
IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE

PERMANENT COURT OF ARBITRATION (2012)

BETWEEN:

ATTON BORO LIMITED

(CLAIMANT)

AND

THE REPUBLIC OF MERCURIA

(RESPONDENT)

PCA CASE NO. 2016-74

MEMORANDUM FOR RESPONDENT

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TABLE OF ABBREVIATIONS AND DEFINITIONS

Abbreviation	Definition
&	And
§/§§	section/sections
¶/¶¶	paragraph/paragraphs
Award	Award rendered in the proceedings between CLAIMANT and the NHA, 20-Jan-2009
Basheera	The Kingdom of Basheera
CLAIMANT	Atton Boro Limited
Court	Mercurian High Court
Denial of Benefits Clause	Clause embodied in Article 2 of the BM-BIT
ed.	Edition
et al.	and others
FET	Fair and Equitable Treatment
i.e.	that is to say
Ibid.	at the same place
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Id.	the same
Infra	Below
IPR	Intellectual Property Rights
Law	Law 8458/09, Amendment to Mercurian Intellectual Property Law
License	License granted to HG-Pharma, 17-Apr-2010
LTA	Long Term Agreement
NHA	National Health Authority
No.	Number
p./pp.	page/pages

Patent	Mercurian patent No. 0187204, granted to Atton Boro Group on 21-Feb-1998
PCA	Permanent Court of Arbitration
PO2	Procedural Order No.2, 26-Jun-2017
PO3	Procedural Order No.3, 28-Aug-2017
Problem	FDI Moot Case 2017
R&D	Research and Development
Reef	the People's Republic of Reef
RESPONDENT	the Republic of Mercuria
SCC	Stockholm Chamber of Commerce
Supra	Above
UNCITRAL	United Nations Commission on International Trade Law
vol.	Volumen
WHO	World Health Organization
WTO	World Trade Organization

TREATIES, CONVENTIONS AND RULES

Abbreviation	Citation
BM-BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the promotion and reciprocal protection of investments (1998)
Doha Declaration	Doha Declaration on the TRIPS agreement and public health (2001)
ECT	Energy Charter Treaty (1991)
ILC Draft Articles	Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)
NAFTA	North American Free Trade Agreement Agreement (1994)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958)
PCA Rules	PCA Arbitration Rules (2012)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)
VCLT	Vienna Convention on the Law of Treaties (1969)

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Apotex	Apotex Holdings Inc. and Apotex Inc. v. USA, ICSID Case No.ARB(AF)/12/1, Award, 25-Aug-2014
Azinian	Robert Azinian, *et al.* v. Mexico, ICSID Case No.ARB(AF)/97/2, Final Award, 01-Nov-1999
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STATEMENT OF FACTS

Mercuria's priorities and goals

1. RESPONDENT is a developing country with a population of more than 67 million people.[1] One of its funding principles, as enshrined in its Constitution, is to assure universal healthcare for every living person in its territory.[2]

2. To this end, RESPONDENT has effected nation-wide health plans, put into practice through a state entity – the NHA.[3] These plans actively involve private corporations, NGOs and the civil society, and include massive public information campaigns and the procurement of medicines at discounted rates.[4]

3. The hat way, the NHA has successfully put into practice five initiatives to tackle critical diseases in Mercuria.[5] For example, the NHA deployed a Comprehensive HIV/AIDS Partnership with a consortium of pharmaceutical companies, led by CLAIMANT. It was considered a huge success, insofar as it allowed 30.000 patients to obtain access to an effective treatment at a 50% cost reduction.[6]

CLAIMANT's activities in Mercuria

4. CLAIMANT is a wholly-owned subsidiary of the Atton Boro Group, a leading pharmaceutical company organized under the laws of Reef.[7] CLAIMANT was incorporated in Basheera in April 1998,[8] as a vehicle for Atton Boro Group's business in South America and Africa.[9] It deals principally in public-private agreements with States and State entities for the manufacture and supply of medicines.[10] Thus, if CLAIMANT knows anything intimately, it is the details and implications of the legal regimes that regulate intellectual property and the interaction between private and state entities in the public health field.

[1] Problem, p.42.
[2] *Id.*, p.39,¶2.
[3] *Ibid*.
[4] Problem, p.41.
[5] *Id.*, p.39,¶2.
[6] *Id.*, p.39,¶3.
[7] *Id.*, p.28,¶2.
[8] *Id.*, p.28,¶4.
[9] *Ibid*.
[10] Problem, p.28,¶5.

5. The Atton Boro Group developed a compound named Valtervite[11] to improve the treatment for greyscale patients. On 21 February 1998, it obtained the Mercurian patent for Valtervite,[12] and later assigned it to CLAIMANT.[13]

6. After being incorporated in Basheera, CLAIMANT set up a manufacturing base in Mercuria,[14] wholly funded by Atton Boro Group.[15]

The dispute's background: The 2003 report and the conclusion of the LTA

7. This dispute arose in the context of a national plan to address the ravages of greyscale, a chronic, sexually-transmitted epidemic.[16] It was first identified in the early 1980s, and by 1985 the WHO confirmed greyscale was present in 43 countries, including Mercuria.[17] It has no cure, only palliative treatment as provided by Valtervite.[18]

8. The NHA's report in 2003 highlighted the imminence of greyscale epidemic, and its possible spiral into a national crisis. Moreover, it observed the inadequacy of the available treatment for greyscale, which fell far short of global standards.[19] The report emphasized the need to define a course of action to address an eventual greyscale crisis.[20]

9. Consequently, a nationwide campaign focused on prevention and mitigation of greyscale was launched,[21] led by a group chaired by the Minister for Health.[22] In such context, the NHA started the first estimations of the possible number of greyscale patients. In parallel, it encouraged regular testing in educational institutions and workplaces,[23] and began a massive public information campaign.[24]

10. The NHA also concluded the LTA with CLAIMANT,[25] based on the available data at that early stage of the investigation.[26] The NHA expected to accomplish two key goals,

[11] Problem, p.28,¶3.
[12] *Ibid*.
[13] PO2,¶6.
[14] Problem, p.28,¶5
[15] PO3, lines 1572-1573.
[16] Problem, p.28,¶3.
[17] *Ibid*.
[18] Problem, p.28,¶3.
[19] *Id.*, p.28,¶6
[20] *Id.*, p.29,¶7.
[21] *Id.*, p.41.
[22] *Ibid*.
[23] Problem, p.29,¶12.
[24] *Id.*, p.41.
[25] *Id.*, p.29,¶9.

namely early detection and access to treatment at affordable prices. Regarding the second point, it agreed with CLAIMANT that the price of Sanior (the commercial name for Valtervite) would reflect a 25% discount.[27]

11. In return, the LTA gave CLAIMANT the best of both worlds: it could immediately monetize its Mercurian patent and be guaranteed minimum annual purchases from the only entity in Mercuria (a poor developing country) in a financial position to buy the medicine in such quantities for that many patients.[28]

12. Under such arrangement, CLAIMANT set up its manufacturing unit and delivered its first consignment in June 2005.[29]

The NHA's Pyrrhic victory

13. The NHA made great strides as regards greyscale treatment in Mercuria. Indeed, by 2006 the awareness campaigns it conducted almost quadrupled (*i.e.,* from 17% in 2003 to 65% in 2006) the share of the population who got tested at least every six months. Besides, by 2006, a majority of patients in Mercuria had transitioned to the modern treatment.[30]

14. However, the NHA's success was a double-edged sword. The increase in the number of tested individuals unveiled a harsh reality: the confirmed number of patients grew from 20,485 in 2003 to 266,298 in 2006,[31] far higher than the most pessimistic estimations made in 2003, when the campaign against greyscale had just begun.[32]

15. The 13-fold increase in the patient population between 2003 and 2006 rocked the NHA's finances to the core. In 2005, there were 10,012 patients who depended solely on public health schemes to obtain treatment,[33] with a cost per person of nearly US$ 10.000 – even at a 25% discounted rate.[34] By 2006, some 100.000 people came to depend exclusively on public health schemes for greyscale treatment.[35]

[26] *Id.*, p.29,¶¶7,13.
[27] *Id.*, p.29,¶10.
[28] *Ibid*.
[29] Problem, p.29,¶11.
[30] Problem, p.42, lines 1334-1336, 1341-1344.
[31] *Id.*, p.42, line 1340.
[32] Problem, p.29,¶15.
[33] *Id.*, p.43, lines 1359-1360.
[34] *Id.*, p.42, lines 1351-1354.
[35] *Id.*, p.43, lines 1360-1361.

16. Therefore, it would cost US$ 1,000,000,000 to provide drugs for a single year just to the poorest 100,000, entirely apart from the cost of treatment to the almost 170,000 additional patients in 2006, most of whom struggled to afford treatment costs as well.[36]

17. These were, of course, the crushing numbers for 2006 alone. As treatment was only palliative, it should continue throughout the life of each patient, thus maintaining an annual expenditure of more than US$ 1,000,000,000 for the indefinite future, even if the number of patients did not increase. This stratospheric expenditure level represented a six-fold increase in the greyscale program budget.[37]

In search of solutions: CLAIMANT's meager cooperation

18. The number of patients coming under care further increased during 2007, doubling the order value for CLAIMANT's drug for each quarter of the year.[38] In early 2008, the NHA was out of financial breath: universal healthcare for Mercuria's population was being threatened. An urgent solution was needed.

19. The NHA asked CLAIMANT for a further discount in the price of Sanior within the ambit of the LTA, in light of the 900% rise (*i.e.* from 10,000 to more than 100,000 people) in its own demand for medicines.[39] CLAIMANT's offer was a paltry 10% discount,[40] – an absurd amount given the dramatic demand increase. The NHA maintained a reasonable approach: it asked for a 40% discount, wholly appropriate to the logarithmic expansion in Sanior sales.[41]

20. CLAIMANT did not agree and no deal could be reached. The record shows no evidence that even the 40% discount requested by the NHA would not assure CLAIMANT handsome profits under the LTA.

21. Between a rock and a hard place, the NHA had no alternative but to terminate the LTA, since it was impossible for it to face the costs the LTA would entail. Consequently, the NHA did so on 10 June 2008.[42]

[36] *Id.*, p.43, lines 1363-1366.
[37] *Id.*, p.43, line 1364.
[38] *Id.*, p.29,¶15.
[39] *Ibid*.
[40] Problem, p.30,¶15.
[41] *Ibid*.
[42] *Id.*, p.30,¶17.

22. CLAIMANT therefore initiated arbitration proceedings in Reef against the NHA, under the dispute resolution clause of the LTA.[43] The Award was issued, granting CLAIMANT US$ 40 million.[44] Enforcement proceedings are currently pending before the Mercurian courts.

Exceptional times require exceptional measures: the amendment of the Mercurian IP Law and the granting of a license for Valtervite

23. The NHA's impossibility to afford the prices of the LTA given the new conditions was just the tip of the iceberg in Mercuria. Much had changed since 2004, when all five of the NHA's initiatives had been successful.[45]

24. By May 2008, several government healthcare programs were in jeopardy due to the budgetary problems that had arisen.[46] For example, had the NHA continued buying Sanior under the LTA, it would have swallowed a third of the overall health budget.[47]

25. Mercuria's constitutional obligation to provide universal healthcare for its population required an urgent solution to the problem. RESPONDENT acted decisively. On 10 October 2009, RESPONDENT amended its intellectual property law by promulgating the Law, which allowed the granting of non-voluntary licenses.[48] The Court would grant (or deny) such licenses after examining whether the issuance of the license was appropriate.[49]

26. In November 2009, HG-Pharma filed an application before the Court, requesting a license to manufacture Valtervite in Mercuria. After evaluating whether the Law's conditions had been met, the Court granted such license until greyscale was no longer a threat to public health in Mercuria, and fixed a 1 % of sales royalty to be paid to CLAIMANT.[50]

[43] *Ibid*.
[44] *Ibid*.
[45] Problem, p.39,¶2.
[46] *Id.*, p.30,¶16.
[47] *Id.*, p.43, lines 1363-1364.
[48] Problem, p.30,¶20
[49] *Id.*,pp.39-40.
[50] *Id.*, p.30,¶21.

27. After a few years, the results were remarkable: the use of generic drugs enabled RESPONDENT to provide medicines to its people at affordable rates, reducing the cost of purchasing medicines by 80%.[51]

28. In the meantime, CLAIMANT continued performing its commercial activities in Mercuria, without any impediments, that being that the situation as of this date.[52]

[51] *Id.*, p.30,¶22.
[52] *Id.*, p.31,¶25.

ISSUES ON JURISDICTION

29. As required by Article 21 of the PCA Rules, RESPONDENT offers three jurisdictional defenses that place CLAIMANT's claims outside the purview of this Tribunal. First, **[I]** there is no jurisdiction to hear any claims in relation to the Award. Second, **[II]** the Tribunal also lacks jurisdiction over the Patent claim. Third and last, none of the claims could be heard either because RESPONDENT **[III]** is entitled to deny CLAIMANT in all respects the benefits of the BM-BIT.

I. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD

30. CLAIMANT has brought two different claims related to the Award. Namely, (i) that an alleged delay in the Award's enforcement proceedings and (ii) the NHA's termination of the LTA, amount each to a breach of the BM-BIT. The Tribunal lacks jurisdiction to hear either of them.

31. RESPONDENT does not challenge that CLAIMANT would qualify as an investor under the BM-BIT, since it is a "[…] *corporation* […] *incorporated or duly constituted in accordance with the applicable laws of that Contracting Party*",[53] namely, Basheera.

32. However, CLAIMANT still carries the burden of proving that the tribunal has jurisdiction because there exists an investment or such investment falls under the protection of the relevant treaty.[54] The PCA Rules so require in Article 27(1): "[e]*ach party shall have the burden of proving the facts relied on to support its claim or defence*."

33. In the present case, neither **[A]** the Award nor **[B]** the LTA qualify as protected investments under the BM-BIT. Thus, there is no jurisdiction to hear the claims.

A. The Award is not an investment

34. Article 1(1) of the BM-BIT defines the term "*investment"* broadly, as "*any kind of asset held or invested* […] *in the territory*" of one of the contracting parties. It also includes a short illustrative list of what is to be considered as an investment, including "claims to money". An arbitral award is *not* expressly listed as an investment.

[53] BM-BIT, Article 1(2)(b).
[54] *Blue Bank*,¶73; *SGS v. Paraguay,*¶53; *Philip Morris*,¶29; *Phoenix Action,*¶64; *Saluka,*¶34; HARB, p.2.

35. CLAIMANT is expected to argue that the Award constitutes a "claim to money" as listed in Article 1(1)(c) of the BM-BIT. However, such conclusion simply cannot prevail.

36. It is commonly agreed that such a broad definition of the term "investment" cannot sensibly be read into BITs,[55] since it is not reasonable to place no limits within the definition. If that were the approach, every existing asset would qualify as an investment, irrespective of its inherent characteristics.

37. Thus, the term "investment" should be interpreted as required by the VCLT, *i.e.* in accordance with its ordinary meaning, in light of its context and object and purpose.[56] Although Mercuria has not ratified the VCLT,[57] its interpretation principles reflect customary international law,[58] and therefore should be applied when interpreting the BM-BIT.

38. Such interpretation must also take into consideration the purpose of a State's relinquishment of freedom of action in a BIT, namely that of fostering international cooperation for economic development.[59]

39. The mere fact of "holding" an award –with no possible argument that the Award was "invested" in Mercuria– that may be assimilated to an item of the list of Article 1(1) of the BM-BIT cannot suffice to consider it an "investment" under the treaty. Indeed, "investment" has an objective and inherent meaning that cannot be ignored when construing Article 1, and which the Award lacks.

40. RESPONDENT does not argue that an arbitration award is not an "asset" from a balance sheet perspective or that it was not "held" by CLAIMANT in the legal or accounting sense. However, it is not an "investment" nor was it made in Mercuria.

41. In short, the Tribunal lacks jurisdiction *ratione materiae* to hear CLAIMANT's claim regarding the Award, since **[i]** the Award fails to meet the objective definition of "investment", and **[ii]** the Award does not fulfill the territoriality requirement of the BM-BIT.

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[55] HARB, p.5.
[56] Problem, p.32.
[57] PO3, line 1565.
[58] CRAWFORD, p.380; *Guinea-Bissau v. Senegal,*¶70; *Mexico v. USA,*¶48; *Bosnia-Herzegovina v. Serbia and Montenegro*,¶¶109-110; *Libya v. Chad*,¶41; *Botswana v. Namibia,*¶18.
[59] *Petrobart*, p.10; RUBINS,pp.286-287.

i. The Award does not meet the objective definition of investment

42. CLAIMANT's Award is not encompassed within the inherent, objective definition of "investment" in order to qualify as such under the BM-BIT. Such meaning goes beyond the mere enumeration of assets, but requires at least a commitment of resources.[60] Tribunals have regularly upheld the existence of said objective meaning.[61]

43. Indeed, if any asset were considered an investment, such definition would be limitless, as almost every transaction has some financial value.[62] As stated in *Azinian*, "*labeling* […] *is no substitute for analysis*."[63]

44. The enumeration of assets in BITs is illustrative and non-exhaustive. Consequently, it is likely that –in certain cases– some assets not contained therein need to be analyzed to establish whether they constitute investments or not. In that sense, the test to identify an investment should be the same in all cases.

45. Under such view, the *Romak* tribunal held –in a dispute akin to the present one– that

> *"*[t]*here must be a benchmark against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an 'investment'* […]. *The term 'investment' has a meaning in itself that cannot be ignored."*[64]

46. The *Romak* tribunal went further with its analysis, and inquired about what would be the effects of merely considering the broad clause of the Switzerland–Uzbekistan BIT it was interpreting ("*every kind of assets, and particularly:* […] *claims to money* […]")[65] to ascertain the existence of an investment.

47. It considered –*inter alia*– that "*it would render meaningless the distinction between investments,* […] *and purely commercial transactions*",[66] and that every award or judgment in favor of a national of one of the parties to the BIT would constitute an investment under such BIT.[67] This last effect would entail that both States had renounced –by entering into the BIT– the application of domestic law, and "*surrendered*

[60] *KT Asia*,¶166.
[61] *Saba Fakes,*¶110; *GEA,*¶141; *Romak,*¶180; *Alps Finance,*¶241.
[62] HARB, p.5.
[63] *Azinian*,¶90.
[64] *Romak*,¶180.
[65] *Id.,*¶174.
[66] *Id.,*¶185.
[67] *Id.*,¶187.

the jurisdiction of their own domestic courts."[68] Based on those facts, such literal construction was considered "*untenable as a matter of international law*."[69]

48. Further, the use of the term "investment" implies an objective meaning, implying a commitment of resources crystallized in a contribution of money or assets, which entails certain duration, an assumption of risk by the investor, and a contribution to the host State's development.[70]

49. Those elements are regularly considered by international case-law within the definition of "investment".[71] Therefore, if an asset does not correspond to the objective definition of the term "investment", the fact that it falls within one of the listed categories does not turn the former into the latter.

50. That the present arbitration is not conducted under the ICSID Convention alters nothing. The definition of investment under a BIT should be consistently drafted under principles of international law, irrespective of the arbitral venue.[72] For example, in *Romak* the tribunal rejected the plaintiff's contention that the definition of "investment" in UNCITRAL proceedings was wider than in ICSID arbitration, because the scope of substantive protection offered by a BIT should not depend on the choice among dispute resolution mechanisms.[73]

51. In the present case, the Award fails to meet such objective definition. Indeed, as was decided by the *GEA* tribunal, an arbitral award itself cannot constitute an investment, as it merely provides for disposition of rights under an agreement between the parties.[74] In the tribunal's view,

> *"*[T]*he* [a]*ward itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall –itself– within the scope of Article 1(1) of the BIT."*[75]

52. Here, the situation is the same. The Award involved no commitment of resources in Mercuria. It is not aimed at having certain duration at all, since its purpose is completely different. It does not involve a risk for CLAIMANT, as it will be enforced insofar as it

[68] *Ibid*.
[69] *Romak,*¶188.
[70] *Salini*,¶52; *Joy Mining,*¶53; *LESI,*¶13.
[71] *Saba Fakes,*¶¶110-111, *Romak,*¶170, *KT Asia,*¶173.
[72] HARB, p.7.
[73] *Romak,*¶194.
[74] *GEA*,¶161.
[75] *Id.*,¶162.

meets the legal requirements established in the NYC. Finally, it does not contribute to Mercuria's development, as it complies no relevant function other than a disposition of rights.

53. RESPONDENT acknowledges that certain tribunals have held that arbitral awards could be investments, if they arise from an underlying transaction that qualifies as such.[76] However, the fact that the Award arose from the LTA does not change anything in this regard because, as will be shown below,[77] the LTA is not an investment either, and separately, the Award cannot be equated with the LTA itself. As stated by the GEA tribunal, "*the two remain analytically distinct*."[78]

54. Simply put, the Award cannot be considered as an investment under the BM-BIT, since it fails to fulfill the applicable criterion in such regard.

ii. In addition and separately, the Award does not fulfill the territoriality requirement of the BM-BIT

55. On top of the foregoing, the Award also fails to meet the requirement of the BM-BIT that it be made "*in the territory of*"[79] Mercuria.

56. The BM-BIT's preamble reflects the parties' intention to promote greater economic cooperation between them with respect to investments made by nationals and enterprises of one Contracting Party *"in the territory of the other Contracting Party*."[80] Article 13 understandably delimits the BM-BIT's application only to investments that meet the same territorial standard.

57. The abovementioned reflects the intention of the parties that the BM-BIT's protection should *only* be given to investments that are subject to the host State's territorial jurisdiction. In that sense, the territoriality requirement plays a significant role in preventing the over-expansion of subject-matter jurisdiction.[81]

58. When faced with the matter, several tribunals have supported such view. Accordingly, in *Canadian Cattlemen*, more than a hundred individuals commenced arbitration against the USA. It was not disputed that the claimants' investments were physically located in

[76] *Frontier*,¶231; *White Industries*,¶7.6.8; *Saipem*,¶127; *Mondev*,¶¶80-83.
[77] *Infra*,¶¶65-71.
[78] *GEA*,¶162.
[79] BM-BIT, Article 1(1).
[80] BM-BIT, Preamble.
[81] ZHENG, p.1.

the territory of Canada, but the claimants argued that they suffered economic losses for measures taken by the USA government. After establishing that NAFTA provisions accord legal protection only to foreign investments, the tribunal held that NAFTA provisions are only applicable to "*investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party*"[82] and absent those conditions, protections of NAFTA are unavailable to an investor.

59. Further, when assessing whether sovereign bonds –*i.e.*, claims to money– fulfilled a territoriality requirement prescribed by the Italy-Argentina BIT, Professor Abi Saab stated in his well-known dissenting opinion in *Abaclat*:

> *"If this right is created by contract, it is the contract that governs its legal existence and the modalities of this existence, including the location of this right. And the right in the present case has been purposefully located outside Argentina."*[83]

60. As regards the treaty at stake here, the purpose of the BM-BIT is not to provide a method of enforcement for transnational claims, but to protect foreign investment. An award arising out of a commercial transaction, falling outside the regulatory jurisdiction of the host State simply cannot be covered by the BM-BIT.

61. The Award was neither issued in Mercuria, nor does it have any territorial nexus whatsoever to Mercuria other than CLAIMANT wishing to have it recognized in Mercuria. The Award was issued in Reef.[84] Such facts prove that it cannot constitute an investment, since the territoriality requirement imposed by the BM-BIT is absent.

62. Thus, even if the Award complied with the standards of Article 1(1) of the BM-BIT to be considered as an investment, the Tribunal would still lack jurisdiction *ratione materiae* over the Award claim.

B. <u>The LTA does not constitute an investment under the BM-BIT</u>

63. As for its second claim, the jurisdictional obstacle CLAIMANT faces is of a different nature: the rights and obligations it held under the LTA cannot pave the way for an investment claim under the BM-BIT.

[82] *Canadian Cattleman*,¶127.
[83] *Abaclat*,¶84.
[84] Problem, p.30,¶17.

64. Indeed, **[i]** the LTA was a commercial contract between CLAIMANT and the NHA, not an investment under the treaty. Furthermore, **[ii]** a competent tribunal has already settled all the issues arising from the LTA, none of which should be re-litigated here. Finally, **[iii]** CLAIMANT's contractual claim cannot be elevated to a treaty claim either.

i. The LTA is a commercial contract, not an investment

65. Any BIT is plainly a limitation of a sovereign's freedom of action. That limitation should be seen as triggered only for a particular purpose, namely expanding progress through cross-border economic activity[85] by way of a flow of direct foreign investments.[86]

66. As noted above in discussing why the Award is not an investment,[87] in the LTA context as well a line between investments and other assets must be drawn. RESPONDENT does not suggest, nor could it, that a contract is not an "asset" from a financial or accounting perspective. Nevertheless, the distinction between investments entitled to treaty protection and a contract reflecting a commercial transaction cannot be rendered meaningless. As the *Joy Mining* tribunal explained:

> *"If a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?"*[88]

67. In that sense, sales or procurement contracts concluded with State agencies do not necessarily involve an investment. More generally, agreements for the sale of goods have been repeatedly rejected as investments by tribunals.[89] For example, in *Nova Scotia*, a Canadian corporation claimed over Venezuela's termination of the claimant's right to receive 1.7 million metric tons of coal at fixed prices from a company controlled by Venezuelan state-owned entities. The tribunal unanimously declined jurisdiction on

[85] RUBINS, pp.286-287.
[86] *Ibid*.
[87] *Supra*, ¶¶42-54.
[88] *Joy Mining*,¶58.
[89] *Phoenix Action*,¶82.

the basis that a sales agreement was not could not be considered as an investment for the purpose of the applicable BIT.[90]

68. Similarly, the tribunal in *Global Trading* inquired whether the outlay of money in performing a contract for the transboundary purchase and sale of goods was capable of constituting an investment.[91] It concluded that the sale and purchase contracts entered into by the parties "*were pure commercial transactions that cannot on any interpretation be considered to constitute investments*."[92] Even more so, the tribunal held that the fact that the trade of those goods furthered the policy priorities of the purchasing State did not change anything, nor did the fact that State officers had assured compliance of the contract.[93]

69. It then concluded that the assets at stake were "*individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis*", and that no contracts of such kind could be construed as BIT-protected investments.[94]

70. In the present case, CLAIMANT concluded a contract with the NHA for the sale of Sanior for a limited period of time. In other words, it was a procurement agreement, which could hardly qualify as an investment due to its inherent nature, *i.e.* a sale on a commercial basis.

71. The LTA simply falls short of being an investment for the purposes of the BM-BIT. Nothing in the treaty suggests RESPONDENT consented to arbitrate commercial transactions before this Tribunal.

ii. In any event, the issues arising from the LTA have already been finally settled

72. In any case, the claims arising from the termination of the LTA by the NHA were submitted to arbitration and the appointed tribunal has conclusively decided the matter.[95] Indeed, the LTA provided for recourse to a specific dispute resolution forum[96] which, by CLAIMANT's own admission, has issued the Award as a final decision. There

[90] *Nova Scotia*,¶113.
[91] *Global Trading*,¶57.
[92] *Ibid*.
[93] *Global Trading*,¶56.
[94] *Ibid*.
[95] Problem, p.30,¶17.
[96] *Ibid.*

just is no claim under the LTA to be made, even if the LTA were regarded as a protected investment.

73. The doctrine of *res judicata* defines the binding effect of a prior final determination made by a competent tribunal. It is seen as a general principle of international law, which is binding between the parties and on international courts.[97]

74. RESPONDENT acknowledges that *res judicata* was historically disfavored by investment tribunals when faced with awards issued by commercial arbitration tribunals, applied only when the so-called *triple identity* test had been strictly met.[98]

75. However, this Tribunal should not follow such formalistic approach. Rather, it should rely on a developing trend in investment arbitration, where previous decisions have been found to have *res judicata* effects when it is sensible to do so.[99]

76. CLAIMANT's claims arising from the NHA's termination of the LTA were submitted to arbitration, out of which the Award arose. It is noteworthy that the NHA and CLAIMANT jointly agreed to arbitration and intended to solve their dispute in that particular forum.

77. CLAIMANT is now reviving the identical claim in an investment arbitration against the RESPONDENT, seeking presumably to obtain a ruling that the termination of the LTA by the NHA was improper. That decision, however, has already been made by another tribunal.[100] CLAIMANT points to no difference with its previous claim and intends only to find shelter in formalistic arguments.

78. Simply put, the Tribunal should declare that CLAIMANT is not entitled to re-litigate its LTA claim, since it has already been finally settled by the authority expressly appointed by CLAIMANT and the NHA to do so.

iii. In addition, CLAIMANT's contract claims cannot constitute treaty claims

79. Regardless of CLAIMANT's attempts to argue otherwise in this arbitration, CLAIMANT's alleged "treaty claims" are in fact commercial contract claims and thus beyond the scope of this Tribunal's jurisdiction.

80. An alleged treaty claim cannot entail a violation of a right while ignoring the specific legal configuration of such right. A treaty may define certain standards of violation, but

[97] *Qatar v. Bahrain,*¶303; *Amco*,¶30; STANIVUKOVIC, p.162.
[98] STANIVUKOVIC, p.164.
[99] *E.g. Apotex,*¶¶7.61-7.62; *Grynberg,*¶¶7.1.9-7.1.11.
[100] Problem, p.30,¶17

the underlying right subject to these violations is defined only by its legal title and the applicable law that governs its existence.[101]

81. In that regard, the mere breach of a contract by a state does not constitute a violation of international law[102] – such violation is subject to the contract's law.[103]

82. The *ad hoc* committee in *Vivendi* described this "conceptual separation" as follows:

> *"Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law in the case of the BIT, by international law, in the case of the Concession Contract, by the proper law of the contract."*[104]

83. It then observed that a treaty course of action is not the same as a contractual one, since it requires a clear showing of a conduct contrary to the relevant treaty standards.[105]

84. Likewise, several tribunals have considered that umbrella clauses could not extend the treaty protection for a breach of an ordinary commercial contract entered either by the State or a State entity.[106]

85. In the case at hand, the NHA's actions are subject to the LTA's nature, *i.e.,* a merely commercial transaction entered by the NHA in its commercial capacity. This is only fostered by the fact that the LTA provided for recourse to a specific commercial dispute resolution forum which has conclusively decided the matter.

86. Moreover, in this case almost every argument configuring CLAIMANT's treaty claim concerns the conduct of NHA, which was –as will be explained below–[107] contractual and not sovereign in character. In that sense, while a BIT breach could exist in the absence of a breach of contract, the existence of a breach of contract would not be sufficient to establish a breach of the BIT.

87. Thus, the termination of the LTA by the NHA falls outside the scope of the Tribunal.

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[101] *Abaclat*,¶86.
[102] MARBOE,¶2.82.
[103] *Id.*,¶2.84.
[104] *Vivendi*,¶96.
[105] *Id.*,¶113.
[106] *El Paso*,¶81; *Pan American,*¶109.
[107] *Infra,*¶231.

II. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S PATENT CLAIM

88. RESPONDENT contends that any and all disputes arising of or in connection with the Patent are beyond this Tribunal's jurisdiction.

89. Although RESPONDENT has acknowledged that CLAIMANT would be encompassed within the BM-BIT's broad definition of investor,[108] CLAIMANT has failed to prove that it has a protected investment in the Patent. In contrast to the arguments above as to the Award or the LTA –which focus on the assets not being an investment by their nature– the argument here is that the Patent is beyond the temporal scope of the treaty. On that basis alone, this Tribunal has no jurisdiction to address such claim.

90. RESPONDENT respectfully requests the Tribunal to find that it lacks jurisdiction to hear any claims arising from the Patent on two alternative grounds. First, because **[A]** the Patent was issued before the BM-BIT's entry into force and thus falls outside its scope. Second, in any event, because **[B]** the assignment of the Patent did not place it under the BM-BIT's protective scope.

A. The Patent is not covered by the BM-BIT

91. The Tribunal lacks jurisdiction to hear any claims arising from the Patent simply because the BM-BIT expressly says so.

92. The jurisdiction of arbitral tribunals whose powers arise from investment treaties is solely based on the consent of the parties.[109] In the present case, RESPONDENT has not consented to arbitrate any dispute in connection with the Patent, because it decided to expressly exclude it from the BM-BIT, through an express limitation in the treaty's temporal scope.

93. Any asset that falls outside such scope of application is not entitled to benefit from the treaty's provisions.[110] Consequently, it affects the jurisdiction of any arbitral tribunal adjudicating a dispute brought under a BIT's provisions.[111]

94. In that regard, Article 13 reads as follows:

[108] *Supra*, ¶31.
[109] BLANCHARD, p.421.
[110] SALACUSE, p.175.
[111] *Id.*, p.174.

> *"This Agreement shall apply to any investment **made** by an investor of one Contracting Party in the territory of the other Contracting Party **on or after the date of its entry into force**."*[112]

95. It then follows that any investment made in Mercuria *prior* to the BM-BIT's entry into force is outside the treaty, including Article 8 and the dispute settlement mechanism established therein.

96. The question then is of when did the BM-BIT come into force. According to its Article 14: "[t]*his Agreement shall enter into force thirty days after the date of exchange of instruments of ratification."* Basheera and Mercuria exchanged their instruments of ratification on 10 March 1998.[113] Consequently, the BM-BIT entered into force thirty days after, *i.e.* on 9 April 1998.

97. It is undisputed that the Patent was issued to Atton Boro and Company –and not to CLAIMANT– on 21 February 1998, almost two months *before* the BM-BIT's entry into force.[114] Thus, the investment, if it was made at all, was *made* on such date, *before* the treaty entered into force. Thus, the Patent is simply outside the scope of the BM-BIT.

98. Therefore, RESPONDENT respectfully requests the Tribunal to find that it lacks jurisdiction *ratione temporis* to hear any claims in connection with the Patent.

B. The assignment did not place the Patent within the BM-BIT's scope

99. In spite of the above, CLAIMANT may argue that the relevant date to consider whether the Patent is within the BM-BIT's scope is the date of its receipt by assignment of the Patent from its controller, Atton Boro and Company, and not the Patent's date of issuance. However, such argument does not withstand scrutiny.

100. As noted, the BM-BIT and its substantive protections are applicable only to investments that were *made* on or after 9 April 1998,[115] not to a Patent issued on 21 February 1998. It is noteworthy that Article 13 employs the term "made", not "held", thus precluding any attempt to dilute the temporal limitation on that basis.

[112] BM-BIT, Article 13 (emphasis added).
[113] PO2,¶2.
[114] Problem, p.28,¶3.
[115] BM-BIT, Article 13.

101. The question becomes whether the acquisition by assignment after the Patent was issued qualifies as the "making" of an investment as required by the BM-BIT. The answer is negative.

102. As stated above,[116] the term "investment" has an inherent meaning that cannot be ignored and which certainly involves an *action* of investing – reflected in at least a commitment of resources and the taking of business risk. By merely "holding" an asset listed in Article 1(1) of the BM-BIT, CLAIMANT did not *invest* it, as its actions did not entail a commitment of resources nor any risk whatsoever.

103. There is a clear distinction between the object of an investment, *e.g.* a patent, and the *action* of *investing*.[117] The *Quiborax* tribunal, referring to shares held by one of the claimants, made a precise assessment of the question:

> *"While shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets."*[118]

104. A similar approach was taken in *KT Asia*. In that case, the investor –a Dutch company– had acquired certain shares of a bank to be sold on a cost basis. However, it never paid for them, since both the seller and the buyer were ultimately owned by the same person, who had actually bought the shares in the first place – and subsequently distributed them amongst his companies. The tribunal then found that the shares were not an investment, since the claimant could not rely on the other party's original contribution, but had to make one itself.[119]

105. The same could be said about the present case. CLAIMANT has a patent that Atton Boro and Company secured for Valtervite in February 1998, outside the scope of the treaty.[120] It is uncontested that CLAIMANT was not the party that committed the necessary resources for the original investment to be made.[121] There is nothing in the record showing that CLAIMANT purchased the Patent by transferring equivalent value –or any real value at all– to Atton Boro Group. Rather, Atton Boro Group assigned the Patent to CLAIMANT in exchange for shares,[122] which represented no transfer of value since

[116] *Supra*, ¶39.
[117] *Quiborax*,¶233.
[118] *Ibid.*
[119] *KT Asia,*¶¶191-192.
[120] PO2,¶3.
[121] Problem, p.28,¶3.
[122] PO3, line 1575.

CLAIMANT was incorporated in Basheera by Atton Boro Group itself.[123] Put simply, the Patent was "given" to CLAIMANT in all practical respects.

106. This falls short of CLAIMANT *making* a protected investment after the entry into force of the treaty. Stated differently, CLAIMANT made no investment at all in the Patent, and it certainly made none after the treaty's date of effectiveness.

107. Additionally, CLAIMANT's alleged investment does not meet other relevant standards, as there is no risk whatsoever involved in its activity. The only conclusion is the same as the one stated by the *KT Asia* tribunal: "*having made no contribution,* [the claimant] *incurred in no risk of losing such (inexistent) contribution*."[124] Hence, as CLAIMANT committed no resources, it incurred in no risk at all regarding the Patent.

108. In light of the foregoing, CLAIMANT did not *make* an investment by being assigned the Patent. Since only investments *made* on or after 9 April 1998 are under the BM-BIT's scope of application, the Tribunal lacks jurisdiction on a *ratione temporis* basis.

109. Therefore, CLAIMANT's Patent claim is inevitably headed to dismissal, since the Tribunal lacks jurisdiction over it in any given scenario.

III. IN ANY EVENT, RESPONDENT IS ENTITLED TO DENY CLAIMANT THE BENEFITS OF THE BM-BIT

110. If any of RESPONDENT's arguments did not suffice to persuade the Tribunal that it lacks jurisdiction over all of CLAIMANT's claims, the latter would still be precluded from invoking the benefits of the BM-BIT. Under the BM-BIT, RESPONDENT is entitled to deny the benefits of the BM-BIT to CLAIMANT.

111. Article 2 of the BM-BIT gives RESPONDENT the right to "*deny the advantages of this Agreement*", provided that the requirements to do so are met. Given the fact that Article 2 applies to the whole BM-BIT, it includes the dispute settlement provisions of Article 8, depriving this Tribunal of jurisdiction to hear the case.

112. Firstly, contrary to any possible argument by CLAIMANT, **[A]** RESPONDENT's invocation of Article 2 of the BM-BIT was made in a timely manner. That being established, **[B]** the two requirements provided therein are met.

[123] Problem, p.28,¶4.

A. RESPONDENT has timely invoked the Denial of Benefits Clause

113. First of all, RESPONDENT is not prevented from invoking Article 2 of the BM-BIT, since there is no time limit –besides the one fixed in Article 23(2) of the PCA Rules– to do so.

114. In that vein, tribunals have considered denial of benefits as timely raised when done –as here– before the expiry of the term to challenge the tribunal's jurisdiction.[125] Particularly helpful is the reasoning of the *Guaracachi* tribunal:

> *"the Tribunal agrees that the denial can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT. It will be on that occasion that the respondent State will analyze whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defense."*[126]

115. Certain cases seem to prohibit the application of a denial of benefits clause retrospectively, but several decisions have stated the opposite.[127] In fact, one of the few cases which rejected a retroactive effect of a denial of benefits –*Plama*– relied on NAFTA Article 1113, concluding that it supported its solution.[128] However, Art. 1113 of NAFTA *does* provide for a form of prior notification and consultation, whilst the ECT (the applicable law in *Plama*) does not contain any such requirements. Thus, such lack of requirements should be seen as the intention of the contracting states to provide further tools to the denying party.[129]

116. Even more so, *Plama*'s requirement of notifying the denial of benefits to an investor *prior* to its investment is simply unreasonable, indeed absurd. Under that approach, States would have to conduct a thorough review of each and every investment structure proposed by any investor and issue "advisory" opinions whether the chosen structure clashes with the denial of benefits clause. Despite the fact that it seems to be an impossible task, it can also be somehow hostile.

117. As soundly noted by the *Guaracachi* tribunal:

> *"Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are*

[125] *Emelec*,¶71; *Ulysseas*,¶172.
[126] *Guaracachi*,¶378.
[127] For example, *Emelec, Guaracachi* and *Pac Rim Cayman*.
[128] *Plama*,¶157.
[129] MISTELIS/BALTAG, pp.1319-1320.

> *fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits."*[130]

118. In the present case, Article 2 of the BM-BIT does not establish any relevant threshold, nor does it require a formal notice whatsoever. Thus, accordingly, the Tribunal should consider that the only temporal limit is the one established in Article 23(2) of the PCA Rules as to jurisdictional objections.

B. The two requirements to deny the BM-BIT's benefits are met

119. Having briefly addressed the timeliness of RESPONDENT's invocation of the Denial of Benefits Clause, the Tribunal should deem RESPONDENT's denial as properly exercised.

120. Article 2 of the BM-BIT reads as follows:

> *"Each Contracting Party reserves the right to deny the advantages of this Agreement to:*
>
> *1. a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized."*

121. Therefore, in order to trigger the denial of rights in Article 2, two cumulative requirements must be met: first, CLAIMANT must be owned or controlled by citizens or nationals of a third state, and second, CLAIMANT must have no substantial business activities in the territory in which it is organized, *i.e.* Basheera.

122. Here, both standards are satisfied, since **[i]** CLAIMANT is controlled by nationals of a third state and **[ii]** it does not have substantial business activities within the territory of Basheera.

i. CLAIMANT is controlled by nationals of a third state

123. There is no dispute that the shares of CLAIMANT are held by parties belonging to third countries.

124. Specifically, CLAIMANT's shares "*are currently held by Atton Boro Group affiliates, which are all ultimately **controlled** by Atton Boro and Company*."[131] Atton Boro and Company is organized under the laws of Reef,[132] and thus holds such nationality.

[130] *Guaracachi*,¶¶371-372.

125. Consequently, CLAIMANT is controlled by nationals of Reef, a third state, proving the first requirement of Article 2 of the BM-BIT to be met.

ii. CLAIMANT does not have substantial business activities in the territory of Basheera

126. CLAIMANT's –weak– activities in Basheera fail to meet the BM-BIT's threshold in order to benefit from its provisions. Indeed, its activities are simply irrelevant.

127. The BM-BIT does not provide a definition of "substantial" business in its Article 2. Thus, the meaning of "substantial business" must be determined by reading the treaty under the accepted interpretative criteria set in the VCLT.

128. The BM-BIT seeks to promote economic cooperation and development between Basheera and Mercuria, as stated in its preamble. The very purpose of a denial of benefits clause is to prevent improper nationality planning,[133] and therefore ensure that States are effectively linked to investors of the other contracting party. The objective sought is to impede *free-riders* from benefitting from BITs, since they have no genuine link with contracting States and cannot bring economic development to the host country – *i.e.* failing to comply with the main purpose of any investment treaty.[134] Thus, denial of benefits clauses should be read with the foregoing in mind when assessing such issues.[135]

129. It is noteworthy that RESPONDENT does not object to nationality planning, only to improper nationality planning, as understood in the BM-BIT. Following such approach, "substantial business" should be interpreted as a company's real and effective development of its main business activity in the territory of the country in which it is incorporated.

130. In that sense, RESPONDENT has reserved the right to deny the benefits of the BM-BIT to companies such as CLAIMANT, established in Basheera only to seek treaty protection. Indeed, CLAIMANT was constituted in Basheera in view of the latter's government new

[131] PO2,¶3 (emphasis added).
[132] Problem, p.28,¶2.
[133] DOLZER/SCHREUER, p.55.
[134] SORANAJAH, p.181.
[135] BLYSCHAK, §4.

outward-looking economic policy, which entailed the conclusion of several international agreements.[136]

131. The record is explicit in that regard: CLAIMANT was incorporated in Basheera "*as a vehicle for carrying on business in South American and African countries*."[137] Its very incorporation as a "*vehicle*" corroborates that CLAIMANT exists as a net to capture treaty protection – not as a self-standing company legitimately conducting substantial business in Basheera. On top of that, Atton Boro Group already had an "*established presence*" in the Basheeran market by itself.[138] The record does not show CLAIMANT had anything to do with that local business.

132. There are no indications that CLAIMANT performs substantial economic activity in Basheera. Quite to the contrary, it has had two to six employees throughout the years.[139] Its activities are exhausted by:

> *"*[M]*anaging its portfolio of patents registered* ***in South America and Africa****, and providing support for regulatory approval, marketing, and sales as well as legal, accounting and tax services for Atton Boro Group affiliates* ***in South America and Africa****."*[140]

133. Those elements are not enough to consider CLAIMANT's activities as "substantial business" in Basheera. Its activities are not even related to Basheera, but are concededly related to administrative work related to South America and Africa. All of CLAIMANT's activities –substantial or not– are performed outside Basheera, which is located in Westeros.[141] This fact alone is sufficient to show that the standards of the BM-BIT are satisfied in this case.

134. Furthermore, CLAIMANT's activities are not even related to its main business and purpose. CLAIMANT itself has acknowledged that its principal business activity is "*the* ***manufacture and sale*** *of pharmaceutical products since its incorporation in 1998*."[142] Plainly, the two to six employees in Basheera cannot, and do not, "manufacture" or "sell" pharmaceuticals. Nothing about the company's "principal" business happens in Basheera.

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[136] Problem, p.28,¶1.
[137] *Id.*, p.28,¶4.
[138] *Ibid*.
[139] PO2,¶3.
[140] *Ibid.* (emphasis added).
[141] PO3, line 1564.
[142] Problem, p.4,¶5 (emphasis added).

135. The Tribunal should then deem CLAIMANT's activities as lacking substantial business, since no activity relating to CLAIMANT's own-admitted purpose is carried out in Basheera. In so doing, the Tribunal should follow *inter alia* the approach of the *Guaracachi* tribunal, which held that: "*insufficient evidence* [was] *provided to prove that* [the claimant] *carried on substantial business activities in the US* […]."[143]

136. Still, CLAIMANT could argue that it conducts substantial activities because it rents an office space, has permanent staff and has a bank account.[144] However, this is insufficient. Any shell company could do as much. A bank account, a telephone, a few employees and a rented office is hardly the hallmark of "substantial" business – it can be had for virtually nothing by virtually anyone. Whatever CLAIMANT does in its jurisdiction of incorporation –probably no more than "exist"– certainly is not "substantial" by any count.

137. On that point, *KT Asia* provides useful guidance. In that case, the claimant was a Dutch company, which had a regular manager, a bank account and held shares of a bank as assets, much like CLAIMANT in Basheera here. However, it was undisputed that the claimant was a shell, since its ultimate owner had acknowledged such fact.[145]

138. The approach should be the same in the instant case, as it becomes evident that those are not relevant factors when addressing whether a company's activities are substantial or not. Actually, the record shows Claimant is a "*vehicle*".[146] In that sense, Atton Boro and Company has funded CLAIMANT not only to set up its manufacturing unit in Mercuria, but also to perform every agreement CLAIMANT entered into with the NHA from 1998 onwards[147]. Besides, Claimant's Patent is the result of its parent company's investigation, and not of its own[148] – what is only further evidence supporting RESPONDENT's position.

139. To sum up, CLAIMANT does not have substantial business activities in Basheera as required by the BM-BIT, since the activities it does develop fall far short from the established threshold. Since CLAIMANT is controlled by a third state national and RESPONDENT has timely denied the benefits of the BM-BIT, the Tribunal should uphold such conclusion.

[143] *Guaracachi,*¶370.
[144] *Ibid*; PO2,¶3.
[145] *KT Asia*,¶19.
[146] Problem, p.28,¶4.
[147] PO3, lines 1572-1573.
[148] Problem, p.28,¶3.

140. Thus, the Tribunal lacks jurisdiction in respect to all of CLAIMANT's claims.

SUBSTANTIVE ISSUES

141. RESPONDENT hereby submits its defense on the merits and respectfully requests the Tribunal to conclude that **[IV]** RESPONDENT has provided fair and equitable treatment in relation to CLAIMANT´s Patent and Award, and that **[V]** RESPONDENT is not liable for the NHA's termination of the LTA.

IV. RESPONDENT HAS ALWAYS PROVIDED CLAIMANT FAIR AND EQUITABLE TREATMENT

142. CLAIMANT brought two claims –for the Patent and the Award– under Article 3(2) of the BM-BIT, which provides for the FET standard. As regards its Patent claim, CLAIMANT argues that granting the License pursuant to the provisions of the Law allegedly constitutes a breach of its legitimate expectations and thus the FET standard.[149] Regarding the Award claim, it argues that the delay in the enforcement violates the mentioned standard as well.[150]

143. Article 3(2) embodies, *inter alia,* the FET standard. It reads as follows:

> *"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."*

144. The FET standard is broad and has to be analyzed in a case by case basis.[151] As will be further shown, such standard was not violated in the present case, insofar as **[A]** the granting of the License to HG-Pharma under the provisions of the Law plainly respected the FET standard, and **[B]** the same is true as to the Award´s enforcement proceedings.

[149] Problem, p.5,¶13.
[150] Problem, p.5,¶13.
[151] DOLZER/SCHREUER, p.139; SALACUSE, p.251; MUCHLINSKI, p. 634; *Mondev,*¶138; *Waste Management,*¶99; *CMS,*¶273; *Noble Ventures,*¶181; *MTD,*¶109.

A. The enactment of the Law and the issuance of the License fall within the FET standard

145. When CLAIMANT decided to enter the Mercurian market, it knew that RESPONDENT is constitutionally obliged to secure universal healthcare for its people.[152] RESPONDENT has acted at all times reasonably in pursuit of this goal, which no doubt was apparent to CLAIMANT when he set up shop in Mercuria.

146. Indeed, both **[i]** the enactment of the Law and [**ii]** the granting of the License were reasonable measures consistent with Mercuria's legal framework, taken to face a health crisis. In addition, **[iii]** Claimant is not entitled to compensation for measures taken for public welfare.

i. RESPONDENT did not breach CLAIMANT's legitimate expectations of a stable legal framework

147. CLAIMANT submitted that RESPONDENT's measures breached FET, specifically by altering the stability of the legal framework in which it had relied its investment.[153] However, the alteration was entirely predictable under the circumstances and well within the range of possible measures in the face of a national health crisis.

148. Preliminarily, –as noted above–[154] all outlays leading to the Patent were made by another entity well before the BM-BIT even came into force. On that basis alone, the notion that "expectations" of a FET could have been legitimately formed is frivolous.

149. The FET standard cannot be deemed as "*designed to forbid any form of regulation against foreign investors*."[155] This standard is not a recipe for inaction or legislative paralysis. Quite to the contrary, investors are subject to the applicable regulations and policies depending on the type of investment they hold or the activity they undertake.[156]

150. Several tribunals have concluded that the FET standard does not affect the State's power to exercise its sovereign right to legislate and to adapt its legal system to

[152] Problem, p.39,¶2.
[153] Problem, p.5,¶13.
[154] *Supra*,¶¶91-98.
[155] CORREA, p.344.
[156] *Ibid.*

changing circumstances.[157] Indeed, "*a general stabilization requirement would go beyond what the investor can legitimately expect*."[158]

151. In the case at hand, RESPONDENT amended its IPR Law to provide for non-voluntary licenses[159] as a result of the dire budgetary situation triggered precisely by the explosion in Sanior sales to the NHA. This, in turn, spread budgetary limitations to remaining government healthcare programs.[160] Had no action been taken RESPONDENT's constitutional requirement to provide free, universal healthcare for its people would have come to an end.[161]

152. Indeed, in 2006, the NHA's annual report regarding greyscale reflected these critical results. The confirmed cases of greyscale in Mercuria had increased by over 13 times from 2003. Additionally, estimations showed that more than half a million working-age people were infected by greyscale.[162]

153. Given such scenario, RESPONDENT was compelled to introduce measures pursuant to its constitutional mandate to safeguard the health of its people. CLAIMANT has participated in several public-private partnerships with States and State entities in developing countries, including Mercuria.[163] Therefore, CLAIMANT either knew or ought to have known the functioning of these health programs and their implication in the budgets of developing countries. However, it elected to do most of its business with government entities – it should clearly have expected the reaction it triggered at the NHA when it chose to be recalcitrant about a requested price reduction for Sanior.

154. RESPONDENT recognizes the need of a strong IPR protection in order to develop new medicines. As stated by its Minister of Health, patents are the cornerstone of the pharmaceutical business.[164] However, compulsory licensing provisions are present in the legislations of more than 100 countries.[165] CLAIMANT, who owns Valtervite patents

[157] *Philip Morris,*¶422; *Parkerings,*¶333; *Continental,*¶254; *Total*,¶113; *Saluka,*¶305;*Electrabel*,¶7.77; *BG Group,*¶¶292-310; *Total,*¶¶123,164; *Paushok,*¶302.
[158] SCHREUER, p. 374.
[159] Problem, p.30,¶20.
[160] Problem, p.30,¶16.
[161] Problem, p.39¶2.
[162] Problem, p.42, lines 1338-1344.
[163] PO2,¶5.
[164] Problem, p.39,¶4.
[165] BIRD&CAHOY, p.10.

in several jurisdictions[166] cannot plausibly argue that the amendment was unforeseeable, that it violated legitimate expectation, or that it was a breach of the FET standard.

155. CLAIMANT further grounds its claim of disappointed expectations on a statement of Mercuria's Minister of Health fostered its legitimate expectations.[167] But a general legislative assurance cannot create legitimate expectations of an immobile legal regime,[168] much less so if, as here, it was subsequent to the decision to invest. In this regard, the *Continental* tribunal rejected the claimant's legitimate expectation claim since they were based on a general legislative assurance made after developing the investment.[169]

156. Further, it is recognized that legitimate expectations are created at the time the investment is made.[170] The Minister's statement was in 2004, *i.e.* six years *after* CLAIMANT had entered into the Mercurian market. Thus, it is self-evident that CLAIMANT could not have taken it into account when making its alleged investment.

157. The reaction of Respondent to the national health crisis was predictable and reasonable, and CLAIMANT knew it to be so. Given its own refusal significantly to lower the price of Sanior despite a veritable explosion in its sales, Claimant can hardly claim to have been surprised or to have had its legitimate expectations disappointed. The measures taken were fully in accordance with the framework that Claimant took into account when investing, namely TRIPS, as will be explained below.[171] Therefore, RESPONDENT's actions within its sovereign regulatory powers were completely in accordance with the FET standard as provided in the BM-BIT.

ii. The granting of the License did not breach the FET standard as well

158. The Court granted to HG-Pharma the License to produce Valtervite on April 2010.[172] As a result, the cost of Valtervite was reduced by 80% and its accessibility assured to the thousands who relied on it for palliative treatment.[173]

[166] Problem, p.28,¶4.
[167] Problem, p.39,¶4.
[168] *Philip Morris,*¶426; *PSEG,*¶¶241-243; *El Paso,*¶¶375-377; POTESTÀ, p.11.
[169] *Continental,*¶259.
[170] DOLZER/SCHREUER, pp.134-135; SCHREUER/KRIEBAUM p.266; *Bayindir,*¶190; *CMS,*¶275.
[171] *Infra*,¶¶160-177.
[172] Problem, p.31,¶21.
[173] *Id.*, p.30,¶22.

159. The granting of the License could not have disappointed Claimant's legitimate expectations. Indeed, **[a]** RESPONDENT's measures were consistent with international covenants and could not infringe CLAIMANT´s legitimate expectations, and **[b]** the granting of the License was a reasonable measure.

a. RESPONDENT's grant of the License is consistent with international norms

160. Contrary to CLAIMANT's assertions,[174] RESPONDENT's course of action was consistent with international covenants and norms governing intellectual property, namely TRIPS and the Doha Declaration.[175]

161. TRIPS is one of the WTO covered agreements. It contains rules regarding IPR that the State Parties must comply with,[176] and is considered as the main international instrument for the regulation of IPR.[177]

162. As an example, Article 8 establishes the right to "*adopt measures necessary to protect public health*."[178] Additionally, Article 31 provides the possibility for the States to limit the exclusive rights of the patent holder without its consent, respecting certain provisions.[179]

163. Following such principles, in 2001, the WTO members unanimously adopted the Doha Declaration, a subsequent agreement regarding the interpretation of TRIPS.[180] Among its main features, it establishes that TRIPS should be interpreted and implemented in a manner supportive of the States' rights to protect public health and, more importantly, to promote access to medicines for all.[181]

164. In the instant case, the granting of the License complied with each and every standard embodied in Article 31 of TRIPS, as shown below.

165. Provision (a) of Article 31 of TRIPS mandates that the authorization for use of a license shall be considered on its individual merits. The Court analyzed HG Pharma's individual application under its individual merits, pursuant to the Law. It establishes that each application for a compulsory license must "*contain a statement setting out the*

[174] Problem, p.5,¶13.
[175] PO2,¶2.
[176] BEAS RODRIGUES, p.13.
[177] GERVAIS, p.506.
[178] TRIPS, Article 8.
[179] TRIPS, Article 31.
[180] VCLT, Article 31; GATHII, p.301.
[181] CORREA I, p.9.

nature of the applicant's interest" as well as the *"facts upon which the application is based*",[182] all considerations the Court made.[183]

166. Provision (b) mandates that applicants make efforts to obtain authorization from the patent holder, but even this can be waived in cases of extreme urgency.[184] Specifically, the Doha Declaration provides that each State *"has the right to determine what constitutes national emergency or other circumstances of extreme urgency."*[185] In the present case, the Court granted the License in a context of extreme urgency, insofar as it was estimated that in the years following 2006 at least 100,000 people would entirely depend on the greyscale healthcare program.[186] The Court granted the License until "*greyscale was no longer a threat to public health in Mercuria*."[187] Therefore, the measure fell within the standards established by provision (b).

167. RESPONDENT also complied with provision (c), which demands a limited use in duration and scope of the authorization,[188] as the License was limited to the purpose of public health, and its use was authorized only until the greyscale epidemic ceased to exist.[189]

168. Provision (d) establishes that the use of the compulsory license shall be non-exclusive.[190] The Law complies with this requirement since it establishes that *"any person interested may make an application to the High Court of Mercuria for grant of a non-voluntary license."*[191]

169. Furthermore, provision (e) determines that the use of the license shall be non-assignable.[192] Neither the Law nor the granting of the License allows HG Pharma to assign the License it obtained, nor is there any evidence to the contrary.

170. Provision (f) was complied with as well. It mandates that the use of the license shall be authorized predominantly for the supply of the domestic market.[193] The License was issued for exclusive supply in Mercuria, and HG- Pharma does not export Valtervite.[194]

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[182] Law, Section 23(C)(2).
[183] Problem, p.47,¶5.
[184] TRIPS, Article 31(b).
[185] Doha Declaration, Article 5(c).
[186] Problem, p.43.
[187] *Id.*, p.30,¶21.
[188] TRIPS, Article 31(c).
[189] Problem, p.30,¶21.
[190] TRIPS, Article 31(d).
[191] Law, Section 23(C)(1).
[192] TRIPS, Article 31(e).
[193] TRIPS, Article 31(f).
[194] PO2,¶5.

171. Provision (g) was also respected, since the authorization for the use of the License was liable to termination when the circumstances which led to it cease to exist.[195]

172. Provision (h) determines that the right holder shall be paid adequate remuneration in the circumstances of each case.[196] Under the License, HG-Pharma would pay CLAIMANT an annual royalty based on its total earnings,[197] which percentage was within the average royalties paid for drugs.[198] If CLAIMANT never received these payments, it was caused by its own conduct. Indeed, although HG-Pharma requested bank account details, CLAIMANT never answered, apparently intending by such denial to protest the License.[199]

173. The Law provides for the possibility of questioning the validity of the non-voluntary licenses, as well as the fixed royalties, before the Court,[200] thus complying with Provision (i).[201]

174. Likewise, the decision relating to the remuneration for the use of the license is subject to judicial review before Mercuria's courts,[202] in compliance with provision (j).[203]

175. Finally, provisions (k) and (l) are irrelevant in the present case.

176. RESPONDENT complied with every provision established in Article 31 of TRIPS. Furthermore, as established by the Doha Declaration, TRIPS *"does not and should not prevent members from taking measures to protect public health."*[204] Thus the Doha Declaration separately supports RESPONDENT's course of action, by allowing the necessary flexibility on the interpretation of TRIPS.[205]

177. Note that Respondent does not contend that TRIPS or the Doha Declaration permits a sovereign to violate its obligations under a bilateral investment treaty. The argument is narrower: in the presence of TRIPS and the Doha Declaration –both of which must have been amply known to CLAIMANT– there could have been no legitimate expectation

[195] TRIPS, Article 31(g).
[196] TRIPS, Article 31(h).
[197] Problem, p.30,¶21.
[198] PO3, lines 1589-1590.
[199] Problem, p.50, line 1596-1599.
[200] PO3, line 1578.
[201] TRIPS, Article 31(i).
[202] PO3, lines 1578-1579.
[203] TRIPS, Article 31(j).
[204] Doha Declaration, Article (4).
[205] *Ibid*.

formed as to the immobility of the legal regime in Mercuria and therefore no violation of expectations capable of supporting a FET violation.

b. The granting of the License was a reasonable measure with a public health purpose

178. Given the fact that the granting of the License to HG-Pharma had the aim of protecting public health, this measure also complies with the standard of reasonableness – one of the elements of the FET standard.[206] Briefly, the reasonableness principle requires that the host State's conduct be reasonably related to a legitimate public policy objective.[207]

179. In the present case, there is a clear and appropriate correlation between RESPONDENT's public policy objective and the measure adopted to achieve it, namely, the granting of the License.

180. Such decision had as its sole purpose to secure prices that could make treatment of greyscale victims possible – surely nothing could be more "reasonable" than that. Had these measures not been taken by Mercuria, it would have breached its constitutional mandate to secure universal healthcare for its citizens.

181. The Doha Declaration follows a similar approach. Though highlighting the importance of IPR protection, it stresses "*the concerns about* [IPR regulation] *effects on prices*."[208] It also sets as a core principle the importance to "*promote access to medicines for all*."[209] Respondent sought reasonably to accommodate these conflicting concerns as best it could in the face of dire public health circumstances.

182. The License was granted in the midst of a public health crisis. Indeed, the health circumstances in Mercuria had collapsed in a few years**.** In 2003 confirmed cases of infected people stood at 20,485. In 2006 this number had exploded to 266,298.[210] A substantial portion of the population depended solely on public health schemes to obtain medical treatment.[211]

[206] SATTOROVA, p.426; MUCHLINSKI, p.272-273; *Saluka*,¶460.
[207] VANDEVELDE, p.54; *Pope & Talbot,*¶79; *Gami,*¶114.
[208] Doha Declaration, Article 3.
[209] *Ibid*.
[210] Problem, p.43, line 1338.
[211] *Id.*, p.43, line 1360.

183. The alternative medicines in Mercuria were not effective.[212] Thus, RESPONDENT acted reasonably in the face of a critical situation.[213]

184. Furthermore, the License to HG-Pharma was limited in time, to last only until greyscale was no longer a threat to public health in Mercuria,[214] and granted a royalty that was well within the range of royalties in the industry.[215]

185. To summarize, the granting of the License was in all respects a "reasonable" measure, falling well within the standard of reasonableness contemplated by the FET in the BM-BIT.

iii. In addition, Claimant is not entitled to compensation for public welfare measures

186. Finally, Claimant is not entitled to seek damages stemming from a non-discriminatory measure that is aimed at the public welfare. Even if Claimant suffered a loss in its profits, it would not be entitled to compensation as a matter of law.

187. It is generally accepted that investors are not entitled for compensation when general *bona fide* regulation aimed at public welfare causes a loss of profits in their investments.[216]

188. In this regard, in the *Philip Morris* case, the respondent took general regulatory measures which restricted the number of cigarettes brands managed by the claimant. The tribunal considered that if the respondent did not take such measures, the claimant would have had more profits.[217] However, this did not imply that the claimant was entitled to compensation for the loss of profits since the measures were taken in a non-discriminatory way in order to protect the health of its citizens.[218] Further, the claimant still held the market share in the Uruguayan market,[219] and, when analyzing a treaty violation, the whole economic operation should be taken into account.[220]

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[212] PO3, lines 1583-1584
[213] Problem, p.30,¶21.
[214] *Ibid*.
[215] PO3, line 1590.
[216] SORNARAJAH, p.375; OECD PAPERS, p.5; *Saluka,*¶255; *Lauder,*¶198; *Tecmed,*¶119; *Methanex*, Part IV, Chapter D,¶7; *Chemtura*,¶266.
[217] *Philip Morris*,¶286.
[218] *Id.*,¶287.
[219] *Id.,*¶286-288.
[220] *Philip Morris,*¶283.

189. Here too Claimant is still actively participating in the Mercurian market with other drugs.[221] The only product affected by the measures is Valtervite. As in the *Philip Morris* case, Respondent took the measures it deemed necessary regarding a public health crisis, and Claimant still operates actively in the Mercurian market.[222]

190. Thus, even if we were to assume –despite any evidence to that effect– that the measures taken by Respondent caused a reduction in profits, this does not mean that Claimant is entitled to compensation for such reduction.

B. The Award´s enforcement proceedings were consistent with the FET standard

191. CLAIMANT alleges that the seven-year delay in the enforcement proceedings constitutes an unreasonable period and a failure to provide any effective means of asserting its rights.[223] From that assertion, Claimant teases a violation of the FET standard in the BM-BIT. However, this is incorrect.

192. The Judiciary has acted at all times in a fair and equitable manner by acting reasonably and within due process of law. Further, a claim based on delay makes for an inaccurate reading of the BM-BIT. Despite the CLAIMANT'S understandable unhappiness at the delay, unhappiness does not make out a FET violation. Much more than mere delay is required, and none of it is present here.

193. Indeed, CLAIMANT's arguments clash with two facts, namely that **[i]** CLAIMANT could have no expectation to enforce the Award in a specific timeframe and; **[ii]** the Judiciary having been responsive and diligent during the enforcement proceedings at all times.

i. CLAIMANT could not legitimately expect the Award to be enforced in a specific timeframe

194. There is no binding provision that would support a legitimate expectation to have the Award enforced in a specific period of time as a matter of treaty obligation.

195. CLAIMANT could first argue that its legitimate expectations were based in the NYC, this being part of the legal framework of Mercuria.[224] However, the NYC does not establish a determined period of time to enforce or recognize awards. Rather, it establishes that

[221] Problem, p.31,¶25.
[222] *Ibid.*
[223] Problem, p.5,¶13.
[224] Problem, p.4,¶10.

contracting parties must "*enforce them in accordance with the rules of procedure of the territory where the award is relied upon*."[225]

196. Indeed, since the enforcement proceedings are determined by domestic procedural law, the time required is not specified by –nor has it violated– the NYC, which "*may have made the recognition and enforcement easier, but not necessary quicker."* [226]

197. In the present case, the Judiciary acted within Mercuria's rules of procedure in the enforcement proceedings, and thus not in violation of the NYC.[227] Thus, CLAIMANT cannot argue that RESPONDENT has breached its legitimate expectations based on such treaty.

198. CLAIMANT could attempt to compare its enforcement proceedings to the shorter duration of the process that led to the granting of the License to HG-Pharma. But these two proceedings have different objects and therefore there is no guarantee that their duration would be similar.

199. CLAIMANT could also bring a claim of legitimate expectations had there been a specific and unambiguous assurance or representation by RESPONDENT.[228] However, Respondent never assured CLAIMANT that it would have its Award enforced in a certain period of time.

200. By contrast, the similarity between the present case and *White Industries* is remarkable. There, the tribunal analyzed whether the duration of an enforcement proceeding could entail a breach of the FET standard, specifically of the claimant's legitimate expectations.

201. The tribunal concluded that the respondent did not breach such legitimate expectations since these are based on the conditions of the host State when the investment was made. If there is an absence of an express assurance that an award would be enforced in a particular time frame, it is not possible *"to have had the expectation as to the timely enforcement of the Award."*[229]

[225] NYC, Article 3.
[226] BREKOULAKIS, p.430.
[227] Problem, pp.7-12.
[228] NEWCOMBE/PARADELL, pp.281-2.
[229] *White Industries*,¶10.3.15.

202. Further, *"an investor must generally take a host State (including its court system) as it finds it."*[230] The tribunal thus concluded that the investor knew or ought to have known when it entered into contract that the domestic court structure was overburdened, and therefore rejected the claim for the breach of legitimate expectations based on delay.[231]

203. This is true in the instant case too. RESPONDENT is a developing country with an overburdened judiciary, yet CLAIMANT decided to deploy its economic activities in Mercuria nonetheless.[232] It cannot now reasonably argue that delay –even an objectively long one– entitles it to claim under a FET theory.

204. Though true that the *White Industries* tribunal found a breach of an effective means clause by a nine-year delay in set-aside proceedings, the present case slightly differs. The BM-BIT does not contain a specific provision that obligates the parties to provide effective means to assert rights.[233]

205. Indeed, the treaty drafters chose not to include any such requirement in the body of the BM-BIT and only recognized it in the preamble to define the object and purpose of the treaty. Even interpreting the FET clause in accordance with the BM-BIT preamble, this Tribunal would still reach the same conclusion: Respondent acted well within the FET standard.

ii. The Judiciary provided FET at all times in the enforcement proceedings.

206. RESPONDENT further submits that its Judiciary acted complying with due process of law and reasonably.

207. The interpretation of the FET standard in relation to the conduct of the Judiciary recognizes the respect of due process as comprising non-denial of justice and lack of arbitrariness.[234]

208. As the tribunal in *Waste Management* notes, a court's conduct can only be deemed unfair or inequitable under international law when there is clear and convincing evidence of egregious violation of due process or a total failure of the judicial system.[235]

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[230] *Ibid.*
[231] *White Industries,*¶1.3.14.
[232] Problem, p.17,¶9.
[233] *White Industries,*¶11.4.15.
[234] KLEIN BROFMAN, p.668.
[235] *Waste Management*,¶98.

209. For example, the *Metalclad* tribunal concluded that FET had been breached when the investor was not notified of a meeting in which its construction permit was denied.[236] Likewise, the tribunal in *Middle East Cement* held that a lack of proper notification of a ship seizure and auction to its owner constituted a breach of due process.[237]

210. Following the same approach, the *Jan de Nul* tribunal decided that since "*the* [c]*laimants had opportunities to put forward their positions in writing and orally"*[238] there was no breach of due process.

211. In the instant case, nothing in the timeline of proceedings provided by CLAIMANT suggests that RESPONDENT's Courts incurred in such gross misconduct as failing to summon CLAIMANT to a hearing or not notifying a relevant decision. Furthermore, CLAIMANT had at all times the opportunity to put forward its position both in writing and orally.[239]

212. CLAIMANT may argue that the judge's statement in the enforcement proceedings on 8 November 2011[240] constitutes a discriminatory measure, and therefore a breach of due process. This is simply not so under the prism of any of the foregoing cases. Nothing in that statement affected CLAIMANT´s right to have access to justice or to be heard in the proceedings.

213. Simply put, mere delay of proceedings is insufficient to establish a breach of due process. CLAIMANT must satisfy a higher burden to demonstrate that the State conduct is arbitrary or grossly unfair.

214. In addition, CLAIMANT was not denied justice – as the threshold for such a violation is even higher.[241] Further, it is necessary to exhaust local remedies to allege a breach of this standard,[242] which CLAIMANT has not.

215. Here, the judiciary responded to every presentation, and did not prevent CLAIMANT from seeking justice. In fact, there is no decision denying CLAIMANT's enforcement application or any shortcoming in the process. Thus, the Judiciary acted within due process and provided justice at all times.

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[236] *Metalclad,*¶¶54,91.
[237] *Middle East Cement,*¶143.
[238] *Jan de Nul,*¶201.
[239] Problem, pp.7-12.
[240] Problem, p.8,¶14.
[241] *Chevron*,¶244; *Jan de Nul*,¶209; *Mr. A.J.O.,*¶291.
[242] UNCTAD SERIES, p.81.

216. In conclusion, there has been no showing of a FET violation on grounds that the enforcement proceedings have taken a longer-than-expected time.

V. RESPONDENT DID NOT BREACH THE UMBRELLA CLAUSE OF THE BM-BIT

217. Contrary to Claimant's assertions, it simply cannot rely on Article 3(3) of the BM-BIT to "elevate" its contractual claims to the status of treaty claims, as the requirements established by the treaty to do so are not met in the present case.

218. In the case at hand, RESPONDENT did not assume the obligations under the LTA. The LTA was a contract by which the NHA assumed certain obligations. RESPONDENT did not participate in the negotiation and conclusion of the LTA,[243] and therefore cannot be held accountable for the obligations it has not assumed.

219. Further CLAIMANT is precluded from invoking Article 3(3) of the BM-BIT, since **[A]** the termination of LTA is not attributable to RESPONDENT, and **[B]** CLAIMANT's claim for the NHA's breach of the LTA entails a double recovery.

A. The termination of the LTA is not attributable to RESPONDENT

220. CLAIMANT argues that the termination of the LTA by the NHA is attributable to Respondent, and it would be protected under the umbrella clause in Article 3(3) of the BM-BIT. However, the NHA entered into the LTA acting in a commercial capacity, and thus its conduct cannot be attributed to Respondent.

221. Article 3(3) of the BM-BIT reads as follows:

> *"*[e]*ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."*

222. Umbrella clauses must be interpreted in accordance to their specific wording, which determines the scope and effect of the clause.[244] In the present case, the wording of the umbrella clause demands that the State has "entered into" the specific contract in order to elevate the contractual claim to a treaty claim.

[243] PO3, lines 1594-1595.
[244] OECD PAPERS I, p.109.

223. Thus, whether RESPONDENT breached the umbrella clause by the NHA's termination of the LTA turns on whether RESPONDENT effectively concluded such agreement.[245] It did not.

224. The Tribunal should take into account the ILC Draft Articles for this purpose, specifically its provisions on state entities.[246] Thereunder, conduct of an entity may be attributed to the State only when: [i] the entity has been empowered with governmental capacity and [ii] the entity is acting under such capacity.[247]

225. In that sense, in *Bayindir* the tribunal stated that the claimant must establish a breach different in nature from a simple contract violation, in other words, one which the State commits in the exercise of its sovereign power.[248]

226. As regards the first requirement, Respondent acknowledges that the NHA was created by the State, in light of its constitutional mandate, being empowered with governmental authority.[249]

227. However, the second requirement – actual conduct under governmental capacity or authority – is absent. Under the ILC Draft Articles, the umbrella clause should not be applied to "any contract" of investors with a governmental entity absent conduct of the entity in its governmental (rather than commercial) authority. Otherwise, BIT tribunals would become courts of first instance or an appeal authority for any contract disputes likely to arise between foreigners and any State entity.[250]

228. Therefore, alleged violations of agreements entered into by State entities in a commercial capacity, rather than involving governmental powers, are not protected by the umbrella clause as a matter of treaty.[251]

229. The *Impregilo* tribunal noted that a State might breach the obligations assumed under a BIT only in the exercise of its sovereign authority, and not as a contracting party.[252] In other words, a BIT only provides a remedy to the investor where it proves that the

[245] GALLUS,pp. 166-167; *Noble Ventures*,¶86; *Eureko*,¶¶ 127-134.
[246] DOLZER/SCHREUER, pp.216-217; MUCHLINSKI, pp.550-551; PAPARINSKIS, p.617.
[247] ILC Draft Articles, Article 5.
[248] *Bayindir,*¶180.
[249] Problem, p.39,¶2.
[250] WÄLDE, p.226.
[251] *Ibid.*
[252] *Impregilo*,¶278.

alleged damages were a consequence of the behavior of the host State acting in breach of the obligations it had assumed under the treaty.[253]

230. Similarly, the *Tulip Real Estate* tribunal held that the actions of Emlak –a Turkish real estate investment trust– were not attributable to the State under the ILC Draft Articles, since such conduct was not carried out under the instructions, direction or control of the State on pursuit of a sovereign purpose.[254] In order to attribute the conduct of a state agency to the State, the conduct of the agency should not be normally replaceable by a private party.[255]

231. The NHA entered into the LTA as a commercial activity, and with no sovereign implication. Further, the breach of the LTA was also a decision of the NHA that arose from a simple arithmetical operation: continuing with the LTA would have entailed an annual expenditure of US$ 1,000,000,000.[256]

232. In fact, the NHA has acted in a governmental capacity in previous situations, by concluding public-private partnerships with other companies[257] – including CLAIMANT. This type of partnerships are collaborative relationships between public and private organizations with the specific goal of delivering public services.[258]

233. Regarding the greyscale epidemic, the NHA did not conclude a partnership with Claimant.[259] The LTA was a supply contract that could have been perfectly made by any private party.

234. Further, RESPONDENT was not involved in the LTA. Indeed, the decision to enter the LTA was made independently by the NHA: RESPONDENT did not direct the NHA in any way, nor was it involved in the negotiations that led to it.[260] Hence, RESPONDENT did not "enter into" the LTA. One cannot breach a contract one did not enter into.[261]

235. There is no evidence of sovereign interference in the NHA's contractual relations with CLAIMANT, and such fact should not be presumed, but proved. Thus, the NHA's conduct is not attributable to RESPONDENT.

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[253] *Id*.,¶260.
[254] *Tulip Real Estate,*¶358.
[255] *Maffezini,*¶¶76-77.
[256] Problem, p.43, line 1363.
[257] *Id.*, p.29¶8.
[258] OUITI, p.199.
[259] Problem, p.29,¶9.
[260] PO3, line 1594.
[261] GALLUS, pp.165-167; FEIT, p.163.

B. CLAIMANT's claim for the NHA's breach of the LTA entails a double recovery

236. CLAIMANT has the burden of showing the legal viability of its claim and its entitlement to relief.[262] It has not done so in connection with the claim for (double) recovery for the breach of the LTA.

237. The prohibition of double recovery for the same loss is a well-established principle,[263] which has arisen in a number of ICSID cases.[264]

238. In this regard, the *Duke* tribunal analyzed whether the claimant was entitled to receive damages under the applicable BIT, aside from the already awarded damages due to a contractual breach. It concluded that since the financial consequences were the same under the contract breach and the alleged treaty breach, it could not be compensated again for the contractual violation.[265]

239. In the present case, CLAIMANT admits that the Award conclusively settled the LTA dispute.[266] Yet it asserts the same claim again before this Tribunal. The Award arose from the same circumstances and sought the same substantial remedy as the one before this Tribunal.

240. In other words, the claim for the breach of the LTA is the same as the one resolved in the Reef arbitration, where damages were awarded for the NHA's breach of the LTA.[267] Here, identical damages are sought for the termination of the LTA by the NHA as an alleged violation of Article 3(3) of the BIT.[268]

241. Therefore, CLAIMANT is seeking recovery for the same alleged losses it suffered –and was awarded– before. This Tribunal should simply not allow that.

[262] *Pey Casado,*¶138.
[263] MUCHLINSKI, pp.1065-1066; DUGAN, p.596.
[264] *Pan American*,¶219; *Railroad*,¶265; *Daimler*,¶155.
[265] *Duke*,¶¶482-483.
[266] Problem, p.4,¶9.
[267] *Id.*, p.30,¶17.
[268] *Id.*, p.27,¶16(e).

PRAYER FOR RELIEF

242. For the foregoing reasons, RESPONDENT respectfully requests this Tribunal to find that:

a) It does not have jurisdiction over CLAIMANT's claims in relation to the Award;

b) It does not have jurisdiction over CLAIMANT's Patent claim;

c) In any event, that RESPONDENT has the right to deny CLAIMANT the benefits of the BM-BIT;

d) Where the Tribunal does not grant the foregoing prayers, that no act of Mercuria violates the substantive protections of the BM-BIT.

Respectfully submitted on September 25, 2017

by

TEAM BRAVO

On behalf of the Republic of Mercuria