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FOREIGN DIRECT INVESTMENT

INTERNATIONAL ARBITRATION MOOT

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ARBITRATION PURSUANT TO THE PCA ARBITRATION RULES 2012

Atton Boro Limited (Claimant)

v.

The Republic of Mercuria (Respondent)

PCA CASE NO. 2016-74

MEMORIAL FOR RESPONDENT

25 September 2017

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Portugal v. Council	*Portuguese Republic v. Council of the European Union*, (Case C-149/96) 1999 ECR I-08395.

TREATIES

ECT	Energy Charter Treaty, *opened for signature* 17 December 1994, *entered into force* 24 April 1998.
Ecuador-US BIT	Treaty Concerning the Encouragement and Reciprocal Protection of Investment, United States-Republic of Ecuador, 27 August 1993.
ICESCR	International Covenant on Economic, Social and Cultural Rights, 16 December 1966.
India-Kuwait BIT	Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Republic of India-Kuwait, 27 November 2001.

NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1 January 1994.
VCLT	Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969 (entered into force 27 January 1980).

MISCELLANEOUS

Doha Declaration	Declaration on the TRIPS Agreement and Public Health, *adopted on* 14 November 2001.
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts (2001).
ILC, Commentary	ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

LIST OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
Art(s)	Article(s)
BIT	Mercuria-Basheera Bilateral Investment Treaty
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
Facts	Statement of Uncontested Facts
ICC	International Chamber of Commerce
IP	Intellectual Property
L	Line(s)
Law	Law No. 8458/09
LTA	Long-Term Agreement
NHA	National Health Authority
Notice	Notice of Arbitration
p./pp.	Page/Pages
PCA Arbitration Rules	PCA Arbitration Rules 2012
PO	Procedural Order
R&D	Research & Development
Response	Response to the Notice of Arbitration
USD	United States Dollar
WHO	World Health Organization
WTO	World Trade Organization

STATEMENT OF FACTS

1. The Republic of Mercuria ("**Mercuria**" or "**Respondent**") is a state in an ongoing battle against the *greyscale* epidemic. The latter is an incurable disease and has been in the center of international concern, as it has, and still is, spreading in an unprecedented rate. The virus causing greyscale appeared in the early 1980's.[1]

2. On 21 February 1998, Atton Boro and Company secured a Patent for Valtervite, a compound used for the greyscale drug Sanior, in Mercuria.[2] This medicine would prevent the transmission of greyscale.[3] Later on, in April 1998, Atton Boro Group incorporated a fully owned subsidiary in Basheera, Atton Boro Limited ("**Claimant**"), as a vehicle for expanding its activities to South American and African countries.[4] To that end, Claimant was assigned the Patent for Valtervite. [5]

3. Subsequently, on 9 April 1998, Respondent and the Kingdom of Basheera ("**Basheera**") ratified the Agreement for the Promotion and Reciprocal Protection of Investments ("**BIT**").[6] Meanwhile, the numbers of greyscale incidents kept rising, so that by 2002, it was already considered a threat to the Mercurian population.[7] This was affirmed by the Annual Report of 2003 by the National Health Authority ("**NHA**"), which further underscored the imminence of a national crisis and the urgent need for action.[8]

4. Immediately, national campaigns were initiated with the aim to prevent the spreading of greyscale.[9] Additionally, in 2004, the NHA concluded a Long-Term Agreement ("**LTA**") with Claimant, subject to the latter's satisfactory performance.[10] This contract would supply the NHA with Sanior at a fixed discounted rate of 25%.[11] In order to perform its contractual obligations, Claimant was funded by Atton Boro and Company.[12]

5. Notwithstanding, the levels of greyscale incidents surpassed even the most flexible calculations.[13] As expected, the NHA invited Claimant to renegotiate the price of Sanior, urging

[1] Annex No.3, p.41.
[2] Notice, ¶6; Facts, ¶¶3,9.
[3] Facts, ¶3; PO3, L-1585-1587.
[4] Facts, ¶4.
[5] Facts, ¶4.
[6] BIT, Art.14(1); PO2, ¶2.
[7] Facts, ¶6.
[8] Facts, ¶6.
[9] Facts, ¶12.
[10] Facts, ¶9-10.
[11] Facts, ¶10.
[12] PO3, L-1572-1573.
[13] Facts, ¶14.

that a further discount was vital in order to continue providing treatment for the proliferating greyscale patients.[14] Still, Claimant turned a blind eye to the urgency of the situation, and complained that a lower price would reduce its profits.[15]

6. On 10 June 2008, Claimant's contractual non-performance eventually forced the NHA to terminate the LTA pursuant to Clause 6 thereunder.[16] Claimant was quick to challenge this termination in front of a Tribunal in Reef, managing to obtain an award ("**Award**") in its favor, which it later sought to enforce in front of the High Court of Mercuria.[17]

7. In the meantime, Respondent, faced with an unprecedented crisis, and with no available treatment,[18] amended its IP legislation so as to permit the issuance of compulsory licenses.[19] Based on the new provision, the HG-Pharma, a generic pharmaceutical company, applied in front of the High Court for a compulsory license to synthesize Valtervite.[20] The Court approved the grant of the license, and awarded Claimant 1% royalty on HG-Pharma's total revenue out of Valtervite.[21] However, Claimant probably in pursuit of a greater profit, never replied to HG-Pharma's calls to pay the royalty due.[22]

8. From the outset, the promulgation of the new Law was indeed life-saving; generic drugs effectively mitigated numerous critical diseases troubling Mercuria, and reduced the medical expenses by 80%.[23] Eventually, Mercuria was even able to provide humanitarian aid to its neighboring countries, plagued by greyscale.[24] By initiating arbitral proceedings and turning against the said Law, Claimant is essentially requesting greyscale-stricken patients to "bend the knee" before its own profit aspirations.

[14] Facts, ¶15.
[15] Facts, ¶15.
[16] Facts, ¶¶10,17.
[17] Facts, ¶17.
[18] PO3, L-1583-1584.
[19] Facts, ¶20.
[20] Facts, ¶21.
[21] Facts, ¶21.
[22] PO3, L-1568-1569.
[23] Facts, ¶22.
[24] Annex No.3, p.43.

SUMMARY OF ARGUMENT

9. Respondent respectfully opposes this Tribunal's jurisdiction on the basis that the Award does not qualify as an investment under Art.1(1) of the present BIT (**I**). In the unlikely event that this Tribunal finds otherwise, Respondent submits that Claimant is a "shell" company, incorporated solely to pursue its beneficial owner's interests. Accordingly, it is denied the benefits of this BIT pursuant to Art.2(1) (**II**).

10. At all rates, Claimant is trying to make a case out of thin air. First, neither the amendment of the IP law, nor the grant of a compulsory license have breached Respondent's obligation to treat Claimant fairly and equitably under Art.3(2) BIT (**III**). Second, the Court fully complied with Respondent's obligation under the FET standard. Claimant cannot allege that it has been denied justice when the duration of the proceedings has been completely reasonable (**IV**). Third, the termination of the LTA by the NHA is a mere contractual issue unable to be elevated to a violation of Art.3(3) BIT (**V**).

ARGUMENTS

I. THE TRIBUNAL LACKS JURISDICTION OVER ANY CLAIMS RELATED TO THE AWARD

11. By overstretching Mercuria-Basheera BIT's wording, Claimant is trying to persuade this Tribunal that a commercial arbitration award rendered in Reef constitutes a protected investment in the territory of Mercuria. Still, Claimant's attempt is over-ambitious and based on uncertain propositions. For, this Tribunal should recall that in a similar attempt in the recent *Anglia v. Czech Republic* investment claim, even the claimant itself there proved realist enough and conceded that

> "there is no unanimity in the case law and among commentators as to whether an arbitral award itself may be considered an investment".[25]

12. Even more importantly, this Tribunal should also recall that, among others, the *GEA* Tribunal decided that an ICC award arising out of a contractual dispute could not in itself qualify as an investment;[26] or, how the Tribunal in *Occidental* noted that "[*h*]*owever broad the definition of investment might be under the Treaty, it would be quite extraordinary for a company to invest in a refund claim*";[27] or, that the *Saipem* Tribunal made it crystal that it was "*not prepared to accept*" that an arbitral award somehow could constitute an investment.[28]

13. It is in this context that Respondent respectfully submits that this Tribunal lacks jurisdiction *ratione materiae* over any claims related to Claimant's Award, since under no reasonable reading of the BIT could that Award qualify as a protected investment under its Art.1(1).

14. Although it is Claimant that bears the burden of proving that the jurisdictional requirements of the BIT are met,[29] Respondent will, at any rate, demonstrate that Claimant's Award cannot be considered an investment either as such (**A**), or by virtue of any other of Atton Boro and Company's undertakings in Mercuria (**B**).

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[25] *Anglia*, ¶144.
[26] *GEA*, ¶161.
[27] *Occidental*, ¶ 86.
[28] *Saipem*, Jurisdiction, ¶113
[29] *Caratube*, ¶468; *Unglaube*, ¶33; *SGS v. Paraguay*, ¶79.

A. Claimant's Award As Such Cannot Constitute an Investment Under Art.1(1) BIT

15. The investment definition included in Art.1(1) BIT illustrates the common intention of the Contracting Parties as to which assets should enjoy the BIT's protection. Respondent does not argue that this definition is narrow, or that the sample list of assets accompanying it is exhaustive. Nonetheless, it is hardly conceivable that an investment definition was meant to function as a "*Midas touch*",[30] somehow transforming any and all transactions and instruments to protected investments.

16. In this regard, it is Respondent's submission that Claimant's Award is not a covered investment, but rather a mere legal instrument (**1**), which lacks the required territorial link with Mercuria (**2**) and does not satisfy the inherent characteristics of an investment (**3**).

1. Claimant's Award Is a Mere Legal Instrument

17. Respondent submits that Claimant's Award being merely an assessment of the latter's claim for damages cannot be regarded as an investment. An award is simply a legal instrument, setting on paper a tribunal's decision ruling on the parties' rights and obligations.[31] This was precisely the finding of the *GEA* Tribunal, remarking that

> "[w]hether tested against the criteria of Article 1 of the BIT or Article 25 of the ICSID Convention, the ICC Award – in and of itself – cannot constitute an "investment.""[32]

In the matter at hand, it is hardly thinkable and defiant of logic for Claimant to have invested in a damage claim or an arbitral award.

18. Leaving this paradox aside, nor may Claimant persuasively attempt to "implant" its Award in the definition of investment using the reference to "*claims to money, and claims to performance under contract having a financial value*" in Art.1(1)(c) BIT. The inclusion of a "*claims to money*" clause in the Mercuria-Basheera BIT does not suffice to argue that any legal, or even financial, instrument having an economic value is an investment covered thereunder. Along these lines, the Tribunal in *Joy Mining*, considering a clause identical to Art.1(1)(c) BIT, refused to grant protection to claimant's bank guarantees thereunder, despite them having admittedly financial value.[33] All the more so, the Tribunal in *Romak* declined to characterize an

[30] *Nova Scotia*, ¶82.
[31] Mistelis, p.3; *Petrobart*, p.71.
[32] *GEA*, ¶161.
[33] *Joy*, ¶¶44,47.

arbitral award as investment, despite the existence of categories explicitly referring to "*claims to money*" and "*rights given by* [...] *decision of the authority*" in the investment definition of the applicable Switzerland-Uzbekistan BIT.[34]

19. It therefore becomes clear that the sample list of assets included in Art.1(1) is not "self-standing"; namely, the enlisted rights and instruments do not fall *ipso facto* within the protective scope of the BIT. A protected investment must always satisfy the *chapeau* of the BIT, as well as the inherent characteristics of an investment,[35] that will be addressed in detail below.

20. In light of the above, it is submitted that Claimant's Award is a mere legal document falling far beyond any conception of investment. However, even if *prima facie* classified under any subcategory of Art.1(1) BIT, that would not suffice to convert the Award into a protected investment.

2. Claimant's Award Lacks Any Territorial Link with Mercuria

21. According to Art.1(1) BIT, all covered investments should be made "*in the territory of the other Contracting Party*". Respondent submits that Claimant's Award has no nexus whatsoever with the territory of Mercuria, failing to qualify as a protected investment. In particular, the Award was rendered by the Tribunal in Reef;[36] it is not an asset that was contributed to Mercuria, it was not made in Mercuria and thus falls outside the protective scope of the BIT.

22. Importantly, the premise of Claimant's allegation that its Award constitutes an investment contradicts the prevailing view held by authorities, such as Professor Emmanuel Gaillard and verified by arbitral case law, that international arbitration is neither a component of a single national legal order, nor a plurality of national legal orders, but rather enjoys an autonomous character.[37] As a result, international arbitral awards, such as Claimant's, by definition display no ties to any territory and its legal order, let alone Respondent's -with the sole exception being the country of the seat (Reef) and for set aside purposes alone.

23. The fallacy underlying Claimant's argumentation is further illustrated if one considers that Claimant's Award rendered in Reef may well be subject to *worldwide enforcement* in accordance with the New York Convention ("**NYC**"), even in parallel with the ongoing

[34] *Romak*, ¶186.
[35] Douglas, ¶387; *Nova Scotia*, ¶77.
[36] Facts, ¶17.
[37] Gaillard, pp.14-15, 35-66.

enforcement proceedings in Mercuria. If this Tribunal entertains Claimant's allegation, this would open Pandora's box by essentially triggering an absurd situation, where Claimant would be capable of manufacturing a territorial link for its alleged investment, based on the very same Award, in whichever NYC country it opts to enforce it; this would be clearly an unacceptable interpretation of the BIT.

24. Moreover, not only is there no physical connection of Claimant's Award with the territory of Mercuria, but Claimant also failed to demonstrate even the existence of any economic link between the two. Even those Tribunals which have adopted a more lenient view regarding the territoriality of financial and generally non-material assets, have required the existence of at least a contribution to the economic development of the host state to establish a territorial link.[38] This view is bolstered by the BIT's Preamble, which contains explicit reference to the "*economic development of the Contracting Parties*", shedding light on the BIT's object and purpose.[39] That said, the Award does not serve to promote Respondent's economy but rather, Claimant's interests. Its enforcement will deprive Respondent of significant economic resources instead of advancing its prosperity.

25. Hence, since the Award is not connected with the territory of Respondent, it cannot be considered a protected investment under Art.1(1) BIT.

3. Claimant's Award Does Not Fulfill the Inherent Characteristics of an Investment

26. In deciding whether an asset is protected under the BIT, recourse should be taken at the ordinary meaning of the term "investment", as mandated by the international customary rules of treaty interpretation reflected in Art.31 VCLT. In this respect, arbitral jurisprudence, following *Romak* Tribunal's lead and looking beyond the mere labelling of assets, has identified certain objective characteristics that form part of the inherent meaning of the word "investment";[40] commitment of capital, duration, regularity of profit and return, and investment risk.[41] These elements are cumulative and failure to meet one of them would lead to refusing the BIT's protection.[42]

27. In light of these considerations, it is Respondent's firm position that the Award does not meet all the above characteristics. More specifically, the elements of duration and regularity of

[38] *Ambiente*, ¶499; *Deutsche Bank*, ¶292.
[39] Dörr/Schmalenbach, pp.232,544.
[40] *Romak*, ¶207; *Nova Scotia*, ¶76-78; *Alps Finance*, 239-240; *Quiborax*, ¶212; Douglas, p.191.
[41] *Saba Fakes*, ¶¶110; *Joy*, ¶53; *Poštová banka*, ¶360; *Caratube*, ¶360.
[42] *Saba Fakes,* ¶101; *KT Asia,* ¶206.

profit and return are closely connected, given that neither is met when the amount of money is paid in its totality.[43] Here, an enforcement of Claimant's Award will consist in a one-off payment to Claimant, lacking thus any duration or regularity of income.

28. Concerning the existence of risk, the *Nova Scotia* Tribunal outlined that the risk inherent in an investment is materially different from a pure commercial risk,[44] a view which is shared among arbitral tribunals.[45] This investment risk exists only when there is uncertainty regarding the return or generally the outcome of the transaction.[46] The *KT Asia* Tribunal associated it with the commitment of capital, finding that the relevant investor "*having made no contribution, incurred no risk of losing such (inexistent) contribution*".[47] The same applies with regard to Claimant's Award: Claimant runs no risk whatsoever.

29. All abovementioned considerations explain why Claimant's Award as such cannot constitute an investment under Art. 1(1) BIT.

B. Claimant's Award Cannot be Considered an Investment by Virtue of Atton Boro and Company's Undertakings in Mercuria

30. It is highly likely that Claimant, aware of the difficulty of simply equating its Award with a covered investment under the BIT, may attempt to rely on different lines of argumentation, based on Atton Boro and Company's undertakings in Mercuria, *i.e.* primarily the Mercurian Patent for Valtervite and the LTA. Still, the fact remains that this Tribunal lacks jurisdiction over any claim related to the Award, since, the Award cannot be considered an investment on account of the "*transformation-clause*" included in the last sentence of Art.1(1) BIT (**1**). Even under the so-called "overall operation" theory, Claimant's Award still does not qualify as a protected investment, since Atton Boro and Company's undertakings in Mercuria are not covered under the BIT (**2**).

1. Claimant's Award Cannot Be Regarded as a Transformation of the LTA

31. Art. 1(1) BIT *in fine* provides that "*[a]ny change in the form of an investment does not affect its character as an investment*". In order for this clause to apply in the present case,

[43] *Joy*, ¶57.
[44] *Nova Scotia*, ¶105.
[45] *Romak*, ¶229; *Joy*, ¶57.
[46] *Romak*, ¶230.
[47] *KT Asia*, ¶219.

Claimant would have to establish that its Award is not merely related to the LTA, but is linked with it in such a way so as to constitute "*a change in its form*", its continuation. Such a close connection is absent in the case at hand. As succinctly stated by the Tribunal in *GEA*, where an identical transformation-clause was found,

> "the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct…".[48]

32. This conclusion is furthered by the well-established separability doctrine, which has been repeatedly applied and recognized as a general principle of international arbitration law.[49] As per this principle, which is also enshrined in Art.32(1) of the applicable PCA Rules, dispute settlement clauses are autonomous and independent from the underlying contracts.[50] In this vein, an award rendered pursuant to an arbitration clause included in a contract remains completely autonomous from the latter. As a result, the Award cannot be regarded as an investment by allegedly being LTA's direct transformation.

2. Atton Boro and Company's Undertakings in Mercuria As Such Are Not Covered Investments Under the BIT

33. Claimant may invoke an "overall operation" theory to argue that its Award is a protected investment allegedly as a part of <u>*its*</u> unified investment operations in Mercuria, consisting mainly of the Mercurian Patent and the LTA. This attempt would be unavailing, since the Patent, and thus the LTA, fall outside the temporal scope of the BIT (**a**), and, at any rate, the true beneficial owner of the Mercurian Patent, the LTA and any "overall investment operation" in Mercuria at stake in the present proceedings, is Atton Boro and Company, rather than Claimant (**b**).

<u>a. The Mercurian Patent Was Registered Before the Entry into Force of the BIT</u>

34. Art.13 BIT provides that the treaty applies only to investments realized "*on or after the date of its entry into forc*e". The BIT entered into force on 9 April 1998, thirty days after the exchange of its instruments of ratification between the parties on 10 March 1998.[51] According to Claimant's own Notice for Arbitration, "*the Mercurian Patent No. 0187204 [was] granted*

[48] *GEA*, ¶162.
[49] *Duke Energy*, ¶131; *Plama*, ¶¶130,212.
[50] Clasmeier, pp.91-93; Sanders, pp.40-41.
[51] Art.14 BIT; PO2, ¶2.

on 21 February 1998".[52] Thus, the Mercurian Patent was registered well before the entry into force of the BIT, and hence falls well outside its temporal scope.

35. The Patent protects the chemical compound Valtervite, the basic ingredient of greyscale drug Sanior, for the supply of which the LTA was concluded.[53] It is only after its registration the exclusive rights under the patent are born. Hence, in the matter at hand the Mercurian Patent constitutes the foundation for the very existence of the LTA, which is thus also drawn outside the BIT's protective temporal scope.

36. Consequently, the Patent and the LTA are not protected under the BIT and Claimant cannot rely on them to somehow maintain its proposition that its Award is *ratione materiae* covered by the BIT as well.

b. Claimant Is Only the Nominal Owner of Atton Boro and Company's Undertakings in Mercuria

37. Respondent respectfully draws this Tribunal's attention to the "*uncontroversial principle of international law*" and "*more general principle of international investment law*" that when a legal title is split between a nominee and a beneficial owner, claimants are not permitted to submit claims "*held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty*". [54]

38. Both arbitral case law[55]and doctrine[56] verify this fundamental proposition. For instance, the *Toto* Tribunal has clarified that an investment exists when the investor has committed its own financial resources and, consequently, has undertaken the relevant risk.[57] This ruling was also followed in *Quiborax* and *Caratube* cases, while the *KT Asia* Tribunal declined jurisdiction mainly based on the fact that the contribution was made by the claimant's beneficial owner, rather than claimant itself.[58]

39. In the case at hand, the record indicates that Claimant was incorporated as a wholly owned subsidiary of Atton Boro Group,[59] whose primary holding company is Atton Boro and Company

[52] Notice, ¶6.
[53] Facts, ¶¶3,10.
[54] *Occidental*, Annulment, ¶¶259-262.
[55] *Siag*, ¶¶87-90; *Impregilo*, ¶¶146,148,151.
[56] Whiteman, pp.1261-1262; Oppenheim, p.514; Crawford, p.704.
[57] *Toto*, Jurisdiction, ¶84.
[58] *Quiborax*, ¶¶232-233; *Caratube*, ¶¶434-435; *KT Asia*, ¶¶192, 206.
[59] Facts, ¶4.

in Reef;[60] that shares of Claimant are ultimately controlled by Atton Boro and Company;[61] and that Atton Boro and Company funded Claimant "*to set up its manufacturing unit in Mercuria,as well as to perform the agreements it entered into with the NHA from 1998 onwards*".[62] It is thus evident that the ownership title of the Mercurian Patent, the LTA and any relevant "overall investment operation" in Mercuria was thus divided between a nominee, *i.e.* Claimant, who held the legal title on behalf of the beneficial owner, and a beneficial owner, *i.e.* Atton Boro and Company. It was the latter who bore the costs, profits, risks and rewards of ownership, and who controlled Claimant as its "puppet master" *via* indirect 100% shareholding.

40. All in all, Claimant did not contribute a single penny for initiating and conducting business in Mercuria. Even the assignment of the Patent was carried out as an intra-group transaction, without any monetary (even nominal) payment whatsoever, but simply in exchange of shares with its beneficial owner, Atton Boro and Company.[63]

41. Accordingly, Claimant has not "*fulfilled its side of the bargain*" so as to qualify as an investor with a protected investment under the Mercuria-Basheera BIT,[64] and this Tribunal lacks jurisdiction over any claims related to Claimant's Award.

II. CLAIMANT CANNOT AVAIL ITSELF OF THE BENEFITS OF THE BIT BY VIRTUE OF ART.2(1) BIT

42. In the unlikely event that this Tribunal finds that it has jurisdiction over the claims related to Claimant's Award, Respondent still submits that Claimant is barred from asserting claims by virtue of the denial of benefits clause under Art.2(1) BIT, since it is a textbook example of a mere "mailbox" company with no real ties to its home state.

43. Accordingly, Respondent asserts that it has rightfully denied the benefits of the BIT to Claimant, since the substantive requirements of Art.2(1) are met (**A**). Moreover, Respondent is not time-barred from raising this objection (**B**).

[60] Facts, ¶2.
[61] PO2, ¶3.
[62] PO3, L-1570-1574.
[63] PO3, L-1575.
[64] Douglas, ¶336.

A. The Substantive Requirements of the Denial Of Benefits Clause Are Satisfied

44. Art.2(1) BIT stipulates that an investor may be excluded from the protective scope of the BIT when it is owned or controlled by nationals of a third state and has no substantial business activity in its home state. The Tribunal in *Amto* ruled that, although the respondent state bears the burden of proving these requirements, it is the investor that should provide the necessary evidence regarding its corporate structure and activities.[65]

45. Despite the scarce information Claimant has provided in the present proceedings, Respondent will still establish how and why Claimant is owned and controlled by investors of Reef, namely Atton Boro and Company (**1**), and that Claimant has no substantial business activities in the territory of Basheera (**2**).

1. Claimant Is Owned and Controlled by Investors of Reef

46. No matter how skillfully Claimant attempts to veil its ownership and control under multiple layers of corporate structure, it cannot conceal the obvious; Claimant is owned and controlled by investors of Reef. As a preliminary point, it bears to be noted that the demonstration of either ownership or control suffices for the fulfillment of the relevant requirement, as it is disjunctively drafted.[66]

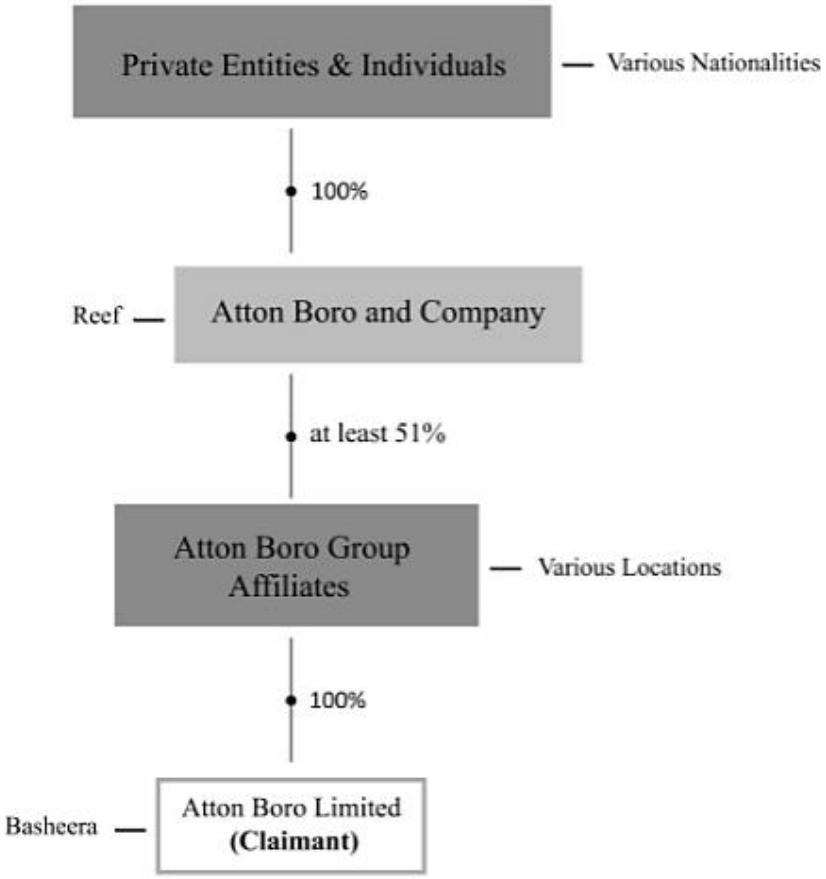
47. In this context, Respondent recalls the findings of the tribunals in *Plama* and *Ulysseas*, which pierced through all the layers of the corporate structure in order to determine ownership and control.[67] This approach accords to the very purpose of a denial of benefits clause, which is precisely the identification of the true beneficial owner.[68]

48. As depicted in the graph below, Atton Boro and Company owns by majority Atton Boro Group,[69] whose affiliates currently hold Claimant's shares.[70] Thus, Claimant is beneficially owned by Atton Boro and Company whose seat is located in Reef.[71]

49. Furthermore, since the latter is owned by *"a mix of private entities and private individuals of a wide variety of nationality"*,[72] one cannot reasonably assert that Claimant is owned by

[65] *Amto*, ¶63.
[66] *Plama*, ¶170; *Caratube*, ¶380.
[67] *Plama*, ¶170; *Ulysseas*, ¶¶169-170.
[68] Baumgartner, p.116.
[69] Facts, ¶2.
[70] PO2, ¶2.
[71] Facts, ¶2.
[72] PO3, L-1570.

nationals of Basheera. This by itself suffices for the fulfillment of the first prerequisite of Art. 2(1)BIT.



50. With regard to the element of control, it has been established by the *Mobil* Tribunal that 100% shareholding proves the control of the legal entity by the parent company,[73] while other tribunals have reached the same conclusion for majority shareholding.[74] For this reason, it is Respondent's submission that Claimant, being fully owned by Atton Boro Group affiliates, is also, controlled by them. However, given that the aforementioned are ultimately controlled by Atton Boro and Company,[75] it is apparent that Claimant is itself controlled by Atton Boro and Company, a national of Reef.

51. On the same wavelength, the Tribunal in *Aguas del Tunari* ruled that the term "control" does not necessarily mean effective control,[76] and as a result, it is not mandatory for Respondent to provide evidence on the latter. However, even in the event that this Tribunal finds otherwise, Respondent submits that Claimant is effectively controlled by Atton Boro and Company. The

[73] *Mobil*, Jurisdiction, ¶153;
[74] *Aguas del Tunari*, ¶264; *Generation Ukraine*, ¶15.9.
[75] PO2, ¶3.
[76] *Aguas del Tunari*, ¶234.

Thunderbird Tribunal held that *de facto* control can be established by the exercise of significant influence over the decision-making of another entity or by certain factors, such as "*access to markets, access to capital, know how*".[77]

52. This is exactly the case here, as Atton Boro and Company assigned Claimant the Mercurian Patent,[78] which can qualify as know-how, granting it access to the relevant market. It also provided Claimant with the necessary funds in order to establish the manufacturing unit in Mercuria and to execute the agreements it concluded with the NHA since 1998.[79] Even more so, Claimant's legal representative in the current arbitral proceedings happens to be in Reef, where Atton Boro and Company is seated.[80]

53. Hence, in direct contrast to the scarce evidence submitted by Claimant, Respondent has provided more than sufficient information proving that Claimant is owned and controlled by investors of a third state.

2. Claimant Has No Substantial Business Activity in the Territory of Basheera

54. Apart from being constantly under the instruction of Atton Boro and Company, Claimant fails to demonstrate any business activities in Basheera that can be possibly construed as "substantial". Specifically, the ordinary meaning of the term "*substantial*", as interpreted by Art.31(1) VCLT, refers to something "*of ample or considerable amount or size*".[81] However, Claimant's activities in the territory of Basheera, if any, are far from being considered as such.

55. Additionally, the *Tokios Tokelés* Tribunal determined the existence of substantial economic activity in the territory of the home state by reference to financial statements, list of goods manufactured, and employment details that were disclosed.[82] It is Respondent's position that Claimant falls far short of this minimum; its role in Basheera is to arrange for the distribution of products that are manufactured and sold abroad.[83] Other than that, it merely supports its holding affiliates in matters of taxes, accounting, and legal services with regard to South America and America having had between 2 and 6 permanent employees from 1998 to 2016.[84] The mere maintenance of few employees for the foregoing purposes does not suffice to

[77] *Thunderbird*, ¶¶107-108.
[78] Facts, ¶4.
[79] PO3, L-1572-1573.
[80] PO1, ¶5.
[81] Lange, p.182.
[82] *Tokios Tokelés*, ¶37.
[83] Facts, ¶4.
[84] PO2, ¶3.

establish substantial business activity, when there is no evidence that Claimant makes financial statements, or manufactures any goods in Basheera.

56. Even more so, the tribunals in *Pac Rim* and *Plama* underlined that an entity cannot avail itself of the actions conducted by other companies within the same group in order to demonstrate substantial business activity.[85] Accordingly, Atton Boro Group's "*established presence*" in Basheera cannot support Claimant's case.[86]

57. Thus, it is ironic that Claimant boasts of the "*strategic financing, constant investment in innovation and forging of public-private partnerships*",[87] at the very moment that its activities in Basheera actually amount to nil.

B. The Invocation of the Denial of Benefits Clause Was Made in a Timely Manner and Has Retrospective Effect

58. Having established that all substantive requirements of Art.2(1) BIT are satisfied, Respondent recognizes that Claimant may once again be tempted to impede the application of Art.2(1) by alleging its untimely invocation. For this reason, Respondent will at this point preemptively establish that it has promptly exercised its right in its Response to the Notice of Arbitration.

59. According to Art.23(2) PCA Rules, the respondent state can raise a preliminary objection until the statement of defence. The *Ulysseas* and *Guaracachi* tribunals, established under the UNCITRAL and PCA Rules respectively, reading an identical provision, found that respondent had timely denied the benefits after the initiation of the arbitral proceedings.[88]

60. More precisely, the *Ulysseas* Tribunal, remarked that no time limit is prescribed for the invocation of the clause[89] and thus, respondent had promptly done so in the Answer to the Notice of Arbitration.[90] Likewise, the *Guaracachi* Tribunal reached the same conclusion for the invocation of the clause at an even later stage, *i.e.* in the Statement of Defence.[91] Consequently, Respondent has more than timely invoked the denial of benefits clause in its Answer to the Notice of Arbitration.

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[85] *Pac Rim*, ¶4.66; *Plama*, ¶169.
[86] Facts, ¶¶2,5.
[87] Notice, ¶5.
[88] *Ulysseas*, ¶172, *Guaracachi*, ¶382.
[89] *Ulysseas*, ¶172.
[90] Response, ¶5.
[91] *Guaracachi*, ¶381.

61. Indeed, an earlier notification of a possible future invocation of the denial of benefits clause would discourage foreign investments,[92] constituting an "*unfriendly and groundless act*".[93] After all, the investors are aware from the outset that they are subject to the invocation of the right and as a result, no legitimate expectations can arise absent such a prior notification.[94]

62. Further still, it would be practically impossible for Respondent to conduct search upon the corporate structure of all its investors, including Claimant.[95] As USA and Costa Rica emphasized in their third-party submissions in *Pac Rim*, a state realizes the true corporate structure of the investor company upon the materialization of the dispute and a requirement of earlier invocation would be an undue burden for the state.[96]

63. What is more, the exercise of Respondent's right can only have a retrospective effect, meaning it applies *ex tunc*; for, a different approach would deprive the clause of its *effet utile*.[97] In fact, since investors are initiating arbitral proceedings for acts of the past,[98] a putative prospective effect would render the invocation of denial of benefits meaningless, while its very purpose is "*to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits.*"[99]

64. Besides, only ECT tribunals have opted for a prior notice and a prospective effect. With regard to this, Respondent submits that such cases cannot serve as guidance on the present matter, as the ECT provides for a special regime that is distinctly different from the BIT at hand. More specifically, the ECT is a multilateral treaty, where the investor has to distinguish between more than fifty different national systems of the signatories, which can indeed make the venture all the more complex.[100] Thus, in those cases an argument concerning a uniform approach can find some merit in the prospect of the "*long-term cooperation*", which is stipulated in Art. 2 ECT.

65. As a concluding remark, Respondent asserts that it has timely denied Claimant the benefits of this BIT. Claimant is indeed attempting to invoke the rights of the present BIT, even though it has practically no substantial presence in its home state. However, Claimant cannot effectively "pave" its way to a convenient arbitration just because its seat is located in Basheera.

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[92] Mistelis/Baltag, p.1321.
[93] *Guaracachi*, ¶379.
[94] *Ulysseas*, ¶173; *Guaracachi* ¶372; Baumgartner, p.117.
[95] *Guaracachi* ¶379; Lange, pp.280-281.
[96] *Pac Rim*, ¶¶4.53, 4.56; Douglas, ¶880.
[97] Behlman, p.406.
[98] Douglas, ¶879.
[99] *Guaracachi*, ¶376.
[100] *Plama*, ¶155; Lange, p.289.

66. As illustrated above, Claimant cannot persuasively assert that it meets this criterion, as it is a mere "vehicle" pursuing the benefits of Atton Boro and Company.[101] However, much to Claimant's discontent, what matters for BIT purposes is the one behind the wheel.

III. NEITHER THE ENACTMENT OF THE LAW NOR THE GRANT OF THE LICENSE HAVE VIOLATED ART.3(2) BIT

67. While Claimant is trying to establish that it has not been treated as it wished to, Respondent submits that one should not lose sight of the prevalent circumstances in Mercuria that render any allegations for mistreatment unmeritorious. Faced with a greyscale epidemic, Respondent undertook the necessary measures in order to secure access to essential medicines by enacting Law No.8458/09 for non-voluntary licenses and subsequently authorizing a generic drug manufacturer to produce medicines based on Claimant's Valtervite.

68. In this regard, it is Respondent's submission that none of these actions has violated the Fair and Equitable Treatment ("**FET**") standard under Art.3(2) BIT (**A**). Moreover, Claimant cannot allege that Respondent breached its inter-state obligations before this Tribunal (**B**). In any event, Respondent's conduct is exempt both under Art.12 BIT and the customary rule of necessity (**C**).

A. The BIT Does Not Protect Claimant's Hopes for a Frozen Legal Framework

69. Respondent submits that it has at all times treated Claimant fairly and equitably. This standard provided under Art.3(2) BIT should be considered equivalent to the customary Minimum Standard of Treatment ("**MST**"),[102] even in the absence of specific wording to that end. This conclusion was also adopted by the *Biwater* Tribunal, which held that the respective FET clause, containing no reference to international law whatsoever, was equated to the MST.[103] Accordingly, a breach of the standard is highly demanding and a balanced interpretation is needed in order not to overstate the protection granted to investors.[104]

70. The FET standard does not protect individual perceptions but solely the investor's objective expectations.[105] The vast majority of arbitral tribunals, including *Frontier* and *Saluka*,

[101] Facts, ¶4.
[102] *Blusun*, ¶319(3); *El Paso*, Award, ¶337; *Genin*, ¶367; *CMS*, ¶284.
[103] *Biwater*, ¶592.
[104] *Biwater*, ¶¶597,599; *Saluka*, ¶300.
[105] *Urbaser*, Award, ¶¶608,616; *Charanne*, ¶495; *El Paso*, Award, ¶358.

have remarked that such expectations must exist at the time the investment is made, while those arising afterwards cannot be protected under the BIT.[106] In fact, they can only be created by representations specifically and individually addressed to the investor.[107]

71. Therefore, in the case at hand, Claimant cannot invoke its "legitimate" expectations, at the very moment that no specific assurances were directed towards it (**1**) and that it recklessly neglected Respondent's sovereign right to regulate (**2**).

1. In the Absence of Specific Representations for a Stable Legal Framework, No Legitimate Expectations Could Arise

72. The Tribunal in the recent *Blusun* case underlined that absent specific commitments, investors should evaluate and undertake the risk of changing circumstances.[108] Accordingly, in the instant case, no promise or guarantee was made to Claimant regarding the immutability of the legal regime and, thus, it should have accepted the inevitable volatility of the circumstances.

73. First of all, the grant of the patent itself is by no means an assurance that the exclusive rights thereunder will remain unaffected from changes of the IP Law and, as such, it cannot give rise to any legitimate expectations.[109] Accordingly, Claimant could not anticipate that merely by virtue of the Mercurian Patent no law for compulsory licenses would be enacted.

74. Furthermore, the statements of state officials are of no avail to Claimant, given that they followed nearly six years after the grant of the Patent, which Claimant presents as its first investment in the country.[110] Similarly, the *Duke Energy* Tribunal held that expectations which arose two years after the realization of the investment were excluded from the protection of the FET standard.[111]

75. Nonetheless, even if these declarations were considered pertinent, Respondent invites this Tribunal to follow the findings in the *Continental* case, where the Tribunal concluded that claimant had no legitimate expectations for the stability of the convertibility regime, despite political assurances to the contrary, notably those from the Minister of Economy.[112] In the most clear terms, the Tribunal emphasized that "*political statements have the least legal value,*

[106] *Saluka*, ¶301; *Frontier*, ¶288; *Jan de Nul*, ¶265.
[107] *Charanne*, ¶¶499,510; *Blusun*, ¶¶319(5),372,373; *Philip Morris v. Uruguay*, ¶426..
[108] *Blusun*, ¶374.
[109] Ruse-Khan, *Protecting IP*, p.20.
[110] Facts, ¶¶3,8,14.
[111] *Duke Energy*, ¶365.
[112] *Continental*, ¶¶113,262.

regrettably but notoriously so".[113] Likewise, Claimant here is not entitled to rely on the statements of the Minister for Health and the President of Mercuria, even more since they are vague and addressed to an indefinable audience.

76. In particular, in 2009, the Minister focused on the *Comprehensive HIV/AIDS Partnership* between the NHA and a consortium of pharmaceutical companies.[114] The fact that Claimant was one of the consortium members,[115] fails to transform the statement into a personal one. At the same time, his reference to the preservation of the IPR regime was too general in content to constitute a basis for Claimant's expectations.[116]

77. In a similar vein, the Tribunal in *Charanne* found that the distribution of documents with the title "[t]*he Sun can be yours*" in order to attract investors to the renewable energy sector, could not create legitimate expectations in the absence of specific content.[117] Even more importantly in the case at hand, the Minister presented the access to healthcare as its ultimate objective[118] and thus Claimant should have been prepared that the legislation could change in view of an unfolding crisis.

78. Equally, the President of Mercuria stated on Twitter that "*Mercuria will do away with red tape and roll out the red carpet for investors*", without any reference to Claimant.[119] In this regard, the *White Industries* Tribunal held that statements of Indian officials reassuring that India was a safe place to invest could not be a basis for legitimate expectations due to their generality.[120] Besides, there is nothing exceptional about the President's announcement, given that similar phrasing is frequently used by politicians, such as a US Senator in 2002 and India's Minister for Finance in 2015.[121]

79. In any case, the investor must have relied on the assurances provided, so that its legitimate expectations are protected.[122] This is clearly not the case at hand. Claimant had already entered Respondent's market shortly after its incorporation in 1998, by signing agreements with the government and the NHA.[123]

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[113] *Continental*, ¶261.
[114] Facts, ¶8.
[115] Annex No.2, ¶3.
[116] Annex No.2, ¶4.
[117] *Charanne*, ¶¶95,495,499.
[118] Annex No.2, ¶4.
[119] Facts, ¶8.
[120] *White Industries*, ¶10.3.17.
[121] US Congressional Record, p.3027; Statement of India's Minister of Finance 2015.
[122] *Duke Energy*, ¶340; *Micula*, ¶667; *Parkerings*, ¶331.
[123] Facts, ¶5.

2. Claimant Should Have Expected that Respondent Would Exercise its Regulatory Powers

80. In the context of legitimate expectations, investors' calculations should be balanced against the host state's interests.[124] Any alleged expectations are *a priori* limited by the state's inherent power to regulate.[125]

81. Indeed, a reasonable investor cannot have the delusion that the legal framework will remain frozen,[126] since the state cannot ties its hands in the face of evolving circumstances[127] or crises.[128] Especially where there is no stabilization clause, as in the present case,[129] the FET standard cannot take its place.[130] In this spirit, the *Genin* Tribunal held the state's regulatory changes should be assessed in the framework of the prevailing conditions in the country.[131] Accordingly, the *Unglaube* and *Urbaser* tribunals remarked that necessary regulatory measures aiming at the protection of public health should be respected and do not violate any legitimate expectations.[132]

82. Besides, such expectations would be violated only if the enactment of law was "*discriminatory*" or "*drastic"*.[133] The non-voluntary license law is applicable to all categories of patent holders,[134] while the fact that such a law did not exist before[135] is not decisive in order to determine whether the change was dramatic. In a similar context, the Tribunal in *Philip Morris v. Uruguay* case highlighted that the introduction of the novel regulation regarding cigarette packages did not violate the FET standard, since the latter does not ensure that "*nothing should be done by the host State for the first time*".[136]

83. All the aforementioned offer material guidance in the case at hand, where Respondent is not facing an ordinary crisis but an epidemic. While the latter takes place when a disease affects more than 1% of the overall population,[137] the greyscale patients amount to 1,2%. Greyscale was present already since 1985 while the first spike in the number of patients was recorded in

[124] *Perenco* ¶560; *Saluka*, ¶306; *EDF*, ¶1005.
[125] *Parkerings*, ¶332; *CMS*, ¶277; *Saluka*, ¶305; *El Paso*, Award, ¶¶350-352,372.
[126] *Enron*, ¶261; *Oostergetel/Laurentius*, ¶224; *Parkerings*, ¶332.
[127] *BG*, ¶298; *Blusun*, ¶319(4); *El Paso*, Award, ¶372; *Urbaser*, Award, ¶628.
[128] *Continental*, ¶258;
[129] Annex No.1, p.32-38.
[130] *Philip Morris v. Uruguay*, ¶423*; Micula*, ¶529; *El Paso*, Award, ¶368.
[131] *Genin*, ¶348.
[132] *Unglaube*, ¶246; *Urbaser*, Award, ¶628.
[133] *Toto*, Award, ¶244.
[134] Annex No.4, p.44-45.
[135] PO3, L-1577-1578.
[136] *Philip Morris v. Uruguay*, ¶430.
[137] UN-Ghana.

2002.[138] It was spreading like wildfire to the point of constituting an immediate threat to public health only in the next year.[139] In 2006, it counted more than 578,390 patients and kept rising to a percentage of 266%.[140] At the same time, even under the agreed discounted rate, the annual cost of Sanior amounting to USD 10,000 per patient was excessive. Under these circumstances, Claimant could not reasonably expect that Respondent would remain idle at the very moment that greyscale had yet to reach its zenith.

84. More importantly, it could have easily predicted the forthcoming change of the IPR regime, given that the Minister for Health had cautioned 3 years before the amendment that the government was prepared to take any measure necessary in order to provide greyscale medicines to all patients.[141] This statement served as a warning that the situation in Mercuria might need to change. In fact, the grant of compulsory licenses under such circumstances is a common practice, especially in the developing world. For instance, Mozambique, Zambia and Malaysia granted compulsory licenses in 2002, when confronted with an AIDS crisis.[142]

85. In light of these considerations, Claimant cannot sincerely argue that it had exercised due diligence, in order to be protected under the FET standard.[143] A prudent investor should take into account the surrounding "*political, socioeconomic, cultural and historical*" conditions in the host state.[144] Besides, *Biwater* Tribunal emphasized, "*investors cannot expect the 'easiest' investment climate when investing in developing countries*".[145]

86. In the present case, Claimant, albeit a part of a multinational company with long-term experience in the field of critical diseases,[146] did not see the forest for the tree. In a nutshell, Claimant should have expected that Respondent would exercise its right to regulate in order to achieve a legitimate regulatory purpose.

[138] Annex No.3, p.41.
[139] Facts, ¶6.
[140] Annex No.3, p.42.
[141] Facts, ¶14.
[142] Love, p.5.
[143] *Parkerings*, ¶333; *Blusun*, ¶383.
[144] *Duke Energy*, ¶340.
[145] *Biwater*, ¶376.
[146] Facts, ¶2.

B. Claimant Cannot Avail Itself of the TRIPS Agreement

87. It is striking that Claimant has alleged in its Notice of Arbitration that Respondent through its measures

> "disregards international covenants such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)".[147]

In response to such an unsubstantiated allegation, Respondent asserts that Claimant cannot bring claims based on supposed violations of the TRIPS Agreement before this Tribunal (**1**). In any case, however, Respondent has fully complied with its international obligations under this treaty (**2**).

1. Claimant Has No Standing to Invoke the TRIPS Agreement Before this Tribunal

88. Claimant seems unmindful of the fact that this arbitral Tribunal cannot rule upon putative violations of the interstate TRIPS Agreement. In detail, Art.64 TRIPS, together with Art.23 Dispute Settlement Understanding ("**DSU**") provide that member states shall settle their disputes arising out of TRIPS exclusively through the Dispute Settlement Body ("**DSB**") of the WTO.[148] Consequently, private parties, like Claimant, are excluded from raising claims related to TRIPS in front of the DSB or any other forum.

89. Accordingly, it should come as no surprise that no arbitral tribunal has directly examined a state's compliance with TRIPS. To the contrary, the Tribunal in *Methanex*, followed by the one in *Grand River*, concluded that it has no power to adjudicate upon claims related to international conventions,[149] including the WTO Agreements.[150] In the same vein, the *Philip Morris v. Australia* Tribunal did not even take into consideration claimant's invocation of TRIPS.

90. Moreover, according to Professor Ruse-Khan, TRIPS cannot be used for the interpretation of the FET,[151] a tactic lately employed by claimants. Even more, it cannot create legitimate expectations, since its provisions have no direct effect and do not give rise to individual rights of investors.[152] As demonstrated by the practice of the WTO Members and the

[147] Notice, ¶13.
[148] Van den Bossche/Zdouc, pp.160,161.
[149] *Grand River*, ¶71.
[150] *Methanex*, Part II, Chapter B, ¶5.
[151] Ruse-Khan, *Compliance with IP Norms*, pp.254-255.
[152] Klopschinski, p.235; Ruse-Khan, *Compliance with IP Norms*, p.256.

recurring jurisprudence of the European Court of Justice, TRIPS has no direct application.[153] Further, the CJEU in the *Parfums Dior* case held that

> "the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law".[154]

91. In light of these considerations, Claimant cannot directly allege violations of the TRIPS Agreement before this Tribunal nor use BIT standards as a vehicle to import through the back door such infringements.

2. In Any Case, Respondent Has Complied with the TRIPS Agreement

92. Even if TRIPS found a way into the present arbitral proceedings, Respondent asserts that Claimant was accorded the minimum level of protection required thereunder. Both the enactment of the law and the grant of the compulsory license are in conformity with Art.31 TRIPS, providing the flexibility to authorize compulsory licenses.

93. In particular, Respondent has respected all provisions of Art.31 TRIPS regarding the grant of the license to HG-Pharma. The Court granted the license after examining HG-Pharma's application on its individual merits and only as long as greyscale poses a threat for the Mercurian population, thus fulfilling paragraphs (c) and (g).[155]

94. Moreover, the requirement of prior negotiations with the patent holder is waived under Art.31(b) by virtue of "*circumstances of extreme urgency*". In this respect, the Doha Declaration recognizes that public health crises qualify as urgent situations,[156] and thus greyscale epidemic cannot but fall under this category. Claimant cannot reasonably argue that it was not notified effectively, since it was impleaded before the High Court, as a party in the proceedings concerning the grant of the license.[157]

95. Furthermore, the use of Valtervite was non-exclusive and non-assignable and it served the supply of the Mercurian market, thus meeting the requirements under paragraphs (d) to (f) of Art.31. The provision of generic drugs to three neighboring countries as humanitarian aid

[153] Van den Bossche/Zdouc, pp.68-69. *Portugal v. Council*, ¶46.
[154] *Joined Cases C-300/98 and C-392/98*, ¶44.
[155] Facts, ¶21.
[156] Doha Declaration, Art.5(c).
[157] PO3, L-1576-1577.

cannot annul that HG-Pharma manufactured Valtervite "*predominantly*", meaning in its majority, for the national market.[158]

96. Additionally, Claimant can challenge both the authorization of the license and the remuneration granted, under the domestic law,[159] as required by paragraphs (i) and (j). Conveniently enough, it chose not to do so and refused HG-Pharma's immediate offer to pay the relevant compensation.[160]

97. Even more so, Claimant's narrative about a "mere royalty of 1%" runs contrary to both law and practice. The royalties paid for incurable non-fatal diseases in Mercuria range between 0.5% and 3% of revenue.[161] Indeed, states enjoy a broad discretion in determining the adequacy of the remuneration.[162] Indicatively, Indonesia, when faced with AIDS, issued compulsory licenses and fixed the royalty at 0.5%.[163] Furthermore, "*adequate*" royalty does not cover lost profits,[164] which by itself rules out any argument concerning the recoup of R&D fees.

98. Considering that the current arbitration proceedings do not constitute the appropriate forum to determine the compliance with the TRIPS Agreement, Respondent will refrain from further elaborating on the matter.

C. Respondent's Measures Are Exempt Both Under the BIT and Customary International Law

99. In the unlikely event that this Tribunal finds that Respondent's actions are capable of breaching Art.3(2) BIT, Respondent is still exempt from liability under Art.12 (**1**), and in any case, under Art.25 of the ILC Articles on State Responsibility ("**ILC Articles**"), which reflects custom[165] (**2**).

[158] Love, p.17.
[159] PO3, L.-1578-1580.
[160] PO3, L-1597-1599.
[161] PO3, L-1590.
[162] Love, p.81.
[163] Love, p.5.
[164] Love, p.81.
[165] *Gabčíkovo-Nagymaros*, ¶51; *Sempra*, ¶344; *Enron*, ¶303.

1. The Enactment of the Law and the Grant of the License Aimed at the Protection of Respondent's Essential Security Interests Under Art.12 BIT

100. Respondent submits that its actions neatly fit the parameters of the Non-Precluded Measures clause ("**NPM**") of Art.12 BIT. When the state undertakes

> "any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations"

it does not violate the BIT.[166] Although such clauses are not self-judging,[167] host states still enjoy a considerable margin of discretion in applying this provision.[168]

101. In particular, the meaning of "*essential security interests*" encompasses protection from a variety of threats, including those against health.[169] This consideration finds an *echo* in the Preamble of the BIT which reads that the protection of investments shall not conflict with *"the protection of health"*.[170]

102. In that regard, a distinctive meaning is to be attributed to the term "*war*" in Art.12 BIT. The former President of World Bank has stated, with regard to AIDS, which is quite similar to greyscale in terms of severity, that "*the world faced a war more debilitating than war itself*".[171] Even the *LG&E* Tribunal departed from the strict meaning of these terms by ruling that the Argentine economic crisis was tantamount to a "*military invasion*", due to the havoc it inflicted to the population.[172]

103. Additionally, the factual background of the current controversy bears testimony to an "*emergency in international relations*". The World Health Organization ("**WHO**"), which normally publishes reports on health issues of top priority,[173] took real interest in greyscale since the very first incidents.[174] Equally, the provision of greyscale medicines to Respondent's neighboring countries[175] evidences that the disease constitutes a matter of international concern.

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[166] *Continental*, ¶164.
[167] *LG&E*, ¶212; *Sempra*, ¶¶375,379; *Continental*, ¶187.
[168] *Continental*, ¶181.
[169] Titi, pp.79,80,82.
[170] BIT, p.32.
[171] WBG, *The Impact on AIDS.*
[172] *LG&E*, ¶ 238.
[173] WHO Reports.
[174] Annex No.3, p.41.
[175] Facts, ¶23.

104. Further, the action in question is "*necessary*" when the *"state has no choice but to act"*, regardless of whether it pursues the sole available course of action.[176] In front of a raging health crisis, and in line with its obligations under Art.12 ICESCR,[177] Respondent took the only measures which could be effective for the confrontation of greyscale. Indeed, the use of generics reduced the expense for the purchase of drugs by 80%.[178]

105. All in all, Respondent's actions aimed at the protection of its essential security interests and thus, they were lawful by virtue of Art.12.

2. In Any Event, Respondent's Actions Are Justified Under Customary International Law

106. Art.25 ILC cumulatively requires that a state takes the "*only*" measure necessary in order to protect an "*essential interest*" endangered by a "*grave and imminent peril*", without impairing the interests of other states.[179] It is Respondent's submission that these prerequisites are met in the case at hand.

107. First of all, the safety of the population qualifies as an "*essential interest*".[180] There is no need that the very existence of the state is under siege,[181] provided that the danger in question is objectively established,[182] as is in the present case the public health crisis. The statistics provided so far regarding the greyscale evolution[183] and the lack of effective treatment in the period 2008-2010[184] evidenced what the future would bring.

108. Furthermore, the action taken is considered the "*only way*" where there is no other alternative reasonably available.[185] From the very beginning, in full accordance with WHO's stipulations,[186] Respondent had monitored the evolution of the disease through case reporting and awareness campaigns across the country.[187] Nevertheless, not only did the epidemic show no signs of abating but it further spiked to an alarming level, rendering the authorization of

[176] LG&E, ¶239.
[177] PO3, L-1566.
[178] Facts, ¶22.
[179] *Gabčíkovo-Nagymaros*, ¶51; *LG&E*, ¶249; *Sempra*, ¶355.
[180] ILC, Commentary, p.83; *LG&E*, ¶251.
[181] *LG&E*, ¶251; Thjoernelund, p.436.
[182] ILC, Commentary, p.83; *Gabčíkovo-Nagymaros*, ¶54.
[183] Annex No.3, p.42.
[184] PO3, L-1583-1587.
[185] ILC, Commentary, p.83; Thjoernelund, p.426.
[186] WHO, *Report on Global Surveillance*.
[187] Annex No.3; Facts, ¶12.

compulsory licenses the only remaining solution, as the previous regime, however convenient for Claimant, would effectively deprive a large amount of patient of access to medicine.[188]

109. In addition, the interests of other states were not impaired but only promoted, since the grant of the license enabled Respondent to provide its neighboring countries with humanitarian aid.[189]

110. The contribution to the state of necessity under Art.25(2)(b) ILC needs to be "*sufficiently substantial and not merely incidental or peripheral*",[190] creating a direct causal link between the acts of the state and the emergency situation.[191] Accordingly, Respondent cannot be accused of having caused the nationwide spread of greyscale, at the very time that it had taken all the measures at its disposal in order to prevent such an evolution.

111. Conclusively, Respondent submits that it cannot be held responsible for a violation of the FET standard under Art.3(2) BIT. The enactment of the new law and the grant of the license were taken in the framework of exceptional conditions and, as such, they are exempt under Art.12 BIT or, alternatively, under Art.25 ILC.

IV. THE CONDUCT OF RESPONDENT'S JUDICIARY DOES NOT AMOUNT TO A BREACH OF ART.3 BIT

112. Respondent submits that Claimant, cognizant of the fact that its allegations regarding the IP Law and the compulsory license are empty words, is trying once more under the guise of the FET standard, to establish Respondent's liability. Notwithstanding, the conduct of Respondent's court during the proceedings for the enforcement of the Award lies in conformity with Art.3 BIT. A mere pendency or delay falls far short of constituting an internationally unacceptable act, especially when no trace of judicial misconduct is found.

113. In this vein, Respondent asserts that judicial acts can be assessed only against the backdrop of denial of justice (**A**). That said, the conduct of the High Court towards Claimant does not meet this high threshold (**B**). Moreover, Claimant's protests for a more hasty enforcement procedure are mere hopes, not protected under the FET standard (**C**).

[188] Annex No.3, p.43.
[189] Facts, ¶23.
[190] ILC Commentary, p.84; *Sempra*, ¶354.
[191] *Urbaser*, Award, ¶¶711,714.

A. Denial of Justice Is the Proper Applicable Standard When Assessing the Conduct of the Judiciary

114. Notably, tribunals have considered that breaches of BIT standards require showing a denial of justice.[192] In this vein, the *Eli Lilly* Tribunal established that only in exceptional cases could a court's conduct constitute a violation of the FET standard, since, as also remarked in previous cases,[193] a tribunal is not an appellate body.[194] Thus, "*considerable deference is to be accorded*" to the domestic judgments.[195]

115. Accordingly, Claimant cannot arbitrarily cherry-pick any legal standard it deems more favorable to its case. Surprisingly enough, in its Notice of Arbitration, it alleges that it had no effective means of asserting its rights,[196] despite the fact that unlike other BITs,[197] the present one does not contain a specific article for the effective means as an independent standard.

116. In fact, it is only mentioned in the Preamble of the BIT, which Claimant cannot use as a vehicle to import a new substantive provision, since, according to Professor Douglas, this lacks any basis in Art.31 VCLT.[198] As a result, Claimant cannot rely on *Chevron, Duke Energy, Petrobart, Amto* and *Gavazzi* cases; for, there was an explicit article in the respective BITs.[199]

117. To sum up, the fact that Claimant invokes a legal standard beyond the scope of the BIT depicts its hardship to base its allegations on solid grounds. Given that it did not raise a denial of justice claim, this Tribunal should refrain from examining its request. However, and for the sake of the argument, Respondent will establish that it did not deny Claimant justice.

B. Claimant Was Not Denied Justice

118. In order for judicial actions to be equated to a denial of justice, the court must have treated the investor in a most "*egregious and shocking*"[200] manner that evinces "*manifest arbitrariness*"[201] and "*complete absence of due process of law*".[202] As the *Oostergetel* Tribunal

[192] *Arif*, ¶¶415-416; *Loewen*, ¶141.
[193] *Philip Morris v. Uruguay*, ¶500; *Loewen*, ¶162; *Eli Lilly*, ¶¶221,224.
[194] *Eli Lilly*, ¶224.
[195] *Eli Lilly*, ¶224.
[196] Notice, ¶13.
[197] Ecuador-US BIT, Art.II(7); India-Kuwait BIT, Art.4(5).
[198] Douglas, ¶147.
[199] *Chevron*, ¶188; *Duke Energy*, ¶313; *Petrobart*, p.12; *Amto*, ¶73; *Gavazzi* (footnote 110).
[200] *Mondev*, ¶127; *Glamis*, ¶22; *Chevron*, ¶244.
[201] *Eli Lilly*, ¶224; *Thunderbird*, ¶194.
[202] *Glamis*, ¶22.

has affirmed, simple breaches of procedural law cannot give rise to a denial of justice claim.[203] Thus, the threshold for establishing a violation is considerably high, regardless of whether the FET standard is qualified.[204]

119. In that regard, Respondent has not refused justice to Claimant, since the enforcement procedure was not prolonged beyond a reasonable amount of time (**1**). Further, there are no signs of arbitrary or discriminatory conduct on behalf of the Court (**2**).

1. The Duration of the Enforcement Proceedings Is Not Unreasonable

120. Much to Claimant's discontent, Respondent submits that there is no fixed minimum duration of court proceedings. Quite the contrary, this issue is reviewed *ad hoc*.[205] It is for this reason that the tribunals in *Jan de Nul* and *Roussalis* held that even a duration of ten years did not amount to a denial of justice;[206] the latter notably did so in the context of criminal proceedings,[207] where, by nature, there is a greater need for a timely closure of the case.[208]

121. In this vein, arbitral tribunals have established that the unreasonableness of the delay in court proceedings is examined on the basis of several factors, including the complexity of the case, the attitude of the litigants, and the court's conduct.[209]

122. To begin with, the enforcement of an award should not be misapprehended as a commercial transaction, solely involving the handing of money. The enforcement proceedings are considered to be complex in themselves,[210] as not only do they constitute a judicial process that involves the submission of the award, the arbitration agreement, and translations,[211] but also, they touch upon essential matters of the state, including its public policy.[212]

123. Specifically, the issue of public policy, notoriously known for being an "*unruly horse*",[213] makes by itself any proceeding complex.[214] In our case, the High Court, in line with

[203] *Oostergetel/Laurentius*, ¶299.
[204] *Chevron*, ¶244; *Biwater,* ¶597; *Philip Morris v. Uruguay*, ¶499.
[205] *White Industries*, ¶10.4.10; *Toto*, Jurisdiction, ¶163.
[206] *Jan de Nul*, ¶204.
[207] *Roussalis*, ¶602.
[208] *White Industries*, ¶10.4.14.
[209] *White Industries*, ¶10.4.10; *Toto*, Jurisdiction, ¶160; *Frontier*, ¶328; *Oostergetel/Laurentius*, ¶290; *Chevron*, ¶250; *Roussalis*, ¶603.
[210] Paulsson M., p.17.
[211] Paulsson M., p.78.
[212] Paulsson M., p.10.
[213] Gary B., p.246-247.
[214] Paulsson J., p.103.

Art.V(2)(b) NYC, was called to rule upon this objection.[215] As such, the need for extensive deliberation between the parties and thorough examination by the Court becomes apparent.

124. In parallel, Claimant seems to turn a blind eye to the volume of the case-file in the enforcement proceedings. This is a factor that has a considerable impact on the estimation of the time needed for the issuance of a decision; this is precisely what the Tribunal in *White Industries* took into consideration when ruling that the Court had to examine a series of requests and petitions.[216] Similarly, one cannot overlook that both parties provided the High Court of Mercuria with multiple oral and written submissions, eleven in total,[217] and requested another twelve additional extensions to conclude them.[218]

125. On the same wavelength, Respondent submits that the foregoing cannot be viewed in isolation from the prevailing circumstances. Considerable weight has to be attached to the fact that the respective host state is "*a developing country* [...] *with a seriously overstretched judiciary*".[219] Similarly, Mercuria is a developing state, with a population of nearly seventy million people,[220] which by itself strains the judicial system. Adding to that, even though Respondent conducted workshops for the Judges,[221] and organized Commercial Benches under the Commercial Courts Act 2012 with a view to quickly adjudicate upon commercial disputes,[222] the amount of cases before the Mercurian courts was overwhelming, especially during the last two years of the enforcement proceedings.[223]

126. Lastly, Claimant cannot neglect the fact that it also, contributed to the length of the proceedings, since it requested hearings, along with the NHA, asked for leave to file further submissions and lastly, requested its case to be transferred.[224]

127. Hence, the duration of the proceedings should not be deemed excessive. Having all the above-mentioned parameters in mind, the enforcement of the Award could not reasonably proceed at a faster pace.

[215] NYC, Art.V(2)(b); PO2, ¶2.
[216] *White Industries*, ¶5.2.17.
[217] Exhibit I, ¶¶4,6,10,22,23,25,27,31,32,38,41.
[218] Exhibit I, ¶¶7,8,10-13,16,22,25,31,37,41.
[219] *White Industries*, ¶10.4.18.
[220] Annex No.3, p.42.
[221] Exhibit I, ¶33.
[222] Facts, ¶19.
[223] Exhibit I, ¶32.
[224] Exhibit I, ¶¶23,17.

2. The Actions of the High Court Are Neither Arbitrary Nor Discriminatory

128. The enforcement proceedings cannot be equated with a denial of justice for an additional reason; the actual treatment Claimant received from the Court was neither arbitrary nor discriminatory.

129. First, the term "*arbitrary*" indicates a conduct that is "*irrational*" or *"capricious*", "*founded on prejudice or preference rather than on reason or fact*".[225] In that regard, the Supreme Court's decision on 1 September 2013, which deviated from previous jurisprudence was not arbitrary. This decision was reached through the interpretation of certain provisions of the Commercial Courts Act, construing them as not allowing for the adjudication of enforcement proceedings before the Commercial Bench.[226]

130. Indeed, the Tribunal in *Eli Lilly* noted that interpretation of a law is a legitimate tool employed by the courts.[227] In the same spirit, the *Philip Morris v. Uruguay* Tribunal underlined that instances of contradictory interpretations of a new regulation by domestic courts do not constitute a denial of justice.[228]

131. Furthermore, the High Court did not act arbitrarily by retroactively adopting the aforementioned decision of the Supreme Court.[229] As the *Mondev* Tribunal underlined, it is for the domestic courts to decide whether to retroactively apply "*decisional law*".[230]

132. Additionally, the Court's conduct cannot be regarded as discriminatory. The act of discrimination involves the "targeting" of a foreign investor on illegitimate grounds with the ultimate motive of shattering an investment.[231] However, no such "targeting" can be found in the case at hand.

133. In particular, the Court was eager to accommodate the requests of Claimant, equally to those of the NHA.[232] Its decision to grant leaves and extensions were based on the requests of both parties.[233] Besides, in view of the NHA's successive absence, the Court respecting Claimant's protests,[234] warned that next time it would be compelled to take adverse measures.[235]

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[225] *Sempra*, ¶318; Black's, pp.119,906; Schreuer, p.2.
[226] Exhibit I, ¶¶26,28.
[227] *Eli Lilly*, ¶420.
[228] *Philip Morris v. Uruguay*, ¶529.
[229] Exhibit I, ¶28.
[230] *Mondev*, ¶137.
[231] UNCTAD Series II, p.82.
[232] Exhibit I, ¶¶16,17,23,25,26,30.
[233] Exhibit I, ¶¶8,10,11,22,25,31,37,41.
[234] Exhibit I, ¶¶5,21,37.
[235] Exhibit I, ¶5.

134. Neither can Claimant find recourse to the Judge's statement that Claimant needs to be less excessive regarding the minimal delay in the delivery of a copy, when the original document had been submitted on time.[236] The *Mondev* Tribunal dealing with a statement of Justice Holmes, that "*[m]en must turn square corners when they deal with the Government*",[237] concluded that as long as the decision of the US Supreme Court did not rely upon it, no violation of the FET standard could be established.[238] Here, considering that the Judge's statement is not even nearly as abrupt as the one in the *Mondev* case, Respondent invites this Tribunal to adopt a similar ruling.

135. In light of these considerations, the court's conduct does not reach the level of egregiousness that is required to amount to an international delict.

C. Claimant's Hopes for a Hasty Enforcement Procedure Are Not Protected Under the BIT

136. Claimant's alleged legitimate expectations for a rusty enforcement procedure are unsubstantiated. In this vein, the *White Industries* Tribunal declined that the claimant had any legitimate expectations for a timely enforcement of its award, while the judiciary was overburdened, and there were no specific representations to that effect.[239] Significantly, it remarked that "*an investor must generally take a host State (including its court system) as it finds it*".[240] Similarly, in the case at hand, Claimant should have been aware of the general congestion reigning over Respondent's judiciary, despite the latter's efforts to relieve the backlog.

137. The same Tribunal further noted that the investor could not base its expectations for the non-setting aside of the award on its personal belief about how the NYC should be applied.[241] Neither should Claimant, which disregards Art.V that allows the non-enforcement of an award due to its contradiction with public policy. Thus, Claimant ought to have anticipated such a turn of events, requiring extensive deliberation.[242]

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[236] Exhibit I, ¶14.
[237] *Mondev*, ¶130.
[238] *Mondev*, ¶134.
[239] *White Industries*, ¶¶10.3.14-10.3.16.
[240] *White Industries*, ¶10.3.15.
[241] *White Industries*, ¶¶10.3.12-10.3.13.
[242] Facts, ¶18; Exhibit I, ¶¶6,22,25,26.

138. As a result, Respondent submits that it has not breached Art.3 BIT, and Claimant has by no means been denied justice. Claimant has, in essence, yet again failed to comprehend the greater picture that, of course, has more to it than merely its corporate earnings.

V. THE TERMINATION OF THE LTA HAS NOT VIOLATED ART. 3(3) BIT

139. As a last resort, Claimant attempts to hold Respondent responsible for an alleged violation of the "umbrella-clause" included in Art.3(3) BIT. What Claimant is essentially trying to do is to repackage its purely contractual –and already decided– claims as treaty violations, so as to manipulate the BIT's protection, exactly as it attempts with the TRIPS Agreement.

140. In this regard, Respondent submits that the umbrella clause has not been violated by virtue of the LTA's termination, since Respondent has not assumed any obligations under the LTA (**A**). In any case, that termination cannot be attributed to Respondent (**B**), nor can it trigger an umbrella clause violation, due to its entirely contractual nature (**C**). Finally, should this Tribunal accept Claimant's allegations, Respondent would also be susceptible to Claimant's double recovery (**D**).

A. Respondent Did Not Have Any Obligations Under the LTA, Since It Was Not a Party to It

141. Art.3(3) BIT reads as follows:

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

The use of the term "*it*", which refers to a Contracting Party to the BIT, leads to the inexorable conclusion that the obligation in question must have been assumed by the host state itself in order to fall within the ambit of the article.[243] Had the Parties intended to include obligations assumed by separate entities under Art.3(3) BIT, they would have adopted language similar to Art.7 which refers to "*a Contracting Party or an agency of a Contracting Party*".[244]

142. In the same vein, the *Impregilo* and *Hamester* tribunals held that contracts signed between the investor and a separate legal entity in the latter's own name did not fall within the

[243] *Impregilo*, ¶223; *Hamester*,¶343.
[244] BIT, Art.7.

scope of the umbrella clause.[245] In the present case, the LTA was signed between Claimant and the NHA, a separate legal entity,[246] while Respondent was not even involved in the relevant negotiations.[247]

143. Respondent further submits that Claimant cannot avail itself of the ILC Articles in order to extend the scope of the umbrella clause to contracts entered into by separate entities. As expressly stated in the ILC Commentary, the Articles only concern internationally wrongful acts and do not apply in order to identify whether a state is party to an obligation.[248] Here, Respondent is clearly not a party to the obligations under the LTA, the latter having been negotiated and concluded between Claimant and the NHA.

B. In Any Case, the Termination of the LTA Can by No Means Be Attributed to Respondent Under the ILC Articles

144. In any event, any attempt on behalf of Claimant to hold Respondent responsible for foreign actions would be in vain; for, not only is Respondent not Claimant's counterparty, but also the termination of the LTA cannot be attributed to Respondent. Were this Tribunal to apply the ILC Articles in this regard, it is Respondent's submission that attribution cannot be established under any Article, since the NHA is not Respondent's organ (**1**), nor did it act in the exercise of Respondent's governmental authority (**2**) or under Respondent's control (**3**).

1. The NHA Is Not Respondent's Organ

145. First of all, under no circumstances could the NHA qualify as a state organ under Art.4 ILC, since the latter requires that the entity in question forms part of the state's structure.[249] Separate legal entities do not fulfill the test of Art.4, regardless of the nature of the specific activity they perform.[250] In the present case, not only is the NHA not part of Respondent's governmental structure, but it is organized in trusts and uncontestedly operates independently from the Mercurian government.[251]

146. To illustrate the above, England's National Health Security (NHS), also organized in

[245] *Impregilo*, ¶223; *Hamester*, ¶347.
[246] PO3, L-1591.
[247] Facts, ¶9.
[248] ILC, *Commentary*, pp.31-39; *Niko Resources*, ¶¶245–8.
[249] *Hamester*, ¶172; Dolzer/Schreuer, p.221.
[250] *Jan de Nul*, ¶160; *Almås*, ¶208-210; *Tulip*, 289.
[251] Facts, ¶8, PO3, L-1592.

trusts and committed to the promotion of public health, constitutes "*an independent body, at arm's length to the [English] government*".[252] Likewise, the NHA is entirely distinct from Respondent's government and its actions cannot be attributed to the latter by virtue of Art.4 ILC.

2. The NHA Is Not Exercising Respondent's Governmental Authority

147. Art.5 ILC specifies that the acts of an entity exercising governmental authority are attributed to the state, "*provided [...] the entity is acting in that [governmental] capacity in the particular instance*". In the case at hand, even assuming that the NHA is generally entrusted to exercise elements of governmental authority, its actions are not attributable to Respondent, since it acted in a commercial capacity when concluding and terminating the LTA.

148. Along the same lines, the Tribunal in *Jan de Nul* refused to find attribution under Art.5 ILC, because, although the relevant entity was generally entrusted with governmental powers, it only acted as any private contracting party when it invited offers for the conclusion of a contract to dredge the Suez Canal and when it rejected payment of costs thereunder.[253] Similarly here, the NHA acted in its commercial capacity when it "*wrote an invitation to Atton Boro to make an offer for supplying its FDC drug*",[254] when it concluded the LTA and when it terminated it. The fact that the content of the LTA was associated with public health purposes, exactly like the contract in *Jan de Nul* case was connected with public transportation objectives, does not refute the commercial nature of the respective acts and thus is not sufficient to establish attribution under Art.5 ILC.

149. Absent the specific exercise of governmental authority in terminating a contract, the Tribunal in *Bosh* also held that the state-owned entity involved, the National University of Kiev, even if generally authorised to exercise governmental authority, did not satisfy the two-fold test of Art.5 ILC.[255] It is on the very same premise, and in light of the above, that the LTA's termination by the NHA cannot be attributed to Respondent.

[252] NHS, UK.
[253] *Jan de Nul*, ¶¶166,169,170-171.
[254] Facts, ¶9.
[255] *Bosh*, ¶¶166,172,178.

3. The NHA Is Neither Controlled Nor Directed by Respondent

150. As per Art.8 ILC, the conduct of an entity is only attributed to the State if it is directed or controlled by the latter. This control should be established in relation to the overall conduct of the said entity, as well as upon the allegedly attributable act.[256] More precisely, Claimant should demonstrate the exercise of effective control,[257] posing thus a rather high threshold for the invocation of Art.8 ILC.[258]

151. In this regard, the *White Industries* Tribunal held that the fact that the state did not participate in the negotiations of the contractual terms nor did it provide its approval before the final conclusion of the contract evidenced the absence of control.[259] The *Hamester* Tribunal reached the same conclusion using the long negotiations preceding the conclusion of the agreement as a relevant indication.[260] Here, the NHA itself initiated protracted negotiations with Claimant which led to the conclusion of the LTA;[261] no state official participated at any stage of that process.[262] The fact that Respondent asked from the NHA to merely assess Mercuria's needs concerning greyscale disease,[263] does not prove on its own that the conclusion of the LTA for the supply of greyscale drugs was under Respondent's instructions.

152. The same applies as to the termination of the LTA by the NHA. Even assuming *arguendo* that the rumor about the private meeting between Respondent's Minister and the NHA's Director[264] holds water, it would need a leap of faith to assume that the LTA was terminated under Respondent's instructions. Besides, even before that alleged meeting, the NHA had already informed Claimant that it would end their cooperation if no further discount was granted.[265] It follows that it was not Respondent's instructions or control that led to the termination of the LTA, but Claimant's "unsatisfactory performance" that triggered the NHA's contractual right to terminate pursuant to Art.6 LTA.[266]

153. In view of the above, Respondent submits that the NHA's independent actions also fail to meet the requirements of Art.8 ILC, and therefore they cannot be attributed to Respondent.

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[256] *White Industries*, ¶8.1.18; *Jan de Nul*, ¶173.
[257] ILC *Commentary*, p.47; *Hamester*, ¶172; *Tulip*, ¶304.
[258] *White Industries*, ¶8.1.10.
[259] *White Industries*, ¶¶8.1.18-8.1.19.
[260] *Hamester*, ¶256.
[261] Facts, ¶9.
[262] PO3, L-1594.
[263] Facts, ¶7.
[264] Facts, ¶16.
[265] Facts, ¶15.
[266] Facts, ¶17.

C. The Termination of the LTA Is a Contract Claim Falling Outside the Scope of the Umbrella Clause

154. Apart from the lack of any intervention by Respondent in the NHA's acts in question, the claim related to the termination of the LTA cannot be protected under Art.3(3), due to its purely commercial nature. Even if this Tribunal accepts that the termination of the LTA is attributed to Respondent by virtue of the ILC Articles, it is highlighted that their very Commentary provides that "*the breach by a State of a contract does not as such entail a breach of international law*.[267] It is only the latter kind of breach that can be examined by an arbitral tribunal,[268] something that does not change merely by virtue of the insertion of an umbrella clause in the BIT.[269]

155. Accordingly, the *SGS v. Pakistan* Tribunal held that were the umbrella clause able to elevate any and all contract claims into treaty ones, it would be rendered so over-expansive that every contractual dispute, even a minor disagreement over an installment payment, could be submitted to international arbitration.[270] In a similar vein, the *Joy Mining*, *Toto* and *Hamester* Tribunals, among others, have held that an umbrella clause cannot -and should not- constitute a loophole for inserting all ordinary contractual disputes to investment arbitration.[271]

156. It is only when the contractual violation is committed under sovereign capacity that liability under the umbrella clause can be triggered.[272] In the words of the *El Paso* and *Pan American* Tribunals, "*it is necessary to distinguish the State as a merchant from the State as a sovereign"* and only an *actum iure imperii* amounts simultaneously to a violation of the BIT under the umbrella clause.[273]

157. In the case at hand, as already analysed for the purposes of attribution, the LTA was a commercial supply contract and its termination cannot be regarded as an exercise of *puissance publique*; the NHA acted as an ordinary purchaser, faced with the failure of its counterparty, *i.e.* Claimant, to fulfill its contractual obligations. Therefore, the essence of Claimant's request is solidly based on the contractual level and it cannot be examined by this Tribunal in the context of the umbrella clause.

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[267] ILC, *Commentary*, p.41, ¶6.
[268] *Vivendi*, Annulment, ¶96.
[269] *Pan American*, ¶115.
[270] *SGS v. Pakistan*, ¶¶167-168.
[271] *Joy*, ¶81; *Toto*, Jurisdiction, ¶202; *Hamester*, ¶349.
[272] *El Paso*, Jurisdiction, ¶¶80-81,84; *Pan American*, ¶¶108-109.
[273] *El Paso*, Jurisdiction, ¶79; *Pan American*, ¶108.

D. Claimant Should Not Be Compensated Twice for the Termination of the LTA

158. Finally, should Claimant be allowed to bring anew a claim for the violation of the LTA before this Tribunal, there is the real risk of it obtaining monetary damages twice for the very same act. This risk has been duly taken into account by Tribunals in similar situation,[274] with the *Mobil* Tribunal further underscoring that the prohibition of double recovery constitutes "*a well-established principle*".[275]

159. Here, Claimant already holds an Award granting it USD 40 million in damages for the termination of the LTA, and has provided no guarantee that it will not continue seeking its enforcement afterwards. It is on this premise that Respondent requests this Tribunal not to allow Claimant to get a "second bite of the same apple" and accordingly dismiss any claim based on the violation of the LTA.

[274] *Urbaser*, Jurisdiction, ¶253; *Burlington,* ¶69; *Pezold* ¶938.
[275] *Mobil*, Award, ¶378.

PRAYER FOR RELIEF

160. Respondent respectfully requests this Tribunal to find that:

(1) it lacks jurisdiction over the claims in relation to Claimant's Award;

(2) Claimant has been denied the benefits of the BIT by virtue of the Respondent's invocation of Art.2 BIT;

(3) Respondent has not violated Art.3(2) BIT by enacting of Law No. 8458/09 and granting the compulsory license;

(4) Respondent has not violated Art.3 BIT via the conduct of its judiciary in relation to the enforcement proceedings;

(5) the termination of the LTA does not amount to a violation of Art.3(3) BIT.

Respectfully Submitted on 25 September 2017

by

Team ARMAND

On behalf of Respondent
THE REPUBLIC OF MERCURIA