PERMANENT COURT OF ARBITRATION

In the Proceeding Between

ATTON BORO LIMITED

(Claimant)

v.

REPUBLIC OF MERCURIA

(Respondent)

MEMORIAL FOR THE RESPONDENT

September 25, 2017

TABLE OF CONTENTS

Contents

LIST OF LEGAL SOURCES

JUDICIAL DECISIONS AND ARBITRAL AWARDS

ICJ	Corfu Channel Case (UK v. Albania) ICJ Reports 1949, Merits Judgment of 9 April 1949 *cited as: Corfu Channel Case*
	Elettronica Sicula S.p.A.(United States of America v. Italy) I.C.J. Reports 1989, Judgment of 20 July 1989 *cited as: ELSI Case* Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia), 20 December 1994 *cited as: Gabcikovo-Nagymaros Case*
	North Sea Continental Shelf Cases (Germany v. Denmark and the Netherlands), ICJ, Judgment of 20 February 1969 *cited as: North Sea Continental Shelf Cases*
PCA	Chevron Corporation and Texaco Petroleum Corporation v, The Republic of Ecuador UNCITRAL, PCA Case No. 2009-23 *cited as: Chevron*
	Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award of January 2014 *cited as: GAI*
	Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, PCA Case No. 2015-13 *cited as: Almas*
	Romak S.A. (Switzerland) v. The Republic of

	Uzbekistan, PCA Case No. AA280 *cited as: Romak*
UNCITRAL	Apotex Holdings Inc. and Apotex Inc. v. United States of America, UNCITRAL Award 14 June 2013 *cited as: Apotex*
	Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL Award 12 January 2011 *cited as: Grand River*
	Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL Award 15 December 2014 *cited as: Hesham*
	Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL Award 23 April 2012 *cited as: Oostergetel*
	Methanex Corporation v United States of America UNCITRAL Award 3 August 2005 *cited as: Methanex*
	National Grid PLC v. The Argentine Republic UNCITRAL Award 3 November 2008 *cited as: National Grid*
	Saluka Investments B.V. v. The Czech Republic, UNCITRAL Award 17 March 2006 *cited as: Saluka*
	Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL Award 28 April 2011 *cited as: Paushok*

	White Industries Australia Limited v. The Republic of India, UNCITRAL Award 30 November 2011 *cited as: White Industries*
US-IRAN CLAIMS TRIBUNAL	Grimm v. The Government of the Islamic Republic of Iran (Case No. 71), ILR. Vol. 71,18 February 1983 *cited as: Grimm*
ICSID	Aguas del Tunari v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005 *cited as: Aguas del Tunari*
	Ampal-American Israel Corporation and others v. Egypt, ICSID Case No. ARB/12/11, IIC 970, Decision on Jurisdiction, 1 February 2016 *cited as: Ampal-American*
	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009 *cited as: Bayindir*
	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 *cited as: CSOB*
	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011 *cited as: El Paso* Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final

	Award, 16 March 2017 *cited as: Eli Lilly*
	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007 *cited as: Enron*
	GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award, 31 March 2011 *cited as: GEA*
	Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010 *cited as: Hamester*
	Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010 *cited as: Global Trading*
	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008 *cited as: Jan de Nul*
	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004 *cited as: Joy Mining Machinery*
	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, 25 July 2007 *cited as: LG&E*

	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 *cited as: Loewen*
	Malaysian Historical Salvors Sdn Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2001 *cited as: Malaysian Salvors*
	Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment, 1 November 2006 *cited as: Mitchell*
	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004 *cited as: MTD*
	Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005 *cited as: Noble*
	Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award on Jurisdiction, 1 June 2012 *cited as: Pac Rim Cayman*
	Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007 *cited as: Parkerings*
	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of

	Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 *cited as: Philip Morris*
	Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2001 *cited as: Saipem*
	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 *cited as: Salini*
	SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 *cited as: SGS (Pakistan)*
	Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 *cited as: Tecmed*
	Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 *cited as: Waste Management*

LIST OF AUTHORITIES

BOOKS, ARTICLES, THESES, AND DISSERTATIONS

Aust, Athony	Modern Treaty Law and Practice. (Cambridge University Press. 2000) *cited as: Aust*
Dolzer, Rudolf and **Schruer,** Christoph	Principles of International Investment Law 2nd Edition (Oxford University Press. 2012) *cited as: Dolzer and Schruer*
Gibson, Christopher	A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation (American University International Law Review 25, No. 3. 2010) *cited as: Gibson*
Keller, Helen and **Grover**, Lena	General Comments of the Human Rights Committee and Their Legitimacy in UN Human Rights Treaty Bodies: Law and Legitimacy (Cambridge University Press. 2012) *cited as: Keller and Grover*
Linderfalk, Ulf	On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (Springer Science and Business Media. 2007) *cited as: Linderfalk*
Mistelis, Louka	Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement. (ICSID Review, Vol. 28, No. 1. 2013) *cited as: Mistelis*
Newcombe, Andrew Paul	Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid? (LLM thesis, University of Toronto. 1999)

cited as: Newcombe

Ruse-Khan, Henning Grosse — Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation (University of Cambridge Faculty of Law Legal Studies, Working Paper No. 52/2014. 2014)
cited as: Ruse-Khan

Vadi, Valentina — *Public Health in International Investment Law and Arbitration* (Taylor & Francis Ltd. 2012)
cited as: Vadi

Van den Berg, Albert John — Authoritative Treatise on the New York Convention (The New York Arbitration Convention of 1958)
cited as: Van den Berg

MISCELLANEOUS

N.Y.U. Journal of Intell. Prop. & Ent. Law Vol. 5:1, p.123 (2015)
cited as: NYU Journal

WIPO, Chapter 2 Fields of Intellectual Property Protection. *(http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf)*
cited as: WIPO

WEB SOURCES

International Accounting Standard, IAS 38 – Intangible Assets — https://www.iasplus.com/en/standards/ias/ias38#link7

Conceptual Framework - Definition of elements (IASB) — https://www.iasplus.com/en/meeting-notes/iasb/2013/february/cf-elements

State Contracts. United Nations Conference of Trade and Development. UNCTAD Series, 2004	unctad.org/en/Docs/iteiit200411_en.pdf

LIST OF STATUTES, TREATIES, AND OTHER INTERNATIONAL INSTRUMENTS

MB-BIT	Agreement Between the Republic of Mercuria and The Kingdom of Basheera For the Promotion and Reciprocal Protection of Investments (1998)
WTO Agreement	Agreement Establishing the World Trade Organization (1995)
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property
CAFTA	Central America Free Trade Agreement (2004)
WTO Dispute Settlement	Dispute Settlement Understanding of the WTO
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ASR or ILC ASR	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001)
ILC Report	Report of the International Law Commission on the work of its fiftieth session, (A/53/10)
PCA Rules 2012	Permanent Court of Arbitration Arbitration Rules of 2012
VCLT	Vienna Convention on the Law of Treaties (1969)
Doha Declaration	Doha Declaration on the TRIPS Agreement and Public Health (2001)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States

LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/ Paragraphs
%	Percentage
ABC	Atton Borro and Company
ABG	Atton Borro Group
AIDS	Acquired Immunodeficiency Syndrome
Art. / Arts.	Article/ Articles
Basheera	Kingdom of Basheera
BIT/ BITs	Bilateral Investment Treaty/ Bilateral Investment Treaties
DoB	Denial of Benefits
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
GAFTA	Grain And Feed Trade Association
GDP	Gross Domestic Product
High Court	High Court of Mercuria
HIV	Human Immunodeficiency Virus
IAS	International Accounting Standards
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Id.	Idem
ILC ASR	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IP	Intellectual Property

IPL	Intellectual Property Law
LTA	Long Term Agreement
MB-BIT	Agreement Between the Republic of Mercuria and The Kingdom of Basheera For the Promotion and Reciprocal Protection of Investments
NHA	National Health Authority
No.	Number
Par.	Paragraph
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
R&D	Research & Development
Reef	People's Republic of Reef
Sec	Section
Supreme Court	Supreme Court of Mercuria
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
USD	US dollars
v	Versus
VCLT	Vienna Convention of the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

STATEMENT OF FACTS

A. The Agreement

1. On January 11, 1998, the Republic of Mercuria (the "Respondent") and the Kingdom of Basheera (Basheera) concluded an *Agreement for the Promotion and Reciprocal Protection of Investments* ("MB-BIT").[1] The parties exchanged their instruments of ratification of the MB-BIT on March 10, 1998 and thirty days after the MB-BIT entered into force on April 9, 1998.[2]

B. The Claimant

2. Atton Borro Limited (the "Claimant") was incorporated by the Atton Borro Group ("ABG") - a leading drug discovery and development enterprise - as its wholly owned subsidiary in Basheera.[3] The shares of the Claimant are currently held by ABG affiliates, which are all ultimately controlled by the Atton Boro and Company ("ABC"), a corporation organized under the laws of the People's Republic of Reef ("Reef"), a third party state.[4]

3. The Claimant's principal dealings involve long-term public-private collaborations with States and State agencies for the manufacture and supply of essential medicines at competitive rates. It entered into the Mercurian market by concluding several agreements with Respondent as well as the newly set up Mercuria National Health Authority (the "NHA"). The Claimant and the NHA concluded a Long Term Agreement ("LTA") for the purchase and supply of the drug Sanior on July 20, 2004.[5]

---

[1] Record, par. 1, p. 28.
[2] Art. 14, MB-BIT.
[3] Supra see footnote 1 at par. 4.
[4] Id. at par. 2.
[5] Record, pars. 6 & 9.

4. ABC funded the Claimant to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA.[6]

5. The NHA terminated the LTA with the Claimant on June 10, 2008 citing unsatisfactory performance by the Claimant.[7]

6. From 1998 to 2016, the Claimant has had only between 2 and 6 permanent employees (*e.g.*, manager, accountant, commercial lawyer, patent attorney) working in Basheera managing its patents and providing support for regulatory approval, marketing, and sales as well as legal, accounting and tax services for ABG affiliates.[8] The Claimant neither owns any manufacturing units in Basheera nor concluded any agreements to manufacture and supply medicines in the latter.

C. The Respondent

7. The Respondent is a developing country which is among those countries with an increase occurrence of *greyscale*, a critical sexual-communicable and incurable epidemic disease that affects mainly working aged individuals.[9]

D. The Investment

8. The Claimant's Mercurian Patent No. 0187204 for Valtervite which was assigned to it by ABG was granted on February 21, 1998.[10] Valtervite is the only effective greyscale treatment available for patients in the Respondent State.[11] Sanior, the

[6] PO3, p. 2.
[7] Record, par. 17.
[8] PO2, par. 3.
[9] Supra see footnote 1 at par. 6.
[10] Record, par. 3-4, p. 28.
[11] PO3, p. 2.

drug which contains the active ingredient Valtervite is being marketed by the Claimant at a regular price of US$36/ pill.[12]

E. Governmental Action

9. The Respondent, guided by the reports of the NHA, aimed to provide accessible and affordable medications to the increasing number of people suffering from greyscale, promulgated Law No. 8458/09 amending its Intellectual Property Law[13]. The law allowed for compulsory licensing in accordance with the TRIPS Agreement. Pursuant to such law, the Respondent's High Court (the "High Court") granted a compulsory license for Valtervite in favour of HG-Pharma on the ground that the drug Sanior which contains the compound Valtervite is not available to the public at a reasonably affordable price.[14]

10. During the application for the compulsory license to manufacture Sanior filed by HG-Pharma before the High Court, the Claimant was impleaded as a party and was awarded 1% royalty of total earnings.[15]

F. The Arbitral Award Enforcement Proceeding

11. Following a favourable judgment in relation to the termination of the LTA rendered by the tribunal in People's Republic of Reef ("Reef"), the Claimant sought to enforce the arbitral award (the "Award") before the High Court of Mercuria. It filed an enforcement proceeding on March 3, 2009. The High Court heard the application on March 16, 2009 and notified the NHA. The NHA moved

[12] Record, p. 42.
[13] Record, par. 20.
[14] Id. at par. 21.
[15] PO3, p. 2.

to decline the enforcement of the Award on the ground that it was contrary to public policy.[16]

12. To resolve the issue of public policy consideration the High Court referred to the New York Convention as well as the existing decisions of the Supreme Court of Mercuria ("Supreme Court"). The High Court requested for position papers from both parties to properly dispose of the case.[17]

13. On April 30, 2012, the Claimant requested the transfer of the case to a newly constituted commercial bench. The case was subsequently transferred and heard however it was reassigned to the regular bench following the clarification issued by the Supreme Court on the jurisdiction of the Commercial bench.[18]

14. When the High Court was about to decide on the public policy consideration, both the Claimant and the NHA informed the court that they intended to settle the case amicably. On October 30, 2016, the Claimant informed the court that settlement had failed.[19] The LTA award enforcement proceedings remain pending before the High Court.[20]

G. Proceedings before the Permanent Court of Arbitration (PCA)

15. On November 7, 2016, the Claimant commenced arbitral proceedings against the Respondent before the PCA pursuant to Article 3 of the PCA Rules 2012.

[16] Record, pars. 17-18.
[17] Record, par. 16.
[18] Record, par. 19.
[19] Record, par. 12.
[20] P03, p.2.

SUMMARY OF ARGUMENTS

16. **JURISDICTION.** Respondent respectfully submits that all of Claimant's prayers for relief must fail as this Honorable Tribunal lacks jurisdiction over the current proceedings. This Tribunal lacks subject matter jurisdiction over any claims in relation to the Award. Should this Tribunal find otherwise, it still cannot rule on any of the Claimant's submissions as this Tribunal lacks jurisdiction over the Claimant's submissions because the Respondent had validly the benefits of the MB-BIT to the Claimant.

17. **MERITS.** In the event that this Tribunal finds that it has jurisdiction over the current proceedings, all the claims advanced by the Claimant must fail because the Respondent did not violate any of the substantive provisions of the MB BIT. First, the Respondent treated Claimant's investment fairly and equitably because it (a) took measures that were not unreasonable, arbitrary, or discriminatory; (b) acted with transparency; (d) accorded it due process of law; and (e) met Claimant's legitimate expectations. Second, the Claimant failed to prove that the conduct of Respondent's judiciary in relation to the enforcement proceedings amounts to a violation of Art. 3(3) of the MB-BIT. Third, the termination of the LTA was not attributable to the Respondent, and in any event, the termination was valid due to a prevailing state of necessity in the Respondent.

ARGUMENTS

PART ONE: JURISDICTION

ISSUE 1. THE TRIBUNAL HAS NO SUBJECT MATTER JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD.

19. Art. 8(1) of the MB-BIT lays down the jurisdiction of this Tribunal, which includes disputes over investments.[21] Art. 1 of the MB-BIT defines and enumerates the forms of investments under its protection.[22] The Award obtained by the Claimant does not constitute an "investment" over which this Tribunal has jurisdiction. Alternatively, the underlying transaction of the award – the LTA – is not an "investment." Therefore, the Award cannot be considered an "investment." As the Award is not an "investment," this Tribunal lacks jurisdiction to hear any claims in relation to it.

I. THE AWARD OBTAINED BY THE CLAIMANT DOES NOT CONSTITUTE AN INVESTMENT OVER WHICH THIS TRIBUNAL HAS JURISDICTION.

20. No valid interpretation allows the Award obtained by the Claimant to be recognized as an investment, and therefore come under the jurisdiction of this Tribunal.

A. The Award, by itself, does not fall within the ordinary and inherent meaning of the term "investment."

[21] Art. 8, MB-BIT.
[22] Art. 1, MB-BIT.

21. Art. 1 of the VCLT states that a treaty should be interpreted in good faith using the ordinary meaning of its terms. It is important to consider a term's ordinary meaning since it is reasonable to assume that it was what the parties intended in drafting the treaty.[23] This being the case, the ordinary meaning of an investment is "an expenditure to acquire property or assets to produce revenue; a capital outlay. The asset acquired or the sum invested.[24]" From this, it is clear that an "investment" inherently involves some type of expenditure with the expectation of profit or economic benefit. Because the Award does not involve such an expenditure, it is not an "investment."

22. Under the New York Convention and the ICSID Convention – both of which the Claimant and the Respondent are parties – the term "arbitral award" is not defined. We move this tribunal to consider the ordinary term of an arbitral award which is "an instrument that brings an end to a dispute with a decision rendered by an independent and impartial tribunal and are capable of being enforced.[25]" Against this ordinary meaning of an arbitral Award, it will be seen that, by itself, it is not an investment under Art. 1 of the MB-BIT. As the ordinary and inherent meaning of an "arbitral award" does not include an expenditure with the expectation of profit or economic benefit, the Award cannot be considered an "investment" under Art. 1 of the MB-BIT.

[23] Aust, p. 188.
[24] Romak [citing Black's Law Dictionary]. See, footnote 152.
[25] Mistelis, p. 66.

B. An Award is not within the definition of an "investment" in the MB-BIT.

1. An Award is not expressly included in the definition and enumeration of what is considered an "investment" under the MB BIT.

24. Art. 1 of the MB BIT defines and enumerates what are considered "investments." Nothing in Art. 1 expressly mentions an arbitral award, or anything closely analogous to it. Hence, not being expressly included by the parties, it is deemed excluded. The generally accepted principle of *expressio unius est exclusio alterius,* or the express mention of one thing excludes all others, is an accepted maxim in treaty interpretation.[26] As the parties did not expressly include an arbitral award as a form of an "investment" in any of the provisions in the MB BIT, then it is deemed excluded.

2. The contracting parties did not expressly intend to cover an arbitral award as an "investment" under the MB BIT.

25. The task of interpretation is to "giv[e] effect to the expressed intention of the parties, that is, their intention as express by them in the light of sorrounding circumstances."[27]

26. The circumstances of both parties of the MB-BIT are that they are developing countries. Applying Art. 31 of the VCLT, we can glean from the preamble of the MB

[26] Linderfalk, p. 299.
[27] Supra see footnote 3.

BIT that one of the purpose "object and purpose[28]" of the MB-BIT is to protect those investments that will "…stimulate the flow of private capital and the economic development of the Contracting Parties.[29]" The MB-BIT was intended to be a means to develop the contracting partie's respective economies.

26. As the parties did not expressly include an arbitral award as a form of an "investment" in any of the provisions of the MB-BIT, then it must be interpreted as the parties not intending to include an award as an "investment" because it would help in the parties' economic development. Hence, this tribunal must respect the parties' intentions and not unduly extend the protection of the MB-BIT to one that was not included by the parties.

3. In any event, an arbitral award is not analogous to any of the items that are to be considered "investments" in the non-exhaustive list in the MB BIT, so it is excluded.

27. Respondent admits that the enumeration in Art. 1 of the MB BIT is not exhaustive; however, the Award cannot still be considered as an "investment" because: (a) it is still not within the ordinary meaning of the term "investment"; (b) it cannot be interpreted as analogous to a term in the list, specifically "claim to money"; and (c) it is really analytically distinct from an "investment".

[28] Art. 31, VCLT.
[29] Preamble, MB-BIT.

a. The Award cannot still be included in the non-exhaustive list as it does not fall under the ordinary and inherent meaning of the term "investment."

28. The Award fails to satisfy the ordinary and inherent meaning of an "investment" under Art. 1 of the MB BIT, *supra*. In *Romak*, applying Art. 31 of the VCLT, the tribunal held that any inclusion to a non-exclusive list must be done by giving an ordinary meaning to the term "investment", which is any activity that entails expenditures or contributions for the purpose of obtaining profit or an economic benefit. This meaning is intrinsic to the word "investment" and cannot be ignored.[30]

29. In *Romak*, similar to the case at bar, the claimant argued for the inclusion of an arbitral award as an "investment" in a non-exclusive list in a BIT that has similar provisions as the MB-BIT. The *Romak* tribunal ruled against the claimant because an award, by itself, does not conform to the ordinary meaning of the word "investment".[31]

b. The Award cannot be interpreted as a claim to money so it should not be covered by the MB BIT.

[30] Romak, par. 188.
[31] Id.

30. The Award should not be interpreted as falling under Art. 1 par. c of the MB BIT as a "claim to money"[32] because doing so would violate Art. 32 of the VCLT as it would lead to a "leads to a result which is manifestly absurd or unreasonable[33]." This tribunal should be guided by the reasoning in *Romak* tribunal. In the *Romak*, the claimant also argued that an arbitral award, the GAFTA award, falls under "claims to money."

31. The *Romak* tribunal disagreed with the claimant. "[T]his is untenable as a matter of law" because this would mean that "the refusal or failure of the host State's courts to enforce such an award would therefore arguably provide sufficient grounds for a *de novo* review"[34] that the contracting States did not expressly, or impliedly, intend to happen. Thus, the argument that the Award is a "claim to money" must fail and violates Art. 31 of the VCLT.

c. The Award, though containing rights or obligations, remains analytically distinct from an "investment".

32. In *GEA*, the tribunal ruled that while an arbitral award contains a determination of the parties' rights and obligations, it is still analytically distinct from an "investment."[35] In *GEA*, similar to the present case, claimant GEA argued that the arbitral award

[32] Art. 1(c), MB-BIT.
[33] Art. 32, VCLT.
[34] Supra see footnote 11 at par. 186.
[35] GEA.

should be considered as an "investment." The reasoned that an unpaid arbitral award "in and of itself" could not constitute as a protected "investment".[36]

33. Furthermore, an arbitral award, as a legal instrument that provides for the disposition of rights and obligations, remains "analytically distinct [as] the Award itself involves no contribution to, or relevant economic activity within the [host state].[37]" Thus while the Award conferred to the Claimant contains a disposition of rights and obligations, it still cannot be considered as an "investment" because, by itself, it is distinct from an "investment".

B. The Award fails to satisfy the recognized hallmarks of what constitutes as an "investment".

1. The Award does not meet the Salini Test.

34. Respondent submits that the Award does not pass the *Salini Test*, one of the recognized tests for the recognition of the existence of an "investment" as developed in *Salini*.[38] Under the test, one can ascertain that: (a) the Claimant had not made any significant contribution in relation to the Award "in money, in kind, or in industry"[39] (without reference to the costs associated with litigation); (b) the Award involved no risk as envisioned by the test (*e.g., force majeure*);[40] (c) there was no certain

[36] Id. at par. 161
[37] Id. at par. 162.
[38] Salini.
[39] Id. at par. 53.
[40] Id. at par. 55.

prescribed duration related to the Award; and (d) the Award did not contribute to economic development in the form of benefiting the public interest of the contracting States and a transfer of know-how.[41] Based on these, the Award is not an "investment".

2. The Award does not contribute to the economy of any of the contracting States, thus missing a central hallmark of an "investment".

35. In *CSOB*[42] and *Mitchell,*[43] the tribunals ruled that contribution, in one way or another, to the promotion of the economy of one of the contracting States is an essential hallmark of an investment. The Award, by itself, does not contribute to the economy of the contracting States for the simple reason that it is the investor who will benefit from the Award, and not the parties to the MB BIT.

4. The Award is not an asset under International Accounting Standards, therefore, not also an investment.

36. IAS recognizes two forms of assets, those with physical substance (*e.g.*, cash, inventory, property) and those that are non-monetary or without physical substance (*e.g.*, legal rights, franchise agreements, trademarks).[44] As the Award is clearly not of the former, then it is as an intangible asset. One form of an intangible asset is indeed a

[41] Id at par. 57
[42] CSOB, par. 64
[43] Mitchell, par. 33
[44]International Accounting Standard, IAS 38 – Intangible Assets, <https://www.iasplus.com/en/standards/ias/ias38#link7> (Accessed September 15, 2017).

legal right. However, the IAS requires that the legal right must be enforceable for it to be recognized an asset.[45] The Award as it currently stands is a mere legal document that the High Court of Mercuria has yet to enforce. Even Claimant recognizes this fact when it initiated the enforcement proceedings. Hence, the Award should not be considered as an asset under Art. 1 of the MB BIT.

37. Moreover, the Award was not issued under the auspices of the ICSID Convention, which provides that arbitral awards under the convention are binding and final and are not reviewable by domestic courts.[46] Instead, both parties are Members of the New York Convention that allows for the review of arbitral awards by domestic courts[47]. Hence, the Award is neither final nor binding and cannot give rise to legal rights. It is clear, therefore, that because the Award is not an asset, it is not an "investment".

II. Alternatively, the underlying transaction of the award – the LTA – is not an "investment"; therefore, the Award cannot be considered an "investment".

38**.** Since the Award stemmed from the termination of the LTA, which is not an "investment", the Award itself cannot be considered an "investment".

A. The LTA is a simple commercial contract, and not an "investment".

[45]Conceptual Framework - Definition of elements (IASB) <https://www.iasplus.com/en/meeting-notes/iasb/2013/february/cf-elements> (Accessed September 15, 2017).
[46]Article 53-54, ICSID Convention.
[47] Art. V, par. 2(b), New York Convention.

39. Respondent submits that the LTA, being a simple commercial contract, cannot be considered an investment under the MB BIT.

1. The LTA fails to meet the standards on what constitutes an "investment" in the MB BIT.

40. A commercial contract is not within the meaning of an "investment" in the MB BIT. It is not within the term's ordinary meaning as it is a mere commercial agreement[48]. While Art.1(e) of the MB BIT includes a "contract, to undertake any economic and commercial activity" as an "investment", interpreting a mere commercial contract – not an investment agreement – as an "investment" violates the ordinary meaning of the phrase and leads to an absurd situation wherein any contract of any nature, if breached, has the potential to drag one of the parties to the MB BIT before an international arbitral tribunal. This is not something that the parties contemplated and violates the principle of interpretation in accordance with the intent of the parties under Art. 32 of the VCLT[49].

41. The principle of *ejusdem generis*, which is recognized and accepted in international law as an aid to treaty interpretation,[50] also leads to the conclusion that the contract is not an "investment". In Art. 1 par. e of the MB BIT, a contract, to be considered an "investment", is qualified by the phrase "to search for, cultivate, extract or exploit

[48] Supra see footnote 11 at par. 187.
[49] Art. 32, VCLT.
[50] Grimm, pp. 650ff.

natural resources…[51]" These terms are found in a concession agreement in the form of a State contract,[52] which involves large infusions of capital (*e.g.*, contracts of infrastructure and mining projects). The LTA is not a State contract because the Respondent State or any of its organs is not a party to it. Nor does it involve an agreement that requires large infusions of capital. The LTA is a purchase contract. Hence, it cannot fall under the contracts that Art. 1(e) of the MB BIT contemplates.

2. It satisfies all the characteristics of a simple purchase and supply contract.

42. The LTA is a simple purchase-and-supply contract for the drug Sanior. In *Global Trading,*[53] which also involved the unilateral termination of a contract involving the purchase and supply of poultry to the State of Ukraine to alleviate a sharp rise in the price of food,[54] the tribunal did not characterize such a contract as an "investment". Rather, it is a simple sale or purchase contract, defined as contracts with limited duration, for the purchase and supply of goods, delivery, and final payment, and this kind of contract cannot be construed as an "investment".[55]

43. In the case before this Tribunal, the LTA is clearly a simple purchase contract. It had a limited duration of ten (10) years; its object is the purchase and delivery of Sanior;

---

[51] Art. 1(e) MB-BIT.
[52] State Contracts. United Nations Conference of Trade and Development. UNCTAD Series, 2004. Available at <unctad.org/en/Docs/iteiit200411_en.pdf> (Accessed September 14, 2017).
[53] Global Trading.
[54] Id., par. 36.
[55] Id., par. 55-56.

and it also requires final payment[56]. Thus, the LTA is not "investment", and by extension, the Award is also not an "investment".

3. The LTA also fails to satisfy the other recognized standards on what an "investment" is.

a. The LTA fails the Salini Test.

44. The LTA does not pass the *Salini Test* because it does not satisfy all three (3) out of the four (4) criteria under the test. It does not have the elements of contribution, risk, and economic benefit to the host State.

45. As to the element of contribution, the contribution of money in the performance of the obligations under the LTA is a normal business expense that cannot be construed as a "contribution" in the context of an "investment".[57] Money was not also to be contributed in furtherance of a venture.[58]

46. As to the element of risk, under the uncontested facts, the element of risk is absent because the Claimant does not risk to lose profits since there is a guaranteed minimum order of Sanior in the LTA.[59] There is also no political risk for the Claimant as nothing in the Record suggest that the political climate in Mercuria is unstable. The

[56] Record, par. 10.
[57] Supra see footnote 34 at par. 56.
[58] Supra see footnote 11 at par. 222.
[59] Record, par. 10.

early termination of a contract is a normal business risk that an investor faces and is not one that is envisioned under the *Salini Test*.[60]

47. As to the element of economic development, under the *Salini Test*, two criteria must be met in order for an activity to contribute to the economic benefit of a host State: (a) benefit to the public, and (b) transfer of know-how. All trade and legal contracts bring in some benefit to the host State. However, by themselves alone, these “benefits” are not the kind that is envisioned in *Salini*.[61] Such is the case with the LTA. There is also no transfer of know-how whatsoever as the LTA is a simple purchase contract. Therefore, it unequivocally does not pass the *Salini Test*, and is not an “investment”.

b. The LTA did not contribute to the economy of Respondent.

48. There is no evidence of a significant contribution to the economy of the Respondent. In *Malaysian Salvors,* the tribunal ruled that a positive and significant contribution to the economic development of the host State is a requirement for an “investment”. The enhancement of the GDP of the local economy is the mark of economic development[62]. Nothing on record suggests that the LTA, through the supply of Sanior to the NHA, contributed to the economic development of the Respondent.

[60] Supra see footnote 11 at par. 229.
[61] Supra see footnote 38.
[62] Malaysian Salvors, par. 73-74.

Neither was evidence put forward that the LTA contributed to the enhancement of the Respondent's GDP.

c. No exceptional circumstance exist that would allow the LTA to be considered as an investment.

49. *Joy Mining Machinery*,[63] which also has similar facts as the present case, stated that contracts to supply a State with Phosphate mining equipment "are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order."[64] Respondent submits that no exceptional circumstance exists for the LTA to considered an "investment"; hence, it is not an "investment".

B. The Award is not part of the underlying transaction – the LTA. Consequently, the LTA did not transform into an "investment" in the form of an award.

50. The Respondent submits that this Tribunal should not be persuaded by the reasoning in *Saipem,*[65] which ruled that an award is part of an "investment", and hence, must be protected. Respondent advances two reasons: first, the material facts in *Saipem* are

---

[63] Joy Mining Machinery.
[64] Id. at par. 58.
[65] Saipem.

different from the present case; and second, the *Saipem* tribunal has itself admitted that it was not ready to recognize an arbitral award as an "investment".

51. First, in *Saipem*, the unpaid claim to money arising from the pipeline contract, which gave rise to the ICC Award, was in and of itself an "investment" under the Italian-Bangladeshi BIT. The rights and obligations of the parties arose from the pipeline contract.[66] It could then be reasonably argued that the ICC Award was an extension of an investment. Such does not situation in the case at bar because the LTA is not an "investment" under the MB BIT.

52. Second, by its own admission, the *Saipem* tribunal did not categorically state that an award, by itself, is an "investment". *Saipem* was "not prepared to accept"[67] that an award is an "investment"..

53. Consequently, the LTA is not an investment in and of itself. This means that it cannot transform into an "investment" in the form of the Award. According to *Romak*, "if the underlying transaction is not an investment... the mere embodiment or crystallization of right arising thereunder... cannot transform it into an investment."[68]

[66] Id. at pars. 100-101.
[67] Id. at par. 113.
[68] Supra see footnote 11 at p. 211.

ISSUE 2. THE CLAIMANT WAS VALIDLY DENIED THE BENEFITS OF THE MB BIT BECAUSE THE RESPONDENT EXERCISED ITS RIGHTS UNDER ART. 2 OF THE MB BIT.

I. THE CLAIMANT MEETS THE REQUIREMENTS OF ART. 2(1) OF THE MB BIT AS AN ENTITY THAT CAN BE VALIDLY DENIED THE BENEFITS OF THE MB BIT.

54. In the unlikely event that this Tribunal does not grant the Respondent's preceding submissions, the Respondent submits that the Tribunal should nevertheless decline jurisdiction to hear any and all of the Claimant's submissions as the Claimant is a legal entity that was validly denied the benefits of the MB BIT.[69]

55. The Claimant meets both conditions in Art. 2(1) of the MB BIT as an entity that can be validly denied the benefits of the MB BIT. First, the Claimant is a legal entity that is owned *or* controlled by nationals of a third party State. Second, it has no substantial business activity in Basheera, the place of its incorporation. This being the case, **the** Respondent validly exercised its right to deny the Claimant benefits under the MB BIT. In addition, the Respondent timely and correctly exercised this right. The effect of the denial of benefits is, in any event, retroactive.

A. Citizens or nationals of a third State own and control the Claimant since it is a wholly owned subsidiary of ABG, and ABC (a national of Reef) ultimately controls it.

[69] Record, p. 33.

56. Under the Uncontested Facts, the Claimant is a wholly owned subsidiary of ABG[70]. While nothing on record indicates the nationality of ABG, the Claimant could have presented evidence that in fact ABG *is* a national of Basheera to conclusively prove that it is not owned by a national of a third party State. By not producing this evidence, as stated in *AMTO v Ukraine*, "negative inferences might be drawn against the claimant for a failure to provide the requested documents or information."[71] That negative inference is that if the Claimant submitted such evidence, it would hurt its case.

57. Even if it is ultimately found that ABG is not a national of a third party State, under Procedural Order No. 2[72], it is beyond dispute that ABC - an entity incorporated in a third party State - ultimately controls the Claimant because ABC controls its shares of stock.

58. Notably, that under the first condition in Art. 2(1) of the MB BIT, "controlled" is not qualified. Control of a legal entity can either be direct or indirect. As long as there is or was possibility of control, then the first condition is satisfied. This is in line with the reasoning in *Aguas*.[73] *Aguas del Tunari* stated that, "the adjective 'controlled' may indicate that 'control' was actually exercised at some point in the past or it may

[70] Record, par. 4.
[71]AMTO.
[72] Record, PO2, par. 6.
[73] Aguas del Tunari.

mean that another possessed the capacity to control that company in the past-or indeed at the present moment."[74]

59. Furthermore, under the Uncontested Facts, ABC is the holding company for ABG, which in turn wholly owns the Claimant.[75] A traditional holding company is a company created in order to "own shares in its groups of companies, with attendant benefits as to control, taxation and risk management for the holding company's group of companies."[76] It thus becomes evident that, by having the ability to control the Claimant's parent company, ABG, by extension then, ABC can either directly or indirectly control the Claimant. Hence "control" is established. Taking all the above into consideration, the first condition to deprive the Claimant of the benefits of the MB BIT is met.

B. The Claimant has no substantial business activities in Basheera, the place of its incorporation.

1. Claimant's business activities are merely of form and not substantial, and no evidence supports any other conclusion.

60. It is conceded that the wording in Art. 2(1) of the MB BIT states "business activity." It could then be argued that the scant entries on the Record of this case, such as renting an office, hiring a few permanent staff, and providing support for ABG

[74] Id at par. 233.
[75] Record, par. 2, 28.
[76] Pac Rim Cayman, par. 4.72.

affiliates[77] for 19 years in Basheera, would count as business activities, and therefore, refute the allegation that the Claimant has no business activity in Basheera.

61. However, the Respondent urges this Tribunal to notice that the word "business" is qualified by the adjective "substantial", and be guided by the reasoning in *AMTO*.[78] In *AMTO*, the tribunal stated that in the absence of the definition of the term "substantial" in the treaty, substantial "means of substance, and not merely of form… the materiality[,] not the magnitude of the business activity is the decisive question." The *AMTO* tribunal was satisfied that AMTO had substantial business activity in Latvia, on the basis of *investment-related activities* in its home State.[79]

62. Applying this reasoning to the present case, in the absence of the definition of "substantial" in the MB BIT, the Respondent submits that this Tribunal define "substantial" as one of materiality on the basis of investment-related activities. Hence, the business activities must be material to the nature of the Claimant's investments and not merely of form. It is uncontested that the Claimant's investment activities are related to the sale and manufacture of drugs,[80] most of which are conducted in the Respondent's territory, which included the establishment of a "robust manufacturing base." Curiously, none of these activities are carried out in Basheera.

---

[77] Record, par. 4, 28; PO2, par. 3.
[78] Supra see footnote 38.
[79] Supra see footnote 27 at par. 69.
[80] Record, par. 4.

63. What Claimant has in Basheera are business activities merely of form, as evidenced by a rented office space for the last 19 years for two (2) to six (6) staff members. The Claimant could have easily set up substantial business activities in Basheera, and yet Claimant refused to do so. Therefore, the Claimant has no substantial business activities in Basheera, the country where it was incorporated. This being the case, the second condition to deny it benefits under the MB BIT is also met.

2. The Claimant is similar to a "mailbox" or "shell" company and was established only as a vehicle by ABG to take advantage of the MB BIT.

64. *Ampal-American* held that "'mailbox' or 'shell' companies are those that have no economic connection to the state whose nationality is invoked.[81]" Respondent submits that the Claimant is merely a "mailbox" or "shell" company. As established earlier, it does not contribute to the economy of Basheera in any meaningful way, and aside from a rented space, has no meaningful connections to it.

65. The Claimant's true purpose of incorporation in Basheera is to take advantage of the latter's investment treaties. In other words, its sole reason to exist is to merely gain Basheeran nationality. The Record reveals that it was set up as a vehicle to conduct its parent companies' business in South America and Africa. From its inception, thus, the Claimant was never intended to have any significant ties to its host State. ABG

[81]Ampal-American, par. 125.

used, and still uses it, as a means to access the benefits under the BITs entered into by Basheera.

3. In any case, the Claimant bears the burden to prove its substantial business activities in Basheera, and it miserably failed.

66. The *AMTO* tribunal stated that in order for there to be a finding of substantial business activity, various evidence of the Claimant's investment-related activities must be submitted before the tribunal. The burden of proof of submitting evidence of its investment related activities lies with the Claimant. As the tribunal reasoned out, it is the Claimant who is in control of the pertinent documents and information, and hence, it can easily present them. The Respondent, on the other hand, might not necessarily have access to the said documents or information.[82]

67. Even this Tribunal's own rules, namely the PCA Rules 2012, reinforces this burden on the Claimant. Art. 20(4) of the Rules provides that, "the statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them."[83] Claimant has not submitted any evidence before this Tribunal to prove that it has investment-related activities in the State of its incorporation. It did not also do so in connection with its Initial Notice of Arbitration[84].

[82] Supra see footnote 38 at par. 65.
[83] Art. 24, par. 4, PCA Rules 2012.
[84] Record, pp. 1-6.

68. As a consequence of the failure of to present evidence, the tribunal in *GAI* ruled in favor of the validity of the denial of the benefits.[85] Respondent submits that this Tribunal can also make the same ruling in view of Claimant's fatal failure to present any evidence to prove that it is more than a "mailbox company".

II. The Respondent validly exercised its right to deny the benefits of the MB BIT to the Claimant.

69. The conditions under Art. 2(1) of the MB BIT could not be read too extensively as incorporating other conditions that are extrinsic to the exercise of the right. Under Art. 2 par. 1, there are no other conditions imposed upon the parties, except those discussed, *supra*. Any of the contracting States may thus invoke the right whenever and how ever they deem proper against an appropriate legal entity. The parties could have easily put forth any other conditions, but chose not to.

70. Nonetheless, the Respondent submits that: (a) it timely invoked the right; (b) it used it as a defense; and (c) Art. 2 of the MB BIT applies retroactively. Hence, all of the Claimant's submissions are bereft of merit.

A. Respondent timely invoked Art. 2 of the MB BIT.

[85] GAI, par. 370.

71. The Respondent submits that it timely invoked its right under Art. 2 of the MB BIT. *Pac Rim Cayman* stated that when the denial of benefit clause does not designate a timeline for its exercise, a Respondent State may invoke it at the time when the benefits of the BIT are claimed.[86] Indeed, this is logical as there would be nothing for the Respondent to deny at any other time. The Respondent could not reasonably know that the Claimant would invoke arbitration against it until the latter ultimately decides to do so and acts on it. Hence, the Respondent timely invoked Art. 2 when it submitted its Response to the Notice of Arbitration.[87]

B. Respondent correctly invoked Art. 2 of the MB BIT as a defense, per the PCA Rules 2012.

72. Under Art. 23 par. 2 of the PCA Rules 2012, "a plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence…"[88] Respondent properly invoked Art. 2 of the MB BIT as an affirmative defense against the Claimant's submissions when it argued that this Tribunal has no authority to rule upon this case. This is because the Respondent invoked the denial of benefits clause at that time by way of defense.

C. Not notifying Claimant prior to invoking Art. 2 was proper.

[86] Supra see note 43 at par. 4.83.
[87] Record, par. 5, p. 16.
[88] Art. 23, par. 2, PCA Rules 2012.

73. Respondent submits that prior to the Claimant's application for arbitration, the Respondent had no obligation to send a notice to the Claimant that it would be invoking Art. 2 par.1 of the MB BIT. As stated above, it is only when the Claimant resorts to arbitration that the Respondent can timely invoke the denial of benefits clause in the MB BIT. As the *GAI* tribunal stated, "it would be odd for a State to examine whether the requirements of [Denial of Benefits provision] had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits would – *per se* – be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments."[89]

D. In any event, Art. 2 of the MB BIT applies retroactively, hence all of Claimant's submissions are without merit.

74. We move this Tribunal to notice that Art. 2 of the MB BIT[90] does not contain any provision as to how the effects of the Denial of Benefits. Respondent submits that the absence of the provision permits the retroactive application of Art. 2 of the MB BIT.

1. The retroactive application of Art. 2 of the MB BIT is inherent and necessitated by the nature of the clause.

75. In *GAI,* the tribunal upheld the retroactive application of the denial of benefits clause . The tribunal stated that, "the very purpose of the denial of benefits is to give the

[89] Supra see footnote 67 at par. 379.
[90] Art. 2, MB BIT.

Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits…[91]" Interpreting it any other way would render the provision inutile as denial of benefits clauses are used to deny BIT protection to "investors" who adopts nationalities out of convenience in order to take advantage of the protection of particular treaties.[92] Those "advantages" include the right to resort to arbitration. Hence, Art. 2 of the MB BIT having been validly invoked, all of Claimant's submission should not be heard by this Tribunal.

2. The retroactive application of Art. 2 of the MB BIT does not frustrate the Claimant's legitimate expectations.

76. Respondent submits that the Claimant, by the very existence of the denial of benefits clause, should be put on notice that the benefits in the MB BIT could be denied to it at any time, provided that the conditions for such denial are met. It is thus incumbent upon the Claimant then to make sure that it does not fall the conditions in Art. 2 of the MB BIT. As the *GAI* tribunal reasoned, "the consent by the host State to arbitration itself is conditional and thus may be denied to it... All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by the denial of benefits."[93]

[91] Supra see footnote 67 at par. 376.
[92] Dolzer and Schruer, p. 55.
[93] Supra see footnote 67 at par. 372.

3. The prospective application of Art. 2 of the MB BIT would lead to absurdity and render the denial of benefits clause meaningless.

77. This Tribunal must not be persuaded by the ruling in *Plama* that a denial of benefits clause applies prospectively only.[94] In view of the nature of the denial of benefits clause in the MB BIT, *Plama's* interpretation goes against Arts. 31 and 32 of the VCLT[95], and would lead to an absurd situation as it would render the provision meaningless.

4. The principle of estoppel cannot bar the retroactive application of Art. 2 of the MB-BIT.

78. In the *North Sea Continental Shelf Cases*, the ICJ stated that for estoppel to exist, three (3) essential elements must be present: a State must make a representation to another State; the representation must be unconditional and made with proper authority; and the State invoking estoppel must rely on the representation. Applying the above elements, the Respondent submits it has not violated any of its representations to Basheera regarding the protection of its investor's investments.

81. The Claimant, a national of Basheera, was aware of the possible invocation of Art. 2 of the MB-BIT. Nothing in the Record suggests that Respondent had made any

[94] Plama, par. 153.
[95] Supra see footnote 14.

representation regarding the protection of the LTA, and by extension the Award, as an "investment". In addition, as will be further discussed in the Merits, the patent itself does not come under the protection of the MB-BIT. Hence, no representation by Respondent was violated.

82. To conclude, the Claimant falls under both conditions in Article 2 (1) of the MB BIT; hence, the Respondent validly exercised its right to deny the Claimant the benefits of the MB BIT. In addition, the Respondent timely and correctly exercised its right when it invoked Art. 2 of the MB BIT, and that the denial of benefits clause applies retroactively.

PART TWO: MERITS

ISSUE 1: THE ENACTMENT OF LAW NO. 8458/09 AND THE GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DO NOT AMOUNT TO A BREACH OF THE FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN THE MB-BIT.

I. The Claimant's patent is not protected by the MB-BIT- as it was granted before the MB-BIT entered into force, thus FET cannot be applied

83. Under Art. 13 of the MB-BIT, the treaty only applies to investments made by any investor on or after the date of its entry into force.[96] Art. 14 of the MB-BIT provides that the treaty shall enter into force thirty (30) days after the date of the exchange of instruments of ratification.[97] The MB-BIT entered into force on April 9, 1998, which is the 30th day after Mercuria and Basheera exchanged instruments of ratification.[98] Applying Art. 13, the MB-BIT protects only those investments entered into on April 9, 1998 or after. Claimant's patent was granted on February 21, 1998[99] or before the MB-BIT was entered into force. It was also made before this date. Therefore, it is not an investment under the terms of the MB-BIT.

84. The fact that the patent was assigned to the Claimant on April 15, 1998 is immaterial. The right of the Claimant over the patent retroacts from the date the patent was granted.[100] Given that the Claimant's patent was granted before the MB-BIT entered

[96] Art. 13, MB-BIT.
[97] Art. 14, MB-BIT.
[98] PO 2, par. 2.
[99] Record, par. 3.
[100] WIPO, par. 2.80.

into force, the MB-BIT does not protect it. Hence, the Claimant cannot invoke the FET standard under the MB-BIT to protect the patent.

II The Claimant cannot bring before this Tribunal claims of breaches of the TRIPS Agreement

85. In asserting Respondent's WTO membership before this Tribunal, the Claimant is directly asking this Tribunal to enforce the provisions of the TRIPS Agreement, which Respondent allegedly violated. This move is unacceptable because (i) the Claimant has no personality to claim protection under the TRIPS Agreement before this Tribunal; (ii) disputes arising out of the TRIPS Agreement fall within the domain of other dispute resolution bodies (in certain cases, the WTO Dispute Settlement Body); and (iii) nothing in the MB-BIT explicitly provides that it covers obligations under the TRIPS.

A. The Claimant has no standing to bring claims of violations of the TRIPS Agreement before this Tribunal.

86. While the Respondent concedes that, as a party to the TRIPS Agreement,[101] it has obligations to comply with its provisions, such obligations exist only between Member States *inter se*.[102] The Claimant – a private corporate entity – has no personality to claim violations of the TRIPS Agreement. Allegations of violations of the TRIPS Agremeent must be brought by the concerned Member State, not by the nationals of such a State. Under the WTO's dispute settlement mechanism, only WTO Member Governments can bring disputes for settlement.[103] Private individuals or companies do not have such standing, even if they may be most directly and adversely affected by the measures allegedly violating the TRIPS Agreement.

[101] PO2, par. 2.
[102] Art. 2, WTO Agreement.
[103] Art 1(1), WTO Dispute Settlement.

Considering this, the Claimant has no standing to directly ask this Tribunal to determine a violation of any of the provisions of the TRIPS Agreement.

B. Disputes arising out of the TRIPS Agreement fall within the exclusive domain of the proper WTO Dispute Settlement Body.

87. With due respect, this Tribunal also has no jurisdiction to resolve questions concerning the TRIPS Agreement. While investment treaty tribunals have jurisdiction over investment treaty disputes, they do not have jurisdiction to decide disputes concerning WTO law and allied bodies of law. Art. 1(1) of the Dispute Settlement Understanding of the WTO provides that the authority to interpret the TRIPS Agreement and State obligations arising out of it is within the exclusive jurisdiction of the WTO Dispute Settlement System.[104] Hence, the Claimant cannot advance any claims based on alleged breaches of the TRIPS Agreement.

C. The MB-BIT does not incorporate treaty obligations under the TRIPS Agreement, thus, they are not to be considered in questions of FET violations.

88. The MB-BIT should not be read too extensively to incorporate other treaty obligations, such as those under the TRIPS Agreement, unless the BIT expressly provides so. In *Grand River*, the tribunal held that the FET standard "does not incorporate other legal protections that may be provided investors or classes of investors under other sources of [international] law."[105] Otherwise, the standard would become "a vehicle for generally litigating claims based on alleged infractions of domestic and international law."[106] Nothing in the body of the MB-BIT directly imposes obligations under the TRIPS Agreement. While the MB-BIT's Preamble refers to the TRIPS Agreement, it does not create any substantive obligations for the

[104] Id.
[105] Grand River, par. 219.
[106] Id.

parties. A preamble is not a substantive BIT provision because it does not establish legally binding rights and obligations.[107] Hence, Claimant's direct claims arising from the TRIPS Agreement must fail.

III. In any event, if this Tribunal were to consider that the patent was protected by the MB-BIT, the Respondent still did not violate the FET standard in the MB-BIT.

89. Art. 3(2) of the MB-BIT guarantees fair and equitable treatment of investors and their full protection and security.[108] The FET clause in Art. 3(2) does not refer to customary international law or the minimum treatment standard. It contains an autonomous FET obligation, which is subject to interpretation in accordance with the ordinary meaning of the terms in their context, and in light of the FET's object and purpose, as Article 31(1) of the VCLT requires.[109]

90. In *MTD,* the tribunal stated that, in their ordinary meaning, the terms "fair" and "equitable" mean "just," "even handed," "unbiased," and "legitimate."[110] On the basis of such and similar definitions, the tribunals in *S.D. Myers, Mondev, ADF,* and *Loewen* held that the FET is infringed by conduct that is arbitrary, grossly unfair, unjust or idiosyncratic; is discriminatory; and lacks due process or transparency.

91. Based on these, the Respondent argues that the enactment of Law 8458/09 and the granting of compulsory license did not violate Article 3(2) of the MB BIT. Rather, the Respondent's measures are: (1) in accordance with the FET standard in the MB-BIT; (2) made in exercise of its regulatory power in respect of public health; and (3) not violative of the Claimant's legitimate expectations.

[107] UNCTAD/ITE/IIT/2006/5, p.3.
[108] Art. 3(2), MB-BIT.
[109] LG&E, par. 122.
[110] MTD, par. 113 [citing The Concise Oxford Dictionary of Current English, 5th Ed., 1964]

A. The enactment of Law 8458/09 and the grant of the compulsory license were done in accordance with the standards and meanings applicable to the FET clause in the MB-BIT.

92. Guided by the above arbitral decisions, the Respondent argues that contrary to the Claimant's allegations, the actions of the Respondent were: (a) neither unreasonable nor arbitrary; (b) not discriminatory; (c) transparent; (d) with due process of law; and (e) exercised in good faith.

1. The measures were reasonable and not arbitrary as they were made pursuant to legitimate State aims.

93. The plain meaning of the terms "unreasonable" and "arbitrary" is substantially the same. They mean something done capriciously or without reason.[111] There is also no relevant distinction between and among the terms "arbitrary," "unjustified," and "unreasonable."[112] Hence, this Tribunal may determine unreasonableness and arbitrariness using the same standard.

94. The ICJ Chamber in the *ELSI Case* defined "arbitrariness' as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[113] *Enron* stated that for regulatory measures to be deemed arbitrary, some important measure of impropriety must manifest, reflecting the absence of legitimate purpose, capriciousness, bad faith, or a serious lack of due process.[114] Consequently, measures undertaken in good faith cannot be considered arbitrary, unless there is manifest lack of rational relationship between the measure and its objective.

[111] National Grid, par. 197.
[112] Schreuer, p.183.
[113] ELSI Case, p 15.
[114] Philip Morris, par. 353.

95. With regard to the enactment of the law, the measure had the purpose of protecting public health.[115] Respondent's objective in enacting Law 8458/09, which allows compulsory licensing, was to secure universal healthcare by promoting access to affordable medications to the public.[116] The Respondent's constitution also envisions this goal.[117]

96. With regard to the grant of the license, pursuant to Sec. 23(c) of Law 8458/09, the High Court of Mercuria issued a compulsory license for Valtervite on the ground that the patented invention is not available to the public at a reasonably affordable price.[118] Sanior, which contains the compound Valtervite, was marketed for US$36 per pill.[119] An afflicted individual has to take one pill a day.[120] At the previous price, it would cost him or her around US$1080 per month or US$12,960 per year. That amount is neither reasonable nor affordable for the average patient in need in Mercuria, considering that the average monthly salary of working individuals in developing countries, according to World Bank, is only US$240/month.[121]

97. Thus, the Claimant has no basis to question the reasonableness of the measures. It is irrelevant if the Claimant believes that courses of action adopted in other countries would have been better because a Tribunal cannot substitute its own policy judgments for those of the State.[122] Moreover, as in *Philip Morris*, "the responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health."[123]

[115] Record, par. 14.
[116] Id.
[117] Record, p. 39.
[118] Sec. 23(c), Law No. 8458/09.
[119] Record, p. 42, At a 25% discounted rate, a single FDC pill costs US$27.
[120] Record, par. 6.
[121] See, https://www.worlddata.info/average-income.php.
[122] Enron, par. 281.
[123] Philip Morris, par. 399.

2. The measures were not discriminatory as they do not have discriminatory intent and effects. Neither did they have disparate impact.

98. The measures were not discriminatory because they were general in nature and made without any unreasonable distinction. *Enron* stated that a measure is considered discriminatory if the intent of the measure is to discriminate, or if the measure has a discriminatory effect.[124] As stated in the *ELSI Case*, in order to establish discrimination, there must be an intentional treatment to favor of a national against a foreign investor, and such was not taken under similar circumstances against another national.[125] Contrary to the Claimant's allegation, the measures had neither discriminatory intent nor effect. The law is of general application, which applies to all domestic and foreign investors. The record bears that it was not enacted to favor or cause disadvantage to a holder of a specific intellectual property or invention.[126] The Claimant, thus, is unable to present any evidence to prove that the challenged measures specifically targeted its patent.

3. The Respondent acted with transparency when it enacted the law and issued the license as the measures were duly made public.

99. Tribunals have rejected the view that the principle of transparency within the FET context requires host states to act "totally transparently."[127] A broader view, especially when taken too literally, would impose inappropriate and unrealistic obligations upon host States.[128] Transparency is "the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors."[129]

[124] LG&E, par. 146.
[125] ELSI Case, pars. 120-130.
[126] Law 8458/09, pp. 44-45.
[127] Tecmed, par. 154.
[128] Saluka, par. 304.
[129] Metalclad, par. 76.

100. With regard to the enactment of the law, the relevant rule spelling out the minimum requirement relating to transparency was complied with. Art. 63 of the TRIPS Agreement provides that, "[l]aws of general application" pertaining to the subject matter of the Agreement "shall be published, or be made publicly available to enable governments and right holders to become acquainted with them."[130] The record bears that Law 8458/09 was published in the Respondent's government gazette on October 10, 2009 for everyone's general information.[131]

101. With regard to the grant of the compulsory license, the Claimant should have predicted that its patent would be subjected to compulsory licensing after the enactment of Law 8458/09 given its general application.[132] Moreover, the Claimant was aware that there was an application of license for Valtervite before the High Court because it was impleaded as a party in the said proceeding.[133] Therefore, the Claimant cannot claim that the Respondent did not comply with requirement of transparency in this case.

4. The Respondent acted in accordance with due process when it enacted the law and involved the Claimant in the license-issuance process.

102. With regard to the enactment of the law, the Claimant alleges that the Respondent failed to notify and allow the Claimant to participate in the legislative process leading up to the enactment of Law 8458/09. However, the denial of due process is a high standard, only met where there is "particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.[134] In relation to the adoption of a legislation, the Tribunal in *Paushok* recognized that legislative assemblies in all countries regularly adopt legislation within a very short time, and

[130] Art. 63, TRIPS Agreement.
[131] Record, p. 44.
[132] Id.
[133] PO3, p. 50.
[134] White Industries, par. 10.4.7.

sometimes, without debates, especially if there is urgency, and there is unanimity of views among parliamentarians.[135] The obligation to accord due process, therefore, does not include an obligation to invite the Claimant to participate in the legislative process as it would be impossible for the State to invite every single investor to participate in the legislative assemblies without unreasonably imposing limitations in its legitimate right to enact, modify, and amend a law.[136]

103. <u>With regard to the grant of the license</u>, the Claimant cannot argue that it was denied due process because the facts indisputably show that the Claimant was duly notified when HG-Pharma filed its application for the issuance of the license before the High Court of Mercuria. In fact, the Claimant was impleaded as a party before the High Court in the matter of the non-voluntary license granted to HG Pharma to manufacture Sanior.[137] Thus, it was accorded due process of law.

5. The Respondent acted in good faith as it did not destroy the investment.

104. *Waste Management* held that in order for there to be bad faith, there has to be a deliberate conspiracy between government authorities to defeat the investment.[138] The standard for providing bad faith is a demanding one.[139] Here, there was no conscious effort to destroy Claimant's investment. The Respondent did not revoke the patent granted to the Claimant, and the Claimant can still continue its business in the Respondent State. In fact, the head of the Claimant's division announced that the people of Mercuria can still continue to benefit from the range of its other health and lifestyle products.[140]

[135] Paushok, par. 304.
[136] Parkerings, par. 332.
[137] PO3, p. 50.
[138] Waste Management, par. 138.
[139] Bayandir, par. 143.
[140] Record, par. 25.

B. The enactment of Law 8458/09 and the grant of the compulsory license were in line with the Respondent's regulatory power to protect and promote public health.

105. States have the inherent right to regulate,[141] particularly with regard to pharmaceuticals, medicines that are crucial to public health.[142] Public health is central to the very existence of the State, and the duty to protect it arises from both domestic law and the social contract that underlies most governments.[143] In the dispute before this Tribunal, both the MB-BIT[144] and the applicable international covenants protecting intellectual property rights[145] recognize the regulatory power of the State to protect public health.

1. The MB-BIT – both in its Preamble and substantive provisions – recognizes the Respondent's regulatory power to protect and promote public health.

106. Art. 6(4) of the MB-BIT allows non-discriminatory measures designed to protect "legitimate public welfare objectives, such as public health."[146] Moreover, the Preamble of the MB-BIT provides that, "the parties intended to achieve its objectives in a manner consistent with the protection of public health."[147] It has been established, *supra.*, that the measures were neither arbitrary nor discriminatory, and that were taken to protect public health.[148] The Claimant, therefore, cannot claim redress from this Tribunal for legitimate regulatory acts of the Respondent. The tribunals in *Saluka*[149] and *Methanex*[150] have held that it is now established that States are not liable to pay compensation to a foreign investor when, in the normal exercise

[141] Apotex, par. 8.57.
[142] Id., par 8.78.
[143] Vadi, p. 30.
[144] Art. 6(4), MB-BIT.
[145] Art. 8, TRIPS Agreement.
[146] Art. 6(4), MB-BIT.
[147] Preamble, MB-BIT.
[148] Record, par. 14.
[149] Saluka, par. 255.
[150] Methanex, Part IV, Ch. D, par. 7.

of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

2. International law, including applicable treaties and other instruments that protect intellectual property rights, recognize the regulatory power of the State to protect its people's right to health.

107. The enactment of Law 8458/09 and the grant of the compulsory license involve pharmaceutical regulation, which is characterized by institutional density and governed by international human rights law (on the right to health) and international intellectual property law.[151]

108. In international human rights law, the ICESCR[152] − both the Respondent and Basheera are parties to this treaty[153] − incorporates a human rights component within the pharmaceutical regime. It identifies the need to protect both public and private interests in knowledge creation and diffusion.[154] Art. 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[155] According to *General Comment 14* of the Committee on Economic, Social and Cultural Rights, access to medicines is one of the requirements of the right to health.[156] General comments, though not binding instruments, constitute authoritative interpretations of States commitments under human rights treaties and can reflect norms of customary law.[157]

109. In international intellectual property law, the TRIPS Agreement − which provides minimum standards for intellectual property protection,[158] and both the Respondent

[151] N.Y.U., p.123.
[152] ICESCR.
[153] P.O 3, p. 49.
[154] Art. 15 (2), ICESCR.
[155] Art. 12, ICESCR.
[156] CESCR, General Comment No. 14.
[157] Keller and Grover, pp.116, 132.
[158] N.Y.U., p. 128.

and Basheera are parties to this treaty[159] − recognizes the supremacy of the right to health in the intellectual property regime. Art. 8 of the TRIPS Agreement states that, "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition."[160] Similarly, the Doha Declaration reinforces State regulatory space to adopt public health measures, recognizing the WTO Members' right to protect public health and use the "flexibilities" under the TRIPS Agreement.[161] In the dispute before this Tribunal, the Respondent enacted Law 8458/09 to promote the availability and accessibility of affordable medicines. Furthermore, the compulsory license for Valtervite was issued in response to the Greyscale epidemic that threatens the well-being of thousands of working-age individuals in the Respondent State.[162] Therefore, the subject measures were enacted to protect the fundamental right to health of the people in accordance with the MB-BIT, the ICESCR, and the TRIPS Agreement.

C. The enactment of Law 8458/09 and the grant of the compulsory license did not change the legal and business environment fundamentally; nor did they make it unstable.

110. In *Philip Morris*, in rejecting the claim for violation of legitimate expectation and legal stability the Tribunal stated that, "changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the FET standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change."[163] In *Eli Lilly*, the Tribunal also rejected the claim that there was a dramatic change[164]

[159] PO2, par. 2.
[160] Art. 8, TRIPS Agreement.
[161] N.Y.U., p.189 [citing Doha Declaration, par. 4].
[162] Record, p. 42.
[163] Philip Morris, par. 423.
[164] Eli Lilly, par. 366.

from previously established intellectual property law, saying that Eli Lilly failed to prove that the change was beyond the acceptable margin of change.[165]

111. Similarly, the amendment in the Intellectual property law of 1976 introducing compulsory license[166] did not cause dramatic change beyond the acceptable margin of change. The law merely introduced a reasonable exception to the rights conferred by the patent, subject to strict limitations, to remuneration and judicial review.[167] This process has of course involved some elements of change, but that change is more incremental and evolutionary than dramatic.[168]

D. The Respondent did not frustrate the Claimant's legitimate expectations.

112. *Saluka* concluded that the FET standard is closely tied to the notion of legitimate expectations as the dominant element of that standard.[169] *Parkerings* stressed that the FET standard is violated when the investor is deprived of its legitimate expectation that the condition existing at the time of the agreement would remain unchanged.[170] An expectation is legitimate if the investor received an explicit promise or guaranty from the host State.[171]

113. Based on the principles above, the Respondent submits that the enactment of Law 8458/09 and the grant of the compulsory license did not frustrate the Claimant's legitimate expectations because: (a) the expectation that Respondent's intellectual property laws would remain static was not legitimate; (b) the grant of the patent did not constitute a specific commitment; and (c) the expectation that the Respondent will comply with the TRIPS Agreement was met.

---

[165] Id., par. 269.
[166] Record, p.44.
[167] Id.
[168] Eli Lilly, par. 350.
[169] Saluka, par. 302.
[170] Parkerings, par. 330.
[171] Id., par. 331.

1. The Claimant's expectation that the Respondent's intellectual property laws would remain static was not legitimate, so the Respondent had the right to change its laws and issue the license.

114. The Claimant cannot reasonably expect that the Respondent's law of 1976 will remain unchanged, given the fact that the Respondent never assured the Claimant that it shall neither change its intellectual property law nor grant compulsory licenses. An investor's expectation is legitimate only when it is based on specific representations of the host State.[172]

115. Likewise, the Claimant cannot rely on the statement of the Respondent's Minister of Health, Joseph Bell, during a press conference on January 19, 2004, and on the President of Mercuria's statement on Twitter, because they are not specific commitments. As in *El Paso*, a commitment is specific if its object is to give a guarantee of stability to the investor with respect to that specific investment. Besides, there can be legitimate expection of an unchanged legal framework in the face of a crisis.[173] Both statements failed to meet the element of specificity. The Minister merely expressed the importance of having a stable intellectual property regime and to empower right-holders, subject to a higher purpose, which is to achieve its goal to secure access to health care.[174] He did not make any specific assurance that the Respondent's law shall remain unchanged. The shared statement of the President[175] also merely reiterates the declaration of the Minister in a general manner.

2. The Respondent's grant of a patent in favor of the Claimant did not constitute a specific commitment that raised a legitimate expectation of the exclusivity of the patent.

[172] El Paso, par. 374.
[173] Id. Par. 376-7.
[174] Record, p.39.
[175] Record, par. 8.

116. Patents do not confer absolute rights, nor do they create any legitimate expectation that the exclusivity they confer is absolute and will remain without interference from accepted checks and balances inherent in the intellectual property system.[176] The government of the territory issuing the patent has the right to restrict the patent holder's control over its rights,[177] and this includes the right to issue compulsory licences in order to protect public health.[178] The Claimant, therefore, cannot rely on its patent to expect that the Respondent shall not grant compulsory licenses for such patent because its right arising from it was never absolute in the first place. Moreover, even the TRIPS Agreement allows compulsory licensing.[179] Accordingly, the issuance of a compulsory license is not a violation of the Claimant's legitimate expectations.

3. In any event, the Respondent implemented the measures in compliance with the TRIPS Agreement; thus, not frustrating the Claimant's legitimate expectations in relation to the Agreement and the MB-BIT.

117. The Claimant asserts that the issuance of the license for Valtervite, pursuant to the enactment of Law 8458/09, disregards international covenants, such as the TRIPS Agreement and violates its legitimate expectations. However, contrary to such allegations: (a) Law 8458/09 is consistent with the TRIPS Agreement; and (b) the compulsory license was also issued in line with the TRIPS Agreement as it was issued amidst a national emergency where procedural obligations could be waived; the period of use of the compulsory license was limited; the Respondent does not export Valtervite; the Claimant has received adequate remuneration; and the issuance of the compulsory license and the adequacy of remuneration were subject to judicial review.

a. Law 8458/09 is consistent with TRIPS Agreement.

[176] Ruse-Khan, p. 13.
[177] Gibson [citing Art. 31, TRIPS Agreement].
[178] Newcombe, p. 74.
[179] Art. 31, TRIPS Agreement.

118. Art. 30 of the TRIPS Agreement provides that Members may provide limited exceptions to the exclusive rights conferred by a patent on the condition that it must be reasonable.[180] The Doha Declaration accords each Member State the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.[181] To comply with the reasonableness requirement of the TRIPS Agreement, Law 8458/09 provides specific grounds before the High Court could grant a compulsory license, *e.g.*, that the patented invention is not available to the public at a reasonably affordable price, and that the patented invention is not worked in the territory of Mercuria.[182] Therefore, the law only allows it for very limited cases, in compliance with the conditions in the TRIPS Agreement.

b. The compulsory license was also issued in line with the TRIPS Agreement.

i. The Respondent did not have to comply with certain procedural requirements as it was a national emergency.

119. Art. 31(b) of the TRIPS Agreement requires prior negotiation with the patent holder before the State can grant a compulsory license.[183] However, this procedural requirement may be waived by a Member in the case of a national emergency.[184] While there was no prior negotiation before the High Court of Mercuria granted the compulsory license for Valtervite, it was justified by the fact that such license was issued in the case of a national emergency following the effect of the greyscale crisis.[185] Under Par. 5(c) of the Doha Declaration, “Each [M]ember has the right to determine what constitutes a national emergency or other circumstances of extreme

[180] Id. Art. 30.
[181] Doha Declaration, par. 5.
[182] Record, p. 44.
[183] Art. 31(b), TRIPS Agreement.
[184] Id.
[185] Record, par.14.

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."

120. It is undisputed that greyscale is one of the critical epidemic diseases that threaten populations in the developing world, together with acquired immune deficiency syndrome or AIDS, cancer, tuberculosis, and malaria.[186] An epidemic, according to WHO, is the occurrence in a community or region of cases of an illness in excess of normal expectancy.[187] Here, it is undisputed that there was a sharp increase in the number of greyscale cases from 20,485 in 2003 to 266,298 in 2006.[188] This figure continued to grow way beyond the liberal estimation of the NHA.

ii. The use of the license was time-and-space limited, and the Respondent is not prohibited from exporting medicines to States that lack production capacity.

121. The period and location of the use of the license were also limited. Art. 31(c) of the TRIPS Agreement provides that, "the scope and duration of such use shall be limited to the purpose for which it was authorized." In compliance with the said provision, the High Court of Mercuria granted HG-Pharma a license to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria.[189] Furthermore, Art. 31(f) of the TRIPS Agreement provides that, "any use of the license shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use." HG-Pharma does not export Valtervite in compliance with the said provision.[190] Finally, nothing in the TRIPS agreement prohibits a State from exporting medicines to other States that lack production capacity.[191] Hence, when the Respondent gave greyscale medicines in form of humanitarian aid to its

[186] Record, par. 2.
[187] See, http://www.who.int/hac/about/definitions/en/.
[188] Record, p. 41.
[189] Record, par. 21.
[190] PO2, par. 5, p. 48.
[191] See, TRIPS Agreement.

three neighbouring States[192] which are all developing countries facing financial difficulties,[193] it did not violate the TRIPS Agreement.

iii. The Claimant was awarded adequate remuneration, in compliance with the TRIPS Agreement.

122. Art. 31(h) of the TRIPS Agreement mandate that the right-holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization. In compliance with such provision, the High Court of Mercuria fixed the royalty to be paid to the Claimant at one percent (1%) of total earnings.[194]

123. On the Claimant's argument that the remuneration was inadequate or unreasonable, the Respondent submits that such argument is misplaced. *First*, the authority to interpret the provisions of the TRIPS Agreement is within the exclusive jurisdiction of the WTO Dispute Settlement System, not this Tribunal.[195] *Second*, in any case, the 1% remuneration is adequate and reasonable because the TRIPS Agreement does not provide for a specific minimum amount of remuneration. In fact, according to the WHO, different countries may prefer different approaches to remuneration based upon administrative capacity, resource constraints, support for research and development, and policy objectives concerning access and innovation.[196] Notably, the remuneration granted to the Claimant falls within the range of royalty rates for drugs that treat incurable and non-fatal diseases (0.5% to 3% of the revenue).[197]

[192] Record, par. 23.
[193] PO3, p. 50.
[194] Record, par. 21.
[195] Art 1 (1), WTO Dispute Settlement.
[196] WHO/TCM/2005.1 Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technology.
[197] PO3, p. 50. The range of the royalty rates is based on 2009-2010 rates.

iii. The issuance of the compulsory licence and the adequacy of remuneration is subject to judicial review, in compliance with the TRIPS Agreement and in furtherance of due process of law..

124. Art. 31 (i) of the TRIPS Agreement provides that, "the legal validity of any decision relating to the authorization of such use [compulsory licensing] shall be subject to judicial review or other independent review by a distinct higher authority in that Member." In the case before this Tribunal, it is undisputed that Mercuria's law provides the patent holder the right to question the validity of the non-voluntary license and the royalty, after being granted, before a two-judge bench of the High Court.[198] This also furthers compliance with due process of law[199] and redress of remedies, betraying the Claimant's allegation that the Respondent has violated the FET standard in the MB-BIT.

ISSUE 2. THE CONDUCT OF THE RESPONDENT'S JUDICIARY, IN RELATION TO THE ENFORCEMENT PROCEEDINGS, DOES NOT VIOLATE ART. 3 OF THE MB-BIT.

125. The conduct of the Respondent's judiciary, in relation to the enforcement proceedings, does not violate any of the substantive protections under Art. 3 of the MB-BIT. Art. 3 prescribes the obligation to create a favorable condition for investors,[200] to treat the investment of the investors fairly and equitably,[201] to observe any obligation each party entered with the investor with regard to its investment,[202] and to take advantage of the law or policy that is more favorable to the investor than

[198] Id.
[199] Chevron, par. 264.
[200] Art. 3(1), MB-BIT.
[201] Art. 3(2), MB-BIT.
[202] Art. 3(3), MB-BIT.

what is provided in the MB-BIT.[203] On the contrary: (1) the Respondent accorded FET to the Claimant in relation to the enforcement proceedings; (2) the Respondent has provided effective means of asserting claims and enforcing rights; and (3) the conduct of Respondent's judiciary is neither arbitrary nor discriminatory so as to violate other substantive provisions in Art. 3 of the MB-BIT.

I. The Respondent accorded FET to the Claimant in relation to the enforcement proceedings.

126. In *Philip Morris*, the Tribunal stated that the FET obligation may be breached if the host State's judicial system subjects an investor to denial of justice.[204] While the Respondent concedes that a State may be liable for the acts of its judiciary, Claimant's claim of a violation of denial of justice arising from alleged delays in the enforcement proceeding must fail because: (a) mere delay of the enforcement does not amount to a denial of justice; (b) the Claimant cannot invoke denial of justice because it failed to exhaust local remedies; and (c) Respondent's conducts in the enforcement proceedings did not frustrate the Claimant's legitimate expectation.

A. The Respondent court's mere delay in the enforcement proceedings does not amount to a denial of justice.

1. Absent clear evidence of systemic injustice or bad faith in this case, there is no denial of justice.

127. Admittedly, there had been delays in the enforcement proceedings before the Respondent's judiciary. However, as held in *Chevron*, denial of justice – as an element of FET – has a high threshold.[205] According to the tribunal in *Philip Morris,*

[203] Art. 3(4), MB-BIT.
[204] Philip Morris, par. 498.
[205] Chevron, par. 244.

"it is not enough to have an erroneous decision or an incompetent judicial procedure... For a denial of justice to exist under international law there must be 'clear evidence of … an outrageous failure of the judicial system' or a demonstration of 'systemic injustice' or that 'the impugned decision was clearly improper and discreditable.'"[206] As Jan Paulsson explains, the international obligation on States is not to create a perfect system of justice, but a system of justice where serious errors are avoided or corrected.[207]

128. With regard to the issue of delay in the enforcement proceedings, the tribunals in *Chevron* and *Jan de Nul* have agreed that a specific amount of delay alone does not itself result in an automatic denial of justice.[208] Instead, a tribunal must look into the circumstances of the case that brought about the delay.[209] For instance, in *Jan de Nul*, where it took the court of first instance ten (10) years to render a decision, which was in the end only fifteen (15) pages long, the tribunal held that though it was certainly unsatisfactory, it did not "rise to the level of a denial of justice considering the complexity of the case involved.[210] Similarly, in *White Industries*, the tribunal rejected the claim of denial of justice for the alleged delay of nine (9) years to enforce an arbitral award and held that, while the delay was regrettable, there was no denial of justice because there was no suggestion of bad faith.[211]

2. Even if there was a delay, the delay was necessitated by the complexity of the case and the behavior of the litigants – all matters beyond the Respondent's control and not particularly serious flaws.

129. The Claimant cannot rely on the fact of delay *alone* to establish a violation of denial of justice because the delay in the enforcement proceedings was due to the cases's complexity and the behavior of the litigants involved.

[206] Philip Morris, par. 500.
[207] Hesham, par. 620.
[208] Chevron, par. 253; Jan de Nul, par. 204.
[209] Id.
[210] Jan de Nul, par. 204.
[211] White Industries, par. 10.4.23.

130. As to complexity, the same became evident when the NHA moved to decline the enforcement of the award based on public policy considerations.[212] This required the Respondent's judiciary to look into the New York Convention and related laws in order to determine whether it can properly set aside an arbitral award made in a third-party state.[213] This meant that the court had to resolve more complicated questions of law that required looking into the challenge, which was based on public policy considerations, before proceeding with the issue of enforcement.

131. As to the behavior of the litigants, Claimant's request to transfer the case to a commercial bench,[214] and both of the parties' desire to settle the case amicably, contributed to the alleged delay.[215] These matters were beyond the control of the Respondent's court.

132. Be that as it may, the conduct of the judiciary was not a particularly serious flaw that amounts to denial of justice. As stated in *Mondev*, there is serious flaw or inadequacy if at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[216]

3. This Tribunal must also consider that the Respondent is a developing country that was facing a public emergency.

133. The Respondent's status as a developing country should be taken into consideration in determining a violation of denial of justice. In *White Industries,* the

[212] Record, par. 18.
[213] Van den Berg, p. 350.
[214] Record, par. 17.
[215] Record, par. 43.
[216] Mondev, par. 127.

tribunal, in rejecting the claim of denial of justice arising from delays, considered that India as a developing country with an over-stretched judiciary. A developing country, such as the Respondent, must be held to different standards than, for example, Switzerland, the United States or Australia.[217] Additionally, the Respondent was suffering from a public emergency at that time.

B. The Claimant cannot invoke denial of justice before this Tribunal because it failed to exhaust local remedies available in the Respondent's legal system; the burden to prove exhaustion is on the Claimant, and it failed to discharge that burden.

134. In *Philip Morris*, the tribunal stressed that, "a denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted."[218]As held in *Oestergetel* and *Loewen*, since a denial of justice implies the failure of a national system as a whole to satisfy minimum standards, exhaustion of local remedies is a prerequisite for claiming it.[219] Exhaustion of local remedies is a condition that has to be satisfied prior to asserting a denial of justice claim.[220]

135. The burden of proof lies with the Claimant to show that this condition has been met or that no remedy giving "an effective and sufficient means or redress" was available, or that if available, it was "*obviously* futile."[221] Claimant failed to prove that it exhausted all the available remedies in the Respondent's judiciary. In fact, nothing in the record suggests that it questioned the delay of the enforcement before the High Court of Mercuria.

[217] White Industries, par. 5.2.18.
[218] Philip Morris, par. 499.
[219] Oestergetel, par. 273; Loewen, par. 154.
[220] Supra, see footnote 123.
[221] Id.

II. The Respondent court's conduct in the enforcement proceedings does not frustrate the Claimant's legitimate expectations.

A. The Respondent did not make clear and specific commitments to the Claimant with regard to the enforcement proceedings.

136. In *White Industries*, the tribunal stated that, "absent an express assurance from India that any award would be enforced in a particular manner or timeframe, it is simply not possible for White, legitimately, to have had the expectation as to the timely enforcement of the Award that it asserts."[222] Similarly, the Respondent did not make any clear and specific commitment to the Claimant on the timely enforcement of the award; hence, it cannot assert a claim of legitimate expectations on the enforcement proceedings.

B. That the Respondent is a party to the New York Convention did not create legitimate expectations because it does not fix a time limit in enforcement proceedings, and the Respondent is a developing State.

137. The Claimant cannot rely on the fact that the Respondent is a party to the New York Convention to legitimately expect a timely enforcement of the Award. The New York Convention does not provide for a specific period or duration within which to enforce an award. On the other hand, the Claimant should have reasonably expected that the enforcement of the Award – questioned for public policy considerations[223] – would be first reviewed prudently in accordance with the New York Convention.[224]

138. Also, the Claimant should have adjusted its expectations given the fact that the Respondent is a developing country.[225] The Claimant either knew or ought to have known at the time it started to conduct activities in the Respondent State that the

[222] White Industries, par. 10.3.15.
[223] Record, par. 18.
[224] Art. 5(b), New York Convention.
[225] White Industries, par. 10.3.14.

domestic court structure of the latter was overburdened, and there was a public emergency.

III. The Respondent provided access to justice to the Claimant by setting up effective means to assert claims and enforce rights.

A. The Respondent's judicial system is effective, and there had been no undue delays in this case.

139. The judicial system in the Respondent is effective as it is capable of asserting claims and enforcing rights. The "effective means" standard has been held to be "distinct and potentially less demanding" when compared to denial of justice under customary international law.[226] While the Respondent does not agree with the Claimant that there is an obligation arising from the MB-BIT to provide effective means of asserting claims and enforcing rights given the fact that: (a) nothing in the body of the MB-BIT gives rise to such obligation, and (b) the Claimant failed to show that it "adequately utilized the means available to assert claims and enforce rights" in the domestic system as required in *Chevron*,[227] the Respondent submits that, in any case, it provided the Claimant access to justice by setting up avenues for the effective means of asserting claims and enforcing rights.

140. *White Industries*[228] stated that in determining a violation of such standard, a tribunal must consider the complexity of the case, the behavior of the litigants involved, and the significance of the interests at stake in the case, the behavior of the courts themselves, and the court congestion and backlogs.[229] It also provides that only

[226] Chevron, par 244.
[227] Id., par. 268.
[228] White Industries, par. 11.3.2.
[229] Id.

indefinite or undue delay in the host State's courts dealing with an investor's "claim" may amount to a breach of the effective means standard.[230]

141. Furtheremore, as already argued, there has been no undue delay here. The reasons for the "delay," as stated above, were beyond the control of the Respondent. Moreover, the tribunal in *Chevron* found that court congestion – which is temporary, promptly and effectively addressed by the host State – is a defense against a claim of breach of the effective means standard.[231] In the case at bar, while the Respondent admits that it has an overburdened judiciary,[232] it continues to make efforts to improve its judicial system. In fact, on January 10, 2012, the Parliament of Mercuria passed the Commercial Courts Act, directing the High Court to constitute special benches that could expeditiously dispose of commercial matters.[233]

IV. As regards the enforcement proceedings, the Respondent complied with the other substantive obligations under Art. 3 of the MB-BIT- it did not act arbitrarily or in a discriminatory manner.

142. The Claimant asserts that the High Court of Mercuria acted in an arbitrary and discriminatory manner in the enforcement proceedings. Specifically, the Claimant questions Respondent's High Court's silence or non-objection to the NHA's alleged unreasonable absences and postponements.[234]

143. However, as previously argued, the standard of arbitrariness under international law has a high threshold; it is not easily violated.[235] Additionally, contrary to the Claimant's allegations, the High Court did not condone NHA's actions. On January

[230] Id.
[231] Chevron, 264.
[232] Record, p.17, par. 9.
[233] Record, p. 28 par. 19.
[234] Record, p. 4, par. 10.
[235] ELSI Case, par. 128.

15, 2010, when the NHA was absent, the Court warned that it would hear the matter *ex parte* if the NHA would be absent during the next date of the hearing.[236] The NHA however appeared on the next hearing. Also, on November 8, 2012, when the NHA was absent, the commercial bench recorded that it would take adverse measures if the NHA will not appear on the next date of the hearing.[237] The NHA appeared on the next hearing date and offered an apology. These circumstances negate the Claimant's allegations. The allegation that the NHA's absences were unreasonable remains to be proven and must not be considered by this Tribunal.

144. The Claimant also asserts that there was discrimination in the conduct of the High Court in the enforcement proceedings, and that the Respondents impaired "the operation, management, use, enjoyment or disposal" of the Claimant's "investment."[238] However, it cannot present any evidence supporting these allegations. In fact, there were instances when the High Court granted the Claimant's request and rejected that of the NHA. On June 14, 2012, the Court granted Claimants request to transfer the case to a commercial bench,[239] while on September 17, 2013 when the NHA objected to the jurisdiction of the commercial bench, the court rejected its objection and held that it had jurisdiction over the case.[240] The other claims of the Respondent are unsubstantiated.

ISSUE 3. Respondent does not violate Art. 3(3) of the MB-BIT when its NHA terminated the Long-Term Agreement.

145. Art. 3(3) of the MB-BIT states that, "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the

[236] Record, par. 5, p. 7.
[237] Record, par. 21, p. 9.
[238] Record, par. 13, p. 9.
[239] Record, par. 18, p. 9.
[240] Record, par. 26, p. 10.

other Contracting Party."[241] A plain reading of Art. 3 (3) of the MB-BIT shows that for there to be a violation of it, the obligation must relate to the investment, and the breach of such obligation must be attributable to the State. However, NHA's termination of the LTA does not violate Art. 3(3) of the MB-BIT because: (1) the termination of the LTA by the NHA was not attributable to the Respondent; and (2) the LTA is purely a commercial contract, not within the ambit of Art. 3(3) of the MB-BIT.

I. The NHA's termination of the LTA was not attributable to the Respondent.

146. In *Almas,* the tribunal stated that, "unless the conduct complained of was attributable to the State, there can be no breach of the BIT."[242] On the issue of attribution the tribunals in *Hamester, Noble Ventures,* and *Jan de Nul* regarded the ILC's ASR as a codification of customary international law on the legally relevant yardstick in determining whether specific acts can be attributed to a host State for purposes of establishing the latter's responsibility for a breach of international law.[243] Applying the provisions of the ASR to this case, the Respondent submits that the NHA's termination of the LTA was not attributable to the Respondent because: (a) the NHA is not a State Organ of the Respondent (Art. 4, ASR); (b) NHA's conduct was not attributable to the Respondent under the "functional test" in the ASR (Art. 5, ASR); and (c) NHA's conduct was not attributable to the Respondent under the "control test" in the ASR (Art. 8, ASR).

A. **The NHA is not a State organ of the Respondent.**

[241] Art 3(3), MB-BIT.
[242] Almas, par. 273.
[243] Hamester, par.171; Noble Ventures, par. 69; Jan de Nul, par. 156.

147. Art. 4 of the ASR provides that State organ's acts are to be considered acts of the State.[244] While the ILC's commentary on Art. 4 suggests that "the conduct of certain institutions performing public functions and exercising public powers (*e.g.*, the police) is attributed to the State," this inference will not be drawn when an entity engages on its own account in commercial transactions, even if these are important to the national economy.[245] In *Almas*, the tribunal held that the Polish Agricultural Property Agency, which holds independent legal personality from Poland, acts separately from Poland, and contracts with third parties in its own name, is not a State organ of Poland.[246] In a similar way, *Bayindir* rejected the claim that Pakistan's National Highway Authority was a State organ because of its separate domestic legal personality, as it can sue and be sued on its own.[247]

148. The NHA shares the same features with the entities considered in the cases mentioned because it operates or acts independently[248] from the Respondent, has an independent legal personality from it, and in fact, was sued and named a party in the case before the tribunal in Reef,[249] as well as before the High Court of Mercuria.[250] It also enters into commercial transactions with third parties in its own name, as it was a party to the LTA as a purchaser of Sanior.[251] The fact that there may be links between NHA and the Ministry of Health does not mean that the two are not distinct. As stated in *Bayindir*, entities do not operate in an institutional vacuum as they normally have links with other authorities, as well as with the Government.[252] Consequently, from all these, the NHA is not a State organ of the Respondent.

B. The NHA's conduct in terminating the LTA was not attributable to the Respondent because this action was not sovereign in character.

[244] Article 4, ASR.
[245] Almas, par. 210.
[246] Id, par. 209.
[247] Bayindir, par. 119.
[248] PO3, p. 50.
[249] Record, par. 17.
[250] Record, par. 18.
[251] Record, par. 9.
[252] Bayindir, par. 119.

149. Art. 5 of the ASR provides that the conduct of an entity, which is not an organ of the State but exercises governmental authority, shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. This is called the functional test.[253] The NHA is generally empowered to exercise elements of government authority. However, this is not sufficient in itself to bring the case within Art. 5 of the ASR because, as stated in *Bayindir,* attribution under that provision requires that the instrumentality acted in a sovereign capacity in the particular instance.[254]

150. The burden to prove that the NHA acted in a sovereign capacity when it entered and terminated the LTA lies with the Claimant.[255] In *Impregilo*, the tribunal stated that the acts of a sovereign authority involve any act of its legislative, executive, or administrative authority.[256] Nothing on the record suggests that NHA exercised any legislative, executive, or administrative powers when it entered and terminated the LTA.

C. The NHA's conduct in terminating the LTA was also not attributable to the Respondent because it was not done under its control or direction.

151. Art. 8 of the ASR provides that the conduct of an entity shall be considered an act of a State under international law if such entity is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[257] The tribunals in *Jan de Nul* and *White Industries* emphasized that "international jurisprudence is very demanding in order to attribute the act of an entity to a State, as it requires both a general control of the State over the entity and a specific control of

[253] Art. 5, ASR.
[254] Bayindir, par. 122.
[255] Id, par. 140.
[256] Impregilo, par. 260.
[257] Art. 8, ASR.

the State over the act the attribution of which is at stake." This is called the effective control test.[258]

152. There is no evidence that the Respondent instructed the NHA to terminate the LTA. The Claimant, who has the burden to prove the fact of control or direction, cannot rely on a general and vague assertion of such fact because, as stated in *Corfu Channel Case,* "proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt."[259] Emphatically, there is also no record that Mercurian officials directly participated in the negotiation of the LTA.[260]

[258] Jan de Nul, par. 173; White Industries, par. 8.1.18.
[259] Corfu Channel Case, p. 18.
[260] PO3, p. 50.

PRAYER FOR RELIEF

Respondent hereby respectfully requests the Tribunal to:

1. Find that it lacks jurisdiction over any claims in relation to enforcement of the

2. Declare that Atton Boro cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;

3. Where the Tribunal does not grant the second prayer, declare that no act of Mercuria's violates the substantive protections of the BIT

4. Find that Mercuria is entitled to restitution by Atton Boro of all costs related tothese proceedings; and

5. Grant such further relief as counsel may advise and that the Tribunal deemsappropriate.

TEAM MCNAIR FOR RESPONDENT

THE REPUBLIC OF MERCURIA