TEAM KEITH

PERMANENT COURT OF ARBITRATION

ATTON BORO LIMITED

(“CLAIMANT”)

V.

THE REPUBLIC OF MERCURIA

(“RESPONDENT”)

PCA CASE NO. 2016-74

MEMORIAL FOR RESPONDENT

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INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
ABC	Atton Boro Company
ABG	Atton Boro Group
Annex	Annexures to the FDI Moot Case 2017
Art./Arts.	Article/Articles
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
CIL	Customary International Law
Claimant	Atton Boro Ltd.
Claimant Exhibit	Exhibits annexed to Claimant's Notice of Arbitration
DoB	Denial of Benefits
DoJ	Denial of Justice
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
ed.	Editors/Edited
et al.	And others
FET	Fair and Equitable Treatment
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
i.e.,	Id est
IIA	International Investment Agreement
Line	Line marked in the FDI Moot Case 2017

LTA	Long Term Agreement
NHA	National Health Authority
Notice of Arbitration	Correspondence requesting institution of current Tribunal
Parties	Republic of Mercuria and Kingdom of Basheera
PO1/PO2/PO3	Procedural Orders issued by this tribunal
PCA	Permanent Court of Arbitration
Response to Notice of Arbitration	Republic of Mercuria's Response to Notice of Arbitration
Respondent	Republic of Mercuria
SUFs	Statement of Uncontested Facts
Tribunal	Present arbitral tribunal constituted under the PCA Arbitration Rules, 2012
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
v.	Versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WHO	World Health Organisation
WTO	World Trade Organisation

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STATEMENT OF FACTS

The Proceedings

1. Claimant, Atton Boro Limited, is a company incorporated in the Kingdom of Basheera ["**Basheera**"]. It is a wholly owned subsidiary of Atton Boro Group ["**ABG**"], a sophisticated multinational conglomerate active in the pharmaceutical sector. Both ABG and Claimant are ultimately controlled by Atton Boro & Company ["**ABC**"], which is organised under the laws of the People's Republic of Reef ["**Reef**"].

2. Respondent is the Republic of Mercuria ["**Mercuria**"]. It concluded an Agreement for the Promotion and Reciprocal Protection of Investments with Basheera on Jan. 11, 1998 ["**BIT**"]. Mercuria and Basheera exchanged the instruments of ratification of the BIT on Mar. 10, 1998. The BIT came into force on Apr. 10, 1998.

3. Both Mercuria and Basheera are parties to the WTO, the ICESCR and the New York Convention.

The Patent

4. Claimant specialises in the manufacture and sale of a wide range of pharmaceutical products. However, its activities in Basheera are confined to carrying out regulatory tasks for ABG affiliates in South America and Africa.

5. ABG developed a compound *Valtervite* that is effective in retarding the progress of a chronic disease greyscale. Respondent granted a patent for *Valtervite* to ABC on Feb. 21, 1998, prior to the BIT coming into force. The same was subsequently assigned to Claimant on Apr. 15, 1998. ABC funded Claimant to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with Respondent's National Health Authority ["**NHA**"].

The National Health Authority

6. In 1998, Respondent established the NHA, which exercises operational autonomy in undertaking social remedial work for tackling critical diseases in Mercuria and assisting Respondent in matters of public health. In 2003, the NHA submitted a report to the Ministry of Health which highlighted the growing incidence of greyscale, a non-fata, incurable disease, in the country, and urged the government to take remedial steps in this regard.

The Long-Term Agreement

7. In May 2004, the NHA wrote an invitation to Claimant to make an offer for the discounted supply of its patent-enabled drug Sanior. After a protracted negotiation process, Claimant entered into a Long-Term Agreement ["**LTA**"] with NHA on July 20, 2004. The agreement was to remain valid for a period of 10 years *subject to* Claimant's satisfactory performance.

8. In early 2008, as the number of greyscale patients rose, the NHA tried to renegotiate the price for Sanior under the LTA. However, Claimant did not agree to a reasonable discount. The NHA soon terminated the LTA due to Claimant's unsatisfactory performance.

The Award

9. In January 2009, Claimant, relying on the dispute resolution clause in the LTA, invoked arbitration against the NHA, and obtained an award for damages from a tribunal seated in Reef ["**Award**"]. On Mar. 3, 2009, Claimant filed an application for enforcement of the Award before the High Court of Mercuria. However, as Mercuria is struggling with an overburdened judiciary, the Award is yet to be enforced.

The Amendment to Intellectual Property Law

10. On Oct. 10, 2009, Respondent promulgated Law No. 8458/09 ["**Amendment**"] to introduce a new regime of compulsory licensing of registered patents. On Apr. 17, 2010, the High Court of Mercuria granted a compulsory license for manufacturing *Valtervite* to HG-Pharma ["**License**"], a generic drug manufacturer, until greyscale was no longer a threat to public health in Mercuria. Unable to adapt to the new regulatory environment, Claimant closed down operations of Sanior in Mercuria.

Institution of Arbitration

11. In 2016, Claimant commenced arbitral proceedings before this tribunal ["**Tribunal**"] under the Permanent Court of Arbitration ["**PCA**"] Arbitration Rules, 2012, pursuant to Art.8(2) of the BIT.

ARGUMENTS ON JURISDICTION

1. THE TRIBUNAL DOES NOT POSSESS JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD.

12. Claimant had entered into the LTA with the NHA for the supply of its drug, Sanior.[1] The LTA was terminated due to Claimant's unsatisfactory performance.[2] Consequently, Claimant invoked arbitration under the LTA and obtained a favourable award for monetary damages from a tribunal seated in Reef ["**Award**"].[3]

13. Despite the ongoing enforcement proceedings in relation to the Award before Respondent's courts, Claimant contests violations of the BIT claiming undue delay. However, these claims cannot be brought before this Tribunal as the Award neither qualifies as an investment *by itself* under the BIT [**1.1**], nor is it a *continuation* of Claimant's investment, namely the LTA [**1.2**].

1.1. The Award by itself does not qualify as an investment.

14. The jurisdiction of *rationae materiae* or qualification of assets as protected investments requires fulfilment of both the definition of investment under the concerned IIA, as well as per the notion of investment.[4] Every word in a treaty must be interpreted according to its plain meaning.[5] This initiates a query into the *notion of investment*, famously prescribed by the *Salini* test.[6] In the absence of such a test, the IIA will be expanded beyond the intention of the parties,[7] as the difference between an ordinary commercial transaction and an investment will be blurred.[8] The Award neither fulfils the definition of investment per the BIT [**1.1.1**] nor does it qualify as investment as per the *Salini* test [**1.1.2**].

1.1.1 <u>The Award does not qualify as an investment under the BIT.</u>

15. For any asset to be protected as an investment, it must fulfil the definition of investment under the relevant IIA. Thus, it must *first,* fall under any of the categories provided

[1] SUFs, ¶10.
[2] SUFs, ¶17.
[3] SUFs, ¶17.
[4] *Romak/Uzbekistan,* ¶¶176,177; *Alps/Slovakia,* ¶241; Schreuer-ICSID, at 129,130; Wolters, at 175.
[5] VCLT, Art.31(1).
[6] *Romak/Uzbekistan,* ¶176; Grabowski, at 287.
[7] Rajput, at 12.
[8] *Joy/Egypt,* ¶58.

under the definition of investment,[9] and *second*, fulfil the territorial requirement delineated in the chapeau of the definition.[10]

16. In the instant case, the Award does not qualify as an investment under any of the listed categories, especially Art.1(1)(c) or Art.1(1)(e) of the BIT. Per the plain meaning of the terms, Art.1(1)(c) includes investments that are claims for money under a contract while Art.1(1)(e) covers rights conferred by law or contract. However, an arbitral award is a legal instrument which only provides for the disposition of rights and obligations arising out of *another* instrument. Thus, the Award does not *create* any of the rights under the listed categories but merely *declares* them.[11] Based on this *analytical distinction* between the creation and disposal of rights, an arbitral award is disqualified from constituting an investment.[12] Therefore, the Award in the present matter does not constitute an investment under the BIT.

17. Additionally, the Award does not fulfil the requirement of territoriality under the BIT.[13] Since the host state's right to regulate is limited by territory, the place of investment must necessarily fall within such limits of regulatory authority.[14] Where the investment may be subject to the regulatory authority of different states, the relevant territory marking the place of investment is the state with the *strongest connection* to the investment. For an arbitral award, the strongest connection lies with the state where the arbitral tribunal is seated because the seat not only governs the formation, composition and functioning of the tribunal, but also the *procedure and form of the award.*[15] In other words, since the courts at the *seat* oversee the arbitration, they, ultimately have the power to confirm or set aside the award and courts of other jurisdictions, when deciding upon the enforceability of the award, must provide absolute deference to such a decision.[16]

18. Further, unlike the state where the arbitral tribunal is seated, a state enforcing an arbitral award must first *recognise* it before any further legal action.[17] Additionally, the courts of state of enforcement faces limitations with respect to enforceability as well as

[9] Williams, at 877.
[10] Annex 1, line 996; Zheng, at 147.
[11] *GEA/Ukraine*, ¶161.
[12] *GEA/Ukraine*, ¶162; Clasmeier, at 91.
[13] Annex 1, line 997.
[14] Zheng, at 140,147.
[15] Redfern/Hunter, at 78,79.
[16] Savage/Gaillard, at 972; Yukos/OJSC; Russia/Yukos; Van den Berg, at 15.
[17] *Bayview/Mexico*, ¶101; Born, at 2894,2895; Zheng, at 149.

the grounds on which the award can be set aside.[18] In the present case, even if it is assumed that the Award can be protected as an investment, *Reef* and not Mercuria would be the place of investment.

19. This conclusion is buttressed by the understanding that the place of investment must overlap with the investment's contribution to the territory of such state.[19] The Award does not contribute but in fact directly *hampers* the economic development of Respondent as it diverts NHA's resources allocated for public health towards the enforcement of the Award. In the absence of the Award's economic contribution, the territoriality requirement remains unfulfilled.

1.1.2 <u>The Award does not qualify as an investment under the Salini test.</u>

20. The *Salini* test requires the fulfilment of four conditions: *first,* contribution of capital or assets; *second,* commitment of the assets for a certain duration; *third,* undertaking of risks; and *fourth,* contribution to the economic development of the host state.[20] The application of the fourth criteria is dependent on the wording of the preamble of the applicable IIA, as it reflects the intention of the parties.[21] The intention of the Parties in the BIT is to *stimulate the … economic development of the Contracting Parties.*[22] This strengthens the applicability of the fourth criterion.[23]

21. The Award obtained by Claimant at Reef does not see any commitment of capital, duration or risk by Claimant in Mercuria. Additionally, an award for enforcement of a contractual agreement *simpliciter* does not contribute to the economy of the host state.[24] For this reason, no arbitral tribunal has recognized an arbitral award as an investment by itself.[25] Further, as iterated, the Award directly hampers the economic development of Respondent, thereby failing to fulfil the fourth criteria under the *Salini* test.[26]

[18] New York Convention, Art.VI; Lew/Mistellis/Kroll, ¶762.
[19] *Abaclat/Argentina,* ¶29; *SGS/Pakistan*, ¶136.
[20] *Salini/Morocco,* ¶152; Newcombe/Paradell, at 67.
[21] Rajput, at 12.
[22] Nacimiento/Lange, at 279,280; Rajput, at 12**.**
[23] Manciaux, at 448,449.
[24] *GEA/Ukraine*, ¶162.
[25] *Saipem/Bangladesh (Jurisdiction),* ¶113; Bjorklund-Enforcement, at 109.
[26] *Supra* ¶19.

1.2. The Award is not a continuation of Claimant's investment, *videlicet* the LTA.

22. For the Award to be a continuation of a pre-existing investment, it must either *crystallise* the rights of the LTA or form a part of its *overall operation*.[27] The only basis for crystallisation of a pre-existing investment is a transformation clause that precludes any change in the form of an investment from *affecting its character as an investment* in a different form.[28] However, each of these forms must individually retain the characterisation of an investment under the IIA as well as the *Salini* test at *every* stage of change.[29] Thus, any arbitral award being contested as a different form of an existing investment must qualify as an investment *by itself* after such transformation.[30] Since an arbitral award is a legal instrument that merely records the rights that exist by virtue of the *contract,* these rights do not emanate from the *award.* Therefore, an arbitral award can never constitute an investment,[31] and a contrary interpretation would result into arbitral awards in relation to ordinary commercial transactions, originally not protected investments, being challenged as *investments* before IIA tribunals.[32] Therefore, the present Award is not a crystallization of the LTA.

23. Further, the Award is not a part of the *overall operation* of the LTA. For an asset to fall under the overall operation of an existing investment, Claimant must show[33] that it is indispensable for the functioning of the investment and *cannot be dissociated* from it.[34] Arbitral tribunals have applied this test to *a series of interrelated contracts* where functioning of one is contingent on that of the other.[35] Here, the execution of the LTA was not contingent upon the Award since the Award merely provided a relief of monetary damages and not specific performance of the LTA. Therefore, it cannot be treated as a part of the LTA's overall operation.

2. CLAIMANT HAS RIGHTFULLY BEEN DENIED BENEFITS OF THE BIT BY RESPONDENT.

24. Claimant, incorporated in Basheera, is a wholly owned subsidiary of ABG. Both entities are *ultimately* controlled by ABC, incorporated in Reef. Claimant's main

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[27] *Saipem/Bangladesh (Jurisdiction),* ¶126.
[28] *Frontier/Czech,* ¶231.
[29] *GEA/Ukraine,* ¶162; *Romak/Uzbekistan,* ¶211.
[30] *GEA/Ukraine,* ¶162; *Romak/Uzbekistan,* ¶211; Bjorklund-Enforcement, at 106-108.
[31] *GEA/Ukraine,* ¶¶157-162; Bjorklund-Enforcement, at 117; *supra* §1.1.
[32] Nacimiento/Lange, at 279,280; Shihata/Parra, at 308.
[33] *Ceskoslovenska/Slovakia (Supplementary Decision),* ¶28; Dugan/Wallace/Rubins/Sabahi, at 280.
[34] *Ceskoslovenska/Slovakia,* ¶¶74–75,80,82.
[35] Schreuer-ICSID, at 245; *SOABI/Senegal,* ¶4.10.

activity in its place of incorporation, Basheera, is to carry on business of parent companies' patents in South America, Africa and Mercuria. The capital and patents for manufacture and other activities under the agreements are provided by ABC.

25. Unlike the Denial of Benefits ["**DoB**"] clause in the ECT, Art.2 of the BIT applies to the *entire* BIT and not merely a *part* of the treaty.[36] This difference in language renders the present invocation of the DoB clause as an issue of jurisdiction and not one of admissibility.[37] In this regard, the invocation of the DoB clause by Respondent at the time of assertion of claims by Claimant is appropriate [**2.1**]. Such an invocation is valid under the BIT as Claimant is controlled by a third state national [**2.2**] and does not have substantial economic activity in Basheera [**2.3**].

2.1. Respondent has invoked the DoB clause in a timely manner.

26. The term 'reserves the right' in a DoB clause ensures that the state has an opportunity to deny benefits to entities choosing a nationality of convenience and taking undue advantage of an IIA.[38] The state reserves this right to ensure that it has an opportunity to deny benefits *as and when the entity changes its corporate structure*.[39] This is in order to keep up with the changing dynamics of an entity which may vary from genuine to sham.[40]

27. This requirement to ascertain the structure of an entity only arises when it seeks benefit before the state, usually through a judicial process.[41] This is the stage wherein the state, based on the fulfilment of the objective criteria under a DoB clause, can deny benefits under the IIA.[42] Any other interpretation would lead to an absurd result wherein the state's ability to deny benefits under the IIA would depend on it keeping track of each and every change in the corporate structure and transactions undertaken by that entity.[43]

28. In this regard, the absence of clear textual language that specifically requires consultation and notice *before* the application of the clause, means that there is no bar from invoking the DoB clause in a retrospective manner.[44] In any case, such an

[36] Mistelis/Baltag, at 1315-1318.
[37] *Plama/Bulgaria*, ¶¶155,156; *Empresa/Ecuador*, ¶71; Mistelis/Baltag, at 1315-1318; Feldman-DoB, at 471.
[38] *AMTO/Ukraine*, ¶69.
[39] Feldman-DoB, at 471.
[40] Legum, at 525; *Guaracachi/Bolivia*, ¶376.
[41] Thorn/Doucleff, at 27.
[42] *Pac Rim/El Salvador*, ¶4.85.
[43] *Ulysseas/Ecuador*, ¶172; *Pac Rim/El Salvador*, ¶4.85; Feldman-DoB, at 471.
[44] Thorn/Doucleff, at 27; Badia, at 140.

interpretation would be contrary to the text of the DoB clause of this BIT, which that only limits the scope and not the time of its invocation.[45] In fact, the only limitation on the time at which the state may deny benefits is derived from the PCA Rules, which require all jurisdictional challenges to be raised only until the filing of the statement of defence.[46] Evidently, Respondent invoked the DoB clause in its Response to Notice of Arbitration.[47]

29. Further, an investor cannot contest that its expectations are affected by such retrospective application as he is aware of the existence of the clause, and the requirements for its application since the inception of the BIT.[48] Therefore, Respondent's DoB to Claimant was done in a timely manner.

2.2. Claimant is controlled by nationals of a third state.

30. The test of control given under the DoB clause is that of identifying the effective controller of an entity and not the owner.[49] Such effective control lies with the entity which has the financial and administrative control of the investor concerned.[50] Thus, even in the presence of an immediate owning entity, the effective control may lie with a different entity,[51] especially when the owner is only an intermediary for the ultimate owner.[52] In such a scenario, the entity providing control over technology, access to supplies, markets, capital, know-how and authoritative reputation is the effective controller.[53] ABC has provided the capital for setting up of manufacturing unit and other facilities for carrying out the pharmaceutical agreements entered into by Claimant.[54] In fact, the patents required to enter into such agreements have also been assigned by ABC to Claimant.[55] Therefore the effective control over Claimant lies with ABC, who is a national of third party state, Reef.

[45] Feldman-DoB, at 470; CAFTA-DR, Arts.10.12.2, 20.4.
[46] PCA Rules, Art.23.
[47] Response to Notice of Arbitration, ¶5.
[48] *Guaracachi/Bolivia,* ¶376.
[49] Schreuer-ICSID, at 323; *TSA/Argentina*, ¶153; *LETCO/Liberia,* ¶¶349,351.
[50] *LETCO/Liberia,* ¶¶349,351; Badia, at 137; *Thunderbird/Mexico,* ¶180.
[51] *Waste Management/Mexico,* ¶85; Schreuer-ICSID, at 323.
[52] Sornaraja, at 329; *Waste Management/Mexico,* ¶85; *SOABI/Senegal,* ¶37.
[53] *Thunderbird/Mexico,* ¶180.
[54] PO3, line 1572.
[55] SUFs, ¶4.

2.3. Claimant has no substantial business activity in Basheera.

31. Substantial business activity is not defined in the BIT and therefore, must be decided on a case to case basis.[56] It is a *qualitative assessment* of comparing the business activity of an entity in the host state to its business activity in the home state.[57] If the entity in the home state is only regulatory or is established solely to manage its business in the *host state*, then it lacks substantial business activity in the home state.[58] Though presence of office premises and payment of taxes may be indicators of a business,[59] 'substantial business activity' is confirmed only by the *genuine business* of that entity,[60] which here is the manufacture and sale of pharmaceutical drugs. Claimant does not have any manufacturing or sale of pharmaceutical products in the home state, Basheera. Therefore, it does not have substantial business activity in Basheera.

[56] Thorn/Doucleff, at 11.
[57] Thorn/Doucleff, at 23.
[58] Mistelis/Baltag, at 1315; *AMTO/Ukraine*, ¶¶39,40,43.
[59] *AMTO/Ukraine*, ¶69.
[60] *Yaung/Myanmar*, ¶¶9,10; Thorn/Doucleff, at 23.

ARGUMENTS ON MERITS

3. THE ENACTMENT OF LAW NO. 8458/09 AND THE GRANT OF A LICENSE FOR VALTERVITE DO NOT BREACH RESPONDENT'S OBLIGATIONS UNDER THE BIT.

32. The promulgation of Law No. 8458/09 to introduce a regime for allowing compulsory licenses of registered patents in Mercuria ["**Amendment**"] and the subsequent compulsory license issued for Claimant's patented compound Valtervite ["**License**"], [jointly referred to as "**Measures**"] do not breach the obligation to provide FET to Claimant's investment as per Art.3(2) of the BIT [**3.1**]. Additionally, Respondent has not expropriated Claimant's investment [**3.2**]. Contrary to Claimant's contention,[61] the present Tribunal is jurisdictionally limited to determining Respondent's liability under the BIT only, and in any case, Respondent has not breached its TRIPS obligations [**3.3**]. Alternatively, any breach is precluded from wrongfulness under Art.25 of the ASR [**3.4**].

3.1. Respondent has not breached its obligation to provide FET to Claimant.

33. Respondent has not breached Claimant's legitimate expectations. Claimant cannot legitimately expect Mercurian laws to remain frozen throughout the period of its investment [**3.1.1**]. Moreover, this expectation is not based on any specific representations made by Respondent [**3.1.2**]. Additionally, the issuance of the License does not amount to DoJ [**3.1.3**].

3.1.1. Claimant cannot legitimately expect Respondent's laws to remain immutable.

34. A treaty obligation to provide a stable legal regime under the FET standard flows only from an explicit reference in the language of the IIA, particularly the preamble.[62] No investment is subject to an automatic guarantee of stability that overrides a state's inherent and undeniable right to regulate.[63] Therefore, in the absence of a contractual stabilisation clause or a treaty obligation to maintain stability, amendment of the legal framework surrounding an investment is not unlawful.[64] Risks emanating from changes in the legal framework due to dynamic social, economic and political landscapes of

[61] Notice of Arbitration, ¶13.
[62] *MTD/Chile*, ¶113; *Siemens/Argentina*, ¶289; *Azurix/Argentina*, ¶360; Gazzini, at 158.
[63] *Eli Lilly/Canada*, ¶384; *Charanne/Spain*, ¶504; Hirsch, at 798; *Parkerings/Lithuania*, ¶322; *EDF/Romania*, ¶217.
[64] *CMS/Argentina*, ¶277; *Total/Argentina*, ¶17.

developing countries must be borne by the investor irrespective of investments becoming less lucrative.[65]

35. In the absence of any positive treaty obligation to maintain stability and in light of the public health crisis in Mercuria, it is unconscionable for Claimant to expect that the regulations applicable to its investment remain unaltered for the sake of its profitability, throughout the duration of the investment.

3.1.2. Claimant's expectations are not based on specific undertakings or commitments by Respondent.

36. A state is bound by the expectations it creates by making *specific* representations.[66] The act of granting a patent to an investor does not qualify as a specific representation, as it merely facilitates access to the domestic intellectual property system.[67] Even post grant, patents remain subject to the accepted checks and balances in the domestic laws which may include internationally recognised flexibilities such as those in TRIPS.[68] In fact, since both Parties are WTO members,[69] Claimant must limit its expectations to accommodate TRIPS flexibilities, such as compulsory licensing. Thus, the mere grant of a patent for Valtervite does not give rise to an expectation against the issuance of a compulsory license throughout the patent term.

37. Additionally, for a representation to be specific, it must be targeted at an identifiable person or group.[70] Mere encouraging remarks by governmental officials[71] and general legislative assurances made to a broad sector of the public[72] cannot raise legitimate expectations. In any case, the representations must be the *basis* of the investor's decision to invest, and must therefore be made *before* the investor decides to invest.[73]

38. Claimant's reliance on the statements of the Mercurian Presidency,[74] and the Minister of Health,[75] as representations promising stability is erroneous as these statements do not amount to *explicit* guarantees of protection to Claimant's investment. They

[65] *Urbaser/Argentina*, ¶¶342,622; Yannaca-Small, at 405.
[66] *Micula/Romania*, ¶668; Jacob/Schill, at 730.
[67] *Philip Morris/Uruguay*, ¶480; Liddell/Waibel, at 17.
[68] *Philip Morris/Uruguay*, ¶480; Ruse-Khan-Conflict, at 17.
[69] PO2, line 1497.
[70] Newcombe/Paradell, at 281; Snodgrass, at 53.
[71] *Nagel/Czech*, ¶326; Yannaca-Small-FET, at 401.
[72] *Continental Casualty/Argentina*, ¶259; *White Industries/India*, ¶10.3.17.
[73] *Parkerings/Lithuania*, ¶331; *Duke/Ecuador*, ¶340; Diehl, at 341.
[74] SUFs, ¶8.
[75] Annex 2.

constitute overarching policy objectives of Respondent, communicated generally to all intellectual property holders in Mercuria. Thus, in the absence of any specific representations by Respondent, there existed no legitimate expectations that could have been breached. Further, the LTA does not serve as a source of legitimate expectations because mere contractual expectations, different from expectations arising from the BIT, are not protected under the BIT owing to the different legal instruments they arise from.[76]

39. In any case, the assignment of the Valtervite patent, amounting to holding of an investment, preceded the representations as well as the conclusion of the LTA by six years.[77] Therefore, these representations were not the basis of Claimant's decision to invest.

3.1.3. Respondent's conduct does not amount to DoJ.

40. The prohibition against DoJ is a crucial component of the FET standard,[78] and condemns procedural misconduct that is malicious,[79] outrageous,[80] and shocks judicial propriety.[81] The standard requires adherence to basic legal mechanisms such as reasonable advance notice, a fair hearing, an unbiased adjudicator, and access to appeal mechanisms.[82]

41. This obligation to prevent DoJ is breached when the courts administer procedural justice in a patently inadequate, unjust or *arbitrary* way.[83] Non-arbitrariness requires that the state's conduct bears a *reasonable relationship to some rational policy*.[84]

42. The High Court conducted proceedings with due process, with hearings spanning over five months,[85] to which Claimant was impleaded as a party.[86] This provided Claimant with appropriate opportunities and time to establish its defence. Further, there was an appeal mechanism in place to review the validity of the License and the royalty,[87]

[76] *Duke/Ecuador,* ¶358; *Hamester/Ghana,* ¶335; Potesta, at 105.
[77] SUFs, ¶¶3,9.
[78] *Vivendi (I)/Argentina,* ¶80; *Azinian/Mexico,* ¶102; Francioni, at 730.
[79] *Azinian/Mexico,* ¶103.
[80] *Mondev/US,* ¶127.
[81] *Loewen/US,* ¶132; ELSI, ¶128; Paulsson, at 7.
[82] *ADC/Hungary,* ¶435; *Feldman/Mexico,* ¶140; Tully, at 667.
[83] *Rumeli/Kazakhstan,* ¶653; *Mondev/US,* ¶144; Yannaca-Small-FET, at 394.
[84] *Eli Lilly/Canada,* ¶423; *Saluka/Czech,* ¶460; Schreuer-Protection, at 188.
[85] SUFs, ¶21.
[86] PO3, line 1576.
[87] PO3, line 1580.

which Claimant did not avail, leading to a non-exhaustion of local remedies, and barring it from raising a claim before this Tribunal.[88]

43. Further, as iterated, DoJ is concerned only with procedural and not substantive aspects of judicial decisions.[89] Therefore, this Tribunal's mandate does not extend to reviewing the decision of the High Court of Mercuria.[90] In any case, the License was issued after a fair interpretation of the Amendment,[91] in light of Respondent's constitutional obligation to ensure universal healthcare,[92] and its international obligation to achieve the 'highest attainable standard of physical and mental health'.[93] Since there was a rational policy behind issuing the License, and it was not issued arbitrarily or maliciously, there has been no DoJ to Claimant.

3.2. The Measures do not amount to an expropriation.

44. Art.6(1) of the BIT prohibits both direct and indirect expropriation. In the absence of a transfer of legal title, there arises no question of direct expropriation.[94] Additionally the Measures do not amount to an indirect expropriation [**3.2.1**], and even if it is considered so, the expropriation is lawful [**3.2.2**].

3.2.1. <u>The License does not amount to indirect expropriation.</u>

45. By way of issuance of the License, there has been no 'substantial deprivation' of Claimant's investment that qualifies as a 'taking' [**3.2.1.1**]. In any case, the 'taking' does not rise to the level of indirect expropriation [**3.2.1.2**]. Further, Respondent has acted within its *police powers* [**3.2.1.2**] in a manner proportionate to its objective of safeguarding public health that precludes the measures from being expropriatory [**3.2.1.3**].

3.2.1.1. The License has not 'substantially deprived' Claimant of its investment.

46. Indirect expropriation occurs when the regulatory measure results in 'substantial deprivation' of the investor's economic rights, i.e., ownership, use, enjoyment or management of the business.[95] In absence of conceptual severance of investments in

[88] *Infra* §4.1.
[89] Paulsson, at 98.
[90] *Eli Lilly/Canada*, ¶225; *Duke/Peru*, ¶225; Newcombe/Paradell, at 241.
[91] PO2, ¶5.
[92] Annex 2, line 1256.
[93] ICESCR, Art.12.
[94] Dolzer/Schreuer, at 101; Kriebaum, at 971.
[95] *Fireman's Fund/Mexico,* ¶176(c); *Philip Morris/Uruguay*, ¶182; Baxter/Sohn, Art.10(3)(a).

assessing substantial deprivation, each of the investor's assets are not taken as individual investments in their own right – instead, the alleged expropriation of the business is examined as a whole.[96] Availability of alternate lines of continuing business precludes a finding of substantial deprivation.[97]

47. Claimant entered the Mercurian market by concluding several agreements like the LTA with Respondent and the NHA,[98] and expanded into several verticals in the pharmaceutical industry in Mercuria.[99] The License has affected Claimant's market for only one of its patented products – Valtervite. All other businesses of Claimant continue without disruptions.[100] Therefore, there is no substantial deprivation of Claimant's control over its investments in Mercuria.

3.2.1.2. Alternatively, the level of interference is not adequately high to raise the 'taking' to an expropriation.

48. In order to constitute indirect expropriation, a 'taking' has to *interfere* with an investment to such an extent that the 'substantial deprivation' is *permanent* or *persistent.*[101] Such a high level of interference is evidenced by assessing the scope and duration of the deprivation.[102] Herein, the License is restricted both territorially as well as temporally since it is to remain effective only until greyscale ceases to be a threat to public health in Mercuria.[103] In fact, the scope and duration of the License are limited by its *purpose of authorisation.*[104] Since the taking of Claimant's patent rights is neither extensive in scope nor permanent in duration, it does not amount to indirect expropriation.

3.2.1.3. The License was granted in pursuance of Respondent's police powers.

49. Per the *police powers* doctrine recognised in CIL[105] and also codified in Art.6(4) of the BIT, a state is not responsible for any economic disadvantage resulting from a *bona fide* exercise of its regulatory powers.[106] The issuance of a compulsory license for public

[96] *Philip Morris/Uruguay*, ¶284; Montt, at 189.
[97] *Feldman/Mexico*, ¶59; *Philip Morris/Uruguay*, ¶284.
[98] SUFs, ¶5.
[99] SUFs, ¶5.
[100] SUFs, ¶25.
[101] *Generation/Ukraine*, ¶20.32; *Fireman's Fund/Mexico,* ¶176(d); Salacuse, at 339.
[102] *Telenor/Hungary*, ¶70; Gibson, at 384.
[103] SUFs, ¶21.
[104] *Infra* §3.3.2.
[105] *Feldman/Mexico*, ¶103; *Saluka/Czech*, ¶262; Pellet, at 451.
[106] *Methanex/US*, §IV(D), ¶7; *Fireman's Fund/Mexico*, ¶176(j); Christie, at 331; Kriebaum, at 1000.

health, in a non-discriminatory manner and in compliance with local laws, will not amount to an indirect expropriation under the police powers doctrine.[107]

50. First, in ascertaining the legitimacy of public purpose behind a health-related policy, substantial deference must be given to host states' decision that is based upon scientific evidence[108] and professional judgement.[109] Greyscale, having affected 43 countries in 1985, has spread viciously since then to affect over three hundred thousand people in Mercuria alone.[110] It is analogous to drug-resistant gonorrhoea and zika, which are incurable and non-fatal,[111] and have been recognised by the WHO as public health emergencies.[112] Incontrovertibly, Respondent was faced with a public health crisis and resorted to the License for a public purpose.

51. Second, a discriminatory measure is evidenced by a lack of *rational justification of differential treatment*.[113] However no differential treatment has been meted out to Claimant or its investments. The Amendment applies generally to all patents that satisfy one of the three grounds stipulated in Section 23C – not meeting the reasonable requirements of the public, not being worked in Mercuria, and not available to the public at a reasonably affordable price. These conditions by themselves constitute valid grounds for issuing compulsory licenses and could not have resulted in either *de jure* or *de facto* discrimination against Claimant.[114] Therefore, the Measures were not targeted solely at Claimant's drug and are not discriminatory. Even if the License was the *only* license issued under the Amendment, the public health crisis warranted such a move and is therefore a rational justification for the inadvertent differential treatment.

52. Finally, with regard to compliance with local law and procedure,[115] the NHA's Annual Report observed that the number of patients lacking access to Sanior at prices charged by Claimant had increased nearly 10 times within a single year.[116] Evidently, the drug Sanior was not available to the public at a reasonably affordable price and met the

[107] Mercurio, at 912; Gibson, at 358.
[108] *Chemtura/Canada*, ¶134; Kriebaum, at 1019.
[109] *Philip Morris/Uruguay*, ¶¶418,419; *Apotex/US*, ¶9.48; Shany, at 907.
[110] Annex 3.
[111] Annex 3, ¶2.
[112] McKenna-Gonorrhea; WHO-Zika.
[113] *Saluka/Czech*, ¶460; Schreuer-Protection, at 193.
[114] Correa, at 97.
[115] *ADC/Hungary*, ¶435; *Feldman/Mexico*, ¶140; Newcombe/Paradell, at 375.
[116] Annex 3.

criterion set out in Section 23C(1)(b) of the Amendment.[117] Further, the requirement of prior negotiations under Section 23C(4)(d) was waived in the face of a national emergency and additionally due to its public non-commercial use.[118] Therefore, the License complied with the local laws.

53. Conclusively, the issuance of License for public health, in a non-discriminatory manner and in compliance with the Amendment does not amount to an indirect expropriation under the police powers doctrine.

3.2.1.4. The License is proportional to its objective.

54. The proportionality of a measure is determined by assessing the measure's *suitability, necessity* and *proportionality stricto sensu.*[119] First, *suitability* examines whether the measure at issue is appropriate to achieve the objective it pursues.[120] Indeed non-voluntary licenses are recognised as the appropriate means to achieve greater accessibility and affordability of medicines.[121] Second, necessity requires that the means be 'necessary' to achieve the end.[122] The License meets one of the highest thresholds of 'necessity' in international law,[123] i.e., the threshold under Art.25 of the ASR.[124] Lastly, proportionality *stricto sensu* assesses whether the consequences of a measure were incommensurate to the other interests involved, in light of less restrictive alternatives capable of producing the same result.[125] Here, alternatives to the License such as drug price control or a voluntary license would not have made a comparable contribution towards the objective, especially in light of the immediacy of action required. Drug price control results in patentees exiting the market which, in absence of local manufacturing, renders patients bereft of any venue for treatment.[126] Further, Claimant's cooperation in formulating a voluntary license, even if assumed, would have been inadequate to achieve the cost cutting required[127] to make Sanior affordable.[128]

[117] Annex 4.
[118] *Infra* §3.3.1.
[119] Henckels, at 192; Xiuli, at 234.
[120] Leonhardsen, at 107; Henckels, at 194.
[121] WHO-Access, at 6.
[122] Xiuli, at 235.
[123] Reinisch-YB, at 154; Bucheler, at 258.
[124] *Infra* §3.4.
[125] Xiuli, at 236; Bucheler, at 155.
[126] Bond/Saggi, at 2.
[127] SUFs, ¶15.
[128] SUFs, ¶22.

The License issued was therefore proportional to Respondent's objective of increasing access and affordability of the Sanior drug.

3.2.2. In any case, the expropriation is not unlawful.

55. Should the Tribunal decide that the License amounts to indirect expropriation, such expropriation is lawful since it satisfies the four criteria under Art.6(1) of the BIT of a lawful expropriation. The criteria of public purpose,[129] absence of discrimination[130] and compliance with local law[131] have been established before. With respect to the final requirement, payment of compensation before or at the time of an indirect expropriation may not be feasible,[132] since the host state is unaware of the expropriatory nature of its acts. Thus, non-payment of compensation can never be the sole basis for a finding of unlawful expropriation.[133] Therefore, the expropriation is not unlawful.

3.3. The grant of the License to HG-Pharma is consistent with TRIPS.

56. WTO obligations exist only between member states *inter se*[134] and Claimant as a private juridical person lacks *locus standi* to invoke an infringement of TRIPS.[135] Additionally, disputes arising out of these obligations fall within the exclusive domain of the WTO's DSU[136] and this Tribunal does not have jurisdiction to decide upon alleged infringements of the TRIPS.[137]

57. In any case, compliance with treaty obligations outside the IIA cannot be mandated in the IIA through FET or the Umbrella Clause,[138] since only domestic law and not international obligations can be considered as the basis for legitimate expectations[139] or as obligations 'entered into with respect to investments' respectively.[140] Further, without a direct effect of WTO obligations upon domestic laws,[141] the distinction

[129] *Supra* ¶50.
[130] *Supra* ¶51.
[131] *Supra* ¶52.
[132] Nikiema, at 7.
[133] *Rusoro/Venezuela*, ¶400.
[134] Marrakesh Agreement, Arts.II:1, II:3; DSU, Art.1.1; US-Shrimp, ¶101; Van den Bossche, at 191; Meltzer, at 693; Gazzini-WTO, at 723; Pauwelyn, at 1.
[135] Wadlow, at 73,74; US-Copyright, ¶3.15; Kennedy, at 218-220; *see*, EC-Trademarks, ¶¶7.623,7.624.
[136] DSU, Art.23; Babu, at 128,445; Steger, at 143.
[137] *Menzies/Senegal*, ¶¶130-135,139; *AHS/Niger*, ¶152; Ruse-Khan, at 249.
[138] Ruse-Khan-Conflict, at 253.
[139] McLachlan/Shore/Weiniger, at 298; Newcombe/Paradell, at 286.
[140] *Eureko/Poland*, ¶¶244-260; Sinclair, at 940-947.
[141] Fabri, at 1.

between international obligations and domestic laws must be retained, especially because intellectual property rights are territorial in nature.[142]

58. Notwithstanding the foregoing, the License is consistent with TRIPS which allows Members considerable discretion in the method of implementation of their obligations.[143] Thus, even though patent owners have the right to exploit their intellectual property without the interference of third parties,[144] such a right to exclude others is not absolute[145] and patent protection can be subjected to a number of exceptions,[146] including the issuance of a compulsory licence.[147] The conditions under Art.31 that regulate compulsory licenses must be interpreted in light of the TRIPS' objective of mitigating restrictive effects of exclusive rights and striking a balance between the interests of the title holder and the public,[148] as well as the overarching supremacy of human rights over private interests.[149]

59. In light of this interpretation, the License conforms to the objectives and principles of TRIPS and also satisfies the conditions enlisted in Art.31 in relation to *issuance* [**3.3.1**]; *scope, duration* and *usage* [**3.3.2**]; and finally, the *remuneration* associated with the License [**3.3.3**].

3.3.1. <u>The issuance of the License complies with exceptions to pre-grant requirements.</u>

60. Art.31(b) stipulating the requirement of prior negotiations between the proposed user and patent holder, waives this pre-grant requirement in times of national emergency or circumstances of extreme emergency [**3.3.1.1**]; and public non-commercial use [**3.3.1.2**].

3.3.1.1. The License was issued to address a national emergency.

61. The obligation of first approaching the patent holder for a voluntary license is excused when time lost in negotiations would impair the very outcome desired from the license.[150] Therefore, when faced with national emergency or circumstances of extreme

[142] Austin, ¶30.
[143] India-Patents, ¶59; Reichman, at 585; TRIPS, Art.1.
[144] TRIPS, Art.28.1.
[145] May/Sell, at 161,162; Watal, at 2,3; Ho, at 371.
[146] TRIPS, Art.30.
[147] TRIPS, Art.31.
[148] TRIPS, Art.7.
[149] OCHR, CESCR.
[150] Correa-Patents, at 247.

urgency, conditions of Art.31(b) requiring prior negotiations based upon reasonable commercial terms are waived.[151]

62. The Doha Declaration reaffirms the autonomy that WTO Members exercise in the determination of national emergency or circumstances that constitute situations of extreme urgency.[152] While the Declaration indicates that certain diseases *per se* represent a national emergency,[153] this by no means limits the number of diseases to those examples.[154] Therefore, an epidemic posing a threat to public health should be considered to amount to a national emergency as per TRIPS.[155] In the present case, greyscale is a severe and pervasive epidemic which threatens the health of millions of individuals in Mercuria.[156] Despite the treatment being offered by Claimant, more than half of the population remained untreated[157] and without a change in the status quo, the studies predicted a considerable rise in the number of people who would have been affected.[158] Therefore, the fact that HG-Pharma did not approach Claimant for a voluntary arrangement does not violate Art.31(b) as Respondent was facing a public health crisis amounting to a national emergency.

3.3.1.2. Additionally, the License was issued for public non-commercial use.

63. Absent a definition of 'public non-commercial use', its ordinary meaning must be construed to refer to use of the license for the benefit of the public on a non-profit basis.[159] Thus, the term 'public non-commercial' focuses on the public nature of the 'use' and not on the public nature of the entity manufacturing the patented product.[160] Use of the patent by HG-Pharma to increase accessibility and affordability of Sanior to the poorest sections[161] of Mercuria constitutes public non-commercial use envisaged under Art.31(b).

3.3.2. <u>The duration and use of the License is consistent with TRIPS.</u>

[151] TRIPS, Art.31(b).
[152] McCalman, at 5.
[153] Doha Declaration, ¶5(c).
[154] Stoll/Busche/Arend, at 574; WHO-Doha, at 17.
[155] Watal, at 321; Outterson, at 680.
[156] SUFs, ¶¶2,15.
[157] SUFs, ¶14.
[158] Annex 3.
[159] Gopalakrishnan/Anand, at 28.
[160] Gold/Lam, at 25; Ho, at 402-404.
[161] DeRoo, at 359.

64. TRIPS does not limit the purposes for which compulsory licenses can be granted and the Members retain the right to determine the grounds for such a grant.[162] Only the duration and use of a compulsory license must be limited "to the purpose for which it was authorized."[163] In this regard, Members can make their own assessment on whether a license is "limited to the purpose for which it was authorized."[164] This interpretation is consistent with the balance of interests expressed in TRIPS Arts.7 and 8.[165]

65. Importantly, this provision does not state that the license must be limited, as compared to exceptions to patent rights other than compulsory licenses.[166] Rather, the license is only to be limited to the *purpose* for which it is authorized. This does not require a time-bound or restrictive license as long as the purpose necessitates otherwise.[167] In fact, the redress needed to remedy life-threatening epidemics must be of a sufficiently long period in order to effectively contain the spread of the disease to constitute a means of cost containment in providing essential medicines that were not otherwise affordable.[168] The License issued by Respondent is limited to the purpose of its authorisation – it will last only till greyscale ceases to threaten the public health of Mercuria.[169] Thus, it satisfies the requirement of Art.31(c).

66. Even the exportation of drugs from Mercuria to three neighbouring states, does not transgress the purpose of authorisation because the principal portion of production under the License is being used to treat patients in Mercuria. TRIPS does not bar Members from exporting patented drugs as long as the use of compulsory licensing is authorised *predominantly* for the supply of the domestic market of the Member authorising such use.[170] The licensee may supply an importing country with the non-predominant share of its production without resort to the Waiver Decision[171] that is now embodied in Art.31*bis*. In the present case, there is no evidence to show that the quantities exported exceeded those destined to internal supply. In any case, to enable

[162] Doha Declaration, ¶5(b).
[163] TRIPS, Art.31(c).
[164] Ho, at 407; UNCTAD-ICTSD, at 471.
[165] Abbott, at 136.
[166] TRIPS, Art.30.
[167] Bartelt, at 283,286; UNCTAD-ICTSD, at 473.
[168] Azmi, at 218; Correa, at 107.
[169] SUFs, ¶21.
[170] TRIPS, Art.31(f).
[171] Doha Waiver Decision; Abbott/Reichmann, at 956.

economies of scale, exportation of excess production to other countries will not transgress the scope of the License.[172]

3.3.3. *Royalty to be paid to Claimant is consistent with TRIPS.*

67. WTO Members have very broad latitude in determining the remuneration payable to the patent holder once a compulsory license has been granted[173] and the determination of the adequacy of remuneration is subject to the circumstances of each case.[174] Members are not bound by any standardization of royalty based upon the average or uniform fee that is paid in the same sector of industry of another country.[175]

68. When determining adequate remuneration, TRIPS does not require a country to make up for the lost profits that the patent owner would have enjoyed with a monopoly and pricing freedom.[176] Notably, the clause states that the economic value of authorisation should be taken into account, but does not state that the remuneration be based *solely* on this economic value. Especially in relation to pharmaceuticals, remuneration should be informed by the Doha Declaration that confirms that terms with more than one defensible meaning should be interpreted to allow reconciliation of protection of intellectual property and access to medicines.[177] Thus, Members may consider policy objectives in determining remuneration for use of patented inventions to make medicines more affordable.[178] Particularly for pharmaceuticals that are used to treat diseases of high incidence or providing treatment that otherwise poses an economic hardship, the rates of royalty fixed should be very low.[179]

69. Art.31(h) thus justifies the payment of a minimal royalty for issuance of a compulsory licence by a developing country in order to address public health crisis and the royalty of 1% fixed by the High Court of Mercuria will amount to adequate remuneration as per TRIPS.

70. Therefore, License complies with all requirements stipulated in Art.31 of the TRIPS and Respondent cannot be held in breach of its WTO obligations.

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[172] Azmi, at 210; Lybecker/Fowler, at 230.
[173] Stoll/Busche/Arend, at 557; WHO-Remuneration, at 68.
[174] UNCTAD-ICTSD, at 475.
[175] Carvalho, at 247; UNCTAD-ICTSD, at 475.
[176] Taubman, at 942–943; UNCTAD-ICTSD, at 461.
[177] Schrerer/Watal, at 925; Lang, at 349; Carvalho, at 247.
[178] EC-Asbestos, ¶174.
[179] WHO-Remuneration, at 68.

3.4. Alternatively, the Measures were 'necessary' to protect Respondent's essential interests.

71. In case the Tribunal finds a breach of any standard of protection under the BIT, the wrongfulness of the Measures is exempted under the CIL defence of necessity under Art.25 of the ASR. The necessity defence therefore precludes the wrongfulness of actions taken to protect an 'essential interest' from a 'grave and imminent peril' [**3.4.1**]. All conditions for its invocation are met [**3.4.2**].

3.4.1. *The Measures were taken to protect an 'essential' interest against a 'grave and imminent peril'.*

72. The concept of 'essential interests' extends beyond the concept of an armed attack.[180] An 'essential interest' need not necessarily affect the state's existence, but includes any danger 'seriously compromising the internal and external situation of the state,'[181] including environmental concerns[182] and in the same vein, public health. In the present matter, there existed a public health emergency, by virtue of an incurable communicable disease spreading explosively to over ten times the affected population within three years. Failing to increase access to treatment posed a significant threat to the working-age population in Mercuria.[183] Therefore, the License was issued to protect an essential interest of Respondent – public health, which was threatened by a grave and imminent peril.

3.4.2. *The conditions for applicability of Art.25 of the ASR have been satisfied.*

73. The invocation of Art.25 requires the satisfaction of four conditions. First, the act must be the 'only way' to protect an essential interest.[184] Second, the measures should not seriously impair the essential interests of another state.[185] Third, the obligation in question must not exclude the applicability of the necessity defence.[186] Finally, the state should not have contributed to the situation resulting in necessity.[187]

[180] Nicaragua, ¶224.
[181] *LG&E/Argentina,* ¶251.
[182] Gabcikovo-Nagymaros, ¶51; Heathcote, at 498.
[183] Annex 3, line 1316.
[184] ASR, Art.25(1)(a).
[185] ASR, Art.25(1)(b).
[186] ASR, Art.25(2)(a).
[187] ASR, Art.25(2)(b).

74. A conclusion with respect to the first requirement of non-availability of other means is difficult to achieve, in light of questions pertaining to protection of health and environment being frequently associated with scientific uncertainty and diverging opinions.[188] This Tribunal must not subject Respondent's policy decisions to a *de novo* review.[189] Resultantly, a wide *margin of appreciation* must be accorded to Respondent's judgment in selection of measures.[190]

75. A strict reading of Art.25(1)(a) would render the defence redundant,[191] as there will always be an alternative to every measure.[192] Thus, the term 'only way' must be accorded a narrow construction that takes into consideration the suitability and proportionality of the measure.[193] This is reflected in the test requiring an 'extremely close causal connection' between the objective and the measure.[194] Therefore, what is required to be seen is not whether there were any other available means to address the greyscale crisis but whether the License was adequate and proportionate to the objective of assuaging the greyscale crisis. As shown,[195] the requirements of proportionality and suitability are fulfilled, thereby satisfying Art.25(1)(a).

76. With regard to the second condition prohibiting impairment of essential interests of other states, the interest sought to be protected must outweigh all other considerations.[196] Notwithstanding that the other interest affected herein is that of a private investor and not a state, economic or monetary interests of investors are inferior to other essential interests, such as long term humanitarian and health concerns,[197] as human rights are the first responsibility of governments.[198] Therefore, the second criteria is satisfied.

77. The third condition requires that the obligation in question does not exclude the applicability of the necessity defence. Since CIL rules including necessity[199] can only

[188] Crawford, at 183.
[189] *LG&E/Argentina,* ¶257.
[190] *Continental Casualty/Argentina,* ¶181; *Philip/Morris/Uruguay*, ¶399.
[191] Bjorklund-Defences, at 488.
[192] Reinisch-YB, at 153.
[193] Reinisch, at 201.
[194] Bjorklund-Defences, at 488.
[195] *Supra* §3.2.1.4.
[196] ASR, Art.25(1)(b); Crawford, at 184.
[197] Gathii, at 953; CESCR, ¶17; OCHR, ¶13.
[198] Vienna Declaration and Programme of Action, Art.1.
[199] Gabcikovo-Nagymaros, ¶¶51,52.

be excluded from applicability through explicit textual mention in a treaty,[200] in the absence of such an exclusion in the BIT, the third criteria for invoking the defence is fulfilled.

78. Lastly, Respondent's conduct should have consistently reflected a desire to mitigate the severity of the crisis.[201] Respondent has consistently been acting against the spread of diseases through massive public information campaigns, procurement of drugs at discounted rates and frequently keeping a check on the patient numbers.[202] The crisis being one beyond the control of Respondent, it cannot be held responsible for contributing to the spread of greyscale.

79. Since all four conditions stipulated in Art.25 of the ASR are met by the present circumstances, the Measures, even if considered wrongful, are exempt under CIL.

4. RESPONDENT IS LIABLE FOR THE CONDUCT OF ITS JUDICIARY UNDER ART.3 OF THE BIT.

80. Claimant cannot raise a claim against Respondent's judiciary ["**the judiciary**"] without exhausting local remedies. [**4.1]** Even if this Tribunal were to address the claims raised, the conduct of the judiciary is not in breach of the obligation to accord FET under the BIT [**4.2**].

4.1. Claim implicating Respondent's judiciary is barred as Claimant failed to exhaust local remedies.

81. Silence in a treaty must be interpreted in a manner that least derogates from the sovereignty of the parties.[203] Since the prerequisite to exhaust local remedies reflects the judicial sovereignty of the state,[204] the presumption that local remedies be exhausted cannot be rebutted by silence but only through an *express* provision to the contrary.[205] Therefore, to establish a claim of DoJ that must implicate the *entire* judiciary,[206] the host state's highest relevant appeals court should have had the chance to overturn prior injustices or failed to do so.[207] The non-exhaustion of local remedies in the present

[200] ELSI, ¶50; McLachlan/Shore/Weiniger, at 67; Dolzer/Schreuer, at 167.
[201] *LG&E/Argentina*, ¶256.
[202] Annex 3, line 1319.
[203] ELSI, ¶50; Sornaraja, at 220.
[204] Amerasinghe, at 200; Alvik, at 42.
[205] ELSI, ¶50; Palenzuela-Mauri, at 304; *see also*, ICSID, Art.26.
[206] *Duke/Ecuador*, ¶225; *Jan de Nul/Egypt*, ¶¶187-191,255-261; Paulsson, at 130.
[207] ASR, Art.44(b); Articles on Diplomatic Protection, Art.14(1); ELSI, ¶59; *Loewen/US*, ¶151; Paulsson, at 111; Brownlie, at 496,497.

matter is sufficient to exclude the states' responsibility in international law for actions or omissions of its judiciary.

82. An exemption from exhausting local remedies applies only if residual remedies are shown to be ineffective or futile.[208] Such futility must be obvious futility and not merely the absence of a reasonable prospect of success or the improbability of success.[209] Therefore, more than showing the probability of failure or the improbability of success, the claimant must show less than the absolute certainty of failure. Claimant has not discharged this burden of proof for the Tribunal to conclude that non-exhausted remedies in Mercuria would be futile.

4.2. Respondent has not breached its obligation to provide FET to Claimant's investment.

83. At the outset, Respondent has no obligation to provide *effective means of enforcement* to Claimant [**4.2.1**]. In any case, the same obligation has been fulfilled [**4.2.2**]. Further, conduct of its judiciary does not amount to DoJ to Claimant [**4.2.3**]. Finally, Respondent has not breached any of Claimant's legitimate expectations [**4.2.4**].

4.2.1 Respondent has no obligation to provide effective means for enforcement *of rights.*

84. There exists no standalone obligation in the BIT to provide *effective means to enforce rights,*[210] nor is there a reference to *effective means* in Art.3(2) of the BIT that incorporates the obligation to mete out FET.[211] In the conspicuous absence of any external positive obligation in the text of the BIT, the narrow negative duty to refrain from DoJ under FET[212] cannot be construed as a positive duty to uphold the *lex specialis* standard of effective means.[213]

85. In this regard, the preamble cannot act as a source of substantive obligations.[214] Thus, an obligation to provide *effective means* cannot be derived from the preambular text.[215] Such an interpretation would be at odds with the customary rules of interpretation[216]

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[208] *Chevron/Ecuador*, ¶¶325,326; Articles on Diplomatic Protection, Art.15(a); ILC Report, at 79.
[209] *ICS/Argentina*, ¶269; *Finnish Ships*, ¶1479; Norwegian Loans, ¶39; Amerasinghe, at 206.
[210] *Chevron/Ecuador*; *Duke/Ecuador*; *AMTO/Ukraine*; *Petrobart/Kyrgyzstan*.
[211] Annex 1, Art.3(2).
[212] *Duke/Ecuador*, ¶391; Alvarez, at 31,32.
[213] *Chevron/Ecuador*, ¶242; *White Industries/India*, ¶11.3.2; *Duke/Ecuador*, ¶391; Alvarez, at 31-32.
[214] *Bayindir/Pakistan*, ¶155; Klager, at 78.
[215] Annex 1, line 982.
[216] *Continental Casualty/Argentina*, ¶258; Gazzini, at 74.

and the Parties' intention.[217] Therefore, Respondent has no obligation to provide effective means of enforcing rights to Claimant.

4.2.2. *In any case, Respondent has provided Claimant with effective means to enforce its rights.*

86. In any case, an effective framework for enforcement of rights does not offer guarantees in individual cases.[218] Thereupon, individual failures do not themselves breach the standard to provide effective means to assert claims or enforce rights.[219] Further, neither New York Convention nor public international law provide time limits within which certain classes of cases must be resolved.[220] Thus, a delay of seven years does not automatically breach the obligation to provide effective means.

87. Further, when proceedings are advancing, delay due to procedural inconsistencies such as extension of deadlines for pleadings or submissions of rejoinders does not violate the standard.[221] In fact, such delays can be condoned when attributable to exigencies of a busy court docket or the unavailability of counsel.[222] In the present case, court proceedings have consistently been progressing albeit subject to delays that can be excused by court congestion and a few procedural inconsistencies.

88. Most significantly, when ascertaining whether delay has been undue, due regard must be paid to the 'complexity of matter' as well as 'significance of interests' at stake.[223] The basis for the Award was the LTA that was terminated due to Claimant's unsatisfactory performance in light of the greyscale epidemic.[224] Further, the quantum of damages, if paid, would have impeded the functioning of NHA, an entity that was instrumental in administering the greyscale health programme.[225] In such a scenario, *domestic* public policy, a ground for judicial review on the merits of an award[226] complicates the enforcement of the Award[227] and also makes the proceedings of significant interest, thereby excusing the delay.

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[217] Newcombe/Paradell, at 115; *Suez/Argentina (Separate Opinion)*, ¶29.
[218] *AMTO/Ukraine*, ¶88.
[219] *AMTO/Ukraine*, ¶88.
[220] *Toto/Lebanon*, ¶155.
[221] *White Industries/India*, ¶¶11.4.6,11.4.7.
[222] *White Industries/India*, ¶11.4.8; *Chevron/Ecuador*, ¶263.
[223] *Chevron/Ecuador; White Industries/India.*
[224] SUFs, ¶¶14-17.
[225] Annex 3, line 1319-1323; SUFs, ¶¶7,12.
[226] New York Convention, Art.V(2); Born, at 3653.
[227] SUFs, ¶18.

4.2.3. *Conduct of the Mercurian judiciary does not amount to DoJ.*

89. DoJ under customary international law is a component of the fair and equitable treatment standard[228] and amounts to a serious and exceptional charge that can be upheld in only the most extreme circumstances.[229] The charge must be directed against the *entire* judicial system as a whole, and its inability to accord justice.[230] It requires the demonstration of a "particularly serious shortcoming" or conduct by the host state or its judicial organs that is *egregious,*[231] *malicious,*[232] *shocking,*[233] *outrageous,*[234]or in *bad faith,*[235] such that it "shocks, or at least surprises, a sense of judicial propriety."[236] In *White Industries*[237] and *Chevron*[238] delays as long as *nine years* caused by multiple courts including the *highest appellate judicial authority* fell short of breaching the extremely high threshold of DoJ. Contrastingly, the present claim of DoJ has been brought to address the conduct of a single court as against Respondent's judiciary as a whole; in relation to a delay of seven years that is justified by factors such as complexity of the case and significance of interests. This does not reach the high threshold of egregious conduct that has been recognised to amount to DoJ.[239]

90. Additionally, international law distinguishes between delays amounting to effective refusal to judge, and an explicable delay that is justifiable by circumstances.[240] Only the former instance engages the state's liability.[241] Thus, as long as the timing in a particular case comports with the usual practices, delays will not attract responsibility.[242] In light of the overburdened judiciary of Mercuria that has been struggling to cater to a population of millions,[243] the time period of seven years for a decision on the enforcement of a is permissible. Thus, the duration of the legal proceedings does not entail DoJ.

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[228] *Jan De Nul/Egypt*, ¶188; *Frontier/Czech*, ¶293; *Rumeli/Kazakhstan*, ¶654; *see also, Loewen/US*, ¶¶128,129.
[229] Paulsson, at 60.
[230] Barcelona Traction, at 160.
[231] Fitzmaurice, at 93,94.
[232] *Azinian/Mexico*, ¶¶103,105.
[233] *Mondev/US*, ¶127.
[234] *Chattin*, at 422,427.
[235] *Neer Case*, at 61,62.
[236] ELSI, ¶128; Garner, at 183,184; Fitzmaurice, at 94; *Loewen/US*, ¶¶131,132.
[237] *White Industries/India*, ¶¶3.2.36-3.2.41.
[238] *Chevron/Ecuador*, ¶33.
[239] *White Industries/India*, ¶10.4.23.
[240] *Chevron/Ecuador (Legal Opinion)*, ¶64.
[241] Ahmadou Sadio Diallo.
[242] Bjorklund-DoJ, at 845,846.
[243] Response to Notice of Arbitration, ¶9.

91. Further, only differential treatment without a rational justification amounts to discrimination.[244] There was no differential treatment meted out to Claimant as the delays caused by backlogs in the Court affected every litigant uniformly. As far as procedural delays caused by NHA are concerned, the judiciary did not overlook or condone such irregularities without cause, and in fact, issued multiple warnings to NHA that it abided by.[245] In any case, procedural irregularities are condoned if the proceeding was otherwise being strenuously defended and the pleadings schedule was not exceptional,[246] as was evidenced in the present case through the filing of multiple rejoinders and applications for shifting of proceedings from one forum to another.[247]

4.2.4. Respondent has not breached legitimate expectations held by Claimant.

92. An expectation is legitimate if the investor received an explicit promise that it took into account in making the investment.[248] Where the host state made no assurance or representation, the conduct of the state at the time of the investment becomes decisive in determining if the expectations are legitimate or not.[249] In doing so, the legitimacy of an expectation must depend upon the political, socio-economic, cultural and historic conditions prevailing in the host state to avoid the imposition of unrealistic obligations.[250] Thus, the capacity of a state is relevant for determining the threshold of its FET bindings.[251]

93. In this case, no explicit guarantees were made to Claimant regarding its right to assert or enforce claims. Further, there couldn't have been any characteristics or qualities of Respondent's judiciary, nor any demonstration of a significant change in its problem of court congestion that could bring about legitimate expectations of favourable timelines of court proceedings.

94. Therefore, taking into account condition of Respondent's judiciary, no legitimate expectations could have arisen with respect to enforcement of the Award.

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

[244] *Saluka/Czech,* ¶460.
[245] Claimant Exhibit-1, ¶¶13, 21.
[246] *White Industries/India,* ¶11.4.8.
[247] Claimant Exhibit-1, ¶¶17-29.
[248] *ADF/US,* ¶189; *Duke/Ecuador,* ¶ 340; Dolzer/Schreuer, 133,134; Fietta, at 398.
[249] *Parkerings/Lithuania,* ¶¶331-333; *Tecmed/Mexico,* ¶¶152,154; *CMS/Argentina,* ¶¶157,611.
[250] Gallus, at 711; *AMT/Zaire,* ¶38; Brierly, at 280,281; *Bayindir/Pakistan,* ¶192; *Saluka/Czech,* ¶304.
[251] Tudor, at 131; *Noble/Romania,* ¶182.

95. The termination of LTA by Respondent's NHA does not violate Art.3(3) of the BIT since the scope of Art.3(3) is limited to obligations entered into by the host state [**5.1**] and cannot be extended to undertakings of NHA, an independent legal entity, by relying on ASR [**5.2**]. Furthermore, even if attribution is found, Respondent cannot be held liable for breach of Art.3(3) since contracts of commercial nature and breaches thereof in commercial capacity cannot be covered by umbrella clauses [**5.3**]. In any case, this Tribunal is prevented from adjudicating on present claims under the doctrine of collateral estoppel [**5.4**].

5.1. The scope of Art.3(3) is limited to obligations entered into by the host state.

96. Art.3(3) of the BIT, the umbrella clause, holds the state responsible for only those obligations that *it* enters into.[252] The plain and ordinary meaning of the words 'obligations *it* may have entered into'[253] are obligations assumed by the *Contracting Parties* and not by separate state entities.[254] An entity, even if state-owned, possesses a separate legal personality from the state and cannot engage international responsibility of the state for breaches of its independent commercial undertakings.[255]

97. Claimant's allegations are based entirely on breaches of obligations contractually assumed by the NHA in the LTA. However, as a legal entity separate from Respondent, NHA alone stands responsible for the performance of its contracts. Respondent therefore cannot be held accountable for any alleged breach of the LTA that it was not party to, for obligations that it did not assume.

5.2. The conduct of NHA is not attributable to Respondent under the ASR.

98. NHA does not satisfy any criteria under the ASR to permit attribution of its conduct to Respondent. NHA cannot be classified as an 'organ' of Respondent. **[5.2.1]**. Further, it does not exercise elements of governmental authority [**5.2.2**] or act under the instruction, direction or control of Respondent. [**5.2.3**]

5.2.1. NHA is not an organ of Respondent per Art.4 of the ASR.

99. The conduct of a *de jure* or *de facto* organ of the state[256] is attributable to the state.[257] A *de jure* organ includes any person or entity classified as an organ as per the domestic

[252] *Hamester/Ghana*, ¶347; *Impregilo/Pakistan*, ¶223; Dolzer/Stevens, at 82.
[253] *Hamester/Ghana*, ¶347; Feit, at 26.
[254] *EDF/Romania*, ¶317; *Azurix/Argentina*, ¶384; *CMS/Argentina (Annulment)*, ¶95; Mann, at 246.
[255] *Nagel/Czech*, ¶162.
[256] Nicaragua, ¶109; Bosnian Genocide, ¶¶391,392.

laws of the state.[258] In the absence of such a classification under domestic law, NHA's characterization as a state organ is untenable.

100. Regardless of its characterisation in domestic law, an entity may be classified as an organ *de facto* in international law.[259] However, such a classification is exceptional, as it entails 'direct day-to-day subordination'[260], 'lack of all operational autonomy',[261] and 'complete dependence'[262] on the state. If the entity operates autonomously, retains any element of independence from the state and receives only 'directions of a general character', its characterization as a state organ would be inapposite.[263] Therefore, functional autonomy reflected by freedom to enter into commercial transactions, even if associated with some state function,[264] will preclude an entity from being considered as a *de facto* organ of the state.[265]

101. Additionally, state-owned entities that possess an independent legal personality under domestic law cannot be considered as state organs.[266] NHA exercises its powers under its own name in concluding commercial relationships.[267] Thus, it possess a legal personality separate from the state and cannot be characterised as a state organ.

102. In the present case, since NHA is free to estimate demand of medicines,[268] conclude its own contracts,[269] negotiate prices,[270] distribute drugs,[271] demand discounts,[272] and terminate the contracts,[273] it does not lack any *operational autonomy*. The lack of record of participation by Mercurian officials in the negotiation of the LTA[274] shows that NHA entered into the LTA by exercising its own prerogative as a commercial purchaser. Hence, NHA cannot be classified as *de facto* organ of Respondent.

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[257] ASR, Art.4(1); Crawford, at 94.
[258] ASR, Art.4(2).
[259] Nicaragua, ¶109; Bosnian Genocide, ¶¶391,392; Crawford, at 98.
[260] *Almas/Poland*, ¶207.
[261] *Almas/Poland*, ¶¶207,212,213.
[262] Bosnian Genocide, ¶¶391,392.
[263] *Hamester/Ghana*, ¶187; *Almas/Poland*, ¶210; Sasson, at 14.
[264] *Almas/Poland*, ¶207.
[265] *Almas/Poland*, ¶¶210,212.
[266] *EDF/Romania*, ¶190; *Bayindir/Pakistan*, ¶119.
[267] SUFs, ¶9.
[268] SUFs, ¶15.
[269] SUFs, ¶9.
[270] SUFs, ¶9.
[271] SUFs, ¶11.
[272] SUFs, ¶15.
[273] SUFs, ¶17.
[274] PO3, line 1594.

5.2.2. NHA's conduct is not attributable to Respondent under Art.5 of the ASR.

103. The conduct of an entity empowered by *the law of that state* to exercise elements of governmental authority' is attributable to the state[275] if it engages in the wrongful conduct in the exercise of such authority.[276] The exercise of gauging governmental authority under Art.5 involves a structural and functional analysis,[277] which takes into account the organisational structure of the entity and its functions respectively.[278] However, whether the entity acted in exercise of such governmental authority *while* committing the wrongful act remains the determinative factor for attribution of such conduct.[279]

104. The 'structural test' involves an assessment of whether the entity in question is established by law as a government entity.[280] The mere creation of an entity by state is not dispositive of its empowerment to exercise governmental authority.[281] The entity must be *empowered by internal law* to exercise elements of governmental authority.[282] In the present case, there is no evidence on record to suggest that NHA was empowered by any law of the host state to exercise elements of governmental authority.

105. The 'functional test' is satisfied when specific activities of an entity are 'essentially governmental rather than commercial in nature'.[283] Thus, it follows that even if the contract is entered into in the exercise of governmental powers, that does not by itself lead to the conclusion that its termination is also inspired by governmental authority.[284] Especially if the act in question entails the exercise of a right emanating from the contract itself, the same cannot be said to be in pursuance of governmental authority[285] despite the contract being related to public purpose.[286]

106. Since NHA's decision to terminate the LTA was made for commercial reasons upon Claimant's 'unsatisfactory performance' in supplying Sanior,[287] the termination of LTA

[275] ASR, Art.5; *Hamester/Ghana*, ¶193; Crawford, at 100.
[276] *Maffezini/Spain*, ¶ 52*; EDF/Romania*, ¶191.
[277] *Maffezini/Spain*, ¶77; Hober, at 556.
[278] *Maffezini/Spain*, ¶50.
[279] *Maffezini/Spain*, ¶¶150,171.
[280] *Maffezini/Spain*, ¶77; Smutny, at 21.
[281] *Otis/Iran*, ¶283; *Kodak/Iran*, ¶153.
[282] Crawford, at 113.
[283] *Maffezini/Spain*, ¶80.
[284] *Jan de Nul/Egypt*, ¶170; *Almas/Poland*, ¶219.
[285] *Almas/Poland*, ¶281.
[286] *Jan de Nul/Egypt*, ¶170.
[287] SUFs, ¶17.

was 'not an exercise of public power but of a purported contractual right'[288]. Therefore, the termination of the LTA is not attributable to Respondent under Art.5.

5.2.3. Respondent did not direct or control NHA's activities per Art.8 of the ASR.

107. Under Art.8 of ASR, the conduct of a private entity which acts on the instructions of the state, or under its direction or control, is attributable to the state.[289] It is not sufficient for a state to provide instructions generally in respect to the entity's overall actions.[290] Instead, there must be *effective control*[291] of the state over such actions, with instructions issued relating to the *specific operation* which is alleged as being internationally wrongful.[292] The standard to demonstrate *effective control* requires proof of 'clear evidence'.[293]

108. In the present case, there is no 'clear evidence' that NHA acted under Respondent's instructions, direction or control when terminating the LTA. In fact, the decision to terminate the LTA was an autonomous decision by NHA in the capacity of a purchaser, and not in response to any governmental directions. Therefore, there is no basis for attribution under Art.8.

109. Accordingly, as the actions of the entity in question cannot be attributed to the host state under the ASR, Art.3(3) of the BIT or the umbrella clause finds no direct application.[294] In any case, Respondent's liability for breach of Art.3(3) is precluded since contracts of commercial nature and breaches thereof in commercial capacity cannot be covered by umbrella clauses.

5.3. Art.3(3) of the BIT does not encompass ordinary commercial contracts.

110. Art.3(3) of the BIT should be interpreted in a narrow manner so as to exclude purely contractual claims **[5.3.1]**. Alternatively, the umbrella clause cannot be breached in the absence of abuse of sovereign authority. **[5.3.2]**.

5.3.1. Art.3(3) merits a narrow interpretation.

[288] *Almas/Poland*, ¶219.
[289] Crawford, at 110,113.
[290] Bosnian Genocide, ¶¶173,400; *Jan De Nul/Egypt*, ¶173.
[291] *Jan de Nul/Egypt*, ¶173.
[292] *White Industries/India*, ¶8.1.18.
[293] Nicaragua, ¶¶109,115.
[294] *AMTO/Ukraine*, ¶¶101,107,108,110.

111. As an accepted principle in international law, breaches of contractual obligations under municipal law do not *by themselves* violate international law.[295] An umbrella clause seeking to derogate from this principle must be interpreted *in dubio mitius,*[296] to accord it a restrictive interpretation.[297] A contrary approach would elevate all contractual breaches to treaty breaches, thereby rendering the remaining substantive standards in the BIT as redundant.[298] It would also undermine the distinction between national legal orders and international law"[299] by transforming even the most minor contract claims into treaty claims.[300] Therefore, the umbrella clause must be interpreted narrowly to exclude ordinary commercial contracts from the scope of 'obligations'.[301]

112. Accordingly, as the claim in relation to the alleged breach of the LTA is purely contractual in nature, it is not covered by the umbrella clause.

5.3.2. Alternatively, Art.3(3) cannot be breached in the absence of any abuse of sovereign authority.

113. A breach of contract by the host state may only violate the umbrella clause if the same involves an abuse of sovereign power.[302] Conversely, a contractual breach of a commercial nature cannot give rise to a breach of the umbrella clause.[303]

114. The LTA was a contract between NHA and Claimant and was terminated due to unsatisfactory performance by Claimant.[304] Hence, the termination of LTA was a purely commercial conduct which did not entail the exercise of any sovereign capacity. Hence, it cannot amount to a breach of Art.3(3) of the BIT.

5.4. The present claims are precluded under the doctrine of collateral estoppel.

115. The doctrine of collateral estoppel prevents re-litigation of a question if, in a prior proceeding, the court or tribunal formulated and adjudicated on the question and found the resolution of the question to be necessary in adjudicating upon the claims before

[295] *SGS/Pakistan,* ¶¶165-170; *Duke/Ecuador,* ¶342; Schwebel, at 425.
[296] *SGS/Pakistan,* ¶171; *Loewen/US,* ¶¶160-164.
[297] ELSI, ¶42; *Noble/Romania*, ¶55.
[298] *SGS/Pakistan,* ¶168.
[299] *Hamester/Ghana,* ¶349.
[300] *El Paso/Argentina,* ¶82; *Pan America/Argentina,* ¶110.
[301] *Impregilo/Pakistan,* ¶214; *Joy/Egypt,* ¶¶81,82; *AMTO/Ukraine,* ¶112.
[302] *Bayindir/Pakistan,* ¶180; *Impregilo/Pakistan,* ¶260; *Sempra/Argentina,* ¶309; Gunther, at 190.
[303] *Joy/Egypt,* ¶¶78,79; *El Paso/Argentina,* ¶77; *Pan America/Argentina,* ¶108.
[304] SUFs, ¶17.

it.[305] In consonance with this principle, investment tribunals have rejected treaty claims when encountered with commercial arbitration awards arising out of the same factual scenario.[306]

116. In the present case, the tribunal in Reef determined whether the termination of the LTA by the NHA constituted a breach thereof. Thus, by virtue of the doctrine of collateral estoppel, the present Tribunal is prevented from adjudicating on claims pertaining to the termination of LTA.

117. The fact that the claims arise from separate legal instruments, i.e., the LTA and the BIT, is not of relevance in the applicability of the doctrine,[307] since both claims are part of the same dispute and the former is essentially predicated on the latter.[308] An umbrella clause does not change the legal character of the underlying contractual obligation as that remains subject to the governing law of the contract.[309] As such, the determination of breach of Art.3(3) remains contingent on the proper law of the contract.[310] Thus, 'the prior tribunal's finding on a series of rights, questions and fact, bind this Tribunal' and cannot be ascertained *de novo* on the basis of an alleged breach of Art.3(3) of the BIT. Hence, the Award rendered by the tribunal at Reef in respect of the breach of the LTA precludes this Tribunal from adjudicating on claims arising from the same issue.

[305] *RSM/Grenada*, ¶7.1.1; *Amoco/Indonesia*, ¶30.
[306] *RSM/Grenada*, ¶7.1.3; *Helnan/Egypt*, ¶163.
[307] *RSM/Grenada*, ¶7.1.3.
[308] *RSM/Grenada*, ¶7.1.3.
[309] Sinclair, at 919.
[310] *Toto/Lebanon*, ¶200.

REQUEST FOR RELIEF

Respondent hereby requests the Tribunal to:

1. Find that both the requirements *ratione materiae* and *ratione personae* under the BIT are not satisfied and therefore the Tribunal does not have jurisdiction over the present dispute;
2. Declare that Respondent is not liable for violations of the BIT and the WTO TRIPS Agreement; and
3. Grant such further relief that the Tribunal deems appropriate.

Respectfully submitted on September 25, 2017 by Keith