Team Robinson

THE PERMANENT COURT OF ARBITRATION

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE BILATERAL INVESTMENT TREATY BETWEEN THE GOVERNMENT OF BASHEERA AND THE REPUBLIC OF MERCURIA

BETWEEN

ATTON BORO LIMITED

(Claimant)

AND

REPUBLIC OF MERCURIA

(Respondent)

MEMORIAL ON BEHALF OF RESPONDENT

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LIST OF ABBREVIATIONS

¶ / ¶¶	paragraph / paragraphs
ADR	Alternative Dispute Resolution
ArbIntl	Arbitration International
Art. / Arts.	Article / Articles
BIT	Bilateral Investment Treaty
ed / eds	editor / editors
ed.	edition
et al.	and others
et seq.	et sequentia (and the following one)
FTA	Free Trade Agreement
i.e.	id est (that is)
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
IL	International law
ILC	International Law Commission
ILM	International Legal Materials

ILR	International Law Reports
LCIA	London Court of International Arbitration
LTA	Long Term Agreement
NAFTA	North American Free Trade Agreement between Canada, Mexico, and the United States of America as entered into force on 1 January 1994
NHA	Mercurian National Health Authority
PCA	Permanent Court of Arbitration
PO	Procedural Order
SCC	Stockholm Chamber of Commerce
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights administered by the World Trade Organization and effective as of 1 January 1995
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNGA	United Nations General Assembly
v.	versus (against)
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO DSS	World Trade Organization Dispute Settlement System
WTO DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes

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3. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967)

4. Permanent Court Of Arbitration Arbitration Rules 2012

5. Permanent Court Of Arbitration Optional Rules For Arbitrating Disputes Between Two Parties of Which Only One Is A State

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8. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

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11. Azurix v Argentina Decision on Provisional Measures, 6 August 2003, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416; 43 ILM (2004) 262
12. Bayindir v Pakistan Decision on Jurisdiction, 14 November 2005

13. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22. 2008 Award

14. Burlington Resources v Ecuador, Decision on Jurisdiction, 2 June 2010

15. Chevron and Texaco v Ecuador Final Award, 31 August 2011

16. CMS v Argentina Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494; 42 ILM (2003)

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21. Fedax v Venezuela, Decision on Jurisdiction, 11 June 1997, 5 ICSID Reports 186; 37 ILM (1998) 1378

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23. Generation Ukraine v Ukraine, Award, 16 September 2003, 10 ICSID Reports 240; 44 ILM (2005) 404

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29. Methanex v United States Award, 3 August 2005, 44 ILM (2005) 1345

30. Occidental Petroleum Corp. and Occidental Exploration and Production Company v Ecuador Decision on Jurisdiction, 9 September 2008 269

31. Pope & Talbot v. Canada. In Pope & Talbot, 6 ICSID 567. Page of 172 interim Award. 26 Jun 2000

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3. Arbitration and Conciliation Center of the Bogota Chamber of Commerce (CACCCB) http://centroarbitrajeconciliacion.com/
4. Arbitration Institute of the Stockholm Chamber of Commerce (SCC) www.sccinstitute.com
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6. Cairo Regional Centre for International Commercial Arbitration (CRICA) www.crcica.org.eg
7. Global Arbitration Review www.globalarbitrationreview.com
8. International Centre for Settlement of Investment Disputes (ICSID) http://icsid.worldbank.org/ICSID
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14. Investment Treaty News www.iisd.org
15. NAFTA Claims www.naftalaw.org
16. New York Arbitration Convention www.newyorkconvention.org
17. The Permanent Court of Arbitration (PCA) www.pca-cpa.org
18. United Nations Commission on International Trade Law (UNCITRAL) www.uncitral.org/uncitral
19. Vienna International Arbitral Centre (VIAC) www.internationales-schiedsgericht.at

STATEMENT OF FACTS

1. The Respondent is the Republic of Mercuria, an independent State with a permanent population of about 67,150,133 by 2006, a defined territory in Westeros, a government and the capacity to enter into relations with other states.
2. On **11th of January 1998**, the Republic of Mercuria ("**Mercuria**") and the Kingdom of Basheera ("**Basheera**") concluded an Agreement for the Promotion and Reciprocal Protection of Investments (the "**BIT**").4 The BIT was one of several international agreements concluded by Basheera, a trend that was attributed to the government's new outward-looking economic policy.
3. Additionally, Mercuria is Party to International Covenant on Economic, Social and Cultural Rights (ICESCR), the Marrakesh Agreement Establishing the World Trade Organization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Doha Agreement, the New York Convention, the Paris Convention and other multilateral, regional, and bilateral agreements and arrangements.
4. In **1998**, the Central Government Mercuria of set up the National Health Authority (NHA) to pursue its goal of securing universal healthcare for its people, as envisioned by the Constitution of Mercuria.
5. On **21st of February 1998**, Atton Boro and Company which is a corporation organized under the laws of the People's Republic of Reef, was granted the Mercurian Patent No. 0187204 for a compound termed as Valtervite which was meant to radically improve treatment for greyscale patients.
6. In **April 1998**, Atton Boro Group, which is the primary holding company in Atton Boro and Company, incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited, as a vehicle for carrying on business in South American and African countries.
7. On **25th of November 2004**, Atton Boro and the Mercuria National Health Authority ("**NHA**") entered into a Long-Term Agreement ("**LTA**") for supply of Atton Boro's blockbuster greyscale-treatment drug, Sanior, at a fixed discounted rate. Sanior contains the active ingredient, Valtervite, for which compound Atton Boro holds the Mercurian Patent No. 0187204 granted on 21 February 1998.
8. In **June 2005**, Atton Boro Limited delivered its first consignment of the drug. The NHA immediately began distribution across Mercuria.

9. On **10th of June 2008**, the NHA unilaterally terminated the LTA by citing unsatisfactory performance by 930 Atton Boro.

10. In **January 2009**, Atton Boro invoked arbitration against the NHA under the LTA. Atton Boro challenged the termination and obtained an award (the "**Award**") in its favor from a Tribunal seated in Reef. The Award directed the NHA to pay Atton Boro USD 40,000,000 in damages for breach of the LTA.

11. On **3rd of March 2009**, Atton Boro filed enforcement proceedings before the High Court of Mercuria (the "**Court**") which were not yet concluding before the institution of this arbitration process. The delay being largely attributed to the changes in law governing courts in Mercuria and the decisions rendered by the Mercurian Supreme Court.

12. On **10th of October 2009**, the President of Mercuria promulgated national legislation for its intellectual property law, introducing a provision for use of patented inventions without the authorization of the owner (Law No. 8458/09).

13. In **November 2009**, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court for grant of a license to manufacture Atton Boro's patented active ingredient, Valtervite. The Court heard the matter through a fast-tracked process, and granted HG-Pharma the license on 1 April 2010 to manufacture and market the drug by paying a 1% royalty of its total revenues to Atton Boro.

14. On **7th of November 2016**, the Claimant Atton Boro Limited served a notice of arbitration to the Permanent Court of Arbitration with the intent to commence proceedings against the Republic of Mercuria majorly citing the violation of the Mercuria-Basheera BIT. It bas

15. On **26th of November 2016** the Respondent replied to the request declaring that it rejected all claims and allegations made by the Claimant in the Request for Arbitration as false and unsubstantiated. Furthermore, the Respondent denied that the Arbitral Tribunal has jurisdiction over this case.

RESPONDENT'S ARGUMENTS

1. JURISDICTION

The Respondent recognizes preliminarily that the principle of *Kompetenz-Kompetenz* under article 23 (1) of the PCA Arbitration Rules 2012[1] and Article 21(1) of the PCA Optional rules[2] does provide this arbitral tribunal with the power to determine its own jurisdictional limitations. Both the PCA Rules 2012 and the PCA Optional Rules are some of the governing rules that guide this arbitration process brought under the Mercuria-Basheera BIT.[3]

Additionally, the Respondent is familiar with the sentiments stated by the tribunal in *Abyei Area Case*[4] and the International Court of Justice in the *Costa Rica/Nicaragua cases* joinder hearing[5], where it was stated that a primary decision-maker vested with *Kompetenz-Kompetenz* powers, must assess whether they can exercise this power when seized with any matter.[6]

Be that as it may, the Respondent submits that the Arbitral tribunal lacks and in any case should not exercise any jurisdiction based on three key arguments:

1. The enforcement of the arbitral award does not form part of the term "Investment"
2. Alternatively, the tribunal lacks the jurisdiction to handle Intellectual Property matters which fall under the WTO DSB and the Claimant lacks the requisite standing.
3. The Respondent State, Republic of Mercuria, is legally justified to Invoke Article 2 of the BIT by denying the claimant any benefits thus denying this Tribunal the exercise of its jurisdiction.

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[1] Article 23, Permanent Court Of Arbitration, Arbitration Rules 2012 effective from December 2012

[2] Article 21(1), Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, July 6, 1993

[3] Procedural Order No. 1

[4] In the matter of an arbitration pursuant to the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, PCA, Final Award, July 22 2009.

[5] ICJ proceedings in joining the case concerning Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) and the case concerning the Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*).

[6] J. Lew & et. al., *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p.46

1.1.The Arbitral Award does not constitute an Investment under the Mercuria-Basheera BIT

From the very onset the Respondent submits that the arbitral award passed by a Tribunal seated in Reef in favour of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely[7] does not constitutes an investment neither on its stand-alone basis nor the overall operation which the arbitral award constitutes of.

1.1.1. The Arbitral Award on a stand-alone basis is not an investment

At the primary level, the definition of what is an investment must be interpreted from the applicable BIT.[8] Thus the BIT becomes the first reference for the Respondent to determine whether the arbitral award on a stand-alone basis is an investment. As noted in *Saipem v. Bangladesh*[9]*, White Industries v. Republic of India*[10] and *Frontier Petroleum Services Limited v. The Czech Republic*[11] a BIT must be appropriately clear from interpretation that it provides an arbitral award on a standalone basis to constitute an investment and it must be on a case to case basis.[12]

The Respondent recognizes from a general stand-point the eligibility of arbitral awards to constitute investment is usually considered under the head of "claims of money arising out of an investment or performance of a contract".[13]This position has been well covered by the tribunals

[7] Uncontested Facts, ¶17

[8] C. Yannaca-Small, *Definition of Investor and Investment in International Investment Agreements*, in International Investment Law: Understanding Concepts and Tracking Innovations, 2008

[9] *White Industries v. Republic of India*, Permanent Court of Arbitration, Final Award, 30th November 2011

[10] *Saipem v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures , 21 March, 2007

[11] *Frontier Petroleum Services Limited v The Czech Republic*, Permanent Court of Arbitration, Final Award, 12 November, 2010

[12] S. K. Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries v. India Award*, vol. 2, no.1, Indian Journal of Arbitration Law, 2013

[13] Ibid; V. Mansinghka & S. Srikumar, *Do Arbitral Awards Constitute "Investment"?*, vol. 5, no. 2, Indian Journal Of Arbitration Law, 2017, pp. 1-22; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007).

in *Saipem* v. *Bangladesh*[14] and *Malaysian Historical Salvors* v. *Malaysia*[15] where both tribunals pointed to the fact that an award falls squarely within the coverage of "claims of money" since "*the prevailing party undoubtedly has a credit for a sum of money in the amount of the award*."[16]

Thus the Claimant might argue that ordinary interpretation[17] of the BIT's article 1(1) read together with article 1(1) (c) qualifies an arbitral award on stand-alone basis to be an investment under the Mercuria-Basheera BIT.

The Respondent however, submits that such an interpretation would definitely cause certain problems.

Firstly, an ordinary interpretation the respondent submits would comfortably permit this tribunal to exercise a supervisory role over Mercuria's domestic courts' competence to annul, enforce or refuse enforcement of arbitral awards.[18]

Secondly, the Respondent submits, ordinary interpretation would eliminate any practical limitation to the scope of the concept of "investment" under the Mercuria-Basheera BIT. In particular, it would render meaningless the distinction between investments, on the one hand, and purely commercial transactions which the LTA signed between NHA and Atton Borro limited is.[19] The result would be that any sales or procurement contract which has an arbitral award attached to it would comfortably qualify as an investment.

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[14] Op. Cit., *Saipem* v *Bangladesh*

[15] Op. Cit., *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*

[16] Ibid, fn 14

[17] Territorial Dispute (*Libya v Chad*), ICJ Reports, vo. 6, 1994, p.22, ¶41; T. Wälde, 'Interpreting Investment Treaties', C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, 2009, pp. 724–725; Sir I. M. Sinclair, *The Vienna Convention on the Law of* Treaties, Manchester University Press, 1984, pp. 57-67; J. R. Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford, Oxford University Press, 2012, pp. 21-29; *ADF Group Inc. v United States of America*, ICSID Case No. ARB (AF)/00/1, Final Award, 9th January 2003, 6 ICSID Rep 449; Sovereignty over Pulau Ligitan and Pulau Sipadan, (*Indonesia v Malaysia*) Judgment, ICJ Reports 2002, p. 625

[18] *Romak SA* v *The Republic of Uzbekistan*, (PCA Case No AA280, 26 November 2009), Para 186;

[19] *Joy Mining Machinery Ltd.* v. *Arab Republic of Egypt*, Award on Jurisdiction, August 6, 2004, ¶ 58*Fedax NV v. Republic of Venezuela*, Award on Jurisdiction, July 11, 1997, ¶ 42

The Respondent thus submits that, Article 1(1) which provides the term Investment to include "claims of money", should not be textually interpreted to include an arbitral award. Such a mechanical application of the categories listed in Article 1(1) of the BIT would produce results which are manifestly absurd and unreasonable[20] as highlighted above by the two negative effects.

This is despite the fact that the ordinary interpretation or textural approach is the default rule for interpretation as highlighted in the *Methanex*[21] and *Wintershall*[22] cases where the tribunals observed that, the text of the treaty should be deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide ranging searches for the supposed intentions of the parties.

1.1.2. The Overall Operation which the arbitral award forms part of is not an investment

1.1.2.1. The Overall Operation under the Mercuria-Basheera BIT

From the onset, it is clearly vital to determine what amounts to an overall operation in the present proceedings. As well captured by the uncontested facts under paragraph 10, the arbitral award emanated from termination of an agreement where the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders.[23]

The rationale of looking at the overall operation and whether the arbitral award constitutes part of that overall operation is that it would be extremely difficult, if not absolutely impossible; to identify the very most commonly expected characteristics of investment from an arbitral award on its stand-alone basis. That position has been well settled by various tribunals such as the

[20] *Certain Expenses of the United Nations* (Art. 17, para 2, of the Charter), Opinion of 20 July 1962, ICJ Reports 1962, p. 151; Kasikili/Sedudu Island, (*Botswana v Namibia*) Judgment, ICJ Reports 1999, p. 1045; Case Concerning the Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), 13 July 2009; SGS *Société Générale de Surveillance SA* v. *Republic of the Philippines* (2004) 8 ICSID Reports 515, para. 116; *Noble Ventures v. Romania* (Award), 12 October 2005, ¶50

[21] Methanex Corporation v United States of America, UNCITRAL (NAFTA), Preliminary Award on Jurisdiction and Admissibility, First Partial Award, 7th August 2002

[22] Wintershall v Argentine Republic, ICSID Case No ARB/04/14, Award (8 December 2008)

[23] Uncontested Facts, ¶10

ICSID Tribunals in *GEA v. Ukraine*[24] and *Saipem v Bangladesh*[25] as well as the PCA in *Chevron v. Ecuador*[26].

The Claimant might argue that, Article 1(1) (d) which provides that investment includes patents such as *Valtervite*[27] read together with the statement ending article 1(1) which provides that; "Any Change in the Form of an investment does not affect its character as an investment"[28] hence the overall operation which the arbitral award forms part of is an investment as per BIT.

The Respondent, however, humbly avers that, that overall operation was purely a commercial transaction because it was a contract for supply with immediate payment at a market rate. Under the uncontested facts[29] it points to the fact that the arbitral award was sought for prematurely terminating the LTA but not failing to pay the Claimant the amount due for the consignments delivered since June 2005.

This is a clear indication that immediate payment was tendered for each purchase order placed. Thus a clear hallmark of a purely commercial contract which is a one-off sales contract as pointed out in *Romak v Uzbekistan*[30] and it was not envisaged under the BIT.

Additionally, the Respondent submits that, if one-off sales contract would constitute an investment under the BIT then as stated in **Romak v Uzbekistan;**

"The wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term investment an extraordinary and counterintuitive meaning which includes one-off contracts."[31]

However, the Respondent submits that the Mercuria-Basheera BIT does not meet the strict threshold set under *Romak.*

[24] *GEA v. Ukraine*, ICSID Case No ARB/08/16, Award (March 28, 2011), ¶ 44

[25] Op. Cit., *Saipem v Bangladesh*; Also in ATA v. Jordan, ICSID Case No ARB/08/2, Award (May 18, 2010)

[26] Chevron v. Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008), ¶ 2

[27] Uncontested Facts, ¶3

[28] *CF*, Energy Charter Treaty, art 1(6); Agreement between Japan and the Kingdom of Cambodia, art 1

[29] Uncontested Facts, ¶17

[30] Op. Cit., Romak v Uzbekistan, Para 209

[31] Ibid

1.1.2.2. The Overall Operation under the *Salini Test*

The Respondent recognizes that where an arbitral award is not distinctively or clear and exhaustive defined as an investment within a BIT or out of abundant caution[32], firstly, the overall operation in which the arbitral award constitutes of under the relevant BIT must be assessed to determine whether it constitutes an investment. Secondly, the *Salini* test[33] should be employed to evaluate whether that overall operation constitutes of an investment.

On the first ground the Respondent has already submitted that the overall operation is not an investment under the BIT and it remains analytically distinct from the arbitral award. On the second ground of using the *Salini test* the Claimant may point out that the *Salini Test* although normally used in ICSID proceedings, it has been widely accepted even in non- ICSID cases such as the present proceedings, in order to accord meaning to the term investment in relation to treaties without a clear and exhaustive definition of the term, or out of abundant caution.[34]

However, the Respondent does submit; First that the Respondent state has not given any express consent to be party to the ICSID Convention[35] which is the condition set under Article 8(2)(a) of the BIT. As well articulated by the ICJ in *Frontier Dispute Case*,[36] the binding force of a treaty comes from the consent of the parties, not from the subject matter or form of the treaty. Therefore the *Salini test* cannot be introduced.

Secondly, the Respondent Submits that, if the tribunal allows the *Salini test* to be used then its elements does not qualify the overall operation in which the arbitral award forms part of to be an investment as demonstrated below.

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[32] Op. Cit., *White Industries v. India*, PCA, Final Award, ¶ 7.4.10

[33] *Salini Construttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction of 16 July 2001, para 52*: Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Award (June 30, 2009), ¶ 109

[34] L. Guglya, *International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)?* 2 Czech Y.B. Int'l. L. 93 (2011); M. Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law*, Kluwer Law International, 2017

[35] Op. Cit., *Romak v. Uzbekistan*, ¶ 205; *ATA v. Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 111; Article 11 and Article 34 of the Vienna Convention on the Laws of Treaties;

[36] *Frontier Dispute Case* (Burkina Faso v Mali) 1986; *Nuclear Test Cases* (1974) ICJ Reports, p. 253, ¶43

1.1.2.2.1. Contribution

In *Salini* contribution was stated to be; Commitment of capital in the form of contributions in money as well as in kind through provision of know-how, equipment and qualified personnel.[37]

In the present case, the Respondent submits that, the Agreement is a supply contract that involves repeated short-term extensions, with a glaring condition set.[38] Thus this can hardly be considered a contribution, given that immediate payment at a market rate was envisaged under the Agreement.

1.1.2.2.2. Duration

The Respondent humbly avers that duration has been considered a paramount factor that differentiates investments from ordinary commercial transactions.[39]Thus, duration is to be analyzed in light of all of the circumstances, and of the investor's overall commitment. Short-term projects are not deprived of "investment" status solely by virtue of their limited duration.[40]

However, the Respondent submits that in the present context the duration is dictated by the presence of a condition within the LTA.[41] Thus therefore a careful reading of the LTA, would portray the transaction to even include a one-off transaction and the Claimant would be just fine.

The Respondent thus submits that, such a timeframe where although there is 10 year period indicated under the LTA, it would be subject to a condition is not of the sort normally associated with "investments" according to the common understanding of the term.

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[37] T. Voon and A. Mitchell, 'Implications of International Investment Law for Tobacco Flavouring Regulation', *Journal of World Investment & Trade*, vol. 12, 2011, p. 65; O.M. Garibaldi, 'On the Denunciation of ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy', in C Binder et al (eds), *International Investment Law for the21st Century: Essays in Honour of Christoph* Schreuer, Oxford University Press, 2009, pp 251–277;

[38] Uncontested Facts, ¶10

[39] Op. Cit., *Joy Mining Machinery Limited v. Arab Republic of Egypt*; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID CASE No ARB/97/7, 9 November 2000.

[40] *Caratube International Oil Company LLP v Republic of Kazakhstan*, Final Award, ICSID Case No ARB/08/12, 5 June 2012, 360–361; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, Decision on Jurisdiction, ICSID Case No ARB/06/2, 27 September 2012, 219 and 227.

[41] Uncontested Facts, ¶10

1.1.2.2.3. Assumption of Risk

From the onset the Respondent does submit and concur with the sentiments laid in the PCA tribunal in *Romak v Uzbekistan,* that;

An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, the investor simply cannot predict the outcome of the transaction.[42]

However, in the present proceedings, the Respondent avers, the Claimant clearly knew that its exposure was limited to the value of the periodically placed purchased order under the agreement.[43] The expansion was only based on the convenience of the Claimant due to the frequency of the orders placed and not uncalculated risk which is the hallmark of an Investment Risk.[44]

The Respondent, therefore, submits that the risk assumed by Atton Boro was circumscribed to the possible non-payment of the purchase orders for Sanior, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship and not an investment risk where the outcome is unpredictable.

Therefore the Respondent submits that the arbitral award and the underlying overall operation investment remain analytically distinct. The overall Operation is not an investment within the BIT and under the *Salini* test. Moreover, the arbitral award on stand-alone basis cannot be interpreted to falling within the scope of Article 1(1) of the BIT.

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[42] Op. Cit., *Romak v Uzbekistan*, ¶229; Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford Unversity Press, 2010, pp. 191–210; M.S.C. Hwang and J.L.C. Fong, 'Definition of "Investment" — A Voice from the Eye of the Storm', *Asian Journal of International Law*, vol. 1, 2010, pp. 30-99; D. Krishan, 'A Notion of ICSID Investment', in TJ Weiler (ed), *Investment Treaty Arbitration and International Law*, 2008, p. 61; A Martin, 'Definition of "Investment": Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?', vol. 11, no.1, 2011, http: //www.bepress.com/gj/vol11/iss2/art3.com , (Accessed on 11th February 2017) ; Jean Ho, 'The Meaning of "Investment" in ICSID Arbitrations', vol. 26, 2011, *Arbitration International*, pp633-647

[43] Uncontested Facts, ¶10

[44] Uncontested Facts, ¶15

1.2. The Tribunal is not the correct forum to handle the present matter.

In the unlikely event the tribunal finds that the Claimant has an investment and it can exercise jurisdiction, it is the alternative submission of the Respondent that the tribunal sets its jurisdiction aside and allow the parties to first engage the World Trade Organisation Dispute Settlement System to handle the matter.

As highlighted under the Mercuria-Basheera BIT article 8, arbitration should be exercised as the last resort after parties have tried to amicably settle the dispute in another manner. Thus the Respondent submits that the WTO DSS is one of those suggested amicable methods under article 8(1) of the BIT. The rationale is threefold.

Firstly, the Respondent, the Republic of Mercuria, and the Kingdom of Basheera, the place where the Claimant is incorporated[45], are parties to both the Marrakesh Agreement Establishing the WTO[46] and the TRIPS Agreement[47]. Thus they are duty bond to comply with the treaty obligations they have willingly consented to.

Secondly, the Claimant assertions revolve around a patent issue which is well covered under the TRIPS Agreement[48], thus the Kingdom of Basheera should engage with the Respondent State in consultation over the disputed issue to reach an amicable solution since the WTO DSS is only a preserve of member states only.[49] If an amicable solution is not reached then the Kingdom of Basheera is entitled to request a panel under article 6 of the DSU and article 64.1 of the TRIPS Agreement.[50]

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[45] Uncontested Facts, ¶ 4

[46] Preamble, Mercuria-Basheera BIT

[47] Procedural Order No. 2, ¶ 4

[48] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/441/458/467

[49] Article 1, Article 3 and Article 4 of the WTO DSU; Alabama Claims (*U.S.A v Great Britain*), 29 R.I.A.A. 125 (14th September, 1872);

[50] The Havana Club Rum case, (*U.S.A v Cuba*), Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, 683 (*adopted on* Feb. 1, 2002).

1.3. The Respondent State is legally justified to Invoke Article 2 of the BIT by denying the claimant any benefits

From the very onset the Respondent State does concede that the Claimant is an investor as per the BIT. In the present proceedings, Article 1(2) of the BIT clearly advocates for the place of incorporation according to the laws of the country. Under the uncontested facts Atton Boro Group incorporated a wholly owned subsidiary incorporated in the name of Atton Boro Limited to carry on business in South America and African countries.[51] The fact that Atton Boro has been incorporated in the Kingdom of Basheera without contestation as to the legality and due procedure, qualifies it under the definition of an investor under the BIT.[52]

Thus the Respondent being aware of previous tribunal decisions such as *Yukos Universal v. Russian Federation* on the basis of the Energy Charter[53], as well as the *Saluka Investments v. Czech Republic* case,[54] the arbitrators considered that it was not their role to "impose upon the parties a definition of "investor" other than that which they had themselves agreed," the Respondent concedes that the Claimant fits the standard of who is an investor under the BIT.[55]

However, the Respondent submits that although the Claimant is legally incorporated under the BIT, the Claimant is exploiting the Respondent State by abusing the treaty shopping concept. Thus, the Respondent has been availed by Article 2 of the BIT the right to deny any benefits accrued by the Claimant and the Respondent submits that it has met the cumulative conditions for denial of benefits as follows.

Therefore, the tribunal is barred from exercising any jurisdiction over the matter at hand.

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[51] PO1 statement of uncontested facts, ¶ 4

[52] Ibid; C. Schreuer, "Nationality of Investors: Legitimate Restrictions vs. Business Interests." *ICSID Review – Foreign Investment Journal of Law*, 2009, vol. 24, No. 2, p. 527.

[53] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Award on Jurisdiction, 30 November 2009

[54] *Saluka Investments v Czech Republic*, Partial Award, 17 March 2006, 15 ICSID Reports 274

[55] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18), award on jurisdiction of April 29, 2004*; Aguas del Tunari v. Bolivia* ICSID Case No. ARB/02/3, verdict on jurisdiction of 21 October 2005, ¶321; *Mobil Corporation, Venezuela Holding BV, et al. v. Venezuela* ICSID Case No. ARB/07/27), decision on jurisdiction, June 10, 2010

1.3.1. Substantial business activities

As pointed out under the BIT article 2(1), the substantial business activities for the Claimant which should be in question are those based in the territory of the Contracting Party in which it is organized, that is, the Kingdom of Basheera.

As pointed out in *Pac Rim Cayman LLC v. The Republic of El Salvador* substantial business activities is not measured by the presence of machines or personnel in a particular jurisdiction but rather the effective input by the investor.[56]Under the uncontested facts, there is no indication whatsoever that the Claimant Atton Borro Limited has substantial business activities rather than merely renting out an office space, opening a bank account, hiring a manager and an accountant, and commencing business.[57] Instead its initial parent company Atton Borro Group is indicated to have a strong foothold in Basheera's pharmaceutical market.[58]

Thus, the Respondent avers that the Claimant lacks substantial business activities in the Contracting Party in which it is organized, that is, the Kingdom of Basheera.

1.3.2. Ownership/Control

As observed in *Plama Consortium v Bulgaria* the denial of benefits effectively allows the "corporate veil" to be pierced in order to narrow the treaty's scope of application.[59] Therefore, due to the presence of the denial of benefit clause within the Mercuria-Basheera BIT, the Respondent has the power to look beyond the place of incorporation and check who the true owners behind the Claimant are.[60]

The Respondent submits that both the ownership and control of the Claimant is citizens or nationals of a third state. As indicated under the uncontested facts, Atton Borro limited is wholly

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[56] *Pac Rim Cayman Limited Liability Company v El Salvador*, Decision on the respondent's jurisdictional objections, ICSID Case No ARB/09/12, IIC 543 (2012), 1st June 2012;

[57] PO1 statement of uncontested facts, ¶ 4

[58] Ibid

[59] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award on Jurisdiction, 8 February 2005; A. Martin, International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina, *Transnational Dispute Management*, vol. 8, no. 1, 2011, pp. 1-17

[60] Op. Cit., *Tokios Tokeles v. Ukraine*; *ADC v. Hungary* (ARB/03/16), October 2, 2006, ¶360; *Rompetrol v. Romania* (ARB/06/3), award on jurisdiction, April 18, 2008, ¶ 85

owned subsidiary by the Atton Boro Group.[61] Thus the shares of Atton Boro Limited are currently held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company which funded Atton Boro to set up its manufacturing unit in Mercuria.[62] Thus, the Respondent submits that the ownership of Atton Boro belongs to citizens and nationals of third state.

Alternatively, the Respondent Submits that the control of the Atton Boro limited is done by a third state entity, in the name of Atton Boro and Company. As indicated Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef.[63] Moreover, Atton Boro has been demonstrated to be providing support for regulatory approval, marketing, and sales as well as legal, and tax services for Atton Boro Group affiliates.[64]

Thus the Respondent submits that it has the right to exercise the denial of benefits under Article 2 of the Mercuria-Basheera BIT for the Claimant has no substantial business activities in the place of incorporation and it is owned and controlled by citizens or nations of a third state not privy to the BIT.[65]

1.3.3. Time of exercising the Right to denial of benefits

The Respondent submits that the Mercuria-Basheera BIT does not indicate the time when a contracting party can exercise its right under article 2 the BIT. Therefore, the Respondent adopts the sentiments postulated in *Pac Rim Cayman LLC v El Salvador*[66] and submits that,

If a treaty in question is silent as to the timeline for the invocation of a denial of benefits clause, there is no obligation for the host state to deny the benefits of the treaty before the request for arbitration is filed neither notify the investor of such a right being exercised.

Thus, the respondent wishes to invoke the right under article 2 at the time of objecting jurisdiction.

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[61] P.O. 1, Statement of Uncontested Facts, ¶ 4

[62] P.O. 2, ¶ 4 and P.O. 3, ¶ 3

[63] P.O. 1, Statement of Uncontested Facts, ¶ 2

[64] P.O. 2, ¶ 3

[65] *Generation Ukraine v Ukraine*, Final Award, 16 September 2003, 10 ICSID Reports 240; 44 ILM (2005) 404

[66] Op. Cit., *Pac Rim v El Salvador*; *GAI & Rurelec v Bolivia*, UNCITRAL, Award, 31 January 2014

2. MERITS

In the unlikely event that the Tribunal decides that it has jurisdiction and that the claims are admissible, the Respondent requests the Tribunal to reject the claims on the basis of merits. All actions by the Respondent state were taken within its permissible 'police powers' and are, thus, awaiting the proper order on the enforcement of the arbitral award. The respondent accorded fair and equitable treatment to the claimant and did not violate the BIT by termination of the LTA.

2.1. The Respondent acted within the FET standard set under Article 3(2) of the BIT by amending its I.P. Law by insertion of Section 23C.

The Respondent recognizes that the FET standard provided under Article 3(2) is a general unqualified FET provision, that is, it contains a simple promise to accord to investment "fair and equitable treatment" without any further reference to source or content, elaboration or restrictions.[67] Therefore, the Respondent submits that, the tribunal should interpret the unqualified FET obligation by equating it to the minimum standard of treatment under customary law.[68] Thus the Respondent avers that the standard of proof should be very high such that it is used as a ceiling and not as a floor as stated in *LFH Neer and Pauline Neer (United States v. Mexico).*[69] The Respondent reiterates that the burden to prove lies with the Claimant.[70]

As observed in numerous arbitral awards such as *Rumeliu Telkom v Kazakhstan*[71] and *Loewen v. USA*[72], the FET Standard encompasses numerous elements within it but in respect to this case the Respondent will submit that;

1. A stable legal framework has been provided
2. No legitimate expectations were made and thus non were broken
3. The Respondent state's judicial conduct did not amount to denial of justice.

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[67] Cf, Article 4, China-Switzerland BIT (2009)

[68] OECD Committee on International Investment and Multinational Enterprises, 1984, p. 12, ¶ 36

[69] *LFH Neer and Pauline Neer v Mexico (*US v Mexico) (1926) 4 RIAA 60, pp. 61-62; *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Award, 26 January 2006; *Cargill v. Mexico*, ICSID Case No. ARB (AF)/05/2, Award, 18 September 2009, ¶¶284–285

[70] *PSEG v. Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, ¶262

[71] *Rumeli Telekom v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, ¶654

[72] *Loewen v. United States*, ICSID Case No.ARB(AF)98/3, Award, 26 June 2003, ¶¶128-129

2.1.1. The Respondent has provided a Stable legal framework

The Respondent submits that by insertion of section 23 to its Intellectual Property Law provided a stable legal framework and did not violate the FET standard. In determining what amount to stable legal framework *Florian Dupuy* & *Pierre-Marie Dupuy*[73] as well as the tribunal in *International Thunderbird Gaming Corp v. Mexico*[74] suggested a three-step criteria which the Respondent adopts in justifying its submission. Thus one ought to assess:

i. presence of explicit commitments to unchangeable rules
ii. severity of the situation that lead subsequent regulatory change
iii. degree of alteration relevant to the legal framework

2.1.1.1. There were no commitments, neither explicit nor implied, of an immutable legal regime

The Respondent asserts that there were no representations of any kind made to Atton Boro with regards to Mercuria laws remaining unchanged. Laws are not static they are progressive hence investor is not granted the right to expect an immutable legal regime.[75] Similarly, in the case *Mondev v United States* it was stated that legitimate expectation cannot be that the state will never modify its legal framework. Legitimate expectations do not also demand that the host state refrain from modifying its legislation unless there was a specific commitment to the investor.[76]

Moreover, BITS are not an insurance against risk of any changes in a host states legal and economic framework. The requirement of stability is not absolute and does not affect the states right to exercise its sovereign power to legislate and adapt its legal system to changing circumstance.[77]

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[73] F. Dupuy and P.M. Dupuy, *What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the 'Legitimate Expectations' Doctrine in International Investment Law*, in F.A.S. El-Kosheri (ed), From the Arab World to the Globalization of International Law, Kluwer, 2015, pp. 273-298.

[74] *International Thunderbird Gaming Corp v Mexico* (Award) IIC 136 (NAFTA, 2006)

[75] *Enron Corp v Argentina* (Award) ICSID Case No ARB/01/3, IIC 292 (2007); *LG&E Energy Corp v Argentina* (Award) ICSID Case No ARB/02/1, IIC 295 (2007).

[76] *Mondev International Ltd v. United States*, ICSID Case No ARB (AF)/99/2, Award, 11 October 2002

[77] PCIJ in *Eastern Carelia Case* (1923); *El Paso Energy International Co v Argentina* (Award) ICSID Case No ARB/03/15, IIC 519

In the present case the matter deals with a patent, the Respondent submits the state has the power, within the confines of IPRs regime as noted in *Phillip Morris v Uruguay*[78], to thoroughly regulate matters dealing with IP which patent is among them.

While the Respondent recognizes that the patent holder enjoys an exclusive right to exclude others from use, they do not enjoy an absolute right of use free from regulation.[79] Thus, the respondent avers that the legitimate expectation of Atton Boro does not limit the right of the state of Mercuria to regulate.[80]

2.1.1.2. There was a severe situation that led the Respondent to exercise its Police powers.

The Respondent recognizes that no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectation was justified and reasonable the host state must have a legitimate and proportionate reason to regulate domestic matters in the public interest.[81]

The Respondent thus submits that the grayscale epidemic presented a very dire situation by affecting the very productive core of its population.[82]Therefore in fulfillment of its international obligation with regards to the health standards as captured in the preamble of the BIT where the desire is to achieve objectives consistent with the protection of health[83] it had to amend the Intellectual property law which held the key to its health issues.

Moreover, the cost of securing the original Fixed-dose Combination (FDC) treatment provided by the Claimant was extremely costly.[84] It was accounting to a third of the overall health budget

[78] *Philip Morris Brands Sàrl v Uruguay* (Award) ICSID Case No ARB/10/7, IIC 597 (2016), ¶271

[79] Ibid.

[80] Op. Cit., *Philip Morris Brands Sàrl v Uruguay*, ¶422

[81] Saluka Investments BV v Czech Republic (Partial Award) PCA Case No 2001-04, 15 ICSID Rep 274, IIC 210 (UNCITRAL) 2006; Asian Agricultural Products Ltd (AAPL) v Sri Lanka (Award) ICSID Case No ARB/87/3, 4 ICSID Rep 245; Tecnicas Medioambientales (*Tecmed*) SA v Mexico (Award) ICSID Case No ARB(AF)/00/2, 10 ICSID Rep 130, ¶154

[82] Annex No. 3, National Health Authority 2006 Report, ¶ on Progress Highlights & ¶ on Key Concerns

[83] Preamble, Mercuria-Basheera BIT

[84] Annex No. 3, National Health Authority 2006 Report, ¶on Key Concerns

and 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000.

Thus, the Respondent submits that it is trying to protect, promote, respect and fulfill its requirement under the International Convention on Social Economic and Cultural Rights under Article 2[85], which recognizes that rights of a state to ensure the progressive realization of each right by all appropriate means.[86] Additionally, the Respondent is also supposed to meet its minimum core obligations internationally where a state is to ensure no person is deprived of the essential elements of the right to health care.[87]

Under the UN General Comment Number 14 highlights that the right to health care should be made available it should be adequate and should be physically and economically accessible.[88] Similarly, if we may draw parallels to the case of *Biwater Gauff v Tanzania* in the amicus submissions which stated that;

"*The right to water and to pursue sustainable development goals, so fundamental to developing countries, should be understood to increase the standards of responsibilities of investors in the water sector… When investors choose to enter into this sector, they encumber themselves with responsibilities linked to the achievement of essential human rights.*"[89]

2.1.1.3. Degree of alteration was relevant to the legal framework

The respondent avers that the degree of alteration which was made by insertion of Section 23 to the Intellectual Property Law was within the scope of change hence it was foreseeable. As earlier submitted, the Respondent reiterates that, it is important to note that the LTA gave no explicit or implied assurances that the laws of the state of Mercuria would remain unchanged.

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[85] Article 2, International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976)

[86] *African Commission on Human and Peoples 'Rights v the Republic of Kenya,* Application 004/2011; *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) ¶44.

[87] General Comment No. 14 of the Committee on Economic, Social and Cultural Rights: The right to the highest attainable standard of health (art.12 of the Covenant) (2000); Principle 67 -Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.

[88] Ibid

[89] *Biwater Gauff v Tanzania,* Amicus Curiae Submissions, 26 March 2007, ¶11

Therefore, in the absence of such agreement or any clause indicating the same, the Respondent submits that there is no legitimate expectation created by the Republic of Mercuria with regards to stability of its laws. The Respondent state was therefore in exercise of its sovereign power to amend its laws. The tribunal in *Parkerings v Lithuania*[90] noted that, save for clear agreements; amendments to a country's laws should not be objectionable.[91]The investor also ought to be aware that laws of a country are not static and may change from time to time.[92]

The Respondent avers that while there can be no expectation to absolute stability of the legal framework, Atton Boro as a seasoned investor with vast investments in various jurisdictions is to be held to a certain level requiring them to carry out due diligence with respect to the prospects of legislative change in a given environment. Thus, it was imperative that Atton borro to have conducted due diligence as was demonstrated in the case of *MTD equity SDN et al v Chile*[93]where the tribunal reduced what MTD Equity could recover by 50% citing that the investor should have carried out investigations of its own.[94]

Therefore, Atton Boro should have taken a holistic account of the state's regulatory environment. As it was stated in *Biwater v. Tanzania,* "*investors should be aware that investment climates in developing countries may not be easy*".[95] Similarly, in *Methanex Corp v USA*, Methanex should have expected to be subject to California's vigilant regulatory environment.[96]

The Respondent consequently submits that the insertion of section 23C into its intellectual Property law did not violate the investors legitimate expectations because they neither exceeded a state's inherent power to regulate for the public interest nor modified the relied upon regulatory framework outside the acceptable margin of change.[97]

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[90] *Parkerings v Lithuania* ICSID Case No ARB /05/8, Award of 11 September 2007, , ¶308

[91] Ibid ¶322; *Rumeli Telekom v Kazakhstan*, ICSID Case No ARB/05/16

[92] ibid para 332-333

[93] *MTD Equity Sdn. BhD et al v Chile* ICSID Case No ARB/01/7, Award (2004)

[94] Ibid

[95] *Biwater Gauff Ltd v Tanzania* (Award) ICISD Case No ARB/05/22

[96] Methanex Corp v United States of America (Award) IIC 167 (NAFTA/UNCITRAL, 2005, Veeder P, Reisman & Rowley)

[97]Op. Cit., *Philip Morris Brands Sàrl v Uruguay* (Award), ¶423

2.1.2. The Respondent State did not violate any legitimate expectation made.

Legitimate Expectation is where a Contracting Party conduct, whether form or inform, creates reasonable and justifiable expectation on the part of an investor or investment to act in reliance on the said conduct, such that a failure by a contracting party to honour those expectation would warrant the investor compensation.[98]

In the present proceedings the Respondent thus embarks to determine whether the assurances, encouragements or representations were meant to attract or induce investments amounted to a legitimate expectation and consequently violated the FET standard under article 3(2) of the BIT.

In answering this question, the Respondent submits to the test established in *Crystallex International Corporation v Venezuela*[99], that is, for assurance, encouragement or representations to amount to legitimate expectations;

i. The assurances, encouragements and representations must be addresses to a specific individual investor.
ii. The assurances, encouragements and representations must be made by a person with the appropriate authority

2.1.2.1. The assurances, encouragements and representations were not directed to a specific Investor

Although, the President's account in the micro blogging site Twitter is regarded by many as a primary source of information regarding government activity[100], the Respondent submits that the statement made by the president on twitter did not meet the specificity test that is, the statements must be addressed to a specific individual investor.[101] Therefore, the Presidential sentiments were too vague and too general could not meet the test of specificity required to create legitimate expectations.

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[98] *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/00/3, 11 ICSID Rep 361, IIC 270 (NAFTA, 2004, Crawford P, Civiletti & Magallón Gómez) ('Waste Management II'); *Metalclad v Mexico*, Award, 30 August 2000, 5 ICSID Reports 212; 16 ICSID Review-FILJ (2001); *Sempra v Argentina* Award, 28 September 2007 18,

[99] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB (AF)/11/2, Award, 4 April 2016, ¶546; *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12)

[100] P.O. No. 3, ¶4

[101] P.O. No.1, Statement of Uncontested Facts, ¶8; Op. Cit., *Crystallex International Corporation v Venezuela*

2.1.2.2. The assurances, encouragements and representations were not made by the person in-charge

Aside from merely looking at the clarity of the statements, the Respondent submits the person making the statements and representations must also be assessed. As noted by the tribunal in *Crystallex Corporation* the states commitment should be generated by a specific state authority with relevant decision making power and should be directed at a specific investor.[102]

The Respondent submits that in the present case the president made a public statement that was too general and lacked any specific assurance with regard to a specific law remaining unchanged. Additionally, the statements could not create a legitimate expectation for the president had no hand and control on the decision to award Atton Boro the Long-term Agreement. It can therefore be concluded that since the President had no direct influence on the processes that followed his statements, there was no legitimate expectation created.

2.1.3. The Judicial Conduct in relation to the enforcement proceedings did not violate Article 3 of the Mercuria-Basheera BIT

From the very onset, the Respondent recognizes that the conduct of its judiciary can be attributed to it and be accountable on its behalf. As Stated in *Eli Lilly v Canada*, a State is not exempted from liability of its courts where a tribunal determines that the conduct of its courts did not comply with the standards of treatment established under the Treaty.[103]

Similarly, Article 4 of the ILC Articles of State Responsibility Adopted by the UNGA in 2001[104] and quoted by the tribunal in *White Industries Australia v India*[105] provides that the conduct of any state organ shall be considered an act of that state under International Law whether the organ exercises legislative, executive or judicial functions.

The Respondent thus submits that the conduct of its Judiciary in the enforcement proceedings of the arbitral award did not violate both the fair and equitable standard as well as the full protection and security standard set under article 3 of the Mercuria-Basheera BIT.

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[102]Op. Cit., *Crystallex international corporation v Venezuela*, ¶586

[103] Eli Lilly and Company v Canada, Final Award, ICSID Case No UNCT/14/2, IIC 771 (2017), 26th March 2017

[104] Article 4, Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp No 10, p 43, UN Doc A/56/10 (2001)

[105] Op. Cit., *White Industries Australia v India*

2.1.3.1. The Fair and Equitable standard of Mercuria's Judiciary

The Respondent avers that the conduct of the Mercuria's Judiciary in the enforcement proceedings has met the fair and equitable standard by according the due process to the Investor's award and protecting his legitimate expectation as well as protecting against denial of benefits.

On according the due process and protecting the Claimant's expectations, an open and transparent court system has been availed to the Claimant to seek the appropriate remedies. Although the Respondent admits that there has been some reasonable delay in the process due to the restructuring of the Judiciary, the entire judicial system has been afforded to the Claimant to exercise their enforcement duty as per the New York Convention.

It is the Respondent submission therefore that the Claimant has failed to exhaust all available local remedies in the Republic of Mercuria. As noted in *Loewen v. USA* exhaustion of the local remedies rule is a rule of thumb, that is, it is a legal requirement and not a matter of choice.[106]

The Respondent submits that the Claimant has only approached the High Court of Mercuria and has not proceeded to any other court such as the Court of Appeal or the Supreme Court opposing the insertion of section 23C into its intellectual property law.[107] This is despite the fact that the Respondent has put in place an elaborate court system to handle disputes.

Additionally, the Respondent submits, there has been no violation on the rule of law on the part of the Mercurian courts. However, if the claimants do wish to assert that the conduct of the court system is at issue then the notion of exhaustion of local remedies must be a substantive requirement and not only a procedural prerequisite to the present international claim.[108]

In respect to denial of justice, the Claimant might argue that there has been a denial of justice in the conduct of the Mercurian courts with regards to the enforcement proceedings.

However, the Respondent does assert that the Republic of Mercuria has provided effective means and provisions for the settlement of dispute and that can be largely seen in its efforts to reform its

[106] Op. Cit., *Loewen v USA*

[107] *Philip Morris Asia Ltd v Australia* (Award on Jurisdiction and Admissibility) PCA Case No 2012-12

[108] *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/98/2, 5 ICSID Rep 443, ¶97

processes for the efficient and expeditious disposal of suits.[109] Thus the Claimant has been accorded audience and the matter is still pending at the courts.

Moreover, for the denial of justice claim to suffice, the Claimant must show that the host state's courts acted in a way that is 'clearly improper and discreditable', giving rise to 'justified concerns as to the judicial propriety of the outcome' in view of 'generally accepted standards of the administration of justice'.[110]

2.1.3.2. Full Protection and Security

The Respondent submits that it has afforded the Claimant the full protection and security by providing and guarantying both physical security to the Claimant's contractual agreement as well as legal security which is reasonably tenable.[111] However, the Claimant has failed to accord the Mercurian Courts time and exercise patience in the enforcement proceedings.[112]

2.2. Termination of the LTA by the Respondent's NHA does not violation of Article 3(3) of the BIT.

Although there is presence of an Umbrella Clause under Article 3(3) of the BIT, the Respondent submits the umbrella clause should not have the effect of elevating the contract claims to treaty claims. Instead the Tribunal should employ a strict delineation between breaches of the treaty and contract claims. The same position which was advocated for by the tribunal in *S.G.S v. Pakistan*.[113]

The Respondent submits that the rationale is twofold; firstly the arbitration clause in the LTA 'is a valid forum selection clause so far as concerns the Claimant's contract claims which do not

[109] PO1 Statements of Uncontested Facts, ¶19

[110] *GEA Group v Ukraine*, ICSID Case No ARB/08/16, Award, 31 March 2011, ¶¶314-319; *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award of 30 November 2011, ¶¶10.4.5-10.4.9.

[111] *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL, Award of 12 November 2010, ¶527

[112] *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award of 30 November 2011, ¶11.3.2

[113] *SGS Société Générale de Surveillance SA v Pakistan* (Decision on Jurisdiction) ICSID Case No ARB/01/13, 8 ICSID Rep 383, ¶ 161; J. Crawford, '*Treaty and Contract in Investment Arbitration*', Arb Int'l, vol.12,2008, pp. 351- 367; C. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, Journal of World Investment and Trade, vol. 5, 2004, pp.231-248

also amount to BIT claims. As noted by the Claimant[114] and acknowledged by the Respondent[115] the specific dispute resolution forum has conclusively decided the matter. Secondly, under general international law, a violation of a contract entered into by a State with an investor of another State was not by itself a violation of international law.[116]

The Respondent thus submits that, by extending the application of the umbrella clause in this matter the tribunal will run into two risks;

i. The clause might be capable of infinite expansion and render all other commitments in the treaty superfluous.
ii. It would also negate the effect of the contractual submission clause.

Therefore, the Tribunal should not effect the umbrella clause, based on the aforementioned reasons.

PRAYERS

1. **Find that it lacks jurisdiction over any claims in relation to enforcement of the Award;**
2. **Declare that Atton Boro cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;**
3. **Where the Tribunal does not grant the second prayer, declare that no act of Mercuria's violates the substantive protections of the BIT;**
4. **Find that Mercuria is entitled to restitution by Atton Boro of all costs related to these proceedings**

[114] The Notice of Arbitration, ¶ 9

[115] The Response to the Notice of Arbitration ¶8,

[116] Op. Cit., S.G.S. v. Pakistan, ¶169