 a witness. In line with what NRD themselves expected  
 15 when they made the application, he determined that the  
 16 November 2010 application was deficient, in particular  
 17 in respect of the exploration works and the resource  
 18 evaluation. Just for your reference, it's at R-111, and  
 19 we will be going to it in due course.  
 20 As we saw in Mr Imena's witness statement that we  
 21 looked at earlier, there was no proper feasibility study  
 22 or resource evaluation as required by Article 2 of the  
 23 contract. So what that means is that Article 2 was not  
 24 complied with, even before you get to the question of  
 25 whether there could be a positive evaluation of any

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17:03 1 the purchase of NRD, and those are points that are said  
 2 to be relevant to Bay View's standing to pursue a claim  
 3 in this arbitration. [REDACTED]  
 4 [REDACTED].  
 5 We will go to the detail of all of that with  
 6 Mr Marshall, and we will be suggesting that the  
 7 Claimants have cooked up a story about the alleged  
 8 liabilities that NRD had to Bay View Group at the time  
 9 of the acquisition. We'll come back to this in  
 10 evidence.  
 11 The other point to note about this period -- this is  
 12 the early part of Mr Marshall's arrival -- is that there  
 13 was and is no evidence to suggest that Spalena had, or  
 14 currently has, any financial substance to it.  
 15 The evidence shows that by the end of 2010, when  
 16 Mr Marshall arrived, NRD itself was in deep financial  
 17 trouble -- we suggest that that's reflected by the  
 18 [REDACTED] purchase price -- and Spalena didn't bring  
 19 anything to the table. It didn't invest, and there's no  
 20 suggestion that it ever had the resources to do so.  
 21 So when we get to the 2014 application and we see  
 22 that one of the problems with the application, as  
 23 identified by the Rwandan teams at the time, was NRD's  
 24 inability to demonstrate that it or its owners had any  
 25 adequate financial resources, that's a deficiency that

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17:06 1 feasibility study for the purposes of Article 4.  
 2 NRD were informed of this in August 2011 by a letter  
 3 from Mr Kamanzi. By that point, as Mr Mugisha explains,  
 4 all rights under the contract to a long-term licence  
 5 were at an end. But Mr Kamanzi did give NRD  
 6 an extension of the licences for six months, to give NRD  
 7 an opportunity to prove it was entitled to be granted  
 8 any further licences.  
 9 Those licence extensions didn't extend the contract,  
 10 but they did amount to extensions of the licences. And  
 11 there was indeed a subsequent licence extension, and the  
 12 last licence extension expired in October 2012. None of  
 13 these licence extensions -- and we'll look at the  
 14 documents -- none of them involved any assurance that  
 15 any long-term contract would ultimately result, or  
 16 anything remotely of that kind.  
 17 Just pausing there, it is unfortunate, we will be  
 18 submitting, that the Claimants have given so many  
 19 distorted quotes from these extension letters, to give  
 20 the impression that these extensions were themselves  
 21 somehow envisaging or encouraging the Claimants in the  
 22 belief of long-term licences. They simply weren't, and  
 23 we can look at the documents.  
 24 There is then, still in this period 2010-2012, what  
 25 we submit is a curious episode which occurs in late

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17:07 1 2011.  
 2 The Claimants' case, their version of events, is  
 3 that NRD agreed a draft long-term contract with  
 4 an employee of the mining industry, Mr Bidega, who is  
 5 one of their witnesses. The Claimants say that  
 6 Mr Bidega went so far as to have the contract approved  
 7 by the minister and submitted to cabinet.  
 8 This is inaccurate, and we will be exploring that  
 9 with the witnesses. Mr Bidega was an employee who was  
 10 just about to join NRD at this point, and did join NRD  
 11 immediately after the events in question. We dispute  
 12 that any draft was ever agreed, or that Mr Bidega would  
 13 ever have been duly authorised to do so. And no such  
 14 draft was in fact ever put to, let alone approved by the  
 15 minister, still less ever submitted to cabinet. That is  
 16 another factual distortion in the case.  
 17 One thing I would say about this episode, and the  
 18 2011 draft that Mr Marshall himself prepared and sent to  
 19 Mr Bidega, is it is quite clearly a draft contract for  
 20 a five-year licence. That's quite an important point,  
 21 because the Claimants' case is that he always understood  
 22 that there was an assurance of a long-term licence, and  
 23 they even say that the November 2010 application was for  
 24 a long-term licence. It's impossible to reconcile that  
 25 with what Mr Marshall was up to in late 2011, which is

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17:10 1 October 2012, just not beyond. We're not saying there  
 2 were no licence extensions after August 2011.  
 3 In August 2012 we have, just for the timeline, the  
 4 first incident involving Mr Benzinge and the RDB, which  
 5 I talked about earlier. And by the end of that year,  
 6 the way things stood was like this: first, the licences  
 7 had expired in October 2012; secondly, there had never  
 8 been an application for long-term licences; thirdly, at  
 9 this point there were environmental and illegal mining  
 10 issues in NRD's western concessions, which had led to  
 11 NRD being suspended from operating in those concessions.  
 12 The next block of time is 2013. In January of that  
 13 year, NRD did put in what purported to be an application  
 14 for long-term licences. But it was a desultory  
 15 document, and we do say it was somewhat telling that in  
 16 his account of things this morning, Mr Cowley didn't  
 17 even mention this document and it didn't feature on his  
 18 timeline. The reason for that is that it doesn't fit  
 19 into his case theory that the 2010 application was still  
 20 somehow live and that the 2010 application was in some  
 21 way for long-term licences. It wasn't live, Mr Marshall  
 22 knew it, and it wasn't for long-term licences. And  
 23 that's why he put in this desultory document in  
 24 January 2013.  
 25 For your note, that's at C-054. It was quite

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17:09 1 drawing up a five-year licence.  
 2 What in fact happened in this period -- we're now at  
 3 late 2011 -- was that Dr Biryabarema told NRD that it  
 4 should be applying for short-term licences for only two  
 5 of the concessions. What he was saying was that NRD  
 6 should be focusing its limited resources on what it  
 7 thought were the two most promising concessions. But  
 8 after this, NRD insisted at all times in holding out for  
 9 all five concessions, even though it didn't in fact make  
 10 any renewed application of any kind for any length of  
 11 licence. And indeed, by this stage NRD had never made  
 12 any application for a long-term licence.  
 13 So that's the end of 2011. The next period is 2012.  
 14 In that period there was the further licence extension  
 15 until October 2012, and after that no further formal  
 16 licence extensions, although we accept there were ad hoc  
 17 permissions to remain on-site. And just to reiterate,  
 18 none of the ad hoc permissions either could have been  
 19 thought to convey any assurance of a long-term licence.  
 20 Just give me one moment to read my own note to  
 21 myself. I apologise. (Pause)  
 22 Yes, it's just to pick up on one point from this  
 23 morning. Just to clarify our case, contrary to what  
 24 Mr Cowley thought our case was, we do certainly accept  
 25 that there were formal licence extensions up until

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17:12 1 literally only a nine-page rehash of points in the  
 2 earlier November 2010 document which had previously been  
 3 seen as inadequate. There's no new material in it at  
 4 all. We would suggest that this could not really  
 5 seriously have been regarded by NRD as a serious and  
 6 real application.  
 7 In May of that year, the RDB countered with what was  
 8 a realistic and serious position, because they indicated  
 9 that the RDB would be prepared to negotiate for each  
 10 concession separately, and they wanted to start  
 11 discussions for a small-scale five-year licence at the  
 12 Nemba concession, which was the most productive  
 13 concession by a distance. So that is a sensible  
 14 position: there was one apparently productive mine, and  
 15 they said to NRD, "Focus your resources on applying for  
 16 a five-year licence for this productive mine".  
 17 That discussion led to one of the letters from  
 18 Mr Marshall to Mr Imena of the kind we'll see a lot of  
 19 in this case: a tirade of complaints and factual  
 20 distortions. And one of the distortions was the  
 21 proposition that NRD was automatically entitled to  
 22 long-term licences, which Mr Marshall had known from the  
 23 outset was never the case.  
 24 Now, by this stage I should say that NRD -- this is  
 25 the summer of 2013 -- had been allowed back onto its

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17:13 1 western concessions, following its own promise that it  
 2 could curb illegal mining on its concessions by  
 3 recruiting demobilised soldiers.  
 4 Now, later in that year -- so I've just referred to  
 5 NRD being invited to apply for a Nemba five-year  
 6 licence. They didn't. And later in that year, it again  
 7 needed to be the government, specifically Mr Imena,  
 8 pushing the NRD to apply. He did that in October 2013,  
 9 making the point to NRD that for a year or so, it had  
 10 now been operating without a licence; the time had come  
 11 it needed to apply. And he also reiterated the point  
 12 that NRD didn't seem to have capacity for five  
 13 concessions and should focus on two, Nemba and Rutsiro.  
 14 Again, this advice was ignored. NRD made no new  
 15 licence application. And we would suggest that despite  
 16 this prompting and chasing, the failure to do so does  
 17 demonstrate part of the unprofessionalism of NRD's  
 18 approach.  
 19 So that's 2013. We then move to 2014. A new Mining  
 20 Law came in in the first half of 2014, and NRD needed to  
 21 apply for a licence under the new law. NRD didn't hold  
 22 an existing licence, so it couldn't take advantage of  
 23 the grandfathering provisions. And also another  
 24 technical issue was that the terms of NRD's licences  
 25 wouldn't have permitted it to rely on grandfathering

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17:15 1 provisions anyway.  
 2 So NRD needed to apply for new licences anyway and  
 3 it had to be prompted by the government to apply. First  
 4 it was prompted in April 2014, which NRD ignored, and  
 5 then it was prompted again in the summer of 2014.  
 6 I'll come back to that in a moment, because in  
 7 between those two prompts we have the Benzinge issues  
 8 coming up again, and that starts to happen after  
 9 May 2014. Because by May 2014 there had been the  
 10 arbitration in April 2013, and there had been two rounds  
 11 of appeal after that, with the Supreme Court decision  
 12 being given in May 2014. And from that point onwards,  
 13 Mr Benzinge had the benefit of that award and those  
 14 judgments.  
 15 So in August 2014 Mr Imena made his follow-up  
 16 request that NRD make a new application for licences  
 17 under the new Mining Law, and this time he gave them  
 18 a deadline: 30 days. It's worth noting that the request  
 19 from Mr Imena specifically identified exactly what  
 20 needed to be provided in the application, and he asked  
 21 that the application be made on  
 22 a concession-by-concession basis.  
 23 It's worth picking up on this: again, the Claimants'  
 24 pre-hearing brief, paragraph 22, where they say:  
 25 "Despite assurances from Mr Imena that negotiations

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17:17 1 of the long term licenses would resume, he inexplicably  
 2 demanded that NRD 're-apply' for its licenses,  
 3 supposedly as a result of the enactment of the new 2014  
 4 mining law. This was entirely inconsistent with prior  
 5 communications in which Claimants were assured that the  
 6 stalled negotiations towards completion of long term  
 7 licenses based upon the submitted application and draft  
 8 long term license would continue. There was never  
 9 a discussion of the need to 'reapply' because Claimants  
 10 had already applied and were in the midst of a process  
 11 to complete the negotiation of the long term licenses."  
 12 We would submit that this is part of the pre-hearing  
 13 brief that loses all contact with reality and what in  
 14 fact the documents show.  
 15 First, it's worth flagging up that a feature we see  
 16 in this paragraph, and also in paragraph 20 just above  
 17 it, a feature of the Claimants' case approach, both in  
 18 the Claimants' memorials and in Mr Marshall's witness  
 19 statement, [is that] whenever a document or a meeting  
 20 refers at all to an extension being given or discussions  
 21 being had about a licence, at each point the Claimants  
 22 interpolate the expression "long term licenses" or "long  
 23 term contracts", to give the impression that the  
 24 relevant document or discussion was indeed about  
 25 a long-term licence and gave the Claimants the

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17:18 1 expectation that NRD would get a long-term licence.  
 2 Just to give an example, you'll see one just above  
 3 it. If you go back to paragraph 20, one can see:  
 4 "When Respondent provided another explicit extension  
 5 of the short term license in October 2012, Respondent  
 6 stated that 'new contracts...will be negotiated as has  
 7 been communicated to all the existing concession  
 8 holders' further confirming Claimants' expectation that  
 9 NRD would receive the long term license."  
 10 Now, one might get the impression from that that  
 11 there was something in this letter that did foster the  
 12 impression that NRD would get or would be negotiating  
 13 long-term contracts, but that document is not  
 14 referenced. That document is the one at C-033.  
 15 I'm going to come back to this pre-hearing brief,  
 16 paragraph 22 in a minute, but if FTI could also pull up  
 17 C-033.  
 18 All that's being said here is -- paragraph 1 refers  
 19 back to extending the previous licence. It then says:  
 20 "In view of the ongoing work on reorganizing the  
 21 mining sector which will have a bearing on the new  
 22 contracts that will be negotiated as has been  
 23 communicated to all the existing concession holders,  
 24 I have the pleasure to extend your license ..."  
 25 So in other words, all that's being said is: there's

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17:19 1 a new law, all concession holders are being told that  
 2 the new law will have a bearing on licence applications,  
 3 and he's extending the licence. One cannot possibly  
 4 read anything in this letter as giving any indication or  
 5 assurance about a long-term contract or a long-term  
 6 licence. That's just one example, and there are very  
 7 many in this case.  
 8 But coming back in the pre-hearing brief to  
 9 paragraph 22, which I just read, looking at that first  
 10 sentence, there was nothing inexplicable in Mr Imena  
 11 demanding that the Claimants reapply under the new law.  
 12 Mr Imena had already been pressing NRD to apply for  
 13 a licence repeatedly, and for nearly one year by this  
 14 stage. The application needed to be under the new law  
 15 because that was what the law required.  
 16 The rest of the paragraph is also a fiction. There  
 17 were no "stalled negotiations" in respect of long-term  
 18 licences.  
 19 The true position is that NRD had made a hopeless  
 20 request, in this desultory nine-page document, for  
 21 a long-term licence in January 2013. NRD had then been  
 22 re-directed, in May 2013, towards making a realistic  
 23 application for a five-year licence, starting with  
 24 Nemba. Since then, since October 2013, Mr Imena had  
 25 repeatedly asked NRD to make a proper application,

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17:21 1 suggesting they focus on two of the five. They had been  
 2 asked again in April 2014 to make an application and  
 3 hadn't done so. And he was finally, in August 2014,  
 4 giving them a 30-day deadline. Nothing at all  
 5 surprising, except all that's surprising is NRD's  
 6 failure and unprofessionalism in not applying for  
 7 a licence sooner.  
 8 So we then go to September 2014, where NRD did make  
 9 an application as required by Mr Imena, but that  
 10 application was itself hopelessly deficient. It was  
 11 another rehash of the 2010 application, and NRD ignored  
 12 the request to apply on a concession-by-concession  
 13 basis. They declined to provide much of the material  
 14 that had been specifically requested. Recall that  
 15 Mr Imena helpfully gave a list of what needed to be  
 16 provided. That material wasn't provided, and what they  
 17 did provide was very far short of what could be expected  
 18 for a realistic application even for a short-term  
 19 licence.  
 20 Just pausing there, the Claimants repeatedly make  
 21 the point that NRD didn't have proper access to their  
 22 Kigali office. There's nothing in this. There are  
 23 evidential points here where we don't accept Claimants'  
 24 premise, which we'll be coming to. But leaving all that  
 25 aside, the critical deficiencies in the application had

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17:23 1 nothing to do with whether or not certain material could  
 2 or could not be obtained from the office. The critical  
 3 deficiencies arose because NRD couldn't possibly ever  
 4 supply compliant material because its operations and the  
 5 work done on the concessions was so deficient.  
 6 To give an example, NRD didn't provide adequate  
 7 information about the financial substance of NRD and  
 8 those behind NRD, such as the Claimants. They didn't do  
 9 so because NRD and those behind it didn't have the  
 10 financial substance. If they had had the financial  
 11 substance, the material could have been provided.  
 12 A similar point arises with information relating in  
 13 essence to feasibility study points: exploration,  
 14 evaluation of reserves and the like.  
 15 We have the 2014 application: it does have  
 16 accompanying documentation. That doesn't have any new  
 17 material from the 2010 report, and the reason for that  
 18 is that there hadn't been any material investment or  
 19 exploration or resource evaluation in the meantime. So  
 20 it's got nothing to do with what's available in the  
 21 Kigali office. Core material that was needed to support  
 22 a serious application didn't exist, and couldn't have  
 23 existed.  
 24 There was also, in the application, misleading  
 25 information that was given as to the level of investment

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17:24 1 from NRD, and we'll come back to that.  
 2 I've referred at the beginning of my submissions to  
 3 what happened to this application; I'm not going to  
 4 repeat it at length. It was evaluated by a team; they  
 5 recommended it was rejected, and it duly was. NRD was  
 6 given two further opportunities to improve the  
 7 application, and was even told exactly what was wrong  
 8 with it. By this stage we are going to 2015, and the  
 9 further information provided by NRD was desultory.  
 10 On each occasion, with each round of further  
 11 information, there was an objective review by Rwanda, by  
 12 a team; and the recommendation to the minister, quite  
 13 rightly, in each case was that the application was  
 14 inadequate and that it should be rejected, and that's  
 15 duly what happened in May 2015.  
 16 Throughout this process, Mr Marshall was still  
 17 writing bullying letters. They included letters to the  
 18 President and others making what we suggest are  
 19 outrageous allegations of corruption, and with  
 20 significant distortions of fact which are evident on the  
 21 face of the letters.  
 22 But one thing that does emerge from these letters is  
 23 that if the Claimants did have a claim of any kind, that  
 24 claim is, on any view, out of time, because the  
 25 Claimants had sufficient knowledge before the cut-off

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17:25 1 date. That knowledge is evident from the correspondence  
 2 which Mr Marshall sent. It even includes threats to  
 3 bring proceedings under the bilateral investment treaty  
 4 made as early as January 2012.  
 5 This is an insuperable difficulty for the Claimants.  
 6 They try to grapple with it at paragraph 30 of their  
 7 skeleton, where they suggest that the Claimants regarded  
 8 the final letter of 19th May 2015, which said their  
 9 applications were refused and they should vacate the  
 10 concessions, they regarded that as a "bump in the road".  
 11 That's untenable, not only in the face of the facts but  
 12 also in the face of Mr Marshall's own contemporaneous  
 13 correspondence.  
 14 Just while we're looking at paragraph 30 -- if  
 15 I could ask FTI to pull it up. It's the "bump in the  
 16 road" paragraph. They say:  
 17 "This was confirmed by Claimants[] dealings with  
 18 Respondent after receipt of the May 19, 2015 letter.  
 19 For example, Mr Imena continued to represent to  
 20 third-parties that NRD owned and operated the mines in  
 21 its Concessions."  
 22 This is also a hopeless submission which was covered  
 23 off in the evidence. Mr Imena met with these relevant  
 24 third parties -- and you were shown the document this  
 25 morning at C-120 -- he met with these third parties in

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17:29 1 That's all a whistle-stop tour, and we'll see quite  
 2 a lot more of the detail with Mr Marshall.  
 3 I'm going to mention something briefly about the  
 4 preliminary objection points. Before I do, could I just  
 5 pick up one other development in the Claimants' case,  
 6 which we do suggest is constantly shifting. This  
 7 relates to the public tender process.  
 8 There was a normal, objective tender process, and  
 9 the winning tender was duly chosen. The Claimants have  
 10 run an entirely false point that the winning tenderer  
 11 was Ngali Mining, being a company organised under the  
 12 Ministry of Defence. That is wrong. That's a point  
 13 made in the Claimants' Memorial at paragraph 270, and  
 14 it's wrong, as we've explained in detail in our  
 15 memorials and our evidence.  
 16 There is now, in the Claimants' skeleton  
 17 (paragraph 43), a new allegation that seems to be  
 18 a variation on this -- it's unpleaded and it's not  
 19 supported by any evidence -- that the concessions were  
 20 "transferred to a Rwandan investor with close ties to  
 21 [the government]". That's never been said before.  
 22 I apologise, I'll give you the reference; I've not  
 23 got it in my note.  
 24 "... the Concessions ... were transferred to  
 25 a Rwandan investor with close ties to [the government]."

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17:27 1 2014, when NRD was still on the concessions. So the  
 2 fact that the third parties didn't write to Mr Marshall  
 3 in 2015 is by the by. The Claimants have repeated this  
 4 submission this morning as if they hadn't even read the  
 5 evidence that makes it clear that this is a bad point.  
 6 As we explain in our skeleton, there was ultimately  
 7 a retendering of the concessions. The concessions, once  
 8 they are retendered, didn't go to the military, didn't  
 9 go to entities connected with the military. That's just  
 10 another conspiracy theory.  
 11 So, as I said at the beginning of my opening, once  
 12 one understands and analyses the story, one can readily  
 13 see that there simply isn't anything in this case.  
 14 There's no expropriation or anything like it.  
 15 NRD had every opportunity to make well-founded  
 16 applications for licences. The government was generous  
 17 in giving them opportunities. The government looked  
 18 fairly and objectively at all the applications that were  
 19 made. And the applications fell far, far short of  
 20 making the grade, as Mr Marshall should always have  
 21 known they would, because he was told of the problems at  
 22 the outset when he bought in, and he thereafter did  
 23 nothing to improve the problems or conduct further  
 24 exploration or further industrialisation that would have  
 25 enhanced the position.

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17:30 1 That's never been said before. No particulars have  
 2 been given, nor any explanation as to how this relates  
 3 to the public tender process that took place.  
 4 We do say that un evidenced allegations advanced by  
 5 way of assertion are unhelpful and they're inappropriate  
 6 in any arbitration or litigation. But they're even more  
 7 inappropriate, we would suggest, when the nature of the  
 8 allegation is extremely serious. These are public  
 9 proceedings, as the Claimants well know, and they should  
 10 be taking care not to make serious allegations without  
 11 proper evidence. But what we've seen here is the  
 12 opposite of them taking care.  
 13 I've already mentioned the extravagant claims  
 14 regarding Rwanda's approach to mineral smuggling and the  
 15 manufactured claims about an unnamed oligarch. Those  
 16 are allegations that simply shouldn't have been made:  
 17 there's no evidence to support them at all.  
 18 I've also mentioned the extreme claims of corruption  
 19 and the like against Mr Imena made by Mr Marshall, which  
 20 are still repeated in the Claimants' memorials. And  
 21 there are two other allegations that I just want to  
 22 mention now.  
 23 The first is the reference to Mr Imena's criminal  
 24 prosecution. As the President rightly picked up with  
 25 Mr Cowley, Mr Imena was acquitted of all charges.

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17:31 1 Mr Cowley suggested this morning that the  
 2 co-conspirators might not have been. We don't even  
 3 accept that. But in any event, that point is  
 4 irrelevant. Mr Imena was acquitted.  
 5 Mr Cowley, on being asked about that, the best he  
 6 could put it was that he didn't really know and he  
 7 wanted to look a bit more at the documents. Well, he  
 8 should simply not be advancing allegations essentially  
 9 insinuating that Mr Imena was guilty of criminal charges  
 10 when the evidence shows he was acquitted and Mr Cowley  
 11 cannot suggest otherwise. That allegation should be  
 12 withdrawn, and that should happen at some stage this  
 13 week, in my submission.  
 14 Just before I move to the second allegation,  
 15 I didn't give you a reference to the point I made  
 16 a little earlier about the tender process. It's  
 17 paragraph 11 of their pre-hearing brief.  
 18 The other allegation that I would like to mention  
 19 now is an allegation in the Claimants' evidence, which  
 20 we suggest is simply untrue, that Mr Marshall received  
 21 indirectly, via Ms Mruskovicova, a warning from  
 22 a Rwandan senior policeman that he had angered some  
 23 dangerous people and his life was in danger. We suggest  
 24 that is simply untrue.  
 25 But worse than that, we now see in the Claimants'

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17:33 1 skeleton that even this serious allegation has now been  
 2 distorted to become something even more serious. And if  
 3 I could just invite you to read what's said at  
 4 paragraph 11 of the skeleton in the last sentence and  
 5 what's said in paragraph 44 in the second sentence.  
 6 These are extremely serious allegations. They are  
 7 untrue. They are unsupported by any evidence, because  
 8 the evidence that is given -- and we suggest that that  
 9 is itself untrue -- which is in the witness statements,  
 10 it doesn't establish or come close to establishing the  
 11 propositions advanced in paragraphs 11 and paragraph 44.  
 12 Again, this is the opposite of taking the kind of  
 13 care that the Claimants should be taking with extremely  
 14 serious allegations of this kind. It's inappropriate,  
 15 it shouldn't have happened. And what's more, this  
 16 allegation doesn't even form any proper part of the  
 17 claim in this case. It's not relied on as a breach of  
 18 the bilateral investment treaty. And we, on our side,  
 19 don't consider it appropriate for our side even to be  
 20 required to spend material amounts of time addressing  
 21 this allegation that falls outside any proper claim that  
 22 can be advanced.  
 23 That's what I wanted to say on the substantive  
 24 merits points. We've also dealt at length in our  
 25 memorials with the legal analysis, and we've summarised

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17:35 1 that at paragraphs 78-94 of our skeleton and we've given  
 2 references to our Counter-Memorial and to our Rejoinder.  
 3 If I could just pick up on a point from the  
 4 Claimants' skeleton relating to the expropriation claim  
 5 and how that's advanced.  
 6 In their pre-hearing brief at paragraphs 41 and 45,  
 7 the Claimants explain, what seems to be to us for the  
 8 first time, what assets they consider to have been  
 9 expropriated. They now seek to say it's:  
 10 "... a processing plant, roads, bridges, reservoirs,  
 11 piping networks, a testing laboratory and other  
 12 buildings ... vehicles, equipment, and other tools ..."  
 13 But that point is advanced for the first time, and  
 14 there's in fact no evidence either of their property  
 15 rights to these items or of any taking of these items by  
 16 Rwanda.  
 17 I just want to now move on to say a few words about  
 18 the preliminary or jurisdictional objections that we  
 19 have. We've obviously explained these at length in our  
 20 Memorial on Preliminary Objections and our Rejoinder.  
 21 We do suggest this case fails in limine, before one  
 22 needs to consider all the merits points that I've been  
 23 spending time on.  
 24 As the Tribunal knows, our objections are of five  
 25 kinds. The first is temporal, and there are two aspects

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17:36 1 to that which we explain at paragraphs 51 to 59 of our  
 2 skeleton, giving the references to our Rejoinder and our  
 3 Memorial on Preliminary Objections.  
 4 The first aspect is that some of the Claimants'  
 5 claims, on analysis, amount to a complaint about matters  
 6 that took place before the treaty even came into force,  
 7 and the treaty doesn't operate retroactively.  
 8 Secondly -- and this is more of a point for this  
 9 week -- the claims are out of time because they were  
 10 submitted to arbitration more than three years after the  
 11 date on which the Claimants acquired knowledge, or  
 12 should have acquired knowledge, of the breaches alleged.  
 13 For that purpose, the relevant date to have in mind,  
 14 we suggest, is 12th June 2015, which is when this claim  
 15 was submitted. The Claimants are wrong in their  
 16 suggestion that 14th May 2015 is the cut-off date,  
 17 because that's the date of the submission of a different  
 18 claim to arbitration including a different party, and  
 19 that claim was not accepted by ICSID. We would suggest  
 20 that the claims are clearly out of time, in any event,  
 21 on either cut-off date.  
 22 This is an aspect that we would invite you to  
 23 particularly keep in mind when you listen to all the  
 24 evidence, because all these alleged breaches, all the  
 25 relevant conduct and matters complained of, all took

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17:37 1 place long before the cut-off date. The Claimants knew  
 2 all about them because NRD -- or Mr Marshall -- was in  
 3 fact complaining vociferously at the time. We say his  
 4 complaints were tendentious and without merit, but it's  
 5 impossible for the Claimants to suggest they weren't  
 6 fully aware of the matters complained of. They were  
 7 even complaining at the time that there was a breach of  
 8 treaty obligations and expropriation by the government.  
 9 The second area of preliminary objection relates to  
 10 standing. And in terms of this week's focus,  
 11 I particularly pick up on the BVG points, because we say  
 12 BVG simply has no standing because it has no interest in  
 13 NRD or in Spalena.  
 14 We'll be spending a little time with Mr Marshall on  
 15 the Claimants' allegations that BVG somehow did acquire  
 16 a sufficient interest in NRD as a result of money  
 17 allegedly lent to NRD under this cooperation agreement,  
 18 or out of alleged claims that NRD had against BVG out of  
 19 that agreement, or out of alleged transfer of assets to  
 20 NRD. Even leaving aside all the legal problems that  
 21 arise with the way the Claimants' case is put, we  
 22 suggest that the facts and the evidence relied on for  
 23 all those points involve a high degree of invention on  
 24 the Claimants' part, which we'll be exploring.  
 25 The third area of objection relates to the lack of

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17:39 1 jurisdiction *ratione materiae*, which we address at  
 2 paragraphs 67-72 of our skeleton. And for this week, we  
 3 will be particularly inviting the Tribunal to pay  
 4 particular regard to the evidence showing the complete  
 5 lack of any relevant investment or substantial  
 6 contribution to Rwanda's economic development by the  
 7 Claimants.  
 8 Spalena acquired NRD for [REDACTED]. You will see at  
 9 times the Claimants seeking to give the false impression  
 10 that the investment purportedly made by Starck prior to  
 11 the arrival of the Claimants was in some way the  
 12 Claimants' only investment.  
 13 You'll see an example of this, just to pick up the  
 14 pre-hearing brief again, at paragraph 35. You see in  
 15 the middle of this paragraph:  
 16 "Contemporaneous documents demonstrate that  
 17 Claimants invested at least €13 million by the end of  
 18 2010 ..."  
 19 By the end of 2010, of course, the Claimants'  
 20 hadn't; they only acquired NRD for \$ [REDACTED] at the end of  
 21 2010. That €13 million figure is not a reference to any  
 22 investment by the Claimants. That is the figure that  
 23 I said was the Starck and Zarnack -- although in  
 24 practice almost all Starck -- investment in the prior  
 25 period, which, as I said, was a third of the amount

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17:40 1 foreshadowed.  
 2 We say that NRD's and the Claimants' account of the  
 3 investments that were made by NRD are highly unreliable,  
 4 and we'll be exploring that in the evidence. And when  
 5 it comes to the Claimants themselves, leaving aside  
 6 Starck, we don't accept that there were any material  
 7 investments after their [REDACTED] acquisition, and indeed  
 8 that was one of the reasons why their 2014 application  
 9 was so hopeless.  
 10 I would just invite the Tribunal to note that the  
 11 lack of any investment by the Tribunal now, in fact,  
 12 appears to be largely accepted, at least impliedly. One  
 13 sees this from paragraph 9 of this document. If FTI  
 14 could go back to paragraph 9.  
 15 There's a reference to various work done, which is,  
 16 I should just point out, in fact new assertion, not  
 17 supported by evidence. So there's a lot of new  
 18 assertion here. But then the punchline is:  
 19 "Most of this investment came from retained earnings  
 20 and Claimants['] intention was to invest more heavily in  
 21 the Concessions after the receipt of the long term  
 22 licenses, which was necessary in order to attract  
 23 substantial investment."  
 24 So there's an implied concession here, an implied  
 25 acceptance that the Claimants didn't actually put any

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17:42 1 new money, despite what we'll see are untrue assertions  
 2 to the contrary given by Mr Marshall at the time.  
 3 The fourth area of objection relates to the lack of  
 4 any prior notification or request for settlement by  
 5 Spalena, as required by Articles 23 and 24 of the  
 6 treaty. We say that, put shortly, the claim by Spalena  
 7 is the one pursued in this arbitration, and there was no  
 8 compliance at all with the articles in respect of that  
 9 claim.  
 10 The Claimants' argument in their skeleton is that  
 11 the Claimants are functionally identical to claims that  
 12 were notified, and that's obviously wrong. One only  
 13 needs to look at the various points that we make in our  
 14 memorials, both on the merits and in relation to  
 15 jurisdiction points, to see that the centrality of  
 16 Spalena as the entity bringing the claims, and the idea  
 17 that notification of a claim not brought by Spalena  
 18 constitutes notification of a claim by Spalena, is, we  
 19 submit, hopeless.  
 20 We're about to move on to the evidential stage, and  
 21 Mr Marshall I know is going to start. Just one point on  
 22 the evidence.  
 23 We've noticed on our side quite a lot of factual  
 24 assertions in the Claimants' skeleton that are new and  
 25 unsupported by evidence. I know the parties have

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17:43 1 an opportunity to supplement their evidence with  
 2 evidence-in-chief, but we hope that this doesn't  
 3 foreshadow that the Claimants are going to seek to use  
 4 evidence-in-chief to advance extensive new evidence  
 5 that's never been notified to us. We submit that would  
 6 not be an appropriate use of their time.  
 7 I would also add that we would ask Mr Cowley or  
 8 Mr Harrison, whoever is doing the evidence-in-chief, to  
 9 please avoid putting leading questions to elicit  
 10 evidence-in-chief. It goes without saying that the same  
 11 applies to re-direct. And if there are any leading  
 12 questions, we will -- I just put down a marker -- be  
 13 inviting the Tribunal to discount any evidence that's  
 14 elicited in that way.  
 15 So unless I can help further, that's what I wanted  
 16 to say by way of opening.  
 17 THE PRESIDENT: Thank you very much. As I read the  
 18 timetable, you are half an hour ahead of your  
 19 allocation.  
 20 MR HILL: Well, I've got a lot to get through with  
 21 Mr Marshall, so I'm delighted.  
 22 THE PRESIDENT: Very well. I don't know whether Mr Marshall  
 23 is immediately available.  
 24 MR HILL: Also, I should say, I would be happy if everyone  
 25 wants to stop for ten minutes to organise --

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17:59 1 connection with Zoom. I did not understand that when  
 2 I said it was being sent now, that it hadn't been  
 3 completed yet. It wasn't completed during the  
 4 [opening]; it's being completed now. Mr Harrison will  
 5 stay offline and stay off the Zoom until it goes out.  
 6 THE PRESIDENT: Very well.  
 7 Let's continue then with Mr Marshall.  
 8 (6.00 pm)  
 9 MR RODERICK MARSHALL (called)  
 10 MR COWLEY: Mr Marshall, I would like to ask you to  
 11 introduce yourself to the Tribunal and, in addition to  
 12 introducing yourself by name, can you provide for the  
 13 Tribunal a brief explanation of the background of your  
 14 professional career?  
 15 THE PRESIDENT: Yes, Mr Marshall first of all has to make  
 16 a declaration.  
 17 MR MARSHALL: I solemnly declare upon my honour and  
 18 conscience that I shall speak the truth, the whole  
 19 truth, and nothing but the truth.  
 20 THE PRESIDENT: Thank you.  
 21 You can carry on with the direct.  
 22 MR COWLEY: Thank you, your Honour.  
 23 (6.01 pm)  
 24 Direct examination by MR COWLEY  
 25 MR COWLEY: Mr Marshall, please introduce yourself to the

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17:44 1 THE PRESIDENT: Shall we have a ten-minute break? I think  
 2 that would be very welcome. Thank you very much.  
 3 (5.44 pm)  
 4 (A short break)  
 5 (5.57 pm)  
 6 MR HILL: Mr President, while [the witness] is coming in,  
 7 can I just say I'm afraid we still haven't had the  
 8 Ehlers email. As I understood from the application, it  
 9 was one email with one attached document, and I really  
 10 struggle now to see why we haven't got it.  
 11 THE PRESIDENT: Mr Cowley?  
 12 MR COWLEY: Apologies, my understanding is Mr Harrison is  
 13 sending it now. When we were talking before --  
 14 Mr Harrison, like I said, is here with me. Just by way  
 15 of brief explanation, the way our system works, we can't  
 16 be on a Zoom call, we can't be on anything that requires  
 17 out-of-office connection, like working from home,  
 18 working in a conference room, and be on Zoom. It will  
 19 not hold.  
 20 So to be on here and present, you know, attending,  
 21 and to be on the network are two different things. So  
 22 while we're going, once we started up again, he hadn't  
 23 hit send yet; he had to stop and go back on to the  
 24 system. My apologies, but we are in our office, but we  
 25 have to maintain a separateness in order to maintain

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18:01 1 Tribunal and, in addition to introducing yourself by  
 2 name, please give a brief explanation of the background  
 3 of your professional career.  
 4 A. My name is Roderick Marshall. I, as a young lawyer,  
 5 moved to Slovakia in the Czech Republic when socialism  
 6 collapsed. I was with a larger firm at that time. We  
 7 started advising -- in fact, we were the -- I was the  
 8 only resident lawyer in Slovakia at that time. There  
 9 were many foreign lawyers in Prague, but only me in  
 10 Slovakia.  
 11 Their biggest problem: they did not have experience  
 12 of anything to do with the markets, sort of common-sense  
 13 things that you and I might automatically take for  
 14 granted. Their desperate need was for liquidity. They  
 15 started a series of financing Slovak Republic -- even  
 16 more so when they split from the Czech Republic, end of  
 17 2012, I guess.  
 18 So I was -- with only limited background in  
 19 sovereign debt financing, began working with a very  
 20 senior partner from my then law firm, which was Squire,  
 21 Sanders & Dempsey. We provided that service for the  
 22 Slovak Government. There were some conflicts between  
 23 the Slovak Government and our law firm, and we split off  
 24 and we continued performing sovereign debt financing for  
 25 the Slovak Government.

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18:02 1 We kept it very simple. In a certain way, blind  
 2 luck for both us and the Slovak Republic. We set the  
 3 terms of the loan arrangements. We did not allow  
 4 significant variations. So Slovakia paid in full and on  
 5 time, and was always able to refinance in successive  
 6 transactions because it had a good reputation.  
 7 I should add that Slovakia was unique in central  
 8 Europe at that time, being the only country which --  
 9 THE PRESIDENT: Mr Marshall, you've only got ten minutes, so  
 10 I suggest you don't spend too long in Slovakia.  
 11 A. Yes, thank you for that.  
 12 In 2003 the market in Slovakia was changing. I was  
 13 approached by USAID, because we're a very small firm and  
 14 could provide the sovereign debt financing services  
 15 cheaply, to provide -- to offer to provide it to Rwanda.  
 16 So at the urgency, as I say, of the State Department and  
 17 USAID, I met with, first, a group of Rwandans in  
 18 a delegation in Boston. They asked me to come and  
 19 visit. I visited. We began providing them with  
 20 pro bono ad hoc assistance on sovereign debt issues.  
 21 And at that same time --  
 22 MR COWLEY: I'm going to ask you to stop, only because I'm  
 23 trying to get to just the highlights at this point.  
 24 A. Yes.  
 25 Q. How long did a relationship with Rwanda regarding such

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18:04 1 services, your professional services as a lawyer,  
 2 transactional attorney specifically, how long did that  
 3 continue?  
 4 A. The whole time. It began -- you know, it was very  
 5 ad hoc at first, because, you know, they were just  
 6 coming off the Congo war. There was really a lot of  
 7 chaos. People were in positions where they didn't have  
 8 good experience. Everybody needed help of one kind or  
 9 another, and they wanted to be able to -- they were  
 10 particularly appreciative of what we were offering  
 11 because, you know, we had done it in Europe, we knew  
 12 what we were doing, and they were able to be sure  
 13 without having to pay very much -- in this case, nothing  
 14 at first -- to get the same services we provided to  
 15 European countries, sovereigns.  
 16 So it was very ad hoc for the Central Bank:  
 17 questions from time to time, sort of ongoing dialogue.  
 18 Very quickly they asked us, "Look, you know, we also  
 19 very badly need US investment in Rwanda", and the reason  
 20 being that they were the highest per capita recipient of  
 21 US foreign aid, not including military aid. So -- and  
 22 there were no investments from the United States, zero.  
 23 So they said, "Can you put together a group?"  
 24 Long story short, we did put together a group. We  
 25 went back and forth. They created most of the documents

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18:06 1 for us in the preparation for a request for licence, for  
 2 a long-term mining licence, they were issuing. Then by  
 3 statute under Rwandan law there are defined provisions  
 4 for how mining concessions are held and operated, and  
 5 that's what was being issued at that time, not more  
 6 generic licences.  
 7 So that's what we did.  
 8 Q. Mr Marshall, how long did you provide services, legal  
 9 services and related professional services, to entities  
 10 within Rwanda? Until what period of time?  
 11 A. Well, it was very much ad hoc until really 2010, because  
 12 we -- there was so much organisation -- these were  
 13 greenfields, there was nothing there, for Bisesero. So  
 14 we were spending enormous -- 24 hours a day of our time  
 15 working on sorting those things out.  
 16 We would get occasional requests for something.  
 17 People would come and see us, even though we were in  
 18 a remote area, and say, "What about this? How do we do  
 19 this?" And we were travelling back and forth to Kigali,  
 20 so we also had communications there.  
 21 It really became a significant portion of our time,  
 22 beginning in 2011, as we were taking responsibility for  
 23 NRD and were more frequently in Kigali, and then even  
 24 more so when -- it's odd to say, but when we didn't have  
 25 tags and couldn't sell materials, our business was

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18:07 1 frozen. So the military then came and bombarded us with  
 2 requests for memos and assistance in meeting companies  
 3 in Slovakia. We had delegations going back and forth.  
 4 That was a key element for them of gaining access to  
 5 European Union technology through the European Union  
 6 process.  
 7 But that really began in 20 -- in earnest, although  
 8 it was ongoing, but in earnest, 2014, 2015 and into  
 9 2016.  
 10 MR COWLEY: Thank you. Nothing further on direct.  
 11 THE PRESIDENT: Thank you.  
 12 Yes, Mr Hill.  
 13 (6.08 pm)  
 14 Cross-examination by MR HILL  
 15 MR HILL: Mr Marshall, you explain in your first witness  
 16 statement that you are the president of The Spalena  
 17 Company and the president of Bay View Group; yes?  
 18 A. Yes.  
 19 Q. And you had those roles since the formation of those  
 20 companies; correct?  
 21 A. Certainly with regard to Bay View, I had previously used  
 22 The Spalena Company as an entity to run a redevelopment  
 23 project, reconstruction of a building in Prague --  
 24 that's what the name Spalena is. It was a joint venture  
 25 with the archdiocese. And whether I was always the

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18:09 1 president, I can't say for sure. But that company went  
 2 inactive when the project was over.  
 3 Q. You are responsible for giving instructions on behalf of  
 4 both Claimant companies to the Claimants' lawyers in  
 5 this arbitration, Duane Morris; yes? You've given the  
 6 instructions?  
 7 A. Primarily.  
 8 Q. And you presumably read and approved the Claimants'  
 9 various memorials in this arbitration before they were  
 10 served?  
 11 A. Yes, I believe I did.  
 12 Q. So that would be the Claimants' Memorial, the Reply  
 13 Memorial and their Counter-Memorial on Preliminary  
 14 Objections; yes?  
 15 A. As far as I recall, yes.  
 16 Q. And in each case you were satisfied that the factual  
 17 version of events that was set out was the version of  
 18 events that you wanted to give to the Tribunal in this  
 19 arbitration; yes?  
 20 A. Yes. If you're implying somehow that there was  
 21 an error, I'm not aware of it.  
 22 Q. Now, The Spalena -- I apologise if my pronunciation  
 23 isn't right, but I've called it "Spalena" --  
 24 A. "Spalena".  
 25 Q. -- Spalena Company was a company incorporated in 1998;

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18:11 1 evidence on the relationship between Spalena and  
 2 Bay View Group.  
 3 A. Can you make them bigger?  
 4 Q. I may have given you a wrong reference, Mr Marshall.  
 5 Can you just tell us what you say the relationship  
 6 is between Spalena and Bay View, bearing in mind that  
 7 Spalena was incorporated before Bay View?  
 8 A. Yes, yes. No, it was a question of the circumstances  
 9 forced on us by Rwanda that we followed through this  
 10 pattern of changes. Bay View Group was the holder of  
 11 Bisesero, okay?  
 12 Q. Carry on, yes.  
 13 A. Bay View Group was the holder of the Bisesero licence.  
 14 It was registered in Rwanda not as a Rwandan corporation  
 15 but as a Delaware corporation licensed to do business in  
 16 Rwanda.  
 17 Q. Well, just going back to paragraph -- if FTI could look  
 18 at paragraph 6:  
 19 "Spalena is an investment vehicle of [the] Bay View  
 20 Group ..."  
 21 Now, that suggests that Spalena is in some way under  
 22 the control and owned by the Bay View Group. What do  
 23 you say is the shareholding relationship between Spalena  
 24 and Bay View?  
 25 A. No, both companies -- there are two Delaware companies,

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18:10 1 yes?  
 2 A. Yes.  
 3 Q. Bay View incorporated in 2007; yes?  
 4 A. Yes.  
 5 Q. Your Memorial --  
 6 A. That's my recollection.  
 7 Q. Sorry, I didn't mean to cut across.  
 8 A. That's my recollection, yes.  
 9 Q. Your Memorial suggests -- Claimants' Memorial suggests  
 10 at paragraph 7 (sic) that Spalena is "an investment  
 11 vehicle of [the] Bay View Group". But Spalena was in  
 12 fact formed before Bay View and isn't any kind of  
 13 subsidiary of that group, is it?  
 14 A. Well, I have to unpack what you just said.  
 15 Q. Well, why don't you unpack what your Memorial says. Do  
 16 you want to look at it? I'm sure it can be brought up  
 17 on the screen. Paragraph 7.  
 18 A. Yes, but you're using a defined term by saying it was  
 19 an investment vehicle of -- sorry, Spalena was  
 20 an investment vehicle of Bay View Group, right? So  
 21 I don't know when it was ... I can give you  
 22 an explanation of the dates, of the approximate dates of  
 23 what occurred when, if that's what you're -- without  
 24 being able to --  
 25 Q. I just want to understand, making sure I've got your

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18:13 1 okay? And when -- I don't, you know, want to -- I need  
 2 to explain to you the background, because otherwise, you  
 3 know, you're presuming an answer that isn't necessarily  
 4 correct.  
 5 Spalena is an investment vehicle of Bay View Group  
 6 in the sense that Bay View's assets were contributed to  
 7 Spalena. We had no choice. That was forced on us by  
 8 the Rwanda Government.  
 9 Q. Who owns Spalena? Who owns Bay View?  
 10 A. It's a group of US investors that are the same in both  
 11 cases.  
 12 Q. You're saying the same investors own both; yes?  
 13 A. Yes.  
 14 Q. We'll come back to that.  
 15 A. I don't know that that's always been the case, but yes.  
 16 Q. Can we just look at paragraph 15 of your first witness  
 17 statement. (Pause)  
 18 This is in a section -- if FTI could just go back  
 19 a page to see where the section starts. We've got  
 20 a section entitled "BVG became a Concession Holder and  
 21 subsequently invested in NRD".  
 22 A. Yes, through Spalena.  
 23 Q. Yes.  
 24 Now, you then get to paragraph 15 of this witness  
 25 statement. So you're dealing with the question of BVG

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18:15 1 investing in NRD, and you say:  
 2 "At the end of 2010, BVG's investors invested in  
 3 Spalena, so that Spalena had capital to acquire the  
 4 shares of the parent of NRD. BVG's investors did so in  
 5 order to continue investing in Rwanda's mining industry.  
 6 In this way, BVG invested in Spalena, which invested in  
 7 NRD, which served as the local Rwandan investment  
 8 vehicle ... BVG and Spalena are commonly owned  
 9 affiliates. BVG and Spalena then capitalized and funded  
 10 NRD's liabilities and expenses in order to develop and  
 11 operate the mining concessions."  
 12 Do you see that?  
 13 A. Yes.  
 14 Q. You were not suggesting in your first witness statement  
 15 that BVG had any shareholding in Spalena, were you?  
 16 A. I don't know what you mean. In my first witness  
 17 statement?  
 18 Q. In this paragraph you are not suggesting that BVG had  
 19 any holding in Spalena? The point you're making there  
 20 is the point, in fact, I think you just made orally that  
 21 you have common investors: investors of BVG also own  
 22 Spalena?  
 23 A. I'm not following you. It says:  
 24 "... BVG's investors invested in Spalena ..."  
 25 Q. Yes.

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18:16 1 A. You're saying it's not that, or what do you mean?  
 2 Q. No, I'm not at this stage taking issue with your  
 3 proposition that the same investors own BVG and own  
 4 Spalena. I'm trying to establish whether you are saying  
 5 that BVG has a stake in Spalena. And you are not saying  
 6 that in this paragraph, are you?  
 7 A. I am saying that in this paragraph.  
 8 Q. Well, where?  
 9 A. "... BVG's investors invested in Spalena ..."  
 10 Q. Yes, but BVG didn't. That's your point: they have  
 11 common investors. But BVG, on your evidence, has no  
 12 interest in Spalena.  
 13 A. (Laughs) I'm sorry, I shouldn't -- yes, I think you're  
 14 misinterpreting the meaning of that.  
 15 Q. Well, I'm making what looks like --  
 16 A. In this way, the second sentence says -- third sentence:  
 17 "In this way, BVG invested in Spalena, which  
 18 invested in NRD ..."  
 19 Q. But "In this way" results from saying, "BVG's investors  
 20 invested in Spalena". There's no evidence from you  
 21 about BVG taking any stake in Spalena, is there?  
 22 A. They had to. We were forced to. We had no choice.  
 23 Q. If you had considered that BVG had itself any direct  
 24 interest in Spalena, you would have explained that in  
 25 this witness statement, wouldn't you?

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18:18 1 A. No, I think you're misrepresenting it.  
 2 Q. Well, I'm just reading your statement, in a section --  
 3 A. "... in this way, BVG invested in Spalena ..."  
 4 I don't think -- I mean, that's pretty clear, right?  
 5 Q. Well, it's clear. But "In this way" is "BVG's investors  
 6 invested in Spalena": that's what the first line says.  
 7 A. Well, I don't read it that way.  
 8 Q. Well, tell me how you read "BVG's investors invested in  
 9 Spalena"?  
 10 A. Well, I would have -- obviously the intention, maybe not  
 11 to you now, but it was always understood in Rwanda that  
 12 BVG's assets all got contributed to Spalena, because BVG  
 13 could no longer function because they were denied the  
 14 possibility of continuing to be a foreign investor  
 15 operating in Rwanda. So when we lost that possibility,  
 16 we had to transfer the assets of BV -- BVG had to  
 17 transfer the assets to Spalena; and in exchange for  
 18 that, they became an investor in Spalena.  
 19 If you think that's inartfully worded, I'm sorry for  
 20 it. But that's not -- you're -- I'm not going to  
 21 understand it the way you read it, the way you said you  
 22 read it.  
 23 Q. What has in fact happened is that had you considered --  
 24 sorry, I'll start my question again.  
 25 Had you considered that BVG did have a direct

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18:19 1 interest in Spalena, you would have mentioned that in  
 2 your witness statement, wouldn't you?  
 3 A. I'm sorry, ask me again. I missed that.  
 4 Q. Well, Mr Marshall, you're a lawyer dealing in commercial  
 5 transactions and an intelligent man. You know precisely  
 6 what I mean when I refer to direct shareholdings. Had  
 7 you thought that BVG had an interest in Spalena, you  
 8 would have mentioned that in this witness statement,  
 9 wouldn't you?  
 10 A. That's what it said:  
 11 "... BVG invested in Spalena ..."  
 12 Q. You recall, don't you, that in May 2019 the Respondent  
 13 in this arbitration filed a Memorial on Preliminary  
 14 Objections in which it identified a number of  
 15 preliminary objections to the Claimants' case, and one  
 16 of the preliminary objections was that BVG was not  
 17 an investor in NRD and did not have standing? Do you  
 18 recall that?  
 19 A. No.  
 20 Q. You don't recall that?  
 21 A. No.  
 22 Q. Well, in August 2019 the Claimants filed a memorial in  
 23 response, and that was accompanied by your supplemental  
 24 witness statement dated 16th August 2019.  
 25 If we could go to that statement, we have a section

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18:20 1 headed "BVG's Investment in NRD and Control of BVG". Do  
 2 you have that? It starts at paragraph 3. I'm just  
 3 taking you to your own -- this is your supplemental  
 4 witness statement of 16th August.  
 5 MR BRODSKY: Thank you. I have two here.  
 6 MR HILL: It's the first one, not the second supplemental.  
 7 That's it.  
 8 MR BRODSKY: Thank you.  
 9 MR HILL: Starting at paragraph -- we can start with page 2,  
 10 thank you.  
 11 So you've got a section headed "BVG's Investment in  
 12 NRD and Control of NRD", and you make two points in this  
 13 section.  
 14 Actually, FTI, don't blow it up, if you would,  
 15 unless someone else asks. Can you not blow it up,  
 16 because I think it's easy to read.  
 17 A. No, it's not. I can't --  
 18 Q. Well, I'm going to ask you to look at two pages. Do you  
 19 have a small screen which means you can't read it?  
 20 A. I don't know. It's micro-print right now.  
 21 Q. Alright. In that case, perhaps blow up paragraphs 4 and  
 22 5, if FTI can do that.  
 23 MR BRODSKY: Simultaneously, it will still be a little bit  
 24 small, if they're both on screen at the same time.  
 25 MR HILL: Well, at paragraph 4 and paragraph 5 you deal with

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18:24 1 Q. -- we looked at your first witness statement, where you  
 2 dealt with the topic of BVG investing in NRD, and  
 3 neither of the points that you make in your supplemental  
 4 witness statement feature at all in your first witness  
 5 statement, do they?  
 6 A. I'm sorry, you're going to have to show me back where  
 7 you're --  
 8 Q. No, please do. If you could be shown again first  
 9 witness statement, paragraphs 13, 14 and 15.  
 10 Do you have a hardcopy witness statement with you or  
 11 not? Do you have your own witness statements?  
 12 A. No.  
 13 Q. Okay.  
 14 Paragraphs 14 and 15. There, just leave it like  
 15 that. Mr Marshall can say if he can't read it.  
 16 A. No.  
 17 Q. I wonder if over the course of the next day or two --  
 18 Mr Marshall, are you in the Duane Morris offices or not?  
 19 A. Yes.  
 20 Q. I wonder if he could be given a bigger screen, because  
 21 it's enormous on my screen. And we've got a lot of  
 22 documents to get through and I do need to be able to  
 23 pull up a page. Are you on a small laptop screen or  
 24 something?  
 25 A. I think this is FTI, this is not Duane Morris's screens.

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18:22 1 a claim that you say BVG had against NRD. Perhaps FTI  
 2 could blow up [paragraph] 5. It's your witness  
 3 statement, so I hope you're reasonably familiar with it.  
 4 (Pause)  
 5 So you say in those paragraphs that there's this  
 6 claim that BVG had against NRD.  
 7 Then if FTI could go to paragraph 6. You say there  
 8 that the claim was written off and assigned to Spalena.  
 9 So that's the first point you make: you've got this idea  
 10 of a claim that was written off.  
 11 Then you say at paragraph 7 that BVG had assets  
 12 totalling \$2.25 million, which it transferred in  
 13 exchange for an ownership stake.  
 14 So that's what you're saying in your supplemental  
 15 witness statement. Both of those points were relied on  
 16 in the Claimants' Memorial in Response to Preliminary  
 17 Objections.  
 18 Now, my question -- and I'm just reminding you of  
 19 your witness statement -- my question to you is that  
 20 neither of these points featured at all in your first  
 21 witness statement that you filed in support of the claim  
 22 in this arbitration, did they?  
 23 A. I don't know.  
 24 Q. Well --  
 25 A. You'll have to show me that --

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18:25 1 Q. But is it a small laptop screen that you're on?  
 2 A. Yes, but sideways.  
 3 Q. Well, if FTI could, in turn, blow up paragraphs 14 and  
 4 15. Thank you.  
 5 So nowhere do you make either of the two points that  
 6 you see in your supplemental witness statement, do you?  
 7 A. You mean I don't talk here about what those assets --  
 8 where it says, "BVG's investors did so in order to  
 9 continue investing in Rwanda's mining industry", but it  
 10 doesn't list them here; is that what you mean?  
 11 Q. It doesn't really say anything, does it? You have made  
 12 points in your supplemental witness statement that  
 13 simply aren't there in your ...  
 14 A. Well, you're character -- I mean, as I understand it,  
 15 you're saying that means that it didn't happen. But  
 16 this language, to me, what it was intended to say was  
 17 that investment was made.  
 18 Q. Now, let's go back to paragraphs 4 and 5 of your  
 19 supplemental witness statement. I'm going to suggest to  
 20 you that you've come up with the versions of events in  
 21 this statement in order to meet the Claimants'  
 22 objections, their preliminary objections. Do you want  
 23 to comment on that now or shall we do so afterwards?  
 24 You've come up with a version of events that BVG has  
 25 a stake in Spalena, haven't you?

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18:27 1 A. I'm sorry, I've lost the thread here.  
 2 Q. You've come up with this version of events that BVG has  
 3 a stake in Spalena, haven't you?  
 4 A. I understood that you said that, but where am I looking  
 5 at, or where --  
 6 Q. I'm asking you. I'm just asking you.  
 7 A. Did I, in order -- no. The events on the ground drove  
 8 what happened to us and why we had to contribute BVG's  
 9 assets to Spalena.  
 10 Q. Let's start with paragraphs 4 and 5.  
 11 A. We had no choice.  
 12 Q. Let's start with paragraphs 4 and 5. So you say that  
 13 there was this cooperation agreement between NRD and BVG  
 14 on 1st November 2010; that's your evidence, yes?  
 15 A. I think that's the evidence in the trial, yes.  
 16 Q. Then you say it involved NRD working on the Bisesero  
 17 concession; yes?  
 18 A. Jointly, yes.  
 19 Q. And you say [REDACTED]  
 20 [REDACTED]; yes?  
 21 A. NRD borrowed, yes.  
 22 Q. And you say that in the period prior to the acquisition  
 23 agreement from Starck -- so this is a seven-week  
 24 period -- [REDACTED]  
 25 [REDACTED]

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18:30 1 witness statement had a whole section of BVG's  
 2 investment in NRD, and there's no mention at all of  
 3 a [REDACTED], is there?  
 4 A. I would be surprised if it isn't there.  
 5 Q. You would be surprised if it ...?  
 6 A. Is not there.  
 7 Q. Well, it's not there.  
 8 A. Okay.  
 9 Q. And the reason it's not there is because there was no  
 10 [REDACTED]?  
 11 A. That's simply not true.  
 12 Q. Your current case also suggests that there is an alleged  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED] Again, if those liabilities had  
 17 truly existed, they would have been mentioned too in  
 18 your first witness statement, wouldn't they?  
 19 A. No, they wouldn't, necessarily.  
 20 Q. Coming back to C-122, if we could look at this  
 21 cooperation agreement document, if FTI could bring that  
 22 up. We can see from the third line of this document  
 23 that on the face of this agreement, this is NRD and BVG  
 24 agreeing to cooperate in the management of the Bisesero  
 25 concession; that's right, isn't it?

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18:28 1 [REDACTED]. Is that what  
 2 you're saying?  
 3 A. Yes, but you're mischaracterising it by phrasing it that  
 4 way, I think.  
 5 What had happened was we started this cooperation  
 6 agreement really in, I would say, mid-September, and it  
 7 carried on -- it was not documented until November 1st  
 8 by Ehlers, with whoever he, on his NRD board, had to get  
 9 permission from. Whether it was a tacit permission  
 10 before, I don't know on what basis they were operating,  
 11 if they didn't have it authorised before. But it was  
 12 memorialised in the November 1st agreement.  
 13 Q. Now, this cooperation agreement didn't feature at all in  
 14 the Claimants Memorial or in your witness statement; do  
 15 you accept that?  
 16 A. Didn't feature where?  
 17 Q. At all in Claimants' Memorial or your first witness  
 18 statement.  
 19 A. I don't -- I would have to go through it to see.  
 20 Q. Are you able to explain why?  
 21 A. I didn't even know it wasn't there, so I can't explain  
 22 why.  
 23 Q. Your current case in this arbitration is that [REDACTED]  
 24 [REDACTED] amounted to an investment in  
 25 NRD. But we saw your witness statement: your first

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18:31 1 A. Yes.  
 2 Q. Then paragraphs 2-4 deal with what, on the face of this  
 3 document, NRD is to do. It's to buy necessary artisan  
 4 mining support equipment for BVG, using money provided  
 5 by BVG, and then also loan its own equipment to the  
 6 artisans, and they're to buy enough artisan support  
 7 equipment so the artisans in the concession can generate  
 8 the maximum possible minerals, and there's reference to  
 9 this [REDACTED]. NRD has got to keep proper  
 10 financial accounts of the transactions made on behalf of  
 11 BVG. Then NRD has got to loan its bulldozer, wheel  
 12 loader and tipper trucks. Then the NRD equipment should  
 13 be provided for such a period of time by BVG. And  
 14 they've got to loan enough machinery and equipment for  
 15 minerals to be processed on site. And then NRD shall  
 16 create a programme of artisanal miners.  
 17 So on the face of this document, BVG was asking NRD  
 18 to conduct the operations for BVG at the Bisesero  
 19 concession; yes?  
 20 A. No.  
 21 Q. Did you say no?  
 22 A. No.  
 23 Q. Well, you explain what your understanding is.  
 24 A. Well, the way it was operating -- this is  
 25 Anthony Ehlers's draft that he wanted approved for his

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18:33 1 board, or I don't know what authorisation process he had  
 2 at NRD internally.  
 3 What we were doing was we were running the two  
 4 concessions jointly. NRD had substantially more  
 5 equipment. They had the plant, which was nearing  
 6 completion at that time. They had a lot of staff, a lot  
 7 of mining minerals expertise, which was a great boon for  
 8 us, since we could cooperate. They needed some of our  
 9 equipment for operating the plant. They needed our  
 10 staff, who had different kinds of relationships with  
 11 different people. And so it was a real cooperation.  
 12 This is Anthony Ehlers's attempt to memorialise it  
 13 for his board, for our --  
 14 Q. Take it in stages. What clearly is involved is that NRD  
 15 is going to be conducting, managing the Bisesero  
 16 concession, isn't it?  
 17 A. That was -- no, it was cooperation in running of it.  
 18 It's not like we left and he came in and ran it. That's  
 19 a complete misunderstanding.  
 20 Q. And it did involve purchasing equipment with a loan from  
 21 BVG; yes?  
 22 A. Yes.  
 23 Q. And it involved lending BVG NRD's bulldozer, wheel  
 24 loader and tipper trucks; yes?  
 25 A. Yes.

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18:36 1 agreement; yes?  
 2 A. Yes.  
 3 Q. And that signature at the bottom of the page, which is  
 4 purportedly Mr Ehlers's, I understand you now accept is  
 5 not his; yes?  
 6 A. We never said that it was his. It was authorised by him  
 7 to sign it.  
 8 Q. And when you put the document --  
 9 A. There are other counterpart signed versions.  
 10 Q. When you put this document in in this arbitration, you  
 11 didn't say that this was not in fact Mr Ehlers's  
 12 signature, did you?  
 13 A. I'm sorry, that would never even occur to me. If you  
 14 put somebody's name/somebody else's initials, that  
 15 suggests, I think universally, that that's not his  
 16 signature, but it's authorised by him to sign.  
 17 Q. Just explain that again. So you consider that this is  
 18 not representing to the reader that this is Mr Ehlers's  
 19 signature?  
 20 A. No, it is representing to the reader that Mr Ehlers  
 21 authorised it and had somebody else sign it because he  
 22 wasn't there, or whatever the circumstances were on that  
 23 day.  
 24 Q. You're a lawyer by profession, Mr Marshall. You don't  
 25 really think, do you, that this was telling the reader

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18:34 1 Q. That's presumably because BVG needed to borrow those  
 2 from NRD because it didn't have its own; yes?  
 3 A. No.  
 4 Q. Well, you can see the whole scheme in paragraph 2 of NRD  
 5 having to provide --  
 6 A. I agree that's what it says, but the function was not  
 7 because we didn't have it. We had different kinds of  
 8 speciality equipment, which is why he needed our  
 9 speciality equipment as well. It was a benefit to him  
 10 at the same time.  
 11 Q. And you can see at paragraph 3, at the end, that:  
 12 "NRD [is to] loan enough machinery and equipment for  
 13 minerals to be processed on site ..."  
 14 So in other words, BVG is dependent on the loan from  
 15 NRD and sufficient equipment to enable minerals to be  
 16 processed?  
 17 A. Yes, but that -- again, you know, the way -- these  
 18 concessions are large areas and there are different  
 19 deposits at different places, and Bigugu had what they  
 20 had identified was a very promising deposit. And  
 21 instead of shifting equipment from somewhere else on our  
 22 concession, we agreed that it would be better to bring  
 23 in new equipment just for Bigugu.  
 24 Q. Now, NRD is, under this agreement, represented by  
 25 Mr Ehlers, the managing director, on the face of this

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18:37 1 that this is not Mr Ehlers's signature but that it's  
 2 something else?  
 3 A. 100%. If you put somebody's name/somebody else's  
 4 initials, that means somebody else signed it on their  
 5 behalf.  
 6 Q. I suggest you don't really think that, do you?  
 7 A. I suggest you're sorely mistaken. Maybe it's a British  
 8 practice which is not the same in the United States.  
 9 I don't know any lawyer who wouldn't assume that there  
 10 was something that they need to look at with regard to  
 11 that signature.  
 12 A signature is a signature. If you put a slash and  
 13 you put somebody else's initials, that means that the  
 14 signature was presumably signed by somebody else, and  
 15 I've never understood the convention otherwise.  
 16 Q. Paragraph 2 of this document refers to a [REDACTED]  
 17 [REDACTED]. You have suggested in your witness  
 18 statement that this [REDACTED] was in fact advanced,  
 19 and that's not true, is it?  
 20 A. Yes, it was advanced.  
 21 Q. How was it advanced and by what means?  
 22 A. I don't recall. But I'm sure it was advanced.  
 23 Q. You were aware that the Respondent disputes this, and  
 24 you haven't produced a single piece of evidence to  
 25 suggest that this [REDACTED] was advanced, have you?

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18:38 1 A. I don't know whether there's another exhibit which shows  
 2 that it's been advanced or not. But I'm certain that it  
 3 was advanced because I was involved in it. In fact, it  
 4 was somewhat delayed, and Mr Ehlers and I got into  
 5 a short spat about: it had been a week late and he had  
 6 been embarrassed.  
 7 Q. Mr Marshall, you're making it up, aren't you? You're  
 8 making it up. Do you want to answer that? You're  
 9 making this up.  
 10 A. I find that really condescending.  
 11 Q. Well, it's a question. Are you denying it?  
 12 A. I find it condescending and I'm denying it.  
 13 Q. If it had been advanced, you would have been able to  
 14 produce a bank statement from BVG or some evidence of  
 15 some kind to support this statement, wouldn't you?  
 16 A. No. What you've taken from our offices -- and this is  
 17 the period -- and still, when your -- all of these  
 18 documents would have been in our offices, and your  
 19 client took them. So if we can get all those documents  
 20 back, I guarantee you we'll be able to show them to you.  
 21 Q. Come on, Mr Marshall. You're not suggesting that  
 22 whatever happened in the office in Kigali in 2014 would  
 23 have prevented you, BVG, which is a Delaware company,  
 24 from going to its bankers to establish proof of this  
 25 [REDACTED] ?

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18:40 1 A. It would not have been -- it was in -- no, I'm sorry,  
 2 I think you're missing the essential aspects of how  
 3 these transactions worked.  
 4 The money would have been -- and I don't know which  
 5 bank account because we had several, because of troubles  
 6 and various issues going on. The money would have been  
 7 in Rwanda. The money would have been transferred to  
 8 Ehlers. He may have insisted on it in cash. Very  
 9 rarely did you do bank-to-bank transfers.  
 10 Q. You're suggesting there was a [REDACTED] --  
 11 A. I know that this happened because of the argument that  
 12 I had with Anthony Ehlers and had to apologise because  
 13 it was some handful of days late.  
 14 Q. You're not suggesting there is a [REDACTED],  
 15 are you?  
 16 A. No. It was paid in instalments, over the time as they  
 17 needed it. We would not have given him [REDACTED]  
 18 [REDACTED] would I?  
 19 Q. And you would have had no difficulty of getting evidence  
 20 of this from BVG's bankers to validate this, would you,  
 21 if it had been true?  
 22 A. No, you're again insinuating facts that are not --  
 23 completely untrue.  
 24 Q. You see that NRD was obliged, under paragraph 2, to keep  
 25 proper financial accounts of these transactions.

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18:41 1 Mr Sindayigaya was the senior accountant of NRD at the  
 2 time: he was not aware of any of these liabilities.  
 3 A. You will have to take that up with Mr Sindayigaya.  
 4 Q. Mr Cowley can take it up with Mr Sindayigaya. What it  
 5 demonstrates, doesn't it, is that these liabilities  
 6 didn't exist; because if they did, NRD's senior  
 7 accountant would obviously have been aware of them,  
 8 wouldn't he?  
 9 A. Well, I think it's interesting that he calls himself  
 10 a senior accountant. He was a bookkeeper and he should  
 11 have been aware of it. My expectation was that he, in  
 12 fact, would have handled it. For him to deny it is  
 13 extraordinary and false.  
 14 Q. Now, you say at paragraph 5 of your witness statement  
 15 that [REDACTED]  
 16 [REDACTED]. That is also  
 17 something where you haven't identified a single document  
 18 to establish the existence of this claim; correct?  
 19 A. No, I think we may have included it in the police  
 20 report. That may have been still available from our  
 21 office; if not from the office, from the police. You  
 22 know --  
 23 Q. If this had been true, Mr Marshall, you would have been  
 24 able to produce emails between you and NRD, or the  
 25 controllers of NRD, saying, "Look, there's

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18:43 1 [REDACTED]".  
 2 Not a single document has been produced by you to  
 3 establish this assertion.  
 4 A. I don't know whether that's true or not. I know the  
 5 facts were what the facts were. We had an inventory.  
 6 Whether it was Mr Ehlers or somebody else -- we believed  
 7 it was Mr Ehlers. Mr Ehlers committed several  
 8 embezzlements and that was part of the reason that we  
 9 fired him, including human trafficking and other things.  
 10 So we were very, very upset. What we have been  
 11 focused on, the [REDACTED] given all of the other crimes  
 12 that he was committing at that time, I'm not sure. I'm  
 13 not sure.  
 14 Q. I'm not talking now about the [REDACTED]. I'm talking now  
 15 about what you say is [REDACTED].  
 16 A. That was the inventory of our minerals in Biseseero,  
 17 which we had not sold any.  
 18 Q. Mr Sindayigaya has heard nothing at all about this  
 19 alleged claim for [REDACTED]; and again,  
 20 he was a senior accountant.  
 21 A. Well, he was not a senior accountant, he was  
 22 a bookkeeper. And he embezzled money, so we fired him.  
 23 Q. He also says, in his second witness statement, that it's  
 24 impossible for that kind of [REDACTED]  
 25 [REDACTED]

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18:44 1 [REDACTED]  
 2 [REDACTED]  
 3 That's correct, isn't it?  
 4 A. He's mistaken.  
 5 Q. Which bit is he mistaken about?  
 6 A. We began operations in Bisesero in 2007. We had -- in  
 7 retrospect, I would not have stored them and kept them.  
 8 To me it was like money in the bank. But I believed  
 9 them to be secure. They disappeared. Whether it was  
 10 Mr Ehlers or Aime Sindayigaya himself, I don't know who  
 11 stole it. But we did not get the financial benefit from  
 12 those minerals.  
 13 Q. Can we look at the sale and purchase agreement between  
 14 you and Starck. This is C-068 at page 9.  
 15 A. Steve, this is subject to the non-disclosure agreement.  
 16 I don't know if there's some process you have to alert  
 17 somebody that this is subject to a non-disclosure.  
 18 Q. Let's look at page 9 and f).  
 19 MR COWLEY: May I ask the Tribunal that I could just  
 20 reassure Mr Marshall that there has been a process about  
 21 how to select out for public viewing those materials  
 22 that are considered confidential by the parties before  
 23 they become fully public.  
 24 MR HILL: So looking at f), you will see that:  
 25 [REDACTED]:

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18:48 1 [REDACTED].  
 2 Q. [REDACTED]. Sorry, that is on page 12.  
 3 Again:  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 A. [REDACTED].  
 13 Q. [REDACTED]."  
 14 [REDACTED]  
 15 A. [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED].  
 19 Q. Will you go to n):  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 Carry on.  
 25 [REDACTED]

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18:46 1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 A. No, I don't believe so. I think this refers to only  
 13 [REDACTED]  
 14 [REDACTED]  
 15 Q. But [REDACTED]. It's  
 16 saying the target --  
 17 A. [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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18:49 1 [REDACTED]  
 2 [REDACTED]  
 3 A. [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 Q. If you go to the last page of the document, this is the  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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18:51 1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]:  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

18:53 1 that arises by virtue of an alleged asset transfer from  
 2 BVG. Do you know what I'm talking about?  
 3 A. No.  
 4 Q. Well, your case is that BVG acquired an interest in  
 5 Spalena because there are assets from BVG, various bits  
 6 of plant and equipment, that were transferred from BVG  
 7 to NRD, giving rise to an interest in Spalena; yes? You  
 8 know that part of the case I'm talking about?  
 9 A. Yes.  
 10 Q. Now, can we go to C-123. This is a resolution from  
 11 7th March 2012.  
 12 A. 27th March.  
 13 Q. Yes, sorry, 27th March 2012. So before this document,  
 14 on any view, Bay View had no interest in Spalena; is  
 15 that right?  
 16 A. We were the same people. How do you mean? Bay View  
 17 Group as an entity? What was the liabilities of  
 18 Bay View Group versus Spalena?  
 19 Spalena was -- at the time of the purchase was  
 20 simply a shell. We wanted Bay View Group to buy the  
 21 parent of NRD. That would have been the Starck  
 22 transaction. Starck was aware that Dr Michael had, for  
 23 reasons we don't know, prohibited Bay View Group --  
 24 there was -- in 2011 there was an amendment to the  
 25 corporate laws of Rwanda: all companies had to

18:52 1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 Q. You're not answering my question. I'm going to ask you  
 5 to focus on my question.  
 6 You've said this is a misrepresentation. This is  
 7 a sale by Starck: this is a professional mining company.  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED],  
 22 [REDACTED]  
 23 [REDACTED]  
 24 Q. Let's move on to the other interest that you say BVG  
 25 acquired in Spalena, and that is an interest, you say,

18:55 1 re-register. BVG, as a foreign company licensed to do  
 2 business in Rwanda, was not given that opportunity, and  
 3 we think it was part of his effort to push us.  
 4 So we suddenly, with the agreed-upon gentlemen's  
 5 agreement, BVG could no longer operate in Rwanda.  
 6 Q. I'm going to come back -- don't worry, you'll get  
 7 a chance to talk about that bit of the story later  
 8 because I'm going to come back to that. Let's just  
 9 focus on this resolution.  
 10 So this is a resolution from you, as president and  
 11 sole director of Bay View Group LLC. And we also have  
 12 the equivalent document for Spalena at C-124, if that  
 13 could be brought up.  
 14 A. Yes. Right.  
 15 Q. Now, were you aware -- and I'm sure you are, because you  
 16 read the memorials -- that the Respondent doesn't accept  
 17 the authenticity of these two documents?  
 18 A. I'm aware that they don't accept the authenticity of  
 19 almost everything we submitted.  
 20 Q. Now, the Respondent made its position clear in its  
 21 Rejoinder. If these had been genuine documents, there  
 22 would inevitably have been some contemporaneous  
 23 documents -- emails, drafts -- to demonstrate their  
 24 existence in March 2012, wouldn't there?  
 25 A. We were out of -- we had lost Biseseero: the police had

18:57 1 come and taken it. What else --  
 2 Q. You have --  
 3 A. Sorry?  
 4 Q. We know how you operate your emails: you have your own  
 5 email account. There would have been no -- if these  
 6 documents had existed in 2012, you would have had no  
 7 difficulty producing emails which demonstrated their  
 8 existence, would you?  
 9 A. To who? This is an administrative or bookkeeping  
 10 procedure. We don't -- we have -- you know,  
 11 I'm guessing, but half a million/a million dollars'  
 12 worth of equipment on the ground. I know that that will  
 13 be the second hearing. But the assets are on the ground  
 14 and there's now no owner.  
 15 Q. If these had been genuine documents, it would have been  
 16 easy for you to produce contemporaneous material showing  
 17 their existence at the time?  
 18 A. To who? To what purpose?  
 19 Q. Well, documents tend to be produced and then circulated,  
 20 for example, by email.  
 21 A. To who? Yes, I understand the concept. But why would  
 22 this be necessary? We have assets in the company that  
 23 no longer can operate in Rwanda. So there is no owner.  
 24 We had to transfer them.  
 25 Q. Let's look at what the resolution says now.

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18:58 1 On its face, this resolution authorises you "To take  
 2 any and all actions necessary" to effect a sale; yes?  
 3 So on the Spalena version, "take any and all actions  
 4 necessary ... to purchase"; and on the other resolution,  
 5 C-123, on the Bay View Group version, "take any ...  
 6 actions necessary ... to ... sell".  
 7 What you don't have is any actual sale agreement  
 8 between the two parties, do you?  
 9 A. Well, I smile because, you know, you're not going to be  
 10 happy. But you took all of our documents. The fact  
 11 that we retained these, for reasons I don't know, in  
 12 a different place is not our fault.  
 13 Q. Sorry, are you suggesting that there was an agreement  
 14 that has got lost? Or are you just making --  
 15 A. It would have been two sentences if there was.  
 16 Q. Well, you don't know, so you're speculating?  
 17 A. I don't recall one way or another, no. I can't imagine  
 18 I would not have created -- because otherwise how was it  
 19 effected. This is the authorisation to act on behalf of  
 20 BVG, the other is the authorisation to act on behalf of  
 21 Spalena, and then you have a two-sentence purchase and  
 22 sale agreement. So I can't imagine that I didn't do it.  
 23 Q. You don't know, because the reality is that there was no  
 24 sale and no transfer of assets, and this is another  
 25 invention for the purposes of this arbitration,

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19:00 1 isn't it?  
 2 A. No, that's not true.  
 3 THE PRESIDENT: Mr Marshall, you have said these documents  
 4 were kept in a different place. Where were they kept?  
 5 A. We had -- I don't -- there were -- we had an office  
 6 which was seized, as you'll recall, and we had  
 7 an apartment. So sometimes -- I would often take  
 8 documents home. This is not a document, where I was  
 9 going, that I would have sent to my investors. This was  
 10 just an administrative housekeeping matter. So --  
 11 MR HILL: The reality is, Mr Marshall, we've got a very  
 12 large number of documents from your side in this  
 13 arbitration. We don't have difficulty getting hold of  
 14 documents where they actually exist. And the reason  
 15 that you haven't identified any documents showing any  
 16 existence of this transfer is that you've made up what  
 17 you do have for the purposes of this arbitration; yes?  
 18 A. No, that's not true. And you can't guess the number of  
 19 documents there would have been because you have no  
 20 idea, with all due respect. You say we have a lot of  
 21 documents, and I'm glad and grateful for that, but you  
 22 can't guess at how many documents there were. You're  
 23 assuming that it's insignificant, and that's not a fair  
 24 assumption for you to be drawing.  
 25 Q. Let's go to C-123. I would like to now go to the second

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19:01 1 page of this document. You will see there that there's  
 2 a list of the items purportedly purchased, involving  
 3 five truck tractors and a number of other trucks and  
 4 bulldozers and other vehicles. And on the next page --  
 5 if FTI could just go to the next page -- a list of heavy  
 6 mining equipment, including crushers and other items,  
 7 and the list goes on.  
 8 Mr Ehlers, as managing director of NRD, has  
 9 confirmed in his witness statement that you took him out  
 10 to look at BVG's Bisesero site in late 2012, and these  
 11 assets were not visible there at all. That's correct,  
 12 isn't it?  
 13 A. No. Some were there. We, in anticipation that this was  
 14 a greenfield mining site, had been -- when we realised  
 15 we were going to be receiving the long-term concession  
 16 in 2007, we started buying materials in the United  
 17 States. We travelled around and bought them at numerous  
 18 places, because they were advantageous prices, and we  
 19 orchestrated them to be shipped over there as we were  
 20 building up the mines.  
 21 You know, I'm sorry, I know you don't have mining  
 22 experience, but you don't bring everything there and  
 23 assemble it like, you know, Tinkertoys. That's not the  
 24 process. You bring assets as and when you need them.  
 25 Q. Mr Ehlers has confirmed that there were no operating

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19:03 1 vehicles and no processing facilities at Bisesero, and  
 2 he is right, isn't he?  
 3 A. No.  
 4 Q. The assets you've mentioned in this list did not exist  
 5 at the Bisesero site at all, did they?  
 6 A. Some of them did, were present in Bisesero. As you  
 7 know, when you're mining, you don't build a plant first:  
 8 you provide jackhammers, you provide compressors and  
 9 generators, so the artisans can generate better  
 10 production than they were by hand.  
 11 Q. So you're suggesting that the jackhammers might have  
 12 been there, but not the other material; is that what  
 13 you're saying?  
 14 A. No. I would have to go through the list and have to sit  
 15 down with our logistics people to find out which ones  
 16 were there and which ones were not.  
 17 Q. Well, there's a lot of processing equipment --  
 18 A. Ehlers arrived in June 2010, formed the joint venture  
 19 with us a month later, saw what we had, needed some of  
 20 our pieces of equipment for what he was doing, was very  
 21 keen to have this cooperation agreement, with the  
 22 expectation that it would be a long-term joint venture.  
 23 We were delighted, you know. Independent of  
 24 Mr Starck -- I mean, of Mr Ehlers, HC Starck --  
 25 Q. I'm just going to stop you there, Mr Marshall, because

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19:06 1 right about that as well, isn't he?  
 2 A. No.  
 3 Q. Well, he would know, wouldn't he?  
 4 A. No.  
 5 Q. Well, of course he would, because he's doing the books  
 6 for this company and he's going to know if all of this  
 7 equipment is being transferred to NRD, isn't he?  
 8 A. No, it was transferred to Spalena, and Spalena was  
 9 transferring it to NRD. What he knew when, we were very  
 10 disappointed in him.  
 11 Q. This asset transfer never happened and these assets were  
 12 never provided to NRD, were they?  
 13 A. They were provided to NRD.  
 14 Q. This is another invention for the purposes of this  
 15 arbitration, isn't it?  
 16 A. No, it isn't.  
 17 Q. You haven't, in fact, produced any corporate  
 18 documentation of either BVG or Spalena which suggests  
 19 that BVG has an interest in Spalena, have you?  
 20 A. Which BVG ... I thought we had.  
 21 Q. Well, you haven't.  
 22 Now, let's come back to the US investors. You say  
 23 the same US investors are behind both Spalena and BVG.  
 24 Who are these investors?  
 25 A. Because of the death threats, I don't want to give their

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19:05 1 that's not at all an answer to my question. I want you  
 2 to focus on my question.  
 3 A. Okay.  
 4 Q. This material was not on site at Bisesero, was it, and  
 5 BVG did not have it to sell to NRD; correct?  
 6 A. No. Some of it was on site and BVG did have it  
 7 available for sale to Spalena.  
 8 Q. No, Mr Sindyigaya was at NRD until September 2012,  
 9 nine months after the resolution that we've just been  
 10 looking at; and not only was he there at NRD, he also  
 11 visited the Bisesero site on several occasions and he  
 12 also says these assets were not there. And he is  
 13 correct too, isn't he?  
 14 A. No, he's not correct either. And he was suspended for,  
 15 I think, maybe six months of that period, until the end  
 16 of 2012. So he was not even in the office during that  
 17 time.  
 18 There were some of these materials here. Which  
 19 ones? I need to get a logistics guy in to say which  
 20 ones were there and which ones were not.  
 21 Q. He confirms that none of the trucks or heavy mining  
 22 equipment that were listed were there, and he's right?  
 23 A. No.  
 24 Q. And perhaps more significant, he also confirmed that  
 25 none of these assets were transferred to NRD. And he's

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19:07 1 names.  
 2 Q. Do you say it is you or family trusts in which you or  
 3 other members of your family are beneficiaries?  
 4 A. I don't wish to -- out of fear of safety, I'm not going  
 5 to comment on that.  
 6 Q. Well, let's look at C-070. This is a letter from the  
 7 Rwanda Development Board, from the registrar general  
 8 there, and this is to the mayor of the  
 9 Bugesera District, and it says:  
 10 "Reference is made to our communication of  
 11 06/08/2012 regarding the suspension of the position of  
 12 Managing Director in the above named company."  
 13 And that's NRD.  
 14 "We have recently received legal and authenticated  
 15 document showing that the holding company of NRD Ltd,  
 16 NRD Holding GmbH, is wholly owned by Spalena Company  
 17 LLC, an American Company, incorporated in Delaware that  
 18 in turn is wholly owned by Mr Roderick Marshall.  
 19 "In his capacity therefore as sole shareholder of  
 20 the holding company, he submitted copies of a notarized  
 21 resolution ..."  
 22 So you were telling RDB and providing them with  
 23 material to show that you were the whole owner of  
 24 Spalena?  
 25 A. No.

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19:09 1 Q. Well, that's what you were telling RDB, isn't it?  
 2 A. No.  
 3 Q. So the US investors are you?  
 4 A. No.  
 5 Q. Why were you telling RDB that?  
 6 A. I didn't.  
 7 Q. They've got it wrong, have they?  
 8 A. This letter is wrong, and they know it.  
 9 Q. That's exactly what you were telling RDB at the time,  
 10 wasn't it?  
 11 A. No.  
 12 Q. I'm going to come on now to the acquisition by Spalena  
 13 of NRD.  
 14 A. I'm happy to introduce all of the investors to the  
 15 arbitration panel, but I don't want their names  
 16 released.  
 17 Q. I'm going to come on to Spalena's entry into the NRD  
 18 story following its acquisition in December 2010.  
 19 Before I do, I just want to ask you about some of your  
 20 evidence that relates to the period before  
 21 December 2010, so before Spalena got involved in buying  
 22 NRD.  
 23 You suggest at paragraph 6 of your witness statement  
 24 that between 2003 and 2007, RDB representatives  
 25 "urgently asked [you] to form a group and a have

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19:12 1 "Thank you for your email, i will sent you update  
 2 email addresses, Tommorrow, some have changes. You will  
 3 send the proposal with a signed transmission letter ..."  
 4 Then he explains what you have to do underneath that  
 5 with regards to the consulate.  
 6 What we can see in this thread is that it is you  
 7 pitching to the Government of Rwanda, and not the other  
 8 way round; correct?  
 9 A. No.  
 10 Q. That's what was happening: you were making a pitch to  
 11 the Government of Rwanda and getting the right email  
 12 addresses to do so; yes?  
 13 A. No. Well, I can imagine that we were being told that  
 14 this is the process that we needed to send the documents  
 15 that they had prepared jointly with us to these  
 16 entities. But this is not our initiative. This is the  
 17 process as explained to us.  
 18 Q. Can you go to C-138. On your side, this is a document  
 19 that you rely on to demonstrate that Rwanda were  
 20 soliciting investments from you. This is the material  
 21 you rely on. Now, this document comes after the email  
 22 we've just been looking at.  
 23 A. This is 20 --  
 24 Q. Sorry, C-138. I think this might be R-138. If FTI can  
 25 pull up C-138.

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19:10 1 a recognizable US-owned mining investment in Rwanda".  
 2 Do you see that at paragraph 6?  
 3 A. Yes.  
 4 Q. That's not correct, is it?  
 5 A. Why?  
 6 Q. It's simply untrue.  
 7 A. No, that's true.  
 8 Q. Can we go to --  
 9 A. Hold on a second. Lambert and his staff were calling me  
 10 certainly every week.  
 11 Q. Shall we go to R-100?  
 12 A. I'm sorry?  
 13 Q. Let's go to R-100. This is an email chain involving  
 14 Ms Mruskovicova, who I know we'll be hearing from.  
 15 Can you go to the second page of this document.  
 16 Ms Mruskovicova says:  
 17 "Here are addresses which I found on internet.  
 18 Please let me know if they are current or we need to  
 19 update them. These are institutions we think the  
 20 material should be send. Also probably to Williams,  
 21 Alex and some other people in RIPA. I hope you are  
 22 arround. Or should I ask somebody in RIPA? Please let  
 23 me know what you suggest."  
 24 Then if we go over to the [previous] page, Mr Mucyo  
 25 responds:

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19:13 1 MR BRODSKY: My apologies.  
 2 MR HILL: That's alright.  
 3 So this is the document that your side rely on to  
 4 demonstrate that Rwanda, you say, were soliciting  
 5 investments from you or people connected to you, and it  
 6 comes after the email we've just looked at. And in the  
 7 third and fourth paragraphs, what's said is -- this is  
 8 from Rwanda:  
 9 "Your proposition are very interesting but for the  
 10 finalization of the joint venture process in short  
 11 period, we ask you to send the offer of your company  
 12 before the 30th September 2005. This includes your  
 13 identification (certified copies), your experience in  
 14 the mining industry, your investment plan and your  
 15 action plan.  
 16 "In the preparation of your investment plan, take  
 17 into consideration our proposition included in the terms  
 18 of reference sent to you in April 2005. In other words,  
 19 the investment plan should take into consideration the  
 20 choice of equipment on the basis of rational methods  
 21 applied in the research and mining and the treatment of  
 22 ores."  
 23 Again, quite clear that it's you who has been  
 24 promoting a proposal to Rwanda, and on the Rwandan side  
 25 they're telling you which targets you need to hit; yes?

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19:14 1 A. Well, I appreciate your interpretation of it, but that's  
2 not the way the process worked.  
3 Q. Well, it's what's evident from the document, isn't it?  
4 A. I don't know that it's evident from all the documents.  
5 We -- as I recall, Lambert communicated after this  
6 letter to us saying, "Yes, yes, yes, that's the official  
7 process, but we need your investment, so here's how this  
8 is going to work", and it had nothing to do with this  
9 process.  
10 Q. This is going to be a bit of a refrain, isn't it,  
11 Mr Marshall, this idea that there are assurances from  
12 people which are not reflected in this document; is that  
13 right?  
14 A. I don't know.  
15 Q. Because the documents do not show any assurances of the  
16 kind that you seek to rely on, and in fact they're  
17 inconsistent with them.  
18 A. I don't know that that's going to be the case.  
19 Q. Shall we go to paragraph 7 of your witness statement  
20 now? You say that:  
21 "The most significant aspect of their solicitation  
22 was that our investment in Rwanda would be strongly  
23 supported by the Government and State agencies,  
24 including guaranteed security for our future company's  
25 staff and property. The RDB took me to dozens of

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19:16 1 meetings with State officials who reassured me that  
2 RDB's representations were true and correct. They  
3 convinced me that Claimants' investment in Rwanda was so  
4 significant to Rwanda that the Government would  
5 gratefully work to ensure our business success."  
6 A. Yes.  
7 Q. Now, none of that is true either, is it?  
8 A. All of that is true.  
9 Q. We've seen the documents. It was you trying to seek  
10 support from Rwandan officials for your proposals, and  
11 you received none of these assurances, did you?  
12 A. I understand that those are your conclusions from those  
13 select documents, but that's not what happened.  
14 Q. Can we look at paragraph 8.  
15 A. There were not just written communications, I think you  
16 appreciate; you know, not -- in addition to whatever has  
17 been taken by the government out of our offices. You're  
18 characterising a system which was never in practice in  
19 Rwanda; never.  
20 Q. Well, when you say -- when you just said earlier "not in  
21 the documents that" -- one moment. (Pause)  
22 When you say "your conclusions from those select  
23 documents", I'm just going to the documents that you  
24 have relied on in this arbitration in support of these  
25 so-called "assurances".

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19:17 1 A. These are the documents we have available. We're forced  
2 to rely on what we have. But it's you that took our  
3 documents.  
4 Q. If you look at paragraph 8, you say:  
5 "I was repeatedly assured that if I invested in  
6 a Concession, the Government of Rwanda would assure that  
7 I would receive a long term contract and be the  
8 statutorily-defined Concession Holder for 30 years with  
9 the possibility of an extension. I learned that all  
10 Concession Holders had received the same guarantee."  
11 That's not true either, is it?  
12 A. Yes, it is true.  
13 Q. Just give me one moment, Mr Marshall.  
14 A. I'm sorry?  
15 Q. Just give me one moment. (Pause)  
16 I'm just trying to understand what your evidence is.  
17 Your last answer was to the effect that Rwanda had taken  
18 your documents, and that's why the material is not  
19 available. But your earlier answer -- and this is at  
20 the transcript at 19.15 (page 221) -- you say:  
21 "[But] I don't know that it's [in evidence] from the  
22 documents ... Lambert communicated after this letter ...  
23 saying, 'Yes, yes, that's the official process, but we  
24 need your investment ...'"  
25 So is your evidence that this thing is undocumented

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19:18 1 or that there were documents that have been lost?  
2 A. I think my memory -- if my memory is correct, I was just  
3 looking at that document yesterday or the day before.  
4 Lambert says, "Yes, you know, there is this process, but  
5 what you need to do is just to write the head of the  
6 Privatisation Ministry and the process will be finished  
7 for you".  
8 Q. There are no documents suggesting any assurances given  
9 and there were in fact no assurances given; that's  
10 correct, isn't it?  
11 A. No.  
12 Q. Let's go back now to the acquisition of NRD. One of the  
13 things you did, when considering whether to acquire the  
14 company, was to review the contract between Rwanda and  
15 NRD relating to the concessions; correct?  
16 A. That's the November --  
17 Q. Yes. One of the things you did when you were thinking  
18 of acquiring NRD was review the contract relating to the  
19 concessions: that's the November 2006 contract?  
20 A. Yes.  
21 Q. Just to place this in time, we're talking about  
22 a November 2006 contract and then an acquisition by you  
23 in December 2010; yes? Four years later.  
24 A. That's correct.  
25 Q. We're about to look at the contract. But it's right to

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19:20 1 say, isn't it, that you had no involvement in the  
 2 negotiation of that contract, because of course that was  
 3 done at the time of the Zarnacks, a long time before you  
 4 got involved; yes?  
 5 A. Yes.  
 6 Q. So the actual understandings of any parties to this  
 7 contract at the time, in the course of the negotiations,  
 8 is not something you can give any evidence on; correct?  
 9 A. Well, only to the extent that there's a course of  
 10 dealings after the signing of the contract.  
 11 Q. Well, again, unless it's after the end of 2010, you  
 12 can't give any evidence on that either, can you?  
 13 A. No, hearsay, that's right.  
 14 Q. And you haven't called any witness who was involved at  
 15 the time, have you?  
 16 A. No.  
 17 Q. So in terms of any understandings about a guarantee of  
 18 a long-term concession for NRD or anything like that,  
 19 you don't know, outside the terms of the contract,  
 20 because you weren't there; correct?  
 21 A. No, I would say that the communication between us and  
 22 the Zarnacks and then us and Starck were several times  
 23 a week. We understood what they told us.  
 24 Q. Well, are you going to suggest that there were  
 25 communications between the Zarnacks and Starck where

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19:21 1 they expressed an understanding about a long-term --  
 2 about a guarantee that you've never mentioned before in  
 3 your memorials or your witness statement?  
 4 A. I think you're a little bit confused. You know, we had  
 5 all been asked to accommodate Rwanda. Mining companies,  
 6 nobody -- you, me -- nobody would take a risk: "Here's  
 7 our millions of dollars of investment, and now you tell  
 8 us whether we get a licence". This is unprecedented.  
 9 And the reason --  
 10 Q. Just drilling it down to something you can express  
 11 accurate evidence on, you have no idea about any  
 12 understanding on NRD's part in any period before you get  
 13 involved in late 2010, do you?  
 14 A. All I can say is that we met as a group, and there was  
 15 maybe ten of us, as I started to express before: all of  
 16 us had the same understanding that that was our safety  
 17 net for all of us. Everybody had the same -- with  
 18 slightly different wording in a few places, but  
 19 everybody had the same contract.  
 20 We're investing now because of the guarantee, the  
 21 representations being made to us now. We understand  
 22 that Rwanda is disorganised and needs to get their law  
 23 in place, and several other administrative steps. But  
 24 we all expected a commercially reasonable long-term  
 25 concession agreement.

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19:23 1 Q. You don't know what --  
 2 A. No exception.  
 3 Q. You don't know what NRD expected, and you didn't  
 4 yourself have any assurance of a long-term concession,  
 5 did you?  
 6 A. We all had the same understanding of that contract.  
 7 That's what we were told it represented.  
 8 Q. Can you go to paragraph 19 of Mr Gatare's witness  
 9 statement.  
 10 A. Sorry, I just want to add one thing. Because otherwise  
 11 Rwanda is scamming. You know, this doesn't make any  
 12 sense. "Please come here, invest \$20 million", or  
 13 however much, "and then we'll tell you whether you can  
 14 stay"? That never happens in the mining industry.  
 15 These are tough, tough companies.  
 16 Q. What they told you --  
 17 A. Rwanda was an exception because of their extraordinary  
 18 history, and that's why.  
 19 Q. What they told you was, "Come here, spend four years  
 20 industrialising and exploring, and if, on the back of  
 21 that, you can provide a feasibility study that is  
 22 satisfactory to the government, then you can look at  
 23 a long-term concession". That's what they told you,  
 24 isn't it?  
 25 A. No. You know, everything that you just described --

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19:24 1 industrialising, exploration -- this takes enormous  
 2 amounts of money.  
 3 Q. That is why the Zarnacks said they were going to put  
 4 forward \$39 million.  
 5 A. The Zarnacks expected the long-term concession. They  
 6 said they were going to put in \$39 million. That's how  
 7 much their commitment was to the future success of  
 8 Rwanda.  
 9 Q. They knew, and you knew, that unless you could do some  
 10 adequate exploration and industrialisation, and on the  
 11 back of that, produce a feasibility report that  
 12 satisfied the government, you wouldn't be getting  
 13 a long-term concession?  
 14 A. It's a feasibility report that satisfied our investors  
 15 to continue, not the Rwanda Government.  
 16 Q. Can we look at Mr Gatare's witness statement at  
 17 paragraph 19. This relates to your assertion that you  
 18 were assured that if you invest in a concession, the  
 19 government would ensure a long-term contract was  
 20 provided.  
 21 A. Yes.  
 22 Q. Mr Gatare says:  
 23 "I do not believe that Mr Marshall was given any  
 24 such assurances and even if he had been it would have  
 25 been clear to him as soon as he read the concession

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19:25 1 agreement between BVG and the Government of Rwanda which  
 2 he signed on 23 March 2007, that the grant of  
 3 a long-term concession was subject to certain conditions  
 4 and did not contain any Government guarantee. The same  
 5 is true in relation to the four year agreement signed  
 6 between NRD and the Government in 2006 ... although that  
 7 was obviously prior to Mr Marshall's involvement ..."  
 8 That's correct, isn't it?  
 9 A. No.  
 10 Q. You would have known that there was no such assurance:  
 11 you knew that in relation to Biseseero, and you would  
 12 have known that when you reviewed the contract in  
 13 relation to NRD?  
 14 A. No, and not only -- we were being asked, as you used  
 15 someplace else, for an "indulgence": "Please help Rwanda  
 16 get their mining system jump-started, give assistance,  
 17 because all of Rwandan mining is artisan support.  
 18 Please help us. Please take that jump, and we promise  
 19 you will be made whole. We promise you will not suffer.  
 20 We promise that you will have a commercially reasonable  
 21 long-term licence".  
 22 Q. Contrary to evidence you've also given, there's no  
 23 understanding in the mining community that the  
 24 application for a long-term licence is a mere formality,  
 25 is there?

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19:27 1 expect that any one party's rights would depend upon the  
 2 terms of its contract, wouldn't it?  
 3 A. I'm sorry?  
 4 Q. The mining community would expect that any party's  
 5 rights would depend on the terms of their contract?  
 6 A. Sure.  
 7 Q. And amongst other things, it would depend on the mining  
 8 operator fulfilling their side of the bargain in the  
 9 initial period; correct?  
 10 A. Yes.  
 11 Q. Now let's look at the contract itself. Go to C-017.  
 12 I should say, sorry, I said to you in one of my  
 13 questions earlier "five-year period"; I meant four-year  
 14 period, just to be clear.  
 15 So this is a contract you would have reviewed as you  
 16 were contemplating acquiring this company. So you would  
 17 have seen from Article 1 that this was a four-year  
 18 contract; yes?  
 19 A. Yes.  
 20 Q. Then in Article 2, you would have known that there are  
 21 these obligations of NRD under the contract; yes?  
 22 A. Yes.  
 23 Q. And you would have known that if NRD was in breach of  
 24 its obligations, the contract was capable of being  
 25 terminated; yes?

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19:26 1 A. No, long-term licence agreements are not a formality;  
 2 they are a real negotiation, prior to any works being  
 3 done. No mining company, with the exception of maybe  
 4 some very superficial exploratory work, is not going to  
 5 spend any money and any deposit without knowing in  
 6 advance that it has a long-term licence concession. You  
 7 can't afford to.  
 8 Q. On that argument, Mr Marshall, you would simply have  
 9 a long-term licence. You wouldn't have what you in fact  
 10 see, which is a contract for a five-year (sic)  
 11 exploration licence, coupled with conditions and  
 12 a requirement for a satisfactory feasibility study.  
 13 It's completely different from what you say was the  
 14 deal.  
 15 A. I'm sorry, you're going to have to rephrase that.  
 16 Q. Well, on your argument, one would simply just move  
 17 straight to a 30-year licence, wouldn't you?  
 18 A. Most companies do. Everywhere else tends to: Uganda,  
 19 Congo, Kenya.  
 20 Q. In this case, what instead happens is you are given  
 21 five years to prove yourself before there is a long-term  
 22 licence being offered; correct?  
 23 A. No.  
 24 Q. Just coming back to your earlier answer about what the  
 25 mining community expects, the mining community would

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19:28 1 A. Yes, that's what the language says.  
 2 Q. Yes. So you would have known even at that point that,  
 3 far from being a guarantee of the long-term licence, it  
 4 was already conditional on whether NRD could meet its  
 5 obligations; yes?  
 6 A. No.  
 7 Q. Well, how else would you have understood it?  
 8 A. This isn't the only communication. You know, they came  
 9 to us and said, "Look, we don't have our long-term  
 10 Mining Act in place". So we're being instructed that  
 11 we're going to do these short-term arrangements so that  
 12 we can -- (answer cut off by questioning).  
 13 Q. Are you suggesting that the real -- are you suggesting  
 14 that the contract doesn't represent, as you understood  
 15 it, the rights of NRD?  
 16 A. No, I would say that the rights of NRD are greater than  
 17 in the agreement. Representations were made to us: "If  
 18 you invest money and you do things that we will be able  
 19 to work you through, in close cooperation with the  
 20 government, then this is -- that's just  
 21 an administrative act, when you get the written  
 22 long-term licence agreement".  
 23 Q. Well, you say, "Representations were made to us". They  
 24 weren't made to you, because this is NRD's contract and  
 25 you weren't even there.

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19:30 1 A. All of the contracts are almost the same. All of us had  
 2 the same experience, the same presentations, et cetera.  
 3 Q. But you don't know what representations were made to  
 4 anyone at NRD when this contract was entered into  
 5 because you weren't there; correct?  
 6 A. It is true that I wasn't there. And if all those  
 7 conclusions are necessarily from the fact that I was not  
 8 there in person, I was with them at every Mining  
 9 Investment Forum meeting. I knew them. We all shared  
 10 agreements. I'd seen this agreement before. We were  
 11 all, as far as we knew, in the same boat.  
 12 Q. When you bought into this company, the rights and  
 13 obligations that NRD had were reflected in this  
 14 contract; yes? That's what you would have thought at  
 15 the time?  
 16 A. I understood this contract to be part of a larger  
 17 relationship, and I knew that Rwanda was good for its  
 18 word. If somebody comes and invests \$10 million,  
 19 whatever number it is, \$20 million, \$30 million, they're  
 20 not going to just throw them out. They don't behave  
 21 that way. They talk to you till they're blue in the  
 22 face about the fact that that's the way they work. They  
 23 have to get people who understand their situation, their  
 24 desperation. They're trying to pull a country together  
 25 after a war.

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19:31 1 Q. Just to be clear, is it your evidence that you knew at  
 2 the time that this guarantee of a long-term licence was  
 3 not in the contract?  
 4 A. It's not in this contract document, but we understood it  
 5 to be in other documents.  
 6 Q. So you knew at the time that the contract document that  
 7 gave --  
 8 A. We understood the (overspeaking) -- I understand that  
 9 they don't use the word "guarantee" here. But we  
 10 understood the meaning of this, the way it was going to  
 11 be interpreted.  
 12 Q. Again, Mr Marshall, you are a lawyer, and  
 13 a transactional lawyer: you know very well that parties'  
 14 rights are reflected in the contracts that they have.  
 15 And you knew very well that this did not contain the  
 16 assurance or guarantee that you now say existed?  
 17 A. Well, two things: (1) -- and I know you and I will be in  
 18 an argument about it --  
 19 THE PRESIDENT: May I just interrupt a moment. It may be  
 20 that we're going to be cut off. We're just trying to  
 21 deal with this. We've got a notice saying we're going  
 22 to be cut off in one minute.  
 23 MR HILL: Well, if you freeze, then I will stop.  
 24 A. In Article 4, we were told that that gave us  
 25 an automatic right to a commercially reasonable

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19:33 1 long-term agreement --  
 2 MR HILL: Sorry, stop, Mr Marshall. I think the Tribunal  
 3 have been cut off. I'll just wait until this is sorted  
 4 out.  
 5 (Pause to resolve a technical problem)  
 6 MR HILL: What I'm wondering, just while the Tribunal is out  
 7 is -- we're about 25 minutes before time -- whether we  
 8 should just simply break and try and find this  
 9 25 minutes in some other part of the rest of the week.  
 10 MR KAPLAN: I can definitely relay that request. I know  
 11 that the President had some administrative points he  
 12 wanted to raise with the parties. And we do have a full  
 13 schedule, so there's also the difficulty in finding the  
 14 25 minutes.  
 15 Let me see what we can do. Hold on, please.  
 16 (Pause to resolve a technical problem)  
 17 THE PRESIDENT: What I suggest we do is adjourn until  
 18 tomorrow morning. We've only got 20 minutes to go.  
 19 Alright? And we must try and sort this out.  
 20 MR HILL: Could I just ask -- I know the President can't  
 21 hear me.  
 22 THE PRESIDENT: I can't hear anything you're saying. I can  
 23 see you. But you can obviously hear me.  
 24 So the first thing I'm going to say is that  
 25 tomorrow -- now I've lost sight of you. I don't know

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19:37 1 whether you can even hear me.  
 2 Can you hear me, Alex?  
 3 MR KAPLAN: Yes.  
 4 THE PRESIDENT: You can hear me? Right.  
 5 Tomorrow the timetable will be changed inasmuch as  
 6 we will have a 30-minute break at the first break and  
 7 a 30-minute break at the second break.  
 8 The second request -- and I don't know whether this  
 9 will get to them -- is that the Tribunal would like to  
 10 have delivered to the hearing room hard copies of the  
 11 transcripts, printed on both sides of each page. Is  
 12 that possible?  
 13 MR KAPLAN: Yes, it's possible.  
 14 THE PRESIDENT: We can't hear you anyway. But you think  
 15 that can be done?  
 16 MR KAPLAN: Yes.  
 17 THE PRESIDENT: Okay. Well, then I think it remains for us  
 18 to say farewell until tomorrow morning. We've made good  
 19 progress, I think.  
 20 MR HILL: The Tribunal hasn't given the witness warning.  
 21 Mr Harrison, you understand the witness warning about  
 22 Mr Marshall not speaking in between the breaks. I'm  
 23 sure the President would have given it, were he here.  
 24 But can I rely you on, Mr Cowley, to give the warning to  
 25 the witness?

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19:38 1 MR HARRISON: Mr Cowley has still stepped out.  
 2 MR HILL: If you explain what I have said to Mr Cowley, I'm  
 3 sure he will give the warning to the witness.  
 4 MR HARRISON: He just came back in.  
 5 THE PRESIDENT: Alright. Farewell until tomorrow.  
 6 MR COWLEY: I apologise for being out.  
 7 MR HILL: Yes. Mr Cowley, where we've got to, the Tribunal  
 8 has given some directions that can be explained by  
 9 Mr Harrison. They can't hear us. They weren't able to  
 10 give the witness warning. So I wonder if you could give  
 11 the witness warning to Mr Marshall, just about not  
 12 speaking to anyone about his evidence while he's giving  
 13 evidence.  
 14 MR COWLEY: I'm sorry, I didn't hear everything that you  
 15 said. Are you saying the Tribunal wants to give this  
 16 instruction or are you asking --  
 17 MR HILL: No, I'm asking you, because we can't communicate  
 18 with the Tribunal. So I'm asking you, unless you  
 19 disagree, to make sure that Mr Marshall understands he's  
 20 not allowed to speak with anyone about his evidence  
 21 while he's giving it, in the breaks.  
 22 MR COWLEY: I have no problem. But if you're putting on me  
 23 the responsibility, I just want to just agree that the  
 24 language I read to him is exactly the language as  
 25 I should be saying it. So if I can ask of you --

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19:41 1 MR HILL: Thank you.  
 2 MR KAPLAN: And this will apply to all witnesses, of course,  
 3 through the hearing.  
 4 MR HILL: Yes.  
 5 MR KAPLAN: Okay. Well, Mr Cowley, while you were having  
 6 a break --  
 7 MR COWLEY: Indisposed.  
 8 MR KAPLAN: Indisposed, comfort break -- this is not  
 9 resolvable right now, the technical issue, so the  
 10 President had suggested to adjourn for the night. The  
 11 parties should please produce an agreed schedule for  
 12 tomorrow that shows the first and second breaks at  
 13 30 minutes. And we will arrange, upon the Tribunal's  
 14 request, for hardcopy transcripts to be delivered to the  
 15 Tribunal as they requested. And that's what you missed.  
 16 MR COWLEY: Thank you.  
 17 MR KAPLAN: Sure. We'll see everybody tomorrow.  
 18 (7.42 pm)  
 19 (The hearing adjourned until 12.00 noon the following day)  
 20  
 21  
 22  
 23  
 24  
 25

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19:39 1 because this is sort of a bit of a curve ball to me --  
 2 just tell me what provision of the --  
 3 MR HILL: Yes, well I'll say it. It's simply that while  
 4 he is giving evidence, as he is now, when he has breaks  
 5 and overnight breaks, he shouldn't speak with anyone,  
 6 his lawyers or anyone else, about his evidence or about  
 7 the case. Obviously it doesn't prevent him speaking  
 8 about other things, but he shouldn't be speaking about  
 9 the case or his evidence to anyone.  
 10 MR COWLEY: That's fine. I simply ask, is there  
 11 a procedural order section that should be read to him?  
 12 I'll make sure he reads it and --  
 13 MR HILL: I don't think -- well, I'm not aware of one.  
 14 MR KAPLAN: No, it's just -- I don't believe in our  
 15 procedural orders we have that. But it is a customary  
 16 undertaking at ICSID, given that Mr Marshall is  
 17 basically still in the witness chair but will be,  
 18 obviously, not physically in it until tomorrow morning,  
 19 or tomorrow -- yes, tomorrow morning. So just the  
 20 understanding not to --  
 21 MR COWLEY: So you're done; you're saying you stated the  
 22 warning, nothing else to be read or shown to him?  
 23 MR HILL: Mr Marshall obviously understands it because he is  
 24 listening; that's right, yes, Mr Marshall?  
 25 THE WITNESS: Yes, I understand what you're saying.

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