TEAM JENNINGS

IN THE PERMANENT COURT OF ARBITRATION

UNDER THE PERMANENT COURT OF ARBITRATION RULES 2012

Memorandum for RESPONDENT

PCA CASE NO. 2016-74

On Behalf of:	Against:
Republic of Mercuria,	**Atton Boro Limited,**
LBP Building, 50, ABC Avenue	22 Faraway Str.
Stoica 03035, Mercuria	Basheera
RESPONDENT	**CLAIMANT**

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANDED MEANING
¶	paragraph/paragraphs
Art.	Article
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts, 2005
LCIA	London Code of International Arbitration
LTA	Long Term Agreement
NHA	National Health Authority of Mercuria
Pakistan BIT	The Agreement entered into by the Swiss Confederation and the Islamic Republic of Pakistan concerning the Promotion and the Reciprocal Protection of Investments, 1995
PCA	Permanent Court of Arbitration
Philippines BIT	The Agreement entered into by the Swiss Confederation and the Republic of Philippines concerning the Promotion and the Reciprocal Protection of Investments, 1997
The BIT	Agreement Between the Republic of Mercuria and the Kingdom of Basheera for the Promotion And Reciprocal Protection of Investments
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention for the Law of Treaties
WTO	World Trade Organisation

LIST OF AUTHORITIES

CASES AND AWARDS	
ABBREVIATION	**CITATION**
ADF	ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2013.
AES Summit	AES Summit Generation Limited and AES-Tisza Eromu Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010.
AMINOIL	Government of the State of Kuwait v. The American Independent Oil Co (AMINOIL), Ad-Hoc Tribunal, Final Award, 1982.
Amoco	Amoco International Finance Corporation v. Iran, Award No. 310-56-3, Partial Award, 14 July 1987.
Asylum	Asylum, Columbia v. Peru, Merits Judgement, [1950] ICJ Rep 226, ICGJ 194, 20 November 1950, International Court of Justice.
Aucoven	Autopista Concesionada De Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001.
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.
Chemtura Corporation	Chemtura Corporation v. Government of Canada, Ad Hoc NAFTA Arbitration, Award, 2 August 2010.
Chevron	Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Partial Award on Track 1, 12 March 2012.
Chevron (II)	Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Expert Opinion of Professor David D. Caron, 12 March 2012.
CME	CME Czech Republic B.V v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003.
Continental Casualty	Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/09, Award, 5 September 2009.
Duke Energy	Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008.

EDF	EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009.
Electrabel	Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/09, Award, 25 November 2015.
EnCana	EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006.
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Gustav	Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010.
Impregilo	Impregilo S.p.A v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.
Italy v. Cuba	Italian Republic v. Republic of Cuba, Ad-Hoc State-State Arbitration, Final Award, 1 January 2008.
Jan de Nul	Jan de Nul N.V and Dredging International N.V v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008.
Joy Mining	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004.
LG&E	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.
LIAMCO	Libyan American Oil Co (LIAMCO) v. Libyan Arab Republic, Ad-Hoc Tribunal, Award, 1977.
Liman	Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010.
Link-Trading	Link-Trading Joint Stock Company v. Moldova, Ad Hoc Tribunal (UNCITRAL), Final Award, 18 April 2002.

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Methanex Corporation	Methanex Corporation v. United States of America, NAFTA, Final Award on Jurisdiction and Merits, 3 August 2005.
Mondev	Mondev International Ltd. v. United States of America, ICSID Case No., ARB(AF)/99/2, Award, 11 October 2002.
Nagel	William Nagel v. Czech Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, 9 September 2009.
National Grid	National Grid Plc v. Argentine Republic, UNCITRAL, Award, 3 November 2008.
Nicaragua	The Republic of Nicaragua v. The United States of America, (1986) ICJ 1, International Court of Justice, 27 June 1986.
Noble Ventures	Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005.
Nova Scotia	Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, 30 April 2014.
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Sempra Energy	Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 27 September 2007.
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MISCELLANEOUS	
ABBREVIATION	**CITATION**
DOHA WTO	Doha WTO Ministerial 2001, Declaration on the TRIPS Agreement Public Health, WT/MIN(01)/DEC/2.
OECD	Katia Yannaca-Small, International Investment Law: Understanding Concepts and Tracking Innovations, OECD 2009 *available at* https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf.
UN Commentary	Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2008 *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
UNCTAD	UNCTAD, Taking of Property: On Issues in International Investment Agreements, 2000, *available at* http://unctad.org/en/docs/psiteiitd15.en.pdf.
WHO Remuneration	World Health Organisation, Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technologies, WHO/TCM/2005.

STATEMENT OF FACTS

PARTIES TO THE DISPUTE

1. The Claimant, Atton Boro Limited, is a company incorporated in Basheera. The Claimant was assigned the patent for Valtervite in Mercuria in 1998 and has since entered the Mercurian market by concluding several agreements with its government and the NHA. It has thus invested in a robust manufacturing base in Mercuria.

2. The Respondent is the Republic of Mercuria.

THE DISEASE

3. In 2003, the NHA's annual report spoke of the threat the Greyscale posed to the country and that treatment at the time was also not in conformity with global standards.

GOVERNMENT ACTION

4. To combat Greyscale, the government invited offers from pharmaceutical companies to combat Greyscale, specifically inviting the Claimant to make an offer.

THE LTA

5. The Claimant and the NHA entered into an LTA to provide Greyscale at a discounted rate for ten years. The Claimant set up its manufacturing unit and by 2006 was providing Sanior to about a third of all Greyscale patients.

TERMINATION OF THE LTA

6. Subsequent to the 2006 report of the NHA, the NHA sought to renegotiate the terms of the LTA asking for a further discount of 40% due to the increasing prevalence of Greyscale. The Claimant failed to cooperate with the Respondent in spite of the threat posed by Greyscale and offered no more than a 10% discount.

7. Faced with the increasing prevalence and cost of treating Greyscale along with a complete lack of cooperation from the Claimant, the NHA terminated the LTA due to their unsatisfactory performance of the spirit of the contract.

ARBITRATION AND THE AWARD

8. The Claimant contested the termination by invoking arbitration against the NHA and an award was granted in its favour. On 3 March, 2009 the Claimant filed for enforcement of the award, which the NHA contested on the grounds of public policy.

9. In January 2012 the Commercial Courts Act was enacted by the Respondent directing for the constitution of special benches to expeditiously dispose of commercial matters. In September 2013 the Supreme Court clarified that this did not include the enforcement of awards and thus pending enforcement proceedings were transferred back to the High Court.

10. Thus, due to general developments in the law and no fault of any party, the proceedings are still pending before the High Court.

COMPULSORY LICENSING

11. Subsequent to terminating the LTA, on 10 October 2009 the Respondent passed legislation which allowed for the use of a patented invention without the permission of the owner. In November, HG-Pharma, a generic drug filed for such compulsory licensing of Valtervite

12. The Court heard the matter in a fast-track manner and on 17 April, 2010 it granted the license until Greyscale was no longer a threat in Mercuria. It also said that a 1% royalty was to be paid to the Claimant.

THE EFFECT OF NON-VOLUNTARY LICENSING

13. The price of the drug fell by 80%, in addition to which the Claimant lost over two-thirds of its market share. However, it the drug was easily available for individuals looking for treatment.

14. Between May and August 2013, several neighboring developing countries indicated that they had received Greyscale medicines from the Respondent.

ARBITRATION

15. On 7 November, 2016, relying on the Basheera-Mercuria BIT, the Claimant filed for arbitration pursuant to Article 3 of the PCA Arbitration Rules, 2012.

16. The Claimant requested the tribunal to find that Respondent breached the LTA in terminating the same. The Respondent had also failed to provide the Claimant with effective means by not enforcing the arbitration award for 7 years. Further, by passing a law allowing for compulsory licensing and granting such a license for Valtervite the Respondent has breached its obligations under the TRIPS and violated the Claimants legitimate concern. For all these violations of its rights, the Claimant requested the tribunal to grant USD 1,540,000,000 along with the costs of the dispute with interest. The Respondent contested all of these claims.

17. Basheera and Mercuria are both parties to the TRIPS and the International Covenant on Economic, Social and Cultural Rights. Both parties have also signed the Vienna Convention on the Law of Treaties, but only Basheera has ratified it.

SUMMARY OF ARGUMENTS

18. **Issue 1:** The arbitral award is not an investment in and of itself. In determining whether an arbitral award is an investment, the Tribunal must rely on the inherent meaning of the term investment. As per the inherent meaning, an arbitral award is not an investment because the arbitral award does not contribute to the economic development of the host state and there is no contribution or risk undertaken. Further, even if the Tribunal does not rely on the inherent meaning, an arbitral award cannot be categorized as an investment by itself as it is a mere legal instrument which acts as a tool for disposition of rights and obligations arising out of the contract. Moreover, the arbitral award is not an investment even by virtue of arising out of the LTA because the LTA itself is not an investment. Furthermore, even if the LTA is an investment, the arbitral award is analytically distinct from the LTA and does not form a part of the investment.

19. **Issue 2:** The Claimant has been denied the benefits of the BIT because both procedural and substantive requirements of the denial of benefits clause are satisfied. The denial of benefits being a jurisdictional objection can be raised till the filing of the statement of defense, as per the PCA Rules. Thus, the Respondent has exercised its right to deny benefits in a timely manner. Further, the denial of benefits can be applied retrospectively in the absence of any prohibition in the BIT. Moreover, the Claimant is owned by Atton Boro Group affiliates and controlled by Atton Boro and Company, both of whom are nationals of third state. Furthermore, the Claimant does not engage in any buying, selling or contracting in the territory of Basheera and thus, does not have substantial business activities in Basheera.

20. **Issue 3:** The Respondent has not violated the Claimant's legitimate expectation of a stable business and legal framework under FET by enacting the Law No. 8458/09. In any case, such an enactment is justified as a part of the regulatory powers of the state. Further, the Respondent has not discriminated against the Claimant under Article 3(2) of the BIT because Sanior can be reasonably differentiated from other drugs in the market. The actions of the Respondent do not constitute an illegal expropriation as they were taken for public welfare and, in any case, comply with the requirements of Article 6 of the BIT. In addition, the Respondent does not owe the Claimant any obligation under the TRIPS and, even if it did, has acted in compliance with such obligations.

21. **Issue 4:** The Respondent has not violated the FET Standard under Article 3(2) by the conduct of its judiciary during the course of the enforcement proceedings. Further, the Respondent has not denied justice to the Claimant by virtue of the delay in the proceedings. The complex jurisdictional challenge, the circumstances of Mercuria and the conduct of the litigants has mitigated the delay. The mere non-application of Mercurian Procedural law does not amount to a breach of the FET Standard. Additionally, the Respondent is under no obligation to provide the Claimant with effective means to assert claims and enforce rights.

22. **Issue 5:** The action of the NHA, through a unilateral termination of the LTA, has resulted in the breach of the LTA. The NHA is an independent body and the Respondent is not internationally responsible for the actions of the NHA. The NHA does not meet the structural, functional and control test and thus, its actions cannot be attributed to the Respondent. In any case, the Respondent has not breached its obligations under Article 3(3). In light of the Fundamental Basis Test and in order to give effect to the intention of the parties, the umbrella clause should be interpreted narrowly to exclude minor commercial contractual breaches from its scope. Further, since the termination of the LTA is a commercial act and not a sovereign act, it does not breach the obligation under Article 3(3).

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMS IN RELATION TO THE AWARD

23. Due to unavoidable reasons, there was a delay in the enforcement of the arbitral award by the Mercurain judiciary. The Claimant contends that this delay in the enforcement of the arbitral award is a violation of its rights under the BIT. However, this Arbitral Tribunal does not have jurisdiction over claims arising in relation to the arbitral award. This is because an arbitral award does not qualify as an investment in and of itself **(1.1)**. Further, the arbitral award does not qualify as an investment by virtue of arising out of the LTA **(1.2)**.

1.1 AN ARBITRAL AWARD IS NOT AN INVESTMENT IN AND OF ITSELF

24. In determining whether an arbitral award is an investment, the Arbitral Tribunal must rely on the inherent meaning of the term investment **(1.1.1)**. Applying this definition, an arbitral award in and of itself is not an investment as per the inherent meaning of the term investment **(1.1.2)**. In any case, even if the tribunal does not use the inherent meaning, an arbitral award still cannot be an investment in and of itself **(1.1.3)**.

1.1.1 The Arbitral Tribunal must rely on the inherent meaning of the term investment

25. Article 1 of the BIT provides an illustrative list stipulating the categories of assets that may qualify as investments.[1] However, merely falling within one of the categories listed in Article 1 of the BIT does not transform an asset into an investment. The term investment has an inherent meaning which must be considered before determining whether an asset qualifies as an investment.[2]

26. This is because a mechanical application of the categories listed in the BIT definition would render absurd results as it would eliminate any practical limitation on the scope of the term investment. The result would be that any sales or procurement contract involving a State agency would qualify as an investment. It would render meaningless the distinction between

[1] Record, Page 32.
[2] Romak, Page 53, ¶ 207; Rajput, Page 17.

investments and purely commercial transactions, a distinction that has been recognized to exist.[3]

27. Moreover, Article 31 of the VCLT requires that a treaty shall be interpreted in accordance with the ordinary meaning of the terms of the treaty. Thus, on applying the VCLT, one has to look at the ordinary meaning of the term investment provided in the BIT.[4]

28. Furthermore, the definition in Article 1 of the BIT uses the word "*includes"* which means that the definition is not an exhaustive one. This open ended nature of the definition calls for recourse to inherent features.[5]

29. Thus, the Arbitral Tribunal must rely on the inherent meaning of the term investment to determine whether an arbitral award qualifies as an investment.

1.1.2 An arbitral award in and of itself does not qualify as an investment as per the inherent meaning of investment

30. The inherent meaning of the term investment is that an investment entails a contribution that extends over a certain period of time, involves some risk and contributes to the economic development of the host state.[6]

31. An arbitral award by itself does not make any contribution whatsoever to the economic development to the host state.[7] Thus, an arbitral award is not an investment by itself because it does not contribute to the economic development of the host state.

32. Moreover, an asset is an investment only if it entails a contribution. A contribution can be in the form of commitment of capital.[8] It is not possible to associate any commitment of capital with an arbitral award.[9] Thus, an arbitral award does not entail any contribution.

[3] Joy Mining, Page 14, ¶ 58; Fedax, ¶ 42.
[4] Nova Scotia, Page 10, ¶ 76.
[5] Nova Scotia, Page 11, ¶ 78.
[6] Rajput, Page 24.
[7] GEA, Page 47, ¶ 162.
[8] Romak, Page 55, ¶ 214.
[9] Mansinghka/Srikumar, Page 18.

33. Furthermore, as regards risk, it is very difficult to associate the presence of an investment risk with arbitral awards.[10] The risk of non-enforcement of an award is a mere commercial risk and not an investment risk.

34. To conclude, an arbitral award is not an investment where there is no investment risk.[11]

1.1.3 Even if the Arbitral Tribunal does not apply the inherent meaning of the term investment, an arbitral award cannot be an investment in and of itself

35. Whether tested against the inherent definition of investment or the definition mentioned in the BIT, an arbitral award does not in and of itself constitute an investment. An arbitral award is a mere legal instrument, which acts as a tool for the disposition of rights and obligations arising out of the contract.[12]

36. The crucial policy reason behind not characterizing an arbitral award by itself as an investment is that allowing such a practice permits the investor to seek indirect enforcement of an annulled award, while circumventing the legitimate supervisory jurisdiction of the courts of the seat.[13] This is because in all cases where an investor approaches an investment tribunal for non-enforcement of arbitral award, it requests the tribunal to grant compensation equivalent to the quantum of the award.

37. Thus, in this way, an investor is able to evade the standard of scrutiny set forth in Article V of the New York Convention and diminishes the value of national courts.[14] Such an appellate venue may be said to be counterproductive to the initial purpose of the New York Convention itself, as it undermines its goal to create an adequate and reliable international regime for international commercial arbitration that allows only domestic courts to have such supervisory power over the recognition and enforcement of these awards.[15] Hence, an arbitral award by itself cannot be characterized as an investment.

[10] Mansinghka/Srikumar, Page 18.
[11] Saipem, Page 31, ¶ 113.
[12] GEA, Page 47, ¶ 161; White Industries, Page 80, ¶ 7.6.3.
[13] Mansinghka/Srikumar, Page 18.
[14] Fraga/Samra, Page 447.
[15] Priem, Page 220.

1.2 THE ARBITRAL AWARD DOES NOT QUALIFY AS AN INVESTMENT BY VIRTUE OF ARISING OUT OF THE LTA

38. The arbitral award arises out of the LTA which was terminated by the NHA due to the Claimant's unsatisfactory performance. The arbitral award does not qualify as an investment by virtue of arising out of the LTA because the LTA itself is not an investment but a mere commercial arrangement **(1.2.1)**. In any case, even if the LTA is an investment, the arbitral award is not a part of the investment **(1.2.2)**.

1.2.1 The LTA itself is not an investment

39. A few tribunals have held that an arbitral award is an investment if the underlying contractual arrangement that gives rise to the award constitutes an investment.[16] However, in the instant case, the arbitral award cannot be an investment because the underlying contract, the LTA itself, is not an investment but a mere contractual arrangement.

40. As already submitted, an investment is something that entails a contribution that extends over a certain period of time, involves some risk and contributes to the economic development of the host state.[17] The LTA is not an investment because the Claimant has not undertaken any investment risk **(1.2.1.1)**. Further, the Claimant has not made any contribution under the LTA **(1.2.1.2)**. Lastly, the LTA does not contribute to the economic development of Mercuria **(1.2.1.3)**.

1.2.1.1 The Claimant has not undertaken any investment risk in relation to the transaction

41. The risk of non-payment or termination of a contract are not any different from those present in a normal commercial contract and cannot be called investment risk.[18] Further, in the instant case, under Clause 5 of the LTA, the Claimant was guaranteed an minimum annual order value.[19] Thus, this avoided the possibility of any risk of under purchase of the medicines produced.

[16] Frontier Petroleum, page 77, ¶ 231; Saipem, Page 35, ¶ 127.
[17] Respondent Memorial, ¶ 25-30.
[18] Joy Mining, Page 13, ¶ 57.
[19] Record, Page 29, ¶ 10.

42. Thus, in the instant case, the Claimant has not undertaken any investment risk with respect to the LTA and hence the LTA is not an investment.

1.2.1.2 The Claimant has not made any contribution under the LTA

43. In the case of *Italy v. Cuba,* the tribunal dealt with an agreement for sale of pharmaceuticals between an Italian pharmaceutical company and an entity affiliated with the Cuban Ministry of Health. The tribunal noted that such an agreement for sale of pharmaceuticals was not an investment because there was no contribution by the Italian company into Cuba.[20] In the instant case as well, the LTA is a mere agreement for sale of pharmaceuticals and there is no contribution by the Claimant into Mercuria.

44. The Claimant may argue that it made a contribution as it set up a manufacturing unit and purchased land and machinery in Mercuria for the production of Sanior. However, the manufacturing unit was not set up by the Claimant by itself. Atton Boro and Company funded the Claimant to set up its manufacturing unit in Mercuria, as well as to perform its obligations under the LTA.[21] Thus, there was no active contribution on part of the Claimant which is a necessary requirement.[22]

45. Moreover, the LTA did not require the Claimant to set up any manufacturing unit or purchase any land or machinery in Mercuria. This was a mere step in fulfillment of Claimant's obligations under the commercial arrangement which does not amount to contribution.

1.2.1.3 The LTA does not contribute to the economic development of Mercuria

46. Although any contract may have some made some economic contribution to the place where it is performed, that however does not make a contract an investment.[23] To qualify as an investment, the contribution to the economic development of the host State must be *significant.*[24] Were there not the requirement of significance, any contract, which enhances

[20] Italy v. Cuba, Page 90, ¶ 215.
[21] Record, Page 50.
[22] Standard Chartered, Page 59, ¶ 260.
[23] Malaysian Historical Salvors, Page 43, ¶ 125.
[24] Joy Mining, Page 12, ¶ 53.

the Gross Domestic Product of an economy by any amount, however small, would qualify as an investment.[25]

47. In the instant case, the LTA did not benefit the economy of Mercuria in a material way or served to benefit the local economy. Although the supply of Sanior was made at a discounted rate,[26] it did not benefit the health budget in a substantial manner. This is reflected in the Annual Report 2006 that anticipated a requirement of 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000.[27]

48. Poor accessibility and affordability of Sanior on account of excessive pricing further indicates lack of substantial positive contribution towards the economy of the Respondent State. In view of these circumstances, the Respondent submits that the LTA failed to make any significant contribution to the host state's economic development.

49. To conclude, the LTA is not an investment.

1.2.2 In any case, the arbitral award is not a part of the investment

50. Even if this tribunal were to hold that the LTA was an investment, the arbitral award is not an investment. An arbitral award rules upon the rights and obligation arising out of an investment. Thus, the award is analytically distinct from the investment. It is not a part of the operation of the investment.[28]

51. In the instant case, the arbitral award in favor of the Claimant rules upon the rights and obligations arising out of the LTA. However, the award is analytically distinct from the LTA. Hence, even if the LTA is an investment, the arbitral award is not an investment

[25] Malaysian Historical Salvors, Page 43, ¶ 123.
[26] Record, Page 29, ¶ 10.
[27] Record, Page 43.
[28] GEA, Page 47, ¶ 162

ISSUE 2: THE CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE BIT BY VIRTUE OF RESPONDENT'S INVOCATION OF ARTICLE 2 OF THE BIT

52. The Claimant has been denied the benefits of the BIT by virtue of the Respondent's invocation of Article 2 because, *first,* the procedural requirements of denial of benefits clause are satisfied **(2.1)**. *Second,* the substantive requirements of Article 2(1) of the BIT are also satisfied **(2.2)**.

2.1 THE PROCEDURAL REQUIREMENTS OF DENIAL OF BENEFITS CLAUSE ARE SATISFIED

53. The Claimant has been denied the benefits of the BIT because the Respondent exercised its right to deny the benefits in a timely manner **(2.1.1)**. Further, the denial of benefits can be applied retrospectively **(2.2.2)**.

2.1.1 The Respondent exercised its right to deny benefits in a timely manner

54. Article 2 of the BIT provides that "*each Contracting Party reserves the right to deny the advantages of this Agreement to…* ".[29] It follows from the plain meaning of these words that each Contracting Party has a right to deny a covered investor the advantages of the Agreement, and, to effect the denial, it must exercise the right.[30]

55. Since the advantages of the Agreement include the right to resolve disputes by way of arbitration, a valid exercise of the right would have the effect of depriving the tribunal of its jurisdiction. Thus, the denial of benefits must be announced at the time of raising objections to jurisdiction.[31]

56. In the instant case, the arbitration is being administered by the PCA.[32] Article 23.2 of the PCA Rules provides that "*a plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defense*". Thus, the denial of benefits being a jurisdictional objection, it can be raised till the filing of the statement of defense. In the instant case, Respondent invoked the denial of benefits in its Response to the Notice or

[29] Record, Page 33.
[30] Yukos, Page 166, ¶456; Liman, Page 59, ¶224.
[31] Ulysseas, Page 59, ¶ 172; EMELEC, Page 22, ¶ 71.
[32] Record, Page 26, ¶ 7.

Arbitration, dated, 26 November, 2016.[33] Thus, Respondent has exercised its right in a timely manner.

57. The Claimant may contend that the exercise of the right must be associated with publicity or another notice which must be provided to the investor either at the time of making the investment or before the dispute arose.

58. However, nothing in Article 2 of the BIT excludes Respondent's right to deny the BIT's advantages after they are sought by the investor through a request for arbitration. In fact, the absence of a prior notification requirement indicates that the intention of the contracting parties was to increase the prerogatives of the denying party so far as the invocation of the denial is concerned.[34]

59. Moreover, a requirement of prior notification and time limit on invocation of the right to deny would place an untenable burden on the Respondent.[35] It would require the Respondent, in effect, to monitor the ever-changing business activities of all enterprise in the territory of Basheera that attempt to make, are making, or have made investments in the territory of the Respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in Basheera.

60. To requiring the Respondent to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 2 before a claim is submitted to arbitration would have the potential to render denial of benefits provisions virtually meaningless.[36]

61. It is only when an investor decides to invoke one of the benefits of the BIT does the Respondent analyze whether objective conditions for the denial are met, and, if so, whether to exercise the right to deny benefits.[37] Before this, states do not necessarily have either a reason

[33] Record, Page 16, ¶ 5.
[34] Mistelis/Baltag, Page 1320.
[35] Pac Rim, Page 24, ¶ 4.85.
[36] Sornarajah *et. al.*, Page 137.
[37] Rurelec, Page 142, ¶ 378.

or the opportunity to evaluate the nationality of the investors involved in potentially countless foreign investments within their territory.[38]

62. Thus, in the instant case, the Respondent denied the benefits in a timely manner.

2.1.2 The denial of benefits can be applied retrospectively

63. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "*activated*" when the benefits are being claimed.[39] There is no condition in Article 2 of the BIT which entails that such denial is only effective in relation to disputes arising after the notification of such denial. Thus, the denial of benefits can be applied retrospectively from the date of exercise of such denial.[40]

64. Claimant may argue that retrospective application of the denial of benefits clause would amount to a violation of its legitimate expectations. However, no legitimate expectation arises in this case. This is because the BIT contains the denial of benefits clause which is designed to give notice to foreign investors that investments falling within the scope of the clause are not protected by the BIT.[41] Thus, the Claimant, whose investment is structured in a way that the grounds in Article 2(1) are triggered, cannot have a legitimate expectation of enjoying the advantages of the BIT.

65. To conclude, the Claimant can be denied the benefits of the BIT retrospectively.

2.2 THE SUBSTANTIVE REQUIREMENTS OF ARTICLE 2(1) ARE ALSO SATISFIED

66. Article 2(1) of the BIT specifies certain requirements for the exercise of right of denial by the host state. The requirements of Article 2(1) are satisfied because the Claimant is owned or controlled by nationals or citizens of a third state **(2.2.1)**. Further, the Claimant does not have substantial business activities in the territory of Basheera **(2.2.2)**.

[38] Legum, Page 525.
[39] Rurelec, Page 142, ¶ 376.
[40] Rurelec, Page 142, ¶ 376.
[41] Ulysseas, Page 60, ¶ 173; Sornarajah *et. al.,* Page 137.

2.2.1 The Claimant is owned and controlled by nationals of a third state

67. The first limb of Article 2(1) of the BIT provides that the benefits of the BIT can be denied only to a legal entity that is owned or controlled by nationals of a third state.[42] The use of the word "*or*" signifies that ownership and control are alternatives; only one of the two criteria needs to be met for the first limb to be satisfied.[43]

68. For the purposes of this clause, ownership includes direct ownership as well as indirect and beneficial ownership.[44] In the instant case, the shares of the Claimant are held by affiliates of the Atton Boro Group.[45] Thus, the Claimant's ownership lies with Atton Boro Group affiliates. Since the Atton Boro Group affiliates are nationals of neither Mercuria nor Basheera, the Claimant is owned by nationals of a third state.

69. In addition to ownership, the Claimant is also controlled by nationals of a third state. In determining who controls a legal entity, the tribunal must find out the "*real source of control*" or the "*true controller*" of the legal entity.[46] Control includes control in fact, including the ability to exercise substantial influence over the affairs of the company.[47] In the instant case, the Atton Boro Group affiliates are all ultimately controlled by Atton Boro and Company.[48] Thus, the real source of control of the Claimant lies with Atton Boro and Company. Since Atton Boro and Company is a national of Reef,[49] it can be concluded that the Claimant is controlled by nationals of a third state.

70. Admittedly, the directors of Atton Boro and Company come from several different countries, two of which are Mercuria and Basheera.[50] Claimant may rely on this to argue that the Claimant is ultimately controlled by nationals of Mercuria and Basheera. However, mere presence on the board of directors is not by itself a sufficient factor to indicate control over a company.[51] Further, in the instant case, a minor presence of nationals of Mercuria and Basheera among directors of several different countries is not sufficient to show that those

[42] Record, Page 33.
[43] Plama, Page 54, ¶ 170.
[44] Plama, Page 54, ¶ 170.
[45] Record, Page 48, ¶ 3.
[46] T.S.A. Spectrum, Page 44, ¶ 153.
[47] Plama, Page 54, ¶ 170.
[48] Record, Page 48, ¶ 3.
[49] Record, Page 28, ¶ 2.
[50] Record, Page 50.
[51] Vacuum Salt, ¶ 53; Baumgartner, Page 123, Schreuer *et. al.*, ¶ 864.

nationals from these two countries exercised control over the affairs of Atton Boro and Company.

71. In fact, Atton Boro and Company is controlled by nationals of third state by virtue of its shareholding. Direct shareholding is a strong indicator of exercise of control over the company. This is because it confers voting rights, and, therefore, the possibility to participate in the decision-making of the company.[52] Atton Boro and Company shares are held by a mix of private entities and private individuals of a wide variety of nationalities.[53] Thus, the control of Atton Boro and Company rests with entities and individuals of those nationalities and not with nationals of Mercuria or Basheera.

72. To conclude, the Claimant is controlled by nationals of third state.

2.2.2 The Claimant does not have substantial business activity in the territory of Basheera

73. Article 2(1) of the BIT provides that benefits of the BIT can be denied only to a legal entity that does not have substantial business activity in the territory of the contracting party in which it is organized.[54]

74. A company is said to have substantial business activity in a territory if it is engaged in buying, selling, and contracting in that territory. These activities have to be beyond the normal activities or functions required by virtue of its corporate existence such as corporate registration and administration, the payment of associated taxes and corporate registration fees.[55] One would also expect such a company to have employees in the territory of the Contracting Party in which it is organized carrying out assignments in furtherance of the business and to engage in procurement locally of inputs for the business.[56]

75. In the instant case, the Claimant's business activity in Basheera is to manage its portfolio of patents registered in South America and Africa.[57] While the Claimant had

[52] Aucoven, ¶ 121.
[53] Record, Page 50.
[54] Record, Page 33.
[55] Coop/Ribeiro, Page 20.
[56] Coop/Ribeiro, Page 20.
[57] Record, Page 48, ¶ 3.

number of employees in Basheera, their work is also limited to managing the portfolio of patents and providing support for Atton Boro Group affiliates in South America and Africa.[58]

76. Thus, the Claimant is not even remotely engaged in buying, selling and contracting in the territory of Basheera. Further, its employees are also not carrying out assignments in furtherance of any such activity in Basheera. Moreover, the Claimant is not engaged in procurement of local inputs for the business.

77. While the Claimant has a bank account[59] and complies with its tax obligations in Basheera,[60] those are activities required merely by the fact of its corporate existence and thus are not indicative of substantial business activity in Basheera. Thus, it can be concluded that the Claimant does not have any substantial business activity in Basheera.

ISSUE 3: RESPONDENT'S ACTIONS HAVE NOT BREACHED THE BIT

78. The enactment of Law No. 8458/09 and the grant of a license to HG-Pharma to manufacture the Claimant's patented active ingredient Valtervite do not constitute a breach of the BIT. This is because Law No. 8458/09 does not violate the legitimate expectations of a stable legal and business environment **(3.1)**. Further, the respondent did not act in a discriminatory manner **(3.2)**. The Claimant is not entitled to damages for an indirect expropriation **(3.3).** Further, the Claimant cannot rely on violations of the TRIPS in the present case **(3.4)**.

3.1. THE ENACTMENT OF THE LEGISLATION DOES NOT VIOLATE THE BIT

79. Article 3(2) of the BIT promises the investments FET.[61] Admittedly, FET clauses have been held to give rise to legitimate expectations of a stable legal and business environment.[62] In the instant case, however, the FET clause has not been violated as *first*, Claimant had no basis for forming legitimate expectations regarding Respondent's laws **(3.1.1)** and, *second*, in any case, Respondent was justified in passing Law No. 8458/09 **(3.1.2)**.

[58] Record, Page 48, ¶ 3.
[59] Record, Page 28, ¶4.
[60] Record, Page 50.
[61] Record, Page 33.
[62] LG&E, Page 37, ¶ 124; Dolzer/Schreuer, Page 145.

3.1.1 Claimant had no basis for forming legitimate expectations regarding Respondent's laws

80. In the absence of any stabilization clause or specific reassurances from the state, investors cannot reasonably expect that the law will not change.[63] Investors must point to these specific and unambiguous representations regarding the stability of laws and show how these have been reneged upon.[64]

81. Encouraging representations that are made by government officials and heads of state, however, have been held to be insufficient to constitute legitimate expectations.[65] Further, if a measure is a part of the international obligations of a state through treaties such as the TRIPS, an investor cannot claim he could not expect a state to pass legislation in accordance with the same.[66]

82. In the present case, there is no mention of a stabilization clause in the contract. The Claimant cannot rely on vague statements concerning the stability of the intellectual property rights to regime to claim that it held legitimate expectations by virtue of the same. These statements are neither specific nor unambiguous and make no direct reference to laws regarding non-voluntary licenses. It is also important to note that these statements were made by the health minister[67] and President,[68] both of whom are government officials and cannot be relied upon to form legitimate expectations.

83. The statements themselves refer to a moving towards "*progressive*" intellectual property rights regime.[69] This has been understood to include allowing for non-voluntary licensing to prevent abuse of patent rights and protect public interests such as public health.[70] Such provisions are also part of the TRIPS,[71] to which the Respondent is a party. Thus, the Claimant had no basis for the formation of any legitimate that laws allowing for non-voluntary licensing would not be passed.

[63] EDF, Page 62, ¶ 217; Electrabel Part 9, Page 3, ¶ 9.10.
[64] Enron, Page 84, ¶ 262-264.
[65] Nagel, Page 96 ¶ 326; Newcombe/Paradell, Page 281.
[66] Brown/Miles, Page 500. Dolzer/Schreuer, Page 145.
[67] Record, Page 39, ¶ 4.
[68] Record, Page 29, ¶ 8.
[69] Record, Page 39, ¶ 4.
[70] Maskus, Page 501; Vadi, Page 76.
[71] Art. 31, TRIPS.

3.1.2 In any case, Respondent was justified in passing Law No. 8458/09

84. Several tribunals have recognized the state's right to exercise its sovereign power to enact, modify and repeal its laws.[72] Investors' legitimate expectations of the stability of the legal and business environment of the state cannot restrict the state's regulatory power over the evolutionary character of the economy.[73] The investor is expected to exercise due diligence and base expectations in light of the prevailing circumstances as well as reasonably anticipate potential changes.[74]

85. Thus, a state is entitled to exercise its legislative power even in the presence of legitimate expectations. The burden for the state is to not act "*unfairly, unreasonably or inequitably*" in doing so.[75] In *Saluka Investments* the tribunal stated that regulations were justified if a reasonable relationship with rational policies could be shown by the state.[76] Various tribunals have held that emergencies, including economic emergencies, must be considered in evaluating violations of FET standards.[77]

86. The public health concern posed by the Greyscale epidemic among the working-age population of Mercuria had been highlighted as a potential national crisis as early as in 2003, even before the contract was signed.[78] By 2006, it was publicly known that the incidence and prevalence of Greyscale was increasing and the population depending on public health schemes was rapidly multiplying.[79] The order value for treatment doubled in every quarter of 2007.[80]

87. Respondent could not afford the price being charged by the Claimant for Sanior. In fact, it informed the Claimant that existing prices for Sanior, even after a further discount of ten percent that was offered, would not be sufficient for the Respondent.[81]

[72] Parkerings-Compagniet, Page 71, ¶ 332; Link-Trading, Page 22, ¶ 68.
[73] Yannaca-Small, Page 405.
[74] AES Summit, Page 61, ¶ 9.3.30.
[75] Parkerings-Compagniet, Page 71, ¶ 332.
[76] Saluka Investments, Page 66, ¶ 307-8.
[77] National Grid, Page 72, ¶ 180.
[78] Record, Page 28, ¶ 6.
[79] Record, Page 43.
[80] Record, Page 29, ¶ 15.
[81] Record, Page 29, ¶ 15.

88. The cost of the treatment for Greyscale was expected to increase further and consume over a third of the public health budget of Mercuria.[82] This would have affected the legitimate public welfare goal of universal free healthcare.[83] As a developing country,[84] Mercuria has a limited budget and needed to cater to the welfare needs of its people. Public health and the associated expenditure constitute a rational policy and non-voluntary licensing is a recognized means to achieve the same.[85]

89. Thus, the Respondent was justified in promulgating Law No. 8458/09.

3.2 THE RESPONDENT DID NOT ACT IN A DISCRIMINATORY MANNER

90. Article 3(2) of the BIT states requires the Respondent to not take discriminatory measures against the Claimant.[86] Discrimination has been held to take place when similar cases are treated differently without reasonable justification.[87] Thus, to prove discrimination, a suitable comparator in similar circumstances must be shown to have been treated in a more favorable manner.[88]

91. In *EDF Services* v. *Romania*,[89] the Respondent enacted ordinances regulating duty-free services at airports. This disqualified the subsidiaries from providing duty-free services. However, since the ordinance was applicable to service providers in general, the tribunal rejected claims of discrimination and arbitrariness.

92. In the instant case, Law No. 8458/09 is of general application as part of the law governing intellectual property in the Respondent state.[90] It applies to both foreign and domestic investors. Therefore, it is not discriminatory.

93. Claimant may argue that the fact that a non-voluntary license was granted only against Sanior constituted discrimination. However, in the present case, there is nothing to suggest that any other disease that posed the threat that was posed by Greyscale. Thus, no

[82] Record, Page 43.
[83] Record, Page 43.
[84] Record, Page 17, ¶ 9.
[85] Art. 4, DOHA WTO.
[86] Record, Page 33.
[87] Saluka Investments, Page 67, ¶ 313.
[88] Methanex Corporation, Part IV, Page 2, ¶ 4.
[89] EDF, Page 87, para 278.
[90] Record, Page 44.

medicine to treat other diseases can be considered to be a "*similar case*" to Sanior. A non-voluntary license granted to treat Greyscale would thus not discriminate between like circumstances and not constitute discrimination.

94. Claimant may then contend that the fact that a compulsory license was granted only for its drug against Sanior constitutes discrimination. However, as stated, a reasonable justification for distinguishing products does not constitute discrimination.[91] In this case, treating the Claimant differently was justified.

95. The Claimant has itself stated that its drug was the most effective in treating Greyscale.[92] The Claimant also has an established infrastructure in the market to provide Sanior[93] and was at one point catering to over a third of the market.[94] Further, when the Claimant was not supplying its drug, medical opinion developed a consensus in stating that there was no effective treatment for Greyscale in the market.[95]

96. Thus, even in treating Greyscale, Sanior is clearly differently placed from all other drugs treating Greyscale and to grant a non-voluntary license for the same is reasonably justified. Thus, the actions of the Respondent do not constitute discrimination against the Claimant's investment.

3.3 THE CLAIMANT IS NOT ENTITLED TO DAMAGES FOR AN INDIRECT EXPROPRIATION

97. The actions of the Respondent do not constitute an expropriation as the Respondent sough to protect legitimate public welfare objectives such as public health in a non-discriminatory manner **(3.3.1)**. In any case, the actions of the Respondent do not entail damages for an indirect expropriation (**3.3.2).**

3.3.1 The Respondent sough to protect legitimate public welfare objectives such as public health in a non-discriminatory manner

98. Article 6(4) of the BIT states that non-discriminatory measures undertaken to achieve public interest objectives such as public health do not constitute indirect

[91] Pope and Talbot, Page 26, ¶ 79; Han, Page 639.
[92] Record, Page 28, ¶ 3.
[93] Record, Page 29, ¶ 15.
[94] Record, Page 29, ¶ 11
[95] Record, Page 50.

expropriation.[96] Widely recognized as the police powers exception, it holds that the right of the state to take reasonable measures in public interest cannot be curtailed.[97]

99. It has been shown that the actions of the Respondent were taken to combat the increasing threat of GreyScale.[98] The actions were thus to protect public health, which has been recognized to be in public interest and part of the police powers of the state.[99] Article 6(4) of the BIT makes specific reference to this effect.[100]

100. The Claimant may argue that the reason for this measure was not a public health consideration but budgetary considerations. However, it is submitted that as a developing country the Respondent has limited funds.[101] Spending excessive amounts on a particular drug would necessarily compromise on other healthcare goals and thus, the ultimately affected welfare goal is public health.

101. The fact that the excessive costs of medicines acts as a hindrance to public health is well recognized and Non-voluntary licensing is a well-established alternative.[102] Both contracting parties are also signatories to the TRIPS,[103] the members of which have recognized that a state has complete discretion in identifying the grounds for a compulsory license.[104] Thus, Claimant cannot argue that the decision was merely a budgetary policy consideration or that the grounds of granting a compulsory license on budgetary considerations were not met.

102. In any case, tribunals have also accepted arguments wherein a harsh impact on a particular sector constituted grounds for the exercise for police powers. In *Saluka Investments* the tribunal allowed for police powers to be exercised because the alternative would have an impact on the banking sector.[105]

[96] Record, Page 35.
[97] Chemtura Tribunal, Page78, ¶ 266; Kinnear, Page 447.
[98] Respondent Memorial, ¶ 86-88.
[99] Newcombe, Page 26.
[100] Record, Page 35.
[101] Record, Page 17, ¶ 9.
[102] Art. 3, DOHA WTO; Sanders, Page 337.
[103] Record, Page 48, ¶ 2.
[104] Art. 5(b), DOHA WTO; Harten, Page 144.
[105] Saluka Investments, Page 58, ¶ 271.

103. In the present case, if the Respondent did not facilitate non-voluntary licensing, then the healthcare sector would be impacted with a third of the healthcare budget having to be spent on Greyscale alone.[106] Thus, it was a legitimate use of the police powers of the state.

104. It has been established that the actions of the Respondent were non-discriminatory. Thus, as per Article 6(4) of the BIT, the actions of Respondent cannot constitute indirect expropriation.

3.3.2 In any case, the actions of the Respondent do not entail damages for an indirect expropriation

105. In any case, the requirements of indirect expropriation have not been fulfilled. To constitute indirect expropriation, a substantial deprivation of the investment was caused and just compensation was not paid.[107] In the present case, *first*, The Claimant has not suffered a substantial deprivation **(3.3.2.1)** and, *second*, The Claimant has received just compensation **(3.3.2.2)**.

3.3.2.1 The Claimant has not suffered a substantial deprivation

106. In order to constitute a substantial deprivation, it is necessary if the Claimant was "*radically deprived of the economic use of*" his investments in such manner that they had "*ceased to exist*".[108] Another consideration is that the investor must not have any degree of control over his business operation by virtue of the actions of the state.[109]

107. In the present case, the Claimant still holds the patent to the drug Sanior. It can still control the production, marketing and sale of the product and also its various marketing units. The legal title, it does not deprive the owner of ownership rights over the protected intellectual property.[110] Therefore, the Respondent could not be said to have indirectly expropriated the Claimant's invention.

[106] Record, Page 43.
[107] Tokios Tokeles, Page 51, ¶ 121.
[108] Tecmed, Page 43, ¶ 115.
[109] Sempra Energy, Page 83, ¶ 284.
[110] Correa, Page 346.

108. Further, the Claimant can also earn significant revenues from the sale of the product and still continued to possess over a third of its erstwhile market share.[111] The Claimant also receives a significant royalty on every sale by HG-Pharma at a competitive rate in the market of royalties for life saving drugs.[112] Thus, the Claimant cannot be said to have been radically deprived of the economic value of his investment such that the same had ceased to exist.

109. Thus, there has been no indirect expropriation in the present case.

3.3.2.1 The Claimant has received just compensation

110. Article 6(2) of the BIT allows for the same if just compensation paid in cases of expropriation to the investor "*according to internationally acknowledged international standards*".[113] Tribunals have held that the compensation is to be measured against similar transactions of comparable market value.[114] Tribunals have also considered equity in providing compensation in these cases.[115] Further, the adequacy of compensation must be as per the legitimate expectations of parties after evaluating risks.[116]

111. As stated, non-voluntary is a recognized regulatory power in treating life-threatening epidemics. Thus, the metric this tribunal should apply to calculate just compensation is cases of non-voluntary licensing as the same was a legitimate expectation of the parties.

112. Here, the Claimant was awarded a royalty of 1%.[117] The average rate of royalty for non-fatal, incurable diseases such as Greyscale was between 0.5%-3%.[118] Thus, the royalty given to Claimant was well within the industry standard for a license.

113. Further, the WTO remuneration guidelines give states wide discretion in providing royalty. They consider the budgetary concerns and Human Development Index difficulties that developing countries face.[119] In cases of non-voluntary licensing, for developing countries a rate of just over 1% has been considered appropriate, while other countries have

[111] Problem, Page 30, ¶ 24.
[112] Problem, Page 30, ¶ 21.
[113] Record, Page 35.
[114] Amoco, Page 69, ¶ 207; Newcome/Paradell, Page 386.
[115]LIAMCO, Page 160; McLachlan et. al Page 328.
[116] AMINOIL, Page 1038.
[117] Record, Page 30, ¶ 21.
[118] Record, Page 50.
[119] WHO Remuneration, Page 8.

gone as low as .2% royalties. By this metric, 1% royalty to the Claimant constitutes just compensation.

3.4 RESPONDENT CANNOT RELY ON VIOLATIONS OF THE TRIPS IN THE PRESENT CASE

114. The Claimant has contended that the Respondent has violated its obligations under the TRIPS. These claims are unfounded because *first,* the TRIPS is inapplicable to the present dispute under the Umbrella Clause **(3.4.1)** and *second,* in any case, the Respondent has complied with the TRIPS **(3.4.2)**.

3.4.1 The TRIPS is inapplicable to the present dispute under the Umbrella Clause

115. Article 3(3) of the BIT requires the Respondent to comply with "*any obligations*" it may have with regard to the Claimant.[120] International obligations under the TRIPS cannot, however, be brought under this clause.

116. It has been widely held that investor-state tribunals do not have the jurisdiction to evaluate TRIPS violations.[121] This is because the forum that the state intended to settle such disputes is the forum provided by the WTO.[122]

117. Considering states know of the WTO dispute resolution mechanism, states would not have intended for the TRIPS, or any other such treaty, to come within the jurisdiction of the BIT.[123] They do not consider TRIPS obligations to be obligations to the investor but to the WTO. The language of umbrella clauses has instead been held to be concerned with a specific and direct obligation that the state undertook with regard to specific investments.[124]

118. Thus, this tribunal should not consider violations of the TRIPS.

3.4.2 In any case, the Respondent has complied with the TRIPS regime

119. The TRIPS lays down several conditions for the grant of a compulsory license.[125] One of these conditions is that the proposed user is required to have made efforts to obtain the license before seeking non-voluntary licensing. However, the provision mentions that this

[120] Record, Page 34.
[121] Vadi, Page 122.
[122] Rutledge, Page 159.
[123] Bungenberg et al, Page 901.
[124] Henning, Page 262.
[125] Art. 31, TRIPS.

may not be needed in cases that constitute national emergency or other situations of extreme urgency.[126]

120. Admittedly, there is nothing to suggest that HG-Pharma attempted to obtain such a license from the Claimant. However, Law No. 8458/09, in compliance with the TRIPS, allows for this requirement to be waived in cases of national emergency or extreme urgency.[127] The emergency caused due to the spread of Greyscale and lack of effective treatment has already been shown.[128] The discretion for what constitutes an emergency is entirely with the state.[129] Thus, this requirement of making prior efforts is not applicable in the present case.

121. The authorization for such licenses under the TRIPS is to be given for a limited scope[130] and to be used predominantly for the domestic supply.[131] In the context of this provision, 'Predominantly' has been held to constitute more than fifty percent of the total[132] and to be understood with reference to the purpose for which the license was granted.[133]

122. In the present case, the license was granted until Greyscale was not a threat in Mercuria.[134] Thus, its scope was clearly delineated as is required by the TRIPS. The fact that this may be a long term measure does not make it a violation of the TRIPS.[135]

123. The claimant may then contend that as the drug was exported to other countries. However, this export was in the nature of humanitarian aid.[136] The restrictions on supply and the scope are to be understood in the context of marketing and selling of the licensed product.[137] Thus, granting humanitarian aid would not constitute a violation of the same.

[126] Art. 31(b), TRIPS.
[127] Record, Page 45.
[128] Respondent Memorial, ¶ 86-88.
[129] Art. 5(c), DOHA WTO.
[130] Art. 31(c), TRIPS.
[131] Art. 31(f), TRIPS.
[132] Correa (1), Page 50.1.
[133] Stoll et al., Page 570.
[134] Record, Page 30, ¶ 21.
[135] Correa, Page 316.
[136] Record, Page 50.
[137] Malbon, Page 77.

124. Further, there is nothing to suggest that this was the predominant use of the license. In fact, the fact that subsequent to non-voluntary licensing reduced costs by 80% and expenditure by 1.2 Billion USD shows it was largely used in Mercuria.[138]

125. Thus, the Respondent has complied with the procedural and substantive requirements of the TRIPS.

ISSUE 4: THE RESPONDENT IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS

126. The Claimant has approached this Tribunal asserting that the Respondent has, through the conducted of its judiciary, breached its obligations under Article 3 of the BIT.[139] The Respondent has consistently upheld its international obligations not violated Article 3. This is so because *first*, The Acts of the Mercurian High Court do not amount to a breach of the FET Standard **(4.1)**. *Second*, The Respondent does not have an obligation to provide Effective Means of Asserting Rights and Enforcing Claims **(4.2)**.

4.1 THE ACTS OF THE MERCURIAN HIGH COURT DO NOT AMOUNT TO A BREACH OF THE FET STANDARD

127. Article 3(2) of the BIT provides that the investments and return of investments *"shall at all times be accorded fair and equitable treatment"*.[140] The standard is specific, autonomous[141] and independent in nature.[142] In order to breach this Standard, the Claimant is required to demonstrate a high degree of inappropriateness on behalf of the Respondent.[143] The Claimant is required to show conduct which is arbitrary,[144] grossly unfair,[145] unjust or discriminatory.[146]

128. Claimant has asserted that the Respondent has failed to provide FET to its investment. Respondent submits that it has not breached its obligations under Article 3(2) because *first*, The delay in enforcement proceedings does not amount to a denial of justice **(4.1.1)**. *Second*,

[138] Record, Page 30, ¶ 22.
[139] Record, Page 5, ¶ 14.
[140] Record, Page 33.
[141] Pope and Talbot, Page 27, ¶83; Mondev, Page 27, ¶81.
[142] UNCTAD, Page 17.
[143] Mondev, Page 37, ¶ 109.
[144] LG&E, Page 48, ¶158.
[145] SD Myers, Page 76, ¶308; ADF, Page 249, ¶116.
[146] Waste Management, Page 35, ¶ 98.

The Respondent did not act in bad faith **(4.1.2)**. *Third*, the error in application of law does not breach the FET Standard **(4.1.3)**. *Fourth*, the Respondent has not breached the legitimate expectations of the Claimant (**4.1.4)**.

4.1.1 The delay in enforcement proceedings does not amount to a denial of justice

129. The Claimant asserts that the Respondent has breached the FET standard because of the unreasonable delay in the enforcement proceedings.[147] Denial of Justice has been held to be an integral part of the FET Standard.[148] The threshold which is required to be met in order to prove a denial of justice is extremely high.[149] It requires demonstration of a "particularly serious shortcoming"[150], "manifest or gross unfairness",[151] "egregious conduct by the host state",[152] "that shocks a sense of judicial propriety".[153]

130. There is no strict standard to assess court delays amount to a denial of justice.[154] It is a highly fact sensitive assessment.[155]

131. Respondent submits that the high threshold required to be met for a denial of justice claim has not been breached in the present case because *first*, the Claimant has failed to exhaust local remedies **(4.1.1.1)**. *Second*, Complexity and Technicality of the legal issues justify the delay in enforcement proceedings **(4.1.1.2)**. *Third*, Circumstances of the State of Mercuria justify the delay in enforcement proceedings **(4.1.1.3)**. *Fourth*, Conduct of the Litigants justifies the delay in enforcement proceedings **(4.1.1.4)**.

4.1.1.1 The Claimant has failed to exhaust local remedies

132. Exhaustion of Local remedies is a substantive requirement which needs to be satisfied in order to make a claim for denial of justice.[156] Denial of justice arises in a situation in which the judicial system as a whole has failed to provide justice to the Claimant.[157] This cannot

[147] Record, Page 5, ¶ 14.
[148] Eagleton, Page 538; Garner, Page 181.
[149] Dolzer/Schreuer, Page 176.
[150] Robert Azinian, Page 25, ¶85.
[151] Loewen, Page 37, ¶ 131.
[152] Mann, Page 244.
[153] Paulsson, Page 57.
[154] Toto, Page 58, ¶ 228.
[155] White Industries, Page 100, para 10.4.10.
[156] Paulsson, Page 109.
[157] Paulsson, Page 36; Loewen, Page 45, ¶ 156.

arise from an individual decision, the standard is that the entire judicial system should have failed.[158]

133. In the instant case, the Claimant has brought a claim for denial of justice before this Investment Tribunal without approaching the Mercurian Supreme Court. Thus, the Claimant has failed to exhaust available local remedies.

4.1.1.2 Complexity and Technicality of the legal issues justifies the delay in enforcement proceedings

134. It was held in *Chevron* that when the issues relates to complex legal challenges, the Courts cannot be culpable of undue delay.[159] In *White Industries*, the enforcement proceedings involved a complex jurisdictional challenge which caused a delay.[160]

135. Similarly, in the instant case, the complexity and technicality of the jurisdictional challenge during the course of the enforcement proceedings was a major source of delay.

136. This complexity arose when the Claimant made an application to the High Court to transfer the proceedings to the Commercial Bench of the High Court.[161] This application was based on two judgements of the Supreme Court of Mercuria which affirmed that the Commercial Bench has exclusive jurisdiction to hear enforcement applications.[162] Subsequently, the case was transferred to the Commercial Bench,[163] where the NHA objected to its jurisdiction.[164] This objection was founded in a decision of the Supreme Court which held that the Commercial Courts Act only applied to commercial suits and not enforcement proceedings.[165] However, the Commercial Bench held that it had jurisdiction.[166]

[158] Waste Management, Page 97, ¶ 35.
[159] Chevron, Page 250.
[160] White Industries, Page 61, ¶ 5.2.13.
[161] Record, Page 8, ¶ 17.
[162] Record, Page 8, ¶ 17.
[163] Record, Page 9, ¶ 18.
[164] Record, Page 10, ¶ 26.
[165] Record, Page 10, ¶ 26.
[166] Record, Page 10, ¶ 27.

137. Ultimately, a notification on the High Court Website stated that Commercial Benches do not have the jurisdiction to entertain enforcement proceedings.[167] Consequently, the matter was transferred to the regular bench of the High Court.[168]

138. This complex jurisdictional challenge involving multiple contradictory Supreme Court decisions and the transfer of the case between the Benches of the High Court resulted in a delay of one year and seven months.[169] The same acts as a justification to the delay.

4.1.1.3 Circumstances of the State of Mercuria justifies the delay in enforcement proceedings

139. While adjudicating on delay, tribunals have to take into account the circumstances of the host state.[170] In *White Industries* the delay of nine years was not held to be a denial of justice because the host state was a developing country with an overburdened judiciary.[171]

140. Similarly, in the instant case, the Respondent state is a developing country with an overstretched judiciary.[172] Thus, the delay is justified as all litigants are facing a delay and the Claimant has not been discriminated against.

4.1.1.4 The Conduct of the Litigants justifies the delay in enforcement proceedings

141. The conduct of the Litigants is an important factor for a denial of justice claim.[173] In the instant case, both the litigants are responsible for the delay in enforcement proceedings.

142. The actions of the NHA, which have contributed to the delay in enforcement proceedings, are not attributable to the Respondent.[174] The Claimant, through an application to transfer the case to the Commercial Bench, which ultimately returned back to the original bench of the High Court, contributed to a delay of one year and seven months.[175] The NHA has through instances of being absent from proceedings[176] and seeking adjournments,[177]

[167] Record, Page 10, ¶ 28.
[168] Record, Page 10, ¶ 29.
[169] Record, Pages 9-10.
[170] White Industries, Page 60, para 5.2.10.
[171] White Industries, Page 96, ¶ 10.3.14.
[172] Record, Page 17, ¶ 9.
[173] Chevron, Page 250.
[174] Respondent Memorial, ¶ 154-166.
[175] Record, Page 10, ¶ 29.
[176] Record, Page 9, ¶19; Record, Page. 11, ¶34; Record, Page 12, ¶44.
[177] Record, Page 8, ¶ 12; Record, Page 11, ¶ 42. Record, Page 12, ¶ 43.

contributed to the delay in enforcement proceedings. Thus, the conduct of the litigants justifies the delay in enforcement proceedings.

4.1.2 The Respondent did not act in bad faith

143. An essential requirement, in order to bring a claim for a breach of the FET Standard is to show that the Respondent acted in bad faith.[178] In the instant case there is no evidence to impute bad faith to the conduct of the Mercurian judiciary.

4.1.3 The error in application of law does not breach the FET Standard

144. Admittedly, the Mercurian High Court did not bring to task the NHA for its breach of Mercurian procedural law during the course of the enforcement proceedings.[179] However, a simple procedural irregularity or error of national law does not amount to a breach of the FET Standard.[180] Further, the conduct of the judiciary cannot be termed as arbitrary since arbitrariness cannot be equated with a mere non-application of the law.[181] Thus, the Mercurian High Courts has not breached the FET Standard under Article 3(2).

4.1.4 The Respondent has not breached the legitimate expectations of the Claimant

145. It is well established that the protection of legitimate expectations is a "*dominant and key element*" of the FET Standard.[182] The purpose is to provide treatment that does not affect the basic expectations that are taken into account by a foreign investor.[183]

146. Amongst these "*basic expectations*", the expectation of a stable and predictable legal system is of significant importance.[184] The idea of legitimate expectations is closely linked to any undertakings and representations made explicitly by the host state.[185]

147. However, in order to create legitimate expectations, state conduct needs to be specific and unambiguous.[186] Mere encouraging remarks from government officials do not create

[178] Saluka Investments, Page 60, ¶ 292.
[179] Record, Page 7, ¶ 4.
[180] Paulsson, Page 73.
[181] Asylum, Page 284.
[182] Newcombe/Paradell, Page 279; Occidental, Page 64, ¶ 183.
[183] Tecmed, Page 61, ¶ 154.
[184] Tecmed, Page 61, ¶ 154; EnCana Corporation v. Ecuador, Page 48, ¶ 158.
[185] Frontier Petroleum, Page 94, ¶ 271.
[186] Klager, Page 164.

legitimate expectations.[187] In order for there to be legitimate expectations, the Claimant must rely on particular representations made by the Respondents.[188] Further, an investor can develop legitimate expectations only based on the conditions of the host state at the time of making the investment.[189]

148. The Claimant was aware of the circumstances of the host state in as much that it had an overburdened judiciary. Further, the Respondent has not made any explicit representations with reference to its judiciary. Thus, the Respondent has not breached any legitimate expectation which the Claimant had at the time of making the investment.

4.2 THE RESPONDENT DOES NOT HAVE AN OBLIGATION TO PROVIDE EFFECTIVE MEANS OF ASSERTING RIGHTS AND ENFORCING CLAIMS

149. The Claimant has asserted that the Respondent has failed to provide the Claimant with Effective Means of asserting its rights and enforcing its claims.[190] However, there is no obligation on the Respondent to provide effective means to assert claims and enforce rights.

150. The Effective Means Standard is a specific treaty obligation.[191] The *Chevron* Tribunal stated that it is *lex specialis* and was created as an independent treaty standard.[192]

151. Admittedly, the Preamble to the BIT mentions "*effective means*" by *"Recognizing the importance of providing effective means of asserting claims and enforcing rights."*[193] However, the preamble merely provides object and purpose to interpreting the treaty and cannot be relied upon to create substantive rights[194] and obligations.[195] Further, the cases in which the effective means standard was employed involved BIT's in which the standard was a part of substantive provisions of those BIT's.[196]

[187] Nagel, Page 96 ¶ 326.
[188] CME, Page 47, ¶ 155.
[189] Tudor, Page 154.
[190] Record, Page 5, ¶ 13.
[191] Chevron (II), Page 21, ¶ 5.
[192] Wirth, Page 326.
[193] Record, Page 32.
[194] Dorr/Schmalenbach, Page 10; Hulme, Page 25.
[195] Continental Casualty, Page 115, ¶ 258.
[196] Chevron(III), Page 15, ¶ 30; White Industries, Page 43, ¶ 4.3.3; Duke, Page 87, ¶ 313.

152. Thus, the effective means standard is an independent treaty standard which creates substantive rights. In the instant case, this standard is contained in the preamble to the BIT, which does not operate to create substantive rights and obligations. Thus, the Respondent has no obligation to provide effective means of asserting claims and enforcing rights.

ISSUE 5: THE TERMINATION OF THE LONG TERM AGREEMENT BY THE RESPONDENT'S NATIONAL HEALTH AUTHORITY DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT

153. The Claimant asserts that by the termination of the LTA by the NHA, the Respondent has breached its obligations under Article 3(3).[197] The Respondent submits that it has not breached its international obligation under the BIT because *First*, the Respondent is not internationally responsible for the acts of the NHA **(5.1)**. *Second, in any case*, the Respondent has not breached its obligations under Article 3(3) **(5.2)**.

5.1 THE RESPONDENT IS NOT INTERNATIONALLY RESPONSIBLE FOR THE ACTS OF THE NHA

154. The ILC Articles on State Responsibility have codified the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.[198] These Articles form a part of customary international law[199] and have been relied upon by tribunals to attribute wrongful acts of entities to the state.[200] Articles 4, 5 and 8 are primarily employed in order to attribute responsibility to a state for internationally wrongful acts carried out by its organs.[201]

155. The Claimant has sought to attribute the breach of the LTA by the NHA to the Respondent.[202] Respondent submits that it is not internationally responsible for the commercial actions of the NHA because *first*, the NHA is not a state organ under Article 4 **(5.1.1)**. *Second*, the NHA does not satisfy the functional test under Article 5 **(5.1.2)**. *Third*, the NHA does not satisfy the control test under Article 8 **(5.1.3)**.

[197] Record, Page 5, ¶ 13.
[198] Feit, Page 145.
[199] Noble Ventures, Page 24, ¶72; Crawford/Pellet, Page 37.
[200] Maffezini, Page 29, ¶79; Eureko BV, Page 47, ¶130.
[201] UN Commentary, Page 38.
[202] Record, Page 5, ¶ 13.

5.1.1 The NHA is not a state organ under Article 4

156. Article 4 attributes the conduct of state organs to the state where the organ exercises legislative, executive or judicial functions.[203] However, in order for an entity to fall within the realm of Article 4, the entity must have that status in accordance with the internal law of that state.[204] In the instant case, the NHA does not have the status of an organ of the state in accordance with internal law. Thus, the actions of the NHA are not attributable to the Respondent.

5.1.2 The NHA does not satisfy the functional test under Article 5

157. Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority.[205] However, the formulation of Article 5 clearly limits its application to entities which are empowered by internal law to exercise governmental authority.[206]

158. Admittedly, the trusts which organise the NHA are constituted under the National Health Authorities Act.[207] However, the test for Article 5 is that the entity in question should be empowered by internal law to exercise governmental authority.[208] This test has not been met in the instant case.

159. Even if it were to be considered that the NHA was exercising elements of governmental authority in the course of its functioning, Article 5 mandatorily requires that the instrumentality should have acted in sovereign capacity in that particular instance.[209] Thus, in order to attribute international responsibility, the particular conduct of the entity must concern governmental activity and not activity of a commercial nature.[210] In the instant case, the termination of the LTA arose from an unsatisfactory performance of the contract by

[203] UN Commentary, Page 40.
[204] UN Commentary, Page 41.
[205] UN Commentary, Page 43
[206] UN Commentary, Page 43.
[207] Record, Page 50.
[208] UN Commentary, Page 43.
[209] Bayindir, Page 33, ¶ 120.
[210] Bayindir, Page 33, ¶ 120.

the Claimant.[211] This conduct does not concern governmental activity but that of a commercial nature.

160. Thus, the NHA is not empowered by Mecurian law to exercise elements of governmental authority and its actions with regard to the LTA were of a commercial nature. This excludes the actions of the NHA from the purview of Article 5.

5.1.3 The NHA does not satisfy the control test under Article 8

161. The touchstone of Article 8 is that the acts must be under the instructions of, or under the direction or control of the state.[212] The test under international law for whether a state directs or controls the act or omissions of a person or a group involves a high threshold.[213]

162. The test of effective control[214] has been developed under international law in order to attribute conduct of entities to the state.[215] The same has been adopted by investment tribunals as,

"In order to attribute the act of a person or entity to a State, it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the effective control"[216]

163. Thus, such conduct shall be attributable to the state only if the state directed or controlled the specific operation and the conduct complained of was an integral part of that operation.[217] In the instant case, the NHA operates independently[218] and the state has not exercised any control over the termination of the LTA.

164. Even if the unconfirmed and unreliable newspaper sources were to be relied upon to show demonstrate that the Minster of Health and the President played a role in the termination of the LTA[219], the same does not come under the purview of Article 8. This is so

[211] Record, Page 30, ¶ 17.
[212] Art. 8, ILC Articles.
[213] White Industries, Page 33, ¶ 4.2.2.
[214] Nicaragua, Page 64, ¶ 109.
[215] Gustav, Page 50, ¶ 172.
[216] Jan de Nul, Page 173, ¶ 55.
[217] Crawford/Pelet, Page 110, ¶ 3
[218] Record, Page 50.
[219] Record, Page 30, ¶ 16.

because the test under Article 8 excludes from consideration matters of organisational structure and consultation on operational or policy matters.[220]

165. Given that the NHA operates independently and the Respondent did not exercise effective control over the termination of the LTA, the Respondent is not internationally responsible for the termination of the LTA under Article 8.

166. Thus, as per the tests under the ILC Articles the Respondent cannot be held internationally responsible for the termination of the LTA by the NHA. Thus, the Respondent cannot be held liable for a breach of its obligations under Article 3(3).

5.2 IN ANY CASE, THE RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS UNDER ARTICLE 3(3)

167. Even if this Tribunal were to hold that the Respondent is internationally responsible for the termination of the LTA, the Respondent has not breached its obligations under Article 3(3) of the BIT. Article 3(3) mandates each contracting party to observe any obligation that it may have entered into with regard to investment of investors of the other contracting party.[221] It enshrines the principle of *pacta sunt servanda* or the obligation to observe legal commitments.[222]

168. Claimant asserts that the termination of the LTA by the Respondent's NHA has resulted in a violation of the obligation under Article 3(3).[223] Respondent submits that it has not breached the Umbrella Clause because *first*, the Umbrella Clause merits a narrow interpretation and should not be interpreted broadly **(5.2.1)**. *Second*, the Fundamental Basis Test is not satisfied **(5.2.2)**. *Third*, effect must be given to the intention of the parties **(5.2.3)**. *Fourth*, the Umbrella Clause cannot be breached by a non- sovereign act **(5.2.4)**.

[220] White Industries, Page 54, para 5.1.25.
[221] Record, Page 34.
[222] Walde, Page 183.
[223] Record, Page 16, ¶ 8.

5.2.1 The Umbrella Clause merits a narrow interpretation and should not be interpreted broadly

169. Article 3(3) requires each contracting party to *"observe any obligations it may have entered into with regard to investment of investors of other the other contracting party"*.[224] The Claimant has sought to give a broad interpretation to the Umbrella Clause and bring the commercial breach of the contract under the scope of the BIT.[225] The Respondent submits that the Umbrella clause merits a narrow interpretation resulting in commercial contractual breaches being excluded from its purview.

170. Under international law violations of a contract entered into by a state with an investor of another state is not by itself a violation of international law.[226] This principle operates against the presumption that Umbrella Clause should be given a broad interpretation.

171. A broad interpretation to the umbrella clause, which takes into its fold every type of minor contract which the state enters into with the investor, will render the other substantive provisions of the BIT superfluous.[227] An investor will no longer have to demonstrate a violation of any substantive provisions of the BIT, if a simple commercial contractual breach will amount to a treaty violation and make the state internationally responsible.[228]

172. In light of the same, tribunals have held that only those contracts are elevated to the level of a treaty breach which violates substantive provision of the treaty such as the FET and FPS Standard.[229] In the instant case, the termination of the LTA by the NHA does not breach any substantive provision of the BIT and consequently, is not a breach of the Umbrella clause.

173. Elevating mere commercial contractual breaches to the status of a treaty breach has legal consequences far reaching in scope, unqualified and sweeping in their operation, burdensome in their potential impact upon the contracting party.[230]

[224] Record, Page 34.
[225] Record, Page 16, ¶ 8.
[226] Weiler, Page 295; Feit, Page 157.
[227] SGS (Pakistan), Page 364, ¶ 168.
[228] SGS (Pakistan), Page 364, ¶ 168.
[229] Joy Mining, Page 77, ¶19; Pakistan, Page 262, ¶ 162.
[230] SGS (Pakistan), Page 363, ¶ 167.

174. Thus, this tribunal should give a narrow interpretation to the Umbrella Clause and exclude breaches of mere commercial contracts from its purview.

5.2.2 The Fundamental Basis Test is not satisfied

175. The *Vivendi* Tribunal laid down the Fundamental Basis test by stating that for a tribunal to have jurisdiction over a claim, the fundamental basis of that claim must be a treaty laying down an independent standard by which the conduct of the parties must be judged.[231] This interpretation is similar to that given by tribunals which mandate a breach of a substantive provision of the treaty to elevate a contractual claim to a treaty claim.[232]

176. In the instant case, the NHA unilaterally terminated the LTA. In accordance with the fundamental basis test, the conduct of the NHA will have to be judged in accordance with Clause 6 of the LTA,[233] and not in accordance with any provision of the treaty. Thus, the fundamental basis of the claim is not a treaty laying down an independent standard. Consequently, the Fundamental Basis test is not satisfied.

5.2.3 Effect must be given to the intention of the parties

177. Admittedly, the *Philippines* tribunal gave a broad interpretation to the Umbrella Clause bringing under its reach any obligation that the Respondent had undertaken with respect to the Claimant.[234] On the other hand the *Pakistan* tribunal chose to interpret the umbrella clause narrowly.[235] This difference in approach has been discussed and debated extensively by academicians and practitioners alike.

178. It is however pertinent to note the difference in the Umbrella Clauses of the Pakistan-Switzerland BIT and the Philippines-Switzerland BIT. The Umbrella Clause in the Philippines BIT contained the phrase, *"any obligation it has assumed with regard to specific investments in its territory."*[236] The Pakistan BIT contained the phrase, *"commitments it has entered into with respect to the investment of investors of the other contracting party."*[237]

[231] Vivendi, Page 100, ¶ 131.
[232] Joy Mining, Page 77, ¶ 19.
[233] Record, Page 29, ¶ 10.
[234] SGS (Philippines), Page 32, ¶ 90.
[235] SGS (Pakistan), Page 339, ¶ 73.
[236] SGS (Philippines), Page 13, ¶ 34.
[237] SGS (Pakistan), Page 324, ¶ 53.

179. The *Philippines* Tribunal while analyzing the Pakistan Decision on Jurisdiction, pointed out this difference in the wording of the Umbrella clause.[238] The Tribunal observed that the Pakistan Umbrella clause is less clear and categorical than the Philippines Umbrella Clause and this has given rise to the contradicting decisions.[239]

180. In the instant case, the wording of Article 3(3), is similar in meaning to that of the Pakistan Umbrella Clause. In light of the wide prevalence of this distinction and the academic debate surrounding these two decisions, the parties to the BIT deliberately chose to incorporate the umbrella clause from the Pakistan-Switzerland BIT. Thus, the intention of the parties must be given effect to, and Article 3(3) of the BIT should be interpreted narrowly.

5.2.4 The Umbrella Clause cannot be breached by a non- sovereign act

181. Certain Investment Tribunals have adopted a middle ground by stating that contractual breaches will be elevated to treaty breaches if there is evidence of governmental interference to escape contractual commitments.[240] Sovereign exercise of powers resulting in a contractual violation will make the state liable under the BIT.[241]

182. In the instant case, the NHA operates independently[242] and the termination of the contract arose from unsatisfactory performance on behalf of the Claimant.[243] The NHA has not gone beyond its role as a mere party to the contract and has not acted in exercise of its sovereign functions, but only in its capacity as a party to a commercial contract.

[238] SGS (Philippines), Page 45, ¶ 119.
[239] SGS (Philippines), Page 45, ¶ 119.
[240] Impregilo, Page 90, ¶278.
[241] Bayindir, Page 49, ¶183.
[242] Record, Page 50.
[243] Record, Page 30, ¶ 17.

PRAYER FOR RELIEF

183. The Respondent respectfully requests this Tribunal to find that:

1. The arbitral award is not an investment and the Tribunal does not have jurisdiction over claims in relation to the award.
2. The Denial of Benefits can be applied retrospectively in the present case.
3. The Claimant has been denied the benefits of the BIT because it does not have substantial business activities in Basheera and it is owned and controlled by nationals of a third state.
4. The Respondent has not violated its obligations under the standards of FET and not acted in a discriminatory manner as against the Claimant in passing Law No. 8458/09 and granting a non-voluntary license.
5. The above actions of the Respondent do not constitute an expropriation and, if they do, they fulfill the requirements of Article 6.
6. The Respondent does not have any obligations to the Claimant under the TRIPS and, even if it does, it has complied with the same.
7. The Respondent has not violated its obligations under the FET Standard.
8. The Respondent has not breached the Effective Means Standard as the Respondent does not have an obligation under the BIT to provide to the Claimant effective means of asserting claims and enforcing rights.
9. The Respondent is not internationally responsible for the actions of the NHA and *in any case*, the Respondent has not breached its obligations under Article 3(3).

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Respectfully Submitted on September 25, 2017

By

Team Jennings

On Behalf of The RESPONDENT

Republic of Mercuria