TEAM TOMKA

PERMANENT COURT OF ARBITRATION

ATTON BORO LIMITED (KINGDOM OF BASHEERA)

V

THE REPUBLIC OF MERCURIA

MEMORIAL FOR RESPONDENT

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Award	Arbitral award issued by the tribunal seated in Reef in January 2009
Basheera	Kingdom of Basheera
BIT	*Agreement Between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments*
CIL	Customary international law
Exhibit 1	Notice of Arbitration, Exhibit 1
Facts	Statement of Uncontested Facts
FDC	Fixed-dose combination
FET	Fair and equitable treatment
High Court	High Court of Mercuria
Holding Company	Atton Boro and Company
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IP Law	Mercuria's amended *Intellectual Property Law*
IPR	Intellectual property rights
LTA	Long-Term Agreement
Mercuria	Republic of Mercuria
NHA	National Health Authority
Notice	Notice of Arbitration
Order 1	Procedural Order 1

Order 2	Procedural Order 2
Order 3	Procedural Order 3
Parent Affiliates	Atton Boro Group affiliates
Parent Company	Atton Boro Group
PCA 2012	Permanent Court of Arbitration, Arbitration Rules 2012
Reef	People's Republic of Reef
Response	Response to Notice of Arbitration
WHO	World Health Organization

TABLE OF AUTHORITIES

NAFTA	*North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States,* CAN TS 1994 No 2 (17 December 1992).
TRIPS	*Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 UNTS 299 (15 April 1994).
USA-Ecuador BIT	*Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment,* (11 May 1997).
USA-Argentina BIT	*Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 31 ILM 124 (20 October 1994).
VCLT	*Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (23 May 1969).
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Allard	*Allard v Barbados*, Award, PCA Case No 2012-06 (27 June 2016).
Ampal Jurisdiction	*Ampal-American Israel Corp et al v Egypt*, Decision on Jurisdiction, ICSID Case No ARB/12/11 (1 February 2016).
Ampal Liability	*Ampal-American Israel Corp et al v Egypt*, Decision on Liability and Heads of Loss, ICSID Case No ARB12/11 (21 February 2017).
AMTO	*Limited Liability Company AMTO v Ukraine*, Final Award, SCC Case No 080/2005 (26 March 2008).
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El Paso Jurisdiction	*El Paso Energy International v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/03/15 (27 April 2006).
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STATEMENT OF FACTS

[1] Atton Boro Limited ("**Claimant**") is a wholly-owned subsidiary of Atton Boro Group ("**Parent Company**"). The Parent Company is primarily held[1] by Atton Boro and Company ("**Holding Company**"). The Holding Company is incorporated in the People's Republic of Reef ("**Reef**") and ultimately controls Atton Boro Group affiliates ("**Parent Affiliates**"). The Parent Affiliates currently hold the Claimant's shares.

[2] On 5 April 1998, the Parent Company incorporated the Claimant in the Kingdom of Basheera ("**Basheera**") as a vehicle for its business activities in South America and Africa. The Claimant's employees manage patents and provide services for the Parent Affiliates. On 15 April 1998, the Holding Company assigned its Mercurian Valtervite patent to the Claimant in exchange for shares.

[3] The Respondent, the Republic of Mercuria ("**Mercuria**"), is a developing country committed to fighting critical diseases. In 1998, Mercuria created the National Health Authority ("**NHA**") to increase access to healthcare. The NHA's HIV/AIDS partnership with the Claimant allowed 30,000 new patients to access HIV/AIDS medicines.

[4] Mercuria and Basheera concluded the *Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Mercuria and the Kingdom of Basheera* ("***BIT***") on 11 January 1998. It entered into force on 9 April 1998. Mercuria is also party to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("***TRIPS***") and the *International Covenant on Economic, Social, and Cultural Rights* ("***ICESCR***").

Mercuria's Battle Against Greyscale

[5] Greyscale is a chronic, incurable disease that causes cracking skin, stiffening muscles, swollen limbs, and severe joint pain. Between 2003 and 2006, confirmed greyscale cases in Mercuria increased by 1,200% (from 20,485 to 266,298). But estimates put the total number of Mercurians suffering from greyscale at 578,390.

[1] Facts ¶2.

[6] In 2002, the NHA warned Mercuria that without aggressive measures, greyscale would spiral into a national public health crisis within a decade. At the time, greyscale treatment available in Mercuria fell short of global standards. So, the NHA launched a national campaign to prevent the spread of greyscale and invited the Claimant to supply Sanior at a discounted rate.

[7] On 20 July 2004, the NHA and the Claimant concluded the Long-Term Agreement ("**LTA**"). This 10-year agreement guaranteed a minimum annual order-value of Sanior at a 25%-discounted rate, subject to the Claimant's satisfactory performance.

[8] The Holding Company funded the Claimant to manufacture Sanior in Mercuria. The Claimant delivered its first order in June 2005.

Mercuria's Poorest Cannot Afford Sanior

[9] Sanior costs Mercurians almost US $10,000 per year (US $27 per pill). At this price, 100,000 patients could not afford greyscale treatment. Mercuria would have to spend US $1 billion, almost one-third of its entire health budget and five times its greyscale budget, to supply Sanior to these patients.

[10] In 2008, faced with an exponentially worsening greyscale epidemic, the NHA asked the Claimant to renegotiate the price of Sanior. The Claimant proposed an additional 10% discount; the NHA instead requested an additional 40% discount. The parties did not reach an agreement.

[11] On 10 June 2008, the NHA terminated the LTA on the basis of the Claimant's unsatisfactory performance.

Mercuria Ensures the Poorest Have Access to Greyscale Medicine

[12] On 10 October 2009, Mercuria amended its *Intellectual Property Law* ("***IP Law***"). At the time, Mercurians did not have access to an effective greyscale treatment. The amendment empowered the High Court to license patents for medicines not publicly available at an affordable price. It also provided patent holders a right to appeal the High Court's decision.

[13] Acting under this amended law, HG-Pharma, a Mercurian generic drug manufacturer, filed an application to manufacture and sell a generic medicine with Valtervite, the Claimant's patented ingredient. The Claimant was impleaded as a party to these proceedings.

[14] The High Court granted HG-Pharma's license but imposed two conditions: it could only manufacture Valtervite until greyscale was no longer a public health threat to Mercuria and it must pay the Claimant a 1% royalty. This royalty fell within Mercuria's 0.5% to 3% range for drugs licensed to treat incurable, non-fatal diseases. HG-Pharma requested the Claimant's bank details to make royalty payments but the Claimant did not respond.

[15] By January 2012, HG-Pharma's generic greyscale medicine reduced the cost of treatment by as much as 80%.

Mercuria Efforts to Alleviate Its Overburdened Judiciary

[16] After the NHA terminated the LTA, the Claimant initiated arbitration. In January 2009, a tribunal in Reef issued a US $40 million award ("**Award**") in the Claimant's favour. Two months later, the Claimant filed award enforcement proceedings in Mercuria's High Court.

[17] Mercuria's overburdened judiciary caused court congestion. So, in January 2012, Mercuria created the Commercial Bench to expeditiously deal with commercial matters. The Claimant, believing the Commercial Bench had "exclusive jurisdiction"[2] to deal with enforcement proceedings, asked the High Court to transfer its case to the Commercial Bench.

[18] But the Claimant was wrong. Mercuria's Supreme Court clarified that the Commercial Bench only had jurisdiction to hear original commercial disputes, not enforcement proceedings. So the Claimant's proceedings were transferred back to the High Court.

[19] The enforcement proceedings before the High Court were ongoing, and coming to conclusion, when the Claimant commenced these arbitration proceedings.

[2] Exhibit 1 ¶17.

Arbitration Proceedings

[20] On 7 November 2016, the Claimant submitted a Notice of Arbitration and commenced these proceedings under the *BIT*. Mercuria submitted its response on 26 November 2016.

[21] Mercuria disputes this Tribunal's jurisdiction.

SUMMARY OF ARGUMENTS

JURISDICTION. The Award is not an investment within this Tribunal's jurisdiction. It is neither a *BIT*-protected investment nor does it meet the *Salini* test for investment.

ADMISSIBILITY. Mercuria can deny benefits to the Claimant because third-state nationals indirectly control the Claimant and the Claimant does not have substantial business activities in Basheera. Denial of benefits does not require Mercuria to give advanced notice and it has retrospective effect, rendering all claims before this Tribunal inadmissible.

MERITS. Mercuria submits that first, the *Intellectual Property Law* amendment does not violate the *BIT*. The patent is not a *BIT*-protected investment because it predates the *BIT*'s entry into force. At any rate, Mercuria treated the Claimant fairly and equitably because, given the greyscale crisis, the Claimant could not have legitimately expected a static intellectual property rights regime. Neither Mercuria's public statement nor *TRIPS* created such legitimate expectations. Regardless, Mercuria met its *TRIPS* obligations. Further, Mercuria's amendment was regulation, so granting a non-voluntary license is not expropriation. Second, Mercuria is not liable for its Judiciary's conduct during the enforcement proceedings. Mercuria is not required to provide the Claimant with an effective means of asserting claims. The Judiciary treated the Claimant fairly and equitably because it did not deny the Claimant justice. The Judiciary did not discriminate against the Claimant and provided the Claimant full protection and security. Third, umbrella clauses do not cover commercial breaches of purely commercial contracts, so the NHA's termination of the LTA does not violate the *BIT*. Regardless, *res judicata* prevents this Tribunal from relitigating the alleged LTA breach.

REMEDIES. Mercuria seeks a declaration that this Tribunal lacks jurisdiction over the present claims and that Mercuria has not violated the *BIT*.

APPLICABLE LAW

[22] The Parties agreed that the PCA Arbitration Rules 2012 ("**PCA 2012**") govern this arbitration.[3] The arbitration rules available under *BIT* article 8 do not include PCA 2012. Nonetheless, the disputing parties agreed these rules would govern this arbitration.[4]

[23] Pursuant to PCA 2012 article 35(1), the disputants designate the law governing this arbitration. Order 1 indicates that the law applicable to this arbitration is the *BIT*, read with applicable international law.[5]

[24] Mercuria has signed but not ratified the *Vienna Convention on the Law of Treaties* ("***VCLT***").[6] Regardless, the *VCLT* articles 31 and 32 codifies customary international law and therefore applies to these proceedings.[7] This Tribunal must therefore interpret the *BIT* according to the words' ordinary meaning; in context; and in light of the *BIT*'s object and purpose.[8]

[3] Order 1 ¶¶1-2.
[4] Notice ¶1; Response ¶1; *Ibid* ¶2.
[5] Order 1 ¶11; PCA art 35(2); *VCLT* art 31(3)(c).
[6] Order 3.
[7] Dörr & Schmalenbach at 521; *Noble Ventures* ¶50.
[12] *VCLT* art 31(1).

I. THIS TRIBUNAL HAS NO JURISDICTION OVER CLAIMS RELATING TO THE AWARD

[25] The Claimant obtained the Award in January 2009 after the NHA terminated the LTA.[9] This Tribunal has no jurisdiction over claims relating to the Award because **(A)** the Award is not a *BIT*-protected investment and **(B)** it does not meet the *Salini* test for investment.

A. The Award is Not a *BIT*-Protected Investment

[26] *BIT* article 1(1) defines investment as:

> Any kind of asset held or invested either directly or indirectly […] in the territory of the other Contracting Party […] and, in particular, though not exclusively, includes:
> (a) movable and immovable property and any related property rights […]
> (b) shares, stocks, bonds, and debentures […]
> (c) claims to money, and claims to performance under contract having a financial value
> (d) intellectual property rights, including rights with respect to copyrights, patents […]
> (e) rights, conferred by law or under contract, to undertake any economic and commercial activity […]
> Any change in the form of the investment does not affect its character as an investment.

[27] **(1)** The *BIT*'s examples of investments do not include the Award. **(2)** The Award is not held or invested in Mercuria's territory; and **(3)** the Award is not a change in the form of the Claimant's investment.

1. The *BIT*'s Examples of Investments Do Not Include the Award

[28] *BIT* article 1(1) provides examples of what the Contracting Parties consider investments; it does not include arbitral awards.

[29] *Ejusdem generis*—an interpretive rule frequently applied by tribunals[10]—dictates that an asset must be "of a like nature"[11] to the *BIT*'s examples of investments to be a *BIT*-protected

[9] Facts ¶5.

[10] *ILC MFN Draft Articles*; *Daimler* ¶211; *CMS* ¶377; *Helnan* ¶45; *Maffezini* ¶¶46-50, 56.

[11] *Helnan* ¶45.

investment. So for the Award to be a *BIT*-protected investment, it must share general characteristics with article 1(1)'s examples.

[30] The Claimant's Award and article 1(1)'s examples of investments do not share the same characteristics. The Claimant may argue that the Award is a "claim to money" under *BIT* article 1(1)(c). But the four other investment types—property; stocks and bonds; intellectual property; and rights to undertake commercial activity—describe investments that contribute to Mercuria's economy.

[31] This Tribunal should also distinguish the Award from other claims to money, such as loans, because a loan first requires the investor to contribute funds to the host state's economy. As the *GEA* tribunal, presided by Professor Jan van den Berg, explained:

> [An award] is a legal instrument which provides for the disposition of rights and obligations […] the award itself involves no contribution to, or relevant economic activity within [the host state].[12]

Since the Award does not contribute to Mercuria's economy, it does not have the same characteristics as the four other investment types.

[32] Moreover, conferring *BIT* protection on the Claimant's Award is inconsistent with the *BIT*'s purpose, as stated in its preamble, to stimulate economic development.[13] The Award does not contribute to Mercuria's economy.[14] Instead, the Award will withdraw money from Mercuria's economy and depress economic development.[15] Conferring the Award *BIT*-protection would be inconsistent with the *BIT*'s purpose.

2. The Award is Not Located in Mercuria's Territory

[33] To qualify for *BIT* protection under article 1(1), investments must be held or invested "in the territory" of Mercuria.[16] But numerous tribunals have found that purely financial

[12] *GEA* ¶¶161-162.
[13] *BIT* preamble.
[14] *GEA* ¶162.
[15] Facts ¶18; Order 2 ¶1.
[16] *BIT* art 1(1).

investments are located where the financial benefits are received.[17] As the majority of the *Abaclat* tribunal, including Professor Jan van den Berg, explained:

> With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds were ultimately used, and not the place where the funds were paid out or transferred.[18]

[34] The Award is a purely financial claim, and since the Claimant is incorporated in Basheera, the Award will not benefit Mercuria. The Award is therefore not located in Mercuria's territory.

3. The Award Is Not a Change in the Form of the Claimant's Investment

[35] *BIT* article 1(1) provides that "any change in the form of an investment does not affect its character as an investment." The *GEA* tribunal interpreted the same clause and rejected the claim that the award at issue was an investment.[19]

[36] The *BIT* clearly distinguishes between investments and returns. Unlike many BITs that define investments and returns together in the same provision,[20] the *BIT* defines these terms separately.[21] In fact, most of the *BIT's* substantive provisions only protect investments, not returns.[22] A return only exists because it is the product of an investment.[23]

[37] The Claimant's Award is more like a return than an investment; it only exists because the Claimant exercised its right to arbitration.[24] Interpreting the Award as a change in the form of the Claimant's investment would be inconsistent with the *BIT* for two reasons. First, it ignores the *BIT*'s distinction between an investment and a return. And second, it renders the term "returns" superfluous since *BIT* article 1(1) would protect all returns as investments.

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[17] *Fedax* ¶41; *SGS Pakistan* ¶¶136-137, 140; *Deutsche Bank* ¶¶288-292.
[18] *Abaclat* ¶374.
[19] *GEA* ¶¶138-164.
[20] *Serbia-UAE BIT*; *Slovakia-Kenya BIT*; *Turkey-Gabon BIT*; *Turkey-Pakistan BIT*; *Turkey-Bangladesh BIT*.
[21] *BIT* arts 1(1), 1(3).
[22] *Ibid* arts 3(1), 3(3), 4(2), 4(3), 5, 6, 7(1), 11.
[23] *Ibid* art 1(3).
[24] Facts ¶17.

B. Neither the Award nor LTA Meet the *Salini* Test for Investment

[38] Most tribunals use the *Salini* test ("***Salini***") to determine if an investment qualifies under the *ICSID Convention*.[25] **(1)** Regardless, this Tribunal should apply *Salini* because the test is consistent with the *BIT*. **(2)** Since the Award fails *Salini*, it is not an investment.

1. This Tribunal Should Apply *Salini* because the Test is Consistent with the *BIT*

[39] While this arbitration is not under the *ICSID Convention*, this Tribunal should still apply *Salini* to determine if the Award is an investment because **(a)** *Salini* represents the most widely-accepted definition of investment; **(b)** the *ICSID Convention*'s definition of investment is consistent with the *BIT*'s definition; and **(c)** applying *Salini* creates a uniform *BIT* definition of investment, regardless of the investor's choice of arbitration rules.

a. Salini *Represents the Most Widely-Accepted Definition of Investment*

[40] Investment has an inherent meaning independent of the *BIT*'s language.[26] Professor Christoph Schreuer explains that *Salini*'s definition of an investment—a contribution of assets having a certain duration and an element of risk[27]—includes characteristics typical of investments.[28] For this reason, non-*ICSID Convention* tribunals have considered and applied *Salini*.[29]

[41] Specifically, the *Romak* tribunal (a non-*ICSID Convention* tribunal) applied *Salini* to determine if an asset, not included in the BIT's examples, was a BIT-protected investment.[30] Since *BIT* article 1(1) is a non-exhaustive definition of investment that does not include awards, this Tribunal should similarly apply *Salini* to determine if the Award is a *BIT*-protected investment.

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[25] *Salini Morocco* ¶52.
[26] *Romak* ¶180; *Nova Scotia Power* ¶¶80-81.
[27] *Salini Morocco* ¶52.
[28] *Romak* ¶207; Demirkol at 42; OECD Concepts at 61.
[29] *Romak* ¶207; *White Industries* ¶¶7.4.10-7.4.19; *Italy-Cuba* ¶¶82-83.
[30] *Romak* ¶180.

b. The BIT *and the* ICSID Convention *Have the Same Objectives*

[42] The *BIT* and the *ICSID Convention* share common objectives. The *ICSID Convention*'s preamble recognizes that private investment facilitates economic development.[31] Likewise, the *BIT*'s preamble indicates that economic development and the flow of private capital are among the *BIT*'s objectives. Since the *ICSID Convention* and the *BIT* share these common objectives, any interpretation of the *BIT*'s definition of investment should be consistent with *Salini*.

c. Applying Salini *Creates a Uniform* BIT *Definition of Investment*

[43] *BIT* article 8(2) allows investors to pursue arbitration under the *ICSID Convention* or PCA 2012. The investor's choice should not affect the *BIT*'s definition of investment.[32] If *Salini*, the leading test for investment in *ICSID Convention* disputes, does not apply simply because the investor chose PCA 2012, the investor's choice would dictate the *BIT*'s definition of investment.[33] For consistency, *Salini* must also apply to PCA 2012 proceedings.

2. The Award Fails the *Salini* Test

[44] *Salini* defines investment as a contribution of assets with a certain duration of performance and element of risk.[34] The Award must meet all three criteria for this Tribunal to consider it an investment.[35]

[45] The Award fails *Salini* for the following reasons:

- The Award is not a contribution of assets. It does not involve dedicating resources,[36] commiting of capital,[37] or providing services of economic value.[38] Rather, the Award will extract US $40 million from Mercuria.

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[31] *ICSID Convention* preamble.
[32] *Romak* ¶193; *Nova Scotia Power* ¶80.
[33] Vadi "Towards A New Dialectics" at 148.
[34] *Salini Morocco* ¶52.
[35] Dolzer & Schreuer at 66.
[36] *Romak* ¶213.
[37] *White Industries* ¶7.4.10.
[38] *Deutsche Bank* ¶297.

- The Award has no certain duration of performance since the Claimant has no performance obligations.
- The Award entails no risk. The Claimant is not exposed to any "investment risk," like a commitment to an unknown amount of spending.[39]

[46] The Claimant may argue that tribunals applying *Salini* to an award examine the underlying investment to determine if the award is an investment.[40] But tribunals only consider the investment and a related award as a single unit if they are interdependent[41]—*i.e.*, where one would not exist without the other. So when applying *Salini*, this Tribunal should examine only the LTA, not the Claimant's manufacturing unit, because the LTA and the manufacturing unit are not interdependent. The LTA did not require the Claimant to establish in-country manufacturing; the Claimant could have used other manufacturing units to produce Sanior.[42]

[47] The LTA also fails *Salini*. While the LTA has a certain duration, it fails the other components of *Salini*. Specifically,

- The LTA only requires a contribution of supplies typical for commercial contracts. Tribunals have found such contributions insufficient because they do not further a greater venture.[43]
- The Claimant is only exposed to the typical risks of a commercial contract. The *Nova Scotia Power* tribunal found such risks insufficient to satisfy *Salini*.[44]

[48] Since neither the Award nor the LTA satisfy *Salini*, the Award is not an investment.

[39] *Romak* ¶230.
[40] *White Industries* ¶¶7.6.2-7.6.4; *Saipem* ¶127.
[41] *Fraport II* ¶337; *SGS Paraguay* ¶¶113-115.
[42] Facts ¶¶9-10.
[43] *Romak* ¶222; *Global Trading* ¶56.
[44] *Nova Scotia Power* ¶¶105, 107.

CONCLUSION

[49] The Award is not a *BIT*-protected investment nor does it meet the *Salini* test for investment. This Tribunal therefore does not have jurisdiction over claims related to the Award.

II. MERCURIA CAN DENY BENEFITS TO THE CLAIMANT

[50] *BIT* article 2(1) provides that:

> Each Contracting Party reserves the right to deny the advantages of this Agreement to 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.

[51] States use denial of benefits clauses to exclude investors controlled by third-state nationals without a real economic connection to their state of incorporation.[45] Put simply, the purpose of denial of benefits clauses is to exclude "free-riders"—companies incorporated merely to obtain treaty benefits.[46]

[52] Mercuria can deny benefits to the Claimant because **(A)** third-state nationals control the Claimant; and **(B)** the Claimant lacks substantial business activities in Basheera. Further, **(C)** the denial of benefits clause does not require Mercuria to give the Claimant advanced notice; and **(D)** Mercuria can retrospectively deny benefits.

A. Third-State Nationals Control the Claimant

[53] The *BIT*'s denial of benefits clause includes indirect control. The *BIT* does not define "control" but tribunals interpreting near-identical denial of benefits clauses determined that indirect control is sufficient to deny benefits.[47] *BIT* article 2(1)'s context and purpose support this interpretation.

[54] *BIT* article 1(1) protects a Contracting Party's investors' indirect investments. Since the *BIT* protects indirectly-held investments, indirect control should similarly satisfy article 2(1)'s control requirement.

[55] Further, "control" must include indirect control to accomplish the clause's purpose to exclude third-state investors. Otherwise, third-state investors could simply incorporate Basheeran intermediaries to obtain *BIT* protection, rendering the clause toothless. *VCLT* article 32(b)

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[45] Dolzer & Schreuer at 55; Mistelis & Baltag at 1301-1302, 1313.

[46] Feldman Corporate Nationality at 294; Gadelshina at 9; Mistelis & Baltag at 1301; Casas at 87.

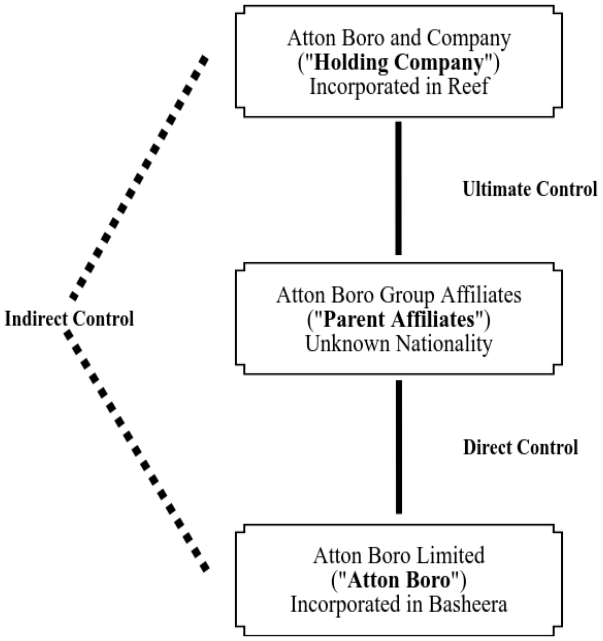
[47] *Plama Award* ¶¶91-95; *AMTO* ¶¶66-67; *Pan American* ¶204.

prevents this Tribunal from interpreting *BIT* article 2(1) so that it has an unreasonable meaning. An interpretation that allows investors to so easily circumvent article 2(1) is unreasonable so this Tribunal should find that it includes indirect control.

[56] Third-state nationals control the Claimant indirectly because **(1)** the Holding Company, incorporated in Reef, indirectly controls the Claimant; and **(2)** the Holding Company is a third-state national.

1. The Holding Company, Incorporated in Reef, Indirectly Controls the Claimant

[57] Tribunals agree that over 50% direct share ownership is sufficient to establish direct control.[48] The *AdT* tribunal found that direct control over an intermediate entity is sufficient to establish indirect control over any entities that the intermediary controls.[49]



[58] The Holding Company, incorporated in Reef, ultimately controls the Parent Affiliates.[50] The Parent Affiliates currently hold 100% of the Claimant's shares[51] and, therefore, directly control the Claimant. Because the Holding Company controls the Parent Affiliates, and the Parent Affiliates control the Claimant, the Holding Company indirectly controls the Claimant.

[59] Mercuria has sufficiently established third-state control. This Tribunal cannot reasonably require Mercuria to produce complete evidence about the Claimant's controllers

[48] *Generation Ukraine* ¶15.9; *AdT* ¶245; *Aucoven* ¶64; *Yukos* ¶536; OECD Concepts at 120-121.
[49] *AdT* ¶264; *Ulysseas* ¶¶175-190.
[50] Order 2 ¶3; Facts ¶2.
[51] Order 2 ¶3. See also Appendix B: History of Claimant's Share Ownership.

because host states cannot readily access this information.[52] Now that Mercuria has raised reasonable doubt, the Claimant must provide evidence that Basheeran nationals control it.[53]

2. The Holding Company is a Third-State National

[60] For Mercuria to deny benefits, *BIT* article 2(1) requires that third-state nationals control the Claimant. While the *BIT* does not define "nationals", *BIT* article 1(2) defines "investor" as "a corporation incorporated in accordance with the laws of the Contracting Party." The *BIT*'s definition of "investor" suggests that the place of incorporation determines a corporation's nationality.

[61] An investor's controller does not need to be a natural person. In fact, tribunals have found corporations can be third-state nationals that control investors.[54] This Tribunal should similarly find that the Holding Company, incorporated in Reef, is a third-state national that ultimately and indirectly controls the Claimant.

B. The Claimant Lacks Substantial Business Activities in Basheera

[62] The Claimant's activities are not substantial business activities in Basheera because **(1)** the Claimant's business activities are not "in the territory" of Basheera; and **(2)** the Claimant's business activities are disproportionate to its claims.

1. The Claimant's Business Activities Are Not "in the Territory" of Basheera

[63] The investor's business activities must be directed towards activities within its state of incorporation. The *Pac Rim* tribunal, including Professor Guido Santiago Tawil, found that only business activities directed towards the investor's state of incorporation are substantial business activities in that territory.[55] The tribunal indicated that had Pac Rim held shares in subsidiaries

[52] Gadelshina at 284; Feldman Corporate Nationality at 298, 300; Lee at 369-370; *AMTO* ¶65; *Pac Rim* ¶4.80; *Ascom* ¶731; *Plama Award* ¶95.

[53] *CCL* ¶152.

[54] *Yukos* ¶536; *GAI* ¶370; *Pan American* ¶204.

[55] *Pac Rim* ¶4.74.

doing business in the investor's state of incorporation, the tribunal might have found that Pac Rim had substantial business activities.[56]

[64] The Claimant's business activities similarly are not "in the territory" of Basheera. The Claimant's employees manage its patents across South America and Africa and support the Parent Affiliates' business there.[57] But Basheera is in Westeros,[58] not South America or Africa. Since the Claimant's activities are not directed towards business in Basheera, its business activities are not in the territory of Basheera.

2. The Claimant's Business Activities Are Disproportionate to Its Claims

[65] To avoid being denied benefits, an investor's business activities need to be proportional to its claims. The denial of benefits clause's purpose is to exclude investors without an economic connection to their state of incorporation from a treaty's benefits.[59] Allowing investors to obtain sizeable awards without a significant economic presence in their state of incorporation would curtail the Contract Parties' economic growth. This would also undermine the *BIT*'s objective, as stated in its preamble, to stimulate economic development.

[66] Tribunals have applied a flexible, context-specific understanding of substantial business activities to determine if a state can deny benefits.

Case	Business Activities	Claim Sought	Substantial Business Activities?
Petrobart[60]	Two employees and a relationship with a management company	US $4 million	Yes
AMTO[61]	Two full-time staff and evidence of investment-related activities	US $24 million	Yes
Pac Rim[62]	Two managers	US $314 million	No

[56] *Ibid*.

[57] Order 2 ¶3.

[58] Order 3.

[59] Feldman Corporate Nationality at 294; Mistelis & Baltag at 1301-1313; Dolzer & Schreuer at 55; *Caratube* ¶354; Sinclair at 385, 388.

[60] *Petrobart* at 18, 63.

[61] *AMTO* ¶69.

[62] *Pac Rim* ¶¶3.31, 4.70, 4.74.

[67] Despite having a similar level of business activities, the *Petrobart*, *AMTO*, and *Pac Rim* tribunals disagreed on whether this level of business activity was substantial. The size of the claim sought is the distinguishing factor: as claims and investment grow, more business activities are necessary for a tribunal to find substantial business activities.

[68] The Claimant possesses a similar level of business activities as in *Petrobart*, *AMTO*, and *Pac Rim*. But the Claimant is pursuing nearly 400-times the amount sought in *Petrobart* and nearly five-times the amount sought in *Pac Rim*. The Claimant's connection to Basheera's economy is miniscule relative to the corresponding US $1.54 billion claim against Mercuria.

[69] If the Claimant could gain *BIT* protection by simply incorporating and hiring two employees in Basheera, it would effectively be able to purchase treaty protection at a disproportionate cost to its investment. This Tribunal should therefore find that the Claimant does not have substantial business activities in Basheera.

C. The Denial of Benefits Clause Does Not Require Advanced Notice

[70] The Claimant may argue that Mercuria must provide notice before denying benefits. But *BIT* article 2 does not include a notice requirement. Other denial of benefits clauses specifically require notice before denying benefits.[63] If the Contracting Parties wanted to include a notice requirement, they would have explicitly done so.

[71] A notice requirement is inconsistent with the Contracting Parties' intentions. States usually learn that an investor can be denied benefits only after a claim is made.[64] A notice requirement would require states to track all foreign investments within their territory and determine ownership and control for each.[65] A developing country like Mercuria cannot reasonably accomplish this task.[66] So Mercuria could not have intended that *BIT* article 2(1) would require advanced notice.

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[63] *NAFTA* art 1113(2); *CAFTA-DR* art 10.12; *Ampal Jurisdiction* ¶88.

[64] Mistelis & Baltag at 1314-1315.

[65] Thorn & Doucleff at 25; Gadelshina at 277.

[66] Thorn & Doucleff at 25; Mistelis & Baltag at 1314-1315.

[72] Regardless, *BIT* article 2 is sufficient notice that a host state may deny benefits.[67] The Claimant had access to the *BIT* and was presumably aware that Mercuria could deny benefits if the conditions were met. Despite this, the Claimant chose not to organize itself differently. So the Tribunal should not require additional notice for Mercuria to deny benefits.

D. Mercuria Can Retrospectively Deny Benefits

[73] *BIT* article 2(1) does not preclude retrospective effect. While some tribunals have found that states could not retrospectively deny benefits, those tribunals were interpreting *Energy Charter Treaty* ("***ECT***") article 17.[68] The *ECT*'s denial of benefits clause applies only to the treaty's substantive obligations, not consent to arbitration.[69] Consequently, once an investor initiates *ECT* arbitration, the host state cannot withdraw its consent. Tribunals applying non-*ECT* denial of benefits clauses found that benefits can be denied retrospectively because denying benefits withdraws the host state's consent to arbitration.[70]

[74] Unlike the *ECT*, the *BIT*'s denial of benefits clause applies to the entire agreement, including Mercuria's consent to arbitration.[71] Because these proceedings are governed by PCA 2012, Mercuria must deny benefits no later than in its Statement of Defense.[72] Mercuria denied benefits in the Response, before any Statements of Defense and in accordance with PCA 2012.[73]

CONCLUSION

[75] Mercuria can deny the *BIT*'s benefits to the Claimant because third-state nationals indirectly control the Claimant and the Claimant does not have substantial business activities in Basheera. The denial of benefits clause does not require Mercuria to give advanced notice. But, if notice is required, the *BIT* serves as notice. Mercuria denied benefits retrospectively and withdrew its consent to arbitration. The Tribunal should therefore find all claims inadmissible.

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[67] D'Allaire at 66; *Ulysseas* ¶173; *GAI* ¶¶372-373, 383.
[68] *Plama Jurisdiction* ¶165; *Yukos* ¶458.
[69] *Plama Jurisdiction* ¶¶145, 149.
[70] *GAI* ¶¶366-367; *Pac Rim* ¶4.84; *Ulysseas* ¶172.
[71] *BIT* art 2(1).
[72] PCA 2012 art 23(2).
[73] Response ¶5.

III. MERCURIA'S *INTELLECTUAL PROPERTY LAW* AMENDMENT DOES NOT VIOLATE THE *BIT*

[76] **(A)** The Claimant's Valtervite patent is not a *BIT*-protected investment. Even if the patent is protected, **(B)** Mercuria treated the Claimant fairly and equitably. Further, **(C)** Mercuria's *IP Law* amendment did not violate *BIT* article 6.

A. The Claimant's Valtervite Patent Is Not a *BIT*-Protected Investment

[77] The Valtervite patent is not a *BIT*-protected investment because **(1)** Mercuria granted the patent before the *BIT*'s entry into force. **(2)** The patent did not become a *BIT*-protected investment when the Holding Company assigned it to the Claimant. Further, **(3)** Mercuria is justified in challenging jurisdiction at this stage in the proceedings.

1. Mercuria Granted the Valtervite Patent before the *BIT*'s Entry into Force

[78] *BIT* article 13 provides that:

> This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of another Contracting Party on or after the date of its entry into force [emphasis added].

[79] Mercuria granted the Valtervite patent to the Holding Company on 21 February 1998[74] but the *BIT* did not enter into force until 9 April 1998.[75] Since Mercuria granted the patent before the *BIT*'s entry into force, it is not a *BIT*-protected investment.

2. The Patent Did Not Become a *BIT*-Protected Investment when the Holding Company Assigned It to the Claimant

[80] *BIT* article 13 limits *BIT* protection to new investments made on or after 9 April 1998. If this Tribunal confers *BIT* protection on the patent, it will render article 13 useless.[76] Existing investments could be assigned to related entities after the *BIT*'s entry into force, allowing existing investments to gain protections only meant for new investments.

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[74] Facts ¶3.

[75] *BIT* art 14; Order 2 ¶2.

[76] *Noble Ventures* ¶50; *SGS Philippines* ¶116; *Salini Jordan* ¶95; *Renco* ¶177; *Daimler* ¶231.

[81] The Holding Company and the Claimant are related entities: the Holding Company ultimately controls the Claimant and funds the Claimant's operations in Mercuria.[77] The Holding Company assigned the Valtervite patent to the Claimant six days after the *BIT*'s entry into force.[78] This Tribunal should therefore exclude the patent from *BIT*-protection.

3. Mercuria Is Justified in Challenging Jurisdiction at this Stage in the Proceedings

[82] PCA 2012 article 23(2) empowers this Tribunal to admit a late jurisdictional challenge if the delay is justified.

[83] This Tribunal should allow Mercuria to challenge jurisdiction over the patent at this stage because this Memorial is Mercuria's first opportunity to do so. Order 2, issued seven months after the Response, revealed that the Contracting Parties ratified the *BIT* on 10 March 1998.[79] Before Order 2 was issued, Mercuria could not have known that the Valtervite patent was granted six weeks before the *BIT*'s entry into force.[80] Mercuria is therefore justified in challenging this Tribunal's jurisdiction over the patent at this stage in the proceedings.

B. Mercuria Treated the Patent Fairly and Equitably

[84] Even if the patent is a *BIT*-protected investment, Mercuria treated the patent fairly and equitably. *BIT* article 3(2) provides that:

> Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment […]

[85] Some tribunals have found that an investor's legitimate expectations are part of fair and equitable treatment (**"FET"**) if the expectations were reasonable in the circumstances and the investor relied on those expectations.[81]

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[77] Order 2 ¶3; Order 3. See section II(A)(1).

[78] Order 3.

[79] Order 2 ¶2.

[80] Facts ¶3; *BIT* art 14(1).

[81] *EDF Services* ¶216; *Parkerings* ¶333; *Allard* ¶¶217-218; *BG Group* ¶¶294, 297.

[86] The Claimant may argue that Mercuria's *IP Law* amendment breached its legitimate expectations for a stable intellectual property rights ("**IPR**") regime. But **(1)** given Mercuria's greyscale crisis, the Claimant could not have legitimately expected a static IPR regime. Neither **(2)** Mercuria's public statements nor **(3)** *TRIPS* create legitimate expectations that Mercuria would not modify its IPR regime. **(4)** Regardless, Mercuria met its *TRIPS* obligations; and **(5)** Mercuria's regulation in the public interest outweighs the Claimant's legitimate expectations.

1. Given Mercuria's Greyscale Crisis, the Claimant Could Not Have Legitimately Expected a Static Intellectual Property Rights Regime

[87] The Claimant could not legitimately expect Mercuria's IPR regime to remain static because **(a)** Mercuria has a sovereign right to regulate investors; **(b)** the *International Covenant on Economic, Social, and Cultural Rights* ("***ICESCR***") requires Mercuria to provide affordable healthcare; and **(c)** the Claimant should have expected regulatory change given Mercuria's commitment to public health.

a. Mercuria Has a Sovereign Right to Regulate Investors

[88] States have a sovereign right to regulate investors in the public interest. This right is entrenched in customary international law.[82] So investors cannot legitimately expect states to refrain from regulating in the public interest.[83]

[89] International law gives host states significant deference to regulate in the public interest.[84] If the state's regulation is non-discriminatory, transparent, and procedurally proper, tribunals will defer to the state's regulatory power, even if the regulatory change negatively impacts investors.[85]

[90] Mercuria properly exercised its sovereign right to regulate in the public interest by amending its IPR regime to increase access to medicine. The amendment was non-discriminatory because it applied to all patented inventions. Further, the amendment was

[82] *Feldman* ¶109; *Methanex* part iv, ch D ¶7; *Saluka* ¶262; *Vivendi II* ¶139; Brownlie at 532; Sornarajah at 357; Newcombe at 23; 1998 Ministerial Statement ¶5; *MIGA Convention*.

[83] *Methanex* part iv, ch D ¶¶9-10; Potestà at 119.

[84] *SD Myers* ¶263.

[85] *Saluka* ¶¶307-308.

transparent and procedurally proper because it outlines the High Court's grounds for granting licenses and the factors the Court must consider to grant a license.[86]

[91] Given Mercuria's greyscale crisis, the Claimant could not have legitimately expected Mercuria to refrain from regulating in the public interest. Since Mercuria properly exercised its CIL right to regulate investors, Mercuria did not violate the Claimant's legitimate expectations.

b. ICESCR *Requires Mercuria to Provide Affordable Healthcare*

[92] The *BIT*'s preamble indicates that the *BIT* builds on multilateral treaty obligations.[87] This notified the Claimant that the *BIT* does not override Mercuria's existing treaty obligations.

[93] As a party to *ICESCR,*[88] Mercuria must provide its citizens "the highest attainable standard of physical and mental health."[89] To fulfill this obligation, states must ensure their citizens have access to affordable healthcare.[90] This obligation is part of *ICESCR*'s minimum core obligations, meaning Mercuria must always meet this obligation.[91] Since states are legally responsible if they fail to ensure access to affordable healthcare,[92] the Claimant must have expected that Mercuria would amend its IPR framework to make greyscale treatment accessible and fulfill its *ICESCR* obligations.[93]

c. The Claimant Should Have Expected Regulatory Change Given Mercuria's Commitment to Public Health

[94] Investors' legitimate expectations must consider the realistic risk of regulatory change given the host state's specific circumstances.[94] For example, the *Methanex* tribunal found that, considering California's historical concern for environmental issues, the investor should have

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[86] *IP Law* art 23C.
[87] *BIT* preamble.
[88] Order 3.
[89] *ICESCR* art 12.
[90] General Comment No 14 ¶12.
[91] *Ibid* ¶¶43-44.
[92] Chapman at 395.
[93] Facts ¶¶20, 22-23; Order 3.
[94] Potestà at 119.

expected regulatory change.[95] The *Glamis Gold* tribunal similarly held that the investor should have been aware of California's historical sensitivity about the environmental consequences of open-pit mining when forming its legitimate expectations.[96]

[95] Given Mercuria's commitment to public health, the Claimant should have expected regulatory change. The Claimant and Mercuria have a long-standing relationship to increase access to medicine in Mercuria.[97] In fact, their HIV/AIDS partnership (1999 to 2004) reduced the cost of treatment by as much as 50% and allowed 30,000 new patients to access medicine.[98]

[96] The NHA sought to partner with the Claimant after its 2003 report concluded that greyscale could spiral into a national crisis within a decade unless "aggressive measures were taken to combat it."[99] Against this backdrop, and Mercuria's historical commitment to public health, the Claimant should have expected that Mercuria would regulate to increase access to medicine.

2. Mercuria's Public Statements Did Not Create Legitimate Expectations for a Static Intellectual Property Rights Regime

[97] FET only protects an investor's legitimate expectations at the time of investment.[100] Mercuria did not make any public statements about its IPR regime until 19 January 2004,[101] almost six years after it granted the Valtervite patent on 21 February 1998.[102] So Mercuria's public statements could not have created legitimate expectations at the time of investment.

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[95] *Methanex* part iv, ch D ¶¶9-10.
[96] *Glamis Gold* ¶767.
[97] Facts ¶5.
[98] Annex 2 ¶2.
[99] Facts ¶6.
[100] *Glamis Gold* ¶22; *TECMED* ¶133; *LG&E* ¶130.
[101] Facts ¶3.
[102] *Ibid* ¶3.

[98] In any case, host states' unilateral statements only create legitimate expectations if the statement intended to create these expectations and the investor reasonably relied on the statements at the time of investment.[103]

[99] Neither the Minister's press release nor the President's Twitter statement created legitimate expectations that Mercuria would not change its IPR regime.

[100] The Minister's 19 January 2004 press release did not create legitimate expectations that Mercuria would not change its IPR regime. While the Minister called for a "stable, progressive IPR regime," he specifically limits Mercuria's commitment to "empower and engage right holders" to measures that will increase "access to healthcare for all."[104] So Mercuria publicly committed to an IPR regime that achieves its healthcare goals. The Claimant therefore could not have reasonably expected that Mercuria would not change its IPR regime to increase access to healthcare.

[101] Further, the Claimant could not have reasonably relied on the President's "tweet" as a basis for its legitimate expectations. On 20 January 2004, the President "shared" the Minister's press release on Twitter, saying: "Mercuria will do away with the red tape and roll out the red carpet for investors."[105] This statement did not promise to leave the IPR regime unchanged; it only promised to reduce bureaucratic hurdles to investment.

3. *TRIPS* Did Not Create Legitimate Expectations for a Static Intellectual Property Rights Regime

[102] The Claimant could not have reasonably relied on *TRIPS* to expect that Mercuria would not change its IPR regime. While *TRIPS* article 28(1) gives patent holders the exclusive right to exclude third parties from manufacturing and selling their patented invention without consent, this right is not absolute. *TRIPS* article 30 allows states to interfere with the patent holder's

[103] Kläger at 187; *Eastern Sugar* ¶¶243-244; *Thunderbird* ¶147; *Parkerings* ¶¶329-331; *BG Group* ¶295; *Allard* ¶¶217-218.

[104] Annex 2 ¶4.

[105] Facts ¶8.

exclusive rights,[106] and article 31 allows states to use a patented invention without the patent holder's permission, subject to certain criteria.

[103] Moreover, *TRIPS* article 8 articulates the treaty's underlying principles. It provides that:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health […] provided that such measures are consistent with the provisions of this Agreement.

The *Doha Declaration* reaffirms that *TRIPS* does not prevent states from acting to protect public health. Rather, *TRIPS* must be interpreted in a way that promotes access to medicine.[107] Specifically *Doha Declaration* article 5(b) provides that:

> Each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.

[104] Given that *TRIPS* limits patent holders' rights, the Claimant could not have reasonably expected that *TRIPS* would prevent Mercuria from amending its IPR regime.

4. Regardless, Mercuria Met Its *TRIPS* Obligations

[105] *TRIPS* aims to protect and enforce IPRs but it does not remove a state's right to regulate.[108] In fact, *TRIPS* article 31 specifically allows states to license patents without the investor's consent if:

- the license applicant tried, and failed, to obtain the patent holder's authorization.[109] But when there is a national emergency, the applicant only needs to notify the patent holder.[110] States have the right to determine what constitutes a national emergency.[111]

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[106] *TRIPS Commentary* at 473-475.
[107] WTO "Doha Declaration Explained".
[108] *TRIPS* art 30; *TRIPS Commentary* at 473.
[109] *TRIPS* art 31(b).
[110] *Doha Declaration* art 5(c); *Ibid*.
[111] *TRIPS Commentary* at 499; *Doha Declaration* art 5.

- the license does not exceed its prescribed scope.[112] States, however, may export licensed medicines to countries lacking production capacity.[113]
- the license predominantly supplies the domestic market.[114]
- the investor is paid adequate remuneration considering the state's economic circumstances.[115] The WHO guidelines indicate that adequate remuneration for pharmaceutical patents in developing countries can be less than 1%,[116] especially when the country is facing a public health crisis.[117]

[106] Mercuria met its *TRIPS* obligations:

- The Claimant was notified when it was impleaded in the license grant proceedings.[118] Since greyscale is a national emergency,[119] *TRIPS* does not require HG-Pharma to seek the Claimant's permission before the High Court can grant its license.
- Mercuria adhered to the license's scope. HG-Pharma's license is effective "until greyscale is no longer a threat in Mercuria."[120] As the Zika crisis demonstrates, disease knows no borders and requires a coordinated international effort to stop its spread.[121] Mercuria's neighbours are struggling financially and may not have the capacity to produce the medicines on their own.[122] As Mercuria's export of medicine to its neighbours helps combat the disease domestically, HG-Pharma's license adheres to the license's scope.
- HG-Pharma's license predominantly supplies Mercuria's domestic market.[123]

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[112] *TRIPS* art 31(c).
[113] *TRIPS Commentary* at 512.
[114] *TRIPS* art 31(f).
[115] *Ibid* art 31(h); *TRIPS Commentary* at 503 n 43.
[116] WHO Guidelines at 8.
[117] *Ibid* at 62.
[118] Order 3.
[119] Facts ¶¶6, 14.
[120] *Ibid* ¶20.
[121] *Zika Situation Report*; *Zika Transmission*.
[122] Facts ¶23; Order 3.
[123] Facts ¶¶20-24.

- The Claimant's 1% royalty is adequate remuneration because it conforms to the WHO's guidelines. This royalty is reasonable considering that Mercuria is a developing country struggling to ensure Mercurians have access to treatment during its greyscale crisis.[124]

[107] Since the Valtervite license complies with Mercuria's *TRIPS* obligations, Mercuria did not violate the Claimant's legitimate expectations.

5. Mercuria's Public Interest in Regulation Outweighs the Claimant's Legitimate Expectations

[108] Even if this Tribunal finds the Claimant legitimately expected that Mercuria's IPR regime would remain static, this Tribunal must balance these expectations against the state's right to regulate in the public interest.[125] As the *Methanex* tribunal explained, investors cannot pretend to have legitimate expectations of stability when states regulate to safeguard public health.[126]

[109] Further, the *BIT* itself requires this Tribunal to undertake this balancing exercise. The Contracting Parties recognized that the *BIT* will stimulate the host state's economic development "in a manner consistent with the protection of health."[127] So this Tribunal must not interpret the *BIT* in a manner that undermines public health.

[110] Mercuria's need to respond to the greyscale crisis outweighs the Claimant's legitimate expectations for a stable IPR regime. Between 2003 and 2006, the number of confirmed Mercurian greyscale patients increased by over 1,200% (from 20,483 to 266,298).[128] 100,000 patients could not afford the Claimant's medicine and others struggled with the cost.[129] So Mercuria enacted legislation empowering the High Court to grant non-voluntary licenses for patented inventions unavailable at a reasonable price.[130] Since Mercuria's regulation was

[124] Response ¶9; *Ibid* ¶16; Annex 3 at 43.
[125] *Lemire* ¶273; *Saluka* ¶¶305-306; VanDuzer at 147.
[126] *Methanex* part iv, ch D ¶9. See also *El Paso Award* ¶361; *Continental* ¶255.
[127] *BIT* preamble.
[128] Annex 3 at 42.
[129] *Ibid* at 42-43.
[130] *IP Law* art 23C(1)(b).

necessary to address its greyscale crisis, Mercuria's public interest in regulation outweighs the Claimant's legitimate expectations for a stable IPR regime.

C. The *Intellectual Property Law* Amendment Did Not Violate *BIT* Article 6

[111] Mercuria did not violate *BIT* article 6 when it amended its *IP Law* because **(1)** the non-voluntary license is specifically provided for by law and the High Court's judgment. Further, **(2)** Mercuria did not expropriate the Claimant's investment, as defined by the *BIT*. Regardless, **(3)** Mercuria compensated in accordance with its *BIT* obligations.

1. The Non-Voluntary License is Specifically Provided for by Law and the High Court's Judgment

[112] *BIT* article 6(1) provides that:

> Investments […] shall not be subject to any measure which might limit permanently or temporarily their joined rights of […] control or enjoyment, save where specifically provided by law and by judgments.

[113] The non-voluntary license is specifically provided by the amended *IP Law*. Any person can apply to the High Court for a non-voluntary license.[131] The High Court will only grant a license on limited grounds dictated by the law and it must consider the patent holder's rights against the public interest, except during national emergencies.[132]

[114] The High Court granted HG-Pharma's application under Mercuria's *IP Law*. The High Court had grounds to grant the license because greyscale medicine was not available at a publicly-affordable price.[133] Given Mercuria's greyscale crisis, the *IP Law* did not require the High Court to consider any other factors before granting HG-Pharma's license. The license was therefore specifically provided for by law and judgment, complying with *BIT* article 6(1).

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[131] *IP Law* art 23C(1).

[132] *Ibid* arts 23C(1)(b), 23C(4).

[133] Annex 3 at 42-43.

2. The Non-Voluntary License is Not Expropriation According to the *BIT*

[115] **(a)** Mercuria did not directly expropriate the Claimant's patent. **(b)** Nor did Mercuria indirectly expropriate the Claimant's patent, as defined by *BIT* article 6(4).

a. Mercuria Did Not Directly Expropriate the Claimant's Patent

[116] Direct expropriation occurs when a host state takes ownership of an investment,[134] like when a state seizes an investor's property.[135]

[117] Mercuria did not take ownership of the Claimant's patent. Mercuria's *IP Law* amendment allowed the High Court to grant a license for the Claimant's patent.[136] But the Claimant still owns the patent. And in fact, international law scholars, such as Professor Andrew Newcombe, do not consider non-voluntary licenses direct expropriation.[137] Mercuria therefore did not directly expropriate the Claimant's patent.

b. Mercuria Did Not Indirectly Expropriate the Claimant's Patent, as Defined by the BIT

[118] *BIT* article 6(4) provides that:

> Non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health […] do not constitute an indirect expropriation under this Article.

[119] *BIT* article 6(4) codifies Mercuria's customary international law police powers to regulate investors without compensating for losses.[138] State measures are *prima facie* a lawful exercise of state power.[139] States lawfully exercise their regulatory power if the measure is non-discriminatory and has a legitimate public-policy purpose.[140]

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[134] Bethlehem at 636; Salacuse at 322.

[135] Francis at 9.

[136] Facts ¶19.

[137] Newcombe.

[138] *Feldman* ¶109; *Methanex* part iv, ch D ¶7; *Saluka* ¶262; *Vivendi II* ¶139; Brownlie at 532; Sornarajah at 357; *Ibid* at 23; 1998 Ministerial Statement ¶5; *MIGA Convention*.

[139] Brownlie at 532.

[140] UNCTAD Expropriation at 78; Gibson at 380-384; Newcombe at 11-12; Paulsson & Douglas at 145-146.

[120] Mercuria did not indirectly expropriate the Claimant's patent because the *IP Law* amendment **(i)** is non-discriminatory and **(ii)** protects a legitimate public welfare objective.

i. The Intellectual Property Law *Amendment is Non-Discriminatory*

[121] Mercuria's *IP Law* amendment applies to all patented inventions.[141] The law clearly sets out the High Court's grounds and considerations for granting a license.[142] So the amended law is non-discriminatory.

ii. The Intellectual Property Law *Amendment Protects a Legitimate Public Welfare Objective*

[122] Mercuria amended its *IP Law* to increase access to medicine.[143] At US $27 per pill, 100,000 greyscale patients could not afford treatment. And Mercuria could only afford to provide treatment for 20,000 of these patients.[144] The *IP Law* amendment allowed HG-Pharma to produce a cheaper generic drug and reduced the cost of treatment by up to 80%.[145] Such savings would increase the number of people who could afford greyscale treatment.[146] The amendment served Mercuria's legitimate public health objective to increase access to medicine, so it is not indirect expropriation.

3. Regardless, Mercuria Compensated in Accordance with Its *BIT* Obligations

[123] Even if this Tribunal finds that Mercuria expropriated the Claimant's patent, it did not violate the *BIT* because **(a)** the Claimant's royalty complies with the *BIT*'s compensation requirements; and **(b)** *lex specialis* requires this Tribunal to defer to the *IP Law*'s appeal process.

[141] *IP Law* art 23C.
[142] *Ibid* art 23C.
[143] Facts ¶¶21-23; Annex 3 at 42-43.
[144] Annex 3 at 42-43.
[145] Facts ¶22.
[146] Annex 3 at 43.

a. The Claimant's Royalty Complies with the BIT *'s Compensation Requirements*

[124] *BIT* article 6(2) provides that Mercuria must immediately, fully, and effectively compensate investors for expropriation.

[125] The Claimant made it impossible for Mercuria to immediately compensate. HG-Pharma requested the Claimant's bank details to pay the royalty but the Claimant did not respond to HG-Pharma's request.[147]

[126] Full and effective compensation is not equal to compensation for an investor's total research and development costs.[148] Countries can choose the most appropriate method of compensation based on their unique circumstances and policy objectives.[149] Royalty rates should not undermine access to medicine.[150] That is why royalty rates are low for developing countries faced with public health crises.[151]

[127] The WHO compensation guidelines recommend that developing countries use the Tiered Royalty Method ("**TRM**") to calculate pharmaceutical royalties. The TRM's base 4% royalty is adjusted to each country's ability to pay.[152] Countries in similar circumstances to Mercuria have applied the TRM method and granted 0.5% royalties for non-voluntary pharmaceutical licenses.

Country	**Disease**	**Total Population**	**People Living with Disease**	**People Who Could Not Afford Treatment**	**Royalty Rate**
Thailand[153]	HIV/AIDS	68.85 million	500,000	400,000 (80%)	0.5%
Ecuador[154]	HIV/AIDS	16.14 million	37,000	30,200 (82%)	0.5%
Indonesia[155]	HIV/AIDS	250 million	143,078	101,000 (71%)	0.5%

[147] Order 3.
[148] UNCTAD IPR at 140.
[149] WHO Guidelines at 7.
[150] *Ibid* at 62, 85; UNCTAD IPR at 123.
[151] WHO Guidelines at 62.
[152] *Ibid* at 85; UNCTAD IPR at 141.
[153] Khor at 12.
[154] *Ibid* at 154; Public Citizen.
[155] Hilty & Liu at 453-454; WHO HIV; Widodo Decree.

[128] Mercuria pays royalty rates for incurable, non-fatal disease like greyscale between 0.5% and 3%.[156] The 1% royalty falls within Mercuria's historical rates and exceeds the rate paid by other developing countries.

[129] Since HG-Pharma tried to compensate the Claimant immediately and the 1% royalty is full and effective compensation, Mercuria did not violate *BIT* article 6(3).

b. This Tribunal Must Apply Lex Specialis *and Defer to Mercuria's High Court*

[130] *Lex specialis* is a principle of legal interpretation that resolves conflicts between multiple bodies of law; it prefers the application of a specialized legal rule over a generic one.[157]

[131] Mercuria's *IP Law* is a specialized legal framework for IPR. It provides patent holders with a specific mechanism to appeal non-voluntary licenses and royalties before the High Court.[158] By contrast, the *BIT* is a general framework for investor protection. So *lex specialis* requires this Tribunal to defer the Claimant's patent claims to Mercuria's High Court because it is the forum applying the *IP Law*'s specialized framework.

CONCLUSION

[132] The Claimant's patent predates the *BIT*'s entry into force and is therefore not a *BIT*-protected investment. Regardless, Mercuria treated the Claimant fairly and equitably because, given the greyscale crisis, the Claimant could not have legitimately expected Mercuria's IPR regime to remain static. Neither Mercuria's public statement nor *TRIPS* created such legitimate expectations. At any rate, Mercuria met its *TRIPS* obligations. Further, Mercuria did not violate *BIT* article 6. And even if the non-voluntary license is expropriation, Mercuria immediately, fully, and effectively compensated the Claimant. Mercuria therefore did not violate the *BIT*.

[156] Order 3.
[157] ILC *Lex Specialis* at 4, 5.
[158] Order 3.

IV. MERCURIA IS NOT LIABLE FOR ITS JUDICIARY'S CONDUCT RELATING TO THE ENFORCEMENT PROCEEDINGS

[133] Mercuria is not liable for its Judiciary's conduct relating to the enforcement proceedings because **(A)** Mercuria has no *BIT* obligation to provide the Claimant with effective means of asserting claims; **(B)** the Judiciary treated the Claimant fairly and equitably; **(C)** the Judiciary did not discriminate against the Claimant; and **(D)** Mercuria provided full protection and security to the Claimant's investment.

A. Mercuria Has No *BIT* Obligation to Provide the Claimant with Effective Means of Asserting Claims

[134] The Claimant argues that Mercuria failed to provide it with effective means to assert its claim.[159] The *BIT*, however, contains no such obligation.

[135] The only mention of effective means to assert claims is found in the *BIT*'s preamble:

> Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment.

[136] Preambles do not create binding obligations.[160] Rather, preambles express the parties' intentions[161] and help the tribunal interpret the BIT.[162] The *Chevron* tribunal only found a failure to provide effective means for asserting claims because this obligation was explicitly included in the *USA-Ecuador BIT*'s substantive obligations.[163] Since the *BIT* in this dispute only refers to "effective means of asserting claims" in its preamble, the parties did not intend to make it a *BIT* obligation.

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[159] Notice ¶13.

[160] Salacuse *Three Laws* at 365; Dolzer & Schreuer ¶32.

[161] Bjorge ¶3.3.2.

[162] *VCLT* art 31(2).

[163] *Chevron* ¶275; *USA-Ecuador BIT* art 2(7).

B. Mercuria's Judiciary Treated the Claimant Fairly and Equitably

[137] The fair and equitable treatment obligation prohibits host states from denying justice.[164] Mercuria treated the Claimant fairly and equitably because **(1)** the Judiciary did not deny the Claimant justice and **(2)** Mercuria's court congestion justifies the proceedings' length.

1. The Judiciary Did Not Deny the Claimant Justice

[138] Denial of justice requires a "gross misadministration of justice […] from an ill-functioning judicial system."[165] Few tribunals have found the host state's conduct sufficiently shocking to violate this standard.[166] Tribunals will only find a denial of justice if the administration of justice is "fundamentally unfair,"[167] like when a court liquidates an investor's assets without a hearing.[168] Mercuria did not treat the Claimant's enforcement proceedings in a fundamentally unfair manner because the Judiciary did not unduly delay these proceedings.

[139] Tribunals measure judicial delays against the case's complexity, the claimant's interests at stake, the litigants' behaviour, and the courts' behaviour, in light of the host state's circumstances.[169]

[140] The enforcement proceedings' delays are attributed as follows:[170]

[164] *Loewen* ¶189; *Jan de Nul* ¶188; *Vivendi I* ¶7.4.11; *Rumeli* ¶654; *Chevron* Paulsson Opinion ¶22; Dolzer & Schreuer at 142; UNCTAD FET at xvi.
[165] UNCTAD FET at 80.
[166] Goldhaber at 393-394.
[167] *Chevron* Paulsson Opinion ¶12.
[168] *Dan Cake* ¶¶145-146, 154, 162.
[169] *White Industries* ¶¶10.4.11-10.4.21.
[170] See Appendix A.

[141] The Judiciary did not unduly delay the Claimant's enforcement proceedings because **(a)** the proceedings do not require swiftness; **(b)** the Claimant is responsible for a 14.6-month delay; **(c)** Mercuria is only responsible for a 16.7-month delay, not the delays attributable to the NHA; and **(d)** the Judiciary's 16.7-month delay is not undue. **(e)** Even if this Tribunal attributes the NHA's conduct to the Judiciary, a 45.5-month delay is still not undue.

a. The Proceedings Do Not Require Swiftness

[142] Proceedings require swiftness when the delay causes a party to suffer.[171] As the *White Industries* tribunal, including the then Honourable Charles Brower, explained, cases involving human rights or criminal charges require swiftness; purely commercial matters, like award enforcement proceedings, are less urgent.[172] The Claimant's enforcement proceedings therefore do not require swiftness.

b. The Claimant is Responsible for a 14.6-Month Delay

[143] The Claimant erroneously assumed that the Commercial Bench had exclusive jurisdiction to hear award enforcement proceedings and asked to transfer its proceedings to the Commercial Bench.[173] This error caused a 14.6-month delay.[174]

[144] The Claimant misunderstood two Supreme Court decisions that upheld Commercial Bench enforcement decisions. These decisions did not find that the Commercial Bench had exclusive jurisdiction.[175] They simply upheld the Commercial Bench's decisions.

[145] Because the Claimant needlessly transferred its case to the Commercial Bench, it caused a 14.6-month delay in its own proceedings.[176]

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[171] *Frontier* ¶328; *Toto* ¶160.
[172] *White Industries* ¶10.4.14.
[173] Exhibit I ¶17.
[174] *Ibid* ¶¶18-28. See also Appendix A.
[175] Exhibit I ¶17.
[176] Appendix A; Exhibit I.

c. Mercuria is Only Responsible for a 16.7-Month Delay, Not Delays Attributable to the NHA

[146] International law distinguishes between state organs and state entities. States are responsible for state organs' conduct when state organs exercise judicial, legislative, or executive power.[177] States are not generally responsible for state entities' conduct because entities are distinct and independent from the state.[178] States, however, will be responsible for an entity's conduct if the state controls or instructs the entity.[179]

[147] The NHA is a state entity, not a state organ. It is an independent body[180] and does not exercise judicial, legislative, or executive powers.[181] Since the NHA is a state entity and Mercuria did not control or instruct the NHA during the enforcement proceedings,[182] Mercuria is not responsible for the NHA's conduct during these proceedings.

d. The Judiciary's 16.7-Month Delay is Not Undue

[148] Tribunals decide whether a delay is undue based on the specific circumstances of the proceedings. Proceedings do not automatically become unduly delayed just because they exceed a certain length.[183] A developing country's overburdened judiciary may justify a longer delay.[184] When the judiciary is overburdened, tribunals have found that delays ranging between five and 10 years are not undue.[185]

[149] Mercuria is a developing country with an overburdened judiciary.[186] The *White Industries* tribunal considered India's developing country status and its overburdened judiciary

[177] *ASR* art 4.
[178] *Ibid* art 8.
[179] *Ibid* arts 4, 5, 8.
[180] Order 3.
[181] Facts ¶5.
[182] Exhibit I.
[183] Freeman at 254; Amerasinghe at 210-211.
[184] UNCTAD FET at 7.
[185] *Frontier* ¶334; *Jan de Nul* ¶204; *Toto* ¶160; *White Industries* ¶¶11.4.9, 11.4.14.
[186] Response ¶9.

and found that the 42-month delay in the claimant's enforcement proceedings was not undue.[187] So a 16.7-month delay in this case is similarly not undue.

e. Even if this Tribunal Attributes the NHA's Conduct to the Judiciary, a 45.5-Month Delay is Still Not Undue

[150] If this Tribunal attributes the NHA's delays to the Judiciary, the Tribunal will find the Judiciary responsible for a 45.5-month delay.[188] The *White Industries* tribunal found that, considering India's developing country status and its overburdened judiciary, a 42-month delay in enforcement proceedings was not undue.[189] But as Professor Jan Paulsson explains, tribunals should not apply a strict formula to denial of justice.[190] Rather, tribunals should assess delays on a case-by-case basis.[191] Given Mercuria's developing country status and overburdened judiciary,[192] this Tribunal should not find that delays just 3.5 months more than those found in *White Industries* are undue.

2. Mercuria's Court Congestion Justifies the Delay

[151] Tribunals accept court congestion as a defense against undue delay if the state took measures to address the backlog and the congestion was temporary.[193]

[152] Mercuria's court congestion justifies the delay in the Claimant's enforcement proceedings. Mercuria took measures to address its judicial backlog. On 10 January 2012, Mercuria established the Commercial Bench to expedite commercial matters.[194] Limiting the Commercial Bench's jurisdiction to "original commercial suits" allowed it to specialize and efficiently deal with these suits.[195] This reduced the High Court's caseload and frequency of

[187] *White Industries* ¶¶10.4.18-10.4.24.
[188] See Appendix A.
[189] *White Industries* ¶¶10.4.18-10.4.24.
[190] *Chevron* Paulsson Opinion ¶12.
[191] Freeman at 254; Amerasinghe at 210-211.
[192] Response at 17.
[193] *Chevron* ¶129.
[194] Facts ¶19.
[195] Exhibit I ¶28.

judicial delays. In fact, the Claimant experienced no delays due to court congestion between May 2014 and November 2015.[196]

[153] Because Mercuria's court congestion was temporary, and Mercuria took measures to address judicial backlog, Mercuria's court congestion justifies the delay.

C. The Judiciary Did Not Discriminate Against the Claimant

[154] *BIT* article 3(2) provides that:

> Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the […] use, enjoyment, or disposal of investments.

[155] States discriminate against investors when state measures result in prejudicial treatment without reasonable justification.[197] But the Judiciary treated both parties equally and accepted every request that it could.[198] Only once was the Judiciary unable to accommodate the Claimant's request for a speedy hearing due to judicial backlog.[199]

[156] Moreover, the court's willingness to reprimand the NHA when necessary demonstrates that the Judiciary did not favour the NHA. On two occasions, the court informed the NHA's counsel that it would not tolerate further delays and would take strict measures if absences continued.[200] Further, on 5 March 2015, the judge stated that the court would not grant the NHA any further extensions.[201] And it did not do so.[202]

[157] Because the Judiciary treated the NHA and the Claimant equally and reprimanded the NHA when necessary, the Judiciary did not discriminate against the Claimant.

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[196] *Ibid* ¶¶32-40.
[197] Dolzer & Schreuer at 485.
[198] Exhibit I.
[199] *Ibid* ¶32.
[200] *Ibid* ¶¶5, 21.
[201] *Ibid* ¶37.
[202] *Ibid* ¶¶38-44.

D. Mercuria Provided the Claimant Full Protection and Security

[158] *BIT* article 3(2) provides that the Claimant's investment "shall enjoy full protection and security." This clause requires Mercuria to protect the Claimant's investment from physical harm.[203]

[159] Mercuria provided the Claimant full protection and security because **(1)** this obligation only applies to physical protection; it does not protect the Claimant's legal rights. **(2)** Even if this Tribunal finds that full protection and security extends to legal rights, Mercuria met this obligation.

1. Full Protection and Security Only Applies to Physical Protection

[160] Tribunals widely agree that full protection and security only applies to physical protection.[204] The *Saluka* tribunal, including Professor Yves Fortier, explained:

> The "full protection and security clause" is not meant to cover just any kind of impairment of an investor's investment but to protect more specifically the physical integrity of an investment against interference by the use of force.[205]

[161] Relying on the *Saluka* tribunal, Professor Christopher Dugan observed that many tribunal decisions indicate that states are only obliged to ensure physical security, not legal or economic security.[206]

2. Even If Full Protection and Security Protects Intangible Rights, Mercuria Met Its Obligations

[162] Even if full protection and security protects intangible rights, it only requires Mercuria to exercise due diligence.[207] States' discharge this obligation when they provide investors with a functioning court system and make legal remedies available.[208]

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[203] *Noble Ventures* ¶¶164-167; Schreuer FPS at 353; *Parkerings* ¶355.

[204] *BG Group* ¶326; *Rumeli* ¶668; *Vivendi II* ¶175; Salacuse at 239.

[205] *Saluka* ¶484; Salacuse at 239.

[206] Dugan at 535.

[207] Schreuer FPS at 14; *TECMED* ¶177; *Noble Ventures* ¶164; *Saluka* ¶484; *Plama Award* ¶181; *Biwater Gauff* ¶¶725, 726; *Rumeli* ¶668.

[208] Schreuer FPS at 16; *Parkerings* ¶¶360-361.

[163] Mercuria's Judiciary was functioning and effective: it was only responsible for a 16.7-month delay in the Claimant's enforcement proceedings.[209] Moreover, Mercuria tried to improve judicial efficiency by creating the Commercial Bench.[210] By providing the Claimant with a functioning court system and access to legal remedies, Mercuria provided full protection and security.

CONCLUSION

[164] Mercuria is not required to provide the Claimant with effective means of asserting claims. The Judiciary treated the Claimant fairly and equitably since it did not deny the Claimant justice. Further, the Judiciary did not discriminate against the Claimant and Mercuria provided the Claimant full protection and security. Mercuria is therefore not liable for the Judiciary's conduct during the Claimant's enforcement proceedings.

[209] Exhibit I.

[210] Facts ¶19.

V. THE NHA'S TERMINATION OF THE LONG-TERM AGREEMENT DOES NOT VIOLATE THE *BIT*'S UMBRELLA CLAUSE

[165] *BIT* article 3(3) provides that:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

[166] The NHA's termination of the LTA does not violate *BIT* article 3(3) because **(A)** the LTA is a purely commercial supply contract that does not attract international responsibility; and **(B)** the LTA was not a *BIT*-protected investment when the NHA entered into it. Further, **(C)** the LTA arbitration forum was the proper forum to hear this claim. In any case, **(D)** *res judicata* bars this Tribunal's jurisdiction.

A. The LTA is a Purely Commercial Supply Contract that Does Not Attract International Responsibility

[167] Umbrella clauses do not apply to states' commercial transactions;[211] only a state's sovereign acts, like enacting legislation, can invoke international responsibility.[212] A state agency engaged in commercial transactions, like the purchase of medicine, acts as a trader, not as a sovereign.[213]

[168] The LTA is a purely commercial supply contract and is not protected by the *BIT* because the NHA did not act as a sovereign when **(1)** it concluded the LTA nor when **(2)** it terminated the LTA**.**

1. The NHA Did Not Act as a Sovereign when It Concluded the LTA

[169] For the Claimant to have a *BIT* remedy, it must demonstrate that the NHA exercised governmental authority beyond that of an ordinary contractor.[214]

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[211] *El Paso Jurisdiction* ¶¶78-81; *Pan American* ¶106.

[212] *Joy Mining* ¶72; *CMS* ¶301; *El Paso Award* ¶¶78-81; *Pan American* ¶¶105-109; *Impregilo* ¶260.

[213] *Jurisdictional Immunity* art 2(c)(i); Dugan at 556; *Italy-Cuba* ¶73.

[214] *Salini Morocco* ¶155; *Impregilo* ¶260.

[170] The *Consortium* tribunal found that a state is responsible for a state entity's commercial contract if the state strongly influenced the entity or was involved in the contract's negotiation.[215] The *Nagel* tribunal similarly refused to attribute state responsibility for a commercial contract because the state was not involved in the contract's negotiation.[216]

[171] Mercuria is not responsible for the NHA's contract. The NHA operates independently from Mercuria and does not rely solely on state funding.[217] Importantly, Mercuria's government officials did not participate in the LTA's negotiations.[218] The NHA acted no differently than any non-state party entering into a contract. The LTA was therefore a purely commercial supply contract and its conclusion was not an exercise of Mercuria's sovereign authority.

2. The NHA Did Not Act as a Sovereign when It Terminated the LTA

[172] Tribunals recognize that not every contractual breach is a breach of international law; rather, only states' sovereign acts can violate a BIT's umbrella clause.[219] For the umbrella clause to elevate the NHA's termination of the LTA to a *BIT* violation, Mercuria must have exercised its sovereign powers when the NHA terminated the LTA.[220]

[173] The NHA, acting in a commercial capacity, allegedly breached the LTA.[221] This alleged breach did not involve state power. Any commercial party could similarly terminate a contract.

[174] The *Sempra* tribunal, interpreting an analogous BIT provision, found that elevating insignificant breaches to umbrella clause violations would be "an indefinite and unjustified extension" of the clause.[222] So this Tribunal should not elevate the NHA's alleged commercial breach to a violation of the *BIT*'s umbrella clause.

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[215] *Consortium* ¶19.
[216] *Nagel* ¶¶162-163.
[217] Order 3.
[218] Facts ¶9; Order 3.
[219] *Joy Mining* ¶72; *CMS* ¶301; *El Paso Jurisdiction* ¶¶78-81; *Pan American* ¶105; *Impregilo* ¶260.
[220] *CMS* ¶301; Bungenberg at 924; *Sempra* ¶310.
[221] Facts ¶17.
[222] *Sempra* ¶310; *USA-Argentina BIT* art II(2)(c).

B. The LTA Was Not a BIT-Protected Investment When It Was Concluded

[175] *BIT* article 3(3) requires Mercuria to "observe any obligation it may have entered into with regard to investments" [emphasis added]. The provision is written in the past tense so, for article 3(3) to apply, the LTA must have been an investment when it was concluded on 28 June 2004.[223]

[176] But the LTA was not an investment when it was concluded. The *Italy-Cuba* tribunal found that a commercial contract for pharmaceutical products was not a BIT-protected investment.[224] Likewise, the LTA was a pharmaceutical sales contract, not an investment.[225] The Claimant was a pharmaceuticals supplier and the relationship between the Claimant and the NHA was purely commercial. The LTA was therefore not a *BIT*-protected investment at the time it was concluded.

C. The LTA's Arbitration Forum Was the Proper Forum to Hear This Claim

[177] The Claimant wishes to bring its LTA claim before this Tribunal even though the LTA creates a specific forum to settle disputes. Past tribunals deferred to contracts' specific dispute-settlement mechanisms.[226] A majority of the *SGS Philippines* tribunal, including Professor James Crawford, held that a contract's specific dispute-settlement mechanism is preferable over a general BIT clause.[227] The *BIT* does not "change the proper law of the contract or its legal incidents, including the provisions for dispute settlement."[228] BITs provide frameworks to support and supplement investment arrangements, not to supplant them.[229] This Tribunal should therefore find the LTA's arbitration forum was the proper forum to hear this claim.

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[223] Order 2 ¶7.
[224] *Italy-Cuba* ¶¶219-220.
[225] Order 3; Facts ¶¶9-10.
[226] *SGS Philippines* ¶134.
[227] *Ibid* ¶141.
[228] *Toto* ¶¶200, 202; Crawford at 368.
[229] *SGS Philippines* ¶141.

D. *Res Judicata* Bars this Tribunal's Jurisdiction Over this Claim

[178] The Claimant is attempting to use *BIT* article 3(3) to relitigate the LTA arbitration. But *res judicata,* a general principle of international law, promotes judicial economy by preventing parties from relitigating a dispute involving the same subject matter, the same parties, and the same cause of action.[230]

[179] Both disputes have the same subject matter: the NHA's termination of the LTA.

[180] Both disputes deal with the same parties: Mercuria and the Claimant. The Claimant may argue that its LTA arbitration was against the NHA, not Mercuria, so the parties are different. But tribunals find that parties share an identity when they share legal interests[231]—*e.g.*, shareholders in the same company or a parent company and its subsidiary.[232] Mercuria had a shared legal interest in the LTA arbitration because the NHA is accountable to Mercuria.[233] So for the purposes of *res judicata*, Mercuria and the NHA are the same party.

[181] Both claims arise from the same cause of action. The Claimant may argue that the cause of action in this dispute is *BIT* article 3(3), not LTA clause 6. This Tribunal should, however, determine the cause of action based on the nature of the rights asserted, not the source of the claims.[234] Claims that arise from the same facts make up the same cause of action even if they are based on different provisions.[235] Since the NHA's termination of the LTA underlies both claims, the cause of action is the same.

[182] So even if *BIT* article 3(3) elevates the LTA's alleged breach to a *BIT* violation, *res judicata* bars this Tribunal's jurisdiction because, by the Claimant's own admission, the LTA arbitration already conclusively decided this claim.[236]

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[230] Blackaby & Partasides at 559; McLachlan at 82-83, 117-121.
[230] *Petrobart* at 40; *CME* Schreuer & Reinsich Opinion ¶46; McLachlan at 122-123, 130.
[231] *CME* Schreuer & Reinisch Opinion ¶¶38-40; *Apotex* ¶¶7.38-7.40.
[232] *Ampal Liability* ¶268; *RSM* ¶7.1.5; *Apotex* ¶7.40.
[233] Order 3.
[234] McLachlan at 130.
[235] Schaffstein at 19; De Ly & Sheppard Interim Report at 42.
[236] Notice ¶9; Facts ¶17.

CONCLUSION

[183] The *BIT*'s umbrella clause does not protect contracts created or breached by commercial acts. NHA did not enter into, or breach, the LTA while exercising sovereign authority. Moreover, the LTA was a purely commercial supply agreement, not a *BIT*-protected investment, when it was concluded. Further, the LTA's arbitration forum is the proper forum to hear claims over the LTA and, by the Claimant's own admission, that claim has been decided. So *res judicata* bars this Tribunal's jurisdiction.

PRAYER FOR RELIEF

[184] Mercuria requests the Tribunal to:

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

2. Declare that the Claimant cannot avail itself of the *BIT*'s benefits because Mercuria denied benefits under *BIT* article 2(1);

3. Where the Tribunal does not grant the second prayer, declare that Mercuria did not violate the *BIT*'s substantive protections. Specifically:

    - that Mercuria treated the Claimant and its investment fairly and equitably, pursuant to *BIT* article 3(2);
    - that Mercuria did not expropriate the Claimant's investment, pursuant to *BIT* article 6;
    - that Mercuria did not deny the Claimant justice, pursuant to *BIT* article 3(2);
    - that Mercuria did not discriminate against the Claimant, pursuant to *BIT* article 3(2);
    - that Mercuria provided the Claimant full protection and security, pursuant to *BIT* article 3(2); and,
    - that the NHA's termination of the LTA does not violate *BIT* article 3(3);

4. Find that Mercuria is entitled to all costs related to these proceedings; and,

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

APPENDIX A: ATTRIBUTION OF DELAYS IN THE CLAIMANT'S ENFORCEMENT PROCEEDINGS

Normal Court Delays Caused a 33.9-Month Delay		
Dates	Delay	Reason
3-Mar-09 to 16-Mar-09	13 days	Lag between the Claimant's filing and first appearance
16-Mar-09 to 11-May-09	1 month, 25 days	Court ordered Claimant to give notice of the application to the NHA
2-Mar-10 to 10-Jun-10	3 months, 8 days	Court directed the NHA to file a response
23-Feb-11 to 2-May-11	2 months, 9 days	Claimant sought leave to file a reply
2-May-11 to 3- Sept-11	4 months, 1 days	NHA sought leave to file a rejoinder
8-Nov-11 to 2-Jan-12	1 month, 25 days	Tribunal set the matter down for hearing
27-Mar-12 to 30-Apr-12	1 month, 3 days	Court directed both parties to file written submissions
2-Jan-14 to 20-Feb-14	1 month, 18 days	Matter was posted for hearing
20-Feb-14 to 20-Mar-14	1 month	Court posted the matter for argument
28-Nov-14 to 31-Jan-15	2 months, 3 days	Matter posted for decision on Amendment Application
31-Jan-15 to 5-Mar-15	1 month, 5 days	Court ordered NHA amended submissions filed
28-May-15 to 25-Jul-15	1 month, 27 days	Claimant directed to file a response
25-July-15 to 10-Nov-15	3 months, 16 days	Matter was posted for oral submissions
5-Mar-16 to 30-Sept-16	6 months, 25 days	NHA's counsel sick (provided doctor's note)
30-Sept-16 to 30-Oct-16	1 month	Parties in resolution discussion

The Claimant is Responsible for a 14.6-Month Delay		
Dates	Delay	Reason
30-Apr-12 to 14-Jun-12	1 month, 15 days	Claimant asked the Court to transfer its case to the Commercial Bench
14-Jun-12 to 4- Sept-12	2 months, 21 days	Case was transferred to the Commercial Bench
8-Jan-13 to 15-Apr-13	3 months, 7 days	Commercial Bench granted the NHA time to make further submissions

15-Apr-13 to 15-May-13	1 month	Matter listed for hearing
29-Jun-13 to 17-Sept-13	2 months, 19 days	Claimant sought extension to make further submissions
17-Sept-13 to 25-Oct-13	1 month, 8 days	Commercial Bench asked the parties to make their submissions on its jurisdiction
25-Oct-13 to 2-Dec-13	1 month, 7 days	Commercial Bench found it had jurisdiction and adjourned the matter
2-Dec-13 to 2-Jan-14	1 month	Matter reassigned to the High Court

The NHA is Responsible for a 28.8-Month Delay		
Dates	Delay	Reason
22-Sept-09 to 15-Jan-10	3 months, 24 days	NHA absent
15-Jan-10 to 2-Mar-10	1 months, 15 days	NHA absent
10-Jun-10 to 2-Oct-10	3 months, 22 days	NHA requests extension
2-Oct-10 to 1-Jan-11	2 months, 30 days	NHA requests extension
3-Sept-11 to 5-Oct-11	1 month, 2 days	NHA's counsel travelling
5-Oct-11 to 8-Nov-11	1 month, 3 days	Did not get client instructions
4-Sept-12 to 17-Oct-12	1 month, 13 days	NHA absent
8-Nov-12 to 8-Jan- 13	2 months	NHA absent
20-Mar-14 to 20-May-14	2 months	NHA miscalculated time needed for oral submissions
9-Sept-14 to 28-Nov-14	2 months, 19 days	NHA absent
5-Mar-15 to 28-May-15	2 months, 23 days	NHA amends submissions
15-Jan-16 to 5-Mar-16	1 month, 19 days	NHA miscalculated time needed for oral submissions
30-Oct-16 to 2-Jan-17	2 months, 3 days	NHA absent

The Judiciary is Responsible for a 16.7-month Delay		
Dates	Days	Reason
11-May-09 to 22- Sept-09	4 months, 11 days	Poor scheduling

1-Jan-11 to 23-Feb-11	1 month, 22 days	Overbooked docket
2-Jan-12 to 27-Mar-12	2 months, 25 days	Overbooked docket
17-Oct-12 to 8-Nov-12	22 days	Overbooked docket
15-May-13 to 29-Jun-13	1 month, 14 days	Overbooked docket.
20-May-14 to 6-Aug-14	2 months, 17 days	Overbooked docket
6-Aug-14 to 9-Sept-14	1 month, 3 days	Judge unavailable: attending a workshop.
10-Nov-15 to 15-Jan-16	2 months, 5 days	Overbooked docket

APPENDIX B: HISTORY OF CLAIMANT'S SHARE OWNERSHIP