TEAM LIPTON

ARBITRATION UNDER THE PERMANENT COURT OF ARBITRATION

PCA ARBITRATION RULES 2012

PCA Case No. 2016-74

ATTON BORO LIMITED

CLAIMANT

V.

THE REPUBLIC OF MERCURIA

RESPONDENT

MEMORIAL FOR RESPONDENT

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25 September 2017

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AWG I	*AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010)
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Argentina-US BIT	Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment concluded on 14 November 1991
CAFTA	Dominican Republic–Central America Free Trade Agreement drafted on 5 August 2004
CAFTA-Hearing	Hearing before the Commission on Ways and Means of the United States' House of Representatives on the "Implementation of the Dominican Republic-Central America Free Trade Agreement", dated 21 April 2005.
Canada-Venezuela BIT	Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments concluded on 1 July 1996
CESCR I	General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities by the Committee on Economic, Social and Cultural Rights, dated 10 August 2017
CESCR II	General Comment No. 14 on the Right to the Highest Attainable Standard of Health by the Committee on Economic, Social and Cultural Rights, dated 11 August 2000

Chinese Model BIT	Third version of the Model Agreement on the Promotion and Protection of Investments of the People's Republic of China, adopted in 1997
Doha Declaration	Declaration on the TRIPS and Public Health adopted on 14 November 2001
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes between the Members of the World Trade Organization concluded on 15 April 1994
ECT	Energy Charter Treaty opened for signature on 17 December 1994
Ecuador-US BIT	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment signed on 27 August 1993
ICESCR	International Covenant of Economic, Social and Cultural Rights opened for signature on 16 December 1966
ICSID Convention	Convention on the Settlement of Disputes Between States and Nationals of Other States, opened for signature on 18 March 1965
ILC Articles	International Law Commission's Draft Articles on State Responsibility adopted in 2001
India-Kuwait BIT	Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of

	Investment concluded on 27 November 2001
NAFTA	North American Free Trade Agreement concluded on 17 December 1992
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards opened for signature on 10 June 1958
Pakistan-Turkey BIT	Agreement between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments conclude on 16 March 1995
Paris Convention	Paris Convention for the Protection of Industrial Property as amended on 28 September 1979
Switzerland-Pakistan BIT	Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments concluded on 11 July 1995
Switzerland-Uzbekistan BIT	Agreement between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments concluded on 16 April 1993
TRIPS or the Agreement	Trade Related Aspects of Intellectual Property Rights Agreement, opened for signature on 15 April 1994
Turkey-Turkmenistan BIT	Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments concluded on 2 May 1992

UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law as adopted by the General Assembly on 15 December 1976
VCLT	Vienna Convention on the Law of Treaties concluded on 23 May 1969

ABBREVIATIONS

Atton Boro or Claimant	Atton Boro Ltd.
Award	Award passed by an arbitral tribunal seated in Reef on January 2009 under the arbitral proceedings between Atton Boro Ltd. and Mercuria's National Health Authority
Basheera	Kingdom of Basheera
BIT	Bilateral Investment Treaty
CL	Compulsory license
Contracting Party	Contracting Party to the Mercuria-Basheera BIT
DSB	Dispute Settlement Body
FDC	Fixed-dose combination
High Court	High Court of Mercuria
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IP	Intellectual Property
LTA	Long-Term Agreement entered into by Atton Boro Ltd. and the National Health Authority on May 2014
Mercuria-Basheera BIT or the BIT	Bilateral Investment Protection Agreement between the Republic of Mercuria and the Kingdom of Basheera signed on 11 January 1998
NHA	National Health Authority of the Republic of Mercuria
PCA	Permanent Court of Arbitration
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
Reef	People's Republic of Reef
Respondent or Mercuria	Republic of Mercuria
the Law	Law No. 8458/09 to Amend Intellectual Property Law, 1976 (Law No. 232/76), 10 October 2009
the Patent	Mercurian Patent No. 0187204, granted on 21 February 1998
UNCITRAL	United Nations Commission on International Trade Law

WHO	World Health Organization
WTO	World Trade Organization

MEMORIAL FOR RESPONDENT

1. In accordance with the Permanent Court of Arbitration Rules ("**PCA**" and "**PCA Rules**"), the Republic of Mercuria ("**Mercuria**" or "**Respondent**") respectfully submits this Memorial in the proceedings filed by Atton Boro Limited ("**Atton Boro**" or "**Claimant**") arising out of the Bilateral Investment Protection Agreement between the Republic of Mercuria and the Kingdom of Basheera (the "**BIT**" or the "**Mercuria-Basheera BIT**"), to which both Respondent and Basheera are signatories.

STATEMENT OF FACTS

2. Years following the entry into force of the Mercuria-Basheera BIT, Respondent was faced with an imminent public health crisis as the number of greyscales cases rose amongst the Mercurian population.[1] Greyscale is a highly contagious chronic disease that, among other symptoms, produces the flacking and cracking of the skin, accompanied with stiffening muscles, swollen limbs and severe joint pain.[2] Although non-fatal, it is incurable.[3] While medication can delay the progress of the disease and even mute the symptoms for a few years, treatment can only go that far.[4]

3. In order to respond to its public health concerns, Mercuria set up the National Health Authority (the "**NHA**") in 1998[5] as an independent legal entity.[6] When greyscale became a concern, the NHA had already tackled several critical diseases in Mercuria, such as HIV/AIDS.[7] Relying on its previous experience, the NHA engaged in hard efforts to promote the prevention and treatment of greyscale. In this way, it launched an aggressive prevention campaign[8] and entered into the Long-Term Agreement (the "**LTA**") with Claimant,[9] Atton Boro Group's legal vehicle in Mercuria.[10] The LTA was a commercial

[1] UF, 872-876; Annex No. 3, 1338-1340.
[2] Annex No. 3, 1299-1301.
[3] Annex No. 3, 1305-1306.
[4] Annex No. 3, 1307-1310.
[5] Annex No. 2, 1255-1257.
[6] PO3, 1591.
[7] Annex No. 2, 1257-1264.
[8] UF, 903-906.
[9] UF, 892-894.
[10] PO3, 1572-1573.

agreement under which Atton Boro had to supply Sanior, a medicine for treating greyscale, to the NHA at a 25% discounted rate.[11]

4. Despite the NHA's attempts, greyscale cases far exceeded the initial estimates,[12] growing beyond any reasonable calculation.[13] Greyscale treatment was not accessible to all the afflicted population as each pill cost USD 27, amounting to an approximate annual cost of USD 10,000 per patient.[14] In turn, the NHA was compelled to request an additional discount on Sanior's price.[15] Unwavering, Claimant refused to grant the NHA the additional discount it needed in order to provide effective treatment to the Mercurian population.[16] On 10 June 2008, the NHA terminated the LTA alleging unsatisfactory performance.[17] Claimant challenged this termination in arbitral proceedings which resulted in an award rendered on 20 January 2009 (the "**Award**").[18]

5. After the termination of the LTA, there was no effective greyscale treatment in Mercuria.[19] It was Mercuria's duty to assure its population that affordable and high-quality treatment would be available. In this way, on 10 October 2009, Respondent lawfully passed Law No. 8458/09 (the "**Law**"), which amended the Intellectual Property Law allowing for the grant of compulsory licenses ("**CL**").[20]

6. By virtue of the Law, HG-Pharma, a pharmaceutical company, was granted a CL to manufacture a generic drug containing Valtervite.[21] Valtervite is Sanior's active compound which had been developed and patented by Atton Boro Group in 1998.[22] HG-Pharma's new generic drug provided the Mercurian population with affordable access to medicines,[23] as envisioned by the TRIPS, the Doha Declaration and the ICESCR.[24]

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[11] UF, 895-896.
[12] UF, 909-912.
[13] UF, 918-921.
[14] Annex No. 3, 1353-1354.
[15] UF, 918-921.
[16] UF, 923-925 and 930-931.
[17] UF, 930-931.
[18] UF, 931-934.
[19] PO3, 1583-1584.
[20] UF, 944-946.
[21] UF, 949-951.
[22] UF, 853-855.
[23] UF, 953-955.
[24] PO2, 1497-1499; PO3, 1565-1566.

SUMMARY OF ARGUMENTS

7. **Jurisdiction**. The Tribunal lacks jurisdiction over the present dispute. First, the Award does not constitute a protected investment under Art. 1(1) of the BIT, as the treaty must be interpreted in light of an objective standard. In consequence, the Award does not involve a commitment of capital, duration, risk nor a territorial link with Mercuria. Second, Claimant cannot avail itself of the benefits conferred by the BIT as it is controlled by a corporation which is not a national of a Contracting Party and as it also lacks substantial business activities in the territory of Basheera. Moreover, Respondent invoked the denial of benefits clause contained in Art. 2(1) in a timely manner.

8. **Merits**. Respondent honored its obligations under the BIT. First, Respondent cannot be held liable for the termination of the LTA. Indeed, it was not a party to the LTA nor can the actions of the NHA be attributed to Mercuria. In any event, the breach cannot be elevated into a treaty claim by way of Art. 3(3) as the termination was a merely commercial act. Second, Respondent treated Claimant in a fair and equitable manner pursuant to Art. 3(2). Since no specific commitment was given, Claimant did not have any legitimate expectation regarding its investment. Furthermore, through the enactment and application of the Law, Respondent reasonably altered its regulatory framework in accordance with its international commitments. Third, the Contracting Parties did not incorporate any 'effective means' provision. In any case, Respondent provided Claimant with effective means to enforce the Award. Fourth, alternatively, the Tribunal must not award the alleged damages under both Art. 3(3) and the 'effective means' standard as this would imply double recovery.

PART ONE: THE TRIBUNAL LACKS JURISDICTION OVER THE PRESENT DISPUTE

9. In the midst of an escalating public health crisis, the NHA launched a strong campaign in order to prevent and treat greyscale in Mercuria.[25] In this way, it entered into the LTA with Claimant in order to purchase Sanior, a fixed-dose combination ("**FDC**") drug that could radically improve greyscale treatment.[26] Even at the 25% discount rate under the LTA, Sanior's price was exceedingly high. As a result, the access and affordability of Sanior became a grave concern for the Mercurian population.[27]

10. After two years of purchasing Sanior at an incredibly high price –and after Claimant refused to grant an additional discount–[28] the NHA was forced to terminate the LTA.[29] Consequently, Claimant initiated arbitral proceedings against the NHA which resulted in the Award rendered in its favor.[30]

11. Now, Claimant resorts to investor-State arbitration wrongfully alleging to have a protected investment in Mercuria in order to avail itself of the BIT's protections. However, the Tribunal lacks jurisdiction as (**I**) the Award is not a protected investment under the BIT and as (**II**) the denial of benefits clause invoked by Respondent bars Claimant from the protections of the BIT.

I. The Award is not a protected investment under the BIT

12. Claimant aims to constitute the Tribunal's jurisdiction on the basis of the Award. In this way, Claimant alleges that the Award ordering the NHA to pay Atton Boro USD 40,000,000 in damages for the termination of the LTA is a protected investment.[31] However, the Award does not constitute a protected investment as (**A**) Art. 1(1) of the BIT must be analyzed in light of an objective standard and (**B**) the Award does not satisfy that standard.

[25] UF, 881-884 and 903-906.
[26] UF, 891-894.
[27] Annex No. 3, 1351-1354.
[28] UF, 921-923.
[29] UF, 930-931.
[30] UF, 931-934.
[31] Notice of Arbitration, 151-154.

A. The existence of an investment under the BIT must be assessed in the light of an objective criterion

13. The definition of investment contained in Art. 1(1) of the BIT is not sufficient on its own to assess the existence of an investment. In fact, an objective criterion must be used to reach an adequate construction of the BIT.

14. Art. 1(1) of the BIT states that: "the term "investment" […] ***in particular, though not exclusively***, includes […]" (emphasis added). In *Nova Scotia*, the tribunal dealt with a similarly worded definition of investment.[32] While construing the phrase 'in particular, though not exclusively', the tribunal held that the assets listed in Art. I(f) of the Canada-Venezuela BIT were merely illustrative and that "[t]he open-ended nature of [that] part of the purported definition of investment call[ed] for recourse to inherent features".[33]

15. In *Romak*, the claimant urged the tribunal to simply confirm that its assets fell within the categories listed in Art. 1(2) of the Switzerland-Uzbekistan BIT.[34] However, the tribunal stated that applying the categories listed in Art. 1(2) of that treaty in a mechanical manner would produce a manifestly unreasonable result, contrary to Art. 32(b) of the VCLT.[35] Accordingly, the tribunal stated that the claimant's interpretation would erase any practical limitation to the scope of the concept of 'investment' and render meaningless the distinction between investments and purely commercial transactions.[36]

16. As a mechanical approach would render the clause absurd,[37] the definition contained in Art. 1(1) of the BIT calls for recourse to inherent features. Therefore, the Tribunal must apply an objective criterion in order to assess whether Claimant has made an investment or not.

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[32] Art. I(f) of the Canada-Venezuela BIT reads: "'investment' means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter's laws. ***In particular, though not exclusively***, 'investment' includes: […]" (emphasis added).
[33] *Nova Scotia*, ¶78.
[34] Art. 1(2) of the Switzerland-Uzbekistan BIT reads: "The term "investment," shall include every kind of assets and particularly […]"; *Romak*, ¶178.
[35] *Romak*, ¶184.
[36] *Romak*, ¶185.
[37] VCLT, Art. 32(b).

Otherwise, any asset belonging to a national of a Contracting Party would constitute an investment under the BIT.[38]

17. In fact, a literal application of the terms of the BIT ignores Art. 31(1) of the VCLT, which requires the tribunal to take into account the 'ordinary meaning' of the terms of the treaty in their context as well as the treaty's object and purpose. Accordingly, the tribunals in both *Nova Scotia* and *Romak* held that the term investment had an inherent meaning that was more aligned with the object and purpose of the BIT, which encompassed three requirements: contribution, duration and risk.[39]

18. Hence, the term 'investment' contained under Art. 1(1) of the BIT must be construed in the light of the BIT's object and purpose which is in part to stimulate the flow of private capital and the economic development of host States.[40] This purpose is reinforced by the protection granted to 'returns' under Art. 3. As such, under the BIT, an investment must entail a 'commitment of private capital' –which the treaty aims to promote–, a 'certain duration' within which the investor can gain its returns and some 'risk' which justifies the protection granted. Moreover, the preamble[41] and Arts. 1(1)[42] and 1(4)[43] of the BIT state that a territorial link must exist between the investment and the host State, therefore setting an additional jurisdictional requirement. The Award, however, does not meet these four objective criteria.

B. The Award fails to fulfill an objective criterion

19. The Tribunal lacks jurisdiction over the Award as it does not satisfy the four objective criteria an investment must fulfill under the BIT.

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[38] *Romak*, ¶¶186-187.
[39] *Nova Scotia*, ¶84; *Romak*, ¶207; *Alps Finance*, ¶241; *Saba Fakes*, ¶110; *Caratube*, ¶360; *Quiborax*, ¶219; *Pey Casado*, ¶231.
[40] Preamble of the BIT, 980-981.
[41] The preamble of the BIT, in its relevant part, reads: "Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises ***of one Contracting Party in the territory of the other Contracting Party***" (emphasis added).
[42] Art. 1(1) of the BIT reads: "the term "investment" means any kind of asset held or invested […] ***in the territory of the other Contracting Party*** […]" (emphasis added).
[43] Art. 1(4) of the BIT reads: "[t]he term "territory" shall mean: (a) […] the territory of the Republic of Mercuria […] (b) the territory of the Kingdom of Basheera".

20. With regards to contribution, in *Poštová*, the arbitral tribunal considered that the interests held in Greek government bonds by Poštová Banka did not imply a contribution of capital. To that effect, the tribunal held that:

> An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which is also a process of exchange of values.[44]

21. In the present proceedings, no contribution of capital was made in order to obtain the Award. The Award is simply an arbitral decision settling a controversy between Claimant and the NHA. Clearly, submitting claims to an arbitral tribunal's jurisdiction does not imply any creation of value.[45] As such, no capital was committed by Claimant for the Award to be issued.

22. With respect to the requirement of duration, arbitral tribunals, such as that in *Salini I* and *RFCC*, have found that a period of two to five years was sufficient for satisfying the objective jurisdictional criterion.[46] The Award, however, lacks any duration as it begins and ends at the time it is issued. If the Award is considered an investment, the time passed between its issuance and its enforcement would be irrelevant. Indeed, its enforcement would amount to the returns of an alleged investment which has already ended at the moment of its issuance.

23. Concerning the risk requirement, an investment risk must be distinguished from ordinary commercial risk.[47] As the tribunal in *Poštová* put it, an investment risk is an operational risk regarding the success or failure of the economic venture concerned and different from commercial or sovereign risks.[48] On this basis, the *Poštová* tribunal rejected its jurisdiction over the non-payment of interests held by the claimant in Greek government bonds as a commercial risk covers "the risk that one of the parties might default on its obligation, which risk exists in any economic relationship".[49] Analogously, an arbitral award entails no

[44] *Poštová*, ¶361. Also, *MNSS*, ¶199.
[45] Similarly, *GEA*, ¶162.
[46] *Salini*, ¶54; *RFCC*, ¶62.
[47] *Nova Scotia*, ¶105; *Romak*, ¶229; *Poštová*, ¶368.
[48] *Poštová*, ¶¶370-371.
[49] *Poštová*, ¶369 and ¶371.

risk other than the risk of non-payment. In fact, this has been indirectly confirmed by the tribunal in *Vestey*, which established a risk-free interest rate on the amounts it awarded.[50]

24. Similarly, in *Romak*, the claimant and three Uzbek entities had entered into a set of contracts for the supply of wheat. However, the State-owned entities failed to comply with their payment obligations. The tribunal concluded that no investment risk was involved as non-performance risks were purely commercial.[51]

25. As shown, the Award entails no other risk than the risk of non-payment which, as analyzed, is not sufficient to satisfy the risk requirement. From the moment the Award was issued, the only risk that Claimant could allege is the possibility for the NHA to default on its payment. This, however, constitutes a purely commercial risk.

26. Finally, in relation with the territorial link feature, the investment must be made in the territory of one of the Contracting Parties. For instance, in *Canadian Cattlemen*, under Art. 1101 of the NAFTA,[52] the claimants were requesting damages after the United States imposed a ban on the importation of Canadian cattle.[53] However, the tribunal held that it lacked jurisdiction as a commitment of capital in the territory of a party to the NAFTA was necessary for a claim to money on cross-border trade to be considered as an investment.[54]

27. With respect to commercial arbitration awards, the territory in which the award is issued – i.e. the seat– has major practical effects. Indeed, it directly influences in a number of issues, such as arbitrability and the law and the jurisdiction governing the annulment of the award, among others.[55] In this way, the seat connects the dispute to the legal system of a given State.[56] The New York Convention applies this criterion as it establishes a clear territorial connection between the seat and the applicable law for the annulment of the Award. For instance, Art. V(1)(d) establishes that awards annulled under the seat's law may not be enforced. Similarly, Art. (1)(a) states that, unless the parties have agreed otherwise, the

[50] *Vestey*, ¶¶445-446.
[51] *Romak*, ¶¶231-232.
[52] Art. 1101(1)(b) of NAFTA reads: "This Chapter applies to measures adopted or maintained by a Party relating to: […] investments of investors of another Party in the territory of the Party".
[53] *Canadian Cattlemen*, ¶2.
[54] *Canadian Cattlemen*, ¶¶126-127 and ¶144.
[55] Belohlávek, pp.262, 268.
[56] Belohlávek, p.266.

validity of the arbitral agreement should be assessed under the law of the seat. The territorial link between an award and the place it was issued is, thus, plain.

28. The Award was issued by an arbitral tribunal seated in the People's Republic of Reef ("**Reef**").[57] For this reason the NHA could potentially request the annulment of the Award before the courts of Reef.[58] In this sense, the territorial link of the Award is with respect to Reef, not Mercuria.

29. Respondent acknowledges that the BIT contains a transformation clause according to which "[a]ny change in the ***form*** of an investment does not affect its character as an investment" (emphasis added).[59] Nevertheless, the Award cannot be considered a transformation of the LTA under this clause. Indeed, 'form' is "the outer shape or structure of something, as distinguished from its substance or matter".[60] Accordingly, while commentating the Chinese Model BIT, Gallagher/Shan illustrate this kind of provisions explaining that they allow, for instance, to transform a joint venture into a foreign-owned enterprise.[61] In this vein, the LTA could not have turned into the Award as, while the former created perfect rights upon Claimant, the latter only entitled Atton Boro to an expectant right contingent on its enforcement and non-annulment. As such, the LTA did not change its form but its substance under the Award.

30. Additionally, as a part of the BIT, the transformation clause must not be applied mechanically, but in accordance with the BIT's object and purpose.[62] Therefore, a reasonable interpretation of the clause requires that the transformed investment complies with the jurisdictional objective requirements set out in the BIT. Even considering the Award as a transformation of the LTA, it still fails to fulfill such objective requirements. Accordingly, the Award cannot be considered a transformation of the LTA.

[57] UF, 931-934.
[58] PO2, 1517-1518.
[59] BIT, Art. 1(1),
[60] Black's Law Dictionary, p.723.
[61] Gallagher/Shan, p.69.
[62] *See* Part One, Section I(A).

31. As shown, the Award does not comply with the objective jurisdictional criteria set out in the BIT. Thus, it cannot constitute a protected investment and the Tribunal's jurisdiction over the claims in relation to it is precluded.

II. Respondent can deny Claimant the benefits of the BIT as the requirements of the denial of benefits clause are met

32. Atton Boro's claims are inadmissible as the benefits of the BIT are not available to Claimant. Even if the Tribunal finds that Claimant is an investor which has made an investment, the protections of the BIT must be denied pursuant to Art. 2(1), which reads:

> Each Contracting Party reserves the right to deny the advantages of this Agreement to:
>
> 1. a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized.

33. In other words, for Claimant to be entitled to the BITs protections it must be owned and controlled by a national of Basheera and have substantial business activities in the territory of Basheera. Atton Boro has neither. In fact, it is a mere mailbox company with no substantial business activities in the territory of Basheera and ultimately controlled by a company in Reef, a non-party to the BIT.[63]

34. Claimant has the burden of proving its allegations. Indeed, Art. 27 of the PCA Rules states that a party seeking to rely on a particular fact has the burden of proving it. In this way, at the jurisdictional stage, the burden of proof is placed upon the claimant and the respondent must only object the propositions that the claimant alleges.[64]

35. In particular, the BIT's denial of benefits clause does not place the burden of proof on Respondent. Concerning Art. 17(1) of the ECT,[65] the tribunal in *Plama* placed upon the claimant the burden of proving the substantive requirements of the denial of benefits

[63] Response to the Notice of Arbitration, 480-483.
[64] Waincymer, pp.762-764; Born, p.44.
[65] Art. 17(1) of the ECT reads: "Each Contracting Party reserves the right to deny the advantages of this Part to: 1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized".

clause.[66] In this line, Sinclair holds that, although States must affirmatively assert the right to deny the benefits to the investor, once this occurs, the burden of proof shifts to the investor to demonstrate that the criteria for invoking the clause do not apply.[67] Simply, claimants must prove arbitral jurisdiction. Accordingly, Respondent should be benefited from the lack of proof.

36. Nevertheless, the requirements of Art. 2(1) of the BIT are met. On one hand, (**A**) Claimant is controlled by a national of a third State to the BIT and lacks substantial business activities in the territory of Basheera. On the other hand, (**B**) Respondent invoked the clause in a timely manner.

A. The substantive requirements of the denial of benefits clause are met

37. Claimant is a mere mailbox company ultimately controlled by a corporation seated in Reef. Thus, the substantive requirements of Art. 2(1) of the BIT are fulfilled as Claimant is not a proper national of a Contracting Party nor has substantial business activities in Basheera.

38. First, it is undisputed that Claimant is owned by Atton Boro Group's affiliates, which are all ultimately controlled by Atton Boro and Company.[68] On its part, Atton Boro and Company is a holding company incorporated in Reef, which is not a Contracting Party.[69] Currently, there are no elements to determine the nationality of the affiliates.[70] Even so, only one condition –i.e. ownership ***or*** control– must be met for the first requirement of the denial of benefits clause to be satisfied.[71] In this case, that condition is fulfilled: Claimant is controlled by a national of a non-party to the BIT.

39. Second, Claimant lacks substantial business activities in Basheera. Indeed, it is an investment vehicle incorporated in Basheera as part of a treaty planning strategy.

40. States have considered that a real and continuous link between investors and contracting parties to investment treaties must exist.[72] Thus, through denial of benefits clauses, States

[66] *Plama*, ¶167.
[67] Sinclair, pp.380-381.
[68] PO2, 1509-1510.
[69] UF, 845-848.
[70] *See* PO2, 1509-1510.
[71] *Pac Rim*, ¶4.82; *Plama*, ¶170.
[72] Behlman, p.398.

aim to counteract nationality planning by barring shell companies from accessing the benefits of investment treaties.[73]

41. The term 'substantial business activities' is not defined in the BIT, nor in any other treaty.[74] Therefore, its meaning must be interpreted in accordance with the aim of preventing treaty free-riding by companies lacking a substantial economic bond with the contracting party to the treaty. As such, the matter must be analyzed on a case-by-case basis. A generic definition of 'substantial business activities' might not be in line with the facts of the particular case.[75] Thus, a universal definition might severely limit the scope of application of the clause. Even more, avoiding an express checklist of substantial business activities reduces the possibility of treaty shopping and abuse by investors who would only do the bare minimum to avail the benefits of the BIT.[76]

42. By the time Claimant was incorporated, Basheera was engaged in a trend towards concluding several international economic agreements.[77] As part of this outward-looking economic policy, Basheera entered into the BIT with Mercuria. Taking advantage of this new scenario, Atton Boro and Company incorporated Claimant in Basheera only to do business in other States, such as Mercuria, where it would be protected by BITs.[78]

43. Even though Claimant affirms to have always been "engaged in the manufacture and sale of pharmaceutical products",[79] it does not commercialize any pharmaceutical drugs in Basheera. In fact, Claimant's principal dealings involve collaborations with States and State agencies,[80] but there is no evidence that Claimant has partnered with Basheera in any way. Even more, Claimant was incorporated in Basheera in order to set up a manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA.[81] Clearly, Claimant's purpose of incorporation was doing business in Mercuria, not in Basheera.

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[73] Dolzer/Scheuer, p.55; Behlman, p.399.
[74] Thorn/Doucleff, p.10.
[75] Thorn/Doucleff, p.11.
[76] *See* CAFTA-Hearing.
[77] UF, 842-844.
[78] PO3, 1572-1573.
[79] Notice of Arbitration, 106-107.
[80] UF, 866-868.
[81] PO3, 1572-1573.

44. As a result, Claimant does not even have a manufacturing base in Basheera. Indeed, it simply has an office space with –in the best-case scenario– 6 employees and –at worst– 2 employees.[82] Thus, Claimant is clearly fabricating a tale. If Atton Boro Group is "a leading drug discovery and development enterprise with over a hundred years of operational experience to its credit",[83] then its subsidiary should operate with much more than 6 employees. It is absurd to even think that Atton Boro, a vehicle for carrying business in two continents, namely South America and South Africa,[84] could operate with only 2 employees.

45. Additionally, Claimant manages a highly successful and thriving pharmaceutical business allegedly with only an accountant, a commercial lawyer, a patent law attorney and a manager.[85] However, employees with these qualifications cannot possibly manage the manufacture and commercialization of pharmaceutical products. This sheds light on an important reality: Claimant's true business lies elsewhere, but most certainly not in Basheera.

46. For these reasons, Claimant lacks any substantial business activities in the territory of Basheera, and as such the second requirement of Art. 2 of the BIT is met. Consequently, both substantive requirements for the denial of benefits to proceed are fulfilled and, therefore, Claimant is not entitled to the BIT's protections.

B. Respondent exercised its right to deny the benefits of the BIT in a timely fashion

47. Respondent exercised its right under Art. 2 of the BIT in a timely manner. In fact, Respondent lawfully exercised that right in the Response to Notice of Arbitration, which brings about retroactive effects.

48. Art. 2 of the BIT does not contain any procedural requirements. Accordingly, it does not prevent Respondent from exercising its right after the commencement of the arbitral proceedings. Furthermore, the object and purpose of a treaty do not allow the rights of

[82] PO2, 1510-1515.
[83] UF, 845-848.
[84] UF, 859-861.
[85] PO2, 1510-1515.

States to be limited by conditions that were not agreed upon by the contracting parties to that treaty.[86]

49. Moreover, if the BIT does not contain an express time-limit for the invocation of the denial of benefits clause, the parties must turn to the rules governing jurisdictional objections. In fact, in *Ulysseas*, the tribunal stated that:

> According to the UNCITRAL rules, a jurisdictional objection must be raised not later than the statement of defence (Article 21(3)). By exercising the right to deny Claimant the BIT's advantages in the Answer, Respondent has complied with the time limit prescribed by the UNCITRAL Rules.[87]

50. Similarly, the tribunal in *Pac Rim* held that there was no express time-limit set out in Art. 10.12.2 of the CAFTA for a Party to invoke the denial of benefits clause.[88] Consequently, it concluded that the time-limit established in Rule 41(1)[89] of the ICSID Convention was incorporated into the CAFTA by reference.[90] A similar result was reached in *Guaracachi*, where the tribunal affirmed that Bolivia had rightly denied the benefits to the investor in its statement of defense as it constituted a jurisdictional objection.[91] As shown, if the BIT does not contain procedural requirements, the rules regarding the timeliness of jurisdictional objections must apply.

51. In this way, the Tribunal must interpret the denial of benefits clause in accordance with the PCA Rules. In turn, Art. 23 of the PCA Rules states that: "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence". On its part, Respondent invoked its right to deny the benefits of the BIT in the Response to Notice of Arbitration.[92] Thus, the right was duly exercised.

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[86] VCLT, Art. 31(1).
[87] *Ulysseas*, ¶172.
[88] *Pac Rim*, ¶4.83.
[89] Rule 41(1) of the ICSID Convention reads: "[…] A party shall file [any jurisdictional] objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the countermemorial […]".
[90] *Pac Rim*, ¶4.85.
[91] *Guaracachi*, ¶371 and ¶381.
[92] Response to Notice of Arbitration, 521-522.

52. Moreover, the denial of benefits clause has retroactive effects as Claimant did not have a legitimate expectation that it would not be denied the benefits of the treaty. While recognizing this effect, the tribunal in in *Ulysseas* held that:

> The Tribunal sees no valid reasons to exclude retrospective effects. […] [S]ince the possibility for the host State to exercise the right in question is known to the investor from the time when it made its investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.[93]

53. In a similar sense, the tribunal in *Guaracachi*, held that the denial of benefits clause could apply retroactively as the clause is activated when the benefits are being claimed.[94] In fact, the tribunal in *Guaracachi* added that it would be odd for a State to examine whether the conditions of the denial of benefits clause were met before the dispute arises.[95] Clearly, the notification of a denial of benefits would be seen as an unfriendly act, contrary to the promotion of foreign investments.[96]

54. The possibility that Respondent could invoke Art. 2 was known at the time the BIT entered into force and, thus, at the time Claimant allegedly invested in Mercuria. Claimant cannot now allege that it had a legitimate expectation that it would not be denied the benefits of the BIT when the treaty expressly envisioned this possibility. Accordingly, Art. 2 has retroactive effects.

55. As shown, Respondent has exercised its right to deny the benefits of the BIT in a timely fashion and, as the substantive requirements of the clause are met, it is entitled to retroactively denied Claimant the BIT's protections.

PART TWO: RESPONDENT DID NOT BREACH ANY OBLIGATION UNDER THE BIT

56. If the Tribunal finds that it has jurisdiction over the present dispute, Mercuria has observed its obligations under the BIT. In fact, Claimant's allegations lack any merit.

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[93] *Ulysseas*, ¶173.
[94] *Guaracachi*, ¶376.
[95] *Guaracachi*, ¶379.
[96] *Guaracachi*, ¶379.

57. First, on 20 July 2004, Claimant entered into the LTA exclusively with the NHA.[97] Ever since, access and affordability of Sanior was a serious concern for the Mercurian population.[98] Indeed, the situation in Mercuria was critical: the number of greyscale cases increased from 20,485 in 2003 to a total of 266,298 cases in 2006.[99] In this context, the NHA terminated the LTA on 10 June 2008.[100] Since then, there was no effective greyscale treatment in Mercuria.[101]

58. The unavailability of treatment prolonged for over a year during which greyscale medication was completely unaffordable. Indeed, Sanior cost USD 36 per day, amounting to an approximate annual cost of USD 13,333 per patient.[102] Measures needed to be taken.

59. On this basis, Respondent enacted the Law which enabled it to grant CLs, a well-established mechanism under international law,[103] and to assure its population the access to affordable medication.[104] By theses means, Respondent fulfilled both its constitutional goals[105] as well as its international commitments under the TRIPS, the Doha Declaration and the ICESCR.[106]

60. All things considered, Respondent's measures to deal with the crisis were consistent with its obligations under the BIT. Notably, Respondent (**I**) cannot be held responsible for the NHA's termination of the LTA under Art. 3(3), (**II**) treated Claimant fairly and equitably in accordance with Art. 3(2), and (**III**) did not assume nor breach any 'effective means' obligations.

I. Respondent is not liable for the termination of the LTA

61. Claimant alleges that Mercuria breached Art. 3(3) of the BIT by unilaterally terminating the LTA.[107] However, (**A**) Respondent was not a party to the LTA, (**B**) nor can its termination

[97] UF, 892-894, PO2, 1528.
[98] Annex No. 3, 1351-1354.
[99] Annex No. 3, 1338-1340.
[100] UF, 930-931.
[101] PO3, 1583-1584.
[102] These estimations were calculated based on: UF, 895-896; Annex No. 3, 1353-1354.
[103] *See* Paris Convention, 5(A)(2); TRIPS, Art. 31; Doha Declaration, Arts. 4-5.
[104] UF, 944-946 and 953-955.
[105] Annex No. 2, 1255-1257.
[106] PO2, 1497-1499; PO3, 1565-1566.
[107] Notice of Arbitration, 147-148.

be attributed to it. In any case, (**C**) the termination of the LTA cannot be elevated to a treaty breach as the NHA acted in its commercial capacity.

A. Respondent was not a party to the LTA

62. Respondent did not enter into the LTA and, therefore, it cannot be responsible for its termination. Art. 3(3) of the BIT reads:

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

63. The terminology employed is clear: 'it' only refers to obligations assumed by Mercuria and/or Basheera. On the contrary, 'it' does not encompass legal entities different from either Contracting Party.[108] As established by the doctrine of privity of contract, a third party cannot acquire rights nor obligations under a contract to which it was not signatory.[109]

64. In *Impregilo*, the claimant alleged that Pakistan had failed to honor its commitments under two contracts.[110] However, these contracts had been concluded between the claimant and the Pakistan Water and Power Development Authority, which, under Pakistani laws, possessed a separate legal personality.[111] In its decision, the tribunal held that the umbrella clause of the Switzerland-Pakistan BIT[112] could only cover contracts entered into directly by Pakistan.[113] Therefore, the contracts signed by the separate legal entity were beyond the clause's scope.[114]

65. Arbitral tribunals, such as those in *Dallah* and *Bridas*, have refused to enforce arbitral awards on the grounds that the defendant States had not been a party to the agreements underlying those disputes.

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[108] Honlet/Borg, p.24. Similarly, *Hamester*, ¶347.
[109] Black's Law Dictionary, p.1320; Ahmed, p.519.
[110] *Impregilo*, ¶16-17.
[111] *Impregilo*, ¶262.
[112] Art. 11 of the Switzerland-Pakistan BIT reads: "Each Contracting Party shall constantly guarantee the observance of the commitment it has entered into by it with respect to the investments of the investors of the other Contracting Party".
[113] *Impregilo*, ¶223.
[114] *Impregilo*, ¶223.

66. For instance, in *Dallah*, the United Kingdom's Supreme Court considered that an award in favor of the applicant could not be enforced against Pakistan as the underlying agreement was entered into only by the applicant and a State trust. Despite Pakistan's direct involvement in the termination of the contract, the Court emphasized that Dallah "well understood the difference between an agreement with a State entity, on the one hand, and the State itself, on the other".[115]

67. Similarly, in *Bridas*, the United States' Court of Appeals refused to enforce an award against Turkmenistan as the underlying agreement was concluded between the applicant and Turkmenneft, an oil company wholly-owned by Turkmenistan. According to the court, the agreement itself did not display the parties' intention to bind the government, expressly recognizing the possibility for a State to create "liability insulating entities".[116]

68. In this case, it is uncontested that Mercuria was not a signatory party to the LTA. Indeed, the LTA was a commercial supply agreement exclusively between Claimant and the NHA,[117] an independent State entity.[118] In fact, there was no involvement of public officials in the negotiation of the LTA.[119] On the contrary, the LTA was celebrated, executed and terminated by the NHA.

69. Claimant is an experienced corporation and, therefore, it well understood the difference between contracting with the NHA or Mercuria, and its consequences. In fact, while the LTA was concluded with the NHA, Atton Boro had signed other contracts with Mercuria itself.[120] Nonetheless, regarding the LTA, Claimant did not require Respondent's intervention as a party nor guarantor.

70. Even more, Claimant shares this understanding. Actually, following the termination of the LTA, it initiated arbitral proceedings under the LTA's arbitration clause exclusively against

[115] *Dallah*, ¶124.
[116] *Bridas*, Section II(D).
[117] UF, 892-894.
[118] PO3, 1591
[119] PO3, 1594-1595.
[120] UF, 868-870.

the NHA. Respondent was not impleaded in those proceedings neither as a party nor as a third party non-signatory.[121]

71. As shown, Respondent was not a party to the LTA. Therefore, it could not have breached Art. 3(3) of the BIT.

B. The termination of the LTA is not attributable to Respondent

72. The NHA's termination of the LTA cannot be accredited to Respondent under the rules of domestic law applicable to that agreement.

73. According to Dolzer/Schreuer, in principle, "state entities are separate and their acts will not be attributed to the state".[122] However, exceptionally, the contractual obligations undertaken by a State entity can be attributed to the State if the applicable domestic law provides for it.[123] As Professor Crawford pointed out:

> [W]hen investments tribunals deal with questions of contractual liability, those questions are governed by the proper law of the contract. The international legal rules on attribution have nothing to do with this enquiry.[124]

74. As the tribunal in *CMS* stated, umbrella clauses do not internationalize a contractual obligation; both the content of the obligation and its proper law remain unaffected.[125] Thus, under an umbrella clause, the issue of attribution would still be governed by the domestic law applicable to the contract.

75. At the merits' stage, "[t]he party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion".[126] Accordingly, Claimant must prove that the NHA's conduct can be attributed to Respondent. However, it has failed to invoke any relevant rule of the law governing the LTA to that effect. Hence, the termination of the LTA cannot be accredited to Respondent.

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[121] UF, 931.
[122] Dolzer/Schreuer, p.219.
[123] Olleson, p.466; *Vivendi*, ¶¶95-96; *CMS*, ¶95(c); *EDF*, ¶¶317-319.
[124] Crawford, p.134.
[125] *CMS*, ¶95.
[126] *Asian*, ¶56; PCA Rules, Art. 27.

76. Mercuria acknowledges that some arbitral tribunals have relied on the ILC Articles when analyzing attribution.[127] The approach fails to convince. Rules of attribution must be applied first to determine the obligation a State has assumed; only then, can the State be held responsible for a breach of that obligation.[128] ILC Articles are not general rules of attribution. As explained in the ILC Articles Commentary, they are intended to attribute breaches of international law, but never State obligations.[129]

77. In this line, the tribunal in *Vivendi* recognized that "attribution has nothing to do with the standard of responsibility".[130] Therefore, the ILC Articles cannot determine whether a State can be bound by a contract entered into by a State entity[131]. In fact, entering into a contract does not normally constitute an internationally wrongful act.[132]

78. For the purposes of the Art. 3(3) of the BIT, Respondent must be first bound to the LTA in order to be attributed its termination. However, the obligations under the LTA did not bind Respondent, but the NHA. Even more, entering into the LTA cannot be considered an international wrongful act. Clearly, the ILC Articles are not useful to attribute the termination of the LTA.

79. All things considered, the termination cannot be attributed to Respondent under Art. 3(3) of the BIT.

C. In any case, the termination of the LTA cannot be elevated to a treaty claim as Respondent did not act in exercise of its sovereign authority

80. Even if the Tribunal considers that the NHA's acts are attributable to Respondent, the scope of Art. 3(3) is limited to the exercise of sovereign State acts. As Respondent has not exercised a sovereign act in order to terminate the LTA, the alleged contractual breach cannot be elevated to a treaty breach.

[127] Feit, p.28.
[128] Feit, pp.28-29.
[129] ILC Articles Commentary, p.39.
[130] *Vivendi*, footnote 17.
[131] Happ, p.324.
[132] Olleson, p.465.

81. The State acting as a merchant –in particular, through instrumentalities– must be distinguished from the State acting as a sovereign.[133] Breaches of contracts will only constitute treaty breaches when the host State acts in exercise of its sovereign authority.[134]

82. For instance, in *Duke Energy*, the claimant alleged that any and all obligations entered into with regards to its investment in Ecuador fell within the umbrella clause.[135] The tribunal, however, found that a violation different from a mere contractual breach had to be established in order to prove a treaty breach, requiring the exercise of the State's sovereign power.[136]

83. Analogously, in *AWG I*, the tribunal determined that Argentina had not expropriated the claimants' rights under a concession contract for water distribution and waste water systems.[137] Indeed, it held that, even if Argentina had exercised its public authority during the crisis of 2001, the State terminated the concession on contractual grounds behaving as a private contracting party.[138]

84. The LTA was a purely commercial supply arrangement between the NHA and Claimant.[139] The NHA acting as a purchaser decided to terminate the LTA under contractual grounds as a consequence of Atton Boro's unsatisfactory performance.[140] In this sense, confronted with an act of an ordinary contracting party, Claimant resorted to the contractual dispute settlement forum,[141] and not to investor-State arbitration. Clearly, Respondent did not exercise its sovereign powers regarding LTA. Thus, the termination cannot be elevated to a treaty claim by virtue of Art. 3(3) of the BIT.

[133] *PAE*, ¶109.
[134] *Duke Energy*, ¶345; *Tulip*, ¶354; *Azurix*, ¶53; *Siemens*, ¶248; *PAE*, ¶109; *Impregilo*, ¶260.
[135] *Duke Energy*, ¶315.
[136] *Duke Energy*, ¶345.
[137] *AWG I*, ¶146.
[138] *AWG I*, ¶¶154-155.
[139] UF, 895-896.
[140] UF, 930-931.
[141] UF, 931.

II. The enactment and application of the Law complied with the fair and equitable treatment standard

85. Claimant alleges that the grant of the CL breached, among other international covenants, the TRIPS, which in turn frustrated its legitimate expectations.[142] However, Respondent did not breach the BIT's fair and equitable treatment ("**FET**") standard contained in Art. 3(2) in any way. Notably, (**A**) Respondent legitimately and reasonably exercised its public health police powers and (**B**) the enactment and application of the Law did not frustrate Claimant's alleged expectations. Moreover, (**C**) Respondent did not act in an arbitrary manner. In the alternative, (**D**) the damages sought under the umbrella clause and the 'effective means' claims overlap.

A. In light of the public health crisis, Respondent legitimately exercised its police powers by enacting and applying the Law

86. As a sovereign State, Mercuria is entitled to exercise its police powers, more so in light of the public health crisis concerning greyscale.[143] The FET standard contained in Art. 3(2) of the BIT must be assessed in light of these circumstances. For that reason, as Respondent enacted and applied the Law within its police powers during a public crisis, such measures were legitimate.

87. The Law constitutes an exercise of Respondent's sovereign powers. Respondent was entitled and even had the duty under international law to take measures in order to safeguard the health of its population.

88. Under the BIT, the Contracting Parties may exercise their police powers to protect the health of their population.[144] The VCLT states that treaties must be interpreted in the light of their object and purpose, which may be found in their preambles.[145] In this way, the FET standard should be interpreted in this light.

89. In the preamble of the BIT, the Contracting Parties agreed that they would pursue the objectives set in the BIT "in a manner consistent with the protection of health, safety, and

[142] Notice of Arbitration, 148-151.
[143] Response to Notice of Arbitration, 488-492.
[144] Preamble of the BIT, 988-989; BIT, Art. 3(1) and Art. 6(4).
[145] VCLT, Art. 31. This view was shared by the tribunal in *Chevron*, ¶161.

the environment […]".[146] Thus, the BIT limits the protections awarded to investors. In fact, Art. 3(1) further reflects this understanding by stating that the Contracting Parties shall admit investments of investors of the other Contracting Party "subject to its rights to exercise powers conferred by its laws and investment policies". Besides, Art. 6(4) of the BIT specifically acknowledges public health as a legitimate welfare objective.

90. In this line, arbitral tribunals, such as those in *Total* and *Philip Morris,* have recognized that States are entitled to act within the scope of its legitimate police powers. In *Total,* when discussing the extent of the protection of investors' legitimate expectations, the tribunal affirmed that States entering into BITs "do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation".[147]

91. Even more, when it comes to public health measures, tribunals should tread carefully when interpreting the scope of the States' police powers. Accordingly, the tribunal in *Phillip Morris* warned that "investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health".[148]

92. Particularly, in this case, as a signatory to the ICESCR,[149] Respondent was not only entitled to act within the scope of its police powers, but was also obliged to protect the human rights of its population. In this vein, Art. 12 of the ICESCR establishes:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: […]
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases […]

93. Regarding the States' obligation to provide accessibility to medicine, the CESCR I asserts that intellectual property ("**IP**") rights shall not restrict the human right to access to essential

[146] Preamble of the BIT, 988-989.
[147] *Total* ¶115.
[148] *Phillip Morris* ¶399.
[149] PO3, 1565-1566.

medicines.[150] Especially, when an epidemic disease affects the population, treatment must be accessible at an affordable price.[151] States are obliged to take active steps to protect these rights.[152]

94. All things considered, Respondent not only was entitled to exercise its police powers for public health purposes, but also had the obligation and responsibility to provide its population with accessible and affordable treatment. Then, Respondent could lawfully act within the scope of its police powers to tackle the greyscale crisis in its territory.

95. Greyscale is a chronic, non-fatal, incurable, highly contagious epidemic disease.[153] In fact, it has severely afflicted the Mercurian population as well as other 43 countries.[154] including Mercuria's neighboring countries in Westeros.[155] Despite Mercuria's repeated efforts to prevent and mitigate the disease,[156] greyscale cases have progressively increased at an alarming rate.[157]

96. In 2003, at least 10,000 patients were unable to afford greyscale treatment.[158] This number climbed to 100,000 patients by 2006.[159] In 2007, the order values of subsidized Sanior doubled with each passing quarter.[160] Access became a grave concern. Indeed, Sanior cost USD 10,000 a year per patient even at discounted rates. After the termination of the LTA, a single FDC pill of Sanior cost USD 36, amounting to USD 13,333 a year of treatment per patient.

97. For these reasons, after the LTA was terminated, there was no effective treatment for greyscale in Mercuria,[161] Respondent had to seek ways to safeguard for vulnerable greyscale patients. Hence, it passed the Law amending its IP regime,[162] which eventually led to the

[150] CESCR I, ¶24.
[151] CESCR II, ¶12(b)(iii).
[152] Peterson/Gray p.24-25.
[153] Annex No. 3, 1305-1306; Response to Notice of Arbitration, 485-486.
[154] Annex No. 3, 1301-1303.
[155] UF, 956-958; PO3, 1564.
[156] Annex No. 3, 1316-1318.
[157] Annex No. 3, 1338-1340.
[158] Annex No. 3, 1359-1360.
[159] Annex No. 3, 1360-1361.
[160] UF, 916-917.
[161] PO3, 1583-1584.
[162] UF, 944-946.

grant of a CL for Valtervite. For that purpose, Respondent fixed adequate royalties for Claimant.[163]

98. Clearly, Respondent acted in accordance with the BIT's preamble and within the scope of its police powers and international commitments. Hence, the enactment and application of the Law cannot be deemed to be unfair nor inequitable.

B. The enactment and application of the Law did not violate Claimant's alleged legitimate expectations

99. Claimant alleges that the issuance of the CL for Valtervite pursuant to the Law disregarded the protections contained in IP international covenants thereby frustrating its legitimate expectations.[164] However, Respondent complied with Art. 3(2) of the BIT. Indeed, (**1**) Claimant had no specific commitment that the regulatory framework would remain unchanged, (**2**) the TRIPS is not a source of legitimate expectations and, in any case, (**3**) Claimant's expectations under international covenants were not frustrated.

1) Respondent did not make a specific commitment towards Claimant

100. Respondent did not commit itself to maintain its regulatory framework unaltered. In the absence of such commitment, Claimant had no legitimate expectation that the regulatory framework existing at the time of its alleged investment would remain unchanged. Indeed, neither the Mercurian Patent No. 0187204 for Valtervite (the "**Patent**") nor Respondent's officials' declarations constitute specific commitments in that sense.

101. In order for investors to have legitimate expectations, they must rely on legally enforceable conditions specifically offered by host States at the time the investment is made.[165] As the *Total* tribunal explained, there is a specific commitment when the host State expressly assumes a specific, legal and binding obligation towards the investor.[166]

102. Similarly, the tribunal in *EDF* explained:

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[163] UF, 947-952.
[164] Notice of Arbitration, 148-151.
[165] Bonnitcha, pp.170-175.
[166] *Total* ¶117. Similarly, *Philip Morris* ¶426; *PSEG*; ¶241; *LG&E*, ¶130; *El Paso*, ¶374.

> Except where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.[167]

103. Therefore, in order for Claimant to successfully invoke that it had a legitimate expectation that the regulatory framework would not be altered, it must prove a specific commitment made by Respondent. Neither the Patent nor Mercurian officials' declarations form legitimate expectations.

104. First, the Patent does not constitute a specific commitment that Mercuria's IP regulatory framework would not be altered. According to Laidell/Waibel, the grant of a patent does not constitute a specific commitment that such patent will always be valid as long as the patent is subject to revocation or invalidity under the host State's law.[168] Analogously, patents do not give rise to a legitimate expectation that the IP regulatory framework will not be altered when host State's IP regime contemplates the possibility of potential modifications.

105. In the present case, at the time the patent was granted, both Contracting Parties were signatories to the TRIPS,[169] the Doha Declaration[170] and the Paris Convention.[171] Under these covenants, States have the right and freedom to allow the grant of CL by way of their local legislation. As an experienced corporation in the pharmaceutical industry, Claimant was well-aware of the existence of these prerogatives. Therefore, the Patent *per se* did not give Claimant a legitimate expectation that its investment would be immune to any regulatory modification. Indeed, the possibility to issue CLs existed even before Claimant decided to invest.

106. Second, public officials' declarations cannot be considered specific commitments. In *El Paso*, the tribunal had to decide whether a statement from the Argentinean president gave rise to a specific commitment to maintain the existing framework unaltered. According to

[167] *EDF*, ¶217.
[168] Liddell/Waibel, p.166.
[169] TRIPS, Art. 31.
[170] Doha Declaration, Art. 4.
[171] Paris Convention, Art. 5(A)(2).

the tribunal, a political speech does not constitute a specific commitment and cannot form legitimate expectations.[172]

107. The declaration of the President of Mercuria and that of the Minister for Health cannot be characterized as a specific commitment since they are not legally binding or specifically directed to Claimant. On one hand, the statement of the Minister for Health released in 2003 was a general communication to the Mercurian population informing the NHA's success since 1998.[173] At no point was a specific commitment made: not only was the target addressed general but also greyscale was not even mentioned.

108. On the other hand, a two-line *tweet* posted by the President of Mercuria cannot be considered a binding commitment. Even more, the President of Mercuria stated: "Mercuria will do away with red tape and roll out the red carpet for investors".[174] This statement in no way addresses Claimant nor constitutes a promise to pharmaceutical investors.

109. As shown, the grant of the Patent and unilateral declarations are not binding commitments concerning the stability of the legal framework. Therefore, Claimant does not have any legitimate expectation based on specific commitments.

2) The TRIPS is not a legitimate source of expectations

110. The TRIPS creates obligations at an inter-State level. It does not, however, grant individuals, such as Claimant, any rights.[175] For this reason, (**a**) Claimant cannot advance allegations relying on obligations contained in the Agreement. In fact, (**b**) the Dispute Settlement Body ("**DSB**") of the World Trade Organization ("**WTO**") has the exclusive jurisdiction over claims related to the TRIPS.

[172] *El Paso*, ¶395.
[173] Annex No. 2, 1257-1260.
[174] UF, 888-890.
[175] Grosse, p.255-256.

a. Claimant has no standing to present submissions relying on obligations contained in the TRIPS

111. Claimant contends that its legitimate expectations arising from the TRIPS have been frustrated.[176] However, the Agreement does not create rights in favor of investors.

112. When defining its nature and scope, Art. 1(1) of the Agreement states that:

> ***Members*** shall give effect to the provisions of this Agreement. ***Members*** may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. ***Members*** shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice (emphasis added).

113. Treaties only have direct effect when contracting parties intend it.[177] That is, their clauses only entitle individuals to enforceable rights when they expressly provide so. On the contrary, the Agreement only imposes obligations upon its 'Members'. As key market players –such as the United States and Japan– have expressly acknowledged, the TRIPS does not bring about direct effect.[178]

114. Consequently, as an individual Claimant does not have any rights under the Agreement. Therefore, it lacks standing to claim a TRIPS violation. In any case, Basheera –and not Claimant– was entitled to submit a complain before the DSB.

b. The WTO's DSB has exclusive jurisdiction over disputes under TRIPS

115. The Tribunal is not the correct recourse to remedy TRIPS violations. As part of the WTO law, the Agreement can only be interpreted and ruled upon by the DSB. In fact, Art. 23(1) of the DSU states that:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of

[176] Notice of Arbitration, 148-151.
[177] Fabri, p.152.
[178] Elfring/Arend, p.79.

> the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[179]

116. Accordingly, as confirmed in *European Communities*, the DSB has the exclusive jurisdiction over matters regarding WTO agreements, including the TRIPS.[180] In turn, Art. 1(1) of the DSU explicitly states that the DSU is only available for Member States.[181]

117. Clearly, the DSB is the only competent forum to hear disputes regarding violations to the TRIPS. Hence, this Tribunal cannot adjudicate upon any alleged rights Claimant might have under the TRIPS.

3) Claimant's alleged legitimate expectations were not frustrated

118. If the Tribunal were to accept that the TRIPS can be used as a guidance to interpret the BIT's substantive standards, then every international covenant entered into by the Contracting Parties must also be brought to the analysis. This would include the TRIPS, the Doha Declaration, the Paris Convention and the ICESCR. In this light, (**a**) the Law was reasonable according to those international covenants and, particularly, (**b**) the enactment and application of the Law complied with the specific requirements set out in the TRIPS.

a. Claimant should have expected the issuance of a CL

119. The introduction of CLs into Mercuria's legislation was a possibility from the moment Claimant decided to invest. Indeed, the Law was within the reasonable margin of change considering the treaties to which both Mercuria and Basheera were signatories at the time of the entry into force of the BIT.

120. As explained,[182] the TRIPS, the Doha Declaration and the Paris Convention all provide for the issuance of CLs by way of local legislation. First, the Paris Convention accepts CLs ever since its 1925 revision.[183] Second, Art. 8 of the TRIPS allows its members to adopt the necessary measures to protect public health, including CLs complying with the minimum

[179] DSU, Article 23(1).
[180] *European Communities*, ¶7.43.
[181] DSU, Article 1(1).
[182] *See* Part Two, Section II(B)(1).
[183] Paris Convention, Art. 5(A)(2).

standards set out in Art. 31. Third, the Doha Declaration encourages and confers States flexibility to grant CLs in order to protect public health.[184]

121. Regarding the ICESCR, Art. 12 recognizes every Mercurian citizen the right to enjoy the highest attainable standards of health. Even more, to achieve the realization of such right, the States are obliged to take steps to prevent, treat and control epidemic diseases.[185]

122. Claimant, well-aware of Respondent's international commitments, should have expected that State would take action if medicine was not available at an affordable price. CLs were an available tool for Respondent to tackle national threats at the time the BIT entered into force. Accordingly, confronted with a growing vulnerable population in need of treatment, Respondent reasonably enacted and applied the Law in order to include CLs. The Law was applied to provide medicine to the Mercurian population, compensating Claimant in return.

123. In sum, the enactment and application of the Law was reasonable considering the local and international legal framework. Claimant, indeed, could have not legitimately expected otherwise.

b. The enactment and application of the Law complied with the specific requirements set out in the TRIPS and the Doha Declaration

124. The enactment and application of the Law complied with the minimum standards contained in Art. 31 of the Agreement and the Doha Declaration.

125. First, Respondent was entitled to issue CLs. Both the Doha Declaration and the Agreement allow States to issue CLs as well as to decide the grounds upon which they may be granted.[186] Accordingly, States have the discretion to determine what constitutes, under Art. 31 of TRIPS, "a national emergency or other circumstances of extreme urgency" when granting CLs.[187] In fact, epidemics, such as HIV and greyscale, can represent emergencies and circumstances of extreme urgency.

[184] Doha Declaration, Arts. 4-5.
[185] ICESCR, Art. 12(2)(c).
[186] Doha Declaration, Art. 5(b).
[187] TRIPS, Art. 31(b); Doha Declaration, Art. 5(c).

126. Under the Law, CLs may be issued when "the patented invention is not available to the public at a reasonably affordable price".[188] Without the 25% discount under the LTA, the price of a single dose of Sanior was USD 36, amounting to an approximate annual cost of over USD 13,333 per patient.[189] This price turned Sanior even more unaffordable to a population struggling for treatment.[190] As such, the CL for Valterivite was granted in a manner consistent with the TRIPS, the Doha Declaration and the grounds contained in the Law.

127. Second, under Art. 23(c)(4)(d) of the Law and Art. 31(b) of the TRIPS, Respondent was entitled to waiver the period of voluntary negotiation between the patent holder and the compulsory licensee in case of "national emergency or other circumstances of extreme urgency".[191] As shown,[192] Respondent enacted the Law in the context of an extreme public health emergency. Hence, the lack of preliminary negotiations does not impair the validity of the process through which the CL was issued.

128. Third, the royalties fixed by the High Court of Mercuria (the "**High Court**") were both reasonable and adequate as envisioned by Art. 31(h) of the TRIPS.[193] As the TRIPS does not establish how to calculate royalties, local courts are free to decide over the appropriate amount. In fact, according to the World Health Organization ("**WHO**"), several methods have been applied in order to calculate royalties for CLs.[194] Generally, the royalties fixed for CLs range between 0.02% and 6% depending on the specific circumstances of each case.[195] Particularly, in Mercuria, between 2009-2010, royalty rates for drugs to treat incurable, non-fatal diseases ranged from 0.5% to 3% of the compulsory licensee's revenue.[196]

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[188] Law, Art. 23(C)(1)(b).
[189] These estimations were calculated based on: UF, 895-896; Annex No. 3, 1353-1354.
[190] UF, 1359-1366.
[191] Law, Art. 23(C)(4)(d); TRIPS, Art. 31(b).
[192] *See* Part Two, Section II(A).
[193] Art. 31(h) of the TRIPS reads: "[T]he right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization".
[194] Love, pp.67-74.
[195] Love, p.8 and p.71.
[196] PO3, 1589-1590.

129. In the High Court's view, the adequate remuneration for Claimant was 1% royalties over HG-Pharma's total earnings.[197] The royalty fixed falls within the worldwide accepted range illustrated by the WHO. A 1% royalty is certainly adequate, as there even have been cases where royalties were awarded at 0.02%.[198] In fact, given the exponential growth in the number of greyscale patients, a 1% royalty over HG-Pharma's total earnings is not inadequate. Even more, Claimant's earnings would be free of any production or distribution cost.

130. Fourth, in accordance with Art. 31(i) and (j) of the TRIPS, Respondent enacted the Law and granted the CL for Valtervite guaranteeing the due process of law. As a matter of fact, Claimant was impleaded as a party before the High Court in the proceedings which resulted in the grant of the CL.[199] Even more, Mercuria's law gives the patent holder the possibility to question the validity of the CL and the royalty after being granted before a two-judge bench of the High Court.[200] Thus, the grant of the CL also complied with Art. 31 (i) and (j) of the TRIPS.

131. In conclusion, Respondent did not frustrate any legitimate expectation that Claimant might have had arising from the TRIPS or the Doha Declaration as the enactment and application of the Law complied with their provisions.

C. Respondent's actions were not arbitrary

132. Respondent did not breach the FET standard contained in the BIT as it did not act in an arbitrary manner.

133. In *Siemens*, the term 'arbitrary' was defined as a conduct: "fixed or done capriciously or at pleasure [or] without adequate determining principle" or "without cause based upon the law". [201] Similarly, in *Cervin*, the tribunal considered that an arbitrary conduct is grounded solely on caprice, contrary to law, justice or reason.[202] Analogously, in *Enron*,[203] the tribunal

[197] UF, 951-952.
[198] Love, p.72.
[199] PO3, 1576-1577.
[200] PO3, 1578-1580.
[201] *Siemens*, ¶318.
[202] *Cervin*, ¶523.
[203] *Enron*, ¶281.

decided that a conduct was arbitrary not just because it was inconsistent with the law, but because the State attempted to accomplish an illegitimate purpose.

134. Evidently, the decisive question is whether a State conduct lacks any ground on the law and pursues an illegitimate end. It is clear that a high threshold must be surpassed in order to deem a State's conduct as arbitrary.

135. In the present proceedings, Respondent acted both in accordance with the law and in pursuit of a legitimate purpose. In this way, the grant of the CL complied both with the Law and the applicable international covenants.[204] Moreover, Respondent modified its national IP legislation and granted the CL to HG-Pharma in order to pursue a legitimate public purpose: to safeguard the public health of its population afflicted by greyscale.

136. In this way, Respondent acted lawfully and enacted measures in order to protect the health of its population. Clearly, its actions cannot be deemed as arbitrary.

III. The enforcement proceeding of the Award in Mercuria complies with the BIT

137. Claimant argues that Respondent failed to provide it with effective means to enforce the Award alleging an undue delay in the enforcement proceedings.[205] However, the claim lacks merit since (**A**) the BIT does not include an 'effective means' clause and, in any case, (**B**) Respondent guaranteed Claimant effective means to enforce its rights.

A. Respondent is not obliged to guarantee Claimant effective means to enforce its rights under the BIT

138. Claimant's pretention to access a lower standard of proof cannot prevail. The BIT does not contain an 'effective means' clause. There is only one mention to 'effective means' in the preamble.[206] Considering this mention as a binding commitment would mean imposing inexistent obligations on Respondent as preambles are not an operative part of the treaty. On the contrary, they constitute hortatory provisions that do not entail legally binding commitments on the parties.

[204] *See* Part Two, Section II(A).
[205] Notice of Arbitration, 151-154.
[206] Preamble of the BIT, 982-984.

139. In *İçkale*, the tribunal analyzed whether the FET standard included an obligation to maintain a stable framework. The Turkey-Turkmenistan BIT does not contain such a provision. The claimant, however, invoked the preamble in order to make its interpretation. In its decision, the tribunal clearly held:

> It is well-established in international law, including in the jurisprudence of investment treaty tribunals, ***that preambles to treaties are not an operative part of the treaty*** and do not create binding legal obligations which are capable of giving rise to a distinct cause of action (emphasis added).[207]

140. Similarly, while in *Continental Casualty*, the arbitral tribunal held that the wording of the Argentina-US BIT's preamble did not impose upon Argentina a legal obligation to preserve the "stability of the legal framework".[208] Analogously, in *Bayindir*, the tribunal noted that, the preamble of the Pakistan-Turkey BIT did not establish any operative obligation to grant a FET.[209]

141. Even more, by the time the BIT was drafted, 'effective means' clauses had already been developed and included in, for example, the 1984-US Model BIT.[210]

142. However, the Contracting Parties deliberately chose not include an 'effective means' provision. Although the preamble acknowledges the importance of providing the investor's effective means to assert their rights, the standard was left out of the BIT's obligatory clauses. The resulting BIT reflects the Contracting Parties' negotiations and intentions, which cannot be disregarded. Given that the preamble is not operative, it would be too burdensome to interpret that the Contracting Parties have the obligation to guarantee investors effective means to enforce their rights.

143. Even more, the FET contained in Art. 3(2) of the BIT cannot be construed to include an 'effective means' obligation. Undeniably, the FET does not comprehend a duty to secure the investor effective means for the enforcement of its rights. Indeed, arbitral tribunals finding an 'effective means' breach, such as those in *White Industries* and *Chevron*, grounded their

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[207] *İçkale*, ¶337.
[208] *Continental Casualty*, ¶258.
[209] *Bayindir*, ¶153.
[210] Art. II(6) of the 1984-US Model BIT reads: "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties".

decisions on express clauses. Even more, in those cases, first, the India-Kuwait BIT and the Ecuador-US BIT, respectively, contain an effective means provision separate from that of the FET. Second, the claimants made two distinct claims under FET and effective means. Third, the tribunal analyzed both claims separately. Fourth, the tribunals recognized that the standards involved a distinct test. Clearly, the FET and the 'effective means' standard are autonomous.

144. All things considered, since the preamble does not give rise to a binding 'effective means' obligation, the claim should be dismissed.

B. In any case, Respondent granted Claimant effective means to assert its rights

145. Even if the tribunal considers that Respondent has an obligation to guarantee Claimant effective means to assert its rights, Respondent did not breach this standard.

146. The effective means protection seeks to guarantee the access to State's courts and the existence of institutional mechanisms for the protection of investments. This standard is systematic:

> [T]he State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach [of the standard].[211]

147. A delay in the means for asserting claims or enforcing rights must be undue in order to amount to a denial of access to those means.[212] Therefore, Claimant must prove that the duration of the enforcement proceeding of the Award was undue or unjustified.

148. In *Chevron*, the tribunal held that, although the claimants' seven breach-of-contract cases had been pending for 13 years, that delay did not result in an automatic breach of the 'effective means' standard. On the contrary, the tribunal held that it had to consider the evidence regarding the reasons for such delay.[213]

[211] *AMTO*, ¶88.
[212] *Chevron*, ¶250.
[213] *Chevron*, ¶253.

149. Indeed, the limit of reasonableness depends on the circumstances of the particular case.[214] Whether or not effective means have been provided by the host State is to be measured against objective elements.[215] A simple allegation is not sufficient. In this line, the tribunals in *Chevron* and *White Industries* agreed that some of the factors that may be considered are: i) the complexity of the case, ii) the behavior of the litigants involved, iii) the significance of the interests at stake in the case, and iv) the behavior of the courts themselves.[216]

150. In the present case, Respondent's judiciary worked effectively in handling Claimant's enforcement application. The duration of the enforcement proceedings is reasonable considering the complexity and characteristics of the case and the behavior of the litigants.

151. First, regarding the complexity of the case, the Tribunal must consider that, on one hand, the NHA submitted an opposition requesting the High Court to decline the enforcement of the Award on the ground that it was contrary to public policy.[217] On the other hand, on January 2012, during the course of the proceedings, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters.[218] This change in the legislation created a new controversy. Claimant argued that that the Commercial Bench had exclusive jurisdiction to hear enforcement applications.[219] The NHA, nonetheless, objected the Commercial Bench's jurisdiction on the grounds that the Commercial Courts Act 2012 only applied to commercial suits and not to enforcement proceedings.[220] This took two years until the High Court solved the matter in 2014.[221] Then, Claimant's application was transferred to a regular bench of the High Court.

152. Second, Claimant itself contributed to the delay of the proceedings in several occasions.[222] As such, Atton Boro's legal strategy was itself a delaying reason.

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[214] *Chevron*, ¶250.
[215] *Chevron*, ¶263.
[216] *Chevron*, ¶250; *White Industries*, ¶¶4.4.5-4.4.6.
[217] UF, 936-937.
[218] UF, 938-943.
[219] Notice of Arbitration, 255-259.
[220] Notice of Arbitration, 287-289.
[221] Notice of Arbitration, 301-309.
[222] Notice of Arbitration, 219-222 and 284-286.

153. To conclude, given the complexity and characteristics of the case and the parties' litigation strategy the delay appears to be justified. Hence, Respondent provided Claimant with effective means to enforce its rights and, therefore, the claim must be rejected.

IV. In the alternative, the alleged damages under the breach of both the umbrella clause and the effective means standard are equivalent

154. If the Tribunal considers that Respondent breached the umbrella clause as well as the effective means standard, Claimant must not receive compensation for each breach separately. Instead, Claimant must only be compensated with the amount of USD 40,000,000.

155. The prohibition of double recovery is a well-established principle in international law.[223] As stated by the tribunal in *Total*, if different breaches to substantives provision of BITs produce the same damages to the same assets, an arbitral tribunal cannot award double recovery.[224] In that case, the tribunal had assessed whether the decision of Argentina to *de facto* freeze gas tariffs implied both an indirect expropriation and a violation of the FET standard. The tribunal concluded that, even if no indirect expropriation had occurred, no additional compensation could be awarded as the damages presumably caused by the alleged expropriation were the same as those caused by the violation of the FET standard.[225]

156. Moreover, the tribunal in *Suez* held that "[w]hile international law requires full compensation for injury, it does not allow for more than full compensation".[226] In fact, the tribunal suggested that if actual double recovery was proven, an arbitral tribunal must not award it.[227] In that case, the tribunal would not have awarded compensation to the claimants if Argentina had established that its national courts would have decided in favor of Aguas Argentinas S.A. in the commercial trial the latter initiated before the claimants.

157. Analogously, in *Venezuela Holdings*, a parallel ICC case decided that a Venezuelan Decree-Law constituted a discriminatory measure and awarded one of the claimants in the investor-

[223] *Venezuela Holdings*, ¶378.
[224] *Total*, ¶198.
[225] *Total*, ¶198. A similar approach was adopted by the tribunal in *Gemplus*, ¶12.52.
[226] *Suez*, ¶38; *AWG II*, ¶38.
[227] *Suez*, ¶38; *AWG II*, ¶38.

State proceeding a compensation for the damages arising out of the State's measure.[228] The tribunal recognized that there was a threat to double recovery as the measure that gave rise to the dispute was also a measure at issue in the ICSID proceeding and as one of the claimants had already been compensated.[229]

158. In the present proceedings, the termination of the LTA gave rise to the ICC arbitration commenced by Claimant which resulted in the Award.[230] Therefore, the Award is nothing but the quantification of the damages allegedly caused by way of the LTA's termination. If the umbrella clause is aimed to protect the LTA and if providing effective means intends to protect the Award which quantifies the damages caused to the LTA, then breaches to those standards contribute to causing the same damage to the same asset: the LTA. Awarding Claimant more than USD 40,000,000 would mean awarding an actual double recovery.

159. Thus, if the Tribunal finds Respondent liable for the breaches of the umbrella clause and the 'effective means' standard, it should not award Claimant more than USD 40,000,000 in order to avoid the imminent threat of double recovery.

[228] *Venezuela Holdings*, ¶379.
[229] *Venezuela Holdings*, ¶379.
[230] UF, 930-934.

REQUEST FOR RELIEF

160. For the aforementioned reasons, Respondent respectfully requests the Tribunal to find that:

(1) It lacks jurisdiction over any claims with respect to the enforcement of Award;

(2) Claimant cannot avail itself of the benefits of the BIT by virtue of Art. 2(1) of the BIT;

(3) Respondent has not violated any substantive protections of the BIT;

(4) Respondent is entitled to the restitution by Claimant of all costs related to these proceedings; and

(5) Respondent is entitled to any other relief considered appropriate by this Tribunal.

Respectfully submitted on 25 September 2017 by

Team Lipton
On behalf of Respondent
The Republic of Mercuria