TEAM AMOR

PERMANENT COURT OF ARBITRATION

PCA Case No. **2016-74**

BETWEEN

ATTON BORO LIMITED (The Kingdom of Basheera)

CLAIMANT

AND

THE REPUBLIC OF MERCURIA

RESPONDENT

MEMORIAL FOR RESPONDENT

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CAFTA-DR	Dominican Republic-Central America Free Trade Agreement (2004).
Canada-Czech BIT	Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments (2009).
Canada-Venezuela BIT	Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (1996).
Doha Declaration	*Doha WTO Ministerial 2001: TRIPS.* WT/MIN(01)/DEC/2. 20 November 2001. Declaration on the TRIPS agreement and public health (Adopted on 14 November 2001).
DSU	*Understanding on Rules and Procedures Governing the Settlement on Disputes. 15/04/1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2*, Vol. 1869 No. 31874 UNTS (1995).
ECT	Energy Charter Treaty (1991).
GATT	*General Agreement on Tariffs and Trade (GATT*

	1947), 01/01/1948, 55 UNTS 194.
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966).
N.Y. Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38 (1958).
PCA Rules	Permanent Court of Arbitration. *Arbitration Rules 2012.*
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TRIPS	*Agreement on Trade-Related Aspects of Intellectual Property Rights 15/04/1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C,* Vol. 1867 No. 31874 UNTS (1995).
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Sempra	*Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, Award (28/09/207).
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SGS Philippines	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29/01/2004).
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MISCELLANEOUS

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ICESCR-Commentary	United Nations, *Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* E/C.12/2000/4 (2000).
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Southern Pacific Railroad	*Santa Clara County v. Southern Pacific Railroad Company,* 118 US 394 (1886).
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	Treatment (2012).
UNCTAD-Transparency	UNCTAD Series on Issues in International Investment Agreements II, *Transparency* (2012).
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LIST OF ABBREVIATIONS

%	Percent
¶/¶¶	Paragraph/Paragraphs
§	Section
Art(s).	Article/Articles
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	The Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
e.g.	*Exempli gratia*
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
ICSID	International Center for Settlement of Investment Disputes
Id.	*Idem*
i.e.	*Id est*
IP	Intellectual Property
No.	Number
Notice	Notice of Arbitration
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PO2	Procedural Order 2

PO3	Procedural Order 3
Records	Foreign Direct Investment International Moot 2017 Case, Table of Documents
Response	Response to the Notice of Arbitration
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
v.	Versus
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

The Parties in this arbitration are Atton Boro Limited ("**Claimant**") and the Republic of Mercuria ("**Respondent**").

Claimant is a vehicle wholly-owned by Atton Boro Group ("**ABG**"), incorporated in Basheera.[1] Shares of ABG are primarily held by a Reef company, Atton Boro and Company ("**ABC**").[2]

Respondent is the host State to Claimant.

1985 - present	Greyscale, a chronic and incurable disease, is prevalent in Mercuria.[3]
1997	ABG synthesized Valtervite, a compound that effectively treats greyscale.[4]
11 January 1998	Mercuria and Basheera concluded the Agreement for the Protection and Reciprocal Protection of Investments (**"BIT"**).[5]
21 February 1998	ABC obtained Valtervite patent in Mercuria.[6]
5 April 1998	ABG incorporated its wholly owned subsidiary, Claimant, in Basheera.[7]
15 April 1998	ABC assigned Claimant its Valtervite patent in exchange for shares.[8]
2003	The National Health Authority ("**NHA**") annual

[1] Facts, ¶4.
[2] Facts, ¶2.
[3] Annex No. 3, p.41.
[4] Facts, ¶3.
[5] Facts, ¶1; Annex No.1.
[6] Facts, ¶3.
[7] Facts, ¶4; PO2, ¶6.
[8] *Id.*; PO3, ¶3.

	report states the greyscale outbreak can be a national crisis unless aggressive measures were taken. It suggested moving to the more effective treatment of fixed-dose combinations ("**FDC**").[9]
20 July 2004	NHA and Claimant concluded the Long-Term Agreement ("**LTA**").[10] Under it, Claimant would supply Sanior, its FDC drugs containing Valtervite.[11] Meanwhile, NHA would periodically purchase Sanior at a discounted rate with a minimum guaranteed order-value.[12]
June 2005	Claimant delivered NHA its first Sanior consignment.[13]
Early 2008	To supply Sanior for nearly twice the number of patients, NHA requested for a 40% discount.[14]
10 June 2008	NHA terminated the LTA due to Claimant's unsatisfactory performances.[15]
January 2009	The tribunal in Reef rendered an award (the "**Award**").[16]
3 March 2009	Claimant filed enforcement of Award to High Court of Mercuria, despite the enforcement being contrary to public policy.[17]
10 October 2009	President of Mercuria promulgated Law No. 8458/09 introducing non-voluntary licensing.[18]

[9] Facts, ¶6.
[10] PO2, ¶6.
[11] Facts, ¶9.
[12] Facts, ¶10.
[13] *Id.*; Facts, ¶11.
[14] *Id.*
[15] Facts, ¶17.
[16] *Id.*
[17] Facts, ¶18.
[18] Facts, ¶20.

November 2009	Mercurian generic drug manufacturer HG-Pharma applied for a license to manufacture Valtervite before the High Court of Mercuria.[19]
17 April 2010	The High Court of Mercuria granted HG-Pharma the requested license until greyscale is no longer to public health in Mercuria.[20]
January 2012	NHA's Director announced that the manufacture of generic drug reduced costs of medicine purchases up to 80%.[21]
10 January 2012	Parliament of Mercuria enacted the Commercial Courts Act for High Courts to constitute special benches to adjudicate commercial cases.[22]
7 November 2016	Claimant filed Notice of Arbitration ("**Notice**") to Permanent Court of Arbitration ("**PCA**").
26 November 2016	Respondent submitted Response to Notice of Arbitration ("**Response**") to PCA.
30 December 2016	Claimant rejected Respondent's proposal to apply the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration in the present proceedings.[23]

[19] Facts, ¶21.
[20] *Id.*
[21] Facts, ¶22.
[22] Facts, ¶19.
[23] PO1, ¶14.

SUMMARY OF ARGUMENTS

PART I: JURISDICTION AND ADMISSIBILITY

1. With all due respect, this Tribunal lacks jurisdiction over claims in relation to: *first,* the Award **(Issue I)**; *second,* breaches of the LTA **(Issue II)**; and *third,* TRIPS **(Issue III)**. All these claims do not arise out of, or even relate to the BIT.[24]

2. Moreover, Claimant's claims are inadmissible pursuant to Article 2(1) BIT. Claimant is controlled by ABC, a Reef national, *and* has no substantial business activities in its home State, Basheera **(Issue IV)**.

PART II: MERITS

3. In any case, Claimant's claims are all meritless.

4. *To start*, Respondent acted fairly and equitably in line with Article 3(2) BIT in amending its IP framework and granting the Valtervite license. **(Issue V)**.

5. *Further*, the High Court of Mercuria's conduct in the Award's enforcement proceeding does not breach Article 3 BIT **(Issue VI)**.

6. *Lastly*, NHA's breach of the LTA does not breach Article 3(3) BIT **(Issue V)**.

[24] Art.8(1) BIT.

PART I: JURISDICTION AND ADMISSIBILITY

7. Jurisdiction of an international tribunal depends entirely on the consent of the parties.[25] Presently, consent of the Contracting Parties to arbitrate a dispute against a foreign investor is contained within Article 8 BIT. Such article only accords this Tribunal mandatory jurisdiction over disputes that arise *"out of or in relation to this Agreement"*,[26] i.e. the BIT.

8. The Contracting Parties did not consent to arbitrate over matters outside of the BIT. As such, this Tribunal lacks, and in any event should not exercise, jurisdiction over claims in relation to: the Award **(I)**, breaches of the LTA **(II)**, and TRIPS **(III).**

9. In the unlikely event this Tribunal sustains jurisdiction over such claims, Claimant's claims are nevertheless inadmissible pursuant to Article 2(1) BIT **(IV)**.

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD

10. As Article 8 BIT only accords jurisdiction over disputes arising out of the BIT, this Tribunal's subject matter – *ratione materiae*[27] – jurisdiction relies on the existence of a protected investment.

11. This Tribunal therefore lacks jurisdiction over claims in relation to the Award, as the Award is not a protected investment **(A)**, or even a transformation of any protected investment **(B)**, under Article 1(1) BIT.

A. THE AWARD IS NOT A PROTECTED INVESTMENT UNDER ARTICLE 1(1) BIT

12. To establish the existence of a protected investment, tribunals must look at the terms of the relevant BIT.[28] Article 1(1) BIT defines the term *"investment"* and also

[25] Sornarajah, p.330.
[26] Art.8(1) BIT.
[27] Yannaca-Small-Investor, p.53.
[28] *Nova Scotia,* ¶75; *GEA Group,* ¶127.

provides an illustrative list of categories. However, in consideration of such list, the term *"investment" in itself* possesses an inherent meaning that cannot be ignored.[29]

13. For the Award to qualify as an investment, this Tribunal must assess the Award through both the BIT's definition and an investment's inherent meaning. Such assessment is a manifest application Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**"), codification of the customary rules of interpretation.[30]

14. Here, the Award fails to conform to the definition under Article 1(1) BIT **(1).** Irrespective of the Award fulfilling the BIT's definition, the Award still does not correspond with the inherent meaning of an investment **(2)**.

1. The Award fails to conform to the definition under Article 1(1) BIT

15. The Award does not qualify as an investment under the chapeau of Article 1(1) BIT **(a)** and the illustration of *"claims to money"* contained within Article 1(1)(c) BIT **(b)**.

a) The Award does not qualify as an investment under the chapeau of Article 1(1) BIT

16. The term *"investment"* is defined in Article 1(1) BIT as:

> *"**Any kind of asset** held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party **in the territory of the other Contracting Party in accordance with the latter's law**..."* [Emphasis added].

17. Article 1(1) BIT must be interpreted based on the *ordinary meaning* of the terms of the BIT *in their context and in light of its objects and purposes.*[31]

18. *First*, considering the ordinary meaning of Article 1(1) BIT. Respondent highlights that such provision limits *"any kind of asset"* through the phrase *"held* [...] *in the*

[29] *GEA Group*, ¶141; *Romak*, ¶180.
[30] *White*, ¶7.3.2; *Romak*, ¶¶176,188-190; VCLT, Arts.31&32.
[31] VCLT, Art.31(1).

territory of the other Contracting Party in accordance with the latter's law".[32] Simply put, for Claimant's asset to be considered an investment, it must be an asset *held* within Mercuria's territory that is not in violation of Respondent's law.

19. This Tribunal cannot ignore the BIT's inclusion of *"in accordance with the* [host State's] *law"*. Through this phrase, the Contracting Parties wish to confer protection only on investments conforming to its law.

20. Such phrase is a host State's means to preserve regulatory control over foreign investment, seeking to ensure only investments promoting their economic development in its territory qualifies for BIT protection.[33] Hence, the existence of an investment will be determined by its validity under the host State's domestic law.[34]

21. *Second*, considering the context of Article 1(1) BIT. Article 1 BIT is aptly titled *"Definitions",* as its content clarifies essential BIT terms "*for the purposes of* [the BIT]*"*.[35] For further context, Article 13 BIT states that the BIT only applies *"to any investment made* […] *in the territory of the other Contracting Party."*[36] Thus, the BIT's general context upholds the territorial limit specified within the definition of investment in Article 1(1) BIT.

22. *Third*, considering the BIT's object and purposes in its preamble. The Contracting Parties explicitly agreed *"to promote greater economic cooperation between them with respect to investment* […] *in the territory of the other Contracting Party"*.[37] Such wording underlines the need for an asset to be invested in either the territory of Mercuria or Basheera, not an asset rendered in a non-Contracting Party's territory.

23. In this vein, a boundless interpretation of the term *"investment"* – through the phrase "*any kind of asset*" – would nullify the definition of investment itself.[38] Limitations provided by Article 1(1) BIT establish a clear link between the BIT's definition of a protected investment and its *"aims of economic development"* in the preamble.

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[32] Art.1(1) BIT.
[33] Sornarajah, pp.317-318.
[34] Kriebaum/Schreuer, p.4.
[35] Art.1 BIT.
[36] Art.13 BIT.
[37] Preamble BIT.
[38] *Romak,* ¶¶185,237.

24. Unlike the relevant BIT within *Romak,*[39] the BIT explicitly provides a territorial limit within its definition of investment. An investor's contribution – dedication of resources possessing economic value[40] – must therefore physically take place within the boundaries of the host State to trigger substantive protection.[41]

25. Presently, Claimant's contributions related to the creation of the Award itself did not occur within Respondent's territory. The Award's arbitration proceedings were entirely held in Reef. Claimant's contributions over such proceedings were instead channeled into Reef, not Mercuria.

26. Conclusively, the Award is not an asset that qualifies as a protected investment under the chapeau of Article 1(1) BIT.

b) The Award does not qualify as a "claims to money"

27. Even if Claimant seeks to categorize its Award through the ordinary meaning of *"claims to money"* under Article 1(1)(c) BIT, the Award itself is still not entitled to be protected under the BIT. This is because Article 1(1)(c) BIT must be understood *in conjunction* with Article 1(1) BIT.

28. The ordinary meaning of *"claims to money"* could encompass a party's right under an award to be paid a sum of money.[42] However, the *Romak* tribunal explained that even when an asset falls within one of the listed forms, it is not automatically transformed into a protected investment.[43]

29. Respondent is aware that international law cases have also considered a sum of money granted under awards as property rights,[44] rights to be protected by a BIT.[45]

[39] *Id,* ¶¶185,237.
[40] *Id,* ¶214.
[41] *Id,* ¶237.
[42] *Anglia Auto*, ¶151.
[43] *Romak*, ¶207.
[44] *Gavazzi*, ¶116; *Kin-Stib and Majkic v. Serbia*, ¶83.
[45] Sornarajah, p.138.

Even so, those property rights are created by the host State's domestic law. Hence, the extent of such rights must be ascertained under it.[46]

30. This further confirms that Article 1(1)(c) BIT must be seen in conjunction with Article 1(1) BIT, as the existence of an investment under the BIT will be determined by its validity under Respondent's domestic law.

31. Even in the context of an award, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**N.Y. Convention**") recognizes that a State's court may refuse recognition and enforcement of an award on grounds that the award would be contrary to the State's public policy,[47] e.g. illegitimate under domestic law.[48]

32. NHA requested the High Court of Mercuria to decline the Award on the ground that it was contrary to public policy.[49] As an investment must be proven valid within its host State to be protected under the BIT,[50] the Award must be recognized and enforced to be a valid investment in Mercuria.

33. Since the Award is not yet enforced in Mercuria, it cannot be considered as a valid investment under Article 1(1) BIT, including *"claims to money"* under Article 1(1)(c) BIT. Justice would be best served if this Tribunal exercises its power[51] to temporarily stay this proceeding until the determination of the Award's validity in Mercuria.

2. The Award does not correspond to the inherent definition of an investment

34. The fact that an asset falls within one of the categories listed in Article 1 BIT does not transform it into an investment if such asset does not correspond to the inherent

[46] *Id*.
[47] N.Y. Convention, Art.V(2)(b).
[48] *R v. V*, ¶43; *Soleimany,* ¶66.
[49] Facts, ¶18.
[50] *Salini*, ¶46; *Tokios*, ¶83.
[51] PCA Rules, Art.17(1).

definition of an investment.[52] The *Romak* and *Azinian* tribunals both stressed, *"labeling is* [...] *no substitute for analysis."*[53]

35. No matter what the forum is, the ordinary meaning of investment in the relevant treaty derives from something more than a list of examples.[54] Tribunals held[55] that the inherent meaning of the term *"investment"* entails *"a contribution that extends over a certain period of time and that involves some risk."*[56]

36. Without the cumulative existence of the aforementioned characteristics, an asset cannot in any way qualify as an investment. It is the investor's burden to prove that such characteristics of contribution, duration, and risk are cumulatively exhibited in its asset.[57] Here, the Award is not an investment as it fails to cumulatively fulfill the inherent characteristics of an investment.

37. *First*, as established *supra*,[58] the Award does not provide "contribution" to Mercuria. "Contribution" refers to any dedication of resources that has economic value, whether it is made in cash, kind or labor, to the host State.[59] In contrast, an award in favor of an investor does not contribute any outcome of economic value to the host State.[60] Clearly, no contribution occurred because Claimant's costs related to the creation of the Award were expended in Reef,[61] not in Mercuria.

38. *Second*, "duration" refers to the extent of time that an investor conducted its contribution,[62] as the inherent characteristics are interrelated.[63] Having made no contribution within Mercuria relating to the creation of the Award, no duration exists for consideration.

39. The Award does not correspond to the inherent definition of investment because it failed to possess the cumulative characteristics entailed within an investment.

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[52] *Romak,* ¶207.
[53] *Id*, ¶207; *Azinian,* ¶90.
[54] *Nova Scotia,* ¶¶77,80; *Romak,* ¶207.
[55] *Romak,* ¶207; *Salini*, ¶¶52,54; *LESI-DIPENTA,* ¶13; *Nova Scotia*, ¶84.
[56] *Romak,* ¶207.
[57] *Ascom*, ¶778.
[58] *Supra*, ¶24.
[59] *Romak,* ¶214.
[60] *GEA Group,* ¶160.
[61] Facts, ¶17.
[62] *Romak*, ¶207; *GEA Group*, ¶141; Sornarajah, p.309.
[63] *Nova Scotia*, ¶84.

Additionally, the Award does not conform to the definition of an investment under Article 1(1) BIT. Consequently, the Award in itself is not a protected investment.

B. The Award is not a transformation of any protected investment under Article 1(1) BIT

40. Respondent is mindful of the BIT's transformation clause within Article 1(1) BIT: *"any change in the form of an investment does not affect its character as an investment."*[64] Claimant may cite such clause to argue that the Award must be recognized as an investment as it arose from the LTA, a commercial agreement between Claimant and NHA concerning the supply of Sanior.[65] However, the transformation clause only applies if the transformed asset is a protected investment.

41. For example, applications of a transformation clause are commonly pertinent for the change of foreign investment enterprises, such as changing from a joint venture into a wholly foreign-owned investment.[66] This is because a change in corporate structure of an investment does not affect its character as an investment.[67] The joint venture's changed form therefore continues to be protected under the relevant BIT by virtue of the transformation clause.[68]

42. Meanwhile, the Award is only a mere asset, not a protected investment.[69] The *GEA Group* tribunal ruled, *"the fact that an award rules upon rights and obligations arising out of an investment does not equate the award with the investment itself."*[70]

43. Claimant cannot then claim that the Award is a transformation of the LTA. If Claimant still seeks to claim protection for the Award under the transformation clause, it must prove that LTA is also a recognized investment under the BIT.

44. Contractual rights are considered as an investment when it derives from a contract possessing the characteristics of an investment and is readily distinguished from

[64] Art.1(1) BIT.
[65] Facts, ¶9.
[66] Brown, p.148.
[67] Vandevelde, §4.2.1.
[68] Brown, p.148.
[69] *Supra,* ¶¶16-39.
[70] *GEA Group,* ¶162.

ordinary contracts.[71] The LTA is not a protected investment as it fails to correspond to the inherent definition of an investment **(1)**, as it is only an ordinary sales contract (**2**).

1. The LTA does not correspond to the inherent definition of an investment

45. Claimant may argue that the LTA is a recognized investment under Article 1(1)(e) BIT, yet this contract lacks the inherent characteristics to conform to the inherent meaning of investment. The criteria to evaluate the existence of an investment – contribution, duration and risk as elaborated *supra*[72] – apply in assessing contracts.[73]

46. Respondent again stresses the *cumulative* nature of these criteria, deemed as the minimum characteristics of an investment.[74] The LTA does not possess all the required inherent characteristics.

47. Particularly, the LTA lacks an investment risk. Investment "risk" refers to a political or economic risk arising from a governmental measure,[75] separate from ordinary commercial risks.[76]

48. The LTA only possesses ordinary commercial risks,[77] limited to the possibility of non-payment and termination under Clause 6 LTA if the Claimant performs unsatisfactorily.[78] This risk is an ordinary commercial risk arising form the LTA itself, not from any governmental measure.

49. Respondent draws similarities between the LTA and the contract within *Nova Scotia.* The *Nova Scotia* tribunal determined that its disputed contract has no investment risk as it already stipulates the quantity of coal negotiated for an agreed selling price.[79]

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[71] Zivkovic, §2.3.2; *AFT* ¶231.
[72] *Supra*, ¶¶37-38.
[73] Zivkovic, §1.2.1.
[74] *Romak*, ¶207; *GEA Group,* ¶141.
[75] Sornarajah, p.310.
[76] *Romak,* ¶¶229-230, *Nova Scotia*, ¶105.
[77] *Joy Mining,* ¶57.
[78] Facts, ¶10.
[79] *Nova Scotia*, ¶94.

The LTA stipulated a minimum guaranteed annual order-value,[80] which considerably decreases even Claimant's ordinary commercial risk.

50. Therefore, the LTA fails to correspond to the inherent definition of an investment.

2. The LTA is only an ordinary sales contract

51. Generally, a sales contract is not an investment.[81] Distinction must be drawn between ordinary sales contracts, even the complex ones, and an investment contract.[82] Otherwise, any one-off sales contract would qualify as an investment.[83]

52. An ordinary commercial contract does not amount to an investment contract if its form and substance essentially remains as a sale and purchase agreement, especially when it does not give rise to the investor's further investment.[84]

53. The *Nova Scotia* tribunal illustrated that the coal supply contract is a mere sales contract, as it is left with an arrangement that is essentially still a sale and purchase of coal – even if it was more complicated in genesis and composition.[85]

54. In parallel, no matter how complex the LTA gets, it only obliged Claimant to supply NHA with Sanior and remains a mere sale and purchase agreement.[86] The LTA's form and substance do not give rise to any investment by Claimant. Other investments after the LTA – manufacturing unit and land – could have existed without the LTA.

55. In conclusion, the LTA itself is not an investment. It neither possesses the minimum characteristics of an investment, nor it is an investment contract. In turn, the Award is not a protected investment arising from the LTA's transformation.

[80] Facts, ¶10.
[81] *MHS,* ¶¶69-72*; Global Trading,* ¶*55; Phoenix Action,* ¶82.
[82] *Joy Mining,* ¶58.
[83] *Id*, ¶¶56-57.
[84] *Mytilineos* (Mitrovic)*,* ¶2.
[85] *Nova Scotia*, ¶113.
[86] Facts, ¶10.

II. THIS TRIBUNAL SHOULD NOT ENTERTAIN CLAIMS IN RELATION TO BREACHES OF THE LTA

56. This Tribunal should not examine claims over breaches of the LTA because it lacks jurisdiction over purely contractual claims **(A)**. In any case, the LTA's specific forum selection clause bars this Tribunal from hearing claims in relation to the LTA **(B)**.

A. THIS TRIBUNAL HAS NO JURISDICTION OVER CLAIMS IN RELATION TO THE LTA

57. Investment tribunals agree that they have no jurisdiction over purely contractual claims.[87] Purely contractual claims are claims that arise from contracts having no relation to any investment.[88] This Tribunal has no jurisdiction over claims in relation to the LTA, simply because the claims are purely contractual.

58. Under Article 3(3) BIT, the Contracting Parties are required to observe any obligations it may have entered into *"with regard to investments"*. Respondent is aware that such article is broad enough to cover contractual obligations, but only limited to contracts *relating to an investment*.[89]

59. Concurrently, the function of investment tribunals is to interpret and apply laws in relation to matters agreed by a BIT's contracting parties[90] – not exceeding the limit set under a BIT.[91] Through this, tribunals in *Sempra* and *Joy* rejected jurisdictions over purely contractual claims that do not arise from an investment.[92]

60. As established *supra*,[93] the LTA and the rights under it are not investments. Therefore, this Tribunal has no jurisdiction over claims relating to LTA.

[87] *RFCC,* ¶68; *SGS Pakistan,* ¶¶161-162; *Sempra*, ¶95.
[88] *Sempra,* ¶95; *Joy Mining*, ¶75.
[89] *Garanti Koza*, ¶330.
[90] *BIVAC*, ¶292.
[91] *Id.*
[92] *Sempra,* ¶95; *Joy Mining*, ¶75.
[93] *Supra,* ¶¶45-55.

B. LTA'S SPECIFIC FORUM SELECTION CLAUSE BARS THIS TRIBUNAL FROM HEARING CLAIMS IN RELATION TO THE LTA

61. Tribunals have refused to hear disputes where the parties have already agreed on a specific forum to resolve contractual disputes.[94] Thus, even if this Tribunal finds jurisdiction over claims in relation to the LTA, this Tribunal should not hear such claims because the LTA contains a specific forum selection clause.

62. If a contract contains a specific forum selection clause, such forum has the exclusive jurisdiction to resolve all disputes arising from the contract.[95] *Ipso facto*, the contractual parties cannot submit its contractual claims to other forums.[96] In particular, when a claim is essentially based upon a contractual breach; tribunals must respect the contractual parties' selected forum in the contract.[97]

63. Demonstrated in *BIVAC*, the tribunal refused to exercise jurisdiction because BIVAC and Paraguay consented to the exclusive jurisdiction of a Paraguayan court to resolve disputes in relation to the Contract.[98] *A contrario*, the *Duke* tribunal accepted jurisdiction over a contractual claim because in their arbitration agreement, Ecuador and Duke consented that ICSID can adjudicate their contractual disputes.[99]

64. NHA and Claimant consented to settle disputes in relation to the LTA to its specific forum selection clause. Accordingly, Claimant has submitted its claims before the exclusive jurisdiction of the Reef tribunal.[100] Despite that, Claimant now requests this Tribunal to hear a claim that is essentially based upon the LTA's breach.[101]

65. Thus, even if this Tribunal finds that it has jurisdiction, it is barred from exercising jurisdiction because of the specific forum selection clause within the LTA.

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[94] *BIVAC*, ¶292; SGS *Pakistan*, ¶¶161-162.
[95] *BIVAC*, ¶154.
[96] *SGS Philippines*, ¶154; *BIVAC,* ¶153.
[97] *BIVAC,* ¶149; *SGS Pakistan*, ¶148; *Vivendi* (Annulment), ¶98.
[98] *BIVAC,* ¶147.
[99] *Duke*, ¶159.
[100] Facts, ¶17.
[101] Notice, ¶13.

III. THIS TRIBUNAL HAS NO JURISDICTION OVER CLAIMS IN RELATION TO TRIPS

66. Undisputedly, both Contracting Parties are members of the World Trade Organization ("**WTO**")[102] and hence, all annexed agreements are binding on them,[103] including the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**").

67. In this line, Claimant argues that Respondent breached the Fair and Equitable Treatment ("**FET**") in Article 3(2) BIT by disregarding its obligations under TRIPS thereby breaching Claimant's legitimate expectations.[104] Nevertheless, this Tribunal has no jurisdiction to hear any claim in relation to TRIPS.

68. To begin, Claimant, a private investor, cannot submit TRIPS claims before this Tribunal or even before the Dispute Settlement Body ("**DSB**") because *only* Member States can bring TRIPS claims before the DSB.[105]

69. Moreover, Article 31(3)(c) VCLT provides that an interpretation of a treaty must take into account any relevant rules of international law applicable between the parties. The Dispute Settlement Understanding ("**DSU**") under WTO must also be taken into consideration in interpreting the BIT.

70. Article 23 DSU obliges all Member States to submit any dispute relating to WTO-covered agreements in accordance with the rules and procedures set in DSU. Hence, any dispute relating to TRIPS must be *exclusively*[106] adjudicated by the DSB.[107]

71. WTO claims *alone* cannot be brought before an investment tribunal.[108] This is because the DSB is the authoritative body to consistently clarify WTO agreements and their applications in order to strengthen the rights and obligations of its Member States under the WTO multilateral treaty system.[109]

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[102] PO2, ¶2.
[103] GATT, Art.XXXIV
[104] Notice, ¶13; PO2, ¶2.
[105] DSU, Art.25.
[106] Dreyfuss/Lowenfeld, pp.275,277.
[107] TRIPS, Art.64(1); DSU, Art.23.
[108] Klopschinksi, pp.368-369; Ruse-Khan, §III(1)(c).
[109] Martin, p.146; DSU, Art.23.

72. For instance, the PCA tribunal in *PMA* did not consider Philip Morris' TRIPS claim[110] because Australia successfully pointed out that investment tribunals cannot adjudicate claims on TRIPS, as it conflicts with the DSB's exclusive jurisdiction over WTO-related claims.[111]

73. By the same token, this Tribunal should find that it has no jurisdiction to adjudicate Claimant's TRIPS claims, as the DSU has exclusive jurisdiction over any claim on TRIPS. Further, Claimant cannot invoke Respondent's TRIPS obligation as a source of its legitimate expectations for an FET breach.[112]

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[110] *PMA* (Notice), ¶¶7.16-7.17.
[111] *PMA* (Response), ¶35.
[112] Klopschinksi, pp.368-369; Ruse-Khan, §III(1)(c).

IV. CLAIMANT'S CLAIMS ARE INADMISSIBLE PURSUANT TO ARTICLE 2(1) BIT

74. Denial of benefits is a matter of admissibility[113] that can be invoked even after jurisdiction has been established.[114] Respondent thereby exercises its right to deny BIT benefits to Claimant pursuant to Article 2(1) BIT, which renders Claimant's claims inadmissible because the two requirements in Article 2(1) BIT are met **(A)**. In any event, Respondent has effectively invoked Article 2(1) BIT **(B)**.

A. THE TWO REQUIREMENTS IN ARTICLE 2(1) BIT ARE MET

75. Article 2(1) BIT provides:

> *"Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity, if citizens or* ***nationals of a third state own or control such entity*** *and that entity* ***has no substantial business activities in the territory of the Contracting Party in which it is organized****."* [Emphasis added].

76. Similar to many denial of benefits clauses, [115] Article 2(1) BIT entitles Respondent, a host State, to deny treaty benefits to an investor who: *first,* is owned *or* controlled by a third State national of the BIT; and *second,* does not have substantial business activities in its home State. Investors fulfilling these requirements are commonly identified as "mailbox companies" – exactly what Claimant is.

77. Operation of a mailbox company typically involves three States: its home State, host State, and a third State.[116] The mailbox company is set up in its home State by a third State national.[117] It acts as an investment vehicle in the host State so that the third State national can gain investment treaty benefits.[118]

78. In parallel, there are three States in Claimant's operation as a mailbox company: Basheera, its home State; Mercuria, its host State; and Reef, the third State. Claimant

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[113] *Generation Ukraine,* ¶15.7.
[114] Fitzmaurice, p.439; Paulsson, p.604.
[115] Baumgartner, p.108; ECT, Art.17(1); CAFTA-DR, Art.10.12(2).
[116] Swart, p.19.
[117] *Id*.
[118] *Id.*

is set up in Basheera under the control of ABC, a Reef national. Claimant acts as an investment vehicle in Mercuria so that ABC can gain BIT benefits.

79. *In casu,* the two requirements to identify a mailbox company under Article 2(1) BIT are met. *First,* Claimant is controlled by ABC, a Reef national **(1)**. *Second,* Claimant has no substantial business activities in Basheera **(2)**.

1. Claimant is controlled by ABC, a Reef national

80. Claimant satisfies the first requirement of Article 2(1) BIT: *"if nationals of a third State own or control such entity."*

81. The word *"or"* indicates that the first requirement is alternative in nature.[119] Proving that Claimant is *either* owned *or* controlled by a third State national is sufficient to meet the first requirement. Here, the facts reveal that ABC, a third State national, has control over Claimant.

82. To start company's nationality is determined through its place of incorporation.[120] As ABC is incorporated under the laws of Reef,[121] it is a national of Reef, a third State.

83. "Control" is found when an entity possesses[122] and exercises[123] controlling rights over another entity through majority of shares ownership.[124] Such control can be extended through an intermediary company.[125] In a corporate organization setting, "control" is found depending on the facts of the case, ranging from day to day operations up to strategic decision-making.[126]

84. Undisputedly, ABC ultimately controls Claimant[127] through its intermediary, i.e. ABG, who owns all of Claimant's shares.[128]

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[119] *Plama*, ¶170; *Ulysseas*, ¶168; Rovine, p.397.
[120] *Autopista,* ¶107; Dolzer/Schreuer, p.49.
[121] Facts, ¶2.
[122] *Aguas*, ¶245; *Ulysseas*, ¶168.
[123] *Perenco*, ¶524; *Aguas*, ¶227.
[124] *Aguas* ¶264.
[125] *Id*; *Plama*, ¶170.
[126] *Aguas,* ¶246.
[127] PO2, ¶3.
[128] Facts, ¶4.

85. The facts significantly illustrate how ABC exercised its control over Claimant throughout the years. ABC funded the establishment of Claimant's manufacturing unit in Mercuria, and all of Claimant's agreements with NHA from 1998 onwards.[129] It also assigned its Mercurian Valtervite patent to Claimant.[130] Even Claimant's legal representatives for this current arbitration proceeding are from Reef, ABC's State.[131]

86. Concluding, Claimant is controlled by ABC, a third State national, thereby fulfilling the first requirement in Article 2(1) BIT.

2. Claimant has no substantial business activities in Basheera

87. Claimant also satisfies the second requirement in Article 2(1) BIT: *"that entity has no substantial business activities in the territory* [the State] *in which it is organized."*

88. Since the term "substantial" is undefined in the BIT, it should be interpreted in light of the objects and purposes[132] in the BIT's preamble, to *"stimulate the flow of private capital and the economic development of the Contracting Parties."*

89. To materialize such aim, substantial business activities refer to those that are mutually beneficial to the Contracting States, both Basheera and Mercuria. However, Claimant has no substantial business activities in Basheera, its home State.

90. When a company conducts business activities in its home State, they are expected to engage in, *inter alia,* buying, selling, and other concrete activities beyond the normal functions required for the company to exist.[133] Simply put, the business activities are insubstantial if solely dealing with formal matters, such as registration, administration, or payment of taxes.[134]

91. Claimant's activities in Basheera are purely formal in nature. Claimant facilitates: the management of patent portfolios, support for regulatory approval and marketing,

[129] PO3, ¶3.
[130] Facts, ¶¶3-4; PO3, ¶3.
[131] Response, p.15.
[132] VCLT, Art.31(1).
[133] Jagusch/Sinclair, p.17.
[134] *Id*.

legal, accounting, and tax services for ABG affiliates.[135] These activities only further prove Claimant's role as a mere vehicle of both ABG and ABC.

92. In this line, Respondent refers to *PacRim*. The tribunal upheld *Amto* tribunal's definition of "substantial", which is *"of substance and not merely its form"*.[136] Thus, a tribunal should focus on the weight of the activities in the home State in relation to the purpose of the business, not its size.[137]

93. By applying the above analysis, the *PacRim* tribunal held that Pacific Rim, a shareholding company, does not have substantial business activities because it held shares in El Salvador – third State – not in USA, its home State.[138]

94. Similarly, Claimant's office space, bank account,[139] and two to six employees[140] in Basheera are nothing but a mere elaboration of its form. None of Claimant's activities in Basheera substantiate its main business dealings of collaborations involving States and State agencies to manufacture and supply drugs.[141] Rather, Claimant's manufacturing unit is located in Mercuria,[142] not in Basheera, its home State.

95. Hence, Claimant has no substantial business activities in Basheera thereby also fulfilling the second requirement in Article 2(1) BIT. Consequently, Claimant is not entitled to benefits of the BIT, i.e. Claimant's claims are inadmissible.

B. RESPONDENT HAS EFFECTIVELY INVOKED ARTICLE 2(1) BIT

96. The BIT does not provide any time limit to invoke Article 2(1) BIT. Since denial of benefits is a matter of admissibility,[143] it can be invoked after the establishment of jurisdiction.[144] Correspondingly, Respondent has effectively denied the BIT benefits to Claimant in its Response.

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[135] PO2, ¶3.
[136] *Amto,* ¶69.
[137] *Id.*
[138] *PacRim* ¶4.74.
[139] Facts, ¶4.
[140] PO2, ¶3.
[141] Facts, ¶5.
[142] *Id*.
[143] *Generation Ukraine,* ¶15.7.
[144] Fitzmaurice, p.439; Paulsson, p.604.

97. The main purpose of a denial of benefits clause in a BIT is to give host States the possibility to withdraw benefits given to ineligible investors.[145] Generally, issues concerning denial of benefits arise after a dispute;[146] denial of benefits clauses are invoked when an investor claims treaty benefits.[147]

98. As host States have neither time nor means to track all investors within its territory,[148] requiring them to provide prior notice imposes an onerous burden.[149] Correspondingly, tribunals in *EMELEC*,[150] *Ulysseas,*[151] and *Guaracachi*[152] acknowledged that invocations of denial of benefit clauses do not require prior notice from the host States.

99. By the same token, Respondent is not required to give prior notice to effectively deny the BIT benefits to Claimant. Thus, Respondent has invoked the denial of benefits clause in a timely manner.

100. Having established that the requirements in Article 2(1) BIT are met and that Respondent has invoked such article effectively, Claimant's claims are inadmissible.

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[145] *Guaracachi*, ¶376; Gastrell/LeCannu, p.96.
[146] *PacRim*, ¶4.18.
[147] *Guaracachi*, ¶376.
[148] Jagusch/Sinclair, p.39
[149] *Guaracachi*, ¶379.
[150] *EMELEC,* ¶71.
[151] *Ulysseas,* ¶¶172-174.
[152] *Guaracachi,* ¶¶376-384.

PART II: MERITS

101. In the unlikely event this Tribunal finds jurisdiction, Claimant's claims are meritless: Respondent did not breach Article 3 BIT. *First*, Respondent acted in accordance with the FET standard in Article 3(2) BIT **(V)**. *Second*, the High Court of Mercuria also accorded justice in Claimant's award enforcement proceeding **(VI)**. *Third,* Respondent did not, in any way, breach Article 3(3) BIT as consequence of NHA's breach of the LTA **(VII)**.

V. RESPONDENT ACTED FAIRLY AND EQUITABLY IN AMENDING ITS IP LAW AND GRANTING THE VALTERVITE LICENSE

102. In response to the greyscale epidemic in Mercuria, Respondent amended its IP law by enacting Law No. 8458/09 to authorize non-voluntary licensing, allowing the use of patents without consent of the patent holder.[153] Following this, the High Court of Mercuria granted non-voluntary license to HG-Pharma – a Mercurian drug manufacturer[154] – to utilize Claimant's patented ingredient Valtervite[155] only until greyscale is no longer a public health threat.[156]

103. Claimant, however, fails to grasp the bigger picture and is quick to accuse Respondent of breaching its obligations under international agreements, such as TRIPS, and the FET standard in Article 3(2) BIT.[157]

104. As established *supra*,[158] this Tribunal has no jurisdiction over claims in relation to TRIPS. If this Tribunal finds otherwise, Respondent's measures are nevertheless consistent with its TRIPS obligations **(A)**. Moreover, Respondent measures are consistent with the FET standard in Article 3(2) BIT **(B)**. In any case, Respondent's measures are legitimate exercises of its right to regulate public health **(C)**.

[153] Ford, p.945.
[154] PO3, ¶9.
[155] Facts, ¶21.
[156] *Id*.
[157] Notice, ¶13.
[158] *Supra*, ¶¶66-73.

A. RESPONDENT'S MEASURES ARE CONSISTENT WITH ITS TRIPS OBLIGATIONS

105. Respondent's amendment of its IP law and grant of Valtervite license to HG-Pharma are consistent with TRIPS.

106. TRIPS recognizes how closely related IP rights and public health are, as shown through the inclusion of provisions that gives prominence to the State's right and duty to protect public health.[159] This is an embodiment of States' international obligations to protect its citizens' rights to the highest attainable standard of health.[160]

107. In 2001, WTO Members adopted the Doha Declaration on the TRIPS Agreement and Public Health ("**Doha Declaration**") to affirm that TRIPS *"does not and should not prevent Members from taking measures to protect public health"*.[161] Accordingly, it also clarifies that TRIPS should be interpreted and implemented in a manner supportive of the State's *"right to protect public health and, in particular, to promote access medicines for all."*[162]

108. Hence, Member States are entitled to use TRIPS provisions to the full extent to achieve such purpose.[163] The Doha Declaration lays out available measures and flexibilities within TRIPS when prices of existing patented drugs are too high for their population.[164] Respondent, a Member State to TRIPS,[165] has the right to determine what constitutes circumstances of extreme urgency, namely public health crises relating to epidemics,[166] and what measures can be taken.[167]

109. In line with Article 31 TRIPS, Article 5(b) Doha Declaration also authorizes Member States to grant non-voluntary licenses and *"the freedom to determine grounds upon which licenses are granted."* In this case, Respondent finds the greyscale epidemic to

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[159] TRIPS, Art.8.
[160] Paris Convention Guide, p.70; ICESCR, Art.12; ICESCR-Commentary, ¶¶1-2,35.
[161] Doha Declaration, Art.4.
[162] *Id.*
[163] *Id.*
[164] Hoen, pp.52,62.
[165] PO2, ¶2.
[166] Doha Declaration, Art.5(c).
[167] *Id*, Art.4.

be of extreme urgency.[168] Subsequently, Respondent granted Valtervite license to HG-Pharma until greyscale is no longer a threat to Mercuria.[169]

110. Respondent also considered Claimant's interest and acted consistently with Article 31(h) TRIPS in granting the Valtervite license by providing Claimant with adequate remuneration in light of the circumstances.

111. The 1% royalty rate granted by Respondent is still within the accepted royalty rate range of 0% to 6% as stated in WHO's Remuneration Guidelines.[170] Not only that, it also falls within the royalty rate in Mercuria for drugs to treat incurable diseases that ranges from 0.5% – 3% of revenue.[171] If Claimant disagrees with the royalty rate, it can file an appeal.[172] Nevertheless, Claimant chose not to do so.[173]

112. Therefore, Respondent's amendment of its IP law and grant of Valtervite license are consistent with its obligations under TRIPS.

B. Respondent's amendment of its IP law and grant of Valtervite license are consistent with the FET standard in Article 3(2) BIT

113. The FET standard is found in Article 3(2) BIT, stating: *"Investments and returns of investors of each Contracting Party shall be accorded fair and equitable treatment."*

114. As the BIT does not define FET, this Tribunal should assess the present FET standard autonomously based on the text[174] of the BIT, State practice and case law or sources of international law,[175] the specific facts of the case,[176] and particularly the regulatory interests of the host State.[177] Concurrently, each FET element must not be interpreted

[168] Facts, ¶¶6-7.
[169] Facts, ¶21.
[170] WHO Guidelines, pp.83-85.
[171] PO3, ¶7.
[172] PO3, ¶4.
[173] PO3, ¶9.
[174] Vandevelde, p.89.
[175] *Micula,* ¶507.
[176] *Mondev,* ¶118.
[177] *ADC,* ¶423; *Total,* ¶¶123,309.

too literally, as it would *"impose upon host States obligations which would be inappropriate and unrealistic."*[178]

115. As the party bearing the burden of proof,[179] Claimant solely relies on legitimate expectations to argue that Respondent's measures breach the FET standard.[180] However, FET is primarily a "treatment" accorded by a host State towards an investment.[181] Thus, there is little explanation of how and why the obligation to not to frustrate the investor's legitimate expectations intersects with the FET standard.[182]

116. As such, this Tribunal must not be fixated only on legitimate expectations in determining an FET breach, but also consider other elements, namely due process[183] and transparency.[184] Presently, Respondent acted fairly and equitably as required under Article 3(2) BIT by fulfilling what Claimant expects to be a stable IP framework **(1),** and acting transparently **(2)** and with due process **(3)**.

1. Respondent met Claimant's expectations of a stable IP framework

117. An investor's legitimate expectations are derived from assurances contained in the legal framework, representations, and undertakings made by the host State's government *at the time when the investment was made.*[185]

118. The investor's expectations cannot exclusively be determined by its subjective motivations and consideration;[186] it must be reasonable and legitimate in light of the circumstances in order for it to be protected.[187]

119. Further, as underscored by tribunals,[188] the determination of an FET breach requires:

> *"A weighing of the claimant's reasonable and legitimate expectations on one hand and the respondent's legitimate regulatory interest on the other."*

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[178] *Saluka,* ¶304.
[179] PCA Rules, Art.27(1); Bin Cheng, pp.329-331; *AAPL*, ¶56.
[180] Notice, ¶13.
[181] *AWG, (*Nikken), ¶4.
[182] Potestà, p.3; *AWG* (Nikken), ¶3.
[183] Newcombe/Paradell, p.292
[184] *Id*, pp.290-292.
[185] *Saluka,* ¶329; *Tecmed,* ¶154; *Duke,* ¶365; Dolzer/Schreuer, p.134.
[186] *Saluka*, ¶ 304.
[187] *Id*; *Duke,* ¶340.
[188] *Saluka,* ¶¶305-306; *BG Group,* ¶298; *Feldman,* ¶12.

In other words, this Tribunal must balance between Claimant's expectations and Respondent's right to regulate.

120. Claimant expects Respondent's IP framework to remain stable. Yet this expectation is neither reasonable nor legitimate. This is because at the time of investment, Respondent did not make any assurances that Claimant could rely on **(a)**. What is more, Claimant knowingly invested in a socioeconomically unstable State **(b)**. In turn, Claimant could and should have reasonably expected Respondent's measures **(c)**.

a) Respondent did not make any assurances to Claimant

121. To begin, no investor can reasonably expect that the circumstances at the time of investment would remain totally unchanged.[189] Stability of a legal framework is not a legal obligation.[190] Due to evolving conditions, it would be unthinkable for a host State to promise an investor not to change its legislation.[191]

122. Respondent is aware that investors rely on host States' assurances to make its investment.[192] Hence, host States are only prevented from changing its legal framework if it contradicts with its specific assurances to the investor.[193]

123. *Firstly*, Respondent *never* assured Claimant that it would not modify its legal framework, especially in the face of a public health threat caused by greyscale epidemic.[194] Respondent is then required take measures – if not, greyscale could spiral into national crisis.[195]

124. Respondent notes that investors may take political statements into consideration, yet relying on them to make an investment is another different thing.[196] Investors

[189] *PSEG*, ¶ 255; *Total,* ¶123.
[190] *Continental Casualty,* ¶258.
[191] *Parkerings,* ¶258.
[192] *Enron,* ¶262; *CME*, ¶611; *Duke,* ¶340.
[193] *El Paso*, ¶364.
[194] Facts, ¶6.
[195] *Id*.
[196] *El Paso,* ¶395.

therefore cannot base its legitimate expectations on the host State's statements that were made after the investment.[197]

125. Additionally, representations made by the host State must display an official character[198] and be addressed directly to the investor, not the general public.[199] The object of such statements must specifically give real guarantee of stability to the investor,[200] *and* regularly repeated to justify an investor's reliance on them.[201]

126. Contrastingly, Respondent's statements to the press[202] and on social media Twitter[203] were relayed after Claimant made its investments. They were neither addressed directly to Claimant nor contained any guarantee of regulatory stability. Instead, it strengthens Respondent's commitment to *"secure access to healthcare for all."*[204]

127. *Secondly*, the BIT does not contain any clause obliging a freeze of legal framework.[205] Contrastingly, the BIT explicitly encourages the Contracting Parties to adopt measures *"consistent with the protection of health"*.[206]

128. *Lastly*, the grant of the Valtervite patent is not an assurance that Respondent's IP framework would remain unchanged. Patents are territorial in nature,[207] wherein the host State has the right to restrict its use,[208] such as through revocations before the period expires[209] or issuances of non-voluntary license.[210]

129. Professors Liddel and Waibel explained that the grant of a patent is always *"conditional upon the substantive and procedural requirements set out in the host state's law"*.[211] Hence, the grant of a patent does not create any legitimate expectation

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[197] *Mamidoil,* ¶695.
[198] *Thunderbird* (Wälde), ¶34.
[199] *El Paso*, ¶¶375-377.
[200] *Id*.
[201] *Feldman,* ¶132.
[202] Annex No.2, p.39.
[203] Facts, ¶8.
[204] Annex No.2, p.39.
[205] *PMU,* ¶423.
[206] Preamble BIT.
[207] Gordon/Cookfair/LoTempio/Lillis, p.115
[208] Gibson, p.361; TRIPS, Art.30.
[209] Liddell/Waibel, p.26; Vadi, p.192.
[210] TRIPS, Art.31; Gibson, p.366.
[211] Liddell/Waibel, p.29.

that the patent will remain without interference from regulations to limit its exclusivity.[212] Thus, patents do not assure investors of legal stability.[213]

130. Neither Respondent nor the BIT provides any specific assurance that Claimant can rely on at the time of its investment. Consequently, Claimant cannot expect Respondent to freeze its IP law in response to the greyscale epidemic.

b) Claimant knowingly invested in a socioeconomically unstable State

131. An investor's legitimate expectation is determined not only from the facts surrounding the investment, but also the host States' prevailing political, socioeconomic and historical conditions.[214] Investors, such as Claimant, are expected to be aware and to take these conditions into consideration.[215]

132. The *Genin* tribunal held that Estonia did not breach Genin's legitimate expectations because the latter was fully aware of the economic conditions in Estonia, but regardless chose to invest there.[216] Similarly, the *Parkerings* tribunal ruled that since Parkerings knowingly chose to invest in Lithuania during a political transition, it accepted the risk of legal instability that could be detrimental to its investment.[217]

133. *In casu*, Claimant invested into Mercuria with full knowledge of the prevailing socioeconomic conditions: greyscale is considered as a national threat,[218] while the population is facing difficulty in accessing the medicine.[219] Claimant is hence presumed to have accepted the socioeconomic conditions and in turn, the potential changes in Respondent's IP law. Therefore, Claimant cannot now argue that it could not have expected such changes.

134. Additionally, an investor's legitimate expectations will only be protected if it exercised due diligence.[220] As a renowned pharmaceutical company,[221] Claimant must

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[212] Ruse-Khan, §III(1)(b); Vadi, p.171; *PMU*, ¶271.
[213] Liddell/Waibel, p.25; Vadi, p.121.
[214] *Duke*, ¶340.
[215] UNCTAD-FET, p.71.
[216] *Genin*, ¶348.
[217] *Parkerings,* ¶¶335-336.
[218] Facts, ¶6.
[219] Annex No.3, p.43.
[220] *Parkerings,* ¶333.

have known the close relation between IP rights and public health.[222] Claimant should then have inquired in advance about potential regulatory changes in light of Respondent's socioeconomic conditions,[223] and adjust its investment accordingly.[224]

135. As Claimant is aware of the greyscale epidemic in Mercuria – at the time of its investment – Claimant could have sought to protect its expectations against potential regulatory changes, such as by concluding licensing agreements with local manufacturers, enabling Claimant to even decide its own royalty fee.

136. Yet in reality, Claimant idly expected Respondent to remain equally idle in the face of the greyscale epidemic.

c) Claimant could and should have reasonably expected Respondent's change in its IP law

137. In any case, Respondent's change in its IP law was at least predictable to Claimant. It was still within the limits of what any investor expects to be a "stable legal framework" in light of the circumstances in Mercuria.

138. Respondent refers to *Eli Lilly*. Canada modified its patent law to require patent inventions to be useful.[225] Eli Lilly expected that its pharmaceutical patents would not be invalidated; but the tribunal deemed this expectation illegitimate because Canada's modification already *"had a foundation"* in its patent law[226] at the time Eli Lilly made its investment.[227] Thus, the tribunal rules that Eli Lilly should and could have expected such changes in Canada's patent law.[228]

[221] Notice, ¶5.
[222] TRIPS, Art.8.
[223] *PMU,* ¶427.
[224] *Parkerings,* ¶333; *Lauder,* ¶292.
[225] *Eli Lilly*, ¶384.
[226] *Id*.
[227] *Id*, ¶383.
[228] *Id*, ¶¶384-385.

139. By the same token, Claimant should and could have expected Respondent's change to its IP law because Respondent's introduction of non-voluntary licensing to its IP framework is explicitly authorized by TRIPS.[229]

140. Respondent also notes that patents do not prevent States from regulating the use of patent rights to achieve their public policy objectives.[230] As IP rights, especially patents, are closely tied to public health,[231] laws governing patents are based on a balance between public needs and private interests.[232] Similar to Respondent, other developing countries authorize non-voluntary licenses when a disparity exists between the need to tackle critical diseases and the cost and access to medicines.[233]

141. Subsequently, Claimant could have reasonably expected Respondent's change in its IP law, especially since Respondent never made any assurances and that Claimant knowingly invested in a socioeconomically unstable State. Concluding, Respondent has met Claimant's expectations of a stable IP framework.

2. Respondent acted transparently in amending its IP law

142. Professors Newcombe and Paradell stated that the transparency element under FET standard only requires host States to publish its laws and regulations applicable to investments and investors.[234] Accordingly, Respondent published its amended IP law[235] thereby acted transparently.

3. Respondent acted with due process in granting the Valtervite license

143. Due process is a general principle in international law that requires a host State to properly adopt a decision affecting an investment, and to provide the investor with opportunity to challenge such decision before an independent and impartial body.[236]

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[229] TRIPS, Art.31.
[230] Vadi, pp.171-172.
[231] Hoen, p.42; Ruse-Khan, pp.4-5; Vadi, pp.121-123.
[232] Vadi, p.186.
[233] Amaral, pp.14-15; Doha Declaration, Art.5.
[234] Newcombe/Paradell, p.291; UNCTAD-Transparency, p.20.
[235] Facts, ¶20.
[236] *Rusoro,* ¶389.

144. Correspondingly, Claimant was present in HG-Pharma's application proceeding.[237] Based on its residual discretionary power and interpretation of Respondent's amended IP law, the High Court of Mercuria granted the Valtervite license to HG-Pharma,[238] reasoning that the *"patented invention is not available to the public at a reasonably affordable price"*.[239]

145. Similar to other judicial decisions in Mercuria, the decision to grant Valtervite license to HG-Pharma can be appealled.[240] Although provided the opportunity to materialize its vow to pursue *"every available legal recourse"* to protect its patent,[241] Claimant showed no attempt to appeal. Therefore, Respondent acted with due process.

C. RESPONDENT'S MEASURES ARE LEGITIMATE EXERCISES OF ITS RIGHT TO REGULATE

146. As confirmed by tribunals, States possess the right to regulate matters within their own territory,[242] such as by modifying laws at its own discretion.[243] Here, Respondent's measures are a legitimate exercise of its right to regulate public health.

147. The right to regulate public health is reflected in both international agreements[244] and also the BIT's preamble, where the Contracting Parties agreed to achieve their BIT objectives *"in a manner consistent with the protection of health."*

148. States cannot be held liable for losses resulting from legitimate exercises of such regulatory power.[245] As a state, Respondent's right to regulate is *prima facie* justified and hence, the investor bears the burden to prove that the measures were not a legitimate exercise of the State's right to regulate.[246]

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[237] PO3, ¶4.
[238] Facts, ¶21.
[239] Annex No.4, p.44, Art.23(c) Law.
[240] Facts, ¶21.
[241] Facts, ¶25.
[242] *PMU*, ¶¶418-422; *Parkerings,* ¶¶327-328; *Total,* ¶¶123,164.
[243] *Parkerings,* ¶332; *El Paso,* ¶368; *Continental Casualty,* ¶261.
[244] ICESCR, Art.12; ICESCR-Commentary, ¶30; TRIPS, Art.8(1).
[245] *PMU*, ¶294; *Saluka,* ¶¶253-265.
[246] *Servier,* ¶¶582-584.

149. A measure that is legitimately exercised within the host State's right to regulate must not be arbitrary and discriminatory.[247] At the same time, the *"circumstances and reasons (importance and urgency of the public need pursued for carrying out the change"* must be taken into consideration.[248]

150. *Firstly,* Respondent's measures are not arbitrary, i.e. founded on reason or fact.[249]

151. By way of example, Claimant refers to both *Enron*[250] and *LG&E*,[251] where the investors were affected by Argentina's non-arbitrary emergency measures in response to its financial crisis. The *Enron* tribunal reasoned that Argentina *"believed and understood"* that the measures were *"the best response to the unfolding crisis."*[252] The *LG&E* tribunal explained that although Argentina's measures were not *"the best"*, they were "*not taken lightly, without due consideration."*[253]

152. Similarly, Respondent adopted its measures with justified reason; it was actually Respondent's last feasible option. Respondent have previously adopted several measures to combat greyscale, such as by launching a nationwide campaign[254] and concluding a Product Development Partnership as a part of its five-year health plan.[255] In spite of these measures, the number of greyscale cases still increased sharply.[256] Subsequently, Respondent's adopted measures are what it perceives to be the best response to the greyscale epidemic in Mercuria.

153. Scientific consensus provides that other greyscale medicines are not as effective as Claimant's medicine Sanior, which contains Valtervite.[257] But greyscale patients face difficulty in affording Sanior,[258] exorbitantly priced at USD 10,000 per person for

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[247] *PMU,* ¶420.
[248] *Total*, ¶123.
[249] *Lauder*, ¶221.
[250] *Enron*, ¶¶71-72.
[251] *LG&E*, ¶65.
[252] *Enron,* ¶¶281-283.
[253] *LG&E,* ¶162.
[254] Facts, ¶12.
[255] Facts, ¶8.
[256] Annex No.3, p.42.
[257] PO3, ¶6.
[258] Annex No. 3, p.43.

one-year treatment.[259] Waiting for other manufacturers to synthesize an equally effective compound like Valtervite, would be highly speculative and time consuming.

154. After weighing all the possible options and Mercuria's condition, Respondent introduced non-voluntary licensing to its IP law[260] and granted HG-Pharma the license to manufacture Valtervite until greyscale is no longer a threat to Mercuria's public health.[261] All this whilst Claimant still possess the right to manufacture and sell Valtervite, and is adequately compensated by royalty payment.[262]

155. *Secondly,* Respondent's measures are also non-discriminatory.

156. When no comparable investor is present, discrimination cannot be determined.[263] In this case, nothing indicates that Respondent's measures are discriminatory; its IP law applies objectively to all patent holders.

157. Therefore, Respondent's measures are legitimate exercises of its right to regulate, as they are neither arbitrary nor discriminatory. They are justified with reason and taken with due consideration, while also considering Claimant's interests.

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[259] Annex No. 3, p.42.
[260] Facts, ¶20.
[261] Facts, ¶21.
[262] *Supra,* ¶¶109-110*;* Facts, ¶21; PO3, ¶7.
[263] *Saluka,* ¶133.

VI. THE CONDUCT OF THE HIGH COURT OF MERCURIA IN RELATION TO THE AWARD'S ENFORCEMENT PROCEEDINGS DOES NOT BREACH ARTICLE 3 BIT

158. In its Notice, Claimant misguidedly accused Respondent of breaching Article 3 BIT[264] by failing to *"provide any effective means to* [Claimant] *of asserting its rights"* with respect to the enforcement of the Award in the High Court of Mercuria.[265] However, the effective means standard is nowhere to be found in Article 3 BIT. It is instead only found in the preamble of the BIT.

159. Respondent draws a distinction between the two different roles of a substantive article and a preamble. A substantive article creates a legal obligation, whereas a preamble, which sets out the purpose and objects of a treaty, does not.[266] As such, a preamble only acts a guidance to interpret a treaty[267] and it cannot add substantive requirements to the provisions of a treaty.[268]

160. The effective means standard is an independent treaty obligation.[269] In cases where such standard applies, the relevant BITs contain a substantive article obliging its contracting parties to provide *"effective means of asserting claims and enforcing rights"* with respect to investment.[270]

161. In applying the effective means standard, the *Chevron* tribunal observed that the placement of such standard within a BIT creates its own legal effects. For instance, the effective means standard placed under Article II(6) 1984 US Model BIT indicates that the drafters intended to create a separate treaty obligation.[271] This effective means standard was later moved to the preamble of the 2004 US Model BIT. The same tribunal viewed such change as an indication that the drafters deemed customary international law to have already provided adequate protection.[272]

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[264] Records, p.27.
[265] Notice, ¶13.
[266] *Continental Casualty,* ¶258.
[267] Hulme, p.1304; ILC Report 1966, ¶221.
[268] *Société*, ¶32; Gazzini, p.158.
[269] *Chevron,* ¶244.
[270] *Duke,* ¶¶390-391; *Chevron*, ¶242.
[271] *Chevron*, ¶242.
[272] *Id*.

162. Similar to the 2004 US Model BIT, the effective means standard in this case can only be found in the preamble of the BIT. Thus, the Contracting Parties have no intention of imposing an independent treaty obligation to provide effective means of asserting claims and enforcing rights.

163. The substantive article referred by Claimant, Article 3 BIT, contains the FET standard,[273] which includes denial of justice[274] that must remain within the scope provided under customary international law.[275]

164. States will only incur international liability for the acts of its judiciary under a denial of justice claim, if there is:

> *"A particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."*[276]

Such shortcoming would include the failure of a national legal system as a whole.[277] Thus, an investor must show that its treatment in various proceedings cumulatively meets the high threshold of denial of justice.[278]

165. Claimant is presently alleging a denial of justice claim based on *only* one proceeding. The delay in the Award's enforcement proceeding does not breach Article 3 BIT, as it is not a surprising shortcoming of Respondent's judiciary **(A)**. In any case, Respondent has also provided Claimant with effective means of asserting its claims and enforcing its rights **(B)**.

[273] *Rumeli,* ¶654.
[274] UNCTAD-FET, p.80; Lidell/Waibel, p.19.
[275] Liddell/Waibel, p.20.
[276] *Mondev,* ¶127; *Chevron*, ¶244; *White,* ¶10.4.7.
[277] Paulsson-DOJ, p.130; *Jan de Nul*, ¶209.
[278] *Amto,* ¶78.

A. Delay in an enforcement proceeding does not constitute denial of justice

166. Unreasonable delays in proceedings fall under the scope of denial of justice under customary international law.[279] Nevertheless, the delay in the Award's enforcement proceeding do not constitute a denial of justice.

167. Claimant based its expectation for a swift enforcement proceeding on the N.Y. Convention.[280] To date, however, the N.Y. Convention has hardly played any role in interpreting and applying the standard of denial of justice.[281]

168. Further, the N.Y. Convention does not prescribe any time limit to enforce an award. State Parties have the discretion to determine its own procedural mechanism in enforcing an award.[282] International law similarly imposes no strict standard to assess which delay amounts to a denial of justice.[283]

169. The reasonableness of a delay depends on the facts of the case.[284] Tribunals consider the need for swiftness in the resolution of the case, the behavior of the litigants, and also the behavior of the court involved.[285]

170. *First,* Respondent does not claim that the Award's enforcement proceeding does not need a swift resolution, but only that such need is less compelling. This position was also put forward by the *White* tribunal, holding that criminal proceedings have a particular need for an urgent resolution, whereas in comparison, purely commercial matters – such as the enforcement of an award – does not. [286]

171. *Second,* it is the enforcement proceeding's disputing parties, particularly Claimant, who contributed to the delay. The Award's enforcement proceeding was continuously moving forward, until Claimant suddenly rejected the jurisdiction of the High Court

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[279] UNCTAD-FET, p.80; Paparinskis, pp.181-182; *Jan de Nul*, ¶188.
[280] Notice, ¶10.
[281] Ferrari/Rosenfeld, p.10
[282] N.Y Convention, Art.III.
[283] *Toto,* ¶155.
[284] *Id*.
[285] *Chevron*, ¶250; *White,* ¶10.4.10; *Oostergetel,* ¶290.
[286] *White,* ¶10.4.14.

of Mercuria and requested its enforcement proceeding to be transferred to the Commercial Bench.[287]

172. The Commercial Bench was constituted to expeditiously dispose commercial matters,[288] and that it has adjudicated two award enforcement applications.[289] Nonetheless, this does not necessarily invalidates the High Court of Mercuria's jurisdiction to hear Claimant's enforcement application. It was Claimant's decision to transfer its enforcement application that prolonged the proceeding for two years.

173. NHA was also repeatedly absent[290] and failed to comply with deadlines.[291] However, Respondent highlights States do not have international responsibility for a party's behavior in a judicial proceeding with respect to denial of justice claims.[292]

174. *Third,* there is neither any apparent unwillingness nor prolonged activity on the High Court of Mercuria. The Award's enforcement proceedings were continuous, and the High Court of Mercuria consistently heard both Claimant and NHA. Even though Respondent's judiciary granted the parties' pleas for extension in filing pleadings,[293] this accounts for only several months of the delay. Hence, Respondent emphasizes that it was Claimant and NHA who are responsible for the delay in the Award's enforcement proceeding.

175. Additionally, this Tribunal must consider the condition of the State's judiciary.[294] The High Court of Mercuria is overburdened with cases arising from a population of 67 million people,[295] and it is trying its best to divide its time for each case.

176. There is no official statistics on the average length of an award enforcement proceeding in Mercuria.[296] The length of an enforcement proceeding varies based on the circumstances.[297] Award enforcement proceedings in developing countries– such

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[287] Exhibit 1, ¶¶17-18.
[288] Facts, ¶19.
[289] Exhibit 1, ¶17.
[290] Exhibit 1, ¶¶4,5,19,34,39,44.
[291] Exhibit 1, ¶¶7,8,13,17,22,31.
[292] *Loewen,* ¶52.
[293] Exhibit 1, ¶¶6,7,8,12,17,31.
[294] *White,* ¶10.4.18.
[295] Response, ¶9.
[296] PO2, ¶4.
[297] Pouget, p.13.

as India and Mercuria – commonly lasts for more than five years.[298] Even a delay of more than nine years in an award enforcement proceeding in India did not amount to denial of justice.[299]

177. Based on the corroborations of the facts above, the delay in the Award's enforcement proceeding is reasonable and do not constitute a denial of justice.

B. In any case, Respondent provided Claimant with effective means of enforcing its rights

178. Even if this Tribunal finds that the effective means standard is applicable, Respondent still provided Claimant with effective means of enforcing its rights.

179. The effective means standard requires the host State to provide an effective system for the investors to bring claims and enforce rights.[300] In *White,* India provided White with effective means of enforcing rights its award; White was able to strenuously defend its enforcement applications, despite the extension of several pleading deadlines and busy court docket.[301]

180. Likewise, Respondent provided Claimant with effective means to enforce its rights in the Award. Despite any deadline extension and its overburdened condition, the High Court of Mercuria continuously heard Claimant's enforcement application.

181. Respondent underlines that individual failures in courts do not, in itself, breach the effective means standard.[302] States are not obliged to create a perfect system of justice, only a system where serious errors are avoided or could be corrected.[303] Subsequently, when a State takes appropriate steps to identify and address deficiency in its legislation, then the progress should be recognized in assessing effectiveness.[304]

182. Correspondingly, Respondent has addressed the court congestion by creating the Commercial Courts Act in 2012, directing the High Court to constitute special

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[298] Pouget, pp.43-44.
[299] *White,* ¶¶10.4.21-10.4.23.
[300] *Chevron,* ¶247.
[301] *White,* ¶11.4.7-11.4.8.
[302] *Amto*, ¶88.
[303] Paulsson-DOJ, p.306; *H&H*, ¶400.
[304] *Amto,* ¶88.

benches that could expeditiously dispose commercial matters.[305] Although the application of the law might not be impeccable, this Tribunal should find that Respondent has taken the appropriate steps to ensure that investors can effectively enforce their rights.

183. Therefore, Respondent has provided effective means for Claimant to enforce its right in the Award in the High Court of Mercuria.

[305] Facts, ¶19.

VII. NHA'S TERMINATION OF THE LTA DOES NOT AMOUNT TO A BREACH OF ARTICLE 3(3) BIT

184. The LTA was concluded between Claimant as the Supplier and the NHA as the Buyer.[306] Pursuant to Clause 6 LTA, NHA terminated the LTA in 10 June 2008.[307] Claimant then initiated arbitration against NHA through the LTA dispute settlement clause.[308] Such acts were well contained within the LTA and its parties, independent of any BIT obligation and Respondent's interference.

185. Yet now, Claimant seeks to obtain additional compensation by trying to increase its restitution manifold through this Tribunal. While Respondent does not deny the existence of NHA's breach through its termination of the LTA, NHA's breach does not in any way equates to a breach of Article 3(3) BIT.

186. Article 3(3) BIT only covers obligations entered into by Respondent as a State **(A)**. Moreover, NHA's actions are not attributable to Respondent **(B)**. In any case, Claimant's present claim is barred due to collateral estoppel doctrine **(C)**.

A. ARTICLE 3(3) BIT ONLY COVERS OBLIGATIONS ENTERED BY THE STATE

187. Claims arising under a BIT must comply with the requirements contained under the provisions consented by contracting parties.[309] Under such view, the BIT's interpretation must be analyzed in light of the Contracting Parties' intention.

188. Each umbrella clause provides its own requirements for a claim to arise under it.[310] Hence, it is only possible to claim contractual breaches as treaty breaches, if the requirements established under the relevant umbrella clause are fulfilled.[311] It is thus necessary to interpret the relevant BIT's umbrella clause independently from the decision other cases.[312]

189. Here, Article 3(3) MB-BIT provides:

[306] Facts, ¶10.
[307] Facts, ¶17.
[308] *Id*.
[309] *Tulip*, ¶145.
[310] *Supervision* ¶284.
[311] *Id.*
[312] *Noble Ventures*, ¶50.

> *"Each Contracting Party shall observe any obligation it may have entered into with regard to investment of investors of the other Contracting Party."*

190. Proper interpretation of an umbrella clause relies heavily upon customary rules of interpretation.[313] Regard should also be given to *effet utile* – principle of effectiveness – that also contributes to treaty interpretation.[314] Accordingly, Article 3(3) BIT only covers obligations that were entered into by the State as a Contracting Party.

191. In its ordinary meaning, the term *"shall"* generates an obligation within a BIT to be complied by its contracting parties.[315] However, the phrase *"any obligation"* must be limited[316] to obligations a contracting party "*may have entered into.*"

192. Simply put, protected obligations under umbrella clauses are those that are entered into by a Sovereign State as a party.[317] Obligations arising from contracts between an investor and a State entity cannot be protected under the umbrella clause.[318] Article 3(3) BIT only covers obligations entered into by Respondent as a Contracting Party.

193. The *Bosh* tribunal held that the scope of the US-Ukraine BIT umbrella clause is interpreted to *only* cover obligations entered into by Ukraine as a Sovereign State.[319] This is because the US-Ukraine BIT preamble defines the term *"Parties"* as *"the United States of America and Ukraine"*, creating distinction between the State and any of its State agencies.[320]

194. Similarly, the *Hamester* tribunal found that the Joint-Venture Agreement is not protected by the Ghana-Germany BIT umbrella clause because Ghana is not named, or even indicated, as a party to the agreement.[321]

195. *In casu*, the LTA is concluded only between Claimant and NHA, separate from Respondent.[322] No Mercurian officials even participated in the LTA negotiations.[323]

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[313] Yannaca-Small-Umbrella, p.22; *Noble Ventures*, ¶50.
[314] *Noble Ventures*, ¶50.
[315] *Id*, ¶51; *SGS Philippines,* ¶115.
[316] *Noble Ventures*, ¶61.
[317] *Bosh,* ¶¶246-247.
[318] *Impregilo,* ¶223; *Amto,* ¶110; *Hamester,* ¶¶184,347,348.
[319] *Bosh*, ¶245.
[320] *Id.*
[321] *Hamester* ¶¶347-348.
[322] Facts, ¶9.

196. Since Article 3(3) BIT is intentionally limited by the Contracting Parties to only cover obligations entered into by as a Sovereign State, the LTA cannot be protected under the umbrella clause.

B. NHA'S ACTIONS ARE NOT ATTRIBUTABLE TO RESPONDENT

197. Article 3(3) BIT can only protect obligations assumed by the host State. Investment tribunals rely on Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") to determine State attribution under umbrella clauses.[324]

198. NHA is not attributable to Respondent because: NHA is not a State organ[325] **(1)**, NHA did not act in any governmental capacity[326] **(2)**, and Respondent did not direct[327] NHA to terminate the LTA **(3)**.

1. NHA is not a State organ

199. Article 4 ARSIWA states, *"the conduct of any State organ shall be considered an act of that State under international law* […]*."*[328]

200. Such article concerns acts of organs expressly entitled to act for the State.[329] Tribunals have determined that an entity possessing separate legal personality from its State cannot be considered as a State organ under Article 4 ARSIWA,[330] even if its activities involve public interest objectives.[331]

201. In the present case, NHA possesses a separate legal personality from Respondent.[332] The LTA was clearly concluded between only Claimant and NHA, not Respondent.[333]

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[323] PO3, ¶8.
[324] *Noble Ventures,* ¶¶68-69; *Eureko,* ¶¶244-260; Feit, p.146.
[325] ARSIWA, Art.4.
[326] *Id*, Art.5.
[327] *Id*, Art.8.
[328] *Id*, Art. 4(1).
[329] *Noble Ventures*, ¶69.
[330] *Bayindir*, ¶119; *EDF*, ¶190; *Hamester,* ¶184, *Noble Ventures*, ¶69.
[331] *Noble Ventures*, ¶69.
[332] Facts, ¶¶5,9.
[333] Facts, ¶9.

Evidently, Claimant invoked the arbitration in Reef against NHA, not Respondent.[334] Even in the Award's enforcement proceedings, the High Court of Mercuria maintains NHA and Claimant as the disputing parties.[335]

202. Since NHA is a legal entity separate from Respondent, it is not possible for NHA to be a State organ that is attributable to Respondent.

2. NHA did not terminate the LTA in any governmental capacity

203. Article 5 ARSIWA stipulates that an entity's conduct exercised in its governmental authority must be considered an act of that State under international law, provided that the entity acted in its government capacity in such wrongful act.[336]

204. To prove State attribution under Article 5 ARSIWA,[337] both the conclusion and termination of the LTA must be acts within NHA's governmental capacity.

205. Article 5 ARSIWA only applies when two cumulative requirements are met: a State's legislation provides express mandate empowering an entity to act as governmental agency,[338] *and* the entity acted in exercise of its empowerment.[339] None are met here.

206. There is no legislation empowering NHA to act in a governmental capacity. NHA is separate from Respondent, entering into contracts and partnerships in its own legal personality.[340] NHA cannot be assumed to represent Respondent without the existence of a legislation entitling such authority.

207. Even if this Tribunal speculates NHA to be an empowered entity, NHA's conclusion and termination are not exercises of its governmental authority. Tribunals found that States *cannot* be liable if the wrongful act is not an exercise of the entity's conferred governmental authority.[341]

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[334] Facts, ¶17.
[335] Exhibit 1, ¶2; Facts, ¶18.
[336] ARSIWA, Art. 5.
[337] Evans, p.167.
[338] *Noble Ventures*, ¶79; *Jan de Nul,* ¶166; *Impregilo*, ¶200.
[339] *Bosh*, ¶178; *Jan de Nul,* ¶171.
[340] Facts, ¶¶5,9; Annex No.2, ¶3.
[341] *Bosh*, ¶¶173, 178; *Jan de Nul*, ¶¶166, 171; *Maffezini*, ¶52.

208. For the purpose of State attribution, the International Law Commission provided that an entity's conduct must only concern governmental activity *and not* other commercial activities in which it may conduct.[342]

209. By relying on such commentary, the *Bosh* tribunal only attributed the University's governmental activity to Ukraine, not its commercial activity.[343] The University's conclusion and termination of the 2003 Contract were acts in its own legal capacity, not its conferred governmental authority.[344] Additionally, the 2003 Contract's nature and purpose were aimed at securing financial benefits for both the University and Bosh, further emphasizing its status as a commercial activity.[345]

210. This decision reflects the earlier *Impregilo*[346] and *Vivendi*[347] awards. Both tribunals declared that a State is not liable for contracts entered into and performed by a provincial authority on its own legal personality.[348] Further, actions done by any contract party[349] to obtain profits cannot be categorized as governmental action. [350]

211. Similar to the above cases, NHA acts independently.[351] It entered into the LTA under its own accord without Respondent's authorization.[352] The LTA aimed to secure mutual financial benefits:[353] Claimant has a guaranteed annual order-value, while NHA would purchase Sanior at discounted prices.[354]

212. NHA, based on Clause 6 LTA,[355] terminated the LTA for commercial reasons,[356] to reduce its spending costs.[357] The NHA Director disclosed that it reduces its spending costs after it terminated the LTA, resulting in annual savings of USD 1.2 billion.[358]

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[342] ARSIWA-Commentary, Art. 5, ¶5.
[343] *Bosh,* ¶176.
[344] *Id*, ¶177.
[345] *Id,* ¶178.
[346] *Impregilo*, ¶210.
[347] *Vivendi* (Annulment), ¶96.
[348] *Impregilo*, ¶210; *Vivendi* (Annulment), ¶96.
[349] *Jan De Nul* ¶¶168-171.
[350] *InterTrade* ¶185.
[351] PO3, ¶8.
[352] Facts, ¶¶9,17.
[353] Facts, ¶10.
[354] *Id*.
[355] *Id*.
[356] Facts, ¶17.
[357] Annex No.3, p.43.
[358] Facts, ¶22.

213. Even if this Tribunal finds that there is a legislation empowering NHA, its conducts relating to the LTA were purely commercial in nature. Hence, NHA's conducts are not exercises of any governmental authority attributable to Respondent.

3. NHA was not instructed, controlled or directed by Respondent to terminate the LTA

214. Article 8 ARSIWA concerns State attribution towards conducts instructed, directed, or controlled by the State.[359] Such attribution requires *clear link* between the instructions, directions, or control of the State and the wrongful conduct.[360]

215. *Firstly*, a State's instructions must be specific to the wrongful act, not the overall actions done by the entity that committed the wrongful act.[361]

216. *Secondly*, a State must possess *both* effective control over the acting entity and specific control over the wrongful act.[362]

217. NHA functions independently from Respondent; it does not act under the Respondent's instruction and control. Instead, the Ministry of Health created its own multi-sectoral think tank[363] to engage in parallel efforts with NHA.[364] This evidences that the Ministry of Health controls its own entity, not NHA.[365]

218. Claimant may argue that Respondent's President and Minister of Health instructed NHA's Director to terminate the LTA due to budgetary issues.[366] The *Pezold* tribunal found that governmental encouragement and endorsement to conduct a wrongful act does not establish attribution under Article 8 ARSIWA.[367] This is because multiple investment tribunals require evidence to be *clear and convincing* in order to exclude

[359] ARSIWA, Art. 8.
[360] ARSIWA-Commentary, p.47.
[361] *Bosnia v. Serbia*, ¶400; *Almas*, ¶268.
[362] *Jan de Nul*, ¶173; *White*, ¶8.1.18; *Almas,* ¶269.
[363] Annex No. 3
[364] Facts, ¶12.
[365] Annex No. 3; Facts, ¶12.
[366] Facts, ¶16.
[367] *Pezold* ¶¶446-448.

any reasonable doubt.[368] Subsequently, the existence of such meeting is insufficient to prove any involvement between Respondent and NHA's termination of the LTA.

219. In light of the above, the NHA is not, in any way, attributable to Respondent. In turn, NHA's breach of the LTA does not result in a breach Article 3(3) BIT.

C. In any case, Claimant's present claim is barred pursuant to the collateral estoppel doctrine

220. The doctrine of collateral estoppel is a general principle of law, utilized by investment tribunals, such as *Amco* and *RSM*.[369] Under this doctrine, an issue shall not be re-litigated between the same parties or their privies,[370] even third parties.[371]

221. The collateral estoppel doctrine focuses on the *"finality of specific instances of fact-finding"*,[372] shifting a courts' focus from claims to issues. This is distinct from *res judicata* that precludes admissibility of decided claims.[373]

222. A re-litigation of the same issue is prohibited as long as the initial judgment remains unchanged, even if the new claim arises from a different cause of action, question, or facts from the former claim.[374]

223. Respondent refers to *Helnan* as example. Helnan claimed that Egypt breached the Denmark-Egypt BIT by evicting Helnan from the hotel it managed under the Management Contract. As such matter was already decided in the Cairo Award – resulting in the Management Contract's termination[375] – the *Helnan* tribunal held that it must respect the final and binding effect of the Cairo Award. Such matter can only be redressed if the Cairo Award was made in breach of the Denmark-Egypt BIT, or general international law.[376]

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[368] *EDF,* ¶64; *Rumeli*, ¶709; *Bayindir*, ¶142.
[369] *Amco,* ¶30; *RSM*, ¶7.1.2; *Gainesville*, p.518.
[370] *Southern Pacific Railroad,* ¶48-49.
[371] *Montana*, p.154.
[372] Gordon, p.554.
[373] *Id*.
[374] *Southern Pacific Railroad,* ¶48-49.
[375] *Helnan* ¶6.
[376] *Id*.

224. Even in *RSM*, RSM's BIT claims were found to be inadmissible because they were *"manifestly without legal merit"*.[377] Grenada emphasized that the finding of the initial claim on a series of rights, questions, and fact prevents the *RSM* tribunal from adjudicating upon RSM's BIT claims.[378]

225. Claimant's BIT claims are also inadmissible on the same grounds. The finding of the Reef tribunal on NHA's premature termination[379] prevents this Tribunal from adjudicating upon Claimant's claims under Article 3(3) BIT.

226. Presently, Claimant has duly exercised its right under the LTA's dispute resolution clause in relation to NHA's LTA termination, which the Reef tribunal conclusively decided upon.[380] Therefore, this Tribunal must respect the final and binding effect of the Award, as the result of the legal remedy provided under the LTA.

227. Even if this Tribunal finds that NHA is attributable to Respondent, Claimant cannot re-litigate the same issue with Respondent based on the collateral estoppel doctrine. Conclusively, Claimant's claims in relation to the breaches of the LTA are inadmissible before this Tribunal.

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[377] *RSM* ¶7.1.3.
[378] *Id*.
[379] Facts, ¶17.
[380] *Id*.

PRAYERS FOR RELIEF

In light of the foregoing, Respondent respectfully requests this Tribunal to issue its award in favor of Respondent, as follows:

I. This tribunal has no jurisdiction over claims in relation to the Award;

II. This tribunal has no jurisdiction over claims in relation to LTA breaches;

III. This tribunal has no jurisdiction over claims in relation to TRIPS;

IV. Claimant's claims are inadmissible by virtue of Article 2(1) BIT;

V. Respondent treated Claimant fairly and equitably in accordance with Article 3(2) BIT;

VI. Respondent's High Court of Mercuria does not breach Article 3 BIT; and

VII. Respondent does not breach Article 3(3) BIT.

Respectfully submitted on 25 September 2017 by

TEAM AMOR

On behalf of Respondent

THE REPUBLIC OF MERCURIA