THE 2017 FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

ARBITRATION PURSUANT TO THE PCA ARBITRATION RULES 2012

BETWEEN

ATTON BORO LIMITED

(Claimant)

AND

THE REPUBLIC OF MERCURIA

(Respondent)

PCA CASE NO. 2016-74

18 September 2017

STATEMENT OF CLAIM
I. RESPONDENT CANNOT RETROACTIVELY DENY THE BIT’S BENEFITS TO CLAIMANT

A. Respondent Cannot Exercise Its Right to Deny Benefits after the Commencement of Arbitration

1. Retroactive application of denial of benefits contradicts the BIT’s object and purpose
   a. Retroactive application of denial of benefits creates disruptive uncertainty for the investor
   b. Inclusion of a denial of benefits clause in the BIT does not constitute sufficient notification of Claimant of potential denial of benefits

2. Respondent cannot rely on the denial of benefits clause in light of its previous knowledge of Claimant’s background

B. In any event, Claimant, Having Substantial Business Activities in Basheera, Cannot Be Denied the BIT’s Benefits

1. Claimant is not ultimately controlled by third State nationals

2. Claimant has substantial business in the territory of its incorporation State

II. THE TRIBUNAL HAS JURISDICTION OVER THE AWARD-ENFORCEMENT RELATED CLAIMS

A. The Award Is an Inextricable Part and Continuation of the Original Investment

1. The LTA constitutes an investment under the BIT and any applicable criteria
   a. The LTA is an investment under the BIT
   b. The LTA is an investment pursuant to the Salini criteria

2. The Award is a continuation of Claimant’s rights under the LTA

B. Alternatively, the Award Is an Investment under the BIT

III. BY ENACTING LAW NO. 8458/09 AND GRANTING A LICENSE FOR CLAIMANT’S PATENTED INVENTION, RESPONDENT BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD OF ARTICLE 3 OF THE BIT

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**Yukos**

*Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014*

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| **ICSID Convention** | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965, 575 UNTS 159 |
| **TRIPS Agreement** | Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299, 33 I.L.M. 1197 |
| **VCLT** | Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 |

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| **Guiding Principles on Unilateral Declarations** | Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 2 Yearbook of the International Law Commission, 2006 |
| **UNCTAD Report** | UNCTAD, Series on Issues in International Investment Agreements (Second series): Fair and Equitable Treatment, 31 December 2010 |
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<td>Long-Term Agreement</td>
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<td>NHA</td>
<td>National Health Authority</td>
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STATEMENT OF FACTS

1. On 11 January 1998, in an effort to bolster its international ties and augment economic cooperation, the Kingdom of Basheera (“Basheera”) entered into the Agreement for the Promotion and Reciprocal Protection of Investments (the “BIT”) with the Republic of Mercuria (“Mercuria” or “Respondent”).

2. Incorporated in Basheera on 5 April 1998, Atton Boro Limited (“Claimant” or “Atton Boro”) is an operating subsidiary of Atton Boro Group, a prominent drug manufacturer with a robust overseas presence, formally owned by Atton Boro and Company, a holding company domiciled in the People’s Republic of Reef. Claimant has served as the Group’s core outpost in the South American and African regions ever since, fully complying with its Basheeran tax obligations and running a fully-fledged business unit.

3. In 1998, the Respondent’s Government established the National Health Authority (“NHA”). Although the NHA operates as a standalone body, it remains politically accountable to Respondent. In 2003, in its annual report to the Mercurian Ministry of Health (the “Report”), the NHA voiced its concern over the growing incidence of greyscale, a severe chronic disease, across Mercuria. Guided by the action plan set out in the Report, the Ministry of Health of Mercuria urged pharmaceutical companies to enter into contracts for long-term supply of greyscale medicines at reduced rates. Respondent was particularly interested in obtaining concentrated fixed-dose combinations (“FDC”) contained in one pill, although, at that time, Respondent already had adequate access to generic pills with a virtually identical clinical effect.

4. In 2004, the NHA and Claimant concluded a Long-Term Agreement (the “LTA”), providing for the supply of Claimant’s Sanior-branded FDC drug at a 25% discounted rate. The envisaged term of the LTA was set at 10 years. In 2005, Claimant started producing Sanior in Mercuria, subsequently ramping up production on the back of ever-increasing demand for its anti-greyscale compound.

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1 Statement of Uncontested Facts, p. 28, para. 1.
2 Ibid., paras. 3-4.
3 Ibid., para. 2.
4 Ibid., para. 5.
5 Procedural Order No. 3, p. 50, line 1574.
6 Statement of Uncontested Facts, p. 28, para. 4.
7 Procedural Order No. 3, p. 50, para. 1595.
8 Statement of Uncontested Facts, p. 28, para. 1.
9 Ibid., paras. 5-7.
10 Ibid., p. 30, paras. 9-11.
5. The primary active component of Sanior, Valtervite, is patented in 50 jurisdictions including Respondent. The Mercurian patent for Valtervite, granted in 1998, is registered in the name of Claimant.\textsuperscript{11} Although Sanior, based on Valtervite, contains a higher concentration of active ingredients, it is all but a universal cure for grayscale. In fact, estimates of Valtervite’s effectiveness are staggeringly divergent.\textsuperscript{12}

6. Meanwhile, the number of Mercurian individuals affected by greyscale had been relentlessly increasing, triggering a corresponding increase in the order value for Sanior. As a result, in 2008, the NHA turned to Claimant, seeking a steeper discount for Sanior purchases. Claimant agreed to grant the NHA a further 10\% discount. Unsatisfied, the NHA demanded a more drastic 40\% price cut. Faced with the threat of a decimated business margin, Claimant refused to supply Sanior on the terms advanced by the NHA. By way of a response, in 2008, the NHA terminated the LTA, appealing to Claimant’s alleged unsatisfactory performance under the contract.\textsuperscript{13}

7. Claimant brought a case concerning the termination of the LTA to an arbitral tribunal seated in Reef, which rendered an award in its favor (the “\textbf{Award}”). On March 2009, Atton Boro initiated enforcement proceedings in Respondent’s High Court, pending to date.\textsuperscript{14} The proceedings have been repeatedly cancelled, suspended and/or postponed under various pretexts to the benefit of the NHA, including, \textit{inter alia}, leaves of absence, retreats and trips of judges and counsel.\textsuperscript{15}

8. In 2009, Mercuria enacted Law No. 8458/09 (the “\textbf{Law}”), permitting the use of patented inventions even absent the owner’s authorization. In furtherance of the Law, in 2010, the High Court granted HG-Pharma, a Mercurian generic drug manufacturer and a joint venture between Respondent and a private pharmaceutical corporation,\textsuperscript{16} a licence to produce Valtervite, such license to remain effective until the eradication of the Mercurian grayscale pandemic.\textsuperscript{17}

9. Following the adoption of the Law, since 2014, Claimant has been afflicted by financial and operational hardship, having ceded the overwhelming fraction (ca. two-thirds) of its market share to HG-Pharma and its generic compound, and being ultimately forced to discontinue its Mercurian Sanior sales altogether.\textsuperscript{18}

\begin{flushleft}
\textsuperscript{11} \textit{Ibid}., p. 28, para. 3.
\textsuperscript{12} Procedural Order No. 3, p. 50, lines 1585-1587.
\textsuperscript{13} \textit{Ibid}., p. 29, paras. 15, 17.
\textsuperscript{14} \textit{Ibid}., p. 30, para. 18; Procedural Order No. 3, p. 50, line 1594.
\textsuperscript{15} Notice of Arbitration, Exhibit 1, pp. 7-12.
\textsuperscript{16} Procedural Order No. 3, p. 50, lines 1596.
\textsuperscript{17} \textit{Ibid}., para. 21.
\textsuperscript{18} Statement of Uncontested Facts, pp. 30-31, paras. 24-25.
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10. In view of the above, on 7 November 2016, Atton Boro filed the Notice of Arbitration, aiming to recover losses and obtain redress for Mercuria’s disregard to its obligations under the BIT vis-à-vis Claimant and its investment.¹⁹

¹⁹ Notice of Arbitration, p. 5.
SUMMARY OF ARGUMENTS

Jurisdiction

1. The present Tribunal has jurisdiction over the case at hand. *First*, Respondent’s attempt to deny benefits by virtue of Article 2 of the BIT is belated and, in any event, the BIT’s denial of benefits clause does not apply to Claimant, as it has substantial business activities in the territory of Basheera, its incorporation State, and control of third State nationals over Claimant is not established. *Second*, the award-enforcement related claims fall within the Tribunal’s jurisdiction as the Award is the continuation of Claimant’s rights under the original investment in the form of the LTA or, alternatively, an investment in its own right.

Merits

2. By granting HG-Pharma a license to produce Claimant’s patented-drug Respondent violated Claimant’s legitimate expectations in breach of Article 3(2) of the BIT, since it previously guaranteed to protect Claimant’s patent from any interference whatsoever. Moreover, Claimant was denied justice. It had been trying to enforce an award against the NHA in Respondent’s High Court for almost 8 years to no avail due to the Court’s favoritism towards the agency. Finally, the NHA unilaterally terminated the LTA at Respondent’s direction in violation of Article 3(3) of the BIT, which obliges Respondent to respect any obligations *vis-à-vis* Claimant’s investment.
ARGUMENTS

PART ONE: JURISDICTION

1. Claimant respectfully submits that the present Tribunal has jurisdiction over the case at hand. First and foremost, Respondent cannot retroactively withdraw the benefits of the BIT, especially not from Claimant, considering that it has substantial business in the territory of its State of incorporation and that Respondent failed to establish control of third State nationals (I). Second, the claims relating to enforcement of the Award fall within this Tribunal’s jurisdiction, as the Award is an inalienable part and continuation of the LTA, Claimant’s original investment extinguished by Respondent, or, in any event, constitutes an investment in its own right (II).

I. RESPONDENT CANNOT RETROACTIVELY DENY THE BIT’S BENEFITS TO CLAIMANT

2. In the effort to shield itself from Claimant’s action, Respondent hastens to cut Claimant off from access to the BIT-guaranteed rights by invoking the denial of benefits clause. However, Respondent’s groundless attempts to deny the BIT’s benefits to Claimant shall fail. To begin with, Respondent resorts to denial of benefits after the dispute has arisen, forcing retroactive application of the denial of benefits provision, which is impermissible (A). Even more so, Claimant does not even trigger the application of denial of benefits clause, considering its substantial business in its State of incorporation and lack of ultimate control by third State nationals (B).

A. RESPONDENT CANNOT EXERCISE ITS RIGHT TO DENY BENEFITS AFTER THE COMMENCEMENT OF ARBITRATION

3. The eleventh-hour invocation of denial of benefits by Respondent fails from the very start on procedural grounds due to sheer untimeliness of the objection.

4. As denial of benefits takes effect only upon the State’s invocation, it cannot operate a backtrack carte blanche at Respondent’s eternal discretion, only to deprive inone fell swoop the investor of the right to arbitration in regard of events which took place prior to the State’s decision. On the contrary, denial of benefits is a right “reserved” by Respondent, and, like any “reservation”, is only valid within a limited timeframe when it may be exercised.

5. Even though the BIT does not set forth any express time limits within which Respondent may exercise its right to deny benefits, the BIT’s interpretation can only guide in one direction, which is directly opposite to retroactive application of denial of benefits.

20 Response to the Notice of Arbitration, p. 16, para. 5.
21 Jagush, Sinclair, Wickaramasooriya, p. 178.
1. **Retroactive application of denial of benefits contradicts the BIT’s object and purpose**

6. The lodestar in interpretation of a treaty is its object and purpose. The BIT profoundly stresses in its preamble the quintessence of its objective, which is to ensure greater economic cooperation and stimulate the flow of private capital. This purpose is achieved, *inter alia*, by creating a stable environment for investors. Uncertainty created by possibility of denial of benefits’ retroactive application runs counter to this purpose (a), which is not remedied by mere presence of the denial of benefits clause in the BIT (b).

   a. **Retroactive application of denial of benefits creates disruptive uncertainty for the investor**

7. A denial of benefits clause is a sleeping dragon which only rears its head when the State invokes it. Until then, the investor remains protected by the treaty guarantees.

8. In the case at hand, Respondent aims to turn back the clock, using the denial of benefits clause in order to bar Claimant from arbitration in regard of investment which enjoyed the BIT’s protections from the very start. Using the apt metaphor of the *Plama* tribunal, the investor in such situation becomes a “hostage”, lured into a State by reasonable reliance on the treaty’s guarantees only to be stripped of them after establishing its business.

9. Interpretation of the BIT which would allow such an abrupt change in an investor’s status runs counter to the very essence of the BIT. In effect, it would render it utterly impossible for the investor to evaluate at the time of making the investment the chances to lose the BIT’s protections. This precariousness is highly disruptive to stability of investment environment and facilitation of capital flow.

10. This position has been reiterated by investment tribunals, which have repeatedly recognized that denial of benefits after the initiation of arbitral proceedings annihilates reasonable reliance of the investor on the treaty guarantees.

11. Such reliance is particularly relevant if the investment was made after the treaty entered into force. For instance, the *Guaracachi* tribunal which agreed to apply the denial of benefits

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22 Art. 31 VCLT.
23 Annex No. 1, p. 32, lines 980-984.
24 Jagush, Sinclair, Wickaramasooriya, p. 178.
25 *Plama*, ¶161.
26 Blyshak, p. 208.
27 *Khan Resources*, ¶428.
28 *Khan Resources*, ¶426; *Sempra*, ¶386.
29 *Plama*, ¶161.
clause retroactively, largely relied on the fact that the investment was made before the BIT entered into force, thus, the investor did not reasonably rely on the BIT. In is exactly the situation at hand.\(^{30}\)

12. Arbitral jurisprudence was also moved by the described considerations: the tribunals examining the identical clause contained in Article 17(1) of the Energy Charter Treaty have all unanimously stressed that a State cannot deny a treaty’s benefits after the dispute has been brought to arbitration.\(^{31}\) This view is not limited to ECT awards: the *Ampal* tribunal came to the exact same conclusion in its analysis of a similarly worded clause of Egypt-US BIT, building its opinion, *inter alia*, on the cross-examination of the expert, Prof. Kenneth Vandevelde, a leading authority on investment agreements.\(^{32}\)

**b. Inclusion of a denial of benefits clause in the BIT does not constitute sufficient notification of Claimant of potential denial of benefits**

13. The very existence of the denial of benefits clause in the BIT cannot be regarded as a sufficient warning for Claimant. *First*, the denial of benefits clause is remarkably self-judging\(^{33}\) and vague. Criteria of “control” and “substantial business activities” are not defined anywhere in the BIT and are subjective by nature.\(^{34}\) Thus, the State’s conclusion in this regard is unpredictable. *Second*, the denial of benefits has discretionary wording, allowing the State to choose whether or not to deny the benefits even if an entity fully qualifies under the respective criteria.\(^{35}\) This is unambiguously demonstrated by the wording “reserves the right to deny”\(^{36}\) rather than “shall deny” used in several treaties.\(^{37}\) Thus, such *caveat investor* approach does not hold water\(^{38}\) in light of the BIT’s purpose of stable and predictable conditions for fostering foreign investments.\(^{39}\)

14. To conclude, the Tribunal shall not allow retroactive denial of benefits, which contradicts the BIT’s object and purpose.

\(^{30}\) Statement of Uncontested Facts, p. 28, paras. 1, 4.

\(^{31}\) *Liman*, ¶¶225, 227; *Plama*, ¶162; *Ascom*, ¶745; *Yukos*, ¶457.

\(^{32}\) *Ampal*, ¶170.

\(^{33}\) *Thorn, Doucleff*, p. 10.

\(^{34}\) *Ibid*.

\(^{35}\) *Khan Resources*, ¶¶417-422; *Ascom*, ¶745.

\(^{36}\) Annex No. 1, p. 33.

\(^{37}\) See, *e.g.*, Article VI ASEAN Framework Agreement on Services 1995.

\(^{38}\) *Khan Resources*, ¶428; *Plama*, ¶163.

\(^{39}\) Gadelshina, p. 276.
2. Respondent cannot rely on the denial of benefits clause in light of its previous knowledge of Claimant’s background

15. Respondent’s reliance on the denial of benefits clause is even more unjustified considering this arbitration is not the first chance for Respondent to learn about Claimant’s corporate structure.

16. As underlined by scholars, in strategically important industries States have plenty of opportunity to monitor the relevant investors. Respondent’s ignorance in the present case is all the more inexplicable considering that Claimant has been operating in Respondent’s market for more than fifteen years, concluding contracts with governmental entities.

17. More importantly, Claimant was not simply taken in from the street: on the contrary, Respondent selected Claimant from the pool of competitors to conclude a strategic product development agreement after “a protracted negotiating process and evaluation of competing offers”. Considering such a thorough assessment, the only possible conclusion is that Respondent either knew or should have known of Claimant’s background but conveniently chose to disregard it only to pull the denial of benefits clause out of the hat when conveniences shifted.

18. Finally, tardiness seems to be Respondent’s trademark style, since Respondent failed to make clear its intentions to deny the benefits even after Claimant notified it of the impending arbitration. On 20 September 2016 Claimant informed Respondent of intent to initiate arbitral proceedings, however, more than a month passed with no response or objection from Respondent.

19. In light of the above, Respondent can no longer be allowed to rely on the denial of benefits provision at its convenience, having lingered too long in invoking it.

B. In any event, Claimant, having substantial business activities in Basheera, cannot be denied the BIT’s benefits

20. In the unlikely event the Tribunal finds that Respondent’s denial of the BIT’s benefits to Claimant was timely, the denial of benefits clause would still be inapplicable since the denial of benefits clause in question does not apply to Claimant.

40 Sinclair, p. 386.
41 Statement of Uncontested Facts, p. 29, paras, 8-9.
42 Ibid., para. 9.
43 Ibid., paras. 8-9.
44 Notice of Arbitration, para. 3.
45 Ibid., para. 3.
46 Ibid., para. 2.
21. The denial of benefits clause enshrined in Article 2 of the BIT sets forth a double-pronged cumulative test determining which companies may be denied benefits.

22. Such an investor needs to both (1) be owned or controlled by nationals of a third state, “and” (2) conduct no substantial business activities in the territory of the State where it is incorporated. Investment tribunals and scholars, which analyzed the exact same wording of denial of benefit clauses have repeatedly confirmed the interpretation of the criteria as cumulative.

23. Neither of the two limbs is present in the case at hand.

1. **Claimant is not ultimately controlled by third State nationals**

24. In order to determine control over a legal entity, investment tribunals analyze the “ultimate control”, going to the “real source of control” which can only be exercised by individuals. Thus, in light of the persuasive approach of prevalent jurisprudence on the issue, Claimant can be deemed to be controlled by nationals of third states only if there is evidence that individuals having ultimate control over Claimant have nationality of third states.

25. This is not such case. Respondent builds its objection only on the nationality of AttonBoro and Company, a legal entity which holds Claimant’s shares. However, shares of AttonBoro and Company, Claimant’s parent company, are held by a variety of investors, including nationals of Basheera and Mercuria, which means no individual beneficiary has control over Claimant. Furthermore, several directors of AttonBoro and Company are nationals of Basheera.

26. Considering this, Claimant cannot be regarded as controlled by nationals of third States, and the first prong of the denial of benefits test fails.

2. **Claimant has substantial business in the territory of its incorporation State**

27. Even if control of third-state nationals is presumed to be proven, it alone is insufficient for Respondent to deny the BIT’s benefits to Claimant. Denial of benefits provisions aim to exclude from treaty protection “mailbox” companies without any real economic connection to their State.

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47 Annex 1, p. 33.
48 AMTO, ¶62; Plama, ¶14.3; Yukos, ¶460.
49 Sinclair, p. 380.
50 TSA, ¶¶147, 161; Ulysseas, ¶170.
51 Yukos, ¶551-552.
52 Response to the Notice of Arbitration, p. 16, para. 5.
53 Procedural Order No. 3, p. 50, line 1570-1571.
54 Ibid.
In other words, if an investor actually conducts business in the place of its incorporation, it is entitled to enjoy the BIT’s benefits regardless of its control.

28. As the result, Claimant, who has for nineteen years engaged in substantial business activities in the territory of Basheera, its State of incorporation, is well off the denial of benefits provision’s target.

29. Although the burden of proof in this regard rests with Respondent who invokes the denial of benefits clause as its objection to this Tribunal’s jurisdiction, Claimant in any event can demonstrate that it conducts substantial business in Basheera.

30. Investment arbitration tribunals generally recognize that the following indicia demonstrate substantial business activities: a physical presence in a form of a rented office, a number of permanent employees, a bank account, payment of taxes and ownership of intellectual property.

31. Jurisprudence demonstrates that arbitrators are very reluctant to establish the lack of substantial business activities. The only case in which a tribunal would recognize the lack of substantial business is that of a company manifestly existing nowhere but on paper, like in *Pac Rim*, where the claimant had no physical existence whatsoever except in corporate documents.

32. To have substantial business it is not necessary for a company to engage in wide-scale operations. As strongly emphasized by the *AMTO* award, the magnitude of activities is unnecessary as long as said activities are beyond merely formal.

33. A company is also not required to engage in manufacturing and contracting, since management and administrative activities suffice. In that vein, in *AMTO* an investment company engaging in managing shares was held to have substantial activities in its State of incorporation as it rented an office, had a bank account and employed a small but permanent staff consisting of two employees. The same conclusion was reiterated in *Petrobart*, where strategic and administrative management was recognized as substantial business activities.

34. In the case at hand, Claimant is poles apart from a mailbox company. On the contrary, its economic ties to its State of incorporation resemble to, and to some extent surpass, those of *AMTO*,

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55Ampal, ¶125.
56 *Generation Ukraine*, ¶15.7; *AMTO*, ¶65; *Pac Rim*, ¶4.60.
57 *AMTO*, ¶¶68-69; *Tokios Tokeles*, ¶37; *Pac Rim*, ¶4.69; Badini, p. 303.
58 *Pac Rim*, ¶4.69.
59 *AMTO*, ¶69.
60 *Petrobart*, ¶63.
61 *AMTO*, ¶¶68-69.
62 *Petrobart*, ¶63.
which was recognized as having substantial business in its territory of incorporation\textsuperscript{63}. Established as a subsidiary to conduct Atton Boro Group’s business in South America and Africa,\textsuperscript{64} Claimant has for nineteen years rented an office in Basheera.\textsuperscript{65} It has constantly maintained personnel between 2 and 6 employees, which is even more than in AMTO,\textsuperscript{66} including a manager, an accountant, commercial lawyers and patent attorneys.\textsuperscript{67} Claimant also has its own bank account,\textsuperscript{68} owns patents assigned by its parent company\textsuperscript{69} and pays taxes in Basheera.\textsuperscript{70} What is more, it manages the Atton Boro Group’s patents and provides accounting, tax and legal services for its affiliates.\textsuperscript{71}

35. On top of that, Atton Boro operates on its own, concluding and performing contracts,\textsuperscript{72} and its parent company’s support is limited to financing,\textsuperscript{73} unlike the case of Pac Rim, where the parent company directed all activities in the territory where the claimant was incorporated.

36. All these indicia are sufficient to demonstrate that Claimant’s activities in the territory of Basheera where it is incorporated are beyond merely formal.

37. Thus, in light of Claimant’s long-standing business in its State of incorporation, Respondent cannot be allowed to unjustifiably shut it out from the BIT’s benefits based solely on the semblance of control by third-state nationals.

38. \textit{Ergo}, Claimant requests the Tribunal to look at the facts and not appearances and prevent Respondent from retroactively applying the denial of benefits clause to a legal entity which does not even remotely trigger its application.

\section*{II. THE TRIBUNAL HAS JURISDICTION OVER THE AWARD-ENFORCEMENT RELATED CLAIMS}

39. Respondent’s objections to the Tribunal’s jurisdiction over award-enforcement related claims\textsuperscript{74} are nothing more than endorsement of its agency’s and its courts’ concerted seven-year-

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\textsuperscript{63} \textit{AMTO}, ¶¶68-69.  \\
\textsuperscript{64} Statement of Uncontested Facts, p. 28, para. 4.  \\
\textsuperscript{65} \textit{Ibid}.  \\
\textsuperscript{66} \textit{AMTO}, ¶69.  \\
\textsuperscript{67} Statement of Uncontested Facts, p. 28, para. 4; Procedural Order No. 2, p. 48, para. 3.  \\
\textsuperscript{68} Statement of Uncontested Facts, p. 28, para. 4.  \\
\textsuperscript{69} \textit{Ibid.}; Procedural Order No. 3, p. 50, lines 1574-1575.  \\
\textsuperscript{70} Procedural Order No. 3, p. 50, line 1575.  \\
\textsuperscript{71} Procedural Order No. 2, p. 48, para. 3.  \\
\textsuperscript{72} Statement of Uncontested Facts, p. 28, para. 5.  \\
\textsuperscript{73} Procedural Order No. 3, p. 50, line 1572.  \\
\textsuperscript{74} Response to the Notice of Arbitration, p. 16, para. 4. 
\end{flushright}
long delay tactics\textsuperscript{75} aimed at avoiding compliance with the Award in Claimant’s favor and should be dismissed. Enforcement-related claims are fully encompassed by the Tribunal’s jurisdiction, since the Award is a continuation of Claimant’s rights under the LTA, the original investment (A), or, in any event, constitutes itself an investment under the BIT (B).

A. The Award is an Inextricable Part and Continuation of the Original Investment

40. The Award issued in Claimant’s favor as compensation for breach of its contractual rights stems from the LTA, which constitutes Claimant’s original investment (I), and constitutes its inalienable part and continuation (2).

1. The LTA constitutes an investment under the BIT and any applicable criteria

41. If the Award is examined as a continuation of the LTA, it is necessary to establish that the LTA itself constitutes an investment.

42. Respondent struggles in vain to present the LTA as a “purely commercial transaction”\textsuperscript{76} since the LTA qualifies as an investment both within the meaning of the BIT and under the stricter requirements of the Salini test should this Tribunal hold it applicable.

a. The LTA is an investment under the BIT

43. It is generally accepted by jurisprudence and prominent scholars, including Christoph Schreuer,\textsuperscript{77} that rights arising out of contracts may constitute an investment.\textsuperscript{78} As profoundly stressed in Alps Finance, a long-term contract with a significant importance for the host State’s economy constitutes an investment.\textsuperscript{79} Jan Paulsson as sole arbitrator in Pantechniki explicitly distinguished between one-off transactions, which were “pure commercial contracts”, and contracts which required significant research and development efforts with contribution of resources to the host State and, therefore, constituted protected investments.\textsuperscript{80}

44. The BIT’s definition of investment is the only applicable standard to determine the LTA’s legal status. This Tribunal’s jurisdiction is based solely on the BIT, and the proceedings at hand are conducted under PCA Rules.\textsuperscript{81} This renders inapplicable the so-called Salini test, which,

\textsuperscript{75} Exhibit 1, p. 7; see also this Statement of Claim, Part IV.
\textsuperscript{76} Response to the Notice of Arbitration, p. 16, para. 8.
\textsuperscript{77} SCHREUER, p. 126.
\textsuperscript{78} MYTILINEOS, ¶109; Alps Finance, ¶¶231, 234; Pantechniki, ¶44; Bishoff/Happ, p. 537.
\textsuperscript{79} Alps Finance, ¶¶231, 234.
\textsuperscript{80} Pantechniki, ¶44.
\textsuperscript{81} Annex No. 1, p. 32.
although often applied by arbitral tribunals, is only relevant in ICSID arbitration, as Article 25 of the ICSID Convention does not define the notion of investment. The application of the Salini test in non-ICSID cases was unambiguously rejected by the majority of arbitral tribunals. More specifically, in White Industries and Guaracachi, the BIT’s definition of investment was held to be the only standard relevant for cases not subject to the ICSID jurisdiction. The ad hoc tribunal in Eureko and the tribunal in Chevron, a PCA case just like the present, did not even conceive to examine whether the claimant’s activities qualified as an investment under any criteria apart from those of the BIT.

45. Article 1 of the BIT contains a broad definition of investments, encompassing “claims to performance under contract having a financial value” and, consequently, Claimant’s entitlements under the LTA.

46. In this vein, Claimant’s rights under the LTA constitute an investment within the meaning of the BIT, which is alone sufficient to establish this Tribunal’s jurisdiction.

b. The LTA is an investment pursuant to the Salini criteria

47. That being said, even in the remote event this Tribunal applies the Salini-based test applied in ICSID jurisprudence, the LTA would amply satisfy it, since it involves (i) contribution of resources, (ii) certain duration and (iii) regularity of profit, (iv) was performed in its entirety within Respondent’s territory, (v) contributed substantially to Respondent’s economy and (vi) was connected with risk.

i. Contribution of resources

48. The contribution criterion is satisfied, inter alia, when an investor makes expenditures of capital or contributes its know-how. Thus, in Salini, provision of necessary equipment and

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82 White Industries, ¶7.4.9; Guaracachi, ¶364.
83 Article 25 ICSID Convention; Krishan, p. 4; IBRD Report, ¶27.
84 White Industries, ¶7.4.9; Guaracachi, ¶364; Eureko, ¶137.
85 White Industries, ¶7.4.9.
86 Guaracachi, ¶364.
87 Eureko, ¶137.
88 Chevron, ¶179.
89 Annex No.1, p. 32.
90 Salini, ¶52; Saipem, ¶99; Legum, Mouawad, p. 330; DOUGLAS, p. 190; Krishan, p. 6.
91 See, e.g., Toto, ¶86(a); PeyCasado, ¶233(a); Salini, ¶52, Bayindir, ¶53; Pantechniki, ¶48; Saipem, ¶100; DOLZER, SCHREUER, p. 68.
financing of the necessary activities was regarded as contribution.\textsuperscript{92} The \textit{Toto} tribunal used the same approach, noting that the claimant brought to the host State its own specialized skills and knowledge, as well as equipment and machinery.\textsuperscript{93} In the case at hand, Claimant did exactly the same.

49. To perform its obligations under the LTA, Claimant constructed a manufacturing unit in Respondent’s territory and fully equipped it to commence production.\textsuperscript{94} Claimant further bolstered the manufacturing base with specifically purchased land and machinery to meet the ever-growing Respondent’s demands for the product, which doubled several times a year.\textsuperscript{95} Finally, Claimant also contributed its know-how, bringing its cutting-edge pharmaceutical development to Respondent’s territory. All these commitments on Claimant’s part are more than enough to establish contribution, using the words of the \textit{Salini} tribunal, “in money, in kind and in industry”\textsuperscript{96}.

\textit{ii. Duration}

50. According to jurisprudence, the minimum duration of an investment is two years.\textsuperscript{97} The lasting partnership between Claimant and Respondent clearly distinguishes the LTA from an ordinary supply which ends with payment for goods sold.\textsuperscript{98} In contrast to the case of \textit{Joy Mining}\textsuperscript{99}, where the investor’s obligations ended when the single supply of goods under the contract was completed, Claimant undertook to continuously manufacture Sanior in Mercuria and furnish it to Respondent over the years. The duration of Claimant’s investment is vividly demonstrated by the very title of the contract between Claimant and Respondent. True to its name, the LTA was meant to last for as long as 10 years,\textsuperscript{100} being a part of a long-standing strategic partnership between Respondent and Claimant.\textsuperscript{101} At the time of its unilateral termination by Respondent, the LTA had already been in force for four years,\textsuperscript{102} amply satisfying the minimum duration criterion crystallized in jurisprudence.

\textsuperscript{92} \textit{Salini}, ¶52.
\textsuperscript{93} \textit{Toto}, ¶86(a).
\textsuperscript{94} Statement of Uncontested Facts, p. 29, para. 11.
\textsuperscript{95} \textit{Ibid.}, para. 15.
\textsuperscript{96} \textit{Salini}, ¶52.
\textsuperscript{97} \textit{Salini}, ¶54; \textit{Jan de Nul}, ¶¶93-96; \textit{Bayindir}, ¶132; \textit{RUBINS}, p. 297.
\textsuperscript{98} \textit{Joy Mining}, ¶57; \textit{Romak}, ¶¶224-227; \textit{Alps Finance}, ¶221.
\textsuperscript{99} \textit{Joy Mining}, ¶57.
\textsuperscript{100} Statement of Uncontested Facts, p. 29, para. 10.
\textsuperscript{101} \textit{Ibid.}, paras. 8-9.
\textsuperscript{102} \textit{Ibid.}, p. 30, para. 17.
iii. Regularity of Claimant’s profits

51. Unlike the cases of Romak\(^ {103}\) and Joy Mining\(^ {104}\), where supply contracts were not recognized as investments due to irregularity of profits, the LTA was not a one-time transaction. Rather, the type of relationship between Claimant and Respondent under the LTA implies expected annual profits for Claimant at least within the minimum annual order-value,\(^ {105}\) establishing the regularity of profit associated with investments.\(^ {106}\)

iv. Territorial link

52. In line with the territoriality criterion,\(^ {107}\) an investor’s obligations should be performed in the host State’s territory.\(^ {108}\) Here, the LTA was performed in its entirety in Mercuria, where manufacturing and supply of Valtervite took place and where Claimant’s production base was set up.\(^ {109}\)

v. Risk

53. The LTA entailed investment risk for Claimant.
54. Investment jurisprudence hardly knows any cases in which tribunals declined jurisdiction on the grounds no risk existed for the investor.\(^ {110}\) In the wording of Fedax decision, the very existence of a dispute demonstrates the investor’s risk.\(^ {111}\) More importantly, as stressed in Toto, risk is by definition inherent in long-term contracts, as the exposure to unexpected negative occurrences increases progressively with the passing of time.\(^ {112}\) In the case at hand, Claimant’s contractual relations were meant to last for the entire ten years, which manifold increased Claimant’s risks.\(^ {113}\)

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\(^ {103}\) Romak, ¶¶224-227.
\(^ {104}\) Joy Mining, ¶57.
\(^ {105}\) Statement of Uncontested Facts, p. 29, para. 10.
\(^ {106}\) CME, Opinion of Ian Brownlie, ¶34; Metalclad, ¶122; RUBINS, p. 298; DUGAN, WALLACE, p. 269.
\(^ {107}\) Annex No. 1, p. 32, line 996; DOUGLAS, p. 171, ¶¶349-350.
\(^ {108}\) See, e.g., SGS v. Philippines, ¶99.
\(^ {109}\) Statement of Uncontested Facts, p. 29, para. 11.
\(^ {110}\) Bishoff, Happ, p. 512; DOLZER, SCHREUER, P. 68.
\(^ {111}\) Fedax, ¶40.
\(^ {112}\) Toto, ¶¶78, 86.
\(^ {113}\) Statement of Uncontested Facts, p. 29, para. 10.
55. Furthermore, returns on Claimant’s investment depended on Respondent’s placement of orders during the year,\(^{114}\) irregularity of which could well lead to considerable strain on Claimant’s financial position\(^ {115}\) and inability to cover its costs.

56. Claimant’s investment also was subject to the risk of a shift in the ever-changing environment. In *Pey Casado*, the tribunal decided that establishment of a magazine entailed a risk connected with economic and political instability.\(^ {116}\) Here, Claimant’s risk is no less as discovery of a more efficient treatment or of a vaccine by a rival developer, or a simple mutation of the virus would result in similar negative consequences.

57. On top of that, Claimant faced the risk of incurring higher production costs, which would have rendered it unable to furnish Respondent the goods at the high discount, which also constitutes an investment risk.\(^ {117}\)

58. Finally, Claimant’s investment in the form of a manufacturing base in Mercuria\(^ {118}\) was subject to political risks, such as seizure of property or destruction by civil turmoil, like any infrastructure established in a host State’s territory.\(^ {119}\)

vi. Impact on Respondent’s economic development

59. Contribution to the host State’s development is generally presumed where there is a commitment of resources for a considerable duration of time connected with a degree of risk.\(^ {120}\) Thus, Claimant’s contribution follows from the duration of its investment and the risk connected with it established *supra*.\(^ {121}\)

60. Apart from that, in the case at hand, the significance of Claimant’s supplies for Respondent’s economy is more apparent than presumed.

61. As follows from the *Consortium R.F.C.C.* case, contribution to the host State’s development implies that investment activities assist the State in furtherance of its tasks.\(^ {122}\) Just like construction of infrastructure in *Consortium R.F.C.C.*, public health falls within the ambit of a State’s functions. Claimant’s cutting-edge developments allowed Respondent to introduce more

\(^{114}\) *Ibid*.

\(^{115}\) Caldwell, Bakker, p. 434.

\(^{116}\) *Pey Casado*, ¶ 233(c).

\(^{117}\) *Consortium R.F.C.C.*, ¶ 63.

\(^{118}\) Statement of Uncontested Facts, p. 29, paras. 11, 15.

\(^{119}\) *Nova Scotia*, ¶ 111.

\(^{120}\) *L.E.S.I.*, ¶72(iv); *Pey Casado*, ¶232.

\(^{121}\) See this Statement of Claim, Part II(A)(1)(b)(ii) and (v).

\(^{122}\) *Consortium R.F.C.C.*, ¶65.
efficient way of treatment for its working-age population. More significantly for Respondent, Claimant supplied the strategically important medicine at a considerable discount of 25 percent, eventually increasing it to 35 percent, which enabled Respondent to keep afloat its healthcare program despite the crumbling budget.

62. In light of the abovementioned, the LTA is worlds apart from an ordinary one-time supply contract and constitutes an investment within the meaning the BIT.

2. The Award is a continuation of Claimant’s rights under the LTA

63. The Award obtained by Claimant as compensation for violation of its contractual rights is also a reincarnation of Claimant’s entitlements under the LTA.

64. There is a general consensus in jurisprudence that an award is a continuation of the original rights which were violated. As appositely elaborated in Romak, an award is inextricably connected to the underlying economic transaction and embodies the party’s rights arising out of such transaction, thus being an integral part of the original investment.

65. In the same vein, tribunals recognize that an investment is protected throughout its lifetime, i.e. from the moment of its establishment until its ultimate disposition. This is especially true in the case at hand, where the BIT contains so-called “transformation clause” in Article 1, which explicitly envisions that “any change in the form of an investment does not affect its character as an investment”, extending the BIT’s protections to any future transformations of an investment. The same clause was examined by the tribunal in Frontier Petroleum, which held on its basis that the rights under the investment transformed into the arbitral award, which therefore fell within investment tribunal’s jurisdiction.

66. In the present case, the Award issued to compensate Claimant for breach of its rights under the LTA is all that remains of Claimant’s rights under the LTA, the original investment. As the sole “survivor”, the Award now rightfully “inherits” all the BIT’s guarantees which failed to...
safeguard the original investment from the NHA’s destructive actions which put an unjustified premature end to the LTA.

67. In light of this, the LTA is the original investment both under the BIT and even the stringent *Salini* criteria. Consequently, the Award, which effectively resurrects Claimant’s rights under the breached and terminated LTA, enjoy the BIT’s protections in its stead and claims relating to its enforcement falls within this Tribunal’s jurisdiction.

**B. ALTERNATIVELY, THE AWARD IS AN INVESTMENT UNDER THE BIT**

68. This Tribunal’s refusal, however remotely probable, to accept the Award as a continuation of the original investment in the form of the LTA, will not affect jurisdiction over award enforcement related claims, since in any event the Award itself constitutes an investment according to the BIT.

69. As established *supra*, in this arbitration based on the BIT and the PCA Arbitration Rules the only test that needs to be satisfied to establish this Tribunal’s jurisdiction is the one enshrined in Article 1(1) of the BIT.

70. The Award fully satisfies the definition of “investment” under Article 1(1) of the BIT, which includes “claims to money, and claims to performance under contract having a financial value”. As the tribunal in *Saipem* highlighted, an arbitral award undoubtedly constitutes a “claim to money”.

71. Furthermore, awards represent real economic value which constitutes “possession” and can expropriated, as noted in *Stran Greek Refineries* and *Saipem*.

72. Consequently, the Award obtained by Claimant in arbitration falls in line with the BIT’s definition, as it embodies Claimant’s right to receive monetary compensation from Respondent. Thus, regardless of the LTA’s status, the Award on its own is an investment within the sense of Article 1 of the BIT.

73. *Ergo*, even though the LTA as Claimant’s original investment in the sense of both the BIT and the stringent *Salini* test is beyond repair, it currently lives on in the Award issued in Claimant’s favour. Claims relating to enforcement of this Award fall within the Tribunal’s jurisdiction either

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133 See this Statement of Claim, Part. II(A)(1)(a).
134 Annex No. 1, p. 32.
135 *Saipem*, ¶126.
136 Mistelis, p. 73.
138 *Saipem*, ¶133.
by virtue of the Award’s status as continuation of the original investment or by its independent character as an investment.

**PART TWO: MERITS**

### III. BY ENACTING LAW NO. 8458/09 AND GRANTING A LICENSE FOR CLAIMANT’S PATENTED INVENTION, RESPONDENT BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD OF ARTICLE 3 OF THE BIT

74. In 2009, Respondent allowed its High Court to issue licenses without authorization of patent-holders under the newly-introduced Section 23C of Mercuria’s IP Law, \(^{139}\) thereby drastically changing the legal framework of Claimant’s investment. If the risk of a license being issued to virtually any manufacturer without Claimant’s consent had existed back in 2004, Claimant would have never concluded a 10-year investment contract for the supply of its patented drug to Respondent’s territory.

75. Not only did Respondent turn the investment framework upside down, but it also granted HG-Pharma permission to produce Claimant’s patented drug, in whose development the domestic manufacturer never invested a dime.\(^{140}\) Given that Respondent owns 50% of HG-Pharma,\(^{141}\) such conduct manifestly ran afoul of Respondent’s previous commitments to protect the IP rights of foreign investors in general and those of Claimant in particular.

76. Thus, Respondent frustrated Claimant’s legitimate expectations in violation of the FET standard enshrined in Article 3(2) of the BIT (A). Moreover, Respondent’s violation could not be justified by its illusory objective to protect public health (B).

#### A. RESPONDENT FRUSTRATED CLAIMANT’S LEGITIMATE EXPECTATIONS

77. It has been repeatedly acknowledged that the obligation to accord FET requires States to respect the “basic expectations” taken into account by foreign investors to make the investment”.\(^{142}\)

78. The concept of legitimate expectations protects investors from arbitrary revocation of promises and guarantees, which existed when the investment was made.\(^{143}\) It is a cornerstone of

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\(^{139}\) Statement of Uncontested Facts, p. 30, para. 20.


\(^{141}\) Procedural Order No. 3, p. 50.

\(^{142}\) *Tecmed*, ¶154

\(^{143}\) Jacob, Schill, pp. 723-723 citing *Tecmed*, ¶154; *Thunderbird*, ¶147.
Investor-State relations, since it allows investors to adequately plan their long-term activities and shields them from abrupt changes in investment policies introduced at a host State’s whim. Investors possess legitimate expectations with respect to their investments if the following indicia are cumulatively present: 1) a State gives a guarantee; 2) the investor relies on that guarantee in making the investment; and 3) such reliance is reasonable.

In the present case, Claimant could legitimately expect that its cutting-edge patent remained intact, as Respondent specifically guaranteed to protect Claimant’s patent (1), Respondent’s guarantee was essential for concluding the LTA (2), and Claimant’s reliance on Respondent’s guarantee was reasonable (3).

1. Respondent specifically guaranteed to protect Claimant’s patent

To attract foreign investors, States commonly give certain public assurances that the investments will be treated in a certain favourable manner. Even though not legally binding, such political statements give rise to legitimate expectations if they are formally made by high-ranking officials and are specific and individualized.

Both criteria are met in the case at hand.

a. Respondent’s guarantee was formally made by its high-ranking officials

Statements of Ministers or Heads of States create legitimate expectations if made in exercise of their government power. Otherwise, such statements are not taken into account when deciding if legitimate expectations exist.

In SPP, a decree of the Egyptian President was found to have given rise to the investor’s legitimate expectations, being “cloaked with the mantle of Government authority”, regardless of said decree being subsequently deemed void. By contrast, in MTD, Chile’s President toast speech praising the potential investment of a Malaysian real estate company given during an

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144 Saluka, ¶301; El Paso, ¶342.
147 Potesta, p. 103 citing Glamis Gold, ¶799; Sempra, ¶298.
148 Potesta, p. 105; UNCTAD Report, p. 70; Enron, ¶262; Thunderbird, ¶¶145-166.
149 Potesta, p. 105.
150 Ibid.
151 SPP, ¶¶82-83.
informal dinner with his Malaysian colleague did not prove the existence of legitimate expectations\textsuperscript{152} due to its unofficial character.\textsuperscript{153}

86. In the present case, Claimant’s legitimate expectation that its patent will be fully protected emerged from the assurances by Respondent’s Minister for Health,\textsuperscript{154} subsequently backed by Respondent’s President.\textsuperscript{155} Both of these statements were made officially, thereby justifying Claimant’s legitimate expectations.

87. The statement of the Minister for Health, reaffirming Respondent’s commitment to protect patent-holders’ rights,\textsuperscript{156} was published online on behalf of the Government of Mercuria.\textsuperscript{157} Hence, the promise shall be construed as given in a formal manner.

88. Moreover, the Minister’s press statement was shared by Respondent’s President on Twitter, adding that Respondent will “roll out the red carpet for the investors”.\textsuperscript{158} As the President habitually used Twitter to announce the State’s policies to more than 40 million users,\textsuperscript{159} the tweet shall be treated as the official position of Respondent’s President, hence, Respondent itself.

89. Thus, both statements were official and gave rise to Claimant’s legitimate expectations.

\textbf{b. Respondent’s guarantee was sufficiently specific and individualized}

90. Public statements promising foreign investors a favourable regime create legitimate expectations if they explicitly define the scope of such a regime and are addressed to specific investor.\textsuperscript{160}

91. In \textit{Metalclad}, the U.S. company was assured by federal authorities that no permit was necessary for its business.\textsuperscript{161} An official letter addressed to the investor was found sufficiently concrete and individualized to engender legitimate expectations.\textsuperscript{162}

92. Here, Respondent’s assurances were similarly specific. In his statement, the Minister for Health confirmed Respondent’s commitment to protect patent-holders’ rights rather than disregard

\begin{itemize}
\item \textsuperscript{152} MTD, ¶¶63, 125, 133, 156-158.
\item \textsuperscript{153} Ibid., ¶156-158.
\item \textsuperscript{154} Statement of Uncontested Facts, p. 30, para. 20.
\item \textsuperscript{155} Ibid.
\item \textsuperscript{156} Annex No. 3, p. 39.
\item \textsuperscript{157} Ibid.
\item \textsuperscript{158} Statement of Uncontested Facts, p. 29, para. 8.
\item \textsuperscript{159} Procedural Order No. 3, lines 1567-1569.
\item \textsuperscript{160} Potesta, p. 105-110.
\item \textsuperscript{161} Metalclad, ¶89.
\item \textsuperscript{162} Ibid.
\end{itemize}
their patents, expressly mentioning Claimant.\textsuperscript{163} Such statement cannot be construed in any other way than a commitment pledged to Claimant that its patent would not be subject to any interference.

93. \textit{Ergo}, two of Respondent’s high-ranking officials formally assured that Claimant’s patent was protected, hence, Claimant legitimately expected that its patent would not be used without its consent.

\textbf{2. Respondent’s guarantee was essential to concluding the LTA}

94. A breach of legitimate expectations arises only if an investor relies on host State’s guarantees while making the investment.\textsuperscript{164} If the guarantees were given \textit{after} the launch of the investment, the investor is deemed to have assumed all business risks, for which States are not liable.\textsuperscript{165}

95. In \textit{Allard}, the tribunal ruled that the investor did not rely on Barbados’ permission to construct buildings while purchasing lands in a reserved area in 1994, since the permission was given in 2001.\textsuperscript{166} Mr. Allard was found to have assumed the risk that the construction might contravene Barbados’ environmental policies.\textsuperscript{167} Assuming business risks is the exact opposite of possessing of legitimate expectations;\textsuperscript{168} therefore, Mr. Allard could not legitimately expect that Barbados would not withdraw the guarantees.\textsuperscript{169}

96. In contrast, here, Respondent promised full protection of Claimant’s patent 3 months before the conclusion of the LTA without any indications that its policy may change.\textsuperscript{170} Had there been a risk that practically any manufacturer could produce Claimant-patented drug disregarding the patent, Claimant would have never even contemplated signing the LTA, let alone purchased additional facilities to boost its production in Respondent’s territory.\textsuperscript{171}

97. Thus, while concluding the LTA, Claimant justifiably relied upon Respondent’s guarantee to secure its patent from interference and legitimately expected Respondent to uphold this guarantee.

\textsuperscript{163} Annex No. 2, p. 39.
\textsuperscript{165} \textit{Potesta}, p. 119; \textit{Allard}, ¶218.
\textsuperscript{166} \textit{Allard}, ¶¶220, 225.
\textsuperscript{167} \textit{Ibid.}, ¶222.
\textsuperscript{168} \textit{Ibid.}
\textsuperscript{169} \textit{Ibid.}, ¶219.
\textsuperscript{170} Statement of Uncontested Facts, p. 30, para. 20.
\textsuperscript{171} \textit{Potesta}, p. 120 citing \textit{ADF}, ¶189; \textit{Invesmart}, ¶272.
3. Claimant’s reliance on Respondent’s guarantee was reasonable

98. An investor’s reliance on a host State’s guarantees is reasonable if the investor “performs a diligent inquiry into the regulatory framework” before relying on such guarantee\textsuperscript{172} to ensure that the promise does not contravene the domestic law.\textsuperscript{173}

99. In \textit{MTD}, the Chilean Government entered into an investment contract, thereby giving the investor an implicit guarantee that construction in a natural reserve area complied with the Chilean law.\textsuperscript{174} The tribunal, however, found the investor’s reliance on such a guarantee unreasonable, since construction in such an area was explicitly prohibited by the applicable Chilean law, which a reasonable investor should have been aware of.\textsuperscript{175}

100. Here, Respondent’s guarantee to protect Claimant’s IP rights did not contradict Respondent’s domestic law. Conversely, such a guarantee not only complied with the domestic law, but was also in furtherance of Respondent’s international obligations enshrined in the TRIPS Agreement.\textsuperscript{176}

101. Under Article 28 of the TRIPS Agreement, Respondent undertook to prevent third parties from using or selling patented products without the consent of patent-owners.\textsuperscript{177} This provision is essential, since investors enrich local economy by their inventions and, in exchange, States commit to protect them from third party infringement.\textsuperscript{178}

102. Thus, Claimant’s reliance on the Minister for Health’s statement, later endorsed by Respondent’s President,\textsuperscript{179} was reasonable, as such a statement was in line with both Respondent’s domestic law and international obligations.

103. \textit{Ergo}, Claimant legitimately expected that its IP rights under the Valtervite patent would never be conferred to anyone without its consent. By introducing Section 26C of the IP Law and allowing HG-Pharma to produce Valtervite notwithstanding the patent, Respondent frustrated Claimant’s legitimate expectations in breach of Article 3(2) of the BIT.

\textsuperscript{172} \textit{Ibid}.

\textsuperscript{174} \textit{MTD}, ¶¶242-246.

\textsuperscript{175} \textit{Ibid}.

\textsuperscript{176} Procedural Order No. 2, p. 48, para. 2.

\textsuperscript{177} TRIPS Agreement, Article 28.

\textsuperscript{178} Vadi, p. 171.

\textsuperscript{179} Statement of Uncontested Facts, p. 30, para. 20.
B. **RESPONDENT CANNOT JUSTIFY THE BREACH BY THE EXERCISE OF ITS POLICE POWERS**

104. Respondent cannot pull down the blinds of its police powers and invoke its aspirations to protect public health to evade the obligation to respect Claimant’s legitimate expectations.

105. While under customary international law States may resort to their “police powers”, *i.e.* introduce measures derogating from treaty standards in the exercise of their sovereign functions if the health of their nationals is under a severe threat, such measures can only be justified if they are both reasonable and proportionate.

106. Here, neither the introduction of Section 23C nor the grant of a license to HG-Pharma can be justified under the plea of “police powers”. Even though Respondent adopted the contested measures to protect its nationals from the greyscale disease, they were unreasonable and disproportionate, since granting a non-voluntarily license on Claimant’s patented drug to HG-Pharma did not contribute to Respondent’s alleged health objectives and in any event Respondent had a plethora of other means to control the virus without extinguishing investor protections.

1. **Respondent’s measures were unreasonable**

107. A State’s measures pursuing public health objectives are reasonable if they are potentially effective.

108. In *Philip Morris*, while fighting against tobacco addiction, Uruguay prohibited sales of various cigarettes brands belonging to the claimant, permitting the investor to sell only one brand – Marlboro Red. That measure was ruled to be justified, since it was proved to have some deterrent effect on smokers and reasonably “addressed the false perception created by use of colors that some brand variants were healthier than others”.

109. In the present case, granting HG-Pharma a license to produce Valtervite was anything but reasonable. It is not scientifically proven that Valtervite cured patients or prevented the disease

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180 *Philip Morris*, ¶290.
181 Kriebaum, pp. 725-729.
182 *Philip Morris*, ¶291.
185 Procedural Order No. 2, p. 50, para. 5.
186 *Philip Morris*, ¶306.
from spreading, hence, the measure did not contribute to the public health aims voiced by Respondent. What it did undoubtedly contribute to was Respondent’s enrichment, which owned 50% of HG-Pharma’s shares.

110. Thus, granting a license to HG-Pharma in breach of Claimant’s IP rights was unreasonable, since it was ineffective for protecting Respondent’s nationals from the disease.

2. **Respondent’s measure was disproportionate**

111. The measure disrespecting a foreign investor’s rights is disproportionate, if there are other less intrusive measures available to the State.

112. In the case at hand, instead of granting HG-Pharma the license to produce Valtervite, Respondent could have resorted to a different means entailing no harm to investors. The disease could have been combated by returning to the previous treatment scheme of taking 5-7 pills every day. By employing this method (which was as efficient as using Valtervite) Respondent would have been able to carry out its mission aimed at protecting its nationals from the greyscale disease without violating Claimant’s rights. Instead Respondent gave its own company the green light to take over Claimant’s business.

113. Thus, licensing HG-Pharma was not only unreasonable, but also disproportionate. Respondent significantly exceeded its police powers in its “public health protection” crusade, hence, the breach of the FET standard in Article 3(2) of the BIT cannot be justified.

114. **Ergo**, by introducing Section 23C into the Mercuria IP Law and allowing HG-Pharma to produce Claimant’s patented drug, Respondent, in complete disregard of its previously advocated full protection of IP rights, frustrated Claimant’s legitimate expectations and breached the FET standard of Article 3(2) of the BIT. Respondent’s measures, allegedly introduced for health objectives, were more beneficial to Respondent itself than to its nationals’ public health. Therefore, Respondent’s actions were unreasonable and disproportionate, which bars Respondent from invoking its police powers to justify its actions.

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190 Procedural Order No. 3, p. 50, para. 5.

191 Ibid., ¶ 8.

192 Kriebaum, p. 732.

193 Statement of Uncontested Facts, p. 28, para. 6.
IV. THE FAILURE OF RESPONDENT’S COURTS TO REVIEW CLAIMANT’S ENFORCEMENT APPLICATION AMOUNTS TO DENIAL OF JUSTICE BY RESPONDENT IN BREACH OF ARTICLE 3 OF THE BIT

115. It is widely acknowledged that States’ obligation to accord FET encompasses an obligation to ensure justice in their courts.\(^\text{194}\) Foreign investors are denied justice, if their proceedings in host States’ courts are administered in a seriously inadequate or unduly delayed manner.\(^\text{195}\)

116. While considering whether justice was denied, arbitral tribunals take into account 1) the actions of the host States’ courts; 2) the litigation strategy pursued by the investor himself; and 3) the complexity of the particular case.\(^\text{196}\) If state courts inadequately delay deciding a straightforward case where investors diligently advance their claims, justice is deemed denied.\(^\text{197}\)

117. In the present case, by undertaking to accord FET under Article 3 of the BIT, Respondent committed to ensure justice. Moreover, in accordance with Article 31 of the VCLT\(^\text{198}\) this obligation shall be interpreted in light of the BIT preamble, which recognizes the importance of providing foreign investors with effective means of enforcing their rights.\(^\text{199}\)

118. However, Claimant was deprived of such effective means as it had been trying to enforce the Award for more than 8 years to no avail.\(^\text{200}\)

119. Thus, Claimant was denied justice by being deprived of a meaningful opportunity to obtain a decision for the enforcement of the Award due to Respondent’s High Court’s unlimited favoritism towards the NHA, Respondent’s agency,\(^\text{201}\) resulting in an inadequate delay in the proceedings (A). The 8-years delay is unjustified, given that Claimant was diligent in pursuing its claims (B) and the case was not complex (C). Moreover, the delay is too long to be cured by Respondent’s developing status (D).

\(^{194}\) Haeri, Dagli, p. 6 citing Loewen, ¶132; Vivendi, ¶7.4.11; Rumelt, ¶651; Jan de Nul, ¶188; Ruper Binder, ¶448; Siag, ¶¶451-461.

\(^{195}\) Azinian, ¶¶102,103.

\(^{196}\) Chevron, ¶250; McLACHAN, SHORE, WEINIGER, p. 300.

\(^{197}\) Chevron, ¶254; Paulson in Chevron, ¶12.

\(^{198}\) VCLT, Article 31.

\(^{199}\) Annex No. 1, p. 32.

\(^{200}\) Exhibit 1, p. 7-12.

\(^{201}\) Procedural Order No. 3, p. 50.
A. Respondent’s Courts Manifestly Favored the NHA and Unduly Delayed the Enforcement Proceedings

120. Where host States’ courts intentionally delay proceedings of foreign investors against host States or state-owned entities, there is clear denial of justice.\(^{202}\)

121. In *Chevron*, Ecuadorian courts failed to render judgments in dozens of cases brought by the investor against the Ecuador Government for 7 years,\(^ {203}\) even though they had officially declared themselves ready to do so.\(^ {204}\) The *Chevron* tribunal found that the Ecuadorian courts were manifestly favorable towards the Government.\(^ {205}\) Their unwillingness to decide the cases was not anyhow addressed by the State, hence, the investor was left with no means of appeal.\(^ {206}\) Thus, the investor’s right to justice was infringed in breach of the BIT.\(^ {207}\)

122. In the case at hand, Respondent’s High Court was also manifestly favorable towards the NHA. Since 2009, the High Court granted the NHA extensions for filing its submissions 14 times,\(^ {208}\) cumulatively delaying the proceedings for 36 months. Additionally, due to the NHA’s absence, the High Court has adjourned hearings 7 times,\(^ {209}\) causing an additional 21-months delay. Moreover, while addressing Claimant’s counsel, the High Court expressly recognized the difference between public status of the NHA and private status of Claimant, siding with the NHA.\(^ {210}\)

123. Thus, by prolonging proceedings for 57 months (4 years and 9 months) for the benefit of the NHA, the High Court utterly disregarded the equality of the parties, thereby denying justice to Claimant.

B. Claimant Was Diligent in Pursuing Its Claims

124. Investors are deemed diligent in their litigation strategies if they pursue them in accordance with the applicable law.\(^ {211}\)

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\(^{202}\) *Chevron*, ¶¶166, 262.

\(^{203}\) *Chevron*, ¶166.

\(^{204}\) *Ibid.*, ¶262.

\(^{205}\) *Ibid.*


\(^{207}\) *Ibid.*

\(^{208}\) Exhibit 1, p. 7-12, paras. 6-8, 11-13, 16, 22, 31, 36-37, 41-42.

\(^{209}\) *Ibid.*, paras. 4-5, 19, 21, 34, 39, 44.


\(^{211}\) *Chevron*, ¶269; *White Industries*, ¶10.4.15.
125. For example, the *White Industries* tribunal ruled that by raising certain jurisdictional objections the Australian investor did not contribute to the delay caused by Indian courts, since it was entitled to such objections under the New York Convention.\(^{212}\) In other words, the investor legitimately strived to be treated in compliance with India’s international obligations, hence, no contribution to the delay.\(^{213}\)

126. Here, two additional years of delay which followed Claimant’s motion to transfer the case to the High Court’s Commercial Bench,\(^{214}\) cannot be opposed to Claimant. Claimant reasonably relied on the Supreme Court’s judgments then in force in justified belief that the High Court’s Commercial Bench was responsible for enforcement.\(^{215}\) Moreover, the High Court endorsed Claimant’s submissions and indeed transferred the case to its Commercial Bench, which additionally demonstrates that Claimant’s transfer application was reasonable and complied with the domestic law.\(^{216}\)

127. Thus, Claimant’s actions did not contribute to the delay, which occurred entirely at the Court’s fault.

### C. The Case Was Not Complex

128. A certain delay in State courts’ proceedings is deemed permissible if the contested issues are particularly complex.\(^{217}\)

129. In *FPS*, a delay in the enforcement proceedings was justified since public policy issues involving insolvency and creditors’ rights, which the courts analyzed with the utmost caution, were at stake.\(^{218}\) Thus, the FPS’s allegations that the Czech courts failed to provide effective means of enforcing the investor’s rights were not sustained.\(^{219}\) In contrast, in *White Industries*, the tribunal found that White’s application to enforce an award posed no major difficulties, therefore, the delay could not be excused.\(^{220}\)

130. Nothing in the present case suggests that the enforcement proceedings in Claimant’s case were anyhow puzzling. The High Court adjourned the hearings either because the NHA was absent

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\(^{212}\) *White Industries*, ¶10.4.15.

\(^{213}\) *Ibid.*

\(^{214}\) Exhibit 1, p. 7-12, ¶ 7.


\(^{217}\) *Chevron*, ¶250; *White Industries*, ¶10.4.13.

\(^{218}\) *FPS*, ¶¶527-528.


\(^{220}\) *White Industries*, ¶10.4.13.
or asked for extension to complete its submissions or because the High Court was congested. The High Court did not even hear the arguments on the merits, hence, it cannot rely on the complexity of the case now to escape responsibility for the delay.

131. Thus, Claimant’s uncomplicated enforcement case cannot be deemed complex to excuse the 8-years delay provoked solely by Respondent’s High Court.

D. Respondent’s Developing Status Does Not Absolve It from Liability for the Delay

132. Court congestion and backlogs in developing countries, which may be relevant when determining whether a delay is excusable, are not an absolute defense, and whether the justice was denied or not will depend on true reasons why the specific court delayed the proceedings.

133. In Chevron, even though Ecuadorian judiciary was deemed overstretched, the delay was not justified since it occurred predominantly due to Ecuador’s court’s unwillingness to decide the case.

134. In the case at hand, adjournment of the proceedings due to the Court’s overload occurred only 5 times. The remaining 20 adjournment events accountable for no less than 56 months of delay were caused solely by the Court’s unreasonable extensions granted to accommodate blatantly obvious delay tactics of the NHA.

135. Thus, the delay by Respondent’s High Court cannot be covered by the fig leaf of its developing country status, because whatever the real motive of the High Court’s red tape extensions, the reason behind them was anything but actual court congestion.

136. Ergo, the High Court remained completely inactive for nearly 8 years doing nothing but protracting Claimant’s proceedings to the benefit of Respondent-owned agency. Thus, Claimant was denied justice after its case was repeatedly adjourned by Respondent’s High Court without any realistic end in sight.

221 Exhibit 1, p. 4-5, paras. 7-12, 6-8, 11-13, 16, 19, 21-22, 31, 34, 36-37, 39, 41-42, 44.

222 Ibid., paras. 3, 9, 15, 20, 24, 32, 33, 40.

223 Ibid., para. 39.

224 Chevron, ¶263; White Industries, ¶10.4.18.

225 Chevron, ¶263.

226 White Industries, ¶10.4.18.

227 Exhibit 1, p. 4-5, ¶¶ 7-12, 6-8, 11-13, 16, 19, 21-22, 31, 34, 36-37, 39, 41-42, 44.

228 Ibid., paras. 3, 9, 15, 20, 24, 32, 33, 40.
V. THE NHA’S TERMINATION OF THE LTA TRIGGERS RESPONDENT’S RESPONSIBILITY PURSUANT TO THE UMBRELLA CLAUSE OF ARTICLE 3(3) OF THE BIT

137. In 2004 Claimant concluded the LTA, a contract for supply of its patented drug, with the NHA, a public entity vested with certain governmental powers and controlled by Respondent. The contract was initially praised by Respondent’s high-ranking officials. However, in 2008 as a result of Respondent’s new health policy the NHA demanded an utterly unreasonable discount of 40% under the LTA, which would result in Claimant was forced to refuse it. After a secret rendez-vous with Respondent’s President and Minister for Health the NHA unilaterally terminated the LTA under a spurious pretext of Claimant’s “unsuccessful performance”.

138. The breach of the LTA by the NHA amounts to a violation of the BIT by Respondent pursuant to the umbrella clause in Article 3(3), which transforms contract breaches into breaches of the BIT.

139. Here Respondent’s international responsibility is triggered since the NHA’s obligations were in fact Respondent’s obligations (A), the LTA was terminated at Respondent’ direction (B). Respondent cannot get away with it, since umbrella clause is sufficiently broad to consider any contract breaches as treaty violations (C).

A. NHA’S OBLIGATIONS ARE RESPONDENT’S OBLIGATIONS

140. If a public entity undertakes contractual obligations in exercise of the functions vested into it by a State, such obligations are also imposed on the State. Otherwise, States would be allowed to create entities responsible for all contract-making to avoid responsibility.

141. In Noble Ventures obligations of State Ownership Fund (SOF) and Authority for Privatization and Management of the State Ownership (APAPS) were deemed to be Romania’s

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229 Statement of Uncontested Facts, p. 29, para. 9.
231 Procedural Order No. 3, p. 50.
232 Statement of Uncontested Facts, pp. 29-30, para. 15.
233 Ibid.
234 Ibid., p. 30, para 16.
235 Ibid.
236 Article 5 of ARSIWA; Olleson, p. 472-473; Clayton, ¶308; Maffezini, ¶52.
237 Feit 2, p. 37.
238 Feit 1, p. 163.
own obligations, since the respective entities were officially vested with representing Romania in privatization process.\(^{239}\)

142. In the present case, the NHA is Respondent’s representative. First, the NHA was established by Respondent’s Government and officially charged with “securing universal healthcare for Respondent’s people” on behalf of Respondent.\(^{240}\) Second, the activities of the NHA were planned as an integral part of the governmental program – the five-year health plan.\(^{241}\) Third, the NHA is politically accountable to Respondent.\(^{242}\) Fourth, the term “national” in the full name of the NHA speaks for itself and signifies that it operates on behalf and in the interests of Respondent. Finally, the NHA is responsible for public healthcare, which Respondent numerous times proclaimed its reserved domain,\(^{243}\) hence, functionally and structurally speaking, the NHA constitutes a part of Respondent’s state apparatus.

143. Thus, the NHA is a mere instrumentality used by Respondent to pursue its public health goals, hence, its undertakings are binding upon Respondent itself.

### B. THE BREACH OF THE LTA IS ATTRIBUTABLE TO RESPONDENT

144. The conduct of a separate entity is attributable to a State if the State exercises general control over such entity and directs it to act in a certain manner.\(^{244}\)

145. In the case at hand, both types of control are present.

1. **Respondent generally controlled the NHA**

146. A State is deemed to have a general control over a separate public entity, if the latter is established and financed by the former.\(^{245}\)

147. In *L.E.S.I.*\(^{246}\) even though *Agence Nationale des Barrages* (ANB) was an independent agency and possessed its own legal personality,\(^{247}\) the *L.E.S.I.* tribunal found that Algeria

\(^{239}\) *Noble Ventures*, ¶86.

\(^{240}\) Annex No. 2, p. 39.

\(^{241}\) Statement of Uncontested Facts, p. 29, para. 8.

\(^{242}\) Procedural Order 3, p. 50, line 1591.

\(^{243}\) Response to the Notice of Arbitration, p. 16, para. 6.

\(^{244}\) Olleson, p. 473 citing *Jan de Nul*, Award on Jurisdiction, ¶173; *Saipem*, ¶148; *Jan de Nul*, Award on Merits, ¶173; *Tulip Real Estate*, ¶309.

\(^{245}\) Olleson, pp. 472-473; Badia, pp. 189-191.

\(^{246}\) *L.E.S.I.*, ¶19.

\(^{247}\) *Ibid.*, ¶19 (iii).
controlled the agency since the agency was established by virtue of a decree and its activities were financed from the state budget.\(^{248}\)

148. Here the NHA’s status is very similar to the described, since the NHA was created by a governmental act\(^ {249}\) and is funded by national taxation.\(^ {250}\) Moreover, the NHA is politically accountable to Respondent’s Government\(^ {251}\) and regularly prepares reports to the Ministry of Health,\(^ {252}\) which demonstrates subordination and tight connection between the NHA and Respondent that cannot be ignored.

149. Thus, the NHA is generally under Respondent’s control.

2. The NHA terminated the LTA at the Respondent’s \textit{sub rosa}\(^ {253}\) direction

150. An act of a separate entity is attributable to a State if said entity acts upon the State’s directions.\(^ {254}\) As such directions are normally kept secret, hence, difficult to establish, they are presumed if the State exercises a significant control over the entity’s personnel.\(^ {255}\)

151. In \textit{Deutsche Bank AG} it was proved that the Government of Sri-Lanka had a significant control over the decision-makers of the Ceylon Petroleum Corporation (CPC), therefore, termination of a Hedging Agreement by the CPC was presumed to be directed by Sri-Lanka as a State.\(^ {256}\)

152. In the present case, the NHA’s Director was likewise significantly dependent on Respondent’s Government.\(^ {257}\) Precisely after the meeting with Respondent’s President accompanied by the Minister for Health the NHA unilaterally terminated the LTA,\(^ {258}\) which in light of the subordination between Respondent and the NHA compels to regard this as more than a mere coincidence.

153. Thus, the NHA was ordered to terminate the LTA by Respondent, and as the result, such termination is attributable to Respondent.

\(^{248}\) \textit{Ibid.}, ¶18 (iii).

\(^{249}\) Annex No. 2, p. 39.

\(^{250}\) Procedural Order No. 3, p. 50.

\(^{251}\) \textit{Ibid.}

\(^{252}\) Statement of Uncontested Facts, p. 28, para. 6.

\(^{253}\) «The Latin phrase \textit{sub rosa} means «under the rose», and is used to denote secrecy or confidentiality» at https://en.wikipedia.org/wiki/Sub_rosa.

\(^{254}\) ARSIWA, Article 8; Baida, pp. 195 – 200.

\(^{255}\) Baida, p. 199.

\(^{256}\) \textit{Deutsche Bank AG}, ¶405.

\(^{257}\) Procedural Order 3, p. 50, lines 1591-1595.

\(^{258}\) Statement of Uncontested Facts, p. 30, para. 17.
C. ARTICLE 3(3) TRANSFORMS THE BREACH OF THE LTA INTO THE BREACH OF THE BIT

154. Umbrella clauses, obliging host States to respect any obligation they may have undertaken with regard to foreign investments, transform any breach of an investment-related contract into a treaty breach. However, some tribunals narrow the scope of umbrella clauses requiring the breach of a contract to be done in exercise of governmental powers.

155. In the present case, no matter which standard applies, the termination of LTA shall be considered as a breach of the BIT.

1. The NHA terminated the LTA in exercise of its puissance publique

156. According to the minority, application of an umbrella clause is triggered only if a contract breach results from States’ deploying of their sovereign powers.

157. In El Paso and Pan American the tribunals ruled that umbrella clauses are intended to protect foreign investors from State’s exercise of their sovereignty in disregard of their contractual obligations. In CMS the tribunal sided with Argentina by discharging it from a liability for a non-payment under a contract with foreign investor, since Argentina did not exercise its puissance publique.

158. In the present case, the NHA’s declaration that the termination of the LTA was due to Claimant’s non-performance rings hollow, as Claimant had been perfectly fulfilling the contract for more than 4 years. The real reasons why the LTA was terminated were the NHA’s aspirations to support Respondent in employing its healthcare program, which was its official function under the relevant governmental decree.

159. Therefore, the NHA breached the LTA in exercise of the sovereign power to protect public health, therefore, umbrella clause in Article 3(3) shall apply to transform the breach of the LTA into the breach of the BIT.

259 Sinclair, pp. 922-928.
260 Ibid.
261 Public power.
262 Sinclair, 924; CMS, ¶301.
263 El Paso, ¶¶ 71, 76; Pan American, ¶105.
264 CMS, ¶301.
265 Statement of Uncontested Facts, p. 29, para. 15.
266 Annex No. 2, p. 39, para. 2.
2. Even if the NHA terminated the LTA in its commercial capacity, Article 3(3) of the BIT still applies

160. According to the majority position, articulated in *SGS v. Philippines*, an umbrella clause means what it says, i.e. it covers any obligation a host State pledged to a foreign investor. In other words, the breach shall not necessarily be accompanied by an exercise of sovereign powers.

161. Such approach was adopted in *Eureko*, where the phrase “any” obligations in the umbrella clause of Netherlands-Poland BIT was construed broadly to include not only obligations of a certain type, but encompass all obligations entered into by Poland with regard to the Dutch investor’s activities.

162. In a more recent case of *BIVAC* the tribunal followed the same logic. It reasoned that the words “any obligations” are all-encompassing and in their plain meaning should include the contractual arrangement between BIVAC and the Ministry of Finance of Paraguay. The tribunal also highlighted that the umbrella clause had to be interpreted in such a way as to give it some meaning and practical effect.

163. Other arbitral tribunals, namely, those in *Noble Ventures*, *Duke Energy*, *Burlington Resources* and *SGS v. Paraguay*, also expressed their support for the view that a simple breach of contractual obligations amounts to the breach of an umbrella clause, even if done without any exercise of sovereign powers.

164. In the present case the broadly-worded Article 3(3) of the BIT is comparable to the umbrella clauses analyzed in abovementioned cases, which were deemed to apply to any contractual breach, not necessarily one involving puissance publique. Thus, even if the NHA terminated the LTA in its commercial capacity, Respondent is still responsible for the breach, as it impliedly assumed NHA’s obligations under the LTA and the umbrella clause is sufficiently broad to transform any contractual breach by Respondent into a violation of the BIT.

267 Sinclair, p. 893.
268 Ibid., p. 927.
269 *Eureko*, ¶¶246-248.
270 *BIVAC*, ¶141.
271 Ibid.
272 *Noble Ventures*, ¶61.
274 *Burlington Resources*, ¶190.
275 *SGS v. Paraguay*, ¶168.
165. *Ergo,* the breach of the LTA by NHA is attributable to Respondent, hence, Respondent failed to observe its obligations *vis-à-vis* Claimant’s investment in violation of Article 3(3) of the BIT.
PRAYER FOR RELIEF

166. For all the reasons stated above, Claimant respectfully requests this Tribunal to:

   I. Find that it has jurisdiction over the present case, including award-enforcement related claims;

   II. Find that Respondent failed to accord to Claimant fair and equitable treatment in breach of Article 3(2) of the BIT by frustrating Claimant’s legitimate expectations and by denying justice;

   III. Find that Respondent violated Article 3(3) of the BIT;

   IV. Order Respondent to pay damages to Claimant for the losses caused by the violations in the amount of no less than USD 1,540,000,000.00, along with the pre-award interest and post-award interest at a rate to be fixed by the Tribunal.

Respectfully submitted on 18 September 2017

by

Team ALFARO

On behalf of Claimant

Atton Boro Limited