Foreign Direct Investment Arbitration Moot 2017

Under the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State

MEMORANDUM FOR RESPONDENT

ATTON BORO LIMITED

(CLAIMANT)

AND

REPUBLIC OF MERCURIA

(RESPONDENT)

TEAM JESSUP

September 25, 2017

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LIST OF ABBREVIATIONS

&	And
¶/¶¶	Paragraph/Paragraphs
ARA	Answer to Request for Arbitration
Arbitral Tribunal / Tribunal	Panel consisting of Mr. Bob Gallo (President) Professor Eli Barré-Sinoussi Ms. Lilly
Art.	Article/Articles
Award	The Award dated 20 January 2009, which directed the National Health Authority to pay Claimant
Basheera	The Kingdom of Baheera
BIT	Agreement Between the Republic of Mercuria and the Kingdom of Basheera for the Promotion And Reciprocal Protection of Investments
Claimant	Atton Boro Limited
Comm.	Commentary
e.g.	*Exempli gratia*; for example
ed./eds.	Editor/Editors/Edition
FET	Fair and Equitable Treatment (standard)

Ibid.	Ibidem, "in the same place"
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rules	International Centre for Settlement of Investment Disputes Arbitration Rules 2006
i.e.	*id est*, "it is"
ILC Articles	International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts
Inc.	Incorporated
Lex arbitri	The procedural law of the seat of arbitration, e.g. the place where arbitration will take place
LTA	Long Term Agreement
Mr.	Mister
Ms.	Miss
NHA	National Health Authority
No.	Number

New York Convention	New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
TRIPS	Trade-Related Aspects of Intellectual Property Rights
p./pp.	page/pages
PCA	Permanent Court of Arbitration
PCA Rules	Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
PO3	Procedural Order Number 3
RfA	Request for Arbitration
Respondent or Mercuria	The Republic of Mercuria
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of United Nations Commission on International Trade Law
v./vs.	Versus; against
Vol.	Volume

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STATEMENT OF FACTS

I. **On 11th January 1998,** Mercuria and Basheera signed the BIT;

II. **On 21st February 1998**, Atton Boro Company obtained Mercurian Patent No. 0187204/1998. for it's synthetized compound called Valtervite;

III. **In April 1998**, Atton Boro Company, an investor based in The People's Republic of Reef, incorporated a subsidiary, Atton Boro Limited to commence its corporate activities in Basheera. The purposes of such incorporation were conducting the management of patents and the regulatory coordination for the production of several medicaments in South American and African Countries. For this reason, numerous patents were assigned to Claimant, including Valtervite's Mercurian Patent;

IV. **In 2003**, the Mercurian National Health Authority (NHA) annual reported stressed the risk of a public health crisis due to the increase of grayscale cases on the working age population. This report prompted the Health Ministry to invite pharmaceutical companies to manufacture medicine against grayscale in Mercuria;

V. **In 2003**, the NHA started an awareness campaign to prevent grayscale and other sexually transmissible diseases;

VI. **On 19th January 2004**, the Minister for Health in Mercuria celebrated, in a press statement, the success of the Mercuria Comprehensive HIV/AIDS Partnership;

VII. **On 20th January 2004**, in his personal account in Twitter, the President of Mercuria shared this statement and commented that "*Mercuria will do away with the red tape and roll out the red carpet for investors*";

VIII. **On 25th November 2004**, Claimant and NHA entered into a Long Term Agreement (LTA) for the supply of Sanior;

IX. **In 2005**, Atton Boro decided to produce Sanior in Mercurian territory. The drug quickly became a commercial success and Atton Boro started to scale up it's operations to accompany the upsurge in demand;

X. **In 2006**, the NHA issued an annual report in which it stated that 50% of all adults were getting tested for grayscale, opposed to only 17% in 2003. By the end of that year, a third of grayscale patients in RESPONDENT's territory were being treated with Sanior;

XI. **On 26th December 2006**, the Minister for Health called for a press conference to celebrate the positive results and stated that "*the government would take every measure it deemed necessary to make sure that grayscale patients could avail treatment*";

XII. **In the beginning of 2008**, the NHA started to demand discounts of up to 40% in the price of Sanior in order to ensure that the product would be affordable for the Mercurian population;

XIII. **On 10th June 2008**, the NHA terminated the LTA, citing an unsatisfactory performance of Claimant;

XIV. Claimant consequently invoked commercial arbitration under the dispute resolution agreement of the LTA in order to obtain a declaration to the sense that Respondent would have unlawfully terminated the LTA;

XV. **On 10th January 2009**, Claimant obtained an award that condemned the NHA to pay USD 40,000,000 for damages due to the breach of the agreement (the "**Award**");

XVI. **On 3rd March 2009**, Atton Boro filed an enforcement procedure for the Award before the High Court of Mercuria;

XVII. **On 10th October 2009**, the president of Mercuria promulgated law No 8458/09, which introduced a provision for granting of non-voluntary licenses under very specific public purpose situations;

XVIII. **On November 2009** HG Pharma filed an application before the High Court in order

to obtain a non-voluntary license to manufacture Valtervite;

XIX. On 17th April 2010, the Court granted HG Pharma the non-voluntary license to manufacture Valtervite by paying a percentage of it's revenue in royalties to Atton Boro until grayscale was no longer a threat to public health in Mercuria;

XX. In January 2012, the director of the NHA revealed that the use of generics reduced costs with the purchase of medicine in 80%, which allowed the Mercurian population to access the treatment at a really accessible cost;

XXI. On 10th January 2012, the Parliament of Mercuria passed the Commercial Courts Act, directing the High Court to constitute special benches that could dispose of commercial matters;

XXII. In September 2013, a ruling from the Supreme Court of Mercuria determined that such benches only had jurisdiction to hear original commercial suits and not enforcement proceedings. All of the enforcement proceedings were returned to regular benches of the High Court;

XXIV. On 7th November, 2016, Claimant filed its request for arbitration against Respondent on the basis that the enforcement of the arbitral award constituted a breach of Fair and Equitable Treatment provisions under the BIT.

XXIII. On 26th November 2016, Mercuria submitted its answer to the request of arbitration filed by Atton Boro.

XXIV. On 10th January 2017, the Tribunal issued Procedural Order No 01, establishing the applicable rules, the language and seat of the arbitration and setting the order of the hearings.

ARGUMENTS

I. ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

50. Initially and prior to the exposure of the specific arguments on jurisdiction and admissibility, Respondent would like to remind the Arbitral Tribunal that it is the judge of its own competence in accordance with the applicable procedural provisions[1].

51. Yet, in order to ascertain its *ratione materiæ* competence and the admissibility of the claims, the Arbitral Tribunal shall observe the provisions of the BIT, which the instrument that provides Respondent's offer to arbitrate, as well as the requisites necessary to trigger the agreement to arbitrate.

52. Accordingly, Claimant alleges that Respondent unlawfully violated rights connected to certain investments it made in the territory of the latter. In order to submit such claims, Claimant contends that the Award has been unlawfully denied enforcement before the courts of Mercuria and that certain patents have been unlawfully expropriated.

53. As a consequence of such violations, Claimant requested the constitution of the Arbitral Tribunal, which would be embodied in Respondent's offer to arbitrate contained in Art. 8 of the BIT, accepted by means of the Notice of Arbitration.

54. However, as Respondent shall address henceforth, such agreement to arbitrate never existed and the Arbitral Tribunal does not have the competence to adjudicate such claims due to (A) its lack of jurisdiction *ratione materiæ* over the Award and (B) the inadmissibility of all claims that Claimant addresses to Respondent under the BIT, given that Claimant was denied the benefits of the BIT in accordance with Art. 2.1. provided therein.

A. THE AWARD DOES NOT QUALIFY AS AN INVESTMENT

55. The claims Claimant brought before the Arbitral Tribunal all connect to what

[1] PCA Rules, art. 21.1

Claimant describes as "*the evisceration of Atton Boro's investments in Mercuria*". Still, Claimant divides such evisceration in two main issues, the first being the intellectual property rights and the second certain rights that arise from the Award.

56. Accordingly, Claimant understands that the an unreasonable delay to enforce such Award before Respondent's courts would qualify as a breach of Respondent's duty to provide Basheeran investors with effective means of asserting rights connected to their investments in Respondents territory in accordance with the BIT.

57. Notwithstanding, the wording of the BIT is clear and the definition of investment of Art. 1.1 does not encompass the Award, since (i) the Award does not qualify as an asset which Claimant could have held or invested in Mercuria; (ii) the Award concerns the dispute over no investment held in Mercuria, but rather to a supply agreement; and (iii) the arbitration agreement contained in the LTA was not violated, as Respondent shall demonstrates hereunder.

i. THE AWARD DOES NOT QUALIFY AS AN INVESTMENT UNDER ART. 2.1 OF THE BIT.

58. Claimant contents that the Award qualifies as an investment protected by the BIT and that, therefore, the Arbitral Tribunal would be entitled to adjudicate the claims it submitted in its Notice of Arbitration.

59. However, Claimant failed to evidence that the award qualifies as a "*kind of asset held or invested (...)"* by an investor of Basheera in the territory of Mercuria, which, therefore, maculates the *ratione materiæ* jurisdiction of the arbitral tribunal.

60. In effect, in order to evidence that the Award does not qualify as an investment, Respondent highlights that the BIT does not provide arbitral awards as an example among others in the list of Art. 1.1 Moreover, arbitral awards fail to qualify primarily in the definition of "assets" as per its literal interpretation, as well as in accordance with the opinion of authorities and the provisions of international law.

61. To that sense, the definition of "asset" in the Black Law Dictionary is:

> A financial contract or physical object with value that is owned by an individual, company, or sovereign, which can be used to generate additional value or provide liquidity. assets are credits to the balance sheet, and may include cash, investments, accounts receivable, loans granted, inventory, real estate, plant and equipment, and goodwill. assets are characterized by varying degrees of liquidity, and may be funded through debt or equity.[2]

62. On the other hand, Born informs that most scholars agree that an arbitral award qualifies as "*a written instrument, drafted and signed by the arbitrator(s), stating the tribunal's final decision on particular claims or disputes."* [3].

63. Further, Born highlights that no document prepared and executed by persons other than the empowered arbitrators may be understood as arbitral awards[4], at least not in accordance with the provisions of the New York Convention and of most arbitration legislation.

64. Therefore, a reasonable interpretation of the term "asset" and, therefore, of the definition of foreign investment protected in accordance with the BIT would necessarily not comprehend a legal document prepared by arbitrators who had no part in any kind of economic activity other than their legal services.

65. Moreover, Dolzer & Schreuer affirm that the debate concerning the legal qualification of investments "*often refer to interrelated economic activities each of which should not be viewed in isolation*" [5]. In the present case, even when viewed without isolation, the Award does not refer to any interrelated economic activity; it is merely the binding result of adjudicative activity.

66. Notwithstanding, Sornarajah detects that, despite a wide range of rights that have been promoted into the definition of foreign direct investment by means of the "interrelated economic activity" argument, the view that any economic activity may be classified accordingly is too expansive to be accepted[6].

[2] Black.
[3] Born, p. 278.
[4] Born, p. 278.
[5] Dolzer/Schreuer, p. 70
[6] Sornarajah, p. 17.

67. Further, Sornarajah also detects that the minimum threshold applied by international practice was the interpretation that investment treaties are meant to promote economic development, reason why rights that are not connected to such promotion of economic development shall not be seen as an investment. [7]

68. Consequently, if the Arbitral Tribunal analyses the claims in accordance with the opinion of the said authorities, it shall conclude that the Award does not mean an investment in accordance with the BIT, as it promotes no economic development and fails to relate to any kind of economic activity, relating merely to, once again, adjudicative activity.

69. Therefore, the Arbitral Tribunal shall decline competence to adjudicate the claims relating to the Award, since it does not represent an investment in accordance with the definitions contained in the BIT.

ii. THE AWARD REFERS TO NO INVESTMENT HELD IN MERCURIA, BUT RATHER TO A SUPPLY AGREEMENT

70. Even if the Arbitral Tribunal understands that the Award can be analyzed as an investment under the BIT due to its connection to an overall investment, according to the arguments that Claimant submitted to the Arbitral Tribunal, the direction of such connection leads to a claim that does not have an attachment to the territory of Respondent.

71. In effect, the Award relates to the Long Term Agreement that has been executed between Claimant and the NHA for the supply, to the latter, of Sanior at a 25% discounted rate by periodically placing purchase orders. However, such supply agreement was not intrinsically connected to any kind of regulatory territorial obligation or duty to transfer funds or assets to the territory of Respondent. The only connection to the territory was the place of delivery of the goods.

72. Thus, as the LTA is a mere purchase and sales agreement and Respondent's actions under it are regulated by commercial law rather than its investment treaty obligations, there is no accomplishment of the economic materialization of the LTA as an investment in the

[7] Sornarajah, p. 314.

territory of Respondent.

73. Such failure to materialize as an investment is the reason why rights arising from any breaches to the LTA shall be considered as *in personam* rights and not *in rem* rights, as *Douglas*[8] stresses when addressing to the qualification of investments under bilateral investment treaties,.

74. Accordingly, the differentiation between those two categories of rights is essential for the Arbitral Tribunal to assess the threshold of territoriality that is intrinsic to the definition of an investment, since Art. 1.1 of the BIT clearly states that an investment shall be "*held or invested* (…) *in the territory of the other Contracting Party* [Mercuria]".

75. In the present case, however, the LTA relates neither to the territory of Respondent, nor to rights that are invested therein. The LTA does not provide that the production would necessarily develop in the territory of Respondent and neither it guarantees that any transfer of assets to Mercuria would be protected by the LTA in order to assure its performance.

76. Thereupon, the breach of the LTA, as well as all the consequences and penalties arising from such breach, i.e., the terms of the Award, attract only Respondent's international commercial liability, a matter that surpasses the competence of the Arbitral Tribunal, reason why it shall be dismissed due to its lack of *ratione materiæ* jurisdiction.

iii. THE ARBITRATION AGREEMENT OF THE LTA HAS NOT BEEN VIOLATED.

77. Finally, if the Arbitral Tribunal understands that the right to arbitrate the disputes arising from the LTA may, somehow, represent a claim to perform an agreement having financial value in the territory of Respondent, in spite of all the arguments addressed above, Respondent reminds the Arbitral Tribunal that such arbitration agreement has not been violated.

78. Accordingly, other arbitral tribunals constituted to adjudicate investment disputes have considered that, despite the impossibility to qualify certain international commercial

[8] Douglas, pp. 202-206.

arbitration awards as investments under the correspondent bilateral investment treaties, the violation of the agreement to arbitrate contained in the commercial agreements that originate such disputes could amount to the violation of the right to arbitrate, which would be considered a claim to money[9].

79. However, such understanding relies on the extinguishment of the right to arbitrate, which can only arise from the unlawful denial to accord to the investor a final decision concerning the recognition or enforcement of the relevant international commercial arbitration award.

80. On the other hand, as it shall be better addressed in Section D hereunder, all proceedings before the courts of Mercuria are being accorded attentive and careful appreciation from the competent authorities; in such a way that the final decision concerning the enforcement of the Award is allowed to represent an adequate and lawful outcome.

81. Finally, even if the Arbitral Tribunal understands that a violation to the right to arbitrate contained in the LTA may be interpreted as violation to an investment protected in accordance with the BIT, the Arbitral Tribunal has no *ratione temporis* jurisdiction over the issues related to the Award, reason why the Arbitral Tribunal shall dismiss the claims related to the Award.

B. CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE MERCURIA-BASHEERA BIT BY VIRTUE OF THE RESPONDENT'S INVOCATION OF ART. 2.1 OF THE BIT

82. Other than the Arbitral Tribunal's material impediments to arbitrate the claims related to the Award, Respondent shall henceforth demonstrate that (i) it has lawfully and timely invoked the denial of benefits provisions of Art. 2.1 of the BIT, which entails the inadmissibility of all claims Claimant brought before the Arbitral Tribunal, given that the case records indicate clearly that (ii) Claimant failed to prove that it is owned or controlled by Basheeran investors, while (iii) it does not hold in the territory of Basheera the substantial business related to the claims it brought before the Arbitral Tribunal.

[9] ATA v. Jordan, ¶ 98

i. RESPONDENT HAS SUCCESSFULLY INVOKED THE PROVISIONS OF ART. 2.1 OF THE BIT.

83. Respondent highlights that, in accordance with Art. 2.1 of the BIT, it has reserved the right to deny the advantages of such treaty to legal entities such as Claimant once nationals of a third state own or control them and whereas such entities have no substantial business activities in the territory of Basheera.

84. Accordingly, when Respondent received the Notice of Arbitration, it had the opportunity to verify that Claimant is a wholly owned subsidiary of Atton Boro and Company, a corporation organized under the laws of Reef, i.e., Respondent verified that Claimant is owned and controlled by a national of a state that is not a party to the BIT.

85. Additionally, Respondent had sufficient information to detect that Claimant was a mere vehicle formally established in Basheera, to which Atton Boro and Company assigned the patent of Sanior in order to assure the investment's protections arising from the BIT.

86. Although not always fraudulent, authors have described such corporate planning as "round-tripping technique"[10], which allows investors to obtain certain treaty-shopping benefits. It is equally notorious that the introduction of denial of benefits provisions are a clear response, on the behalf of the states, to the round-tripping practice[11], resulting in a right that may be invoked and used by the state party to the treaty when the alleged investor is, in fact, a free-rider.

87. Consequently, further to the discoveries regarding Claimant's corporate organization, Respondent, in its Response to the Notice of Arbitration, lawfully invoked the denial of benefits clause, which the contracting parties to the BIT introduced therein in order to prevent such round-tripping companies to benefit from the advantages of the BIT, and therefore confirmed that it did not consent to arbitrate under the provisions of the BIT the claims raised by Claimant.

[10] Sornarajah, p. 328
[11] Sornarajah, p. 329

88. As to the issues concerning the correct moment to invoke the denial of benefits provisions, it is clear that Respondent raised the jurisdiction plea related to the admissibility of the claim in a moment no later than the statement of defense, which entails the conclusion that the denial of benefits provision was opposed to Claimant in accordance with the provisions of Art. 21.3 of the PCA Optional Rules.

89. Even if Claimant contends that the denial of benefits invocation should have a prospective effect, as some tribunals have wrongfully found[12], such understanding would imply the need for a declaration of the denial of benefits prior to any kind of investment litigation. Yet, the Arbitral Tribunal shall not reasonably require that Respondent constantly track the corporate structure of every foreign company investing and acting commercially in its territory[13].

90. To that sense, the practical implications of such requirement would either be the absolute ineffectiveness of Art. 2 of the BIT or the overly whelming bureaucratization of foreign investment in the territory of the contracting parties of the BIT. Yet, both outcomes are radically contrary to the purpose of the BIT and shall not be admitted by the Arbitral Tribunal.

91. Thus, the Arbitral Tribunal shall accept Respondent's invocation of the denial of benefits clause and therefore investigate the investor's personal requirements for the rejection of the denial of benefits, which may only lead to the conclusion that Claimant is an entity owned by an investor of Reef, which does not hold substantial business activities in the territory of Basheera.

ii. CLAIMANT IS WHOLLY OWNED AND CONTROLLED BY AN INVESTOR OF THE REPUBLIC OF REEF.

92. The first criteria contained in Art. 2.1 of the BIT – i.e., the provision that authorizes Respondent to deny benefits to investors of Basheera – is the evidence that nationals of third states own or control the corporate interests of the investor claiming the adjudication of its disputes against the contracting party to the BIT.

[12] Douglas, p. 470
[13] Douglas, p. 470

93. Accordingly, as mentioned above, the case records are clear to evidence that Claimant is a wholly owned subsidiary of Atton Boro and Company, which is an investor of Reef and, therefore, a person that may not be granted the protection provided by the BIT.

94. If Claimant had undertaken the burden of proving that citizens of Basheera ultimately control it, such discussion would tend in favor of the admissibility of the claims. Still, no proof has been produced or submitted to the Arbitral Tribunal to such sense and it would be an unreasonably heavy, not to say impossible to accomplish, burden to Respondent to seek proof of Claimant's ultimate corporate control.

95. Therefore, whereas there is proof that a national of Reef controls Claimant and whereas Claimant has not submitted evidences of its ultimate corporate control, the Arbitral Tribunal shall find that the nationality requirement for the application of the denial of benefits clause has been fulfilled.

iii. CLAIMANT DOES NOT HOLD SUBSTANTIAL BUSINESS ACTIVITIES IN THE KINGDOM OF BASHEERA.

96. Further to the nationality criteria contained in Art. 2.1 of the BIT, Respondent evidences below the reasons why Claimant failed to comply with the requirement of substantial business activities in the territory of Basheera.

97. Still, prior to evidencing accordingly, Claimant would like to briefly remind the Arbitral Tribunal of the circumstances and of the conditions that Claimant alleges in order to embody the admissibility of the claims it submitted in the current proceedings.

98. Initially, Claimant requested the Arbitral Tribunal to adjudicate (i) certain issues concerning the enforcement of an international commercial arbitration award that pertain to a dispute it engaged against Respondent in relation to a supply agreement for medicaments dealt under the commercial name of "Sanior", which main compound – Valtervite – is subject matter of the (ii) issues and disputes arising from the treatment Respondent accorded to the Mercurian Patent No. 0187204/1998.

99. Moreover, according to Claimant, such claims would be admissible by the Arbitral Tribunal due to the overall character of investment that the Award and the relevant intellectual property rights would have, and given that Claimant' would be incorporated, based and with substantial business activities in the territory of a contracting party to the BIT – the Kingdom of Basheera.

100. Simultaneously, the figures of the current dispute would be closely associated with Respondent's unlawful thwart of Claimant's expectations with the outcome of the LTA, as well as with the high value of the intellectual property rights related to Valtervite.

101. However, if the Arbitral Tribunal carefully analyses the case records, it shall detect that, in February 2015, when Claimant's Mercurian division announced the retreat of Sanior from Respondent's medicaments' market, a representative of Claimant declared that the said retreat happened amidst a price war that an "*innovative drug developer with billions of dollars to recoup before turning a profit*" could not sustain.

102. Accordingly, it is clear that the subject matter of the claims Claimant brought before the Arbitral Tribunal shall be either submitted as a mere commercial claim and, therefore, related to the management and supply of goods, or, which is Claimant's contention, as a true investment matter, related to an entire chain of investment and returns, which initiates when it invests funds in order to achieve Research & Development results and is paid-off with the profits that arise from the sale of such goods developed by the investor.

103. Therefore, if the Arbitral Tribunal is prepared to admit the Claims of the current proceedings as a practical and ultimate result of a certain "whole investment", it shall also analyze the requisite of substantial business activities in line with the investment.

104. Notwithstanding, in accordance with the records, Claimant is a corporate vehicle nested in the territory of Basheera in order to manage a portfolio of patents and commercial agreements explored economically in South American and African countries, while Atton Boro Group is a "*leading drug discovery and development enterprise*".

105. To that sense, tribunals such as *Pac Rim Cayman v. El Salvador* have acknowledged that even holding companies may be granted protection under bilateral investment treaties.

Nonetheless, such companies shall prove that, as an investor, they carry autonomous substantial business activities that would dismiss the application of denial of benefits provisions[14]. Such understanding is in line with the perception that substantial business activities represent the economic autonomy of the investor, e.g. holding enough assets to carry the economic activity the investor develops.

106. However, in the present case, Claimant's actions and representations point to the opposite direction as they imply that the whole of the investment is deeply connected to the Research & Development funds, as well as the efforts applied in order to produce the intellectual property that is in the root of all claims Claimant submitted.

107. Accordingly, the Arbitral Tribunal shall ultimately find that the claims are related to a business activity that is not substantially held by Claimant in the territory of Basheera, but rather by Atton Boro and Group outside such territory, reason why Respondent's denial of benefits operated fully against Respondent and entailed the inadmissibility of the claims Claimant submitted to the Arbitral Tribunal.

[14] Pac Rim v. El Salvador ¶¶ 4.72-4.73

II. ARGUMENTS ON THE MERITS

C. RESPONDENT HAS COMPLIED WITH THE FAIR AND EQUITABLE TREATMENT STANDARD

i. RESPONDENT HAS NOT VIOLATED CLAIMANT'S LEGITIMATE EXPECTATIONS

108. Claimant contends that RESPONDENT has breached the FET standard because such standard obligates the host State to maintain the legal framework completely immutable regardless the circumstances. RESPONDENT was having serious problems in controlling an incurable disease, with several transmission routs, threatening the working age individuals of its population. In this sense, "to imply, without qualifications, a requirement of stability within FET places obligations on host States which would be inappropriate and unrealistic."[15]

109. It seems that Claimant fails to acknowledge the fact that legitimate expectations are encompassed within a complex structure of a balanced protection, and must embrace both the investor's and the host State's interest. That is, there is a "*need to maintain a reasonable degree of regulatory flexibility on the part of the host State to respond to changing circumstances in the public interest*."[16]

110. The tribunal in *Saluka v Czech Republic* supported such idea when observed that:

> "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well." [17]

111. It should be stressed that legitimate expectations and its requirement of stability cannot be interpreted within subjective hopes and perceptions[18], let alone be deemed as an absolute concept[19]. As the tribunal in *Suez v Argentina* said, "*one must not look single mindedly at the Claimant's subjective expectations*," rather there must be an examination

[15] Saluka v. Czech Republic, ¶ 304
[16] McLachlan/Shore/Weiniger, p. 239
[17] Saluka v. Czech Republic, ¶ 305
[18] Dolzer/Schreuer, p. 148
[19] Parkerings v Lithuania, ¶¶ 327-338

from an objective point of view."[20]

112. In this sense, for an investor to claim damages due to the alteration of the legal framework, the State must have either contractually committed to it in the form of a stabilization clause, or have made a specific unilateral declaration that it would not change the laws.[21] Yet, none of those requirements can be found in the case at hand.

ii. THERE WAS NO STABILIZATION CLAUSE TO SUSTAIN A COMPLETELY IMMUTABLE LEGAL FRAMEWORK

113. As to the first requirement, it comes from the idea that the State can renounce its exercise of regulatory power [22] when making a specific contractual commitment in the form of a stabilization clause inserted in the investment contract.[23] In such scenario, the investor can be found covered by a higher protection as it "*has been able to bargain that commitment individually*"[24] with the State.

114. In this sense, using the legitimate expectations doctrine, that is, the doctrine that establish that a foreign investor is entitled to no changes in the legal framework due to legitimately grown expectations, to extend such protection to investors who have not managed to bargain for such commitment would be unfair and illogical.[25]

115. In *Total v Argentina* the tribunal understood that there must be specific stabilization promises to the foreign investor to build expectations on a completely stable legal framework. According to the tribunal, if there is no such specific stabilization promises, then the changes in the general legislation will simply "*reflect a legitimate exercise of the host state's governmental powers that are not prevented by a BIT's FET standard*."[26]

116. In *Lemire v Ukraine*, the tribunal understood that a stabilization clause must be inserted into the investment contract in order to restrict a State's sovereign right to legislate

[20] Suez v Argentina, ¶ 209
[21] Potestà, p. 113
[22] Suez v Argentina, ¶ 31
[23] Potestà, p. 114
[24] Potestà, p. 114
[25] Snodgrass, p. 38
[26] Total v Argentina, ¶¶ 113-124

under its own jurisdiction, otherwise the State will not be considered to have abdicated of such right.[27]

117. There is nothing in the Case Files indicating that there was a stabilization clause in the Long Term Agreement celebrated between Claimant and the NHA. In this sense, Claimant cannot have the higher protection of a stabilization clause extended to it as it didn't bargain to have it inserted in the contract. Therefore, with the crucial change in the circumstances of the public health, there was no reason for Claimant to allege a breach of its legitimate expectations when Respondent was rightfully using its regulatory power to adjust the framework pursuant to the changing circumstances and needs.

118. In *Parkerings v Lithuania*, the Tribunal remarked that:

> "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."[28]

119. Thus, in order to determine if an action of the host State has actually violated the investor's legitimate expectations, it is necessary to find out if a measure has exceeded normal regulatory powers and if it has "*fundamentally modified the regulatory framework for the investment beyond an acceptable margin of change*"[29]

120. Respondent has acted completely within its sovereign legislative power when enacting Law No. 8458/09. Mercuria already had an Intellectual Property Law, that even though did not expressly provide for issues of compulsory licenses[30], cannot be deemed to have been fundamentally changed just because an express provision for such issues which regulated the issues of the granting of a compulsory license was added.

121. Many countries have allowed compulsory licenses. For example, HIV had countless countries that issued a compulsory license for, as well as the TRIPS agreement itself regulates

[27] Lemire v Ukraine, ¶ 500-505
[28] Parkerings v Lithuania, ¶ 332
[29] El Paso v Argentina, ¶ 402
[30] PO3, p. 50, ¶ 5

the possibility of compulsory license. Claimant acts as though Law No. 8458/09 has unreasonably and unconditionally allowed for the granting of compulsory licenses.

122. However, that is not true, referred law has been amended within the acceptable margin of change, that is, a change acceptable within the already existent framework and that it does not fundamentally compromises its original structure. The law also provides for reasonable terms and conditions when judging a license application, and it is in accordance with the international law.

iii. RESPONDENT HAS NEVER MADE A SPECIFIC AND DIRECT COMMITMENT TO CLAIMANT THAT IT WOULD NEVER CHANGE ITS LAWS

123. In regard to the second requirement, that is, an unilateral specific declaration made to the investor, Claimant also contends that Respondent has made representations and promises assuring Claimant that Respondent's legal framework would remain the same. However, in order for representations made by a State to be relied on by the investor, such representations must be specific, concrete, and directed towards the investor itself.[31]

124. Furthermore, the investor should not rely on general political statements when alleging a breach of the FET. The tribunal in *Continental v Argentina* ruled that political statements have a notoriously lack of legal value, and rejected the claim of breach of the FET arising from the reliance upon such a statement.[32]

125. The tribunal in *El Paso v Argentina* corroborated this idea and explained that for a statement to be considered specific there must be one of these two characteristics: if it is specific to the addressee or if the precise object of the statement was to give a real guarantee of stability to the investor. The first characteristic implies that the commitment should have been made directly to the investor only, and not the world at large.[33]And the second provides that general texts cannot be deemed as specific commitments.[34]

[31] Dolzer/Schreuer, p. 148; Plama v Bulgaria, ¶ 176
[32] Continental v Argentina, ¶ 261(i)
[33] Potestà, p. 105
[34] El Paso v Argentina, ¶¶ 375-377

126. Moreover, the tribunal in *El Paso* stated that even a declaration made by the President of the Republic shall be viewed as a political statement, and, thus, it has limited confidence. The tribunal explained that, although such representations might have contributed to inducing investors, "*it is one thing to be induced by political proposals to make an economic decision, and another thing to be able to rely on these proposals to claim legal guarantees*."[35]

127. In the present case Claimant is relying upon a general statement by the Minister for Health that hasn't been directed towards Claimant itself, but widely published in the national press.[36] Claimant is also basing its expectations on the President's social media account, which is not a concrete and direct assurance towards Claimant, but made of statements accessed by forty million users. As can be noticed, none of the statements that Claimant is pointing out was either directly addressed to Claimant, nor had their precise object giving it a real guarantee of stability.

128. In *PSEG v Turkey*, the claimant argued to have had legitimate expectations arising from the host State's policy to encourage and welcome investment. However, the tribunal held that the general investment encouragement policy pursued by Turkey "*did not entail a promise made specifically to the Claimant about the success of their proposed project*."[37] In the same way, a mere statement such as "*Mercuria will do away with red tape and roll out the red carpet for investors*"[38] proclaimed by the President is not enough to raise legitimate expectations.

129. In cases where there are no explicit guarantees or promises, another way to find if legitimate expectations have been built is to analyze the circumstances surrounding the conclusion of the contract.[39] When looking at the circumstances surrounding the celebration of the LTA, one could come to the conclusion that Claimant should have, in fact, expected that sooner or later the government would need to interfere through its legitimate police powers in order to refrain the health crisis.

[35] El Paso v Argentina, ¶ 395
[36] Case Files, p. 39; PO3, p. 50, ¶ 3
[37] PSEG v Turkey, ¶ 243
[38] Case Files, p. 29, ¶ 8
[39] Parkerings v Lithuania, ¶ 331

130. With an upsurge in the prevalence of greyscale in 2002, indications of instability have been rising since 2003, a year before the conclusion of the LTA, when the government of Mercuria started to act decisively, launching a nationwide campaign focused on prevention and mitigation of greyscale.[40] Also by 2003 was when the NHA's annual report warned that the imminent public health could spiral into a national crisis within a decade unless aggressive measures were taken to combat it.[41]

131. Therefore, it all pointed out to a potential scenario of national instability, which was reaffirmed throughout the duration of the LTA, when the Minister for Health informed that "*the government would take every measure it deemed necessary to make sure that patients of greyscale could avail treatment*".[42]

132. There must be some due diligence on the investor's side, who "*must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.*"[43] Claimant has been in Respondent's territory since 1999, and it should have observed the signs and change of circumstances in Respondent's territory.

133. It is widely accepted that it would be unconscionable for a State to promise not to change its legislation with the needs changing over time. It is unreasonable to expect that the State will "tie its hands in case of a crisis of any type arose".[44]

134. In only 3 years the number of confirmed cases of greyscale were multiplied by over 12 times its amount. Even though this disease is not fatal, it is incurable. In addition, it was threating the life of working age individuals, which are the key element for the development and growth of a country.

135. Therefore, Respondent has never made any specific and direct commitment towards Claimant, as it would be unreasonable on Respondent's side if it had done so, given the potential health crisis and the constantly changing circumstances. Thus, with the lack of a

[40] Case Files, p. 41
[41] Case Files, p. 28, ¶ 6
[42] Case Files, p. 29, ¶ 14
[43] Parkerings v Lithuania, ¶ 333
[44] Continental Casualty v Argentine, ¶ 258

stabilization clause and concrete promises, Claimant is not entitled to allege a breach of legitimate expectations, since there should have been no expectations in the first place.

iv. CLAIMANT KNEW THAT RESPONDENT IS A DEVELOPING COUNTRY, THUS IT SHOULD NOT HAVE EXPECTED A HIGH LEVEL OF STABILITY

136. Another factor that should be analyzed when assessing if an investor has legitimately grown expectations is the level of development of the host country that investor has invested in.[45] It is quite obvious that "*what an investor can legitimately expect cannot be the same in a highly developed country as it is in a developing country*."[46]

137. Usually investors tend to be attracted to invest in a developing country because the perspective of the rate of return on its capital "*may be higher than in developed economies*".[47] However, that also implies a greater possibility of instability, which the investor must take into account as a business risk.[48]

138. In this sense, the tribunal in *Parkerings v Lithuania* has understood that the circumstances in a developing country are not reasonable to raise legitimate expectations as to the stability of that legal framework. A prudent businessman in such circumstances should seek to protect its legitimate expectations through a stabilization clause.[49]

139. In *Toto v Lebanon*, the claimant complained about the changing in the law of taxes and custom duties, which, according to claimant, had caused drastic consequences to its business. The claimant alleged that the contract implied that the project would be subject to the Lebanese tax legislation in effect at the time the contract was entered. A thorough examination of such tax laws were crucial when respondent submitted its offer, which, according to the claimant, it build legitimate expectations that such laws wouldn't change. However, the tribunal ruled that the investor was aware that claimant was investing in a country going through a post-civil war situation with substantial economic challenges, and,

[45] Duke Energy v Ecuador, ¶ 340
[46] Potestà, p. 118
[47] Generation v Ukraine, ¶ 20.37
[48] Potestà, p. 119
[49] Parkerings v Lithuania, ¶ 335-336

therefore, there should have been no legal expectations that custom duties would remain unchanged.[50]

140. In *Bayindir v Pakistan*, the tribunal found that the investor was fully aware that Pakistan was going through a high political volatility moment when it entered into the investment contract. The tribunal determined that the claimant "*could not ignore the fact that the project was linked to the political shifts affecting*" the respondent. The tribunal then stated that it appeared "*difficult to accept that Bayindir had wider expectations of stability and predictability so as to justify protection under the FET*"[51]

141. Similarly, as already mentioned, Claimant entered into an environment of a potential health crisis due to a rapidly spreading disease and that its contract project was linked to the political and health shifts that affected Claimant. Claimant knows this disease pretty well, as it has been studying it for at least the past decade,[52] and, thus, knows how serious it can be, as it is incurable and has several ways of transmission.

142. Not only was Respondent was facing a disease attacking the population key element to its economic and populational growth, but to provide drugs for a single year of FDC just to the poorest would cost Respondent 1 billion USD. Bearing in mind that the disease is incurable and non-fatal, the drugs would need to be subsidized in the following years as well.

143. Tribunals and authors argue that an investor cannot claim to have its legitimate expectations violated in order to rid itself of the potential risks attached to that activity, even more if that market and environment was considered highly risky.[53] Therefore, being Respondent a developing country struggling with budgetary problems and a serious disease, Claimant cannot reasonably have expected that Respondent would not take more effective measures to fight such situation.

D. FACTORS THAT SHOW THAT RESPONDENT'S ACTIONS DID NOT BREACH THE FET

[50] Toto v Lebanon, ¶¶ 241-245
[51] Bayindir v Pakistan, ¶ 194
[52] Case Files, p. 28, ¶ 3
[53] Saluka, ¶ 304-5; EDF v Romania, ¶ 217; Muchlinski, p. 639

144. There are some factors accepted by scholars that indicate that Respondent's conduct does not amount to a breach of the FET, such as having an objective basis for amending its legal framework or when the measures adopted by the host State do not constitute a severe impact on the investor.[54] Contrary to what Claimant has argued, though, Respondent has provided for the presence of those factors. In this sense, Respondent will prove that (a) has taken its decisions pursuant to an objective basis; and (b) has not caused a disproportionate impact on Claimant.

i. RESPONDENT HAD AN OBJECTIVE BASIS TO CHANGE THE LEGAL FRAMEWORK

145. Claimant has tried to convince this tribunal that Respondent's health situation is not enough to constitute a worrisome public health scenario, but Claimant is only providing for a shallow analysis of the concrete facts. In this way, Respondent will open this tribunal's eyes with a thorough explanation of the real perspective and its underlying consequences.

146. Greyscale is a disease that is chronic, non-fatal and incurable[55], and to make it worse, it has several transmission routes.[56] It has spread so fast that there has been confirmed occurrences in 43 countries[57]. In Mercuria, after the upsurge in 2002, the disease has its number of confirmed cases multiplied by over 12 times in only 3 years, which accounts for 266,298 persons![58] However, there is still a significant proportion of the vulnerable population that has not been tested, thus, there is also a number of estimated cases, which sums up to 578,390 people. When putting both numbers together, it reaches an amount of 844,688 infected people!

147. By 2006 around 100,000 people depended solely on public health schemes to obtain the medicines, which costs the government nearly a third of the overall health budget just to provide those drugs for a single year.[59] However, given that the disease is non-fatal and incurable, the government will be expected to keep subsidizing the patients in the following

[54] McLachlan/Shore/Weiniger, p. 244
[55] Case Files, p. 41
[56] PO3, p. 50, ¶ 7
[57] Case Files, p. 41
[58] Case Files, p. 42
[59] Case Files, p. 43

years as well.[60]

148. Pursuant to Art. 33 of the TRIPS, which Respondent is a party to, the term of protection available to a patent "*shall not end before the expiration of a period of twenty years counted from the filing date*". Therefore, given that Claimant had its patent protection granted in 1998[61], by 2006 when things were getting more and more aggravated, Respondent still had to wait for around 12 more years for the protection to expire and the medication to become available in a more accessible price.

149. It would be unreasonable to expect that Respondent would pay at least 12 billion dollars for the next years. Respondent is not a developed country and it has many other areas of the public interest where the money needs to be invested, such as education and security. It is also not in Respondent's interest that those who can afford the drug will need to keep paying such high prices.

150. In the *Genin v Estonia*, for example, the claimant argued that the respondent had breached the FET because it had revoked claimant's banking licence. However, the tribunal understood that the decision must be considered through the analyses of the circumstances in the proper context, and it determined that the respondent had a good cause to revoke the license. The tribunal held that:

> "The tribunal further accepts that the circumstances of political and economic transition prevailing in Estonia at the time justified heightened scrutiny of the banking sector. Such regulation by a state reflects a clear and legitimate public purpose. (…) any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action."[62]

151. Respondent has not acted in bad faith, it was simply looking after the welfare of its people. Moreover, there was no willful disregard of the due process in the amendment of Law No. 8458/09, let alone an extreme insufficiency of action, since Respondent acted within the scope of its regulatory powers and amended an existent law in accordance to international standards.

[60] Case Files, p. 43
[61] Case Files, p. 28, ¶ 3
[62] Genin v Estonia, ¶ 371

152. Also, Claimant tries to blame Respondent for this crisis, when Respondent has been acting decisively on the combat of greyscale, launching nationwide campaigns for the prevention and mitigation of the disease.[63] Meanwhile, other critical diseases have been successfully controlled by Respondent's government without causing any troubles or judicial disputes.[64] Therefore, Claimant has no real facts to sustain such allegations of Respondent poorly administering its public health programs, but only hearsay from governmental private meetings.[65]

153. The Basheera-Mercuria BIT's preamble clearly states that the objectives to be achieved within the treaty are to be "*in a manner consistent with the protection of the health*" and Doha Declaration on the TRIPS Agreement and Public Health allows Respondent, as a WTO member, to construe what it considers to be a national emergency:

> "Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."[66]

154. Therefore, given the growing health threat attacking Respondent's population, even more the working age individuals who are responsible for the economic development as well as the population growth, Respondent's impossibility to afford the medications consisted on a clearly objective basis to amend its laws.

ii. THE CHANGE IN THE LEGAL FRAMEWORK DID NOT CAUSE A DISPROPORTIONATE IMPACT ON CLAIMANT

155. In addition to analyzing single actions and if they have been taken on reasonable terms, tribunals have also found that to establish whether there has been a breach of the FET standard, the impact such measure has caused in the investor must be observed.[67]

156. Thus, if a measure does not have a disproportionate impact on the investor and falls

[63] Case Files, p. 41
[64] PO3, p. 50, ¶ 8
[65] Case Files, p. 30, ¶ 16
[66] Doha WTO Ministerial, item 5(c)
[67] Dolzer/Schreuer, p. 142

equally on everyone in the host State, then such measure cannot be deemed as breaching the FET standard.[68]

157. In *Pope & Talbot* case the tribunal explained that the measures taken by the respondent could not be considered to have caused a huge impact on the claimant because it constituted a "*large scale scheme affecting many producers, and it could not be shown that it had been implemented in a way which singled out the foreign investor*."[69]

158. The enactment of the Law No. 8458 and the possibility it imposed of the granting of a compulsory license was applied to everyone within the Respondent's territory, both foreign and nationals, as well as any type of patent inventors. Thus, it could be considered as a large scheme affecting a big diversity of people, not aimed to single out Claimant.

159. Claimant contends that it has suffered a severe impact because it spent over 1 billion USD to develop Valtervite and was not able to recoup that money. However, Claimant fails to mention that by 2009 when the compulsory license was granted there had already been 11 years since it had acquired protection to its patent. Therefore, Claimant had already had 11 years to exclusively sell and profit from its drug in Respondent's territory and in the 50 other jurisdictions it had also secured its patent. If by 2009 Claimant was not able to recoup a big proportion of the money it spent, then Respondent cannot be the one liable for such failure.

160. Moreover, as a matter of analogy, when a tribunal, for example, needs to assess whether there has been an indirect expropriation, it must also analyze if the state measure in question has caused a severe impact on the investor. The tribunal in *Feldman v Mexico* found that there had been no taking of property once Mexico had deprived the claimant from only one of its many sources of profit, and, thus, that there had been no sufficient severe impact. The tribunal declared that:

> "The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking."[70]

[68] McLachlan/Shore/Weiniger, p. 245
[69] Pope Talbot, ¶ 155; McLachlan/Shore/Weiniger, p. 245
[70] Feldman v Mexico, ¶ 187

161. The same applies to Claimant as it stated that "*it will ensure that the people of Mercuria can continue to benefit from its range of other health and lifestyle products*." Thus, Sanior is only one among a range of several other products Claimant sells and profits from within Respondent's territory. Such net of profitability provides for the safe thought that if there has been an impact with the compulsory license, such alleged impact has been neutralized.

162. Therefore, once the law fell equally on everyone within Respondent's territory, and that Claimant had had 11 years of exclusive selling of its product in 51 jurisdictions, as well as it still had many other products to profit from, it cannot be said that Claimant suffered a disproportionate economic impact with the enactment of the referred Law.

E. THE ENFORCEMENT PROCEEDINGS HAVE BEEN CONDUCTED WITH PROPRIETY BY RESPONDENT'S COURTS, AND, THUS, THERE HAS NOT BEEN A BREACHED OF THE FET STANDARD

163. Claimant argues that Respondent has breached the FET through denying it justice on the enforcement proceedings of the award rendered in favor of Claimant. More specifically, Claimant contends that Respondent has been deliberately delaying the proceedings in a way that its courts have failed to act with propriety. However, Respondent's courts have treated the enforcement with due propriety, granting equal rights to both parties to make their cases, and if there has been an undue delay, Respondent cannot be the one to be entirely and solely blamed.

164. When the concept of denial of justice is found as a breach of the FET standard, it means that the host State's domestic courts have acted with discrimination, bias or malicious application of the law.[71] Overall, it usually "involves a lack of due process leading to an outcome which offends judicial propriety"[72], that is, a failure to hear the investor.[73]

165. As Jan Paulsson states, "*in international law, denial of justice is about due process,*

[71] Jan de Nul, ¶ 211
[72] Loewen v United States, ¶ 132
[73] Metalclad v Mexico, ¶ 91

nothing else—and that is plenty."[74] This means that international arbitral tribunals are not meant to be an appellate court to decisions taken by the domestic courts, that is, international law recognizes that there is a special deference[75], and it aims to protect the *institution* of adjudication, only intervening "*when the process itself fails to afford the basic qualities that justify its existence*."[76]

166. In the case at hand, Respondent's courts have properly provided Claimant an access to justice, as it has given Claimant an opportunity to present its case, as well as it has granted all requests of extensions that Claimant asked for. The Court has also provided the possibility of taking adverse measures in case the NHA would be absent again.[77]

167. Moreover, a State can only be held liable for denial of justice once there has been an exhaustion of the remedies of its local courts with the wrongdoings remaining uncorrected.[78] Jan Paulsson emphasizes such theory:

> "National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected… The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice before exhaustion."[79]

168. In the case at hand, Claimant's enforcement proceedings are still pending and have not yet been finalized, thus, once Claimant still have other remedies to resort to, it cannot be deemed to have exhausted Respondent's judicial system as a whole.

169. Nevertheless, Claimant argues that Respondent has been unreasonably and deliberately delaying the proceedings. In this sense, the concept of undue delay presents an exception to the requirement of exhaustion of local remedies,[80] causing Claimant to be entitled to raise the issue of the denial of justice. However there has been no undue delay, and even if this Tribunal thinks that there has been, it should understand that Respondent is not the only responsible for such.

[74] Paulsson, p. 7
[75] Douglas, pp. 877-88
[76] McLachlan/Shore/Weiniger, p. 298
[77] Case Files, pp. 7, 9 and 11, ¶¶ 5, 21 and 37
[78] McLachlan/Shore/Weiniger, p. 296
[79] Paulsson, pp. 245-246
[80] McLachlan/Shore/Weiniger, p. 300; ILC 'Draft Articles on Diplomatic Protection', Art. 15(b)

170. First, it is important to point out that in order to assess an "*unreasonable delay sufficient to rise to the level of an international delict*", the tribunal should analyze the matter in light of all the circumstances, specially the "*circumstances affecting the court docket in the particular country*".[81]

171. The circumstances affecting the court docket in Respondent's territory are the facts that Respondent is a "*developing country with an overburdened judiciary struggling to cater to its population of 67 million people*."[82] The judiciary is so overburdened that, during Claimant's enforcement proceedings, the matter had to be adjourned five times due to lengthy arguments in other cases. [83]

172. It should be noted that such circumstances are not within the courts' control and that those five adjournments happened in a space of six years, which makes, in fact, for less than one adjournment per year, proving that the courts were doing the best they could.

173. In *White Industries* case, the claim was also about undue delay of India's courts on the enforcement proceedings of an ICC commercial arbitration award rendered against a state-owned corporation. In that case, the enforcement was pending for at least 8 years, and yet, given the host State's situation, the tribunal ruled that there had been no denial of justice for undue delay:

> "Taking account of the conduct of the parties, and assessing the conduct of the courts themselves in light of the overall position of the judiciary in India, a developing country with huge population, it found that there had been no denial of justice."[84]

174. In *Frontier Petroleum v Czech Republic* the tribunal took into account the fact that the delay complained by the claimant was not entirely caused by the respondent. According to the tribunal the fact that the claimant had contributed to the delay was part of the reason why the circumstances had not met the required threshold for a denial of justice claim.[85]

[81] McLachlan/Shore/Weiniger, p. 300
[82] Case Files, p. 17, ¶ 9
[83] Case Files, pp. 7-9 and 11, ¶¶ 9, 15, 20, 24 and 40
[84] White Industries, ¶¶ 10.4.18 -10.4.24
[85] Frontier Petroleum v Czech Republic, ¶ 334

175. In the present case, Claimant sought a leave to file a reply, requested hearings and extra hearings, being all of those granted. But most importantly, Claimant was the one to request the court to transfer its case from the High Court to the Commercial Bench, which had to be later on retransferred back, causing a nineteen months delay.[86]

176. Therefore, given Respondent's current situation of a developing country with an overburdened judiciary and that Claimant contributed to at least two years of the complained delay, Claimant is not entitled bring a claim on denial of justice once it has had the same right as NHA during the proceedings and it has not exhausted local remedies yet.

F. THE ROYALTY WAS REASONABLY DETERMINED

177. Claimant argues that the royalty set by Respondent is too low and unreasonable comparing to the amount of money it spent by creating the medicine, as well as with the amount of money it lost because it could not recoup it through the profits of an exclusive sell of the medications.

178. Claimant, however, seems to ignore the fact that the royalty obligation should not undermine the access of medication for all.[87] In fact, when dealing with medical technology, the remuneration policies for compulsory licensing should follow the Doha Declaration on the TRIPS Agreement and Public Health, which clearly stated that:

> "The TRIPS agreement should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[88]

179. The promotion of a free healthcare access is also, but not coincidently, the same goal pursued by Respondent's governmental planning.[89] It should be pointed out that the "*TRIPS Agreement does not require a country to make up the lost profits that the patent owner would have enjoyed with a monopoly and pricing freedom*".[90]

[86] Case Files, p. 9, ¶ 17
[87] WHO Guidelines, pp. 62-63
[88] Doha WTO Ministerial, item 4
[89] Case Files, p. 43
[90] WHO Guidelines, p. 81

180. In fact, according to Professors William Jack and Jean Lanjouw who proposed the Ramsey pricing model at the World Bank Seminar in 2003, developing countries "*should not necessarily cover their own marginal costs of drug production and distribution*." The Professors stress that "*in particular, these countries should not necessarily share in any of the costs of the R&D.*"[91]

181. WHO Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technology suggests that the approaches from the UNDP and JPO Guidelines are considered desirable for countries to adopt royalty guidelines, and those approaches set royalties from 0 to 6%[92]. Thus, it can be said that Respondent's royalty rates of 0.5% to 3%[93] are among the internationally accepted patterns.

182. In the Ministerial Conference of the WTO in Doha, the Ministers established that States "*should be able to take measures to protect public health and, in particular, to promote access to medicines for all*." Most importantly, the Ministers stated that "*countries have the right to determine the grounds upon which they will grant the compulsory licenses*."[94]

183. Therefore, a definition of what can be considered adequate royalty remuneration will vary from country to country[95]. The WHO Remuneration Guidelines clearly states that in cases of low-income countries, when dealing with medications to treat diseases of high incidence and which the treatment cost poses an economic hardship, then the royalty should be very low.[96] This, in fact, is the exact case in which Respondent finds itself in.

184. Respondent might not be a least developed country, but nothing indicates that it is a developed country either. Greyscale has been spreading fast and can be considered of high incidence, as well as a treatment that will cost a third of the overall health budget just for a single year can be considered as posing an economic hardship. In this sense, Respondent has reasonably and adequately set the 1% royalty.

G. THE TERMINATION OF THE LTA BY RESPONDENT'S NATIONAL HEALTH

[91] Jack/Lanjouw, paper No. 28
[92] WHO Guidelines, p. 7
[93] PO3, p. 50, ¶ 8
[94] Doha WTO Ministerial, items 4 and 5(b)
[95] WHO Guidelines, p. 82
[96] WHO Guidelines, p. 82

AUTHORITY DOES NOT AMOUNT TO A VIOLATION OF ART. 3(3) OF THE BIT SINCE IT WAS ACTING AS A PURCHASER UNDER A COMMERCIAL CONTRACT

185. Claimant argues that the early termination of LTA, due to Art. 3(3) of the BIT also constituted a violation of the BIT. However, alleged breach was an action by a state entity acting as a purchaser with regard to a commercial contract, not contemplating a sovereign act, and, thus, not encompassed within the umbrella clause's protection.

186. Firstly, it is important to distinguish when a State is acting as a merchant (*jure gestionis*) and when it is acting as a sovereign (*jure imperii*). It is important because a State's actions in the capacity of a merchant do not violate international law, whereas in the sovereign capacity they do.[97]

187. Judge Schwebel explains that the State will only be directly responsible, on the international sphere, not for ordinary breaches, but for sovereign acts involving breaches of contract resulting from an obviously arbitrary or tortuous element.[98]

188. Accordingly, the claims resulting from breaches arising from the State's sovereign actions find an internationally secured legal remedy provided in the treaty, "*while mere commercial contracts governed by national law afford remedies in domestic Courts*."[99]

189. In this sense, given that not all contracts signed with the State or one of its entities can be elevated to the level of treaty claims,[100] the foreign investor will either have entered into a "*commercial contract with an autonomous State entity or it will have celebrated an investment agreement with the State*."[101] The former will find remedy within national law and domestic courts, while the latter will be protected under international law.

190. Therefore, tribunals wisely suggest that when assessing what is covered by the umbrella clause, the tribunals should "*read the word sovereign into umbrella clauses, limiting*

[97] El Paso v Argentina, ¶ 79-80 (decision on Jurisdiction)
[98] Schwebel, p. 111
[99] El Paso v Argentina, ¶ 77 (decision on Jurisdiction)
[100] SGS v Pakistan, ¶ 166
[101] El Paso v Argentina, ¶ 70 (decision on jurisdiction)

their reach to sovereign or noncommercial or tortious acts."[102] Such guidance provided by case law is at least sensible, once it would be unreasonable to resort to complex international remedies for every single commercial violation the investor might suffer.

191. Many scholars adopt this line of thought and conclude that the umbrella clause will only encompass those conflicts involving breaches of contract where the breach is not a simple breach, [103] but a violation "*stemming from an investment agreement stricto sensu, that is, an agreement in which the State appears as a sovereign*."[104]

192. Professor Wälde understands that "*if the center of gravity of a dispute is not about the exercise of governmental powers but about a normal contract dispute*", then the umbrella clause will have no role in such dispute.[105]

193. Therefore, as the tribunal in *El Paso* explained, the umbrella clause does not extend contract claims when "such claims do not rely on a violation of the standards of protection of the BIT"[106], for example, the FET, MFN, full protection and security and so on. Thus, a mere contractual commercial breach shall not be deemed as encompassed under the umbrella's protection. As Gallagher and Shan explain:

> It is not the function of the umbrella clause to turn minor disagreements under a contract into a breach under international law. **Clearly treaty provisions may be invoked only where there is a specific breach of rights and a violation of contract rights protected under the treaty**.[107]

194. In the present case, the LTA deals with the procurement of medication, it is purely a commercial contract of sale and purchase of goods. Even though the most important part of the medications is the patented active ingredient, the contract does not concern, for example, the transferring of the intellectual property, or technology or know-how, but about the sale and purchase of the product Sanior.

195. The LTA should not be considered an investment agreement *stricto sensu*, because

[102] El Paso v Argentina, ¶ 81; SGS v Pakistan ¶ 166
[103] Schwebel, p. 111; p. 559-560; Wälde, p. 236; Gallagher/Shan, p. 220
[104] El Paso v Argentina, ¶ 71 (decision on Jurisdiction)
[105] Wälde, p. 236
[106] El Paso v Argentina, ¶ 84 (decision on Jurisdiction)
[107] Gallagher/Shan, p. 220

Respondent did not appear in such contract as sovereign. In fact, there is not even record of direct participation by Mercurian officials in the negotiation of the LTA.[108] Moreover, the issue of early termination has not violated the BIT's standards of protection, and as explained, the umbrella clause does not extend contract claims when such claims do not rely on a violation of the standards of protection of the BIT.

196. It should also be stressed that the LTA is a contract ruled by national law, which can afford remedies in domestic courts. The claim of the breach for an early termination is a mere commercial claim that should not be turned into a breach of international law, let alone need an internationally secured legal remedy.

197. Claimant also argues that the ordinary meaning of the words in the BIT's umbrella clause, the "any obligations", imply that not only sovereign acts, but all acts of the State would be within the clause's scope. However, the tribunal in *El Paso* stated that using the umbrella clause to transform any contract claim and any commitments of the States, even the minor ones, into treaty claims is not a desirable approach. The tribunal explained that:

> "(…) far-reaching consequences of a broad interpretation of the so-called umbrella clauses are quite destructive of the distinction between national legal orders and the international legal order."[109]

198. In this sense, to assimilate all obligations and contracts that a State enters into with an investor and accepting that any breach of contract would consist into a breach of the BIT "*would completely blur the division between the national legal order and the international legal order*."[110]

199. It is important to point out that *El Paso v Argentina*, consisted in a case where the BIT had a very similar umbrella clause also containing the wording "any obligations", and yet, the tribunal decided that the claims encompassed within the clause would be only those "resulting from a violation of a commitment given by the State as a sovereign State."[111]

200. Thus, given that the LTA consists in a commercial contract and that when entering

[108] PO3, p. 50, ¶ 9
[109] El Paso v Argentina, ¶ 82 (decision on Jurisdiction)
[110] El Paso v Argentina, ¶¶ 73 and 77 (decision on Jurisdiction)
[111] El Paso v Argentina, ¶ 82-84 (decision on Jurisdiction)

into the LTA Respondent was not acting as a sovereign but as a merchant, the decision to terminate the LTA was made by a State entity acting as a purchaser on commercial matters and the claims arising out of it should not be elevated to the level of treaty claims.

III. III. REQUEST FOR RELIEF

I – The Arbitral Tribunal shall declare its lack of jurisdiction *ratione materiæ* to adjudicate the disputes arising from the Award;

II – The Arbitral Tribunal shall recognize Respondent's invocation of the denial of benefits clause and consequently find that all claims are inadmissible under the BIT;

III – The Arbitral Tribuinal shall dismiss all claims on the merits, since Respondent has not breached any of its international obligations towards Claimant.