TEAM TANAKA

PERMANENT COURT OF ARBITRATION

PCA CASE NO. 2016-74

ATTON BORO LIMITED

V.

THE REPUBLIC OF MERCURIA

MEMORIAL FOR RESPONDENT

25th September 2017

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MISCELLANEOUS	
UNCTAD FET	United Nations Conference on Trade and Development, Fair and Equitable Treatment, U.N. Sales No. E.11.II.D.15 (2012)
Draft Article ILC	United Nations, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

LIST OF ABBREVIATIONS

Art.	Article(s)
BIT	Bilateral Investment Treaty
FDC	Fixed-Dose Combinations
FET	Fair and Equitable Treatment
GATT	The General Agreement on Tariffs and Trade
MB-BIT	Mercuria-Basheera BIT
NYC	New York Convention
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ILC	International Law Commission
IP	Intellectual Property
IPR	Intellectual Property Rights
LTA	Long Term Agreement
NHA	National Health Authority
Para(s).	Paragraph(s)
Pg(s).	Page(s)
PCA	Permanent Court of Arbitration
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

STATEMENT OF FACTS

1. The Claimant was set up in April 1998 by Atton Boro & Company as a vehicle company for carrying on business in South American and African countries. It was assigned several patents including the Mercurian patent for Valtervite, a compound which could treat greyscale.

2. In 2003, the NHA's annual report highlighted that the incidence of greyscale was an imminent public health concern.

3. In response, the NHA of Mercuria entered into an LTA with the Claimant to supply FDC greyscale medicine named Sanior in 2004. The Claimant set up its manufacturing unit and started delivering consignments in 2005.

4. In early 2008, with the rising number of cases of greyscale patients, the NHA asked for a discount for the remaining period of the LTA. The offer was rejected by the Claimant and the LTA was subsequently unilaterally terminated by the NHA for "unsatisfactory performance" on 10 June 2008.

5. Arbitration was invoked against the NHA under the LTA. The Tribunal in Reed decided in favour of the Claimant in January 2009. The Claimant then attempted to enforce the Award in the High Court of Mercuria on 3 March 2009 but has been unsuccessful thus far due to Mercuria's overburdened judiciary.

6. On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09) which allowed the use of patented inventions without the authorization of the owner.

7. On 17 April 2010, HG Pharma, a Mercurian generic drug manufacturer, was granted a license through a fast track process by the High Court to manufacture Valtervite until the greyscale threat was no longer a public health concern.

8. Several distributors the Claimant had dealings with indicated their intention to switch to the more cost-effective alternative. By 2014, the Claimant had lost nearly two-thirds of its market share to the generic FDC pill.

SUMMARY OF PLEADINGS

JURISDICTION

The Tribunal lacks jurisdiction over the present dispute. Firstly, the award fails to satisfy the requirement of *ratione materiae* as it is not an investment. Secondly, the dispute is not one that arises out of an investment as the underlying transaction is a commercial contract. (**Section I**) Thirdly, the Claimants are denied the benefits of the BIT as both of its cumulative requirement have been met. The Claimant is owned and/or controlled by a foreign national and does not have substantial business in Basheera (**Section II**).

MERITS

If the Tribunal finds that it has jurisdiction and rules on the merits of the case, the Respondent submits that firstly, the enactment of the intellectual property law is not a violation of the fair and equitable treatment standard. This is due to the fact that the prerequisite of a legitimate expectation is not present to substantiate the claim that Art-3 of the BIT has been breached. The Respondent did not breach any international obligation, specifically, obligations under the TRIPS Agreement. Mercuria has every right to enact law by virtue of the state sovereignty *("puissance publique")* doctrine. (**Section III**) Secondly, The Respondent is not liable for the conduct of its judiciary under Art-3 of the MB-BIT. The Respondent did provide an effective means for the Claimant to assert claims and enforce rights. (**Section IV**) Thirdly, the Respondent has not violated Art-3.3 of the bit by the conduct of the NHA. This is because the LTA was a purely commercial supply agreement made between the NHA and the Claimant. Also, the NHA is a commercial purchaser and a body legally distinct from the Respondent and the wrongful commercial decision was made without any interference by the State. (**Section V**)

ARGUMENTS ON JURISDICTION

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

9. The Tribunal only has jurisdiction to settle disputes between an investor of one Contracting State and the other Contracting State "*arising out of or in relation to*" the BIT by virtue of Art-8.1.

10. The non-enforcement of the Arbitral Award decided in Reef is not a dispute arising out of or in relation to the BIT. This is because the Award is not an investment and therefore its protection is not covered under the BIT (**Section A**). Furthermore, the Award is not a crystallization of rights arising out of an investment as he LTA is not an investment (**Section B**).

A. The Arbitral Award Does Not Qualify as an Investment

11. Art-1.1 of the BIT provides the definition of the term "investment" as:

> "*any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws…*"

12. The "*ordinary meaning*" of the term "investments" is the commitment of funds or other assets with the purpose to receive a profit, or "return," from that commitment of capital. The term "asset" means property of any kind.[1]

13. The Award cannot be classified in the categories listed under Art-1.1 of the BIT. It is not an asset with the expectation of returns. The Award is merely a legal instrument which provides for dispositions of rights and obligations that arise out of the LTA.[2]

[1] Romak, para.177

14. In other words, the Award merely constitutes the embodiment of Atton Boro's contractual rights (as determined by the Arbitral Tribunal in Reef) stemming from the LTA entered into by Atton Boro.[3]

15. It is at most merely a liquidated sum of compensation for a breach of contract, and not a form of contribution towards an investment for the economic development of a State.[4]

16. Even if in *arguendo* the Award is an asset, it is not one which is "invested by the Claimant in the territory of the Contracting Party." The Award was decided in Reef and therefore is not an asset invested in either Contracting States of the Mercuria-Basheera BIT.

17. This was the similar conclusion reached by the Tribunal in *GEA v Ukraine,* where it was decided that an ICC Award in and of itself, when tested against the criteria of Art-1 of the BIT, cannot constitute an "investment".

18. The Tribunal in *GEA* agreed with the Respondent's position that the Award cannot be an investment because it "*is not an asset that was contributed to Ukraine, it was not made in Ukraine, and therefore it does not fall within the definition of an investment*."[5]

19. The Tribunal went on further to say that although the Award:

> "*rules upon rights and obligations arising out of an investment, it does not equate the Award with the investment itself. The two remain analytically distinct."* [6]

20. Similarly, any rights or obligations that arise out of the termination of the LTA should be considered as analytically distinct from the rights or obligation of an investment.

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[2] GEA, para.161
[3] Romak, para. 211
[4] GEA, para. 162
[5] Ibid, para. 169
[6] Ibid, para. 170

The Award has no economic contribution or relevance within Mercuria or Basheera to be considered as an investment.

21. Furthermore, the Award fails to satisfy the objective criterion of being classified as an investment. There is an inherent meaning to investments which should be read with Art-31.1 of the VCLT.[7]

22. The provisions of the Treaty should 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*."[8]

23. The object and purpose of the BIT can be found in its preamble which uses the terms *economic cooperation* and *economic prosperity of both States* suggests an intent to protect a particular kind of assets, distinguishing them from ordinary commercial transactions.[9]

24. Thus, the objective, ordinary meaning of "investment" pursuant to the rule of interpretation in Art-31.1 of the VCLT provides that investments carry "*an inherent meaning entailing a contribution that extends over a certain period of time and that involves some risk.*"[10]

25. This finding has its resonance from the *Salini* test, which remains the most highly used objective standard to determine whether a particular asset falls within the ambit of an "investment".[11]

26. The *Salini* test has been cited in several other cases such as: LESI-Dipenta v Algeria,[12] LESI, Spa & Astaldi SpA v Algeria;[13] *Bayindir v Pakistan*;[14] *Jan de Nul v Egypt*;[15] *Saipem v Bangladesh.*[16]

[7] KT Asia, para. 165
[8] VCLT Art-31.1
[9] Romak, para. 181; Annex No, pg. 32
[10] Romak, para. 165
[11] Salini, para. 52
[12] para. 13(iv)
[13] para. 72(iv)
[14] para. 130
[15] para. 91

27. If an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in the BIT does not transform it into an investment.[17] In the general formulation of the Tribunal in *Azinian*, "*labeling… is no substitute for analysis*."[18]

28. The Tribunal in *Romak,* in deciding whether Arbitral Awards could be classified as investments, rejected the Claimant's position of interpretation through construction of the BIT that puts special emphasis on the literal words in the list of Article 1.[19]

29. Therefore, in the event that the Claimants rely on the provision of Art-1.1(c) of the BIT with regards to "claim to money" to satisfy the definition of an investment, it is submitted that this Tribunal should not look into the wording of the BIT literally.

30. This leads to the conclusion that the Award in and of itself cannot then be considered as an investment in any form.

B. The Award is not a crystallization of rights that arise out of an investment

31. It is further disputed that the Award arises out an investment and therefore, no crystallization of rights under an investment can take place to transform the Award into an investment for the purpose of this Tribunal's jurisdiction.

32. The Tribunal in Romak concluded that:

> *"If the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment."*[20]

[16] Saipem, para. 99
[17] Romak, para. 207
[18] Azinian, para. 90
[19] Romak, para. 179
[20] Ibid, para. 211

33. The LTA is merely a commercial contract to supply pharmaceutical goods. It is not for the economic development of a State. There is a difference between a contribution in furtherance of a venture and a mere transfer of title over goods in exchange for payment. The LTA falls into the latter and thus cannot be defined as an investment.[21]

34. The *ad hoc* Tribunal in *Italy v Cuba* also reasoned that, in spite of collaborations with State affiliated entities, the mere sale of pharmaceutical goods did not amount to an investment.[22]

35. This is also in line with the UNCITRAL Tribunal in *Canadian Cattleman for Fair Trade v United States* where the Tribunal adopted a bright rule line that mere sale of goods is not an investment as:

> "*the state is not gaining from the bargain and the investor is not contributing enough by taking risks or contributing to the economic development of a state.*"[23]

36. This is particularly important as was stressed by the Tribunal in *Joy Mining Machinery* that:

> "*there must be a distinction between commercial contracts and investments or else all any sales or procurement contracts involving a State agency would qualify as an investment.*"[24]

37. The Tribunal further elaborated that "*international 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.*"[25]

38. This is more so relevant in the present case as it involves dealings between the NHA, an entity affiliated with the Government of Mercuria and the Claimant. The LTA is at its

[21] Romak, para. 222
[22] Italy v Cuba, para. 80
[23] Canadian Cattleman, para. 144
[24] Joy Mining, para. 58
[25] Ibid

essence a commercial contract that the NHA entered into in its commercial capacity. To extend that parenthesis would impute more legal obligations than the State had consented into.

39. The very purpose of the LTA was specifically to cater to the medicinal needs of the people of Mercuria to combat the greyscale epidemic. It was transfer of medicinal goods for payment like any other commercial contract.

40. The LTA also fails to satisfy the requirement of "risk" under the *Salini* test. The test, as explained above, is the most appropriate test to be used in defining investments.

41. The doctrine generally considers that investment infers: *a contribution that extends over a certain period of time and that involves some risk.*[26]

42. It is submitted that the LTA fails to satisfy the requirement of risk under the Salini test. All contracts carry the risk of non-performance which is purely commercial. An investment risk entails "*a different kind of alea where the investor cannot be sure of a return on his investment.*"[27] A contract risk on the other hand only relates to the risk of non-performance.

43. Furthermore, the Tribunal in *Nova Scotia v Venezuela* noted that:

> *"the relevant risk is that which is specific to the investment which did take place, not the lost opportunity to make a different investment or commercial decision"*

44. By looking into the nature of the LTA itself, it is obvious that the transaction is one of a commercial contract. No reference to investments nor mechanisms aimed to take advantage of the BIT are present in its terms.[28]

[26] Salini, para. 52
[27] Romak, para. 230
[28] Joy Mining, para. 56

45. Furthermore, it is denied that the Claimant was exposed to the risk that contribution of long duration, would be reduced in value or affected, such that the investment would not yield the benefit expected. It is not uncommon to commit in a supply contract for the purchase of goods over a mid-long term period.[29]

46. Likewise, any risk inherent thereof in the pharmaceutical purchasing arrangement would have been contemplated and mitigated in the LTA itself.[30] This is evident by the fact that the NHA was bound to place a certain number of orders throughout the validity of the LTA as stipulated by Clause 5 of the LTA.[31]

47. Moreover, there is no market risk inherent in an investment as the Claimant is the only provider for the drug Valtervite. Likewise, the Claimant only assumed the risk of non-performance which is the ordinary commercial risk in a contractual relationship.[32]

48. Additionally, in the event this argument is raised by the Claimant, it is submitted that the LTA is not a "claims to money" under Art-1.1(c). There is no stipulation or promise for the payment of a certain sum of money in the LTA other than the normal terms for a sale of goods agreement.[33] The Claimant's contractual rights thus cannot be transformed into an investment.[34]

49. Moreover, in the event this argument is raised by the Claimant, the LTA does not grant exclusive privileges for the Claimant to conduct their commercial activities in Mercuria to fall within the meaning of Art-1.1 (e) of the BIT. They had already been involved in the activities even before they entered into the LTA. The Claimant did not need the LTA to have the right to carry on their distribution of pharmaceutical goods.[35]

50. As the underlying transaction is not an investment, the Award cannot be considered as a crystallization arising out of an investment.[36]

[29] Nova Scotia, para. 107
[30] Ibid, para. 108
[31] Uncontested Facts, pg. 29 para. 5
[32] Romak, para. 231
[33] Facts pg. 29 para 10
[34] White Industries, para. 7.4.7
[35] Uncontested Facts, pg. 28 para. 5
[36] Saipem, para. 114

II. THE CLAIMS ARE INADMISSIBLE BY VIRTUE OF ART-2 OF THE BIT

51. Art-2.1 of the BIT allows the State to deny the benefits of the BIT provided that its requirements are satisfied, in which the investor must be:

> "*a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized*"

52. The Tribunal in *Maffezini* noted the importance of both protecting investor access to independent dispute resolution, and respecting the parameters of States' ex ante consent to such arbitration.[37]

53. It was generally noted that when the objective criteria used in a BIT may include investors to whom a Party would not wish to extend the treaty protection, some treaties include "denial of benefits" clauses allowing exclusion of the investors in certain categories.[38]

54. Therefore, it can be seen that the main purpose of the inclusion of this clause into the BIT is to create '*safeguards for the State against the problem of treaty shopping through the creation of "sham" enterprises.*'[39]

55. It becomes evident that if the investment is structured in a way to avail itself of the substantive protection of an investment treaty, the investor has to ensure that the investment comply with the requirements to negate the denial of benefits clauses which deny pure "mailbox companies" the recognition as an investment or an investor.[40]

56. Thus, to successfully invoke the Denial of Benefits clause, two cumulative conditions must be met:

[37] Maffezini, para. 54
[38] Redfern and Hunter, pg. 441-500
[39] Caplan and Sharpe, pg. 150
[40] Markert, pg. 6

a) Claimant must be owned or controlled by third party nationals, and

b) Claimant does not conduct substantial business activities in the place of its organization[41]

57. Therefore, the prerequisites are satisfied as the Claimant is wholly owned and controlled by a national of a third state (**Section A**) and does not have substantial business activities in Basheera (**Section B**). Furthermore, the Denial of Benefits clause is timely raised during the objection to jurisdiction (**Section C**).

A. The Claimant is wholly owned and/or controlled by a third State national

58. The Claimant is a wholly owned subsidiary of the Atton Boro Group.[42] The parent company of the Atton Boro Group, Atton Boro & Company, has the nationality of Reef.[43] Reef is not a Contracting State to the Mercuria-Basheera BIT and is thus considered as a third State.

59. Though there is no provision in the MBBIT as to the requirement of ownership in the context of shares in companies, it is submitted that ownership generally refers to a minimum percent of share ownership or equity interest in a beneficial owner.

60. For example, the Japan-India EPA defines 'owned' as when *"an investment if more than 50 percent of the equity interests in it is beneficially owned by the investor*".

61. This clearly fulfills the requirement of foreign ownership as the Claimant's shares are undisputedly owned 100% by its parent company, Atton Boro & Company.

62. Furthermore, as a wholly owned subsidiary, Atton Boro Group has total ownership of share capital in Atton Boro Limited. Total ownership of share capital is a clear manifestation of control.[44] The Atton Boro Group would have total control in the appointment of its directors and the general conduct of the company.

[41] Ulysseas, Inc. v. Ecuador para 167
[42] Uncontested Facts, pg. 28 para. 4
[43] Ibid, pg. 28 para. 2
[44] Generation Ukraine, para. 15.9

63. Additionally, the Claimant was set up and assigned several patent rights by the Atton Boro Group.[45] This shows that the Atton Boro Group has exercisable control over the Claimant.

64. The Tribunal is also empowered by the provision in the BIT to pierce the corporate veil to determine the nationality of foreign influence.[46] The Denial of Benefits clause complements the control criterion in determining the nationality of legal entities.[47]

65. However, it is submitted that the Claimant's nationality is not in dispute. Instead, the Tribunal should only resolve the existence of foreign influence within the Claimant's company and the nationality of such influence, as per the requirement of Art 2 of the BIT.

66. It is evident that there is foreign influence within the Claimant's company by the Atton Boro Group, thus this prerequisite is satisfied.

B. The Claimant does not have substantial business in Basheera

67. There is no clear test in the BIT or case law to define the term "substantial business activities." The provision should be interpreted in light of Art 31(1) of the VCLT "*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*."[48]

68. The Preamble provides context for this provision where the purpose of the BIT is to "*promote greater economic cooperation*" between investors and the Contracting State as well as to accord treatment to the investments "*to stimulate the flow of private capital and economic development of the Contracting Parties.*"[49]

[45] Uncontested Facts, pg 28 para. 4
[46] TSA, para. 159
[47] Nikiema, pg. 13
[48] VCLT, Art-31.1
[49] Annex No. 1, pg. 32

69. The term "substantial business activities" should therefore have bearing towards the economic development of the State and not merely within the context of the Claimant's business activities.

70. There is no economic link between the Claimant and Basheera. A substantial portion of the Claimant's business activities occur in Mercuria and not in Basheera.[50] The Claimant's choice of incorporation in Basheera was out of convenience and not for the active contribution to the economic development of Basheera.

71. This is illustrated in *Apotex Inc v USA*, which dealt with a Canadian company bringing new generic drugs in the United States market. The Tribunal declined jurisdiction on the ground all that the development and manufacture of products for sale in the US occurred in Canada, not in the territory of the United States.[51]

72. Moreover, in interpreting "substantial" to mean "of substance, and not merely of form" rather than "large," the tribunal in *Amto v. Ukraine* underscored the purpose of Article 17 (1) as being to "exclude from ECT protection investors which have adopted a nationality of convenience.[52]

73. Furthermore, its main purpose of incorporation was to conduct long-term private-public collaborations with South American and African countries.[53] It is absent in the facts if the Claimant had ever intended to conclude similar dealings with Basheera itself.

74. The renting of an office and employment of a small staff in Basheera is insufficient given the nature of the business.[54] It is doubtful if the Claimant conducts any administrative functions as there is no mention the company having a Board of Directors or partners.[55] As a subsidiary, it is more likely that the administrative functions are handled by the parent company, Atton Boro & Company.

[50] Uncontested Facts, pg. 29 para. 11
[51] Apotex, para. 160
[52] Amto, para. 61
[53] Uncontested Facts, pg. 28 para. 4
[54] AMTO, para. 69
[55] Uncontested Facts, pg. 28 para. 4

75. Though the Claimant has employed a small number of staff, their scope of employment does not contribute to the economy of Basheera. Their business activities are for Atton Boro Group affiliates in South American and African countries.[56] There is no mention if they provide the same service in Basheera itself. It is also absent in the facts if the Claimant had ever relied on its numerously assigned patents in their dealings with Basheera.

76. The Claimant fails to show evidence to prove that they conduct substantial business activities in Basheera which are aimed towards its economic development. Therefore, the second prerequisite is satisfied.

C. The objection on admissibility is timely raised

77. The denial is only activated when the benefits are being claimed. Thus, the proper stage of proceedings to raise the denial of benefits clause is during objection on jurisdiction.[57]

78. The denial of benefits clause, once successfully invoked, serves as a potential filter on the admissibility of claims.[58]

79. Furthermore, there is no requirement in the BIT for a formal notification, unlike the mandatory notice in an ECT.[59] The right to the denial of protection by the Respondent is known to the Claimant from the time when they made the investment.[60]

80. This draws the conclusion that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.[61]

81. The Denial of Benefits clause was timely raised during objection on jurisdiction.[62]

[56] Procedural Order No. 2, pg. 48 para. 4
[57] EMELEC, para. 71
[58] Generation Ukraine, para. 15.7
[59] Plama, para. 56
[60] Guarachi & Rululec, para. 118ncont
[61] Ulysseas, para. 173
[62] Response to the Arbitration, pg. 16 para. 5

82. The Tribunal in *Ulysseas* further reasoned that the Denial of Benefits clause found in the US-Ecuador BIT implied that the benefits could be denied retroactively, specifically to preclude the jurisdiction of such a tribunal under the BIT.[63]

83. Therefore, the Claimant's allegations should be made inadmissible before this Tribunal.

[63] Ulysseas, para. 161

III. THE ENACTMENT OF THE INTELLECTUAL PROPERTY LAW IS NOT A VIOLATION OF THE FAIR AND EQUITABLE TREATMENT STANDARD

84. The prerequisite of a legitimate expectation is not present to substantiate the claim that Art-3 of the MB-BIT has been breached **(Section A).** The Respondent did not breach any international obligation, specifically, obligations under the TRIPS Agreement **(Section B).** Mercuria has every right to enact law by virtue of the state sovereignty *("puissance publique")* doctrine. **(Section C)**

A. The prerequisite of a legitimate expectation is not present to substantiate the claim that Art-3 of the BIT has been breached

85. To initiate a claim of having a Legitimate Expectation, the Claimant must substantiate specific assurance that has induced them to make an investment in Mercuria. In the case of *International Thunderbird Gaming v Argentina*, the tribunal finds that the absence of specific representations is a material factor in leading to a finding that the FET standard has not been breached.[64]

86. Furthermore, reliance on one particular assurance is insufficient to trigger any investor's legitimate expectations if the assurance was never repeated by the Respondent in any avenue. This principle of a valid legitimate expectation was highlighted in the case of *El Paso v Argentina.* The tribunal in this case found that the assurance that has been received must be a reiteration of the same type of commitment in different types of general statements which equates to a specific behaviour of the Respondent.[65]

87. In the present case, there are two assurances made by the Respondent that could be relied upon by the Claimant. The first assurance is a statement made by the Minister for Health **(Section a)** meanwhile the second is the statement made by the President of Mercuria on twitter **(Section b).**

[64] Sauvant; International Thunderbird Gaming v Mexico, para. 166
[65] El Paso v Argentina, para. 377

88. However, based on the facts that were known or which should have been known to the Claimant at the time of its investment, none of its asserted expectations in this case were objectively *"reasonable"* or *"legitimate"*.

a) The statement made by the Minister for Health

89. On 19 January 2004, the Minister for Health has made a statement.[66] This statement lacks a precondition to be determined as a valid source of legitimate expectations due to the absence of 'specificity'. This is because the Minister for Health as Mercuria's official representative was merely praising the success of the NHA's comprehensive HIV/AIDS Partnership with the Claimant.

90. For an investor's expectations to be preserved, there must be a result of an identifiable legal commitment by the State to the investor and not merely arising from political statements as concluded in the case of *Starmill and Multipack v. Romania.*[67] Moreover, it is provided in the *Continental Casualty v Argentina*[68] that mere political statements are incapable to trigger one's legitimate expectations.

91. Supporting the same dimension, in *Sempra Energy v International*, the tribunal concluded that an assurance given by the host State must be made clear and precise.[69] In *Sempra's* case, in order to attract foreign investors, Argentina had expressly included several advantageous features for investors in its regulatory framework. They have also honoured those obligations since 1993 until 1999 causing Sempra to rely upon them. Subsequently, when Argentina had enacted a new law defying the features, the tribunal decided that Sempra's legitimate expectations have been defeated as the assurances given by Argentina were clear and precise.

92. On the contrary, in the instant case, the statement was envisioned to laud the success of the NHA's comprehensive HIV/AIDS Partnership with the Claimant but did not generate the level of specificity required to establish legitimate expectations of the Claimant.

[66] Annex No. 2, para. 4.
[67] Starmill and Multipack v. Romania, para. 4
[68] Continental Casualty v Argentina, para. 261
[69] Sempra Energy v Argentina, para. 298

93. Furthermore, the statement does not entail any obligation that Mercuria would preserve Atton Boro's rights by refraining the regime's legal framework from evolving. Thus, the statement made by the Minister for Health is incapable to trigger the Claimant's legitimate expectations as it was only a mere political statement which lacks legal commitment.

b) The statement posted on Twitter by the President of Mercuria

94. In respect to a tweet posted by the President of Mercuria, the statement reads:

> *"Mercuria will do away with red tape and roll out the red carpet for investors"*[70]

95. The nature of the assurance received must be specifically and formally given to the investor to depict consensus that a State shall treat the investor in a certain ways.

96. It is provided in the case of *Nagel v. Czech Republic,* where an assurance that is informal in nature, could not trigger the investor's legitimate expectation. However, it can be regarded as a mere hope or legally irrelevant personal expectation.[71]

97. In *Total v Argentina*, the tribunal observed that legitimate expectations are based on representations made which were specifically addressed to a particular investor by the host State.[72]

98. On the contrary, in the instant case, the nature of the statement posted on Twitter is indistinct as it lacks clarity. The statement encompasses of an ambiguous term such as "*roll out the red carpet for investors*". A statement welcoming an investor does not reflect a vivid assurance that Mercuria will not attempt to restructure the regulation.

[70] Uncontested Facts, para. 8.
[71] Nagel v. Czech Republic, para. 33
[72] Total v Argentina, para. 119

99. Notwithstanding the ambiguity, the statement was neither made specifically nor directly towards the Claimant as their name or specific characteristics was never mentioned.

100. As the form of the statement posted lacks formality and clarity to Atton Boro, the assurance should not be the basis of the Claimant's legitimate expectations.

101. Since both of the statements made are not clear and precise, there is an absence of a specific assurance given by Mercuria to the Claimant. Thus, following the finding in the case of *Thunderbird*,[73] the present tribunal should decide similarly by dismissing the claim.

B. International obligation under TRIPS has not been infringed

102. In the case of *El Paso v Argentina*, it was found that a general statement in treaties or legislation does not equate to a specific assurance because it is noted that the nature of general regulations can evolve over time.[74]

103. Therefore, in the present case, the Claimant could not invoke international obligation, in particular, the TRIPS Agreement as the basis of their legitimate expectations.

104. Notwithstanding the fact that the WTO's Dispute Settlement Understanding is the correct forum to discuss matters specifically pertaining to TRIPS,[75] the measure taken by Mercuria is not an infringement of any international law.

105. The measure taken by Mercuria does not violate any provision under the TRIPS Agreement as it falls under Art-30 which provides exceptions to the rights conferred. Art-30 reads:

> *"Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the*

[73] International Thunderbird Gaming v Mexico, para. 222
[74] El Paso v Argentina, para. 376
[75] Art-64.1 of TRIPS

legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

106. Furthermore, the conditions for the grant of compulsory licenses under Art-31 were respected.[76] Compulsory licensing under the TRIPS[77] requires the applicant to make a reasonable attempt to negotiate with the patent holder in order to obtain authorization on reasonable commercial terms and conditions within a reasonable amount of time. The IP law in Mercuria stated that the reasonable period of negotiation would be within six months.[78]

107. However, it is provided that the requirement may be waived by a Member in the case of a national emergency or other circumstance of extreme urgency or in cases of public non-commercial use. This can be seen through the national legislation that reads:

"Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anticompetitive practices adopted by the patentee, but shall not be required to take into account matters subsequent to the making of the application."[79]

108. Even though there has been no evidence to depict that there was any negotiation made between HG Pharma and the claimant, but the conditions for the grant of compulsory licenses have been waived as there is a circumstance of a national emergency.

109. By virtue of Art-5 of the Doha Declaration,[80] the Respondent can, by its own, determine what constitutes to a national emergency. Moreover, the article[81] adopted a broad definition of what constitutes a national emergency and it recognizes public health crises such as HIV/AIDS, tuberculosis, malaria, and other epidemics.

[76] Art-31 para (b) of TRIPS
[77] Ibid
[78] Annex No 4, line 1420
[79] Ibid, line 1415
[80] Doha Declarations - World Trade Organization
[81] Ibid, para. 5(c)

110. In the instant case, Mercuria is currently facing with the wave of a severe epidemic disease named greyscale.[82] Greyscale is a disease of the cracking and flaking of the skin on patients' bodies which identified by having symptoms such as progressive stiffening muscles, swollen limbs, and severe joint pain.[83] Also, in the year of 2002, Mercuria witnessed an upsurge in the prevalence of greyscale.[84]

111. Since greyscale is undisputedly an epidemic disease which equates to a national emergency under Article 5(c) of the Doha Declaration, thus, the exception under Art-31(b) is met.

112. As there is no legal requirement to proclaim and declare a national emergency, thus, it should be sufficient to only invoke Article 5 of the Doha Declaration on TRIPS Agreement.

113. In the alternative, if any obligation under TRIPS has been breached, there is a mechanism in hearing this dispute which is deemed fit. Under Art-64.1 of TRIPS, dispute resolution provisions in GATT 1994 as elaborated by the WTO's Dispute Settlement Understanding apply. The claim under TRIPS can only be brought by the state contracting parties, and not by the investors. Therefore, the PCA tribunal lacks jurisdiction to decide matters pertaining to TRIPS as the correct forum to hear this claim is the WTO's Dispute Settlement Understanding.

C. Mercuria has every right to enact law by virtue of the state sovereignty *("puissance publique")* doctrine

114. Every state has its rights to enact any law and exercise the doctrine of state sovereignty as embedded under Art-2.1 of the UN Charter. Therefore, Mercuria is entitled to enact the Intellectual Property law since it is reasonable for the protection of public health.

115. An investor is entitled to its rights to place an expectation that the Host State will not drastically change the legal framework, provided that the expectation is reasonable. In

[82] Uncontested Facts, para. 2
[83] Annex no. 3, pg. 41
[84] Ibid, pg. 42

Eli Lilly v Canada, the Claimant's argument that they had a legitimate expectation in which Canadian law would prefer the company's interpretation of patentability standards is unsustainable. On the contrary, it was found that a foreign investor is ought to reasonably and legitimately expects that its investment will be subjected to the legal system of its host state.[85]

116. Furthermore, not any assurances given can simply be invoked as the basis of the Claimant's legitimate expectation. In *MTD,* the tribunal stated that BITs are not an insurance against business risk and the Tribunal considers that Claimants should bear the consequences of their own actions as experienced businessmen.[86]

117. The tribunal in *Parkerings-Compagniet A.S. v. Lithuania* agreed, explaining that it is not any subjective expectation that is entitled to protection, but rather only those that are legitimate and reasonable:

> *"In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, thus, structure its investment in order to adapt it to the potential changes of legal environment."*[87]

118. In *Duke v. Ecuador*, the tribunal set out a holistic approach to the evaluation of expectations which reads:

> *"The assessment of reasonableness or legitimacy (of the investor's expectations) must take into account all circteumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."* [88]

[85] Eli Lilly v Canada, para. 284; Billingsley, pg. 35
[86] Lalani/Lazo, pg. 59; MTD v Chile, para. 178; Maffezini v Spain, para. 69
[87] Parkerings-Companiet v Lithuania, para. 333
[88] Duke v Ecuador, para. 340

119. In the instant case, the enactment of Law No. 8458/09 was made in a manner consistent with the prevailing circumstance of public health crisis which is the wave of a chronic epidemic disease named greyscale that threatens the population in the developing world.[89]

120. In *Philip Morris v Uruguay*, a breach of a treaty is justified if it was made in matters of public health. Uruguay asserted that public health matter is not negotiable which are above other sovereign powers and obligations even if they restrict investors' economic rights.[90]

121. Also, the tribunal in *Saluka Investment* referred to the preamble of the Netherlands-Czech Republic BIT which it found established a linkage between fair and equitable treatment and that is the stimulation of foreign investments and the economic development of the contracting parties.[91]

122. In light with the preamble of the present MB-BIT, it desires the objectives under the treaty to be achieved in a manner consistent with public health interest. The preamble reads:

> *"Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;"* [92]

123. The tribunal must also follow the general rule of interpretation of Art-31(1) of the VCLT to interpret the MB-BIT. This rule provides that:

> *"[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."*

[89] Uncontested Facts, paras 2 & 6
[90] Philip Morris v Uruguay, para. 155
[91] Saluka Investments v Czech Republic, para. 298
[92] Ibid; Annex No. 1, line 988

124. Therefore, due to the preamble that reflects the very core purpose of the treaty and since it has to be interpreted in accordance with its ordinary meaning, the enactment of the Intellectual Property Law is to be seen as a reasonable regulation.

125. In addition, the measure is not arbitrary since Mercuria's judiciary has fixed the royalty to be paid to Atton Boro at 1% of total earnings for those whom were granted the license to use Valtervite.[93]

126. There is no single accepted approach. Not only do countries have very different practices from each other in accordance to the royalty guideline set by the World Health Organisation.[94] The State practice in determining "reasonable" royalties or "adequate" remuneration is highly varied and extensive. There is no single accepted approach. This is because each country has different practices depending upon the industry sector or the purpose of the authorisation. In recent cases, governments have set royalties between 0.5% and 5% of the price of the generic drug for the use of patents on medicines.

127. In the instant case, the royalty payment falls within the reasonable and adequate range which is 1%. Moreover, Mercuria has set a standard and consistent practice in determining the percentage to be given as royalty. In 2009-2010, Mercuria's royalty rates to be compensated for non-fatal diseases have always ranged from 0.5% to 3% of revenue.[95]

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128. The payment of the royalty by HG Pharma that was fixed by the discretionary power conferred under the new IP law (i.e. Section 23 C (3) of Law No.8458/09) was impeded by Atton Boro due to protest.[96] The reason why the royalty has not been paid is because Atton Boro is not responding to HG Pharma's request for its bank details as a demonstration of disagreement.

[93] Uncontested Facts, para. 21
[94] Love, pg. 82
[95] Procedural Order No. 3, line 1590
[96] Ibid, line 1598

129. Nonetheless, the measure enacted by the Respondent is not arbitrary since it reserves a platform for the patent holder to question the validity of the non-voluntary license and the royalty given, after being granted, before a two-judge bench of the High Court.[97]

130. Mercuria had to balance the interests of the Claimant with the public essential interest and its sovereign power to regulate the issues vital for its citizens in their best interest. Therefore, the measure taken is reasonable and not an abuse of regulatory power as it was made in the conformity with the relevant standards of protection which is to accord with the public health conditions in Mercuria.

IV. THE RESPONDENT IS NOT LIABLE FOR THE CONDUCT OF ITS JUDICIARY UNDER ART-3 OF THE MB-BIT

131. Firstly, the conduct of the respondent's judiciary does not amount to a denial of justice (**Section A**). The Respondent did provide an effective means for the Claimant to assert claims and enforce rights (**Section B**).

A. The conduct of the respondent's judiciary does not amount to a denial of justice

132. Denial of justice has been recognised to be an infringement of law that may give rise to a breach of the fair and equitable treatment requirement in intemational law.[98]

133. It is provided in *El Oro Mining Railway Company v Mexico* that a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.[99]

134. Therefore, by virtue of *Chevron-Texaco v Ecuador,* the Claimant is ought to substantiate that the conduct of Mercuria's judiciary is a demonstration of a particular

[97] Procedural Order No.3, line 1579
[98] Lowen Group v United States, para 421
[99] El Oro Mining v Mexico, para. 9

serious shortcoming and egregious conduct that shocks[100] or at least surprises a sense of judicial propriety.[101]

135. In *Toto v Lebanon*, it is elaborated that public international law does not provide fixed time limits and has no strict standards to assess whether courts' delays are a denial of justice.[102]

136. The length of the delay does not equate to a gross misadministration if the conduct can be justified. For instance, in *Victor Pey Casado v Chile*, the delay of seven years amounts to a denial of justice.[103] However, in *Jan De Nul v Egypt*, the period of 10 years to only obtain a first instance judgment was unsatisfactory, but does not amount to a denial of justice.[104]

137. There must be a violation of due process or manifest arbitrariness that resulted in a total failure of the judicial system and not simply errors, misinterpretation or misapplication of domestic law. This has been concluded in *Glamis Gold Ltd v United States.*[105] Thus, the length of the delay is not a prerequisite element to determine denial of justice but it is the circumstances that are ought to be observed holistically which is the contributing factors.

138. In *White Industries v India*, the tribunal found that the assessment of whether a judicial delay amounts to a denial of justice is obviously highly fact-sensitive.[106] International tribunals have identified various factors which are relevant to the determination of whether delays in judicial proceedings amount to a denial of justice. The factors include the complexity of the proceedings[107] **(Section a)**, the behaviour of the litigants[108] **(Section b)**, and the behaviour of the court[109] **(Section c)**.

[100] Mondev v United States, para. 127
[101] Chevron-Texado v Ecuador, para. 244
[102] Toto v Lebanon, para. 155
[103] Victor Pey Casado v Chile, para. 659
[104] Jan De Nul v Egypt, para. 204
[105] Glamis Gold, para. 627; UNCTAD, pg. 56
[106] White Industries v India, para. 10.4.10
[107] Ibid, para. 10.4.11
[108] Ibid, para. 10.4.15
[109] Ibid, para. 10.4.17

a) The complexity of the proceedings

139. In *Jan De Nul v Egypt*, the tribunal dismissed the claim under denial of justice as the issues were complex and highly technical.[110] In that case, there were two cases involved and the parties were especially productive in terms of submissions and filed extensive expert reports.

140. In *White Industries v India*, the Tribunal does not consider there to be anything particularly complex about the White's application to enforce the Award. However, the progress of that application has obviously been affected by Coal India's own previous application to set the Award aside. As to that proceeding, in correlation with the obligations under the New York Convention,[111] Indian courts can properly entertain an application to set aside an arbitral award.[112]

141. Similarly in the instant case, the NHA was challenging the arbitral award granted to the Claimant.[113] On 3 March 2009, Atton Boro files its enforcement proceedings before the High Court of Mercuria. Subsequently, the NHA filed its response to request the Court to set aside the arbitral award on the ground that it was contrary to public policy.[114]

142. Although it is not primarily complex, but the High Court of Mercuria was authorized to entertain the NHA's application pursuant to Art-5.2(b) of the New York Convention that allows an enforcement of an arbitral award to be set aside due to public policy.

b) The behaviour of the litigants

143. In *Victor Pey Casado v Chile,* the tribunal concluded that the delay amounts to a denial of justice because Claimant could not obtain the response and requirements needed from the President of Chile.[115]

[110] Jan De Nul v Egypt, para. 204
[111] New York Convention, Art-5.2(b)
[112] White Industries v India, para. 10.4.11
[113] Notice of Arbitration, pg. 7
[114] Uncontested Facts, para. 18
[115] Victor Pey Casado v Chile, para. 659

144. On the contrary, in the present case, even due to the NHA's absentees and pending of their submissions, they have tendered a formal apology[116] and concluded its oral submissions correspondingly.[117]

c) The behaviour of the Court

145. In the present dispute, for each time the delay had occurred, the High Court of Meruria has provided reasons.[118] One of the reasons includes that for several times, the matter could not be heard due to the lengthy arguments in several cases that were listed on the same date.[119] This proves that the delay was an unintended circumstance which is out of the court's control.

146. Furthermore, it is noteworthy to acknowledge the court's exertions to mitigate the delay. The High Court of Mercuria did accommodate the litigants to Commercial Bench as applied by the Claimant. The transfer to the special bench was envisioned to expeditiously dispose of commercial matters.[120] This indicates that Mercuria's judiciary is performing its duty to mitigate the delay by disallowing such proceeding to remain unchecked.

147. However, in September 2013, the Supreme Court of Mercuria made a ruling and clarified that benches constituted under the Commercial Courts Act had jurisdiction only to hear original commercial suits and not enforcement proceedings. Therefore, the enforcement was returned back to the regular benches of the Court.[121]

148. The fact that the court did accommodate the litigants for a chance of being expeditiously heard in the Commercial Bench proves the good intention of the Court. This is one of the exertions of the court acting to mitigate the delay and by disallowing the proceeding to remain unchecked.

[116] Notice of Arbitration, pg. 9
[117] Ibid
[118] Notice of Arbitration, paras 7-11
[119] Ibid
[120] Uncontested Facts, para. 19
[121] Ibid

149. Also, in *White Industries*, the Tribunal take into account and bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.[122]

150. Notwithstanding the fact that Mercuria only have 6.7 billion people, but the condition of an overburdened judiciary[123] faced by a developing country to cater its population is still justified for the unintended delay.

151. After taking into consideration of all the contributing factors, the present tribunal should dismiss the claim under denial of justice as similarly decided in *White Industries.*[124]

B. The Respondent did provide an effective means for the Claimant to assert claims and enforce rights

152. The Respondent fulfils its obligation by virtue of the preamble of MB-BIT by providing an effective means for the Claimant to assert claims and enforce rights. Effective means standard is a system of law in which a party is able to redress their grievances in an objectively effective and proper manner which matches the international standards when the dispute arises or when any redressal is sought.[125]

153. Effective means is defined as a distinct and potentially less demanding test is applicable under the effective means clause by the tribunal in *Chevron-Texaco v Ecuador*.[126] Therefore, the Respondent is ought to prove that its judicial system provides an effective means for the Claimant to enforce their rights.

154. The courts of Mercuria must provide foreign investors, particularly the Claimant, with means of enforcing legitimate rights within a reasonable amount of time. "Reasonable"

[122] White Industries v India, para. 10.4.18
[123] Response of Arbitration, pg. 17
[124] White Industries v India, para. 10.4.24
[125] Ibid, para. 11.1.5.
[126] Chevron-Texaco v Ecuador, para. 244

here should be determined by looking back to the factors that contribute to the determination of denial of justice.[127]

155. In the present case, the fact that the High Court of Mercuria was authorised to entertain the NHA's application to set aside the award and that the court did attempt to mitigate the delay by accommodating the litigants for a chance of being expeditiously heard in the Commercial Bench indicates that the court's conduct is neither egregious nor that it contributed to the sever years of delay.

156. Relying on the case of White Industries v India, it is noted that the delay in regards to the enforcement proceeding was not considered to be a breach of the effective means standard. This is because the tribunal accepted that the three and a half year enforcement proceedings were "less than ideal" but also noted that "India is a developing country with a seriously overstretched judiciary".[128] Thus, the delays in the national court system are endemic, with extended timelines causing considerable difficulties for international parties.

157. Similarly in the present case, Mercuria did provide an effective means for the Claimant to enforce the arbitral award. However, it is only the unintended circumstances that contributed to the delay in which they are justifiable. In the case of White Industries, the tribunal noted that the non-recognition of the validity of an arbitral award is one of the material factors in which a standard of effective means has been breached.[129]

158. However, the High Court of Mercuria recognizes the validity of the arbitral award, but it is only due to the fact that the NHA's set-aside application on the ground that it concerns public policy.[130] Therefore, a means has been provided to the Claimant and any other investors to enforce their rights accordingly.

[127] Chevron-Texaco v Ecuador, para. 136
[128] White Industries v India, para. 10.4.18.
[129] Ibid, paras. 11.4.5-11.4.7
[130] Uncontested Facts, para. 18

V. THE RESPONDENT HAS NOT VIOLATED ART-3.3 OF THE BIT BY THE CONDUCT OF THE NHA

159. The act of the NHA could not be attributable to Mercuria based on three reasons. First, the LTA was a purely commercial supply agreement entered between the NHA and the Claimant **(Section A)**. Second, the NHA is a commercial purchaser and a body legally distinct from the Respondent **(Section B)**. Third, the wrongful commercial decision was made without any interference by the State **(Section C)**.

A. The LTA was a purely commercial supply agreement made between the NHA and the Claimant

160. Art-4 of the ILC Draft Articles on State Responsibility provides the general rules for attribution which reads:

> *"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State."*

161. In the *Mallen* case, the tribunal laid down two situations.[131] Firstly, the act of an officer acting in a private capacity is not attributable to the State. However, in the second situation, the act conducted by the same officer in his official capacity could be made attributable.

[131] Mallen, para. 175; Commentary of Draft Articles ILC on State Responsibility, pg. 42

162. The test to prove attribution is the functional test[132] laid in *Maffezini v Spain.* The test is to verify the function of the entity as a government or a commercial entity while the wrongful decision was exercised.

163. In *CME v Czech Republic*, the tribunal concluded that the termination of the agreement by CET 21 (i.e. A state owned entity of Czech Republic) was seen as a purely commercial decision, thereby, disallowing the claim for attribution.[133]

164. In the present case, the NHA has entered into a commercial agreement with Atton Boro to supply Valtervite for Greyscale. Due to a gross underestimated amount of greyscale cases in Mercuria, the NHA was compelled to terminate the agreement because the price of the drug was too high.[134]

165. Nonetheless, the wrongful conclusion of the LTA has been decided in favour of the Claimant in the previous tribunal seated in Reef.[135]

166. Therefore, a mere commercial dispute caused by a wrongful commercial decision could not be attributable to Mercuria.

B. The NHA is a commercial purchaser and a body legally distinct from the Respondent

167. In *Salini Construttori v Jordan*, the tribunal decided that although the Government exercises a strict control of the JVA, this Authority is an autonomous corporate body distinct legally and financially from the state of Jordan.[136] Also, it appears that the Contract was concluded by the signature of the Minister and the Secretary General of the JVA, both acting on behalf of the JVA.[137]

[132] Maffezini v Spain, para. 52
[133] CME v Czech Republic, para. 234
[134] Uncontested Facts, para. 15
[135] Uncontested Facts, para. 17
[136] Salini v Jordan, para. 84; Hobér, pg 7
[137] Ibid, para. 91

168. In the present case, although the NHA is a state owned entity controlled by the Minister for Health, but the body operates individually[138] and is legally distinct from the Government. This is because for the first event, the NHA, on its own, was sued as a party by the Claimant during the previous tribunal seated in Reef.[139] On the second event, the claim for enforcement proceeding was brought against the NHA, as a party on its own.[140]

169. Therefore, since the LTA was concluded by the NHA which is a body legally distinct from Mercuria, Atton Boro's claim to impute the NHA's wrongful conduct to Mercuria should be disregarded as concluded in the *Salini* case.

C. The wrongful commercial decision was made without any interference by the State

170. Art-8 of the ILC Draft Articles on State Responsibility provides:

> *"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*

171. To impute responsibility to a State for the wrong conduct of an entity, it was necessary to observe whether it was acting under the direction, instigation, or control of an organ of government.[141] In *Vivendi v Argentina*, the tribunal emphasizes on the importance of instruction from the government in dismissing a claim under attribution.

172. In *CME v Czech Republic*, liability could not be attributable even though it the wrongful decision was conducted by a government entity. This is because, although the party (i.e. CET 21) whom conducted a wrongful act is a state owned entity, but CET 21 made a wrongful decision within its commercial capacity without any interference by the State. Therefore, it could not be attributable to the State.[142]

[138] Procedural Order No. 3, line 1591
[139] Uncontested Facts, para. 17
[140] Ibid, para. 18
[141] Vivendi v Argentina, para. 6.8.2.
[142] CME v Czech Republic, para. 234

173. In *Salini Construttori*, even when the Government exercised a strict control upon its state entity, the JVA, but the tribunal decided that the contractual breach was concluded by the representatives of the JVA itself.[143] The tribunal also concluded on the basis of the Art-2 that is known as the umbrella clause, which did not deprive it of jurisdiction with respect to treaty claims.[144]

174. In the instant case, on 10 June 2008, the NHA made a decision on its own to terminate the LTA with the Claimant.[145] There has been no evidence of a specific instruction from Mercurian officials to the NHA ordering to terminate the LTA.

175. Therefore, since there is no causal link to attribute the wrongful conduct to the Government, the present tribunal should find that there is no international wrongful act. Mercuria has not infringed Art-3.3 of the BIT by assigning any gross treatment to be conducted by the NHA nor has that Mercuria disregarded any obligations that fall under the provision.

[143] Salini v Jordan, para. 91; Hobér, pg. 8
[144] Ibid, para. 57
[145] Uncontested Facts, para. 17

PRAYERS FOR RELIEF

In light of the Respondent's submission, the Respondent respectfully asks the Tribunal to declare that:

1. It lacks jurisdiction to adjudicate any claims in relation to the enforcement of the arbitral award decided in Reef;
2. That all other claims are inadmissible;
3. The enactment of Law No. 8458/09 is not a violation of the Fair and Equitable Treatment standard as provided under Art-3.2 of the MB-BIT;
4. The Respondent is not liable for the conduct of its judiciary under Art-3 of the MB-BIT due to no wrongful act;
5. The termination of the LTA does not violate the Fair and Equitable Treatment standard by virtue of Art-3.3 of the MB-BIT.

TEAM TANAKA

On behalf of The Republic of Mercuria