TEAM RAU

PERMANENT COURT OF ARBITRATION

PCA ARBITRATION NO. 00/2017

ATTON BORO LIMTED

(CLAIMANT)

V.

REPUBLIC OF MERCURIA

(RESPONDENT)

~ MEMORIAL FOR RESPONDENT ~

TABLE OF CONTENTS

LIST OF ABBREVIATIONS iv

LIST OF AUTHORITIES v

AWARDS……………………………………………………………………………………. v

BOOKS…………………………………………………………………………………… xiii

ARTICLES………………………………………………………………………………… xiv

CONVENTIONS, REPORTS AND OTHER RESOURCES……………………………………… xvi

STATEMENT OF FACTS 1

ARGUMENTS 3

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMS IN RELATION TO THE AWARD ………………..……………………………………………………………. 3

A. THE AWARD, BY ITSELF, IS NOT AN INVESTMENT UNDER ARTICLE 1(1) OF THE BIT….. 3

i. Classification of the Award as investment, is contrary to the Rules of Interpretation in the VCLT…………………………………………………………………………………... 4

ii. The Award does not fulfill the inherent meaning of an investment……………………….. 5

B. THE ARBITRAL AWARD CANNOT BE CONSIDERED A PART OF THE CLAIMANT'S ALLEGED 'INVESTMENT', I.E. THE LTA ……………………………………………………………… 6

i. The formulation of issues requires that the Award must be considered individually…………………………………………………………………………...… 6

ii. In the alternative, the LTA is a commercial contract and not an Investment……………..…………………………………………………………………….. 7

iii. The LTA does not satisfy the inherent meaning of investment and the Salini test.. 7

a. The Claimant made no economic contribution to the Respondent State…….……….. 8

b. The Claimant assumed no risk under the LTA………………………………………… 8

iv. The Award is analytically different from the LTA……………………………..…….. 10

II. THE CLAIMANT HAS BEEN RIGHTFULLY DENIED THE BENEFITS OF THE BIT BY VIRTUE OF THE RESPONDENT'S INVOCATION OF ARTICLE 2 OF THE BIT…………………. 11

A. THE RESPONDENT HAS INVOKED ARTICLE 2 AT THE APPROPRIATE TIME………………………………………………………………………………………. 11

i. The appropriate time of invocation is, upon the assertion of claims by the Claimant………………………………………………………………………………… 11

a. Pursuant to the PCA Rules 2012………………………………………………..…. 12

b. Pursuant to International Arbitration Practice ……………………………….... 12

ii. The denial of benefits clause has retrospective application …………………………… 13

B. THE CONDITIONS LAID DOWN IN ARTICLE 2(1) OF THE BIT HAVE BEEN FULFILLED……………………………………..………………………………… 14

i. The Claimant is owned or controlled by nationals of a third state……………………….. 14

ii. The Claimant does not have substantial business activities in the Kingdom of Basheera……………………………………………………………………………..… 15

III. THE ENACTMENT OF LAW NO. 8458/09 AND/OR THE GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DOES NOT AMOUNT TO A BREACH OF THE MERCURIA - BASHEERA BIT, IN PARTICULAR, THE FAIR AND EQUITABLE TREATMENT STANDARD………………………………………………………………………… 17

A. RESPONDENT'S ACTIONS ARE CONSISTENT WITH THE INTERNATIONAL CONVENTIONS AND NORMS. ………………………………………………………………………… 17

i. The Tribunal does not have jurisdiction to adjudicate upon a violation of the TRIPS Agreement …………………………………………………………………….…... 18

ii. No violation of the Paris Convention ……………………………………………………. 19

iii. No violation of the Doha Declaration ………………………………………………… 19

B. THERE HAS NOT BEEN A BREACH OF THE FAIR AND EQUITABLE STANDARD……………………………………………………………………….... 20

i. The expectations of the Claimant are not legitimate …………………………………… 20

ii. There has not been violation of the expectations ……………………………………… 22

C. THE RESPONDENT IS NOT LIABLE FOR EXPROPRIATION…………………………… 22

i. Police powers ……………………………………………………………………… 23

a. There existed a State of Necessity ……………………………………………………… 23

b. Requirement of public health ……………………………………………………………… 24

c. No compensation needs to be paid ………………………………………………… 25
ii. Compensation paid was adequate …………………………………………………… 25

IV. MERCURIA IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS. ……………………… 27

A. NO DENIAL OF JUSTICE …………………………………………………………… 27
i. No violation of components of Denial of Justice ……………………………………… 29
a. Claimant's Acts ……………………………………………………………… 29
b. Significance of Claimant's interests at stake ………………………………… 30
c. Conduct of Mercurian Judiciary ……………………………………………… 30
d. Complexity of issue involved ………………………………………………… 31
ii. Alleged breach of domestic procedural law is insufficient to constitute denial of justice……………………………………………………………………………… 31
iii. Obligations under New York Convention have not been breached……………………... 32
iv. Exhaustion of local remedies ………………………………………………………… 32
B. NO OBLIGATION OF EFFECTIVE MEANS ....…………………………………………… 33
i. Effective Means is not a substantive obligation under the BIT ………………………….. 33
ii. Respondent has not breached effective means standard ………………………………… 34

V. THE TERMINATION OF THE LTA BY NHA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT…………………………………………………………….. 36

A. NHA's conduct is not attributable to the Respondent State…...…………………… 36
i. Absence of Specific Control ………………………………………………………… 37
ii. Commercial Functions ……………………………………………………………… 38
B. UMBRELLA CLAUSE DOES NOT PROTECT THE LTA AS IT IS PURELY A COMMERCIAL SUPPLY ARRANGEMENT ………………………………………………………………… 39
C. THE PRESENCE OF AN INDEPENDENT DISPUTE SETTLEMENT CLAUSE IN THE LTA OPERATES AS A BAR TO THIS TRIBUNAL'S JURISDICTION ……………………………… 40
D. THERE HAS BEEN NO BREACH OF THE UMBRELLA CLAUSE BY THE RESPONDENT STATE……………………………………………………………………………….. 41

PRAYER FOR RELIEF ……………………………………………………………………… 42

LIST OF ABBREVIATIONS

SYMBOL / ABBREVIATION USED	MEANING
¶	Paragraph
BIT	Bilateral Investment Treaty
Claimant	Atton Boro Limited
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
MoH	Ministry of Health
NHA	National Health Authority
PCIJ	Permanent Court of International Justice
Respondent	Republic of Mercuria
SCC	Stockholm Chamber of Commerce
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UNTS	United Nations Treaty Series
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

LIST OF AUTHORITIES

AWARDS AND DECISIONS

SHORT REFERENCE	AWARD
Abaclat	*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
Alps Finance	*Alps Finance and Trade AG v. The Slovak Republic,* UNCITRAL, Award, 5 March 2011
Ampal	*Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016
Amto	*LLC Amto v. Ukraine,* SCC Case No. 080/2005, Final Award, 26 March 2008
Arif	*Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013
Arrest Warrant case	*Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment, [2002] ICJ 3
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009
Bosh	*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012
Bosnia Genocide	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, [2007] ICJ 2
Chevron	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Partial

	Award, 17 September 2013
CMS	*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005
Consortium RFCC	*Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003
Continental	*Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008
Duke Energy	*Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008
Eastman	*Eastman Kodak Company v. The Government of Iran,* Iran-US Claims Tribunal, Award No. 329-227, 11 November 1987
EDF	*EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009
El Paso	*El Paso v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011
EMELEC	*Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/05/9, Award, 2 June 2009
Emmanuel	*Emmanuel Too v. Greater Modesto Insurance Associates & U.S.*, Iran-US Claims Tribunal, Award, 1989
Eureko BV	*Eureko BV v. Poland*, UNCITRAL Partial Award, 19 August 2005
Finnish Ships	*Finnish Ships Case*, (Finland v. United Kingdom), Judgment [1934] I.C.J. 413

Gabčikovo-Nagymaros	*Gabčikovo-Nagymaros Project*, Hungary v Slovakia, Judgment, [1997] ICJ Rep 88
Gami	*Gami Investments, Inc. v. The Government of the United Mexican States,* UNCITRAL, Award, 15 November 2004
GEA	*GEA Group Aktiengesellschaft v. Ukraine,* ICSID Case No. ARB/08/16, Award, 31 March 2011
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001
Grenada	*Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010
Gustav	*Gustav F.W. Hamester GmbH & Co. KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010
Hebei	*Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, [1999] 2 HKC 205
Hesham	*Hesham T. M. Al Warraq v. Republic of Indonesia,* UNCITRAL, Final Award, 15 December 2014
Impregilo	*Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005
Jan de Nul	*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008

Joy Mining	*Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004
Kasikili/Sedudu Island	*Kasikili/Sedudu Island, Botswana v Namibia*, Judgment, Merits, [1999] ICJ Rep 1045
Larsen	*Larsen v. Hawaiian Kingdom*, PCA, 119 I.L.R. 566, Award, 5 February 2001
Liamco	*Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic*, Award, 12 April 1997
Libyan Arab Jamahiriya/Chad	*Territorial Dispute, Libya v Chad*, Judgment, merits, [1994] ICJ Rep 6
Ligitan-Sipandan Dispute	*Sovereignty over Pulau Ligitan and Pulau Sipadan,* (Indonesia v Malaysia), Judgment, Merits, [2002] ICJ Rep 625
Liman	*Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010
Loewen	*Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003
Maffezini	*Emilio Agustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000
Marvin Feldman	*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002

MCI	*M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007
Mondev	*Mondev International Ltd. v. United States of America*, (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002
Murphy	*Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010
Nagel	*William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award, 9 September 2003
National Grid	*National Grid P.L.C. v. Argentina Republic,* UNCITRAL, Award, 3 November 2008
Nicaragua paramilitary	*Case concerning military and paramilitary activities in and against Nicaragua*, (Nicaragua v. United States of America), Merits [1986] ICJ Rep 14
Noble Energy	*Noble Energy Inc. and Machala Power Cia. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008
Noble Ventures	*Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005
Nova Scotia	*Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014
Nuclear Tests Case	*Nuclear Tests Case,* (New Zealand v. France), Judgement, [1974] I.C.J. 253
Occidental	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012

Olguín	*Eudoro Armando Olguín v. Republic of Paraguay,* ICSID Case No. ARB/98/5, Award, 26 July 2001
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Award, 23 April 2012
Otis	*Otis Elevator Co v Iran*, Iran-United States Claims Tribunal, Award No. 304-284-2, 29 April 1987
Pac Rim	*Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Award, 14 October 2016
Pan American	*Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic,* ICSID Case No. ARB/03/13, Decision, 27 July 2006
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007
Parsons	*Parsons & Whittemore Overseas v.* Société *Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2nd Cir. 1974)
Plama	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005
PSEG	*PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award, 19 January 2007
Quiborax	*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015

Robert	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999
Romak	*Romak S.A. (Switzerland) v The Republic of Uzbekistan,* UNCITRAL, PCA Case No. AA280, Award, 26 November 2009
Rurelec	*Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia,* UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014
Saba Fakes	*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010
Saipem	*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 2007
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4 , Decision on Jurisdiction, 31 July 2001
Saluka	*Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006
Schering	*Schering Corporation v. Iran*, Iran-United States Claims Tribunal, Award No. 122-38-3, 16 April 1984
Sedco	*Sedco Inc. v. National Iranian Oil Co. and the Republic of Iran*, Iran-United States Claims Tribunal, Award No 309-129-3
Serafin	*Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, Decision on Jurisdiction, 15 December 2014

SGS v. Pakistan	*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision, 6 August 2003
SGS v. Philippines	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision, 29 January 20
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003
Toto	*Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009
Traxys	*Traxys Europe S.A. v. Balaji Coke Industry Pvt. Ltd.*, [2012] FCA 276 (23 March 2012)
TSA Spectrum	*TSA Spectrum de Argentina S.A. v. Argentine Republic,* ICSID Case No. ARB/05/5, Award, 19 December 2008
Tulip	*Tulip Real Estate and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013
Ulysseas	*Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, final award, 12 June 2012
Vivendi	*Compania de Aguas de Aconquija S.A. And Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007
Waste Management	*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3
White	*White Industries Australia Limited v. The Republic of India*, UNCITRAL, Award, 30 November 2011

X v. Y	*X (S.p.A.) v. Y (S.r.l.)*, Arrêts du Tribunal Fédéral (2006) 132 III 389
Yukos	*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, 18 July 2014

BOOKS

SHORT REFERENCE	FULL REFERENCE
Andrea	Andrea K. Bjorklund, *Yearbook on International Investment Law & Policy*, 2014-2015
Brownlie	Ian Brownlie, *Principles of Public International Law*, Clarendon Press, 1998
Carvalho	Nuno Pires de Carvalho, *The TRIPS Regime of Patent Rights*, Kluwer Law International, 2005
Deihl	Alexandra Diehl, *The Core Standards of International Investment Protection: Fair and Equitable Treatment*, Kluwer Law International, 2012
Garry Born	Gary B. Born*, International Arbitration Law and Practice (Second Edition)*, Kluwer Law International, 2015
Martinez	Martinez A. *Invoking State Defenses in Investment Treaty Arbitration*, London: Kluwer Law International, 2010
Rudolf	Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008
Jan Paulsson	Jan Paulsson, *Denial of Justice in International Law*, Cambridge, Cambridge University Press, 2005

Stephen Jagusch	Stephen Jagusch and Anthony Sinclair, Part II- *The limits of protection for investments under the Energy Charter Treaty* in *Investment Arbitration And The Energy Charter Treaty*, Clarisse Ribeiro, JurisNet, LLC, 2006
Suda	Suda R. *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, Oxford: Hart Publishing 2006
Tudor	Ioana Tudor, *The Fair and Equitable Treatment Standard in the Law of Foreign Investment*, Oxford University Press, 2008
Vadi	Valentina Vadi, *Public Health in International Investment Law and Arbitration*, New York: Routledge, 2013
Zachary Douglas	Zachary Douglas, *The International Law of Investment Claims,* Cambridge University Press, 2009

ARTICLES

SHORT REFERENCE	FULL REFERENCE
C. Schreuer	Christoph Schreuer, *Fair and Equitable Treatment (FET): interactions with other standards*, Investment Protection And The Energy Charter Treaty 63, 89-90 (2008)
Carlos	Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements,* Michigan Journal of International Law, 26 MICH. J. INT'L L. 331 (2004)
Crawford	James Crawford, Jacquline Peel and Simon Olleson, *The Commentary to the ILC's Articles, The International Law Commission's Articles on State Responsibility*, 12 European Journal of International Law 963-991 (2001)
Fitzmaurice	Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 227

	(1957)
Gibson	Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation,* 25(3) AM. UNIV. INT'L L. REV. 386 (2010)
Lalitha	N. Lalitha, *Doha Declaration and Public Health Issues,* Journal of Intellectual Property Rights 13 (2008)
Mann	Howard Mann, Konrad von Moltke, *Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11,* ILSD (2002)
O'Hara	Philip O'Hara, *Creating Social and Health Equity: Adopting an Alberta Social Determinants of Health Framework,* ESPC (2005)
Paulsson	Jan Paulsson, *The New York Convention in International Practice—Problems of Assimilation,* ASA Special Series No. 9, 100, 113 (1996)
Pauwelyn	Joost Pauwelyn, *The Dog that Barked but did not Bite: 15 Years of Intellectual Property Disputes at the WTO*, 1 J. INT'L DISP. MGMT. 389, 393, 395 (2010)
Pécoul	Pécoul B. *et al.*: *Access to Essential Drugs in Poor Countries. A Lost Battle?* JAMA (1999)
Potestà	Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Rev. 88–122 (2013)
Silberman	Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 2009-2010 GA. J. INT'L & COMP. L. 25, 35.
Taubman	Antony Taubman, *Rethinking TRIPS: 'Adequate Remuneration' for Non-Voluntary Patent Licensing*, Journal of International Economic Law, 11 J. INT'L ECON. L. 927, (2008)

Tsai-Yu	Tsai-Yu Lin, *Compulsory Licenses for Access to Medicines, Expropriation and Investor-State Arbitration Under Bilateral Investment Agreements – Are There Issues Beyond the TRIPS Agreement?* 40 INT'L REV. INTELL. PROP. & COMPETITION L. 152, 153-54 (2009)
Yannaca-Small	Yannaca-Small, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?,* Arbitration Under International Investment Agreements: A Guide To The Key Issues 473 (2010)

CONVENTIONS, REPORTS AND OTHER RESOURCES

SHORT REFERENCE	FULL REFERENCE
CESCR	*CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article12)*, 22nd Sess., Doc E/C.12/2000/4 (Aug. 11, 2000)
Doha Declaration	*Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/1 (Nov. 20, 2001)
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15 1994, 1869 U.N.T.S. 401
HRI	*Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008)
ICESCR	*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 316
ILC Commentary	*Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts,* International Law Commission, 53 UN GAOR Supp. (No. 10), 53rd Sess., U.N. Doc. A/56/10

ILC State Responsibility	*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, 53 UN GAOR Supp. (No. 10), 53rd Sess., at 43, U.N. Doc. A/56/83 (Aug. 3, 2001)
State Responsibility Report	*Second report on State responsibility,* UN Office of Legal Affairs, U.N. Doc. A/CN 4/498 (July 19, 1999)
NY Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 7 1959, 330 U.N.T.S. 38
Paris Convention	*Paris Convention for the Protection of Industrial Property*, March 20 1883, 828 U.N.T.S. 305
TRIPS	*Agreement on Trade Related Aspects of Intellectual Property Rights,* Apr. 15, 1994, 1869 U.N.T.S. 299
UN Access to Medicine	*Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* HRC 12th Sess., UN Doc A/HRC/RES/12/24 (Oct. 12, 2009)
US-EC Report	*United States – Import Measures On Certain Products From The European Communities*, WT/DS165/AB/R (Dec. 11, 2000)
WHO Guidelines	*Remuneration guidelines for non-voluntary use of a patent on medical technologies* WHO/TCM/2005.1
WTO Health	*Technical Cooperation Activities: Information From Other Intergovernmental Organizations,* World Trade Organisation, IP/C/W/305/Add.3 (Sept. 25, 2001)
WTO Patent Report	WTO Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Jan. 16, 1998)

STATEMENT OF FACTS

[A] The Claimant

Atton Boro and Company, a corporation organized under the laws of the People's Republic of Reef, acts as the primary holding company for Atton Boro Group. Atton Boro Group synthesized Valtervite, for the treatment of Greyscale patients. Atton Boro and Co. obtained the patent for Valtervite in the Republic of Mercuria, on 21st February 1998. In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in the Kingdom of Basheera, Atton Boro Limited ("**Atton Boro**", the Claimant).

[B] The Investment Treaty

Mercuria and Basheera concluded an Agreement for the Promotion and Reciprocal Protection of Investments ("**BIT**") on January 11, 1998.

[C] The Long Term Agreement

In May 2004, Mercuria's National Health Authority (the "**NHA**") wrote an invitation to Atton Boro to make an offer for supplying its fixed- dose combination ("**FDC**") drug, Sanior. NHA and Atton Boro entered into a Long-Term Agreement ("**LTA**"). Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders. Clause 6 of the LTA stated the validity of the agreement for a period of 10 years, subject to the Supplier's satisfactory performance.

[D] Manufacturing and Supply

Atton Boro set up its manufacturing unit for Sanior in Mercuria and delivered its first consignment by June 2005. By the end of 2006 about a third of all Greyscale patients were being treated using Sanior. The order value for Sanior doubled with each quarter in 2007. Atton Boro purchased land and machinery to bolster its production setup. Atton Boro offered a further discount of 10% for the remaining period of the LTA. The NHA rejected this offer, and demanded an additional discount of 40%.

[E] The Award

On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA. In January

2009, a Tribunal seated in Reef passed an award (the "**Award**") in favor of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

[F] The Enforcement Proceedings

On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response. The Commercial Courts Act was passed by the Parliament of Mercuria, on 10 January 2012, directing the High Court to constitute special benches that could expeditiously dispose of commercial matters. In September 2013, the Supreme Court of Mercuria clarified that these benches had jurisdiction only to hear original commercial suits and not enforcement proceedings. All enforcement matters were returned to be heard before regular benches of the Court.

[G] Law No. 8458/09

The National Legislation for its Intellectual Property Law promulgated by Mercuria's President on 10 October 2009 allowed for the use of patented inventions without the authorization of the owner. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court under the new provision, seeking grant of a licence to manufacture Valtervite. The Court heard the matter through a fast-tracked process and granted HG-Pharma a licence on 17 April of 2010 to manufacture Valtervite until Greyscale was no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atton Boro at 1% of total earnings.

[H] Profits and loss

In January 2012, the director of the NHA disclosed that the use of generic drugs reduced costs of purchasing medicines by as much as 80%, resulting in over 1.2 billion USD in savings annually. Between May and August of 2013, three neighboring States of Mercuria expressed gratitude for the Greyscale medicines received in the form of humanitarian aid from Mercuria. By 2014, Atton Boro had lost nearly two-thirds of its market share to the generic FDC pill. In February 2015, the head of Atton Boro's Mercuria division announced that the company would no longer be dealing in Sanior in Mercuria.

ARGUMENTS

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMS IN RELATION TO THE AWARD.

1. The jurisdictional requirement of the Tribunal entails the presence of an 'investment' under the BIT.[1] The Claimant has not made an investment under the BIT in the form of the Award, as, **(A)** The Arbitral Award, by itself, does not qualify as an investment under Article 1(1) of the BIT. Furthermore, **(B)** the Arbitral Award cannot be considered a part of the claimant's alleged 'investment', i.e. the LTA.

A. THE AWARD, BY ITSELF, IS NOT AN INVESTMENT UNDER ARTICLE 1(1) OF THE BIT

2. Article 1(1) of the Mercuria - Basheera BIT defines 'investment' in the following terms: *"For the purposes of this Agreement, the term "investment" means any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting party in accordance with the latter's laws and, in particular, though not exclusively includes: [...]"*[2]

3. The Tribunal must examine definition of 'Investment' in accordance with the ordinary meaning[3] and the objects of the BIT, pursuant to the principles set out in the VCLT.[4] The arbitral award passed by the Tribunal in Reef is not an 'Investment' as, (i) such a classification is contrary to the Rules of Interpretation under VCLT. Furthermore (ii) the Award, does not fulfill the inherent meaning of an investment.

[1] Article 8, BIT
[2] Article 1(1), BIT
[3] Alps Finance ¶ 230
[4] Article 31 and 32, VCLT; *Kasikili/Sedudu Island*; *Libyan Arab Jamahiriya/Chad*

i. Classification of the Award, as investment is contrary to the Rules of Interpretation in the VCLT.

4. A literal interpretation of '*claims to money*'[5] to include the Award under Article 1(1) goes against objects and purposes of the BIT. The tribunal, while interpreting the definition of investment has to take in to account the objects and purposes of the BIT along with its ordinary meaning.[6]

5. The objects of the BIT provide for the promotion of *"greater economic cooperation"* between the contracting parties, and, that, *"investments will stimulate the flow of private capital and economic development."*

6. The Arbitral Award, is a legal instrument disposing the rights and obligation of the parties to the LTA.[7] It does not promote economic cooperation or development or private capital flow in the Contracting parties. Thus, a mechanical application of *'claims to money'* to include an Arbitral Award is against the objects of the BIT.[8]

7. Additionally, this mechanical application of 'claims to money' would lead to a manifest unreasonable and absurd interpretation.[9] Such an interpretation would eliminate the limitations to the scope of investment. In particular, it would eliminate the distinction between a purely commercial contract and an 'investment'.[10]

8. Therefore, the Award to constitute an investment under the BIT, must satisfy the categories as well as the inherent meaning of investment.[11] The fact that it falls within one of the categories listed in Article 1, does not automatically transform it into an investment[12]

[5] Article 1(1)(c), BIT
[6] Article 31, VCLT
[7] GEA ¶ 162
[8] Saipem ¶ 113-114
[9] Article 32, VCLT; Romak ¶ 188
[10] Romak ¶ 185; Joy mining ¶ 58
[11] Romak
[12] Romak ¶ 207; Quiborax ¶ 216

***ii. The Award does not fulfill the inherent meaning of an investment*.**

9. The arbitral award does not satisfy the inherent meaning of an investment under the BIT. The term "investment" per se is considered to have an objective meaning in the BIT.[13] The ordinary meaning of the term investment includes 3 elements: (a) contribution to the economy of Respondent State, (b) the investment should be for a specific duration and (c) the investment should be subject to an element of risk.[14] These are the necessary conditions which must be satisfied to fulfill the inherent meaning of investment.[15]

10. The arbitral award does not envisage a *commitment of capital* nor any *contribution* to the economic development of Respondent.[16] The award does not make any contribution having a financial value to the Respondent State. Contribution refers to contribution in money, kind and industry.[17] Instead, the Award is a legal instrument, which rules upon the rights and obligations of the parties to the LTA.[18]

11. Further, the Award does not entail any *risk* which is inherent to an investment. Such a risk pertains to the returns arising from contributions made.[19] An arbitral award, being an embodiment of rights and obligations of the contracting parties does not involve such an element of risk with regard to commercial return.[20] It does not include any risks undertaken by the Claimant.

12. Lastly, it does not fulfill the *duration* requirement. Tribunals have held that the required duration of contributions is at a minimum 2 to 5 years[21]. The award does not envision contribution of capital over a considerable period of time.[22]

---

[13] GEA ¶ 151; Nova Scotia ¶ 80
[14] Quiborax ¶ 215; *Romak* ¶ 237; *Saba Fakes* ¶ 99-102. ;Salini
[15] Alps Finance ¶ 241
[16] GEA ¶ 162
[17] Salini ¶ 53
[18] GEA
[19] Nova Scotia
[20] White
[21] Salini ¶ 52
[22] *Id.*

13. The Award, being a legal instrument fails to fulfill the requirements of an investment[23] and hence cannot be granted protection as an investment before this tribunal.

B. THE ARBITRAL AWARD CANNOT BE CONSIDERED A PART OF THE CLAIMANT'S ALLEGED 'INVESTMENT', I.E. THE LTA.

14. This Tribunal must not consider the Award in conjunction with the entirety of the Claimant's activities in the Respondent State as, (i) the formulation of issues in Procedural Order 1 requires that the Award must be considered individually. In the Alternative, (ii) the LTA is a commercial contract and does not constitute an investment. Furthermore, (iii) the award is analytically different from the LTA.

i. The formulation of issues requires that the Award must be considered individually

15. This tribunal in Procedural Order No.1 framed the issues for consideration before it. It provides that: "the main stage will address, *(a) whether the Arbitral Tribunal has jurisdiction over claims in relation to the arbitral award*."[24]

16. This restricts the scope of inquiry of the Tribunal to only determine its jurisdiction over claims in relation to the Award. In contrast, the tribunals in *Saipem*[25] and *White*[26] had to consider whether the Claimant had made an investment under the BIT. This allowed them to analyze the entire span of the Claimant's activities in the host state.

17. However in the present dispute the issue strictly pertains to claims in relation to the arbitral award and not whether the Claimant had made an investment under the BIT.[27]

18. Additionally, as per International Arbitration Practice, it is for the Tribunal to determine which issues need to be dealt with and in what order. Parties cannot change the essential

---

[23] *Id.* ¶ 113 - 114
[24] Procedural order No. 1
[25] Saipem ¶ 5.1
[26] White
[27] Procedural order No. 1, Page 27

basis on which the Tribunal itself is constituted.[28] Thus, the issues framed by the tribunal determine the scope of its present inquiry.

19. Therefore, in accordance with the issues framed by this tribunal,[29] the award must be taken into consideration individually while determining the rationae materiae of the tribunal. The scope of inquiry should not bring within its ambit the entirety of the Claimant's activities in the Respondent State.

ii. In the Alternative, The LTA is a commercial contract and not an Investment

20. The LTA was a commercial contract for the supply of the drug 'Sanior' entered into between the Claimant and the NHA. It is imperative to draw a distinction between ordinary sales contracts, even if complex, and an investment.[30] Contractual rights arising out of a contract for the supply of goods and services, would not satisfy the requirements of an investment.[31] In order for the LTA to be treated as an investment, it must satisfy the inherent meaning of the term investment.[32]

iii. The LTA does not satisfy the inherent meaning of investment and the Salini test.[33]

21. As previously submitted, the inherent meaning of the term "investment" includes 3 elements: *contribution having economic value*, *duration* and *an element of risk*.[34] These well established features have been recognized by many investment arbitration tribunals as the triad representing the minimum requirements of an investment.[35] The test developed by the tribunal in Salini v. Morocco, also requires that these elements be fulfilled in order to classified as an investment.

22. The Claimant, through the LTA entered into a simple commercial contract and has not made an investment in the territory of the Respondent, as (a) it does not make any

---

[28] Larsen; Gary Born
[29] Procedural order No. 1, Page 27
[30] Joy mining ¶ 58
[31] Zachary Douglas, Page 203
[32] Quiborax
[33] Salini
[34] Quiborax ¶ 215; Romak ¶ 237; Saba Fakes 99-102.
[35] Nova Scotia ¶ 84

economic contribution in the Respondent State, and (b) the Claimant assumed no risk under the LTA.

a. The Claimant made no economic contribution to the Respondent State.

23. As Atton Boro and Company funded the Claimant to set up its manufacturing unit in Mercuria, as well as, to perform the agreements it entered into with the NHA from 1998 onwards,[36] no contribution of economic value can be attributed to the Claimant. The tribunal in *White Industries* while determining the existence of '*contribution*' relied on the fact that the expenditure in carrying out the contractual obligations in the host state was made by the Claimant itself.[37] In the present case no such contribution has been made by the Claimant in setting up of any manufacturing bases in Mercuria.

24. Furthermore, the supply of the drug itself cannot be considered a contribution as this supply contemplated the payment of a fixed price to the Claimant.[38] Contracts of sale, including contractual rights to purchase or sell a product a a particular price do not envisage a *contribution* within the meaning of an investment, at its heart this transaction under the LTA involves payment for goods received .[39]

25. Nevertheless all obligations under this contract were funded by Atton Boro and Co., not the Claimant. Thereby while determining whether the 'Claimant' made a contribution under the LTA, the actions of Atton Boro Company cannot be said to be the actions of the Claimant. Thus the Claimant has not made any contributions having economic value in the Respondent state.

b. The Claimant assumed no risk under the LTA.

26. The Claimant did not undertake any risk that would indicate the existence of an investment under the LTA. Clause 5 of the LTA assured the Claimant, the minimum

[36] Procedural order No. 3, Line 1570
[37] White ¶ 7.4.12
[38] Romak ¶ 215
[39] Nova Scotia

guaranteed annual order value.[40] There was no risk accruing from a change in prices or demand, as a minimum demand and fixed prices were stipulated under the LTA.[41]

27. All economic activity entails a certain degree of risk. All contracts including those which are not investment contracts carry the risk of non performance. However this kind of risk is purely commercial, counterparty risk, or otherwise stated the risk of doing business.[42]

28. On the contrary, an 'investment risk' entails a different situation, in which the investor cannot be sure of a return on his investment, and may not know the extent of contributions he would have to make even if all relevant parties discharge their contractual obligations.[43] The Claimant under the LTA, did not undertake any such 'investment risk'. There was no risk regarding the returns on any contributions made as the annual minimum order value and price of the drugs was fixed under the agreement. Therefore, the element of risk essential to the inherent meaning of an investment is not present in the LTA.

29. As the Claimant under the LTA, has not made any contribution having economic value and has not undertaken any investment risk, the LTA does not fulfill the inherent meaning of an investment.

30. *In conclusion*, the LTA fails to fulfill the inherent meaning of an investment under the BIT and hence does not constitute an investment. The award rendered in the favour of the Claimant by the tribunal seated in Reef relates to a commercial contract for the sale and purchase of 'Sanior'. It is a legal instrument, disposing of rights and obligations with respect to a commercial transaction and cannot be held to be an investment.[44]

---

[40] LTA ¶ 10
[41] Uncontested facts ¶ 10
[42] Joy mining; Nova Scotia ¶ 107
[43] Romak ¶ 230
[44] GEA ¶ 161

iv. The Award is analytically different from the LTA

31. The award does not crystalize the rights of the parties but is rather a legal instrument disposing the rights and obligations of the parties. The disposition of these rights does not equate the award to an investment, it remains a legal instrument.[45]

32. Therefore, even if, the LTA were to constitute an Investment, the Arbitral Award remains distinct from it as it rules upon the rights and obligations of the parties pertaining to the investment. This disposition of rights, however, does not equate the Award to an investment. These two remain analytically different.[46]

33. The award remains analytically different from any underlying investment and cannot be characterized as an investment.

34. *In conclusion*, the Arbitral Award, by itself, does not constitute an investment under the BIT. Furthermore, the Award cannot be considered a part of the LTA as the formulation of issues by this Tribunal in Procedural Order No. 1 restricts the scope of inquiry, on jurisdiction to, only the claims in relation to the Award. Alternatively, the LTA does not constitute an investment under the BIT and the Award remains analytically distinct from it.

[45] *Id.* ¶ 162
[46] *Id.*

II. THE CLAIMANT HAS BEEN RIGHTFULLY DENIED THE BENEFITS OF THE BIT BY VIRTUE OF THE RESPONDENT'S INVOCATION OF ARTICLE 2 OF THE BIT.

35. The Respondent has rightfully invoked Article 2 in the Response to the Notice of Arbitration dated 26 November 2016.[47] To determine the rightful invocation of the Denial of Benefits Clause under Article 2 of the BIT,[48] the tribunal must determine whether the denial of benefits is valid *rationae temporis* and further whether it is valid *rationae materiae*.[49]

36. The Respondent State has rightfully denied the benefits of the BIT, as (A) The Respondent has invoked Article 2 at the appropriate time, and, (B) the conditions laid down in Article 2(1) have been fulfilled.

A. THE RESPONDENT HAS INVOKED ARTICLE 2 AT THE APPROPRIATE TIME.

37. The Respondent has properly exercised its right to deny benefits to the Claimant under the Mercuria-Basheera BIT pursuant to Article 2.[50] There exists valid *rationae temporis* as, (i) Invocation of Article 2, in response to the assertion of claims is appropriate. Furthermore, (ii) The Denial of Benefits clause of the BIT has retrospective application.

i. The appropriate time of invocation is, upon the assertion of claims by the Claimant

38. The invocation of the denial of benefits clause must be made after the Claimant invokes the arbitration clause. This time of invocation is appropriate pursuant to (a) The PCA Rules 2012, and (b) International arbitral practice.

[47] Response to Notice of Arbitration ¶ 5
[48] Article 2, BIT
[49] Rurelec ¶ 376
[50] Response to Notice of Arbitration ¶ 5

a. Pursuant to the PCA Rules, 2012

39. The present proceedings are governed by the PCA Rules 2012.[51] According to these Rules, invocation of the DOB Clause in the Response to the Notice of Arbitration is proper in time.[52] Article 23(2) provides that "*A plea that the arbitral tribunal does not have jurisdiction shall be raised no later that in the Statement of defense…*"[53]

40. The tribunal in *GAI v. Bolivia,* held that the invocation of the DOB clause in the Response to the Notice of Arbitration, was good in time.[54] The Respondent State, by exercising its right to deny Claimant the BIT's advantages in the Response, has complied with the time limit prescribed by the Rules.[55]

b. Pursuant to International Arbitration Practice

41. Various tribunals while determining the appropriate time of invocation of the denial of benefits clause, have held that it is appropriate to do so once a claim is made by the Claimant.[56] The very purpose of the denial of benefits is to give the Respondent State the possibility of withdrawing the benefits granted under the BIT. Therefore, it is proper that the denial is "activated" when the benefits are being claimed.[57]

42. The Respondent State's invocation of Article 2 in the Response to the Notice of arbitration[58] is the proper stage of the proceedings to make such an announcement, i.e. when objections are raised upon jurisdiction. Only if this Tribunal should agree to hear the merits of the present case, would it become appropriate to examine the substantive requirements for the denial of benefits.[59]

[51] Procedural Order No. 1
[52] Article 23 (2) PCA Rules 2012; Ulysseas
[53] PCA Rules 2012
[54] Rurelec ¶ 382
[55] Ulysseas ¶ 172
[56] Rurelec; Pac Rim; Ulysseas ; EMELEC
[57] Rurelec ¶ 376
[58] Response to Notice of Arbitration ¶ 5
[59] EMELEC ¶ 71

43. Therefore, in accordance with the PCA Rules 2012 and international arbitral practice, the Respondents invocation of Article 2 in the Response to the Notice of Arbitration, is proper in time.

ii. The denial of benefits clause has retrospective application

44. Once Article 2 has been appropriately invoked, it must apply retrospectively to all the activities of the Claimant in the Respondent State, for which the Claimant seeks protection of the BIT. There exists no valid reason to exclude retrospective effect of the clause. The possibility of the Respondent State exercising the right in question is known to the investor from the time when the investment was made and the BIT came into force. The protection afforded by the BIT is subject to, the possibility of a denial of benefits of the BIT by the host state, during the life of the investment.[60]

45. Furthermore, the retrospective application of the denial of benefits clause does not breach any legitimate expectations of the Claimant. Upon the coming into force of the BIT, the Claimant and was aware of the possibility of such a denial under the BIT. Therefore, its legitimate expectations have not been frustrated.[61]

46. The DOB clause can only be invoked against legal entities, which are owned or controlled by citizens or nationals of a third state, and, do not have substantial business activities in the territory of the contracting party, in which they are organized.[62]Therefore, the Claimant being aware of this clause should have acted in such a manner, as to preclude the Respondent from invoking the same.[63]

47. *In conclusion,* the Respondent State's invocation of Article 2 in the Response to the Notice of arbitration forms valid *rationae temporis* before this tribunal. Further this clause must be applied to all of the Claimant's activities in the Respondent state which are sought to protected as 'investment' and such application does not frustrate the legitimate expectations of the Claimant.

[60] Ulysseas ¶ 173
[61] Rurelec ¶ 372
[62] Article 2(1), BIT
[63] Rurelec ¶ 375

B. THE CONDITIONS LAID DOWN IN ARTICLE 2(1) OF THE BIT HAVE BEEN FULFILLED

48. Article 2(1) lays down two conditions which must be fulfilled in order to deny benefits of the BIT under this Article;"*Each contracting party reserves the right to deny the advantages of this agreement to: (1) a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the contracting party in which it is organized…*"[64]

49. The Respondent State has rightfully denied the benefits of the BIT to the Claimant on the fulfillment of the conditions in Article 2(1), as (i) the Claimant is owned or controlled by nationals of a third state. And (ii) the Claimant does not have substantial business activities in the Kingdom of Basheera.

i. The Claimant is owned or controlled by nationals of a third State.

50. The Claimant is owned by nationals of a third State to the BIT, i.e. nationals belonging to any State other than Mercuria or Basheera. The word "or" in this condition, signifies that ownership and control are alternatives, only one need be met for the first limb of the clause to be satisfied.[65] Further, ownership includes indirect and beneficial ownership.[66] While control includes control in fact, or an ability to exercise substantial influence over the legal entity's management, operation and decision making.[67]

51. Atton Boro Company is a corporation organized under the laws of the People's Republic of Reef.[68] Thus it is a national of a third state, which is not a party to the BIT.[69] Further, the shares of Atton Boro and Co. are held by a mix of private entities and individuals of a wide variety of nationalities.[70] Atton Boro Group and all its affiliates are ultimately

---

[64] Article 2(1), BIT
[65] Plama ¶ 170
[66] *Id.*
[67] TSA Spectrum ¶ 160
[68] Uncontested facts ¶ 2
[69] *Id.*¶ 2
[70] Procedural Order No. 3

controlled by Atton Boro and Company.[71] The Claimant, Atton Boro Limited, is a wholly owned subsidiary of Atton Boro Group and affiliates[72] which hold all its shares.[73]

52. Moreover, Atton Boro and Company funded the Claimant to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA from 1998 onwards. The Claimant's ultimate ownership lies with Atton Boro and Co. which is owned by nationals of a third state and hence Claimant is owned by nationals of a third State, thereby fulfilling the first limb of Article 2(1).

ii. The Claimant does not have substantial business activities in the Kingdom of Basheera.

53. The Claimant's activities in the kingdom of Basheera do not constitute 'substantial business activities' as required under Article 2(1) of the BIT. Limited activities such as renting out office space and setting up a bank account for incorporation do not constitute substantial business activities.

54. In order to constitute substantial business activity, the Claimant should be engaged in buying, selling and contracting, beyond the normal activities or functions of its mere corporate existence.[74] However the Claimant did not undertake any such activities in the Kingdom of Basheera. Furthermore, the Claimant did not fund the contracts and obligations that it had entered into. Instead, Atton Boro and Company funded the Claimant to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA from 1998 onwards.[75]

55. The Claimant was incorporated as a vehicle to carry on business on behalf of the Atton Boro Group merely 3 months after the BIT came into force.[76] For this purpose multiple patents were assigned to the Claimant by its parent company, the Atton Boro Group. Being a special purpose vehicle and failing to show other business activities such as

---

[71] Procedural Order No. 2 ¶ 3
[72] Uncontested facts ¶ 4
[73] Procedural Order No. 2 ¶ 3
[74] Stephen Jagusch, Page 73
[75] Procedural Order No. 3
[76] Uncontested facts ¶ 4

business associates, dealings leads to the conclusion that there are no substantial business activities which can be attributed to the Claimant.[77]

56. Thus, the Claimant does not have any substantial business activities in the territory of the Kingdom of Basheera as required under the second limb of Article 2 (1). As both the conditions of Article 2(1) have been fulfilled by the Claimant, there exists valid rationae materiae in the Respondent State's invocation of Article 2(1).

57. *In conclusion,* the Claimant has been rightfully denied the benefits of the BIT as the Respondent invoked Article 2 at an appropriate time i.e. the Response to the Notice of Arbitration, thereby establishing valid rationae temporis. Further the fulfillment of both conditions enumerated in Article 2(1) of the BIT fulfill the *rationae materiae* requirement for such denial of benefits to the Claimant by the Respondent State.

[77] Rurelec

III. THE ENACTMENT OF LAW NO. 8458/09 AND/OR THE GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DOES NOT AMOUNT TO A BREACH OF THE MERCURIA - BASHEERA BIT, IN PARTICULAR, THE FAIR AND EQUITABLE TREATMENT STANDARD

58. In October 2009, the President of the Respondent State promulgated a National Legislation for the amendment of its Intellectual Property Law (Law No. 8458/09) which allowed the use of patent inventions without the authorization of the owner.[78] The regulatory measures of enactment of Law No. 8458/09 and the grant of the license[79], were in furtherance of the objective of protection of health.[80].

59. The enactment of Law No. 8458/09 is justified on the grounds that **[A]** Respondent's actions are consistent with the TRIPS Agreement and the Paris Convention. Further, **[B]** the actions of the Respondent were in accordance with 'Fair and Equitable Treatment' standard under Article 3 of the BIT. Lastly, **[C]** the Respondent has not 'expropriated' the Claimant's property under Article 6 of the BIT.

A. RESPONDENT'S ACTIONS ARE CONSISTENT WITH THE INTERNATIONAL CONVENTIONS AND NORMS.

60. The Respondent issued the compulsory license in favour of HG Pharma[81] to protect the public health from the increasing incidence of the incurable disease of Greyscale[82]. The Contracting Parties are parties to the TRIPS Agreement[83], the Paris Convention[84] and the Doha Agreement.[85] The Claimant **(i)** cannot approach this Investment Tribunal contending a violation of the obligations under TRIPS. Furthermore, the Respondent is

[78] Uncontested Facts ¶ 20
[79] *Id.*¶ 21
[80] Preamble
[81] Uncontested Facts ¶ 21
[82] Uncontested Facts ¶ 6; Annexure No. 3
[83] Procedural Order No. 2 ¶ 2
[84] *Id.* ¶ 2
[85] Procedural Order No. 2 ¶ 2

not liable for its actions for granting a compulsory license because there is no violation of the **(ii)** Paris Convention and **(iii)** Doha Declaration.

i. The Tribunal does not have jurisdiction to adjudicate upon a violation of the TRIPS Agreement

61. The Mercuria - Basheera BIT is the *lex specialis* governing the relationship between the parties to the dispute and is drafted in accordance with the consent of the Contracting States.[86] Clause (1) of Article 31 of the VCLT restricts the interpretation of the BIT according to the meaning of the terms in the Treaty.[87] The provisions of the BIT do not provide the right to the Claimant to bring a claim on the ground of TRIPS violation. Therefore, this tribunal has the jurisdiction to decide on the matters in relation to the breach of the BIT only. The WTO's Dispute Settlement Mechanism is the proper authority to adjudicate the claims of TRIPS violations.[88] The WTO's Dispute Settlement Understanding provides an exclusive jurisdiction for the resolution of disputes arising out of obligations under the TRIPS Agreement.[89] Therefore, any breach of the TRIPS Agreement has to be adjudicated in accordance with the rules formulated by the WTO Dispute Settlement Understanding, and this tribunal would not have the jurisdiction to adjudicate upon the same.[90]

62. *In the alternative,* if this tribunal holds that it has jurisdiction to decide on obligations under TRIPS, the Respondent has not violated the provisions of the Agreement. The Respondent enacted the Law No. 8458/09 in accordance with the provisions of TRIPS. Article 1.1 of the TRIPS gives the freedom to the Respondent to enforce the provisions of the Agreement in accordance with the needs of the legal system and practise.[91] Moreover, Article 27 allows the Respondent to even exclude the patentability of certain drugs, to protect public order and morality, including the protection of human life.[92] The

[86] Serafin
[87] Article 31(1), TRIPS
[88] Pauwelyn
[89] Gibson Page 403; US–EC Report ¶ 111.
[90] Article 23, DSU
[91] Article 1.1 TRIPS; WTO Patent Report ¶ 7.41
[92] Article 27, TRIPS

TRIPS Agreement is implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.[93]

63. The TRIPS allows use of the patent without authorization of the right holder.[94] Clause (b) of Article 31 requires prior negotiations with the right holder, but such requirement is waived if there is a public health crisis, national emergency or other circumstances of immediate emergency.[95] The Respondent while amending its Intellectual Property rights laws adopted measures necessary to protect public health of its citizens.[96]

ii. No violation of the Paris Convention

64. The Claimant sold the drug 'Sanior' at a very high price which was unaffordable for the people of the Respondent State.[97] Thus, the exercise of the exclusive rights conferred by the patent will make 'Sanior' unaffordable which would jeopardize the health of the citizens of the Respondent. The Respondent has the right to grant compulsory license to prevent such non-affordability.[98] Even at a 25% discounted rate, a single Fixed-dose combination (FDC) pill costs USD 27, and the annual cost of FDC medicine per patient nearly USD 10,000. At current prices, it would cost 1 billion USD, or and 500% of the Greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000.[99] The Respondent, being a developing country[100], could not afford to spend nearly a third of the overall health budget on the provision of Sanior.[101] Hence the grant of the non-voluntary license was within the parameters of the Paris Convention.

iii. No violation of the Doha Declaration

65. Greyscale is a chronic, incurable disease[102] that threatens population in the territory of the Respondent State. [103] The spread of Greyscale in the Respondent State is a situation

[93] Doha Declaration ¶ 4
[94] Article31, TRIPS
[95] *Id.,* Article3 1(b)
[96] *Id.,* Article 8
[97] Annexure No. 3
[98] Article 5A(2), Paris Convention
[99] Annexure No. 3
[100] Response to Notice of Arbitration
[101] Annexure No. 3
[102] *Id.*
[103] Uncontested Facts ¶ 2

of public health crisis and situation of extreme urgency.[104] Article 5 of Doha Declaration postulates that the Respondent has the right to grant compulsory license to protect its citizens from the public health crisis constituted by the spread of Greyscale.[105] The actions of the Respondent were in conformity with the increasing incidence of Greyscale. There was a tenfold increase in the number of confirmed greyscale patients in a period of 3 years itself.[106] Therefore, the measures of the Respondent were within the ambit of the Doha Declaration.

B. THERE HAS NOT BEEN A BREACH OF THE FAIR AND EQUITABLE STANDARD

66. The burden of proof is on the Claimant to show that it has not received treatment amounting to the Fair and Equitable Standard provided under the BIT.[107] The Fair and Equitable Standard is not entirely autonomous; instead, it must be interpreted in a manner such that the rights of the Claimant are proportionately balanced with the interests of the Respondent.[108] The Respondent has not breached its obligation under Article 3(1) of the BIT of creation of favourable conditions for the Claimant, since **(i)** the expectations of the Claimant are not legitimate and **(ii)** there has not been a violation of the expectations.

i. The expectations of the Claimant are not legitimate

67. The investment by the Claimant in the territory of the Respondent State has not given rise to legitimate expectations. These expectations of the Claimant must be grounded in reality, experience and context.[109]

68. The remarks by government officials and the Prime Minister, were political statements with respect to the bilateral relations of the Contracting Parties, and thus, would not be sufficient to raise legitimate expectations.[110] The Claimant's expectations are not legitimate because the Claimant seeks to recoup losses arising from normal business

[104] Article5(c), Doha Declaration
[105] *Id.,* Article 5(b)
[106] Annexure No. 3
[107] Tulip ¶ 71–72, 92; Abaclat ¶ 496; Murphy ¶ 132, 149–57; Noble Energy ¶ 212; Tudor, Page 138
[108] Tecmed
[109] Duke Energy ¶ 340
[110] Nuclear Tests Case ¶ 43; Nagel ¶ 326; Duke Energy ¶ 340

risk.[111] In order to be considered legitimate, the expectations of the Claimant must be reasonable in light of the socio-economic conditions prevailing in the Respondent State.[112]

69. Economic and legal life is by nature evolutionary.[113] There is a requirement of due diligence from the Claimant, who must anticipate change of circumstances, and thus structure its investment in order to adapt it to the potential changes of legal environment.[114] It is appropriate to expect a high level of due diligence from the Claimant in the foreign direct investment ("FDI") context, since FDI carries a higher risk than purely domestic investment.[115] The Claimant should legitimately expect regulations to change over time as an aspect of the normal operation of legal and policy processes of the economy they operate in.[116] The Claimant may not reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.[117] A requirement of stability within fair and equitable treatment would place obligations on the Respondent which would be 'inappropriate and unrealistic'.[118] The Respondent's right to regulate cannot be considered frozen or restricted.[119]

70. The BIT encourages the Respondent to create of favourable conditions for the Claimant to make investments in its territory which is subject to its right to exercise powers conferred by its laws.[120] The Respondent has the right to enact, modify or cancel a law at its own discretion, in public interest.[121] Claimant cannot expect laws to remain immutable during public crisis.[122]

71. FET involves a balancing exercise that takes into account the Respondent's legitimate right subsequently to regulate domestic matters in the public interest.[123] The Respondent has been given a wide margin of appreciation in determining what constitutes public

---

[111] Waste Management
[112] Duke Energy ¶ 365-366; Bayindir ¶ 193; MCI ¶ 154
[113] El Paso ¶ 352.
[114] Parkerings ¶ 333.
[115] Diehl Page 415
[116] Occidental ¶ 190; PSEG ¶ 262
[117] Saluka ¶ 305, 351
[118] Saluka ¶ 304; Continental ¶ 258.
[119] Potestà
[120] Article3(1), BIT
[121] Parkerings ¶ 123
[122] Yannaca-Small; Marvin Feldman; EDF ¶ 217
[123] Arif ¶ 537

purpose.[124] In cases where the international tribunals had found a breach of FET, it was highlighted that in those circumstances the laws were changed continuously.[125] In the present case however, there is a legitimate change of legal regulation necessary to ensure that Greyscale is no longer a threat in the territory of the Respondent State.

ii. There has not been violation of the expectations

72. An important consideration in the reasonable and legitimate expectations review would be the rationale behind the state's conduct.[126] The disappointment of Claimant's expectations cannot per se be equated to a violation of the fair and equitable standard included in the BIT.[127] The invocation of legitimate expectations cannot turn the fair and equitable treatment standard into a general umbrella clause.[128]

73. There is no violation of the FET standard as the Respondent's conduct did not reflect an insufficiency of action falling far below international standards, or even subjective bad faith.[129] The obligation of transparency is not violated as the legislation was made public and available by notification in the government gazette.[130] The amendment was non-discriminatory as it is of general application. It does not target the Claimant's investment solely. Respondent did not act unreasonably, since "the plain meaning of the terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously, without reason.[131] The enactment of the law was to prevent uncontrolled exploitation of the patent by the Claimant.

C. THE RESPONDENT IS NOT LIABLE FOR EXPROPRIATION.

74. The grant of the non-voluntary license to HG Pharma to manufacture Valtervite does not amount to expropriation. The actions of the Respondent are justified on the grounds that the Respondent exercised **(i)** police powers for public health and necessity. *In the*

---

[124] Liamco ¶ 192
[125] PSEG ¶ 252-253
[126] Andrea
[127] Potestà
[128] C. Schreuer
[129] Genin; Brownlie Page 527–531
[130] Annexure No. 4
[131] National Grid ¶ 197

alternative, if this Tribunal were to hold that there was expropriation, such expropriation was lawful and therefore **(ii)** the compensation was adequate.

i. Police powers

75. The measures adopted by the Respondent are regulatory measures.[132] They fall within the scope of the Respondent's police powers.[133] The Respondent imposed restrictions on rights of the Claimant as **(a)** there existed a state of necessity. The measures are necessary **(b)** to prevent the violation of public interest.[134] The Respondent is not liable for economic injury to the Claimant, and **(c)** no compensation has to be paid.

a. There existed a State of Necessity

76. Respondent's actions fall under Article 25 of the ILC Articles, which permits states to invoke an explicit defence of necessity under certain circumstances.[135] This ground is widely accepted as reflective of customary international law.[136]

77. The essentials laid down under this article are grave and imminent peril, impairment of an essential interest, exclusion of the defence under international obligation, and no contribution by the Respondent itself.

78. Firstly, there was a grave and imminent peril. Greyscale is a chronic, incurable disease.[137] It causes progressively stiffening muscles, swollen limbs, and severe joint pain.[138] It poses a threat to working-age population which is crucial for the economy of a developing country.[139]

---

[132] Marvin Feldman, ¶ 103
[133] Sedco
[134] Vadi
[135] Article25, ILC State Responsibility
[136] Gabčikovo-Nagymaros, ¶ 32
[137] Annexure No. 3
[138] *Id.*
[139] *Id.*

79. Secondly, the Claimant can still manufacture the drug Sanior. The commercial right of the Claimant to manufacture and sell the drug in the territory of the Respondent is not being violated.

80. Thirdly, the BIT does not expressly prohibit the invocation of the defence of necessity. The Respondent, in accordance with Customary International Law had the right to invoke necessity in such a situation of peril.

81. Further, the Respondent has not contributed to the situation of necessity. Instead, the Ministry of Health emphasised the need for more rigorous campaigning and research to unearth the full extent of the crisis.[140]

82. Since all the elements of necessity have been met, the enactment of the amended law is justified.

b. Requirement of public health

83. Article 6 of the BIT states that non-discriminatory measures to protect public health do not constitute indirect expropriation.[141] Compulsory license may be authorized pursuant to a Respondent's police power in emergency circumstances dictated by public health concerns.[142] The Contracting Parties are party to the ICESCR[143] thereby permitting the Respondent under Article 12 to take steps necessary for the prevention, treatment and control Greyscale.[144]

84. Section 23C of the amended law allows for non-voluntary licences if reasonable requirements of the public with respect to the patented invention have not been satisfied, or the invention is not affordable to the public at a reasonable price.[145] These conditions have been met.[146]

---

[140] Uncontested facts ¶ 14
[141] Article6, BIT
[142] Taubman; Carlos Page 349; Tsai-Yu
[143] Procedural Order No. 3
[144] Article12.2 (c), ICESCR
[145] Annexure No. 4
[146] Gami ¶ 114

85. Increased protection of Valtervite by the Claimant led to higher drug prices. The drug remained out of reach to people in Mercuria[147] and fell short of global standards.[148] Access to Valtervite to prevent Greyscale is one of the fundamental elements of the right of the citizens of the Respondent to the enjoyment of the highest attainable standard of health.[149] The Greyscale patients depend solely on public health schemes to obtain medicine for treatment.[150] The number of people suffering from Greyscale has drastically increased[151] and there is a need to supply the medicine to twice the number of people.[152]

c. No compensation needs to be paid

86. The police powers doctrine states that bona fide non-discriminatory regulation within the police powers of the state does not require compensation at all.[153] The acts of the Respondent are not covered under the concept of expropriation, and no compensation is payable as a matter of international law.[154] The Claimant may be frustrated in its dealings with the Respondent, but such frustration should not be automatically considered expropriation despite the economic damage.[155] The regulatory measure taken by the Respondent to exercise its police powers is a legitimate expression of sovereignty and does not require compensation.[156] The measure of issuance of the Compulsory License, taken by the Respondent is proportional to goal of eradication and prevention of Greyscale which is a high bar to meet.[157]

ii. Compensation paid was adequate

87. *In the alternative*, if the Tribunal was to hold that there has been expropriation, the compensation offered is appropriate. Mercuria being a developing State, the rate of royalty for the compulsory license needs to be determined accordingly.[158]

---

[147] Pécoul
[148] Uncontested facts
[149] UN Access to Medicine; Article12.1, ICESCR; CESCR ¶ 17, HRI; WTO Health
[150] Line 1360, NHA Mercuria Annual Report 2006
[151] Annexure No. 3
[152] Uncontested facts, page 30
[153] Suda
[154] Mann
[155] Emmanuel ¶ 378; Robert ¶ 90-91
[156] Martinez Page 315- 337
[157] Tecmed ¶115-116
[158] Lalitha, Page 401-413

88. In 2009-2010, royalty rates of 0.5% of revenue were granted in Mercuria for drugs to treat incurable, non-fatal diseases.[159] The royalty rate of 1% for the manufacturing of Valtervite is appropriate[160] as Greyscale is a disease of high incidence[161] and the cost of the treatment poses an economic hardship[162].

89. Since the Respondent is facing difficult resource constraints, and cannot provide access to medicines for all, the royalty payments should not exceed a modest fraction of the generic price.[163] Further, adequate remuneration does not include future profits.[164] Public health objectives must be considered while determining remuneration.[165]

90. Hence, measure taken by Respondent have not breached the FET requirement of the Claimant's investments and has not resulted in expropriation of the Claimant's property.

---

[159] Procedural Order No. 3
[160] WHO Guidelines
[161] Annex. No. 3
[162] *Id.*
[163] WHO Guidelines, Page 5
[164] Taubman, Page 461
[165] WHO Guidelines, Page 5; Carvalho

IV. MERCURIA IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS.

91. The alleged delay in enforcement of the Award passed by the Tribunal seated in Reef has not amounted to the violation of the FET standard under Article 3(3) of the BIT. The Claimant filed for the enforcement of the Award before Mercurian High Court on 3 March 2009.[166] The Mercurian Parliament passed the Commercial Courts Act to constitute special benches that could expeditiously dispose of commercial matters. However a Supreme Court ruling later clarified that these special benches did not have jurisdiction for enforcement proceedings.[167] Thus the extension of proceedings was majorly due to the incorrect transfer of the case from the High Court to the Commercial Bench and then back again.[168] These extensions are not unreasonable and do not invoke the international responsibility of the Respondent.

92. Thus, the alleged delay in enforcement of the Award by the Mercurian High Court has not led to **(A)** the denial of justice to the Claimant's rights under the BIT. Further, (**B)** the effective means standard is not a binding obligation of the Respondent under the BIT.

A. NO DENIAL OF JUSTICE

93. Denial of justice is a grave charge under international law that requires proof of exceptional circumstances, serious shortcoming or egregious conduct.[169] Delay in enforcement of the Award is not sufficient to constitute a breach of the FET Standard under the BIT. The alleged delay falls short of the high threshold required to constitute its breach.[170] Undue delay must be indicated by total "refusal to judge" for it to amount to denial of justice.[171]

[166] Uncontested Facts, ¶ 18
[167] *Id.* ¶ 19
[168] Exhibit to Notice of Arbitration
[169] Chevron ¶ 244
[170] *Id.* ¶ 275
[171] Toto ¶ 156; Jan de Nul ¶ 204

94. Further, the Respondent State does not have an international responsibility to create a 'perfect' system of justice.[172] Respondent is a developing country, with a vast population of 67 million and a heavily overburdened judiciary.[173] Considering these factors, the Respondent State should be held to more lenient standards of judicial functions as compared to developed countries.[174] Thus, the Respondent cannot be held liable for denial of justice merely due to alleged delay in judicial proceedings.[175] The Claimant ought to have been aware of the condition of the Host State's judiciary before deciding to invest in it.[176] The alleged delay has no suggestion of bad faith and the extension of enforcement proceedings is reasonable, hence it does not shock or even surprise judicial propriety.[177]

95. While adjudging the reasonableness of the extension of time in enforcing the arbitral award, the Tribunal may divide this period of seven years into 3 phases:

96. During the **first phase** from 3 March 2009 till 14 June 2012 before the Mercurian High Court, it is evident that the Mercurian courts took all actions possible in order to ensure speedy disposal of the case. The court granted short dates[178] and regularly remanded NHA for its callous behaviour.[179]

97. The **second phase** from 4 September 2012 till 2 January 2014 before the Commercial Bench should be disregarded while considering the reasonableness of the extension in enforcement proceedings. This is because that delay was due to the incorrect transfer to the Commercial Bench under the new law.[180]

98. Throughout the **third phase** from 20 February 2014 till 30 October 2016 again before the Mercurian High Court, the court granted short dates at intervals of less than two months to decide and dispose of the matter.[181] The Court also explained that it had an

172 Hesham ¶ 620
173 Response to Notice of Arbitration ¶ 9
174 White ¶ 5.2.18
175 *Id.* ¶ 10.4.18
176 Saluka ¶ 305
177 Mondev ¶ 127
178 Exhibit to notice ¶ 1 - 14
179 *Id.* ¶ 5,6
180 Uncontested Facts ¶ 19
181 Exhibit to notice ¶ 30 - 42

overwhelming caseload.[182] However the repeated absence and request for adjournments from the parties cannot be attributed to the Court for undue delay.

99. This evidences that the delays were normal procedural extensions due to overstretched judiciary. No *mala fide* or unreasonable or deliberate extensions have been granted by the Mercurian Courts. Hence, in the present case the investment has not been subjected to unfair and inequitable treatment.[183]

100. This delay of enforcement does not amount to denial of justice because the Respondent has (i) not violated the components of denial of justice. Further (ii) alleged violation of domestic procedural law does not rise to the high threshold required for denial of justice. Moreover, (iii) the Respondent has not breached its obligations under the New York Convention. Lastly, (iv) the Claimant cannot invoke denial of justice without exhaustion of local remedies.

i. No violation of components of Denial of Justice

101. Delay of judicial proceedings does not amount to denial of justice by the Respondent as, **(a)** the Claimant's acts have attributed to the delay and **(b)** the interests of the Claimant are not excessively important in the face of a public health crisis. Further **(c)** the conduct of Mercurian courts was within the procedural law of the State. Lastly, **(d)** the enforcement of the award is a complex issue which can be done only after determining whether its enforcement would lead to violation of Respondent's public policy.

a. Claimant's Acts

102. Claimant has demonstrated lack of diligence in pushing their case forward. Claimant itself requested the High Court to transfer the case to the Commercial Bench on 30 April 2012. Till the date of return of the case to the High Court on 20 February 2014, approximately 1.5 years of delay was caused due to this incorrect transfer. Moreover, the Claimant could not complete its oral submissions within one hearing and asked for

[182] *Id.* ¶ 32
[183] Mondev ¶ 127

extension.[184] Since the acts of the Claimant have actively and significantly contributed to the delays, therefore the Claimant has not come to this Tribunal with clean hands.[185] This act of first, delaying the enforcement purposefully and then, seeking denial of justice by the Respondent for the same, shows that the Claimant's conduct is dishonest, fraudulent, *mala fide* or unconscionable.[186] Thus Claimant's conduct must be considered before determining that delay is wrongful.

b. Significance of Claimant's interests at stake

103. The Claimant is a corporation merely seeking to enforce an award which is unimportant in the face of the public health crisis being faced in the Respondent State. Greyscale is an incurable disease which is plaguing the working age population of the Respondent.[187] Working population of a developing country contributes to its GDP. Hence greyscale's increasing incidence was imminent and grave for the Respondent to mitigate and prevent.[188] Thus the Respondent contributed all its organs towards treating the disease. The legislature enacted the law allowing compulsory license of patents under which the judiciary speedily granted the license for treatment of Greyscale.[189] Thus the enforcement of contractual claims took a backburner as the situation demanded it.

c. Conduct of Mercurian Judiciary

104. Mercurian courts are overburdened with cases. The huge backlog of cases lead to the Respondent's courts facing regular and systematic delays. Yet, the court tried to provide short dates and proceedings for enforcement of the award took place at regular intervals.[190] Further there were no prolonged periods of complete inactivity on the part of Mercurian Courts.[191] There was no deliberate or *mala fide* delay by the Courts of the Respondent.

---

[184] Exhibit to notice ¶ 25
[185] Yukos ¶ 1357
[186] Arrest Warrant case ¶ 35 (Dissenting Opinion of Judge Van den Wyngaert)
[187] Annexure No. 3; Uncontested Facts ¶ 6; Response ¶ 9
[188] Annexure No. 3
[189] Uncontested Facts ¶ 20,21
[190] Exhibit to Notice of Arbitration
[191] *Id.*

d. Complexity of issue involved

105. The issue in enforcement of the award is complex as the violation of public policy needs to be determined before the award could be enforced.[192] Reference is made to public policy for refusing enforcement of an award when it deviates from the core values of a legal system.[193] When enforcement would violate the forum state's most basic notions of morality and justice, then award would not be enforced.[194] The Mercurian Courts were required to determine the question of public policy before the award is enforced. Since the questions of justice and morality are of grave importance, they cannot be decided in a hasty manner.

ii. Alleged breach of domestic procedural law is insufficient to constitute denial of justice

106. Further, Claimant's unfounded allegations of breach of domestic procedural law due to NHA's absences from court hearings are not sufficient to meet the high threshold of denial of justice.[195] The standard for denial of justice goes beyond mere misapplication of domestic law.[196] Procedural irregularities of domestic law are not enough to prove denial of justice.[197] Alleged disregard of this hypothetical procedural law does not qualify as a ground for arbitrariness and discrimination for the purpose of denial of justice.[198]

---

[192] Uncontested Facts¶ 18
[193] Paulsson
[194] Silberman; Parsons; Traxys; Hebei; X v. Y
[195] Chevron (Opinion of Jan Paulsson) ¶ 16
[196] Liman ¶ 274; Waste Management ¶ 116
[197] Loewen ¶ 121
[198] Mondev ¶ 86; Oostergetel ¶ 304.

iii. Obligations under New York Convention have not been breached

107. Both the Contracting Parties are parties to the New York Convention.[199] New York Convention itself allows Respondent to enforce the award according to its domestic procedural law.[200] The New York convention does not provide a time frame within which arbitral award is to be executed. Moreover, international law has also not laid down any strict standards to assess whether court delays are a denial of justice.[201] Further it has the discretion to refuse enforcement of the award in case it is contrary to Respondent's public policy.[202] Protection of public health is one of the central aims of a State's public policy.[203] Thus the Mercurian courts have a right to first determine this question raised by NHA and then determine the enforcement of the award in accordance with its procedural law.[204]

iv. Exhaustion of local remedies

108. The Claimant has not exhausted local remedies which is an essential requirement under the standard of denial of justice.[205] Article 44 of ILC Articles of State Responsibility states that a State's international responsibility cannot be invoked only if the claim is one to which the rule of exhaustion of local remedies applies and, any available and effective local remedies has not been exhausted.[206] Professor James Crawford opines that where a State by international law is liable to provide FET to its investors, it would not be held liable in case the impugned court decision can be challenged through the domestic judicial process.[207] Therefore the Claimant was under a requirement to exhaust all the remedies that were available in Republic of Mercuria which might have accelerated the enforcement proceedings.[208] Since an option of appeal before the Mercurian Supreme Court existed and the Claimant did not exhaust this remedy to expedite the process, therefore it cannot invoke Respondent's international obligation of denial of justice. Remedies are presumed effective and the Claimant is not excused from

[199] Procedural Order No.2 ¶ 2
[200]Article3, NY Convention
[201] Toto ¶ 155
[202] Article5(2)(b), NY Convention
[203] O'Hara
[204] Uncontested Facts ¶ 18
[205] Loewen ¶ 151
[206] North Sea Continental Shelf Case
[207] State Responsibility Report ¶ 75
[208] Jan Paulsson, Page 130

not pursuing available remedies.[209] Without exhaustion, the Claimants' denial of justice claims lack the element of finality, essential to establish State Responsibility for the acts of its judiciary. Therefore, the non applicability of the available remedy is Respondent's defence against the claim of denial of justice.[210]

B. NO OBLIGATION OF EFFECTIVE MEANS

109. Alleged delay of seven years in enforcing the arbitral award, passed by the tribunal seated in Reef, has not lead to any breach of Respondent's obligations under the BIT. Effective means standard requires effective means of asserting claims and enforcing rights.[211]

110. There is no breach of the effective means standard because **(i)** it is not a substantive obligation on the Respondent. In the alternative, if the Tribunal holds it to be a binding obligation **(ii)** then effective means standard has not been breached by the conduct of Respondent's judiciary.

i. Effective Means is not a substantive obligation under the BIT

111. The BIT does not mention effective means in its Articles. Effective means standard is *lex specialis i.e.* it is an independent treaty obligation rather than a mere restatement of the principal of denial of justice.[212] As per Article 31 of VCLT, preamble of the BIT is only to be used for interpretation of the treaty. The preamble is relevant for the interpretation of the BIT however it does not establish an operative obligation on the Contracting Parties.[213] The reference to effective means clause in the preamble together with the absence of the same from the Articles of the BIT evidences that the Contracting Parties intended not to include Effective Means as a substantive obligation in the BIT.[214] The

---

[209] White ¶11.4.13
[210] Finnish Ships
[211] Preamble, BIT
[212] Chevron ¶242
[213] Bayindir ¶155
[214] *Id*

preamble strictly ought not to contain substantive provisions.[215] The preamble of the BIT is only to be used for the objects and purpose of the BIT and not in its discussion of text and context.[216] Therefore the presence of the Effective Means clause in the Preamble of the BIT, is not sufficient for it to be made a binding obligation on the Respondent. The Respondent has hence not breached a requirement that is not binding on it.

ii. Respondent has not breached effective means standard

112. Alternatively, delay of enforcement proceedings has not lead to the breach of the Effective Means clause. Effective means requires effective means of assertion of claims and enforcement of rights with respect to investment.[217] "Effective" is a systematic, comparative, progressive and practical standard.[218] The standard in general guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments.[219] Existence of institutional mechanisms in place are evident from the establishment of High Courts and Supreme Court in the territory of the Respondent.[220] The delay caused has been occasioned by the plagued judicial conditions of the Host State[221] catering to an enormous population and cannot be attributed to an intentional act of Mercuria to the investor's detriment.[222]

113. Effective means clause does not create obligations in particular cases. [223] Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Respondent's obligations.[224] Therefore the requirement for the breach of Effective Means is not fulfilled due to a single instance of delay in enforcement proceedings.

114. Claimants are required to exhaust local remedies before they can argue breach of an effective means clause. The claimant must make use of all remedies that are available

[215] Fitzmaurice
[216] Ligitan-Sipandan Dispute ¶ 37-52; CMS ¶274
[217] Preamble, BIT
[218] Amto ¶88
[219] Duke Energy ¶391
[220] Uncontested Facts ¶18,19
[221] White
[222] Response to Notice of Arbitration ¶ 9
[223] Amto ¶88
[224] *Id.*

and might have rectified the wrong even where the claimant does not have a high likelihood of succeeding in its local attempts.[225]

[225] Chevron ¶ 326

V. THE TERMINATION OF THE LTA BY NHA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT.

115. The termination of a commercial contract by a non-sovereign act of the NHA, does not give rise to Respondent's obligations under the BIT. The LTA was terminated by NHA due to the failure in renegotiating the price of Sanior with the Claimant.[226] The monopolistic pricing practices of the Claimant did not allow NHA to procure drugs sufficient to meet the increasing supply.[227] The NHA terminated the LTA citing unsatisfactory performance on the part of the Claimant.[228] Therefore, the termination of the LTA by NHA was within Clause 6 of the LTA that provides for validity of the contract *"[...] subject to Supplier's satisfactory performance"*.[229]

116. Hence the termination of the LTA by the NHA does not amount to a breach of Article 3(3) of the BIT as **(i)** NHA's commercial acts are not attributable to the Respondent. Further, **(ii)** the LTA is not protected under the Umbrella Clause of the BIT. Additionally, **(iii)** the adjudication of claims under the LTA by the tribunal seated in Reef should bar this tribunal's jurisdiction so as to avoid readjudication of claims. Lastly, **(iv)** the breach of the LTA by NHA has not lead to a breach of the Umbrella Clause given under Article 3(3) of the BIT.

A. NHA'S CONDUCT IS NOT ATTRIBUTABLE TO THE RESPONDENT

117. The Umbrella clause under Article 3(3) of the BIT states *"Each contracting party shall observe any obligations it may have entered into [...]."*[230]*Pacta Sunt Servanda* requires that BIT should be interpreted in good faith and in accordance with the consent of the Contracting States.[231] Further the interpretation of the BIT should be as per its ordinary

[226] Uncontested Facts ¶ 15,17
[227] *Id.*¶ 17
[228] *Id.*¶ 17
[229] *Id.*¶ 10
[230] Art.3(3), BIT
[231] Art.26, VCLT

meaning in the light of its object and purpose.[232] The Preamble of the BIT includes The Republic of Mercuria and the Kingdom of Basheera in the definition of '*Contracting Parties'.*[233] Since, the BIT expressly clarifies the same it ought to be honoured. Therefore, State Enterprise cannot be included in the term 'Contracting Party' for the purposes of the Umbrella Clause.[234] Further, *"Obligations entered into"* are the obligations undertaken by the Respondent State itself.[235] Additionally, the Respondent is not a named party to the LTA thus proving absence of intention of its Parties to hold the Respondent liable under the contract. [236] Thus, the Respondent has not undertaken any obligations under Article 3(3).[237] Therefore, this tribunal does not have the jurisdiction to decide disputes regarding a mere breach of a domestic contract to which an entity other than the Respondent is a named party.[238]

118. Moreover, NHA's acts concerning the LTA are not attributable to the Respondent as **(i)** the Respondent does not exercise specific control over NHA's acts which caused the breach and **(ii)** the Respondent is not liable for NHA's commercial functions.

i. Absence of Specific Control

119. For NHA's acts to be attributable to the Respondent there is a requirement of Respondent's control over NHA's acts.[239] The mere fact that the Respondent initially established NHA is not a sufficient basis for the attribution to the Respondent of the subsequent conduct of NHA.[240] For attribution of NHA's conduct to the Respondent, the Respondent is required to exercise effective control on the NHA on a day to day monitoring basis.[241] The 'effective control' test requires that the Respondent instructs the specific act which lead to the alleged violations.[242] However, NHA operates independently and there is no record of direct participation of Respondent's officials in the negotiation or breach of the LTA.[243] Respondent's MoH only exercises general

232 *Id.* Art.31
233 Annexure No. 1
234 Bosh ¶ 245
235 EDF ¶ 316
236 Gustav ¶347
237 *Id.* ¶ 347
238 Impregilo ¶ 210,216
239 Article8, ILC State Responsibility
240 ILC Commentary Page 48; Schering Page 361; Otis *Page* 283; Eastman Page 153
241 White ¶8.1.21; Bosnia Genocide ¶400; Rudolf Page 201; Nicaragua paramilitary ¶113, 115
242 Bosnia Genocide ¶400; Rudolf Page 201; Nicaragua paramilitary ¶113, 115
243 Procedural Order No. 3

control over the NHA and not specific control.[244] NHA's submission of only annual reports to MoH evidences lack of its monitoring on a daily basis by the Respondent.[245] The Respondent did not guide, direct or instruct NHA to act or not to act in a particular manner; or how to execute or implement the LTA with the Claimant.[246] Respondent only instructed NHA to invite offers from pharmaceutical companies, however it did not instruct NHA about its commercial activities.[247] Moreover, the budgetary issues faced by the Respondent's government were communicated to the NHA and any subsequent decision of termination of the LTA was taken by the NHA alone, without any interference by the Respondent.[248] Respondent cannot be liable for NHA's termination of the LTA as it did not have any effective control over that specific act of the termination.[249] Thus, in absence of Respondent's specific and day-to-day control over NHA, its acts are not attributable to the Respondent.[250]

ii. Commercial Functions

120. NHA's acts are not attributable to the Respondent, because entering into the LTA and its subsequent termination is not a 'governmental function'.[251] Conduct of public entities although owned and consequently controlled by the State, is not attributable to the State unless the impugned act was done in exercise of governmental functions.[252] For Respondent's international responsibility, NHA's conduct must concern governmental activity and not other private or commercial activity.[253] It is necessary to distinguish between Respondent as a 'sovereign' and as a 'merchant'.[254] The Respondent undertakes obligations under the BIT only in exercise of its sovereign authority *(puissance publique)* and not as a contracting party.[255] Thus, Article 3(3) would apply only when the Respondent enters into a contract through its sovereign acts.[256]

---

[244] Uncontested Facts ¶ 6
[245] *Id.* ¶ 6
[246] *Id.*¶ 9,10
[247] *Id.*¶ 8
[248] *Id.*¶ 16,17
[249] *Id.*¶ 17
[250] White ¶8.1.21; Bosnia Genocide ¶ 400; Rudolf Page 201; Nicaragua paramilitary ¶ 113, 115
[251] Art 5, ILC State Responsibility
[252] EDF ¶ 170
[253] Crawford
[254] Pan American ¶ 108
[255] Consortium RFCC ¶ 51
[256] El Paso ¶ 73, 82

121. Alternatively, if NHA was exercising governmental functions while providing public health care services, its conduct in contracting the LTA was not carried out in exercise of such sovereign authority.[257] Thus, NHA's acts are not attributable to the Respondent as it was acting as a Merchant, and not a Sovereign.[258] Hence breach of the LTA is not attributable to the Respondent, thus not making him liable under Umbrella Clause.

122. Due to lack of Respondent's effective control over NHA's acts and NHA's termination of the LTA amounting of a commercial act, NHA's acts are not attributable to the Respondent.

B. UMBRELLA CLAUSE DOES NOT PROTECT THE LTA AS IT IS PURELY A COMMERCIAL SUPPLY ARRANGEMENT

123. Umbrella clause provides protection only to obligations it may have entered into '*with regard to investments of investors*'.[259] Article 31 of the VCLT requires ordinary meaning to be given to the terms of the treaty. Therefore only investment contracts are protected under Article 3(3) of the BIT. There is no investment contract in the present case, hence the question of protection under the umbrella clause does not arise.[260]

124. However words such as '*any obligation*' in Article 3(3) should not be used to expand the scope of the Clause. This is because such an expansive interpretation would give rise to a flood of suits seeking to hold the host state liable for every contractual breach by a domestic entity towards a foreign investor.[261] A broad construction of the Umbrella Clause would mean any legal breach would amount to a breach of the BIT. This would render the rest of the provisions of the BIT to be futile.[262] The principle of *ut magis valeat quam pereat* states that the law should be given effect rather than be destroyed. Using this principle and the principle of *effet utile* a provision should not be interpreted in a way to make other provisions superfluous or meaningless.[263] Moreover, *t*he principle

[257] Bosh ¶162, 177
[258] Joy Mining ¶ 81; Impregilo ¶ 260.
[259] Article3(3), BIT
[260] El Paso ¶ 533
[261] SGS vs. Pakistan ¶ 166
[262] El Paso ¶ 536
[263] Pan American Energy v. Argentina ¶ 132

of *in dubio mitius* states that a restrictive approach should be taken in case of doubt.[264] Hence, a restrictive approach should be followed while interpreting the Umbrella clause and its ambit should be confined to the protection of only investment obligations.

125. Therefore, purely contractual claims cannot be brought under the BIT.[265] When the claimant's rights arise out of a supply contract, which is a commercial contract for delivery of goods against a price, it does not amount to an investment.[266] Thus the LTA being a commercial supply contract is not an investment and hence not protected under the Umbrella Clause.[267]

C. THE PRESENCE OF AN INDEPENDENT DISPUTE SETTLEMENT CLAUSE IN THE LTA OPERATES AS A BAR TO THIS TRIBUNAL'S JURISDICTION

126. LTA's dispute resolution clause grants jurisdiction to a Tribunal seated in Reef which has already passed an award in favour of the Claimants.[268] . As per the maxim *generalia specialibus non derogant,* the general provision of the BIT should not have an overriding effect on specific provisions under the LTA, which has been freely negotiated between the parties.[269] An Umbrella Clause need not be interpreted to override dispute settlement clauses of particular contracts.[270] As Professor Schreuer says, "*[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application.*"[271] The LTA signed between the Claimant and NHA is more specific than the BIT which was not consented to by the Claimant themselves. Thus the dispute resolution clause of the LTA should be given precedence over the BIT.

127. Claims for breach of the BIT include a pure claim for the breach of the LTA which has already been adjudicated upon. This Tribunal should not exercise its jurisdiction over it to avoid multiplicity of proceedings.[272] Pursuing the same claim with essentially the

---

[264] SGS v. Pakistan ¶ 171
[265] Vivendi ¶100-107
[266] Romak ¶173-243
[267] El Paso ¶531
[268] Uncontested Facts ¶17
[269] SGS v. Philippines ¶141
[270] Eureko BV ¶256
[271] C. Schreuer, Page 362.
[272] SGS v. Philippines ¶155

same factual matrix before this Tribunal would be an abuse of process.[273] Successive proceedings should be dismissed under the doctrine of abuse of process even where requirements of *res judicata* have not been met.[274]

D. THERE HAS BEEN NO BREACH OF THE UMBRELLA CLAUSE BY THE RESPONDENT STATE

128. An umbrella clause does not automatically elevate a breach of contractual claim to the level of a breach of the BIT.[275] Termination of a contract by the Respondent's entity does not itself give rise to direct international responsibility on the part of the State.[276] As per ILC Commentary, "*something further*" is required to make the Respondent liable under international law.[277] BIT's are not insurance policies against the breaches of commercial contracts or bad commercial decisions, thus, they cannot convert mere contract claims into international law claims.[278] Therefore, Umbrella Clause does not transform contractual claims into treaty claims.[279] Moreover, a state may breach a contract without breaching a treaty.[280]

129. Therefore, Respondent cannot be made internationally liable for the commercial acts of NHA in terminating the LTA which was not specifically directed by the Respondent. Article 3(3) protects only investment contracts and hence this Tribunal should hold that Claimant's contractual claims have not breached the Umbrella Clause under the BIT.

---

[273] Ampal ¶331
[274] Grenada ¶4.6.17
[275] SGS v. Pakistan ¶172
[276] Noble Ventures ¶53
[277] ILC Commentary Page 41
[278] Olguín ¶73; Maffezini ¶64
[279] Pan American ¶110, 114
[280] Vivendi ¶95

PRAYER FOR RELIEF

The Respondent respectfully requests this Tribunal to find that:

(1) The tribunal lacks jurisdiction over the claims in relation to the Arbitral Award.

(2) The Respondent has rightfully denied the benefits of the BIT to the Claimant by invoking Article 2 of the BIT;

(3) Respondent has not violated the Fair and Equitable Treatment standard by the enactment of Law No. 8458/09 and grant of compulsory license;

(4) Respondent has not violated Article 3 of the BIT by the conduct of its judiciary in relation to the enforcement proceedings.

(5) Respondent has not violated Article 3(3) of the BIT by breach of the LTA.

Respectfully Submitted on September 25, 2017

By Team Rau

On Behalf of Respondent

Republic of Mercuria