TEAM **UGON**

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

ATTON BORO LIMITED
-CLAIMANT-

v.

THE REPUBLIC OF MERCURIA
-RESPONDENT-

MEMORIAL FOR RESPONDENT

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ABBREVIATION	FULL CITATION
	INTERNATIONAL TREATIES
Canada-Peru BIT	Agreement between Canada and Peru for the Promotion and Protection of Investments, 2007
COMESA Investment Agreement	Common Market for Eastern and Southern Africa Investment Agreement 33 I.L.M. 1067, 1994
Doha Declaration	Doha Declaration on the TRIPS Agreement and Public Health, 41 I.L.M. 755, 2002
ECT	Energy Charter Treaty 2080 U.N.T.S. 95, 1998
India-Kuwait BIT	Agreement between Kuwait and India for the Encouragement and Reciprocal Protection of Investment, 2001
NAFTA	North American Free Trade Agreement 32 I.L.M. 289, 1993
PCA Rules	PCA Arbitration Rules 2012
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1896 U.N.T.S. 299, 1994
US-Ecuador BIT	The Treaty between the USA and Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a Related Exchange of Letters, 1993
VCLT	Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331
	NATIONAL LEGAL SOURCES
C.F.R.	US Code of Federal Regulations
	AWARDS AND DECISIONS OF INVESTMENT TRIBUNALS
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LIST OF ABBREVIATIONS

BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
ECT	Energy Charter Treaty
IIA	International Investment Agreement
LTA	Long-Term Agreement
NHA	National Health Authority

STATEMENT OF FACTS

1. Claimant, Atton Boro Limited ("**Atton Boro**"), is a company incorporated in the Kingdom of Basheera ("**Basheera**").

2. Respondent, the Republic of Mercuria ("**Mercuria**"), is a developing country that since 2002 has been struggling with a spreading epidemic of greyscale virus.

Atton Boro

3. In 1998, Atton Boro Group, a pharmaceutical enterprise incorporated in the People's Republic of Reef ("**Reef**"), registered Atton Boro, a wholly-owned subsidiary in Basheera.

4. Atton Boro is a vehicle that performs certain routine functions for group's businesses outside Basheera. It rents an office space and has had 2-6 employees engaged in accounting, tax, legal, sales, marketing and regulatory approval assistance to foreign affiliates of the group. Atton Boro holds title to assets in Mercuria. With its skeleton staff there is no evidence that Atton Boro actually controls or manages the Sanior and other businesses of the group in Mercuria.

Greyscale and LTA

5. In 2002, incurable disease, causing suffering due to skin flaking – greyscale – spread in Mercuria. In 2004, after protracted negotiations Mercurian National Health Authority ("**NHA**") signed 10-year agreement for supply of anti-greyscale drug Sanior with Atton Boro ("**LTA**") with minimum annual order-value guaranteed. NHA is owned by a number of Mercurian public corporations.

6. In 2006, increase of medical testing in Mercuria revealed significant incidence of greyscale. NHA calculated that supplying the drug at the same price would exceed the program budget by 500%. In 2008 NHA notified Atton Boro that Sanior price would have to be renegotiated. Atton Boro offered a further 10% discount, while NHA asked for additional discount of 40%. Without reaching an accord, NHA terminated LTA.

Compulsory license

7. As the number of detected greyscale cases more than doubled in 2006, Mercuria, facing an imminent healthcare crisis, introduced legislation in 2009 allowing use of patented inventions under compulsory license.

8. In 2010 Mercurian court granted a license to manufacture Valtervite to a generic drug company, HG-Pharma. Atton Boro was ascribed royalty of 1% of the licensee's net revenue, in line with usual Mercurian royalty rates for similar drugs that range from 0.5% to 3%.

Award enforcement

9. In January 2009, an arbitral tribunal found that the NHA breached the LTA. The NHA objected to the enforcement of the Award in Mercuria starting from 2009, when Atton Boro commenced enforcement proceedings.

10. While the Award enforcement proceedings have not been completed yet, the length of the proceedings results from numerous objective factors and litigants' conduct. For example, both Atton Boro and the NHA sought leaves to file supplementary documents, requested adjournments and additional hearings. In total, delay attributable solely to Atton Boro's own actions amounts to approximately 3 years.

Arbitration under the BIT

11. Mercuria and Basheera are parties to the BIT concluded in 1998. In November 2016, Atton Boro filed a request for arbitration, relying on Art. 9 BIT. In its statement of defense Mercuria invoked Article 2 BIT and denied the treaty benefits to Atton Boro.

SUMMARY OF ARGUMENTS

12. **JURISDICTION OF THE TRIBUNAL OVER THE AWARD-RELATED CLAIMS.** Atton Boro's attempt to expand the BIT protection to the assets that cannot be recognized as investments should not be allowed to succeed. The Tribunal has no jurisdiction over the Award-related claims. Firstly, the Award in itself, being just a decision by a tribunal, does not constitute an investment, because it lacks the essential elements inherent to any investment, such as commitment of capital. Secondly, the Award being analytically distinct from the LTA and other Atton Boro's assets is not a transformation of the original investment and, therefore, falls outside of the BIT protection.

13. **DENIAL OF BENEFITS.** The Tribunal lacks jurisdiction over the present dispute. Mercuria validly denied benefits to Atton Boro under the BIT, including Mercuria's consent to arbitration. Firstly, Mercuria can deny benefits to Atton Boro under the BIT since the company is controlled by a non-party to the BIT and has '*no substantial business activities*' in Basheera. It conducts insignificant operations that have no economic link to Basheera, and therefore it can be denied benefits. Secondly, Mercuria is entitled to withdraw BIT protection after initiation of arbitration. Neither wording of Art. 2 BIT, nor the object and purpose of the treaty place any time constraints on Mercuria's right to invoke the clause. The only deadline to trigger Art. 2 is stipulated in PCA Rules, and Mercuria abided by it.

14. **LEGITIMATE GRANT OF COMPULSORY LICENSE TO PROTECT THE HEALTH OF MERCURIAN PEOPLE.** Mercuria did not breach the BIT by enactment of the Law No. 8458/09 and granting the license to HG-Pharma. Firstly, Mercuria's actions aimed at protection of public health do not constitute indirect expropriation of Atton Boro's IP rights under express wording of the BIT. Alternatively, the measures are proportionate to the public purpose pursued and therefore constitute legitimate exercise of Mercuria's police powers. Secondly, Mercuria did not violate Art. 3 BIT. The measures were reasonable in the circumstances of public health crisis. Furthermore, Mercuria did not impair Atton Boro's legitimate expectations as there was no basis for them. Atton Boro could neither expect that Mercuria will refrain from authorization of compulsory licensing, nor that Mercuria will follow the best practices of TRIPS implementation.

15. **ENFORCEMENT OF THE AWARD.** Mercuria complied with its obligations under the BIT, since its judiciary properly conducts the Award enforcement proceedings. Firstly, actions of Mercuria are far from constituting the denial of justice. Secondly, while the denial of justice remains the only standard relating to the proceedings, Mercuria's conduct in the enforcement proceedings also complies with the 'effective means' standard.

16. **UNILATERAL TERMINATION OF THE LTA BY MERCURIA.** Termination of LTA does not amount to a breach of Art. 3(3) BIT for two reasons. Firstly, LTA does not relate to an investment and it is not an obligation of Mercuria, since it was concluded by NHA, a separate legal entity whose conduct is not attributable to Mercuria. Secondly, in any event, termination of LTA does not violate BIT as no public powers were exercised and NHA's termination of contract cannot be attributed to Mercuria.

I. THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER THE AWARD-RELATED CLAIM

18. Under the BIT the Tribunal has jurisdiction only over claims that arise out of investment.[1] It does not have jurisdiction over claims arising out of the Award, since it is not an investment (**A**). Nor does it constitute a transformation of any protected investment of Atton Boro (**B**).

A. THE AWARD ITSELF DOES NOT QUALIFY AS AN INVESTMENT UNDER THE BIT

19. Article 1 BIT defines investment as any kind of asset, including claims to money under contract having financial value. However, this is an incomplete definition that should be supplemented by the ordinary meaning of the term '*investment*' (**1**). The Award does not constitute an investment under the BIT if this proper definition is applied (**2**).

1. The term 'investment' in the BIT should be interpreted as incorporating inherent characteristics of an investment

20. The term '*investment*' has its autonomous and self-standing meaning, while the types of assets listed in the BIT are no more than illustrations that should be interpreted in the light of the inherent meaning of '*investment*' that in turn require certain elements such as contribution, duration and risk to be present.[2] Such a balanced approach is necessary, since it takes into account both the state sovereignty and the necessity to protect foreign investments.[3]

21. Firstly, Article 1(1) BIT expressly confirms that the list of illustrative categories of assets is not exhaustive by stating "*the term 'investment' <...> in particular, though not exclusively includes*". Therefore, there can be other types of assets that fall under the definition of

[1] Art.8(1) BIT, p. 36.

[2] *Alps Finance v. Slovakia*, para.240; *Romak v. Uzbekistan*, para.188.

[3] Alvarez/Sauvant, pp.191-192; *Saluka v. Czech Republic*, para.300; *Pan Am v. Argentina*, para.99; *El Paso v. Argentina*, para.650.

investment.[4] This means, there should be "*a benchmark against which to assess those non-listed assets*" to decide whether they are covered by the BIT.[5]

22. Secondly, the definition in the BIT requires the relevant assets to be '*invested*' that itself points out that not every asset belonging to the investor qualifies, but only the asset that satisfies the test.[6]

23. Thirdly, literal application of the mentioned categories alone would lead to "*manifestly absurd*" results.[7] Specifically, there would be no limits on the scope of the notion of '*investment*' and no distinction between investment activity and purely commercial activity.[8] This, in turn, would deprive different international trade instruments of any effect if all commercial disputes involving a State element can be submitted to international investment arbitration.[9]

24. Fourthly, to recognize that these characteristics of investment apply only in the ICSID arbitration would mean widening or narrowing the protection that the BIT from case to case and this is unreasonable and incentivizes forum-shopping.[10] The BIT in this case provides for alternative dispute settlement options, namely recourse to an ICSID tribunal and arbitration under the PCA Rules. It would be unreasonable to conclude that the Parties defined the term '*investment*' in such broad terms that in certain circumstances render resort to the ICSID impossible.[11]

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[4] *Alps Finance v. Slovakia*, para.230.

[5] *Romak v. Uzbekistan*, para.180.

[6] Clasmeier, p.67.

[7] *Alps Finance v. Slovakia*, para.237; *CIM v. Ethiopia*, p.2.

[8] *Romak v. Uzbekistan*, para.185.

[9] *Joy Mining v. Egypt*, para.58.

[10] *CIM v. Ethiopia*, p.2; *Romak v. Uzbekistan*, para.194.

[11] *Alps Finance v. Slovakia*, para.239; *Romak v. Uzbekistan*, para.195.

25. Recent non-ICSID tribunals, interpreting treaties similar to the BIT in this case, found that the term investment has an inherent meaning.[12] They applied the following criteria to define investment, deriving from the ordinary meaning of the word: 1) contribution made in the host state, 2) which extends over certain period of time, 3) and entails some risk for the investor.[13]

26. Thus, it is insufficient for the Award to fall under one of the illustrative categories designated in the BIT, rather it should exhibit inherent characteristics as well.

2. The Award does not amount to an investment since it does not possess the necessary inherent characteristics

27. The Award does not amount to the investment since it does not entail any contribution to Mercuria. An award is "*a legal instrument, which provides for the disposition of rights and obligations*" arising out of the contract.[14] It lacks the most important element of the investment, namely contribution of assets to the state that is "*commitment of resources*"[15].

28. As noted in *LESI-Dipenta v. Algeria:*

> "*With respect to contributions: there can be no investment unless a portion of the contribution is made in the country <...>. These contributions could, then, consist of loans, materials, works, or services <…>*".[16]

29. With respect to arbitral awards specifically another tribunal noted that *the "*[a]*ward itself involves no contribution to, or relevant economic activity within* [*the host State*]".[17]

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[12] Demirkol, pp.45-46; *Romak v. Uzbekistan*, paras.180,207; *Alps Finance v. Slovakia*, paras.231-240; *CIM v. Ethiopia*, pp.1-2.

[13] *Quiborax v. Bolivia*, para.219; *Saba Fakes v. Turkey*, para.110; *Romak v. Uzbekistan*, para.207; *Alps Finance v. Slovakia*, paras.231-241; *KT Asia v. Kazakhstan*, para.170.

[14] *Gea v. Ukraine*, para.162.

[15] *Quiborax v. Bolivia*, para.219

[16] *LESI-Dipenta v. Algeria*, para.14(i).

[17] *Gea v. Ukraine*, para.162.

30. The Award in this case did not involve any commitment of capital by Atton Boro that would have created any economic value to Mercuria. It was rendered by a tribunal seated in Reef.[18] Atton Boro committed no assets to Mercuria to obtain the Award.

31. In conclusion, the Award itself is not an investment under the BIT.

B. THE AWARD IS NOT A TRANSFORMATION OF ANY ORIGINAL INVESTMENT

32. Though there is a factual link between the Award and the LTA this link does not make the Award an investment, since the LTA itself is not an investment protected under the BIT (**1**). In any case, the Award cannot be regarded as '*change in the form*' of the original investment since it remains analytically distinct from the LTA (**2**).

1. The LTA does not constitute an investment

33. The LTA does not amount to the investment because it does not satisfy the criteria discussed in paragraph 25 above. It is a mere commercial contract that does not entail any contribution or investment risk.

34. First, the LTA did not entail any commitment of capital. When goods are delivered under supply agreement against payment, they do not entail commitment of capital.[19] Under the LTA Atton Boro supplied medicine against payment by NHA, hence LTA did not commit capital.

35. Atton Boro may not claim that its assets (such as manufacturing unit) should be considered together with the LTA and that taken together with them LTA constitutes an investment. Activities carried out in order to support a purely commercial transaction cannot be considered together with that commercial transaction and create the investment in their entirety.[20] Other investments of an investor may elevate a commercial contract to the level of investment only where they are inextricably linked together, such as when an office is built exclusively to perform a contract.[21] In this case there is no such link, since the relevant

[18] Uncontested Facts, p.30, para.17.

[19] *Globex v. Ukraine,* para.56; *MHS v. Malaysia,* para.69.

[20] *Apotex v. USA*, paras.227, 235.

[21] *SGS v. Pakistan*, paras.136-140.

manufacturing unit has been constructed and is being operated to produce various drugs, including Sanior, to be supplied not only under the LTA but to the market in general.[22]

36. Second, Atton Boro undertook no investment risk by entering into and performing the LTA. An investment risk exists if "*the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending*".[23] In this case, under the LTA Atton Boro was guaranteed minimum annual order-value.[24] This means that Atton Boro was assured of profit. Moreover, the LTA was concluded for a period of 10 years. Therefore, there was no unpredictable risk for Atton Boro to be left without a contract. Alleged breach of the LTA by NHA does not amount to an investment risk, since a breach of contract is a normal commercial risk.[25]

37. In conclusion, the Award cannot constitute an investment, since the LTA itself is not a protected investment.

2. Alternatively the Award is not a '*change in the form*' of the LTA

38. Awards being "*analytically distinct*" from the investment do not constitute a change in the original investments form and do not qualify as protected investments on this basis.[26]

39. Firstly, if ordinary meaning of '*change in the form'* of investment is used, such a change occurs, for example, when construction materials become a factory. An award of damages does not necessarily enforce any contractual right and thus is not merely a change of form of a claim under contract, but rather creates a new right.

40. In this case, the Award directs NHA to pay damages for the breach of LTA.[27] There is no evidence that the Award enforces any provision of the LTA (such as liquidated damages)

[22] PO3, p.50, lines 1581-1582.

[23] *Romak v. Uzbekistan*, para.230.

[24] Uncontested Facts, p.29, para.10.

[25] *Joy Mining v. Egypt*, para.57.

[26] *Gea v. Ukraine*, para.162.

[27] Notice of Arbitration, p.4, para.9.

and therefore it creates a new right that may be factually connected with the LTA, but it is not just a contractual right in a different form.

41. Secondly, there are strong policy reasons for treating awards separately. Treating awards as investments would create "*a new instance of review of State court decisions concerning the enforcement of arbitral awards*".[28] Any party aggrieved by non-enforcement would ask for a "*de novo review*" of the competent court's decision by an investment tribunal, creating ample room for '*second-guessing*' the decision of the national court.[29] The parties to the BIT are unlikely to have intended to create such an opportunity, given that the New York Convention vests national courts with exclusive jurisdiction over enforcement applications.

42. For these reasons this Tribunal should not follow earlier decisions, finding that an award constitutes transformation of investment. Investment tribunals are not bound by decisions of previous tribunals.[30] While they may defer to absolutely consistent jurisprudence there is no such consistency in this case.[31] Besides, these tribunals did not explain their decision to treat awards as investments, with their reasoning restricted to the Delphic statement that the award was a "*crystallisation of investor's contractual rights*".[32]

43. Besides, the first case considered the award to be an investment as a measure of last resort when all of the investors' initial investments were destroyed and the award remained the last thing related to the initial investment to protect.[33] This is not the case here. Atton Boro possesses different assets on the territory of Mercuria, including the LTA, that it seeks protection for under the BIT in this arbitration. Therefore, there is no need to artificially expand the BIT's protection to the award where other assets are protected on their own.

44. **To conclude on Section I**, the Tribunal has no jurisdiction over the Award-related claim.

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[28] *Romak v. Uzbekistan*, paras.186-187.

[29] Ibid.

[30] Clasmeier, p.101.

[31] *Gea v. Ukraine.*

[32] *Saipem v. Bangladesh*, para.127; *White Industries v. India*, para.7.6.10.

[33] *Mondev. v. USA*, paras.80-81; *Chevron v. Ecuador*, paras.183-185; *Frontier Petroleum v. Czech Republic*, para.231.

II. ATTON BORO HAS BEEN DENIED BENEFITS UNDER THE BIT

45. The Tribunal does not have jurisdiction, since Mercuria validly denied benefits to Atton Boro under the BIT, including Mercuria's consent to submit disputes to arbitration. Atton Boro qualifies as a company Mercuria may deny benefits to (**A**). Mercuria was entitled to revoke benefits of the BIT after Atton Boro had initiated arbitration (**B**).

A. MERCURIA WAS ENTITLED TO DENY BENEFITS TO ATTON BORO, A REEF-CONTROLLED CORPORATION WITH "*NO SUBSTANTIAL BUSINESS ACTIVITIES*" IN BASHEERA

46. Atton Boro is a company that Mercuria may deny benefits to under the BIT. Art. 2(1) BIT sets two characteristics of an investor, who may be denied treaty benefits: control by a third-state national and "*no substantial business activities*" in the country of incorporation.[34] First condition is uncontested by Atton Boro, since it is controlled by a Reef-incorporated Atton Boro Group.[35] Second condition is satisfied as Atton Boro has '*no substantial business activities*' in Basheera. Properly interpreted '*substantial business activities*' require genuine and sizeable business operations and their connection with the state of incorporation (**1**). Atton Boro lacks such activities and connection with Basheera (**2**).

1. '*Substantial business activities*' require genuine and sizeable presence in the state of incorporation

47. An investor with third-party control may be denied benefits under the BIT if its activities do not surpass small-scale operations and are not linked to investor's home state.[36] To qualify as '*substantial*', they should also be significant in substance and form. The above follows from the ordinary meaning of terms (**a**) and the purpose of Art.2 BIT (**b**).

(a) '*Substantial business activities*' mean activities of commercial substance connected with the state of incorporation

48. '*Substantial business activities*' in Art. 2 BIT should be interpreted as sizable operations serving commercial goal. Art. 31(1) VCLT prescribes to interpret treaty terms taking into

[34] Art.2 BIT, p.33.

[35] PO3, p.50, lines 1570-1571.

[36] Jagusch/Sinclair, p.20.

consideration their ordinary meaning. "[*B*]*usiness activities*" mean commercial operations for profit-making or "*furtherance of the business*"[37], as opposed to any '*activities*'. '*Substantial*' connotes activities stretching beyond procedures associated with incorporation of a company or tax remissions, both in substance and magnitude. They cannot mean any business operations; otherwise, '*substantial*' qualification would be meaningless.

49. Tribunals consider '*substantial business activities*' to require significant operations.[38] In interpreting a similar qualification – "*real economic activities*" – the tribunal observed that "*'real' cannot but be <…> 'genuine' <…> or 'tangible'*."[39] Such operations should contribute to a commercial purpose and home state's economy.[40] For instance, maintenance of office and occasional meetings of the board of directors do not suffice as '*substantial business activities*'.[41] To demonstrate economic contribution, investors need to have a large portion of their transactions in the state of incorporation, as well as to procure inputs locally.[42] The first threshold for substantial presence is thus involvement in commercial operations that serve a defined business goal, while also impacting the state's economic turnover.[43]

(b) To fulfil the purpose of Art. 2 BIT, tribunals should exclude companies with insignificant business operations from treaty protection

50. The second threshold required for substantial presence is a comparatively significant scale of operations in the context of the respective group. Granting treaty protection to companies that are not '*mailbox*', yet can be easily set up to "*free ride*"[44] a treaty is contrary to the

[37] Jagusch/Sinclair, p.20.

[38] See *Alps Finance v. Slovakia*; *Rurelec v. Bolivia*.

[39] *Alps Finance v. Slovakia*, para.226.

[40] Baumgarter, p.256.

[41] *Rurelec v. Bolivia*, para.370.

[42] Jagusch/Sinclair, p.20.

[43] See, e.g. Art 1(4)(ii) 2007 COMESA Investment Agreement

[44] Walker, pp.373, 388.

objective of denial-of-benefits clause.[45] To ascertain that a company passes this requirement, tribunals should assess magnitude of its operations.[46] Maintenance services for a business, including legal and tax, performed by a small number of employees, do not meet the scale requirement.[47] To give effect to the denial-of-benefits, it should be applied not only to "*shell*"[48] with no activities beyond "*corporate existence*"[49], but also to entities that can be easily set up and maintained by a third-party investor.

51. Since '*substantial business operations*' concept emerged in the US BITs[50], it is instructive to look at how the same criterion is applied in the US in tax context, where a similar objective of curbing "*free-rid*[ing]" is pursued. In the US tax regulations[51] this qualification[52] is used for exemption of "*surrogate foreign corporation*"[53] from taxation by the Internal Revenue Service. It is interpreted as requiring US corporate group to have "*at least 25 percent of the group employees, <…> assets, <…> income <…> in the relevant foreign country*"[54] via entity in question. Otherwise, foreign corporation is considered a vehicle for tax optimization.

52. The above standard demonstrates that to qualify as substantial, companies' activities should be quantitatively significant compared to their corporate group.

[45] Chaisse, pp.302-303.

[46] See, e.g. Art 1(4)(ii) 2007 COMESA Investment Agreement.

[47] *Rurelec v. Bolivia*, para.217.

[48] Gastrell/Le Cannu, p.81.

[49] Jagusch/Sinclair, p.20.

[50] Walker, p.388.

[51] 26 C.F.R. para.7874(B)(iii).

[52] UNCTAD, p.93.

[53] 26 C.F.R. para.7874(B)(iii).

[54] IRS Internal Revenue Bulletin, Section (B).

2. Atton Boro lacks required economic link with Basheera

53. A mere outpost of Atton Boro Group in Basheera, Atton Boro does not conduct '*substantial business activities*' there (**a**). It is not a holding company with *sui generis* substantial activities (**b**). Nor may Atton Boro rely on operations of Atton Boro Group in Basheera (**c**).

(a) Atton Boro conducts no significant and genuine business activities that are linked with Basheera

54. Atton Boro is only a special-purpose vehicle of Atton Boro Group.[55] Firstly, it provides support for legal and accounting services, which are not associated with "*furtherance of the business*", but rather with "*corporate existence*" of its affiliates.[56] Secondly, such services and management of patent portfolios lack economic link with Basheera and, therefore, do not suffice as '*substantial*' in the context of Art. 2 BIT.[57] Atton Boro manages IP assets of the group and provides legal and other services to affiliates outside of Basheera. These activities can be carried out from any jurisdiction, not exclusively Basheera.

55. Furthermore, composition and number of its staff – "*manager, accountant, commercial lawyer, patent attorney*" – demonstrate small scale of Atton Boro's activities, which cannot account for a substantial part in revenue and service contribution to a billion-dollar corporation.[58] Atton Boro exhibits typical characteristics of a company, which is simple to maintain in any jurisdiction by relocating personnel or outsourcing a function for "*protection shopping*".[59] It does not qualify as conducting '*substantial business activities*' in Basheera for the purpose of Art.2 BIT.

(b) Atton Boro does not have a managing or controlling role

56. Atton Boro does not meet '*substantial business activities*' criterion by claiming to carry out significant management activities. A holding company may qualify as an investor with

[55] Uncontested Facts, p.28, para.4.

[56] PO2, p.48, para.3.

[57] *Pac Rim v. El Salvador*, para.4.74.

[58] PO2, p.48, para.3; Notice of Arbitration, p.5, para.160; Uncontested Facts, p.28, para.2.

[59] Chaisse, p.303; Baumgarter, p.109.

'*substantial business activities*' only if it actively manages shares in affiliates.[60] Claimant exercises no management or control over the group's affiliates; it only provides sales, marketing and maintenance-related services to them.[61]

(c) Atton Boro may not rely on activities of Atton Boro Group

57. Investor's insufficient business presence cannot be compensated "*with business activities* [of] *an associated but different legal entity <...> even when it controls the Claimant.*"[62] Only activities of an entity, which owns an investment, matter under Art.2 BIT, since the BIT defines '*investor*' as a legal entity and does not extend this definition further. Therefore, "*established presence*" [63] of Atton Boro Group in Basheera, reflecting activities of companies other than Atton Boro, does not provide support for Claimant's link with Basheera.

B. MERCURIA DENIED BENEFITS OF THE BIT TO ATTON BORO IN A TIMELY MANNER

58. Timing for revocation of the BIT protection from Atton Boro was appropriate. Text of Art. 2 BIT does not require Mercuria to give prior notice to an investor regarding forthcoming denial of benefits (**1**). Such interpretation of Art. 2 is consistent with the object and purpose of the BIT and the denial-of-benefits clause (**2**). In this respect, the Tribunal should not follow case law that deals with Art. 17 ECT[64], since ECT's framework is distinct from that of the BIT (**3**). Lastly, Mercuria exercised its rights to deny Atton Boro benefits under BIT, complying with the deadline set out in PCA Rules (**4**).

[60] *Pac Rim v. El Salvador*, para.4.72.

[61] PO2, p.49, para.3.

[62] *Plama v. Bulgaria,* para.169; See also *Pac Rim v. El Salvador*, paras.4.71-4.72.

[63] *Pac Rim v. El Salvador*, para.4.66; Art.2 BIT, p.33; Uncontested Facts, p.28, para.4.

[64] See *Plama v. Bulgaria*; *Liman v. Kazakhstan*; *Ascom v. Kazakhstan*.

1. The text of the BIT permits to deny benefits after commencement of arbitration

59. Ordinary meaning[65] of "*reserves the right to deny*"[66] in Art. 2 BIT does not prescribe any specific manner of revocation of treaty protection.[67] Succinct language of the clause has been the Parties' choice.[68] No express time limit or notice requirement has been included in the BIT, unlike Canada-Peru BIT or NAFTA.[69] Hence, the wording of Art. 2 BIT imposes no temporal restrictions on revocation of benefits.[70]

60. Since limitations on state's rights may not be presumed without a provision explicitly restraining them,[71] Art. 2 BIT is not subject to time constraints.

2. Retrospective denial of benefits is consistent with the object and purpose of the BIT

61. Object and purpose of the BIT is to create both predictable and safe investment environment.[72] It cannot be accomplished without granting Parties the right to protect themselves from investors seeking to "*free ride*" the treaty.[73] Art. 2 BIT itself warns investors that such right is permanently reserved by States and eventual denial does not undermine predictability (**a**). Furthermore, effective interpretation of Art. 2 BIT warrants retrospective denial of benefits (**b**).

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[65] Art.31(1) VCLT.

[66] Art.2 BIT, p.33.

[67] Jagusch/Sinclair, pp.28-29.

[68] Baumgartner, p.37.

[69] See Art.19(3) Canada-Peru BIT, Arts.1113, 1803 NAFTA.

[70] *Pac Rim v. El Salvador*, para.4.83; *EMELEC v. Ecuador*, para.71; *Ulysseas, Inc v. Ecuador*, paras.166-169.

[71] *The case of the SS. Lotus (PCIJ)*, p.18.

[72] Chaisse, p.239; Schreuer/Dolzer, p.22; BIT Preamble, p.33, lines 977, 989.

[73] Thorm/Doucleff, p.26; Douglas, p.471; Chaisse, p.302.

(a) Art. 2 BIT itself put Atton Boro on notice that Mercuria may deny it BIT benefits

62. Atton Boro may argue that retrospective denial of benefits under the BIT is contrary to its object and purpose because it disrupts predictable investment environment.[74] However, this argument is misconceived.

63. Denial-of-benefits in IIAs serves to notify investors about a possibility of revocation of treaty benefits.[75] It would be "*artificial*"[76] for investors to exclude potential of retrospective denial of benefits, as "[this] *clause is part of the 'pactum' agreed by the <…> Parties*".[77] Atton Boro should have foreseen retrospective withdrawal of protection under the BIT as such exercise of Art. 2 right follows from the text of the treaty.

(b) Effective interpretation of Art. 2 BIT allows Mercuria to deny benefits retrospectively

64. Treaty provisions should not be interpreted in a manner that makes them impossible or difficult to apply.[78] To interpret Art. 2 BIT as yielding the right for prospective withdrawal of benefits would be contrary to its *effective interpretation*. To deny benefits prospectively under investment treaties, States need to possess information regarding investors' ownership structure and business activities before it files for arbitration. States rarely have the means to do so beforehand due to a large number of investors in their territory and "*asymmetries*" of information.[79] Accordingly, states should not be expected to investigate these issues before an investor files for arbitration.[80] Mercuria's application of Art. 2 BIT retrospectively is in line with *effet utile* of the provision.

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[74] BIT Preamble, p.33, lines 977, 989.

[75] *Rurelec v. Bolivia*, para.375; *Ulysseas v. Ecuador*, para.173.

[76] Douglas, p.471.

[77] *Rurelec v. Bolivia*, para.375.

[78] *Fisheries Jurisdiction Case (ICJ)*, para.43; *Case Concerning Application of CERD*, para.124.

[79] Jagusch/Sinclair, pp.40, 35; *Pac Rim v. El Salvador*, paras.4.53, 4.56.

[80] *Ulysseas v. Ecuador*, para.174.

3. The Tribunal should not follow case law based on Art. 17 ECT

65. Atton Boro may not rely on ECT-based cases[81] to demonstrate Mercuria's alleged obligation to deny benefits under the BIT prospectively.

66. Firstly, in dealing with Art. 17 ECT, tribunals ruled on revocation of substantive protection, as opposed to advantages of the entire treaty.[82] Art. 17 ECT does not affect a right to initiate arbitration.[83] The same logic cannot apply to provisions akin to Art. 2 BIT, which deny advantages of the entire treaty.[84]

67. Secondly, ECT concerns investments in energy sector, where States are in position to deny benefits prospectively, unlike in the usual BIT context. Energy investments are scrutinized by governments due to the sector's strategic role[85] as in Bulgaria and Kazakhstan, which were respondents in the relevant cases.[86] Hence, ECT parties are likely to be aware of ownership structures and business activities of investors in energy sector, unlike BITs, which are not sector-specific.[87]

4. The only restriction for invocation of Art. 2 BIT stems from PCA Rules and Mercuria complied with it

68. Art. 23(2) PCA Rules obliges Mercuria to challenge the Tribunal's jurisdiction no later than statement of defence. Art. 4(1) requires it to be submitted "[w]*ithin 30 days of the receipt of the notice of arbitration*".[88] This is the sole deadline for triggering Art. 2 BIT.[89] It has been

[81] See *Plama v. Bulgaria*, *Liman v. Kazakhstan*, *Ascom v. Kazakhstan*, *Yukos v. Russia*.

[82] *Yukos v. Russia*, para.455; Gastrell/Le Cannu, p.81.

[83] See Part V. ECT; *Plama v. Bulgaria*, para.147; Mistelis/Baltag, p.1316.

[84] *Ulysseas v. El Salvador*, para.125.

[85] See Selivanova.

[86] *Plama v. Bulgaria*, paras.163,165; *Liman v. Kazakhstan*, para.227; Energy Sector Overview (Bulgaria); *Mills/Howard*.

[87] Gastrell/Le Cannu, p.96.

[88] Art. 4(1) PCA Rules.

[89] *Rurelec v. Bolivia*, paras.371-372; *Pac Rim v. El Salvador*, para.4.85.

respected by Mercuria since it denied benefits to Atton Boro 19 days after receipt of its notice of arbitration.[90]

69. **To conclude Section II**, Mercuria validly exercised its right to withdraw protection under the BIT. Atton Boro has no '*substantial business activities*' in Basheera; they are not associated with commercial purpose, lack substantive link to Basheera and are small-scale. Likewise, Mercuria invoked Art. 2 BIT in a timely manner, in line with literary meaning of its terms and purpose, while respecting PCA Rules' deadline by including the denial of benefits in its statement of defence.

III. NEITHER THE ENACTMENT OF THE LAW, NOR THE GRANT OF THE LICENSE TO HG PHARMA VIOLATES THE BIT

70. In response to a quickly unfolding health crisis, involving a debilitating disease affecting more than 0.5 million of its citizens,[91] Mercuria used a commonly accepted instrument – a compulsory license – to ensure access to the medicine. The licensee was required to pay royalty to Atton Boro in the amount within the market range in Mercuria.[92] Authorization of compulsory licensing and granting the license to HG-Phrama (the "**License**") do not constitute indirect expropriation of Atton Boro's investment (**A**). Nor do they violate Art. 3 BIT, including the fair and equitable treatment standard (**B**).

A. MERCURIA'S ACTIONS DO NOT CONSTITUTE INDIRECT EXPROPRIATION

71. A compulsory license for Valtervite does not amount to expropriation of Atton Boro's overall investment (**1**). Furthermore, as Mercuria granted the License to promote access to essential drug by reducing the price thereof, its actions cannot constitute indirect expropriation of Atton Boro's IP rights under the BIT as they are exempt under Art. 6(4) and constitute legitimate exercise of police powers (**2**).

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[90] *Notice of Arbitration*, p.2, line 42; *Response*, p.16, para.1.

[91] NHA Report, p.42, line 1343.

[92] PO3, p.50, line 1590.

1. The License does not amount to expropriation of the overall investment

72. Atton Boro cannot claim expropriation of its Sanior business, including the production facilities. The widely accepted criterion for state measures to constitute indirect expropriation is effective neutralization of the benefit of property of the foreign owner.[93] The right should have been "*rendered so useless that they must have been expropriated*". [94] The loss of control over the investment is essential for finding expropriation. [95] If only the economic activity was rendered more difficult, but not impossible, this does not amount to indirect expropriation.[96] For instance, the tribunal in *Philipp Morris v. Uruguay* held that

> "*partial loss of profits that the investment would have yielded if the measure has not been taken does not confer an expropriatory character of the measure*"[97]

73. Atton Boro was not deprived of its overall investment**.** There is no evidence that the production facilities could not have been used for production of other medicines. To the contrary, Atton Boro originally set up its facilities to produce Sanior *and other drugs*.[98] After the issuance of the License Atton Boro appears to continue production of other products.[99]

74. Nor can Atton Boro rely on significant loss of market share to competitors. The market share is not "*capable of economic use independently of the remainder of the investment*"[100] and thus cannot be considered as subject to expropriation.[101]

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[93] *CME v. Czech Republic*, para.604; *LG&E v. Argentina*, para.188.

[94] *Starrett Housing v. Iran*, p.154.

[95] *Pope & Talbot v. Canada*, para.100.

[96] Best Practices, p.14.

[97] *Philipp Morris v. Uruguay*, para.286.

[98] Uncontested Facts, p.28, para.5.

[99] Uncontested Facts, p.31, para.25.

[100] Kriebaum, Partial Expropriation, p.83.

[101] UNCTAD, Expropriation, p.25.

75. For these reasons Atton Boro's business in Mercuria, including the production assets, has not been expropriated.

2. Mercuria did not expropriate Atton Boro's IP rights

76. Mercuria's actions do not constitute indirect expropriation as they fall within the category excluded from the scope of indirect expropriation by Art. 6(4) (**a**). Alternatively, the License was a legitimate exercise of Mercuria's police powers aimed at protection of public health and proportionate thereto and does not constitute expropriation on this basis (**b**).

(a) The License was issued to protect public health and therefore cannot constitute indirect expropriation pursuant to express wording of Art. 6(4) BIT

77. Art. 6(4) BIT provides that the measures that are "*designated and applied to protect legitimate public welfare objectives, such as public health*," do not constitute indirect expropriation. This provision implements the BIT Preamble which states that the BIT objectives shall be achieved "*in a manner consistent with the protection of health*".[102]

78. Art. 6(4) does not require the tribunal to assess whether the measures taken are necessary or proportionate. Art. 6(4) BIT does not amount to restatement of the police powers exception as provided by customary international law to justify importation of the relevant restrictions. In comparable situations tribunals interpreted the provisions on essential security interest as providing for an independent standard distinct from the state of necessity under customary international law that does not require satisfaction of conditions to invoke necessity.[103] Nor is there basis to interpret Art. 6(4) restrictively as there is no "*canon that presumes States cannot have intended to restrict their range of actions*".[104]

79. Mercuria concedes that Art. 6(4) shall be invoked in good faith.[105] However, in this case there is no evidence that the License was issued for a reason other than protection of public welfare and public health. Therefore, the issue of lack of good faith does not arise.

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[102] BIT Preamble, p.32, lines 988-989.

[103] *CMS Annulment*, para.127.

[104] *Aguas del Tunari v. Bolivia*, para.91.

[105] *LG&E v. Argentina*, para.214; *Continental Casualty v. Argentina*, para.182.

80. It follows that to determine the lawfulness of the measures the Tribunal should consider the following factors based on the wording of the BIT provision: whether the measures were "*designated and applied*" to protect public health (**i**) and whether they were non-discriminatory (**ii**).[106] The License satisfies both of these conditions.

i. The License was '*designed and applied*' to protect public health

81. Compulsory licensing of pharma-related patents is widely accepted to be a measure aimed at protecting public health. The use of compulsory licensing within pharmaceutical industry is accepted on international level.[107] Each state has the right to grant compulsory licenses.[108] Compulsory licensing proved extremely useful in increasing the access to medicines by reducing their price and is widely used for this purpose by other countries.[109] USA, Zimbabwe, Thailand, Indonesia and other states used compulsory licensing specifically to reduce the prices for the drugs.[110]

82. In the present case, Mercuria has authorized the License precisely to ensure access to the medicine to those who could not afford it. By 2006 the awareness campaigns revealed 10 times increase in number of confirmed cases of greyscale since 2003. In 2006 100,000 of 578,390 greyscale patients could not afford Sanior and depended on state program which is 10 times more than a year ago.[111] Current price for Sanior was no longer affordable for the state budget to subsidize,[112] or for the rest of the population.[113] Sanior was the only effective remedy against the disease.[114] In these circumstances, the License was a measure "*designed and applied*" to protect public health by making the necessary medicine available.

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[106] Art.6(4) BIT, p.35.

[107] Doha Declaration, para.4.

[108] Doha Declaration, para.5(b).

[109] Kaur/Chaturvedi, p.280, Table 1.

[110] Ibid.

[111] NHA Report, p.42, lines 1342-1344.

[112] NHA Report, p.43, lines 1363-1366; Uncontested Facts, p.30, para.16.

[113] NHA Report, p.43, lines 1365-1366.

[114] PO3, p.50, lines 1583-1584.

ii. The measure was not discriminatory

83. There is no evidence that the License was granted on discriminatory basis. Discrimination arises from explicitly different treatment of similarly situated individuals or groups without justification.[115] The Law No.8458/09 applies to all patented inventions and there is no evidence that it specifically targeted Valtervite or Atton Boro, or that the License was issued due to Atton Boro's nationality.

(b) Alternatively, compulsory licensing was a legitimate exercise of Mercuria's right to adopt regulatory measures proportionate to the goal pursued

84. A measure taken in exercise of normal regulatory powers - a *bona fide* regulation within the accepted police powers of the State - does not constitute indirect expropriation.[116]

85. Should this Tribunal decide that the requirements for exercise of police powers standard provided by customary international law are applicable, these requirements, including that the measure is proportionate to the public purpose pursued and to the effect to Atton Boro's investment (**i**) as well as not contrary to investor's legitimate expectations[117] (**ii**), have been satisfied.

i. The License is a proportionate exercise of police powers

86. In assessing proportionality between a legitimate government aim and the measure taken the tribunal should first consider the goals and reasonableness of the government measures.[118] In this case the License is proportionate as there has been a risk of serious harm to the population and other available means were ineffective.

87. *Firstly*, there was a serious risk to the health of Mercurian population that the License addressed.

88. Investment tribunals accept that a regulation adopted to prevent *potential* and not only present harm to the public constitutes exercise of police powers. For instance, the tribunal

[115] Mitchell/Heaton/Henckels, p.5; *Canada – Patent protection*, para.7.94.

[116] *Too v. USA*, p.378; *Saluka v. Czech Republic*, para.255.

[117] *Tecmed*, para.122; *Azurix v. Argentina*, para.311; *LG&E v. Argentina*, paras.189,194,195.

[118] Newcombe, p.16; *Tecmed*, para.122.

in *Chemtura v. Canada* found that the ban on a chemical responding to danger of the substance for the human health and environment does not constitute expropriation.[119] According to Professor Newcomb, "*the requirement for science-based risk assessment*" constitutes sufficient basis for exercise of police powers.[120]

89. In the present case, there was a serious risk Mercuria would not be able to afford providing any medicine to its population going forward. By the time the License was issued it had proved impossible to establish scientifically the percentage of the population affected by greyscale: the estimated percentage of patients varied from 20% to 80%.[121] The License was necessary to address the risk resulting from this. First, Mercuria could not provide free Sanior to the growing number of patients. Second, given that greyscale is incurable, Mercuria should have prevented further transmissions of the virus absent verified information. Sanior prevents the transmission to healthy people.[122] Therefore, the License which makes the Sanior more available to the population minimizes the risk that greyscale would be further transmitted. Thirdly, given a potentially very high yet unknown number of citizens requiring treatment it was unsustainable to expand funds on procurement of the medicine at market prices risking that the available funds would be depleted and Mercuria would not be able to secure provision of *any* treatment to its population, given that even generic drug costs 20% of the Sanior market price.[123]

90. Secondly, there were no appropriate alternative ways to address the risk.

91. Restricting access to Valtervite-based drugs produced under the License was inappropriate. Creating a system that requires verification of low-income status and other factors for a group of patients that was expected to increase drastically[124] would be very time consuming and therefore less effective in addressing a growing epidemic. The exact dynamic of

[119] *Chemtura v. Canada*, para.266.

[120] Newcombe, p.26.

[121] PO3, p.50, line 1585-1587.

[122] Ibid.

[123] Uncontested Facts, p.30, para.22.

[124] NHA Report, p.43, lines 1359-1361.

greyscale incidence is not known still,[125] and this required decisive action to stop the spread of the virus.

92. Increasing State funding for procurement of Sanior for low-income patients was not an appropriate alternative. Firstly, Atton Boro failed to present any evidence that NHA could have procured such funding or Mercuria could have provided it. Secondly, in assessing the appropriateness and proportionality of the measure the Tribunal should take into account the effect on investor.[126] Atton Boro invested US$ 1 billion in developing Sanior,[127] but has been receiving at least US$ 1.6 billion a year from the NHA under the LTA.[128] In those circumstances the License was proportionate.

ii. The License did not violate Atton Boro's legitimate expectations

93. Mercuria's intent to take "*aggressive*" measures has been clear since 2003.[129] Mercuria will demonstrate below that compulsory licensing in these circumstances did not infringe any of Atton Boro's legitimate expectations.[130]

B. NEITHER THE LAW, NOR THE LICENSE TO HD-PHARMA VIOLATES ART. 3(2) BIT

94. Compulsory license is an instrument frequently used by States around the world to ensure access to critical medicine for their populations. Mercuria's decision to use this instrument to address the rising threat of greyscale was in full compliance with its obligations under Art. 3(2). It was neither unreasonable (**1**), nor infringed any legitimate expectations of Atton Boro (**2**).

[125] PO3, p.50, line 1586.

[126] *Tecmed*, para.122; *Philip Morris v. Uruguay*, para.306.

[127] PO3, p.50, lines 1600-1601.

[128] Uncontested Facts, p.30, para.22.

[129] Uncontested Facts, p.28, para.6.

[130] See paras.98-118 below.

1. The License was not an unreasonable measure

95. The terms reasonableness and arbitrariness are treated as synonyms by investment tribunals.[131] The threshold for the measures to be arbitrary is high and requires a measure "[in] *the sense of something done capriciously without reason*".[132] The criterion for unreasonableness is whether the State's conduct had a reasonable relationship to some rational policy.[133]

96. In the present case it does. First, as shown in paras. 81-82 above, the production under a compulsory license was the most appropriate measure in the circumstances of spreading but presently incurable disease. Second, the measure achieved the public purpose. It reduced the costs of purchasing medicines by as much as 80%.[134]

97. Atton Boro cannot claim that the terms of the license constitute unreasonable measure. The tribunal in *Invesmart* stressed that "[a] *state should not be held to an obligation to act in accordance with international best practice"*.[135] Therefore, the amount of royalties cannot render the issuance of the License unreasonable.

2. Atton Boro had no legitimate basis to expect that no compulsory license would be issued

98. Atton Boro should have expected that Mercuria may authorize compulsory licensing – a common regulatory instrument authorized by TRIPS since 1994. More to the point, there was no basis for legitimate expectation that *no* such license would be issued as Atton Boro cannot rely on general regulatory framework (**a**) and Mercuria have never given specific commitments towards Atton Boro (**b**). Moreover, Atton Boro cannot rely on the TRIPS (**c**).

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[131] *National Grid v. Argentina*, para.197; *Plama v. Bulgaria*, para.184; Kriebaum, Unreasonable measures, p.3.

[132] *National Grid v. Argentina,* para.197.

[133] *Invesmart v. Czech Republic,* para.454.

[134] Uncontested Facts, para.22, p.30.

[135] *Invesmart v. Czech Republic,* para.459.

(a) Atton Boro cannot rely on general regulatory framework that initially did not authorize compulsory licenses

99. A legal regime that lacks the element of specificity[136] does not constitute a basis for legitimate expectations unless a state explicitly assumed a legal obligation, such as stabilization clause.[137]

100. In the present case, Mercurian patent law lacked specificity – it was a law of general applicability containing no guarantee against introduction of compulsory licenses. Mercuria did not undertake that the law would remain unchanged. Moreover, the option of compulsory licensing has been available for Mercuria since at least 1995,[138] long before Atton Boro entered the market through LTA in 2004 and manufacturing unit in 2005.[139]

101. Moreover, the unfolding greyscale crisis should have put Atton Boro on notice that Mercuria may take measures to address it. Where investments are made in the context of a mounting crisis investors should expect change of the regulatory framework.[140] The tribunal in *Parkerings v. Lithuania* stated that the investor must anticipate the change in circumstances and adapt the investment.[141]

102. In 2003 Atton Boro was aware that greyscale could spiral into national crisis and the state was required to take "*aggressive measures to combat it*".[142] Hence, it had no basis to expect that compulsory licenses would not be introduced.

103. Therefore, Atton Boro cannot rely on the absence of compulsory licensing in the law as a basis of legitimate expectations.

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[136] *Total v. Argentine Republic*, paras.121-124; *EDF v. Romania*, para.217; *El Paso v. Argentina*, para.364.

[137] Potesta, pp.114-115.

[138] Art. 31 TRIPS; Doha Declaration, Arts.4,5(b); Remuneration Guide, p.15.

[139] Uncontested Facts, p.29, para.11.

[140] *Metalpar v. Argentina*, para.187.

[141] *Parkerings v. Lithuania*, para.333.

[142] Uncontested Facts, p.28, para.6.

(b) Mercuria have never given commitments to Atton Boro

104. The representations creating legitimate expectations should be clear and addressed to a particular investor.[143] In *Methanex v. USA* the Californian ban on a gasoline additive was held not to be contrary to legitimate expectations as no specific commitments that "[t]*he government would refrain from such regulation*" had been given to the putative foreign investor.[144]

105. In the present case, Mercuria never gave Atton Boro specific commitment that it will not authorize compulsory licensing. Neither the patent (**i**), nor the LTA (**ii**), nor the statement of Mercurian officials (**iii**) can be treated as such.

i. The patent does not create legitimate expectations

106. The patent is a part of the regulatory framework subject to regulatory changes and does not constitute specific commitment without the stabilization clause.[145] There are clear policy reasons for such approach – laws are frequently implemented through licenses or other documents issued to businesses. If a generic permit has the effect of freezing State's power to regulate the respective business this would significantly hinder States' ability to perform their functions. In cases where, for example, a license was considered to create legitimate expectations, the licenses were part of a bespoke package specifically designed to induce investors.[146]

107. In the present case, Atton Boro's patent is a generic patent issued on common terms of Mercurian law. There is no evidence that it was issued to induce Atton Boro's investment.

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[143] *Total v. Argentina*, para.119.

[144] *Methanex v. USA*, p.4.

[145] Potesta, p.112.

[146] *CMS v. Argentina*, para.277; *Enron v. Argentina*, para.264; *Sempra v. Argentina*, para.289; *BG Group v. Argentina*, para.310*; National Grid v. Argentina*, paras.250, 254; Klager, p.171.

Indeed, it was granted in 1998[147] before greyscale became a health concern in Mercuria in 2002.[148] Hence, it did not create legitimate expectations.

ii. LTA did not create legitimate expectations

108. Expectations under a commercial contract are "*mere*" contractual expectations not protected under the BIT.[149] Even tribunals that found that contracts create legitimate expectations limited them to an expectation of compliance only.[150]

109. In the present case, the LTA did not contain any representation that no compulsory license will be issued. Indeed, it was concluded not with Mercuria, but with a separate entity, the NHA.[151] At its highest, the LTA may only create an expectation of NHA's compliance with the procurement obligations, but it cannot restrict the state's powers to issue compulsory licenses.

110. Therefore, LTA does not constitute a ground for legitimate expectations.

iii. The statements of Mercurian officials did not create legitimate expectations

111. General political statements do not create legitimate expectations unless specific and individualized.[152] Representations should not be addressed "*to the world at large*".[153] For instance, in *PSEG v. Turkey* the tribunal held that the host State's policy to encourage and welcome investment is not sufficient to support a claim of legitimate expectations.[154]

112. All statements of Mercurian officials in the record are too abstract and generic to create legitimate expectations. Firstly, neither the statement of Minister for Health, nor the President's post on twitter account[155] contained specific representation towards Atton Boro.

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[147] PO3, p.50, line 1575.

[148] NHA Report, p.41, lines 1313-1315.

[149] *Duke Energy v. Ecuador*, para.358; *Impregilo v. Pakistan*, para.360.

[150] Potesta, pp.101,102; *Parkerings v. Lithuania*, para.344; *Impregilo v. Argentina*, para.292.

[151] *Paushok v. Mongolia*, para.302.

[152] UNCTAD FET, p.68.

[153] *El Paso v. Argentina*, paras.375-377.

[154] *PSEG v. Turkey*, para.241.

[155] Uncontested Facts, p.29, para.6.

Secondly, the content of the statements in no way guarantees the absence of compulsory licensing. For instance, Minister for Health reaffirmed the importance of IP rights regime, while stressing the need to "*secure access to health care for all*".[156]

(c) Atton Boro cannot rely on TRIPS Agreement

113. The TRIPS Agreement did not create a basis for legitimate expectation that compulsory licenses would be issued in full compliance with TRIPS (**i**). Moreover, the License was issued in accordance with TRIPS (**ii**).

i. TRIPS did not create legitimate expectation of full compliance with TRIPS provisions on compulsory licenses

114. Atton Boro cannot claim breach of its legitimate expectations of state's compliance with TRIPS Agreement. Indeed, even WTO members cannot generally derive legitimate expectations[157] from TRIPS. The same applies to private parties. [158] Similarly, the tribunal in *White Industries* held that IIA does not create legitimate expectations of the investor that state would comply with its treaty commitments.[159]

ii. The License was issued in accordance with the TRIPS

115. Atton Boro may argue that the License does not comply with the TRIPS that requires prior negotiations and an adequate amount of royalties. However, Mercuria did not violate these requirements.

116. First, the requirement of prior negotiations with patent owner was properly waived. It may be waived if there is an ongoing public health crisis.[160] In this case by 2006 the number of greyscale cases doubled.[161] When the License was issued the greyscale was a public crisis

[156] Minister for Health Statement, p.39, para.4.

[157] *India – Patents, Appellate Body Report*, paras.33-42.

[158] Khan, p.14.

[159] *White Industries v. India*, para.10.3.12.

[160] Art.31(k) TRIPS; Remuneration Guide, p.13.

[161] NHA Report, p.42, lines 1342-1344.

affecting up to 80% of Mercuria's population.[162] In these circumstances, a waiver of negotiations was justified.

117. Second, the royalty ordered by the court is "*adequate*" as required by TRIPS.[163] The applicable rules leave the royalty to be paid for compulsory license primarily within state's discretion.[164] Each country may set its own approach to royalties' calculation according to its own "*measures of adequacy*".[165] Where the rate reflects the market practices it would be deemed "*adequate*".[166]

118. The royalty of 1% stays within the Mercurian market practice. The royalty rates in Mercuria for drugs to treat similar disease ranged from 0.5% to 3% of revenue.[167] Atton Boro presented no evidence that the rate was inadequate compared to the market rates in Mercuria. The sole factor Atton Boro ever invoked is the amount of R&D costs.[168] However, this fact alone cannot serve as the ultimate measure of adequacy of the rate. Indeed, Valtervite have been patented in 50 jurisdictions apart from Mercuria[169] and Atton Boro cannot expect royalty rates from compulsory license in one of jurisdictions to necessarily compensate the expenses in the entirety. Moreover, Atton Boro could have challenged the amount of royalties before the High Court.[170] Its failure to do so reaffirms Atton Boro's lack of evidence of inadequacy of the rate.

119. **To conclude on Section III**, the grant of License neither constitutes an indirect expropriation, nor violates fair and equitable treatment standard.

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[162] PO3, p.50, line 1586.

[163] Art.31(h) TRIPS.

[164] Love, pp.688-689.

[165] Nuno, p.399.

[166] Nuno, p.400.

[167] PO3, p.50, line 1590.

[168] PO3, p.50, lines 1600-1601.

[169] Uncontested Facts, p.28, para.3.

[170] PO3, p.50, lines 1578-1580.

IV. AWARD ENFORCEMENT PROCEEDINGS COMPLY WITH MERCURIA'S OBLIGATIONS UNDER ART. 3 BIT

120. Enforcement proceedings initiated by Atton Boro comply with Mercuria's obligations under the BIT. Firstly, actions of Mercurian judiciary do not constitute denial of justice (**A**) and this is the only standard under the BIT that applies to the proceedings (**B**). Secondly, even if the BIT contains a separate obligation of providing '*effective means*', proceedings comply with this standard (**C**).

A. MERCURIA DID NOT DENY JUSTICE TO ATTON BORO

121. Mercuria accepts that the obligation to provide fair and equitable treatment encompasses prohibition of denial of justice.[171] However, the enforcement proceedings do not amount to denial of justice.

122. Denial of justice takes place only when the actions of the courts shock and surprise,[172] when reached outcome offends *"judicial propriety",*[173] and when the investor is treated in highly unjustified and arbitrary manner[174]. Claimant must establish that the legal system failed to provide justice; a single procedural irregularity is insufficient.[175]

123. Undue delay amounts to denial of justice only when it evidences that the whole judiciary system is broken.[176] For example, in *El Oro Mining* the 9-year delay was held to amount to denial of justice, since during these 9 years the system was so overburdened that no hearing took place.[177]

124. In the present case, hearings were held on a regular basis and Atton Boro was given every opportunity to present its case. Indeed, the court considered all the issues and motions filed.

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[171] *Rumeli v. Kazakhstan,* para.654; Paulsson (Opinion), paras.21-22.

[172] *ELSI v. Italy*, para.128; *Chevron v. Ecuador*, para.244.

[173] *Waste Management v. Mexico,* para.98; *Loewen v. USA*, para.132; *Mondev. v. USA*, para.127.

[174] *Myers v. Canada*, paras.95-98.

[175] Newcombe/Paradell, pp.241-242.

[176] *El Oro Mining v. Mexica,* p.198, para.10.

[177] *El Oro Mining v. Mexica,* p.198, para.9. See also *Adams v. Slovakia,* p.1.

Atton Boro itself is partially responsible for the length of proceedings, having requested postponements.[178]

125. The respondent in these proceedings, the NHA, appears to vigorously defend its rights and use some tactics that may not reflect the best practices in litigation. However, the High Court is required to respect procedural rights of both parties and the judges' decision not to sanction the NHA as such cannot evidence denial of justice.

126. For all these reasons, enforcement proceedings do not amount to denial of justice.

B. THE BIT DOES NOT CONTAIN A STANDALONE OBLIGATION TO PROVIDE EFFECTIVE MEANS

127. Atton Boro is likely to claim that the BIT requires Mercuria to provide '*effective means'* of enforcing investors' rights referring to the preamble of the BIT. However, properly interpreted, the relevant recital of the preamble does not create a separate obligation.

128. The reference in the preamble of the BIT to effective means does not impose an obligation to provide a higher standard to investors. To impose an obligation on the State such obligation should be clearly expressed and precisely formulated.[179] A new obligation of the government *"should not lightly be read into a treaty which does not spell* [it] *out clearly*".[180] The explanation is simple: it is unlikely that the state will give up some of its guarantees and subscribe to the more stringent line of conduct by using preamble, a section normally reserved to exhortatory policy statements.[181]

129. In this case, the preamble of the BIT provides that Basheera and Mercuria "[r]*ecogniz*[e] *the importance of providing effective means*". The operative provisions of the BIT do not contain an obligation to provide effective means or similar standard. The phrase in the preamble can be interpreted as Parties' acknowledgment that the level of protection embodied in the operative provisions of the BIT (such as the ban on denial of justice) is

[178] Timeline of the Proceedings, p.7, para.10, p.9, para.25.

[179] Hulme, p.1317; *EDF v. Romania,* para.217*; Parkerings v. Lithuania*, para.332.

[180] *Total v. Argentina*, para.115.

[181] Hulme, p.1318.

sufficient to provide the necessary effective means. This is logical as the effective means standard is directed "*at many of the same potential wrongs as denial of justice*".[182]

130. Had the Parties intended to introduce '*effective means'* as a separate obligation under the BIT they would have done so expressly. Indeed, this was the case in all treaties, tribunals have found to contain this obligation.[183]

C. IN ANY EVENT, MERCURIA PROVIDED ATTON BORO WITH EFFECTIVE MEANS TO PROTECT ITS RIGHTS

131. Even if the Tribunal finds that Mercuria and Basheera undertook a separate obligation to provide '*effective means'*, Mercurian courts provided Atton Boro with such means. Mercuria created an efficient system of courts to which Atton Boro had access (**1**). The delay in the enforcement proceedings does not evidence ineffectiveness of means provided to Atton Boro (**2**).

1. Mercuria created a working system of courts

132. The effective means standard is not more or less stringent than the denial of justice. Rather, it is a guarantee aimed at the same concerns that "*seeks to implement and form part of the more general guarantee against denial of justice*".[184] Specifically, the effective means clause "*guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments*".[185]

133. In the case at hand, Mercuria created working system of courts. Atton Boro had access to that system and fully utilized it by commencing enforcement proceedings, making submissions, presenting its case and filing motions that were granted by the court.[186]

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[182] *Chevron v. Ecuador*, para.242.

[183] Art.II (7) US-Ecuador BIT (*Chevron v. Ecuador; Duke Energy v. Ecuador*); Art.4(5) India-Kuwait BIT (White *Industries v. India*); Art.10(12) ECT (*Petrobart v. Kyrgyz Republic; AMTO v. Ukraine*).

[184] *Duke Energy v. Ecuador*, para.391.

[185] Ibid.; *AMTO v. Ukraine*, para.88; *Loewen v. USA*, para.168.

[186] Timeline of the Proceedings, p.7, para.10, p.9, para.25.

Accordingly, Mercuria performed its obligation to provide Atton Boro with the effective means.

2. Durations of the proceedings does not evidence lack of effective means

134. Even if the Tribunal decides that the effective means standard demands the host state to ensure the cases are considered within time adequate in the circumstances,[187] Mercuria submits that in this case the length of enforcement proceedings is reasonable.

135. The effective means standard does not guarantee that an application or claim will be resolved within a particular period of time.[188] The limit of reasonableness depends on the conduct of the litigants and the courts themselves.[189] As it was pointed out in *Chevron*, to find that undue delay violated the effective means standard, it is necessary for delay to amount "*to a denial of access to those means*".[190]

136. For example, in *White Industries* the manner in which the enforcement proceedings were conducted was very similar to the present case. Enforcement proceedings in India lasted more than 9 years. Many times the court granted respondent additional time and adjourned the proceedings for 2-3 months. The initial judge was replaced with a new one.[191] The tribunal noted that the situation was "*less than ideal*", but concluded that India did not fail to provide White Industries with effective means to enforce its rights "*simply because it took this long to get to this point*".[192] The fact that the court was "*generous with Coal India when it extended several pleadings deadlines*" did not make the pleadings schedule exceptional, "*either in the Indian context or otherwise*"[193]. The crucial factor for the tribunal was that

[187] *White Industries v. India*, para.11.3.2 (b); *Chevron v. Ecuador*, para.247.

[188] *White Industries v. India*, para.11.4.7; *Chevron v. Ecuador*, para.250.

[189] *Chevron v. Ecuador*, para.250.

[190] Ibid.

[191] *White Industries v. India*, para.11.4.7.

[192] Ibid.

[193] Ibid, para.11.4.8.

both parties had contributed to the overall length of the proceedings by asking for adjournments.[194]

137. In the case at hand, the length of the proceedings was the result of numerous objective factors, such as the judge being on leave,[195] court's significant caseload[196] that are perfectly legitimate and occur in any legal system.

138. Moreover, Atton Boro contributed substantively to the overall delay. It sought leaves to file additional documents,[197] requested additional hearings to conclude its submissions,[198] and agreed to adjournments to amicably settle the dispute.[199] Atton Boro initiated the transfer of the case to another bench on the basis of incorrect interpretation of Mercurian legislation and court decisions.[200] In total, all these actions took approximately 3 years. The situation may be "*less than ideal*"[201], but Atton Boro certainly had and continues to have access to Mercurian courts to pursue its application which it has actively used.

139. For all these reasons, Mercuria provided Atton Boro with effective means of asserting its claims and enforcing rights.

140. **To conclude on Section IV**, Mercuria complied with its obligations under Art. 3 BIT when conducting the Award enforcement proceedings.

V. MERCURIA DID NOT VIOLATE ART. 3(3) BIT THROUGH TERMINATION OF THE LTA BY THE NHA

141. An alleged breach of commercial contract by a state-owned corporation does not violate BIT. Contract parties are well aware of who they contract with and they voluntarily incur

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[194] Ibid.

[195] Timeline of the Proceedings, p.7, para.3, p.11, para.33.

[196] Ibid, p.10, para.32.

[197] Ibid, p.7, para.10.

[198] Ibid, p.9, para.25.

[199] Ibid, p.12, para.43.

[200] Ibid, p.8, para.17.

[201] *White Industries v. India*, para.11.4.7.

corresponding risks by concluding contracts not with the State directly but with independent entities. The LTA, as NHA's contract, does not fall under Art. 3(3) BIT (**A**) and, in any event, termination of the LTA does not amount to a breach by Mercuria of Art. 3(3) BIT, since it is not attributable to Mercuria (**B**).

A. LTA DOES NOT FALL UNDER ART. 3(3)

142. Art. 3(3) BIT covers "*obligations <…> entered into* [by a Contracting Party] *with regard to investments of investors*". It does not apply to the LTA since the LTA is not an obligation of Mercuria (**1**) and it is not related to an investment (**2**).

1. The LTA is not an '*obligation of*' Mercuria

143. LTA is not an "*obligation of*" Mercuria since contracts with state-owned entities are not covered by Art. 3(3) of BIT (**a**). Even if contracts of companies whose conduct is attributable to a State are covered, conclusion of LTA by the NHA is not attributable to Mercuria (**b**).

(a) Under domestic law LTA is not an obligation of Mercuria and domestic law is the proper law

144. BIT provisions such as Art. 3 apply only to contracts entered directly with the State.[202] Indeed, Art. 3 provides that "[e]*ach Contracting Party shall observe any obligation it may have entered <…>*"[203], where Contracting Party refers only to Mercuria and Basheera[204]. Therefore, contract obligations can rise to the treaty level only if a State is a party. For example, in *Nagel v. Czech Republic* the tribunal refused to apply umbrella clause to a contract between a state company and the investor, because the host state was not party to contract or involved in negotiations.[205] A strong reason for following this approach is that the investors voluntarily conclude contracts with state-owned entities, not with the state,

[202] *AMTO v. Ukraine*, para.112; *Impregilo v. Pakistan*, para.223; *Nagel v. Czech Republic*, para.324; Newcombe/Paradell para.9.17.

[203] Art.3(3) BIT, p.34.

[204] BIT Preamble, p.33, line 975.

[205] *Nagel v. Czech Republic*, para.162-163.

without requesting any guarantees from the latter. Under such circumstances investor cannot legitimately expect a State to be responsible for performance of the contract.

145. Atton Boro cannot attribute the LTA to Mercuria using international law rules on attribution of conduct. These rules do not apply to breaches of municipal contract by a separate entity.[206] It is the domestic law that governs the contracts, thus, domestic law has to be applied to determine the parties to the contract.[207] Rules of customary law, codified in DARS, are designed to engage responsibility of the State for an alleged breach of an international obligation, not determine the scope of these obligations. These rules cannot be used to decide who the party to a municipal contract is.[208]

146. In the present case, two private entities, Atton Boro and NHA concluded LTA. Under Mercurian law NHA is not a state organ.[209] Mercuria did not enter into the contract, nor participated in its negotiations.[210] Atton Boro presented no evidence that under Mercurian law the NHA's actions are attributable to Mercuria or that Mercuria should be treated as a party to NHA's contracts. Thus, LTA is a private commercial contract, which does not fall under Art. 3(3) BIT.

(b) In alternative, the NHA's actions are not attributable to Mercuria under international law

147. Even if international law rules on attribution apply, conclusion of LTA cannot be attributed to Mercuria. Atton Boro may not rely on any of the grounds for attribution of responsibility to a state: the conduct of its organs (**i**), actions of private persons it directs (**ii**) and actions of entities exercising elements of public authority (**iii**).

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[206] *Impregilo v. Pakistan*, para.210; Happ, p.324; Commentary to DARS, para.5.

[207] ICC Case No. 3327, pp.433-434; ICC Case No.7640, paras.70-72.

[208] Commentaries to DARS, p.39; Evans, p.460; Feit, p.154.

[209] PO3, p.50, line 1591.

[210] Uncontested Facts, p.29, para.9.

i. NHA is not a state organ

148. An entity is an organ of a state if it has such status under internal law of that State[211]. It should make up the organization of a state and act on his behalf.[212] This is not the case in regard to NHA.[213]

ii. Mercuria did not direct the conclusion of LTA

149. The conduct of an entity is attributable to a state if the organization acted under its direction.[214] Such direction has to relate to a specific operation.[215] There is no evidence that there was any direction to conclude LTA.

iii. NHA did not exercise elements of governmental authority

150. Conclusion of LTA is not attributable to Mercuria because NHA was not empowered to exercise elements of governmental authority and it did not act in public capacity while concluding LTA.[216]

151. Firstly, NHA did not exercise elements of governmental authority. What is regarded as "*governmental*" depends on the nature of the entity's powers.[217] Usually, the powers are *not* considered governmental when they could have been exercised by a private entity.[218] Additionally, even if entity's acts are important to the government, but it engages on its own account in commercial transactions, the conduct of an entity is not attributed to the state.[219]

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[211] Art.4 DARS.

[212] Commentary to DARS, Art.4, para.1.

[213] PO3, p.50, line 1591.

[214] Art.8 DARS.

[215] Commentary to DARS, Art.8, para.3.

[216] Art.5 DARS; *Phosphates in Morocco (PCIJ)*, p.10; *US Diplomatic Staff in Tehran (ICJ)*, p.3; *Jan de Nul v. Egypt*, para.163.

[217] Commentary to DARS, Art.5, para.6; *Hamester v. Ghana*, para.197.

[218] *Maffezini v. Spain*, para.86; *Almas v. Poland*, paras.99, 218; Yannaca-Small, p.301.

[219] *Almas v. Poland*, para.210; *CSOB v. Slovakia*, para.20.

152. In the present case, NHA purchases and supplies medicine[220] and conducts awareness workshops.[221] These are commercial activities of private nature which are routinely carried out by health insurance companies worldwide. NHA's purpose to "*secure* <…> *healthcare for* [Mercurian] *people*" is not strictly governmental, since in some countries it is implemented by private companies (*e.g.* United States, China, Mexico).[222] Therefore, NHA is not empowered to exercise elements of governmental authority.

153. Secondly, NHA acted in commercial capacity while entering into the LTA. To determine the capacity in which the entity acted the tribunals examine the nature of its activities; if actions of the entity do not differ in their nature from actions of other private actors, then this entity acted in its private capacity.[223] Additionally, an organization, acting in public capacity, would have to exercise its governmental powers while entering into a contract.[224]

154. In the case at hand, NHA did not act beyond its private capacity in concluding LTA. Acting as any other purchaser, it invited offers from different companies for production the drug, evaluated them, led "*protracted negotiations*" and signed LTA, a contract for procurement of drugs.[225] Nothing in this process suggests that NHA acted in its public capacity, exercising any element of governmental authority.

155. Therefore, the conclusion of LTA cannot be attributed to Mercuria, and for this reason LTA is not an '*obligation of*' Mercuria.

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[220] Uncontested Facts, p.29, para.15.

[221] Uncontested Facts, p.29, para.12.

[222] OECD (2015); Ling, pp.9-14.

[223] *Jan de Nul v. Egypt*, para.169; *CSOB v. Slovakia*, para.20; *Energoalliance v. Moldova*, para.375.

[224] *Almas v. Poland*, para.219.

[225] Uncontested Facts, p.29, para.9.

2. LTA is not an investment

156. Art. 3(3) applies to the obligations "*entered into with regard to investments* <…>". However, LTA is not an investment, as demonstrated in Section I.[226] Therefore, Art. 3(3) BIT does not apply to the LTA.

B. TERMINATION OF THE LTA DOES NOT VIOLATE ART. 3(3) BIT

157. Even if LTA does fall under Art. 3(3) BIT, an ordinary contractual breach is not enough to violate a treaty standard and LTA was terminated not in exercise of Mercuria's sovereign powers (**1**). Moreover, NHA's conduct in terminating the LTA is not attributable to Mercuria (**2**).

1. Alleged breach of LTA was not in exercise of public powers

158. A breach of contract amounts to a breach of an umbrella clause, such as Art. 3(3) BIT, only if it was caused by significant governmental interference with the rights of investor[227] or State's exercise of its sovereign authority.[228] A contractual conduct, which does not go beyond an ordinary contractual party behaviour is not enough to violate a provision of an international treaty,[229] since that would allow for an indefinite expansion of the scope of Art. 3(3).[230]

159. In the case at hand, NHA acted as any other purchaser on the market who terminated the contract once its performance has become unsatisfactory.[231] Further, NHA, as a commercial company, took into account final considerations, particularly the fact that it could not afford to continue buying an expensive product.[232] Mercuria did not interfere in this process at any

[226] See paras.18-44 above.

[227] *CMS v. Argetina*, para.299.

[228] *Impregilo v. Pakistan*, para.260; *Sempra v. Argentina*, para.310; Wälde, p.7.

[229] *Impregilo v. Pakistan*, para.260; *Salini v. Jordan*, para.155; Schwebel, p.111.

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

[231] Uncontested Facts, p.30, para.17.

[232] Uncontested Facts, p.30, para.15.

point, nor did it exercise sovereign powers.[233] Thus, the alleged breach of LTA does not amount to a violation of Art. 3(3) BIT.

2. Termination of LTA is not attributable to Mercuria

160. Even on most liberal interpretation, umbrella clause elevates contractual breaches to treaty violation only if the state assumed obligations under the contract and is responsible for its termination.[234] Termination of LTA is not attributable to Mercuria, since NHA, not being empowered to exercise elements of governmental authority,[235] acted in its commercial capacity (**a**) and Mercuria did not direct termination of LTA (**b**).

(a) NHA acted in its commercial capacity

161. The capacity is determined by examining the nature and purpose of entity's activities.[236] The capacity is commercial when an entity acts as any other commercial agent would.[237] Particularly, termination of contract is not attributed to the state if an organization terminates it for commercial reasons, such as inability to pay or because the performance has become uneconomical.[238]

162. In the present case, NHA decided to terminate LTA because it could not afford to keep buying the drug from Atton Boro at the agreed rates.[239] It was motivated by financial considerations of a commercial company. Therefore, NHA acted in its commercial capacity while terminating LTA.

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[233] Uncontested Facts, p.30, para.17.

[234] Crawford/Lenaerts, p.29; Qian Gu, p.30.

[235] See paras.151-152 above.

[236] Commentary to DARS, Art.5, para.6; *Hamester v. Ghana*, para.197.

[237] *Jan de Nul v. Egypt*, para.169; *CSOB v. Slovakia*, para.20; *Energoalliance v. Moldova*, para.375.

[238] Mann, p.575.

[239] Uncontested Facts, pp.29-30, paras.15,17.

(b) Mercuria did not direct termination of LTA

163. Conduct is attributed to a state only if the direction was issued in connection to the operation.[240] Acts of a state-owned corporation could be attributed only if a state used its ownership interest or control over the entity for specific governmental undertakings.[241]

164. In the case at hand, there is no evidence that Mercuria had any control over decisions of NHA, particularly the termination of LTA. Ministry of Health did not have any shareholding interest in NHA.[242] In terminating LTA NHA acted independently, negotiating a reduction of the price and terminating the contract when the accord was not achieved. Therefore, termination of LTA was not directed by Mercuria.

165. **To conclude Section V**, since Mercuria did not assume obligations under LTA and is not responsible for its termination, Art. 3(3) BIT is not violated.

[240] Commentary to DARS, para.3.

[241] Commentary to DARS, Art. 8, para.6.

[242] PO3, p.50, lines 1592-1594.

PRAYER FOR RELIEF

For the foregoing reasons Mercuria requests the Tribunal to find that:

I. The Arbitral Tribunal does not have jurisdiction over the Award-related claims;

II. Atton Boro was denied treaty benefits under Art. 2 BIT;

III. The enactment of Law No. 8458/09 and the grant of the License does not breach Arts. 3 and 6 BIT;

IV. Mercuria complied with Art. 3 BIT conducting enforcement proceedings;

V. Termination of the LTA does not amount to violation of Art. 3(3) BIT.

Respectfully submitted on 25 September 2017.

TEAM **UGON**
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REPUBLIC OF MERCURIA