TEAM ELIAS

TENTH ANNUAL

FOREIGN DIRECT INVESTMENT

INTERNATIONAL MOOT COURT

2 to 5 November 2017

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE PERMANENT COURT OF ARBITRATION

Atton Boro Limited (Claimant)

v.

The Republic of Mercuria (Respondent)

MEMORIAL FOR RESPONDENT

25 September 2017

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Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001)
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Sempra, Award	*Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, Award (29 June 2010)
Sempra, Jurisdiction	*Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, Decision on Jurisdiction (11 May 2005)
SGDR	*Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008)
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SOABI	*Société Ouest Africaine des Bétons Industriels v. Senegal,* ICSID Case No. ARB/82/1, Award (25 February 1988)
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Waste Management	*Waste Management Inc. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)

White Industries	*White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011)
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Nuclear Tests	*Nuclear Tests Cases (Australia & New Zealand v. France), ICJ, Judgement (20 December 1974)*
Prevention and punishment of the crime of genocide	*Case concerning Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment (26 February 2007)
Territorial Dispute	Case concerning Territorial Dispute (Libyan Arab Jamahiriya v. Chad), ICJ, Judgement (3 February 1994)

TREATIES

BIT	Republic of Mercuria – Kingdom of Basheera Bilateral Investment Treaty, *signed on 11 January 1998* (entered into force 9 April 1998)
GATT	General Agreement on Tariffs and Trade (1994)

GATS	General Agreement on Trade in Services (entered into force January of 1995)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *signed on 10 June 1958* (entered into force 7 June 1959)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, *Open for signature on 15 April 1994*, (entered into force on 1 January 1995)
VCLT	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980)
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States – International Center for Settlement of Investment Disputes, Washington 1965 (entered into force 14 October 1966)

MISCELLANEOUS

ASR	International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
Doha Declaration	World Trade Organization, Ministerial declaration 2001, Doha (Adopted on 14 November 2001)
ICJ Statute	Statute of the International Court of Justice, *signed on 26 June 1945* (entered into force 24 October 1945)
ILC Guiding Principles	Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (2006)

LIST OF AUTHORITIES

BOOKS

Badia	Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Wolters Kluwer, 2014)
De la Ossa	Manuel Fernando de la Ossa Ciodaro, *Diseño de modelos financieros*, (Ed. UEC, 2016)
Dolzer & Schreuer	Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008)
Douglas	Zachary Douglas, *The International Law of Investment Claims,* (Ed. Cambridge University Press, 2009)
Dugan, Wallace, Rubins & Sabani	Christoper Dugan, Don Wallace Jr, Noah D. Rubins, Borzu Sabani, *Investor – State Arbitration* (Ed. Oxford University Press, 2008)
Muchlinski, Ortino, Schreuer	Peter T. Muchlinski, Federico Ortino, Christoph Schreuer (ed.), *The Oxford handbook of International Investment Law* (Ed. Oxford University Press, 2008)
Sasson	Jan Sasson, *The Unsettles Relationship between International Law and Municipal Law* (Substantive Law in Investment Treaty Arbitration, 2010)
Waibel, Kaushal, Chung & Balchin	Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, *Testing Treaty Language and the Concept of "Investor",* (The Blacklash against Investment Arbitration, 2010)
Wehland	Hanno Wehland, *The Coordination of Multiple Proceedings in Invetment Treaty Arbitration,* (Ed. Oxford International Arbitration Series, 2013)

ARTICLES

Asada	Masahiko Asada, CTBT: Legal Questions Arising from Its Non-Entry-Into-Force in *Journal of Conflict and Secutiry Law* No. 7 (2002)
Avi-Yonah & Panayi	Reuven S. Avi Yonah & Christiana HJI Panayi, "Rethinking Treaty Shopping: Lessons for the European Union" in *Tax Treaties: Building Bridges between Law and Economics*, pp. 21-50 (2010)

Dolzer	Rudolph Dolzer, "Fair and Equitable Treatment: Today's Contours" in *Santa Clara Journal of International Law*, volume 12 (2014)
Feit	Michael Feit, Book Review of *Piercing the Veil of State Enterprises in International Arbitration in ICSID Review*. F.I.L.J. (2015)
Gadelshina	Elvira R. Gadelshina, "Burden of Proof Under the 'Denial-of-Benefits' Clause of the Energy Charter Treaty: Actori Incumbit Onus Probandi?", in *Journal of International Arbitration 29*, no. 3 (2012)
Lee	Eunjung Lee, "Treaty Shopping in International Investment Arbitration: *How often has it occurred and how has it been perceived by tribunals?"* Department of International Development London School of Economics and Political Science, (2015)
Potestà	Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept" in *ICSID Review – F.I.L.J.* Vol. 28, Issue 1 (2013)
Tushnet	Mark Tushnet, "The Political Constitutuion of Emergency Powers: Parliamentary and Separation of Powers Regulation" in *International Journal of Law in Context,* Volume 3, Issue 4 (2007)
Schaltz	Sylvia Schatz, "The Effect of the Annulment Decisions in Amco v. Indonesia and Klöckner v. Cameroon on the Future of the International Centre for the Settlement of Investment Disputes." *In American University International Law Review*, Volume 3, Issue 2 (1998)
Smith	Douglas G. Smith, "Piercing the Corporate Veil in Regulated Industries" in *Brigham Young University Law Review,* Rev. 1165 (2008)
Stone & Della Cananea	Alec Stone Sweet & Giacinto Della Cananea, "Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez" in Faculty Scholarship Series, paper 4994 (2014)
Swart	Fai de Swart, "*The Use of Mailbox Companies in International Investment Protection"*. European Company Law 12, No. 1 (2015)

MISCELLANEOUS

Gerhardsen	Tove Iren S. Gerhardsen, *"Tailandia presenta informe sobre su experiencia con licencias obligatorias"* in Intellectual Property Watch (19 March 2007)
Saez 1	Catherine Saez, "*El Ecuador concede primera licencia obligatoria para medicamentos contra el VIH/SIDA"* in Intellectual Property Watch (26 April 2010)
Saez 2	Catherine Saez, "*Indonesia considera licencias obligatorias para tres medicamentos más contra el VIH/SIDA"* in Intellectual Property Watch (29 November 2007)
UNAIDS	Joint United Nations Programmme on HIV/AIDS, *Global Report* (Ed. WHO Library Cataloguin-in-Publication Data, 2010)
OECD FET	OECD, *"Fair and Equitable Standard in International Investment Law".* OECD Working Papers on International Investment, (2004)
OECD Investment	OECD, *"Definition of Investor and Investment in International Investment Agreements".* International Investment Law: Understanding Concepts and Tracking Innovations, (2008)
OECD Investor	OECD, *Investor Nationality: Policy Challenges*, International Investment Law: Understanding Concepts and Tracking Innovations (2008)
World Bank inflation data	World Bank [online]. Thailand's historic inflation (24 September 2017) Available in: https://datos.bancomundial.org/indicador/FP.CPI.TOTL.ZG?locations=TH.

LIST OF ABBREVATIONS

¶ / ¶¶	Paragraph(s)
A2	Annex 2
A3	Annex 3
A4	Annex 4
Art./Arts.	Article(s)
ASEAN	Association of Southeast Asian Nations
E1	Exhibit 1 - Timeline of the proceedings in enforcement application No. 973/2009 Before the Hon'ble High Court of Mercuria
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
ILC	International Law Commission
IPR regime	Intellectual Property Rights Regime
LCIA	London Court of International Arbitration
LTA	Long Term Agreement
LTCs	Long Term Public – Private Collaboration(s)
p. / pp.	Page / Pages
PCA	Permanent Court of Arbitration
PO	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
R	Record
WHO	World Health Organization
WTO	World Trade Organization

STATEMENT OF FACTS

1. In **January 11th 1998,** the Republic of Mercuria ("**Mercuria**" or "**Respondent**") and the Kingdom of Basheera ("**Basheera**") concluded an Agreement for the Promotion and Reciprocal Protection of Investments ("**BIT**").[1]

2. Atton Boro and Company is a corporation organized in the People's Republic of Reef ("**Reef**"), and its shares are held by a mix of private entities and private individuals of a wide variety of nationalities.[2] It acts as the primary holding company for Atton Boro Group, an enterprise with experience in the pharmaceutical industry,[3] developing treatments for critical epidemic diseases,[4] including Valtervite, a compound that would improve treatment for greyscale patients.[5]

3. In **April 5th 1998,** Atton Boro Company funded Atton Boro Limited ("**Atton Boro**" or "**Claimant**") to set up its manufacturing base in Mercuria and to perform the agreements it entered into with Respondent from 1998 onwards.[6] In **February 21st 1998**, Atton Boro and Company obtained the Mercurian patent No. 0187204 for Valtervite,[7] which was assigned to Atton Boro in exchange of shares on **April 15th 1998**,[8] to accomplish the corporation's objectives.

4. In this sense, Claimant was incorporated in Basheera as a wholly owned subsidiary of Atton Boro Group, to be the vehicle for carrying on business in South America and Africa.[9] Claimant's shares are currently held by Atton Boro Group affiliates which are controlled by Atton Boro and Company.[10] From **1998** to **2016**, Atton Boro has had

[1] Facts ¶840
[2] PO3 ¶1570
[3] Facts ¶848
[4] Facts ¶851; PO2 ¶1525
[5] Facts ¶855
[6] PO3 ¶1572; PO2 ¶1525
[7] Facts ¶856
[8] PO3 ¶1575
[9] Facts ¶861
[10] PO2 ¶1510

between 2 to 6 permanent employees working in Basheera, who manage its portfolio of patents registered in South American and African countries, and provide support for regulatory approvals, marketing, sales, legal, accounting and tax services.[11]

5. Atton Boro's principal dealings involved long-term public-private collaborations with States and State agencies for the manufacture and supply of essential medicines at competitive rates.[12] It concluded several agreements of the same nature with Mercuria's government and the National Health Authority ("**NHA**").[13]

6. In **2003**, the NHA's annual report to the Ministry of Health noted that the imminent public health concern was the increasing cases of greyscale among working-age individuals in Mercuria and even cautioned that, unless aggressive measures were taken to tackle it, the situation would become a national crisis.[14] It also noticed that the treatment available by the time, was only effective if the infection was detected at a very early stage and, even then, it fell far short from global standards of treatment for greyscale. The above, since Mercuria's treatment required the patients to take 5 to 7 pills, and most countries had moved to the novel fixed-dose combinations ("**FDC**") contained in a single pill.[15] Acting accordingly, the Ministry for Health directed the NHA to estimate the medicines' requirement and invited offers form pharmaceuticals companies for long-term strategic supply of the FDC drug at discounted rates.[16]

7. In **May 2004**, the NHA invited Atton Boro to make an offer for supplying its FDC drug, Sanior.[17] Once the negotiation and evaluation process was completed, the NHA and Atton Boro entered into a Long-Term Agreement ("**LTA**"), under which the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing

[11] PO2¶1507
[12] Facts ¶866
[13] Facts ¶870
[14] Facts ¶875
[15] Facts ¶880
[16] Facts ¶883
[17] Facts ¶892

purchase orders.[18] Accordingly, Atton Boro set up its manufacturing unit for Sanior in Mercuria and delivered its first consignment by **June 2005.**[19]

8. Since **2003**, the NHA had been engaged in parallel efforts to promote prevention of sexually transmitted diseases like greyscale, conducting awareness workshops in educational institutions and workplaces to encourage people to be tested regularly.[20] In **2006**, the NHA annual report estimated that nearly 50% of all adults were getting themselves tested every six months.[21] As a result, the Minister for Health expressed its concern regarding the greyscale crisis,[22] and stressed the need for more rigorous campaigning and research to find out what was the full extent of the crisis. It also stated that Mercuria's government would take every measure it deemed necessary to make sure that greyscale patients could avail treatment.[23]

9. In **2007**, as the number of patients coming into care increased, the order value for Sanior doubled with each quarter.[24] In early **2008**, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior since it needed to supply medicines for nearly twice the number of people.[25] Atton Boro offered a further discount of 10%, however, the NHA was compelled to request an additional discount of 40%.[26]

10. The NHA terminated the LTA on **June 10th 2008,** due to unsatisfactory performance by Atton Boro.[27] Because of this, the latter invoked arbitration against the NHA under the LTA, and a tribunal seated in Reef issued an Award in its favor on **January 2009.** [28] On **March 3rd 2009**, Atton Boro filed enforcement proceedings before the High Court of

[18] Facts ¶¶894-899
[19] Facts ¶900
[20] Facts ¶905
[21] Facts ¶908
[22] Facts ¶911
[23] Facts ¶915
[24] Facts ¶917
[25] Facts ¶920
[26] Facts ¶924
[27] Facts ¶930
[28] Facts ¶933

Mercuria, and the NHA filed its response requesting the High Court to decline the petition because it was contrary to public policy.[29]

11. The President of Mercuria promulgated National Law No. 8458/09 for its Intellectual Property Law, which allowed the use of patented inventions without the authorization of the owner in **October 10 2009**.[30] Under this provision, HG-Pharma, a generic drug manufacturer, filed an application before the High Court in **November 2009** to obtain a license to manufacture Valtervite.[31] Atton Boro was impleaded as a party before the High Court during the course of this matter.[32]

12. In **April 17 2010,** the High Court granted the license to HG-Pharma until greyscale was no longer a threat to public health in Mercuria, and fixed a 1% royalty of total revenues to Atton Boro.[33] Between 2009-2010, royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases, ranged from 0,5% to 3% of revenue.[34] HG-Pharma wrote to Atton Boro requesting its bank details to transfer royalties under the non-voluntary license, but Atton Boro, intending to protest the license, chose not to respond.[35]

13. Mercuria's laws provide to patent holders the possibility to question the validity of the non-voluntary license and the royalty, after it was granted, before a two judge-bench of the High Court.[36]

14. The NHA's Director disclosed, in **January 2012**, that the use of generic drugs reduced costs of purchasing medicines at 80%, resulting in over 1.2 billion USD in savings annually.[37] Additionally, Mercuria sent greyscale medicines to three neighboring States as humanitarian aid.[38]

[29] Facts ¶935
[30] Facts ¶945
[31] Facts ¶950
[32] PO3 ¶1580
[33] Facts ¶951
[34] PO3 ¶1590
[35] PO3 ¶1596
[36] PO3 ¶1580
[37] Facts ¶954
[38] Facts ¶956

SUMMARY OF ARGUMENTS

15. This Tribunal does not have jurisdiction (*i*) *ratione personae*, because Atton Boro does not qualify as an investor under the scope of BIT Article 1.2(b) since it is neither incorporated, nor duly constituted in accordance with the laws of Basheera, (*ii*) *ratione materiae* since the patent and the Award does not qualify as protected investments within the meaning of BIT Article 1.1, (*iii*) *ratione temporis* since the BIT applies only to investments made "*on*" or *"after*" its entry into force. **(Part I)**

16. Claimant is not entitled to invoke the provisions of the BIT since the benefits have been denied to it, in accordance with the denial of benefits clause because (*i*) Claimant has no effective seat in Basheera, as it is owned and controlled by nationals of a third state, (*ii*) Atton Boro has failed to prove substantial business activities in Basheera, and (*iii*) Respondent's invocation of the denial of benefits clause was done in accordance with the BIT and the PCA Arbitration Rules of 2012. Furthermore, the claims related with the LTA shall be inadmissible before this Tribunal since the dispute over those claims was already settled by an Award. The latter, is currently under enforcement proceedings before the High Court of Mercuria, which evidences that Claimant chose another forum for the settlement of the disputes that arose from the LTA. As a result, there is *res judicata* over the present proceedings. **(Part II)**

17. Respondent did not fail to comply with the standards of protection recognized in the BIT, in particular, the Fair and Equitable Treatment, because (*i*) the statements of Mercuria's representatives did not create to Claimant any legitimate expectation regarding the stability of its legal framework, (*ii*) Respondent has acted in a manner that is stable and consistent, fulfilling Claimant's legitimate expectations, (*iii*) Respondent's actions were proportional, and (*iv*) international covenants endorse Respondent actions, (*v*) Respondent's judicial system had complied with international law, and therefore, had not resulted in a denial of justice and a breach of due process. **(Part III)**

18. Respondent's measures do not constitute an Indirect Expropriation under BIT Article 6, as the measure was non-discriminatory, and complied with the international covenants and norms governing intellectual property rights, such as the TRIPS Agreement. **(Part IV)**

19. Respondent's actions were necessary and, therefore, are excused under international law, because *(i)* the BIT recognizes the Contracting Parties' right to protect their public interest, and *(ii)* Mercuria's actions were allowed under customary international law. **(Part V)**

20. Respondent has no liability under BIT Article 3 for the conduct of its judiciary in relation to the enforcement proceedings because there is a pending matter arising from NHA's request to decline the enforcement of the Award on the ground that it was contrary to public policy and, therefore, Respondent must guarantee due process. **(Part VI)**

21. Respondent's termination of the LTA does not amount to a violation of BIT Article 3.3 since this provision was not designed to invoke commercial agreements. **(Part VII)**

ARGUMENTS

PART ONE: THE TRIBUNAL LACKS JURISDICTION OVER THE PROCEEDINGS

22. Mercuria, fulfilling its international obligations, respectfully submits that this Tribunal lacks jurisdiction *(i) ratione personae,* since Claimant is not an investor under the scope of BIT Article 1.2(b). However, even if the Tribunal considers that Claimant is an investor, it lacks jurisdiction *(ii) ratione materiae*, as Claimant does not have an investment under BIT Article 1.1. Still, if the Tribunal considers that there is a protected investment, it lacks jurisdiction *(iii) ratione temporis* because the scope of application of the BIT does not cover the investment and, therefore, it does not apply to the present proceedings.

I. CLAIMANT IS NOT AN INVESTOR UNDER THE SCOPE OF BIT ARTICLE 1.2(b)

23. In this case, although Claimant is incorporated under the laws of Basheera, it is not an investor since is a mere "mailbox company"[39] used to acquire jurisdiction before this Tribunal. As a result, the Tribunal does not have jurisdiction over the present proceedings.

A. Claimant has no effective seat in Basheera as it is not an investor

24. The BIT establishes that, to be considered as an investor, a company must be "incorporated or duly constituted in accordance with the applicable laws of that Contracting Party",[40] and must have substantial business activities in that territory.[41]

25. In this sense, even though, incorporation is the most common criteria used to determine corporate nationality, it is not the only one. The requirement of effective seat also has to

[39] R. p. 16
[40] Art. 1.2(b) BIT
[41] Art. 2.1 BIT

be assessed, as it is a useful criteria to establish jurisdiction.[42] In this sense, arbitral investment tribunals in cases as *Autopista* and *Saluka,* have recognized the importance of determining the effective seat of the company in the jurisdiction stage.[43] It has been acknowledged, that the proper criteria to determine the corporate nationality is related to the effective seat or the place where the company has its central administration.[44] Moreover, the tribunal in *Saluka* concluded that the corporations that are mainly used as a vehicle to invoke the provisions of a treaty (mailbox companies) shouldn't be entitled to invoke it.[45]

26. Furthermore, when analyzing the scheme of control in enterprises, it can be evidenced that a first company could have an effective control through a second company over a third company. In this scenario, there is a direct control from the first company to the third one and, because of that control, the direct investment relationship continues down the chain of ownership.[46]

27. The intention of the Parties, when setting the effective seat requirement,[47] was to assure that only corporations with effective seat would be entitled to invoke the provisions of the BIT, excluding subsidiaries or holdings without substantial activities in the home state.

28. In this context, although Atton Boro is a company incorporated under the laws of Basheera, it lacks of substantial business activities. Moreover, Claimant's incorporation and its activities had been focused in the assistance to Atton Boro Group's business activities.[48] Atton Boro's main objective is to conduct businesses in South American and African countries,[49] not to perform substantial business activities, nor to have effective seat in Basheera. Since its incorporation in Basheera, Atton Boro's have just opened a

[42] Dolzer & Schreuer p. 49.
[43] *Autopista* ¶107; *Saluka* ¶240
[44] *Autopista* ¶107
[45] *Saluka* ¶240
[46] Douglas pp. 312 - 323
[47] R ¶1030
[48] PO2 ¶1510
[49] Facts ¶860

bank account, rent an office space and hired six employees[50] to provide support to Atton Boro Group and Atton Boro's subsidiaries.[51] Hence, it cannot be considered that Claimant is engaged in activities related to the research, development and production of pharmaceuticals.

29. In this case, is Atton Boro Group who has an established presence in Basheera's pharmaceutical industry,[52] developing pharmaceutical activities. Atton Boro does not develop any of those activities in Basheera and, it has not concluded any long-term public private collaboration with Basheera's government.[53]

30. As a result, Atton Boro does not have control in Basheera, nor the faculty to develop its own main business activities in that territory. Atton Boro is part of a control scheme, where Atton Boro & Company, as the head of the corporate structure, has control over Atton Boro Group,[54] at the same time that it has effective control over Atton Boro.[55] Hence, Atton Boro's effective seat shall be determined by the place of incorporation of Atton Boro & Company, which is Reef, a non-party of the BIT.

31. Therefore, Claimant is not an investor under the scope of BIT Article 1.2(b) of the and this Tribunal lacks jurisdiction *ratione personae*.

B. Customary International Law dismisses the jurisdiction of the Tribunal

32. Respondent respectfully submits that this Tribunal does not have jurisdiction since Claimant, does not complied with the current state of customary international law. The above, considering that Claimant´s nationality is not based on the principal seat of business, which must be Basheera.

[50] Facts ¶861
[51] PO 2 ¶1510
[52] Facts ¶861
[53] Facts ¶861
[54] Facts ¶845
[55] Facts ¶870

33. Customary international law is a source of law comprehended on state practice and *opinio juris*, recognized in Article 38 of the ICJ Statute.[56] In this sense, general practice under international law of non-ICSID international investment tribunals establishes that the nationality of a corporation should be based on a test.[57]

34. To determine the applicable test of nationality for the present proceedings, the Tribunal shall resort to the customary international law rule regarding interpretation of treaties.[58] In that sense, Article 31.1 of the VCLT establishes that a treaty must be interpreted in good faith, in light of the ordinary meaning of the words, in context and accordingly with its object and purpose.[59] Furthermore, Article 31.2 of the VCLT establishes that the context is comprehended by (i) treaty provisions, (ii) preamble, (iii) annexes, (iv) any agreement between the parties related to the treaty, and (v) any related instrument ratified by the parties.[60] Additionally, Article 31.3 of the VCLT establishes that it shall be taken into account (i) any further agreement of interpretation between the parties, (ii) any subsequent practice on the application of the treaty, and (iii) any relevant rules of international law applicable to the parties' relation.[61]

35. The ICJ interpretation of the current stage of state practice and international law rule for investor-state arbitration is not based on diplomatic protection as stated in the *Barcelona Traction* case,[62] but rather on the *ELSI* precedent.[63] The first ruled that only the seat of incorporation of the company shall be determined as the one that gives legitimacy to a claim.[64] However, recognizing the evolution of international law, the ICJ admits the possibility to pierce the corporate veil and allowed the U.S to advocate claims of two U.S nationals that controlled shares in *ELSI*, a company incorporated in Italy.[65] With the same

[56] Art. 38 ICJ Statute
[57] Dolzer & Schreuer p. 203; *Philip Morris Asia* ¶¶456 – 509; *Veteran* ¶¶1343 – 1447; *Yukos* ¶¶1343 – 1447; *SGDR* ¶¶95 – 121; *Yaung* ¶¶42 – 63; *Thunderbird* ¶¶ 96 - 110
[58] *Navigational and related rights* ¶47; *Prevention and punishment of the crime of Genocide* ¶160; *Territorial dispute* ¶41; *Avena and Other Mexican Nationals* ¶83
[59] Art. 31.1 VCLT
[60] Art. 31.2 VCLT
[61] Art. 31.3 VCLT
[62] Dugan, Wallace, Rubins & Sabani p. 311; *Barcelona Traction*, p. 45
[63] *ELSI* ¶106
[64] Dugan, Wallace, Rubins & Sabani p. 309.
[65] Dugan, Wallace, Rubins & Sabani p. 309.

reasoning, tribunals have concluded that the *Barcelona Traction* case only applies to diplomatic protection.[66]

36. In the present case, because of the state of customary international law regarding nationality of corporations, the Tribunal should apply a test to determine the real nationality of Atton Boro.

37. According to the BIT, Atton Boro had the possibility to choose between the ICSID or the PCA proceedings.[67] If it had chosen ICSID[68], the nationality of the company would be determined in harmony with the Washington Convention[69]. However, it chose the PCA proceedings,[70] and therefore, allowed the Tribunal to determine its nationality by interpreting the wording of the BIT.[71]

38. In this context, the Tribunal shall find that the BIT established a qualified rule for a corporation to be considered as an investor under its provisions. This rule includes the seat of incorporation, effective seat and substantial business activities.

39. Ordinary meaning of the words on BIT Article 1.2(b) reveals the incorporation requirement under the local laws of the Contracting Parties,[72] which is the only requirement that Atton Boro fulfilled.[73] The second requirement is established in BIT Article 2.1(a), forbids the company to be controlled by nationals of third states.[74] Atton Boro does not comply with this requirement, since it is a "wholly owned subsidiary"[75] of Atton Boro Group which is a company primary controlled by Atton Boro & Company.[76]

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[66] Dugan, Wallace, Rubins & Sabani p. 311; *CMS* ¶42; *Camuzzi* ¶¶141-142; *LG&E* ¶53; *Gami investments* ¶31; *Sempra jurisdiction* ¶¶151-153; *Suez* ¶51; *BP America* ¶218
[67] Art. 8 BIT
[68] Art. 8.2(a) BIT
[69] Art. 25 Washington Convention
[70] Art. 8.2(c) BIT
[71] R, p. 3. ¶65 – 69.
[72] Facts ¶860
[73] Facts ¶862
[74] Art. 2.1(a) BIT
[75] Facts ¶860
[76] Facts ¶845

Moreover, Atton Boro does not comply with the third requirement, since it doesn't have "substantial business activities in the territory of Basheera".[77]

40. Furthermore, the purpose of the BIT is to promote the cooperation between the investors of Mercuria and Basheera, *mutatis mutandis*.[78] Moreover, the Preamble and the BIT provisions, reveal the Parties' intention to grant protection only to nationals of Basheera or Mercuria, excluding nationals of third-countries.

41. The Tribunal shall determine whether it has jurisdiction according to the standard of control set forth in the BIT, which expressly requires the effective control of the company, excluding mailbox companies.

42. Thus, this Tribunal lacks jurisdiction *ratione personae* over the present proceedings.

II. THE TRIBUNAL LACKS JURISDICTION *RATIONE MATERIAE* BECAUSE THERE IS NOT A PROTECTED INVESTMENT UNDER ARTICLE 1.1.

A. The patent does not qualify as a protected investment under Article 1.1.

43. BIT Article 1.1 establishes that an investment must be done directly by an investor of one of the Contracting Parties or indirectly through an investor of a third state.[79]

44. In accordance with Article 31.1 of the VCLT, the criteria used to define whether there is an investment, has been built around the involvement of (i) the transferal of funds, (ii) long-term projects, (iii) regular income (or at least the purpose), (iv) participation in the transference of funds, and (v) risk on the business.[80]

[77] Art. 2.1 BIT
[78] Preamble BIT
[79] Article 1.1 BIT
[80] Dolzer & Scheurer p. 60; *Salini; Joy mining* ¶¶30-35; *Jan de Nul* ¶¶92-95; *Saipem* ¶114; *Helnan International* ¶¶102-119; *Consortium Groupement* ¶¶32 – 40; *Victor Pey Casado* ¶¶231 – 234.

45. In the case under analysis, "through an investor of a third state"[81] requires that the company recognized as a third-state investor is protected by a treaty between the host state and that third state, and that under that treaty there is an effective investor. Atton Boro and Company, which is the actual investor in Mercuria as it complies with the definition of investor, is a company from Reef, which does not have an investment treaty or a treaty with investment related provisions with Mercuria. Therefore, there is no investment constituted under the scope of the BIT.[82]

46. Moreover, to determine an indirect investor through that definition, is necessary that Mercuria has an investment agreement with Reef, otherwise the definition of investment is contradicted and the interpretation of the clause will be against the context and purpose of the treaty.

47. Furthermore, Claimant does not comply with the requirements set to be accepted as a direct investor: Claimant is not the patent holder for Valtervilte[83], there was no transfer of funds from Atton Boro, but from Atton Boro & Company, and there is no LTCs in Mercuria, since there is only a terminated agreement.[84]

48. Moreover, Atton Boro has a regular income derived from its business activities, but not derived from the allegedly investment, to the point that the Head of Atton Boro's Mercuria division stated that "the company will no longer be dealing with Sanior in Mercuria".[85]

49. Likewise, the risk of Claimant's business is related to the selling of medicines, not the patent, demonstrating that there is not an existent investment. Therefore, and considering that none of these criteria are even met, Atton Boro is not entitled to argue the existence of an investment in Mercuria.

[81] Art. 1.1 BIT
[82] Art. 1.1. BIT
[83] Facts ¶4.
[84] Facts ¶17.
[85] Facts ¶25; Salini ¶52

50. Consequently, this Tribunal lacks jurisdiction *ratione materia*, since there is no protected investment under the scope of BIT Article 1.1.

B. The Award does not qualify as a protected investment within the meaning of BIT Article 1.1

51. BIT Article 1.1 establishes that an investment is "any kind of assets held or invested (...) by an investor of one Contracting Party in the territory of the other Contracting Party".[86] Furthermore, BIT Preamble establishes that its desire is to "stimulate the flow of private capital and the economic development of the Contracting Parties".[87]

52. In this sense, the definition and purpose of the BIT seeks to protect assets invested in the territory of the Contracting Parties and not judicial decisions. Additionally, an award does not constitute an investment, since it does not reveal by itself any economic activities in the territory of the host state.[88]

53. Moreover, the intention of the Parties when entering the BIT, was not the protection of legal decisions, but to protect assets invested either directly or indirectly through an investor of a third state,[89] which creates a flow of private capital either in Mercuria or in Basheera.[90]

54. Consequently, the Award rendered in the tribunal seated on Reef does not comply with the requirements established on BIT Article 1.1 and its Preamble. The foregoing, because it's only a judicial decision and, in any case, it does not promote economic development between the signatories' States, or stimulate the economic development of the Contracting Parties' economy.

[86] Art. 1.1 BIT
[87] Preamble BIT
[88] *GEA Group* ¶113
[89] Art. 1.1 BIT
[90] Preamble ¶2 BIT

55. In conclusion, the Award does not evidence any economic activity in the territory of Mercuria, neither promotes the investment in its territory, nor creates economic cooperation between the Contracting Parties. Hence, it cannot be considered as an investment under the BIT.

56. Therefore, this Tribunal lacks jurisdiction *ratione materia* over the present proceedings.

III. THE TRIBUNAL LACKS JURISDICTION *RATIONE TEMPORIS* BECAUSE THE BIT APPLIES ONLY TO INVESTMENTS MADE *ON* OR *AFTER* ITS ENTRY INTO FORCE.

57. BIT Article 13 establishes that its provisions will apply only to the investments made "on or after the date of its entry into force".[91] BIT Article 14 states that it will entry into force thirty days after the exchange on ratification instruments.[92]

58. Regarding the application of a treaty, Article 28 of the VCLT establishes that if there is a non-retroactive clause, it's provisions do not bind the state in situations that took place before the day of entry into force.[93] Therefore, the date when a treaty enters into force is the basis for the determination of the binding effect for the state, fixed by the will of the contracting parties. In this sense, the contracting parties can determine that the treaty may be applied before that date when: (i) the contracting parties had agreed to it in the treaty, or (ii) they have expressed it through an implicit in behavior. Additionally, ASR Article 13 states that, for an act of the state to constitute a breach of an obligation, it must be binding to the state at the time that the act occurs.

59. Following this context, treaties only apply to events that occurred after its entry into force.[94] This position has been adopted by several investment tribunals as in the cases of *Mondev* and *SGS Philipines,* in which was stated that the time when the events occurred

[91] Art. 13 BIT
[92] Art. 14 BIT
[93] Art. 28 VCLT
[94] Asada pp. 85 – 101; Badia p. 36

are relevant to determine whether there is a breach of the obligation.[95] Moreover, in *Jan de Nul*, the tribunal considered that according to ASR Article 13, the "legality of an act must be assessed in the light of the law applicable at the time of its performance".[96]

60. In the present case, the BIT was ratified on March 10, 1998,[97] and it's entry into force was on 9 April 1998. In this sense, it's only applicable to investments made on or after its entry into force, not prior.[98] The patent for Valtervilte was requested prior to the signature of the BIT,[99] and it was granted prior to its enter into force.[100] Therefore, there was no treaty-based protection at the time the alleged investment was made.

61. Even though, the States have the possibility to agree on a provisional application of the treaty, which would allow the investors to have protection under the BIT prior of its entry into force, they did not do so, not expressly, nor indirectly as a result of their behavior. Therefore, in accordance with international law, Mercuria does not have the obligation to recognize any alleged investment occurred prior to the entry into force of the agreement.

62. Therefore, this Tribunal lacks jurisdiction *ratione temporis* since the BIT applies only to investments made on or after its entry into force.

PART TWO: THE CLAIMS ARE INADMISSIBLE

63. Respondent submits that whether the present Tribunal finds that it has jurisdiction *ratione persona*, *ratione materia* and *ratione temporis*, (i) the claims are inadmissible because the benefits of the BIT had been denied to Claimant as it lacks effective seat and substantial business activities. Likewise, (ii) the claims in relation to the LTA are inadmissible because there is *res judicata* over that issue.

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[95] *Mondev* ¶70; *SGS Philippines* ¶167
[96] *Jan de Nul* ¶132
[97] PO2 ¶1500
[98] R, p. 39. ¶13; Art. 13 BIT
[99] Facts ¶855-859
[100] Facts ¶855-859

I. THE BENEFITS OF THE BIT HAD BEEN CONCLUSIVELY DENIED TO CLAIMANT

64. The benefits of the BIT had been conclusively denied to Claimant since (i) it has no effective seat in Basheera, (ii) it has no substantial business activities in Basheera, and (iii) the denial of benefits has been done in accordance with BIT Article 2 and the PCA Arbitration Rules 2012.

A. Claimant has no effective seat in Basheera

65. As recognized in *Plama*, two conditions must be met to allow a state to deny the benefits of a treaty to potential investors: the legal entity must be owned or controlled, either directly or indirectly, by nationals of third state parties; and it must lack of substantial business activities.[101] Moreover, for a state to exercise the right to deny the benefits of a treaty, both requirements, ownership or control, and substantial business activities, must be fulfilled due to its cumulative nature.[102]

66. Furthermore, international law has conceived "treaty shopping" as a legal operation executed by a potential investor, to acquire the protection of a more beneficial provision.[103] It is well-known that this conduct produces negative effects such as tax avoidance, breach of the *quid pro quo* among treaties, and undesired revenue loss,[104] which means it usually constitutes a disincentive for countries to negotiate investment agreements.

67. Additionally, "treaty shopping" is the main reason for which the denial of benefits clause is included by some states in its BITs, since it reduces the states' aversion to assume obligations on a non-reciprocal basis, based on the principle of reciprocity among investment treaties. [105]

[101] *Plama* ¶80
[102] *Plama* ¶22
[103] Lee p. 2
[104] Avi-Yonah & Pnayi, p. 26-27
[105] Gadelshina pp. 269 - 284

68. For this reason, tribunals had found necessary to pierce the corporate veil to determine the effective nationality of the investor's corporation.[106] In this sense, the criteria that it's frequently used for this includes: (i) the place of incorporation,[107] (ii) principal seat of the corporation,[108] (iii) ownership or control,[109] (iv) origin of capital and nationality of the controlling shareholder.[110]

69. In the present case, regarding the concepts of ownership or control included in the denial of benefits clause,[111] it has been recognized that the word *"or"* means that these two elements are alternative. Therefore, this first limb shall be satisfied by proving either the ownership or the control of a third state over the enterprise involved in the dispute. Additionally, the condition of "control" and "ownership" are usually included in treaties because they are consistent with the aptitude to exercise political and economic privileges inherent with the holding of shares.[112]

70. Moreover, considering that international investments constitute intricate holding structures and multiple layers of ownership,[113] tribunals in *Amco* and *Aguas del Tunari* stated that is necessary to apply a test to determine the nationality of the ultimate controller, and whether the foreign entity directly control the company who seeks protection.[114]

71. In this sense, and in relation with the notion of control, tribunals pierce the corporate veil with the intent to look beyond the formal corporate structure and to assess the business more thoroughly.[115] Tribunals had applied it when it's necessary to determine the nationality of the entity that has the ultimate control over the enterprise or the origin of

[106] Sasson p. 113
[107] Sasson p. 57
[108] Waibel, Kaushal, Chung & Balchin p. 7
[109] *Plama* ¶170
[110] Sasson pp. 97-144
[111] Art. 2.1 BIT
[112] Feit pp. 268-274
[113] OECD Investor p. 124
[114] Schaltz pp. 488; *Aguas del Tunari* ¶¶46-73, *Amco* ¶396
[115] Smith, pp.4-15

its capital.[116] This type of examination of the corporate structure has proceeded when the specific circumstances of the case led to believe that the holding company is seeking protectio in an illegitimate manner or abusing of the corporate form.[117] Consequently, tribunals as *Tokios Tokéles* have adopted a "control test", to make a proper inquiry when establishing the company's ultimate controller.[118] Moreover, in *SOABI*, the tribunal found that the term "foreign control" does not necessarily means direct or immediate control over the company in question.[119]

72. In this sense, the host state can exercise the denial of benefits clause when the other party is under "foreign ownership or control".[120] Additionally, even though, the BIT does not specify the type of test that should be applied to decide if these requirements are met, this Tribunal should narrow the scope of protection of the BIT only to those companies that have real, continuous and effective management by nationals of a Contracting Party.[121] The above, since it can be evidenced through the object and purpose of the BIT that the intention of the parties is to limit the scope of protection to the companies with effective seat and substantial business activities.

73. In the present case, Atton Boro is a legal entity effectively controlled by Atton Boro and Company which shares are held by nationals of a variety of nationalities,[122] but incorporated in Reef. The controller incorporated Claimant as a wholly owned subsidiary in Basheera through Atton Boro Group, as a vehicle for carrying on business in South American and African countries. This proves that the corporate nationality of Claimant is ultimately from a third party.

74. Additionally, Claimant had failed to prove that it controls its business, since nationals from Basheera do not have the majority of shareholdings, the voting rights attached to the

[116] *Tokios Tokelés* ¶¶ 53-57; *SOABI* ¶¶ 29-35
[117] Sasson pp. 97-144
[118] *Tokios Tokelés* ¶¶53-57
[119] *SOABI* ¶¶29-35
[120] Art 2.1 BIT
[121] OECD Investor, pp. 22-30
[122] PO3 ¶1570

shares, legal capacity to influence over the selection of members of the boards of directors or any other managing body of the enterprise, financial interest, among others.[123]

75. Furthermore, Claimant is a wholly owned subsidiary of Atton Boro Group, which is a filial of Atton Boro & Company. The latter is Claimant's ultimate owner, which is not incorporated under the laws of one of the Contracting States of the BIT. Therefore, the company that holds the totality of its shares and have the "effective control" over Claimant is Atton Boro and Company.

76. This would be further confirmed if the Tribunal pierce the corporate veil to Atton Boro, as it would evidence that it maintains its central administration and principal place of business in Reef, and it's a mere mailbox company with no real connections to Basheera's pharmaceutical market.

77. Therefore, Claimant does not have effective control and the benefits of the treaty shall be denied.

B. Claimant has no substantial business activities in Basheera

78. The denial of benefits clause applies in the present proceedings, since Claimant lacks substantial business activities in Basheera. Therefore, the claims are inadmissible.

79. A company has substantial business activities if maintains its primary business place or its central administration in the territory of one of the Contracting Parties, or has a "real and continuous" relationship within the Contracting Party.[124]

80. In accordance with the ordinary meaning of the words,[125] a "mailbox company" is defined as "a legal entity with no substantial activities in the host country that works in close

[123] Sasson p. 57, pp. 97-144; Waibel, Kaushal, Chung & Balchin p. 7; Plama ¶170

[124] Art 2.1 BIT
[125] Art. 31.1 VCLT

relation with a foreign (controlling) entity and was mainly set up in a jurisdiction to obtain a favorable legal framework".[126] Although the constitution of these vehicles is not prohibited under international law, this practice is frequently avoided by Contracting States because there is no intention to protect rights of nationals of third states, non-parties of the BIT.[127]

81. Regarding who should satisfy the burden of proof to find the factual and juridical basis for its application, the tribunal in *Plama* concludes that states are not obliged to have a record of all of the foreign stakeholders that develop economical operations within the state borders.[128]

82. The aforementioned because, usually international investments constitute an intricate web of enterprises that are separated by multiple layers of intermediate holding companies.[129]

83. Imposing the burden of proof to the state would be almost an impossible task, as it has limited access to the potential investor's internal documents and information. In this sense, it is easier for a claimant to provide the necessary evidence to prove the economic activities that it develops in a state, while this kind of information might not be accessible for respondent. [130]

84. In the present case, Claimant has failed to prove that it has a genuine link with Basheera. The only connection that it has in Basheera is its 6 employees, which do not develop any substantial activity in Basheera, since their endeavors are not related to the development of disease treatments, but rather to provide support to for Atton Boro Group affiliates in South America and Africa.[131]

[126] Swart pp. 19-25
[127] Gadelshina pp.269 – 284
[128] *Plama* ¶¶155-157
[129] Gadelshina pp.269 – 284
[130] Gadelshina pp. 269 - 284
[131] PO 2 ¶1515

85. In addition, the BIT does not include any further requirement regarding the way in which the denial of benefits clause should be invoked in order to proceed. This means that there is no time limit in the treaty for the State to deny the benefits to the corporation which is seeking protection.[132]

86. Furthermore, Claimant is the one that has to prove the existence of ownership and control by nationals of Basheera and substantial business in the same state. It is a complicated task for Mercuria to establish which legal entity ultimately owns or controls Atton Boro, when ownership or control involve several entities of the corporation in different jurisdictions.

87. Therefore, due to the absence of Claimant's substantial business activities in Basheera, the benefits of the treaty may be denied.

II. THE CLAIMS RELATED TO THE EARLY TERMINATION OF THE LTA SHALL BE INADMISSIBLE BEFORE THE TRIBUNAL

88. Claimant invoked arbitration under the LTA in a tribunal seated on Reef to determine Mercuria's liability for its termination, which resulted in an Award which is currently under enforcement proceedings before the High Court of Mercuria. Therefore, the claims are inadmissible.

A. There is *res judicata* over the present proceedings: Claimant chose another forum for the settlement of disputes regarding the LTA.

89. *Res judicata* is a general principle of international law recognized by civilized nations. This principle precludes Claimant from initiating further proceedings before an investment tribunal as it has been issued a valid decision in another forum.[133]

[132] Art. 2 BIT
[133] Muchlinski, Ortino, Schreuer p. 1013

90. The main effect of the *res judicata* principle is that it bans the parties form initiating new proceedings before a tribunal whenever there is the same subject matter, same legal grounds and same parties. Furthermore, "denotes the binding character of a decision, allowing each party to base itself on what has previously been decided".[134]

91. BIT Article 8.1 allows the investor to resort to arbitration when there is a manifest violation of its obligations.[135] On the other hand, the LTA between Mercuria and Atton Boro had a dispute settlement clause that allows arbitration.[136]

92. Arbitral investment tribunals in cases as *SGS Pakistan* concluded that it does not have jurisdiction over the contractual dispute because the matter had been already decided and, in accordance with the *non bis in idem*, it cannot be tried again.[137]

93. In the case at hand, there is *res judicata* over the claims related with the termination of the LTA, since it was already decided by a commercial tribunal that its early termination breached the contractual obligations acquired under it.[138] Moreover, Respondent submits that this Award was issued over the same subject matters invoked before the present Tribunal, this is, the NHA's early termination of the LTA made on June 10, 2008.[139] Furthermore, over the same legal ground, i. e., the State's contractual obligations derived from the LTA.

94. In this sense, Claimant is not entitled to invoke arbitration before this Tribunal, as the decision rendered in Reef is binding for both parties.

95. Furthermore, Claimant has the alternative to initiate investment proceedings by the time that the breach of the LTA took place.[140] However, Claimant prefer to resort arbitration

[134] Wehland p. 180
[135] Art. 8.1 BIT
[136] R, p. 30. ¶932.
[137] *SGS Pakistan* ¶162.
[138] Facts ¶930
[139] Facts ¶930
[140] Art. 8 BIT

under the LTA, before a commercial tribunal seated on Reef, instead of initiating investment arbitration proceedings.[141]

96. The above-mentioned precludes this Tribunal from hearing the claims related to that commercial agreement, restricting its scope of judgment to the claims not related with the LTA.

97. Therefore, the claims related to the LTA and its termination are inadmissible before this Tribunal.

PART THREE: MERITS

98. Respondent submits that the enactment of National Legislation for its Intellectual Property Law (Law No. 8458/09), the grant of a license by the High Court to HG-Pharma, the enforcement proceedings initiated by Claimant before Respondent's judicial authorities, and the treatment to which Claimant's investment was subjected does not amount to a breach of the standards of protection provided in the BIT, in particular, the Fair and Equitable Treatment.

I. RESPONDENT DID NOT FAILED TO COMPLY WITH THE STANDARDS OF PROTECTION RECOGNIZED IN THE BIT, IN PARTICULAR, THE FAIR AND EQUITABLE TREATMENT ("FET")

99. Claimant seeks, by means of the FET clause included in BIT Article 3.2, to obtain high-priced and overvalued profits, without considering the circumstances prevailing in Mercuria. The Tribunal's conclusion on whether Respondent violated the FET standard needs to be reached by assessing the facts of the case and,[142] if taken as a whole, had the potential to violate the FET clause.[143]

[141] Facts ¶930
[142] *Mondev* ¶118
[143] *Micula* ¶517

100. In the present case, Respondent did not failed to comply with the standards of protection provided in the BIT, in particular, the FET standard, as (i) the statements of Mercuria's representatives did not create to Claimant any legitimate expectation regarding the stability of its legal framework, (ii) Respondent has acted in a manner that is stable and consistent, (iii) Respondent's actions were proportional, and (iv) the actions of Respondent's judicial system had complied with international law, and therefore, had not resulted in a denial of justice and a breached of due process.

A. The statements of Respondent's representatives did not create to Claimant any legitimate expectation regarding the stability of its legal framework

101. It is usual that investors claim the frustration of its legitimate expectations, whenever a state had made statements or informal representations, and had failed to honor them.[144] Nonetheless, not all the representations or promises are capable of generating legitimate expectations.[145] In this sense, for a representation to create a legitimate expectation, it requires a certain amount of specificity, which means that, first, the content of it should be unambiguous, and second, it should be addressed to the investor.[146]

102. Furthermore, general statements that are meant to encourage and welcome investments do not create legitimate expectations. Moreover, it had been recognized that political statements, lack of specificity and are known to have the least legal value.[147] Additionally, public international law cannot be applied at the present case, as state's unilateral declarations entails obligations between states inter se. Nonetheless, if the Tribunal choose to consider its application, the creation of a legal obligation by a unilateral declaration of a state must be clear and specific,[148] done publicly, and with the intent to be bound by it. Furthermore, in case of doubt, those declarations must be interpreted in a restrictive manner.[149]

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[144] Potestà p. 19
[145] *Frontrier Petroleum* ¶76, ¶455, ¶465, ¶468; *White Industries* ¶5.2.6, ¶10.3.17; *Feldman* ¶¶148-149
[146] *El Paso* ¶¶375-377
[147] *PSEG* ¶¶241-243; *Continental* ¶252, ¶261, ¶393; *El Paso* ¶¶392-396
[148] *Nuclear Tests, id.* 457.
[149] Art. 7 ILC Guiding Principles

103. In the present case, the statements made by the Minister of Health and the President of Mercuria in January 19[150] and 20[151] of 2004, respectively, in which it was said that Mercuria would empower and engage patent owners,[152] did not create any legitimate expectation to Claimant, regarding the stability of Mercuria's IPR regime, as they lack of specificity in its content, and were not addressed to Atton Boro particularly, but rather were mere political statements to encourage and welcome investors in a general manner. In this sense, it cannot be concluded that the declarations made by Mercuria's representatives entail any kind of obligation regarding the stability of its IPR regime.

104. Therefore, this Tribunal should find that the statements of Respondent's representatives do not create to Claimant any legitimate expectation regarding the stability of its legal framework.

B. Respondent acted in a stable and consistent manner since the alleged legitimate expectations never existed.

105. The legitimate expectations of an investor must be protected under FET.[153] However, a legitimate expectation to be considered as so, must (i) be objective, not subjective,[154] (ii) involve a specific assurance by the state to induce the investment, which was relied upon by the investor,[155] (iii) exist at the time the investor decided to make the investment,[156] and (iv) be reasonable in the circumstances, including the political, socioeconomic, cultural and historical conditions prevailing in the host State.[157]

106. In *El Paso* case, the tribunal said that a host state "should not unreasonably modify the

[150] Facts ¶885; PO2 ¶1516
[151] Facts ¶885
[152] PO2 ¶860
[153] *Metalclad* ¶99; *Tecmed* ¶154; *MTD* ¶113; *Occidental* ¶183; *CMS* ¶274; *Waste Management* ¶98; *Saluka* ¶302; *LG&E* ¶¶123-131; *Enron* ¶¶259-263; *Sempra, Award* ¶288.
[154] *Mobil* ¶152; *Glamis Gold* ¶621; *Vivendi* ¶7.4.12
[155] *Glamis Gold* ¶620; *Mobil* ¶152
[156] *Duke Energy* ¶340
[157] *Duke Energy* ¶340

legal framework".[158] Such has been the same position of the *Alpha* and *Jan Oostergetel* tribunals. [159] Nevertheless, it has been acknowledged that the state's right to regulate cannot be annulled under the guise of FET.[160] A modification in the legal framework would be consistent with the standard if there are serious and exceptional reasons that forced the state to change its course of action and take measures that might affect but not void the investment.[161]

107. In *Eli Lilly* case which, concerned the invalidation of two pharmaceutical patents by the Courts of Canada, the tribunal concluded that claimant did not fulfill its burden of proof regarding the "*dramatic change*" of the rules governing its investment.[162] Moreover, it stated that all patentees, including claimant, understood that their patents could be challenged before the courts on the ground that the invention does not satisfy one or more patentability requirements.[163]

108. In the present case, Mercuria was compelled to take every measure within its power, when faced with a public health crisis that could have increased dramatically if actions were not taken. No reasonable investor would expect Mercuria to refrain from exercising its police powers and maintained its legal framework unchanged under those circumstances, especially when nothing in the BIT guarantees it.

109. Furthermore, in 2003 the NHA published an annual report to the Ministry of Health in which highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals, and even cautioned that the situation could spiral into a national crisis unless aggressive measures were taken to combat it,[164] way before Atton Boro and the NHA agreed on the LTA.[165]

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[158] *El Paso* ¶364
[159] *Alpha* ¶420*; Jan Oostergetel* ¶224
[160] *Saluka*, ¶¶304-308; *Parkenings-Compagniet* ¶¶334-338; *Continental* ¶258
[161] Dolzer p. 21
[162] *Eli Lilly* ¶439
[163] *Eli Lilly* ¶282
[164] Facts ¶875
[165] Facts ¶893

110. It can be said that, in 2006, Mercuria had to provide treatment to 100.000 people,[166] that represents the 37,5% out of the 266,298 Mercurians infected with greyscale.[167] In the case that the same proportion is applied with the available data in 2003,[168] right before Atton Boro and the NHA entered into the LTA,[169] the number of people expected to receive treatment afforded by the State would have been 7,282. Still, in 2005, the government afforded the treatment of 10,012 Mercurians.[170]

111. The next table evidences what would have been Atton Boro's forecast if the LTA would have not been early terminated and includes prices with no discount, 25% discount and 65% discount.[171] The inflation historic data was taken from Thailand between 2008-2015, same period of the present dispute, considering that the population and market conditions are similar to Mercuria.[172]

Sanior's price (USD)[173]	**Paid percentage**	**Gross profit (USD)**	**Income (USD)**	**Year**	**Cost (USD)**	**Net profit (USD)**
36	100%	207,414	76,743,180	2003	250,000	-173.256.820
27	75%	270,324	100,019,880	2005	250,000	-49,980,120
23,4	65%	2,700,000	999,000,000	2006	250,000	749,000,000
12,6	35%	1,260,000	466,200,000	2006	250,000	216,200,000

[166] A3 ¶1360
[167] A3 ¶1344
[168] A3 ¶1340
[169] Facts ¶893
[170] A3 ¶1360
[171] De la Ossa, pp. 169-188
[172] World Bank inflaition
[173] A3 ¶1350

Total	1,000,000,000	

	2003	**2005**	**2006**	**2007**	**2008**	**2009**
Price single FDC pill (USD)	36	36	36	36	36	36
Inflation					5,50%	-0,85%
Final price (USD)	36	36	36	36	38	36
Dose	370	370	370	370	370	370
Scenario A (discount)	25%	25%	25%	25%	25%	25%
Scenario B (discount)	25%	25%	25%	25%	65%	65%
Price A (USD)	27	27	27	27	28,5	26,8
Price B (USD)	27	27	27	27	13,3	12,5
Population	7,682	10,012	100,000	100,000	100,000	100,000
Increase of population infected (every 3 years)			166,66%			166,66%
Final population	7,682	10,012	100,000	100,000	100,000	266,662

Income A (USD)	76,743,180	100,019,880	999,000,000	999,000,000	1,053,945,000	2,641,310,333
Income B (USD)	76,743,180	100,019,880	999,000,000	999,000,000	491,841,000	1,232,611,489
Cost (USD)	250,000,000	250,000,000	250,000,000	250,000,000	263,750,000	261,508,125
Profit A (USD)	-173,256,820	-149,980,120	749,000,000	749,000,000	790,195,000	2,379,802,208
Profit B (USD)	-173,256,820	-149,980,120	749,000,000	749,000,000	228,091,000	971,103,364

	2010	**2011**	**2012**	**2013**	**2014**	**2015**
Price single FDC pill (USD)	36	36	36	36	36	36
Inflation	3,38%	3,81%	3,02%	2,19%	1,90%	-0,86%
Final price (USD)	37	37	37	37	37	36
Dose	370	370	370	370	370	370
Scenario A (discount)	25%	25%	25%	25%	25%	25%
Scenario	65%	65%	65%	65%	65%	65%

B (discount)						
Price A (USD)	27,9	28	27,8	27,6	27,5	26,8
Price B (USD)	13	13,1	13	12,9	12,8	12,5
Population	100,000	100,000	100,000	100,000	100,000	100,000
Increase of population infected (every 3 years)			166,66%			166,66%
Final population	266,662	266,662	711,087	711,087	711,087	1,896,198
Income A	2,751,331,631	2,765,450,587	7,318,287,741	7,259,326,579	7,238,725,692	18,780,107,494
Income B	1,283,954,761	1,290,543,607	3,415,200,946	3,387,685,737	3,378,071,990	8,764,050,164
Cost	270,085,592	280,375,853	288,843,203	295,168,869	300,777,078	298,190,395
Profit A	2,481,246,040	2,485,074,735	7,029,444,537	6,964,157,710	6,937,948,614	18,481,917,099
Profit B	1’013,869,170	1,010,167,755	3,126,357,742	3,092,516,868	3,077,294,912	8,365,859,769

112. In this sense, in case that the LTA would have not been early terminated, Atton Boro's forecast regarding its costs and income just confirmed the fact that the further discount asked by the NHA during the renegotiations was reasonable, as the income it would have

received would have cover not only the USD 1-billion to develop Valtervite and bring it to market,[174] but it would have also start to produce revenues in 2010. Furthermore, if the 25% discount would have remained intact during the 10 years of the LTA's validity, Atton Boro would have started to receive earnings almost at the same year, but it would have been at the expense of the hundreds of thousands of Mercurian's infected with greyscale.

113. Moreover, it confirms that, Atton Boro's maximum income expected, at the time that the parties entered into the LTA was USD100,019,880. Additionally, it evidences that, if measures were not taken, the amount of population infected with greyscale would have increase to 711,087.

114. The above-mentioned proves that the alleged legitimate expectations never existed, and were not reasonable taking into account the circumstances prevailing in Mercuria as a developing country. Even so, it proves that Respondent measures were not arbitrary but necessary which, doubtlessly, is consistent with the FET standard.

115. Therefore, this Tribunal should find that Respondent acted in a stable and consistent manner, since it did not create and as a result could not violate any alleged legitimate expectation.

C. Respondent's measures were proportional

116. International law provides a framework or method to balance legal principles in conflict.[175] This method is known as proportionality. Respondent measures, i. e., the introduction of a provision that allows the use of patented inventions without the authorization of the owner in the IPR regime and the grant of a license to a generic drug manufacturer to produce Claimant's invention, fall within the scope of what is considered proportional under international law, because the measures were (i) suitable, (ii) necessary, and (iii) proportional *strictu sensu*.[176]

[174] PO3 ¶1600
[175] Article 51 ASR; Art. XX GATT; Art. XIV GATS
[176] Stone & Della Cananea pp. 917-918

117. Respondent's measures were suitable, as there is a causal relationship between the measures and its objective.[177] Moreover, the measures were necessary, as they were the least restrictive and reasonable alternative capable of achieving the objective sought.[178] Furthermore, the effects of the measure were not disproportionate nor excessive *strictu sensu* with respect to the other interest affected.[179]

118. In the present case, the introduction of a provision that allows the use of patented inventions without the authorization of the owner in the IPR regime, and the grant of a license to a generic drug manufacturer to produce Claimant's invention,[180] was suitable to achieve Mercuria's objective. The above, since there is a clear and explicit relation between the changes in Respondent's IPR regime and the issuance of a compulsory license for Sanior, and the need to provide treatment to the 100,000 of Mercurians infected with a disease, which treatment they could not totally afford, and the rest of Mercurians that could not pay the treatment, in order to control its effects and further spreading.[181]

119. Furthermore, the measures were necessary and proportionate, as the modification of Mercuria's IPR regime and issuance of a compulsory license for Sanior, were the least restrictive alternatives as it is proved by the fact that international covenants, such as the TRIPS Agreement[182] and the Doha Declaration,[183] which endorse and allow these kind of measures. Additionally, it is indubitable that these measures were based on critical and serious circumstances, rather than in capricious or illegitimate ones.

120. Finally, the effects of the measures were not disproportionate nor excessive with respect to Atton Boro's interest, as Respondent provided Claimant with a royalty and with the right to challenge its fixed rate.[184] Moreover, Claimant was impleaded as a party before the High Court in the matter of the compulsory license granted to HG-Pharma to

[177] *LG&E* ¶195
[178] *Continental* ¶¶231-232; *Methanex* Part IV, Chapter E, ¶20
[179] *Tecmed* ¶122
[180] Facts ¶945-950
[181] Facts ¶1350-1375
[182] Art. 31 TRIPS
[183] Doha Declaration ¶4
[184] PO3 ¶1575-1580

manufacture Sanior.[185]

D. International covenants endorse Respondent´s measures

121. The BIT Preamble recognizes that the Contracting Parties, have rights and obligations under the Marrakesh Agreement establishing the WTO. Both of them are bound to comply with the TRIPS Agreement and the Doha Declaration.[186] Moreover, for a compulsory license to be endorsed under international law, it must comply with the requirements set in Article 31 of TRIPS.

122. The authorization for such use, must be considered on its individual merits.[187] In the present case, Law No. 8458 of 2009 set the elements that need to be fulfilled to grant a license and stated that Mercuria's High Court was the competent authority to evaluate the application to grant it.[188] This means that whenever Mercuria grants a license to use a patented invention, the authorization is given on a case-by-case basis.[189]

123. Moreover, prior to such use, the applicant should have had make efforts to obtain authorization from the right holder on reasonable commercial terms, and if they were not successful, it should have been within a reasonable period of time.[190] However, in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, this requirement may be waived.[191] In this case, Mercuria's law established that the proceedings and requirements that may be fulfilled in order to obtain a compulsory license shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use.[192]

[185] PO3 ¶1575-1580
[186] PO 2 ¶1500
[187] Art. 31(a) TRIPS
[188] A4 ¶1390
[189] A4
[190] Art. 31(b) TRIPS
[191] Art. 31(b) TRIPS
[192] A4 ¶1415

124. Additionally, literal (d) of the Law No. 8458 provides the requirement set in literal (d) of the TRIPS Agreement.[193] The aforementioned means that, because of Respondent's national emergency, it was not forced to fulfill the requirement concerning the previous negotiation between the applicant and the right holder. However, even if this Tribunal considers that Respondent was not in a situation of national emergency, Mercuria complied with the TRIPS and its laws when its government tried to engage in a price negotiation with Claimant as soon as it realized the magnitude of the disease.[194]

125. Furthermore, the scope and duration of such use shall be limited to the purpose for which it was authorized.[195] In this case, Mercuria's High Court clearly stated that the duration of the compulsory license that allowed HG-Pharma to manufacture and market Claimant's investment was limited to the time when greyscale was no longer a threat to public health.[196]

126. Likewise, such use shall be non-exclusive.[197] Respondent at no time restricted or banned Atton Boro of Sanior's manufacture.

127. In addition, such use shall be non-assignable.[198] In the case at hand, nowhere in the record is said that Mercuria's law allows the applicant to assign the patent to which the compulsory license was issued.

128. At the same time, such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.[199] In this case, the terms of the compulsory license are clear regarding its duration and its intent, which is to control the spreading and effect of the epidemic in Mercuria's population, not to export it.[200]

[193] A4 ¶1414
[194] Facts ¶916
[195] Art. 31(c) TRIPS
[196] Facts ¶950
[197] Art. 31(d) TRIPS
[198] Art. 31(e) TRIPS
[199] Art. 31(f) TRIPS
[200] Facts ¶950

129. In the same way, authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the that led to it cease to exist and are unlikely to recur.[201] Regarding this, Mercuria's High Court explicitly stated that the authorization would be valid until greyscale stop being a threat to public health.[202]

130. Finally, the right holder shall be paid adequate remuneration in the circumstances of each case,[203] the legal validity of any decision related to the authorization of such use shall be subject to judicial review,[204] and any decision related with the remuneration provided in respect of such use shall be subject to judicial review.[205] In the present dispute, Mercuria's High Court fixed the royalty to be paid to Atton Boro at 1% of HG-Pharma's total earnings,[206] this is, between the 0,5% to 3% of revenue that is usually granted for royalty rates of drugs that treat incurable, non-fatal diseases.[207] Moreover, Mercuria's law provides the patent holder the possibility to question the validity of the compulsory license and the royalty, after being granted, before a two-judge bench of the High Court.[208] Furthermore, Atton Boro was a party before the High Court in the matter of the compulsory license granted to HG-Pharma.[209]

131. Besides, the Doha Declaration on the TRIPS Agreement and Public Health of 2001 confirmed the WTO Members' right to take the necessary measures to protect public health through the flexibilities provided in the TRIPS Agreement.[210] It clarifies that each member is free to determine the grounds upon which the licenses are granted,[211] and makes it clear that public health crises can constitute a national emergency or other

[201] Art. 31(g) TRIPS
[202] Facts ¶950
[203] Art. 31(h) TRIPS
[204] Art. 31 (i) TRIPS
[205] Art. 31 (j) TRIPS
[206] Facts ¶950
[207] PO3 ¶1590
[208] PO3 ¶1580
[209] PO3 ¶1580
[210] Doha Declaration ¶4
[211] Doha Declaration ¶5

circumstance of extreme urgency,[212] and includes within this category the HIV/AIDS, tuberculosis, malaria and other epidemics.[213]

132. To illustrate, countries like Ecuador,[214] Indonesia[215] and Thailand[216] had been issuing compulsory licenses for medicines that treat HIV/AIDS since 2004. According to the UNAIDS Report on the Global AIDS epidemic, the reported number of people receiving treatment for HIV/AIDS in Ecuador[217] went from 3,728 people in December of 2008 to 5,538 in December of 2009, in Indonesia[218] went from 10,606 in 2008 to 15,442 in 2009, and in Thailand[219] went from 185,086 in 2008 to 216,118 in 2009. The above-mentioned just shows that the countries that had issue compulsory licenses to guarantee treatment to a sexual transmitted disease, just like greyscale, had been able to increase health care to its infected population in exercise of the rights conferred by the TRIPS Agreement and the Doha Declaration. In the present case, Mercuria's infected population went from 20,485 in 2003 to 266,298 in 2006 out of the 67,150,133 Mercurians,[220] and could have increase to 578,390 persons if actions were not taken.[221] The above, only confirms that Mercuria's situation was critical and required Respondent to react quickly to prevent a greater damage in the health and security of its population.

E. The actions of Respondent's Judiciary complied with international law, therefore, had not resulted in a denial of justice neither a breach of due process.

133. Denial of justice has been defined by arbitral tribunals as such an evident and obvious arbitrariness, unfairness, discrimination, lack of due process, or complete lack of reason that it falls below accepted international standards.[222] Thus, it has been recognized that procedural deficiencies of non-fundamental and non-abusive nature can contribute to

[212] Doha Declaration ¶5(c)
[213] Doha Declaration ¶5(c)
[214] Saez 1
[215] Saez 2
[216] Gerhardsen
[217]UNAIDS p. 248
[218] UNAIDS p. 250
[219] UNAIDS p. 252
[220] A3 ¶1340
[221] IA3 ¶1344
[222] *Glamis Gold* ¶22

finding a violation, but will not be sufficient to establish a breach, if the measure itself is legitimate.

134. Consequently, the *Genin* tribunal established that certain procedural violations do not amount to a denial of justice if it is found to be a reasonable regulatory decision.[223] Furthermore, the *Azinian* tribunal stated that denial of justice "could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."[224] Moreover, the *Vivendi* tribunal recognized that the investor only could have claim a denial of justice if it was denied access to the Courts, treated unfairly in those courts, or if their judgement were substantively unfair.[225]

135. In the present case, whereas the enforcement proceedings had taken several years, it can't be assumed an egregious or shocking degree of non- activeness to amount to a denial of justice and a breach due process. It falls far short of the high threshold for constituting an international wrongful act on the part of a national court, as every extension granted[226] or adjournment[227] had an objective an legitimate basis and, at the end, was the result of an overburdened judiciary struggling to cater justice to its population. Additionally, Atton Boro was able to exercise the means of defense available in Mercurian procedural order.

136. Furthermore, it is important to considered that, when Atton Boro filed the enforcement proceedings, the NHA filed its response in the matter requesting the Court to decline the enforcement of the Award on the ground that it was contrary to public policy,[228] creating a dispute over the enforcement of the Award which settlement is still pending. Hence, while there were some minor procedural deficiencies, under no circumstance can be found that it amounts to a denial of justice and a breached of due process under international law.

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[223] *Genin* ¶¶363-365
[224] *Azinian* ¶¶99-103
[225] *Vivendi* ¶80
[226] E1 ¶7, ¶8, ¶11, ¶12, ¶13, ¶16, ¶17, ¶22, ¶31, ¶37, ¶41, ¶42, ¶43
[227] E1 ¶9, ¶15, ¶20, ¶24, ¶40
[228] Facts ¶935

137. Therefore, this Tribunal should find that the actions of Respondent's Judiciary complied with international law, and therefore, had not resulted in a denial of justice neither a breach of due process.

II. RESPONDENT'S MEASURES DO NOT CONSTITUTE AN INDIRECT EXPROPRIATION UNDER THE BIT

138. Mercuria's actions did not disrupt unreasonably the normal exploitation of Claimant's investment. BIT Article 6.4 states that non-discriminatory measures designated and applied to protect legitimate public welfare objectives, such *as public health*, do not constitute an Indirect Expropriation under this Article.[229] It also states that investments shall not be subjected to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment.[230]

139. Additionally, states that the investments shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects, except for public purposes, or national interest.[231] Moreover, and as the BIT Preamble recognizes, the Contracting Parties are bound to comply with the obligations acquired as state members of the WTO. Hence, Mercuria is allowed to limit the rights conferred by the TRIPS only if (i) there is not an unreasonably conflict with the normal exploitation of the patent and (ii) the measure do not unreasonably prejudice the legitimate interests of the patent owner.[232]

140. Furthermore, the TRIPS agreement recognized that countries, through its parliament, are entitled to promote certain public interests and prevent the abuse of rights by the patent holder.[233] In this sense, provides that members may, in formulating or amending their laws and regulations, adopt necessary measures to protect public health, and to promote

[229] Art. 6.4 BIT
[230] Art. 6.1 BIT
[231] Art. 6.2. BIT
[232] Art. 30 TRIPS
[233] Art. 8 TRIPS

the public interest.[234] It establishes as appropriate measures those needed to prevent the abuse of intellectual property rights by right holders, among others.[235]

141. According to the *Saluka* tribunal, a measure is discriminatory whenever is based on unjustifiable distinctions.[236] Furthermore, the *Methanex* tribunal states that a regulation must be deemed as non-discriminatory and cannot amount to an expropriation whenever it is (i) done for a public purpose, (ii) enacted in accordance with due process and, which (iii) affects, *inter alios*, a foreign investor or investment.[237]

142. In the present case, Mercuria's measures were non-discriminatory because the law is applicable to foreign and local investors alike. Also, the compulsory license was granted due to an application from a generic drug manufacturer.[238] Additionally, Respondent's High Court fixed a royalty to be paid to Atton Boro at 1% of HG-Pharma's total earnings,[239] and provided it with the possibility to challenge the validity of the compulsory license and the royalty, after being granted,[240] which Claimant abstained to do. Moreover, HG-Pharma requested Atton Boro for its bank account information to transfer the royalties under the compulsory license, but Atton Boro, intending to protest the license, refused to provide that information, even though it knew about the challenge procedure.[241]

143. Therefore, this Tribunal should find that Respondent's measures do not constitute an Indirect Expropriation under BIT Article 6, as the measure was not-discriminatory, and comply with the international covenants and norms governing intellectual property rights, such as the TRIPS agreement.

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[234] Art. 8 TRIPS
[235] Art. 8 TRIPS
[236] *Saluka* ¶309
[237] *Methanex*, Part IV, Ch D, ¶ 7.
[238] Facts ¶950
[239] Facts ¶950
[240] PO3 ¶1580
[241] PO3 ¶1596

III. RESPONDENT'S ACTIONS WERE NECESSARY

144. It is a general principle in international law that an international wrongful act of a State entails its international responsibility.[242] Nonetheless, the wrongfulness of the act may be precluded under international law if a state of necessity arises. In this case, even if the Tribunal find that Respondent failed to provide the standards of protection established in the BIT and expropriate the investment, the wrongfulness of those acts is excused because (A) BIT Article 12 recognizes the Contracting Parties' right to protect their public interest, and (B) Respondent's actions were allowed under customary international law.

A. The BIT recognizes the Contracting Parties' right to protect their public interest

145. The BIT expressly allows the Contracting Parties' to take any action necessary to safeguard their public interest.[243] It goes further and includes a list of scenarios in which a State may be compelled to take extraordinary measures that, under normal circumstances, may violate the BIT.[244]

146. It has been understood that an emergency befalls whenever "a nation or some part of it faces a sudden and unexpected rise in social cost",[245] connected with an enormous uncertainty regarding the length of time during which that high cost will persist.[246] Furthermore, the Doha Declaration clarified that each member has the right to determine what constitutes a national emergency or other circumstance of extreme urgency[247], including public health crises.[248] Usually, Tribunals do not question if the measures taken by a state in legitimate exercise of its policy powers were the most desirable or favorable, but rather left it to its own determination.[249]

[242] Art. 1 ASR
[243] Art. 12 BIT
[244] Art. 12 BIT
[245] Tushnet p. 275
[246] Tushnet p. 275
[247] Doha Declaration ¶5(c)
[248] Doha Declaration ¶5(c)
[249] *Eli Lilly* ¶423; *Philip Morris Uruguay* ¶399

147. In the present case, Respondent considered that greyscale spreading among its population between 2003 and 2006,[250] was a scenario that lead to a national emergency. Therefore, Mercuria was required to take any measure available in order to handle it, including the modification of its IPR regime[251] and the issuance of a compulsory license.[252]

148. Notwithstanding the foregoing, even if the Tribunal considers that the necessity clause provided in the BIT cannot be determined by Mercuria, Respondent's claims regarding the necessity of the measures are objectively justifiable. In this case, Mercuria was faced with an epidemic disease that threatened the life of 266,298 individuals, a number that could have had increased to 578,390[253] if the government did not take immediate action.[254] The aforementioned, left Mercuria without any other choice but to modify its laws and issued a compulsory license[255] that allowed it to provide treatment to every greyscale patient within its territory in a sustainable way.

B. Respondent´s actions are excused under customary international law.

149. Customary international law recognizes that sovereign States enjoy certain amount of regulatory freedom whenever it is required to take the necessary measures to handle unexpected circumstances in no time. Mercuria's actions regarding the sudden change in its IPR regime and the issuance of the compulsory license are justified under customary international law.[256]

150. ASR Article 25 establishes that a state of necessity might be invoked as a ground for excusing the State's wrongful actions if "(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, and (b) the act did not seriously impair an essential interest of the State or States towards which the obligation existed, or of the international community as a whole". Additionally, it states that it would not be an admissible defense if "(a) the international obligation in question

[250] Facts ¶875, ¶¶905-910
[251] Facts ¶945
[252] Facts ¶950
[253] A3 ¶1340-1345
[254] Facts ¶875
[255] Facts ¶945
[256] Art. 25 ASR.

excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."[257]

151. In this sense, Mercuria's actions meet the requirements provided in ASR Article 25 as, the taken measures[258] were the effective mean to provide treatment to the infected population and, by doing so, Respondent safeguarded the health of thousands of Mercurians and avoided a massive emergency in the long-term[259] that could have left Mercuria not only with a very serious public health crisis, but also an economic and social one.

152. As a matter of fact, Mercuria's actions do not affect any essential interest of a State or the international community as a whole. Respondent's measures only secure that the right to health and access to essential medicines, a valuable and essential right for the international community,[260] is protected and guaranteed.

153. Furthermore, the BIT does not exclude the possibility of invoking necessity, as it explicitly recognized that whenever a State's essential security interest is endangered, the Contracting Parties' are not precluded from taking the necessary measures to protect it.[261]

154. Finally, a State that contributed to the state of necessity, is precluded from claiming it as a defense. In the present case, Mercuria did not contribute to the state of necessity, on the contrary, it tried to prevent it from aggravate it as soon as it became aware in 2003 of the amount of population infected with greyscale and the threat that the disease

[257] Art. 25 ASR.
[258] Facts ¶950
[259] A4 ¶1344
[260] Universal Declaration of Human Rights (1948), Constitution of the World Health Organization (1946), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), African Charter on Human and Peoples' Rights (1981), American Convention on Human Rights (1969), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Convention of the Council of Europe on the counterfeiting of medical products and similar crimes involving threats to public health (2011).
[261] Art. 12 BIT

represented.[262] The fact that Respondent underestimated the magnitude of the people infected, under no circumstance contributed to the state of necessity. The necessity just surfaced when the real statistics were revealed in 2006.[263]

155. Therefore, this Tribunal should find that Respondent's actions were necessary, complying with the BIT and justified under customary international law.

IV. RESPONDENT HAS NO LIABLITY UNDER BIT ARTICLE 3 FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS

156. Mercuria's judiciary branch actions comply with the standards of protection provided in BIT because the New York Convention allows the Parties to refuse the recognition and enforcement of the Award if the competent authority finds that enforcing it would be contrary to public policy.[264]

157. The New York Convention deals with the recognition and enforcement of foreign arbitral awards.[265] It defines as foreign awards those made in the territory of a state other than the requested state.[266] Furthermore, it established in Article 5.2(b) that the recognition and the enforcement of the Award may be refused, if the competent authority in the country where the recognition and enforcement is sought find that the enforcing of it would be contrary to the public policy of that country.[267]

158. In the present case, Claimant filed enforcement proceedings on March 3rd 2009,[268] before the High Court, to enforce the Award rendered in Reef in 2009. However, the NHA requested the High Court to refuse its enforcement on the ground that it was contrary to

[262] Facts ¶¶909-918
[263] Fact ¶¶907-915
[264] Art. 5.2(b) New York Convention
[265] Art. 1.1 New York Convention
[266] Art. 1.1 New York Convention
[267] Art. 5.2(b) New York Convention
[268] Facts ¶935

Mercuria's public policy, which, ultimately, created a dispute.[269] Besides, the enforcement proceedings have been prolonged since the case was transferred to a Commercial Bench in June 14th 2012,[270] where proceedings developed expeditiously. However, after 2 years, the case was transferred to a regular bench of the High Court in January 2nd of 2014 due to a Supreme Court of Mercuria ruling of September 1st of 2013;[271] proceedings which currently are on the oral submissions stage.[272]

159. Furthermore, Mercuria, as a signatory of the New York Convention, have made all the efforts to lead Claimant's enforcement proceedings to a successful ending by granting the procedural requests of the parties. The High Court has given notice to Claimant regarding procedural decisions and Atton Boro have resorted to the available instances in the enforcement proceedings, demonstrating due process.

160. The above-mentioned means that the amount of time that has taken Mercuria to enforce the Award resulted from the complexity of the case, the challenge of the NHA, and the fact that Respondent must ensure that the final decision over the enforcement proceedings is given by the competent authority.

161. Therefore, Mercuria's Judiciary branch actions comply with the standards of protection provided in BIT.

V. RESPONDENT'S TERMINATION OF THE LTA DOES NOT AMOUNT TO A VIOLATION OF BIT ARTICLE 3.3

162. The termination of the LTA does not amount to a violation of BIT Article 3.3 of the because it is a commercial agreement between Atton Boro and the NHA acting as a purchaser. Thus, disputes regarding this agreement have to be solved in a commercial forum, and not in an investment one. Besides, Atton Boro already challenged its termination and obtained an Award by a tribunal seated in Reef.[273]

[269] Facts ¶935
[270] E1 ¶18
[271] E1 ¶28-29
[272] E1 ¶41
[273] Facts ¶930

163. This Tribunal should refuse to entertain Atton Boro's claims regarding the breach of the LTA, since the umbrella clause included in BIT Article 3.3 is not intended to transform the law applicable to a contract into international law.

164. A breach of a contract cannot automatically be a breach of international treaty law, as it is considered to be a matter of domestic rather than international law.[274] Moreover, purely commercial aspects regarding contracts cannot be hear in an investment forum.[275] In this sense, the mere presence of an umbrella clause, does not automatically cover all the breaches of the state. For an umbrella clause to be applied, there should be a clear violation of treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the treaty protection.[276]

165. It has been recognized that the interpretation of the investment treaty protection should be done considering, in one hand, the State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and, in the other, the necessity to protect foreign investment and its continuing flow.[277]

166. Furthermore, the necessity to distinguish the State as a merchant, from the State as a sovereign has been acknowledged in the context of investment arbitration.[278] In this sense, the umbrella clause should be interpreted in light of BIT Article 8.1 that, among the investment disputes under the treaty, includes all disputes resulting from a violation of a commitment given by the State as a sovereign State.[279]

167. The umbrella clause provided in BIT Article 3.3, read in conjunction with Article 8.1, will not extend the BIT protection to the violation of an ordinary commercial contract

[274] *SGS Pakistan* ¶166
[275] *CMS* ¶¶298 - 305
[276] *Joy Mining* ¶81
[277] *El Paso Jurisdiction* ¶70
[278] *El Paso Jurisdiction* ¶81; *CMS* ¶299
[279] *El Paso Jurisdiction* ¶81; *CMS* ¶302, ¶303; *Salini Jordan*¶¶131- 152; *Joy Mining* ¶¶71 - 82

entered into by the State or a State-owned entity. It will only cover additional investment protections contractually agreed by the State as a sovereign.

168. In the present case, the LTA was a purely commercial supply arrangement between Mercuria's NHA and Atton Boro, and its termination was NHA's decision acting as a purchaser[280]. This is further confirmed by the facts that, first, there is no record regarding the direct participation of Mercurians officials in the negotiation of the LTA[281] and, second, the NHA operated independently.[282]

169. Therefore, this Tribunal should conclude that the termination of the LTA does not amount to a violation of BIT Article 3.3.

[280] Facts ¶890-895
[281] PO3 ¶1595
[282] PO3 ¶1595

PRAYERS FOR RELIEF

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

(1) It does not have jurisdiction over the present dispute;
(2) The claims in relation to the LTA are inadmissible over the present proceedings;
(3) Respondent have denied the benefits of the treaty to Claimant under BIT Article 2;
(4) Respondent comply with its obligation under BIT Article 3.2 to provide Claimant with Fair and Equitable Treatment;
(5) Respondent comply with its obligations under BIT Article 6 and did not Indirectly Expropriate Claimant's Investment;
(6) Respondent actions were necessary;
(7) Respondent comply with its obligations under BIT Article 3 in relation to the conduct of its judiciary in relation to the enforcement proceedings;
(8) Respondent comply with its obligations under BIT Article 3.3;
(9) Respondent must not compensate Claimant for any damage.

Respectfully submitted on 25 September 2017

By TEAM ELIAS

On behalf of Respondent
REPUBLIC OF MERCURIA