FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT COMPETITION

2-5 November 2017

ARBITRATION PURSUANT TO THE PCA ARBITRATION RULES 2012

Atton Boro Limited

(Claimant)

v.

The Republic of Mercuria

(Respondent)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

§(§§)	Paragraph(s)
¶(¶¶)	Page(s)
Atton Boro Limited	Atton Boro
Basheera	Kingdom of Basheera
BIT	Agreement for the Promotion and Reciprocal Protection of Investments
ECT	Energy Charter Treaty
EU	European Union
Exhibit 1	Timeline of the Proceedings in Enforcement Application No.873/2009 Before the High Court of Mercuria
FDC	Fixed- dose combinations
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID Convention	International Centre for Settlement of Investment Disputes Convention, Regulations And Rules
IP	Intellectual Property
Law	Basheeran Law No. 8458/09
LTA	Long Term Agreement
Mercuria	Republic of Mercuria
Mercuria-Basheera BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
MFN	Most favoured Nation
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NHA	National Health Authority
Patent	Mercurian Patent No. 0187204, granted on 21 February 1998
Press Statement	Statement by the Minister for Health Mr. Joseph Bell concerning the five-year health plan 1999-2004
Reef	People's Republic of Reef
TRIPS	Agreement On Trade-Related Aspects Of Intellectual Property Rights 1995
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

LIST OF AUTHORITIES

Abbreviation	Citation
Awards and Decisions	
AHS	AHS Niger and Menzies Middle East and Africa S.A. v. Republic of Niger, ICSID Case No. ARB/11/11, Award, 15 July 2013
Americans in Morocco	Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), [1952] ICJ Rep. 176
AMTO	Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005
Amco Asia	Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction
CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award
CIM	Compagnie Internationale de Maintenance v Ethiopia, UNCITRAL, Award of 1 January 2009 (unpublished)
Continental Casualty	Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008
Continental Shelf	Case Concerning the Continental Shelf (Libyan Arab Jamahiriyah v. Malta), [1985] ICJ Rep., p. 29, para. 27
Duke	Duke Energy Electroquil Partners and Electroquil SA v. Ecuador, ICSID Case No. ARB/04/19, Award, 12 August 2008
El Paso	El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Award, 31, October 2011

Eli Lilly	Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017
Enron	Enron Corporation Ponderosa Assets, L.P. v. Argentina, ICSID Case. No. ARB/01/3, Award, 22 May 2007
Fedax	Fedax N.V. v. Venezuela, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3
Feldman	Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002
GEA	GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16
Impregilo	Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 [Decision on Jurisdiction of 22 April 2005]
Joy Mining	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11
Klöckner	Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Award
LETCO	Liberian Eastern Timber Corporation v. Republic of Liberia, ICSID Case No. ARB/83/2, Award
Malaysian Salvors	Malaysian Historical Salvors Sdn Bhd v Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction, 10th May 2017
Marion Unglaube	Marion Unglaube and Reinhard Unglaube v. Republic of Costa

	Rica, ICSID Case No. ARB/09/20, 16 May 2012
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case. No. ARB/01/7, Decision on Annulment, 21 March 2007
Nykomb	Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC, Arbitral Award, 16 Dec 2003
Parkerings-Compagniet	Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007
Petrobart	Petrobart Limited v. The Kirgyz Republic, 29 March 2005, (unpublished)
Philip Morris	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016
Philip Morris Asia	Philip Morris Asia vs. Australia, Notice of Arbitration, 21 November 2011
Romak	Romak SA v The Republic of Uzbekistan, PCA Case No. AA280, UNCITRAL, Award of 26 November 2009
Salini	Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 Decision on Jurisdiction, 2004
Saluka	Saluka Investments BV v. The Czech Republic, UNCITRAL-PCA, Partial Award, 17 March 2006
Sempra	Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007

SGS Pakistan	SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13
SGS Paraguay	SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29
Siemens	Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8 [Award of 6 February 2007]
Suez	Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken
Total	Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010
Urbaser	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 9 December 2016
Vivendi	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) Award
Vivendi I Annulment	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award Annulment
Walter Bau	Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand, UNCITRAL, Award, 5 October 2007

Yaung Chi Oo	Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award
Articles	
Bartelt	S Bartelt, 'Compulsory Licenses Pursuant to TRIPS Article 31 in the Light of the Doha Declaration on the TRIPS Agreement and Public Health' (2003) 6 J World Intell Prop 283, 295
Dodge	Dodge W.S., Res Judicata, Max Planck Encyclopedia of Public International Law, 2006
IA Reporter	IA Reporter, 'Ethiopia Prevailed in Face of Foreign Investor's Attempt to Use Investment Treaty to Sue over ICC Arbitral Award', 4 March 2012, www.iareporter.com/articles/20120304_4.
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Potestà	Potestà M, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 28 ICSID review 88-112 (2013) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102771
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Zambia Compulsory License	Republic of Zambia, Ministry of Commerce, Trade, and Industry, Compulsory License NO. CL 01/2004 online: http://sippi.aaas.org/ipissues/updates/?res_id=432
Watal	Jayashree Watal, Post-TRIPS Options for Access to Patented Medicines in Developing Nations, 5 Journal of International

	Economic Law 913-939 (2002)
Subramaniu m	Arvind Subramanian, 'The AIDS Crisis, Differential Pricing of Drugs, and the TRIPS Agreement. Two Proposals' (2001) 4 J World Intell Prop
Books	
Dolzer & Schreuer	Dolzer, R. & Schreuer, C. Principles Of International Investment Law 55 (Oxford Univ. Press 2008)
Rubins	Noah Rubins, In Studies in Transnational Economic Law, Volume 19, ed. by N.Horn/Kröll
Shihata & Parra	I. Shihata and A. Parra, The Experience of the International Centre for Settlement of Investment Disputes (1999), 14 ICSID Rev-FILJ 2999
Sornarajah	Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment 263 (CUP 2015)
Lauterpacht	Hersch Lauterpacht, The Development of International Law by the International Court, 20-21 (London: Stevens, 1958)
Schreuer	Christoph Schreuer, The ICSID Convention: a Commentary 1082 (2001)
Daemmrich & Musacchio	Arthur Daemmrich, and Aldo Musacchio, "Brazil: Leading the BRICs" Harvard Business School Case 9-711-024 (2011)
Conventions	
ECT	Energy Charter Treaty 1991
MIGA Convention	Multilateral Investment Guarantee Agency Convention
GATS	General Agreement on Trade in Services

VCLT	Vienna Convention on the Law of the Treaties (VCLT
UNIDROIT	UNIDROIT Principles of International Commercial Contracts (2010)
Websites	
Oxford Dictionary	https://en.oxforddictionaries.com/definition/substantive.
Irinnews	See http://www.irinnews.org/news/2013/03/25/indonesia-override-patents-live-saving-medicines
ICTSD Report	See ICTSD report, https://www.ictsd.org/bridges-news/bridges/news/thailand-issues-compulsory-licence-for-patented-aids-drug
ICTSD Report Brazil	See ICTSD report, https://www.ictsd.org/brazil-issues-compulsory-licence-for-aids-drug
NY Times	http://www.nytimes.com/india_overrules_bayer_allowing_generic_drug.html

STATEMENT OF FACTS

Parties to the dispute

1) Claimant, Atton Boro Limited is a private company with limited liability incorporated under the laws of the Kingdom of Basheera.

Respondent is the Republic of Mercuria.

Investor

2) Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef ("Reef") and acts as the primary holding company for Atton Boro Group. In April 1998, Atton Boro Group established a wholly owned subsidiary: Atton Boro Limited ("Atton Boro"). The subsidiary was incorporated in Basheera and used as a vehicle for carrying on business in South American and African countries.

3) Atton Boro Group synthesized a compound called Valtervite for treatment of greyscale patients. After first securing patent protection for Valtervite in Reef in 1997, Atton Boro and Company went on to obtain patents in 50 jurisdictions, including Mercuria (Mercurian Patent No. 0187204, granted on 21 February 1998).[1] The Atton Boro Group assigned a number of patents to Atton Boro, including the Mercurian patent for Valtervite.

Historical background

4) On 11 January 1998, the Republic of Mercuria ("Mercuria") and the Kingdom of Basheera ("Basheera") signed an Agreement for the Promotion and Reciprocal Protection of Investments (the "Mercuria-Basheera BIT").[2]

5) 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.

6) In 2003, the NHA's annual report to the Ministry of Health of Mercuria highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals across the country, and cautioned that the situation could spiral into a national crisis within a decade unless aggressive measures were taken to combat it. The report observed that the treatment currently available in Mercuria was only effective if the infection was detected at very early stages, and even then, it required taking five to seven pills every day.[3] This fell far short of the global standards of treatment for greyscale.

[1] Statement of Uncontested Facts, § 858.
[2] Statement of Uncontested Facts, § 840.
[3] Statement of Uncontested Facts, § 875.

7) Acting on the recommendations in the report, the Ministry of Health directed the NHA to estimate the requirement in Mercuria and invited offers from pharmaceutical companies for strategic supply of FDC greyscale medicines at discounted rates to prevent an epidemic.

8) In May 2004, the NHA invited Atton Boro to make an offer for supplying its FDC drug, marketed under the brand name of Sanior. Following a protracted negotiation process and evaluation of competing offers, the NHA and Atton Boro entered into a LTA.[4]

LTA

9) Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders as and when required.

10) Atton Boro delivered its first consignment by June 2005. The NHA began distribution across Mercuria. By the end of 2006 about a third of all greyscale patients were being treated using Sanior. As the number of patients coming into care grew, the order value for Sanior doubled with each quarter in 2007.

Origins of dispute

11) In early 2008, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior, as demands had grossly exceeded initial estimations[5] and the NHA needed to supply medicines for nearly twice the number of patients. Atton Boro only offered an additional discount of 10% for the remaining period of the LTA despite the fact that orders were more than double of the initial estimate. The NHA was forced to reject this offer, and requested an additional discount of 40%, stating that it would be compelled to terminate the agreement if its terms were not met in light of the grave situation.

12) 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 favour of Claimant.

Enforcement of Award

13) On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria and on 16 March 2009 the Court heard Atton Boro's application.[6] On 10 January 2012, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters. In September 2013, a ruling by the Supreme Court of Mercuria clarified the legal standing th that benches constituted under the Commercial Courts Act only had jurisdiction to hear

[4] Statement of Uncontested Facts, § 890.
[5] Statement of Uncontested Facts, § 915.
[6] Exhibit 1, §201.

original commercial claims, not enforcement proceedings. The enforcement proceedings commenced by Atton Boro are still running in the National Courts of Mercuria.

Patent

14) On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09), which introduced a provision allowing for the use of patented inventions without the authorisation of the owner.

15) 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.[7] The Court heard the matter 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.[8]

16) In January 2012, the director of the NHA disclosed in an interview 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.[9] Atton Boro did not participate or intervene in this proceedings as a third-party nor did it take any steps to protect its interests or mitigate its losses.

[7] Statement of Uncontested Facts, § 945.
[8] Ibid.
[9] Statement of Uncontested Facts, § 950.

SUMMARY OF ARGUMENTS

Jurisdiction

18) Firstly, Respondent submits that it may decline the benefits of the Mercuria-Basheera BIT to Claimant. This is so because Claimant is a mere mailbox company, owned and controlled by nationals of a third State. Further, Claimant has no substantial business activities in Basheera and, as a consequence, does fall under the provisions of Art. 2 of the Mercuria-Basheera BIT (denial of benefits).

19) Secondly, Respondent submits that also the Award does not qualify as an investment protected pursuant the Mercuria-Basheera BIT. Additionally, Claimant submits that the rights arising out of the LTA are not protected by the Mercuria-Basheera BIT.

Merits

20) Respondent submits that none of its actions amounts to a breach of the FET standard as laid down in the Mercuria-Basheera BIT. FET does not include the protection of legitimate expectations. Even if – arguendo – the Tribunal were to decide that FET includes legitimate expectations, none of the State's actions could have generated a legitimate expectation. Subsequently, Respondent has fulfilled all of its obligations under the FET standard.

21) Furthermore, the conduct of Respondent does not constitute unreasonable or discriminatory measures under Article 3 (2) Mercuria-Basheera BIT.

22) In addition to this, Respondent also submits that there is no reason to believe that it had breached the umbrella clause enshrined in Article 3 (3) Mercuria-Basheera BIT. It has always respected its obligations and commitments towards the investor.

ARGUMENTS

I. RESPONDENT MAY DECLINE THE BENEFITS OF THE MERCURIA-BASHEERA BIT TO THE CLAIMANT

24) Respondent submits that, in exercise of the prerogative enshrined in Article 2(1) of the Basheera-Mercuria BIT, all of Atton Boro's claims are inadmissible because the benefits of the BIT are not available to Atton Boro. Atton Boro is a mere "Mailbox Company" set up in Basheera by investors of a third State - The People's Republic of Reef.

25) Article 2(1) of the Basheera-Mercuria BIT provides for the right of the contracting party to deny the advantages of the BIT to a legal entity if citizens or nationals of a third State own or control such entity and if such entity has no substantial business activity in the territory of the Contracting Party in which it is organized.

26) Respondent submits that (A) Claimant is owned and controlled by nationals of a third State, and (B) it does not fulfil the "substantive business activity requirement". Respondent may, therefore, deny the benefits of the BIT to Claimant.

A. Atton Boro is owned and controlled by nationals of a third State

27) Respondent submits that Claimant is owned and controlled by nationals of a third State, namely Atton Boro Group, incorporated under the laws of Reef.

a) Ownership

It is undoubted that Claimant is fully owned by Atton Boro Group.[10]

b) Control

Respondent submits that Claimant is controlled by Atton Boro Group. Article 2(1) BIT does not define the term "control".

(i) Control through ownership

28) In ICSID proceedings, control is usually qualified as ownership of the majority of the company's capital stock.[11]

29) Additionally, a number of international conventions address this very term and define it as follows. The MIGA Convention uses the control criterion, defined as ownership of the majority of the company's capital stock. The Algiers Claim Settlement Declaration of the

[10] Statement of Uncontested Facts, § 859.
[11] See in particular *Amco Asia*; *LETCO*; and *Klöckner*.

Iran-United States Claims Tribunal goes down the same way and states in Article VII (1) that at least fifty per cent of the entity's capital stock needs to be held by nationals of one to confirm control of the latter.

30) As Atton Boro Group holds one hundred per cent of Claimant's shares, it cannot be contested that Atton Boro Group controls Claimant.

(ii) Control through the power to take decisions

31) Some treaties, in order to establish control, tend to refer to the direct or indirect power to make decisions rather than to mere ownership of the majority percentage of a company's capital stock, even if some of these treaties do not provide a specific definition for it.

32) For example, Article XXVIII(n) of the GATS provides that a juridical person is controlled by nationals of a Contracting State if "*such persons have the power to name a majority of its directors or otherwise to legally direct its actions*". The Understanding with Respect to Article 1(6) of the Energy Charter Treaty defines "*control of an investment*" as "*control in fact, determined after an examination of the actual circumstances in each situation*." This Understanding also clarifies that "*in any such examination, all relevant factors should be considered, including the investor's ... (b) ability to exercise substantial influence over the management and operation of the investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body*."

33) Respondent submits that Atton Boro Group holds the power to make decisions and exercise substantial influence over the operation of the investment. It did not only decide on the area of activity of the Claimant company, which is South America and Africa[12], but also assigned a number of pharmaceutical patents, including the patent for Valtervite, to Claimant. The holding, Atton Boro Group, thus, still exercises its power over Claimant and takes decisions regarding the operation of the investment.

34) Therefore, Claimant is controlled by Atton Boro Group, a national of Reef. It follows from this analysis that Atton Boro is owned and controlled by nationals of a third State.

B. Atton Boro does not fulfil the "substantive business activity" requirement

35) Further, Respondent submits that Claimant does not fulfil the substantive business requirement.

36) The requirements of Article 2(1) address the business activities of Atton Boro in Basheera, as the investor Atton Boro is incorporated under the laws of Basheera. The purpose of a denial of benefits clause is to show an economic connection between the investor and the home State under which it is organized, enabling host States to reject the protection afforded

[12] Statement of Uncontested Facts, § 861.

under a BIT to investors and to counteract nationality planning.[13] This right can be exercised when the host State can demonstrate that there are no economic connections or links between the investors and the host State.

a) Meaning of substantive

37) When interpreting the provisions of the BIT at stake it is useful to refer to Article 31 of the Vienna Convention on the Law of the Treaties (VCLT).[14] This article provides that a treaty be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." Hence, when interpreting treaty provisions in accordance with international law, the terms and their ordinary meaning (textual interpretation) and the terms in their context (contextual interpretation) as well as the object and purpose of the provisions play an important role.

38) Pursuant to the preamble of the BIT, the contracting parties' "*[d]esire to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Contracting Party in the territory of the other Contracting Party*". Furthermore, they wish to stimulate the flow of private capital and the economic development of both States.

39) According to the Oxford Dictionary the term "*substantive*" means something "*firm*", "*important*", "*meaningful*" or "*considerable*".[15] Atton Boro had an office space and opened a bank account, it hired a manager and an accountant: this does not per se show any commercial activity.

40) Respondent submits that the business activity of Claimant in Basheera is by no means substantive. A manger, an accountant and an office space cannot be seen as "*important*", "*meaningful*" or "*considerable*". It follows that Claimant has no substantive business activity in Basheera which falls under the terms of Article 2(1) BIT. Therefore, Respondent submits that it has the right to deny the benefits of the BIT to Claimant.

b) No economic link

41) Atton Boro Group was already present in the Basheeran pharmaceutical market[16] and only needed a shell to engage in economic relations and to intensify these with the Government and the NHA.

42) Where the investment is made over a period of time, as in the present case, effective management of the investing company at the place of incorporation may be required throughout this period.[17] Atton Boro is managed by Atton Boro Group, incorporated under

[13] Dolzer & Schreuer, ¶ 55.
[14] See Salini, § 75; Vivendi, §§. 7.4.2-7.4.4;
[15] Oxford Dictionary
[16] Statement of Uncontested Facts, § 863.
[17] Yaung Chi Oo, §. 49.

the laws of Reef. The effective management is henceforth established in Reef. The place of the business activity is therefore Reef and not Basheera.

43) It follows that Claimant has no substantial business activity in Basheera. It is only used as a shell by its holding to enter into contracts with the Mercurian government and the NHA.

Hence, Respondent may deny the benefits of the Basheera-Mercuria BIT to Claimant.

II. AWARD AND LTA DO NOT QUALIFY AS AN "INVESTMENT" WITHIN THE MEANING OF MERCURIA-BASHEERA BIT

44) Respondent in the present matter, respectfully submits that this Tribunal lacks, and in any event should not exercise, jurisdiction, contrary to the misplaced and unmeritorious assertions of Claimant.

A. Award does not qualify as an "investment" under Article 1(1) of the Mercuria-Basheera BIT

45) Respondent submits that the Tribunal has no jurisdiction to adjudicate any claims in relation to the enforcement of the Award dated January 2009. The reason being that an arbitral award does not qualify as an "investment" within the meaning of the Mercuria-Basheera BIT.

46) The Respondent submits that the Award cannot be an investment because it is not an asset that was contributed to Mercuria, it was not made in Mercuria, and therefore it does not fall within the definition of an investment.[18]

47) The large majority of arbitral tribunals and doctrine agree that an arbitration award or a court decision can only constitute an investment if – and only if – the underlying transaction is an investment. If it were otherwise, many civil, commercial and even criminal decisions issued by courts and tribunals would be investments. This cannot be the purpose of the treaties. In this case Respondent submits below that LTA itself was not an "investment".

48) Whether tested against the criteria of Article 1(1) of the Mercuria-Basheera BIT or Article 25 of the ICSID Convention, the Award – in and of itself – cannot constitute an "investment." Properly analysed, it is a legal instrument[19], which provides for the disposition of rights and obligations arising out of the LTA.

49) Even if – *arguendo* – the Tribunal were to decide that the LTA could be characterised as an investment, Respondent submits that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself.

[18] *GEA*, Award, §160.
[19] *GEA*, Award, §161.

50) In this respect, the tribunal in *GEA* also held that "*the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.*"[20]

51) A number of investment treaty tribunals[21] have concluded that an arbitral award in and of itself does not qualify as an investment and Tribunals[22] which have decided cases in favour of the claimants have avoided dealing with the question of whether an arbitral award by itself constitutes an investment.Tribunal must next determine whether Claimant actually "invested" in Mercuria at all, within the meaning and scope of the Basheera-Mercuria BIT.

52) Investment treaty tribunals have declined jurisdiction when an award did not form part of an overall investment process, confirming that *"[i]f the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallisation of rights arising thereunder in an arbitral award cannot transform it into an investment*".[23]

53) Commentators and tribunals have cautioned that if any arbitral award were to qualify as a protected investment because it constitutes a "claim to money", a category of assets listed in most broad, asset-based investment definitions, investment treaty tribunals would assume "supervisory-supervisory jurisdiction" over domestic courts' competence to annul, enforce or refuse enforcement of commercial awards.[24]

54) It is not so much the term "investment" in the ICSID Convention than the term "investment" per se that is often considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT. For example, the tribunal in *Romak*, conducting its proceedings on the basis of the UNCITRAL Arbitration Rules, observed as follows:

> The term *"investment" has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. . . . . The Arbitral Tribunal therefore considers that the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk . . . . By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment."* In the general formulation of the tribunal in *Azinian*, "*labelling ... is no substitute for analysis*".[25]

[20] *GEA*, Award, §162.
[21] *GEA*, Award.
[22] *Saipem*, Award. *ATA*, Award.
[23] *Romak*, Award, §211.
[24] Reisman & Iravani, ¶39; see also *Romak*, Award, §186.
[25] *Romak*, Award, ¶180 and ¶207.

55) Recently, the arbitral tribunal in *GEA* adopted a more stringent approach and concluded that even though *"the ICC Award could be characterized as directly arising out of the Conversion Contract or the Products, the Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself."*[26] In the eyes of the *GEA* tribunal, the award is not an investment but a mere legal instrument, which provides for the disposition of rights and obligations arising out of a contractual relationship.

56) In light of the above, Respondent argues that Claimant has not made an investment since the Award does not fulfil the requirements normally exhibited by investments, a certain *"regularity of profit and return,"* a certain *"duration of the economic operation,"* the existence of a *"risk assumed by the investor"* and a contribution to the *"economic development of the host State"* These principles underpin the definition of the term "investment" under Article 1(1) of the Mercuria-Basheera BIT and Article 25 of the ICSID Convention.

B. LTA was a purely commercial supply arrangement between Claimant and NHA

57) As far as Article 1(1) of the Basheera-Mercuria BIT is concerned, Respondent maintains that the LTA was no more than a sales agreement, which did not confer on Claimant any rights to claims to money, claims to performance under contract and/ or rights to undertake any economic and commercial activity.

58) Respondent submits that the LTA was simply a commercial supply agreement, under which Claimant agreed to deliver a certain amount of Sanior to the NHA against payment.

59) Further Respondent submits that the LTA was a purely commercial supply arrangement between Mercuria's National Health Authority and Claimant, and that the termination of the LTA was NHA's decision acting as a purchaser.[27] The Respondent had no role to play in this decision and, therefore, this claim against it should be dismissed.

60) Obligations under a commercial contract are distinct from those under an investment agreement, and there can be no attribution of international responsibility to Mercuria for acts done by the NHA in a commercial capacity. This view is only furthered by the fact that the LTA provided for recourse to a specific dispute resolution forum which, by Claimant's own admission, has conclusively decided the matter.

61) With regards to sale of goods, it is well established that a simple transaction does not amount to an investment. One-time sales or purchases of goods would not normally be investments. Commercial transactions are not investments when "*they are ephemeral, speculative (in the sense that a profit will be realized with little or no sacrifice from the foreign actor), or eminently predictable in outcome (like a sale of goods, where the costs*

[26] *GEA*, Award, §162.
[27] Statement of Uncontested Facts, § 895.

and revenues are known in advance).”[28] In the words of Shihata and Parra, *“[a] simple sale of goods is often cited as an example of a transaction that clearly is not an investment.”*[29] It is well established that the LTA was a supply agreement where the NHA would only periodically place orders.[30]

62) Respondent submits that if this Tribunal were to decide otherwise, the fears of the tribunal in *Joy Mining* would come true, namely that:

> *“the Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?”*[31]

63) An arbitral tribunal in an UNCITRAL arbitration found that under the universally recognized principles of international law, a sale of goods cannot be considered an investment:

> “*In fact, despite the well-known formula, the actual contents of ‘the universally recognised principles of international law’ is uncertain, indeed frequently contentious. Suffice it for present purposes to note the following. ‘Foreign investment’ is mostly defined as a transfer of tangible or intangible property from one country to another for the purpose of use in that country with a view to generating profit, or at least wealth, under the control of the owner of the property. Such transfers are to be distinguished from the much more frequent export transactions where goods are sold by manufacturers, or owners, in one State to traders or users in another State. Foreign investment involves a more permanent relationship between the foreign investor and the host State than is involved in the transitory international sales transaction. [The Contract] falls unquestionably into the latter category*”.[32]

[28] Rubins, ¶ 309; see also *Fedax*, Decision on Jurisdiction, § 28.
[29] Shihata & Parra, ¶ 308.
[30] Statement of Uncontested Facts, § 895.
[31] *Joy Mining*, Decision on Jurisdiction, §58.
[32] *Petrobart Limited*, ¶ 10.

64) Claimant might put forth the view of the tribunal in *Romak* that on the basis of the freedom of contract, contracting States are free to consider any asset or economic transaction as an investment protected by the treaty. The *Romak* tribunal stated that *"Contracting States can even go as far as stipulating that a ''pure'' one-off sales contract constitute an investment [...]. However, in such cases, 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."*[33]

65) However, Respondent wants to make it clear that the Basheera-Mercuria BIT has no provision to consider contracts such as the LTA as an investment and the parties never intended to extend the protection of the Mercuria-Basheera BIT to such supply arrangements.

66) In conclusion, Respondent submits that Claimant has not made an investment protectable under the Mercuria-Basheera BIT, since neither the Award nor the LTA fulfil the requirements provided for in the definition of the term "investment" under Article1(1) of the Mercuria-Basheera BIT.

III. NEITHER THE ENACTMENT OF LAW NO. 8458/09 NOR THE GRANTING OF THE LICENSE AMOUNT TO A BREACH OF FET

67) Respondent submits that the enactment of Law No. 8458/09 does not breach the FET standard. Respondent will prove that Claimant's assertion that the acts of Mercuria are in breach of the FET standard are not supported by the law or the facts.

68) Respondent submits that (A) the FET standard does not include an obligation to protect investors' expectations; (B) even if – *arguendo* – the Tribunal assumes that FET protects investors' expectations, none of the representations made by Mercuria gives rise to Claimant having legitimate expectations; (C) the legitimate expectations on reasonable profits are ungrounded; (D) Respondent has fulfilled all its obligations under the FET clause, and (E) such standard does not prohibit Respondent from taking actions aimed at the protection of public interests.

A. The FET standard does not include protection of legitimate expectations

a. *The ordinary meaning of the FET Standard does not include a protection of legitimate expectations*

69) Respondent submits that the obligation to protect legitimate expectations is neither derived from the ordinary meaning of FET nor can it be considered an obligation under the Mercuria-Basheera BIT.

[33] *Romak*, Award, § 205.

70) Pursuant to Article 31(1) VCLT, a treaty should be interpreted in accordance with its ordinary meaning. Since the phrase "*fair and equitable treatment*" has not been interpreted in the Blacks' law dictionary or the Oxford dictionary, its meaning may be determined through examining its components. "*Equitable*", according to the Oxford Dictionary, means "*fair*", making the two terms substantially similar.[34] "*Fair*", in the same dictionary, is defined as: (1) in accordance with rules and standards, or (2) just or appropriate in the circumstances.[35] The ordinary meaning of the term, therefore, does not expressly provide for an obligation to protect investors' expectations. Despite tribunals' unwarranted tendency to expand the meaning of the phrase, arbitrator Pedro Nikken, in *Suez* noted that:

> "*The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor [...] does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable.*"[36]

71) Professor Sornarajah agrees with this statement explaining:

> "*No canon of treaty interpretation can support the view that the term 'fair and equitable treatment' can include any reference to the protection of the legitimate expectations of the foreign investor. It is not the natural meaning of the term. It has to be conjured through a mystical process of divining the intention of the parties from the preamble and infusing the intention into the fair and equitable standard. The interpretation is contrived.*"[37]

72) Since the FET standard in essence refers to an obligation under the treaty, other tribunals have rightfully differentiated between "*obligations under the treaty*" and "*investors' expectations*", highlighting the practical differences between the two, as well as their different legal consequences. When analyzing this issue, the *MTD* annulment committee observed that:

> "*The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT exceeds its powers*."[38]

73) Similarly, the CMS ad-hoc committee decided that "*[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations.*"[39]

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[34] Oxford Dictionary
[35] Ibid.
[36] *Suez*, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken, § 3.
[37] Sornarajah, ¶ 263.
[38] *MTD*, Decision on Annulment, § 67.
[39] *CMS*, Decision on Annulment, § 89.

The ordinary meaning of "*fair and equitable treatment*" does not encompass "*legitimate expectations*". Such interpretation does not correspond to the ordinary meanings in any language and unreasonably infuses the intention of parties. Further, "*investors' expectations*" are different from treaty *"obligations*" or treaty "*rights*". Thus, Respondent submits that Tribunal should not read the investor's expectation into the FET standard.

b. *The obligation to protect legitimate expectation does not derive from customary international law*

74) Article 31(3)(c) of the VCLT requires tribunals to take into account the relevant rules of international law that are applicable in the relation between the parties. This allows tribunals to consider the treaty executed by the parties as well as customary international law. There are no legal grounds supporting Claimant's argument that legitimate expectations are protected under customary international law.

75) In order to prove the existence of a rule of customary international law, two requirements must be met: substantial State practice *and* an understanding that such practice is required by law (*opinio juris sine necessitatis*).[40] In this case, Claimant bears the burden of proving the existence of both conditions.[41]

76) Claimant cannot discharge this burden by simply referring to previous tribunals which held that legitimate expectations form part of FET. As noted by Michele Potestà:

> "*The technique that has been used by most arbitral tribunals to buttress the application of the legitimate expectation principle is to simply refer to previous arbitral awards which have endorsed such concept, in a sort of cascade effect … the analysis (of the root of legitimate expectation) is not to be found in the early awards on which subsequent tribunals rely.*"[42]

77) Arbitral awards cannot by themselves create customary international law. Only constant State practice can do so. According to Professor Lauterpacht: *"Decisions of international courts are not a source of international law... [t]hey are not direct evidence of the practice of States or of what States conceive to be the law.*"[43]

78) Given that the only sources Claimant can point to are arbitral awards and that these awards only refer to each other instead of establishing State practice, Claimant cannot discharge its burden of proving that protection of legitimate expectation has formed a customary international law.

c. *This Tribunal is not bound by the decisions reached by the previous tribunals*

[40] *Continental Shelf*, § 27.
[41] *Americans in Morocco*, ¶ 200.
[42] Potestà, ¶¶ 3-4.
[43] Lauterpacht, ¶¶ 20-21.

79) It is well established that there is no doctrine of precedent in investment arbitration. Professor Schreuer has clearly articulated this principle by referring to Article 53 of the ICSID Convention, which reads "*the award shall be binding on the parties.*"[44]

80) Additionally, nothing in the Convention's *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied.[45] As the *MHS* tribunal held, "*the purpose of analyzing these cases is not slavishly to adhere to precedent.*"[46] Indeed, each treaty shall be analyzed independently in accordance with its own particularities.

81) In fact, there is evidence to suggest that the FET clause was not intended to cover legitimate expectations. In fact, in Article 3(2) of the BIT, right after the FET language, a qualifying sentence follows immediately: "*Neither Contracting Party shall ... in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments*". This suggests that "fair and equitable treatment" was meant to only prohibit "unreasonable or discriminatory measures". As "arbitrary measures" and "legitimate expectations" were treated as separate grounds for the breach of FET by previous tribunals, the structure of this paragraph implies the exclusion of "legitimate expectation".

82) In light of the above, Respondent respectfully requests this Tribunal to closely consider the treaty language and customary laws, both of which do not support the existence of legitimate expectations under the FET standard in the Mercuria-Basheera BIT.

B. Even if the tribunal were to regard the protection of legitimate expectations to form part of the FET clause, Claimant could not have the legitimate expectation that the host State would not change the IP regime

83) There are no legal or factual grounds supporting Claimant's assertion that it had a legitimate expectation that Mercurian laws would remain static. This expectation cannot be reasonably inferred from (a) the statements made by the Minister or the President, nor from (b) the patent or the LTA. In fact, Respondent submits that (c) Claimant ought to have known and expected that the general legal framework could change in response to the public interests and especially in case of an emergency like the one Respondent faced .

a. *Assuming arguendo the BIT includes legitimate expectations, the statements of the Health Minister and the President did not generate such expectations*

84) The statement made by the Health Minister and the President's tweet did not create a legitimate expectation. Firstly, politicians' encourageing foreign investments are often mutable and, secondly, even assuming that a statement of the Health Minister and a

[44] Schreuer, ¶ 1082.
[45] Duprey, ¶ 267.
[46] *MHS*, Award on Jurisdiction, § 104.

President's tweet can reasonably be relied on in this case, the context of the statements have clearly limited the scope of the expectetions that could be derived from them.

85) Tweets of an individual, even of the President, do not represent an offiicial political statement. Tweets can be used to express personal opinions of chiefs of state, and they do not necessarily represent the officia stance of Governments. They should be taken as what they are, and not elevate their standard so as to derive 'promises' from them. Allowing investors to generate legitimate expectations from tweets would deviate the spirit of the whole investment arbitration regime, and would clearly put State at the mercy of opportunistic investors like Claimant. We could even make an example with Trumps tweets to evidence that there is a huge gap between a countries stance and a President's tweet.

86) Politicians' statements have been given the *least* value in evaluating legitimate expectations. In *Continental,* the claimant relied on *"Argentina's representations to keep its money in Argentina",* as well as on *"certain public statements by Minister Cavallo, undertaking not to abandon the convertibility regime"*. The tribunal refused to find that legitimate expectations had been frustrated by way of repudiation of such statements and held that in order to evaluate the relevance of the *"reasonable legitimate expectations"* concept applied within Fair and Equitable Treatment standard, "*relevant factors include: i) the specificity of the undertaking allegedly relied upon … which is mostly absent here, considering moreover that political statements have the least legal value, regrettably but notoriously so*."[47]

87) Similarly, the *El Paso* tribunal observed that "*a declaration made by the President of the Republic clearly must be viewed by everyone as a political statement, and this Tribunal is aware, as is every individual, of the limited confidence that can be given to such political statements in all countries of the world.*"[48]

88) Claimant cannot argue that the expectation can be formed or strengthened through repetition of the politician's promises. Even though two statements may appear to provide a stronger basis for reasonable expectation than only one statement, it changes neither the fact that they were made by politicians nor the statements' nature as political incitements. The *El Paso* case, for example, is a case where different methods to encourage investments were used. The Argentinian government had organised road shows, conferences and seminars to explain the main features of the framework and to give assurance to investors that their rights would be protected. Considering all these forms of encouragements, the tribunal still decided that "*such political and commercial incitements cannot be equated with commitments capable of creating reasonable expectations protected by the international mechanism of the BIT*."[49]

[47] *Continental Casualty*, Award, ¶¶ 252 & 261.
[48] *El Paso*, Award, § 395.
[49] *El Paso*, Award, § 392.

89) Consequently, the statement of the Minister lauding the success of the *Mercuria Comprehensive HIV/AIDS Partnership* as well as the President's tweet regarding red carpets for Investors cannot be seen as creating any legitimate expectations.

90) Furthermore, Respondent submits that none of the statements contain a promise of absolute protection of the IP regime. In addition, Claimant neglects the context of their statements. The Feldman v. Mexico tribunal has articulated the standard of specificity of informal representation, i.e. they should be "definitive and unambiguous".[50] Respondent never made any definitive and unambiguous statement to investors which guaranteed the absolute protection and freezing of the IP regime. The statement in the first paragraph clarifies that the fundamental purpose of the cooperation between the Government and the private sector was to "*secure healthcare for Mercuria's people*"; in other words, the development of the IP regime is subject to, and contingent on, the protection of health of the people.

91) Furthermore, the priority of public health is again emphasized in the last sentence of the statement, where it is provided that the commitment of empowering the patent right holder is conditioned upon "*secure access to healthcare for all [Mercurians]*".[51] Thus, Respondent's commitment to protect the IP regime is by no means limitless and the needs of the State and society supercede it. The Claimant cannot argue that they have the legitimate expectation that the IP regime cannot be changed under any circumstances. Claimant's assertion about the absolution protection of investors under the IP regime is a distortion of the statements.[52]

92) To conclude, past tribunals decisions on political statements alone not being sufficient to create legitimate expectations along with the State's need to prioritise the healthcare to prevent an epidemic, made the changes to the IP regime a necessity. Claimant cannot claim a breach of its legitimate expectation on these grounds.

b. *Neither the issuance of a patent, nor the LTA generated legitimate expectations*

93) The mere issuance of a patent does not mean that such patent will not be challenged or invalidated in the future. This position was supported by the *Eli Lilly* tribunal, which is so far the only case in international investment law that deals with domestic patent protection and revocation.

94) The granting of a patent is always conditioned upon the fulfilment of the requirements set out in the domestic patent law. According to *Eli Lilly*, a patent can be invalidated by the State judiciary with the evolvement of the patent law. In *Eli Lilly*, the Federal Court of Canada revoked Eli Lilly's Zyprexa and Strattera patents for lack of utility on the basis of the development of the so-called 'promise utility doctrine' under Canadian patent law. The tribunal agreed with Canada that the term 'useful' under that doctrine was not defined in the

[50] *Feldman*, Award, § 148.
[51] Press Statement, § 1271
[52] Notice of Arbitration, § 150.

Canadian Patent Act, and its meaning had, therefore, necessarily evolved through jurisprudence.[53]

95) In fact, the argument that the mere issuance of a patent represents the State's promise to not invalidate that patent would equalize patents to stabilization clauses. Stabilization clauses, as defined by the *Total* tribunal, are "*clauses with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned would be illegal*".[54]

96) A patent is entirely different from a stabilization clause. It is a bundle of rights granted by host States to individual applicants and does not contain any promises about future legal regimes. Changes of patent regimes are mostly independent from existing patents; but sometimes they can even invalidate existing patents. As the *Eli lily* tribunal said, "[*patentees*] *may not have been able to predict the precise trajectory of the law … it should have, and could have, anticipated that the law would change over time*." If patents were to be regarded as stabilization clauses, they would freeze States' power to promulgate new patent legislation.

97) Thus, Respondent submits that the mere issuance of patents should be differentiated from stabilization clauses and that issuing patents does not generate the expectation that the patent regime will stop changing.

98) Moreover, Respondent submits that the LTA cannot generate any legitimate expectations regarding the IP regime either as the LTA was a "*purely supply arrangement*" between NHA and ClaimantA purely supply arrangement normally will not include any content about future legal regime. Claimant cannot simply *infer* the commitments in the contract without providing its exact contents. To do the otherwise will violate the good faith principle.

99) Finally, Respondent submits that Claimant cannot argue the existence of legitimate expectations based on the patent or the LTA, both of which do not contain a stabilization clause or any express promises to not change the law.

c. *It was reasonable for Claimant to expect Mercuria would amend its legislation to protect public interests when facing a health crisis*

100) Contrary to its statement in the Notice of Arbitration, Claimant should have expected that the general legal framework might change in response to public interests and State needs.

101) In *Duke*, the tribunal established a holistic approach to evaluate expectations:

> "*The assessment of the reasonableness or legitimacy [of the investor's expectations] must take into account all circumstances including not only the facts surrounding the*

[53] *Eli Lilly*, Final Award, § 418.
[54] *Total*, Decision on Liability, § 101.

investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."[55]

102) Therefore, since the text of the Mercuria-Basheera BIT, the experience of Claimant and its holding company, and the situation of Mercuria are all the relevant circumstances in this case, they shall be examined by the Tribunal.

103) Firstly, the preamble of the Mercuria-Basheera BIT sets out that promotion of greater economic cooperation should "*be achieved in a manner consistent with the protection of health*".[56] This reiterates that any expectations of investors shall be balanced with the ultimate goal of the protection of public health. Thus, a change of legal regime for the protection of public health could not be expected to be prohibited under the Mercuria-Basheera BIT.

104) Secondly, the preamble also sets out that States ought to obey their international obligations under the WTO agreements.[57] TRIPS, as part of the WTO agreements, expressly stipulates in its Article 31 that State law can "*allow for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government*," as long as certain provisions are respected.[58] Claimant, who seeks protection under the Mercuria-Basheera BIT, thus should have foreseen the possibility of compulsory licensing in the future as provided for under this treaty.

105) Thirdly, as an experienced drug discovery and development enterprise with over a hundred years of operational experience to its credit and operations in the developing world.[59] Claimant must have known that developing countries are often faced with severe public health issues and often legislate in response to public health crisis. For example, in 2004 Zambia[60] and Indonesia[61] granted compulsory licences to third parties for AIDS therapy. In 2006, Thailand issued a compulsory licence to import Merck's drug "Efavirenz" from India.[62]Similarly, in 2007, Brazil awarded a compulsory licence to import "Efavirenz" from India.[63] In March 2012, India granted its first compulsory license ever. The license was granted to Indian generic drug manufacturer for a cancer drug.[64]

106) As Mercuria shared many similarities to these countries – all are developing countries, have enormous population, and face serious challenges concerning public health – it should not

[55] *Duke*, Award, § 340.
[56] Mercuria-Basheera BIT, § 977.
[57] Mercuria-Basheera BIT, § 986.
[58] Article 31, TRIPS
[59] Statement of Uncontested Facts, § 845.
[60]Zambia Compulsory License.
[61] Irinnews.
[62] ICTSD Report.
[63]ICTSD Report Brazil.
[64] NY Times.

have been difficult for Claimant to foresee that such a change of legal regime could take place in the future.

107) The tribunal's decision in *Urbaser* accurately summarizes Respondent's submissions on this issue. The tribunal held:

> *"If the host State is hit, for instance, by an epidemic threat to the health of a very large amount of people, it has to take all measures required by the situation even if this implies hurting investors' interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow. What the fair and equitable treatment standard requires is that the basic expectations of the investor in respect of the fate of its investment are nevertheless taken care of by the host State when reacting to unforeseen circumstances. There is no bar for the host State to act accordingly merely because a situation of public concern emerged that was not transparent to the investor at the outset."*[65]

108) In sum, a reasonable investor with experience in developing countries should have looked at the whole text of BIT, consulted the TRIPS agreement, and also considered previous experiences in other developing countries. All these elements show that a prudent investor should not have reasonably expected that the IP regime would remain static in the brink of a health crisis.

C. Claimant does not have the legitimate expectation of reasonable profits in this case

109) The decisions where tribunals find a violation of FET on the basis of reasonable profits or economic rationality – namely, *Walter Bau AG*[66] and *Total*[67]– can be distinguished from the case at hand.

110) Even though the *Walter Bau AG* tribunal found violation of FET on Thailand failing to guarantee a reasonable profit or return to the investor, the case does not concern any public interests, not to mention a health crisis. As stated previously, any expectation from the investor shall take into account all the circumstances. Expectations regarding profits are no exception. Profits shall by no means override the health of the people of a nation in an epidemic, especially given that the preamble of the BIT here has expressly mentioned the importance of public health.

111) The *Total* case, in contrast with *Water Bau*, does involve a severe economic crisis faced by Argentina.[68] The tribunal in that case found that the investor had expectations regarding reasonable profits. However, the Argentina-France BIT does not mention protection of health. By expressly providing the importance of public health and free healthcare to the

[65] *Urbaser*, § 628.
[66] *Walter Bau Ag*, Award.
[67] *Total.* Award.
[68] Total, Decision on Liability, § 333.

whole nation, the Mercuria-Basheera BIT has set public health as the priority in the situation of a health crisis. Claimant cannot claim an implicit principle against an express one.

112) In sum, Respondent submits that this principle of reasonable profits or economic rationality is questionable as very few cases have supported its existence. In any event, those cases can be distinguished from the case at hand.

D. Mercuria has fulfilled its obligations under FET.

a. The FET clause does not require the State to freeze its legislative framework

113) Respondent submits that Claimant has wrongly interpreted the fair and equitable treatment clause. Even though appearing as a broad term, fair and equitable treatment does not mean each and every conduct that adversely affects investor will be considered a violation of the standard.[69] To believe otherwise would amount to the freezing of States' legislative and regulatory power.[70]

114) In *Phillip Morris*, a very recent case where the tribunal deals with governmental measures responding to the health problems created by cigarettes, the tribunal takes a similar standing. Reviewing a series of cases including *EDF* and *El Paso*, the tribunal reached the conclusion that "*changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest*".[71]

115) The *Urbaser* tribunal, in the same vein, envisions that States may have to take measures to protect public interests against an epidemic. The tribunal first observes that, "*the investor is and must be aware of the State's commitment to deal with situations and problems that may emerge over the time and were impossible to anticipate*." Then it elaborates with examples, saying that "*if the host State is hit by an epidemic threat to the health of a very large amount of people, it has to take all measures required by the situation even if this implies hurting investors' interest*", which is *exactly* the case here.[72]

116) Indeed, the ultimate goal of States entering into a BIT is to utilize foreign investments for the benefit of their people. It would be unreasonable to assume that when the primary interests of a host State's people are in danger, investors' interests are still prioritized. When faced with public threats, host States should be allowed to take measures even if that is against investors' interests. The question is not whether measures responding to the crisis can be taken when they might hurt investors, but rather what are the obligations of States while taking such measures.

[69] *Saluka*, Partial Award, §§ 305 & 351.
[70] *Parkerings-Compagniet*, Award, §333
[71] *Philip Morris*, Award, §§ 422-425.
[72] *Urbaser*, Award, § 628.

117) Therefore, it is unreasonable for Claimant to have expected that the Respondent would not take measures to adapt its legal framework to counter the prevailing situation. The State's commitment to deal with situations affecting the health of its people trumps any commercial commitments to investors.

b. Mercuria's actions where proportional taking into account the health crisis that the country was facing.

118) The evaluation of Respondent's acts shall be put in the context of the crisis.

The greyscale epidemic is a severe health crisis. The NHA Report 2006 estimates that with the then discount rate of 25% the overall cost to provide drugs only to the poorest 100,000 would be 500% of the greyscale budget and represents nearly one third of the overall health budget.[73] In addition, the costs would only increase in the future, in just one year, costs of patients who solely depend on NHA for drugs would increases ten folds.[74] Besides, a significant proportion of the vulnerable population remains untested. [75]

119) In response to such a crisis, Respondent requested from Claimant only an additional discount – which was negligible compared to the significant crisis Mercuria was facing and the vast increase in demand for Sanior in the market. It should also be emphasized that Respondent did not choose to legislate immediately; it is only after Claimant rejected this solution that state the Respondent State had to think about the alternatives.

120) Changing the legal framework and implementing the Law was a necessity to prevent the outbreak of the Greyscale epidemic. In adopting the Law, Respondent took into account the Claimant's interests by making the new law fully compliant with TRIPS Article 31. TRIPS allows States' to make their own laws regarding compulsory licenses, provided that the provisions in TRIPS Article 31 are complied with. TRIPS does not require domestic legislation to employ exactly the same wording as used in Article 31, as long as the requirements set forth in TRIPS are present in national laws. In order for Claimant's FET claim to succeed, it must convince this Tribunal that the Law does not comply with TRIPS Article 31. However, there is no single piece of evidence in the record supporting this contention

121) Furthermore Article 31(g) requires that an authorization of use shall be terminated when the circumstances that led to the issuance of the authorization cease to exist and are unlikely to recur. Accordingly, the court granted the patent of manufacturing Valtervite only until greyscale was no longer a threat to public health in Mercuria.[76] Also, Article 31(f) requires that any such use be authorized predominantly for the supply of the domestic market of the

[73] Annual Report, § 1364.
[74] Annual Report, § 1361.
[75] Annual Report, § 1349.
[76] Statements of Uncontested Facts, §951.

Member authorizing such use. Accordingly, HP-Pharma does not export Valtervite.[77] Thus, both the legislation and its implementation comply with TRIPS Article 31.

122) In relation to the royalty rate decided by the Mercurian court, 1% cannot be said to be unreasonable – the number is hardly surprising in an international context. In May 2007 Brazil issued a compulsory license for Efavirenz with a royalty rate of 1.5% to Merck.[78] Available evidence presented by Scherer and Watal suggests that in most cases, the royalty rates paid to the patent holders have been quite low, often being under 5%.[79]In fact, as Professor Arvind Subramanian argued, any benefit would be nullified if the company manufacturing under a compulsory licence has to pay too high a remuneration.[80]

123) Further, Claimant is still able to obtain significant financial returns from the years to come. The earning of Claimant will depend on how many people need the drug and for how long these patients will need it. The available statistics show that just in the year 2015-2016, the patients of Greysale increased tenfold.[81] The aggressive disease awareness workshops across the country will lead to an increase of greyscale patients,thus, ensuring that demand will be enormous over a long period of time. The NHA report has clearly said that Greysale is a chronic disease and infected patients will need the drugs in many years to come. Given the gigantic market and long duration of the treatment, it would be unreasonable to claim that no profits can be earned by Claimant after the granting of compulsory licence.

124) In conclusion, Respondent submits that the State of Mercuria has attended to Claimant's interests in the crisis. To sum, Respondent submits that Claimant does not have legitimate expectations arising from the aforementioned statements or legal instruments; nor does it have legitimate expectations about its returns or profits. In fact, Respondent has fulfilled its obligation towards Claimant in dealing with the health crisis.

IV. RESPONDENT'S ACTS DO NOT CONSTITUTE UNREASONABLE OR DISCRIMINATORY MEASURE UNDER ARTICLE 3(2) OF THE BASHEERA-MERCURIA BIT

A. Respondent's acts do not constitute unreasonable measures.

125) "Unreasonable measure" does not eequate to "undesirable measure". Just because a measure is undesirable for Claimant, it does not make it "unreasonable" under the treaty. The standard for a measure to be unreasonable is very high. As the *Enron* and *Sempra* tribunals observe in the context of Argentina's measures in response to its economic crisis, "*the impropriety has to be manifest*"[82] it cannot be a measure which is "*not entirely surprising in the context in which it takes place*."[83]

[77] Procedure Order No. 2, §1524.
[78] Daemmrich, & Musacchio.
[79] Watal, ¶¶ 913-939.
[80] Subramanian, ¶ ¶ 323 & 331.
[81] Annual Report, §§ 1339-1340.
[82] *Enron*, Award, § 281
[83] *Sempra*, Award, § 318.

126) In the same vein, the *Phillip Morris* tribunal observes that tribunals should defer to the decision-making of domestic authorities. Similarly to the present case, the *Phillip Morris* tribunal was faced with Uruguay's regulatory measure dealing with a public health problem, which intended to curtail the dangers tobacco products pose to its people's health through national legislation.[84]

127) The tribunal decided that in evaluating the reasonableness or proportionality of States' measures "*taken to address an acknowledged and major public health problem*", "*substantial deference [was] due*" to the national authorities' policy decision.[85] The tribunal explains, "*the fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal*."[86] Respondent submits that this Tribunal should do the same and defer to the national authorities' decision, unless the measure is "manifestly inappropriate".

128) Respondent further submits that Claimant cannot establish that the enactment of the Law is a manifestly inappropriate response to the crisis. As discussed above, the Greyscale crisis was grossly underestimated. Patients increased tenfold in only one year.[87] In the meantime, the costs for providing drugs only to the poorest 100,000 is nearly five times of the current budget and represents one third of the overall health budget.[88] In the context of a crisis of such severity, amending the IP law to allow compulsory license, which will enable many more companies to provide affordable drugs to all patients, is entirely normal and appropriate.

129) Moreover, Respondent submits that Claimant cannot base the impropriety argument on the fact that the Respondent State had not initiated negotiations before taking measures to ensure the health and safety of its people. Respondent had first approached Claimant and requested it to support the State in tackling the Greyscale epidemic.

When States are faced with a crisis, they can take actions which inevitably hurt some subjects. For example, in the case of Brazil's compulsory license in 2007, the royalty rate is only 1.5%. Therefore, NHA's request of an additional 40% discount is insignificant, especially considering the severe budget deficit. Claimant's denial of discount despite the crisis created a considerable burden for the State and the health crisis could not have been dealt with effectively. Thus, after Claimant's rejection, it was futile to continue negotiations and the Respondent had no other option than to take the steps it did. More importantly, a health crisis cannot wait. It takes time for a legal draft to go through the whole legislation process. The longer Mercuria had waited, the longer it would have taken before all patients could have received the medication. Respondent faced two options, passing a law that would allow the market to set the just price for the medication by permitting compulsory licenses

[84] *Philip Morris*, Award.
[85] Philip Morris, Award, § 418.
[86] Ibid.
[87] Annual Report, §§ 1339-1340.
[88] Annual Report, §1364.

while still assuring economic benefits to Claimant, or pleasing an investor attempting to profit from a national crisis.

130) To conclude, Respondent submits that the enactment of the law is not unreasonable because it is not manifestly inappropriate in the situation. Even if this tribunal has doubts about the severity, it should defer to the judgement made by the domestic authorities. Which states what? Why should they defer to that?

B. Respondent's acts do not constitute discriminatory measure either

131) A State measure is discriminatory when it subjects an investment to differential treatment and is "*based on unjustifiable distinctions*."[89] Tribunals have stated that "*while discriminatory intent is important, it is the discriminatory treatment that is the key*".[90] However, neither the discriminatory effect nor the intent can be established by Claimant.

132) Any claim of discrimination shall be accompanied by a comparison. Discriminatory effect cannot be established by the fact that only *one* foreign company is harmed. For example, if the Claimant claims discrimination based on nationality, it needs to show that the legislation subjects foreign and/or domestic companies to different treatments. However, the legislation is neutral. All the provisions are equally applicable to both foreign and domestic investors.

133) Claimant might claim that courts have treated investors differently in court proceedings. However, Respondent submits that this argument is defective for two reasons. First, the proceedings are totally different. The *Nycomb* tribunal cannot be clearer regarding discrimination, "*one should only compare like with like*".[91] Since one proceeding is an enforcement proceeding and the other is a license application, they cannot be compared. Secondly, in any event, Claimant neglects that the licensing proceeding concerns 67,150,133 people living in this country.[92] Thus, a fast-tract proceeding was justified by the severity of the crisis and important public interests. Therefore, the differential treatment is not unjustified.

134) Discriminatory intent cannot be established either. Just because a State realized that an investor would be harmed by legislation, it does not mean that the State *intends* to discriminate the investor. The harm suffered by the Claimant is an inevitable result from compulsory license legislation. Mercuria's purpose is to solve the health problem but did not *intend* to bring that harm.

135) In conclusion, Respondent contends that the measures taken by it were with the sole intention of tackling the Greyscale crisis. None of the measures taken were discriminatory and/or unreasonable in light of the circumstances. Had the Claimant acceded to Respondent's requests, Respondent would not have been forced to take these measures and

[89] *Saluka*, § 309.
[90] Unglaube & Reinhard, § 262.
[91] *Nykomb*, Arbitral Award, § 53.
[92] Annual Report, §1328.

further, lost valuable time in formulating new legislation instead of distributing medicines to its people. In light of this, Claimant cannot establish that the legislation is discriminatory and breaches Article 3(2) of the Basheera-Mercuria BIT.

V. THE CONDUCT OF THE MERCURIAN JUDICIARY DID NOT VIOLATE THE FET STANDARD.

136) Respondent submits that its judiciary did not act in breach of any standard laid down in the Mercuria-Basheera BIT and, in particular, that the Mercurian courts did grant a fair and equitable treatment to the investor. On the contrary, Claimant contends that the time taken so far by the Mercurian courts to rule on its enforcement application fails in providing a due protection to investor rights.[93] Respondent will show it has not violated the FET standard.

A. The conduct of the judiciary did not amount to a denial of justice.

137) In order for the Tribunal to assess the point, the correct standard should be identified. Then, such parameter shall be used to evaluate the conduct of the judiciary. Respondent submits that the national courts acted and are acting in full fairness and propriety.

138) It is widely accepted that the denial of justice is a very demanding parameter, featuring seriously high thresholds. It is the common opinion of scholars and the orientation of investment tribunals (*jurisprudence constante*) that denial of justice has two features: systematic nature and egregiousness.

a. Systematic nature: exhaustion of the local remedies.

139) For a denial of justice to take place, a claimant must have exhausted all the available internal remedies to correct the wrongdoing. This is so because errors are endemic to any legal system and, thus, States shall be permitted to correct such mistakes themselves.[94] Respondent concedes that this can be untrue when a waiver of the local exhaustion is granted in the relevant BIT[95], but this is not the case in the present dispute.

140) The ILC Articles on State Responsibility[96] expressly state that "*Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim*".[97] The fact that local remedies are still available to the allegedly damaged party bars such party from bringing a claim before an international tribunal. If a party is not compliant with such principle, its claim is inadmissible.[98]

[93] Notice of Arbitration, § 13.
[94] Paullsson, ¶¶ 107-112; Also see Newcombe & Paradell, ¶ 242.
[95] Sattorova, ¶¶ 223-246.
[96] Draft articles on Responsibility of States for Internationally Wrongful Acts (2001). As widely known, the ILC Articles do not have a normative value per se, but rather "*the general conditions under international law for the State to be considered responsible for wrongful actions or omission*" (ILC Articles, General commentary, §. 1).
[97] Article 7 ILC Articles Commentary.
[98] Article 44(b) ILC Articles.

141) As a consequence, Claimant should have waited for all the local remedies to be tried, and then (possibly) complain for a denial of justice before an investment tribunal. On the contrary, Claimant did not even wait for a first-instance merit decision, which would possibly grant the enforcement of the Award, but rather seized the Tribunal with an unsubstantiated claim.

142) The fact that local exhaustion of local remedies should be completed before starting an investment arbitration has been confirmed by the practice in the field. The *Loewen* tribunal sided with the proposition that in cases in which international claims arise from the conduct of the judiciary, State responsibility only arises after the judicial system has taken a final view on the matter.[99] The rationale of this standing is very sound: the obligation of a State is that of providing a proper judicial system, not one immune of errors; as a consequence, the system as a whole shall be tried before bringing an investment claim.[100] The *Loewen* case further clarified that the mere availability of remedies is relevant, whereas their adequacy or effectiveness bears, in principle, no weight.[101]

143) Many other tribunals agreed that the exhaustion of remedies is a condition for a denial of justice to take place. For example, the 2012 *Oostergetel Laurentius* award held that "*because denial of justice deals with the failure of a system not of a single court, it cannot be established until local remedies have been exhausted thereby giving an opportunity for higher courts to rectify mistakes of lower instance*s".[102]

144) Similarly, the *Waste Management* tribunal confirmed that the denial of justice shall be assessed from a systematic standpoint, i.e. after all possible remedies to a judicial wrongdoing have been undergone.[103]

145) Only one conclusion can be drawn from the application of this principle to the present case. Claimant should test all the possible remedies available to him before national courts before resorting to investment treaty arbitration. In this case, Claimant failed to do so and, as a consequence, the Tribunal should reject its denial of justice allegations by virtue of the failure to satisfy this prong of the test alone.

146) However, Respondent will also deal with the lack of egregiousness of the alleged court misconduct, only in order to show that this second prong of the test has not been met by Claimant.

b. The misconduct of the judiciary, if any, was not substantial.

[99] *Loewen*, Award, §. 217.
[100] Greenwood, ¶ 61.
[101] Greenwood, § 167.
[102] Oostergetel & Laurentius, § 225.
[103] *Waste Management*, Award, § 97.

147) After local remedies have been exhausted a party may bring a denial of justice complaint at the international level. In order to be successful on such a claim the party shall show, up to a very high threshold, unfairness in the conduct of the proceedings before the national courts.

148) In order for a judicial misconduct to represent a denial of justice, it should represent a "*wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[104] It can be easily seen that this is a very strict definition: judicial errors, mistakes, omissions, do not per se constitute a denial of justice. They are only relevant (to our purposes) if and when they offend a sense of juridical propriety.

149) The just mentioned standard has been variously declined by other tribunals which, however, always reiterated the difficulty in proving such a vicious misconduct. As an example, the *Mondev* tribunal articulated the standard in identifying a denial with a "*decision [..] clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment*".[105] An immunity for a regulatory body was not, in this light, a denial of justice. It is also interesting to note that the award explicitly states that investment tribunals are not appeal venues and, as such, do not rule on the administration of justice, but only on gross justice violations.[106]

150) Again, denial of justice has been defined as the "*manifest disrespect of due process that [..] offends a sense of judicial propriety*".[107] The *Arif* tribunal also highlighted that what adjudicators should look at is the denial of justice through the application of procedures so void that they show bad faith.[108]

151) As it has been effectively summarized in *Waste Management*, the most relevant arbitral practice rules for a denial of justice only when a judicial conduct "*involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*".[109]

152) None of this happened in the case before this Tribunal. Mercuria is a developing country facing an ever-growing population. Despite all the attempts to make the judicial system responsive to the increased need for a prompt justice, the large number of cases before national courts have overburdened them.

153) In addition to this, Claimant did not file a small, routinary commercial claim. On the contrary, it requested the enforcement of an international award recognizing to a foreign entity about 40M in damages for the wrongdoing of a regulatory body. This is not a standard case, and requires particular caution by the judiciary.

[104] *Elettronica Sicula*, §128, This test has been verbatim quoted by following tribunals, such as *Loewen*, Award, § 127.
[105] *Mondev*, Award, §127.
[106] *Mondev*, Award, §§126-127.
[107] *Arif*, Award, § 447.
[108] *Arif*, Award, § 482.
[109] *Waste Management*, Award, § 98.

154) Furthermore, new case-law and reforms influenced the practice of the courts after the filing of Claimant's application for enforcement. All these changes aimed at fast-tracking certain disputes, thus benefitting foreign investors; this notwithstanding, it is clear that a short adaptation time is needed to cope with such changes.

155) Based on this Respondent submits that its judiciary did not deny justice to Claimant.

Indeed, Claimant first of all failed to exhaust all local remedies before resorting to this Tribunal. As confirmed by the above reported tribunal practice, this in itself disqualifies Claimant's denial of justice allegations as inadmissible and/or ill-grounded On the other hand, Claimant failed to meet the very high threshold for finding a denial of justice in a State conduct. As shown above, denial of justice features very high standard of proof, being essentially restricted to judiciary conducts so vicious and improper that offend judicial propriety.

In sum, Respondent submits that the Claimant failed to meet both prongs of the denial of justice test and therefore, cannot rely on this protection under the Mercuria-Basheera BIT.

VI. MERCURIA HAS NOT BREACHED THE UMBRELLA CLAUSE IN ARTICLE 3 (3) OF THE BIT

156) Respondent submits that none if its actions has breached Article 3(3) of the Basheera–Mercuria BIT. It has not entered into any obligations with regard to Claimant. Article (3) Basheera–Mercuria BIT states that "*[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."*

157) First, Respondent argues that it is not bound by the LTA pursuant to the principal of privity of contract. Second, a breach of the LTA constitutes only a commercial breach that does not amount to a treaty breach. Third, a difference has to be made between commercial breaches and significant government interference. Fourth, contract breaches and treaty breaches are governed by two different bodies of law. Fifth, pursuant to the principle of res iudicata the dispute has already finally been settled by the Reef tribunal. Finally the enactment of the law has not violated the umbrella clause.

A. Privity of contract

158) Claimant may argue that the breach of the LTA amounts to a violation of the umbrella clause in Article 3(3) BIT. However, Respondent submits that it is not even party to said agreement. It, therefore, does not constitute an obligation it has entered into with regard to Claimant.

159) Tribunals have required privity for the application of the umbrella clause: if the contract in question is not with the State itself but with a State entity or a province, the umbrella clause may be of no avail.[110] Thus, the *Impregilo* tribunal explained:

> "*In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan. Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming arguendo that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity*".[111]

160) The LTA is concluded between Atton Boro and the Mercuria National Health Authority, a distinct separate and distinct entity from the State As the name states it is obvious that the NHA is just an "*authority*" and not a ministry. Mercuria already as a Ministry of Health[112], with the NHA only acting under the auspices of the latter. It is part of a healthcare program for which the Ministry cooperates with private entities. Furthermore the NHA is led by its own Director and has no direct affiliation with the Ministry of Health. Hence it constitutes a separate and distinct entity. Contracts the NHA concludes bind solely the NHA and neither the Ministry of Health, nor any other organ of the State.

It follows that the umbrella clause is of no avail to the Claimant.

B. Only a commercial breach

161) Alternatively, Respondent submits that breaches of the LTA do not amount to treaty breaches, since breaches of a commercial contract do not amount to BIT breaches. As the LTA is a simple commercial contract, the latter is subject to Mercurian law. The LTA contains a forum selection clause that gives competence to an arbitral tribunal. The Reef tribunal has declared itself competent on that matter and rendered an award.

162) As the *Siemens AG* Tribunal stated, umbrella clauses only bind a State with respect to sovereign contracts but not with respect to commercial contracts.[113]

Pursuant to the Commentary of Article 1 of the UNIDROIT Principles of International Commercial Contracts (2010)

> *"(t)he restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i.e. to make the application of the*

[110] *Impregilo*, § 223.
[111] Ibid.
[112] Statement of Uncontested Facts, § 873.
[113] *Siemens AG*, § 206.

Principles dependent on whether the parties have the formal status of "merchants" (commerçants, Kaufleute) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called "consumer transactions" which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession."

163) Under the LTA, the NHA purchased drugs from Atton Boro by periodically placing purchase orders. This was in no way a contract between a legal person and a consumer. Both parties to the agreement are legal persons and agreed on the purchase of a good. Therefore, the LTA constitutes a commercial contract.

164) It follows that a breach of the LTA does not amount to a Treaty breach and therefore not a breach of the umbrella clause.

C. Commercial breaches and significant government interference

165) Furthermore, Respondent submits that a distinction has to be made between mere commercial breaches and significant government interference.[114] In *CMS* the tribunal stated that "*(p)urely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor*"[115] The Sempra tribunal followed this approach and agreed that ordinary commercial breaches of contract are not the same as treaty breaches.[116]

166) Umbrella clauses are only intended to create a treaty obligation on States to protect against the exercise of sovereign powers in a manner that interferes with contractual commitments and other legal obligations entered into with respect to investments.[117]

On 10 June 2008, the NHA terminated the LTA. The Reef tribunal decided accordingly the termination of the LTA only breached the LTA. The government interfered by no means. There is not even a need to address the question of what the term "significant" means in this context.

Therefore, Respondent submits that the breach of the LTA constitutes a commercial breach and that the umbrella clause has not been breached.

D. Contract breaches and Treaty breaches are governed by two different bodies of law

167) Respondent further submits that a simple contract dispute has to be heard by the forum selected in the forum selection clause of the contract. As the Tribunal stated in *SGS*

[114] *CMS*, Award, § 299.
[115] Ibid.
[116] *Sempra*, §310.
[117] Ibid.

Pakistan, in the case of a contractual dispute, the contractual dispute resolution clause of the contract needs to be respected, such that the investment tribunal does not take jurisdiction.[118]

168) The tribunal in *Vivendi I* Annulment took it even further and affirmed that breaches of the contract and of the treaty are two different bodies of law.[119] The dispute regarding the contractual breach goes to national courts, disputes regarding breaches of a BIT go to an investment tribunal.

169) The Reef tribunal accepted its jurisdiction; there is no need to decide on what tribunal has competence to hear the dispute.[120] Pursuant to the doctrine of Kompetenz-Kompetenz it ruled in its own competence. The breach of the commercial contract can only be heard by the competent forum, in this case the Reef tribunal. Therefore this tribunal is not even competent to hear the dispute at stake.

170) Hence, Respondent submits that the existence and legal consequences of a possible LTA breach by Respondent are not for this Tribunal to assess, since they are outside the scope of its jurisdiction. All such matters are not devolved to the Tribunal which, as a consequence, should reject its jurisdiction on any and all of these issues.

E. Principle of Res Judicata

171) Respondent submits that the dispute has already been finally decided. As the LTA is a simple commercial contract, the latter is subject to Mercurian law. The LTA contains a forum selection clause that gives competence to an arbitral tribunal. The Reef tribunal has declared itself competent on that matter and rendered an award.

172) Pursuant to the principle of res judicata "*a final adjudication by a court or arbitral tribunal is conclusive*"[121]. The same matter can therefore not be judged again.

In the present case the Reef tribunal has already finally decided on the matter and rendered an award. Henceforth Respondent submits that the breach of the LTA cannot be brought forward by Claimant.

Hence, Respondent submits that it has not breached the umbrella clause.

F. The enactment of the Law does not violate the umbrella clause

173) Article 3(3) of the Mercuria-Basheera BIT reads: *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*." The Respondent did not violate this provision. Firstly, no tribunal has

[118] *SGS Pakistan*, § 168.
[119] *Vivendi I Annulment*, § 96.
[120] Statement of Uncontested Facts, § 932.
[121] Dodge, § 1.

previously held that an umbrella clause can be used to invoke multilateral treaty obligation. Secondly, TRIPS has its own forum for dealing with disputes.

174) No tribunal has previously held that an umbrella clause can be extended to treaty obligations. The Claimant might refer this tribunal to cases such as *Enron v. Argentina* where the tribunal interpreted "*obligations*" as "*any obligations regardless of their nature*" [122], or SGS v. Paraguay, where the tribunal said "*The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally."* [123]

175) But Claimant neglects that, aside from the fact that the meaning and scope of such provisions is a matter of great controversy, the tribunals in those cases were *not* dealing with an international treaty obligation; nor did they expressly apply the umbrella clause to an international treaty.

176) The only two cases where this issue was brought up might be *Phillip Morris Asia* and *AHS*. In *Phillip Morris Asia*, Philip Morris has tried to argue this point but finally dropped it.124 The precautions shown by the Claimant in that case suggests that its viewpoint is not solidly grounded in jurisprudence. In *AHS*, the alleged breach of an international IP treaty was explicitly rejected on jurisdictional grounds: the complainants had simply not provided any relevant arguments why compliance with the Bangui Agreement could be subject to arbitration[125]. This further proves the controversial nature of this argument and lack of jurisprudence in this matter.

177) Moreover, TRIPS has its own forum of dealing with disputes – that is, the WTO dispute settlement system. Article 23 of the DSU provides that Member States "shall not make a determination to the effect that a violation has occurred … *except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*." Thus, by agreeing to DSU, the States have agreed that the breach of TRIPS agreements will be resolved according to the procedures set out in DSU.

178) there are undesirable consequences. It will in fact allow investors to circumvents the traditional barriers to initiating a WTO dispute and make diplomatic espousal no longer a check on the unmeritorious claims, disrupting the traditional WTO discipline. In addition, if claims are raised both in the WTO forum and investment arbitration, apart from the confusion regarding whether the arbitration tribunal or WTO panel should take the case, this opens the possibility that the same disputes are in fact decided twice. The worst scenario is that the two decisions in two forums and the remedies therein are different, creating further confusion.

[122] *Enron*, Award, § 274.
[123] *SGS Paraguay*, Award, § 77.
[124] *Philip Morris Asia*, §§ 6.5 & 7.6-7.11.
[125] *AHS*, Award, §§152-154.

179) For the said reasons, the Respondent asks the tribunal to exercise prudence and not to entertain the Claimant request to arbitrate this WTO matter in the forum of investment arbitration. The BIT in issue is not substantially different from that the one in *Philip Morris* or *AHS*. As a result, Respondent does not see any compelling reason for this Tribunal to hold differently.

PRAYER FOR RELIEF

Respondent respectfully requests this Tribunal to:

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

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

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

Respectfully submitted on September 25th 2017

By

Team Simma

On Behalf of Mercuria