COUR PERMANENTE D'ARBITRAGE PERMANENT COURT OF ARBITRATION

ARBITRATION UNDER

THE AGREEMENT BETWEEN THE REPUBLIC OF MERCURIA AND THE KINGDOM OF BASHEERA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

AS WELL AS THE PCA ARBITRATION RULES, 2012

[AND THE OFFICIAL RULES AND INSTRUCTIONS OF THE FDI MOOT]

BETWEEN

ATTON BORO LTD.

(CLAIMANT)

AND

THE REPUBLIC OF MERCURIA

(RESPONDENT)

PCA CASE NO. 2016-74

MEMORIAL ON BEHALF OF THE RESPONDENT

ARBITRAL TRIBUNAL

BOB GALLO (PRESIDENT)

PROF. ELI BARRE SINOUSSI

LILLY MONTAGNIER

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A2	Anthony D'Amato	Anthony D'Amato, *Good Faith, in 12* ENCYCLOPAEDIA OF PUB. INTL'L L. (Rudolf Bemhardt, ed. 1995).
A3	C.N. Brower	C.N. Brower, *The Future of Foreign Investment-Recent Developments in the International Law of Expropriation and Compensation, in* V.S. CAMERON, PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975 (Matthew Bender, Southwestern Legal Foundation Symposium Series, New York, 1976).
A4	Howard Mann	Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities,* INT'L INSTITUTE OF SUST. DEV. BULLETIN (2008).
A5	Roman Picherack	J. Roman Picherack, *The Expanding Scope of Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9 J. OF WORLD INV. & TRADE 255 (2008).
A6	J. Steven Jarreau	J. Steven Jarreau, *Anatomy of a BIT: The United States-Honduras Bilateral Investment Treaty*, 35 U. MIAMI INTER-AM. L. REV. 429 (1995).
A7	James Crawford	James Crawford, *Treaty and Contract in Investment Arbitration,* 24(3) ARB. INT'L. L. 351 (2008).
A8	Jonathan Moffett	Jonathan Moffett, *Resiling from Legitimate Expectations,* 13(4) JUD. REV. 219 (2008).
A9	Moshe Hirsch	Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law* (University of Jerusalem Law Faculty: Working Paper No. 07-13, June 2013).
A10	Sherman & Oakley	Peggy B. Sherman & Ellwood F. Oakley, III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs,* 41 A. BUS. L. J. 353 (2004).
A11	Holiday Inns v. Morocco	Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco): Some Legal Problems*, (1980) 51(1) BRIT. Y.B. INT'L L. 123.
A12	Thorn & Doucleff	Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Coinnncept of Investor, in* THE BACKLASH AGAINST

		INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al., The Netherlands : Kluwer Law Int'l 2010).
A14	Robert Weissman	Robert Weissman, *A Long Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069 (1996).
A15	Jagusch & Sinclair	Stephen Jagusch & Anthony Sinclair, *The Limits of Protection for Investments and Investors under the Energy Charter Treaty, in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY (Clarisse Riberio ed., 2006).
A16	Stephen Vasciannie	Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. OF INT'L L. 99(1999).
A17	Susan K. Sell	Susan K. Sell, *TRIPS-Plus Free Trade Agreements and Access to Medicines*, 28 LIVERPOOL L. REV. 41 (2007).
A18	Thomas W. Walde	Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent*, JOURNAL OF WORLD INV. & TRADE 183 (2005).
A19	Tyler Cowen	Tyler Cowen, *Poor U.S. Scores in Health Care Don't Measure Nobel and Innovation*, N.Y.TIMES (Oct. 5, 2006).
AWARDS		
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B2	Ambiente v. Argentina	Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, (Feb. 8, 2013).
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BOOKS		
C1	PHILIPPE MERLIN	9 PHILIPPE ANTOINE MERLIN, RECUEIL ALPHABÉTIQUE DE QUESTION DE Droit (France. Cour de cassation, Tarlier, 1829).
C2	ALBERT JAN VAN DEN BERG	ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (Kluwer Law and Taxation, 1st ed. 1981).
C3	MCLACHLAN ET AL.	CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford Univ. Press 2007).
C4	CHRISTOPH SCHREUER	CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (Cambridge Univ. Press, 2nd ed. 2001).
C5	ISSUES OF STATE RESPONSIBILITY	ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS THE CLIFFORD CHANCE LECTURES (Malgosia Fitzmaurice, Dan Sarooshi, Clifford Chance Lectures 2004).
C6	JAMES CRAWFORD (THE GENERAL PART)	JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (Cambridge Univ. Press 2013).
C7	JAN PAULSSON	JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge Univ. Press, 1st ed. 2005).
C8	KENNETH J. VANDEVELDE	KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxford Univ. Press, 1st ed. 2010).
C9	KINNEAR ET AL	MEG KINNEAR, ANDREA BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (Alphen aan den Rijn: Kluwer Law Int'l 2006).
C10	MICHAEL WAIBEL	MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (London: Kluwer Law Int'l 2010).
C11	HORN & KROLL	N. HORN & S. KROLL, ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS (The Hague: Kluwer Law Int'l 2004).
C12	OPPENHEIM'S INTERNATIONAL LAW	OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings, Arthur Watts Kcmg QC, Oxford Univ. press, 9th ed. 2008).
C13	REDFERN & HUNTER	REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (Alan Redfern et al., Oxford Univ. Press, 6th ed. 2015).
C14	DOLZER & SCHREUER	RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012).
C15	STEPHEN M.	STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE

	SCHWEBEL	SALIENT PROBLEMS (Grotius Publ., 2014).
C16	VCLT COMMENTARY	VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Oliver Dorr & Kirsten Schmalenbach, Springer Science & Business Media 2011).
C17	KARL SUVANT	YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY (Karl Sauvant, Oxford Univ. Press 2010).
C18	ZACHARY DOUGLAS	ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge Univ. Press 2009).
ICJ CASES		
D1	Genocide case	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), 2007 I.C.J. 43 (Feb. 26).
D2	ELSI case	Case Concerning Elettronica Sicula S.P.A.(ELSI) (U.S. v. It.), 1989 I.C.J. 15 (July 20).
D3	Nuclear Tests case	Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).
MISC.		
E1	Statement of Implementation regarding the North American Free Trade Agreement	Canadian Dep't. of External Affairs, Canada Gazette 152, Statement of Implementation regarding the North American Free Trade Agreement (1994).
E2	Canadian Statement of Implementation for NAFTA	Canadian Statement of Implementation for NAFTA, CANADA GAZETTE, PART I, 149 (Jan. 1, 1994).
E3	OECD Negotiating Group on the Multilateral Agreement on Investment	Chairman of the MAI, DAFFE/MAI/DG2(66)1/REV1, OECD Negotiating Group on the Multilateral Agreement on Investment, Note by the Chairman: Definition of Investor and Investment (1996).
E4	Decision of General Council	Decision of the General Council, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/JL/540 (Aug. 30, 2003).
E5	Kyrgyzstan's Letter of Submittal	Dept. of State, Kyrgyzstan Bilateral Investment Treaty Letter of Submittal, (Sept. 7, 1993).
E6	ILC Commentary	*Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, (2001) A 56/10 IYILC.
E7	UNCTAD (FET)	Fair and Equitable Treatment, UNCTAD Series on International Investment Agreements, UNCTAD/DIAE/IA/2011/5 (Dec. 31, 2010).
E8	Implementation of the Dominican Republic-Central	H. Comm. on Ways and Means, 109th Cong. 193, Implementation of the Dominican Republic- Central America Free Trade Agreement (DR-CAFTA), Hearing before the H.

	America Free Trade Agreement	Comm. on Ways and Means (2005).
E9	ARSIWA	Int'l Law Comm'n Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (Aug. 3, 2001).
E10	NAFTA Free Trade Commission	NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Minimum Standard of Treatment in Accordance with International Law (Jul. 31, 2001).
E11	Niazi v. Secretary of State	Niazi v. Secretary of State for the Home Department [2008] EWCA Civ 755.
E12	EC – Commercial Vessels	Panel Report, European Commission – Measures Affecting Trade in Commercial Vessels, WT/DS301/6 (June 27, 2005).
E13	PCA Rules 2012	*Permanent Court of Arbitration Rules 2012* (Dec. 17, 2012), https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf.
E14	UNCTAD (Scope and Definition)	Scope And Definition, UNCTAD Series On Issues In International Investment Agreements II, UNCTAD/DIAE/IA/2010/2 (Feb. 28, 2011).
E15	NAFTA Statement of Administrative Action	US President and Implementing Bill, H.R. Doc. No. 103–59, NAFTA Statement of Administrative Action (1993).
E16	World Trade Organization, Ministerial Declaration	World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
E17	WTO Factsheet	WTO Fact-Sheet, *TRIPS and pharmaceutical patents: Obligations and Exceptions* (Sept. 26, 2006), http://www.wto.org/english/tratop_e/trips_e/factsheetpharm02_e.htm.
E18	U.S. – Jordan BIT Commentary	Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investment, U.S. – Jordan, (July 2, 1995), https://www.state.gov/documents/organization/43565.pdf.
TREATIES AND CONVENTIONS		
F1	TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.
F2	New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38.
F3	ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14 1966, 575 U.N.T.S. 159.

F4	DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
F5	VCLT	Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331.

STATEMENT OF FACTS

~Atton Boro and its Activities~

1. Atton Boro and Company is the holding company for Atton Boro Group, which is organized under the laws of Republic of Reef (**"Reef"**). Atton Boro Group is a leading drug discovery and development enterprise that synthesized a compound called *Valtervite*, which could radically improve treatment for greyscale patients. Atton Boro and Company secured a patent for *Valtervite* in Reef in 1997, and thereafter obtained patents in 50 more jurisdictions, including in Mercuria, which was granted on 21 February 1998.

2. In 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera i.e. Atton Boro Limited (**"Atton Boro"**) as a vehicle to carry business in South American and African countries. Atton Boro Group has an established presence in Basheera's pharmaceutical market. Atton Boro's principal dealings involve long-term public-private collaborations with States and State agencies for the manufacture and supply of essential medicines. For this purpose, Atton Boro & Co. assigned a number of its patents to Atton Boro Ltd., including the Mercurian patent for *Valtervite*.

~The scenario in Mercuria~

3. The Republic of Mercuria (**"Mercuria"**) and the Kingdom of Basheera (**"Basheera"**) entered into a Bilateral Investment Treaty (**"BIT"**) on 11 January 1998. In 2002, Mercuria witnessed an upsurge in prevalence of greyscale, a sexually transmitted chronic, non-fatal, and incurable disease. To counter the increasing incidence of greyscale before it could spiral into a national crisis, in 2004, Mercuria's National Health Authority (**"NHA"**) and Atton Boro Ltd. entered into a Long-Term Agreement (**"LTA"**) whereby the NHA would purchase Atton Boro's blockbuster greyscale medicine *Sanior* at a 25% discounted rate by periodically placing purchase orders.

4. In 2006, the annual report of NHA pointed out that greyscale was growing at an alarming rate. It further opined that given the high costs of greyscale medication, Mercuria would need to subsidize the drugs in the coming years. The NHA noted that at the existing prices, it would cost 1 billion USD, or nearly a third of the overall health budget and

500% of the greyscale program budget to do so, and therefore, it recommended that the current prices at which greyscale medicines were bought needed to be revisited.

5. Subsequently, due to increasing demand of the drug in 2008, NHA approached Atton Boro to renegotiate the prices and demanded an additional 40% discount. Both parties could not agree on a new price. On 10 June 2008, NHA terminated the LTA unilaterally, citing unsatisfactory performance by Atton Boro.

~The Enforcement Proceedings~

6. Aggrieved by the termination of the LTA, Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a tribunal seated in Reef passed an award (**"Award"**) in favour of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

7. On 3 March 2009, Atton Boro initiated enforcement proceedings for the award in the High Court of Mercuria. NHA requested the court to decline the enforcement of the award on the ground that it was contrary to public policy. However, because of various reasons, there were delays in the proceedings, which have been pending till date for more than seven years.

~Compulsory Licensing~

8. On 10 October 2009, the Mercurian President promulgated National Legislation (Law No. 8458/09 (**"Law"**)) for its intellectual property law, which introduced Section 23C for use of patented inventions without the authorization of the owner. In April 2010, HG Pharma, a Mercurian generic drug manufacturer, was granted a license to manufacture Atton Boro's patented drug *Valtervite* by the High Court of Mercuria through a fast tracked process. A royalty of 1% of the total revenue was fixed to be paid to Atton Boro.

9. Thereafter, Atton Boro, by invoking Article 8 of the BIT read with PCA Arbitration Rules 2012, served a Notice of Arbitration to Mercuria on 7 November 2016 to refer the disputes between Atton Boro and Mercuria to arbitration before the present Tribunal.

ARGUMENTS ADVANCED

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

10. The Tribunal does not have jurisdiction over the claims in relation to the Award as **(A)** the Award does not qualify as an investment; and **(B)** the Tribunal cannot assume jurisdiction over the Award together with the LTA. Alternatively, **(C)** the underlying LTA does not qualify as an investment under the objective definition of the term.

A. The Award does not qualify as an investment.

11. The Award does not qualify as an investment ***(i)*** under Article 1 of the BIT; or, alternatively, ***(ii)*** under the objective definition of the term 'investment'.

i. The Award is not an investment under Article 1 of the BIT.

12. Article 1(1)(c) of the BIT provides that a claim to money is an investment.[1] However, the claim to money embodied in an arbitral award is not created by the award itself. It arises from the underlying contract on which the award adjudicates.[2] The award is a mere legal instrument providing for the monetary disposition of contractual rights.[3] For this reason, it is incorrect to characterize an arbitral award as a 'claim to money'.[4]

13. Therefore, the Award is not an investment under Article 1 of the BIT.

ii. Alternatively, the Award is not an investment within the objective definition of the term.

14. The Award is not an investment as **(a)** it must be tested against an objective definition of 'investment'; and **(b)** it does not qualify as an investment within this objective definition.

a. The Award must be tested against an objective definition of 'investment'.

15. The Award must be tested against an objective definition of an investment as **(1)** a literal interpretation of Article 1(1) is not tenable; and therefore **(2)** the inherent objective

[1] *Mercuria-Basheera BIT*, art. 1(1)(c).
[2] *Saipem v. Bangladesh (Jurisdiction)*, at ¶127.
[3] *GEA v. Ukraine*, at ¶161.
[4] *White Industries v. India*, at ¶7.6.3.

meaning of the term 'investment' should be applied to test the existence of an investment.

(1) A literal interpretation of Article 1(1) is not tenable.

16. Article 1(1)(c) provides that a claim to money or performance is an investment.[5] Consequently, all commercial contracts could be characterized as an investment under Article 1(1)(c). However, ordinary commercial contracts are not investments, and are governed by separate international regimes other than investment treaties.[6] Bringing ordinary contracts within the scope of the BIT's protection would mean that the Contracting States have surrendered the jurisdiction of the domestic judiciary with respect to every contract made by a foreign national in the territory of those States.[7] This result is manifestly absurd and unreasonable, and therefore untenable in international law.[8]

17. Further, this result is also contrary to the object and purpose of the BIT. A treaty provision is to be interpreted by its ordinary meaning and object and purpose simultaneously.[9] The Preamble states that the object of the BIT is to promote economic development of Contracting States.[10] An investment must have contributed to this objective in order to be protected under the BIT.[11] Ordinary commercial transactions do not contribute to economic development, and therefore, are not intended to be protected under the BIT.[12]

18. Therefore, a literal interpretation of Article 1(1), which tests the existence of an investment against the categories of assets listed therein, is not tenable.

(2) The inherent, objective meaning of the term 'investment' should be applied to test the existence of an investment.

[5] *Mercuria-Basheera BIT*, art. 1(1)(c).
[6] *Joy Mining v. Egypt*, at ¶58.
[7] *Romak v. Uzbekistan*, at ¶187.
[8] *Romak v. Uzbekistan*, at ¶188.
[9] VCLT COMMENTARY, at p. 541; *VCLT*, art. 31.
[10] *Mercuria-Basheera BIT*, Preamble.
[11] ZACHARY DOUGLAS, at p. 162.
[12] *Phoenix v. Czech Republic*, at ¶93.

19. The categories of investments listed in Article 1(1) of the BIT are not exhaustive. They simply denote some of the most typical categories of investments.[13] The use of the word 'includes' means that there exist other categories which are not listed in Article 1(1), but, nevertheless, are considered investments protected under the BIT.

20. These non-listed categories cannot be tested against any definition, except for the inherent meaning of the term 'investment' itself. Therefore, the term 'investment' in Article 1(1) retains its inherent meaning. The categories listed under Article 1 are clearly intended to be merely illustrative,[14] and cannot prevail over the inherent meaning of the term 'investment'.[15]

21. Article 25(1) of the ICSID Convention provides that the forum would have jurisdiction over legal disputes arising out of an 'investment'.[16] The term 'investment' in Article 25(1) is undefined.[17] However, in its ordinary meaning read in light of its object and purpose, it imports certain basic economic attributes of an investment, namely, that of involving a contribution, risk and having a certain duration.[18] The term 'investment' in Article 1(1) of the BIT imports these same economic attributes, as the ordinary meaning and object and purpose are the same.[19] Therefore, 'investment' under the BIT will have the same objective definition as 'investment' under the ICSID Convention.

22. Further, the term 'investment' in Article 1(1) of the BIT cannot be read more broadly than 'investment' in Article 25(1) of the ICSID Convention, as the result would contradict Article 8(2) of the BIT. Article 8(2) provides the investors a choice between the ICSID and the PCA mechanism. However, if the BIT protects a broader range of investments than the ICSID Convention, then even though an investment may be protected under the BIT, the ICSID Centre would not have jurisdiction over it.[20] Consequently, recourse to the ICSID mechanism would be effectively excluded, and the choice offered in Article 8(2) would be rendered meaningless.[21]

[13] *Alps Finance v. Slovak Republic*, at ¶230.
[14] *Romak v. Uzbekistan*, at ¶180.
[15] ZACHARY DOUGLAS, at p. 165.
[16] *ICSID Convention*, art. 25(1).
[17] ZACHARY DOUGLAS, at p. 164.
[18] *Pey Casado v. Chile*, at ¶232.
[19] ZACHARY DOUGLAS, at p. 190.
[20] *Patrick Mitchell v. Congo*, at ¶67.
[21] *Romak v. Uzbekistan*, at ¶195.

23. Therefore, the Award in the present case is to be tested against the objective definition of the term 'investment', which is the same as the objective definition under the ICSID Convention.

b. The Award does not qualify as an investment within this objective definition.

24. According to consistent interpretation by various tribunals,[22] the inherent, objective meaning of the term 'investment' entails a **(a)** contribution that **(b)** extends over a certain period of time and that **(c)** involves some risk.

(1) The Award does not entail any contribution.

25. If the economic activity conducted involves no specific or tangible contribution to the Host State, the company has not made an investment.[23] The award did not make any tangible or even intangible contribution in the Host State.

(2) The Award does not entail any risk.

26. Risk entails a situation in which the investor cannot be sure of a return on the investment.[24] A mere risk of non-performance by the counter-party does not satisfy the criteria of risk.[25] Further, where the return is an obligation which is fixed, unconditional and not dependent on the success of any commercial undertaking or capital project, it is not sufficient to fulfil the criteria of risk.[26]

27. Therefore, the award faced no investment risk and thus fails to fulfill the criteria.

(3) The Award does not have sufficient duration.

28. An investment ordinarily lasts for a duration of two to five years. [27] An award does not have any duration.

[22] *Romak v. Uzbekistan*, at ¶207; *Pey Casado v. Chile*, at ¶232; *LESI v. Algeria*, at ¶13(iv); *Salini v. Morocco*, at ¶52.
[23] *Joy Mining v. Egypt*, at ¶55.
[24] *Romak v. Uzbekistan*, at ¶230.
[25] *Romak v. Uzbekistan*, at ¶229.
[26] MICHAEL WAIBEL, at p. 6.
[27] *Saipem v. Bangladesh (Jurisdiction)*, at ¶100; Toto v. Lebanon, at ¶86(c).

29. Due to the above reasons, tribunals have consistently refused to hold that an Award satisfies the objective definition of an investment.[28]

B. The Tribunal cannot assume jurisdiction over the Award together with the LTA.

30. The Tribunal cannot see the Award as a crystallization, transformation or a part of the LTA, because ***(i)*** the Award is distinct from the economic activity it rules on; ***(ii)*** the doctrine of general unity of an investment operation does not apply here; and ***(iii)*** the dispute concerning the award is as to a right governed by general law.

i. The Award is distinct from the economic activity it rules on.

31. The doctrine of separability has been recognized in investment law decisions[29] as well as in the PCA rules governing the present dispute.[30] This doctrine interprets the arbitration clause in a contract as separate from the rest of the contract and an agreement in and of itself.[31] Therefore, the arbitration clause in the LTA is to be interpreted as an agreement in and of itself. It is a separate legal act, distinguishable from the rest of the LTA.[32]

32. Mere legal acts are not investment.[33] Therefore, the arbitration agreement is not an investment. The Award is a mere legal instrument[34] which is the outcome of the arbitration agreement.[35]

33. Therefore, since the arbitration agreement is a mere legal act distinct from the LTA, the Award is also distinct from the LTA.

ii. The doctrine of 'general unity of an investment operation' does not apply here.

34. The doctrine of general unity of an investment operation is applied where the investment is a result of several separate but inter-related contracts between a State and an

[28] *Saipem v. Bangladesh (Jurisdiction)*, at ¶113; *GEA v. Ukraine*, at ¶161; *Romak v. Uzbekistan*, at ¶210-211; *ATA Construction v. Jordan*, at ¶115.
[29] *Plama v. Bulgaria*, at ¶212.
[30] *PCA Rules 2012*, art. 23.
[31] REDFERN & HUNTER, at p.52.
[32] *ATA Construction v. Jordan*, at ¶118.
[33] *GEA v. Ukraine*, at ¶157.
[34] *GEA v. Ukraine*, at ¶161.
[35] PHILIPPE MERLIN, at p. 145.

investor.[36] An investor-state arbitration clause present in any one of these contracts would apply to all of the contracts, since all contracts together constitute a single investment operation.[37] The principle does not apply where the investor-State arbitration clause is present in an umbrella instrument such as a BIT.[38] Therefore, the principle will not apply in the present dispute which is governed by the BIT.

35. Alternatively, the factual matrix does not support the application of the principle. A particular transaction is brought within the overall operation of an investment only if the economic reality of the investment and the common intention of the parties so dictate.[39] A transaction may only be included if it were an integral part of the investment operation.[40] Further, transactions constitute a single overall operation where they cannot be seen as separate, but as two closely inter-related parts, one of which is the technical pre-condition for the implementation of the other.[41]

36. In the present facts, there is no evidence that the parties intended the Award and its enforcement to be integral to the performance of the LTA. Further, the non-enforcement of the Award does not leave the investment operation incomplete. Therefore, the Award is not a part of the Claimant's larger investment operation.

iii. *The Tribunal's ratione materiae jurisdiction does not extend to legal disputes concerning rights governed by general law of the State.*

37. The Tribunal's *ratione materiae* jurisdiction is circumscribed by the scope of the Host State's consent to arbitration, as expressed in Article 8 of the BIT.[42] Article 8 provides a mechanism for the settlement of investment disputes,[43] meaning that the dispute must be arising out of an investment.[44] This includes disputes concerning only those rights which an investor acquires from the BITs, or which arise directly out of an investment.[45]

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[36] CHRISTOPH SCHREUER, at p. 245.
[37] CHRISTOPH SCHREUER, at p. 245.
[38] *Duke Energy v. Peru*, at ¶121.
[39] *Holiday Inns v. Morocco*, at p. 159.
[40] *CSOB v. Slovak Republic*, at ¶72.
[41] *SOABI v. Senegal*, at ¶27; *Ambiente v. Argentina*, at p. 52.
[42] ZACHARY DOUGLAS, at p. 233; *Saipem v. Bangladesh (Jurisdiction)*, at ¶116.
[43] *Mercuria-Basheera BIT*, art. 8.
[44] ZACHARY DOUGLAS, at p. 247.
[45] *Amco v. Indonesia*, at ¶130.

38. However, this must be distinguished from disputes concerning rights which are available to any legal person as a result of the general, domestic law of the State. Disputes pertaining to rights under general law do not fall within the jurisdiction of an investment law tribunal,[46] and are to be decided by the appropriate procedures in the Host State.[47]

39. The right to have an arbitral award enforced was neither included in the BIT nor did it arise directly out of the investment. It accrued to the Claimant from the general law of the Respondent read with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**"New York Convention"**). Therefore, the dispute pertaining to the enforcement of the arbitral award is not within the jurisdiction of the Tribunal.

C. <u>Alternatively, the underlying LTA does not qualify as an investment under the objective definition of the term.</u>

40. The LTA does not satisfy the objective definition of an investment as ***(i)*** it makes no contribution to the Respondent's economy; and ***(ii)*** the Claimant assumed no risk under the LTA.

i. The LTA made no contribution to the Respondent's economy.

41. A mere transfer of title over goods in exchange for full payment does not qualify as a contribution for the purpose for establishing investment.[48] The Claimant merely made a transfer of title over the medicines to the Respondent's NHA under the LTA, and therefore the LTA does not satisfy the criteria of contribution.

ii. The Claimant assumed no risk under the LTA.

42. An investment risk is a situation in which the investor is not sure of a return on his investment.[49] By contrast, a commercial risk is a mere risk of non-performance that is inherent in all economic activities;[50] while a sovereign risk is the risk of general

[46] *Amco v. Indonesia*, at ¶125.
[47] *Saluka v. Czech Republic (Jurisdiction)*, at ¶75-76.
[48] *Romak v. Uzbekistan*, at ¶222.
[49] *Romak v. Uzbekistan*, at ¶230.
[50] *Romak v. Uzbekistan*, at ¶229.

interference by the government.[51] An investment involves an assumption of an investment risk, and not a commercial risk[52] or a sovereign risk.[53]

43. In the current dispute, the LTA provided that the NHA will purchase *Sanior* at a predetermined price.[54] All the terms and condition were already negotiated. This means that the Claimant's returns were fixed irrespective of the popularity of his product. Therefore, the LTA did not involve any investment risk for the Claimant.

[51] *Istrokapital SE v. Hellenic Republic*, at ¶369.
[52] *Romak v. Uzbekistan*, at ¶230.
[53] *Istrokapital SE v. Hellenic Republic*, at ¶369.
[54] *Statement of Uncontested Facts*, at ¶10.

II. THE CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE BIT BY VIRTUE OF THE RESPONDENT'S INVOCATION OF ARTICLE 2(1) OF THE BIT.

44. The Claimant has been denied the benefits of the BIT as **(A)** the Respondent has invoked Article 2 in a timely manner; and **(B)** the conditions for invoking Article 2 are satisfied.

A. The Respondent has invoked Article 2(1) of the BIT in a timely manner.

45. The Respondent has invoked Article 2(1) of the BIT against the Claimant in the Response to Notice of Arbitration.[55] Article 2(1) itself does not provide for a time-limit for its invocation, and therefore there is no express restriction on the timing of a denial of benefits.

46. Additionally, the Respondent cannot be held to have violated any implied time limit as ***(i)*** the denial of benefits has been properly done within the procedural time-limit for raising preliminary objections; ***(ii)*** a retrospective denial of benefits is in conformity with the object and purpose of the clause; and ***(iii)*** the BIT cannot be construed to permit only a prospective denial of benefits.

i. The Respondent has properly invoked Article 2(1) within the time limit to raise preliminary objections.

47. Article 2 allows a Contracting State to deny any advantage of the BIT,[56] including the option of investor-State arbitration provided in Article 8 of the BIT.[57] Such a denial would prevent a tribunal from hearing a dispute on its merits.[58] Consequently, the denial of benefits is a preliminary objection, and therefore, it must occur within the time provided for raising preliminary objections[59] provided in the relevant procedural rules.[60]

48. Article 23(1) of the PCA Arbitration Rules 2012, which govern the present arbitration, provides that a jurisdictional objection may be raised no later than in the respondent's statement of defence.[61] The Respondent has invoked the denial of benefits in its

[55] *Response to the Notice of Arbitration,* at ¶5.
[56] *Mercuria-Basheera BIT*, art. 2.
[57] *Mercuria-Basheera BIT*, art. 8.
[58] *Ulysseas v. Ecuador*, at ¶172.
[59] *EMELEC v. Ecuador*, at ¶70-71.
[60] *Ulysseas v. Ecuador*, at ¶172.
[61] *PCA Rules 2012*, art. 23(1).

Response to the Notice of Arbitration,[62] and therefore within the time limit provided by the procedural rules governing the present arbitration.

ii. The Respondent's retrospective denial of benefits is in conformity with the object and purpose of Article 2(1).

49. The purpose of the denial of benefits is to allow the Host State to withdraw the benefits granted under the BIT from investors who invoke those benefits. Therefore, a denial is only "activated" when an investor invokes benefits under the BIT. It will be on that occasion that the Respondent State will analyse whether the conditions for the denial are met and, if so, decide whether to deny the benefits of the BIT.[63]

50. Therefore, the Respondent has rightly denied the benefit of investor-State arbitration to the Claimant, when such a benefit was invoked by the Claimant.

51. Further, the object of a denial of benefits clause is to prevent investors, who are only formally from a Contracting State, but in reality from a third State, from seeking protections under the BIT. Therefore, it is a clause that privileges substance over form. Creating formal pre-requirements for invoking such a clause would be contrary to its object and purpose.[64]

52. Therefore, the object and purpose of Article 2(1) does not allow the creation of formal requirements for the invocation of the clause.

iii. The BIT cannot be construed to permit only a prospective denial of benefits.

53. Article 2(1) can only be invoked once it is ascertained that the investor does not have substantial business activities and is owned or controlled by nationals of a third State.[65] A Contracting State cannot be aware of the nationality of every investor in its territory, the extent of their business activities in their Home States, and the nationality of their owners or controllers. Further, this information does not even remain static, because investors often restructure their companies or buy/sell investments at any time. Therefore, it is only feasible for the State to assess whether the criteria of Article 2(1)

[62] *Response to the Notice of Arbitration,* at ¶5.
[63] *Rurelec v. Bolivia*, at ¶376; KINNEAR ET AL., at p. 1113-6; *Thorn & Doucleff*, at p.25.
[64] *Pac Rim v. El Salvador*, at ¶4.53.
[65] *Mercuria-Basheera BIT*, art. 2(1).

apply to an investor at the time the investor brings his claim. Any alternative approach would deprive Article 2(1) of its effectiveness.[66]

54. Additionally, even if a State Party could monitor all investors before and after investment, such a practice would be intrusive for the investor, creating more bureaucratic hurdles and consequently, reducing foreign investment.[67] This would be contrary to the object and purpose of the BIT to promote foreign investments.[68]

55. Therefore, a requirement to only prospectively deny benefits would be unfeasible, impracticable and contrary to the object and purpose of the BIT.

B. <u>The criteria laid down in Article 2(1) of the BIT are fulfilled.</u>

56. The criteria for invocation of Article 2(1) are fulfilled as ***(i)*** The Claimant is owned by a national of a third State, and ***(ii)*** The Claimant does not have substantial business activities in the territory of the Home State, Basheera.[69]

i. The Claimant is owned by nationals of Reef.

57. The Claimant is a wholly owned subsidiary of Atton Boro and Co., a corporation organized under the laws of Reef.[70] Therefore, the Claimant is owned by a national of a third State.

ii. The Claimant does not have 'substantial business activities' in the Home State, Basheera.

58. The phrase 'substantial business activities' is not defined in the BIT. Therefore, it has to be interpreted in light of its ordinary meaning in light of its object and purpose. The Claimant does not have substantial business activities as **(a)** its principal place of business is not Basheera; **(b)** it does not conduct operations in Basheera beyond those required by law; **(c)** it does not undertake decision-making pertaining to the company's affairs in Basheera; **(d)** it does not own the activities of its affiliates in Basheera.

a. The Claimant's principal place of business is not in Basheera.

[66] *Pac Rim v. El Salvador*, at ¶4.53.
[67] *Pac Rim v. El Salvador*, at ¶4.56, 4.59; *Rurelec v. Bolivia*, at ¶379.
[68] *Mercuria-Basheera BIT*, Preamble.
[69] *Mercuria-Basheera BIT*, art. 2(1).
[70] *Statement of Uncontested Facts*, at ¶4.

59. The object and purpose of Article 2(1) is to enable States to bar shell or mailbox companies from benefiting from the treaties' protections when they are controlled by nationals of third parties.[71] The test to identify a mailbox company is whether the company maintains its central administration or principal place of business in the territory of the Home State.[72]

60. The Claimant operates in multiple countries across the world. The primary holding company for the Claimant's group of companies is in Reef. [73] Therefore, the Claimant's principal place of business is not Basheera.

b. The Claimant does not conduct operations in Basheera beyond those required by law.

61. At the minimum, a company which is not a mailbox company engages in some clear business activity beyond that which is legally required for corporate existence, such as an office with an address for legal service,[74] corporate registration and the payment of associated taxes.[75] Such a company will ordinarily undertake a number of operations,[76] procure inputs, and engage in buying, selling or contracting with a number of clients.[77]

62. The Claimant's principal dealings are long-term public-private collaborations with State agencies for the manufacture and supply of medicines.[78] However, it does not have such collaborations with the Basheeran government. Additionally, all of its contracts and transactions are with clients outside Basheera.[79] Therefore, the Claimant does not undertake any business transactions or operations in Basheera.

c. The Claimant does not undertake decision-making pertaining to the company's affairs in Basheera.

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[71] *NAFTA Statement of Administrative Action*; *Statement of Implementation regarding the North American Free Trade Agreement*; *Implementation of the Dominican Republic- Central America Free Trade Agreement the CAFTA-DR Implementation hearings*; *OECD Negotiating Group on the Multilateral Agreement on Investment*, ¶3.
[72] *Kyrgyzstan's Letter of Submittal*, at definition of "Company"; *US-Jordan BIT Commentary*, art. XII.
[73] *Statement of Uncontested Facts*, at ¶2.
[74] *UNCTAD (Scope and Definition)*, at p. 93.
[75] *Jagusch & Sinclair*, at p. 20.
[76] *Alps Finance v. Slovak Republic*, at ¶219.
[77] *Jagusch & Sinclair*, at p. 20; *Tokios Tokelés v. Ukraine*, at ¶37.
[78] *Statement of Uncontested Facts*, at ¶5.
[79] *Procedural Order No. 2* at ¶3.

63. A company that has substantial business activities would have resident managers[80] or managing bodies actively involved in actual decision-making of the business.[81] Further, a company that operates investments in multiple countries would have a formal board of directors and regular board meetings. [82]

64. The Claimant does not have a board of directors or regular board meetings in Basheera.[83] Therefore, the Claimant does not undertake regular decision-making in Basheera.

d. The Claimant does not own the activities of its affiliates in Basheera.

65. A company that undertakes investments and operations in multiple countries would have ownership in all its affiliate-subsidiaries, including the affiliates located in the Home State itself.

66. The Claimant does not have ownership in any of its affiliates located in Basheera.[84]

67. Therefore, based on all the above considerations, the Claimant does not have substantial business activities in Basheera.

[80] *Jagusch & Sinclair*, at p.20.
[81] *Alps Finance v. Slovak Republic*, at ¶219.
[82] *Pac Rim v. El Salvador*, at ¶4.72.
[83] *Statement of Uncontested Facts*, at ¶4.
[84] *Pac Rim v. El Salvador*, at ¶4.72; *Rurelec v. Bolivia*, at ¶370.

III. THE ENACTMENT OF LAW NO. 8458/09 OR GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DO NOT AMOUNT TO A BREACH OF THE BIT.

67. The Respondent by the its actions has not violated its obligations **(A)** under Article 3 of the BIT; and **(B)** under the Agreement on Trade-Related Intellectual Property Rights (**"TRIPs"**).

A. <u>The enactment of the Law and the grant of the license do not violate Article 3 of the BIT.</u>

68. The Respondent has not violated Article 3 of the BIT as ***(i)*** the standard of liability under Article of the BIT is the same as the minimum standard of treatment in customary international law; and ***(ii)*** the enactment of the law does not contravene this standard. Alternatively, ***(iii)*** the Respondent is not liable even under an autonomous standard of 'fair and equitable treatment.' As a further alternative, ***(iv)*** the enactment falls within the police powers of the Respondent.

i. The standard of liability in Article 3 of the BIT is the same as the minimum standard of treatment in customary international law.

69. Article 3(2) provides that all investments must be accorded fair and equitable treatment. Fair and equitable treatment is nothing but a legal term of art that refers to the minimum standard of treatment accorded to foreign nationals under customary international law.[85]

70. The precise language of a BIT determines the threshold for a violation of the 'fair and equitable treatment' standard.[86] The absence of any additional qualifying language in Article 3(2) shows that the intention of the Contracting States is to incorporate the minimum standard of treatment as under customary international law.[87]

71. Therefore, the standard for a State's liability to arise under Article 3(2) is the same as that under customary international law.[88]

ii. The Respondent has not violated this standard by its actions.

[85] *Philip Morris v. Uruguay*, at ¶314; *NAFTA Free Trade Commission*, at ¶2(2); *Canadian Statement of Implementation for NAFTA*, at p. 149.
[86] *Vivendi v. Argentina (Award)*, at ¶148, 177-178; *Saluka v. Czech Republic (Award)*, at ¶286-295; *Biwater v. Tanzania*, at ¶586-593; *Stephen Vasciannie*, at p. 103.
[87] *Philip Morris v. Uruguay*, at ¶316.
[88] *Occidental Exploration v. Ecuador*, at ¶190.

72. The threshold for a breach of the minimum standard of treatment is a high threshold that is only breached when a serious instance of unfair conduct has occurred.[89] The Respondent has not breached the threshold as **(a)** the Respondent's actions satisfy the pre-requisites of transparency and due process; **(b)** the Respondent's actions are not arbitrary or unreasonable; and **(c)** the Respondent has acted in good faith.[90]

a. The Respondent's actions meet the pre-requisites of transparency and due-process.

73. Where a BIT does not have an explicit provision obligating States to ensure transparency, this obligation is included within the 'fair and equitable treatment' standard. However, in such a case the obligation is less onerous,[91] so as to not create extensive financial and administrative burdens on States.[92] In such a case, transparency would only require that the legal framework for the investor's operation is readily apparent, and that any decisions affecting the investor can be traced to this legal framework.[93] This obligation is violated only where the State does not disclose the rules to be applied or the policy behind those rules.[94]

74. The Claimant was aware of all relevant legal requirements at the time of making of the investment.[95] Further, the Law was disclosed to the public at large. Furthermore, the policy for enactment of such a measure was related to the goal of securing universal healthcare for its people[96] and the requirement of revisiting pricing policies for the drug *Sanior*.[97] Therefore, the Respondent fulfils the requirement under transparency and due process.

b. The Respondent's actions are not arbitrary or unreasonable.

75. Arbitrary means depending on individual discretion, founded on prejudice or preference rather than on reason or fact.[98] The Host State's actions would be reasonable where it has

[89] *UNCTAD (FET)*, at p. 86; *Roman Picherack*, at p. 269-270; *Glamis Gold v. USA*, at ¶616; *Philip Morris v. Uruguay*, at ¶314.
[90] *Roman Picherack*, at p. 270;
[91] *UNCATAD (FET)*, at p. 23.
[92] *UNCATAD (FET)*, at p. 23.
[93] *UNCTAD (FET)*, at p. 51; *LG&E v. Argentina*, at ¶128.
[94] KENNETH J. VANDEVELDE, at p. 83.
[95] DOLZER & SCHREUER, at p. 133-134; *Metalclad v. Mexico*, at ¶76.
[96] *Annexure 2 to Procedural Order No. 1*, at ¶2.
[97] *Annexure 3 to Procedural Order No. 1*, at p. 43.
[98] *Lauder v. Czech Republic*, at ¶220–221; *PLC v. Argentina*, at ¶19.

a legitimate reason or public interest for implementing a measure,[99] and the measure is proportionate to the public harm sought to be prevented.[100] Further, the measure must be logically connected with a state's objectives.[101]

76. The Respondent's enactment of the Law had a legitimate reason of protecting public health by preventing the epidemic of greyscale. [102] The measure is also proportionate as it was able to improve the health of a significant proportion of the population.[103] Therefore, the Respondent's actions are not arbitrary or unreasonable.

c. The Respondent has acted in good faith.

77. The obligation to act in good faith is subsumed within the requirement to accord fair and equitable treatment.[104] Bad faith is understood as a conscious action of the Host State[105] to harm investor's assets on purpose.[106] A measure affecting both foreign and domestic investors equally is considered to be undertaken in good faith.[107]

78. The Law enacted by the Respondent was not specifically intended to harm the Claimant's investment on purpose. The Law allowed compulsory licenses for all industries and not just the pharmaceutical industry, and applied to both domestic and foreign patent-holders. Therefore, the Respondent has not enacted the Law in bad faith.

iii. Alternatively, the Respondent is not liable under an autonomous 'fair and equitable treatment' standard.

79. The Respondent is not liable under an autonomous 'fair and equitable treatment' standard as **(a)** the Claimant cannot have an expectation that the Respondent's legal framework will not change due to the absence of a stabilization clause in the BIT; and, alternatively, **(b)** the Claimant received no representations that could give rise to legitimate expectations of stability in the Respondent's legal framework.

[99] *LG&E v. Argentina*, at ¶162; *Philip Morris v. Uruguay*, at ¶310; *Saluka v. Czech Republic (Award)*, at ¶460.
[100] KARL SUVANT, at p. 106.
[101] *Philip Morris v. Uruguay*, at ¶310, *Saluka v. Czech Republic (Award)*, at ¶460.
[102] *Philip Morris v. Uruguay*, at ¶339.
[103] *Philip Morris v. Uruguay*, at ¶309.
[104] *Anthony D'Amato*, at p. 611.
[105] *Waste Management. v. Mexico*, at ¶138.
[106] DOLZER & SCHREUER, at p. 156.
[107] MCLACHLAN ET AL., at p. 245.

a. The Claimant cannot have an expectation that the Respondent's legal framework will not change due to the absence of a stabilization clause in the BIT.

80. A stabilization or renegotiation clause in a BIT prevents any unfavourable legislation from being applied to an investor who has already made an investment.[108] In the absence of such a clause, the 'fair and equitable treatment' standard does not prevent changes to the general legislation of the State.[109]

81. The BIT did not have an explicit stabilization clause. Therefore, the Claimant cannot have an expectation that there would be no general regulatory change in the Respondent's legal framework.

b. Alternatively, the Claimant received no representations that could give rise to legitimate expectations of stability in the Respondent's legal framework.

82. An investor's legitimate expectations may arise reasonably from assurances[110] and representations made by the Host State to the investor.[111] These representations must be made specifically to the investor[112] in the form of explicit promises or guarantees,[113] and must not be vague[114] or general in nature.[115] Informal signals intended to encourage foreign investments are not formal representations that can give rise to legitimate expectations.[116] The statements by the President and the Minister of Health were not specifically made to the investor. They were informal signals intended to encourage foreign investment. Therefore, they do not give rise to legitimate expectations.

83. Further, general municipal legislation does not give rise to legitimate expectations.[117] The absence of a compulsory licensing provision in the Respondent's laws at the time of making the investment does not give rise to an expectation that the law will never

[108] *EDF v. Argentina*, at ¶217; *Total v. Argentina*, at ¶101.
[109] *Philip Morris v. Uruguay*, at ¶481; *Parkerings v. Lithuania*, at ¶332; *Jonathan Moffett*, at ¶19; *Niazi v. Secretary of State*, at ¶30.
[110] *Sempra v. Argentina*, at ¶298.
[111] *Waste Management v. Mexico*, at ¶*98; EDF v. Romania*, at ¶216.
[112] *Continental Casualty v. Argentina (Award)*, at ¶8; *Duke Energy v. Ecuador*, at ¶340; *EDF v. Argentina, at* ¶217.
[113] *Methanex v. USA*, at ¶79.
[114] *White Industries v. India*, at ¶10.3.17.
[115] *El Paso v. Argentina (Award)*, at ¶375-377.
[116] *Nagel v. Czech Republic*, at ¶183.
[117] *Philip Morris v. Uruguay*, at ¶377.

change. The legitimate expectations of an investor will not prevail over a State's right to enact, modify or cancel a law,[118] unless there are definitive, unambiguous and repeated assurances.[119] There were no such unambiguous and repeated assurances made to the Claimant.

84. Furthermore, obligating a Host State to not amend its legal framework as times and needs change[120] would infringe the State's sovereignty.[121] An investor's legitimate expectations do not survive in a change in the circumstances existing in the Host State, such as a change in the public health scenario.[122] The introduction of the Law was subsequent to a sudden upsurge in the number of greyscale cases, whereby the demand rose by more than 16 times. Therefore, the Claimant's legitimate expectations would not apply in such a changed set of circumstances, and the Respondent had the right to amend its laws.

iv. Alternatively, the Respondent's actions falls within the police powers of a State.

85. The exercise of normal regulatory power in pursuance of public interest measures such as public health are not prevented by the 'fair and equitable treatment' standard.[123] Every State has the sovereign right to exercise its police powers in a non-arbitrary and non-discriminatory manner to protect public health.[124] Under a State's police powers, it may even cause property owners significant economic losses by taking their property, without incurring liability for the same.[125] A change in law would only be a violation of the BIT if there is a "roller-coaster effect of legislative changes,"[126] and not an ordinary amendment to the laws of the Host State.

86. The enactment of the Law is an ordinary amendment to the laws of the Host State. Therefore, the enactment falls squarely within the police powers of the State.

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[118] *Parkerings v. Lithuania*, at ¶332; *Philip Morris v. Uruguay*, at ¶422.
[119] *Marvi v. Mexico*, at ¶148.
[120] *Continental Casualty v. Argentine (Award)*, at ¶258.
[121] *Moshe Hirsch*, at p. 3.
[122] *Philip Morris v. Uruguay*, at ¶407.
[123] *Philip Morris v. Uruguay*, at ¶423.
[124] *Philip Morris v. Uruguay*, at ¶382; *Thunderbird v. Mexico*, at ¶102.
[125] HORN & KROLL, at p. 283.
[126] *PSEG v. Turkey*, at ¶250, 252-253.

B. <u>The enactment of the Law and the grant of the license cannot be adjudged as a violation of the Respondent's obligations under the TRIPs Agreement.</u>

87. The Respondent's actions cannot be adjudged as a violation of the TRIPs Agreement as ***(i)*** this Tribunal cannot adjudicate upon TRIPs obligations; and, alternatively, ***(ii)*** the Respondent has not violated the TRIPs Agreement.

i. The Tribunal cannot adjudicate upon TRIPs obligations.

88. The World Trade Organization (**"WTO"**) has a Dispute Settlement Understanding[127] that confers compulsory jurisdiction over any dispute between WTO member States to the WTO Dispute Settlement System.[128] Further, Article 64 of the TRIPS Agreement provides that disputes pertaining to compliance with TRIPs obligations are subject to the WTO's dispute settlement procedures.[129] Submission of a dispute to a judicial forum outside the WTO framework is a violation of the State's obligation to compulsorily resolve disputes through the WTO Dispute Settlement System.[130]

89. Therefore, this Tribunal does not have jurisdiction to determine if the Respondent's grant of the compulsory license is compliant with its obligations under the TRIPs Agreement.

ii. Alternatively, the Respondent has not violated the TRIPs Agreement.

90. The Doha Declaration makes developing nations' obligations under the TRIPs Agreement less onerous.[131] It provides that the TRIPs Agreement is to be interpreted and implemented in a manner supportive of the Contracting States' right to promote public health[132] and access to medicines for all,[133] especially in the face of health crises resulting from HIV/AIDS, malaria, tuberculosis, and other diseases.[134]

91. Regardless, the Respondent's grant of the compulsory license is compliant with its obligations under the TRIPs Agreement. Article 31 of the TRIPs Agreement allows a State to issue compulsory licenses for patents for 'other use'. 'Other use' includes use by

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[127] *DSU*.
[128] *DSU*, art. 6(1).
[129] *TRIPs*, at art. 64; *DSU*, art. 23.
[130] *EC - Commercial Vessels*, at, ¶7.186.
[131] *Sherman & Oakley*, at p. 358-59.
[132] *World Trade Organization, Ministerial Declaration*, at ¶4.
[133] *World Trade Organization, Ministerial Declaration*, at ¶4.
[134] *World Trade Organization, Ministerial Declaration*, at ¶1.

governments for their own interests.[135] The grant of the compulsory license for *Valtervite* was to in order to allow greyscale medicines to be provided to the population of Mercuria at affordable rates, which was an objective of the Respondent. Therefore, the grant of the license falls within the scope of Article 31.

92. Article 31(a) requires that every compulsory license must be considered on its individual merits. The grant of the compulsory license in the present case was done in light of a shortage of *Sanior* available to the Mercurian population at affordable rates.[136]

93. Article 31(b) provides that the requirement to make an initial attempt to obtain a voluntary license before the grant of a compulsory license may be waived during a national emergency, circumstances of extreme urgency, or for a public non-commercial use of the patent.[137] The Doha Declaration further allows nations to develop their own definitions of 'national emergency'.[138] Public health crises, such as epidemics, can represent a national emergency or other circumstances of extreme urgency.[139] The Respondent was ravaged by the epidemic of greyscale in the time leading up to the grant of the compulsory license.[140] This qualifies as a circumstance of extreme urgency, and consequently, there is no requirement on the Respondent to make efforts to obtain a voluntary license for *Valtervite* from the Claimant. Therefore, the grant of the license is compliant with Article 31(b) of the TRIPs Agreement.

94. Article 31(c) provides that the scope and duration of a compulsory license shall be limited to the purpose for which it was authorized.[141] The grant of license to HG Pharma was limited to secure the public health of the Mercurian population.[142] Further, the duration of the license was limited till the time the greyscale epidemic was no longer a threat to public health in Mercuria.[143] Therefore, the grant is compliant with Article 31(c) of the TRIPs Agreement.

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[135] *WTO Factsheet,* at p.4.
[136] *Annexure 3 to Procedural Order No. 1*, at p. 42.
[137] *Tyler Cowen*; *TRIPs*, art. 31(b).
[138] *World Trade Organization, Ministerial Declaration,* at ¶5(c).
[139] *Susan K. Sell*, at ¶41.
[140] *Statement of Uncontested Facts*, at ¶2.
[141] *TRIPs*, art. 31(c).
[142] *Statement of Uncontested Facts*, at ¶21.
[143] *Statement of Uncontested Facts*, at ¶21.

95. Article 31(f) provides that any such compulsory license shall be authorized predominantly for the supply of the domestic market of the State authorizing such use.[144] The compulsory license for *Valtervite* was authorized only for the population of the Respondent. Further, export of medicines to countries that do not have local production of that medicine is permitted.[145] Therefore, the grant of the compulsory license is compliant with Article 31(f) of the TRIPs Agreement.

96. Lastly, Article 31(h) provides that the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.[146] Adequate remuneration is interpreted according to the limits of each State's available resources.[147] Developing countries are unable to pay compensation at the patent holder's full market price, as they lack resources to address public health issues.[148] The grant of the compulsory license entailed a royalty of 1% which was to be paid to the Claimant.[149] The royalty rates in the Respondent State at the time of the grant of the license were between 0.5% to 3%. Therefore, adequate remuneration was being provided to the Claimant and the grant of the compulsory license is compliant with Article 31(h) of the TRIPs Agreement.

97. Therefore, the Respondent's grant of the compulsory license does not violate any obligation under the TRIPs Agreement.

[144] *TRIPs*, art. 31(f).
[145] *Decision of General Council*, at p. 6.
[146] *TRIPs*, art. 31(h).
[147] *Robert Weissman*, at p. 1114.
[148] *Robert Weissman*, at p. 1114.
[149] *Statement of Uncontested Facts*, at ¶21.

IV. THE RESPONDENT IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS.

98. The Respondent has not violated its obligations article 3 of the BIT as **(A)** it has not violated fair and equitable treatment under the BIT; **(B)** it has not breached its obligation under the New York Convention.

A. <u>The Respondent has not failed to accord the fair and equitable treatment as per Article 3(2) of the BIT.</u>

99. The Respondent has not failed to accord fair and equitable treatment since ***(i)*** there has not been a denial of justice by the Respondent; ***(ii)*** the Respondent has not violated the 'effective means' standard by the conduct of its judiciary.

i. There has not been a denial of justice by the Respondent.

100. A denial of justice is a breach of the obligation to accord fair and equitable treatment.[150] The standard of proving a denial of justice is objective and requires the demonstration of "a particularly serious shortcoming" and egregious conduct that "shocks, or at least surprises, a sense of judicial propriety".[151] Only if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law.[152]

101. There is no denial of justice by the Respondent as **(a)** the Claimant's claims have not been subjected to undue delay;[153] and **(b)** the Claimant has failed to exhaust the available local remedies. [154]

a. The Claimant's claims have not been subjected to undue delay.

102. Although there are no strict standards to determine an undue delay,[155] few factors have been identified which determine whether delays in judicial proceedings amount to a denial of justice.[156] These factors include the complexity of the proceedings, the need for

[150] *Franck Charles v. Moldova,* at ¶297.
[151] *Mondev* v. *USA,* at ¶127.
[152] ISSUES OF STATE RESPONSIBILITY, p. 58.
[153] *Robert Azinian v. Mexico,* at ¶269, 290.
[154] *Loewen v. USA,* at ¶154.
[155] *Toto v. Lebanon,* at ¶155.
[156] *Chevron v. Ecuador,* at ¶250.

swiftness, the behaviour of the litigants, the significance of the interest at stake and the behaviour of the courts themselves.[157]

103. Matters involving changes in jurisdiction and applications involving setting aside of an award on grounds of public policy are complex matters that take time to be resolved by the courts.[158] The proceedings in the High Court involved a transfer application of the enforcement proceedings from an ordinary bench to a commercial bench & back[159] The resolution of this transfer application in itself took a period of two and a half years. Further, the NHA had filed an application to set aside the Award on grounds of public policy. Therefore, the proceedings before the High Court were complex in nature.

104. A swift resolution is required in pertinent matters such as criminal proceedings or an application before human rights court. Commercial matters are not required to be resolved as swiftly.[160]

105. The behaviour of the NHA in seeking extensions and adjournments from the High Court is in the ordinary course of judicial proceedings.[161] Regardless, litigation strategies adopted by NHA during the enforcement proceedings cannot be attributed to the Respondent, because these acts were not acts authorized by the Respondent.[162] Further, acts of the Claimant, such as filing a reply after a long period of 60 days,[163] have equally contributed to the prolonged proceedings before the High Court.

106. The behaviour of the High Court is not objectionable in the present case. There were no prolonged periods of complete inactivity.[164] The enforcement proceedings had regular hearings, even in a country where the judiciary was already overburdened.[165] Further, rejection of objections regarding procedural law violations is a discretion that lies with the court.[166] Therefore, the High Court's grant of extensions and adjournments cannot be seen as conduct that shocks judicial propriety.

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[157] *White Industries v, India,* at ¶10.4.10.
[158] *White Industries v, India,* at ¶10.4.11.
[159] *Exhibit 1 to Notice of Arbitration*, at ¶26.
[160] *White Industries v, India,* at ¶10.4.14.
[161] *White Industries v, India,* at ¶10.4.15.
[162] *Saipem v. Bangladesh (Award)*, at ¶191.
[163] *Exhibit 1 to Notice of Arbitration,* at ¶10.
[164] *Chevron v. Ecuador,* at ¶250.
[165] *Exhibit 1 to Notice of Arbitration*, at ¶9.
[166] *Mondev v. USA*, at ¶86, *Jan v. Slovakia*, at ¶285.

107. Based on all the above considerations, it can be seen that though the enforcement proceedings have not concluded for seven years, the delay does not rise to the level of a denial of justice which shocks judicial propriety and is manifestly unjust. [167] Further, the delay cannot include the total period of seven years.[168] A period of two and a half years was spent in deciding the transfer application. These proceedings are separate from the enforcement proceedings, and this time period must be deducted while calculating the total period of delay.[169] Therefore, the delay is only of a period of five years, which does not rise to the level of denial of justice.[170]

b. The Claimant has not exhausted available local remedies.

108. The exhaustion of local remedies is a substantive element of a denial of justice claim, and not a mere procedural prerequisite.[171] The State does not commit an internationally wrongful act if local remedies are still available,[172] since the State still has an opportunity to redress the wrong in question.[173] A denial of justice arises only when the national judicial system as a whole has failed to correct an aberrant situation, despite being given a reasonable opportunity.[174] Further, the likelihood of success of the local remedies does not dilute the requirement of exhausting local remedies.[175]

109. The enforcement proceedings before the High Court are still pending before that court. The Claimant has not tried to approach any appellate court in the Respondent State.[176] Therefore, the available local remedies have not been exhausted, and a claim for denial of justice is unsustainable.[177]

ii. The Respondent has not violated the 'effective means' standard by the conduct of its judiciary.

[167] *Jan de Nul v. Egypt*, at ¶204.
[168] *White Industries v. India*, at ¶11.4.13.
[169] *White Industries v. India*, at ¶11.4.4.
[170] *White Industries v. India*, at ¶11.4.7.
[171] *Waste Management v. Mexico*, at ¶97.
[172] *Pantechniki v. Albania*, at ¶96-97; *Jan de Nul v. Egypt*, at ¶255–259.
[173] *Duke Energy v. Ecuador*, ¶391.
[174] *Pantechniki v. Albania*, at ¶97; *Jan De Nul v. Egypt*, at ¶209; JAN PAULSSON, at p. 100; *Loewen v. USA*, at ¶168.
[175] *Chevron v. Ecuador*, at ¶326.
[176] *Loewen v. USA*, at ¶151-154.
[177] *Loewen v. USA*, at ¶144.

110. The Respondent has not violated the 'effective means' standard as **(a)** the Respondent is under no obligation to provide effective means to the Claimant to assert its rights; or, alternatively, **(b)** the Respondent has not failed to provide effective means to the Claimant to enforce its rights.

a. The Respondent is under no obligation to provide effective means to the Claimant to assert its rights.

111. The obligation to provide effective means to assert claims and enforce rights is a special, autonomous treaty obligation, and not a mere restatement of the customary law standard of denial of justice.[178] All tribunals dealing with the 'effective means' standard have had a specific provision in their respective BITs obligating States to provide effective means.[179] The BIT in the present case does not have any substantive provision obligating States to provide effective means. Further, recitals in the preamble do not give rise to substantive obligations on the Host State.[180]

112. Therefore, the Respondent is under no obligation to provide effective means to the Claimant to enforce his rights.

b. Alternatively, the Respondent has not failed to provide effective means to the Claimant to enforce its rights.

113. In determining a breach of the 'effective means' standard, a measure of deference has to be afforded to the domestic justice system.[181] A State must provide an effective framework or system for the enforcement of rights, but it does not offer guarantees in individual cases.[182]

114. Although there is no definition for determining when a party is fails to provide effective means,[183] a prolonged period of complete inactivity by the court has been considered a

[178] *Chevron v. Ecuador,* at ¶242-243.
[179] *Duke Energy v. Ecuador*, at ¶390; *Petrobart v. Kyrgyz Republic*, at p. 12; *White Industries v. India*, at ¶11.1.1 *Chevron v. Ecuador*, at ¶206.
[180] *Bayindir v. Pakistan (Jurisdiction),* at ¶230; *Bayindir v. Pakistan (Award),* at ¶153-155; *Howard Mann,* at p. 10.
[181] *Chevron v. Ecuador,* at ¶247.
[182] *Amto v. Ukraine*, at ¶88.
[183] *J. Steven Jarreau*, at p. 430.

breach of this standard.[184] There was no prolonged period of complete inactivity in the enforcement proceedings before the High Court of Mercuria.

115. Further, court congestion and backlogs are relevant factors to be considered in determining the period of delay that is reasonable in the circumstances.[185] Despite the congestion of cases in the judiciary, the High Court held regular hearings in the enforcement proceedings. This further mitigates the unreasonableness of the delay.

116. Therefore, the Respondent has not failed to provide effective means to the Claimant to enforce its rights.

B. The Respondent has not violated its obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

117. The New York Convention under Article III makes it mandatory for a Contracting State to recognize arbitral awards as binding and enforce the award granted in another Contracting State.[186] However, it does not prescribe any time limit for such enforcement. The time periods applicable to recognition and enforcement of awards are procedural issues that are governed by the domestic laws of the Contracting States.[187]

[184] *Chevron v. Ecuador,* at ¶256.
[185] *White Industries v. India,* at ¶11.3.2.
[186] *New York Convention,* art. 3.
[187] ALBERT JAN VAN DEN BERG, at p. 240.

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

118. The Respondent is not liable for the termination of the LTA as **(A)** Article 3(3) of the BIT does not elevate a breach of a contract to a treaty claim; or, alternatively, **(B)** Article 3(3) only mandates the observance of contracts where the State participates as a sovereign; or, alternatively, **(C)** the Respondent has not entered into any contractual obligations itself; or, alternatively, **(D)** the actions of the NHA are not attributable to the Respondent.

A. Article 3(3) of the BIT cannot elevate a contractual breach to a treaty claim.

119. Article 3(3) does not elevate a contractual breach to a treaty claim as ***(i)*** a literal interpretation of Article 3(3) is not tenable; and therefore, ***(ii)*** Article 3(3) must be interpreted in a restrictive manner.

i. A literal interpretation of Article 3(3) is not tenable.

120. A literal interpretation is not tenable as **(a)** it leads to a broad, ambiguous and absurd result; and **(b)** it renders the other substantive protections of the BIT meaningless.

a. A literal interpretation leads to a broad, ambiguous and absurd result.

121. The phrase 'any obligation' in Article 3(3) of the BIT does not differentiate between statutory, administrative or contractual obligations. By a literal interpretation, all of these obligations would be included within the ambit of Article 3(3). Further, the 'obligations' which are the subject matter of the clause may be commitments of the State itself as a legal person, or of any entity whose acts are attributable to the State.[188] Therefore, any commitments of the State in respect to investments can be transformed into treaty claims. Such an interpretation would be destructive of the distinction between the international and national legal orders.[189]

122. Therefore, the liberal interpretation of Article 3(3) leads to a broad, ambiguous and absurd result.

[188] *SGS v. Pakistan*, at ¶166.
[189] *El Paso v. Argentina (Jurisdiction)*, at ¶82.

b. A literal interpretation renders the other substantive protections of the BIT meaningless.

123. If Article 3(3) is interpreted literally, the breach of 'any obligation' of the State would amount to a treaty violation. Aggrieved investor would simply have to demonstrate that any State interference with their investment is a violation of the Home State's municipal or contractual obligation. They would no longer have to satisfy the high thresholds set for the violation of other substantive protections of the BIT, such as fair and equitable treatment, expropriation, etc. This would makes other substantive protections of the BIT substantially superfluous.[190]

124. Therefore, Article 3(3) cannot be given a literal interpretation that elevates contractual claims to the level of treaty claims. As a result, the breach of the LTA would not amount to a breach of Article 3(3).

ii. Consequently, Article 3(3) must be interpreted in a restrictive manner.

125. Article 3(3) must be interpreted restrictively as **(a)** it is an exception to a general rule of international law; and **(b)** a restrictive interpretation imposes less onerous obligations on States.

a. Article 3(3) is an exception to a general rule of international law.

126. A treaty does not create an exception to an established principle of international law, unless the words of the treaty clearly demonstrate an intention to do so.[191] It is a widely accepted principle of international law that a mere contractual breach by a State is not in itself a violation of international law.[192]

127. Consequently, Article 3(3) cannot make a State liable in international law for a contractual violation, unless there is clear and convincing evidence that it was the intent of the Contracting States to do so.[193] There is no clear evidence that Mercuria and Basheera intended Article 3(3) to have such a meaning. Further, the words of Article 3(3) are too loosely framed and do not specifically make contractual breaches a violation of

[190] *SGS v. Pakistan*, at ¶168.
[191] *ELSI case*, at ¶98.
[192] STEPHEN M. SCHWEBEL at p. 103.
[193] *SGS v. Pakistan*, at ¶167.

the BIT. Therefore, Article 3(3) does not prevail over the general rule of international law that a State is not liable in international law for contractual breaches.

b. The restrictive interpretation is less onerous to the Contracting States.

128. The principle of *in dubio mitius* provides that if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the Contracting States, or which interferes less with their territorial supremacy.[194]

129. The literal interpretation of Article 3(3) would create unqualified and far-reaching obligations on the Contracting States.[195] Therefore, such an onerous meaning cannot be given to Article 3(3) and an alternative meaning is to be preferred.

B. <u>Alternatively, Article 3(3) only mandates the observance of contracts where the State participates as a sovereign.</u>

130. Article 3(3) must be interpreted in light of its object and purpose.[196] The scope of the clause was originally intended to be restricted to large-scale investment and concession contracts, in the making of which the State is deliberately exercising its sovereignty. Ordinary commercial contracts would not fall within the scope of the clause.[197] Therefore, if the core of a contractual dispute does not involve the exercise of governmental powers, then Article 3(3) would not apply to that circumstance.[198]

131. Further, it is necessary to distinguish between the State as a sovereign and the State as a merchant for the purpose of international law.[199] Only acts involving some form of State interference with the investor's operations and contracts are decided by international law.[200] Purely contractual breaches are decided by the domestic contractual law of the State, and not by international arbitration.[201]

[194] OPPENHEIM'S INTERNATIONAL LAW, at p. 1278; *Nuclear Tests case*, at p. 267.
[195] *SGS v. Pakistan*, at ¶167.
[196] *VCLT*, art. 31.
[197] *C. N. Brower*, at p. 93, 105.
[198] *Thomas W. Walde*, at p. 205.
[199] *El Paso v. Argentina (Jurisdiction)*, at ¶79.
[200] *Joy Mining v. Egypt*, at ¶72.
[201] *Vivendi v. Argentina (Annulment)*, at ¶96.

132. Therefore, Article 3(3) must be interpreted as only applying to contracts where the State is participating or interfering in its capacity as a sovereign, such as investment agreements between an investor and the Host State.[202]

133. The LTA involved the NHA taking up ordinary commercial obligations. Further, the termination of the LTA was also not done by any sovereign interference, but was only done in a purely commercial capacity. Therefore, the breach of the LTA would not amount to a breach of Article 3(3) of the BIT.

C. Alternatively, the Respondent has not entered into any contractual obligation.

134. Article 3(3) does not affect the parties to the contract or the proper law governing the contract.[203] Contractual obligations will still be governed by the domestic contract law, and the parties to the obligation remain as they were under contract law. [204]

135. Article 3(3) only mandates the performance of a contractual obligation, once it is ascertained to exist.[205] A contract creates obligations only on the parties to the contract. If a sub-entity of the State has entered into a contract, and the State is not a party to the contract, there exist no contractual obligations on the State. Therefore, Article 3(3) would not apply where the State itself is not a party to the contract.[206]

136. The LTA was contracted between the NHA and the Claimant. Therefore, the Respondent is not a party to the LTA and will not be obligated by it.

D. Alternatively, the actions of NHA in breaching the contract are not attributable to the Respondent.

137. The actions of NHA are not attributable to the Respondent as ***(i)*** it is not an organ of the Respondent State; and ***(ii)*** it did not exercise any governmental authority vested in it in terminating the LTA.

i. The NHA is not an organ of the Respondent.

[202] *El Paso v. Argentina (Jurisdiction)*, at ¶85; *Pan American v. Argentina*, at ¶109; *Sempra v. Argentina*, at ¶307; *Noble Ventures v. Romania*, at ¶51.
[203] *CMS v. Argentina (Annulment)*, at ¶95.
[204] *SGS v. Philippines*, at ¶126.
[205] *SGS v. Philippines*, at ¶126.
[206] *Impregilo v. Pakistan*, at ¶223; *Nagel v. Czech Republic*, at ¶162; *Azurix v. Argentina*, at ¶384; *Hamester v. Ghana*, at ¶347; *Amto v. Ukraine*, at ¶110; *Anthony C. Sinclair*, at p. 12.

138. Article 4(2) of the ARSIWA explains the relevance of internal law in determining the status of an entity as a State organ.[207] Where there is no law granting the status of an organ to an entity, attribution does not occur.[208] Mere ownership of an entity by the State does not automatically convert that entity into an organ of the State.[209] The NHA has not been characterized as an organ under any internal law.

139. Although the status of an organ may also be bestowed by practice, it requires an exceptionally great degree of State control over the entity in question.[210] It must be shown that the entity was in complete dependence of the State, of which the entity is a mere instrument[211] lacking any real autonomy.[212] Such dependence has to be established based on factors such as whether there was State involvement exceeding the provision of training and financial control; whether there was complete control *in fact* over the entity, as opposed to a mere potential for control; and whether the State selected, installed or paid the leaders of the group.[213]

140. It has not been shown that the Respondent was exercising control over the NHA's activities beyond financial assistance. Further, it has not been shown that NHA's management was appointed or influenced by the Respondent State. The Respondent has also not been shown to have significant ownership in the NHA. Furthermore, the NHA itself designed the 5-year plans that guided its activities.

141. Therefore, it cannot be said that the NHA is completely dependent on the Respondent and lacks any real autonomy. Consequently, it cannot be said that the NHA is an organ of the State.

ii. The NHA did not exercise any vested governmental authority in terminating the LTA.

142. Firstly, to attribute NHA's acts to the Respondent on this ground, it must be shown that the NHA was empowered with governmental authority by any law in force in the

[207] *ARSIWA*, art. 4.
[208] *EDF v. Romania*, at ¶190.
[209] *Nagel v. Czech Republic*, at ¶162-165.
[210] *Genocide case*, at ¶393.
[211] *Genocide case*, at ¶392.
[212] *Genocide case*, at ¶394.
[213] JAMES CRAWFORD (THE GENERAL PART), at p. 125.

Respondent State.[214] There is no provision of law that specifically empowers the NHA to exercise its functions or enter into contracts with investors.

143. Secondly, under this ground, only acts involving the exercise of governmental authority are attributable to the State.[215] Consequently, acts which are essentially commercial in character and are not related to the exercise of governmental authority will not be attributed to the State.[216] The termination of the LTA to meet growing demands for drugs and a determination that the Claimant was performing unsatisfactorily are not actions that would fall under any implied governmental authority given to NHA.

144. Therefore, the actions of NHA are not attributable to the State.

[214] *ARSIWA*, art. 5.
[215] *ARSIWA*, art. 5.
[216] *Maffezini v. Spain (Jurisdiction)*, at ¶57.

REQUESTS FOR RELIEF

In light of the submissions made, the Respondent hereby respectfully requests the Tribunal to dismiss all of the claims raised by the Claimant, and in particular, to find and order that:

1. The Tribunal lacks jurisdiction over the claims in relation to the Award;
2. The Claimant cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;
3. The Respondent has not failed to accord fair and equitable treatment to the Claimant;
4. The Respondent is not liable under Article 3 of the BIT for the conduct of its judiciary in relation to the enforcement proceedings;
5. The termination of the LTA by the Respondent's NHA does not amount to a violation of Article 3(3) of the BIT;

And accordingly order the Claimant to restitute all costs incurred by the Respondent in relation to the present proceedings, or such amount as it finds reasonable and just by a determination at the Costs Stage, as well as any other relief that the Tribunal deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Sd/-

(Counsels on behalf of the Respondent)

25 September, 2017