TEAM GROS

ARBITRATION PURSUANT TO THE RULES OF THE
PERMANENT COURT OF ARBITRATION (PCA)
PCA Case No. 2016-74

FOREIGN DIRECT INVESTMENT
INTERNATIONAL MOOT COMPETITION
3–6 NOVEMBER 2017

ATTON BORO LIMITED
Claimant

v.

THE REPUBLIC OF MERCURIA
Respondent

MEMORIAL FOR RESPONDENT

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24 September 2017

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Doha Agreement	The Doha Declaration on the TRIPS Agreement and Public Health (2001).
ECT	Energy Charter Treaty (1994).
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).
Marrakesh Agreement	The Marrakesh Agreement (1994)

US-Ecuador BIT	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1993).
VCLT	Vienna Convention on the Law of Treaties (1969).

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OALD	Oxford Advanced Learner's Dictionary, 9th ed. (online).
Tudor	The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008)

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ELSI	*Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15.
Hilmarton Summary	New York Convention Guide, Summary of *Société Hilmarton*

HK FAQ	Hong Kong Trade and Industry Department, Frequently Asked Questions about Closer Economic Partnership Arrangement.
ILC Articles	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2010).
PCA Rules	Permanent Court of Arbitration, Arbitration Rules (2012).
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Pulau Litigan	*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Rep 625, Judgement (2002).
Restatement	Third Restatement of the Foreign Relations Law of the United States (1987)
Société Hilmarton	Société Hilmarton Ltd v. Société Omnium de tratement et de valorisation (OTV), France Cour de Cassation Case No. 92-15.137 (1994).
UNCITRAL Rules	United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2014).

TABLE OF ABBREVIATIONS

Art./Arts.	Article/Articles
BIT	Bilateral Investment Treaty
DSB	Dispute Resolution Body
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
¶/¶¶	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
R–##	Record page ##

STATEMENT OF FACTS

1. The present arbitration was initiated on 7 November 2016 under the "Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments" (the "**BIT**"), which entered into force on 9 April 1998,[1] between the Republic of Mercuria ("**Mercuria**" or "**Respondent**") and the Kingdom of Basheera ("**Basheera**"). Atton Boro Limited ("**Claimant**") is a wholly owned subsidiary of Atton Boro Group, which is in turn owned by Atton Boro and Company, based in the Republic of Reef ("**Reef**").[2] In April 1998, Claimant was incorporated in Basheera, a country in the continent of Westeros,[3] for the purpose of assisting operations in South America and Africa.[4] Claimant maintains only two permanent staff in Basheera, and there is no record indicating that Claimant generates any income or pays any income tax there.

2. The current dispute arises from Respondent's reaction to the greyscale epidemic. Greyscale is an incurable and chronic disease that has spread rapidly throughout Mercuria and its neighboring countries over the last decade.[5] It causes cracking and flaking skin, stiffening muscles, swollen limbs, and joint pain, and poses a distinct threat to the working-age population.[6] In the 1990s, Atton Boro Group developed a new treatment compound called Valtervite, patented it, and transferred the Mercurian patent to Claimant.[7]

3. The Mercurian National Health Authority (the "**NHA**") was created in 1998.[8] The NHA's 2003 Annual Report highlighted that greyscale posed a severe problem and had the potential to cause a national health crisis.[9] In 2004, the NHA invited Claimant to supply Sanior, a drug containing Valtervite. After comparing competing offers, the NHA entered into a Long-Term Agreement (the "**LTA**") with Claimant, whereby the NHA agreed to purchase Sanior from

[1] The parties exchanged instruments of ratification on 10 March 1998. R-48.
[2] R-28.
[3] R-49.
[4] R-28.
[5] R-41.
[6] Facts, R-28, also R-41.
[7] R-50.
[8] R-39.
[9] R-28.

Claimant at a 25% discount.[10] The contract was to be valid for ten years, "subject to the Supplier's satisfactory performance."[11] No Mercurian government official directly participated in the negotiation process.[12]

4. By 2007, it had become obvious that the financial burden of responding to the greyscale epidemic was becoming unmanageable. The number of confirmed cases of greyscale saw an increase of over 1000%, from 20,485 in 2003 to 266,298 by 2006, and the estimated maximum number of cases rose from 216,900 to 578,390 during the same period.[13] Claimant charged over USD 10,000 per patient per year for Sanior, which an estimated 100,000 greyscale patients in Mercuria could not afford.[14] The NHA realised that subsidising treatment for these patients alone would absorb up to two-thirds of Mercuria's entire annual healthcare budget.[15]

5. As the crisis continued to spiral out of control in 2007, the order value for Sanior doubled every three months.[16] In 2008, the NHA attempted to work with Claimant to address this unsustainable situation by proposing a renegotiated price for Sanior that would still allow Claimant to earn a profit[17] but would also allow the NHA to provide medication to more greyscale patients.[18] Claimant made no good-faith effort to negotiate, offering only a 10% discount.[19] While Claimant needed to charge only USD12.60/pill to earn a profit,[20] it refused to budge from a price of USD 23.60/pill—a margin of almost 90%.[21]

6. On 10 June 2008, the NHA was forced to terminate the LTA.[22] Pursuant to the terms of the LTA, Claimant invoked its contractual right to arbitration in Reef, and within a short seven months received an arbitral award (the "**Award**") in its favor, finding that the NHA's early

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[10] R-29.
[11] *Id.*
[12] R-50.
[13] R-42.
[14] *Id.*
[15] R-43.
[16] R-29.
[17] R-4.
[18] R-29–30.
[19] *Id.*
[20] R-4.
[21] R-29–30. The price in 2006 was $27/pill (including the original 25% discount, making the non-discounted base price $36). Respondent states in its Notice of Arbitration that Claimant's offer of an additional 40% discount made its margins "virtually nothing," which implies they still make a profit at the resultant price of $12.60). Claimant's counter offer was $23.40 (total 35% discount on base price).
[22] R-30.

termination breached the LTA.[23] Claimant subsequently filed for enforcement in 2009 before the High Court.[24] Despite diligent efforts by the High Court, the enforcement proceedings remain pending, in part due to multiple requests by Claimant for the extension of deadlines, adjournment, and transfers between courts.[25] Respondent has also constituted a new set of courts—the Commercial Bench—in a good faith effort to help resolve congestion in the High Court.[26]

7. After the termination of the LTA the epidemic worsened.[27] In October 2009, sixteen months after the LTA was terminated, the President of Mercuria promulgated National Legislation for its Intellectual Property Law ("**Law 8458/09**"), which allows a judge to grant a compulsory licence if "the patented invention is not available to the public at a reasonably affordable price."[28] In April 2010, the High Court of Mercuria granted a domestic producer, HG-Pharma, a temporary licence to manufacture Sanior until greyscale no longer posed a threat to public health, and required HG-Pharma to pay Claimant royalties of 1% of total earnings.[29] Claimant has not challenged the validity of the compulsory licence and the royalty payments in Respondent's courts.[30] HG-Pharma has attempted to pay Claimant the royalties due under the Licence, but Claimant has refused to accept.[31]

SUMMARY OF ARGUMENT

8. The Tribunal does not have jurisdiction *ratione materiae* or *ratione personae* over claims related to the Award. There are three reasons for this deficiency of jurisdiction *ratione materiae*. First, the Award, rendered by a tribunal seated in Reef, is not held by Claimant in the territory of Mercuria. Whether viewed from a delocalised perspective—as a decision in the international realm—or a localised perspective—as a decision residing in Reef—the Award has not been held in Respondent's state. Second, the Award does not meet the definition of "investment," in light of the objective meaning of the word. The Award does not involve any

[23] R-30.
[24] R-29–30.
[25] R-7–12.
[26] R-8–9.
[27] R-50.
[28] R-44–45.
[29] R-30.
[30] R-50.
[31] *Id.*

economic activity, have a temporal duration, or carry any investment risks. Third, the BIT contracting parties did not intend for awards to be considered investments; to invoke the logic of "crystallisation" or "change in form" to call the Award an investment would be counter to intent of the parties to the BIT. Finally, the Tribunal lacks jurisdiction *ratione personae* because Claimant is not a Basheeran investor.

9. Even if the Tribunal finds that it has jurisdiction over claims related to the Award, Respondent has properly denied benefits of the BIT to Claimant under Article 2 of the BIT. Claimant is indirectly owned and substantively controlled by Atton Boro and Company, a Reef entity, and was set up in Basheera on the eve of the Basheera-Mercuria BIT coming into force. Its alleged business of managing operations in South America and Africa seems dubious in light of the fact that Basheera is located in a different continent of Westeros. Faced with such blatant abuse of the treaty system, Respondent promptly raised its objection in its Response to the Notice of Arbitration, and revoked its consent to arbitration. This invocation was proper under the PCA Rules, since any objection to the Tribunal's jurisdiction can be raised before the statement of defence.

10. Even if the Tribunal decides that Claimant has access to the protection of the BIT, Claimant's substantive claims should fail for lack of merit. First, Respondent did not breach its duty of Fair and Equitable Treatment by passing Law 8458/09 and subsequently granting a licence for Valtervite to HG Pharma. Passing legislation and regulating patents are the natural prerogatives of a state. Claimant could not reasonably have expected the Mercurian policies to stay static in light of urgent threats of an international and domestic epidemic. Respondent took the responsible step of passing a new law that is limited in scope and which allowed for the direct targeting of the greyscale crisis. Furthermore, Claimant can derive no legitimate expectations from the inclusion of the Marrakesh Agreement in the preamble of the BIT. Alternatively, Respondent's reactions to the greyscale epidemic are justified under the necessity doctrine under customary international law. The drastic increase in greyscale incidences would have alerted any responsible government concerned about the wellbeing of its citizens, and the Tribunal should not punish Respondent and its taxpayers by imposing formidable penalties for the necessary measures.

11. Second, in an effort to tag on as many claims as possible, Claimant has alleged, without specificity, that Respondent's judiciary violated Article 3 of the BIT. However, Claimant's suit is progressing forward as Respondent's courts work to ensure that all parties' due process rights are respected. Given Respondent's status as a developing country with limited resources and Claimant's failure to exhaust local remedies, the actions of Respondent's courts fall far short of the high bar required of denial of justice claims. Further, Claimant's arguments regarding effective means to assert claims are beyond the scope of this hearing and, in any event, are meritless. Finally, Respondent has neither breached the BIT's full protection and security guarantees nor impaired Claimant's purported investment through any unreasonable or discriminatory measures. This Tribunal should not assume the role of an international appellate body and should not sit in judgment of Respondent's courts.

12. Finally, Claimant's attempt to double-recover for the termination of the LTA should be rejected by this Tribunal. The alleged breach of contract, which underlies the current claim, has been heard and decided by a commercial tribunal seated in Reef. Claimant advocates for an interpretation of Article 3(3) that reaches beyond the intent of the contracting parties and that threatens the dichotomy of contract claims and treaty claims. "Internationalising" even minor contractual breaches would open the floodgate for investment tribunals to sit in judgment of trivial disputes over the details of contract performance, a function that is better reserved for domestic courts and commercial tribunals agreed upon by the parties.

ARGUMENT

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE MATERIAE* OR *RATIONE PERSONAE* OVER CLAIMS RELATING TO THE AWARD

13. In order for this Tribunal to have jurisdiction *ratione materiae*, Claimant must show that it has a protected investment.[32] Article 8(1) further states that the agreement for arbitration only applies to investment disputes "arising… out of or in relation to [the BIT], or the… application… thereof."[33]

14. This Tribunal does not have jurisdiction over claims relating to Claimant's Award as: (**A**) the Tribunal does not have jurisdiction *ratione materiae* because Claimant never held the Award in Respondent's territory; or alternatively, because (**B**) the Award does not constitute an investment given the objective definition of "investment." Furthermore, (**C**) the Tribunal should refrain from employing the logic of "crystallisation" or "change in form" to the Award because doing so would counteract the parties' intent and cut against international arbitration policy. Finally, (**D**) the Tribunal does not have jurisdiction *ratione personae* because Claimant is not an "investor of one Contracting Party" as defined under Article 1(2) of the BIT.

A. The Tribunal Does Not Have Jurisdiction *Ratione Materiae* because Claimant Does Not Hold the Award in Respondent's Territory

15. Article 1(1) of the BIT requires that an asset be "held or invested either directly, or indirectly… by an investor… *in the territory* of the other Contracting Party"[34] in order to qualify as a protected investment. Like in *SGS*, "investments made outside the territory of the Respondent State… would not be covered by the BIT."[35]

16. Claimant has not held its Award in Respondent's territory; the Award is not a protected investment. Whether viewed from a localised or delocalised perspective, the Award is not "of"—and has not been "held in" the territory of—Respondent. Under a delocalised approach to awards, a commercial arbitration award remains a decision in and of the international legal

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[32] Each provision granting substantive protections to a Claimant grants protection only to investments or returns of investors. *See, e.g.*, BIT Arts. 3, 4. *See also*, BIT Art. 13.
[33] R-36.
[34] R-32 [emphasis added].
[35] *SGS v. Philippines* ¶99.

realm,[36] "escaping the hold of any national law and thus subject directly to international law."[37] In *Hilmarton*, the French Cour de Cassation adopted a delocalised approach[38] and explained that a commercial arbitration award "was an international award which was not integrated into the legal order of that State."[39] Likewise, Claimant's Award remains an international award not integrated into Mercuria's legal order.

17. The result is the same when viewed under the localised perspective.[40] Under the localised approach, an award is held within the legal order of the seat of arbitration.[41] Here, Claimant's Award was rendered in Reef,[42] and existed under Reef's law as a product of that jurisdiction.[43] The Award, therefore, has no legal connection to Respondent. Either way, Claimant has not held the Award "in the territory of" Respondent.

B. Alternatively, the Tribunal Lacks Jurisdiction *Ratione Materiae* because the Award Does Not Constitute an Investment under the Objective Definition of the Word

18. Even if the Tribunal finds that Claimant held the Award in Respondent's territory, it cannot exert jurisdiction *ratione materiae*. The BIT substantive provisions only protect investments.[44] Claimant's Award is not a protected investment as: (**1**) the definition of "investment" under Article 1(1) of the BIT should be interpreted to respect the objective meaning of the term "investment," and (**2**) the Award fails to satisfy the criteria that are inherent hallmarks of an investment.

1. *This Tribunal Should Interpret Article 1(1) of the BIT in Light of the Objective Definition of Investment*

19. The plain text of the BIT, taken alone, does not provide a precise definition of the term "investment." Article 1(1) of the BIT defines an "investment" as assets or property held or invested by a protected investor in Respondent's territory.[45] The BIT then proceeds to enumerate

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[36] *See, e.g.*, Mistelis, 169, 174–75.
[37] Fragistas, quoted in Paulsson, 362.
[38] The Dutch and Swiss legal traditions have also adopted the delocalised approach. *See* Mistelis, 170, 175.
[39] Summary of *Société Hilmarton.*
[40] Gaillard (II), 15.
[41] Paulsson, 358.
[42] R-30.
[43] *See* Paulsson, 360–62.
[44] *See, e.g.*, BIT Arts. 3, 4.
[45] R-32.

a list of certain categories of investments, in Article 1(1)(a-e).[46] But this non-exhaustive list is ambiguous, leaving the work of interpretation to the Tribunal.

20. While interpreting Article 1(1), and establishing a fuller definition of "investment," the Tribunal must not deprive the term "investment" of its objective meaning.[47] According to the tribunal in *Romak*—which was similarly tasked with interpreting a non-exhaustive definition of "investment"—there 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.'"[48] This "benchmark" is the objective meaning of the term "investment": "the commitment of funds or other assets with the purpose to receive a profit, or 'return,' from that commitment of capital."[49] A purely textual construction of Article 1(1) of the BIT fails to fully incorporate the objective meaning of "investment," which must function as a "benchmark." This Tribunal should therefore avoid such a textual construction.

21. Investments—distinct from purely commercial transactions[50]—exhibit common hallmarks. These hallmarks were first laid out in the *Salini* test. Under *Salini*, investments: (1) involve a contribution of assets, (2) last for a certain duration, (3) subject the investor to risk, and (4) contribute to the economic development of the host state.[51] Recently, numerous tribunals have abandoned the fourth prong of the *Salini* test.[52] *Romak*, delivered by a PCA tribunal, found that "the term 'investments' under the BIT has an inherent meaning… entailing a *contribution* that extends over a *certain period of time* and that involves some *risk*."[53] This Tribunal should follow suit and adopt this definition.

22. Tribunals must avoid unreasonable results in the interpretation of treaties.[54] According to the *Romak* tribunal, using a treaty-specific definition would create limitless scope of "investment"; destroys distinction between investments and pure commercial transactions; and

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[46] Under the BIT, investment, "in particular, *though not exclusively*, includes…" [emphasis added]. *Id.*
[47] *Romak* ¶180; *see also* VCLT Art. 31(1).
[48] *Romak* ¶180.
[49] *Romak* ¶177, citing *Black's Law Dictionary*, 9th ed.
[50] *Joy Mining* ¶58; *see also, infra* Section V.
[51] *Salini* ¶52.
[52] *See, e.g., LESI* ¶13(iv); *Pey Casado* ¶232; *Saipem* ¶99.
[53] *Romak* ¶207 [emphasis in original].
[54] VCLT Art. 32(b) (treaty interpretation must avoid "result[s] which [are] manifestly… unreasonable").

leads to renunciation of domestic law in dealings with foreign investors.[55] These results are unreasonable and thus this Tribunal should avoid a treaty-specific definition.

23. In addition, an objective definition of "investment" must not be employed in some *fora* and shunned in others. Claimant may argue that only ICSID tribunals, operating under Article 25(1) of the Washington Convention, are subject to the jurisdictional limitations arising out of an objective definition of "investment." But, according to the *Romak* tribunal, arbitrators must employ an objective definition of investment regardless of whether they are operating under the ICSID Convention, or under UNCITRAL or PCA Rules.[56] It would be unreasonable for a tribunal's interpretation to allow an investor to invoke a broader (more favourable) definition of investment by choosing UNCITRAL or PCA arbitration over ICSID arbitration.[57] This Tribunal should require Claimant's Award to satisfy the three criteria employed in an objective definition of investment.

2. The Award Does Not Satisfy the Three Criteria Required of an Objective Definition of Investment

24. Under the objective definition, a protected investment involves each of: (1) a contribution of assets or money, (2) duration, and (3) economic risk.[58] Generally, tribunals have found that arbitral awards do not satisfy these criteria, and have refused to classify awards as protected investments. The tribunals in each of *ATA*,[59] *GEA*,[60] *Saipem*,[61] and *White*,[62] for example, denied claimants' arguments that awards constituted investments. This Tribunal, in applying this test to the Award, should find that the Award fails each prong.

25. First, Claimant's Award does not satisfy the "contribution" requirement. The *Romak* tribunal interpreted "contribution" as being a "dedication of resources that has economic value… made in cash, kind or labor."[63] Like the award discussed in *GEA*, Claimant's Award "does not constitute an investment because the award itself does not involve… relevant economic activity

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[55] *Romak* ¶¶184–87.
[56] *Id.* at ¶¶192–97.
[57] *Id.* at ¶¶192–95.
[58] *See LESI*, *Pey Casado*, *Saipem*, and *Romak*, *supra* at notes 20, 21.
[59] ¶113 (refraining from calling the award an investment).
[60] ¶161 (finding that an ICC Award could not constitute an investment).
[61] ¶113 (stating tribunal was "not prepared to accept" the idea that an award could be an investment).
[62] ¶7.6.8.
[63] *Romak* ¶214.

within the respondent state."[64] An award merely marks the *end* of an investment or economic operation.

26. Nor does the Award satisfy the "duration" criteria. Unlike an economic operation that spans the period of months or years,[65] an award simply does not have a "start" or "end" date—the award remains valid even after any damages have been paid.

27. Finally, Claimant's Award does not involve investment risk. When making an investment, an "investor cannot be sure of a return on his investment, and may not know the amount he will end up spending."[66] This kind of investment risk differs from the any risk Claimant might face in relation to the Award.[67] Claimant is not uncertain about how much it should spend, and the Reef tribunal has specified the amount of Claimant's damages.

C. The Award Cannot Be Considered a Crystallisation or Change in Form of an Underlying Investment, Given the Parties' Intentions and Good Arbitral Policy

28. Under Article 31 of the VCLT,[68] the Tribunal must interpret the BIT "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[69] The Tribunal should refrain from departing from legitimate arbitral policy. If this Tribunal applies the logic of "crystallisation" or "change in form" to the Award, this will undermine both the object and purpose of the BIT.

29. Whether Claimant represents the Award as an investment through "crystallisation" or "change in form," the Tribunal must reject the application of this logic to the Award as: (**1**) the logic of crystallisation is unsound and must not apply here, and (**2**) it would be opposed to the parties' intentions and the object and purpose of the BIT, as the parties did not show that they meant for awards to be protected investments.

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[64] Annacker summarising *GEA*.
[65] *Quiborax* ¶208 (holding mining operation lasting three years satisfied "duration").
[66] *Romak* ¶229.
[67] *Id.* at ¶¶229–30.
[68] The VCLT applies as customary international law, regardless of Mercuria's lack of ratification. *See Pulau Litgitan* ¶27; *Phoenix* ¶75.
[69] VCLT Art. 31(1).

1. *The Logic of Crystallisation Is Unsound and Must Not Apply Here*

30. Claimant may rely on *Saipem*, and employ the logic of crystallisation to argue that the Award arose out of the LTA, thereby crystallising Claimant's rights under the original contract.[70] Under this logic, the Award is an investment because the underlying rights that it crystallised constituted an investment.[71] Tribunals have criticised this crystallisation logic. For example, the *GEA* tribunal denounced this approach, stating that "the [*Saipem*] Tribunal made statements that are difficult to reconcile" when calling an ICC award a crystallisation and therefore an investment.[72] This Tribunal should thus refrain from employing this contradictory approach. It should likewise refrain from applying the final clause of Article 1(1)—stating that investments may change form[73]—because it is equally vague.

2. *"Crystallisation" or "Change in Form" Logic Counteracts the Parties' Intentions and the BIT's Object and Purpose*

31. The Tribunal must interpret the BIT in light of its context and object and purpose.[74] A BIT's object and purpose can be reflected in its preamble.[75] Here, the preamble to the BIT indicates a respect for national law.[76] Yet, the "national law" component of the preamble would be rendered superfluous should this Tribunal find that the Award—through crystallisation or a change in form—constitutes an investment. In deeming the Award an "investment," the Tribunal would, in effect, allow Claimant to bypass enforcement of its claim under national law. This outcome is at odds with the object and purpose of the BIT.

32. Moreover, if parties to a BIT intend to employ an "extraordinary" definition of investment, they must do so clearly and precisely.[77] The *Romak* tribunal highlighted the need for precision and clarity in establishing definitions:

> States are free to deem any kind of asset or economic transaction to constitute an investment… [but] in such cases, the wording of the instrument in question must leave no

[70] *See also Saipem* ¶127.
[71] *See, e.g., Saipem* ¶127; *White* ¶7.4.1; *Romak* ¶211.
[72] *GEA* ¶163.
[73] R-33.
[74] VCLT Art. 31(1).
[75] *Romak* ¶181.
[76] R-32 (recognising the importance of providing protection "with respect to investment under national law…").
[77] *Romak* ¶205.

> room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning.[78]

To call an award an investment is extraordinary and counterintuitive.[79] Had the BIT parties intended to adopt such an unusual definition, they should have eliminated doubt by stating so in the BIT. Because they failed to do so,[80] the Tribunal must not embrace a crystallisation or change in form argument and consider the Award as an investment.

33. Likewise, nothing in the BIT indicates that the contracting parties intended to provide an arbitral tribunal with "supervisory-supervisory jurisdiction,"[81] allowing it to review the decisions of national courts. Should this Tribunal call the Award an investment, and assert jurisdiction *ratione materiae*, it would become a "second-guessing appellate venue," assessing the work of Respondent's courts.[82] An assertion of supervisory-supervisory jurisdiction by this Tribunal may counteract the purpose of the BIT to "promote greater economic cooperation" between the parties.[83]

D. The Tribunal Does Not Have Jurisdiction *Ratione Personae*

34. Even if Claimant's Award is an investment held in Mercuria, this Tribunal still lacks jurisdiction *ratione personae*. Under BIT Article 8(1), only a "dispute between an investor of one Contracting Party and the other Contracting Party... shall... be settled by arbitration."[84] Section II, below, will show that Claimant—which does not have substantial business activities in Basheera—attempted to adopt a nationality of convenience in order to take advantage of the BIT. Claimant is therefore not "an investor of one Contracting Party," Basheera.[85]

II. ALL CLAIMS MUST BE DISMISSED UNDER ARTICLE 2 OF THE BIT

35. Claimant provides professional services for its parent company's businesses in Africa and South America. Basheera is located in Westeros, a different continent. Thus, Claimant does not have any business in Basheera, let alone substantial business activities there. Additionally, Claimant is indirectly owned by Atton Boro and Company, a Reef company. Thus, (**A**) Claimant

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[78] *Id.*
[79] *See, e.g.*, *ATA* ¶113; *GEA* ¶161; *Saipem* ¶113; *White* ¶7.6.8.
[80] *See generally*, R-32–38.
[81] *See* Reisman & Iravani, 36–44.
[82] Priem, 200, *citing* Martinez-Fraga & Samra, 440.
[83] R-32.
[84] R-36.
[85] *Id.*

satisfies the two-prong test imposed by Article 2 of the BIT, because it is owned by nationals of a third state and does not have substantial business activities in its state of incorporation. Furthermore, Article 2 is a matter of jurisdiction, pursuant to which Respondent revoked its consent to arbitration. In accordance with PCA Arbitration Rule 23, Respondent can raise its objection to jurisdiction no later than the statement of defence. Thus, (**B**) Respondent invoked its right to deny benefits under Article 2 of the BIT in a timely manner.

A. Claimant Is Owned by Nationals of a Third State, Reef, and Does Not Have Substantial Business Activities in Basheera

36. Article 2 of the BIT provides in relevant part that:

> Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized…[86]

37. Both conditions are satisfied: (**1**) Claimant is owned by Atton Boro and Company, a national of Reef. Furthermore, (**2**) Claimant has no substantial business activities in Basheera, where it is organised. This is because (**a**) this Tribunal should take the paucity of evidence on record as proof of lack of substantial business activities, (**b**) Claimant does not have a business in Basheera, and (**c**) maintaining a bare minimum physical presence does not make Claimant's business activities in Basheera substantial.

1. Atton Boro and Company Is a National of Reef and Indirectly Owns Claimant Through Atton Boro Group

38. Atton Boro Group owns Claimant[87] and Atton Boro and Company in turn owns Atton Boro Group.[88] It is settled international law that ownership in denial of benefit clauses includes indirect ownership.[89] Thus, Atton Boro and Company owns Claimant. It is also settled international law that, for the purpose of denial of benefits, companies are nationals of their place

[86] R-33.
[87] R-28.
[88] *Id.* Atton Boro and Company is the primary holding company of Atton Boro Group.
[89] *See, e.g.*, *Plama* ¶170 ("ownership includes indirect and beneficial ownership" in denial of benefits context); *Yukos* ¶536.

of incorporation.[90] Thus, Atton Boro and Company is a national of Reef. In sum, a national of third state owns Claimant.

39. Claimant might argue that the use of Article 2 is barred because nationals of Basheera and Mercuria indirectly own Claimant through their ownership of shares in Atton Boro and Company.[91] But nationals of Basheera or Mercuria need to own more than 50% of Atton Boro and Company to own Claimant for the purpose of denial of benefits.[92] The record does not indicate the extent of ownership by any national of Basheera or Mercuria. Thus, this Tribunal's inquiry on ownership should stop at Atton Boro and Company.

2. Claimant Does Not Have Substantial Business Activities in Basheera

a. This Tribunal should Take the Paucity of Evidence on Record as Proof of Lack of Substantial Business Activities

40. As the party invoking denial of benefits, Respondent concedes that it bears the burden of proof. However, only investors know the extent of their activities in their home state and tribunals have accordingly reduced the burden of proof on respondent states. For example, the *AMTO* tribunal allowed the respondent state to "exploit the paucity or ambiguity of the evidence relating to the claimant's business activities to argue these activities have no substance."[93] Similarly, the *Rurelec* tribunal held that Rurelec did not have substantial business activities because "insufficient evidence has been provided to prove that [the claimant] carried on substantial business activities."[94] In short, this Tribunal should take paucity of evidence on record as proof of lack of substantial business activities.

b. Claimant Does Not have Substantial Business Activities in Basheera because it Does Not Have a Business in Basheera

41. The plain meaning of the phrase "substantial business activities" implies that an investor needs to carry on a business in its home state before it can claim to have substantial business activities there. Claimant might claim the professional services it provides to Atton Boro Group's businesses in Africa and South America constitute substantial business activities. But these

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[90] *See, e.g.*, *Yukos* ¶537 ("GML and Palmus Trust Company are UK nationals"); *Pac Rim* ¶4.79 (Pac Rim was owned by its Canadian parent company, "a person of a non-CAFTA Party for the purpose of [denial of benefits]").
[91] R-50.
[92] *See, e.g.*, *Yukos* ¶536 (concluding that the Palmus Trust, with a 52.3% stake in the company that owns Claimant, owns Claimant, but six other trusts with a minority stake do not).
[93] *AMTO* ¶65.
[94] *Rurelec* ¶370.

activities do not constitute a business. A business is "the activity of making, buying, selling or supplying goods or services for money."[95] None of the activities listed by Claimant involves supplying services for money.[96] Nothing in the record indicates Claimant ever charged Atton Boro Group for the plethora of services Claimant provided. Nothing in the record indicates Claimant ever paid corporate income tax in Basheera.[97] As argued above, lack of evidence should be drawn as an inference against Claimant. The Tribunal should therefore infer that Claimant does not generate any income. Providing services free of charge to a related party is not a business and cannot constitute substantial business activities.

42. This interpretation is confirmed in treaties worded similarly to the BIT. The Mainland and Hong Kong Closer Economic Partnership Arrangement uses the term "substantive business operations" to define service suppliers, and gives an illustration. A supplier of cinema theatre services needs to engage in the business of running cinemas in Hong Kong to qualify as having a "substantive business operation."[98] This interpretation of substantial business activities was confirmed in *Pac Rim*, where the tribunal found Pac Rim to have no substantial business activities in part because it did not engage in any "wealth creation" in its home state.[99] Here, Claimant does not have any business in Basheera by its own admission. Basheera is in Westeros.[100] But Claimant is a "vehicle for carrying on business in South American and African countries."[101] Thus, just as *Pac Rim*, Claimant does not engage in any "wealth creation" or carry on any business in its home state of Basheera. Without a business in Basheera, Claimant does not have substantial business activities in Basheera.

c. Maintaining a Bare Minimum Physical Presence Does Not Make Claimant's Business Activities in Basheera Substantial

43. Claimant might cite to *AMTO* for the proposition that a permanent staff of two can constitute substantial business activities.[102] Despite some factual similarities, Claimant's conduct differs from AMTO's conduct in a significant way. Unlike Claimant, AMTO paid value-added

[95] OALD.
[96] *Id.*
[97] R-50 (Claimant "complies with its tax obligations in Basheera," but the record does not indicate whether Claimant pays corporate income tax).
[98] HK FAQ.
[99] *Pac Rim* ¶4.71.
[100] R-49.
[101] R-28.
[102] *AMTO* ¶69.

tax in its home country, which is evidence that it generated an income in its home state and provided services for money.[103] As argued above, the existence of a business, while not dispositive, is a criterion for the existence of substantial business activities.

44. Even if the conduct of Claimant and AMTO were found to be analogous, this Tribunal should refrain from applying *AMTO* here for two additional reasons. First, no other tribunal has adopted the *AMTO* standard of two permanent employees. In a subsequent study on investor-state disputes commissioned by the Dutch government, the criteria used for "substantial business activities" is the existence of an office and at least 10 employees.[104] Second, this Tribunal should not apply the substantial business activities test mechanically. Contracting states to investment treaties leave "substantial business activities" undefined to prevent a formulaic and mechanical application of the test, which would be detrimental to the goal of preventing treaty shopping.[105] At minimum, the nature of an investor's activities should inform that inquiry.[106] As argued above, Claimant does not have a business in Basheera, let alone substantial business activities there.

B. Respondent Invoked its Right to Deny Benefits under Article 2 of the BIT in a Timely Manner

45. Respondent invoked its right to deny benefits of the BIT to Claimant in its Response to the Notice of Arbitration.[107] Respondent submits that (**1**) this is timely under Article 23(2) of the PCA rules. (**2**) Even if this Tribunal finds prior notice necessary to invoke Article 2, there is an exception for states that did not have relevant knowledge before receiving notice of the dispute. Respondent qualifies for this exception.

1. Denial of Benefits is a Matter of Jurisdiction which, under PCA Rules, Can Be Invoked at any Time before the Statement of Defence

46. Article 2 of the BIT allows Respondent to revoke its consent to arbitration under Article 9 of the BIT. Since "the consent of the parties is the basis of the jurisdiction of all international

[103] *Id.* at ¶68.
[104] Dutch Study, 7 (despite using the term "substantial business activities," the study does not explicitly refer to denial of benefit clauses).
[105] Thorn, 11.
[106] *Id.* ("The inquiry [on substantial business activities] has been more qualitative").
[107] R-16.

arbitration tribunals,"[108] Article 2 is a matter of jurisdiction. In the absence of an express time limit in Article 2, the procedural rules on jurisdictional objections apply.[109] Under Article 23(2) of the PCA rules, "a plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence."[110] Since Respondent invoked its right to deny benefits and objected to the Tribunal's jurisdiction in its Response to the Notice of Arbitration, it invoked its right in a timely manner.

47. Claimant might point to awards that have interpreted the denial of benefits clause in the ECT. Those awards have concluded that denial of benefits must be invoked before the commencement of arbitration.[111] But the ECT denial of benefit clause can be distinguished from Article 2 of the BIT on a textual basis.[112] The denial of benefits clause under the ECT only denies benefits in Part III of the ECT.[113] Part III of the ECT contains substantive provisions on investment promotion and protections;[114] provisions on dispute settlement mechanism and the contracting states' consent to arbitration are covered in Part V.[115] Thus, "unlike most modern investment treaties,"[116] denial of benefits under the ECT expressly does not apply to consent to arbitration. The *Plama* tribunal and the *Yukos* tribunal[117] seized upon this feature specific of the ECT to hold the contracting states' consent to arbitration "unaffected by the operation of [denial of benefits]"[118] and to find the issue as one of merits. The BIT does not have that special feature. Unlike denial of benefits in the ECT, Article 2 of the BIT denies the benefits of the BIT in its entirety, including the consent to arbitration in Article 9. Thus, unlike tribunals in the ECT line of cases,[119] this Tribunal should follow the PCA Rules on timing and allow raising denial of benefits any time before the statement of defence.

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[108] Dugan, 219.
[109] *See, e.g., Ulysseas* ¶172 (time-limit of UNCITRAL rules on jurisdictional objection applies in the absence of express time limit in the BIT); *Pac Rim* ¶4.85.
[110] PCA Rules, Art. 23.
[111] *See, e.g., Plama* ¶165.
[112] *See, e.g.*, Gastrell, 81 ("This textual difference has influenced a number of tribunals in determining whether to characterise the invocation of a denial-of-benefits clause as an issue of jurisdiction.").
[113] ECT Art. 17.
[114] Such as fair and equitable treatment and most favored nation. ECT Art. 10.
[115] ECT Art. 26.
[116] *Plama* ¶149.
[117] *Yukos* ¶441.
[118] *Plama* ¶148.
[119] *See, e.g., Plama* (tribunal did not consider the ICSID rule on timing for objection to jurisdiction).

2. Alternatively, Respondent Qualifies for an Exception to the Notice Requirement because Nothing in the Record Indicates Respondent Knew about the Extent of Claimant's Business Activities in Basheera

48. Even if this Tribunal declines to follow the PCA Rules on timing, it should find an exception to the notice requirement because of Respondent's lack of knowledge. This exception was contemplated in *Liman*: "in case of a change in the relevant factual circumstances or appearance of new facts, the host state may exceptionally be permitted to retroactively invoke [denial of benefits]."[120] This exception is also supported by contracting states to investment treaties. In their non-disputing party submissions in the *Pac Rim* case, Costa Rica and the United States noted that a host state "is not necessarily informed at all times of the share make-up and corporate structure of all investors from other Parties to the Treaty in its territory."[121] Thus, requiring a respondent to provide notice before a claim is submitted to arbitration:

> would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territories of [all other contracting parties] that attempt to make, are making, or have made investments in the territory of the respondent.[122]

49. This exception applies to Claimant. The relevant factor is knowledge by the government department that has the power to invoke denial of benefits.[123] The exception did not apply in *Liman* because the Kazakhstani Ministry of Energy, which could invoke denial of benefits,[124] was a party to the licence at issue[125] and wrote a letter demonstrating relevant knowledge more than three years before denying benefits. The same cannot be said of Respondent. Claimant dealt exclusively with the NHA in its negotiation for the LTA.[126] The NHA operates independently,[127] and nothing in the record indicates that it had the power to deny benefits to Claimant. Relevant knowledge of Claimant's business activities in Basheera cannot even be imputed to the NHA. Atton Boro and Company, a Reef company, performed the agreements Claimant entered into

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[120] *Liman* ¶227.
[121] *Pac Rim* ¶4.53.
[122] *Id.* at ¶4.56. *See also Rurelec* ¶379 ("[T]he fulfilment of the [denial of benefits] requirements is not static and can change… which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met").
[123] *Liman* ¶227 ("such a knowledge would have caused [the Ministry] to invoke [denial of benefits]").
[124] *Id.*
[125] *Id.* at ¶210.
[126] R-50.
[127] *Id.*

with the NHA.[128] Unlike the Kazakhstani Ministry of Energy, Respondent did not have relevant knowledge of Claimant's corporate structure and business activities in Basheera until it received the Notice of Arbitration. Thus, the exception contemplated in *Liman* applies and Respondent timely denied benefits to Claimant.

III. RESPONDENT'S PASSAGE OF LAW 8458/09 AND THE GRANT OF THE LICENCE TO HG-PHARMA DID NOT VIOLATE FAIR AND EQUITABLE TREATMENT

50. Respondent was within its rights as a sovereign state in passing Law 8458/09 and in granting the Licence for Valtervite (the "**Licence**") to HG-Pharma. The Law was designed to counteract the grave medical emergency that Respondent faced. The passage of Law 8458/09 and the subsequent grant of the Licence do not conflict with any of the principles of FET, because (**A**) these actions did not violate Claimant's legitimate expectations at the time of the investment. (**B**) Even if the Tribunal finds that Respondent's actions violated FET, Respondent was excused by necessity given its grave medical emergency.

A. The Passage of Law 8458/09 and the Subsequent Grant of the Licence to HG-Pharma Did Not Violate Claimant's Legitimate Expectations

51. Article 3(2) of the BIT states:

> [i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment… in the territory of the other Contracting Party.[129]

A key component of FET is the protection of investors' legitimate expectations.[130] Assessing legitimate expectations is not purely subjective,[131] but is instead based on objective government conduct and circumstances prevailing in the host state at the time of the investment.[132] Respondent did not violate Claimant's legitimate expectations because: (**1**) at the time of Claimant's investment, Claimant could not have reasonably expected that Respondent's patent regime would remain unchanged for twenty years; (**2**) TRIPS could not be the source of any legitimate expectations under the BIT; and **(3)** even if TRIPS was a source of legitimate expectations under the BIT, Respondent's actions did not violate any expectations established by TRIPS.

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[128] *Id.*
[129] R-34.
[130] *Saluka* ¶284. While FET contains other components, Claimant only raises legitimate expectations in its Notice of Arbitration. R-5.
[131] *See e.g.*, *El Paso* ¶356.
[132] *See generally* Bungenberg.

1. At the Time of Claimant's Investment, Claimant Could Not Have Reasonably Expected that Respondent's Patent Regime Would Remain Unchanged for Twenty Years

52. The reasonableness of an investor's expectations must be assessed against the political, socio-economic, cultural, and historical conditions of the host state.[133] An investor's subjective beliefs do not suffice.[134] Furthermore, legitimate expectations only arise from specific representations made to the investor, "such as by contracts, concessions or stabilisation clauses."[135] Legal regimes or legislation do not create legitimate expectations that there will be no change in the law.[136] In *Golden East*, the tribunal found that, absent such specific representations, the claimant had no legitimate expectation that the host state's tax regime would remain unchanged.[137] The tribunal in *Frontier Petroleum* even found that statements made by government officials to the investor regarding the settlement of private litigation were not sufficiently specific to generate legitimate expectations.[138]

53. In the present case, Respondent never stated to Claimant that its IP regime would remain unchanged. There is also no stabilisation clause in the BIT.[139] Furthermore, Claimant was aware—or should have been aware—that Respondent was a developing nation potentially facing threats from epidemic diseases, given that Claimant's parent company specialises in drugs for that market.[140]

54. Further, an investor can only rely on legitimate expectations generated by the conditions of the host country at the time of investment.[141] Consequently, Claimant's anticipated invocation of statements by government officials should be rejected because they did not inform Claimant's calculations at the outset of the investment in April 1998, when Claimant acquired the Mercurian patent of Valtervite.[142]

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[133] *Duke* ¶340.
[134] Saluka ¶¶217–19.
[135] *Total* ¶117.
[136] *Philip Morris v. Uruguay* ¶426.
[137] *Golden East* ¶302.
[138] *Frontier Petroleum* ¶468.
[139] R-32–38.
[140] R-28.
[141] *Plama* ¶¶175–78.
[142] R-28.

55. Even if the Tribunal treats subsequent government statements as a potential source of legitimate expectations, the statements by the President and the Minister for Health in this case did not create any such expectations. Subsequent representations can only create legitimate expectations if they contain specific assurances and are intended to modify an investor's behavior.[143] These requirements were not met here. The statements by the Minister for Health and the President were not specifically directed at Claimant, and only used broad platitudes when referring to IP rights.[144] Thus, the statements did not create legitimate expectations.

2. The Principles Underlying TRIPS Were Not Incorporated into Claimant's Legitimate Expectations

56. This Tribunal should find that the principles and legal requirements of TRIPS were not incorporated into Claimant's legitimate expectations, because (**a**) merely alluding to other treaties in a preamble does not provide the type of specific assurance that is needed for an investor to have legitimate expectations regarding a regulatory regime. Further, (**b**) TRIPS is not a "relevant rule of international law" under Article 31 of the VCLT.

a. The Allusion to TRIPS in the BIT Preamble does not Generate Legitimate Expectations

57. Mere allusion to a treaty in the preamble of a BIT cannot create an investor's legitimate expectations with regards to the content of that treaty. Provisions in a preamble cannot create binding obligations, especially when doing so would limit sovereign power in a manner not otherwise contemplated in the treaty. For example, in *Continental*, the tribunal found that even where a preamble specifically named the principle of "stability of the legal framework," it would be "unconscionable" to curtail the ability of a state to manage a crisis based on implications drawn from that section of the preamble.[145] Here, the preamble does not even explicitly incorporate the principles of TRIPS, it merely references the Marrakesh Agreement, while also affirming the importance of acting in a "manner consistent with the protection of health."[146] This vague reference to a treaty means, at most, that the principles of TRIPS are to be considered in conjunction with the protection of public health.

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[143] *Kardassopoulos* ¶¶434–41.
[144] R-39.
[145] *Continental* ¶258.
[146] R-32.

b. TRIPS Cannot Inform Legitimate Expectations as a "Relevant Rule of International Law"

58. TRIPS also cannot be incorporated under Article 31 of the VCLT. Article 31(3)(c) states that for the purposes of interpretation, tribunals shall take account of "any relevant rules of international law applicable in the relations between the parties."[147] Claimant may argue that since both Basheera and Respondent are signatories to TRIPS,[148] this Tribunal should apply the principles of TRIPS to inform the scope of Claimant's legitimate expectations. However, the substantive IP protections found in TRIPS cannot be read in isolation from the dispute resolution provisions of that treaty.[149] Under TRIPS a claim can only be brought by a contracting state on behalf of one of its investors, and parties to that treaty contracted for specific protections to counter-balance this voluntary surrender of sovereign immunity.[150] For example, the WTO dispute-resolution system does not allow for the granting of damages.[151] If this Tribunal reads VCLT Article 31(3)(c) as transposing the right to IP protection into the BIT, it must also bring with it the limitations on remedies contained in TRIPS. At best, Claimant could have only expected that Basheera could bring a TRIPS claim on its behalf before the WTO DSB.

3. Even if the Tribunal Holds that the Principles Underlying TRIPS Could Give Rise to Legitimate Expectations under the BIT, Respondent Did Not Violate Claimant's Legitimate Expectations

59. Claimant cannot legitimately expect to receive greater protections from TRIPS than the agreement itself provides. TRIPS Article 31 allows member states, under certain conditions, to authorise the use of a patent without the patent holder's permission.[152] Article 31 actualises the principles expressed in Article 8, granting member states flexibility "in formulating or amending their laws and regulations [to] adopt measures necessary to protect public health."[153] The mere existence of a provision allowing the grant of a compulsory licence undermines Claimant's argument that such a grant breached its legitimate expectations. Yet even more probative is the scrupulousness with which Respondent complied with the conditions laid out in Article 31 when granting the Licence.

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[147] VCLT Art. 31(3)(c).
[148] R-48.
[149] *Philip Morris v. Australia*.
[150] TRIPS Art. 64.
[151] GATT Annex 2, Art. 22.
[152] TRIPS Art. 31.
[153] TRIPS Art. 8.

60. First, authorisation of the Licence was granted only after individual consideration of the case by Respondent's courts.[154] While the greyscale emergency obviated Respondent's need to obtain authorisation from Claimant for the Licence, Respondent went above and beyond the requirements of the BIT by negotiating with Claimant over Valtervite.[155] In addition, the scope of the Licence was limited to the duration of the greyscale crisis and was non-exclusive (as Claimant still maintains a patent on the product) and non-assignable.[156] Respondent granted this Licence in response to the greyscale crisis and to meet the needs of its plague-afflicted citizenry.[157] Finally, Claimant was offered royalties under the Licence.[158] Because Respondent thus satisfied each of the requirements under TRIPS Article 31 when granting the Licence, and was "adopting measures necessary to protect public health,"[159] Claimant cannot coherently allege that any legitimate expectations that it might have had based on TRIPS were violated.

B. Respondent is Excused from Liability by the Customary International Law Doctrine of Necessity

61. Even if, *arguendo*, the Tribunal finds that Respondent breached Article 3(2) of the BIT, the customary international law doctrine of necessity allows a state to temporarily violate its obligations "to safeguard an essential interest against a grave and imminent peril."[160] (**1**) The current medical emergency relating to the greyscale epidemic falls within these parameters, and (**2**) as a result, Respondent is excused from any obligation to pay Claimant compensation.

1. Respondent's Grant of an Involuntary Licence Is Excused by the Customary International Law Doctrine of Necessity

62. Customary international law recognises that state sovereignty is a vital right and requires that a state be permitted the flexibility to govern in the face of threats to its essential interests. This customary right is enumerated in the ILC Articles. ILC Article 25 allows a state to invoke necessity so long as it "is the only way for the State to safeguard an essential interest against a grave and imminent peril."[161] Respondent has met all of the requirements for such a necessity defence. Fighting the greyscale epidemic (**a**) was an essential interest of Respondent and the

[154] R-30; fulfilling TRIPS Art. 31(a),(i),(j).
[155] R-29–30; fulfilling TRIPS Art. 31(b).
[156] R-30; fulfilling TRIPS Art. 31(c),(d),(e),(g).
[157] R-29–30; fulfilling TRIPS Art. 31(f).
[158] R-50; fulfilling TRIPS Art. 31(h).
[159] TRIPS Art. 8.
[160] ILC Art. 25.
[161] ILC Art. 25(a).

epidemic created a grave and imminent peril. Further, (**b**) granting an involuntary licence was the "only means" by which Respondent could have reacted.

a. Greyscale Threatened an Essential Interest of Respondent and Created a Grave and Imminent Peril

63. The threat to Respondent's essential interest and the "grave and imminent peril" it faced were apparent from the sheer number of greyscale cases and the economic strain of the cost of treatment.[162] In *LG&E*, the tribunal found that a financial crisis satisfied these requirements and noted that "economic, financial, or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests."[163] The greyscale epidemic meets this standard. Between 2003 and 2006 the number of confirmed cases of greyscale increased by 1200%, resulting in a massive increase in the cost of providing Sanior for poor Mercurians.[164] Providing drugs to all of Respondent's citizens affected by greyscale would have cost up to two-thirds of Respondent's health budget and more than ten times the budget for greyscale response.[165] Furthermore, these numbers only reflect *confirmed* cases, and do not factor in Respondent's reasonable anticipation that the number of greyscale cases would continue to climb.[166] Claimant's prices directly contributed to the severity of the threat by making treatment unaffordable.[167] These circumstances constituted a grave situation in which immediate action by Respondent was necessary to avoid further escalation.

b. Respondent's Grant of the Licence Was the "Only Means" by which Respondent could Have Combatted the Greyscale Crisis

64. In order to meet the "only means" requirement, Respondent must show that its response fell within the category of actions required to address the crisis. In *LG&E* the tribunal found that while Argentina could have addressed its economic crisis in a number of ways, what mattered was the necessity of "an across-the-board" response.[168] Similarly, Claimant may argue here that Respondent could have addressed the greyscale epidemic in various ways. However, the root of the crisis was a lack of affordable drugs. Claimant's refusal to lower its price meant that

[162] R-42.
[163] *LG&E* ¶251.
[164] R-29, 42.
[165] R-30.
[166] *Id.*
[167] *Id.*
[168] *LG&E* ¶257.

Respondent had no choice but to use its sovereign power to procure treatment for hundreds of thousands of its citizens who could not afford Claimant's prices.

2. The Doctrine of Necessity Excuses Respondent from any Obligation to Pay Compensation to Claimant

65. Under Article 27 of the ILC Articles, invocation of the doctrine of necessity does not necessarily excuse Respondent from the payment of compensation.[169] However, this matter was addressed in *LG&E*, where the tribunal found that the state was excused from its obligations during a period of emergency and therefore owed no compensation.[170] The Tribunal in the instant case should similarly find that Respondent owes no compensation because its actions were excused by the necessity doctrine.

IV. THE ACTIONS OF RESPONDENT'S JUDICIARY DID NOT PLACE RESPONDENT IN BREACH OF ARTICLE 3 OF THE BIT

66. Respondent's judiciary has been working diligently to resolve Claimant's suit, all the while ensuring that the due process rights of all parties are upheld. Yet Claimant now argues that the time and attention devoted to its case constitute a breach of the FET standard found in Article 3 of the BIT, including a denial of justice. Justice, in fact, is exactly what Respondent's judiciary has been working so assiduously to achieve in this case. Respondent (**A**) has not denied Claimant justice and has met its obligations under FET; (**B**) has provided to Claimant an effective means to assert rights; and (**C**) did not breach the Full Protection and Security standard ("**FPS**") nor impair Claimant's investment through unreasonable or discriminatory measures. Finally, (**D**) this Tribunal is not an international appellate body and should not sit in judgment of Respondent's courts.

A. Respondent Has Not Denied Claimant Justice and Has Met its Obligations under FET

67. Respondent has not committed a denial of justice—and thus not breached FET[171] — because (**1**) the balance of factors commonly used by tribunals demonstrates that no denial of justice has occurred; (**2**) the actions of Respondent's courts do not meet the high standard

[169] ILC Art. 27 ("The invocation of a circumstance precluding wrongfulness... is without prejudice to… the question of compensation for any material loss caused by the act in question.").
[170] *LG&E* ¶261.
[171] R-34.

required for a denial of justice claim; (**3**) the Tribunal must take into account Respondent's level of development and internal situation; and (**4**) Claimant failed to exhaust local remedies.

1. The Balance of Factors Commonly Used by Tribunals Demonstrates that No Denial of Justice Has Occurred

68. Denial of justice sets the international minimum standard of conduct for a state's judiciary. A denial of justice occurs when there is "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety,"[172] or a "manifest injustice in the sense of lack of due process."[173] International law "has no strict standards to assess whether court delays are a denial of justice,"[174] but tribunals often examine the complexity of the case, the need for a speedy resolution, the significance of the issues, the behavior of the litigants, and the behavior of the courts.[175]

69. The balance of these factors weighs against a denial of justice finding in this case. While enforcement proceedings are not generally considered complex,[176] other factors weigh in Respondent's favour. First, these proceedings will not have significant precedential value.[177] Second, commercial matters do not require as speedy a resolution as, say, criminal cases.[178] Additionally, Respondent's courts worked to schedule court dates as early as possible, sometimes as little as one month in the future, and never more than four months.[179] Claimant's suit was therefore progressing forward step-by-step, according to the requests of the parties and the court's schedule.[180] Further, as the litigation progressed, Claimant's own requests of the court contributed to the so-called "delay" that Claimant now complains of. Respondent's courts ensured Claimant's due process rights by accepting Claimant's own requests for additional hearings and filings on multiple occasions,[181] granting Claimant's request to transfer the case to

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[172] *ELSI* ¶128.
[173] *Loewen* ¶132.
[174] *Toto* ¶155.
[175] *White Industries* ¶10.4.10.
[176] *Id.* at ¶10.4.11.
[177] Compare the present case, in which there is no set aside application, R-48, with *White Industries*, in which the resolution of a set aside application had larger precedential significance, *id.* at ¶10.4.13.
[178] *Id.* at ¶10.4.14.
[179] R-7–12.
[180] Tribunals have looked to this type of procedural progress when assessing whether a denial of justice has occurred. *See, e.g.*, *Toto* ¶166.
[181] R-7–12.

the Commercial Bench of the High Court,[182] and setting early hearing dates to the extent possible when requested by Claimant.[183]

70. Claimant now portrays these efforts to safeguard its due process rights as a violation of FET, when itself is partially responsible for the pace of litigation and cannot be allowed to abuse these efforts of Respondent's judiciary to preserve Claimant's due process rights.

2. The Actions of Respondent's Judiciary Do Not Meet the High Standard Required of a Denial of Justice Claim

71. The standard necessary to find a denial of justice is high.[184] Many cases that involve seemingly egregious delaying behavior have not passed this high threshold. In *Chevron*, the tribunal found that thirteen to fifteen years of delays by Ecuadorian courts in multiple proceedings did not constitute a denial of justice.[185] In *White Industries*, nine years of delays in Indian courts did not meet the high standard necessary to establish a denial of justice.[186] In the present case, seven years of proceedings likewise do not.

72. Claimant may rely on *Pey Casado* to argue that seven years of court proceedings can constitute a denial of justice. However, besides being virtually unique,[187] *Pey Casado* is distinguishable. In *Pey Casado*, litigation had finished except for final judgment, and Chilean courts failed to deliver that judgment for years.[188] By contrast, in *White Industries*—where a denial of justice claim was rejected—"matters progressed in [court] with reasonable celerity."[189] The present case mirrors *White Industries* and not *Pey Casado*, as Claimant's suit was progressing through Respondent's courts.

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[182] *Id*.
[183] *Id*.
[184] *See, e.g., Oostergetel* ¶273 ("[A] claim for denial of justice… is a demanding one.").
[185] *Chevron* ¶270.
[186] *White Industries* ¶10.4.22.
[187] In fact, "only two modern [tribunals] have expressly found a denial of justice." Goldhaber, 386.
[188] *Pey Casado* ¶21.
[189] *White Industries* ¶10.4.17.

3. The Standard for Finding a Denial of Justice Is even Higher for Respondent, a Developing Nation with an Overburdened Judiciary

73. When assessing denial of justice claims, tribunals should take into account the resources available to a country's judicial system.[190] In *White Indus*tries, the tribunal specifically referenced India's massive population, "overstretched judiciary," and status as a developing nation in finding that nine years was a reasonable time for the course of the litigation.[191] In the present case, Respondent is likewise a developing nation with a large population and overburdened judicial system.[192] Following *White Industries*, the Tribunal should consider these factors in deciding a reasonable timeframe for the resolution of Claimant's case.

74. In addition, the *Toto* tribunal considered Lebanon's multi-year internal political turmoil when declining to hear a denial of justice claim against the state, concluding that the situation was "undoubtedly… not conducive to the functioning of Lebanon's judicial system."[193] Given the scale of the greyscale epidemic and Respondent's need to address that crisis during the pendency of Claimant's litigation, the situation was likewise not conducive to rapid action by Respondent's courts.

4. Claimant Did Not Satisfy the Requirement to Exhaust Local Remedies

75. Generally, a claimant must have exhausted the remedies available to it within the local court system before making a denial of justice claim.[194] In other words, a state must be granted a reasonable opportunity "to take measures to correct faulty results."[195] Claimant has neither allowed Respondent a reasonable opportunity to correct any alleged improprieties nor tested Respondent's judicial system as a whole, because Claimant has made no effort to appeal even

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[190] *Id.* at ¶10.4.18. *See also Chevron* ¶263 ("Court congestion and backlogs are relevant factors to be considered in determining the period of delay that is reasonable.").
[191] *White Industries* ¶10.4.18.
[192] R-10–11, 17.
[193] *Toto* ¶165. *See also Chevron* ¶265 (finding it valid to consider "backlog and delay occasioned by… political upheaval").
[194] *Waste Management* ¶97 ("[T]he system must be tried and have failed" in order for there to a successful denial of justice claim).
[195] *Chevron, Opinion of Jan Paulsson* ¶63.

one decision of the High Court.[196] Under the circumstances, Claimant cannot allege that is has exhausted local remedies.[197]

76. Claimant might argue that seven years is sufficiently long to demonstrate that any attempt to exhaust local justice would be futile.[198] However, Claimant has no evidence that an appeal to a higher court would not be handled expediently,[199] because Claimant has made no attempt to appeal.

B. To the Extent Required, Respondent Has Provided Claimant with an Effective Means to Assert Rights

77. Claimant's anticipated argument that Respondent is in breach of the effective means language of the BIT must fail because (**1**) the effective means language is in the preamble of the BIT, not in Article 3 and, as such, is beyond the scope of this issue; and (**2**) in any event, Respondent's judiciary has provided to Claimant an effective means to assert rights.

1. Claimant's Effective Means Arguments Are Beyond the Scope of This Issue

78. Issue (d) of the "main stage" hearing is to address "whether Mercuria is liable under Article 3 of the BIT."[200] Nowhere in Article 3 is there any mention of "effective means."[201] Instead, the language upon which Claimant relies is found in the preamble to the BIT,[202] rendering Claimant's effective means arguments beyond the scope of this stage of the proceeding.

79. While the preamble may inform the interpretation of the BIT's substantive provisions, it does not create separate obligations or new causes of action.[203] Claimant must rely on the language that the drafters included in Article 3 to pursue its claim. Crucially, in the two leading cases upon which Claimant might rely, *Chevron* and *White Industries*, the effective means

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[196] R-7–12.
[197] *See also Loewen* ¶217 (failing to appeal to U.S. Supreme Court meant that local remedies had not been exhausted); *Toto* ¶167 ("[T]he Tribunal has not seen evidence that Toto made use of local remedies to speed up the proceedings").
[198] *Chevron* ¶268; *Binder* ¶451.
[199] In fact, just the opposite, as demonstrated by the Supreme Court's April 2012 decisions upholding rulings by the Commercial Bench that was created in early 2012. R-8.
[200] R-27.
[201] R-33–34.
[202] R-32.
[203] VCLT Art. 31 says that the preamble may help establish "[t]he context for the purpose of the interpretation of a treaty," but says nothing about it establishing new and separate obligations.

provisions were found within the substantive provisions of the BIT.[204] Additionally, tribunals disagree as to whether an effective means provision does create a separate treaty obligation, or is instead "part of the more general guarantee against denial of justice."[205] Thus, any reliance on these cases to establish an effective means obligation would be misplaced.

2. Even if Claimant's Effective Means Arguments Are Admissible, Respondent Still Provided Claimant with an Effective Means to Assert Claims

80. When evaluating an effective means claim, tribunals consider the same factors that are used to evaluate denial of justice claims.[206] As demonstrated above, these factors weigh in favor of Respondent.[207]

81. Claimant may rely on *Chevron* and *White Industries* to attempt to establish that the acts of Respondent's judiciary breached the effective means clause of the preamble of the BIT. However, these cases are distinguishable. In *Chevron*, the Ecuadorian courts were sitting on cases that were complete except for issuing final judgment.[208] By contrast, in the present case, Claimant's suit was steadily progressing, and never more than four months went by between hearings.

82. Further, in *White Industries*, the key was that the Indian Supreme Court granted the claimant's request for an expedited appeal, and then the claimant was forced to wait for more than five years.[209] The tribunal found that this amounted to a violation of effective means because "there was no effective course open to White to seek to expedite the appeal further."210 In the instant case, Claimant never made any attempt to appeal to any higher court. Likewise, there was no breached promise of expedited proceedings. Thus, there was no violation of any supposed effective means standard in the BIT.

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[204] U.S.-Ecuador BIT, Art. II(7); in *White Industries*, White imported the effective means provision through a Most-Favoured Nation clause. In the present case, Most-Favoured Nation is in Article 4, and thus beyond the scope of issue (d).
[205] *Duke* ¶391.
[206] *Chevron* ¶250.
[207] *Supra* section IV(A)(1).
[208] *Chevron* ¶256 (finding "prolonged periods of complete inactivity on the part of the Ecuadorian courts.").
[209] *White Industries* ¶11.4.18.
[210] *Id.*

C. The Actions of Respondent's Judiciary Did Not Breach the Principle of Full Protection and Security, Nor Impair Claimant's Investment Through Unreasonable or Discriminatory Measures

83. Full protection and security ("**FPS**") is found in Article 3(2) of the BIT, and generally only applies to tangible properties.[211] Should the Tribunal choose to apply FPS protections to intangible property, the provision then requires that a state exercise "due diligence" in protecting investments.[212] Lauder clarifies that, in the event of a legal dispute, Respondent's "due diligence" duty is "to keep its judicial system available for the Claimant, and [allow any] claims to be… decided in accordance with… law."[213] Respondent has done its due diligence by making its court system available to Claimant.[214]

84. Additionally, the BIT protects against impairment of investments by "unreasonable or discriminatory measures."[215] A state action is unreasonable when there is no rational relationship between a purported justification and legitimate government policy.[216] When Respondent's courts granted extensions and additional filings to Claimant and the NHA, they did so to protect both parties' due process rights as required under Mercurian law. Therefore, Respondent's courts were acting on legitimate policies and were reasonable. There is no evidence to demonstrate that Respondent's judiciary treated the Award differently than that of any other party.[217] Thus, Respondent's actions were not discriminatory.[218]

D. The Tribunal Is Not an International Appellate Body and Should Not Sit in Judgment of the Decisions of Respondent's Courts

85. It is not the role of arbitral tribunals to serve as appellate bodies supervising national courts.[219] In *Chevron*, the tribunal emphasised that it was "not empowered… to act as a court of appeal reviewing every individual alleged failure of the local judicial system."[220] This Tribunal should exercise the modesty expressed by its peers,[221] and not sit in judgment of a sovereign

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[211] *See, e.g., BG Group* ¶¶324–28.
[212] *Dolzer & Stevens,* 61; *AAPL* ¶77.
[213] *Lauder* ¶314.
[214] R-7–12.
[215] R-34.
[216] *Saluka* ¶¶460–61.
[217] *See generally* R.
[218] *Lemire* ¶261.
[219] *Saipem* ¶158 ("[T]his tribunal… [is] not… a supranational appellate body for local court decisions.").
[220] *Chevron* ¶247.
[221] *See, e.g., Azinian* ¶99; *Mondev* ¶126.

nation's courts when Claimant's suit is working its way through those courts in the normal course.

V. THE TERMINATION OF THE LTA BY THE NHA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT

86. On 10 June 2008, the NHA, a separate entity from Respondent, terminated the LTA as allowed for under the contract. The ensuing dispute was fully adjudicated by an arbitral tribunal seated in Reef. Claimant now seeks to double-recover by attempting to shoehorn this contractual claim into a treaty claim. Respondent submits that: (A) the Tribunal does not have jurisdiction *ratione personae* or jurisdiction *ratione materiae* over the submitted claim; (B) the claim is inadmissible given the completed commercial arbitration; and (C) in any case, the claim does not have merit.

A. This Tribunal Does Not Have Jurisdiction *Ratione Personae* or *Ratione Materiae* over Claims Regarding the Termination of the LTA

87. Claimant submits that (**1**) the Tribunal does not have jurisdiction *ratione personae* because the NHA's act of terminating the LTA cannot be attributed to Respondent and (**2**) the tribunal does not have jurisdiction *ratione materiae* because Article 3(3) of the BIT cannot elevate Claimant's contractual claim regarding the termination of the LTA into a treaty claim.

1. This Tribunal Lacks Jurisdiction Ratione Personae*, as the NHA's Termination of the LTA Cannot be Attributed to Respondent*

88. The Tribunal lacks jurisdiction *ratione personae*, since the NHA's act of terminating the LTA cannot be attributed to Respondent under Articles 4, 5, or 8 of the ILC Articles.[222]

89. The NHA is not an organ of the state of Mercuria under Article 4 of the ILC Articles. In determining the status of an entity, the Tribunal should look at "the internal law of the state."[223] Claimant has failed to demonstrate that under the laws of Mercuria, the NHA shares the same legal identity as the state, or is part of the legislative, executive, or judicial branches of Mercuria. As held in *Jan de Nul*, [224] *Bayindir*,[225] and *Almås*,[226] the mere fact that an entity was set up by the

[222] *Noble Ventures* ¶69 ("While those Draft Articles are not binding, they are widely regarded as a codification of customary international law.")
[223] ILC Art 4(2); see also *Ulysseas* ¶126; Almås ¶208.
[224] *Jan de Nul* ¶160-61 (holding that the Suez Canal Authority−created by law to carry out public activities−was not a state organ).
[225] *Bayindir* ¶119 (National Highway Authority).

central government to carry out certain public activities is insufficient for establishing that the entity is a state organ. Here, despite being set up by the Mercurian government, the NHA operates independently and enters into commercial transactions on its own account.[227] As such, it has the status of a non-state organ.[228]

90. Further, under Article 5 of the ILC Articles, the NHA's action is not attributable as an exercise of governmental authority. Article 5 imposes two mandatory conditions before an act can be attributed to the state. First, the person or entity must be "empowered by the law of that State to exercise elements of the governmental authority; and second, the person or entity must be acting in that capacity in the particular instance."[229] Even if the Tribunal finds that the first condition is satisfied, the second condition is clearly not. As discussed in Part V(A)(2)(b), the act of terminating the LTA by the NHA did not involve any exercise of public functions, but was "in purported exercise of contractual powers."[230]

91. Lastly, Claimant's anticipated invocation of Article 8 of the ILC is equally unavailing, since the NHA was not acting "on the instructions of, or under the direction or control of" the government of Mercuria when it terminated the LTA.[231] Not only has Claimant failed to offer any concrete evidence that the Mercurian government ordered the termination of the LTA, the timing of events renders Claimant's allegation baseless. Prior to the meeting between the Director of the NHA, the Minister for Health, and the President of Mercuria, the NHA had already been in communication with Claimant to request further discounts and had made clear that the NHA "would be compelled to terminate the agreement" in the event that negotiations were unsuccessful.[232] The final termination of the LTA was simply a result of that unsuccessful negotiation, and not because of an order from the Mercurian government.

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[226] *Almås* ¶209 (Agricultural Property Agency).
[227] R-50.
[228] *Almås* ¶210.
[229] ILC Art. 5; *see also Jan de Nul* ¶163-64.
[230] *Almås* ¶251.
[231] ILC Art. 8.
[232] R-30.

2. This Tribunal Lacks Jurisdiction Ratione Materiae*, as Article 3(3) of the BIT Cannot Elevate Claimant's Contractual Claim Regarding the Termination of the LTA into a Treaty Claim*

92. The NHA's termination of the LTA only constituted an alleged breach of contract, not a breach of treaty. Contrary to Claimant's suggestion, this Tribunal should read Article 3(3) of the BIT narrowly, and refrain from elevating Claimant's contract claim into a treaty claim, since a broad interpretation of the umbrella clause would have the undesirable result of elevating to a treaty claim every minor dispute over details of contractual performance. Specifically, this Tribunal should find that (**a**) the scope of Article 3(3) is limited, only covering acts of the state done in a sovereign capacity and not those in a commercial capacity, and (**b**) that the act of terminating the LTA is a commercial act, not a sovereign act, and thus is not covered under Article 3(3).

a. Article 3(3) Should be Interpreted Restrictively to Only Cover Acts of the State Made in a Sovereign Capacity, and Not Those in a Commercial Capacity

93. Article 3(3) of the BIT reads:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.[233]

In interpreting this umbrella clause this Tribunal should construe the text in its context and in light of the object and purpose of the BIT.[234] A purely textualist approach would be misguided, since umbrella clauses similar to the one in question have been given disparate interpretations by different tribunals.[235] Some umbrella clauses that are arguably broader in scope than the current one have been interpreted narrowly. For example, the tribunal in *El Paso* held that Article 2(c) of the US-Argentina BIT, which reads, "Each party shall observe any obligation it may have entered into with regard to investments," did not extend treaty protection to breaches of a commercial contract.[236]

94. It is thus helpful to consider the object and purpose of the BIT. An overly-broad interpretation of the umbrella clause would defeat the carefully crafted balance of other substantive provisions. As pointed out by the *SGS v. Pakistan* tribunal, an expansive

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[233] R-34.
[234] VCLT Art. 31.
[235] Compare *SGS v. Philipphines* ¶127 and *Joy Mining* ¶81.
[236] *See e.g.*, *El Paso* ¶82.

interpretation of the umbrella clause would "amount to incorporating by reference an unlimited number of State contracts, as well as municipal law instruments," and a violation of any of them would qualify as a breach of the BIT.[237] If that were the case, then "[t]here would be no real need to demonstrate a violation of… substantive treaty standards."[238]

95. Such expansive elevation of minor contractual claims would also make host states vulnerable to abusive corporate litigants.[239] As Professor Schreuer observes:

> Problems could… arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available.[240]

Adopting the broad interpretation advanced by Claimant would allow investors to circumvent or nullify freely negotiated dispute settlement clauses and forum-shop between tribunals and national courts. Opportunistic claimants could even double-recover in different forums—as Claimant is attempting in this current case[241]—while the state party would be precluded from settling the dispute in the contractually specified forum unless the claimant agreed to do so.[242]

96. A review of the history of umbrella clauses also reveals that the initial drafters of such clauses never intended for them to have such expansive applications as argued by Claimant. The drafters of the original umbrella clauses "assumed [it] as evident that the State conduct targeted by the clause had to be qualified as 'governmental.'"[243] The drafters did not address its application to contracts completed by states in a commercial context because it did not occur to them that anyone would argue for this application. Nothing suggests that they intended "to create a treaty-based forum for adjudicating all contractual disputes between State entities and foreigners."[244]

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[237] *SGS v. Pakistan* ¶168.
[238] *Id.*
[239] *El Paso* ¶76.
[240] Schreuer, 255.
[241] *Infra* V(B).
[242] *SGS v. Pakistan* ¶168.
[243] Wälde, 205.
[244] *Id.*

97. This differential treatment between state as sovereign and state as merchant is consistent with the widely accepted dichotomy of contract claims and treaty claims,[245] and has a simple justification. For purely commercial disputes with a state, an investor should proceed as they otherwise would against commercial entities, either through domestic courts or other contractually agreed upon mechanisms.[246] This Tribunal should thus adopt a restrictive interpretation of Article 3(3) and follow the tribunals that have limited the application of umbrella clauses to a State's actions in a sovereign capacity, and not those in a commercial capacity.[247]

b. The Termination of the LTA Is a Commercial Act, Not a Sovereign Act

98. In terminating the LTA, the NHA acted "as a mere party to the contract," and did not exercise any "specific functions of a sovereign."[248] The LTA is a simple purchase agreement.[249] After unsuccessful negotiations to modify the contract price, the NHA terminated the LTA.[250] The act of terminating the LTA was a quintessentially commercial act, and did not involve any function beyond the capacity of a commercial entity.

99. Past tribunal decisions also support this position. Actions that have been found to be sovereign acts include: issuance or revocation of permits or licences,[251] major legislative and regulatory changes,[252] and breach of a stabilisation clause in an investment agreement.[253] All of them "involve a kind of conduct that only a sovereign State function or power could effect."[254] In contrast, terminating a supply contract is an act that a mere commercial entity could effect. In addition, Claimant's anticipated attempt to link the termination of the LTA with Law 8458/09 should also fail, since that law was passed more than a year after the termination.

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[245] *Vivendi Universal* ¶96.
[246] *El Paso* ¶82.
[247] *El Paso* ¶79, *Impregilo* ¶ 260, *Pan American* ¶¶101-03, 110.
[248] *Azurix*, ¶53, *see also Impregilo* ¶ 260.
[249] R-10.
[250] R-17.
[251] *Técnicas* ¶119.
[252] *Sempra* ¶311.
[253] *El Paso* ¶410.
[254] *Sempra* ¶310.

B. The Claim Is Inadmissible given the Completed Commercial Arbitration

100. Even if this Tribunal finds that it has jurisdiction over Claimant's claim, it should nonetheless dismiss the claim as inadmissible. Pursuant to the LTA, an arbitral tribunal seated in Reef has already rendered an award based on the same substantive facts surrounding the termination of the LTA. Commentators have recognised that a claimant commits an abuse of process "when it initiates more than one proceeding to resolve the same or related dispute"[255] since such practice discriminates against the respondent by forcing it to defend variations of the same dispute in front of different tribunals. In *RSM*, the tribunal exercised its discretionary power when it dismissed a subsequent treaty claim that was dressed up from a previously concluded commercial proceeding.[256] This Tribunal should not allow Claimant to re-litigate the same matter, which would offer it a chance at double-recovery and would run counter to the principle against abuse of rights.

C. In any Case, the Claim Does Not Have Merit

101. In the event that this Tribunal finds that it has jurisdiction over Claimant's claim, and that the claim is admissible, it should nonetheless dismiss the claim on its merits since Claimant has failed to prove that Respondent breached its obligations under the BIT.[257]

102. A party bears the burden of proof in establishing the facts that it asserts.[258] Claimant thus bears the burden of proving that Respondent failed to observe its obligations under the LTA.[259] However, Claimant has not advanced sufficient evidence or legal argument for the Tribunal to find a breach. In particular, Claimant has not even provided the full text of the LTA in order for the Tribunal to determine the scope of the NHA's contractual obligations. Claimant has also failed to provide legal arguments or expert testimony on why the NHA's termination constituted a breach of any potential obligations.[260] Simply put, Claimant's claim is nothing more than an unsubstantiated allegation and should not be given any weight by the Tribunal.

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[255] Gaillard (I), 7.
[256] *RSM*, ¶¶7.3.6, 7.3.7.
[257] *SGS v. Paraguay*, ¶74.
[258] *See e.g., Soufraki* ¶58, *Middle East Cement* ¶90, *Alpha* ¶236, *Asian Agricultural* ¶56.
[259] In *SGS v. Paraguay*, the tribunal found that the claimant can prove a breach of the observance of obligations clause if the State failed to observe its commitments under the contract. *SGS v. Paraguay* ¶74.
[260] *Cf. Micula* ¶¶422, 447, 459 (noting that the claimants provided insufficient evidence and legal arguments on the content of Romanian law for the tribunal to find the existence of an obligation protected by the umbrella clause).

REQUEST FOR RELIEF

For the aforementioned reasons, Respondent respectfully asks the Tribunal to find that:

A. this Tribunal has no jurisdiction over the claim in relation to the Award;

B. Respondent's invocation of Article 2 of the BIT bars Claimant from accessing the protection of the BIT;

C. the enactment of Law 8458/09 and the grant of the Licence to HG-Pharma do not amount to a breach of the BIT, in particular, the Fair and Equitable Treatment standard;

D. Respondent is not liable under Article 3 of the BIT for the conduct of its judiciary in relation to the enforcement proceedings; and

E. the termination of the LTA by the NHA does not amount to a violation of Article 3(3) of the BIT.

Respectfully submitted on 24 September 2017 by

TEAM GROS

On behalf of Respondent

THE REPUBLIC OF MERCURIA