PERMANENT COURT OF ARBITRATION
UNDER THE PERMANENT COURT OF ARBITRATION
ARBITRATION RULES 2012

ATTON BORO LIMITED
Claimant

v.

REPUBLIC OF MERCURIA
Respondent

MEMORIAL FOR RESPONDENT

25 September 2017

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LIST OF ABBREVIATIONS

Abbreviation	Meaning
Award	Award passed on 20 January 2009 by the tribunal seated in Reef
Basheera	Kingdom of Basheera
BIT	Bilateral investment treaty
Court	High Court of Mercuria
Claimant	Atton Boro Limited
Enforcement Proceedings	Proceedings in enforcement application no. 873/2009 before the High Court of Mercuria
FET	Fair and Equitable Treatment
Guaracachi	investor in *Guaracachi*
Government	Mercurian Central Government
Ibid.	In the same place
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
IP	Intellectual Property

IPR	Intellectual Property Rights
Italy-Romania BIT	Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments.
LTA	Long-Term Agreement entered into between Claimant and NHA on 25 November 2004
NHA	Mercuria National Health Authority
Notice	Notice of Arbitration
M-B BIT	Agreement between the Republic of Mercuria and Kingdom of Basheera for the Promotion and Reciprocal Protection of Investment
p./pp.	page/pages
Patent	Mercurian Patent No. 0187204 granted on 21 February 1998
para./paras.	paragraph/paragraphs
Parties	NHA and Atton Boro
PO1	Procedural Order No. 1 of 10 January 2017
PO2	Procedural Order No. 2 of 26 June 2017
PO3	Procedural Order No. 3 of 28 August 2017
Preamble	Preambule of the M-B BIT
Reef	The People's Republic of Reef

Respondent / Mercuria	Republic of Mercuria
R&D	Research and development
Response	Response to the Notice
Timeline	Timeline of the Proceedings in Enforcement Application No. 873/2009 Before the Hon'ble High Court of Mercuria
Tribunal	Arbitral Tribunal under the permanent court
UNCITRAL	United Nations Commission on International Trade Law
US-Ecuador BIT	Agreement Between the United States of America and the Republic of Ecuador, Concerning the Reciprocal Promotion of Investments of 27 August 1993
WTO	World Trade Organization

STATEMENT OF FACTS

Involved Entities

1. Claimant, Atton Boro, is a limited liability company incorporated under the laws of Basheera.[1] Through its parent company Atton Boro Group, it is owned and controlled by Atton Boro and Company, a corporation organized under the laws of Reef.[2]

2. Respondent is the Republic of Mercuria.[3]

The greyscale epidemic

3. In the early 1980s,[4] an infectious disease called greyscale emerged and has since grown into an epidemic inflicting serious health crisis on the developing countries. Respondent witnessed an upsurge of incidence of greyscale in 2002[5] and reacted by launching public information campaigns, engaged NGOs, private corporations as well as civil society.[6]

4. In 2003, as the greyscale epidemic was at its rise, the treatment available in Mercuria was only effective in early stages of infection and fell short of global standards of greyscale treatment. Therefore, in 2004, Mercuria encouraged the NHA to invite offers from pharmaceutical companies for supply of the more advanced medication.[7]

5. In 2006, the incidence of greyscale was at its historical peak. As a developing country, Mercuria faced a serious health crisis and struggled to provide sufficient treatment for all of its population. The total costs of greyscale treatment for just one year mounted to USD 1 billion, which amounted to 500% of the governmental greyscale program

[1] Notice, para. 1.

[2] PO2, para. 3.

[3] Notice, para. 1.

[4] PO1, Annex No.3, line 1298.

[5] PO1, Annex No.3, line 1313.

[6] PO1, Annex No.3, lines 1319-23.

[7] Statement, para. 7.

budget.[8]

Claimant's business activities in Mercuria

6. Claimant's parent company, Atton Boro Group, is a pharmaceutical company, which engages in drug development in a vast variety of medical branches. It has focused on boosting its business through developing treatments for critical epidemic diseases, which are threatening the population of developing countries, including greyscale.[9]

7. In 1998, Atton Boro and Company secured the Patent for a greyscale treatment called Valtervite in Mercuria.[10] In April 1998, Claimant was incorporated by Atton Boro Group to serve as its "*vehicle for carrying on business in South America and African countries*"[11] and for these purposes was assigned the Patent for Valtervite.[12] Atton Boro and Company also funded Claimant's manufacturing in Mercuria.[13]

8. On 20 July 2004, Claimant concluded the LTA with the NHA.[14] The LTA was a supply agreement under which Claimant undertook to supply Sanior, a drug containing Valtervite to NHA and NHA committed to place annual orders.[15]

9. The NHA is an entity that operates independently from the Government.[16] It, however, experienced budgetary problems due to the increased demand for greyscale medicines.[17] On 10 June 2008, after an unsuccessful attempt to renegotiate the prices agreed in the LTA, the NHA decided to terminate the LTA.[18]

The Award and the Enforcement Proceedings

[8] PO1, Annex No.3, lines 1363-66.

[9] Statement, para. 2.

[10] Statement, para. 3.

[11] Statement, para. 4.

[12] *Ibid.*

[13] PO3, line 1572.

[14] PO2, para. 6.

[15] *Ibid.*

[16] PO3, line 1591.

[17] Statement, para. 15.

[18] Statement, para. 17.

10. The NHA's termination of the LTA was reasoned by Claimant's unsatisfactory performance.[19] Claimant, however, contested the legitimacy of the termination and decided to invoke LTA's dispute resolution clause. Subsequently, in January 2009, Claimant obtained an arbitral Award issued by a tribunal seated in Reef[20] providing that the NHA is to compensate claimant with USD 40,000,000.[21]

11. On 3 March 2009, Claimant filed for the Enforcement Proceedings.[22] The Court heard Claimant's application immediately after, on 16 March 2009.[23] On 14 June 2012, the matter was transferred to a commercial bench[24] upon Claimant's own submission. However, the NHA objected to the jurisdiction of the commercial bench and the matter was subsequently returned to a regular bench.[25] These jurisdictional issues, together with numerous submissions of both parties, caused the Enforcement Proceedings to last until this day.[26]

The amendment to intellectual property law

12. Respondent is a developing country and high prices of greyscale treatment put its budget under serious pressure.[27] In 2005, Respondent was still facing a negative projection with regard to further spread of greyscale.[28]

13. On 10 October 2009, in a last attempt to secure healthcare for its people, Respondent as a party to TRIPS invoked one of the flexibilities under the TRIPS Agreement and introduced legislation on non-voluntary licences.[29]

[19] *Ibid.*

[20] *Ibid.*

[21] Notice, para. 9; Statement, paras. 17 and 18.

[22] Notice, Exhibit I, para. 1.

[23] *Ibid,* para. 2.

[24] *Ibid,* para. 18.

[25] *Ibid,* para. 29.

[26] PO3, line 1595.

[27] PO1, Annex No.3, lines 1363-66.

[28] Notice, para. 7.

[29] Statement, para. 20.

14. On 17 April 2010, a licence to manufacture Valtervite was issued by the High Court in favor of HG-Pharma, a generic drug manufacturer.[30] The licence was issued against standard compensation for Claimant.[31]

15. Claimant has never appealed against the issuance of the licence. Moreover, it refused to provide its cooperation with regard to the payment of the royalties under the licence.[32]

16. In 2012, the use of generic drugs for treatment of greyscale reduced the costs by as much as 80%,[33] making effective treatment available for all infected patients. Moreover, in 2013, Mercuria was able to provide humanitarian aid to people in three of its neighboring States.[34]

[30] *Ibid*, para. 21.

[31] PO3, line 1589.

[32] PO3, line 1597.

[33] Statement, para. 22.

[34] *Ibid,* para. 23.

PART ONE: PRELIMINARY ISSUES

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

17. The Tribunal does not have jurisdiction *ratione materiae,* because the Award does not enjoy the protection of the M-B BIT. The M-B BIT was concluded in order to promote greater economic cooperation between Mercuria and Basheera with respect to investments.[35] The protection was meant for investors who contributed to the economy of one of the parties to the M-B BIT and thus deserved fair and equitable treatment as well as other substantial protections.

18. In the present case, however, Claimant attempts to pass as an investment a foreign arbitral decision against an entity separate from Respondent. The Award does not represent any economic contribution made by Claimant to Respondent which would "promote economic cooperation" between Mercuria and Basheera in any way and thus deserve protection under the M-B BIT.

19. The sole purpose of Claimant's attempt to frame the Award as an investment is the establishment of the Tribunal's jurisdiction which would give Claimant an additional laverage when enforcing the Award.

20. Respondent invites the Tribunal not to follow Claimant's line of argumentation which would deny the purpose of the M-B BIT for the following reasons. First, despite Claimant's misinterpretation of its nature, (**A**) the Award does not constitute an investment in itself. Second, (**B**) the Award cannot benefit from the protections under the M-B BIT as a continuation of an investment because its basis, the LTA, does not qualify as an investment.

A. The Award does not qualify as an investment

21. Article 1 M-B BIT defines investment as "*any kind of asset held or invested either directly, or indirectly through an investor* (…) ".[36] The Award on its own does not satisfy such a definition of an investment, because it is nothing more than a decision of

[35] M-B BIT Preamble, lines 977-979.

[36] Article 1 M-B BIT, para. 994.

a foreign tribunal on rights and obligations under a commercial contract.[37]

22. In addition, it is necessary to perceive the term "investment" as defined in Article 1 M-B BIT within the meaning of the M-B BIT as a whole. As held by the tribunal in *Romak*, "*the term investment has a meaning in itself which cannot be ignored when considering the list contained in BIT*".[38] In the present case, Award does not satisfy the inherent meaning of the investment as established in Article 1 M-B BIT as it is not an asset held or invested through an investor, but a tribunal's decision.

23. It was established by the case law that arbitral awards in themselves do not qualify as investment protected by the relevant BIT. For instance in *Saipem*, the tribunal was considering decision on jurisdiction issued on 21 March 2007 and held that: "*It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.* "[39]

24. Furthermore, when the tribunal in *GEA* was considering an award and its underlying contract, it came to the conclusion that the "*two remain analytically distinct, and the Award itself involves no contribution to* [Respondent]*, or relevant economic activity*".[40]

25. In the present case, the Award is just a decision on commercial rights made by a foreign tribunal, provides no economical contribution and thus cannot be defined as an investment.

26. Therefore, the Award does not qualify for the investment protection including the jurisdiction of the Tribunal.

B. The Award is not an investment because the LTA is not an investment either

27. It is uncontested, that the LTA is only a sale-purchase agreement which laid base to

[37] *GEA,* para. 161.

[38] *Romak,* para. 180.

[39] *Saipem,* para.127.

[40] *GEA,* para. 161.

the exchange of money for goods, in particular the supply of Sanior.[41]

28. Article 1 c) M-B BIT defines investment as "claims to money".[42] However, as the tribunal in *Romak* found "*a mechanical application of the categories listed in…BIT would produce a result which is manifestly absurd or unreasonable*."[43]

29. The M-B BIT, as an international treaty, shall be interpreted in line with the VCLT. As the tribunal in *Muhammet* notes "*VCLT is applicable as customary international law in the relations between the parties and with respect to the interpretation of the BIT*".[44]

30. According to Article 31 VCLT "*terms of the treaty should be given meaning in the light of its object and purpose*".[45] Furthermore, when considering what interpretation should be used to follow the purpose of the treaty, tribunal in *Plama* held that "*a balanced interpretation which takes into account the totality of the Treaty's purpose is appropriate*".[46]

31. Therefore, when interpreting whether a certain asset qualifies as an investment, we need to use the balanced interpretation and look at the purpose of the M-B BIT, which is to protect and promote foreign investments.[47] And as found in *Romak* "*if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment*".[48] Or as found by the tribunal in *Azinian* "*labelling ... is no substitute for analysis*."[49] This approach is summarized in the so called "*unity of investment rule*".

32. Under the unity of investment rule, the Award could be defined as an investment only

[41] Statement, para. 10.

[42] M-B BIT, lines 1002-1003.

[43] *Romak,* para. 184.

[44] *Muhammet,* para. 93.

[45] Article 31 (1) VCLT.

[46] *Plama,* para. 167.

[47] Poulsen, p. 2.

[48] *Romak,* para. 207.

[49] *Azinian,* para. 90.

if it constituted a part of an overall economic operation in the respondent state,[50] which the Award does not satisfy.

33. Article 1 c) M-B BIT recognizes as investments "claims to money under a contract".[51] Nevertheless, not any contract can fall within this ambit. In accordance with the need to follow the purpose of the M-B BIT and in order to find a balanced interpretation, simple sale-purchase contracts do not qualify.

34. It is essential to distinguish between sale-purchase agreements and investments, as the objective which is set out in the Preamble of the M-B BIT is to protect investments and not to create a new judiciary instance for contractual disputes between private parties.[52] As held by the tribunal in Joy Mining "*if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment*".[53]

35. As LTA in not an investment, the Award which is based upon the LTA cannot constitute an investment within the meaning of Article 1 M-B BIT either. As found in Romak "*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*".[54]

36. Claimant's effort to dress up a contractual claim as a treaty claim cannot change the nature of the LTA and miraculously transform it into an investment. Therefore, this Award is not an investment and the Tribunal has no jurisdiction.

II. CLAIMANT HAS BEEN DENIED BENEFITS OF THE M-B BIT BY VIRTUE OF RESPONDENT'S INVOCATION OF ARTICLE 2 M-B BIT

37. By delivery of the Notice to the Permanent Court of Arbitration, Claimant accepted Respondent's standing offer and initiated an arbitral dispute under Article 3 PCA Arbitration Rules. On 9 November 2016, the International Bureau of the Permanent

[50] Global arbitration review, page 2.

[51] Article 1 M-B BIT, lines 1002-1003.

[52] *Romak,* para.187.

[53] *Joy Mining,* para. 58.

[54] *Romak,* para. 211.

Court of Arbitration acknowledged the receipt of the Notice and invited Respondent to respond to the Notice and appoint its arbitrator.[55] On 26 November 2016, Respondent submitted its Response to Claimant's notice and invoked Article 2 M-B BIT where the denial of benefits clause is enshrined.[56] By doing so, Respondent prevented admissibility of Claimant's claims and denied Claimant the benefits of the M-B BIT. Therefore, Respondent respectfully submits that Claimant is not entitled to invoke the M-B BIT and asks the Tribunal to decline jurisdiction over Claimant's claims.

A. Respondent has validly denied Claimant the benefits under the M-B BIT

38. Claimant arrogates to itself the protection under the M-B BIT against Respondent's alleged wrongdoings.[57] However, the Tribunal should not be misguided from the fact that Claimant is a mere mailbox company without any genuine business activity in the place of its incorporation.

39. In this regard, Respondent invites the Tribunal to take measures against Claimant's treaty shopping practice and declare its claims inadmissible pursuant to Article 2 M-B BIT because (**a**) Claimant is both owned and controlled by nationals of a third State, and (**b**) Claimant has no substantial business activity in Basheera.

a. Claimant is both owned and controlled by nationals of a third State

40. Respondent is entitled to deny benefits of the M-B BIT to "*a legal entity, if citizens or nationals of a third state own or control such entity.*"[58] These conditions are alternatives to one another pursuant to the ordinary meaning[59] of the conjunction "or". In the present case, both of these alternatives are met, as Claimant is not only owned, but also controlled by nationals of a third State.

41. The term "*nationals*" had previously been discussed by the *Abaclat* tribunal with the conclusion that, according to general international law, applied to corporate entities and other forms of organizations, the nationality requirement means that such entities and organizations must be duly constituted and organized under the law of the State of

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[55] Problem, line. 409-413.

[56] Response, para. 5.

[57] Notice, paras. 4, 14.

[58] Article 2(1) M-B BIT.

[59] Article 31 VCLT.

their nationality.[60]

42. When it comes to the ownership criterion, Claimant's shares are owned by Atton Boro affiliates, which are controlled by Atton Boro and Company.[61] Atton Boro and Company is constituted and organized under the laws of Reef.[62] Furthermore, the shares of Atton Boro and Company are owned by entities and individuals from the entire world.[63] Therefore, there remains no doubt that the ownership criterion of Article 2(2) M-B BIT is met in the present case.

43. Regarding the control over Claimant, it is not contested that Claimant was incorporated as a "*vehicle for carrying on business in South America and African countries.*"[64] It follows from the case file that Claimant is financially controlled by Atton Boro and Company from Reef. Firstly, Claimant's activities in Mercuria were funded by Atton Boro and Company[65] which provided financing to Atton Boro to perform its agreements with the Mercurian NHA since 1998 onwards.[66]

44. Secondly, even Claimant's parent company recognizes that Claimant is not much more than a "mailbox" company. The CFO of Claimant's parent company spoke of the compensation, which was granted to Claimant by the Mercurian Court, as if it was a direct compensation for the parent company itself.[67] Claimant's parent company fully financed research of medicines sold by Claimant.[68] The Patent, which served as a foundation of Claimant's business, was originally obtained by Atton Boro and Company[69] and only later assigned to Claimant[70] for Claimant's only purpose – to serve as a "vehicle" of a national of a third State, specifically the Kingdom of Reef.

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[60] *Abaclat,* para. 420.

[61] PO2, para. 3.

[62] Statement, para. 2.

[63] PO3, lines 1570-1571.

[64] Statement, para. 4.

[65] PO3, lines 1572-1573.

[66] *Ibid.*

[67] PO3, lines 1600 *et seq.*

[68] Statement, para. 3; PO3, lines 1600 *et seq.*

[69] *Ibid*.

[70] Statement, para. 4.

45. For the abundance of evidence both with regard to ownership and control of Claimant by nationals of a third State, the Tribunal is invited to pierce Claimant's corporate veil and find the conditions of Article 2(1) M-B BIT to be fulfilled.

b. Claimant has no substantial business activity in Basheera

46. In the Notice, Claimant introduces itself as an innovative pharmaceutical company with established presence in markets across the developing world.[71] Such description, however, does not reflect the real state of affairs since Claimant acts only as a vehicle for commercial operations of its holding companies without performing any substantial business activities in its place of incorporation in Basheera.

47. Pursuant to Article 2(1) M-B BIT, one of the conditions for Claimant to benefit from the protection of the investment treaty is substantial business activity in the territory of Basheera. Since the M-B BIT does not provide any guidance with regard to the interpretation of the term, Respondent invites the Tribunal to follow the decisions which dealt with similar legal and factual background.

48. For example, in *Guaracachi*, the investor sought relief for an abrupt nationalization of an electric generator by the Bolivian government, invoking the provisions of the US-Bolivia BIT.[72] In response to these claims, Bolivia raised an objection that Guaracachi was owned by third-country nationals and did not have any substantial business activity in the US where it was incorporated, hence could not rely on the BIT protection based on the denial of benefits clause.[73]

49. In fact, Guaracachi maintained offices in Delaware and Ohio, hired a commercial agent, held occasional shareholders's meetings in Ohio as well as Board of Directors' meetings, prepared the minutes of the said meetings, elected officers capable of entering into agreements and complied with the local tax regulations.[74] Despite all these facts, the tribunal was not satisfied that Claimant had substantial business activity in the US and declared that it had no jurisdiction to entertain investor's

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[71] Notice, para. 5.

[72] *Guaracachi*, para. 4.

[73] *Ibid*, para. 211.

[74] *Guaracachi Claimant's Counter-Memorial*, para. 62; *Guaracachi Réplica al Contra-Memorial*, paras. 141, 144.

claims.[75]

50. With regard to the evidence in the present case, Claimant's link to Basheera is even more doubtful than Guaracachi's link to the US. Although Claimant rented offices, hired two employees and opened a bank account shortly after its incorporation,[76] it has always remained a shell company with *"nominal, passive, limited and insubstantial activities*".[77] Unlike Guaracachi, Claimant has never held any meetings of shareholders or the board of directors, which casts further doubt on its actual operation. Its *pro forma* character is also corroborated by the fact that all Claimant's assets were either provided or directly financed by its holding companies.[78]

51. The lack of substantial business activities cannot be remedied by previous operations of Atton Boro Group in the territory of Basheera. As the tribunal in *PAC Rim Cayman* aptly explained, when dealing with the denial of benefits clause of a similar wording, the condition did not refer to the "*collective activities of a group of companies*, *but to activities attributable to the "enterprise" itself*".[79] In this regard, the presence of Atton Boro Group in Basheera's pharmaceutical market prior to Claimant's incorporation[80] has no evidentiary value.

52. For all the reasons above, Respondent submits that Claimant has been validly denied the benefits under the M-B BIT. Claimant has never had any substantial business activity in the territory of Basheera as its initial steps should have served as a mere camouflage for the treaty-shopping tactics pursued by Claimant's holding companies.

B. Denial of benefits can be invoked retroactively

53. Even if Claimant argues that denial of benefits was belated, this is not a case of belated invocation.

54. When two States enter into a BIT, they express their will to be bound by certain rules. These rules are agreed upon before-hand. An investor which is business conscious

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[75] *Guaracachi*, paras. 370, 384.

[76] Statement, para. 4.

[77] *PAC Rim Cayman*, para. 4.75.

[78] Statement, para. 4; PO2, para. 6; PO3, lines 1572-1573.

[79] *PAC Rim Cayman*, para. 4.66.

[80] Statement, para. 4.

should be aware of the conditions stipulated in the BIT. Inclusion of the denial of benefits clause in the BIT means that "*the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled.*"[81]

55. By entering into the M-B BIT, Mercuria and Basheera created a "*package of benefits to investors of both countries, including the benefit of being able to submit disputes to arbitration coupled with an express prior reservation of the right to deny those benefits if and when the Respondent so decides...*"[82] That's why any investor already knows in advance that it is possible for Mercuria to deny benefits subject to certain requirements. Claimant was fully aware of the denial of benefits clause and could have avoided such invocation by Respondent if it took certain precautions.

56. According to the *Ulysseas* tribunal, the time limit for the exercise of the denial of benefits clause is subject to the rules governing the arbitration. In *Ulysseas*, these were UNCITRAL rules, where the jurisdictional objections must be raised no later than in the statement of defence.[83] The relevant provision of the UNCITRAL rules as mentioned below is the same as Article 23(2) PCA Rules governing this arbitration:

> *"A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off."*[84]

57. Respondent invites the Tribunal to follow the decision made by the *Ulysseas* tribunal. The above cited articles explicitly allow the jurisdictional objections to be raised in the Response. That is precisely what Respondent did on 26 November 2016.[85] The future possibility of denial of benefits is a part of the M-B BIT and Claimant should have been aware that Respondent may invoke Article 2 M-B BIT in any time until the probable dispute arises and Respondent files its response. Respondent invoked the denial of benefits clause timely pursuant to the PCA Rules and the M-B BIT in

[81] *Guaracachi*, para. 372.

[82] *Ibid*, para. 373.

[83] *Ulysseas*, para. 172.

[84] UNCITRAL Rules, Article 23(2).

[85] Response, para. 5.

Response to Claimant's Notice.[86]

58. The tribunal in *Guaracachi* agreed that usually denial of benefits will be used after the investor decides to invoke one of the benefits of the BIT, i.e. when Claimant fils a notice of arbitration. "*The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed.*"[87]

59. If Respondent notified Claimant about denial of benefits before any dispute arose, it could be seen as an "*unfriendly and groundless act, contrary to the promotion of foreign investments.*"[88] After the dispute arose, Respondent had a reason to examine whether the M-B BIT benefits apply to Claimant.

60. Although Respondent acknowledges according to some tribunals the denial of benefits may have only prospective effects. However, all such decisions were taken by ECT tribunal under the ECT which is not applicable in this case. Given the sufficient amount of applicable case law as described above, this Tribunal should not be concerned with ECT case law.

61. For the aforementioned reasons, Claimant was denied benefits of the M-B BIT. Hence, Respondent believes that this Tribunal shall be deprived of the jurisdiction over the present dispute as all conditions for denial of benefits were met.

PART TWO: MERITS

III. AMENDMENT TO RESPONDENT'S IP LAW AND ISSUANCE OF NON-VOLUNTARY LICENCE DO NOT CONSTITUTE BREACH OF THE BIT

62. In 2002, Mercuria was massively hit by epidemic of an incurable disease which became a serious threat to the health of its working-age population.[89] In an attempt to prevent the spread of greyscale, Respondent launched a massive campaign[90] and

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[86] Response, para. 5.

[87] *Guaracachi*, para. 376.

[88] *Ibid*, para. 379.

[89] PO1, Annex 3, lines 1315-1316.

[90] *Ibid*, lines 1316-1318.

directed the NHA to invite offers for the supply of greyscale treatment.[91]

63. Despite Respondent's efforts, which led to a nearly 50% increase in the number of individuals who got themselves tested,[92] greyscale uncontrollably spread across the country and brought the public health system to the brink of a collapse when the number of patients dependent on publicly funded treatment rocketed by 900 % in only one year.[93]

64. In the face of the public health crisis, Respondent resorted to extraordinary measures and invoked one of the flexibilities in the TRIPS Agreement to regain access to greyscale treatment through a non-voluntary licence.[94] However extreme, these actiones were to protect public health and as such (**A**) do not amount to an indirect expropriation, (**B**) in any event, were lawful and fall within the police powers of Respondent, (**C**) are fully compliant with Respondent's TRIPS obligations, and (**D**) do not violate the fair and equitable standard of treatment under Article 3(2) M-B BIT.

A. Respondent's measures do not constitute indirect expropriation

65. In the Notice, Claimant blamed Respondent for abuses of its police powers to the detriment of investors,[95] suggesting that Respondent's actions were tantamount to taking of Claimant's IPR. However, Claimant's allegations concerning this indirect expropriation by Respondent lack both factual and legal support.

66. To establish indirect expropriation, Claimant bears the burden of proof[96] to show that (**a**) it has been substantially deprived of its investment, and (**b**) such deprivation is of permanent character. While Claimant's IPR have indisputably been affected by the amendment to Mercurian IP law and the issuance of compulsory licence, Respondent submits that the effects of such actions do not reach the threshold for indirect expropriation.

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[91] Statement, para. 7.

[92] PO1, Annex 3, lines 1334-1336.

[93] *Ibid*, 1359-1361.

[94] *Ibid*, paras. 20-21.

[95] Notice, paras. 11-13.

[96] *Electrabel Jurisdiction and Liability*, para. 6.53; *Link-Trading Jurisdiction*, para. 8.8.16.

a. Claimant failed to prove substantial deprivation of its investment

67. To define a State measure as indirect expropriation, it is required to establish substantial damage to the investment.[97] In *Pope & Talbot*, the tribunal found that mere interference in the form of export quotas which resulted only in a reduction of profits for the investor did not amount to an expropriation, emphasizing that the investor remained in control of the investment, directed day-to-day operations and was free from interferences into the pursuit of the company's economic strategies and appointment of employees.[98] Since identical criteria were uniformly applied in other cases concerning the same issue,[99] Claimant invites the Tribunal to follow the *Pope & Talbot* test when considering the facts of the present case.

68. Even after the legislative changes and the issuance of the non-voluntary licence, Claimant remained the holder of the patent to Valtervite,[100] losing only the right to its exclusive use but not the control as such, which Claimant itself recognized in the Notice.[101] Similarly as in *Pope & Talbot*, Respondent has neither run Claimant's daily business nor interfered in its management decisions regarding the marketing of greyscale treatment. Although Claimant argues the opposite, it was its own choice to stop dealing in Sanior[102] when its market share and profits declined due to market competition.[103]

69. In sum, while Respondent's measures affected to a certain extent the returns of Claimant's investments into the R&D of greyscale treatment, the reduction of Claimant's profits is not sufficient for the Tribunal to indirect expropriation.

b. Respondent's measures are temporary

70. In evaluating the degree of Respondent's interference into Claimant's IPR, the Tribunal should analyse not only the economic impact but also the duration of the

[97] *Telenor*, paras. 65, 70; *Metalclad*, para. 103; *CME*, para. 688; *Pope & Talbot Interim Award*, paras. 96, 102; *Philip Morris*, para. 284.

[98] *Pope & Talbot Interim Award*, paras. 99-100.

[99] *CMS*, para. 263; *LG&E*, para. 188; *Sempra*, para. 284; *Enron*, para. 245.

[100] Statement, para. 21; PO1, Annex 4.

[101] Notice, para. 11.

[102] Statement, para. 25.

[103] *Ibid*, para. 24.

measures.[104] Generally, the expropriation has to be of a permanent nature to create '*a persistent or irreparable obstacle*'[105] to Claimant's use of IPR.

71. In *Tecmed*, the investor claimed compensation for the non-renewal of an operating licence and the enactment of domestic legislation which prohibited the use of the site where the investor's landfill was located to confine hazardous waste due to the proximity to the urban centre of Hermosillo. Applying the test of permanent deprivation, the tribunal found that Mexican regulation made it effectively impossible for the investor to operate the landfill at any time in the future, and resulting in indirect expropriation.[106]

72. Claimant has never been confronted with similar obstacles. According to the Court decision from 17 April 2010, the non-voluntary licence to manufacture Valtervite was granted only temporary until greyscale epidemic no longer posed a threat to public health in Mercuria.[107] Besides, Respondent has never indicated that it would extend the validity of the compulsory licence to permanently restrict Claimant's IPR.

73. Respondent accepts that the licence has been in place already for seven years,[108] but during this time it tried to stop the spread of the illness through nation-wide campaigns[109] and cross-border cooperation.[110] In this regard, the duration of the measures must be imputed to the aggressive character of the epidemic, not to Respondent itself.

74. In conclusion, since the non-voluntary licence was granted only temporary with the objective of restoring Claimant's IPR as soon as possible, the indirect expropriation claim must be dismissed.

B. In any event, Respondent's measures were lawful and in accordance with the police powers doctrine

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[104] *S.D. Myers*, para. 283; *LG&E*, para. 193.

[105] *Generation Ukraine*, para. 20.32.

[106] *Tecmed*, paras. 116-117.

[107] Statement, para. 21.

[108] *Ibid.*

[109] PO1, Annex 3, lines 1316-1318.

[110] Statement, para. 23.

75. Claimant is trying to discredit the legitimacy of the IP legislation by describing it as a method for Respondent's enrichment at the expense of investors. [111] Such allegation is, however, far from being accurate as the provision regarding non-voluntary licences was incorporated into the Mercurian legal system as "a law for need, not a law for greed".[112]

76. It is a well-established practice in investment arbitration that in the area of policy matters, States are free to regulate in the interest of public welfare,[113] without being held responsible for potential damage to investors.[114] This prerogative finds support also in Article 6(4) M-B BIT which provides that non-discriminatory measures protecting legitimate public goals, such as public health specifically, do not qualify as indirect expropriation.

77. Since 2002, Mercuria has been struggling with a progressive growth in the number of greyscale patients as well as lack of funding,[115] with the situation deteriorating every year, as Claimant itself recognized in the Notice.[116] In view of its positive obligations under Article 12 ICESCR,[117] Respondent, therefore, had to take a decisive action to ensure access to the greyscale treatment and control the spread of the illness devastating the population. While a non-voluntary licence is unquestionably a measure of last resort, it is by no means irregular or unusual.

78. According to the survey conducted by the WIPO Secretariat, non-voluntary licences to patent-protected inventions are in some form incorporated in the IP legislation in both developed and developing countries.[118] Furthermore, in the area of pharmaceuticals specifically, the pursuit of licensing procedures has been a standard reaction to public health crises and related financial difficulties all over the world, as the examples of Brazil, Ghana, Indonesia, Malaysia, Mozambique, Rwanda, Thailand, Zambia or

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[111] Notice, paras. 8, 11, 12.

[112] Sornarajah. pp. 329-357.

[113] Dolzer and Schreuer, p.120.

[114] *Feldman*, para. 103; *Telenor*, para. 64; *S.D. Myers*, para. 281; *Saluka*, para. 262; *Continental Casualty*, para. 276.

[115] PO1, Annex 3, lines 1338-1344, 1363-1374.

[116] Notice, para. 7.

[117] CESCR General Comment No. 14, paras. 44

[118] WIPO Secretariat, pp. 3-6; Correa 1, X.1 Grounds for Granting Compulsory Licenses.

Zimbabwe illustrate.[119]

79. Claimant's complaints about Respondent's measures, therefore, disregard the common practice and as such must fail on the merits – even more as Claimant has been provided with a standard[120] compensation in the form of a royalty accounting for 1 % of Valtervite revenues.[121]

C. Respondent's measures are fully compliant with its obligations under the TRIPS Agreement

80. Claimant requests the Tribunal to find that Respondent violated its obligations under the TRIPS Agreement.[122] Respondent submits that such a request must be rejected because the Tribunal has no jurisdiction over disputes arising under international IP treaties concluded by States.[123]

81. Non-voluntary licences constitute one of the flexibilities in the TRIPS Agreement which enables States to set aside strict IP protection rules in support of crucial public interests. According to Article 31 of the treaty, States may authorize the use of patents without the consent of the right holder provided that such use is non-exclusive, non-assignable, limited in scope and duration to the declared purpose and against an adequate remuneration. Considering the general wording of the respective provision, States are given a relatively wide margin of discretion for its application.[124]

82. In the present case, the non-voluntary licence was incorporated into Mercurian legal system at a time when the country was fighting an aggressive epidemic which claimed an increasing number of victims every year.[125] Due to the national emergency[126] and missing supplies of treatment for patients,[127] Respondent was allowed to rely on the exception under Article 31(b) of the TRIPS Agreement to permit the use of Valtervite

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[119] Zimmeren and Requena, pp. 123, 139; Love, pp. 11-18; Goodwin, p. 569; Reichman, p. 6.

[120] PO3, lines1589-1590.

[121] Statement, para. 21.

[122] Notice, para. 13.

[123] DSU, Article 23; *AHS*, para. 152.

[124] Haugen, p. 245.

[125] Notice of Arbitraiton, para. 7; PO1, Annex 3, lines 1338-1344.

[126] Declaration on TRIPS, para. 5(c).

[127] PO3, lines 1583-1584.

without seeking Claimant's consent. Furthermore, being impleaded as a party to the proceedings before the Court,[128] Claimant is not able to establish any violation of the procedural requirements.

83. Turning to the substantive obligations, the licence for the manufacturing of Sanior was issued on a non-exclusive and non-assignable basis for a limited period of time until greyscale remained the threat to the Mercurian population.[129] The fact that the licence has been in place for seven years is completely irrelevant since the WTO Member States themselves recognized that even long-term public health crises, such as those related to HIV/AIDS, tuberculosis or malaria, may represent "*circumstances of extreme urgency*".[130]

84. Additionally, Claimant was awarded a standard[131] compensation in the amount of 1 % of Valtervite revenues.[132] Although the Mercurian legal system provides patent holders the opportunity to question the validity of the licence as well as the royalty,[133] Claimant decided not to use its procedural rights, even refusing to cooperate in the matter of the transfer of the compensation.[134] In this regard, Claimant's complaints regarding the judicial proceedings and denial of compensation[135] are simply inapposite.

85. Considering the Tribunal's lack of jurisdiction and absence of evidence of any violations of Respondent's international IP obligations, Respondent respectfully asks the Tribunal to dismiss all claims related to the TRIPS Agreement.

D. Respondent's actions do not amount to an unfair and inequitable treatment of Claimant's investments

86. Contrary to what Claimant suggests, Respondent did treat Claimant's investments fairly and equitably because (**a**) Claimant could rely on the stability of the legal system

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[128] *Ibid*, lines 1576-1577.

[129] Statement, para. 21.

[130] Declaration on TRIPS, para. 5(c). See also Correa 2, p. 17.

[131] PO3, lines 1589-1590.

[132] Statement, para. 21.

[133] PO3, lines 1578-1580.

[134] *Ibid*, lines 1597-1599.

[135] Notice, para. 12.

in Mercuria, and (**b**) Respondent's measures were non-discriminatory and proportionate.

a. Respondent did not frustrate Claimant's legitimate expectations

87. Claimant objectioned that by changing the legal regime concerning IPR, Respondent frustrated Claimant's legitimate expectations.[136] Claimant, however, has never received any assurances about permanent regulatory freeze.

88. It is common ground in the decisions of investment tribunals that the requirements of legitimate expectations and legal stability do not affect the State's prerogative to adapt its legal system to changing circumstances.[137] In this regard, amendments to general legislation do not violate the fair and equitable standard of treatment if they do not modify the regime relied upon by the investor "*outside of the acceptable margin of change*".[138]

89. In order to meet its burden of proof,[139] Claimant needs to provide evidence of specific undertakings or representations made by Respondent. In *Philip Morris*, the investor tried to base its legitimate expectations to explore its brand assets and enjoy its IPR on the general Uruguayan trademarks regulation. Pointing to the harmful effects of investor's products,[140] the tribunal held that Philip Morris failed to produce any evidence of specific commitments made by Uruguay, concluding that:

> *"no undertaking or representation may have been grounded on legal rules of general application [....], made subject in any case to the State's regulatory power in the public interest."*[141]

90. The Mercurian patent to Valtervite was granted in February 1998,[142] more than ten

[136] *Ibid*, para. 13.

[137] *BG Group*, paras. 292-310; *Plama*, para. 219; *Continental Casualty*, paras. 258-61; *AES*, paras. 9.3.27-9.3.35; *Total*, paras. 123,164; *Paushok*, para. 302; *Impregilo*, paras. 290-291; *El Paso*, paras. 365-367.

[138] *El Paso*, para. 402.

[139] *Eli Lilly*, para. 385.

[140] *Philip Morris*, para. 429-430.

[141] *Ibid*, para. 431.

[142] Statement, para. 3.

years after the occurrence of greyscale had been confirmed in the country.[143] While the Mercurian legal system did not provide for the issuance of compulsory licences at the time of the investment,[144] such state of affairs became unsustainable in the light of the increasing number of victims and dwindling funds.[145]

91. Given Respondent's status as a party to the TRIPS Agreement,[146] it would be highly unreasonable from Claimant not to anticipate Respondent's willingness to invoke one of the flexibilities to the stringent IP regime to safeguard public health and ensure access to vital treatment. Such conclusion is further corroborated by the fact that Claimant itself projected further upsurge in the prevalence of greyscale,[147] making Respondent's interference into the IP regulatory framework even more likely.

92. For completeness, the fact that Mercurian official authorities supported the reduction of bureaucratic obstacles[148] and cooperation with IP right holders[149] is irelevant in the present case. Both statements were made six years after the grant of the patent[150] and cannot, therefore, form a valid basis for expectations upon which Claimant relied when making the investment.

b. Respondent's measures were non-discriminatory and proportionate

93. As far as the impact of the amended IP regulatory regime is concerned, Respondent submits that the measures which affected Claimant's investment were neither discriminatory, nor disproportional.

94. In order to establish discrimination, an investor bears the burden of proving a discriminatory basis upon which the State pursued unjustifiable differential treatment.[151] In the present case, Claimant, however, has not and will not be able to do

[143] PO1, Annex 3, lines 1301-1303.

[144] PO3, lines 1577-1578.

[145] PO1, Annex 3, lines 1338-1344, 1359-1366, 1374.

[146] PO2, para. 2.

[147] Notice, para. 7.

[148] Statement, para. 8.

[149] PO1, Annex 2, lines 1269-1271.

[150] Statement, para. 8.

[151] *Saluka*, para. 313; *Crystallex*, para. 715.

so since the wording of the Law no. 8458/09 is strictly neutral.[152] Providing for the opportunity to file a request for a non-voluntary licence, the law sets no criteria with regard to the identity or characteristic of applicants or right holders. Furthermore, the fact that the new legislation targets industries closely related to patents lacks any evidentiary value since investment tribunals consistently held that differential treatment of certain sectors in pursuit of public interests did not constitute unjustifiable discrimination.[153]

95. Turning to the principle of proportionality, the necessity and suitability of Respondent's actions requires further analysis which, however, needs to pay due regard to "*the context within which a measure was adopted and the host State's purpose*."[154] In this respect, a measure cannot be deemed disproportionate if it contributes to the regulatory end pursued which cannot be achieved by less restrictive means.

96. In the present case, the non-voluntary licence was issued in response to an imminent threat to public health of the Mercurian population. Since 2002, greyscale has claimed a growing number of victims each year,[155] hence putting Respondent's budget under enormous pressure.[156] Following the termination of Sanior supplies in 2008,[157] the public health crisis in the country further deteriorated as the patients in Mercuria were deprived of the only effective treatment.[158]

97. In light of these circumstances, the regulatory change and subsequent issuance of a compulsory licence to Valtervite was necessary not only to secure the missing supplies, but also to ease the financial burden of a developing country. The suitability of the adopted measures is then evidenced by the 80% drop in purchase costs[159] owing to which Respondent is able to better control the spread of the illness by providing

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[152] PO1, Annex 4.

[153] *Rusoro*, para. 563; *GAMI*, para. 114; *El Paso*, para. 315; *Metalpar*, para. 161.

[154] *LG&E*, para. 194.

[155] PO1, Annex 3, lines 1313-1315, 1338-1344.

[156] *Ibid*, lines 1351-1354, 1363-1366.

[157] Statement, para. 17.

[158] PO3, lines 1583-1584.

[159] Statement, para. 22.

greyscale treatment to vulnerable parts of the population for free.

98. To conclude, although the non-voluntary licence certainly had an impact on Claimant's investment, it was issued on a non-discriminatory basis in the interest of the whole Mercurian population. With regard to the absence of alternative treatments and effects on Respondent's budget, the measure was both necessary and suitable to protect public health in Mercuria and as such does not violate the fair and equitable standard of treatment.

IV. RESPONDENT DID NOT BREACH ARTICLE 3 M-B BIT THROUGH THE CONDUCT OF ITS JUDICIARY IN THE ENFORCEMENT PROCEEDINGS

99. The Tribunal does not have jurisdiction in relation to the enforcement of the Award. However, even if the Tribunal asserts such jurisdiction, Article 3 M-B BIT has not been breached by Respondent.

100. On 3 March 2009, the High Court of Mercuria received Claimant's application for enforcement of the Award, passed by a tribunal in Reef.[160] Claimant's application was heard by the Court on 16 March 2009,[161] immediately after its processing. The course of the Enforcement Proceedings, which is recorded in the Timeline,[162] was in accordance with national laws and principles of due process. Although Claimant asserted that "*the Court indulged every delay tactic employed by the NHA*",[163] it failed to provide any evidence.

101. Mercuria is a developing country with overburdened judiciary catering to a population of 67 million people.[164] For over a decade, Claimant has been in business with Mercuria[165] and therefore aware of Respondent's conditions. In spite of these conditions, the Enforcement Proceedings were conducted justly, fairly and equitably.

102. Claimant's claims for the breach of Article 3 M-B BIT in relation to the Enforcement Proceedings shall be denied because (**A**) Respondent did not violate the fair and

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[160] Notice, Exhibit I, para. 1.

[161] *Ibid*, para. 2.

[162] Notice, pp. 7-12.

[163] *Ibid*, para. 10.

[164] Response, para. 9.

[165] Notice, para. 6.

equitable treatment standard under Article 3(2) M-B BIT as (**a**) Claimant has not been denied justice and (**b**) Claimant's legitimate expectations were not violated. Furthermore, (**B**) Respondent has not violated the effective means standard.

A. Respondent did not violate the fair and equitable standard under Article 3(2) M-B BIT

103. The court in *Mondev* observed that "[a] *judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case*."[166] According to Schill, "*in view of the existing arbitral jurisprudence on fair and equitable treatment,*"[167] there are several elements of FET which can be discerned. Respondent will demonstrate that not one of the elements of FET was breached. In particular, (**a**) Claimant has not been denied justice over the course of the Enforcement Proceedings as (**i**) there has not been an undue delay and (**ii**) there have been no discriminatory and arbitrary measures. Secondly, (**b**) Claimant was not subject to any discriminatory and arbitrary measures and (**c**) Claimant's legitimate expectations were not violated.

a. Claimant was not denied justice in the Enforcement Proceedings

104. There is no exhaustive definition of the denial of justice; nevertheless, it is recognized that only the gross or manifest instances of injustice are considered to be a denial of justice.[168] In Proffesor Paulson's words, a denial of justice can be found if "*state administers its laws to aliens in a fundamentally unfair manner.*"[169]

105. "*The test for establishing a denial of justice sets* (...) *a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.*"[170] As explained further below, the Court's conduct was neither shocking nor surprised a sense of judicial propriety. Hence, Claimant could not have been denied justice.

[166] *Mondev,* para. 118.

[167] Schill, p. 11.

[168] Brochard, (Article 9).

[169] Paulsson on Chevron, para. 12.

[170] *Chevron*, para. 244.

i. Enforcement Proceedings were not burdened with an undue delay

106. For the denial of justice there needs to be "[m]*anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*."[171] As defined in *Chevron*[172] and subsequently used by the tribunal in *White,* which specified that it is a stringent standard[173] and also noted that "*public international law does not provide fixed time limits within which certain classes of cases must be resolved*."[174] This opinion is also supported by UNCTAD which stated that "*the length of the delay required in order for a denial of justice to arise is unclear*."[175]

107. The *White* tribunal has established criteria[176] to determine whether a judicial delay amounts to a denial of justice. These criteria include (1) complexity of the proceedings, (2) the behaviour of the litigants involved, (3) significance of the interest at stake and also (4) the behaviour of the court itself.

108. Similarly to the present case, the tribunal in *White* also considered whether an undue delay in enforcement of an arbitral award in line with the NY Convention. The *White* award was granted for a breach of a supply contract and the enforcement proceedings took over seven years.

109. As shown below, upon proper analysis of the *White* criteria, the conduct of the Enforcement Proceedings was not unduly delayed.

1) The Enforcement Proceedings included complex procedural questions

110. Although enforcement proceedings usually lack complexity because the merits of the dispute were already dealt with by the tribunal, the Enforcement Proceedings in the present case included complex procedural issues.

111. In particular, the Court considered what bench has jurisdiction for enforcement of

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[171] *Loewen*, para. 132.

[172] *Chevron*, para. 244.

[173] *White*, para. 10.4.8.

[174] *Ibid*, para. 10.4.9.

[175] UNCTAD, p. 80.

[176] *White*, para. 10.4.10.

foreign arbitral awards in line with the NY Convention.[177] As shown below, the parties to the Enforcement Proceedings created the issue when Claimant asked for transfer of the case which was subsequently challenged by the NHA.[178]

112. There were in total two transfers between benches of the Court during the Enforcement Proceedings. The first change occurred on 14 June 2012, when, based on Claimant´s own request[179], the case was transferred to a Commercial Bench of the Court. This transfer was then challenged by the NHA.[180]

113. On 25 October 2013 the Court decided that the Commercial Bench had jurisdiction to hear the enforcement applications. Nevertheless, the appropriate clarification of the Commercial Courts Act 2012 by the Supreme Court of Mercuria had shown that the commercial benches have jurisdiction to entertain only original commercial actions. The enforcement application was then transferred back to regular bench on 2 January 2014.[181]

114. It is evident that on both occasions the Court acted as quickly as possible. It took the Court a mere month to reject the jurisdiction objection filed by the NHA.[182] Similarly, the Court quickly implemented the interpretation of the Commercial Courts Act 2012 and thus transfered the Enforcement Proceedings to the appropriate forum. Despite the Enforcement Proceedings included rather complex jurisdictional issues, they were dealt with in a very brisk fashion.

115. Claimant should not expect that the Court will disregard the established case law or not interpret a newly passed law. Respondent's courts were only properly settling its procedure which cannot be regarded as an attempt to ignore justice.

116. To summarise, the Enforcement Proceedings were complex in procedural issues regarding the appropriate forum and the "delay" created in order to solve such preliminary question cannot make Respondent liable for a denial of justice.

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[177] Notice, Exhibit 1, paras. 17 and 26.

[178] *Ibid.*

[179] *Ibid.* para 17.

[180] *Ibid.*

[181] *Ibid,* paras. 26-29.

[182] *Ibid,* paras. 26 and 27.

2) The behaviour of the Parties lengthened the Enforcement Proceedings

117. During the course of the Enforcement Proceedings, both Claimant and the NHA filed several submissions subject to the Court's ruling which proportionally lengthened the procedure.

118. Furthermore, the Court had to adjourn the Enforcement Proceedings when the NHA failed to attend the hearings. Claimant can hardly argue that Respondent, as a State, should be liable for an absence of a party in judicial proceedings.

119. It is also important to note that the NHA as a party to the proceedings had a right to be heard and the Court thus had to adjourn the proceedings in order for this right to be fulfilled. The same would have been granted to Claimant.

3) The Enforcement Proceedings concerned a significant interest and were conducted accordingly

120. The Enforcement Proceedings were worth USD 40,000,000[183] which is a rather significant value. Furthermore it concerned a dispute which touched upon questions of public health, the stakes were thus also rather high. These circumstances compelled the Court to conduct the Enforcement Proceedings diligently and not rush them forward while ignoring procedural rights of both parties.

4) The Court behaved accordingly to the circumstances

121. Claimant did not point to any relevant facts which would establish malpractice or bias on the part of the Court. The seven instances when the hearing had to be adjourned for organizational reasons[184] could be hardly characterised as a conduct offending the sense of judicial propriety.

122. To the contrary, the Court behaved very actively and in a clear attempt to ensure the celerity of the Enforcement Proceedings. The adjournments were always a matter of few months[185], which is a rather short period for an overburdened court.

123. In the light of the foregoing, Respondent submits that the Enforcement Proceedings

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[183] Notice, para. 9; Statement, paras. 17 and 18.

[184] Notice, Exhibit I, paras. 3, 9, 15, 20, 24, 33, 40.

[185] *Ibid*.

were conducted in a proper manner. The vast majority of their length can be ascribed to complex procedural issues concerning the correct interpretation of the Commercial Courts Act 2012 or were caused by the conduct of the parties to the Enforcement Proceedings for which the Court and thus Respondent cannot be held liable. Although lengthy, the Enforcement Proceedings were thus not burdened with an undue delay.

b. Claimant was not subjected to any discriminatory and arbitrary measures

124. As the tribunal in *Waste Management* remarked in its definition of FET, which the tribunal laid down by considering other arbitral awards dealing with this standard, there is a high threshold for finding a violation of FET. Such violation is found only when:

> *"the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."*[186]

125. Arbitrary conduct is defined as conduct which "*wilfully disregards of due process of law, act which shocks, or at least surprises a sense of judicial propriety.*"[187] The non-discrimination requirement as part of the FET standard appears in the BITs "*to prohibit discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a "deliberate conspiracy* […] *to destroy or frustrate the investment.*"[188]

126. In the present case, there is no evidence of any of the aforementioned wrongdoings. The Court as a judiciary organ of the State has the power to decide at its own discretion, so long as it respects the law. The Court might have decided contrary to Claimant's wishes, however, a decision in favor of one party or the other is the sole purpose of the Court. A decision of the Court to adjourn the proceedings can hardly be perceived as a "*grossly unfair*" act "*which shocks*" but rather a standard practice in any court proceedings.

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[186] *Waste Management*, para. 98.

[187] *ELSI*, para. 15.

[188] UNCTAD reffering to *Glamis.*

127. In any event, Claimant had never raised any objections as to any unlawfulness of any of the Court's conduct. Even if Claimant had any doubts with regard to obedience of law by the Court, it has never utilized any local remedies which may be available in Mercuria, nor has it attempted to do so.

128. Claimant was treated fairly and justly during the Enforcement Proceedings. All requests made by both parties during the enforcement of the Award were justly considered in line with Mercurian procedural law. Therefore, since there has been no manifest failure of justice, Respondent is not liable for the conduct of its judiciary under Article 3(2) M-B BIT.

c. Claimant's Legitimate Expectations were not violated

129. The tribunal in *Saluka* interpreted the FET standard in accordance with the VCLT rules of treaty interpretation[189] and concluded that the FET standard is "*closely tied to the notion of legitimate expectations*".[190] The tribunal relied on the *Tecmed* tribunal's conclusion that the obligation to provide FET means "*to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*."[191]

130. More specific definition and limitations of the legitimate expectations standard was provided by a tribunal in *Duke Energy*, which stated:

> *"To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to*

[189] Article 31 VCLT.

[190] *Saluka*, para. 302.

[191] *Tecmed*, para. 154.

invest."[192]

131. In connection with this statement, UNCTAD suggested in its series on FET that it is possible to identify a number of key qualifying elements which will help in determination of legitimate expectations. Among these elements UNCTAD listed that legitimate expectations may arise only from a State's specific representations or commitments made to the investor, on which the latter has relied and that the investor must be aware of the general regulatory environment in the host country.[193]

132. Having regard to the abovementioned, Claimant could only have expected that the Court would deal with the filed application for enforcement of the Award and that the Enforcement Proceedings would be initiated and carried out in accordance with Mercurian law. Indeed, these expectations were met by the Court.

133. At the time Claimant made its alleged investment, i.e. concluded the LTA and obtained the Award, it had already been involved in several dealings on the Mercurian market.[194] Therefore, it must have been aware of the political, socioeconomic, cultural and historical conditions prevailing in Mercuria. As already stressed, Mercuria is a developing country facing many struggles. Its judiciary is overburdened as it caters for a population of 67 million people.[195] Claimant has not provided any evidence of any specific representations of Respondent's officials which would provide basis for any expectations of a brisk enforcement of the Award.

134. Respondent is a party to the New York Convention,[196] however, the NY Convention does not set any time limits in which an award should be enforced; neither constitutes how a court should proceed with the enforcement. Therefore the only expectation Claimant could reasonably have had was that its application for the enforcement of the Award will not be denied and that the Award will eventually be enforced. This expectation, however, could not have been violated as the Enforcement Proceedings

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[192] *Duke Energy*, para. 340.

[193] UNCTAD, p. 68.

[194] Statement, para. 5.

[195] Response, para. 9.

[196] PO2, para. 2.

are still under way.[197]

135. It follows that the FET standard was not breached by Respondent in any of its possible forms. Therefore, the Tribunal is invited to dismiss Claimant's claims based on Article 3(2) M-B BIT.

B. The length of the Enforcement Proceedings did not breach the effective means standard

136. First and foremost, the M-B BIT does not contain any provision which would require contracting states to ensure that internal judicial proceedings will not extend beyond a certain time period. In other words, the M-B BIT does not contain any material provision under which Claimant´s claim could be subsumed.

137. Nevertheless, Respondent finds it necessary to react to Claimant´s allegations that Respondent "*failed to provide any effective means to Atton Boro of asserting its rights*"[198] by which Claimant attempts to invoke the effective means standard. As shown below, there is no ground for such allegation in ether the M-B BIT or the circumstances of the present case.

138. In the past, the tribunals which considered a possible breach of the effective means standard were operating with clear expression of such obligation in the respective BIT. For example the tribunal in both *Duke Energy* and *Chevron* interpreted Article II(7) of an US-Ecuador BIT, which reads:

> *"Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."*[199]

139. Similarly, the tribunal in *Amto* based its decision on Article 10(12) of the ECT, which provides:

> *"Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of*

[197] PO3, line1595.

[198] Notice, para. 13.

[199] US-Ecuador BIT Article II(7) in *Duke Energy,* para. 390.

> *rights with respect to Investments, investment agreements, and investment authorizations."*[200]

140. Finally, the tribunal in *Gavazzi* interpreted Article 2(5) of the Italy-Romania BIT of the following wording:

> *"Each Contracting Party undertakes to provide effective means of asserting claims and enforcing rights with respect to this present agreement, to the investment authorizations and properties."*[201]

141. To the contrary, the M-B BIT does not contain any provision which would oblige Respondent to provide the effective means standard. Even though the contracting states included the term in the M-B BIT Preamble[202] it was never reflected in any of the binding provisions of the M-B BIT.

142. The term "effective means" is mentioned only in the Preamble to the M-B BIT where one of the introductory proclamations reads "[r]*ecognizing the importance of providing effective means of asserting rights and enforcing rights.*"[203]

143. Firstly, Respondent stresses out that the Preamble is not binding. As the tribunal in *Continental Casualty* noted, when something is mentioned in the preamble of the BIT, *"[i]t is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty*."[204] Moreover, the proclamation in the Preamble lacks any imperatives such as "*shall*" or *"undertakes."* Therefore, both the location of the term in the Preamble instead of the body of the M-B BIT as well as the wording itself lead to the conclusion that the Parties did not intend to establish a material and enforceable obligation by such proclamation of a mere "*recognition of importance*". Employing the international standards of treaty interpretation under Article 31 VCLT,[205] neither the wording, nor the context suggests that Mercuria assumed an obligation of the same nature as respondent States in *Amto, Chevron,*

[200] Article 10(12) of the ECT.

[201] Italy-Romania BIT Article 2(5).

[202] M-B BIT Preamble, para. 4.

[203] *Ibid*.

[204] *Continental Casualty*, para. 258.

[205] Article 31 VCLT.

Duke Energy or *Gavazzi* as mentioned above.

144. However, for the sake of argument, Respondent submits that even if the M-B BIT contained the effective means standard as its material and binding provision, the duration of the Enforcement Proceedings would not amount to a breach of such provision.

145. The tribunal in *Amto* concluded that "*the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of* [the effective means standard].*"*[206] Similarly, following a reasoning of the *White* tribunal, a tribunal in *Gavazzi* noted that *"effective means* (…) *is a wide notion that does not guarantee that each and every decision is correct.*"[207]

146. Firstly, Claimant failed to provide any evidence showing that the duration of the Enforcement Proceedings was anyhow unusual in Mercuria. As noted above, Mercuria is a developing country with overburdened judiciary. Claimant either was or should have been aware of these facts when it entered the Mercurian market and thus assumed it as its risk.

147. Secondly, it follows from the aforementioned that even if the Enforcement Proceedings took longer than Claimant would have hoped, this does not amount to a breach of the effective means standard. What is important is that Claimant was provided with an opportunity to file for the Enforcement Proceedings and the application was entertained and actively pursued by the Court.

148. In light of all the aforementioned, Respondent is not liable under the M-B BIT for the alleged failure to provide Claimant with effective means of enforcing the Award. Firstly, Respondent was never under any such obligation, which "breach" is now claimed because the M-B BIT does not contain an effective means clause. Furthermore, even if such obligation existed, the duration of the Enforcement Proceedings would not amount to its breach.

V. THE TERMINATION OF THE LTA DOES NOT AMOUNT TO A

[206] *Amto,* para. 88.

[207] *Gavazzi,* para. 260.

VIOLATION OF ARTICLE 3(3) M–B BIT

149. Respondent has never been a contractual party to the LTA. However, Claimant argues that "*Mercuria breached its obligation towards Atton Boro by unilaterally terminating the LTA.*"[208] In an attempt to invent such obligation of Respondent, Claimant invoked article 3(3) M-B BIT, which 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."*

(hereinafter the "**Umbrella clause**").

150. However, Claimant's attempt to subsume the LTA under the M-B BIT's protective umbrella is bound to fail, because firstly, (**A**) the LTA was entered into and terminated by the NHA, an entity distinct and separate from Respondent. Secondly (**B**) a simple contractual violation does not fall within the scope of the Umbrella clause. Lastly, (**C**) the LTA termination has already been conclusively adjudicated by a commercial tribunal in Reef.[209]

A. Respondent had not entered into the LTA

151. It follows from the wording of the Umbrella clause that the obligations it was intended to cover are those entered into exclusively by the State.[210] Had the States wished to extend the applicability of the M-B BIT to other entities, they would have given the Umbrella clause an explicit extended effect.[211] An example of such extension can be found in the Czech Republic-Singapore BIT 1995, which provides that:

> *"Each Contracting Party shall observe commitments, additional to those specified in this Agreement; it has entered into with respect to investments of the investors of the other Contracting Party. Each Contracting Party shall not interfere with any commitments, additional to those specified in this Agreement, entered into by*

[208] Notice, para. 13.

[209] Statement, para. 17.

[210] OECD working papers p. 9.; *Hamester*, para. 347.

[211] *SGS v Pakistan*, para. 173.

> *nationals or companies with the nationals or companies of the other Contracting Party as regards their investments."*[212]

152. However, in absence of evidence of this intention, Claimant's interpretation which stretches the scope of the clause would be susceptible to "*indefinite expansion*"[213] and capable of incorporating an unlimited number of contracts into the M-B BIT, putting unreasonable burden on Respondent.[214]

153. Even in cases where arbitral tribunals interpreted the respective umbrella clause very broadly, the first precondition for the claim to be successful is the attribution of the relevant act to the respondent State.[215] In the present case, however, no such attribution can be made as Respondent is not a party to the LTA and simultaneously the NHA is not a party to the present proceedings.

154. Therefore, the Umbrella clause cannot be invoked by Claimant.[216] The acts of the NHA cannot be attributed to Respondent neither (**a**) under Mercurian national law, nor (**b**) under international customary law.

a. Acts of the NHA are not attributable to Respondent under Mercurian national law

155. An act of NHA, in particular a breach of the LTA, is not attributable to Respondent under Mercurian law since entering into the LTA cannot be attributed to Respondent. As such, Respondent cannot be liable for breach of any obligation arising from the LTA or the Umbrella clause.

156. When interpreting the Umbrella clause, the leading interpretative tool is the "*ordinary meaning*", i.e. wording of the provision.[217]. The Umbrella clause clearly speaks of *"obligations* [Respondent] *may have entered into*". Therefore, firstly, the conclusion of the LTA would have to be attributable to Respondent. Only then Claimant could claim that breach of the LTA is attributable to Respondent. In other words, "[t]*he act*

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[212] Czech Republic-Singapore BIT 1995, Article 15 Other Obligations, para. 2 in *International Investment Law*.

[213] *SGS v. Pakistan*, para. 166.

[214] *Ibid,* para. 167 – 173; *El Paso Jurisdiction*, para. 82; *Pan American*, para. 110.

[215] *Noble Ventures*, para. 68; *EDF,* para. 213; *Nykomb*, para. 4.2.

[216] *Siemens*, para. 204.

[217] Article 31 VCLT.

breaching the obligation is meaningless if the obligation is not that of the state."[218]

157. Claimant invokes the international customary rules on attribution summarized in the ILC Articles to make Respondent liable for acts of the NHA. However, the ILC Articles pertain only to internationally wrongful acts[219] and cannot be used to attribute an entry into a contract and individual obligations under such contract to the State. This view is supported by the *2001 Commentary to ILC Articles*, which clearly states that:

> *"The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State (...) [T]he rules concerning attribution set out in this chapter are [not formulated for] purposes for which it may be necessary to define the State or its Government."*[220]

158. The intention behind the ILC Articles also follows from a 1973 report from their drafting stages, where it is clearly explained that these rules are not intended for attribution of entering into obligations for the purposes of the subsequent attribution of their breach.[221] According to the drafters, "[i]*t would be wrong to adopt the same criteria in these two cases and to propose an identical solution based on a general and common definition of 'act of a State'.*"[222]

159. This approach was followed by the *Impregilo* tribunal which noted that the respondent State was not party to the underlying contract and the umbrella clause took "*the matter no further*".[223] The *Amto* tribunal as well observed that "*the contractual obligations have been undertaken by a separate legal entity, and so the umbrella clause has no*

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[218] Gallus, p. 166; see also Blyschak, pp. 610-11.

[219] Article 2 ILC Articles.

[220] Commentary, para. 5 at p. 39.

[221] *Yearbook,* para. 5 at p. 189.

[222] *Ibid.*

[223] *Impregilo Jurisdiction,* para. 223.

direct application."[224]

160. Pursuant to Mercurian legal regulation, the attribution of the entry into the LTA is subject to Mercurian national law and legal character of the NHA. In this respect Claimant provided no evidence that NHA was within the structure of Mercurian State at the time of the LTA conclusion. To the contrary, it follows from the case file that the NHA operates independently from Respondent.[225] Therefore, Claimant fails to demonstrate that conclusion of the LTA is an act attributable to Respondent.

161. Consequently, acts of an NHA as an entity separate from Respondent, such as entering into the LTA and its subsequent conduct, cannot be attributable to Respondent pursuant to Mercurian law. The termination of the LTA therefore cannot be attributed to Respondent either, as Respondent was not a party to the LTA and therefore was not in a position to breach it.

b. Acts of the NHA are not attributable to Respondent under international customary law

162. Even in the event that the Tribunal opts to apply the ILC Articles to consider attribution of the entire contractual relationship under the LTA, Respondent is not liable for acts of the NHA.

163. Pursuant to Article 4 ILC Articles, all acts of State organs are attributable to the State, while "[a]*n organ includes any person or entity which has that status in accordance with the internal law of the State.*"[226] Furthermore, as explained above, the NHA is not a State organ pursuant to Mercurian law.

164. Further, pursuant to Article 5 ILC Articles, acts of an entity may be attributed to a State, if that entity is "*empowered by the law of that State to exercise elements of the governmental authority.*"[227] According to the *Commentary to ILC Articles:*

> "Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct

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[224] *Amto,* para. 110.

[225] PO3, line 1591.

[226] Article 4 para. 2 ILC Articles.

[227] Article 5 ILC Articles.

> of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions."

165. It is submitted that Claimant failed to provide any proof of neither NHA's empowerment by law, nor any governmental authority exercised by the NHA. Respondent acknowledges that the NHA is organized by the NHA trusts, which are established by the National Health Authorities Act. However, this legislature only concerns questions of funding and can by no means be regarded as an "empowerment" to undertake any acts within the meaning of Article 5 ILC Articles.

166. With regard to the governmental authority, Respondent points out that the NHA operates independently of the Government.[228] For the absence of any reliable proof that the NHA was authorized to conclude the LTA in the capacity of the Government, it cannot be attributed to Respondent under Article 5 ICL Articles.

167. Lastly, pursuant to Article 8 ILC Articles, a State is liable for acts of entities which are "*acting on the instructions of, or under the direction or control of, that State"*.[229] In this regard, Respondent acknowledges that the Government directed the NHA to invite offers from pharmaceutical companies which resulted in the conclusion of the LTA.[230] The Government had a good reason to do so in midst of a major health crisis. However, only because the Government expressed its interest in encouraging the NHA to negotiate and conclude the LTA does not prove any control of the Government over which pharmaceutical company was chosen by the NHA as its contractual partner. Nor had the Government any control over the terms of the LTA as there was no participation of Mercurian officials in its negotiation.[231]

168. The NHA terminated the LTA after experiencing serious budgetary difficulties[232] and Respondent does not contest that the NHA is partly funded by national taxation.[233] However, as a tribunal in *Amto* previously explained, a "[f]*ailure to actively ensure*

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[228] PO3, line 1591.

[229] Article 8 ILC Articles.

[230] Statement, para. 7.

[231] PO3, line 1594.

[232] Statement, paras. 15-17.

[233] PO3, line 1592.

adequate funding of [operations of a Respondent owned entity][234] *may have negative implications, but it is not of the importance to elevate it to the nature of an international breach*."[235] Although Respondent as a developing country may have struggled to provide the NHA enough funds in a time of a serious health crisis does not render Respondent liable under the Umbrella clause.

169. The NHA chose to enter into a commercial contract over which Respondent had no control. There is no evidence that Respondent was present during the negotiations of the LTA and neither that it had any influence with regard to its transaction. Therefore, Respondent cannot be held liable for the breach of the LTA under the Umbrella clause.

B. Simple contractual violations are not covered by the Umbrella clause

170. The LTA is a simple supply agreement, under which two autonomous merchants established a business relationship with one another. More specifically, the NHA undertook to place purchase orders and Claimant undertook to deliver its FDC drugs.[236] Respondent is not in a position to challenge the breach of the LTA, as it is not a party to the LTA. However, there is no support in the M-B BIT for holding Respondent liable for Claimant's claims originating from a commercial contract.

171. Even if Respondent was a party to the LTA, it is important to distinguish between a State as a merchant and a State as a sovereign. A tribunal in *El Paso* was dealing with an umbrella clause of the exact same wording as contained in the M-B BIT. The tribunal held that the umbrella clause "*will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity*".[237] In another words, if the core of the dispute is a "*normal*" contractual dispute, "*the Umbrella clause has no role*".[238]

172. As the *Consortium* tribunal put it: a State may perform a contract badly, but this will not result in a breach of a treaty provision, "*unless it* [is] *proved that the state or its*

[234] *Amto,* para. 20.

[235] *Ibid,* para. 108.

[236] Statement, paras. 9-10.

[237] *El Paso Jurisdiction,* para. 81.

[238] Wälde, 6 (2).

emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign."[239] Otherwise, those contracts are to be strictly separated from investments and submitted to commercial arbitration.[240]

173. The LTA was an ordinary supply agreement entered into by the NHA as a mere party to the contract. Even if it was entered into by Respondent itself, the conclusion of such supply agreement does not require any sovereign powers and virtually any company could have concluded it. Equally, the termination of the LTA, although it was in breach of LTA's provisions, was an act requiring no governmental powers. Both NHA and Atton Boro could equally terminate the LTA prematurely. Therefore, the obligation is of purely contractual nature and does not establish a breach of the Umbrella clause.

174. In the present case, the link between the LTA and the M-B BIT is missing. Claimant's claims from the LTA, however carefully repackaged and served to the Tribunal, are fundamentally still of purely contractual nature. Therefore, Respondent respectfully invites the Tribunal to rule that the Umbrella clause is without effect to the LTA termination.

C. The LTA termination has already been conclusively adjudicated

175. After the LTA was prematurely terminated by the NHA, Claimant sought to recover its damages pursuant to the forum choice contained in the LTA and has obtained the Award.[241] Now it is seeking to recover damages on the very same grounds before the present the Tribunal. However, the breach of the LTA is a matter that has been conclusively adjudicated by the tribunal in Reef.

176. In presence of a specific forum resolution clause in the contract, an "elevation" of contractual claims into treaty claims would provide the investor with unlimited possibility to obliterate the effect of any dispute settlement mechanism, which it previously committed to respect.[242]

177. The *Joy Mining* tribunal, while dealing with a contractual forum choice, cited the

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[239] *Consortium*, para. 65 cited in *Azurix* para 53; *Impregilo Jurisdiction*, para 260.

[240] *Joy Mining*, para. 58.

[241] Statement, para. 17.

[242] *SGS v Pakistan*. para. 168.

Compañía de Aguas decision as an entirely logical outcome of its analysis, as follows:

> *"In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."*[243]

178. Similarly to the present case, a tribunal in *BIVAC* was dealing with a contractual claim which claimant attempted to elevate to a BIT claim. The tribunal noted that the BIT entered into force two years before the contract was concluded and the parties to that contract therefore must have been aware of its dispute resolution clause.[244] It then went to conclude that:

> *"having regard to the fundamental principle that the autonomy and will of the parties is to be respected, is that the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an "umbrella clause" provision… To allow* [Claimant] *to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy."*[245]

179. In light of this analysis, the tribunal concluded that claimant could not elevate the obligation of respondent State from the contract, yet ignore the contractually agreed forum.[246]

180. The M-B BIT entered into force on 11 January 1998.[247] The LTA was concluded almost seven years later, on 25 November 2004.[248] Therefore, Claimant must have been aware of the dispute resolution clause present in the M-B BIT, yet opted to agree to jurisdiction of the tribunal in Reef with regard to disputes from the LTA.

181. Lastly, as the tribunal in *Suez* put it: "*While international law requires full*

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[243] *Compañía de Aguas*, para. 98 in Joy Mining, para. 90.

[244] *BIVAC,* para. 146.

[245] *Ibid,* para. 148.

[246] *Ibid.*

[247] Statement, para. 1.

[248] Notice, para. 6.

compensation for injury, it does not allow for more than full compensation."[249] Therefore, in the alternative that the Tribunal finds Respondent liable for the premature termination of the LTA, it is also invited not to provide Claimant with any further compensation under the M-B BIT.

[249] *Suez,* para. 38.

PRAYER FOR RELIEF

182. In the light of the above, Respondent respectfully requests the Tribunal to find that:

(1) It does not have jurisdiction over the claims in relation to the Award;

(2) Respondent effectively denied Claimant the benefits under the M-B BIT by invoking Article 2 M-B BIT;

(3) Respondent did not violate M-B BIT with regard to Claimant´s IP;

(4) Respondent did not breach Article 3(1) or (2) M-B BIT by the conduct of its judiciary in the Enforcement Proceedings; and

(5) Termination of the LTA by the NHA does not amount to a violation of Article 3(3) M-B BIT.

Respectfully submitted on 25 September, 2017

By:

Team Trindade

On Behalf of Respondent

Republic of Mercuria