FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

2ND -5TH NOVEMBER 2017

PERMANENT COURT OF ARBITRATION

In the Proceeding Between

ATTON BORO LIMTED

(Claimant)

Vs

REPUBLIC OF MERCURIA

(Respondent)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

I. CASES: II

II. BOOKS, ARTICLES AND REPORTS X

III. DOCUMENTS XIV

STATEMENT OF FACTS 1

ARGUMENTS 3

I. PART 1: JURISDICTION 3

A. The tribunal Does not have jurisdiction rationae materiae in the dispute 3

i. Arbitral awards do not constitute an Investment under the BIT 3

B. The respondent State has rightfully denied the benefits of this BIT to the investors under Article 2 of the BIT

i. The Respondent has exercised its rights under Article 2 in a timely manner. 7

ii. The Claimant investor is owner and/or controlled by nationals of a third State. 11

iii. The Claimant investor does not undertake substantial or any business activities in its place of incorporation i.e., Basheera. 12

C. The arbitral tribunal lacks the jurisdiction to adjudicate the claims relating to trips 14

II. PART 2: MERITS 15

D. Mercurian Courts are not liable under Article 3 of the BIT 15

i. There has been no denial of Justice violating Customary International Law or other standards under Art. 3 15

ii. There has been no breach of the 'Effective Means' Standard 18

a. The Modern Day Effective Means standard cannot be imported to this Dispute 18

b. Arguendo, the modern day - 'Effective Means' standard was not violated 19

E. The termination of the lta does not result in the violation of an international obligation 20

i. Article 3(3) Does Not Umbrella the LTA Into the BIT 20

ii. NHA's Acts cannot be attributed to the State of Mercuria 22

a. The NHA was acting in its commercial capacity. 22

iii. The NHA has not violated any international obligations. 23

F. The enactment of Law No. 8458/09 and/or the grant of a license for the Claimant's invention does not amount to a breach of the Mercuria-Basheera BIT, or otherwise the general principles of International Law 24

i. The issuance of a compulsory license in this case is a legitimate regulatory measure and does not constitute expropriation 24

ii. The compulsory license issued by the Respondent does not amount to indirect expropriation 28

iii. The Compulsory license issued is non-compensable in nature. 30

iv. The actions of the Respondent were valid and justifiable under the TRIPS Agreement in General and Article 31 in particular 33

v. The Respondent has provided a Fair and Equitable treatment to the Investment of the investor. 37

EXHIBIT- I 40

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STATEMENT OF FACTS

(¶ 1.) Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef and acts as the primary holding company for Atton Boro Group, a leading drug discovery and development enterprise After years of intensive research, Atton Boro Group synthesized a compound called Valtervite, aimed at the Greyscale patients. They also obtained a patent for Valtervite.

(¶ 2.) In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited ("Atton Boro"), as a vehicle for carrying on business in South American and African countries. Atton Boro Group had an established presence in Basheera's pharmaceutical market.

(¶ 3.) In May 2004, the NHA wrote an invitation to Atton Boro to make an offer for supplying its FDC drug, which it 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 Long-Term Agreement ("**LTA**"). Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders. Clause 6 of the agreement laid down that the agreement is valid for a period of ten years and can be terminated in case of unsatisfactory performance of the supplier.

(¶ 4.) The NHA campaign involved actively conducting awareness workshops in educational institutions and workplaces to encourage people to be tested regularly. The NHA annual report 2006 estimated that nearly 50% of all adults were getting themselves tested every six months, as compared to just over 17% in 2003. The number of patients coming into care grew, the order value for Sanior doubled with each quarter in 2007. Atton Boro reassured the NHA that it had built capacity to meet the rising demand, and offered a further discount of 10% for the remaining period of the LTA. The NHA rejected this offer, and demanded an additional discount of 40%, stating that it would be compelled to terminate the agreement if its terms were not met.

(¶ 5.) On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed an award (the "Award") in favor of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

(¶ 6.) On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy. The matter is still pending before the court and the same has not even gone past the jurisdiction stage.

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

(¶ 8.) Three neighboring States of Mercuria carried letters from their respective government offices expressing gratitude for the greyscale medicines received in the form of humanitarian aid from Mercuria. By 2014, Atton Boro had lost nearly two-thirds of its market share to the generic FDC pill. Atton Boro has initiated arbitration under the Mercuria-Basheera BIT for violation of various substantive rights therein.

I. PART 1: JURISDICTION

1. It is submitted that the tribunal does not have jurisdiction *rationae materiae* to hear the dispute. The arbitral award does not constitute an 'Investment'. Following which, protection under the BIT cannot be sought. It is also submitted that the denial of benefits clause has been invoked in a timely manner and all the objective criteria for exercising the denial of benefit clause has been met.

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONAE MATERIAE* IN THE DISPUTE

i. Arbitral awards do not constitute an Investment under the BIT

2. For invoking protection under the BIT, the Arbitral Award is required to fall within the ambit of the definition of the same under the BIT[1].

3. On analyzing the cases which have dealt with the question of arbitral award constituting an investment, it can be seen that no jurisprudence states that arbitral award in itself can constitute an investment[2]. An award is nothing more than a legal instrument, which provides for the disposition of rights and obligations arising out of the Long-Term Agreement[3]. The tribunals have examined awards and found them to be analytically different from the underlying investment. An arbitral award was characterized as a legal instrument[4]. Legal acts or instruments may be viewed differently from the underlying investment activity. This distinction between the arbitral award and the underlying business activity brings to mind the doctrine of separability, a principle that is well established in international commercial arbitration[5]. The contract to arbitrate in investment arbitration is based upon acceptance of a

[1] PO 1, BIT, Article 1(1), p.32

[2] Saipem v Bangladesh, ¶113

[3] GEA v Ukraine, ¶161

[4] *Ibid*

[5] Ayten Mustafayeva

unilateral offer to arbitrate by the state contained in the relevant BIT. The doctrine therefore applies in distinguishing between the arbitration agreement and the underlying investment and its legality or validity[6]. The theory stipulates that arbitrators serve as the agents of the parties that have given them authority by way of the arbitration agreement. The resulting arbitral award is considered to be a contract in itself that was formed by the agents on behalf of the respective parties[7]. Applying the doctrine, we can find that the award is different from the underlying investment in itself.

4. Furthermore, under the definition of investment under article 1 of the BIT, a broad asset based definition is provided for[8]. Any "asset" of an investor of the other contracting State either directly or indirectly through a third person is allowed to seek protection under the BIT[9]. Such an interpretation would lead to disastrous effects if the broad interpretation of an investment were to be followed.
5. It is possibly the broadest definition among similar definitions, as embracing everything of economic value, virtually without limitation.[10] These definitions of the term can encompass all types of transactions, whether they were intended to be "investments" or not. They would render the distinction between investments and other commercial transactions meaningless if such an approach was taken[11]. The definition of investment nor the BIT should function as a Midas Touch for every commercial operator doing business in a foreign state who finds himself in a dispute.[12]
6. Article 31 of the VCLT requires the provisions of the treaty to be interpreted in their ordinary meaning, keeping in mind the object and purpose of the treaty[13]. Such an object and purpose may be gleaned using the preamble of the BIT which provides that the object and purpose of the BIT is to increase economic prosperity of the contracting parties[14]. Therefore, only those

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[6] Kreindler, p. 248.

[7]Yu, p. 272

[8] Bayindir v Pakistan, ¶113

[9] PO 1, BIT, Article 1(1), p.32

[10] Bayindir v. Pakistan, ¶112

[11] Joy Mining v Egypt, ¶58; Fedax v Venezuela, ¶42; Romak SA v. Uzbekistan, ¶185

[12] Joy Mining v. Egypt, Nova Scotia v. Venezuela, ¶82

[13] Article 31, Vienna Convention on the Law of Treaties ("VCLT")

[14] PO 1, BIT, Preamble Clause 2, p.32

assets which cause the economic development or prosperity of the host State may constitute an investment under the BIT. The Arbitral Award in question is claimed against an entity within the territory of Mercuria. It is a direction to pay a certain sum of money to the investor. As such, it cannot under any circumstance, lead to economic development of the host State and thereby, may not constitute an investment for the purposes of the BIT[15]

7. If, upon an ordinary reading of the provision along with its objects and purposes, all types of transactions, namely commercial and investment transactions, add to the economic prosperity of the State, then such an interpretation would be absurd or ambiguous and subsidiary means of interpretation would need to be followed[16]. Keeping in mind the tribunal's approach in *Romak SA v. Uzbekistan,* the Respondent submits that the subsidiary means are to be looked at to distinguish normal commercial transactions and investment transactions[17]. In order to highlight the same, the Respondent intends to utilize the inherent definition of the term 'investment' along with jurisprudence emerging from other investment arbitration tribunals as well as writings of scholars in the field.
8. The writings of Zachary Doughlas[18], which was relied by the Respondent in *White Industries v. India*[19], contain a general test to determine an investment, one which is said to be applicable in all investment treaty claims, regardless of whether they are claims brought under the PCA Rules or the ICSID Convention. Rule 23 of the same states

"*The economic materialisation of investments requires the commitment of resources to the economy of the host state by the Claimant entailing the assumption of risk in the expectation of a commercial return.*"

9. Using jurisprudence as emerged from other arbitration tribunals[20] which would provide an objective definition of the term, criteria such as a regularity of profit and return, duration of economic operation, existence of risk assumed by the investor and a contribution to the

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[15] PO 1, BIT, Article 1(1), p.32

[16] Article 32, VCLT

[17] Romak SA v Uzbekistan, ¶184

[18] Zachary, International law of Investment Claims

[19] White Industries, ¶5.1.2

[20] Romak SA v Uzbekistan, ¶207; Alps Finance v Slovak Republic, ¶241

economic development of the host state are essential for a transaction to be termed an investment.

10. The Respondent submits that the claim to money does not satisfy the required criteria and therefore, through the use of the above entitled subsidiary means of interpretation, do not constitute an investment as under the BIT.

    - Economic development of the host state: The arbitral award does not contribute to economic development of the host state, namely Mercuria. In order to prove the same, the Respondent relies upon interpretation of the same term as offered by various tribunal ICSID tribunals[21].

      The tribunals in these cases have come up with certain requirements which must be satisfied by the investment for it to lead to economic development of the host state. Firstly, the public interest of the host state needs to be served through the transaction, and secondly, there has to be a transfer of know-how to the host state by the investor. In fact, if anything, it places an unnecessary burden on the state. For these reasons, the assets in question do not result in the economic development of the host state.
    - Existence of risk assumed by the investor: It must be noted that the investor must assume certain risk with regards to the 'invested' assets. It must be noted here that there is no actual risk with regard to the investment. The award is a final adjudication of the rights in a claim and the same is not subject to any risk.

11. Thus, the Respondent submits that an arbitral award cannot be considered to be an investment under the BIT and other principles of International law. Thereby, the Tribunal must come to a finding as to its lack of jurisdiction *rationae materiae* in the instant case.

[21] Joy Mining v. Arab Republic of Egypt

B. THE RESPONDENT STATE HAS RIGHTFULLY DENIED THE BENEFITS OF THIS BIT TO THE INVESTORS UNDER ARTICLE 2 OF THE BIT

12. The Respondent has successfully exercised its right to deny the benefits of this BIT to the investor in the instant case under Article 2 of this BIT[22]. The Denial of Benefits Clause, if successfully exercised by the Respondent in the instant case, would prevent the investor from enjoying any and all benefits arising out of the BIT including the benefit of the Dispute Settlement Clause[23]. As such, the question as to the successful exercise of this Article 2 right shall be a jurisdictional question before this Arbitral Tribunal[24].
13. Therefore, the burden is upon the Claimant in the instant case to prove a *prima facie* case before this Arbitral Tribunal before the burden may shift upon the entity making the assertions, the Respondent[25] [26].
14. In order for the successful exercise of this right, the Respondent must have exercised this right in a timely manner (*ratione temporis* requirement)[27] (a) and must also effectively prove that the Claimant is owned or controlled by nationals of a third state (b) and that it does not undertake substantial business activities within the territory of its place of incorporation, the Kingdom of Basheera[28] (*ratione materiae* requirement)[29] (c).

i. The Respondent has exercised its rights under Article 2 in a timely manner.

15. Article 2 of the BIT is silent as to any time or notification requirements for the exercise of such a Denial of Benefits Clause by the Respondent. In the absence of the same, the Tribunal may not accord such a requirement, not included by the drafters of the BIT, as a pre-requisite

[22] PO 1, Mercuria-Basheera BIT, Article 2, p.33

[23] Pac Rim v El Salvador, ¶4.4; Siemens v Argentina, ¶102

[24] Pac Rim v El Salvador, ¶4.4; GAI v Bolivia, ¶381

[25] Iran v USA, ¶15

[26] EC Hormones, ¶98

[27] Ulysseas v Ecuador, ¶72.

[28] PO 1, Statement of Uncontested Facts, ¶4, p.28

[29] Plama v Bulgaria, ¶143

for the successful exercise of the Clause[30]. Doing so would be in violation of the established principles of international law, by which both parties and this Tribunal are governed [31].

16. In the instant case, it is evident that the parties expressly not only chose not to impose a time period within which such a Clause need be exercised by the host State, but also expressly negated the addition of a notification requirement as is present in the Denial of Benefits Clauses of other Treaties[32]. As such, an intention of the parties may be determined from such an express exclusion of these requirements. This intention must be given effect to by this Arbitral Tribunal[33].
17. Furthermore, the PCA Arbitration Rules[34] which form the applicable arbitration rules in the instant case[35], lays down a time limit upon the raising of a plea of jurisdiction, as required to be made no later than in the Statement of Defense[36].
18. Here, the Respondent has raised this plea regarding jurisdiction, of the Claimant not enjoying the benefits under the BIT, at the time of the Response to the Notice of Arbitration[37], which satisfies the time limit imposed under the PCA Arbitration Rules.
19. Furthermore, in the case of BITs which involve a Denial of Benefits Clause, the consent of the host state to arbitration of a dispute with the investor is conditional, and may be denied by the party upon the satisfaction of the objective *materiae* requirements[38]. This reservation of the right to deny the benefits of this BIT operates on the Contracting Parties' offer of consent to arbitration as much as every other benefit conferred under the BIT[39]. As such, at the time of the Notice of Arbitration, the Respondent had not yet fully consented to arbitration before this Tribunal, neither has it done so ever since the issue of the Notice of Arbitration. As consent is a pre-requisite for the grant of jurisdiction to an international forum under

[30] Polish Nationality Advisory Opinion.

[31] PO 1, Applicable Laws and Arbitration Rules, ¶11, p.26

[32] Article 1113, NAFTA

[33] Article 31(4), VCLT

[34] PCA Arbitration Rules, Article 23(2)

[35] PO 1, Applicable Laws and Arbitration Rules, ¶12, p.26

[36] Ulysses v Ecuador, ¶172; GAI v Bolivia, ¶382

[37] Response to Notice of Arbitration, Objections, ¶5, p.16

[38] GAI v Bolivia, ¶372

[39] *Ibid,* ¶373

international law[40], this Tribunal may not exercise jurisdiction over the instant case under the BIT.

20. Even if this Tribunal were to accord a valid consent on the part of the host State to arbitration under the same, such consent would be conditional upon a reservation made by the host State to deny the benefits of this BIT, if it so choses, where the objective requirements under Article 2 have indeed been satisfied[41].

21. Next, in practice, the State's right to deny the benefits of a Treaty to an investor is generally not questioned prior to the existence of a dispute. States generally do not have the opportunity or the reason to do the same with respect to investments made in their country[42]. The very purpose of such a Clause is to enable the host state from denying the benefits of the Treaty to investors who invoke these benefits. As such, it is proper that the Clause be exercised when the investors seek these benefits. The host state must therefore not be precluded from exercising this Denial of Benefits in a retroactive manner when the investors claim such a protection[43].

22. Furthermore, with the number of investments made into a State pursuant to a BIT, it seems highly impractical to expect a State to analyze and monitor the ownership and control structure of each of the many investors who make investments within their territory. Even if the host state were indeed able to establish such a monitoring system within its territory, such a system would be intrusive to the investor, creating bureaucratic hurdles and as such likely to reduce foreign investment within the territory rather than increase it[44]. Furthermore, it is extremely possible that such an ownership and control structure change more than once during the course of the investment of the investor. As such, it seems highly impractical to expect the host state to monitor to such a large extent, the ownership and control structure of their investors[45]. Imposing such a requirement upon the host state would convert something that the investor knows with certainty, whether it is subject to foreign ownership or control and whether it has substantial business activities in its State of incorporation, into a burden

[40] Matthew Lister

[41] GAI v Bolivia, ¶373

[42] GAI v Bolivia, ¶378; Pac Rim Cayman v El Salvador, ¶4.18

[43] GAI v Bolivia, ¶376

[44] *Ibid,* ¶4.59 (*Amicus Curiae* Brief)

[45] *Ibid*

upon the host state to make such a determination which it has no way of knowing or determining[46].

23. Lastly, a retrospective application of the Denial of Benefits Clause would not be in violation of the legitimate expectations of the investor[47]. In order to prove the existence of a legitimate expectation, not only must the investor prove the existence of an expectation, but must also prove that such an existing expectation was legitimate in nature, that the same was created by the host State in an official capacity and that the expectation caused a trust-inspiring action[48]. Furthermore, legitimate expectations of an investor forms part of the good faith or *pacta sunt servanda* principle in investment arbitration[49]. As such, in compliance with this principle of international law, also enshrined in the VCLT[50], a host State is required to give effect to such a legitimate expectation of the investor. However, where the act in question of the host State, is part of the *pactum* agreed upon by the Contracting Parties to the BIT, then the same cannot violate the *pacta sunt servanda* principle and by extension, the legitimate expectations principle[51].

24. Further, with the express inclusion of the Denial of Benefits Clause in the governing law of the investment (the BIT)[52], the parties would most definitely be aware of the possibility of such a denial on the part of the host State if it does satisfy Article 2's objective requirements. The denial of benefits would therefore come as no surprise to the investments, thereby not frustrating its legitimate expectations[53].

25. As such, a retrospective application is neither in violation of the BIT, nor the established international law principles, but is rather permitted under the basic rules of interpretation, the established principles of international law and from a practical view of the host State's conduct. As such, the Respondent submits that such a retrospective application, as has occurred in the instant case must be permitted by this Arbitral Tribunal.

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[46] Yukos v Russia, ¶452

[47] GAI v Bolivia, ¶372

[48] Thunderbird Gaming Corporation v Mexico, ¶21

[49] *Ibid,* ¶25; Tecmed v Mexico, ¶154

[50] Article 26, VCLT

[51] GAI v Bolivia, ¶375

[52] PO 1, Mercuria-Basheera BIT, Article 2, p.33

[53] *Ibid,* ¶383

ii. The Claimant investor is owner and/or controlled by nationals of a third State.

26. A plain reading of Article 2 dictates that the use of the term 'or' requires the Respondent to merely satisfy either the ownership or control of the investor as being with nationals of a third State in order for the satisfaction of the first requirement[54].

27. With respect to the ownership of the investor, the Tribunal, to satisfy the object of the Denial of Benefits Clause of denying the benefits of this BIT to entities which chose a nationality of convenience[55], would have to identify the true owner of investor which may be identified only through the identification of the ultimate owner[56]. Otherwise, investors may merely invest their funds through intermediaries while maintaining the same level of control as they would have maintained if they would have had direct control[57]. In order to ensure the same, the Tribunal must pierce multiple layers of the corporate veil as was done by the Tribunal in similar circumstances in numerous other cases[58].

28. In the instant case, the shares of the investor, Atton Boro are held completely by the affiliates of Atton Boro Group, whose shares are in turn held in whole by Atton Boro and Company, an entity incorporated in Reef[59] [60]. Atton Boro Group, the parent Group, incorporated Atton Boro as a vehicle for the conduct of its business in South America and Africa[61] all the while using Atton Boro and Company as its primary holding company[62]. As such, it is evident that Atton Boro Group has set up and is in ownership of the investor, Atton Boro, through its primary holding company. The nationality of Atton Boro's ultimate owner is therefore The People's Republic of Reef. The Respondent thereby submits that it has indeed successfully proven the third-party ownership requirement.

[54] Plama v Bulgaria, ¶170

[55] National Gas v Egypt; AMTO, ¶66-67

[56] Vacuum Salt v Ghana; Autopsita v Venezuela; GAI v Bolivia, ¶370; Pac Rim v El Salvador, ¶4.79-4.82

[57] SOABI v Senegal, ¶37

[58] *Ibid*; TSA v Argentina

[59] Exhibit- I

[60] PO 1, Statement of Uncontested Facts, ¶2, p.28

[61] PO 1, Statement of Uncontested Facts, ¶4, p.28

[62] *Ibid*, ¶2

29. With respect to the control requirement, the Tribunal must again peel multiple layers of the corporate veil in order to find the ultimate source of control[63]. An entity may be said to control another either directly or indirectly through an intermediary, if that entity possesses the legal capacity to control the other entity, where the BIT does not require the showing of day-to day control[64]. Such control may be seen through the fact that the entity is in complete or majority ownership of the purported investor[65].

30. In the instant case, Atton Boro and Company is indirectly in ownership of the purported investor[66]. Furthermore, the very incorporation of the investor is in order to act as a vehicle for the conduct of business for the Atton Boro Group, acting through its primary holding company, Atton Boro and Company. Also, the primary activities of the investor along with its principal assets are all those which it has been assigned by Atton Boro and Company and the activities in question of the purported investor within the territory of Mercuria are also those which have been funded by Atton Boro and Company[67].

31. Thereby, the Respondent submits that Atton Boro and Company is not only in legal control of the purported investor, but also in operational control of its day-to-day activities and as such, the Respondent has indeed satisfied the primary requirement for the exercise of the Denial of Benefits Clause.

iii. The Claimant investor does not undertake substantial or any business activities in its place of incorporation i.e., Basheera.

32. The phrase 'substantial business activities' has not been defined under the BIT and as such, the ordinary meaning of the term must be looked into while interpreting the term. 'Substantial business activities' would therefore necessitate an examination into the materiality of the activities being undertaken, rather than its magnitude[68]. The question that would arise would therefore be one of the existence of an economic benefit in the conduct of the activities in

[63] TSA v Argentina

[64] Aguas Tunari v Bolivia

[65] Generation Ukraine v Ukraine, ¶15.9; LETCO v Liberia, Amco v Indonesia

[66] Exhibit- I

[67] PO 3, Line 1572

[68] AMTO, ¶69

question[69]. In this regard, authors opine that one would expect that, at a minimum, the company in question will be engaged in buying, selling and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence, to be a party to substantial transactions in the area of the Contracting Party associated with the furtherance of its business and to engage in procurement locally of inputs for the business[70].

33. The primary purpose of such a requirement is to ensure that the investor has realistic ties to its State of incorporation rather than merely using the same as a nationality of convenience[71]. As such, an important factor for such a determination would be as to whether the investor does indeed undertake its primary business activities even within the territory of its State of incorporation.

34. In the instant case, the purported investor, although established in Basheera, undertakes little or no activities there. The office of the purported investor within the territory of Basheera undertakes no activities to contribute towards the economic benefit of the company. It is merely a regulatory and supporting body for its immediate owners[72]. It does not undertake any manufacture or supply activities within the territory of Basheera nor does it have any current public-private collaborations with any Basheera public entity, activities which its claims are part of its principal dealings.[73] Furthermore, due to such a lack of activity in the Basheera pharmaceutical market, it undertakes no procurement or supply contracts either. The only recorded activities of Atton Boro occur within the territory of Mercuria pursuant to its LTA with the Mercurian NHA[74].

35. As such, Atton Boro, the purported investor in the instant case, undertakes little if any activities within Basheera. Its activities in Basheera have no connection with its principal dealings[75] and merely involve provision of support and regulatory services and management of its portfolio of assets[76].

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[69] Ulysseas v Ecuador, ¶123

[70] Yaung Chi v Myanmar, ¶9-10; Crina Baltag, p.162

[71] National Gas v Egypt; AMTO, ¶66-67

[72] PO 2, Denial of Benefits, ¶3, p.48

[73] PO 1, Statement of Uncontested Facts, ¶5, p.28

[74] PO 1, Statement of Uncontested Facts, ¶9, p.29

[75] PO 1, Statement of Uncontested Facts, ¶5, p.28

36. Atton Boro is clearly being used for its nationality of convenience by the Atton Boro Group and Atton Boro and Company to reap the benefits of the Mercuria- Basheera BIT. The Respondent therefore submits that the Tribunal must uphold the exercise by the Respondent Host State of Mercuria of its right to deny the benefits of this BIT to the purported investor, with the inclusion of the benefit to resort to the Dispute Resolution Mechanism under the BIT, and by doing so, come to a finding of its lack of jurisdiction to adjudicate upon the instant matter.

C. THE ARBITRAL TRIBUNAL LACKS THE JURISDICTION TO ADJUDICATE THE CLAIMS RELATING TO TRIPS

The third issue is with respect to whether alleged violation of the TRIPS Agreement may be addressed by this Tribunal. The Respondent submits in this regard that Article 8 of the BIT refers to the settlement of investor-state disputes arising out of or in relation of the BIT. The Tribunal is therefore merely empowered to analyse breaches of the BIT and not breached of TRIPS Agreement. Violations of TRIPS may only be analysed by the WTO Dispute Settlement Undertaking and not this Arbitral Tribunal.

[76] PO 2, Denial of Benefits, ¶3, p.48

II. PART 2: MERITS

D. MERCURIAN COURTS ARE NOT LIABLE UNDER ARTICLE 3 OF THE BIT

i. There has been no denial of Justice violating Customary International Law or other standards under Art. 3

37. Several factors are indicative of Denial of Justice, which may breach the FET or 'unreasonable or discriminatory measure standard' as set out in Art. 3. Some of which are unwarranted delays, obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment.
38. The above-mentioned criteria have been illustrated in the *Robert Azinian v. Mexico* case and is an embodiment of the International Standard with particular emphasis on the role of the state[77]. This stands as a logical corollary to the standard mentioned in the ELSI Judgment by the ICJ which stated that only a 'particularly serious short coming' and 'egregious conduct by the host state and its judicial organs' that 'shocks, or at least surprises, a sense of judicial propriety' would constitute breach of this standard.[78]
39. Such shortcomings and delays are to be properly assessed in light of existing circumstances, which include the reasonable expectations of the investors given the knowledge of the Municipal Court system they have to work within and the consequential limitations of such a regime.[79] Every prudent investor is expected to analyze and provide for such risks when entering the market. Atton Boro, with several years' prior presence in the Mercurian pharmaceutical market, is expected to understand the burden and time constraints faced by an overworked judiciary. Therefore it cannot shock or even surprise a sense of judicial propriety.
40. Further the test for establishing a denial of justice sets a high threshold. While the standard is objective it does however require the Claimant to show a manifest or gross unfairness; a

[77] Robert Azinian , ¶102.

[78] ELSI

[79] Chevron, ¶263.

flagrant and inexcusable violation; a palpable violation exposing bad faith (and crucially, not mere judicial error) at its core; or an undoubted mistake of substantive or procedural law prejudicing the investor.[80]

41. This has been further illustrated in the *Mondev* case, where denial of justice was said to be demonstrable through: refusal by a relevant court to entertain a suit; subjection to undue delay by a court; administration of justice in a seriously inadequate manner; or a clearly malicious application of the law by the courts. All these conditions are to be viewed in totality for the Tribunal to decide denial. [81]
42. Furthermore, the host state's highest relevant appeals court must have had the chance to overturn prior injustices and failed to do so, for the entire judiciary to be accused of the extreme injustice and partiality[82] required for a denial the denial of justice threshold to be met.[83]
43. Here, the Mercurian Courts did not act in a manner manifestly or flagrantly violative of the above- mentioned standard, it did not refuse to enforce the award or misapply the law in furtherance of such malicious intent. The state's highest court i.e The Supreme Court of Mercuria did not have an opportunity to overturn this alleged injustice and therefore an outright blanket determination of holding the entire Judiciary of Mercuria liable is still premature at this stage.
44. When making a determination on Denial of Justice the total time period to be taken into account is crucial. Here there are two time periods, which have to be considered. The period between the transfer from the High Court Bench to the Commercial bench[84] and subsequent retransfer back to the High Court bench[85] from 30th April 2012 to 2nd Jan 2014 resets the clock on the time period. The initial transfer to the High Court was done on the request of Atton Boro [86], and therefore cannot be ascribed to intentional delay on part of the Respondents. The Supreme Court judgment on the 1 Sept. 2013 merely clarified the already

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[80] Loewen, ¶130

[81] Mondev ¶126-127; Azinian, ¶102-103

[82] Vattel, Law of Nations, ¶ 350

[83] Jan Paulsson, Denial, pg. 100-101.

[84] Notice of Arbitration, Exhibit- I, ¶18, p.9

[85] Notice of Arbitration, Exhibit- I, ¶29, p.10

[86] Notice of Arbitration, Exhibit- I, ¶17, p.8-9

existing law in the state and restated the jurisdiction of the Commercial benches with relation to arbitral enforcement proceedings[87].

45. In *Jan de Nul v. Egypt*, where the Tribunal did not accept that ten years of waiting for a first instance judgment constituted a denial of justice, even though it was recognized that ten years was a long time for such a result. In doing so, the Tribunal took the complexity and technicality of the issues in those proceedings into account.[88]

46. In *White Industries v. India*, the Tribunal considered proceedings which had been pending for more than nine years. The nine years were considered as two separate periods of time and taken into consideration separately: first, an initial period of three and a half years starting from the initiation of an enforcement action before the national courts to its stay after a Supreme Court decision. Thereafter, a six- year period after the Supreme Court decision in which no resolution was reached, during which time the claimant chose not to appeal the stay of the enforcement order. The tribunal held this was not violative of the Customary International Law Standard.

47. In *Mondev*[89], the ICSID tribunal on referring to this standard opined:

"The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."

48. In the case at hand there was delay by the Municipal Courts. However, such delay had not reached a stage where it could be counted as egregious or unfair and inequitable this is the same delay undergone by all such cases in the Municipal System of Mercuria due to unavoidable constraints.

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[87] Notice of Arbitration, Exhibit- I, ¶28, p.10

[88] Jan de Nul, ¶204.

[89] Mondev, ¶127

49. Therefore, there has been no breach of the International standard and consequently no denial of Justice by the Mercurian Courts.

ii. There has been no breach of the 'Effective Means' Standard

a. The Modern Day Effective Means standard cannot be imported to this Dispute

50. The 'Effective Means' standard as illustrated in *Chevron* Case lays down criteria that require a host state to establish a proper system of laws and institutions that work effectively in a given case.[90] This standard and the corresponding test which was laid down in Chevron and consequently followed in *White Industries* lays down the basis for the understanding of the term in modern Investment Law.
51. Under Art. 31(4) a special meaning is given to a term if it is established that the parties so intended.[91] A corollary to this would mean if the parties could not have possible intended to accord a meaning to a term then such a meaning cannot be imported to it and cannot be possibly inferred. The parties concluded the BIT on 11th January 1998.[92] The Chevron case was decided by the PCA on March 30th 2010 a decade after the BIT was signed by the two parties and long after it came into force. Therefore, the intention of the parties at the time of signing of the BIT must be taken into account and could not possibly be extended to the post-Chevron meaning of the term 'Effective means'.
52. The pre- Chevron meaning of the term was present in U.S and International treaty practice however this did not substantially differ from the International Minimum Standard. "Effective" was interpreted as a systematic, comparative, progressive and practical standard. It is a practical standard in that some areas of law, or the application of legislation in certain circumstances, raise particular difficulties which should not be ignored in assessing

[90] *White Industries*

[91] Art 31(4), VCLT

[92] PO 1, Statement of Uncontested Facts, ¶1, p.28

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effectiveness.[93] It "seeks to implement and form part of the more general guarantee against denial of justice."[94]

53. Therefore, there was no violation of the Effective Means standard as intended by the parties.

b. Arguendo, the modern day - 'Effective Means' standard was not violated

54. The 'effective means' standard as set out in Chevron includes points such as recognizing the standard as a *lex specialis* and further no requirement that evidence be shown "of the host State's extreme interference in the judicial proceedings." It is a standard separate yet confusingly similar to the already recognized Minimum standard and as a consequence there are still widespread scholarly debates as to the contours of the Standard.[95] A review of the juristic writings as well as claims and decisions of the tribunals suggests that in so far as wrongful delay by the courts of the host state is concerned, it will give birth to denial of justice under customary International Law. In contrast, the effective means standard is to be invoked in cases where there is inordinate delay. However, from the criteria laid down it is impossible to distinguish a delay from an inexcusable delay violating the 'effective means' standard.

55. The functioning of institutional mechanisms, rather than the mere existence of such mechanisms, was the most critical determinant of whether a state had breached the effective means standard.[96]

56. The Mercurian Courts have provided for an institutional framework within which the arbitral award is to be enforced, and these courts function with certain limitations as can be expected of any developing country. The High Court cannot be expected to give more importance to the enforcement proceedings over Municipal Cases, there exists a functioning mechanism. The *Chevron* criteria has again failed to demarcate when failure or shortcoming is sufficient to categorize the court as functioning rather than merely existing, if understood in common parlance there is a functioning judiciary. Therefore, the effective means standard has not been breached by the Respondent State.

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[93] AMTO, ¶88.

[94] Duke Energy, ¶ 391

[95] Schill, Investment Law, pg.219

[96] Duke Energy, ¶392.

E. THE TERMINATION OF THE LTA DOES NOT RESULT IN THE VIOLATION OF AN INTERNATIONAL OBLIGATION

i. Article 3(3) Does Not Umbrella the LTA Into the BIT

57. One of the layers of protection offered to investments of either party under a Bilateral Investment Treaty is in the form of the Umbrella Clause. Article 3(3) of the BIT[97], is said to be the Umbrella Clause. Despite the use of mandatory phrasing[98] and the placement of the clause among the substantive rights guaranteed by the BIT, that alone is not grounds for interpretation of the Umbrella clause. The interpretation of this clause is left to the discretion of the Tribunal. It may either be a 'narrow' or 'broad' interpretation.[99]
58. The narrow interpretation of the Umbrella Clause is not a denial of the existence of the said clause in the BIT, but rather a strict application of the same according to stringent criteria laid down by each individual Tribunal. The Tribunal in *SGS v. Pakistan*,[100] found that the Tribunal has no jurisdiction in purely contractual matters and mere breach of a strictly contractual obligation did not amount to a Treaty violation. The same view was confirmed in Vivendi,[101] wherein the Tribunal stated that a "*substantially superfluous, wide interpretation*" must not be favored by the Tribunal as, violation of contract by a State with regard to investments of the other State does not amount to a violation of international law in case of a purely commercial contract.
59. When the National Health Authority of Mercuria entered into the Long-Term Agreement with Atton Boro in 2004[102], it did so in a purely commercial and contractual capacity. Indeed, the NHA is an instrumentality of the Government of Mercuria[103], however it may enter into contracts in a purely commercial capacity and not necessarily as the discharge of a sovereign

[97] PO 1, BIT, Article 3(3), p.34

[98] SGS v. Philippines, ¶115

[99] Yannaca-Small, K.

[100] SGS v. Pakistan, ¶96

[101] Vivendi v. Argentina, ¶98

[102] PO 1, Statement of Uncontested Facts, ¶9, p.29

[103] PO 3, Line 1591-1595, p.50

function. In this case, transaction was one that was commercial in nature. The LTA between the NHA and Atton Boro was for the purpose of supplying Sanior, at a 25% discounted rate by periodically placing purchase orders, with a minimum guaranteed annual order-value.[104] The nature of the same is indicative of a transaction that is commercial in nature and not for the discharge of a sovereign function. Tribunals in *El Paso*[105] and *Pan America*[106] have held that Umbrella Clauses are so narrow that they only can protect those undertakings where the state act as a sovereign party rather than in a commercial capacity.

60. The Tribunal in *Sempra*[107] noted that the dispute arose from "how the violation of contractual commitments with the licensees impacts the rights the investor claims to have in light of the provisions of the treaty and the guarantees on the basis of which it made the protected investment." In this case, the basis being the invitation of the NHA.[108] This can also be further inferred by the Tweet of the President of Mercuria, a primary source of news for his 40 Million followers[109], wherein he claimed that,

"*Mercuria will do away with red tape and roll out the red carpet for investors.*"

The aforementioned facts are in congruity with the implications made above.

61. Since the transaction was commercial in nature, there is no reason to treat the state differently from non-state operators involved in commercial disputes.[110] The Tribunal in *CMS*, in its final award expressed the view that the application of this "proper" umbrella clause was restricted to contracts concluded between an investor and the State acting as sovereign[111]. Further, in *Joy Mining*[112]*,* the Tribunal found that an umbrella clause cannot operate to transform a contract claim into a treaty claim, unless there exists a clear violation of the

[104] PO 1, Statement of Uncontested Facts, ¶10, p.29

[105] El Paso v. Argentina

[106] Pan America v. Argentina

[107] Sempra Energy v. Argentina

[108] PO 1, Statement of Uncontested Facts, ¶9, p.29

[109] Procedural Order 3

[110] Salini v. Jordan

[111] CMS v. Argentina

[112] Joy Mining v. Egypt

Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection. It is evident that the instant case lacks such grounds.

62. Thus, in conclusion, a narrow interpretation of the Umbrella Clause must be sought in the instant case. The claim of Atton Boro cannot be elevated to that of a treaty claim for the aforementioned reasons.

ii. NHA's Acts cannot be attributed to the State of Mercuria

63. The acts of the NHA in entering into the LTA and in its termination, are not attributable to the Republic of Mercuria[113]. The NHA's actions are done so in its commercial capacity rather than in exercise of elements of governmental authority. Therefore, the elements of Article 5 have not been met in the instant case preventing the same actions from being attributable to Mercuria.

a. The NHA was acting in its commercial capacity.

64. In determining as to whether the actions of the NHA in termination of the LTA are commercial or governmental, an analysis of the status of its act of entering into the LTA need be looked into. If the NHA had entered into the LTA in its commercial capacity as compared to in its exercise of governmental authority, then the termination of the LTA would also have been an act undertaken in its commercial capacity.

65. In determining whether acts of an entity are in their commercial capacity or in the exercise of elements of governmental authority, the Tribunal need look at the nature of the impugned act rather than the purpose of the act[114]. Even if the activities were performed for the purposes of promoting governmental policies or for the purposes of the State, if the activities themselves were essentially commercial in nature rather than governmental, it would not be attributable to the State[115].

66. In the instant matter, the NHA has merely entered into a commercial supply agreement with another entity[116] and has later terminated the same. Even if the Claimant successfully proves

[113] State Responsibility Articles, Article 5

[114] Jan de Nul v Egypt, ¶169

[115] Ceskoslovenska v Slovak Republic, ¶20

[116] PO 1, Statement of Uncontested Facts, ¶9, p.29

that the agreement was entered into for governmental purposes, the fact that the nature of the act is essentially commercial would result in the acts not being attributable to Mercuria. Furthermore, the fact that the NHA has the commercial freedom to undertake its activities, freedom which it had exercised in the instant matter while entering into the commercial supply agreement, indicates that the NHA was merely acting in its commercial capacity[117] [118].

67. Therefore, the Respondent submits that the contracting and subsequent termination of the LTA by the NHA may not be attributable to the Republic of Mercuria under Article 5 of ARSIWA.

iii. The NHA has not violated any international obligations.

68. Even if the Arbitral Tribunal does deem there to exist an international obligation upon the NHA to abide by the provisions and obligations of the LTA by virtue of it being umbrella'd in to the BIT[119], such an obligation has not been violated by the NHA in the instant case as the LTA was lawfully terminated by the NHA.

69. Clause 6 of the LTA allows for the NHA to terminate the Agreement during the period of its validity if it believes there to be unsatisfactory performance on the part of the supplier[120]. The NHA has terminated the LTA in the instant case citing the very same provision[121]. As such, the LTA was lawfully terminated by the NHA, thereby not giving rise to a violation of an international obligation.

70. It is to be noted here that Clause 6 requires merely for the NHA to believe in the unsatisfactory performance of the Supplier[122]. Here, Atton Boro has presented and marketed itself to be a company that provides access to essential medicines at comparative rates[123]. It has become synonymous through its various collaborations, with the 'movement to secure sustainable access to essential medicines to patients across the world'[124]. As such, the

[117] Nykomb v Latvia, ¶4.2

[118] PO 3, Line 1591, p.50

[119] PO 1, BIT, Article 3(3), p. 34

[120] PO 1, Statement of Uncontested Facts, ¶9, p.29

[121] PO 1, Statement of Uncontested Facts, ¶17, p.30

[122] PO 1, Statement of Uncontested Facts, ¶9, p.29

[123] PO 1, Statement of Uncontested Facts, ¶5, p.28

[124] Notice of Arbitration, Summary of the Dispute, ¶5, p.4

reasonable pricing of the medicines being supplied by Atton Boro under the LTA was the primary factor leading to the collaboration, such that the same constituted a material part of the Treaty.

71. When such pricing was no longer affordable for the NHA due to the drastic increase in the number of patients and Atton Boro's corresponding refusal to accordingly adjust the price of the medicines supplied[125], the Sanior medicines being supplied no longer were affordable for the NHA to the extent that the supply was costing 500% of the available budget for the same[126].

72. This constituted a material breach of the Agreement resulting in the Supplier's unsatisfactory performance, thereby permitting termination or suspension of the LTA under Clause 6 of the LTA as well as Article 60 of the VCLT[127].

F. THE ENACTMENT OF LAW NO. 8458/09 AND/OR THE GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DOES NOT AMOUNT TO A BREACH OF THE MERCURIA-BASHEERA BIT, OR OTHERWISE THE GENERAL PRINCIPLES OF INTERNATIONAL LAW

73. The compulsory license by the Respondent does not constitute unlawful expropriation. The Respondent's submits a twofold submission in this regard. Firstly, the actions taken by Mercuria comply with the requirements for legitimate expropriation (1). Secondly, these actions are expressly authorised under Article 6(2) and 6(4) of the Mercuria-Basheera BIT (2).

i. The issuance of a compulsory license in this case is a legitimate regulatory measure and does not constitute expropriation

a. <u>Mercurian framework permits the issuance of a compulsory license</u>

[125] PO 1, Statement of Uncontested Facts, ¶15, p.29-30

[126] Annual Report of the National Health Authority, Key Concerns, Line 1364-1365, p.43

[127] VCLT, Article 60

74. Mercuria acted in accordance with its provisions of legal framework while granting the compulsory license. Both Mercuria and the Claimant are parties to the TRIPS Agreement.[128] Accordingly, the amendment to the domestic legislation was made in compliance with the TRIPS Agreement.
75. Section 23 C of the Intellectual Property Law of Mercuria provides for the issuance of a non voluntary license in certain situations.[129] Similarly, Article 31 of the TRIPS Agreement enables member states to use the subject matter of the patent without prior authorisation of the patent owner.[130] As a result, of the existence of compulsory license both under domestic and international law, the patent granted is by no means inalienable. It is always subject to the provisions of Article 31 of TRIPS and Section 23 C of the IP law of Mercuria.

b. The level of interference does not substantially deprive the Claimant of its investment

76. The degree of interference is the detrimental parameter to distinguish between expropriation and legitimate regulatory measure. The tribunal in *Tecmed* stated it is the degree of interference that "is one of the main elements to distinguish between a regulatory measure, an expression of state's police powers that entails decrease in assets or rights, and de facto expropriation that deprives those assets and rights of real substance."[131] It is the submission of the Respondent that just because the rights of the Claimants are affected by the issuance of the compulsory license, does not automatically indicate that the patent was expropriated. The compulsory license is non- expropriatory in nature as long as the action taken by the Respondent was a legitimate regulatory measure.
77. This is alogical corollary to the balance between soveriegnity and Intellectual Property Rights. Private entities only have property rights to the extent that the sovereign state chooses to allocate those rights. Even when a nation state does grant a property ownership to a private entity, the state withholds certain rights. The rights that it withholds are all of the rights that, if not withheld, would have the effect the ability of the state to carry out legitimate public policy measures.

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[128] PO 2, Para No. 2, p. 48.

[129] Annexure No 4. p. 44.

[130] Article 31, TRIPS.

[131] Tecmed v. Mexico, ¶115.

78. The ICSID tribunal in *CMS v. Argentina* endorsed the concept of "substantial deprivation"[132] as a determining factor to establish whether the taking constituted indirect expropriation. The determination was based on a question "whether the enjoyment of the property has been effectively neutralised."[133]

79. In *ITT Industries v Iran* the Iran-US claims tribunal held that if an interference by the government denies the property owners its fundamental rights of ownership, use, enjoyment or management of business it may amount to expropriation.[134]

80. The tribunal in *Azurix v. Argentina* took an approach more sympathetic to the investor when it held that a loss of 10% of the asset's value is not an expropriation.[135] In essence, expropriation occurs only if the regulatory measure renders the rights of the investor useless.[136]

81. In the present case, Atton Boro continues to maintain significant control over its patent. It has a right to sell its patent, enjoy the economic benefits of the patent. The Respondent has neither deprived the Claimant of the use, enjoyment or disposal of its Patent, nor has it rendered the Claimant's rights useless, as it can still be sold in the country. The only change in the *status quo* is the deprivation of the exclusivity. This, patent exclusivity does not play a core role, as it is a recognised principle that a state may overrun exclusivity in the wake of public interest, such as issuance of essential medicines in the face of an overwhelming Public Health Crisis,[137]

82. Therefore, it is the submission of the Respondent that as such there is no substantial deprivation of the Claimant's property by way of issuance of the compulsory license by the state and the degree of such interference is manifestly low for it to be called expropriation.

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[132] CMS v. Argentina, ¶ 262.

[133] Id.

[134] ITT Industries v. Iran

[135] Azurix v. Argentina, ¶ 322.

[136] Metalclad v. Mexico ¶ 111.

[137] Gibson, p. 12.

c. A regulatory non compensable measure affecting the property rights is allowed under the international law

83. It is a recognized principle that a state has a right to control property and economic resources within its territory to enhance political, economic and other objectives.[138] This right at times may be exercised to the detriment of the private owners. This principle has been endorsed by the tribunal in *Saluka* where it was observed that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police power of States, forms part of customary international law today"[139]
84. Similarly, the ICSID tribunal in *Feldman* observed that "a reasonable governmental regulation" "cannot be achieved if any business that is adversely affected may seek compensation, and … customary international law recognises this."[140]The general regulatory measures that substantially decrease the value of property, provided the right to use, enjoy, manage and control property are left substantially intact, do not amount to compensable expropriation.[141]
85. A regulatory action includes measures taken by the state in wake of public interest in the areas of health, safety, protection of environment and maintaining public order.[142] In the present case the compulsory license was issued in the wake of public interest whereas it was of prime importance to make the essential medicines available to the bulk of the population at an affordable price to curb the menace of the Greyscale in the country.[143] and it is the sole prerogative of the state to decide what constitutes such Public Health Crisis[144]
86. Therefore the compulsory action taken by the Respondent amounts to non-compensable regulatory measure.

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[138] Sornarajah, p. 345.

[139] Saluka, ¶ 262.

[140] (Marvin Roy) v. United Mexican States, ¶ 103.

[141] NEWCOMBE, p. 74.

[142] NEWCOMBE, p. 76.

[143] Annexure 2, p. 39.

[144] Para 5 of the Doha Decleration.

ii. The compulsory license issued by the Respondent does not amount to indirect expropriation

87. The Mercuria-Basheera BIT provides in Article 6(4) that 'non-discriminatory measures', 'designated and applied to protect legitimate public welfare objectives, such as public health' and 'safety' do not constitute an indirect expropriation under the BIT.
88. The issuance of compulsory license by the Respondent's amounts to lawful indirect expropriation under Article 6(2) & 6(4) of the Mercuria-Basheera BIT. During the course of the submission the Respondent shall demonstrate, firstly, (1) the measure taken was to serve the objective of public welfare. Secondly (2) the measure was non-discriminatory in nature.

a. <u>The compulsory license was issued to serve public interest, particularly to secure public health.</u>

89. According to Article 31 of the VCLT: '*A treaty shall 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'*.[145]
90. The Preamble of the Mercuria-Basheera BIT is a key to the intention of the parties. It provides the objectives of the BIT, this stipulates that the provisions are to be interpreted "in a manner consistent with the protection of health, safety, and the environment."[146]According to Article 6(4) a measure taken for legitimate public welfare objective including public health would not constitute indirect expropriation.
91. In the present case, the economic impact of the government action resulted in denial of rights of the Investor. However, this was done in the backdrop of an eminent Public Health Crisis.
92. The WHO defines "public health emergency" as "an occurrence or imminent threat of an illness or health condition, caused by bio terrorism, epidemic or pandemic disease, or (a) novel and highly fatal infectious agent or biological toxin that poses a substantial risk of a significant number of human fatalities or incidents or permanent or long-term disability. The declaration of a state of public health emergency permits the governor to suspend state

[145] Article 31 of VCLT.

[146] PO 1, BIT. P. 35.

regulations, change the functions of state agencies and alter regulations allowing necessary functionality so as to minimize and manage the problem.[147]

93. It was further specified in *Noble Ventures*, that if a measure is "provided in all legal systems and for much the same reasons", the measure is not arbitrary.[148] In *Thunderbird*, the tribunal specifically emphasized that what is prohibited is "manifest arbitrariness falling below acceptable international standards"[149]

94. In the present case the presence of an impending Public Purpose is clearly ascertainable as the State of Mercuria faced a National Health Crisis due to outbreak of the chronic disease Grey Scale affecting over 300,000 people and likely to affect even more if not acted upon. The budgetary constraints and limitations of a developing country such as Mercuria with regard to mass purchase of the life- saving Sanior would have been impossible at price the Claimants were offering the drugs for. The difference alone is over $1.2 B annually – a third of the country's total health budget.[150] Due to the prices and the rapid progression rate of the disease the Respondent had no other choice but to choose to issue the compulsory license.

95. Therefore, the compulsory license was issued with a public welfare objective of securing the health of the population of Mercuria.

b. <u>The compulsory license issued was on a non-discriminatory basis</u>.

96. Article 6(4) and 6(2) of the Mercuria-Basheera BIT provides protection to the Claimant against discriminatory measures taken by the Respondent. It invalidates any measure which is discriminatory in nature. It binds the Respondent to provide the Claimant's non-discriminatory treatment vis-à-vis investors competing in 'like circumstances' in Mercuria. Such protection is based upon a comparison of investors whose circumstances of competition are "like" in that they participate in the market. As noted by the Pope & Talbot Tribunal, by their very nature "circumstances" are context dependent and have no absolute meaning across the spectrum of fact situations.[151]

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[147] (WHO/DCD, 2001).

[148] Noble Ventures Inc. v. Romania, ¶ 178.

[149] Thundergaming Co. ¶ 194.

[150] Annexure 3, p. 43.

[151] Pope & Talbot, ¶ 75.

97. The test for determining "like circumstances" should be "sensitive to the particular circumstances of each case with the analysis focusing on the specific nature of the measure under challenge"[152]

98. The Respondent did not discriminate against the Claimant's since none of the companies operating in the same sector and holding similar patents were "in like circumstances" with the Claimants.

99. The Claimant is the only company in the state of Mercuria which manufacture the patented drug. Furthermore, the variants available in the market are not as effective as the drug sold by the Claimant. Moreover, the burden is upon the Claimant to prove that it discriminated solely on the basis of its nationality.[153]

100. Therefore, the compulsory license issued by the Respondent is on a non-discriminatory basis.

iii. The Compulsory license issued is non-compensable in nature.

101. The action taken by the Respondent is a valid exercise of Mercuria's police powers. Interference with the foreign property is valid exercise of the police power. It provides and exception to Expropriation, Fair and Equitable Standard and Legitimate expectation standards recognised under the customary international law.[154]

102. The Respondent at the outset submits that there has been no violation of its international obligations under the BIT and it is therefore not liable for compensation. The Respondent State was well within its police powers while coming out with the legislation. The measures taken by the Respondent in that respect fall within its power to regulate and therefore the consequences of those are not compensable.

[152] Corn Products ¶ 118.

[153] Noble Ventures Inc. v. Romania, ¶ 180.

[154] Brownlie, p. 532.

a. The Police Power is relevant and applicable to the present case

103. Police power is a legally actionable "expression of sovereignty." The US Supreme Court in *Commonwealth v. Alger* defined police powers as : "*the power [...] to make, ordain, and establish all manner of wholesome and reasonable laws, status, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same*".[155]

104. The tribunal in *Saluka,* the tribunal found that "the measures at issue [could] be justified as permissible regulatory actions."[156] It affirmed that: "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."[157] Furthermore, the burden is upon the Claimant to prove that the regulatory measure by way of a compulsory license has not the requirements of public purpose, non-discrimination, and so on that configure the valid exercise of police power.[158]

b. The Compulsory license issued is a valid exercise of police powers

105. National Security & Public welfare objective: In 2003 the total number of Grey Scale cases were approximately 20,000. This number had increased exponentially to approximately 200,000 by 2006. Approximately, around 100,000 people were directly dependent upon the supply from the NHA.[159] The remaining 100,000 patients who did not fall under the poorest of the poor had to pay for this drug from their own pocket in the open market, or risk using the less effective non – FDC version, which only works at very early stages.[160] In 2006 the NHA press conference report stated that the incidence and prevalence of Grey Scale emerging from the data far exceeded even liberal estimates projected by the NHA.[161]

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[155] Commonwealth v. Cyrus, ¶ 85.

[156] Saluka, ¶ 265.

[157] Ibid., ¶ 1255.; Media Ventures, ¶ 76.

[158] UNCTAD Report, p. 95

[159] Annexure 3, p. 43.

[160] PO 1, Statement of Uncontested Facts, ¶6, p.28

[161] PO 1, Statement of Uncontested Facts, ¶ 14, p.29.

106. According to the World Bank – Atlas Method of classification as of 2015 the GNI (Gross National Income) – which is avg. annual income of a citizen of a low income country is below 1,025$ of a middle income country is between 1,026 and 4,035$. The treatment for Sanior costs 10,000$ per patient per annum.[162] Mercuria being a middle income developing country,[163] would fall under the low income category. Even if we assume they fall under the middle income category it is still impossible for a common person to afford such a drug at such a high price. Furthermore, the procurement of the drug is not a onetime affair as Greyscale is a chronic illness and such costs do not reduce after initial treatment but continue life- long. [164] Such costs are extremely prohibitive to an average citizen of Mercuria.

107. Given these statistics the Monetary impediments and the rapid progression rate of the disease, the state was facing a crisis situation which it deemed as a National Emergency, the state had no other choice but to issue the compulsory license so as to bring down the cost and ensure it can provide treatment for its citizens effectively and ensure the containment of the disease.[165]

108. *Reasonableness*: The objective of the Respondent state was to secure the health of the public and prevent it from spreading further.[166] In *Saluka v. Czech Republic* tribunal summed the reasonableness test perfectly stating: "reasonable measures bear relationship to rational policies."[167]

109. The policy of the state to secure the public health of its population could have been possible only with the effective implementation of a system which would make the drugs available at an affordable price, thus compulsory license formed a reasonable nexus with the objective being sought after by the Respondent.

110. Non-Discriminatory: The Respondents were not discriminated against as: Firstly, under Art. 6(2) of the BIT, expropriation can be considered legal when it has been done with a public purpose, in a non-discriminatory manner while adhering to the legal provisions and

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[162] Gross national income per capita 2016, Atlas method and PPP available at http://databank.worldbank.org/data/download/GNIPC.pdf

[163] Response to Notice of Arbitration, Objections, ¶9, p.17.

[164] Annexure 3

[165] PO 1, Statement of Uncontested Facts, ¶ 14, p.29.

[166] Id.

[167] Saluka, ¶ 307.

procedures. There has been no discrimination under the applicable law, which in this case is the national legislation. Under Art. 23(C) of the IPR Act, the procedure for the issue of non-voluntary licenses is laid down. The conditions to be satisfied are:

1) The licenses need to be issued after a period of three years from the date of grant of patent which is complied here as the Patent was issued on 21st Feb 1998.

2) It satisfies condition 1 (b) i.e. the patented invention is not available to the Public at a reasonably affordable price.

3) Sub clause d of Clause 4 is waived as there is a situation of National Emergency prevailing in the State.

111. Therefore, the regulatory measure by way of issuance of a compulsory license by the Respondent state is a valid exercise of its police powers and hence is non-compensable in nature.

iv. The actions of the Respondent were valid and justifiable under the TRIPS Agreement in General and Article 31 in particular

a. <u>The actions were in accordance with Article 7 & 8 of the TRIPS</u>

112. Adherence to the TRIPS Agreement is required by all the WTO member.[168] With respect to the question of the compulsory license issued by the Respondent, it is humbly submitted before this Court that the Preamble of the TRIPS, and sections 7, 8 underline the importance of "socio economic welfare" and underline the importance of the right to access to medicines as well.

113. In Canada- Patent Protection of Pharmaceutical Product Case[169], the WTP Panel recounted: The Clause is to be read:

"in a manner conductive to social and economic welfare, and to a balance of rights and obligations" "Article 7…declares that one of the key goal of the TRIPS Agreement was a balance

[168] Thomas Pogge, p.39

[169] Canada Panel Report

between the intellectual property rights created by the Agreement and other socio-economic policies of WTO Member governments. Article 8 elaborates the socio-economic policies in question, with particular attention to health and nutritional policies."

114. Also as the TRIPS RESOURCE book declares: *"TRIPS is not intended only to protect the interests of right holders. It is intended to strike a balance that more widely promotes social and economic welfare."*[170]

115. Article 8 provides the interpretative or normative principle of the TRIPS Agreement. The provision sates: "*Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the Agreement*."[171]

116. In the present case Greyscale has become an epidemic in Mercuria and the nearby countries. The Respondent acted in accordance with Article 7 & 8 of the TRIPS to protect public health in Mercuria. The compulsory license issued was in accordance with the provisions laid down under Article 31 of the TRIPS. Hence, it is humbly submitted that the actions of the Respondent state are in consonance with the objectives laid down under Article 7 & Article 8 of the TRIPS.

b. The actions of the Respondent were valid under Article 31 of the TRIPS Agreement

117. The TRIPS Agreement incorporates Article 31 which provides the requirements that must be met for compulsory licensing.[172] The intention of this Agreement is to strike a balance between public interests and the legitimate interests of owners of patents.

118. Article 31(b) has been complied with: Clause (b) requires that the right holder should be first approached for his authorization for the intended use barring exceptions of "national emergency", "extreme emergency", and "public non-commercial use". Although, the TRIPS does not define what constitutes a "national emergency" or an "extreme urgency" but item (c) of the Doha Ministerial Declaration has given the right to the member to determine what

[170] UNCTAD- ICSTD, p.126.

[171] TRIPS, Article 8.1

[172] Avtar Krsihen, p.469.

constitutes national emergency or other situations of extreme urgency. There are no such elements that permit to distinguish but it can be submitted that the obligation of previously seeking a voluntary licensing is excused when circumstances lead to the conclusion that spending time with the undertaking such negotiations would necessarily impair the desired outcome of the compulsory license.[173]

119. In the present case, the outbreak of Greyscale is rapidly spreading in Mercuria. This disease primarily affects the working age population.[174] Moreover, this cost of purchase of the drug which prevents the spread of this disease is disproportionately high. This would also further continue to overwhelm the economy of Mercuria as, Greyscale is a chronic disease.[175] This has not only affected the economy of the state but has also affected the health of public of Mercuria whereas many as 266,298 people were reportedly infected by the disease.[176] Such a large scale outbreak is certainly a situation of "national emergency" and calls for urgent steps to be taken. Since, the outbreak of Greyscale is a "national emergency", it is not required that the proposed user makes efforts to obtain authorisation from the right holder on reasonable commercial terms and conditions.

120. Article 31(c) has been complied with: The duration of the compulsory license should be limited to the purpose for which it was authorised. In the present case the Compulsory license was granted to HG Pharma until Greyscale was no longer a threat to the public health of the citizens in Mercuria. This shows that the scope and duration of this licence under Article 31(c) was to help Mercuria deal with the problem of "Greyscale" i.e. help the citizens of Mercuria by not letting a situation of shortage of supply by making the drugs affordable and within the range of a common person. Therefore the scope and duration of the Compulsory license has been limited to the purpose for which it was authorised.

121. Article 31(f) has been complied with: Art. 31(f) stipulates that grant of C.L. should be predominantly for the supply of the domestic market. Export of drugs to other countries on the grounds of humanitarian aid does not violate this provision as: Firstly, it does not place an absolute restriction on usage by another country as can be ascertained from the word

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[173] Nuno Pires, p.323.

[174] PO 1, Statement of Uncontested Facts, ¶ 14, p.29.

[175] Annexure 3

[176] Ibid

predominantly. Secondly, it was not given to another country with a profit making motive but was given in the form of humanitarian aid which can only be granted when there is a humanitarian crisis which implies that the specific country is unable to manufacture produce or import such a drug to sustain a crisis. Paragraph 7 of the Doha Declaration lays down the provision related to giving away of such drugs to such countries, and Para's 17- 19 state that the TRIPS agreement does not and should not protect member governments from acting to protect Public Health. Therefore in conclusion, the claimants were not discriminated against by the Respondent State.

122. Article 31(g) has been complied with: Article 31(g) is the corollary to Article 31(c). Compulsory licenses are given to address to situations which are temporary.[177] Compulsory licenses shall be granted where justifying circumstances exist. In the present case, the State has granted compulsory license to H.G. Pharma so as to help all Mercurian citizens get the availability of medicines to combat Grey Scale. Thus the license would terminate once the circumstances were under control and ceases to be a national health crisis

123. Article 31(h) has been complied with: This provision says that the right holder must be paid adequate remuneration taking into account the economic value of authorisation.[178] Although the word adequate has not been defined anywhere it generally means satisfactory or acceptable. In the present case, the royalty paid is 1% of the total sales value of HG Pharma, which is within the customary royalty rates followed by Mercuria i.e between 0.5 – 3% due to non-cooperation of the Claimant even such Royalty was not accepted.[179]

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[177] Nuno Pires, p.365.

[178] Frederick & Rudolf, p. 61.

[179] PO. 3

v. The Respondent has provided a Fair and Equitable treatment to the Investment of the investor.

124. In *SD Myers*,[180] the tribunal noted that a breach occurs when it is shown that an investor has been treated in "*such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*". Some treaties refer to "*fair and equitable*" treatment *simpliciter*,[181] certain others qualify the words with a reference of "*international law*"[182] or "*customary international law*". Art 3(2) of the BIT entitles the Claimant to full protection of its investments, explicitly providing that those investments "shall at all times be accorded fair and equitable treatment and full protection and security in the territory of the other contracting party."

125. This standard has its historical origins in the OECD Draft Convention on the Protection of Foreign Property of 1967. The notes and comments to the Draft reveal that the FET standard was understood as referring to the minimum standard of treatment under customary international law.[183]

126. In *Siemens v. Argentine Republic* Case it was held the burden rests on Claimant to prove that, at the time the BIT was concluded, the minimum standard of treatment is different than the one set out in Neer.[184] It is evident that the minimum standard of treatment, even if seen as an evolving concept, would not exclude rational, reasonable regulatory changes, undertaken in good faith. Here the article that deals with fair and equitable treatment does not provide for a different treatment from the customary international standard. It refers to "non-discriminatory and unreasonable" measures and says that the same cannot be imposed on the investors to ensure that they are treated in a fair and equitable manner.

127. Legitimate Legislative and regulatory measures do not breach either the customary international law threshold set by Neer, or the evolving concept of the standard, which remains a high threshold.

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[180] SD Myers

[181] For example: The India-Netherlands BIT; Ecuador-Canada BIT (arbitrated in the *Occidental* case); Netherlands-Czech Republic BIT (arbitrated in the *CME* case).

[182] For example: Art 1105 of the North American Free Trade Agreement (NAFTA)

[183] Dolzer & Schreuer, p. 135.

[184] Siemens v. Argentine Republic, ¶295.

128. To ascertain if the governmental action were within the scope of its legislative and regulatory measures certain criteria have to be looked into: Firstly, whether the state offered a stable and predictable legal framework in view of specific representations being provided to the investor Secondly, if the state procedure or actions lacked transparency or was taken in a manner that was considered arbitrary. Thirdly, if there was any unreasonable or discriminatory measure under Art 3(2) of the BIT.

129. The third standard has already been dealt with in the above submission therefore, the Respondent should present submission with regard to the first two.

130. In light of such interpretation the Respondent's submit that the acts of are not contrary to the principle of FET as required under Article 3(2) of the Mercuria-Basheera BIT, as the legitimate expectations were not violated and due process of law was followed.

a. <u>The legitimate expectation were not violated</u>

131. Where the FET standard is considered to protect an investor's expectations with regard to its investment in the host state, this Tribunal must consider whether the Claimant's expectations at the time of investment were legitimate.[185] 'Legitimate expectations' must be evaluated objectively: an Investor's expectations are legitimate where they are reasonably based on specific representations [186] made at the time of investment. FET does not cover the subjective expectations an Investor may have had.

132. FET cannot elevate the requirement for legal stability to mean that the host state's laws are frozen at the time of investment unless such provisions are specifically provided for under the LTA by a stabilization clause, which is absent here.

133. As the Tribunal in *Saluka* observed:

"*No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right to regulate domestic matters in the public interest must be taken into consideration*." [187]

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[185] Tecmed ¶340; *LG&E Energy Corp., LG&E,* ¶130.

[186] Parkerings v. Lithunia, ¶ 331.

[187] *Saluka*, ¶ 305

134. An important aspect of FET is the fact that there needs to be a predictable legal framework for the investors. The investors need to be provided with a law that has a degree of certainity so as to enable them to carry on with their investments and make decisions based on the framework which is available at the point in time.

135. Unless the modification is arbitrary, or affects the "*basic expectations*" of the investor, the FET standard provides legitimate scope for regulatory flexibility. [188]

136. The Data available to the authorities of Mercuria in 2003 pointed towards the fact that if aggressive measures were not taken, it could spiral into a national emergency.[189] However in 2006 even these estimates were surpassed many fold and a time of National Emergency ensued which called for and justified stringent regulatory measures.[190]

137. Given that the Government had explicitly been advised to take 'aggressive measures' and the number of cases and the price of the discounted drug and the price in the open market a large MNC such as Atton Boro is expected to have made the calculation for the annual costs and prediction as to the number of drugs needed and consequently the cost for the same to be borne by the NHA. The corresponding budget allocated for Grey Scale at the time and would have concluded that such a cost is extremely unsustainable and prohibitive to further continuation of the LTA.

138. Further, The action taken by the Government is not unprecedented as, similar action has been taken by other States when faced with a similar health crisis such as by Brazil for HIV/ AIDS which lead to the Brazil, the issuance of C.L. by Zimbawe, Zambia, Ghana, Malaysia, Indonesia, Rwanda, Ecuador for AIDS. There is wide spread state practice and acceptance for the same especially among developing countries such as Mercuria. Therefore, this cannot be considered unprecedented and falls well within the contours of exercise of the State's legitimate regulatory powers.

139. Therefore, the legitimate expectations of Atton Boro were not breached by the Respondent.

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[188] UNCTAD-Expropriation

[189] PO 1, Statement of Uncontested Facts, ¶ 6, p.28.

[190] PO 1, Statement of Uncontested Facts, ¶ 14, p.29.

EXHIBIT- I

OWNERSHIP STRUCTURE